

# **Cultural Resource Standards and Guidelines for Renewal of Right-of-Way grants and Temporary Use Permits**

## **Introduction**

These standards and guidelines do not replace those agreed to in the Programmatic Agreement with the Western Area Power Administration (WAPA) signed in 2002 regarding impacts of routine maintenance of transmission lines, substations, and other facilities on archaeological resources on land administered by BLM Colorado, Wyoming, Nebraska, and Utah. WAPA is the lead federal agency for the purposes of compliance with Section 106 of the National Historic Preservation Act (NHPA) for all WAPA activities regardless of land ownership.

## **Authorities:**

National Historic Preservation Act of 1966 (NHPA; 16 U.S.C. 270): Section 106 requires 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.

National Environmental Protection Act of 1969 (NEPA; 42 U.S.C. 4321 and 4331-4335) requires the consideration of cultural resources and Native American religious concerns (See American Indian Religious Freedom Act of 1978).

Federal Land Policy and Management Act of 1976 (FLPMA; 43 USC 1711): Section 201(a) requires constant inventory, monitoring and evaluation of Federal lands. Therefore, the Field Manager, as a delegated agent of the Secretary of the Interior, can require an inventory of lands that encompass, or are encompassed by, a ROW grant in order to assess resource condition in the area “and to identify new and emerging resources and other values.” This phrase is neutral and neither includes nor precludes cultural resource inventory.

Existing regulatory guidance relating to the terms and conditions for ROW grants and TUPs are found in regulations for FLPMA at 43 CFR 2801.2 (b) and regulations for the Mineral Leasing Act (MLA) at 43 CFR 2881.2(b). Both regulations allow the authorized officer (AO) to add such terms, conditions, and stipulations as may be required for any ROW grant or TUP that is amended, renewed or assigned.

Archaeological Resources Protection Act of 1979 (ARPA; 16 U.S.C. 470aa-mm) provides for the protection of archaeological resources on Federal land through the prohibited acts section and 43 CFR Part 7.4.

Native American Graves Protection and Repatriation Act of 1990 (NAGPRA; 25 U.S.C. 3001 et seq.) requires Federal agencies to follow a process in case of inadvertent discoveries of human remains, funerary objects, sacred objects, or objects of cultural patrimony on federal and tribal land (43 CFR 10.4).

Executive Order 13007 dated May 24, 1996, *Indian Sacred Sites* requires Federal agencies, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions to; (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, and (2) avoid adversely affecting the physical integrity of such sacred sites.

**Policy and Guidance:** BLM policy for the renewal of FLPMA and MLA grants is contained in BLM Manual 2801.42(G). This manual guidance stipulates that if a ROW grant or a TUP is not in compliance with the terms and conditions of the authorization, renewal is not appropriate. Further, that grants providing for renewal, including those issues under MLA, may not be modified without good cause and/or the holders consent. Generally, only conditions created by new law or involving major health and safety conditions will be considered good cause. The cultural resource authorities discussed above have amended regulations that have created new conditions for consideration as good cause. Cultural resources are not normally considered to create major health and safety conditions. At 2801.42G3(b), grants not providing for renewal in the original terms and conditions may be considered for modification and renewal based on a current environmental assessment. BLM will issue a new ROW grant form 2800-14 to document the renewal of any grant or TUP.

The renewal of a ROW grant and TUP is considered a routine undertaking under the Colorado Protocol (Section VIII C (1)).

### **Section 106 Requirements:**

1. The AO, in coordination with the cultural resource specialist, will determine if the following conditions warrant further consideration prior to renewing a grant; (1) Section 106 of NHPA; (2) emergency undertakings; (3) unanticipated discoveries; (4) damage to archaeological resources on Federal land; and (5) protection of sacred sites on Federal land.
2. The cultural resource requirements under Section 106 of NHPA for the renewal process vary by the authority for Right-of-Way grants (ROW) and Temporary Use Permits (TUPs).

#### Pre-FLPMA authority

- a. This ROW grant generally has no expiration date, so renewal is rarely an issue. The holder is strongly encouraged to renew under FLPMA. Pre-FLPMA grants are governed by 43 CFR 2801.4, including their allowance of cultural resource

inventory under certain conditions, unless the original ROW grant language allows the holder unconditional rights for improvements and other land disturbances within the ROW. Note that while renewal of Pre-FLPMA ROW grants may be considered a categorical exemption under NEPA, this does not relieve the BLM of its affirmative obligations under NHPA to consider the effects of this undertaking upon historic properties.

b. Cultural resource inventory was usually not completed on these grants. Because these grants generally do not expire, there is no opportunity to revisit cultural resource inventory under existing procedures and authorities. The holder is not responsible for pre-FLPMA damage to cultural resources; however, they have a ROW grant and are responsible for post-FLPMA maintenance-caused damage to cultural resources. Known cultural resources within the ROW can be field checked to monitor for disturbance throughout the life of this permit.

c. The identification of post-FLPMA damage would require the AO to have documentation on past and current conditions resulting from the monitoring of the ROW to identify resource damage.

d. In deciding whether or not to condition the renewal of these grants with provisions requiring cultural inventory, the BLM Field Office shall verify that the holder is:

11) in compliance with the terms and conditions of the grant;

22) not requesting a change in existing use or asking for any kind of upgrading of the facility(ies) and;

33) not requesting or contemplating any major surface disturbing maintenance activity within or outside of the ROW

e. Where the BLM has the authority to modify the existing grant, if the holder is in compliance with the grant terms and either is requesting or contemplating any surface disturbing maintenance activity within or outside of the ROW and/or is requesting or contemplating surface disturbing maintenance activities within or outside of the ROW, then the renewal must include requirements for cultural resource inventory and any mitigation, if needed, within the Area of Potential Effect (APE) in accordance with BLM requirements. A condition shall be placed on the renewal requiring the holder to notify BLM prior to any surface disturbance on the ROW and TUP. The BLM will determine if a cultural resource inventory is required.

f. Where the BLM has the authority to modify the existing grant, if the holder is in compliance with the grant terms and is not requesting a change in existing use, asking for any upgrading of facilities, or requesting or contemplating surface disturbing maintenance activities within or outside of the ROW, then a condition shall be placed on the renewal requiring the holder to notify BLM prior to any

surface disturbance on the ROW and TUP. The BLM will determine if a cultural resource inventory is required.

FLPMA authority

a. Cultural resource inventory should have been completed on this ROW grant and TUP. If cultural inventory was not completed, it can be reconsidered under existing procedures and authorities. A condition shall be placed on the renewal requiring the holder to notify BLM prior to any surface disturbance on the ROW and TUP. The BLM will determine if a cultural resource inventory is required.

Mineral Leasing Act authority

a. Cultural resource inventory was generally completed on these grants issued after the mid 1970's when field offices started staffing archaeologists. Older pipeline grants were probably built without any cultural resource inventory. Many of the grants issued prior to 1973 did not contain expiration dates so there will not likely be a renewal request. Regulations at 43 CFR 2881, allow the AO to add conditions of approval when strong justification is present. A condition shall be placed on the renewal that the holder notifies BLM 180 days prior to any surface disturbance on the ROW grant or TUP. The BLM will determine if a cultural resource inventory is required.

b. The cultural resource requirements vary by grant and permit document. The grant and permit document is controlling when it comes to renewal, although nearly all grants and permits issued by the BLM in Colorado since FLPMA were passed with a provision for renewal. Each situation may have a different set of requirements and may require different treatment, thus, must be evaluated on a case-by-case basis.

3. Prior to renewal, the cultural resource specialist will complete a record search for the APE to identify known cultural resources that are potentially eligible and eligible for the National Register of Historic Places (NRHP), or listed on the NRHP. Known cultural resources located on BLM-administered land within the ROW and TUP can be field visited to monitor for disturbance from past operation and maintenance.

4. A Class II or Class III inventory may be required as part of the NEPA process prior to renewal or prior to any surface disturbing activity in the APE. Under Section 110(g) of the NHPA, the BLM **may require** the license or permittee to pay for reasonable costs as a condition to the issuance of such license or permit. BLM may require the holder to conduct the appropriate cultural resource inventory by a BLM permitted cultural contractor. If BLM decides to complete the cultural resource inventory, it is to be completed in a timely manner dependent upon the time of year, weather, and available resources. If the BLM time frame is not adequate the holder may choose to hire a BLM permitted cultural contractor to complete the work.

5. Any treatment and mitigation identified and agreed to in the course of complying with Section 106 of NHPA may be required of the holder as a condition of the grant or permit, or through a separate letter of agreement or a project work plan referenced in the grant and permit documents. The holder will be responsible for the cost of treatment and mitigation and for maintenance-caused damage to cultural resources and the AO will make any decision in coordination with the cultural resource specialist as to proper treatment and mitigation after consulting with the holder.

6. Mandatory Cultural Stipulations on ROW Grant or TUP

a. Pursuant to 43 CFR 10.4(g) the holder of this authorization or its contractor must notify the AO, by telephone, with written confirmation, immediately upon the discovery of human remains, funerary items, sacred objects, or objects of cultural patrimony. Further, pursuant to 43 CFR 10.4(c) and (d), the holder must stop activities in the vicinity of the discovery and protect it for 30 days or until notified to proceed by the AO.

b. The operator or its contractor is responsible for informing all persons who are associated with the project operations that they will be subject to prosecution for knowingly disturbing historic or archaeological sites, or for collecting artifacts. If historic or archaeological materials are uncovered during any project or construction activity, the operator must stop work in the area of the discovery that might further disturb such materials, and immediately contact the AO. Within five working days the AO will inform the operator as to the mitigation measures the operator will likely have to undertake before the site can be used (assuming in place preservation is not necessary).

c. The holder shall notify the AO at least 180 days prior to non-emergency activities that would cause surface disturbance in the ROW or TUP. The BLM will determine if a cultural resource inventory, treatment, or mitigation is required.

d. A "Notice to Proceed" stipulation shall be required for any non-emergency activities as defined above that would cause surface disturbance on the ROW or TUP. Any request for a "Notice to Proceed" should be made to the AO, who shall review the proposed action for consistency with resource management concerns such as wildlife, big game winter range, paleontology, threatened and endangered species, and cultural resource protection. Additional measures may be required to protect these resources.