

## **Appendix E**

### **BLM Cultural Resources Protection Procedures**

## **Program Objectives**

The BLM has developed a cultural resources program designed to inventory, evaluate, and manage cultural resources on BLM-administered public land and in areas of BLM responsibility. The BLM management of cultural resources (archaeological, historic, and socio-cultural properties) is in accordance with the provisions of the National Historic Preservation Act (NHPA) of 1966, as amended, and other applicable legislation.

## **Identification of Cultural Resources**

The BLM requires cultural resource inventories for actions with federal responsibility that include surface disturbance as a part of the action. The purpose of inventories is to identify cultural resources prior to any ground disturbing activity. This way, sites can be protected through project redesign or other mitigation measures prior to any threat of disturbance. Numerous laws and regulations mandate this policy. For a brief overview of selected laws and policies dictating the BLMs treatment of cultural resources, please see the end of this appendix.

Three classes of cultural resource inventory have been established; Class III is the most intensive.

Class I inventories are completed with the use of existing data from cultural resource inventory files maintained by both the BLM and the Wyoming SHPO. Class I inventories are conducted at two different levels: at the planning stage of an EIS to produce a regional overview; and at the site-specific level for individual proposed projects to determine if previous cultural resource inventories have been conducted within the area of potential effect (APE). The purpose of Class I inventories are to provide cultural resource specialists and managers with an informed basis for understanding the nature of the archaeological record within the area in question.

Class II inventories are statistically based sample surveys designed to aid in characterizing the probable density, diversity, and distribution of cultural properties in the area, to develop and test predictive models, and to answer appropriate research questions. Within individual sample units, survey aims, methods, and intensity are the same as those applied in Class III survey. Class II survey may be conducted in several phases, using different sample designs, to improve statistical reliability.

Class III intensive field surveys are conducted by professionals through pedestrian survey of an entire target area. The intent of a Class III inventory is to locate and record all historic properties and is consistent with standards in the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 Federal Register [FR] 44716). Class III inventories conform to the prevailing professional survey standards for the region involved, provided that the regional standards meet or exceed the Secretary's Standards and Guidelines. Because Class III survey is designed to produce a total inventory of the cultural properties observable within the target area, once it has been completed no further survey work should be needed in the target area as long as the current standards are met. Areas with a high probability of containing buried cultural materials or known cultural materials may require additional work of professional monitoring and/or data recovery excavations. Areas that require additional work are analyzed on a case-by-case basis, depending on the proposed action and the types of cultural resources present in the project area.

## **BLM Jurisdiction on Privately Owned and/or Split Estate Lands (including the checkerboard land pattern)**

### **Survey**

The BLM frequently authorizes permits and ROWs, or provides approvals for actions on federal lands in which portions of the overall project may take place on nonfederal lands or the federal action may have contingent or cumulative effects on nonfederal lands. Before the BLM can authorize (through permit, license, etc.) any project which may adversely affect significant cultural resources (i.e., historic properties), the BLM has the legal responsibility to take into account the effects of its actions on these resources. In order for the BLM to fully consider the effects of its actions, it also has the responsibility to gather the information necessary to know what cultural resources may be affected, evaluate the resources for eligibility for inclusion in the National Register of Historic Places (NRHP), and mitigate adverse affects to historic properties where possible.

If a project requires the use of federally owned surface lands as well as privately owned surface lands, there are two authorities that require federal agencies to apply the same NHPA Section 106 compliance standards to private lands as they do to federal lands. The regulations at 36 CFR, Part 800.4(b) require the federal agency to "take the steps necessary to identify historic properties within the area of potential effect." That this includes both federal and nonfederal lands is implicit throughout the statute and the regulations, since the regulatory definition of "area of potential effect" is "the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties" [36 CFR, Part 800.16(d)]. It makes no distinction between federal and nonfederal lands. More explicit, however, is EO No. 11593, entitled "Protection and Enhancement of the Cultural Environment." Under the EO, Section 1(3) it states that all Federal agencies: "...in consultation with the ACHP, institute procedures to assure that federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural, or archaeological significance." The BLM's responsibility for inventory, evaluation, and protection of cultural properties on lands outside the BLM administrative jurisdiction is limited according to the degree to which the Field Manager's decisions determine or control the location of surface-disturbing activities on those lands.

The BLM makes this policy known to project proponents, who in turn are responsible for providing all of the information the BLM requires for making informed decisions. If cultural resource data is lacking from private lands so that the BLM authorized officer cannot make an informed decision, the BLM cannot allow the undertaking to proceed. Thus, it is the responsibility of the project proponent to acquire the appropriate information.

Within the checkerboard land pattern that encompasses much of the project area, Wyoming BLM has set forth the policy that the entire project area, if it covers any federal lands, must be inventoried. The reasoning for this is that the distances between federal ownership and private ownership are so short, that the potential for the federal portion to not dictate the placement of the project on private is remote.

Split estate lands are defined as those lands where surface ownership has been transferred to private landowners from the federal government but the mineral rights were retained by the federal government. These situations arose either through patent under the 1914 amendment to the Homestead Act or purchase under the Stock-raising Act of 1916. Each of these Acts also allowed for the federal government to "reenter and occupy so much of the surface...as may be required for all purposes reasonably incident to the mining or removal of coal or other minerals." At the time of purchase, the buyer agreed to these terms. Since completing compliance of the NHPA Section 106 process is required of a federal agency by statute and regulation prior to the federal action, and then being able to complete that process is a purpose reasonably incident to the extraction of the minerals.

## Site Management

As stated above, the BLM has multiple authorities for requiring cultural resource inventories on private lands. This jurisdiction only holds forth with federal undertakings. Cultural resources that are located on private lands are recorded for the permanent record and appropriate mitigation measures are applied, in consultation with the private landowner. This jurisdiction comes from the requirement that the federal agency must take into account its effects on all historic properties. Once the federal undertaking has been fully processed, the federal responsibility for an historic property is completed. The historic property remains under the ownership of the landowner, thus the BLM has no control over the historic property outside of the venue of a federal undertaking.

## Evaluation of Cultural Resource Sites

### Criterion for Eligibility

The BLM evaluates the significance of cultural resources identified during inventory in consultation with the Wyoming SHPO to determine if the resources are eligible for inclusion in the NRHP. Cultural resource properties may be considered eligible for inclusion in the National Register if they meet one or more of the following criteria identified in 36 CFR 60.4:

- Criterion A: An historic property is associated with an event or events that have made a significant contribution to the broad patterns of America's history.
- Criterion B: An historic property is associated with the lives of persons significant to our past.
- Criterion C: An historic property embodies the distinctive characteristics of a type, period, or method of construction, or represents the work of a master, or possesses high artistic value or represents a significant and distinguishable entity whose components may lack individual distinction.
- Criterion D: An historic property has yielded or may be likely to yield information important in prehistory or history.

To facilitate evaluation of cultural resource values in Wyoming, the BLM has devised guidelines for determining the eligibility of archaeological and historical sites and historic trails (BLM Manual 8110.32). The guidelines supplement the National Register criteria for evaluation (36 CFR 60.4) and provide consistency across all BLM jurisdictions. Application of the guidelines ensures that significant cultural resources are recognized and managed accordingly.

### Aspects of Integrity

Integrity is the ability of a property to convey its significance. To be listed in the NRHP, a property must not only be shown to be significant under the National Register criteria, but it also must have integrity. The evaluation of integrity is sometimes a subjective judgment, but it must always be grounded in an understanding of a property's physical features and how they relate to its significance.

Historic properties either retain integrity (this is, convey their significance) or they do not. Within the concept of integrity, the National Register criteria recognize seven aspects or qualities that, in various combinations, define integrity.

To retain historic integrity a property will always possess several, and usually most, of the aspects. The retention of specific aspects of integrity is paramount for a property to convey its significance. Determining which of these aspects are most important to a particular property requires knowing why, where, and when the property is significant.

- **Location:** The place where the historic property was constructed or the place where the historic event occurred.
- **Design:** The combination of elements that create the form, plan, space, structure, and style of a property.
- **Setting:** The physical environment of an historic property.
- **Materials:** The physical elements that were combined or deposited during a particular period of time and in a particular pattern or configuration to form an historic property.
- **Workmanship:** The physical evidence of the crafts of a particular culture or people during any given period in history or prehistory.
- **Feeling:** The property's expression of the aesthetic or historic sense of a particular period of time.
- **Association:** The direct link between an important historic event or person and an historic property.

### **Contributing and Non-contributing to National Register of Historic Places Eligibility**

Properties that encompass large areas can be deemed to have contributing and non-contributing portions. Contributing portions are seen to retain integrity of the values for which the property is considered eligible for the NRHP. Non-contributing portions are identified portions of the property which are not deemed to retain the integrity of values which would render the property eligible for the NRHP. The determination of contributing versus non-contributing portions of an eligible property can be made at any time after adequate evaluation has been conducted.

Historic trails including the Overland and Cherokee, the Rawlins to Fort Washakie Freight Road, and the Rawlins to Baggs Freight Road, are considered eligible for the National Register under Criterion A. However, some portions of the trails no longer retain the aspects of integrity necessary for eligibility. Trail segments are evaluated pursuant to the National Register criteria of integrity (location, design, setting, materials, workmanship, feeling, and association). If a predominance of criteria is met, the segment will be considered contributing to the properties' overall NRHP eligibility.

### **BLM Use Allocations**

After determination of eligibility, significant cultural resource properties are further evaluated for assignment to one or more use categories. The BLM has established six use categories as follows:

1. **Scientific Use.** This category applies to any cultural property determined to be available for scientific or historical study using currently available research techniques, including methods that would result in the property's physical alteration or destruction. Recommendations to allocate individual properties to this use must be based on documentation of the kinds of data the property is thought to contain and the data's importance for pursuing specified research topics.
2. **Conservation for Future Use.** A cultural property included in this category is deemed worthy of segregation from all other land or resource uses, including cultural resource uses, which threaten the maintenance of its present condition or setting, and will remain in this use category until specified provisions are met in the future.
3. **Traditional Use.** This category is to be applied to any cultural resource known to be perceived by a specified social and/or cultural group as important in maintaining the cultural identity, heritage, or well being of the group. Cultural properties assigned to this category are to be managed in ways that recognize the importance ascribed to them and seek to accommodate their continuing traditional use.

4. **Public Use.** This category may be applied to a cultural property found to be appropriate for use as an interpretive exhibit in place, or for related educational and recreational uses by members of the general public.
5. **Experimental Use.** This category may be applied to a cultural property judged well-suited for controlled experimental study, to be conducted by the BLM or others, concerned with the techniques of managing cultural properties, which would result in the property's alteration, possibly including loss of integrity and destruction of physical elements. It should not be applied to cultural properties with strong research potential, traditional cultural importance, or good public use potential, if it would significantly diminish those uses.
6. **Discharged from Management.** This category is assigned to cultural properties that have no remaining, identifiable use. Most often these are prehistoric and historic archaeological properties, such as small surface scatters of artifacts or debris, whose limited research potential is effectively exhausted as soon as they have been documented. Properties discharged from management remain in the inventory, but they are removed from further management attention and do not constrain other land uses.

When a cultural resource property is assigned to one or more use categories, a decision is made pertaining to the management of that property. The criteria and guidelines for the evaluation of cultural resources and the assignment of significant cultural resource properties to specific use categories would remain unchanged under all the alternatives addressed in this plan.

### **Determinations of Effect**

Once the eligibility of an historic property has been determined, the BLM must then determine the effects a proposed undertaking may have on a cultural resource. Standard measures for reducing effects are to be considered part of the project design. Determination of effect must be made after standard treatment measures and best management practices have been integrated into the project design. The final project design must incorporate all agreed upon treatment measures and be included in the Conditions of Approval or components of the Surface Use Plan, Plan of Operations, or Plan of Development.

#### **A. No Historic Properties Affected**

If no cultural resource sites eligible for inclusion in the NRHP are present in the proposed project area, there are historic properties present but the undertaking will have no effect upon them, or a proposed project will not be visible from an historic property or there is no contrast between the project and the setting, the BLM will find that the undertaking has no potential to affect historic properties.

#### **B. No Historic Properties Adversely Affected**

If a proposed project will cause effects to an historic property, but the effects will not diminish the aspects of integrity nor the characteristics that make the property eligible for inclusion in the NRHP, only non-contributing portions of historic properties will be affected, or if setting is an important aspect of integrity for an historic property and the project will cause a weak contrast, the BLM will find that the undertaking has no potential to adversely affect historic properties.

### C. Historic Properties Adversely Affected

An adverse effect is found when an undertaking may alter, directly, or indirectly, any of the characteristics of an historic property that qualify the property for inclusion in the NRHP in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects cause by the undertaking that may occur later in time, be farther removed in distance, or be cumulative.

## **Consultation**

### **SHPO Consultation**

According to the Programmatic Agreement between the ACHP and the BLM, the BLM is required to consult with the Wyoming SHPO on eligibility and effects to each cultural property. The Wyoming BLM and Wyoming SHPO have developed a Protocol for consultation that serves to streamline the process and reduce consultation time frames from the guidelines set forth in the 36 CFR 800 regulations. Under the Protocol between the Wyoming BLM and the Wyoming SHPO, those sites recommended as eligible for listing under Criteria A, B, or C or the setting is an important aspect of integrity requires case-by-case consultation with the Wyoming SHPO. Additionally, the BLM has implied concurrence for determining eligibility and effects for sites eligible for listing under Criterion D of the NHPA. Determination of effects to sites follows the criteria outlined in 36 CFR 800.5.

### **Native American Consultation**

In addition to consultation with the Wyoming SHPO office, the BLM conducts Native American Consultation in compliance with Section 106 of the NHPA, the American Indian Religious Freedom Act of 1978, and EO No. 13007. The BLM has created a process for conducting Native American consultation for federal undertakings, as described in BLM Manual 8120 and BLM Manual H-8120-1. The BLM has worked extensively with tribes who have traditional ties to the region to establish a protocol for consultation. Consultation with Native American tribes occurs during the planning process of environmental impact statements and when individual projects are proposed that may impact properties that have traditional use (i.e., Traditional Cultural Properties [TCPs]) or are sacred to Native American cultures. When one of these site types are identified within proximity to a proposed undertaking, the project proponent and tribal governments are notified. Determinations of eligibility and effects the project may have on the site are determined in consultation with tribal representatives. The BLM does not authorize any undertaking that has the potential to affect TCPs or Native American Sacred Sites without first consulting with tribes. The likelihood of inadvertently affecting a TCP or sacred site is low because of the established protocols the BLM has developed with tribal representatives.

### **Interested Parties**

The BLM will solicit such input through the public participation opportunities afforded by the BLM's land use planning and environmental review processes established under the NEPA and the Federal Land Policy and Management Act (FLPMA) of 1976, and in accordance with regulations at 43 CFR Part 1610.3. Interested parties shall be invited to participate in the Section 106 consultation process if they have a demonstrated interest in a BLM undertaking or action on historic properties. Such interested parties may include, but are not limited to, local governments, grantees, permittees, owners of affected lands or land surfaces, Indian tribes, and other interested parties determined jointly by the BLM and SHPO.

In making determinations of effect, the BLM may request comments of interested parties. When the BLM makes a determination of adverse effect, they will request comments of interested parties. The BLM will maintain lists of interested parties based on their identified interests.

The BLM and SHPO will consult to identify invited concurring parties based on their demonstrated interest and level of participation. Invited concurring parties will be provided the opportunity to sign a Memorandum of Agreement or Programmatic Agreement. Refusal by an invited concurring party to sign an agreement will not invalidate the agreement.

### **Management of Cultural Resources**

Management objectives for significant cultural resource values provide a direct link between the assignment of properties to use categories and the achievement of the cultural resource program objectives. The basic management objectives for significant cultural resource values would remain unchanged under all of the alternatives addressed in this plan.

### **Standard Protective Measures**

Within the framework described above, the BLM has developed protective measures to minimize adverse effects (as defined in 36 CFR 800.5[1]) on significant cultural resource values. Protective measures are used in response to the proposed actions of BLM programs involving surface disturbance. These measures include cultural resource inventories, evaluation of cultural resources located during inventory, setting assessments where applicable, Best Management Practices and mitigation of potential adverse impacts on significant cultural resources.

A setting assessment is used to determine what physical features of a proposed undertaking will be visible from a historic property for which setting is an important aspect of integrity. Visibility of undertakings will vary. The scale of visual analysis should be commensurate with the scale of the undertaking. In the majority of cases, undertakings will not be seen beyond 3 miles; pipelines, fiber-optic and other ground level disturbance will not likely be seen beyond 1 mile. In rare cases, undertakings may be seen beyond 5 miles if they are unusually large or are skylined on the horizon, such as wind turbines and communication towers.

A setting assessment can also be used to determine whether a proposed undertaking will introduce audible elements to the historic property where setting is an important aspect of integrity. These proposed undertakings may include compressor stations, pumping stations, or wind turbines. An assessment of the existing audible elements will be documented and then the BLM archaeologist will work with the project proponent to ensure new audible elements do not result in an adverse effect. Best management practices and mitigation measures will be utilized to achieve this goal.

### **Best Management Practices**

In situations where a proposed undertaking has the potential to affect the physical integrity of an historic property, there are numerous measures that can be applied to reduce or eliminate the effects. BLM archaeologists work with the contracting archaeologist and the project proponent to determine which practice would best suit the needs of all parties. Application of BMPs is dependent upon the nature of the undertaking, and the nature of the historic property.

**Avoidance.** Avoidance through modification of the proposed undertaking is the primary and preferred measure used to protect cultural resources. This can be accomplished at the project planning stage.

**Monitoring.** In situations where avoidance of adverse effects is not feasible, or there is a determination of no adverse effects, but the potential remains for there to be adverse effects through inadvertent discovery, a BLM permitted archaeologist will monitor construction activities. The presence

of a monitor is to ensure that buried cultural materials are immediately identified and that construction activities in that area are halted to avoid further impacts to the site. Prior to BLM authorization of the project, the project proponent submits a discovery plan to the BLM for review which outlines the way in which cultural resources will be treated and the responsibilities of the project proponent. This plan is reviewed by BLM archaeologists and submitted to SHPO for concurrence. In the case where monitoring results in a discovery situation, the discovery plan is enacted. Depending on the nature of the discovery the project may be allowed to proceed, redesigned, or data recovery may be required.

**Standard Measures to Reduce Visual Contrast.** When a proposed project is found to be within the contributing setting of an historic property, an assessment of potential impacts is conducted through viewshed analyses, on-site inspection, and photo inspection. For historic trails such as the Cherokee Trail, Overland Trail, Rawlins to Fort Washakie Road and Rawlins to Baggs Road, protection measures would be carried out similarly to other historic properties if any project were found to be located within 0.25 mile of a contributing portion of the historic trail. When a proposed project is outside of the 0.25 mile buffer of the trail, but found to be within the viewshed that contributes to NRHP eligibility, analyses of potential impacts to the integrity of the setting would be carried out in the same way as other properties where setting is an aspect of integrity.

For the proposed project, best management practices and applicant-committed measures used to ensure that the contributing viewshed of historic properties are not adversely affected include:

- Preserving vegetation to the greatest extent possible;
- Utilizing undulating surface disturbance edges;
- Contoured grading;
- Controlling erosion;
- Restoring exposed soils as closely as possible to their original contour and vegetation;
- Operators would monitor and maintain visual mitigation measures for the approved project in accordance with a visual monitoring and compliance plan;
- The operator would maintain revegetated surfaces until a self-sustaining stand of vegetation is re-established and visually adapted to the undisturbed surrounding vegetation; and
- No surface disturbing activities would occur within either 0.25 mile or the visual horizon (whichever is closer) of a cultural property/historic trail.

Proposed mitigation measures to reduce visual impacts associated with the proposed project are listed under Visual Resources in **Appendix B, Table B-4**, Proposed Mitigation Measures. If adopted, these measures also would reduce adverse effects to historic properties where setting is an important aspect of integrity.

### **Mitigation**

Mitigation measures are determined by the types of proposed actions, the nature of the potential effect and the qualities of the historic property that render it eligible for NRHP listing. Mitigation measures are applied when best management practices will not reduce or minimize adverse effects. Mitigation may include data recovery, Historic American Buildings Survey/Historic American Engineering Report (HABS/HAER) documentation, or other agreed upon measures. Consultation with the Wyoming SHPO and the ACHP is required when proposed actions are expected to adversely affect properties eligible for the National Register and mitigation is determined to be the best course of action.

**Data Recovery.** There are two times during a project that data recovery may be implemented. The first is when it is determined prior to project construction that there will be an adverse effect to an

NRHP-eligible property. The project proponent, the BLM, and the SHPO work together to develop a data recovery plan which will mitigate the adverse effects. The second is after a discovery situation when it is determined that the project has already adversely impacted an historic property. Again, the project proponent, BLM authorized officer, and SHPO work to develop a plan that mitigates all effects of the construction. Data recovery in itself is a destructive process, thus it must be carried out in a way to successfully retrieve all pertinent information from the site.

**HABS/HAER.** HABS/HAER documentation as a mitigation measure may be implemented if no other mitigation measure would adequately minimize the adverse effect. This documentation includes large format photography, drawings, and research of the property to document all aspects of the property prior to adverse effects.

**Agreement Documents.** In situations where data recovery or HABS/HAER documentation is not appropriate to mitigate adverse effects or multiple historic properties will be affected by a single undertaking, the BLM will work with the SHPO and the project proponent to develop an agreement document. Depending on the nature of the undertaking, this may result in a Memorandum of Agreement (MOA) or a Programmatic Agreement (PA). The agreement document will outline the manner in which adverse effects will be mitigated, and the roles and responsibilities of each signatory. The agreement document stays in effect until all measures have been completed to the satisfaction of all parties.

### **Modification**

Under certain circumstances, the protective measures described are modified to take into account emergency situations and the surface management regulations for leasable and locatable minerals.

### **Cultural Resource Laws and Regulations**

American Antiquities Act of 1906—provides for permits to authorize scholarly use of properties, for misdemeanor-level penalties to control unauthorized use, and for presidential designation of outstanding properties as national monuments for long-term preservation.

NHPA:

- Section 106 directs all federal agencies to take into account effects of their undertakings (actions and authorizations) on properties included in or eligible for inclusion in the NRHP.
- Section 110 sets inventory, nomination, protection, and preservation responsibilities for federally owned cultural properties. Section 110(c) requires each federal agency to designate a Preservation Officer to coordinate activities under the act.

American Indian Religious Freedom Act of 1978 – establishes the policy of the U.S. to protect and preserve for the American Indian, Eskimo, Aleut, and Native Hawaiian the inherent right of freedom to believe, express, and exercise their traditional religions. Federal agencies are directed to evaluate their policies and procedures to determine if changes are needed to ensure that such rights and freedoms are not disrupted by agency practices.

Archaeological Resources Protection Act of 1979 – provides felony-level penalties for the unauthorized excavation, removal, damage, alteration, defacement, or the attempted unauthorized removal, damage, alteration, or defacement of any archaeological resource, more than 100 years of age, found on public lands or Indian lands. The act also prohibits the sale, purchase, exchange, transportation, receipt, or offering of any archaeological resource obtained from public lands or Indian lands.

Native American Graves Protection and Repatriation Act of 1990 – requires Native American consultation for the excavation and/or removal of “cultural items” including human remains, funerary objects, sacred objects, and objects of cultural patrimony. Consultation is also required if “cultural items” are discovered during land use activities.

EO No. 13007: Indian Sacred Sites – establishes access to and ceremonial use of Indian sacred sites by Indian religious practitioners on federal lands. The federal agencies shall avoid adversely affecting the physical integrity of such sacred sites and maintain confidentiality of said sites.