

Legal Foundations Transcript

Hello, I'm Connie Stone. I worked for more than 20 years as a Cultural Resource Specialist in the Phoenix District and currently serve as the Archeologist for the Renewal Energy Coordination Office in the Arizona State Office of BLM.

Welcome to this module in the "Fundamentals for Managing the Cultural Heritage Program" training series. This module presents an overview of the legal foundations for managing cultural resources.

We will consider the laws, executive orders, and other authorities that provide the legal basis for our work in the BLM.

The laws are very detailed, and it would take days to explore those details. For more information on statutes and associated regulations, you should refer to BLM Manual 8100, The Foundations for Managing Cultural Resources. Appendix 1 includes copies of the major laws that guide our everyday work.

I like to describe what I call the "lofty purpose" of these laws. They were established to protect cultural resources and to give all citizens a voice in preserving our cultural heritage.

Sometimes it's difficult to interpret and implement them. Nevertheless, we can take pride in the idealistic goals that created the legal foundation for our work.

The objective of this training is to provide you with a basic understanding of the legal foundations for your work in the BLM Cultural Heritage Program. By the end of this session, you will be familiar with:

- The interrelationships of laws, regulations, executive orders, policies, and related guidance in BLM manuals;
- The key statutes and their major provisions;
- The "lofty purpose" underlying the passage of major laws: and
- The history and major provisions of the National Historic Preservation Act.

SO, WHAT IS THE LEGAL FOUNDATION FOR OUR WORK?

Now it's time to review major laws that serve as the foundation for BLM's Cultural Heritage Program. I'll review them in chronological order. We'll begin with the Antiquities Act of 1906.

Picture the early 1900s. Unfettered development was the rule of the day.

Concerned citizens reacted by creating the conservation movement. Citizens and historic preservation advocates were outraged by rampant looting and vandalism of prehistoric Pueblo sites in the Southwest.

Teddy Roosevelt, the President, was a champion of conservation. His support ensured passage of the Antiquities Act. This law emphasized the importance of the scientific values of archaeological sites.

The Lofty Purpose of this law was to provide - “Proper care and management of...historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.” Examinations were to be “undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects.”

Major Provisions of the Antiquities Act provided for the following:

- Penalties for damage and destruction of objects of antiquity on Federal land. The penalties could include fines or imprisonment.
- Requirement of permits for excavation and removal, granted to qualified scientific or educational institutions. The Secretary of the Interior had the authority to issue permits.
- Enabled the President to establish National Monuments by proclamation to protect “objects of historic or scientific interest.”

Historic Sites Act of 1935 was the first major effort to institutionalize historic preservation in the Federal government, in order to protect the built environment and archaeological resources from destruction.

It’s Lofty Purpose was that “It is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States.”

The Major Provisions of this law gave the National Park Service a prominent role in administering the Federal historic preservation program. It directed the Secretary of the Interior to:

- Make a survey of historic and archaeological sites, buildings, and objects to determine those of exceptional value for commemorating or illustrating the history of the United States;
- Restore, reconstruct, rehabilitate, preserve, and maintain historic or prehistoric properties of national significance;
- Develop related educational programs; and
- Erect and maintain commemorative markers.

The Historic Sites Act directly or indirectly resulted in the creation of the following programs:

- Historic American Buildings Survey;
- Historic American Engineering Record;
- National Historic Landmarks Program;
- Historic American Landscapes Survey; and
- National Register of Historic Places.

The Reservoir Salvage Act of 1960 was designed to help protect archaeological sites primarily from large reservoir projects and other public works constructed during the post-World War II era.

Its provisions seldom apply directly to BLM work. However, this act is important because it provided for the preservation of archaeological data that might otherwise be lost as a result of a Federal construction project or a federally licensed or assisted project.

It also authorized Congress to provide funds to recover, preserve, and protect archaeological data. “Salvage archaeology” projects for new reservoirs and highways contributed important data and led to what was later known as “contract archaeology.”

The Historic Sites Act of 1935 set the stage for the National Historic Preservation Act of 1966. Thirty years later, the social and political context of the 1960s led to public activism that resulted in the passage of the NHPA. I’d like to take a few minutes to describe its history.

Picture the early 1960s.

America was celebrating economic prosperity, materialism, youth, and anything new. Cheap gasoline allowed citizens to enjoy new highways, shopping malls, and housing developments in the suburbs. JFK and Jackie were a youthful presence in the White House.

New trends and innovations included everything from the first heart transplant to Beatlemania to the first Super Bowl. Archaeologists even talked about the “new archaeology.”

Big construction projects focused on urban renewal and construction of the interstate highway system.

The Federal government paid about 80 percent of the cost of urban renewal projects. Cities obtained new legal powers to condemn private property to clear out slums. Of course, many historic buildings and neighborhoods, as well as prehistoric sites, were destroyed in the process.

The National Trust for Historic Preservation, the Society for American Archaeology, and other historic preservation organizations reacted against this wave of destruction. They developed an expanded concept of preservation, not limited to big events and famous people.

At the same time, Lady Bird Johnson began her campaign to beautify America. The First Lady convened a White House Conference in 1965, which spawned a Special Committee on Historic Preservation.

In 1966, the Committee, along with the National Trust and the U.S. Conference of Mayors, published a book-length report called “With Heritage So Rich.” This book prompted the development and passage of the National Historic Preservation Act.

The statement of purpose of the NHPA is almost a page long.

Here are key excerpts:

“Historic properties significant to the Nation’s heritage are being lost or substantially altered with increasing frequency. The preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.”

This is a long and detailed law. We will hit the highlights that are relevant to BLM work.

Section 2: Declaration of Policy

- To administer Federally owned and administered prehistoric and historic resources in a “spirit of stewardship.”
- The Federal government is to encourage and assist non-Federal governments, tribes, private organizations, and individuals in historic preservation efforts.

Section 101

- Authorizes the Secretary of the Interior to expand, maintain, and establish criteria for a National Register of Historic Places.
- Created State Historic Preservation Programs, administered by State Historic Preservation Officers appointed by governors, and describes SHPO responsibilities.
- States that properties of traditional religious or cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for the National Register.
- Requires the Secretary to establish guidelines and standards for Federal agency responsibilities.

Section 106

- Addresses the responsibility of Federal agencies to take into account the effect of a proposed undertaking on properties listed or eligible for the National Register.
- States that agencies shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on a proposed undertaking.

Section 110

- Directs Federal agencies to establish programs to identify, evaluate, nominate, and protect historic properties that are eligible for the National Register.
- Preservation-related activities are to be carried out in consultation with other Federal, state, and local agencies, Indian tribes, and the private sector.
- Agencies are to ensure that in planning, they consider potential effects on properties that are not under their jurisdiction or control.

Section 112

- Agency personnel or contractors responsible for historic resources shall meet qualification standards established by the Office of Personnel Management in consultation with the Secretary and appropriate professional societies.

Section 201

- Establishes the Advisory Council on Historic Preservation and describes its members and their terms of office. Under Section 211, the Council is authorized to promulgate rules and regulations to govern the implementation of Section 106. This resulted in the writing of the 36 CFR 800 regulations.

Section 302

- Authorizes Federal agencies to expend funds to comply with the Act.

Section 304

- Allows agencies to withhold from public disclosure any information about the location, character, or ownership of a historic resource, if such disclosure would risk harm to the resource, cause a significant invasion of privacy, or impede the use of a traditional religious site by practitioners.

Such information may be exempt from disclosure under the Freedom of Information Act.

The National Environmental Policy Act of 1969 established national policy for the protection and enhancement of the environment. It provides for public participation in agency decision making.

In practice, the steps of preparing an environmental assessment or environmental impact statement are parallel to those of the Section 106 process: identifying and evaluating the potential effects of a proposed project and addressing mitigation measures to avoid or reduce adverse effects.

Note that cultural resources need not be determined eligible for the National Register to receive consideration under NEPA.

The Lofty Purpose was that the Federal government is to “preserve important historic, cultural, and natural aspects of our national heritage.”

President Nixon issued Executive Order 11593 in 1971 to jump-start agency compliance with the National Historic Preservation Act. Its title is Protection and Enhancement of the Cultural Environment.

It directed Federal agencies to inventory cultural properties under their jurisdiction and to nominate properties to the National Register.

Agencies were also to assure that Federal plans and programs contribute to preservation of non-Federal properties.

The Federal Land Policy and Management Act of 1976 established the modern BLM and its principle of multiple use management.

BLM is directed to manage public lands in a manner that will “protect the quality of historical resources and archeological values.”

Note that cultural resources need not be determined eligible for the National Register to receive consideration under FLPMA.

The American Indian Religious Freedom Act of 1978 is a policy statement relating to Native American religions. The Federal government is to protect the right of freedom to believe, express, and exercise traditional religions.

This law emphasizes First Amendment guarantees of religious freedom but is not implemented by specific regulations. Federal agencies are to evaluate their policies and procedures to ensure their practices don't disrupt religious freedoms.

Here are its major provisions:

- Protection of access to religious sites and the use and possession of sacred objects;

- Protection of the freedom to worship through traditional ceremonies;
- Views of Indian leaders must be obtained and considered when a proposed land use might conflict with traditional beliefs or practices; and
- Unnecessary interference with Indian religious practices should be avoided during project implementation; but conflict need not bar Federal agencies from adopting proposed land uses in the public interest.

The Archaeological Resources Protection Act of 1979, like the Antiquities Act and the National Historic Preservation Act, resulted from a concerted effort by historic preservation organizations that were concerned about trends of increasing destruction and vandalism of archaeological sites.

In the mid-1970s, it became apparent that it was difficult to successfully prosecute vandals for violations of the Antiquities Act. Not only was it difficult to enforce, but there were no substantive criminal and civil penalties to deter looters.

Historic preservation advocates realized that we needed a more modern, stronger law to protect archaeological resources, which resulted in the passage of ARPA.

Its Lofty Purpose was to set forth that:

- “Archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation’s heritage;”
- “Existing Federal laws do not provide adequate protection to prevent the loss and destruction of these archaeological resources;” and
- “The purpose of this act is to secure, for the present and future benefit of the American people, the protection of archaeological resources.”

Here’s a sketch of the major provisions of ARPA:

- Provides a detailed legal description of archaeological resources at least 100 years old;
- Establishes procedures to issue permits for excavation or removal;
- Defines prohibited acts and their criminal and civil penalties; the act prohibits the actual or attempted and unauthorized excavation, removal, damage, alteration, or defacement of resources;
- Outlaws the sale, purchase, exchange, transportation, or offering of any resource obtained in violation;

- States that agencies can restrict the disclosure of information concerning the nature and location of an archaeological resource; and
- A 1988 amendment explicitly directs Federal agencies to establish educational programs that explain the importance of archaeology, to help the public understand why resources are protected from unauthorized removal or damage.

The Native American Graves Protection and Repatriation Act of 1990 established the right of Indian tribes and Native Hawaiian organizations to claim ownership of human remains and associated objects that are held by Federal agencies and museums that receive Federal funds.

The act requires agencies to identify such holdings and to work with appropriate Native American groups toward their repatriation.

Here's a brief description of the major provisions of NAGPRA:

- Provides detailed descriptions of protected materials including burial sites, human remains, funerary objects, sacred objects, and objects of cultural patrimony;
- Establishes rights of ownership for items discovered or excavated after November 1990;
- Identifies procedures for the inadvertent discovery and the intentional excavation and removal of human remains and associated objects;
- Defines penalties for illegal trafficking in protected remains and objects;
- Addresses procedures for inventories of remains in the possession of agencies and museums;
- Identifies procedures for the repatriation of materials to lineal descendants and tribes determined to be culturally affiliated; and
- Establishes a Review Committee to address disputes.

Executive Order 13007, Indian Sacred Sites, was issued by President Clinton in 1996. It provides that Federal agencies shall accommodate access to and ceremonial use of Indian sacred sites; shall avoid adversely affecting the physical integrity of such sites; and shall maintain their confidentiality.

Here are some key points:

- Agencies are to carry out this order to the extent practicable, permitted by law, and not clearly inconsistent with agency functions;

- The responsibility to inform tribes of proposed actions or policies that could affect sacred sites rests with the agency;
- The responsibility to identify sacred sites to the agency rests with the Indian tribe or an authoritative representative of an Indian religion;
- “Sacred site” is defined as “any specific, discrete, narrowly delineated location on Federal land” that is identified by a tribe as sacred by virtue of its established religious significance.

Executive Order 13287, Preserve America, was issued by President George W. Bush in 2003.

It orders the Federal government to take a leadership role in the protection, enhancement, and contemporary use of historic properties owned by the government.

The order establishes new accountability for agencies with regard to inventories and stewardship. It also emphasizes partnerships with state and local governments, Indian tribes, and the private sector to promote historic preservation through such activities as heritage tourism.

This review provides you with a basic understanding of the major laws and executive orders that are the foundation for your work in BLM.

It also shows how the “lofty purposes” of these laws support our efforts to identify, protect, and appropriately use cultural resources; to respect and address Native American concerns; to protect the confidentiality of information when appropriate; and to educate the public about the importance of cultural heritage values.

Obviously, there are many details that I haven’t addressed in this brief introduction.

There are other training modules in this series, which provide greater detail on implementing the National Historic Preservation Act, Archaeological Resources Protection Act, Native American Graves Protection and Repatriation Act, and others.

In conclusion, here are a few helpful pointers:

- BLM Manual 8100 provides descriptions as well as the text of these laws and executive orders. Helpful information can also be found on the National Park Service website, and the NPS has published a useful booklet on Federal historic preservation laws.
- Keep current on amendments to laws and revised regulations. Many of the laws that I’ve described have been amended since they were passed.
- Your role is to provide recommendations to managers. You are the subject matter expert in your office. Use your knowledge of legal foundations to explain your recommendations in understandable terms.

- Very few, if any of you, are attorneys or legal experts. When in doubt, consult your Deputy Preservation Officer.
- Keep in mind the lofty purpose of these laws. You are playing an important role in managing the resources and knowledge that are an important part of the nation's cultural heritage. Take pride in your work.

Thank you for your attention and best wishes for success.

Links:

[Laws, Executive Orders and Regulations](#)

[FLPMA](#)