

What Triggers Section 106 Compliance? Transcript

Hello, I'm Gary Stumpf. Welcome to another module in the "Fundamentals for Managing the Cultural Heritage Program" series. In this session, we'll discuss what triggers Section 106 compliance. In other words, "How do we know when we have to make some level of effort to comply with Section 106 that involves existing information reviews, tribal consultation or field inventory?"

First, we'll explore this issue focusing on minerals management to follow up on our previous training module on "Cultural Resource Compliance when Managing Minerals." Then we will walk through a wide range of activities that often occur on public lands and discuss whether each would normally trigger some form of Section 106 compliance effort.

The objective of this module is for you to be able to explain what an undertaking is for purposes of complying with Section 106 of the National Historic Preservation Act, and when Section 106 compliance efforts are needed before making decisions on a variety of land use actions.

The first thing we need to determine is whether or not the action we are about to take is an undertaking as it is defined in the regulations. Undertakings, for the purposes of Section 106 compliance, are defined in the 36 CFR 800 regulations 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."

Translating that to our world, undertakings are actions BLM takes directly like improvement projects, disposals, and so forth. Undertakings are also non-BLM actions that are carried out under the sanction of BLM licenses, leases, permits or other authorizations.

In practice, anything BLM has decision-making authority to do or allow to be done, which could have an effect on cultural properties, whether these properties are known or not, and whether these properties are Federal or not, is an undertaking.

Let's start by looking at mineral leasing. Is mineral leasing an undertaking? This is an important issue because until a few years ago, the minerals division in Washington Office held the position that mineral leasing was not an undertaking, and therefore was not subject to Section 106 compliance.

How did they come to this conclusion? In 1980 the New Mexico District Court ruled in a lawsuit known as National Indian Youth Council vs. Andrus, that in the case of coal leasing, it wasn't issuing the lease that constituted the license for the federal undertaking, it was approval of

the subsequent mining plan. It said Section 106 was triggered by approval of the mining plan. The District Court's ruling was subsequently upheld by the 10th Circuit Court of Appeals.

In April 1988, the Associate Solicitor for Energy and Resources in Washington, D.C., issued an opinion applying this ruling to oil and gas leasing. The solicitor said that on a Federal oil and gas lease, approval of a permit to drill, not issuance of the oil and gas lease, would constitute approval of the proposed undertaking triggering the requirement to comply with Section 106.

In practice, BLM had for decades been deferring Section 106 compliance for mineral leasing to the stage when mining plans or applications for permission to drill were being considered for approval. And it makes sense to do this because leases cover enormous areas, only a small portion of which will actually be disturbed, if any at all.

It makes sense to wait until you know where the impacts will occur before you commit the time and money to go through the steps of identifying, evaluating and treating the historic properties that will be affected by development activities.

In recent years, however, a series of IBLA appeals and lawsuits in Utah and Montana brought this issue to a head. The National Trust for Historic Preservation even became involved in these challenges to the way BLM had traditionally handled Section 106 compliance for oil and gas leasing. The challengers said that the decision to lease itself was an undertaking subject to Section 106 and that BLM had to complete compliance with 106 before issuing leases.

Because of these challenges, BLM began to reconsider its longstanding practice of deferring Section 106 compliance to the APD stage.

This is where the confusion about the definition of undertaking comes in. If you read the BLM solicitor's opinion closely, you will find that it doesn't explicitly say leasing is *not* an undertaking. And, in fact, there is no written BLM policy, either from the cultural program or the minerals program, that says leasing is not an undertaking subject to Section 106.

The fact is, the decision to lease *is* an undertaking, and it is subject to Section 106 compliance. Leasing an area, whether it is for oil and gas, coal, geothermal or coal bed methane, presupposes a right to develop the mineral deposits within that lease hold. And development of those mineral deposits involves activities that could affect historic properties.

The recognition that leasing itself is an undertaking subject to Section 106 was affirmed most recently in District and Appeals Court decisions involving oil and gas leasing on Otero Mesa in New Mexico. In that case, the courts ruled that BLM should have prepared an EIS analyzing reasonably foreseeable site-specific impacts before making the decision to lease and that some level of Section 106 compliance, including tribal consultation, should have been completed before the leases were issued.

Now, it's important to point out that Otero Mesa is a relatively small area where the impacts of leasing could be reasonably predicted, as opposed to many lease areas where impacts cannot be identified until exploration narrows the likely range of drilling sites. But the point is, reasonably foreseeable impacts of leasing must be considered, and some level of Section 106 compliance must be completed, before making the decision to lease.

In light of this, does it still make sense to defer intensive identification, evaluation and treatment efforts to the stage where approval of APDs or mining plans is being considered? Sure it does.

Does it make sense to do Class III surveys of very large lease areas before issuing leases? Absolutely not. So what do we do? We do exactly what Section 106 says we should do – we make a reasonable and good faith effort.

It isn't reasonable to survey hundreds of thousands of acres in a potential lease area at 30 meter intervals before we can consider leasing it. It isn't reasonable to expect that we can do all the consultation we need to do with tribes to identify all the sacred sites and places of traditional cultural importance to them on hundreds of thousands of acres of potential lease area before we can consider leasing it.

It *is* reasonable, however, to use a phased approach to compliance, gathering enough information before making the decision to lease an area to know whether the mineral deposits can be developed without creating unresolvable adverse effects on historic properties.

It *is* reasonable to pull together existing information from previous surveys in an area, and perhaps do some additional survey where not enough is known, to be able to characterize the cultural resource potential of the area.

It *is* reasonable to initiate consultation with tribes before leasing an area to give them an opportunity to identify places having traditional values that would be impacted by drilling activities.

Will we still need to do additional surveys and tribal consultation when considering APDs and mining plans? Of course. But we must be able to document some level of compliance – a reasonable level of effort – before we identify lands suitable for leasing in our land use plans, before we identify lease constraints on those areas, and before we issue the leases.

This kind of phased approach to compliance for mineral leasing was upheld by a 2005 IBLA decision on an appeal brought by the Mandan, Hidatsa and Arikara Nation against the Montana State Office.

The concept of using a reasonable and good faith approach to compliance that we discussed here using minerals as an example can be applied to other resources and programs, as well. What constitutes a reasonable and good faith effort is one of those gray areas that slowly come into focus over time as decisions and interpretations come down from IBLA and the courts. No one

will have pat answers for these situations, and as we have seen, even longstanding practices may need to be modified in light of more recent challenges.

Once you have determined what triggers Section 106 for a particular action, you have to decide on a reasonable and good faith approach to compliance. Your Deputy Preservation Officer is your best source of information about what an appropriate level of effort would be to comply with Section 106 for any given undertaking. And this is something that should be worked out with your SHPOs within the context of your individual state Protocols.

Now let's turn to locatable minerals. The term "casual use" means activities that ordinarily result in no disturbance or negligible disturbance of the land or resources. In reference to mining activities for locatable minerals, casual use generally includes collection of rock, soil or mineral specimens using hand tools -- no mechanized earth-moving equipment or drilling equipment, no chemicals, no explosives, no use of vehicles off road.

No authorization from BLM is required for casual use, nor is the miner required to notify BLM before engaging in these activities. So if someone wants to carry out this kind of activity, would it be an undertaking subject to Section 106? No, it would not. BLM would be taking no action, making no decision, exercising no discretion over the activities.

Under the 43 CFR 3809 regulations, notices are required for exploration activities covering an area of five acres or less. Exploration means creating surface disturbance greater than casual use that includes sampling, drilling, or underground work to evaluate the mineral values present.

Before carrying out activities of this nature, the operator has to submit a notice to BLM at least 15 days before starting work. BLM has 15 days to review the notice but BLM approval of the notice is not required. Reviewing a mining notice does not involve decision-making on the part of BLM. Therefore, it does not constitute an undertaking subject to Section 106.

However, 43 CFR 3809 specifically provides for the protection of cultural properties by prohibiting mining operators on claims of any size from knowingly disturbing or damaging them. Upon discovering a cultural resource, the operator must inform BLM of the discovery and leave it intact until BLM allows the operations to proceed.

Within 30 days of notification by the operator, BLM must protect or remove the resource and allow the operations to proceed. Consequently, while processing a notice does not trigger Section 106, decisions made by BLM after cultural properties are discovered on a claim are subject to Section 106 compliance.

Under the 3809 regulations, Plans of Operation, which we call mining plans, are now required for all mining activities that exceed casual use, regardless of the size of the area is that is involved in the mining. Plans of Operation are also now required for all exploration activities

that disturb an area of more than five acres. Many mining activities that formerly only required a notice under the old 3809 regulations, now require Plans of Operation.

BLM must approve Plans of Operation before the proposed mining activities can proceed. The same provisions that protect cultural resources under notices protect them under mining plans, and they all involve some level of decision-making by BLM. The approval of Plans of Operation is an undertaking subject to Section 106.

In an earlier raining module, we talked about mineral material sales on split estate and the need for BLM to comply with Section 106 before selling those materials when BLM owns the mineral estate, even if the surface is privately owned.

BLM has complete discretion to decide whether or not to sell mineral materials when it owns both the surface and mineral estates or when it owns only the mineral estate. Consequently, BLM must complete Section 106 compliance before making a decision to sell mineral materials.

What about granting rights-of-way across public land to access mineral materials on private land? If someone requested a right-of-way across public land to access a gravel pit on private land, BLM's grant of that ROW would be an undertaking subject to Section 106.

The Area of Potential Effects – the area for which we would take responsibility in our 106 compliance – would depend on the degree to which we are conditioning or controlling the impacts on the private land. But the point here is that BLM's proposal to issue a ROW would trigger Section 106.

Under the 1872 Mining Law, a mining claim can be patented if a qualified applicant has made a valid mineral discovery and has satisfied certain requirements. These requirements have to do with making assessments or improvements, surveying the claim, posting and publishing a notice, and making payment to the Federal Government.

Issuing a mineral patent is not a discretionary action by BLM. BLM responds to a patent application by making a series of objective determinations of fact, and does not have the option to modify or deny an application that meets the requirements.

If BLM finds that the law and regulations are met, title passes to the applicant. BLM also cannot deny a patent application for the purpose of protecting resources from mining activities, nor can BLM condition or encumber the patent with provisions for resource protection.

Therefore, BLM's review of a patent application and issuance of a mineral patent is not an undertaking subject to Section 106 compliance.

However, there are things we can do to protect cultural resources before the patent is issued. BLM's 43 CFR 3809 regulations have provisions to prevent unnecessary or undue degradation of surface resources on unpatented claims. In cases where patent applications have been filed,

we should consider the need to inventory and possibly protect cultural resources on those claims, as part of our general cultural resource management responsibilities, before the claims pass out of Federal control.

If there are important cultural resources on the unpatented claims, relocation of those resources, or detailed recordation or data recovery might be appropriate actions we could take before the claims are patented. Any measures like this that we carry out before the patents are issued would be considered undertakings subject to compliance with Section 106.

Now that we have examined when Section 106 compliance would be triggered when managing minerals, let's go through some examples of activities that often occur on public lands and discuss whether each would normally require some form of Section 106 compliance effort involving existing information reviews, tribal consultation or field inventory.

Before we go through this exercise, please keep in mind that the specific manner in which each state carries out Section 106 compliance for each of these activities will depend upon that state's protocol with the State Historic Preservation Officer. Each state's protocol provides a framework for implementing Section 106 compliance procedures under BLM's national cultural resources Programmatic Agreement.

Also keep in mind that my purpose in walking through this list of activities is not to provide hard and fast answers on how you should comply with Section 106. My intent is to encourage you to think about an appropriate compliance response, recognizing that my answers may not be the best answers for you in every situation.

For each activity, answer Yes or No to indicate whether you would normally carry out some form of identification efforts, including existing information reviews, tribal consultation and/or field inventory, to comply with Section 106.

Identifying areas suitable for coal leasing in land use plans. The answer to this one is Yes. The decision to allow leasing within an area should be an informed one, based in part on the effects mineral development would have on other resources, including cultural resources. A broad level of inventory to characterize the cultural resource potential of the area would be appropriate.

Leasing areas for oil and gas development. Yes, this would require a broad level of identification, including some consultation with Indian tribes to identify places of traditional cultural and religious importance. Leasing presupposes a right to develop the mineral deposits within the lease hold. And developing mineral deposits involves activities that could affect historic properties.

Approving oil and gas and geothermal Applications for Permit to Drill (APDs). Yes, approving APDs would authorize development actions that could affect cultural properties.

Approving mining plans for locatable minerals on Indian reservations. Yes, BLM is responsible for the effects of its decisions regardless of who owns or administers the lands affected. BLM would have to comply with Section 106 before approving actions that could affect cultural properties on Indian reservations.

Approving mining plans for locatable minerals on lands with private surface. Yes, the new 43 CFR 3809 regulations give BLM the authority to regulate mining operations on public lands where the mineral interest is reserved to the United States, including lands with private surface.

Seismic operations off existing roads. Yes, use of vehicles and equipment off existing roads could disturb the ground surface and displace or damage artifacts or features.

Land sales and exchanges. Yes, transferring cultural properties out of federal ownership removes them from the protection of federal historic preservation laws and regulations, potentially exposing those properties to adverse effects.

Issuing Special Recreation Permits. Yes, recreational activities that could result in ground disturbance, artifact collecting, or even interference with Indian traditional religious ceremonies would require Section 106 compliance before being authorized.

Continuing or extending existing land withdrawals. Here we are talking about public lands withdrawn for management by other Federal agencies, and the answer is Yes. Making, modifying and extending withdrawals are actions subject to compliance with Section 106.

The 43 CFR 2310 regulations require the applicant to provide a report identifying cultural resources. Because lands to be withdrawn will remain under Federal control, and because the agency assuming jurisdiction will also assume Section 106 responsibility for subsequent actions on the withdrawn lands, an agreement between the applicant agency and BLM can satisfy BLM's Section 106 obligations.

If extending an existing withdrawal will not change present use, Section 106 review should conclude with a finding of no effect.

Issuing rights-of-way where surface disturbance is authorized. Yes, authorizing surface disturbance would have the potential to affect cultural properties.

Issuing a right-of-way to use an existing road across public land. Yes, if the activities that might result from the authorized access have the potential to affect cultural properties or places of traditional religious or cultural importance to tribes. For example, if the right-of-way across public land would lead to development on private land that would involve ground disturbance, or could increase vandalism or artifact collecting, those potential adverse effects must be considered.

Herbicide spray projects. Generally, no. However, there may be unusual circumstances in which effects of herbicide spraying would trigger Section 106 compliance efforts. For example, if a spray project included an area used by an Indian tribe for gathering plants used for traditional religious or cultural purposes, tribal consultation should be carried out and effects considered under Section 106.

Trespass rehabilitation measures to clean up and restore public lands. Yes, because clean up and restoration activities may involve ground disturbance or may inadvertently result in removal of historic materials or features if these are not identified and evaluated in advance.

Road construction or improvement. Yes, because excavation, blading and other ground disturbing activities can displace and damage artifacts.

Land and easement acquisitions. No. If cultural properties are involved, acquiring lands and easements will bring them under the umbrella of federal authorities that will provide protection from adverse effects.

Chaining and other vegetation clearing projects. Yes, uprooting and clearing vegetation can damage archaeological sites and could harm places of traditional religious and cultural importance to tribes.

Maintenance of existing roads and trails. Probably not, unless maintenance would involve blading or other disturbance of previously undisturbed areas.

Approving activity plans for range and wildlife programs. Yes, if the plans include actions that could affect cultural properties. For example, Section 106 compliance efforts should be completed before a decision is made to develop a wildlife catchment at a spring considered sacred by an Indian tribe.

Approving cultural resource project plans. Yes, because such plans would affect cultural properties, even if the effects were beneficial. Depending on the individual state's protocol, Section 106 compliance in such cases would not necessarily involve consultation with the State Historic Preservation Officer, but determinations of eligibility and effect should be documented in the project file.

Authorizing collection of forest products, e.g., moss, ferns, and pinyon nuts. No, assuming collection would not involve use of vehicles off existing roads.

Prescribed burns. Yes, although any field inventory done would probably be less intensive than for ground disturbing activities and would focus on areas likely to contain cultural resources vulnerable to the range of temperature expected during the burn.

Timber sales. Yes, harvesting timber involves many activities that could affect cultural properties, both directly and by altering the settings in which they occur.

Designating areas closed to OHV use. Probably not, although you would want to consider whether closing one area to OHV use would increase impacts in another area, in which case Section 106 compliance efforts might be warranted.

Designating areas open to OHV use. Yes, OHV use can displace and damage archaeological resources and can lead to increased vandalism and artifact collecting.

Designating existing OHV routes as open to use. Yes, because this designation would be a decision to authorize a use that could affect cultural properties where no such decision had been made previously. Compliance with Sec 106, however, would be based on how much disturbance had already taken place on the routes by the time the designation was made and would consider how much additional effect, if any, the designation would have on cultural properties. Policy on this was issued with IM No. 2007-030.

Geophysical explorations using vibroseis trucks on existing roads. No, unless the vibrations would threaten historic properties such as standing structures.

Cultural resource emergency protection measures. By definition, such measures would affect cultural properties, so some level of Section 106 compliance would have to be documented in the files. However, each state should have agreements with its State Historic Preservation Office to allow for expedited compliance efforts when responding to immediate threats.

Withdrawal revocations where management of the land returns to BLM. No. Bringing the land back under BLM jurisdiction does not invoke any actions that could affect cultural properties and ensures that they will receive the benefit of the laws, regulations and policies under which BLM operates.

Maintenance of existing fences, pipelines or reservoirs. No, unless this would involve disturbance of previously undisturbed areas.

Designating Areas of Critical Environmental Concern in land use plans. No. Designating an ACEC in and of itself would not trigger Section 106 compliance because it doesn't approve actions that could affect cultural resources.

Approving management prescriptions for designated ACECs. Yes. Although designation of an ACEC would not trigger Section 106, the decision to approve management actions prescribed for the ACEC may do so, depending upon whether they would affect cultural properties.

Emergency fire activities. Yes, for activities that would involve ground disturbance or deliberately burning areas to prevent the further spread of wildfire. However, each state should have agreements with its State Historic Preservation Office to allow BLM to satisfy its Section 106 obligations in a manner that will avoid unnecessary delay of fire suppression activities.

Approving conversion of an unsuccessful oil and gas well to a water source well. No, assuming no new ground disturbance would be necessary for the conversion.

Issuing mineral patents. No. Issuing a mineral patent is not a discretionary action by BLM. BLM does not have the option to modify or deny an application that meets the requirements. A patent application also cannot be denied for the purpose of protecting resources from mining activities, nor can the patent be conditioned or encumbered with provisions for resource protection.

Authorizing mining activities that are considered “casual use.” No, and this is somewhat of a trick question because BLM does not authorize any casual use activities.

Reviewing a notice for locatable mineral exploration. No. BLM has 15 days to review the notice but BLM approval of the notice is not required. Reviewing a mining notice does not involve decision-making on the part of BLM and does not constitute an undertaking subject to Section 106.

Enlarging existing springs to enhance fish habitat. Yes. This would involve ground disturbance that could affect artifacts or features near the springs. Altering springs or the settings surrounding them could also affect traditional religious or cultural values ascribed to them by Indian tribes.

Renewing grazing permits and leases. Yes. Policy on complying with Section 106 before renewing grazing permits and leases was issued with Instruction Memorandum No. 99-039.

Issuing a Cultural Resource Use Permit for survey or recordation. No. Identifying and documenting cultural properties would not affect any characteristics that might make them eligible for the National Register.

Issuing a Cultural Resource Use Permit for collection or excavation. Yes. Collection and excavation, even for the purposes of scientifically recovering information that might otherwise be lost, constitutes an effect on cultural properties that would require Section 106 compliance.

Now in most cases, you wouldn't have to go through a separate Section 106 compliance effort before issuing a Cultural Resource Use Permit because permits are usually issued as part of a larger undertaking, e.g., a project requiring data recovery, and Section 106 compliance would be done for the larger undertaking as a whole.

But if you were going to issue a collection or excavation permit for a research project not connected with any other undertaking, the permit application itself would be the trigger for going through the Section 106 compliance process.

Storing and curating artifacts collected from an archaeological site. Yes. If the artifacts were collected because they contributed to the characteristics that made the site eligible for the

National Register, and their historic value depended upon proper safeguards, decisions made about storage and curation would be included in the actions considered under Section 106 compliance for the project as a whole.

Issuing a Special Use Permit to an Indian tribe authorizing tribal members to conduct dances at an archaeological site. Yes. Assuming the dance activities, including use of vehicles to carry participants to the site, have the potential to displace surface artifacts or features, Section 106 would be triggered by the permit application.

This concludes our module on “What Triggers Section 106?” In this module we discussed what an undertaking is for purposes of complying with Section 106 of the National Historic Preservation Act, and when compliance efforts such as existing information reviews, tribal consultation or field inventory would be needed before making decisions on land use actions involved in several aspects of minerals management. We also discussed when such efforts would be needed in response to a wide range of other activities that typically occur on the public lands.

Thank you for attending. If you would like more information on Section 106 compliance, please contact your Deputy Preservation Officer.