Questions and Answers: National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA) coordination

1. **Why is the BLM issuing the IM and where does the authority/recommendation for coordination of NHPA and NEPA come from?**

Answer: The purpose of this IM is to provide clarity on how and when BLM should coordinate its NHPA Section 106 and NEPA compliance efforts as a means of gaining efficiencies in a manner that may lead to better, more informed agency decisions. The Council on Environmental Quality's (CEQ) NEPA regulations state that, to the fullest extent possible, agencies shall prepare draft Environmental Impact Statements (EISs) concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental laws and executive orders. 40 CFR 1502.25. Coordination of NHPA and NEPA is also useful during the preparation of an Environmental Assessment (EA). The NHPA Section 106 regulations similarly address the coordination of the Section 106 process with the requirements of other statutes, such as NEPA, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archaeological Resources Protection Act (ARPA), and agency-specific legislation. See 36 CFR 800.2(a)(4), 800.3(b), and 800.8(a)(1). (To avoid confusion, it should be noted that in addition to the coordination of NHPA and NEPA, the Section 106 regulations also set forth a specific process where agencies may use the NEPA process to comply with NHPA Section 106. This process, which is often called "integration," is described at 36 CFR 800.8(c), and further discussed below in Question 10.)

Section 800.2(a)(4) of the Section 106 regulations states that the agency official should coordinate Section 106 consultation with other requirements of other statutes, including NEPA. It also encourages agencies to use existing agency procedures and mechanisms to fulfill the consultation requirements of the Section 106 regulations to the extent possible. For instance, a coordinated approach allows an agency's NEPA process for information gathering, analysis, and public involvement to be used to assist in compliance with similar aspects of the requirements of NHPA Section 106. Coordination works best when officials coordinate the steps of the Section 106 process, as appropriate, with the overall planning schedule for the undertaking, and with any reviews required under authorities such as NEPA. 36 CFR 800.3(b). In this way, information can be timely and appropriately considered, and shared with the public and consulting parties, thereby assisting the agency in meeting the requirements of both statutes in a timely and efficient manner. 36 CFR 800.8(a)(1). While both the Section 106 regulations and the NEPA regulations encourage federal agencies to coordinate compliance with various statutes, particularly NEPA and NHPA, as early and as thoroughly as possible for improved tracking and efficiency, they provide few specifics. As procedures to comply with NHPA and NEPA vary among agencies, this guidance addresses opportunities for coordination consistent with the BLM's NHPA and NEPA compliance procedures.

2. **If a project qualifies for a Categorical Exclusion (CX) under NEPA, what are the BLM official's responsibilities under Section 106 of the NHPA?**

Answer: Compliance with Section 106 of the NHPA is independent of NEPA, and therefore, compliance with NEPA through reliance on a CX cannot satisfy an agency's obligations pursuant to NHPA Section 106. Under Section 106, the BLM must consider whether the proposed action is an "undertaking" for the purposes of the NHPA, and whether it is the type of activity that has the potential to cause effects to historic properties assuming historic properties are present. If the proposed action is an undertaking that is the type of activity that could cause effects to historic properties, then the BLM must comply with the procedural requirements of Section 106 before approving the undertaking.

3. **What are the distinctions between the NEPA and NHPA Section 106 requirements for external (public and tribal) notification and involvement?**

Answer: NEPA and NHPA Section 106 both place an emphasis on notifying the public about proposed federal actions and involving the public in the decision making process. CEQ's NEPA regulations require agencies to "make diligent efforts to involve the public in preparing and implementing their NEPA procedures," 40 CFR 1506.6(a), and "to provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents," 40 CFR 1506.6(b). In cases where an EIS is prepared, NEPA scoping involves the notification of and opportunities for comments on a proposed action from other agencies, organizations, tribes, local governments, and the public for the purpose of determining the scope of issues and identifying significant issues related to the proposed action. Agencies are required to make the draft EIS available for public review, invite comments, and respond to any comments submitted. By contrast, while the CEQ NEPA regulations require some form of public involvement in the preparation of EAs, they do not require scoping or agencies to make EAs available for public review and comment. 40 CFR 1506.6; DOI NEPA regulations at 43 CFR 46.305; BLM's NEPA Handbook H-1790-1 at page 76.

The NHPA Section 106 regulations also recognize the importance of public involvement in the federal decision-making process. Agencies are required to "provide the public with information about an undertaking and its effects and seek public comment." 36 CFR 800.2(d)(2). The regulations require the BLM to inform and/or involve the public during the steps of the Section 106 process.

In addition to the public involvement requirements, the NHPA Section 106 regulations outline a process whereby the agency consults with parties that have a specific interest in the effects of an undertaking on historic properties to address concerns about historic properties. Distinct from NEPA, which focuses on disclosure of information in order that the public may be aware of, comment upon, and inform decision making, the Section 106 process is intrinsically a consultative process. The Section 106 process "seeks to accommodate historic preservation concerns with the needs of the Federal undertaking through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, which include other Federal, State, and local agencies, and Indian tribes, and the interested public." 36 CFR 800.1(a). Consultation is defined in the Section 106 regulations as "the

process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." 36 CFR 800.16(f). The consultation process is used to identify and evaluate historic properties potentially affected by an undertaking, and seek to avoid, minimize or mitigate any adverse effects on those properties. In spite of the differences in how to involve the public, i.e., public involvement versus consultation, and the way in which the processes consider and address information about a proposed federal action, both NHPA Section 106 and NEPA encourage coordination, as discussed in Question 1 above.

4. **Does NHPA Section 106 require federal agencies to conduct an inventory of historic properties for all alternatives analyzed in an EA or EIS? What are NEPA's requirements for identifying and discussing cultural and historic resources, and how can these requirements inform the NHPA Section 106 process?**

Answer: The NHPA Section 106 regulations only require the BLM to make a reasonable and good faith effort to identify historic properties within the Area of Potential Effect of the proposed undertaking, 36 CFR 800.4(b)(1); there is no requirement in the NHPA Section 106 regulations to identify and evaluate historic properties for all alternatives analyzed under an EA or EIS. However, the Section 106 process may require additional identification of historic properties as part of the BLM's effort to develop and evaluate alternatives to the proposed undertaking to avoid or mitigate adverse effects.

Historic and cultural resources under NEPA cover a broader range of resources than historic properties identified and defined under NHPA Section 106. NEPA requires agencies to describe the environment likely to be affected by the proposed action and alternatives, and to discuss and consider the environmental effects of the proposed action and alternatives, so as to allow the public and the decision maker to compare the consequences associated with alternate courses of action. This analysis requires agencies to identify important historic and cultural resources not limited to those listed in or eligible for the National Register of Historic Places, and to discuss the potential impacts to such resources for all alternatives evaluated in an EA or EIS. Typically, the BLM may meet the requirements for identifying historic and cultural resources in NEPA documents through a literature search, reconnaissance inventory or Class II inventory. The identification of historic and cultural resources and the analysis of impacts to such resources during the preparation of an EIS or EA under NEPA for all alternatives can be useful information for agencies to consider in the Section 106 process as part of the agency's obligation to resolve adverse effects (if any) to historic properties through the development and evaluation of alternatives or modifications to the undertaking that could avoid, minimize or mitigate such adverse effects. See Question 8 below.

5. **If a project is analyzed in an EA and the NHPA Section 106 process results in a finding of adverse effect, can the EA still result in a FONSI or does such a finding require BLM to analyze the environmental consequences of the project in an EIS?**

Answer: An adverse effect determination in the Section 106 process does not necessarily mean that the BLM will be unable to reach a Finding of No Significant Impact (FONSI) pursuant to NEPA. Section 110(i) of the NHPA states that nothing in the NHPA shall be construed to

require the preparation of an EIS where not otherwise required under NEPA. The Section 106 regulations also state that the determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," which would require preparation of an EIS, must consider likely effects on historic properties. 36 CFR 800.8(a)(1). However, neither NEPA nor the NHPA require the preparation of an EIS solely because the BLM finds that the proposed undertaking will potentially adversely affect an historic property. E.g., 40 CFR 1508.14. Rather, the BLM will still need to determine whether the environmental effects of the action are "significant" within the meaning of 40 CFR 1508.27.

6. **When does the BLM need to complete the NHPA Section 106 process?**

Answer: Section 106 requires the BLM to take into account the potential effects of its proposed undertakings on historic properties listed in or eligible for listing in the National Register of Historic Places prior to approval of an undertaking, which NHPA defines as a "project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency." The goal of the NHPA Section 106 process is for agencies to identify historic properties potentially affected by a proposed undertaking, assess the effects and seek ways to avoid, minimize or mitigate any adverse effects. Such consideration must occur before BLM conducts or authorizes activities that restrict its ability to consider alternatives to avoid, minimize, or mitigate the undertaking's adverse effects on historic properties. See Questions 4, 7, 12 and 13.

7. **Which BLM documents represent agency approval of an "undertaking" that may not be signed prior to completing the NHPA Section 106 process?**

Answer: The BLM must complete the NHPA Section 106 process before signing the decision documents except in the limited circumstances discussed in this document. EISs, Determinations of NEPA Adequacy (DNAs), EAs, and FONSIs are not decision documents. Instead, the Decision Record (DR) that documents the decision regarding the action for which an EA or DNA was completed is the relevant decision document (H-1790-1, Chapter 8.5, the BLM's National Environmental Policy Act Handbook). Thus, the BLM should satisfy its Section 106 compliance prior to signing a DR. While the BLM's general policy is to use DRs to document its decisions when relying on an EA/FONSI, in those instances where, because of specific program requirements no DR is used, and instead the BLM uses a program-specific approval as the decision document, the NHPA Section 106 process must be completed prior to execution of those program-specific decision documents. The following is a non-exhaustive list of instances in which some decision documents other than a DR might be used: grazing permits, oil and gas leases, special recreation permits, and mining plans of operation. A ROD, which is used when BLM prepares an EIS, also serves as a decision document and may not be signed before the BLM has completed the NHPA Section 106 process. Finally, some land use planning decisions contain implementation-level decisions in addition to plan-level decisions, and therefore, care should be taken to ensure that appropriate compliance with Section 106 occurs prior to BLM's approval of such decisions. See Question 13 below.

8. **What documentation regarding impacts to cultural and historic resources is necessary for EAs, EISs, and DNAs, respectively, and how does the NHPA Section 106 process inform the preparation of these documents?**

The NEPA requires that Federal agencies address and discuss the reasonably foreseeable impacts of the proposed action and alternatives to historic and cultural resources, if any, whether preparing an EA or an EIS. For EAs, the federal agency must consider whether a Federal action will significantly impact the human environment, which should include an evaluation of "unique characteristics of the geographic area such as proximity to historic and cultural resources" and "the degree to which the action may adversely affect [resources] listed in or eligible for the National Register of Historic Places or may cause loss or destruction of significant . . . cultural or historical resources." 40 CFR 1508.27(b)(3), (b)(8). If the Federal agency is making a finding of no significant impact, then it will issue a FONSI based on the analysis in the EA. If the Federal agency concludes that the action will have significant impacts, then it must prepare an EIS that analyzes the environmental consequences of the proposed action and alternatives, including consequences to historic and cultural resources. 40 CFR 1502.16(g). While not a NEPA document, a DNA should reflect the cultural and historic resources analysis considered in the previous NEPA document that the Federal agency is relying on to support a new decision.

The information obtained through the NHPA Section 106 process, including tribal consultation, is important to the NEPA analysis and disclosure of impacts. Any avoidance, minimization or mitigation measures adopted as a result of the NHPA Section 106 process may be an important part of the discussion of historic and cultural resources in the NEPA documents.

9. **How does the BLM "complete" the NHPA Section 106 process?**

Answer: The Section 106 process may be concluded in several different ways depending on the outcome of resource identification, consideration of adverse effect, and the resolution of adverse effects process. For instance:

(a) If the BLM determines that the proposed action is not an undertaking: the BLM documents the finding, which concludes the Section 106 process.
(b) If the BLM determines the undertaking is of a type that does not have potential to cause effects on historic properties, assuming such historic properties are present: the BLM documents the finding, which concludes the Section 106 process.
(c) If the BLM determines that no historic properties are present or historic properties are present but the undertaking will have no effect on such properties: the BLM provides documentation of its finding to the SHPO/THPO, notifies all consulting parties and makes its finding available to the public, and if the SHPO/THPO does not object within 30 days the Section 106 process is complete.
(d) If the BLM determines in consultation with SHPO that there is no adverse effect and no consulting party objects to that finding: the BLM documents and provides information to the public upon request, which concludes the Section 106 process.
(e) If the BLM determines that there is an adverse effect and resolves that effect through development of a Memorandum of Agreement (MOA) in consultation with the SHPO/THPO,

ACHP (if involved), Indian tribes, and other consulting parties: the BLM executes the MOA and, when signed by all required Signatory Parties the Section 106 process is complete.
(f) If the BLM determines that there is a potential for an adverse effect but that the undertaking is so complex that the effects cannot be determined prior to the approval of the undertaking, involves nonfederal parties with major decision-making responsibilities, consists of numerous routine management activities, involves staged undertakings, or that other circumstances warrant a departure from the normal 106 process, and the BLM prepares a project-specific programmatic agreement (PA) in consultation with the SHPO/THPO, ACHP, Indian tribes, and other consulting parties: the BLM executes the PA and, once signed by all required Signatory Parties, the Section 106 process is complete.
(g) If the BLM determines that there is an adverse effect and is unable to resolve that effect and terminates consultation: the BLM Director or an Assistant Secretary or other officer with appropriate Department-wide or agency-wide responsibility shall request ACHP formal comments, document consideration of those comments, and make a decision, which concludes the Section 106 process.

10. **Can the BLM use an EA/FONSI or EIS to satisfy the NHPA Section 106 requirements?**

Answer: Yes. The BLM may use the process and documentation required for the preparation of an EA/FONSI or an EIS to comply with NHPA Section 106, in lieu of the procedures set forth in 36 CFR Part 800.3 through 800.6. Use of the NEPA/NHPA "integration" (as opposed to coordination) authority requires the BLM to notify the SHPO/THPO and the ACHP of its intention and to comply with the procedural standards set forth in 36 CFR Part 800.8(c)(1)-(5).

11. **What is required to satisfy tribal consultation in the NHPA Section 106 process?**

Answer: The Section 106 regulations require agencies to ensure an affected Indian tribe has a "reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 CFR 800.2(c)(2)(ii)(A). There is no simple measure of sufficiency for tribal consultation efforts. Unless there is a consultation agreement with a particular tribe, Field Officers must determine what constitutes an adequate amount of consultation on a case-by-case basis and document their judgments to ensure a complete record. The amount of consultation should take into account the level of impact, the project scope, and the complexity of issues involved. The agency's final decision for an undertaking should be communicated in writing to the affected tribe with an explanation. A good way to gauge whether consultation efforts have been sufficient is to consider the degree to which an objective review of the administrative record would conclude that the BLM made a reasonable and good faith effort to identify, notify, involve, and respond to all Indian tribes and their members potentially affected by a proposed action. The Secretary of the Department of the Interior issued a tribal consultation policy that provides Department-wide guidelines and standards. The policy may be found at: http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=269697.

12. **Can the BLM use a phased identification and evaluation process or defer final identification and evaluation of historic properties? How does the BLM document the use of these processes?**

Answer: The Section 106 regulations provide agencies with some flexibility as to how to satisfy the requirements of Section 106 in different circumstances. The regulations permit agencies to use a "phased process" to conduct identification and evaluation efforts and to apply the adverse effects criteria "[w]here the alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted." 36 CFR 800.4(b)(2), 800.5(a)(3). The use of a phased process, however, does not permit the agency to bypass the Section 106 process. Instead, phasing allows the agency to comply with the Section 106 regulations over time, given the nature and scope of the undertaking at issue. When using a phased process in appropriate circumstances, agencies have an affirmative obligation, to "establish the likely presence of historic properties within the [defined] area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties." 36 CFR 800.4(b)(2). In other words, an agency cannot simply state an intention to identify and evaluate historic properties at a later date. Rather, the agency's record documenting its decision must document its identification and evaluation efforts initiated prior to that decision. Agencies must "make a reasonable and good faith effort" to identify historic properties taking "into account past planning, research and studies, the magnitude and nature of the undertaking, degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." As specific aspects or locations of an alternative are refined or access is gained, the agency proceeds with identification, evaluation, and applying the criteria of adverse effects.

The Interior Board of Land Appeals (IBLA) and federal courts have recognized the BLM's use of a phased approach to Section 106 compliance. For instance, the IBLA acknowledges that a phased approach to Section 106 compliance is sometimes permissible in the context of oil and gas leasing and development. See, e.g., Mandan, Hidatsa, and Arikara Nation, 164 IBLA 343, 354 (2005).For oil and gas leasing and development, the first phase occurs during the land use planning process where BLM makes allocation decisions about whether to open or close areas to oil and gas leasing, and under what conditions (i.e., lease stipulations). At this stage, the BLM must begin to identify and evaluate information about historic properties, and where appropriate to protect such properties, make modifications to the allocation decisions or include lease stipulations that may preclude surface occupancy. The second phase of decision making for purposes of compliance with Section 106 involves oil and gas leasing decisions for areas identified as open in the land use planning process. Before the BLM issues a lease through a competitive or noncompetitive process, the BLM must analyze the existing information regarding historic properties and, when appropriate, ensure that adequate stipulations are attached to such potential leases, including, e.g., stipulations notifying lessee of the need to complete the Section 106 process before any ground-disturbing activities may be approved, and that the BLM reserves the authority to modify or disapprove of activities in order to protect historic properties. The BLM must complete the Section 106 process before it approves any oil and gas activities (i.e.,

approval of an application for permit to drill, or other site-specific authorization, which would be considered the third phase for Section 106 purposes).

Additionally, agencies are also permitted to "defer final identification and evaluation" of historic properties, but this must be "specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with [NEPA] pursuant to § 800.8." 36 CFR 800.4(b)(2). In other words, similar to the use of a phased process, agencies cannot simply bypass the Section 106 process. Instead, agencies must initiate consultation for the proposed undertakings, and seek to identify and evaluate historic properties within the area of potential effects, and document the process for completing Section 106 through an MOA, PA, or the NEPA process as outlined in 36 CFR 800.8(c). An example of the type of undertaking where deferred final identification and evaluation of historic properties may be appropriate is an authorization for a linear right-of-way covering hundreds of miles.

13. **What is the BLM's NHPA Section 106 obligation when approving a land use plan?**

Answer: The BLM's approval of a land use plan, i.e., a new plan, revision, or amendment, is an undertaking that may trigger the Section 106 process depending on the nature of the decision being made. In general, land use plan decisions do not in and of themselves authorize specific activities that have the potential to cause effects on historic properties, but instead establish future management goals and objectives for resource management, as well as the measures needed to achieve these goals and objectives. These types of decisions do not require BLM to initiate the Section 106 process. See 36 CFR 800.3(a).

Based on several recent federal court decisions, there may be some resource allocation decisions evaluated in a proposed land use plan that may have the potential to affect historic properties, e.g., new oil and gas allocation decisions that restrict BLM's ability to consider alternatives to avoid, minimize or mitigate potential affects to historic properties in subsequent phases. In these situations, BLM must initiate consultation with the SHPO/THPO, Indian tribes, and inform the public in order to begin to identify and evaluate historic properties potentially affected by future actions that may be authorized consistent with the approved land use plan. However, BLM is not required to complete the Section 106 process before approval of a land use plan and a phased approach may be appropriate as described in Question 12. In short, determining whether a land use planning decision triggers Section 106 consultation will depend on the nature of the decision and the extent to which it may constrain the subsequent consideration of alternatives to avoid, minimize, or mitigate potential adverse effects on historic properties in the future. 36 CFR 800.1(c).

Where a land use planning decision may designate or allow for specific resource uses that do not require subsequent implementation-level decisions, e.g., designating an area as "open," "closed," or limited" to off-highway vehicle use, they require completion of the NHPA Section 106 process prior to a decision being made. See BLM Land Use Planning Handbook H-1601-1 at page 29 (Mar. 11, 2005). The level of effort to identify and evaluate historic properties must be commensurate with the character of the alternative land use planning decisions being

proposed. A phased process for compliance with the NHPA Section 106 process for these land use planning decisions may be appropriate. See Question 12 above.