



April 28, 2022

Mr. Jon K. Raby  
State Director  
Bureau of Land Management  
1340 Financial Blvd.  
Reno, NV 89502

Ref: *Guidance for Consultation under the Section 106 Process, State of Nevada*

Dear Director Raby:

On March 17, 2022, the Advisory Council on Historic Preservation (ACHP) met with the Nevada State Historic Preservation Officer (SHPO) to discuss the Bureau of Land Management's (BLM) compliance efforts 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 SHPO reported a number of persistent problems with the manner in which BLM conducts and documents its Section 106 reviews. The ACHP has subsequently met with BLM staff to discuss these problems, and both parties have acknowledged that guidance and clarification from the ACHP on certain matters would be helpful to resolve these issues and reach common ground on the meaning and intent of the Section 106 implementing regulations. This letter is intended to document discussion points raised during these meetings and provide clarification on questions raised by the SHPO regarding the BLM's federal agency responsibilities under Section 106.

- 1) *What is the BLM's responsibility to consider and respond to "substantive" and "non-substantive" comments provided by the SHPO and other consulting parties?*

In various letters to, and agreement documents negotiated with, the SHPO, the BLM has indicated that it will only respond to—and in some cases only consider—comments made by the SHPO that are "substantive," a term which the BLM defines in its National Environmental Policy Act (NEPA) Handbook (H-1790-1). Examples of comments meeting this definition include those that: question, with reasonable basis, the accuracy of information or methodology for assumptions used in the environmental analysis; present new information relevant to the analysis; or present reasonable alternatives. The BLM has acknowledged to the ACHP that this definition may have not been made explicitly clear to the SHPO in past exchanges, and therefore the use of "substantive" as a NEPA term of art may not have been immediately transparent.

Nevertheless, in a review of a sample of letters from past Section 106 reviews, the ACHP has struggled to find any questions and comments posed by the SHPO that fail to meet this definition. Often, these matters deal with fundamental steps in the Section 106 review, including the appropriate delineation of areas of potential effects (APEs), eligibility of historic properties for listing in the National Register of Historic Places (NRHP), and the results of consultation with Indian tribes regarding historic properties of religious and cultural importance to them. In some cases, they identify clerical or typographic errors. In past letters

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to the BLM, the ACHP has observed that even minor typographic and clerical errors in letters and reports may inhibit the ability of a consulting party to accurately interpret an agency's Section 106 findings.

The BLM's position on not responding to comments it deems non-substantive is particularly problematic when it comes to determinations of eligibility for potential historic properties for listing in the National Register. At certain points throughout the Section 106 review, if an agency does not receive a response from a SHPO (or Tribal Historic Preservation Officer [THPO], if applicable) or other consulting party, it may proceed with its initial analysis and determination. Such an action presumes that no responses have been received, which is not the case here. In other key steps in the process, this is not a possibility; namely, in determining which resources are eligible for NRHP listing as historic properties. These are determinations an agency *cannot* make unilaterally but must rather consult with the SHPO/THPO and any Indian tribes that attach religious and cultural significance to the identified properties. If any agency cannot reach agreement on the eligibility of these properties, it must seek determinations of eligibility from the Keeper of the NRHP, as described in 36 CFR §§ 800.4(c)(1) and 63.

Furthermore, the Section 106 implementing regulations do not differentiate between substantive and non-substantive comments, and therefore do not allow agencies to define broad categories of comments that may be considered or dismissed. However, the regulations do provide a clear definition of consultation, which requires "seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process."<sup>1</sup> Instead of attempting to consult to resolve these issues on a case-by-case or programmatic basis, the BLM often simply ignores or fails to respond to many of the comments and requests for information raised by the SHPO. The ACHP recognizes the high demands on BLM and SHPO staff time, which can be exacerbated by multiple rounds of document review. For this reason, we recommend that the BLM consult with the SHPO to identify measures to reduce these strains, such as identifying categories of comments that can be accepted with no additional acknowledgement required. Until such time as these approaches can be concurred upon, the ACHP recommends that the BLM avoid the use of "substantive" terminology in its dialogue with SHPO.

2) *What is the BLM's responsibility to consult on the development of APEs under its template visual APE policy?*

Under the Section 106 regulations at 36 CFR §§ 800.4(a)(1) and 800.16(d), the federal agency is required to determine and document the APE in consultation with the SHPO/THPO. The ACHP has previously provided general guidance to the BLM on their obligation to consult with the SHPO to determine the APE and will not repeat that advice here (refer to letter enclosed).

However, the BLM has continued to experience difficulties with the implementation of its visual-APE template, which it adopted as a statewide policy under an Instruction Memorandum in 2020. The SHPO has pointed to procedural flaws in the development of the visual APE methodology that could compromise the APEs being developed for these classes of undertakings; most significantly, that the APEs for visual effects are delineated from the outermost point at which undertakings may *adversely* affect historic properties, rather than merely *affect* historic properties, as required by the regulations. As the SHPO has correctly pointed out in correspondence to the ACHP and BLM, this distinction is important as the APE delineation precedes the identification effort, meaning that the BLM at this point in the process would likely not have sufficient data regarding historic properties within the APE to understand what visual effects on them might be adverse, based on their respective significance criteria and aspects of integrity.

Again, the ACHP recommends that the BLM consult with the SHPO to refine this methodology to reach a

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<sup>1</sup> 36 CFR § 800.16(f).

mutually agreeable approach. Doing so, hopefully, will reduce the recurrent comment-and-response cycles that have occurred for undertakings over the past several years. We also encourage the BLM to expand its use of visual aids (maps, keyed photographs, etc.) to illustrate the mathematical principles used to develop APEs against real-world conditions. Doing so will especially help consulting parties and members of the public to understand the underlying analysis that informed the development of these APEs. The ACHP also notes that, unless these template APEs are adopted as part of an applicable program alternative (including potential adoption as an appendix to the existing Nevada State Protocol Agreement), the BLM is still required to consult on the development of APEs on a case-by-case basis with the SHPO/THPO.

3) *What are the documentation standards that federal agencies must meet to document APEs and other deliverables in the Section 106 review?*

The SHPO has stated that submission materials provided by the BLM in initiation packages do not meet the documentation standards that they need to review these materials, especially for APE maps. The SHPO has requested, in general, that APEs be depicted on 7.5' USGS topographic maps provided in hard copy for their review. The documentation standards found in the Section 106 regulations at 36 CFR § 800.11 are not prescriptive when it comes to the specific formats of deliverables; however, they do state that agencies should provide photographs, maps, and drawings as necessary to illustrate the APE and other aspects of the undertaking. The regulations also encourage agencies to take into account applicable local and state standards and guidelines when preparing submissions. Although the ACHP is not aware of any statewide submission guidelines for Section 106 reviews in Nevada, the SHPO has been consistent in requesting submissions at this scale in correspondence to the BLM. For these reasons, we encourage the BLM to accommodate these requests made by the SHPO. If the BLM cannot meet these requests on a consistent basis, we encourage you to consult with the SHPO to reach a mutually agreeable format, recognizing SHPO staff workload and the limitations of their abilities under the Historic Preservation Fund Grant agreements.

The BLM has also stated in discussions with the ACHP that the preliminary nature of these APEs at the initiation stage might not warrant the time and materials necessary to map and print them at the requested scale (i.e., they are not intended to represent final APEs, but rather as starting points to inform the consultation and identification processes). If this continues to be the case, we encourage the BLM to work with SHPO staff to appropriately characterize these submissions as draft or study areas. This is especially true for large undertakings when multiple alternatives are under consideration for analysis in the NEPA document, and APEs are more likely to shift as further design and analysis is conducted. As the BLM expands its use of National Environmental Policy Act (NEPA) processes and documentation to comply with Section 106 in lieu of the procedures set forth in 36 CFR §§ 800.3 through 800.6 (commonly known as NEPA substitution), it is critical that these issues are resolved with the SHPO/THPO, Indian tribes, and other consulting parties. We appreciate the outreach the BLM has made to the ACHP to develop appropriate strategies for NEPA substitution.

Thank you for the opportunity to comment on these issues. As our earlier points recommended, the ACHP feels strongly that these issues should be resolved through consultation between the SHPO and BLM. These efforts may take the form of meetings, mediation sessions, or trainings offered by the ACHP and attended jointly by BLM and SHPO staff. The ACHP is ready and willing to assist both parties in develop such programs or materials to remedy these issues. We will be in touch to facilitate these further discussions. In the meantime, if the ACHP may be of further assistance in this regard, please contact Bill

Marzella, ACHP Liaison to the BLM, at (202) 517-0209, or via e-mail at [bmarzella@achp.gov](mailto:bmarzella@achp.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Reid J. Nelson", with a long horizontal flourish extending to the right.

Reid J. Nelson  
Director  
Office of Federal Agency Programs

Cc Rebecca L. Palmer, Nevada SHPO

Enclosure