

The Standard Section 106 Compliance Process Described in 36 CFR 800

The regulations implementing Section 106 of the National Historic Preservation Act are found at 36 CFR Part 800. The basic steps of this process are as follows:

A. Establishing the Existence of an Undertaking

An undertaking, as it applies to Section 106, is anything BLM has discretionary decision-making authority to do or allow to be done, which could have an effect on cultural properties (i.e., archaeological sites, historic sites, or places of traditional cultural importance). It doesn't matter whether the cultural properties are known or not, or whether they are Federal or not. If BLM determines that it has no undertaking, or that its undertaking has no potential to affect historic properties, BLM has no further Section 106 obligations.

To comply with Section 106, BLM must complete the following steps in considering the effects of the undertaking on historic properties. BLM must consider the effects of the project, not only on federal land that it administers, but also on historic properties located on state or private land. Where an undertaking involves more than one federal agency, one agency will take the lead for compliance with Section 106. The lead agency is responsible for conducting consultations with the State Historic Preservation Office (SHPO), other agencies, Indian tribes, and members of the public.

A note on private lands: If an undertaking affects both public and private lands, BLM is obligated to consider the project's effects on historic properties located on the private lands, as well.

B. Identifying Historic Properties

First, the responsible official determines the "*area of potential effects*" that would be directly or indirectly affected by an undertaking. This area could include access roads and other related facilities.

Generally, a cultural resource survey is completed within the area of potential effects. Professional archaeologists walk over the area systematically and record archaeological and historic sites. Documentary research, consultations, and interviews may also contribute to the identification of cultural properties. For actions initiated by the public or private industry, these tasks are ordinarily completed by private consultants who have permits to conduct surveys on federal and state lands. BLM staff usually conduct the cultural resource surveys for actions initiated by BLM .

C. Evaluating Historic Properties

"*Historic properties*" are sites, buildings, structures, and places that are eligible for listing on the National Register of Historic Places. To be eligible, a site must meet one or more of the following criteria.

- Criterion A: Association with “*events that have made a significant contribution to the broad patterns of our history.*”
- Criterion B: Association with “*the lives of persons significant in our past.*”
- Criterion C: Possession of “*distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic value.*”
- Criterion D: Properties “*that have yielded, or may be likely to yield, information important in prehistory or history.*”

Generally, cemeteries, birthplaces, religious properties, relocated buildings, and places less than 50 years old are not eligible for the National Register. However, the regulations provide for certain exceptions based on outstanding significance.

An eligible property must also possess “*integrity,*” which means that it is in good condition in an original location within a preserved setting. Other aspects of integrity include the degree of preservation of design, materials, workmanship, and association with other properties.

BLM makes its own eligibility determinations, considering the recommendations of consultants and the comments of the SHPO. In some cases, information from a survey is insufficient to reveal a site’s informational potential. In such cases, limited excavations may be needed to gain the information needed to assess eligibility.

Sites that are *not* eligible for the National Register may include the following.

- Sites that have been fully recorded and have limited potential to yield further information.
- Sites that have been damaged to the extent that they have limited integrity or limited potential to yield important information.
- Sites at which scientific data recovery has already been completed.

D. Assessing Effects on Historic Properties

BLM, in consultation with the SHPO, determines whether the undertaking will have an effect on historic properties. Adverse effects would alter or damage the qualities that make a property eligible for the National Register. Although impacts on individual properties are considered, BLM’s formal effect determination applies to the undertaking as a whole.

Examples of adverse effects are:

- Physical destruction, damage, or alteration of all or part of a historic property,
- Isolation of a historic property from its setting, or alteration of its setting,
- Introduction of visual, audible or atmospheric conditions that are out of character with the property or its setting

No historic properties affected. If no historic properties are present, or are present but would not be affected by the action, there would be a determination of *no historic properties affected*. The Section 106 process would conclude at this point.

No adverse effect. If the undertaking has the potential to adversely affect historic properties, and these impacts are avoided through a project re-design or other measures, there would be a determination of *no adverse effect*.

Adverse Effect. If adverse impacts to historic properties cannot be avoided, there would be a determination of *adverse effect*. Further consultations may be required to resolve adverse effects.

E. Resolving Adverse Effects

Under the standard 36 CFR 800 process, BLM would consult with the SHPO, the land use project applicant (if there is one), and other interested parties to identify ways to avoid, minimize, or mitigate adverse effects. For properties with informational values, mitigation generally involves a program of scientific data recovery. Consultation usually results in a Memorandum of Agreement (MOA), which defines agreed-upon measures that BLM will take to avoid, minimize, or mitigate any adverse effects. In some cases, the consulting parties may agree that no such measures are possible, but that the adverse effects must be accepted in the public interest. For example, it may be difficult to mitigate effects that involve cultural or artistic qualities, as opposed to information potential.

F. Implementation

When an MOA is signed and executed, the undertaking proceeds under the terms of the agreement. BLM, in consultation with the other parties to the agreement, generally will be required to develop and implement a Treatment Plan for historic properties. The Treatment Plan can address a variety of topics, including the development of a research design for scientific investigations; procedures for reviewing, commenting, and completing reports; and the placement and long-term storage of artifact collections and data in federally approved museums or other “curation facilities.”

Scientific data recovery may include the following tasks.

- Detailed mapping and photography.
- Collection and analysis of artifacts and other specimens.
- Excavation or partial excavation of sites.
- Laboratory analyses.
- Research into historical records.
- Interviews (oral histories).
- Report preparation.

Data recovery is not complete until BLM receives and approves a final report and proof that the collections and data have been stored in a museum or other facility that meets federal standards. To avoid project delays, the MOA may allow for activities to begin soon after the completion of the data recovery fieldwork, as it may take months or years to complete the analysis and report.

When BLM executes and implements the MOA, the requirements of Section 106 are met.

The BLM's National Cultural Resources Programmatic Agreement: a New Approach to Section 106 Compliance

The National Historic Preservation Act (NHPA) provides an opportunity for federal agencies to develop agency-specific procedures for implementing Section 106 and other sections of the law. In 1997, BLM became the first agency to do so, by virtue of the proven track record of its cultural heritage program and staff. The BLM, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers signed a national Programmatic Agreement that defines how the BLM will meet its various responsibilities under the NHPA. Following the agreement, each BLM State Office worked with its SHPO to develop a Protocol that specifies how they will operate and interact under the national Programmatic Agreement.

Prior to the national Programmatic Agreement, BLM offices were required to consult with the SHPO, and in many cases to involve the Advisory Council, for case-by-case reviews of proposed undertakings. Formal consultations were conducted at various steps of the Section 106 process, including National Register eligibility determinations, effect determinations, and development of MOA's and treatment plans. In each phase, the SHPO had 30 days for review and comment, and the Advisory Council was accorded comment periods of up to 60 days.

The Programmatic Agreement and State Protocols still provide for formal SHPO or Council reviews in the following types of cases:

- Non-routine interstate or interagency projects or programs, such as interstate utility lines that require the preparation of environmental impact statements.
- Undertakings that would directly and adversely affect National Historic Landmarks or National Register-listed properties of national significance.
- Highly controversial undertakings, when Advisory Council review is requested by the BLM, the SHPO, an Indian tribe, a local government, or an applicant for a BLM authorization.
- Undertakings that will have an adverse effect on historic properties when the BLM determines that the adverse effect cannot be satisfactorily avoided, minimized, or mitigated through the implementation of a treatment plan.

However, the Programmatic Agreement and State Protocols streamline the Section 106

process by reducing the requirements for case-by-case and step-by-step consultations with the SHPOs and Advisory Council for all other kinds of actions. The Programmatic Agreement and State Protocols expedite Section 106 compliance on most BLM undertakings. Each State Protocol is different, but all of them provide some measure of streamlining compared to the standard compliance process.