

Section 106 of the National Historic Preservation Act

State Historic Preservation Office

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Wyoming State Parks & Cultural Resources

National Historic Preservation Act 1966 (NHPA)

- Established Federal Policy to:
 - Foster productive harmony between modern society and historic resources
 - Provide preservation leadership
 - Administer historic resources in spirit of stewardship
 - Assist preservation efforts of state and local governments, Tribes, and the public

Section 106

- The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of any expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Requirements of Section 106

- Prior to taking any action on an undertaking, agencies must:
 - Take effects on historic properties into account
 - Afford the Advisory Council on Historic preservation a reasonable opportunity to comment

Participants

- Federal agencies
- Council
- Consulting Parties
- Public

Public involvement



Initiate Section 106 Process

Establish undertaking
Identify appropriate SHPO/THPO
Plan to involve the public
Identify other consulting parties



NO UNDERTAKING/
NO POTENTIAL TO
CAUSE EFFECTS

UNDERTAKING MIGHT AFFECT HISTORIC PROPERTIES



Public involvement



Identify Historic Properties

Determine scope of efforts
Identify historic properties
Evaluate historic significance



NO HISTORIC
PROPERTIES
AFFECTED

HISTORIC PROPERTIES ARE AFFECTED



Public involvement



Assess Adverse Effects

Apply criteria of adverse effect



NO HISTORIC
PROPERTIES
ADVERSELY
AFFECTED

HISTORIC PROPERTIES ARE ADVERSELY AFFECTED



Public involvement



Resolve Adverse Effects

Continue consultation



MEMORANDUM
OF AGREEMENT

FAILURE TO AGREE



COUNCIL COMMENT

Addressing Multiple Steps to Expedite Consultation

- As process proceeds, Agency can address multiple steps at one time
- SHPO/THPO must agree
- Consulting parties and the public must still have adequate opportunity to participate

Step I: Initiate the Process

- *Section 800.3*
- Early Consideration and
- Consultation

Establish Undertaking

- Agency must determine:
 - whether its action meets the 1992 NHPA definition of undertaking
 - if so, whether it is a type of activity that has potential to affect historic properties

Definition of Undertaking

- Project, activity, or program under direct or indirect jurisdiction of a Federal agency
- Includes activities that:
 - are carried out by or on behalf of agencies
 - receive Federal funds
 - require a Federal permit, license, or approval
 - are regulated under delegated programs

Determining Potential to Cause Effects

- Based on the potential of the undertaking as a type of activity
- PROPSECTIVE - no need to know whether historic properties are present
- Knowledge about specific properties irrelevant - assumptions about effect must be validated by proceeding with the review

Confidentiality

- Agency must withhold information on historic properties if it determines that release would:
 - cause a significant invasion in privacy
 - risk harm to a historic property
 - impede use of a traditional cultural property
- Agencies may withhold information on undertakings to protect privacy of affected parties

Determining Area of Potential Effect (APE) and Scope of Effort

- Area of Potential Effect
- Consultation with SHPO required in determining APE
- Specific requirement to gather info from Indian tribes and Native Hawaiian organizations for identifying properties of religious and cultural significance (on or off tribal lands)

Step II: Identify Historic Properties

- **Evaluation of Significance**
- **Apply National Register Criteria**
- **Evaluate Integrity**
- **Determine Eligibility**

Evaluation of Significance

- National Register criteria now applied with SHPO/THPO and Indian tribes that attach religious and cultural significance (on or off tribal lands)
- Agencies shall acknowledge expertise of Indian tribes and Native Hawaiian organizations in assessing eligibility of properties of concern to them

National Register Properties

- Property Types:
 - Buildings
 - Structures
 - Objects
 - Sites
 - Districts
- National, State, or local significance

National Register Criteria

- A. Association with events
- B. Association with important people
- C. Distinctive design /construction
 - distinctive construction characteristics
 - work of a master
 - artistic value
 - a distinguishable entity
- D. Data potential

Integrity

- Properties must have integrity of (as appropriate):
 - Location
 - Setting
 - Design
 - Materials
 - Workmanship
 - Feeling and association

Determining Eligibility

- Consensus determination process between Agency and SHPO/THPO
- Agency must consult, but agreement not required, with Indian tribes or Native Hawaiian organizations off tribal lands
 - These groups may ask the Council to request a formal determination

“No Historic Properties Affected” Finding

- Appropriate when:
 - the Agency has determined (through a consensus determination or determination by the Keeper) that no historic properties are present in the APE; or
 - there are historic properties present but the undertaking will not have any effect on them

Review of “No Historic Properties Affected” Finding

- Agency must provide documentation to the SHPO, notify consulting parties, and make documentation available to the public
- SHPO or Council may object within 30 days, triggering next step in process
- If no objection, Section 106 complete

Step III: Assess Adverse Effects

Section 800.5

Definition & Council Involvement

Criteria of Adverse Effect

- Adverse effect occurs when integrity of property diminished
- Agency must:
 - consider both direct and indirect effects
 - consider reasonably foreseeable effects: cumulative, later in time, or at a distance
 - consider all qualifying characteristics of property

Examples of Adverse Effect

- Physical destruction of or damage to all or part of the property
- Relocation of property now explicitly identified as an adverse effect
- Neglect/deterioration not an adverse effect if a recognized quality of property of religious and cultural significance to tribes or Native Hawaiian organizations
- Transfer/lease an adverse effect only when property leaving Federal control

Applying Criteria of Adverse Effect

- Agency applies criteria with:
 - SHPO
 - any Indian tribe that attaches religious and cultural significance to a property
- Agency must consider views provided by other consulting parties & public
- Agency initially notifies consulting parties and invites their views

Review of No Adverse Effect Finding (NAE)

- In consultation with SHPO, Agency can propose NAE, with or without conditions
- Agency must provide all consulting parties with finding and documentation
 - Lack of SHPO response within 30 days considered agreement
- Agency must seek Council review only in event of a disagreement

Council Review of NAEs

- Council review now required only:
 - to resolve disputes
 - if dispute, Agency must refer to Council
 - Indian tribes & Native Hawaiian organizations can bring dispute directly to Council
 - when Council requests within 30-day review period
- 15 day Council review period -- no response equals concurrence
- Council determination binding

Step IV: Resolve Adverse Effects

Section 800.6

- Agreements
- Council Role

Council Involvement Not Needed in Many Adverse Effect Cases

- MOAs can be negotiated and finalized between Agency and SHPO without Council involvement
- Council may still become involved:
 - when requested by the Agency or a consulting party
 - when the Agency and SHPO/THPO cannot reach agreement
 - when necessary to ensure purposes of Section 106 and NHPA are met

Memorandum of Agreement

- Outcome of consultation when agreement can be reached
- Governs the undertaking and all of its parts
- Legally binding document
- Specifies the agreed upon alternatives and/or mitigation
- Identifies parties responsible for implementing

Failure to Resolve Adverse Effects

- If Agency and SHPO cannot agree, Council **must** now be invited to participate
- Council may consult or choose to comment
- If further consultation not productive, Agency, SHPO, or Council can terminate

Council Involvement in Individual Cases

- The council may elect to participate when one or more of the criteria are met;
 - Criterion 1: Substantial impacts on important historic properties
 - Criterion 2: Important questions of policy or interpretation
 - Criterion 3: Procedural problems
 - Criterion 4: Issues of concern to Indian tribes

Programmatic Agreements

- PAs for complex or multiple projects
 - Developed like MOAs
 - Council must be invited to consult
 - Lack of agreement on PA for multiple undertakings triggers case-by-case review
- PAs for regional or national programs
 - Consultation required (as appropriate) between Council, NCSHPO, SHPOs/THPOs, tribes and Native Hawaiian organizations, and the public

Sources of Information

-<http://www.achp.gov/pubs.html>

-<http://www.cr.nps.gov/nr/publications/>

-<http://wyoshpo.state.wy.us/>



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