

Section 106 Responsibilities on Non-Federal Lands Transcript

Hello, I'm Connie Stone.

Welcome to another module in the “Fundamentals for Managing the Cultural Heritage Program” training series. This module describes the BLM’s responsibilities for Section 106 compliance for proposed projects and actions that include non-Federal lands, in addition to those administered by the BLM and other Federal agencies. Non-Federal lands may include lands administered by states, counties, or local governments as well as privately owned land.

It is not easy to define BLM responsibilities for Section 106 compliance on non-Federal lands. Each case will be unique. In providing advice on this issue, you may encounter resistance from decision makers or private landowners.

They may not understand why our responsibilities extend beyond BLM boundaries, or they may feel that the government is intruding on private property rights. On the other hand, you may encounter pressure from the State Historic Preservation Office or other parties to assume responsibility for compliance, when the BLM’s role should actually be limited to the Federal lands.

Fortunately, the BLM’s 8100 Manual Series provides relevant guidance. This guidance is based on a long history of fairly obscure legal and administrative decisions. These decisions resulted in a principle called the “Rule of Reason.”

The knowledge that you gain from this module will help you to provide reasonable and defensible advice on BLM responsibilities. Most importantly, it will help to ensure that we are devoting adequate consideration to identifying and resolving any adverse effects on significant cultural resources that are involved in Federal actions.

The objective of this training is for you to help ensure that the BLM meets its responsibilities for Section 106 compliance on non-Federal lands. By the end of this session, you will know:

- The broad legal authorities and the history of administrative decisions relating to Section 106 compliance;
- The evolution of the “Rule of Reason” that guides our responsibilities;
- Information to consider in applying the “Rule of Reason;” and
- Relevant guidance in BLM Manual 8140, Protecting Cultural Resources.

There are some broad legal authorities we operate under like the...National Historic Preservation Act

The key point for us to remember, as cultural heritage specialists, is that the National Historic Preservation Act applies to Federal actions, regardless of who owns the land surface and the cultural resources on that surface.

Let's consider a quote from BLM Manual 8140, Protecting Cultural Resources:

“The Field Office manager ensures that his or her land use decisions will not have an inadvertent adverse effect on the qualities that qualify cultural properties for the National Register.”

Note that this sentence does not say “cultural properties on Federal land.” The 36 CFR Part 800 regulations, and the BLM's counterpart procedures, dictate that we should evaluate the potential consequences of an undertaking within its “Area of Potential Effect.”

This area is defined as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties.”

Consider a simple example. The BLM is considering issuing a right-of-way grant for a 60-mile pipeline that would cross multiple land jurisdictions. The project would be located mostly on Federal land, but for 10 miles in the middle, the line would cross private land.

The private land is along a river and contains the highest concentration of prehistoric sites in the project area. These sites contain subsurface deposits and clearly may yield important information.

Let's say these are the only National Register-eligible sites in the project area. If the BLM were to approve the project, without attempting to avoid or mitigate impacts to these sites, they could be damaged or destroyed.

The fact that impacts will occur on private surface does not diminish BLM's responsibility to consider alternatives that might avoid those impacts; nor does it diminish BLM's authority to impose mitigation measures to avoid or reduce those impacts. Why? It's because those impacts will occur as a direct consequence of activities approved by BLM.

Executive Order 11593 was issued by President Nixon in 1972. It is best known for its directive to Federal agencies to inventory and nominate sites, buildings, and districts under their jurisdiction for listing on the National Register.

However, it also directs Federal agencies to “institute procedures to assure that Federal plans and procedures contribute to the preservation and enhancement of non-federally owned sites, structures, and objects of historical, architectural or archaeological significance.”

Let's consider the history of administrative decisions relating to Section 106 compliance responsibilities on non-Federal lands. The story begins in the mid-1970s.

The Western Slope Gas Company submitted an application to build a 200-mile pipeline in Colorado. Only 38 miles of the pipeline route would cross BLM-administered land.

The BLM and the Advisory Council on Historic Preservation disagreed on the definition of the Area of Potential Effect and the extent of BLM's oversight under Section 106. They eventually agreed that the APE would include the entire 200 miles. Western Slope filed an appeal with the Interior Board of Land Appeals.

In 1979, the IBLA denied the request for reconsideration of BLM's decision. However, its decision was not very forceful. The IBLA said that while BLM was not required under the terms of NHPA to request a survey of the non-Federal lands, it could "as a matter of discretion, require such survey."

The IBLA decision was not very strong, but it set the stage for further guidance. In 1979, the Department of Interior Solicitor issued an opinion that sought to strengthen the BLM's discretion.

The opinion's title is "The Extent to Which the National Historic Preservation Act Requires Cultural Resources to be Identified and Considered in the Grant of a Federal Right-of-Way."

It is also known as the "Krulitz Memo" because it was addressed to Acting Secretary Krulitz, who approved it. The Solicitor stated that the IBLA decision in the Western Slope case was inconsistent with Section 106.

In reference to that case, the opinion stated that "the Federal grant for a pipeline right-of-way requires the Department to comply with Section 106 on both the Federal and non-Federal lands involved in the project."

The Opinion recommended that a "rule of reason" should be applied to determine the appropriate extent of surveys on non-Federal lands. It also prescribed an appropriate level of inventory based on the potential effects of the undertaking.

To follow up on the Krulitz memo, in 1980 BLM issued Instruction Memorandum 80-282. The title of this IM is "Cultural Inventory on Non-Federal Lands Related to the Grant of a Federal Right-of-Way."

It affirmed the 1979 Solicitor's Opinion and BLM's responsibility to consider the potential effects of actions on non-Federal lands. The IM also offered guidelines for determining the scope of BLM's involvement in the Section 106 process.

These included the following considerations:

- What are the boundaries and limits of the proposed project area?

- Does the length of the proposed right-of-way allow for a reasonable range of alternatives?
- Could the project occur without any BLM involvement? The IM cited the concept of “independent utility”—could the project be independently viable, regardless of BLM approval? This consideration was the basis for the Rule of Reason.

In 1984, BLM issued Instruction Memorandum 84-274. Its title is “Non-Bureau Cultural Properties and Rule of Reason: Clarification of Policy.”

In This IM reaffirmed that BLM must consider if its land use decisions will have inadvertent adverse effects on properties determined eligible for the National Register.

It also said that the level of attention devoted to sites on non-Federal lands should be based on the “degree to which Bureau decisions control the location of surface-disturbing activities.”

This was the basic question that underlies the Rule of Reason: could the project happen without BLM approval? If BLM involvement is essential to the project, then to comply with Section 106, we must identify and evaluate sites on the non-Federal lands.

Instruction Memorandum 85-548, issued by BLM in 1985, provided more detailed guidance on applying the Rule of Reason. Its title is “Identification and Consideration of Cultural Properties on Non-Federal Lands Affected by BLM Right-of-Way Grants.”

According to this IM, the BLM’s Section 106 responsibility depends on:

- The extent to which its decision would impact non-Federal lands; and
- Whether it is serving as the lead agency for compliance.

Note that “lead agencies” tend to be defined for larger, complex projects that involve more than one Federal agency.

Also, it is possible for another agency to have the compliance lead for a project involving public land, even though it isn’t a land managing agency like BLM. IM 85-548 wisely counsels that “where public land constitutes only a small part of the entire project, another participating Federal agency should be encouraged to assume the Section 106 and NEPA lead whenever possible.” Some projects may not require designation of a lead agency.

IM 85-548 provides guidance for several hypothetical scenarios. Let’s consider them.

Scenario 1:

BLM will consult with the lead agency regarding steps to be taken on BLM administered lands, but will not be concerned with other lands involved in the project.

Scenario 2:

BLM will have responsibility for considering effects to cultural properties over the entire project and will take the lead on Section 106 consultations.

The following scenarios apply to cases where there is no defined lead agency. This may happen when BLM is the only Federal agency involved in the project.

Scenario 3:

This could happen when a project would cross public land only occasionally or would be located predominantly on non-Federal lands. If the BLM were to deny a right-of-way, it would still be possible to find a way to construct the project.

So BLM's involvement might be incidental to the project. In such a case, BLM's consideration of cultural resources would be limited to the public lands. However, if factors on the public land, like topography, substantially affect the placement of an alignment on non-Federal lands, BLM may appropriately consider the effects of the project for a "reasonable distance" onto non-Federal lands. This reasonable distance will be a case-specific decision depending on local conditions.

Let's just say that BLM shouldn't do anything that would direct a project straight toward that big Clovis site on private land. The IM calls this concept the "sphere of influence."

Scenario 4:

Where an alignment would cross alternating sections of public and non-Federal lands, BLM must consider the effects on the intervening non-Federal sections. Our approval would essentially control the use of those non-BLM sections. This consideration also applies to small parcels of non-Federal land called "inholdings."

Scenario 5: In some cases, the use of BLM-administered lands will be essential to the proposed project. Patterns of land tenure, zoning restrictions, or other constraints may make it physically, economically, or legally infeasible to link the intended end points without crossing public lands. BLM's responsibility will likely extend to the entire project.

Scenario 6:

If a proposed project must begin or end on public land and could not occur otherwise, BLM's responsibility may be found to extend to the entire project. This could happen even if the public lands represent a small proportion of the entire project.

Finally, it's important to mention that this IM describes the obligations of the project applicant. BLM is authorized to require the applicant to carry out the needed inventory, evaluation, and

mitigation tasks that are necessary for Section 106 compliance on non-Federal lands as well as public lands.

In 1993, the administrative court affirmed BLM's decision to deny a right-of-way application because the applicant failed to submit an archaeological survey report for areas on non-Federal lands. The BLM had argued that until it had the archaeological report for the entire route of the proposed power line, the right-of-way application would be incomplete. The court also agreed that the BLM could require the applicant to bear the cost of preparing the survey report.

In the real world, you will likely encounter situations where a project applicant resists the requirement to survey private lands involved in a project. The applicant may cite difficulties in obtaining access to private land.

As a cultural resource specialist, your role is to advise the manager or appropriate decision maker about the requirements for Section 106 compliance on non-Federal lands.

If your SHPO is involved in Section 106 consultations for the project, you can likely count on the SHPO staff to confirm the wisdom of your recommendations.

We are fortunate to rely on well-written manuals that guide our work in BLM. It's always good advice when someone tells you to "check the manual."

The Rule of Reason and its convoluted history are enshrined in BLM Manual 8140, Protecting Cultural Resources. The relevant manual section is 8140.06, especially subsection D.

According to 8140.06.D the responsibility for considering cultural resources outside BLM lands depends on the degree to which the BLM's decisions determine or control the location of surface-disturbing activities on those lands.

If the project is dependent on, or directly related to, a BLM decision and could not take place without the use of Federal lands, the BLM must take into account the effects on all lands clearly affected.

Where alternative locations for a project are left open by a BLM decision—that is, where the use of BLM-administered land is not essential for the project—the BLM shall consider only those potential effects to cultural resources off the public lands that are reasonably attributable to BLM's decision. Now I found that it could be good to share this passage from the manual with your manager and your land specialist.

Now, I would like to summarize the steps to follow in applying the rule of reason

1. Determine the scope of the undertaking and the Area of Potential Effect.
2. Determine the need for a lead agency and which agency will fulfill that role.

3. Consider the “independent utility” of a project: how critical is the use of public land?
4. How could the BLM’s decision affect cultural resources on non-Federal land?

Links:

[EO 11593](#)