

The National Programmatic Agreement And State Protocols Transcript

Part 1: Training Objectives and History of the National Programmatic Agreement and State Protocols

Hello, I'm Dr. Connie Stone. This training module will provide you with an understanding of the national Programmatic Agreement and state protocols. These documents are the basis for the Bureau of Land Management's compliance with the National Historic Preservation Act.

First, let's define the national Programmatic Agreement in terms of the five "W" words: what, who, when, where, and why.

What is the national PA? It's a legal agreement that defines how the BLM will comply with Section 106 and other provisions of the National Historic Preservation Act. In a broader sense, it serves as the foundation for managing the BLM's entire cultural heritage program.

Who are the formal parties to the agreement? The signatories are the BLM, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers. Many other parties, including Indian tribes, were consulted during the development of the national PA.

When was the agreement signed? The national PA was first signed in 1997. A new, revised version was signed in February of 2012.

Where does the agreement apply? The agreement is nationwide, but state offices work with their State Historic Preservation Officers, or SHPOs, to develop a formal protocol that defines specific procedures for cooperation and consultation. Each of the eleven western states established a state protocol after the BLM signed the national PA in 1997.

Why did the BLM and the other parties decide to develop and implement a national PA? The objectives were to streamline procedural requirements and to improve overall management of the historic properties on public lands.

Let's review the objectives of this training module. We want to clarify and enhance your understanding of the following topics:

- How the national PA serves as the foundation for the BLM's cultural heritage program and its compliance with the National Historic Preservation Act;
- The historical context and what the BLM intended to achieve in developing the 1997 programmatic agreement;
- The factors that led to the development of the 2012 national PA;
- The purpose and applicability of the current agreement;
- The role, composition, and operation of the BLM's Preservation Board;
- The process of communication and consultation with Indian tribes, SHPOs, the Advisory Council, and other parties;
- Procedures for considering and addressing the effects of undertakings in compliance with Section 106;
- The operation and components of state protocols; and

- The components of the agreement that relate to training, periodic reviews, and certification of offices.

I encourage you to read a copy of the national PA and keep it handy for reference. This training will not go through the agreement line-by-line. Instead, I'd like to begin by taking a trip down memory lane.

From personal experience, I can attest that a national PA is a good thing. In the mid-1990s, shortly after I began to work as a field office archaeologist, the BLM decided to pursue the development of a national PA. Why did this happen?

The leaders of the cultural heritage program knew that the National Historic Preservation Act provides for the development and implementation of alternate, programmatic procedures on an agency-wide basis. They realized this was a good idea for the BLM.

During the prior two decades, the BLM had developed a mature cultural heritage program with a capable and experienced staff. BLM leaders considered the agency capable of effectively implementing a programmatic approach.

A rapidly growing Section 106 workload created a need for greater efficiency. Other legal compliance workloads had also increased, for example, in response to passage of the Native American Graves Protection and Repatriation Act in 1990. However, because President Clinton and Vice President Gore were working to reduce the size of the federal government, it appeared unlikely that the agency would be able to hire additional staff.

The BLM wanted to streamline Section 106 compliance to give its staff more time to work on proactive projects, partnership efforts, and new initiatives like Adventures in the Past and the Heritage Education Program.

The BLM also wanted to develop cooperative relationships with SHPOs on such efforts as data management and public education. Many states already had programmatic agreements with SHPOs to streamline some aspects of the Section 106 process. We wanted to highlight these productive relationships, while moving away from the model of SHPO as policeman.

There was also a desire to enhance the agency's efficiency and effectiveness through better internal communication and greater consistency throughout the program. The states needed to cooperate on common objectives, such as a training program and revisions to the 8100 Manual Series for cultural resource management.

Let's review what the BLM intended to achieve in pursuing the development of a national Programmatic Agreement: recognition of BLM's expertise and judgment; streamlining of Section 106 compliance; more time for proactive work; improved relationships with SHPOs; consistency and communication among the states; and ensuring that district and field offices have adequate staffing for cultural resource work.

In 1995, staff from the Washington Office and the state offices established work groups and began to hold meetings and negotiations with the Advisory Council and the National Conference of State Historic Preservation Officers. BLM conducted a successful pilot project in Wyoming. The first national PA was signed in 1997. The states began to work with their SHPOs to develop state-specific protocols under the agreement. Arizona signed the first state protocol in 1997, followed by the other states, and finally Utah in 2001.

The 1997 agreement provided for periodic reviews of its effectiveness. At least two factors indicated a need for revision, which resulted in the new agreement signed in 2012. In 2004, the 36 CFR Part 800 regulations, which govern the traditional process of compliance with Section 106, were amended to broaden the definition of “adverse effect” on historic properties. Scientific data recovery, previously treated as a situation of “no adverse effect,” now was regarded as an adverse effect.

The new amendments focused on improving the process of tribal consultation. Such attention was needed to address increasingly complex issues relating to traditional cultural places and landscapes, as well as the appropriate nature of government-to-government consultation. The amendments also emphasized ways to more effectively involve other consulting parties and the public.

The BLM worked with the Advisory Council and the National Conference of State Historic Preservation Officers to develop and sign a new national PA in February of 2012. The new agreement supersedes the 1997 agreement but carries forward many of its provisions. Existing state protocols remain in effect until the State Director and SHPO sign a successor protocol or until otherwise terminated. State Protocols to be revised must be changed within 24 months, by February of 2014. If a state doesn’t have a revised or new Protocol, it will operate under the 36 CFR Part 800 regulations.

In summary, the national PA describes the legal responsibilities of the signing parties. It promotes the value of cooperative relationships between the BLM and SHPOs. It acknowledges the benefits of consultations with Indian tribes that possess special expertise in assessing historic properties that may have religious and cultural significance. It expresses a desire, “in the public interest, to streamline and simplify procedural requirements, reduce unnecessary paperwork, and emphasize the common goal of planning for and managing historic properties under the BLM’s jurisdiction and control.” The resulting efficiencies may enable more attention to proactive work, such as:

- Analysis and synthesis of existing data;
- Surveys and identification of historic properties;
- Nominations to the National Register of Historic Places;
- Long-term preservation planning; and
- Creative public education and interpretation.

In the next lesson, we will consider the components of the national PA in more detail, starting with the role of the Preservation Board.

Part 2: Role of the Preservation Board; Consultation Responsibilities; Procedures for Considering Effects of Undertakings

In this training module, we will consider the role of the BLM’s Preservation Board; the agency’s consultation responsibilities under the national Programmatic Agreement; and the procedures for considering and addressing the effects of undertakings.

The national PA in 1997 established the BLM’s Preservation Board. Its purpose is to advise the Director, State Directors, district and field office managers, and any other line managers who have the authority to make decisions. The Board provides advice on the development and

implementation of policies and procedures for compliance with the National Historic Preservation Act and other laws relating to cultural resources.

The Preservation Board meets and coordinates with the Advisory Council to review the status of implementation of the national PA. It plays an active role in resolving any related issues. The Board prepares responses to formal inquiries from the Advisory Council, the National Conference of SHPOs, individual SHPOs, Indian tribes, local governments, and the public, in regard to how the BLM is carrying out its responsibilities under the national PA. The Board oversees the development and implementation of training programs for BLM cultural specialists and managers. It also monitors the performance of district and field offices to foster consistency and to address any problems with implementation of the PA. The Board advises State Directors on the certification and decertification of offices.

The Preservation Board is responsible for revising the relevant BLM manuals, handbooks, and other formal policy and guidance. The 8100 Manual Series was first published in the 1970s. The BLM released updated manuals in 2004 as required by the 1997 national PA. The Board creates further updates as needed or required, for example, by the 2012 national PA.

The Preservation Board typically includes at least 19 members. The Board is chaired by the BLM's Federal Preservation Officer in Washington, DC. Its members include the Deputy Preservation Officers from each state office, who serve as the leaders of the state cultural heritage programs. The Bureau's National Tribal Coordinator was added to the Board in the 2012 agreement. At least four line managers serve for term positions, typically for two years. Members also include two cultural resource specialists from district or field offices, who serve for two- year terms.

The Preservation Board generally meets twice each year in the Washington, DC area and alternating locations in the western states. The meeting minutes are posted on the BLM's website. Representatives from the Advisory Council and SHPOs may be invited to attend or give presentations. Between meetings, Board members communicate informally to discuss issues and provide consistent advice to field offices.

In regard to the Preservation Board, I'd like to make a few suggestions to field office staff. Take the time to read the meeting minutes to keep aware of current issues and developments in the cultural heritage program. When you are dealing with complex issues, questions, or procedures, work through your state's Deputy Preservation Officer to obtain advice through discussions with other Board members. Finally, I encourage you to apply to serve as a member of the Preservation Board. I served a term on the Board, and it was a very enlightening and rewarding experience. It's a good thing to know that you've had some influence on national policies and procedures.

Now we will look at how the BLM's consultation responsibilities are addressed in the national PA. First, let's review the general guidelines. The agreement encourages the BLM to develop written protocols for productive consultation with SHPOs. The BLM invites the Advisory Council to participate in consultations when undertakings meet the thresholds defined in the national PA. I'll describe these thresholds and state protocols in the next part of this course.

The BLM is to consult with the relevant SHPO, Indian tribes, and other consulting parties during land use planning and at all phases of the Section 106 process. This is especially true for all undertakings that may adversely affect historic properties. We must also seek and consider

views of the public regarding proposed plans and undertakings. For public involvement, the BLM may use procedures defined in state protocols or those used in conjunction with the National Environmental Policy Act. States are to publish schedules of pending actions, including land exchanges, made available on a regular basis to the public and Indian tribes.

The Preamble and other sections of the national PA describe the importance of effective consultation with Indian tribes. Tribes possess expertise in assessing properties of traditional significance. The National Historic Preservation Act requires consultation, so that tribes may identify their concerns about historic properties, including those of traditional religious and cultural significance; provide advice on the identification and evaluation of such properties; articulate their views on the potential effects of an undertaking; and participate in resolving adverse effects.

Beyond the National Historic Preservation Act, the BLM's programs benefit from government-to-government consultation under many other laws and authorities relating to cultural resources. In order to achieve a more effective consultation process, some tribes may want to form more cooperative relationships with the BLM through formal or informal agreements on consultation procedures.

The national PA emphasizes certain principles relating to tribal consultation.

- The special legal status of tribal governments requires government-to-government consultation procedures.
- Information from tribes will be given good faith consideration.
- Managers and staff shall recognize that "traditional tribal practices and beliefs are an important, living part of our Nation's heritage and seek to avoid to the degree possible under existing law and regulation their potential disruption" as a result of a BLM decision.
- Managers shall consider whether their decisions may inhibit or destroy tribal access to public lands for religious or traditional uses. To the extent consistent with law, BLM decisions should not substantially burden the pursuit of traditional religious and cultural practices.

The national PA defines procedures to be followed in tribal consultation.

- State Directors and line managers, as appropriate, will represent the United States in government-to-government consultations. District and field office managers shall establish working relationships with tribal officials, comparable to their relationships with other government officials.
- Within a year after signing of the PA, State Directors are to contact tribes to begin discussions on how to foster better communication. The BLM will offer individual tribes the opportunity to establish agreements or other formalized procedures for the consultation process. Discussions will also seek to identify geographic areas, property types and undertakings of concern, and confidentiality issues.
- BLM will provide a tribal point of contact for each State Office and each district and field office.
- Consultation is to take place at the outset of land use planning. This provides the best opportunity to foresee and avoid potential conflicts between authorized land uses, historic properties, and traditional uses.

- State Directors are to make schedules of impending actions available to tribes on a regular basis and to regularly contact affected tribes.
- For proposed undertakings, BLM is to consult early and often through all phases of the Section 106 process.
- The BLM will protect from public disclosure any sensitive and confidential information about traditional practices, beliefs, and associated locations. This will be done to the greatest extent possible under law and regulation.

Let's move on to describing the procedures for considering the effects of undertakings. The following steps, as defined in the national PA, define the process of compliance with Section 106 of the National Historic Preservation Act.

- Determine the undertaking's area of potential effects.
- Review existing information on historic properties and seek information from Indian tribes and other interested parties.
- Determine the need for further actions to identify historic properties, such as field surveys or ethnographic studies. Make a good faith effort to identify cultural resources that could be affected.
- Determine if any properties meet one or more of the eligibility criteria for the National Register of Historic Places. These could include properties of traditional religious or cultural significance. In making eligibility and effect determinations, the field manager will follow the state protocol with the SHPO. The manager will consider the views of tribes, other consulting parties, and the public.
- If the field manager determines that a property is not eligible, the manager will provide documentation to the SHPO. That property won't be subject to further consideration under Section 106.
- The field manager determines if National Register-listed or eligible properties may be directly or indirectly affected by the undertaking.
- Say that the field manager finds the undertaking would not affect those characteristics that qualify a property as eligible. The manager will document this finding and provide the SHPO with documentation of "no historic property affected."
- If the undertaking may affect the qualities that make a property eligible, the manager will apply the Criteria of Adverse Effect. If the manager finds that the effect would not be adverse, or if the undertaking is modified to avoid adverse effects, the manager will document this finding and provide the SHPO with documentation of a finding of "no adverse effect." Be careful to determine if such cases meet thresholds for case-by-case review by the SHPO or the Advisory Council.
- If the undertaking would diminish or destroy the qualities that make a property eligible for the National Register, the manager will make a determination of adverse effect. The manager will then make a reasonable and good-faith effort to avoid, minimize, or mitigate adverse effects. This will be done "to the most reasonable and fitting extent," in consultation with the SHPO, tribes, and other consulting parties.

At this point, you may be wondering when the Advisory Council is involved in reviewing the effects of undertakings. The national PA defines thresholds for notification of the Advisory Council. The BLM will request its participation in the following classes of undertakings.

- Non-routine interstate and/or interagency projects or programs;

- Undertakings adversely affecting National Historic Landmarks;
- Undertakings that BLM determines to be highly controversial; and
- Those that will have an adverse effect, and where disputes cannot be resolved through formal means, such as a memorandum of agreement.

The Advisory Council reserves the right to participate, on its own initiative or at the request of a SHPO, Indian tribe, local government, or other consulting party. It will notify the BLM Director, State Director, and line manager when it decides to participate. BLM follows the process at 36 CFR Part 800.6(b) (2) when the Advisory Council is involved in resolving adverse effects.

The development of project-specific programmatic agreements follows the process defined in 36 CFR Part 800.14. Therefore, for complex or controversial projects, like renewable energy facilities or interstate utility lines, the BLM essentially reverts to the process defined in the 36 CFR Part 800 regulations. The terms and procedures within a specific programmatic agreement will be negotiated among the consulting parties and tailored to the specifics of the project.

In the next lesson, we'll review the purpose and provisions of state protocols. By the end of this training module, you will also be familiar with the remaining components of the national PA.

Part 3: State Protocols and Additional Components of the National PA

In this segment of the training, we'll talk about state protocols and the remaining provisions of the national PA. You may already be familiar with the provisions of your existing state protocol. What is the purpose of the state protocol? Protocols are agreements that provide the framework for the BLM's interaction with the State Historic Preservation Office. They are the preferred means to implement the national PA at the state level.

No two protocols are exactly alike. Each one is different, as each BLM state has its own types of cultural resources, issues, and processes. Differences between protocols also reflect the relationships and histories of interaction with SHPOs. It's likely that a protocol for Wyoming would not be a good fit for New Mexico. There is great variation in the level of detail of state protocols. For example, the initial protocol for Alaska was thirteen pages long, while the California protocol was a book of 377 pages.

Despite the differences, all protocols address a similar range of topics. They also incorporate the process defined in the national PA for addressing the effects of undertakings on historic properties.

The national PA defines the following topics that are to be addressed, at a minimum, in state protocols. Some refer to the compliance process for undertakings.

- Ways for making a schedule of pending undertakings available to Indian tribes and the public on a regular basis;
- A commitment to fulfill tribal consultation obligations;
- How the BLM will involve the public and consulting parties in protocol-guided compliance processes;
- Types of properties that the BLM may determine ineligible without seeking SHPO agreement;

- Types of undertakings and classes of affected properties that will trigger case-by-case review by the SHPO. This includes all undertakings that will have an adverse effect on historic properties;
- The manner in which the BLM will ensure that appropriate professional expertise will be obtained or made available for certain types of properties or undertakings; and
- Circumstances under which the BLM or SHPO may choose to operate under the 36 CFR Part 800 regulations, in place of the protocol.

Other topics addressed in protocols are intended to foster a more cooperative relationship with the SHPO. They include the following.

- Data sharing, including database development, support, and security;
- Data synthesis and improvement of data quality;
- Preservation planning;
- Cooperative stewardship, as one example, the Arizona Site Steward Program;
- Public education and community involvement in historic preservation; and
- Provisions for annual meetings, reporting, resolving disagreements, and amending or terminating the protocol.

State protocols stipulate that new BLM managers and specialists with Section 106 responsibilities will receive training on the national PA and protocol within 90 days of their report date. On a national basis, the BLM will maintain a training program to instruct line managers and cultural heritage specialists on these agreements and related policies, including tribal consultation. BLM is also committed to enhance the skills and knowledge of other personnel involved in cultural resource management.

The BLM is to assess and enhance specialists' opportunities for professional development through training, details, part-time graduate education, or other means. In the late 1990s, the Preservation Board established the Heritage Training Committee, which works closely with the BLM National Training Center. The committee developed a week-long course on the fundamentals of the cultural heritage program, which was conducted at the Training Center four times between 2005 and 2012. The committee is also responsible for developing video training modules such as this one.

Now we'll look at the component of the national PA that addresses the certification and decertification of BLM offices. The certification process gives approval for an office to operate under the provisions of the national PA. What does it take for an office to be certified? There are three conditions.

- Managers and specialists have received training in the national PA and state protocol;
- Qualified professional staff is available to each district and field office manager, and specialists' duties are clearly defined; and
- The office is operating consistent with the national PA and protocol.

An office may be decertified as a result of a detailed review of its staff and procedures. Decertification may occur when an office lacks the professional capability needed to carry out required policies and procedures, or if it is proceeding in contravention of its state protocol or BLM internal guidance. The review of an office may be initiated by the Preservation Board, or at the request of the State Director, a line manager, the Advisory Council, or the SHPO. The Preservation Board may decline a request for review of an office. If it does so, it must provide

the requester with a response including the rationale for its decision. All requesters will be notified of the findings of certification reviews.

The reviewers are the Preservation Board, including the Deputy Preservation Officer from that state; the Advisory Council; the SHPO; and other parties that may be invited by the BLM. The State Director makes a decision following a recommendation from the Preservation Board. Decertified offices will operate under the 36 CFR Part 800 regulations. A decertified office may take corrective actions to restore its basis for certification. In that case, the Preservation Board will recommend that the State Director recertify that office.

Obviously we want to avoid decertification, as it would restrict an office from using the streamlined processes and other benefits of the national PA. It would also be a discouraging situation. However, the threat of decertification also serves as an insurance policy. It is a reminder of the importance of doing things right and maintaining adequate staffing and training programs.

The national PA has accountability measures. The Preservation Board, in consultation with the Advisory Council and SHPOs, may select one or more state, district, or field offices for a detailed review of the agreement's implementation. All of these parties would participate in the review. The agreement calls for annual reports to SHPOs, made available to the public. It encourages annual meetings between SHPOs and State Directors or their designees. The notes from Preservation Board meetings are also available to the public.

The BLM is to provide information to the Advisory Council and the National Conference of SHPOs on the following items. These topics may be the subject of consultation at their request.

- Major policy initiatives;
- Proposals for new regulations;
- Proposals for organizational change that could affect relevant relationships;
- Budget proposals for historic preservation activities;
- Relevant training opportunities; and
- Schedules for regional and long-range planning.

Finally, the national PA contains provisions for dispute resolution, revision, and amendments. Changes that may affect opportunities for public participation or tribal consultation will be subject to public notice and consultations. The signatories will meet to attempt to resolve any objections related to the agreement's implementation. Every two years, the signatories will meet to review the status of implementation. The national PA is in effect for a period of ten years from the date of signing. Afterward, there is an option for renewal in two-year increments if the signatories are in agreement.

In conclusion, I want to thank you for your attention to this training module. The national Programmatic Agreement provides the foundation for performing your job correctly—and for doing the excellent work that is so interesting and valuable to scientific research, public education, and cultural heritage preservation. Please remember, when you have questions, you can rely on advice from your Deputy Preservation Officer, the Preservation Board, and a series of clear and well-written manuals. Best wishes for success in your projects and careers.

Links:

[National Programmatic Agreement](#)

[Alaska State Protocol](#)
[Arizona State Protocol](#)
[California State Protocol](#)
[Colorado State Protocol](#)
[Idaho State Protocol](#)
[Montana State Protocol](#)
[Nevada State Protocol](#)
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