Section 106 Issues Transcript

Hello, I' m Signa Larralde. Welcome to another module in the Fundamentals for Managing the Cultural Heritage Program training series. In this module, we will quickly review the steps in the Section 106 process of the National Historic Preservation Act or NHPA. Then we'll discuss several hot button issues and some gray areas that we often come up against as we manage cultural resources in BLM. We'll look at best practices for resolving those issues.

Section 106 is not a cookie cutter process it has nuances and differences in interpretation for virtually every project and every undertaking that it applies to. One of the joys of working for BLM is that the job is never boring at least partly because of the constant variety of circumstances that we face when applying Section 106.

We in BLM also see some trends in Section 106 compliance as it evolves. In this module, we ll be discussing these trends. The most important ones we see are

- A broader definition of the Area of Potential Effects, or APE, for undertakings
- A wider range of identification measures necessary to show that the agency has made a good faith effort to identify cultural resources
- Inclusive consultation that solicits the views of tribes and interested parties
- A consideration of longer term impacts, especially for developments like oil and gas fields that consist of a large number of similar undertakings over time

Understanding the Section 106 process will help us to cope with the challenges that these trends present to us. The steps in the NHPA Section 106 process, as outlined in the law and in the 36 CFR Part 800 regulations are to:

1. Determine if there is an undertaking.
2. Make a good faith effort to identify cultural resources that may be affected by the undertaking
3. Evaluate the significance of the cultural resources you identified
4. Assess the effect of the undertaking on significant cultural resources
5. Resolve any adverse effects of the undertaking on those significant cultural resources.

Interpreting what each of these steps actually means can vary considerably from one undertaking to another. Remember that it helps to take the process one step at a time. Going back to the law and to the regulations when there are gray areas can help you to understand a particular issue and can guide you in its resolution. Now let s go through the five steps. So, what is an undertaking under Section 106?

In the 36 CFR Part 800 regulations, an undertaking is defined as: A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

Note that projects do not need to occur on Federal land in order to be undertakings. If Federal funding, or a Federal permit, license or approval is required for the project, it is an undertaking. Undertakings are similar to federal actions under the National Environmental Policy Act, or NEPA.

The second step in the Section 106 process is to make a good faith effort to identify cultural resources that may be affected by the undertaking. What constitutes a good faith effort?

In order to demonstrate a good faith effort, several actions are required.

First, determine the Area of Potential Effect, or the APE this determination is becoming an increasingly important part of Section 106 compliance. Different effects may have different APEs.

For example, the visual effects of an undertaking on a site s setting may be mapped differently than effects related to ambient noise generated by an undertaking.

Next, compile existing information about the cultural resources in the APE. Existing information certainly includes doing an archaeological records check. But it can also mean checking Government Land Office records, historic air photos, historic versions of USGS maps, and checking SHPO historic sites records especially if these records are not integrated into the archaeological records (as is the case in New Mexico). Many SHPOs separate their archaeological functions from their architectural or built environment functions, so that there is a different data base that must be checked to see if non-archaeological sites might be impacted by a project.

Such sites likely to be encountered during BLM projects might include historic irrigation districts that are still in use and historic highways and other kinds of transportation routes, as well as historic buildings.

The next action is conducting a field survey. Conducting the field survey is the step we most often think of as inventory or identification. However, the other steps mentioned here are equally important in identifying historic properties.

Finally, the cultural resources must be identified. Documenting resources not identifiable through field survey surely includes tribal consultation to identify Traditional Cultural Properties, or TCPs. But it may also include checking with other traditional communities (such as local Hispanic communities in the Southwest) or other traditional users (like sheepherders, ranchers, or simply the locals sitting around at the local cafe). Even resources that are identifiable through survey might be better documented through these kinks of contacts.

Ethnographic overviews or ethnographic inventories may be an important way to identify historic properties, especially in areas known to be tribal traditional use areas.

The third step in the Section 106 Process is to EVALUATE sites according to the National Register Criteria.

In the process of evaluation, the implementing regulations for the National Register at 36 CFR Part 69 state that: The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association.

The last part of that definition integrity of location, design, setting, materials, workmanship, feeling, and association is particularly important because it refers to the context of a site.

Along with context, one or more of the four significance standards must be met. The site must be:
1. Associated with important events OR
2. Associated with important persons OR
3. Representative of a distinctive style or period, or work of art, OR
4. Important in history or prehistory.

One or more of these four criteria must be met along with the integrity of context in order for a property to be considered significant. Clearly, there is much room for interpretation in whether or not a site meets any of these criteria.

The fourth step in the Section 106 process is assessing effects. Effect means any change in the characteristics that qualify a cultural property for nomination to the National Register.

Not all impacts affect the characteristics that make a property eligible. Impacts may not involve the physical alteration of a historic property. Ask "what makes this property eligible?" Then ask, "Will this characteristic be affected?"

Types of adverse effects listed in the regulations include:

- Physical destruction of all or part of a National Register eligible property
- Alteration of the property through repair or maintenance
- Removal of a property from its original location
- Neglect Visual, audible, or atmospheric changes, and
- Transfer, lease or sale

Transfer, lease or sale causes adverse effects by removing the protections of Federal preservation law from significant properties.

If the undertaking will not change the characteristics that qualify a cultural property for nomination to the National Register the undertaking has No Adverse Effect.

No adverse effect can be achieved through the creative modification of undertakings. Projects may be redesigned to avoid sites, or sites may be buried to avoid impacts. Project re-design may eliminate visual or audible impacts to sites. Stipulations like monitoring or fencing may be

imposed during construction or afterwards, to protect sites. Modifications to the built environment may include restoration or rehabilitation rather than demolition.

No adverse effect is achieved when:

- the undertaking's effects do not meet any of the criteria of adverse effect OR
- the undertaking is modified to avoid adverse effects OR
- conditions are imposed to avoid adverse effects.

The final step in the Section 106 process is to RESOLVE ADVERSE EFFECTS, if they cannot be avoided. Adverse effects may be minimized by measures like data recovery, archival research, detailed recordation, or public interpretation. Ways to minimize or mitigate adverse effects often rely on documentation. However, when the characteristics that make a site significant cannot be mitigated through documentation of the property being affected, other kinds of mitigation must be negotiated, in consultation with BLM s partners in the Section 106 process.

Although CONSULTATION with our partners is critical in resolving adverse effects, consultation is required throughout the Section 106 process.

Each of the five steps described above must be done in consultation with participants in the process, named by the law and the regulations as:

- the State Historic Preservation Officer or SHPO,
- the Advisory Council on Historic Preservation or ACHP, when it decides or is asked to participate in the process,
- Tribes, and
- Consulting parties like local governments and those with a demonstrated interest in historic properties affected by the undertaking.

Consulting parties may include those who have an economic interest in the undertaking a legal interest in the undertaking OR a concern about the effect of the undertaking on historic properties.

As you can see, virtually anyone who is concerned about the undertaking's effects on historic properties may participate in consultation. This definition calls for the active participation of many sectors of the public in each step of the Section 106 process.

While State Protocol Agreements may streamline steps in the Section 106 process, keep in mind that the requirements of the process are transparency and an opportunity to participate by specific partners but also for the general public.

Now we're going to look at some issues in Section 106 compliance that come up frequently:

- Defining who the participants in the process are
- Defining the Area of Potential Effect
- Finding and avoiding sites
- Mitigating cumulative impacts AND
- Working with Traditional Cultural Properties

Each undertaking you deal with will have a different and interesting mix of these issues. Let s examine the participants in the process.

Who can be a consulting party? Aside from the SHPO and the ACHP, Tribes must be afforded the opportunity to participate. The agency official must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property that is, whether or not it is on tribal land.

Those with Demonstrated interest must also be afforded the opportunity to participate. Note, though, that participation as a consulting party is subject to approval by the responsible Federal agency.

When can these various parties participate? Consulting parties may participate at any point during the Section 106 process. For example, in New Mexico, for oil and gas leasing surrounding Chaco Canyon, we have received requests for consulting party status from the Chaco Alliance and the San Juan Citizens Alliance. These consulting parties want to work with BLM to determine the Area of Potential Effect for oil and gas leasing at the very beginning of the Section 106 process.

How do they participate? We use the process outlined in the National Environmental Policy Act or NEPA - to involve the general public as well as local governments, applicants, and other entities. The NEPA process must be tailored to reach tribes as well as those members of the general public with an interest in historic properties. This means that cultural resource specialists must be actively engaged in NEPA, to make sure that the targeted public is notified and involved, and also provided with sufficient information about the Section 106 process that is how the APE was defined, what identification methods were used, results of identification and evaluation, and mitigation of adverse effects so that they can understand how the agency means to fulfill its Section 106 responsibilities.

How do we decide who participates? Do all the potential participants get involved with every undertaking? The 36 CFR Part 800 regulations describe when and how participants are involved in the Section 106 process.

Our national programmatic agreement defines this process further, and our State protocol agreements tailor the process to specific states.

Although all potential participants may not be involved with every undertaking, our partners should be well enough informed of both our process and our work load so that they know how to get involved when they want to.

The BLM and the SHPO are constant partners in all undertakings, whereas

The Advisory Council on Historic Preservation serves as an overseer. The ACHP oversees the Section 106 process on a national level.

- They provide guidance and advice to participants on specific projects, and.
- They decide if and when they will participate as an active partner on specific projects.

Their decision to participate is based on the degree of controversy of a project and the perception that an agency needs assistance in following the regulations, particularly in making sure that tribes and other stakeholders have a say in the process.

It is important to identify the participants early on in the five step process, because the fifth step RESOLUTION OF ADVERSE EFFECTS - requires the negotiation of an agreement that spells out the roles and responsibilities of each party in ensuring that the adverse effects are mitigated. The term consulting parties refers to all the parties who have a required or voluntary role in the Section 106 process, including all those parties who negotiate an agreement at the end of the process.

For specific projects, the agreement will be a Memorandum of Agreement. For long term projects with uncertain outcomes, the agreement will be a Programmatic Agreement.

While all parties should have the opportunity to consult, not all consulting parties must be invited to sign agreement documents. Working with the various parties during the entire course of a long undertaking may create an expectation that they can all sign the agreement document but each kind of signatory has specific roles and responsibilities in the implementation of an agreement.

When the time comes to sign the agreement, the status of various signatories is defined by those required to sign, those invited to sign, and those who concur with the agreement.

Required Signatories have the authority to execute, amend and terminate the agreement.

Signatories must include:

- The agency official in this case, the BLM manager in charge of the undertaking
- The State Historic Preservation Officer AND
- The Advisory Council on Historic Preservation

Invited Signatories may include:

- The applicant in other words, the undertakings sponsor or the project proponent
- Other agencies with Section 106 obligations, for example, other agencies who manage lands on which the undertaking is located, state or federal
- Other entities with responsibilities under the agreement

Invited signatories have a role in the agreement and are tasked with responsibilities outlined in the agreement.

Tribes may be invited signatories if they have responsibilities under the agreement. The lead federal agency decides who to invite to sign the agreement as invited signatories, in consultation

with the primary partners the State Historic Preservation Officer and the Advisory Council.

Along with the required signatories, invited signatories have the right to seek amendment or termination of the agreement.

In contrast, concurring parties may have participated in 106 consultation (as consulting parties, if allowed by the agency) but have no responsibilities under the agreement, and no rights to amend or terminate it. Their concurrence adds weight to the agreement and signals to the other signatories that they are interested parties who have a stake in seeing that the agreement is implemented and who may continue to be involved.

The lack of a concurring party s signature does not prevent implementation of the agreement. The agency official decides who to invite to be a concurring party, in consultation with the SHPO and the Advisory Council. Concurring parties cannot amend or terminate the agreement.

Next we'll examine some issues that can have a major impact on our implementation of the five step process.

While it is important to define the parties involved in the process, it is also critical to define the geographic area that will be affected by the undertaking. When defining the Area of Potential Effect, archaeologists all too often concentrate on only the footprint of the project on the ground. It is important to take a larger view of the APE that includes indirect effects. NEPA also requires the analysis of cumulative effects. In cases where many small actions may combine to result in an adverse effect, it is wise to consider the potential for cumulative effects in Section 106 as well, although it is not specifically mentioned in the regulations.

Remember that the APE is more than the area of direct effects and that the APE may be redefined over time, as the scope of the undertaking changes or as additional effects are known or recognized.

The Area of Potential Effect is defined in the 36 CFR Part 800 regulations as: The area within which an undertaking may directly or indirectly alter the character or use of historic properties.

The Federal agency determines and documents the APE in consultation with the SHPO. Land status is not necessarily a consideration in determining the APE. Direct and indirect effects should be taken into consideration.
The 36 CFR Part 800 regulations state that the agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.

The APE may vary, depending on the effect. Visual, noise, smell, night sky these are effects that will each have a different APE for an undertaking.

For example, a proponent may propose a well pad on BLM land. After further discussion, it becomes clear that well pad construction and operation will require an access road, a pipeline, a power line, and a material stockpile. The footprint of the well pad itself along with all its associated facilities constitute direct effects to any sites located within that immediate area.

In this example, there are no sites that will be directly affected by the well pad and its associated facilities. However, there are two sites that are close enough to the project that they may experience indirect effects a rock art site and a homestead. Indirect effects may include an increased risk of vandalism to the sites because the pipeline and access road make them easier to get to. Each undertaking will have its own range of direct and indirect effects.

Another issue to consider is the need to document all steps in the Section 106 Process, including identification and evaluation. Avoiding the documentation and evaluation of sites may save time in the short run. But it is costly in the long run. By lack of documentation, I mean the failure to record and evaluate sites that were identified during the inventory phase of the process, or the failure to write a report that describes the undertaking, the inventory methods used, and the inventory results including the sites located and their National Register evaluations.

We tend to take the path of least resistance, which generally means modifying projects to avoid sites we have identified. This does not mean that sites that are avoided should not be fully recorded and reported-quite the contrary.

There are many down sides to not recording sites or completing inventory reports. Perhaps the BIG down side is that the same area will have to be re-inventoried the next time there is a project in that area because there is no record of the present inventory or the sites just found: a cost of additional time and money.

When all sites discovered during a project are not recorded, and when the inventory report is not completed, we save in the short term and pay in the long term. Information about those sites is not available for planning of future projects. There is no record of the total area inventoried. No information is available on current site condition in the event that a site is damaged in the future and a case can be pursued under the Archaeological Resources Protection Act, or ARPA. Recording all sites discovered during an inventory and writing the inventory report is not only a best practice it's an ethical obligation.

In addition, sites should be evaluated for National Register eligibility when they are recorded. BLM s national Programmatic Agreement and the individual State Protocol Agreements streamline the consultation required for third step of the Section 106 process evaluating sites for significance. But both identification and evaluation provide information that BLM needs in order to manage its cultural resources effectively.

We may identify and evaluate individual sites or features conscientiously while at the same time missing important patterns that connect them. The danger here is that cumulative impacts from project-by-project decisions may result in an entire class of sites being obliterated.

Each individual site or feature may be determined not eligible--but we have inadvertently missed the important relationships between them. The big picture pattern suffers death by a thousand cuts eventually, all the feature or sites are gone, or so many are gone that we can no longer recognize the overall pattern.

An excellent example of this problem is found along the shores of dry lakes in the Great Basin. Is a hole in the ground important? How about several holes? How about a pattern of holes located along the strand line of a lake bed that is currently dry? These holes are believed to be fish traps used by the Cahuilla Tribe. Without recognizing the pattern, though, each small pit might easily be dismissed as modern in origin or unknown in function, hence not National Register eligible. Actually, the pattern of pits is physical evidence of an important subsistence activity that may not otherwise show up in the archaeological record.

You can see that destructive mitigation on a project by project basis may lead to the eventual loss of an entire site type.

Manual 8100.02.D describes BLM s objective of preserving the full array of cultural resources on public lands.

BLM s Resource Management Planning or RMP - process is the best way to establish administrative protection measures for site types vulnerable to this kind of loss.

Resource Management Plans establish special designations such as Areas of Critical Environmental Concern
or ACECs that may be set aside with the specific intention of preserving the full range of site types on public lands.

Congressionally designated National Landscape Conservation System- or NLCS- units including wilderness areas, wilderness study areas, national monuments, and national conservation areas, may offer similar opportunities.

While National Register listing and even National Landmark designation does not provide additional protection to sites, this recognition may eventually result in special designation through BLM s RMP process.

The RMP process may also be used to define use allocation for sites, for example, allocation to the “Conservation for Future Use category.”
It behooves Cultural Resource Specialists to engage fully in the Resource Management Planning process for just these kinds of circumstances.

The RMP process allows us to establish special designations based on site types that would otherwise go unprotected.

Remember! Effective cultural resource management is more than Section 106.

Another issue related to cumulative impacts can result from the practice of flagging and avoiding sites. This practice may protect sites in the short term, but over the long term cumulative impacts from many nearby projects may result in adverse impacts to sites.

At some point, flag and avoid no longer protects sites from cumulative impacts.

We see this issue clearly in oil and gas fields, especially old fields that continue to be developed.

In the Loco Hills area of southeastern New Mexico, the density of well pads, pipelines and access roads was already high in 1996. Sites found before then had been flagged and avoided during the construction of individual well pads. Then other well pads, pipelines, and roads were constructed nearby.

By 2005, the density of well pads, access roads, and pipelines had greatly increased, making it more and more difficult to avoid known sites. The known sites become islands in a sea of pipelines, roads, well pads, power lines, and other facilities.

Even though overlapping inventories continue to be done for each project, sites are increasingly vulnerable to erosion, vandalism, and destruction through maintenance activities.

The best solution would have been to treat the development of the oil and gas field as a single undertaking and consider cumulative effects prior to development. But many of these fields date back as early as the 1920s, far earlier than the National Historic Preservation Act.

For oil and gas fields that pre-date the NHPA, an agreement to address adverse effects to sites in a large area may be necessary to resolve cumulative impacts.

The Permian Basin Memorandum of Agreement in southeastern New Mexico is an example of this kind of agreement. It encompasses an area of intense existing oil and gas development, where cultural resource inventories had already been done on more than 25% of each of 28 USGS quadrangles in the agreement area. It was negotiated after an intensive analysis of the results of these inventories. Such agreements need to be tailored to fit the types of cultural resources found in the area being considered. Each agreement is likely to be very specific to a particular geographic area.

The last- but certainly not the least - issue we'll consider is the identification of Traditional Cultural Properties or TCPs during the second step of the Section 106 process. TCPs must be identified by Tribes, since by definition; these properties are important traditional places for tribes. However, Tribes may be reluctant to identify TCPs early enough in the planning process to avoid impacts.

The lack of information about TCPs early in planning will very likely mean that these important places are not considered during the Section 106 process. As a result, adverse effects may not be recognized, and mitigation of these effects may not take place or not in a timely way.

In order to prevent these dire outcomes, we need to improve tribal consultation as an important part of Resource Management Planning. Planning both for RMPs and for large-scale Environmental Impact Statements is an opportunity to inform tribes of preservation tools such as special designations.

Another planning tool is the "traditional use" category this tool is available ONLY through planning.

Guidance found in the 8120 Manual and the H-8120-1 handbook will be useful when working with tribes, and so will the tribal liaisons working in your state or nearby states.

When consulting with tribes, you may find that they expect that all TCPs are National Register eligible and worthy of protection.

Tribes may have differing perceptions of the definition of a TCP. As with other kinds of cultural resources, not all TCPs are National Register eligible.

Alternatives to the National Historic Preservation Act may be more effective in considering places important to Tribes, including those that are not National Register eligible (for example, some sacred sites). NEPA and the Resource Management Planning process are examples of these alternatives.

TCPs that encompass large areas have special management implications for BLM. Entire landscapes may be National Register eligible.

There are an increasing number of important traditional examples from the BLM states, including

- Tahquitz Peak and Tecate Peak in California
- Spirit Mountain in Nevada
- Montezuma s Head and the San Francisco Peaks in Arizona and
- Mount Taylor in New Mexico

Large TCPs can be difficult management challenges. Again, it is best to work through the Section 106 process step by step and one step at a time.

Our perceptions are evolving as to what a Historic Property can be or what it can encompass as contributing features.
In landscape scale TCPs, Tribes may define such contributing elements as wildlife, rivers, other water sources, or even air.

If we think about historic landscapes that have been long recognized as significant, perhaps these contributing elements may be easier to understand. For example, many Civil War battlefields must include topographic features like rivers, ridges, or even agricultural fields in order to be understood in their historic context.

To sum up what we've covered in this module, the five steps of the Section 106 process are

1. Determine if there is an undertaking.
2. Make a good faith effort to identify cultural resources that may be affected by the undertaking
3. Evaluate the significance of the cultural resources you identified
4. Assess the effect of the undertaking on significant cultural resources
5. Resolve any adverse effects of the undertaking on those significant cultural resources.

You can apply these steps to the virtually infinite variety of undertakings that may be proposed on BLM lands. The Section 106 process is evolving, and some trends are evident. These trends include

- A broader definition of the Area of Potential Effects, or APE, for undertakings
- A wider range of identification measures necessary to show that the agency has made a good faith effort to identify cultural resources
- Inclusive consultation that solicits the views of tribes and interested parties AND
- A consideration of longer term impacts, especially for developments like oil and gas fields that consist of a large number of similar undertakings over time.

A thorough understanding of each of the steps will help you meet the challenges of effectively managing cultural resources as the use of our public lands expands and increases. It has been my pleasure to present this module in the Fundamentals for Managing the Cultural Heritage Program series. If you would like more information about BLM s compliance responsibilities pertaining to the Section 106 process, please contact your Deputy Preservation Officer.

Links:

36 CFR Part 800 Regulations