Preserving America's Heritage

February 14, 2020

Bryan Hockett
Deputy Preservation Officer
Bureau of Land Management
Nevada State Office
1340 Financial Blvd.
Reno, NV 89502

REF: *Guidance for Historic Property Identification and Evaluation under the Section 106 Process, State of Nevada*

Dear Mr. Hockett:

On December 20, 2019, the Advisory Council on Historic Preservation (ACHP) hosted a teleconference with representatives from the Bureau of Land Management (BLM), Nevada State Office, and the Nevada State Historic Preservation Office (SHPO) to provide guidance concerning ongoing questions regarding federal agency responsibilities under Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108) and its implementing regulations, "Protection of Historic Properties" (36 C.F.R. Part 800). The ACHP initiated this meeting at the request of the Nevada SHPO, following earlier discussions and extensive email correspondence among ACHP, BLM, and SHPO staff, which also included a conference call with these parties and the National Park Service (NPS), National Register of Historic Places (NRHP) staff. This letter is intended to document discussion points raised during these meetings and provide clarification on questions raised by the BLM regarding its federal agency responsibilities under Section 106.

1) *In advance of the December meeting, the BLM raised questions regarding its responsibility to consider consulting party comments as it develops and delineates areas of potential effects (APEs). These included: "Are federal agencies required to inventory and assess eligibility and effect to resources that lie outside the established APEs if the undertaking has no potential to cause adverse effects outside of those APEs?" and "Are federal agencies required to establish APEs and levels of effort to identify historic properties multiple times throughout the Section 106 process?"*

The Section 106 implementing regulations *do not* require federal agencies to identify historic properties falling outside of a properly delineated APE, or evaluate potential effects an undertaking may have on them. However, these questions suggest that some consulting parties believe APEs are not being adequately sized and documented at the outset of a Section 106 consultation to consider the full range of potential effects on historic properties, as the regulations *do* require. The number of incidents where such disagreements occur within Nevada lead the ACHP to recommend that BLM reassess how it is delineating this geographical area and further consider whether it is reasonable to take a more expansive approach to defining them.

Under the regulations, the federal agency is responsible for determining and documenting the APE in consultation with the appropriate SHPO and/or Tribal Historic Preservation Officer (THPO) where tribal lands are involved. Although concurrence from a SHPO/THPO on an APE's boundaries *is not* required under the regulations, consideration of their feedback on this process *is* required. Therefore, finalizing an APE without consideration of such feedback is not consistent with the regulations and should be reevaluated and clearly documented in the administrative record for the undertaking's Section 106 review. The ACHP's online archaeology guidance (at https://www.achp.gov/Protecting-Historic-Properties/Section_106_Archaeology_Guidance) provides much more detailed guidance on these issues.

Once an APE has been adequately determined and documented, it should not remain static, but rather can be or should be adjusted as a federal agency further develops the details of the undertaking and learns more about potential historic properties and how they may be affected. Again, the input of consulting parties, including continued feedback from the SHPO/THPO, is crucial to this informed revision and refinement of the APE throughout Section 106 review. The ACHP recommends that the federal agency make this information available to the appropriate parties in advance of the identification effort, to allow for timely responses to inform the scope of any anticipated fieldwork.[1] In order to avoid multiple or duplicative identification efforts, the ACHP also recommends starting out with an APE that is reasonably broad enough to capture the full geographic extent of the undertaking's potential effects, and reassess it as more information is gathered.

To expedite this process and minimize future disputes regarding the adequacy of an APE's boundaries, the BLM may, in consultation with the SHPO, consider establishing standardized APEs for routine undertakings or classes of undertakings where the potential effects on historic properties may be reasonably certain. Such an approach could be consulted upon and agreed to through the State Protocol Agreement between the BLM and Nevada SHPO, which the ACHP understands is currently being amended. Alternately, if a federal agency feels it cannot meet these identification obligations before an undertaking must be approved due to time, budget, or other restrictions, the Section 106 process provides flexibility to phase identification efforts through the development and implementation of a memorandum of agreement or programmatic agreement.

2) *Regarding the identification effort, the BLM also asked: "Are federal agencies required to analyze all cultural resources under all 5 Property Types for every undertaking, regardless of size/scope of the undertaking, level of federal involvement and control over the resources involved, and potential to adversely affect historic properties?"*

The NRHP recognizes five types of historic properties: districts, sites, buildings, structures, and objects. During the December meeting, the BLM requested clarification on its requirements under law or regulation to evaluate all cultural resources under all five property types for every undertaking, versus what might be considered a best practice or standard approach. Strictly speaking, neither the NRHP nor Section 106 implementing regulations require an agency to assess properties under all five property types for every evaluation effort, but they do require an approach that considers guidance from other knowledgeable parties and past planning and studies, as described further below.

Once an APE is has been developed and the federal agency has reviewed existing information about the area and sought information from consulting parties regarding the any known potential historic properties and the undertaking's potential effect on them, if present, it then proceeds to the identification process and implements procedures to meet the "reasonable and good faith" standard as required by the regulations. A

[1] Conversely, the SHPO/THPO and other consulting parties must provide feedback in a timely manner to support responsible federal agency decision making. Consulting parties who do not provide feedback to agencies within a reasonable timeframe potentially forsake their ability to do so at a later date.

federal agency's identification effort can be considered reasonable in scope and carried out in good faith when, in consultation with the SHPO/THPO and others as appropriate, it has considered the factors specified in the Section 106 regulations at 36 CFR 800.4(b)(1) that are used to determine the level of effort it will make: the magnitude and nature of the undertaking, degree of federal involvement, nature and extent of potential effects on historic properties, and likely nature and location of historic properties within the APE (again, our online guidance discusses these factors in detail). Ultimately, it is up to the federal agency to consider and weigh these factors in developing an effective and reasonable approach to the identification of historic properties in Section 106 review.

In conducting its identification effort, federal agencies *are required* to consult with the SHPO/THPO to determine the scope of identification efforts, including the factors described above. Therefore, if the SHPO/THPO provides guidance or feedback as to the nature and potential of historic properties that may exist within a given area, the federal agency *is required* to consider this feedback in the development of its identification strategy. The federal agency *must also* acknowledge the special expertise of Indian tribes and Native Hawaiian organizations in assessing the eligibility of historic properties that may possess religious and cultural significance to them. The agency may ultimately not reach the same conclusion or eligibility determination as suggested by the SHPO/THPO, Indian tribes, and other consulting parties, but it nevertheless must clearly document its decision-making process, both relative to the findings of its investigations and the reasonable and good faith standards. Similarly, as described in 36 CFR 800.4(b)(1), the agency *must* "…take into account past planning, research and studies" to identify historic properties; accordingly, if previous studies have identified, for example, a preponderance of eligible properties within a geographic area falling within a certain property type, the agency *must* consider this evidence and factor it into its own evaluation effort. National Register Bulletin *How to Apply the National Register Criteria for Evaluation* provides additional guidance on how these categories should be considered and selected.

As stated during the December meeting, the ACHP regularly encourages federal agencies to seek the advice, guidance, and assistance of the ACHP in resolving disputes with other consulting parties on its level of effort to identify and evaluate historic properties [36 CFR § 800.2(b)(2)]. Because the ACHP established this standard, its views on what constitutes an appropriate level of effort to identify eligible historic properties deserve careful consideration in the Section 106 process. In the end, however, the ACHP's views are advisory and the federal agency makes the final decision regarding what level of identification is appropriate. Similarly, disputes regarding the eligibility of a historic property may be resolved by requesting a determination of eligibility from the Keeper of the NRHP pursuant to the process referenced in 36 CFR 800.4(c)(2) and described fully in 36 CFR 63. In such cases, determinations made by the Keeper are final and binding upon an agency and SHPO. The NPS has confirmed that such disputes can include a review of the appropriateness of the selected property type versus another.

3) *In advance of the meeting, the SHPO provided examples of correspondence from the BLM in which they refused to respond to technical or typographical errors in reports, characterizing such edits as "non-substantive" in nature and not "meet[ing] the intent of consultation."*

During the December call, the participants discussed the Section 106 case in question that led to the correspondence quoted above. In that case, the preparer of the materials had transposed data which resulted in the presence of historic properties within an APE being factually incorrect, as follows: "… SHPO states that there are discrepancies between the BLM transmittal letter and the report text. Specifically, the transmittal letter transposed the site numbers of those sites ***inside*** the report's Project Area with those sites ***outside*** of the Project Area" (emphasis added).[2] Characterizing such comments as "non-substantive," the same letter went on to conclude: "In the future, if the [BLM] does not receive

[2] Douglas W. Furtado, District Manager, Battle Mountain District Office to Rebecca L. Palmer, State Historic Preservation Officer, July 20, 2018.

substantive comments from the SHPO within the 35-day period specified, we will assume SHPO concurrence with any determinations requested by the BLM per Section III.A.2 [of the Nevada State Protocol Agreement]." The ACHP finds the spirit of this response troubling, as it both diminishes the expertise of the SHPO and subverts its consultative role in the Section 106 process. The ACHP acknowledges that such human-generated errors are perhaps unavoidable, especially in lengthy archaeological survey reports, and we encourage all parties to exercise flexibility in how such errors are addressed. We also observe that it is *not* a SHPO/THPO's responsibility to proofread federal agency reports.

During the meeting, the BLM acknowledged this approach as problematic and stated it is not a statewide policy. The meeting participants discussed possible strategies for addressing these comments in future, with a general consensus for the following approach. Any errors in submission documents prepared by the BLM—whether they are typographical or otherwise—that inhibit a SHPO/THPO or consulting party's ability to accurately interpret, and form conclusions from, the identification of historic properties or an undertaking's potential effects on them, should be considered substantive in nature and potentially meriting a request for correction or additional information from the BLM. Those that do not prohibit such an understanding can be noted for correction but should not inhibit a formal response from the SHPO to further the Section 106 process. Under no circumstances should a federal agency "assume concurrence" where a SHPO has indicated it needs additional information to draw a reasonable conclusion from the submission materials.

The ACHP recognizes that many SHPOs and THPOs continue to face rising workloads without significant new resources, so it urges federal agencies to work with them to ensure they have adequate time, and the proper documentation, to respond to agency requests to consult. The ACHP encourages the BLM to explore other ways they might assist SHPOs and THPOs in addressing heavy Section 106 review workloads by providing them assistance and flexibility where possible.

4) *The ACHP understands that the Nevada State Protocol Agreement is currently being amended, and we hope that this document can be a tool to reconcile these disputes and reach consensus on productive approaches moving forward.*

State-specific protocols between the BLM and SHPOs provide for the implementation of the BLM's National Programmatic Agreement on a state-by-state basis and establish how consultation will occur under this alternative approach to Section 106 compliance. The Nevada State Protocol Agreement deviates from the standard Section 106 process somewhat in that it requires SHPO concurrence at several decision points not required by the regulations. The BLM has indicated that it might consider utilizing the regulations versus the Protocol approach for individual undertakings on a case-by-case basis to circumvent these additional SHPO authorities and realize greater efficiencies in their reviews. Although the ACHP recognizes the BLM's authority to do so, we also share the SHPO's concerns that this approach diminishes the effectiveness and consistency of the Protocol by allowing BLM to utilize an ad hoc approach for when it may suit only its own interests and timelines. We stress the importance of the mutually beneficial efficiencies the Protocol provides as the foundation of the SHPO-BLM relationship. We also understand from the BLM that this ad hoc approach is being addressed in the ongoing Protocol amendment process. We look forward to continuing to be a participant in that process and ensuring the best possible vehicle for fostering this relationship.

Thank you for the opportunity to comment on these issues. As stated during the meeting and previously in this letter, the ACHP is available to provide assistance and guidance—both formally and informally—to the BLM, SHPO/THPO, and other consulting parties at each stage of the Section 106 process. If we may be of further assistance, or you would like to discuss this matter, please contact Bill Marzella, ACHP Liaison to the BLM, at (202) 517-0209, or via e-mail at bmarzella@achp.gov.

Sincerely,

Reid J. Nelson
Director
Office of Federal Agency Programs

cc: Rebecca L. Palmer, Nevada State Historic Preservation Officer