

BLM Nevada

Statewide Protocol Agreement 2015



How does the BLM meet its responsibilities under Section 106 of the NHPA?

BLM has chosen to develop a program alternative to the standard 106 process. This alternative is called a Programmatic Agreement and it is allowed under 36 CFR 800.14, the regulations that implement the NHPA. In 1997, BLM, the ACHP, and the NCSHPO entered into a national Programmatic Agreement (nPA) as an alternative to comply with the NHPA. This agreement restructured the BLM preservation program and authorized the development of Protocols between BLM and SHPOs that outline specific measures for the protection of historic properties in eleven western states. The Protocols specifically take the place of the 36 CFR 800.3 through 800.7 regulations. The revised nPA completed in February, 2012, made some changes to the BLM's alternative process that required revision of existing BLM-SHPO Protocols.

What are the main changes between the 1997 nPA and the 2012 nPA revision?

- I. The revised nPA makes a commitment to initiate a revision of relevant manual sections to be consistent with the definitions of "adverse effect" and "consulting parties" in the 2004 36 CFR 800 regulations. This change will eliminate the provision that an undertaking otherwise found to be adverse may be considered not adverse, when a historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines.

II. The revised nPA establishes a requirement for the BLM to consult with the relevant SHPO, Indian tribes and other consulting parties for all undertakings that will adversely affect properties that are eligible for listing in the National Register of Historic Places (National Register), and for the development of any procedures such as project-specific PAs.

III. The revised nPA establishes a requirement to invite the ACHP's participation for:

- a. Non-routine interstate and/or interagency projects or programs;
- b. Undertakings adversely affecting National Historic Landmarks;
- c. Undertakings that the BLM determines to be highly controversial; and
- d. Undertakings that will have an adverse effect and with respect to which disputes cannot be resolved through formal agreement between BLM and SHPO, such as a Memorandum of Agreement.

IV. The revised nPA gives the ACHP authority to participate on its own initiative or at the request of the SHPO, an Indian tribe, a local government, an applicant or other consulting party, in a manner consistent with its role under 36 CFR 800, and criteria under Appendix A of 36 CFR Part 800.

V. The revised nPA establishes a requirement that the BLM follow the process under 36 CFR 800.14 for the development of program alternatives, including project specific PAs.



VI. The revised nPA establishes the requirement that BLM-SHPO Protocols implementing the nPA must address the following new items:

- a. A means for making a schedule of pending undertakings available to the public and Indian tribes on a regular basis;
- b. The manner in which public participation and involvement of consulting parties is addressed for Protocol-guided compliance processes;
- c. A commitment to fulfill tribal consultation obligations; the actions required by the BLM-Tribal Relations in Section 6c of the nPA support the core principles of the new DOI tribal consultation policy;
- d. Provisions for resolving disagreements between the BLM and SHPO; and
- e. Circumstances under which BLM or SHPO may choose to operate under the regulations rather than the Protocol

Establishing an Undertaking

A qualified BLM Cultural Resource Specialist (CRS) and the Authorized Officer will determine if a planned action is an undertaking subject to compliance with the NHPA. Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of the BLM. Undertakings also include those carried out by or on behalf of BLM; those carried out with BLM's financial assistance; and those requiring a BLM permit, license or approval, after 36 CFR 800.16(y).

1. If a proposed action is not an undertaking, no notice to SHPO is necessary.
2. If a proposed action is determined to be an undertaking and if it has the potential to cause effects on historic properties, then it is subject to the provisions of the Protocol.
3. If the undertaking does not have the potential to cause effects on historic properties, this should be documented in the case file (a CRINA would suffice), and the BLM has no further obligations under Section 106 of the NHPA.

Common Situations in Which Undertakings May Proceed With No Further Obligations Under Section 106

1. Record search indicates that the area has been previously inventoried, and no historic properties are present
2. Any 1 of the 20 Exemptions from Inventory Requirements contained in Appendix A of the Protocol apply

A. No. 1 – issuing permits and ROWs where no additional surface disturbance is authorized

B. No. 10 – issuing recreational and informational signs, kiosks, cattle guards etc. in previously disturbed areas

C. No. 17 – issuing SRPs where routes are within previously disturbed ground and where historic properties will not be highly visible

D. No. 19 – authorizing range improvement projects where it cannot be determined that the existing improvements are at least 50 years old, or modern maintenance has changed the character of the improvements, and disturbance is within the boundaries of the existing disturbance

SHPO Notification of Proposed Undertakings

In the earliest feasible planning stage for any undertaking, BLM will determine the information needed to identify and evaluate historic properties within the Area of Potential Effect (APE).

Sites of religious and cultural significance to Native American tribes must be included in determining inventory needs, based on appropriate notification and consultation

SHPO is notified via the Cultural Resources Inventory Needs Assessment Form or CRINA.



A qualified CRS will prepare a CRINA, establishing the:

- (1) inventory type required (Class I, II, III, reconnaissance)
- (2) direct effects APE boundary; indirect effects APE boundary (if applicable; e.g., NHT, standing structures, TCP within or near project area)
- (3) summary of known resources within the APE(s)
- (4) methods used to analyze effects (e.g., KOP's)
- (5) tribes to be consulted (if necessary)
- (6) consulting parties and/or members of the public to be consulted

The CRINA should also state whether the BLM intends to handle the project as an under-threshold or an above-threshold undertaking. The completed form will be forwarded to the responsible Manager or other responsible agency official for approval.

a. One copy of the form will be included in the case file to document the information gathering decision; and

b. One copy of the form will be sent to the SHPO. SHPO will have five working days from when the completed written form is electronically transmitted by BLM (e.g., via e-mail) to notify BLM via electronic transmittal that:

1. The SHPO wants to consult on the undertaking, or
2. The SHPO may provide recommendations within the same electronic transmittal regarding additional parties that might be consulted, inventory recommendations , adequacy of the APE(s), or adequacy of the methods described to analyze adverse effects
 - a. If SHPO provides comments/recommendations on the CRINA:



- If the project is being handled as under-threshold, then BLM can:
 - Accept SHPO's recommendations, update the CRINA accordingly, and proceed with the Section 106 process
 - Not accept all or part of SHPO's recommendations; respond to SHPO's recommendations via electronic transmittal justifying BLM's final determinations, and proceed with the Section 106 process
- If the project is being handled as above-threshold, then BLM and SHPO must agree on the contents of the CRINA prior to proceeding with the Section 106 process

If the project description or inventory methods change after a CRINA has been sent and concurred upon by SHPO, send an amended CRINA to SHPO

WHEN TO CONSULT: UNDER-THRESHOLD VS. ABOVE-THRESHOLD UNDERTAKINGS

- “Threshold” refers to “required consultation”, either with the SHPO, Advisory Council on Historic Preservation (ACHP), or both.
- If consultation with SHPO/ACHP are not required, then the undertaking is considered to be “under-threshold”
- If consultation with SHPO/ACHP are required, then the undertaking is considered to be “above-threshold”

AVOIDING “FORECLOSURE”

An undertaking that has been approved (Decision Record [EA], Record of Decision [EIS], Decision Letter, Grant, Permit etc..) in which SHPO/ACHP consultation was required but was not completed, is considered a “foreclosure”.

This is because the BLM made a decision without affording the SHPO/ACHP their lawful right to engage in all or part of the Section 106 process.

The ramifications of foreclosure:

- A. Illegal undertaking
- B. Harmful to BLM-SHPO future trust and relations

ABOVE-THRESHOLD UNDERTAKINGS REQUIRING CONSULTATION WITH SHPO

1. that involve interstate or interagency projects or programs for which BLM Nevada is the lead Federal Agency;
2. that adversely affect National Register listed or eligible properties;
3. that require an Environmental Impact Statement (EIS);
4. that are phased or segmented and require a Programmatic Agreement (PA);
5. undertakings that contain architectural resources where BLM lacks access to appropriate expertise to address eligibility, effect, or treatment;
6. that are determined by either party to be highly controversial;
7. that involve land transfers out of Federal management;
8. when SHPO agrees to consult on an undertaking because SHPO review has been requested by a tribal government, a local government, an applicant for a BLM authorization, a member of the public, or other interested person;

ABOVE-THRESHOLD UNDERTAKINGS
REQUIRING CONSULTATION WITH SHPO

9. where BLM's treatment options for historic properties may be limited due to land status or statutory authority;
10. development of historic contexts;
11. when the BLM must otherwise notify the ACHP

Let's Look More Closely at #'s 2 & 4

2. that adversely affect National Register listed or eligible properties;
 - Memorandum of Agreement (MOA) or Programmatic Agreement (PA) between BLM and SHPO required prior to authorizing the undertaking
 - Historic Properties Treatment Plan (HPTP) may or may not be attached to the MOA/PA at the time of signature. However, the HPTP must be approved by BLM, consulted and concurred by the SHPO, and implemented prior to ground disturbing activities that will cause the adverse effects



4. that are phased or segmented and require a project-specific Programmatic Agreement (PA)

- What is a phased project?
 - An incremental approach to identifying, evaluating, and treating historic properties. Phased or segmented undertakings postpone the identification, evaluation or agreed-upon treatment of historic properties until after the approval of the undertaking.
 - If a Decision will be signed prior to surveys that record the known extent of cultural resources and prior to the evaluation of those resources to determine which are eligible for the National Register of Historic Places (NRHP), then you likely have a phased project requiring a PA. *No HPTP is possible prior to authorization.*
 - An MOA, in contrast, is generally reserved for projects in which the effects to historic properties are known. Thus, an HPTP can be developed and concurred upon by the SHPO at the same time as the MOA is signed.

BELOW-THRESHOLD UNDERTAKINGS NOT REQUIRING CONSULTATION WITH SHPO

- Undertakings that are authorized under a DNA, CX, EA, or Decision Letter (e.g., casual use); and
- Undertakings that culminate in a “no effect” or “no adverse effect” determination

These undertakings mean that the BLM Managers (through the recommendations of their CRS) may make eligibility determinations and determinations of project effects without consulting with SHPO prior to authorization. The resulting reports are sent to SHPO as “informational copies” to be incorporated into the Statewide Inventory held by SHPO (electronic report copies) and the Nevada State Museum (hard report copies). As well, site information is uploaded into the Nevada Cultural Resource Inventory System (NVCRIS).

CATEGORICAL DETERMINATIONS

Classes of Properties Not Eligible for the National Register

- Isolated artifacts and features
- Unassociated Prehistoric and Historic Sites
 - Unassociated Prehistoric Sites:
 - 20 or less unmodified flakes
 - No more than 10 obsidian flakes present
 - No tools present
 - No potential or low potential for buried materials
 - Not associated with an identified Historic District

CATEGORICAL DETERMINATIONS

Classes of Properties Not Eligible for the National Register

- Unassociated Prehistoric and Historic Sites
 - Unassociated Historic Sites:
 - Not associated with an historic theme identified in the Nevada Comprehensive Preservation Plan (1991)
 - Not depicted on:
 - GLO map
 - Land status map
 - Mineral survey records
 - NSM records
 - State Water Engineer records
 - 15' quadrangle maps
 - Local, city, and county records

CATEGORICAL DETERMINATIONS

Classes of Properties Not Eligible for the National Register

- Post-1970 cultural resources
- Certain linear resources (see Protocol page 19 for details)
 - Roads/Trails
 - Water Conveyance
 - Fences
 - Telecommunication Lines

Categorical No Effect or No Adverse Effect Undertakings

Can be found on pages 24-28 in the Protocol:

- Includes Hazard Abatement, or Abandoned Mine Land Program
 - *John Callan Lead Discussion*

BLM Responsibilities on Non-Federal Lands

- The intent of the National Historic Preservation Act is to consider the effects of federal decision making on historic properties regardless of the land status involved. Therefore, the BLM will assure that its actions and authorization are considered in terms of their effects on cultural resources located on non-federal as well as federal lands.
- The BLM will conduct, or cause to be conducted, an inventory and evaluation of cultural resources on non-federal lands within the area potentially impacted by proposed land uses, whether the undertaking was initiated by BLM, or in response to a land use application.
- The BLM will consider the effects of its decision-making upon historic properties. It will either treat, or cause to be treated, adverse effects to non-federal historic properties that would result from land uses carried out by or authorized by BLM, or will consult with the SHPO and the Council on the basis of an adverse effect determination.
- When treatment involves data recovery, the artifacts, samples, and collections recovered from non-federal lands remain the property of the non-federal landowner unless donated to the federal government, a state facility, or are otherwise subject to state law.

Recordation & Evaluation of Sites on Private Land Associated With Undertakings Located on Both Public and Private Lands May be Waived If:

- Would the project remain viable if the federal authorization were not provided? If yes, there is probably little federal involvement.
- How likely are historic properties in the area of potential impact? If historic properties are not likely to be present on the private lands, then consider excluding them.
- How would BLM authorizations affect the location of surface disturbing activities on non-Federal lands? If surface disturbance on the private lands is minimal and unlikely to cause adverse effects, private lands could be excluded.

If it is determined that a BLM authorization would not likely adversely effect historic properties on the private land sections, then these areas may be deleted from the APE. This decision should be noted and justified in the CRINA sent to SHPO.

REPORTING

- Cultural Resource Reports document the results of inventories, and provide details of the number and type of archaeological resources recorded within the APE. Details of the requirements of this documentation are contained in two step-down BLM Nevada policy documents:
 - *Guidelines and Standards for Archaeological Inventory*
 - *Guidelines for Recording and Reporting Architectural Resources in Nevada*
- 3rd party reports provide recommendations to the BLM concerning site eligibility for the NRHP, potential adverse effects to eligible sites, and recommendations for avoiding or minimizing adverse effects.
- BLM Managers approve Cultural Resource Reports , and make determinations of site eligibility and project effects on historic properties (as well as determining how adverse effects will be mitigated) through the recommendations of their CRS.
- BLM Managers report their determinations of eligibility, project effects, and any mitigation strategies (through the execution of PAs or MOAs, and approval of HPTPs) to the SHPO.

COOPERATIVE ACTIVITIES WITH THE SHPO

- BLM Nevada has signed Assistance Agreements with the NV SHPO to cooperatively manage:
 - Nevada Cultural Resource Inventory System (NVCRIS)
 - Site Stewardship Program

GRAZING PERMIT RENEWALS

With Jake Vialpando

- Compare areas of known high grazing use with areas of known high cultural resource site density and locations of historic properties
- If overlap in high grazing intensity and cultural resources occur, field visit a percentage of these areas and document whether adverse effects are occurring that can reasonably be attributable to cattle grazing. If so, minimize, reduce, eliminate, or mitigate the effects.
- Perform reasonable Class II surveys in suspected areas where historic properties are expected to be located. Document whether adverse effects are occurring that can reasonably be attributable to cattle grazing. If so, minimize, reduce, eliminate, or mitigate the effects.
- Perform appropriate surveys for targeted range improvement projects noted in the NEPA document.
- Make sure Section 106 strategy is documented in CRINA, and included in the range case file for the TPR.

END

THANK YOU!

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