

Programmatic Agreements and Memorandum of Agreements: The National Historic Preservation Act and Section 106 Cultural Resource Compliance

Cultural resources can be thought of broadly as virtually anything that has a value to people or very specifically as defined within various legislative mandates. Within the confines of this discussion, this latter usage is what drives the development of Programmatic Agreements and Memorandum of Agreements.

When a federal agency conducts or permits an action, Section 106 of the National Historic Preservation Act [<http://www.achp.gov/nhpa.html>] requires that the agency must consider the effects of the action on historic properties that are eligible or potentially eligible to the National Register of Historic Places [<http://www.achp.gov/regs-rev04.pdf>]. This is done broadly by:

- 1) Identifying any historic properties that might be in the area that will be potentially affected by the action;
- 2) Determine if the historic properties are eligible or potentially eligible to the National Register;
- 3) Determine if the National Register eligible historic properties will be affected by the action. If they will be affected, then the agency will seek a way to minimize the adverse affects of the action on the historic properties. How this “mitigation” of impacts is achieved is codified in a **Memorandum of Agreement** for one-time actions or a **Programmatic Agreement** for more complex activities that are ongoing or for which the outcomes cannot be easily foreseen.

These steps are completed by the federal agency that is undertaking the action, or has permitting authority (“Lead Agency”), in consultation with a number of players. These include state and tribal historic preservation officers (SHPO, THPO – required for any Section 106 consultation), other land managers and property owners, Native American tribes or other cultural groups that are related to the historic properties (eg. Traditional Cultural Properties (TCPs) [<http://www.nps.gov/nr/publications/bulletins/nrb38/>], action funding entities, Advisory Council for Historic Preservation [<http://www.achp.gov/>], and potentially other members of the public. While the Lead Agency and the SHPO or THPO are required to sign the agreement resolving adverse affects, any or all of the other parties may be invited to be a signatory to the agreement.

In the Adaptive Management Program, there are currently three overarching cultural resource compliance agreement documents in place. There are also a couple of action-specific documents that fall within the broad parameters of the 1994 Programmatic Agreement.

- 1) The 1994 Programmatic Agreement on Cultural Resources (1994 PA) [<http://www.usbr.gov/uc/envdocs/eis/gc/pdfs/Attach/attach2.pdf>]

This is the original cultural resources compliance document that was prepared in conjunction with the 1996 Environmental Impact Statement on the operations of Glen Canyon Dam. Broadly, it stipulated that cultural resources along the Colorado River corridor would be identified and evaluated for National Register eligibility, a Monitoring and Remedial Action Plan would be developed that would guide future monitoring activities and remedial actions necessary to address any adverse effects to historic properties that was identified through the monitoring. Finally, a Historic Preservation Plan was to be developed that would guide the long-term management of the historic properties under the 1994 PA. This document would incorporate all of the previous actions. While work has occurred under all of these stipulations, only the identification, evaluation, and development of the Monitoring and Remedial Action Plan have been substantially completed. A draft Historic Preservation Plan was developed, but never finalized.

- a) Two MOAs were developed, in 2008 and 2009, to specifically address excavation that was going to occur a number of archaeological sites that had been identified as having adverse erosional effects. The excavation activities were planned to continue at additional sites beyond those identified in the two MOAs, but when some concerns were raised about the excavations by participating tribes, the Bureau of Reclamation terminated excavation as a mitigation strategy.
- 2) Memorandum of Agreement for Non-Native Fish Control in the Colorado River below Glen Canyon Dam

This document establishes cultural resources compliance for the activities surrounding potential non-native fish removal activities that the Bureau of Reclamation might undertake for compliance with the endangered species act. The focus of this document is on the Grand Canyon as a TCP to the participating tribes and the potential adverse impacts that killing fish would have on the integrity of the property. The resolution of adverse effects provided for is to attempt to conduct live removal of non-native species (primarily rainbow trout) and put them to beneficial use. Since completion of the MOA no removal activities have been conducted. Additionally, it is no longer considered feasible to conduct live removal of non-native fish because of the presence of Whirling disease in the system, so renegotiation of the appropriate means to minimize impacts will need to occur before removal activities can be conducted.

- 3) Memorandum of Agreement for Glen Canyon Dam High-Flow Experimental Protocol

This document establishes cultural resources compliance for potential high flows from Glen Canyon Dam that would occur under a ten-year experimental plan. The flows are being proposed a mechanism to help preserve or restore sediment deposits at levels higher than can be reached by regular water releases from the dam. Potential direct impacts to archeological sites as a result of the higher flows is assessed prior to the first flow event and action taken to protect against adverse effects if necessary. In addition,

monitoring of cultural resources over the full duration of the experiment is used to identify effects (either positive or negative) that may occur to historic properties, including archaeological sites and TCPs. While the compliance approach presupposes that the net effects of the high flows will be positive for cultural resources, it allows mitigative treatments to occur should adverse impacts be identified during the course of the experiment.