

## **The Cultural Heritage Program: A Course for Managers**

### **Module 3: The Section 106 Process**

The National Historic Preservation Act is the primary law that provides the foundation for BLM's cultural heritage program. It was passed in 1966 to protect historical sites that were increasingly threatened by urban renewal, the construction of highways and dams, and other development activities. Section 106 requires federal agencies to consider the effects of their proposed undertakings on historic properties. Undertakings are projects, programs, plans, or management activities that have the potential to affect historic properties. Undertakings may involve either federal lands or funding.

Compliance with Section 106 is a process that involves a series of steps. It requires ongoing consultations with many consulting parties. There are several decision points; negotiations may be required to resolve issues and come to agreement at different points in the process. Managers play a crucial role in decision making, consultations, and negotiations to reach agreement.

#### Steps of the Section 106 Process: Gathering Information

Let's review the steps of the Section 106 process, as they are defined in the BLM's national PA for compliance with the National Historic Preservation Act.

First, we define the undertaking, consider how it could affect historic properties, and identify its area of potential effects. Effects could be direct or indirect and are based on the nature of the proposed activity. Such effects could range from ground disturbance to alterations of views from historic trails. Defining the area of potential effects too narrowly could complicate the further steps of the process.

Then we compile existing information and seek input from Indian tribes and other interested parties. We may determine a need for further actions to identify cultural resources, such as field inventories or ethnographic studies. Ethnographic studies focus on the history of tribal activities and values associated with an area.

#### Steps of the Section 106 Process: Consultation

BLM is to consult with Indian tribes and other parties early and through all phases of the process. It's best to identify and address any issues early, as it may take considerable time and effort to resolve them.

The details of the consultation process may vary from state to state, as defined in the BLM's state protocols. Consider the following list of participants who may be involved in consultation.

- The lead federal agency, which implements the process for a particular undertaking.
- Other federal agencies that are involved.
- The Advisory Council on Historic Preservation, which has a formal advisory role in administering the implementation of the National Historic Preservation Act. The Advisory Council may choose to comment and become involved in consultations.
- State Historic Preservation Officers, who have a formal role in legal compliance and consultation at the state level.
- Indian tribes.
- The project proponent or applicant.

- Agencies and elected officials of state, county, and local governments.
- The public, which may include local communities, interested organizations, and citizens.

State protocols or other special agreements may define different thresholds for case-by-case reviews by the SHPO. Early in the process, the BLM should notify the Advisory Council in the following cases.

- Non-routine interstate and/or interagency projects or programs;
- Undertakings adversely affecting National Historic Landmarks;
- Highly controversial undertakings;
- Cases of adverse effect, where disputes cannot be resolved through formal means; and
- Projects affecting large areas of landscapes, such as renewable energy facilities.

After being notified, the Advisory Council may agree or decline to participate in further consultations, unless requested to do so by an Indian tribe or other consulting party.

#### Steps of the Section 106 Process: National Register Eligibility

Once we complete inventories or studies to identify the resources that could be affected, we evaluate their eligibility for inclusion in the National Register of Historic Places. This applies not only to archaeological sites, but also to places of traditional religious or cultural importance. National Register-eligible locations are labeled as “historic properties.” To be eligible, a property is more than 50 years old, though there are exceptions, and it has integrity. That is, the site is in sufficiently good condition to sustain its informational values or other National Register qualities. For some properties, aspects of integrity include their relatively undisturbed settings. A property also must meet one or more of the four eligibility criteria for the National Register. The criteria include an association with an important event, series of events, or person; significant artistic, technological, or engineering qualities; and the capacity to yield important information.

The manager makes the decisions on National Register eligibility, after considering the recommendations of the cultural resource specialist, as well as the views of tribes, other consulting parties, and the public. If a site is determined as not eligible, the manager provides documentation to the SHPO. That property isn’t subject to further consideration under Section 106. However, consultations may be needed if the SHPO or other parties object to the determination that a property isn’t eligible for the National Register.

While a site determined as not eligible may not be immediately subject to further consideration under Section 106, it still is to be considered a resource to be managed by BLM. In the future, new information or reaching the 50-year threshold may lead the property to be re-evaluated as eligible for the National Register. Also, BLM may find an appropriate use for the property, even if it isn’t eligible. Experimental, interpretive, and other uses will be described in the upcoming training module on proactive resource management.

#### Steps of the Section 106 Process: Determination of Effect

The manager’s next decision is to determine if any historic properties would be directly or indirectly affected by the undertaking. Adverse effects are disturbances that would diminish or destroy the qualities that make a property eligible for the National Register. When those qualities include a property’s setting, adverse effects could include visual impacts or noise.

The manager may find that the undertaking wouldn't affect any historic properties at all, or that there would be no adverse effects on such properties. In some cases, the proposed project design could be modified to avoid adverse effects. The manager would document the finding and provide the SHPO with documentation of "no historic property affected" or "no adverse effect."

If the undertaking would adversely affect any of the historic properties, the manager would make a determination of adverse effect. The manager would then make a reasonable and good-faith effort to avoid, minimize, or mitigate the adverse effects. This would be done in consultation with the SHPO, tribes, and other consulting parties.

The agency prepares a treatment plan to avoid or mitigate the adverse effects. Mitigation measures may include scientific data recovery, long-term monitoring and protection, and interpretive products for public education. The agency consults with the SHPO and other parties to develop and implement a formal agreement that defines the content of the treatment plan, applicable standards, the roles and responsibilities of the consulting parties, time frames for reviews, and other required procedures. Depending on the scale and complexity of the undertaking, it may require a programmatic agreement or a memorandum of agreement.

#### Potential Issues in the Section 106 Process

Now you can understand why many staff specialists devote so much time to Section 106 compliance. Let's consider a few of the issues that might arise in the Section 106 process.

- Conflicting opinions may complicate efforts to define the area of potential effects; make determinations of eligibility and effect; and identify treatment measures to mitigate adverse effects. Disagreements among consulting parties may complicate and slow the development of agreement documents.
- Consulting parties may question the adequacy and timing of tribal consultations and public participation opportunities. Tight project schedules complicate the matter.
- Effects on traditional cultural places and landscape-level resources can be difficult to define, evaluate, and mitigate. This is especially true for renewable energy and other large projects that cover extensive portions of landscapes, with impacts on the settings or views from historic trails or traditional cultural places.

In addition, managers must determine if their decisions affect historic properties on split estate and non-federal lands. This issue could also be a source of conflict.

#### BLM's Responsibilities on Non-Federal Lands

It isn't easy to define BLM responsibilities for Section 106 compliance on non-federal lands. Each case is unique. Project applicants or property owners may not understand why our responsibilities extend beyond federal boundaries. They may view this as an intrusion on private property rights. On the other hand, the SHPO may urge BLM to assume the responsibility for compliance for the entire project, when our role can rightly be restricted to the effects on BLM-administered lands.

Let's consider an example. Suppose that BLM is considering a right-of-way application for a 60-mile gas pipeline that would cross multiple jurisdictions. The project would be located mostly on federal land; but for 10 miles in the middle, the line could not avoid crossing private land. The private land is along a river and contains the highest concentration of National

Register-eligible sites in the project area. In contrast, there are no eligible sites on the affected public lands. If the BLM were to grant the right-of-way, without requesting the avoidance or mitigation of impacts to the sites on private land, those sites could be damaged or destroyed. BLM would bear some responsibility for their destruction.

Starting in 1979, BLM began to develop guidance that evolved into what is called the “Rule of Reason.” The BLM Manual explains the rule. The responsibility for considering cultural resources outside of public lands depends on the degree to which BLM’s decisions determine or control the location of surface-disturbing activities on those lands. If the project is dependent on, or directly related to, a BLM decision and could not take place without the use of federal lands, the BLM must take into account the effects on all of the lands clearly affected. Where the use of BLM-administered land is not essential for the project, or there are other reasonable options that could bypass public land, the agency needs only to consider the potential effects on non-federal resources that are reasonably attributable to its decision.

#### Coordination of Section 106 and NEPA Procedures

It’s apparent that the Section 106 process parallels that of the National Environmental Policy Act, or NEPA. Both processes involve similar steps:

- Definition of the affected area;
- Tribal consultation and public participation;
- Identification and evaluation of affected resources;
- Assessment of direct and indirect effects; and
- Development of measures to avoid, minimize, or mitigate adverse effects.

BLM policy supports the opportunity to coordinate the two processes, including procedures for public involvement and tribal consultation.

There are a few differences. Cultural resources don’t have to be eligible for the National Register to warrant consideration under NEPA. Under NEPA, there is a greater focus on the evaluation of project alternatives. NEPA’s broad definition of mitigation, including compensatory mitigation, may support creative approaches to resolving adverse effects on historic properties and landscapes.

#### Role and Responsibilities of Staff and Managers

Cultural resource specialists provide technical expertise throughout the process and coordinate with counterpart staff from the SHPO, other government agencies, and tribes. They monitor the work of contractors, review and comment on reports, and conduct inspections of the area of potential effect and the affected resources to fully evaluate and ensure reasonable determinations of National Register eligibility and effect. They guide the development of treatment plans to mitigate adverse effects. Specialists draft the formal correspondence required through the various phases of the process. Section 106 correspondence can be a surprisingly complex and time-consuming task.

Managers have the following responsibilities in Section 106 compliance:

- Participating in consultations, when needed to help resolve disagreements with the SHPO or other consulting parties; or to represent the BLM in discussions with elected officials or decision makers from other Federal or state agencies or county and local governments.
- Consulting with leaders and officials of Indian tribes, based on formal government-to-government relationships.
- Considering the staff specialist's recommendations, as well as the outcome of consultations in formalizing decisions on the area of potential effect, National Register eligibility, determination of effect, and treatment of adverse effects. The manager acts as decision maker and conveys his or her decisions in formal correspondence to the SHPO.
- Exercising the authority to sign formal agreement documents.

Section 106 focuses on process, not penalties. The presence of a National Register-eligible site need not stop a project, but it can prompt a design change that avoids an adverse effect. It's important to understand that legal compliance is based on a good-faith and comprehensive effort to accomplish each step of the Section 106 process, including consultations with Indian tribes and other parties. Aside from the specific decisions, from the legal perspective, the BLM will be judged on how well it conducted the process. Its success may depend on the leadership and negotiation skills of the manager, as well as the expertise and technical advice of the specialist.

#### Obligations under Multiple Agreements

At any one time, an office may be legally obligated to carry out the requirements of multiple agreements. These can range from the Programmatic Agreement for Solar Energy Projects, to state-specific agreements with SHPOs, to project or program-specific documents like PAs and MOA's. Many of these agreements remain in effect for years. Managers need to be aware of the legacy of their office's agreements and the staff workload associated with them.

Treatment plans represent the completion of mitigation efforts. Staff specialists may need to review research designs and technical reports, monitor the fieldwork of consultants, and ensure that data and collections are properly curated in facilities meeting federal standards. This legacy workload exists in addition to the annual work plan.

The next training module will review in more detail the requirements of tribal consultation under the National Historic Preservation Act and other laws.