

Section 106 Agreement Documents

March 2, 2017

Matt Basham
Deputy Preservation Officer



Cultural Resource Laws and Executive Orders

- Antiquities Act of 1906
- Historic Sites Act of 1935
- National Historic Preservation Act of 1966
- Archaeological and Historic Preservation Act 1974
- American Indian Religious Freedom Act of 1978
- Archaeological Resources Protection Act of 1979
- Native American Graves Protection and Repatriation Act of 1990
- Curation of Federally Owned and Administered Archaeological Collections (36 CFR 79 issued in 1990)
- EO 11593 Protection & Enhancement of the Cultural Environment
- EO 13007 Indian Sacred Sites
- EO 13175 Consultation & Coordination with Indian Tribal Governments
- EO 13287 Preserve America



Section 106 of the NHPA

54 U.S.C. 306108

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted **undertaking** in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, **take into account the effect of the undertaking on any district, site, building, structure, or object** that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a **reasonable opportunity to comment** with regard to such undertaking.

In short...

Section 106 requires federal agencies to take into account the effects of their undertakings on historic properties and afford the ACHP an opportunity to comment.



Section 106

- All federal agencies under the executive branch of the U.S. government are subject to Section 106
- Compliance with Section 106 is a federal agency responsibility
- Section 106 process is to ensure that federal agencies consult with interested parties to:
 - Identify & evaluate historic properties
 - Assess the effects of their undertakings on historic properties
- Section 106 encourages a preservation outcome, but does not require it
- Section 106 ensures that a federal agency assumes responsibility for the consequences of its undertakings on historic properties



ACHP Regulations

- 36 CFR 800 “Protection of Historic Properties”
- Implements Section 106 of the NHPA
 - Mandates the historic preservation review process
 - Sometimes referred to as the Section 106 Process
- There is no such thing as a “Section 106 clearance”
 - Conduct Section 106 review and analysis
 - We do not “clear land” - we “review undertakings”



36 CFR 800 Regulations

1. Purposes
2. Participants in the Section 106 process
3. **Initiation of the Section 106 process**
4. **Identification of historic properties**
5. **Assessment of adverse effects**
6. **Resolution of adverse effects**
7. **Failure to resolve adverse effects**
8. Coordination with NEPA
9. Council review of Section 106 compliance
10. Special requirements for protecting NHLs
11. Documentation standards
12. Emergency situations
13. Post-review discoveries
14. Federal agency program alternatives*
15. Tribal, State, and Local Program Alternatives
16. Definitions



Section 106 Process

1. Initiate Section 106 Process
2. Identify Historic Properties
3. Assess Effects
4. Resolve Adverse Effects

Note: The steps in the 106 process, as in most processes, must be completed sequentially.



Use of Memorandum of Agreements

Used to resolve Adverse Effects to eligible historic properties.

Execution of an MOA evidences the agency's compliance with 106

- Described in 36 CFR 800.6
- Identification effort is complete
- Effect determination is “adverse”
- Evaluation for National Register is complete
- Assessment of effect to each historic property is complete



Use of Programmatic Agreements

- Described in 36 CFR 800.14
- When effects on historic properties are similar and repetitive or regional in scope
- When effects on historic properties cannot be fully determined prior to approval of an undertaking
- Where routine management activities are undertaken at Federal installations or land management units
- Where circumstances warrant a departure from the normal 106 process (36 CFR 800.3 – 800.7)



Memorandum of Agreement (MOA) or

done under 800.6(b)(2)

- Identification effort is **complete**
- Effect determination for Undertaking is “adverse”
- Evaluation for NR eligibility **has been done**
- **Assessment of effect** to each historic property **has been done**
- Treatment measures are identified, or provides for the development of a HPTP

Programmatic Agreement (PA)

done under 36 CFR 800.14 (b)(1)(ii)*

- Identification effort is **incomplete**
- Effect determination for Undertaking is “adverse”
- Provides for completion of identification effort
- Evaluation for NR eligibility **has not been done**
- Provides process for NR eligibility evaluation
- **Assessment of effect** to individual historic properties **has not been done**
- Provides for the assessment of adverse effects to historic properties
- Provides for the development of an historic properties treatment plan (HPTP)

36 CFR 800.4 (b)(2): *Phased identification and evaluation.* Where alternatives under consideration consist of **corridors** or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official **may also defer final identification and evaluation of historic properties** if it is specifically provided for in a **memorandum of agreement** executed pursuant to § 800.6, a **programmatic agreement** executed pursuant to § 800.14, or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to 800.8.

36 CFR 800.14 (b)(1)(ii): When effects on historic properties cannot be fully determined prior to approval of an undertaking.

Section 106 and NEPA: Requiring an EIS and Using a Memorandum of Agreement (MOA)

- ❖ Historic properties identification effort (class III) is complete, and an “adverse effect” determination has been made. (800.5 (a) and 800.6).
- ❖ The agency, the SHPO/THPO and the ACHP (if participating) agree on how the adverse effects will be resolved
- ❖ The MOA specifically names the historic properties that will be adversely affected.

NHPA – Section 106 - MOA

- Establish undertaking and initiate the 106 process
- Begin identification process and in most cases, complete it
- Evaluate sites for NR eligibility and apply criteria of adverse effect
- Lead agency makes “adverse effect” determination
- Notify ACHP of “adverse effect” determination and provide documentation (800.11 (e) *
- Develop draft MOA
- Continue consultations – 106 and tribal
- Finalize and execute MOA
- **Concludes the Section 106 process**



NEPA- Environmental Impact Statement (EIS)

- Notice of Intent (includes section 106 language)
- Public scoping (public and tribal letters
 - include NEPA and 106 language
- Development of the DEIS
- Publication of the DEIS
- Include draft or final MOA in the DEIS
- Publish Final EIS
- Record of Decision (ROD) signed
- MOA and POD are incorporated into ROD
- **Concludes the NEPA process**



Implement MOA:

- Continue identification process, if necessary (variances, tribal consultation)
- Develop Historic Properties Treatment Plan (HPTP)
- Implement HPTP and/or other mitigation measures-
Resolves adverse effects



Implement Plan of Development (POD)

- Engineering/staking
- Complete necessary studies
- Re-alignments/spanning to avoid resources, including cultural
- Treatments for historic properties are carried out (mitigation)
- During construction the Monitoring and Discovery Plan is used
- A 3rd party Monitor is used for overall project compliance, archaeological monitors are used when appropriate

*Council may or may not elect to join consultations

Section 106 and NEPA: Requiring an EIS and Using a Programmatic Agreement (PA)

- ❖ Alternatives are being considered under NEPA – usually several
- ❖ Historic properties identification effort is incomplete, but an “adverse effect” determination is made based on the nature and scale of the project. The Applicant can choose to have a class III inventory done during planning, but often do not due to the expense. NEPA and NHPA allow this: 36 CFR 800.4 (b)(2) and 800.14(b)(1)(ii)

NHPA – Section 106 - PA

- Establish undertaking
 - Initiate section 106 process
- ↓
- Notify ACHP of “adverse effect” determination
 - Engage in consultations – 106 and tribal
 - Begin identification process (class I inventory)
 - Continue identification process (i.e. class II inventory, or other methods)
 - Develop draft PA
- ↓
- Execute final PA (defines Area of Potential Effects (APE))
 - **Concludes the Section 106 process**
- ↓

Implement PA:

- Complete **identification** process (class III inventory, continue tribal consultation)
- **Evaluate** cultural resources for NR eligibility (historic properties result – determined eligible)
- **Assess adverse effects** from project to historic properties
- Devise ways to avoid, minimize and mitigate effects
- Develop Historic Properties Treatment Plan (HPTP)
- Implement HPTP and/or other mitigation measures- **Resolves adverse effects**

NEPA- Environmental Impact Statement

- Notice of Intent (includes section 106 language)
 - Public scoping (public and tribal letters include NEPA and 106 language)
- ↓
- Develop Draft EIS
 - Begin identification process (class I)
 - Continue identification process (i.e. class II inventory, or other methods)
 - Publish DEIS – including draft PA
- ↓
- Publish Final EIS
 - Record of Decision (ROD) signed
 - PA and POD are incorporated into ROD
 - **Concludes the NEPA process**
- When the identification and evaluation effort is complete, an MOA is done rather than a PA*

Implement Plan of Development (POD)

- Engineering/staking
- Complete necessary studies
- Inventories are done (cultural, biological, visual, etc.)
- Re-alignments/spanning to avoid resources, including cultural
- Treatments for historic properties are carried out (mitigation)
- During construction the Monitoring and Discovery Plan is used
- A 3rd party Monitor is used for overall project compliance, archaeological monitors are used when appropriate

Parts of a Section 106 Agreement

- I. Title: Identifies the undertaking and the signatories to the agreement. It will also indicate whether the document is a Memorandum of Agreement or a Programmatic Agreement.



Parts of a Section 106 Agreement

2. Preamble: Notes the statutory authority for the undertaking; introduces the signatories; provides relevant background facts about the project, activity, or program; briefly describes the Section 106 consultation process; identifies the consulting parties.



Parts of Section 106 Agreement

3. Stipulations: Form the heart of the agreement by detailing each of the avoidance, minimization, or mitigation measures the federal agency has agreed to ensure are implemented.



Parts of a Section 106 Agreement

A rule of thumb on how to frame "whereas" clauses in the preamble versus "stipulations" in the body of the agreement is that "whereas clauses" should state facts that exist at the time the agreement document is executed, and "stipulations" should denote actions the agency commits to ensuring are carried out in the future, after the agreement document is executed.



Thanks for your time.

For additional questions or support, please contact:

Matt Basham, Deputy Preservation Officer

mbasham@blm.gov

602-417-9216

Contact me anytime, its my job!

