

Managing Cultural Resources with Other Land Uses

Module 2 – Lesson 2

The notion that BLM is responsible for the effects of its actions on cultural resources that aren't on federal land surprises many BLM employees. But when you think about it, NEPA works the same way. Both NEPA and the National Historic Preservation Act are blind to land ownership. Under both laws, BLM must consider the effects of its actions regardless of who owns the land that is affected. NEPA was passed three years after the National Historic Preservation Act and was patterned after it in this regard.

BLM's responsibility to identify and protect non-federal cultural resources is limited by the degree to which BLM decisions determine or control the location of activities on non-federal lands which could affect cultural resources.

As a general rule of thumb, the extent to which we consider cultural resources on non-federal lands under the National Historic Preservation Act should parallel the extent to which we consider the non-federal lands under NEPA. It may be easiest to explore this concept by looking at linear rights-of-way, although the concept applies to other kinds of land use actions, as well.

When BLM has lead responsibility for Section 106 or NEPA, or when BLM is the only federal agency involved in the project and therefore has to take the lead, then we are responsible for considering effects to cultural resources over the entire project, regardless of land ownership.

When another federal agency has lead responsibility for Section 106 or NEPA, we need to consider effects to cultural resources on BLM lands, but we don't need to be concerned with non-BLM lands involved in the project.

What if the public lands can be avoided by the project? If there is no definite lead agency, and the project would only cross BLM lands occasionally, so that the alignment could enter and leave BLM lands with little restriction, or could avoid BLM lands altogether, then we can consider our involvement to be incidental to the project. The question to ask here is, "Without BLM's authorization, could the project still occur?" If the answer is "Yes," we would limit our consideration of cultural resources just to the BLM lands, plus a reasonable distance onto non-federal lands to the extent to which our authorization affects where the alignment goes on the non-federal lands.

What if the public lands cannot be avoided? Where land ownership patterns make it infeasible for an alignment to link the intended end points of the project without crossing public lands, so that BLM's involvement is pivotal to the project, our responsibility will extend beyond the BLM lands. If we ask our question again, "Without BLM's authorization, could the project occur?", and the answer is "No," BLM will generally be responsible for Section 106 compliance on the entire project.

What if the project crosses through a checkerboard land ownership pattern? Where an alignment would cross alternating sections of BLM land and non-federal lands, we must consider the effects on the intervening non-federal sections. Because so little distance would separate the

public land segments of the alignment, our approval of the application would affect the non-federal portions as well.

What if the project begins or ends on public land? If a proposed right-of-way must begin or end on public land, so that the project could not occur without the involvement of the public lands, our responsibility may extend to the entire project.

When BLM issues a lease, permit or license, BLM may require effects on cultural resources to be identified, and adverse effects to be mitigated, as a condition of a that lease, permit, or license regardless of whether federal or non-federal lands are involved.

Now that we have discussed the nature of cultural resources and the various compliance requirements, let's talk about what I as a cultural resource specialist need to know from you when you ask for my help with cultural resource compliance on a proposed project or authorization.

First of all, I will need a complete description of the project -- exactly what will take place as a result of the land use decision. I need this to determine the nature of the undertaking and the Area of Potential Effects as these are described in the regulations implementing Section 106.

Because I will need to carefully consider both direct and indirect effects on resources as diverse as archaeological sites and traditional cultural properties, it is important for me to know everything that will take place on the public lands resulting from the proposed action -- all the details. Please don't leave anything out even if you don't see how it could affect cultural resources. My job as a cultural resource specialist is to help you make sure that your project is not delayed or challenged administratively or legally. A complete description of the project will help me anticipate potential pitfalls.

I will also need a good map showing all project components, preferably on a USGS quadrangle. I will need this to compare it to my own site record maps, which also use USGS quadrangles. This will allow me to determine whether all or part of the project area has already been surveyed for cultural resources and whether cultural properties have already been recorded within the Area of Potential Effects.

The map will also help me gauge whether the proposed action could have indirect effects on cultural properties outside the immediate project area, including the potential for increased visitation and visual or audible effects on places of traditional religious or cultural importance.

Part of working for BLM is being able to juggle several projects and workloads simultaneously. Fitting overlapping deadlines into crowded calendars just goes with the territory. Time frames for completing Section 106 compliance and consulting with State Historic Preservation Officers, Indian tribes and other stakeholders are difficult to predict, at best, but I can be most helpful to you if I know what your time frame is for the action you are processing.

Discussing the planned timeline for an action with me also gives me an opportunity to let you know whether cultural resource compliance is likely to be relatively lengthy or quick based on

the complexity of the project, potential controversy, or concerns that have been expressed. My goal is to avoid the need for project schedules to slip because of cultural resource compliance. Knowing your project time frames can help me give you a more realistic estimate for completing the various steps in the compliance process.

In my experience working for BLM, setting priorities seemed to be one of the most challenging tasks for managers and staffs alike. It always seemed as though there were plenty of first priorities but not quite as many second or third priorities. The best time to set priorities is during annual work planning. Of course, we all know that unanticipated workloads have a way of just walking in the door but to the extent we can, difficult as it may be, I need you to set a realistic priority for your project so that I can set a realistic priority for the work I do on it.

At that point, I can ask my supervisor to help me adjust my workload based upon how important your project is relative to other tasks I have been asked to do, and let the managers communicate with each other to sort out the assignments. That way, you will know when to expect my assistance and I will know when I'm expected to deliver it.

Once you have told me what I need to know about the project, I can tell you the nature of the cultural resource compliance work that will have to be done and how long it is likely to take so that you can factor this into your schedule for completing the project.

The very first thing you need to know from me is whether the proposed action is an undertaking as it is defined in the regulations implementing Section 106. You may recall we discussed the definition of undertaking earlier when we were talking about the steps of the Section 106 compliance process.

Many actions BLM takes and decisions BLM makes would not meet the definition of undertaking because they would not have the potential to affect historic properties, i.e., cultural properties listed on or eligible for listing on the National Register of Historic Places. If BLM determines that a proposed action is not an undertaking, or is an undertaking that has no potential to affect historic properties, BLM would have no further Section 106 obligations. Your cultural resource specialist is the person with the most expertise to advise your Field Manager in making this determination.

If the proposed action is an undertaking, you will want to know if a complete, new field survey needs to be done or if all or part of the project area has been previously surveyed. If it was previously surveyed, was the work done recently enough to be adequate for the new proposed action, or will it have to be augmented or done over again? Will BLM cultural resource staffs do the survey in house or should BLM require the land use applicant to do it?

The sooner you find out from me how a proposed action might conflict with cultural resource values, the easier it will be for you to work with the land use applicant to modify the action to avoid conflicts that would be significant. It can also be very helpful to the land use applicant to have early knowledge of potential conflicts and the possible need for costly mitigation.

My knowledge of the cultural properties that may already have been recorded in the project area, adjacent areas or similar environments can help me anticipate whether the proposed action is likely to conflict with significant cultural resources, including places of traditional religious or cultural importance outside the project area. So one of the first questions you will want to ask me after I have had a chance to review the project description is what the potential conflicts are with cultural resources.

The standard Section 106 process described in the regulations requires BLM to consult with the SHPO when determining the National Register eligibility of cultural properties, when determining effects on those properties, and when determining appropriate mitigation to resolve adverse effects. But we have learned that each State has its own tailored process for complying with Section 106 that substitutes for the standard process described in the regulations.

The need to consult with the SHPO at various points in the compliance process differs considerably among the States. You will need to know from me how much involvement your SHPO will have in the compliance process for your project. SHPOs are ordinarily given 30 days to respond each time they are consulted, so the extent of your SHPO's participation in consultation will affect your project time line. This is particularly true if you will need to develop a Memorandum of Agreement to conclude Section 106 compliance because your SHPO will need to sign that agreement.

If the project you are working on is unusually large, complex or controversial, you may need to invite the Advisory Council on Historic Preservation to participate in Section 106 consultations or the Council may decide to enter the consultations on its own accord. You will want to know from me how likely this will be because Council participation could add several months or even longer to your project time line. This is especially true if a Programmatic Agreement will need to be prepared because the Council will need to sign that agreement.

BLM's national cultural resources Programmatic Agreement has considerably reduced the need for Council involvement, but your cultural resource specialist can tell you if your project is likely to meet one or more of the thresholds requiring consultation with the Council.

We consult with Indian tribes on all land use plans, but not on all land use actions. BLM makes thousands of land use decisions every year, and neither BLM nor the tribes could handle the consultation workload if all land use actions were included. In addition, tribes are consulted by many federal agencies, so we have to focus our consultation on actions that warrant it.

Consultation with tribes on land use actions is necessary whenever BLM determines that the nature or location of a proposed land use could affect tribal interests or concerns. This will always be a judgment call on the part of Field Managers, a judgment call that should be based on the advice and recommendations of cultural resource staffs. Because consultation with tribes under the various authorities that require it can greatly affect project schedules, you will need to know from me how likely it will be that such consultation will be necessary and what the timeframes are for accomplishing it.

I mentioned that consultations with the SHPO, Advisory Council and Indian tribes can greatly affect project schedules. The nature and extent of the literature review, field survey and any agreement documents that are needed – a Memorandum of Agreement or Programmatic Agreement – will also have to be factored in.

There are many unknowns about how the compliance process will play out when you are still in the early stages of project planning, and it may be very difficult for your cultural resource specialist to predict how long it will take to complete the process. But no one is better equipped to give you an estimated time frame, even if it is within a fairly broad range, than your cultural staffs. The more experience they have had with Section 106 compliance, the more accurate their estimates will be. They will also know the extent to which the compliance process for your particular project can be expedited by agreements with your SHPO. Asking how long it will take to complete compliance is a legitimate question for you to ask, even though it may be difficult to answer.

Estimating how much compliance work will cost is as difficult as estimating how long it will take to complete. Even if we know the cultural properties that will be affected, what we see on the surface of the ground is often little indication of what exists beneath the surface. The cost of data recovery for a scatter of artifacts on the surface may be a small fraction of the cost of data recovery for a site with buried cultural deposits.

It is generally not appropriate to their jobs or logistically possible for BLM cultural resource specialists to carry out data recovery investigations in house. Developing estimates for the cost of data recovery, and funding data recovery, are the responsibility of the land use applicant.

Estimates of the cost for field survey will generally be much more accurate than estimates for the cost of subsequent mitigation. If the survey is to be done in house, your cultural staffs will be able to tell you how much time they will need to charge to the benefitting subactivity or cost recovery account.

Estimates of the time it will take to complete Section 106 consultations, preparation and review of reports, and the development of any agreement documents that may be necessary will be more accurate for small, simple actions than for large and complex ones. The costs that will need to be charged to a benefitting subactivity or cost recovery account for these tasks will be easier for your cultural staffs to estimate after field surveys are completed and any necessary testing is done to determine the subsurface characteristics of the cultural properties affected.

This concludes our training session “Managing Cultural Resources with Other Land Uses.” The objective of this training was for you to be able to work more effectively with your cultural resource colleagues to carry out the projects, land use authorizations and other efforts for which you are responsible. In the first module, we explained what cultural resources are, described the diversity of the cultural resources managed by BLM, considered why they should matter to you, summarized the basic requirements of various historic preservation laws, discussed the different ways cultural resources are managed, and talked about how land uses can impact cultural resources.

This second module discussed the primary steps of the Section 106 compliance process and BLM's alternative procedures for complying with Section 106. We also addressed requirements for consulting Indian tribes and talked about BLM's responsibility to consider effects on non-federal cultural resources. Finally, we discussed 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 your projects comply with historic preservation laws.

Being your instructor for this course has been a pleasure, and I hope you find the instruction helpful. Thank you for attending.