

Managing Cultural Resources with Other Land Uses

Module 2 – Lesson 1

Welcome to Module 2 of Managing Cultural Resources with Other Land Uses. In this module, we will focus on compliance. We will discuss the primary steps of the Section 106 compliance process and BLM's alternative procedures for complying with Section 106. We will also discuss when Indian tribes should be consulted, BLM's responsibility to consider effects on non-federal cultural resources, what your cultural resource specialists need to know from you to help you with compliance work on your projects, and what you need to know from your cultural resource specialists about the processes they will follow to ensure that your projects comply with historic preservation laws.

In the first module, when we were discussing the various authorities under which BLM manages cultural resources, I said we would delve into the National Historic Preservation Act in more detail. The reason I want to devote more time to the National Historic Preservation Act specifically is that meeting the requirements of Section 106 of this law represents the primary cultural resource compliance workload associated with the projects and use authorizations for which you are responsible.

Section 106, like NEPA, applies to actions in which there is some federal involvement, regardless of land ownership. In Section 106, such actions are called "undertakings." We need to comply with Section 106 when the action we are about to take meets the definition 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 religious or 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.

The regulations implementing Section 106 of the National Historic Preservation Act are found at 36 CFR Part 800. The basic steps of the compliance process are described in these regulations, and I'll walk through them with you now. However, you should be aware that different BLM states follow variations of the standard process. The variations to this process are based upon a national cultural resources Programmatic Agreement signed in 1997 that gives BLM considerable flexibility in how it complies with Section 106. Variations further depend on agreements called Protocols that individual BLM states have made with their own State Historic Preservation Officers, or SHPOs. So please keep in mind as I describe the basic steps of the Section 106 compliance process that each State complies a bit differently from the others.

After we have determined that the action we are about to take, or decision we are about to make, is an undertaking as defined in Section 106, we determine the "Area of Potential Effects." The

Area of Potential Effects is the area that would be directly or indirectly affected by the undertaking. This area could include access roads and other related facilities, or even areas within the viewshed of a project.

Generally, a cultural resource field inventory, or survey, is completed within the Area of Potential Effects to identify cultural properties. In this survey, cultural resource specialists 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 third party contractors who have permits to conduct surveys on federal lands. BLM cultural resource staffs usually conduct the surveys for actions initiated by BLM.

BLM uses three classes of inventory, or survey: Class I, Class II and Class III. These classes have become industry standards, and you will hear your cultural resource specialists, SHPOs and third party contractors refer to these classes when they are discussing Section 106 compliance requirements.

Class I inventory. A Class I overview is, strictly speaking a comprehensive, professionally prepared compilation and analysis of all available cultural resource information about a large area, and a synthesis and interpretation of that data. Class I overviews of this type usually cover entire Field Offices or large portions of states, and are done very infrequently. However, you will usually hear the term Class I applied to the much more abbreviated literature review, or file search, or records check, that is done as a first step before a field survey is initiated. This first step often involves little more than checking survey and site records to determine whether any field survey has already been conducted in an area and whether any cultural properties have already been recorded.

Class II survey. A Class II survey is a statistically based sample survey designed to determine the probable density, diversity and distribution of cultural properties in an area. Surveys like this are most useful for large-scale planning purposes, or when comparing alternative locations for proposed undertakings. They may consist of a sample of randomly selected units within a project area a sample of systematically selected units distributed evenly over a project area a stratified sample with more units selected in some areas than others, or combinations of different sampling strategies.

Class III survey. A Class III survey is a complete pedestrian survey of an entire project area intended to locate and record all cultural properties that may be affected by an undertaking. Class III survey methods may differ from State to State, and sometimes between geographical regions within a State, but they conform to the prevailing professional survey standards for the State or region involved. Class III standards for a State are usually determined by agreement between BLM and each State Historic Preservation Officer, or SHPO.

Once we have identified the cultural properties within the Area of Potential Effects, we evaluate them to determine whether they are significant. Significance, within the context of Section 106, means listed on or eligible for listing on the National Register of Historic Places. Sites, buildings, structures, and places that are listed on or eligible for listing on the National Register

of Historic Places are referred to in Section 106 as “historic properties.” It doesn’t mean they are properties dating only to the historic period as opposed to the earlier prehistoric period. It means any properties, from the historic or prehistoric periods, that are listed on or eligible for the National Register. To be eligible for the National Register, a cultural property must:

- be associated with important events, such as a place where an important battle occurred, or a transportation route associated with settlement of the west
- or it must be associated with important people. These can be actual historical persons or even spiritual beings. Tahquitz Canyon in Southern California, for example, is listed on the National Register in part because of its association with the spirit Tahquitz, who is a prominent figure in the traditions of the Cahuilla Indians.
- or it must represent an architectural style, period, or method of construction, or represent the work of a master, or have high artistic value,
- or it must have, or be likely to have, information in it that is important in prehistory or history. This is the criterion under which most archaeological sites are determined eligible because they are primarily valuable for the scientific information we can obtain from them.

Generally, cultural properties less than 50 years old are not eligible for the National Register but there are exceptions if the properties have outstanding significance.

An eligible property must also have “integrity,” which means that it is in good condition in an original location within a preserved setting. In other words, the place cannot be so altered that it has lost the qualities that made it significant in the first place.

BLM makes its own National Register eligibility determinations. When doing this, BLM considers the comments of the SHPO and the recommendations of other parties BLM may consult, including knowledgeable members of the public and Indian tribes. Sometimes, we cannot gather enough information during a field survey to determine an archaeological site’s importance. In such cases, we may need to do some limited collecting of surface artifacts or conduct test excavations to determine the site’s eligibility.

The next step in the Section 106 process is determining whether any historic properties will be affected by the undertaking. And remember, historic properties in this context means cultural properties that are listed on or eligible for listing on the National Register. Cultural properties that are not eligible or listed are no longer considered from this point on in the Section 106 process.

BLM consults with the SHPO to determine whether the undertaking will have an effect on historic properties. If any of the historic properties involved are places of traditional religious or cultural importance to Indian tribes, BLM would also consult with the tribes that ascribe importance to them.

An undertaking would have an adverse effect if it would alter or damage the qualities that make a historic property eligible for the National Register.

Examples of adverse effects are:

- Destroying, damaging, or altering a historic property,
- Isolating a historic property from its setting, or altering its setting, or
- Introducing 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, the Section 106 process would conclude at this point.

No adverse effect. If the undertaking could adversely affect historic properties, but these impacts are avoided by modifying the project, 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,” and BLM would seek ways to mitigate, or resolve, those effects.

You may have heard the cultural resource specialists in your offices use the terms “no adverse effect” and “adverse effect,” and you may have the impression they are equivalent to “pass” and “fail” for your projects. But that really isn’t the case. Even if an undertaking is determined to have an adverse effect, we can almost always find ways to satisfactorily reduce, or resolve those effects so that the project can proceed with minimal delay.

Under the standard Section 106 process as it is described in the 36 CFR 800 regulations, BLM would consult with the SHPO, the land use applicant (if there is one), and other interested parties to identify ways to avoid, minimize, or mitigate adverse effects. For properties that are significant for the information they contain, such as most archaeological sites, mitigation generally involves some form of scientific data recovery – excavating, collecting and studying the artifacts.

Memorandum of Agreement. Consultation with the SHPO usually results in a Memorandum of Agreement, an MOA, which defines measures that BLM will take to avoid, minimize, or mitigate 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 not be possible to fully mitigate effects that involve traditional cultural values, or effects that alter the setting of a historic property, as opposed to effects on scientific values that can be mitigated through data recovery.

Programmatic Agreement. For some large and complex projects, especially those that will be constructed in phases where not all of the impacts on cultural resources are known at the time the project is authorized, a Programmatic Agreement, a PA, may be used instead of an MOA. A PA lays out a process by which all historic properties will be identified, evaluated and treated before they are impacted. The PA is signed before the decision is made to approve the project. This allows BLM to fully comply with Section 106 even though some identification, evaluation and mitigation may not be completed until the project is being implemented.

Consultation with ACHP. In unusual cases, BLM may need to consult not only with the SHPO, but also with the Advisory Council on Historic Preservation during the Section 106 process. The Advisory Council is an independent federal agency that advises the President and Congress on national historic preservation policy. The Council has a statutory role to play in advising federal agencies on how to comply with Section 106. It is the Council's prerogative to participate in consultations with the federal agency if it chooses to do so. Usually, however, the Council only chooses to participate in consultations on highly complex or controversial projects. The Council does not commonly become involved with BLM actions, but you should be aware that it is another potential partner in the Section 106 process.

When an MOA or PA is signed, 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; and procedures for reviewing, commenting, and completing reports. It might also provide for the long-term storage of artifact collections in federally approved museums or other "curation facilities."

The most common form of mitigation for archaeological sites is scientific data recovery. Because most cultural properties affected by BLM actions are archaeological sites, data recovery will be the predominate form of mitigation required on your projects. Data recovery may include:

- Detailed mapping and photography
- Collection and analysis of artifacts and other specimens
- Excavation or partial excavation of archaeological sites
- Laboratory analyses
- Research into historical records
- Interviews of knowledgeable people
- 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 or PA may allow for project activities to begin soon after the completion of the data recovery fieldwork, because it may take months or years to complete the analysis and report.

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

I mentioned earlier that BLM follows a Section 106 compliance process that differs from the one described in the 36 CFR 800 regulations. The National Historic Preservation Act allows 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 National Historic Preservation Act.

Following the agreement, each BLM State Office worked with its own 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 national Programmatic Agreement doesn't eliminate SHPO and Advisory Council review entirely. It still provides for SHPO or Advisory Council reviews in the following types of cases:

- Non-routine interstate or interagency projects, such as interstate utility lines that require 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 adversely affect historic properties when the BLM determines that the adverse effect cannot be satisfactorily avoided, minimized, or mitigated through treatment.

For all other kinds of actions, however, the national Programmatic Agreement and State Protocols streamline the Section 106 process by reducing the need for case-by-case and step-by-step consultations with the SHPOs and Advisory Council. And those other kinds of actions that are streamlined represent at least 90 percent of the actions BLM undertakes. So we can feel fortunate that the Programmatic Agreement and State Protocols will expedite Section 106 compliance on most of your projects and authorizations. Each State Protocol is different, but all of them provide some measure of streamlining compared to the standard compliance process.

As I mentioned earlier, the important thing for you to know is that your State has its own tailored, or customized, set of procedures for complying with Section 106 that differ in various ways from the standard compliance process described in the regulations. The cultural resource specialists in your State Office and Field Offices are probably the only people who understand the specifics of the compliance process you will need to follow to meet the requirements of Section 106 on the actions for which you are responsible. So please involve your cultural resource staffs early and let them help you through the process to avoid any surprises and delays.

We talked about consulting Indian tribes as part of the Section 106 compliance process. The regulations implementing Section 106 require BLM to invite Indian tribes to participate in BLM's efforts to identify places of traditional religious or cultural importance, evaluate the significance of those places, assess effects on those places, and determine treatment to avoid or reduce adverse effects.

But consulting tribes is not just required under Section 106. Actions for which you are responsible may require tribal consultation under any or all of the authorities I discussed in the first module. Let's walk through those tribal consultation requirements now.

Under FLMPA, we consult Indian tribes during land use planning. When developing Resource Management Plans and plan amendments, we involve tribes at five points:

- identifying issues
- reviewing proposed planning criteria
- reviewing the draft RMP/EIS
- reviewing the final RMP/EIS, and
- notifying tribes of any changes as a result of protests.

The reason we consult tribes under FLPMA is to give them an opportunity to identify places, resources and uses of public lands, and values relating to them, that are important to the tribes and should be considered in land use plans. And we consult them to seek consistency between the land use plans, guidelines, rules and regulations affecting public land and those affecting tribal land.

We consult tribes under NEPA whenever other governmental entities or the public are formally involved in BLM's environmental review. We consult tribes on:

- Environmental Impact Statements (EISs),
- "major" Environmental Assessments (EAs), i.e., EAs for which there will be a public review and comment period,
- other NEPA documentation that entails public involvement or discussions with local or state governments, and
- when a proposed action may affect an Indian reservation.

The purpose of consulting tribes under NEPA is to identify potential conflicts that we would not otherwise know about when making land use decisions. This includes conflicts with tribal members' use of public lands for traditional cultural, religious and economic purposes. We also consult tribes to seek alternatives that would avoid, reduce or resolve the conflicts.

We consult tribes under the American Indian Religious Freedom Act before doing something that could hinder use of traditional religious places by American Indian religious practitioners or intrude upon or interfere with their traditional religious ceremonies.

Although some actions with which you are involved might have the potential to affect traditional religious places or practices, the only way you can know this is if the religious practitioners tell you.

The purpose of consulting under this law, then, is to obtain and consider the views of traditional religious practitioners so that we can seek ways to avoid or minimize disturbance to their religious places or disruption of their religious practices.

Under the Archaeological Resources Protection Act, an Indian tribe must be notified before BLM approves a Cultural Resource Use Permit for the excavation or collection of archaeological resources when a location with religious or cultural importance to the tribe may be harmed or destroyed by the permitted activity. After notifying the tribe, BLM must consult with the tribe if the tribe requests it.

The purpose of notifying and consulting tribes before we issue permits under ARPA is to avoid hindering traditional religious and cultural observances at places, whether or not those places are archaeological sites. Places having religious or cultural importance to tribes may have no archaeological resources at all but may be affected by proposed archaeological work near them.

Archaeological excavations or collections may sometimes be required as a mitigation measure for your projects, and tribal consultation for this work may affect project schedules. For example, if you are a realty specialist processing a land exchange, and the BLM land has an archaeological site on it that must be excavated before transfer of title, you will need to allow time for tribal notification and consultation in your project timeline.

Under the Native American Graves Protection and Repatriation Act, Indian tribes are consulted when Native American human remains, funerary objects buried with them, or certain other items described in the law are intentionally excavated or inadvertently discovered on federal land. The purpose of consulting is to determine how the remains and objects will be removed from the ground (if they must be removed), how the remains should be treated, and how the remains will be transferred to the most closely affiliated tribe after they are removed.

Important for you to know is that when items covered under this law are discovered during land use activities, all work in the area of discovery must stop for up to 30 days while tribal consultation takes place. This may affect project schedules. Even if there are no known Native American burials within a project area, the likelihood of burials being discovered during project implementation, and the need to comply with NAGPRA, should be considered when developing mitigation measures. The cultural resource specialists in your offices can help you assess the probability of encountering burials at a given location and can assist you with development of appropriate mitigation measures.

You may recall from our discussion earlier that Executive Order 13007 directs federal agencies to accommodate use of Indian sacred sites and avoid disturbing them. The purposes of consulting under this Executive Order are:

- To determine whether a proposed land use would impede Indian religious practitioners' access to sacred sites on public land and their use of those places for ceremonies,

- To determine whether those actions would physically harm Indian sacred sites on public land, and
- To seek alternatives that would avoid, reduce or resolve potential conflicts.

Your cultural resource staffs can be helpful in complying with this Executive Order because they are most familiar with the traditions of tribes in your areas. Mountains, prominent rock outcroppings, caves and rockshelters are considered sacred by many Indian tribes, as are springs like this one at Quitobaquito in southern Arizona. But many places important to Indians would not be obvious to non-Indians, including places where plants used for traditional or religious purposes grow, and the locations of ancient travel routes connecting sacred places. Little by little, as your relations with tribes mature, you will become more aware of the kinds of places they consider sacred.