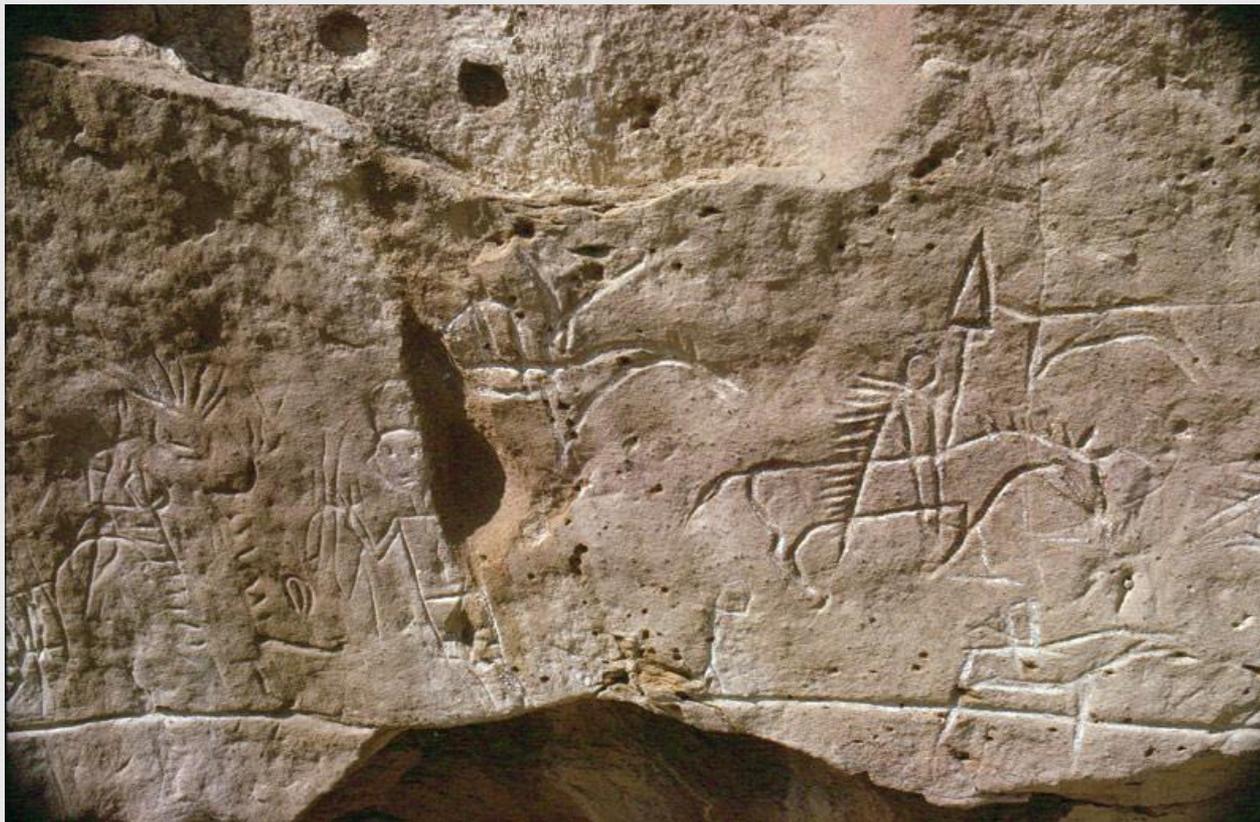


The Section 106 Process



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BLM Rock Springs Field Office, May 2014



Presentation Outline



- ❧ Important Terminology
- ❧ NHPA & Wyoming State Protocol
- ❧ The Four Steps of the Section 106 Process, plus:
 - ❧ Determining the APE
 - ❧ Class III Cultural Inventory & Reporting
 - ❧ Evaluating Sites for Eligibility to the NRHP
 - ❧ Adverse Effects
 - ❧ Tribal/SHPO Consultation
 - ❧ Agreement Documents
- ❧ Public and Non-public Lands

- ❧ **Undertaking:** An undertaking is “a project, activity, or program funded in whole or part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency, those carried out with Federal financial assistance, and those requiring a Federal permit, license or approval.” NHPA Section 301(7)
- ❧ **National Register of Historic Places (NRHP):** a listing of archaeological & historic sites (“properties”) determined important based upon their association with past people or events, their designs, or their scientific-data potential. The NRHP is maintained & updated by NPS.
- ❧ **Historic Property:** Any district, site, building, structure, or object included in or eligible for inclusion in the NRHP

National Historic Preservation Act (NHPA)



- ❧ The NHPA was passed in 1966 to protect and preserve historical & archaeological resources
- ❧ NHPA required the following:
 - ❧ Established the Advisory Council on Historic Preservation (ACHP)
 - ❧ Governor had to appoint a State Historic Preservation Officer (SHPO)
 - ❧ Created the National Register of Historic Places (NRHP)
 - ❧ Federal agency had to establish procedures for identifying, inventorying, & evaluating the NRHP eligibility of cultural resources
 - ❧ Federal agencies must consider the potential effects of undertakings on historic properties (Section 106)

Section 106 of the NHPA



- ❧ Section 106 requires all Federal agencies to take into account the effects of their undertakings on properties included in or eligible for inclusion in the National Register of Historic Places (NRHP)
- ❧ Section 106 is outlined and implemented via 36CFR800 – this is referred to as “The Section 106 Process”

The National Programmatic Agreement & the Wyoming State Protocol



- ❧ The National Programmatic Agreement between ACHP, NCSHPO, & BLM legally replaces 36CFR800.3-.7
- ❧ The Wyoming State Protocol acts as a supplement to the National P.A.
 - ❧ Establishes alternative agency procedures for how the BLM will meet its responsibilities under Sections 106 of the NHPA as a substitute for following the 36CFR800 regulations
 - ❧ This allows the BLM to operate more effectively in a manner that works best for the State of Wyoming

The Section 106 Process



- ❧ Four primary steps of the Section 106 Process:
 - ❧ Step 1: Initiate the Process
 - ❧ Step 2: Identify Historic Properties
 - ❧ Step 3: Assess Effects
 - ❧ Step 4: Resolve Adverse Effects

Step 1: Initiate the Process



- ❧ Process is initiated when Proponent notifies BLM of a proposed project (via NOS, ROW Request, etc.)
 - ❧ NOTE: Proponent should provide a complete project description & a map that shows the entire undertaking, preferably on a topo map
- ❧ BLM determines if the project is an undertaking
- ❧ BLM determines if historic properties might be affected
 - ❧ If no potential to affect HPs, Section 106 Process ends here (if SHPO concurs)
 - ❧ If there is a potential to affect HPs, proceed to next step

Step 2: Identify Historic Properties

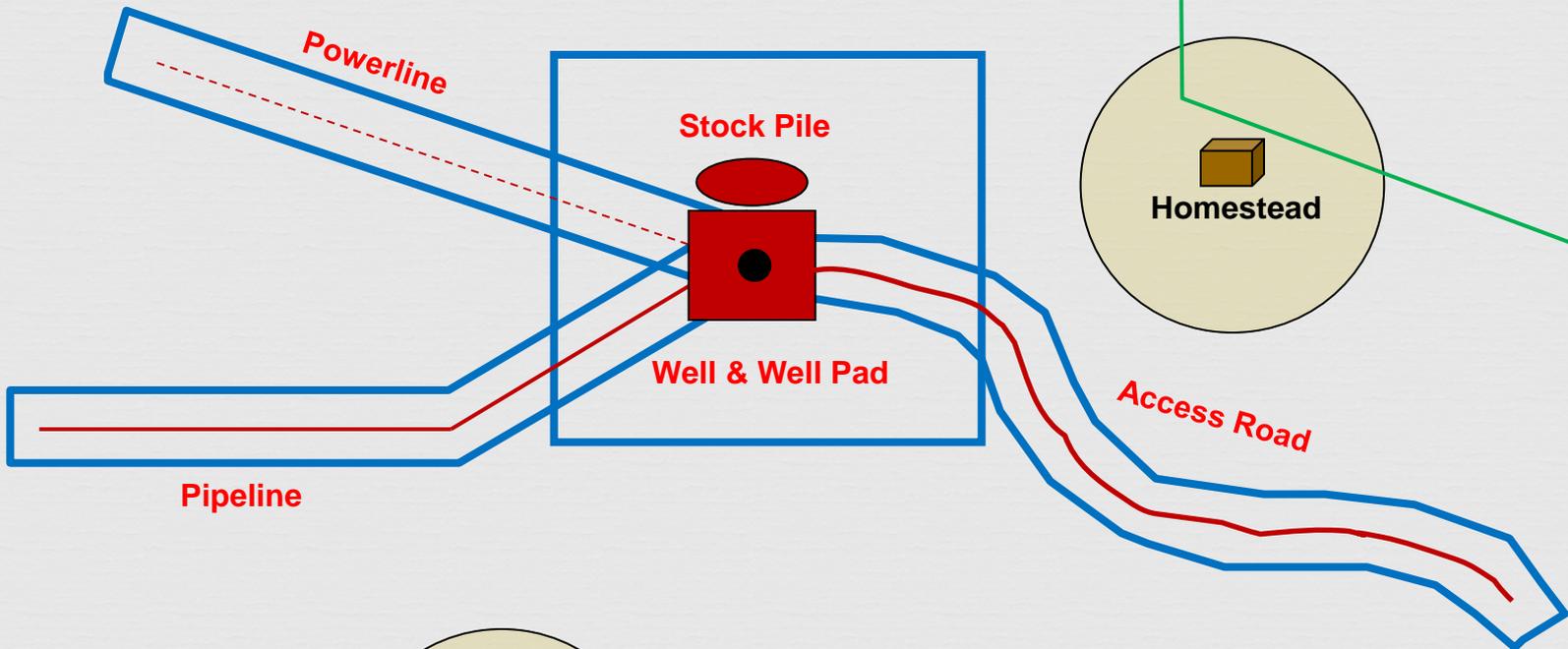


- ❧ BLM defines the area of potential effect (APE)
- ❧ BLM determines scope of identification efforts
- ❧ If BLM determines Class III inventory is required, the applicant hires a cultural consultant to complete the fieldwork & report
- ❧ Cultural consultants identify all archaeological sites and isolated cultural resources regardless of land ownership
- ❧ All sites must be evaluated for their eligibility for the NRHP
- ❧ Consultant makes effect *recommendations* based on their findings

Determining the Area of Potential Effect (APE)



- ❧ **Standard (*Minimum*) Direct APEs (Under New Wyoming State Protocol):**
 - ❧ Single Well Pads: 10 acres
 - ❧ MET Towers: 10 acres
 - ❧ Communication Sites: 10 acres
 - ❧ Transmission Lines: twice the construction ROW
 - ❧ Pipelines: twice the construction ROW
 - ❧ Roads: twice the construction ROW



Powerline

Stock Pile

Homestead

Well & Well Pad

Access Road

Pipeline

Rock Art

Class III Cultural Inventory



- ❧ A Class III inventory is an intensive pedestrian (on foot) examination; archaeologists are generally spaced no more than 30 meters apart
- ❧ Proponent must ensure that the entire project is staked prior to any archaeological fieldwork
- ❧ The consultant submits a fieldwork notification request to the BLM; BLM has 10 days to respond
- ❧ The consultant must also notify BLM at least 3 days prior to starting actual fieldwork
- ❧ If archaeological sites are found, site testing may be necessary to assist with determining site boundaries and eligibility to the NRHP

The Class III Report



- ❧ Consultant submits two copies of the Class III Inventory report to BLM, which includes *recommendations* for site eligibility and effects
 - ❧ BLM sends the extra copy to SHPO once BLM accepts the report
- ❧ BLM reviews report to make sure it complies with the report standards determined by the SHPO
- ❧ BLM may accept recommendations or may choose to disagree
- ❧ The Class III report is BLM property; *while the consultant is hired by proponent they are technically working on behalf of BLM*
 - ❧ Note: Proponent may receive *redacted* copy of report – proponent does not get to review the report before it is submitted to BLM

Evaluating Sites for Eligibility to the NRHP



☞ Four Criteria for Eligibility to the NRHP:

- ☞ A - Sites that are associated with events that have made a significant contribution to the broad patterns of our history
- ☞ B - Sites that are associated with the lives of persons significant in our past
- ☞ C - Sites that embody the distinctive characteristic or a type, period, or method of construction or that represent the work of a master, or that possess high artistic values, or that represent a significant & distinguishable entity whose components may lack individual distinction
- ☞ D - Sites that have yielded, or may be likely to yield, information important to prehistory or history

Step 3: Assess Effects



- ❧ Once BLM receives & reviews the Class III Inventory BLM makes a determination of effect on all historic properties:
 - ❧ Direct Effects: direct physical impacts
 - ❧ Indirect Effects: visual or audible impacts
- ❧ If potential *adverse effects* are identified, BLM will work with Proponent for project redesign in attempt to avoid or minimize adverse effects
- ❧ If adverse effects are successfully avoided or minimized, BLM will then submit the inventory report & site forms to the Wyoming State Historic Preservation Office (SHPO) for review & process ends here (if SHPO concurs)

What is an Adverse Effect?



❧ Adverse Effect is defined at 36 CFR 800.5:

“An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register....Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative.”

Types of Adverse Effects



- ❧ Physical destruction of, damage to, or alteration of all or part of the historic property
- ❧ Removal of the historic property from its original location
- ❧ Change of the character of the historic property's use or physical features within the property's setting
- ❧ Introduction of visual, atmospheric, or audible elements that diminish the integrity of a historic property's significant features
- ❧ Transfer, lease, or sale of a historic property out of Federal ownership

Tribal Consultation



- ❧ Section 101(d)(6)(B) of NHPA requires consultation with Indian tribes that attach religious and cultural significance to historic properties.
- ❧ Consultation can occur throughout the Section 106 Process
 - ❧ For large projects – BLM consults from the beginning
 - ❧ For small projects – BLM consults when historic properties are identified
- ❧ Tribal Consultation is Government to Government; therefore BLM is responsible for conducting all consultation

SHPO Consultation



- ❧ The NHPA requires Federal agencies to consult with the State Historic Preservation Officer (SHPO) regarding undertakings
- ❧ As with Tribal consultation, formal (and informal) consultation with SHPO can occur throughout the Section 106 Process
- ❧ BLM is responsible for conducting all consultation with SHPO
- ❧ SHPO concurrence with BLM's determinations of effect is sought for every undertaking
 - ❧ Small projects with No Effect - Notify and Proceed
 - ❧ Projects with (Non-Adverse) Effects - SHPO has 15 to 30 days to review
 - ❧ Projects with Adverse Effects - SHPO review time is open ended

Step 4: Resolve Adverse Effects



- ❧ If adverse effects cannot be avoided, the BLM and SHPO will consult to determine resolution (Tribes, private landowners, interested parties, and the public may also be involved in consultation)

- ❧ Resolution (mitigation) depends on why the site is eligible:
 - ❧ For sites eligible under Criteria A, B, or C, resolution is commensurate with the scale of the impact and is outlined in an Agreement Document
 - ❧ For sites eligible under Criterion D, resolution may be data recovery excavation (Data Recovery Plan & Additional Reporting Required)
 - ❧ All resolutions should benefit the public

Agreement Documents



- ❧ An agreement document is a way to address the resolution of adverse effects to historic properties eligible under Criteria A, B, and C
- ❧ Participants include federal agency, SHPO, Advisory Council on Historic Preservation, Tribes, Proponent, Landowners, & Interested Parties
- ❧ Two types of agreement documents:
 - ❧ Memorandum of Agreement (MOA)
 - ❧ Programmatic Agreement (PA)

MOA vs. PA



- ❧ MOA is used when adverse effects to historic properties are known in advance of the construction and you lay out the process by which those effects will be addressed
- ❧ PA is used as a custom compliance process for a large, complex or controversial undertaking
 - ❧ Completed prior to cultural inventories
 - ❧ Establishes roles & responsibilities
 - ❧ Establishes time frames for a phased process

Initiate Section 106 Process

BLM receives NOS (etc) from Proponent
BLM establishes undertaking
BLM determines if there is a *potential* for effects

▶ *No undertaking/no potential to cause effects*

▼
Undertaking is type that might affect historic properties

Identify Historic Properties

APE is defined
Determine scope of efforts (i.e. Class III)
Identify & evaluate historic properties

▶ *No historic properties affected*

▼
Historic properties are affected

Assess Adverse Effects

Apply criteria of adverse effects
Attempt to avoid or minimize adverse effects

▶ *No historic properties adversely affected*

▼
Historic properties are adversely affected

Resolve Adverse Effects

Continue consultation

▶ *Memorandum of Agreement*

▼
FAILURE TO AGREE

▶ **ACHP COMMENT**

Public Land vs. Private Land



- ❧ Section 106 does not identify a distinction between public land and other land. Therefore, BLM must consider the effects of the undertaking on cultural resources located on non-federal (state & private) as well as federal lands
- ❧ If the non-federal portion of the project is dependent upon a federal permit, license, or approval, then BLM must address & mitigate effects to cultural resources for the entire project, not just the part that crosses BLM lands

For more information



Applicant Toolkit on the ACHP website:

<http://www.achp.gov/apptoolkit.html>

Wyoming State Protocol & National PA

<http://wyoshpo.state.wy.us/>

Questions?



Section 106

NEPA

Initiate the process

Scoping

Identify Historic Properties

Prepare Draft EIS

Assess Adverse Effects

Public Comment Period

Resolve Adverse Effects

Prepare Final EIS

Agreement on Historic Protection
and Mitigation

Public Record of Decision

