

“Tail Wagging the Dog”: Understanding, Preparing, and Planning for NHPA Section 106

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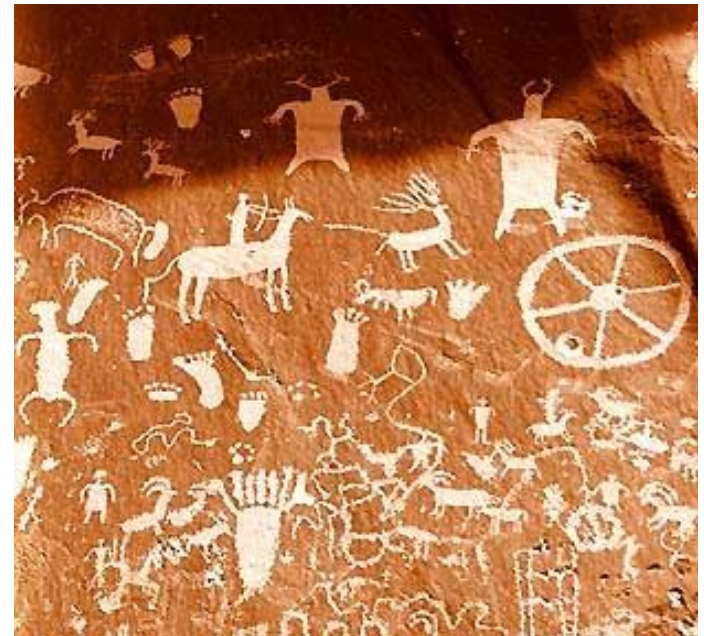
WYO-BEN, INC.

27TH ANNUAL MINE, DESIGN, OPERATIONS & CLOSURE CONFERENCE

MAY 7-9, 2019

Purpose – “Why NHPA?”

- 2016-2018 - Experiences
 - AEMA – attendance noted the increased attention being paid to NHPA
 - Fundamental misunderstanding about the process leading to timetable delays
- Questions: Is the “Tail Wagging the Dog”?
 - Regulatory creep vs. Industry misunderstanding/confusion
- Original Plan –
 - Address the basic concepts of NHPA and provide a primer
 - Process vs. Outcome
 - Agency Manuals / State Specific criteria
 - Too much material to reasonably cover in our time
 - Focus on BLM / Wyoming State Protocols
- Revised Plan –
 - Address areas of misunderstanding
 - Provide legal background to better understand practical examples (Wyo-Ben, Inc.)



Confusion - NEPA & NHPA

- Differences
 - Public Involvement
 - NEPA – “make diligent efforts to involve the public . . . provide public notice”
 - NHPA – similar + **CONSULTATION** (seeking agreement where feasible)
 - Tribes
 - NEPA – Encouraged / EO 13175 “Consultation and Coordination w/ Indian Tribal Governments
 - NHPA – **MANDATORY** (regardless if property is located on tribal lands)
- Section 106 requirements **MAY** but are not always performed under NEPA
 - See 40 C.F.R. Parts 1500-1508 (NEPA seeks to integrate process with other planning / environmental review)
 - See 36 C.F.R. Par 800 (NHPA encourages the coordination with other agencies)
 - 36 C.F.R. Part 800.8(a) “Coordination With the National Environmental Policy Act”
 - 36 C.F.R. Part 800.8(c) “Use of the NEPA process for Section 106 Purposes”
- Considerations
 - 36 C.F.R. 800.8(b) – NEPA Catex = Section 106
 - Use of NEPA process for Section 106 purposes requires that the process/results be consistent with Section 106 procedures
 - Objection/Challenge to NEPA process for insufficiency. See 36 C.F.R. 800.8(c)(2)
 - Coordination may be easier than substitution

NHPA – History

- 1966 National Historic Preservation Act (NHPA) (P.L. 89-665; 16 U.S.C. §470)
- Executive Order 11593, “*Protection and Enhancement of the Cultural Environment*” – agency burden to know if projects threatened historic places
- 1976 Amendments – addition of Section 106 Review
- 1980 Amendments – addition of Section 110 (codifies EO 11593)
- 1992 Amendments – increased role of Native Americans in consultation (P.L. 102-575)
- 1992 Amendments – defined “undertaking” (scope)



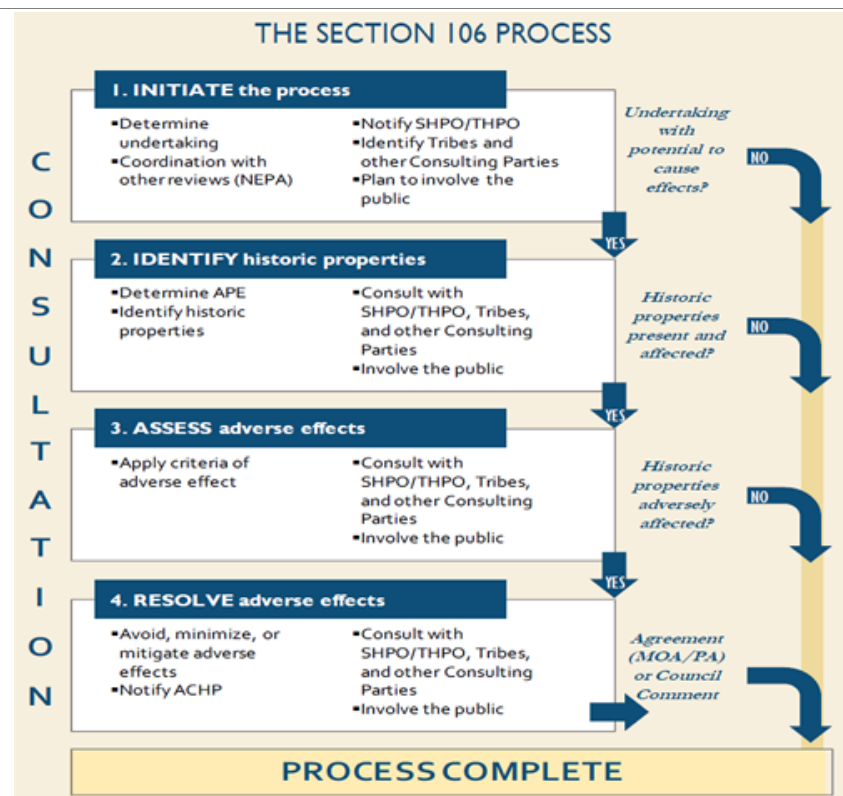
Statutory / Regulatory Framework

- 16 USC §470 - Statutes
- 36 C.F.R. Part 800 – Regulations
- Agency Manuals - various agencies enact (*i.e.* FERC, USFS, BLM, VA, FEMA, HUD, etc.)
- ACHP – Guidance documents
 - November 2018 – Guidance
- BLM – (*USFS 2360 for another day*)
 - BLM Manual Series 8100 “Managing Cultural Resources”
 - BLM Manual Series 8400 “Visual Resource Management”
 - BLM Instructional Memorandum – Nationwide / Statewide
 - December 8, 2019 – IM (compensatory mitigation)
 - BLM Resource Management Plans (RMPs defining VRM)
 - 2012 Nationwide Programmatic Agreement (ACHP / BLM)
 - 2015 Statewide Protocols



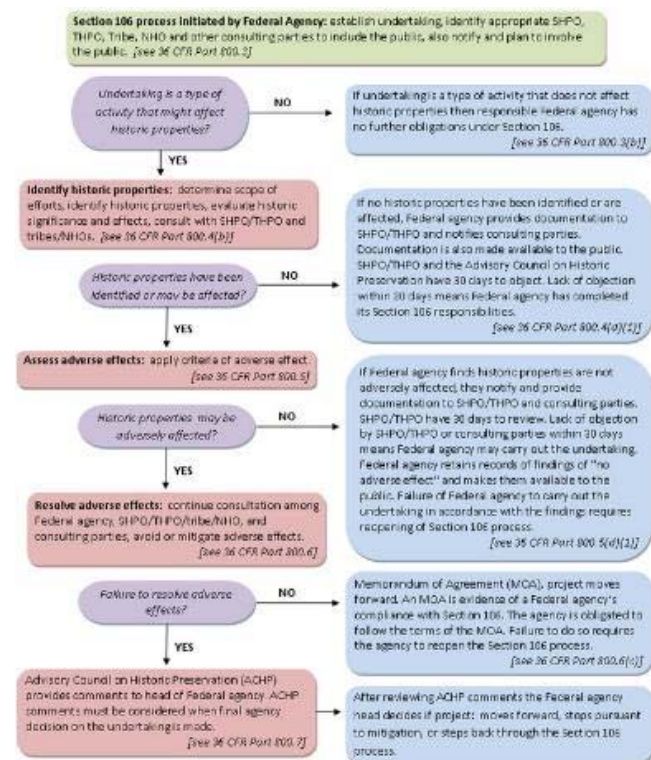
Basics of 106: 4 Step Process

- o 1. Initiate the process
- o 2. Identify “historic properties”
- o 3. Determine the potential adverse effects
- o 4. Resolve the adverse effects



..... Complications

- 1. Initiate Process
 - A. Evaluate Undertaking Status
 - B. Determine Lead Agency
 - C. Coordinate with other reviews
 - D. Identify consulting parties (continuing)
 - E. Develop public involvement plan
- 2. Identification of Historic Properties
 - A. Determine area of potential effect
 - B. Reasonable & good faith effort to identify historic properties
 - Seek input from consulting parties
 - Class 1 / 2 / 3 review
 - C. Resolve between consulting parties (SHPO / THPO) if property is eligible
 - ACHP makes determination if disagreement
- 3. Determination of Adverse Effects
 - A. Review which characteristics qualify a property for inclusion
 - B. Review and catalogue all potential (may) adverse effects
- 4. Resolution of Adverse Effects
 - A. Develop and evaluate alternatives or modifications that could avoid, minimize, mitigate
 - B. Consult and agree on mitigation efforts
 - C. Draft MOA (or PA) outlining agreement
 - D. If no agreement – cancel resolution and seek ACHP comments
 - E. Implement comments into final decision



Section 106 - Confusion

- Lack of clarity and/or ambit for regulatory discretion in several procedural aspects of Section 106.
 - Lack of guidance = potential overreach by agency
 - Lack of guidance = misunderstanding by project applicant
 - Regulatory discretion = potential to adjust to needs of differing project
 - Regulatory discretion = potential to impact timelines
- Areas of greatest concern (our experience)
 - Understanding the vital role of tribal consultation and the extent as to how far the consultation should reach
 - Determining the APE (Direct/Indirect)
 - Compensatory Mitigation – how is it a public benefit, related to the project, and what is appropriate



Tribal Consultation (Step 1 Issue)

- Tribal consultation is mandatory - P.L. 102-575
 - Regulations – 36 CFR 801(c)(2)(ii)
 - “Make reasonable and good faith effort to identify Indian tribes that shall be consulted”
 - “Consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected”
- Non-defined – which tribes attach religious and cultural significance to historic properties?
 - See BLM/WY Protocols, Sec. IV(B)
 - Do those properties need to be their own? (creating by them, used by them, or merely significant to them)
 - What qualifies as religions / cultural significance and how can a tribe show it?
 - Do we default that they MAY attach significance and we therefore should allow them to opt out?
 - Is mere presence in an area sufficient cause to contact a tribe?
 - Does presence include traditional lands, areas of travel, areas of raiding?



Areas of Potential Effect (Step 2 Issues)

- Determine the area of potential effects (“APE”)
 - “In consultation with the SHPO/THPO, the agency official shall . . .determine and document the area of potential effects . . .” – 36 C.F.R. 800.4(a)(1)
 - **“Area of potential effects** – means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influence by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” – See 36 C.F.R. 800.16(d)
- Identify historic properties
 - **“Historic property** – means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic PlacesThis term includes artifacts, records, and remains that are related to an located within such properties. . .” – See 36 C.F.R. 800.16(l)(1)
 - Level of effort – “shall make a reasonable and good faith effort to carry out appropriate identification . . .field survey” (Class I / II / III)
 - Class III – generally required in previously unsurveyed APE
 - Consultation with the parties (tribes)
 - “All cultural resources within the APE must be evaluated for NRHP eligibility” – See BLM / WY Protocols, Section V.B.i.
- Evaluate historic significance
 - Determine if property is eligible for the National Register
 - What characteristics qualify it and does it have “integrity” as relating to setting, etc.
 - **“Criteria of adverse effect** – 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 in a manner that would diminish the integrity . . .” See 36 C.F.R. 800.5

APE (Direct)- continued

- Direct APE – not defined in regulation or BLM Manual, rather a function of discretion based upon broad guidelines in the 2015 WY Protocols
 - “BLM will consult with SHPO on undertakings for which a standard APE has not been developed. . .”
 - No defined guidance on **how** the Direct APE is establish – open to determination by the BLM after consultation with the SHPO
 - Anecdotal – Wyoming is 100 ft beyond the disturbance footprint



APE (Indirect)- continued

- Indirect Effect - not defined in regulation or BLM Manual, rather a function of BLM/WY PA and left open ended.
 - “The indirect APE shall include known or suspected historic properties and their associated setting where setting is an important aspect of integrity.” – BLM / WY Protocols, Sec. V.B.i
 - Adverse effect - “introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.” 36 C.F.R. 800.5(a)(2)(v)
- What is sufficient basis to claim a “suspected historic property” as a basis for expanding the indirect APE?
- How far do we need to expand the indirect APE to capture any visual elements that would diminish the integrity of the setting?
 - (V)(D)(iii) – “if setting, feeling and/or association are contributing aspects of integrity for any historic property, and a proposed undertaking will be visible from the historic property, and there is a moderate or strong contrast”
 - Appendix C I (II)(B) not seen beyond 5 miles (need to consider how far away can be seen)
 - BLM Manual 8400 – Foreground to middleground = 3.5 to 5 miles



Compensatory Mitigation (Step 4 Issue)

- Adverse effects that cannot be avoided may result in a requirement of “compensatory mitigation”
 - “Compensatory mitigation, or compensating for an effect by replacement or providing substitute resources or environments, will be considered after application of all other forms of avoidance, minimization and mitigation within the APE have been exhausted. Compensatory mitigation can occur at, or immediately adjacent to, the area affected but can also be located anywhere in the same general geographic area. . . .Compensatory mitigation generally provides a public benefit.” – BLM / WY Protocols, Sec V.F.ii.c
- Confusion
 - What constitutes compensatory mitigation?
 - Does it have to be directly related to the property being affected?
 - What constitutes a public benefit?
 - What is within the “general geographic area”
 - Is there a requirement of compensatory mitigation for indirect impacts?
- Not all projects should have compensatory mitigation
 - Priority it to AVOID / MINIMIZE / MITIGATE – only if that cannot be done should compensatory mitigation be considered
 - Be willing to challenge with ACHP if you disagree (all must be approved by the BLM)
- Volunteering to pay compensatory mitigation
 - Will be incorporated into the MOA / PA
 - Does not guarantee this is all that will be required
 - But does serve as a basis for future requests



Takeaways

- 1. Challenge expansions of APE (indirect especially – early)
 - Consultation with lead agency (BLM) who has authority to determine
 - If indirect APE are being expanded on basis of VRM – determine early if “setting” is a vital part of the “integrity” of the area for listing
- 2. Challenge and disagree with a finding of adverse effect (especially to setting)
 - Be active consulting party in determining the characteristics of a property that qualify it for inclusion
 - Be active consulting party in disagreeing with findings of adverse effect – especially when those implicate visual / setting as it expands current and future need for indirect APE
- 3. Know your limitations on mitigation
 - Be prepared with a plan on how to avoid / minimize / mitigate any adverse effect
 - Do not freely volunteer compensatory mitigation – use voluntary compensatory mitigation as a tool
 - Be willing to challenge the applicability of compensatory mitigation to the adverse effect to the characteristic of the property
- 4. Be or Get Active
 - Drafting of the PA, be willing to consult and be an active party
 - Be aware of the state protocols and the potential effects to you and your projects in the future
- 5. KNOW THE PROCESS – do not assume that subsuming into NEPA or coordination within NEPA will be a simple fix to problems arising under Section 106.