

Section 106 Example 1 (short, but worked with ACHP!)

REDACTED will consult with Federal undertakings assuming the role of SHPO in the section 106 process on tribal lands pursuant to the NHPA and the regulations 36 CFR 800. The participants are the lead agency, the THPO, the SHPO on non-tribal lands, the cultural committee, other culturally affiliated tribes, local agencies, local governments.

To ensure compliance with the Section 106 process, the THPO will work closely with the lead agency to identify and evaluate historic and cultural properties on and off tribal lands. To initiate the Section 106 process, wherein the determination that an activity is an undertaking is established. At this point in the process the lead agency will identify the appropriate THPO or SHPO, other tribes and other consulting parties and plans at made to involve the public. This may result in a “no undertaking/no potential to cause effects to historical properties” finding. This is done to ensure that developments on tribal lands do not harm but protect and preserve historic, religious and cultural sites.

The second step is the identification phase of the 106 process. The lead agency will continue to work with the THPO or SHPO its efforts to identify and evaluate historic, religious and cultural properties that are important. We will continue consultation and decide if the result is affected or no affect. If affected then step three will follow.

The third step will be to assess the adverse effects in the Section 106 Process. If a historic property, as identified in the previous step of the section 106 process, is affected by an undertaking that the agency applies the criteria of adverse effect.

The lead agency will continue to consult with the THPO or SHPO, as determined in the initial step of the section 106 process, and will determine either that there are no adverse effects to the historic property or there will be adverse effects to the historic property. If there are adverse effects, then the next step in the Section 106 process will be followed.

The fourth step in the 106 process, is the resolve adverse effects. The lead agency in consultation with the THPO or SHPO, other tribes and other consulting parties as determined in the initial step in the section 106 process will resolve the adverse effects to the historic property. This may be to avoid, minimize, or mitigate the adverse effects and result in an agreement pertaining to the undertaking. In most cases consultation during the mitigation phase will adequately meet the necessities of the tribe and an agreement will be reached. In instances where an agreement cannot be made and consultation is terminated the THPO, SHPO may consult the advisory committee and make comment with in a thirty (30) day period. The Advisory Council on Historic Preservation may at any time in the Section 106 process choose to enter the consultation or may enter the consultation at the request of the THPO, SHPO, tribes, consulting parties or public. After receipt of the request, the Advisory Board has thirty (30) days to issue a comment. After the THPO, SHPO, and or the Advisory Council make comments, the lead agency may make a determination and notify the THPO, SHPO, and the Advisory Council and consulting parties.

Section 106 Example 2 (longer)

I. Consult with Appropriate Federal Agencies

REDACTED will consult on:

- (i) Federal undertakings that may affect historic properties; and
- (ii) the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to such properties; and

The REDACTED Cultural Resources Department consults with Federal Agencies on a regular basis. A large number of projects/undertakings affect the Tribe's cultural and historic properties may fall outside our Tribal land but which fall within our ancestral territory. As such, the Tribe engages in government-to-government consultation on a regular basis with multiple federal agencies and therefore is extremely familiar with the Section 106 process. As these consultations have occurred for years, the Tribe has established effective working relationships with several agencies that facilitate informal information sharing. Fostering informal consultation processes helps the REDACTED preserve and protect cultural "sites."

For the basis of this Plan, a "historic property" is defined as a place, location, landscape, structure, object, thing, or remnant of a previous lifeway and can be either historic or prehistoric in nature. In the majority of present situations, sites are identified by outside consultants, who are hired by a developer or project proponent to assess the potential impacts of the project and to determine the presence or absence of significant sites.

The Federal law which addresses the preservation of these "sites" is Section 106 of the NHPA. Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties. The historic preservation review process mandated by Section 106 is outlined in guidance issued by ACHP. In 1992 the roles of Tribes and THPO with regards to the NHPA were updated. Revised regulations, "Protection of Historic Properties" (36 CFR Part 800), became effective August 5, 2004.

Federal Agencies must comply with Section 106 of the NHPA for all of their undertakings. Undertakings can be projects of their own, funding, or issuance of permits, or rights-of-ways. The NHPA states that agencies must consider the effects of their actions on historic properties and allow the Advisory Council on Historic Properties an opportunity to comment. Section 106 is a Step by Step process that involves determination of the Area of Potential Effects (APE), which can include vertical and horizontal, include both direct and indirect effects. Agencies must identify and evaluate resources for inclusion in the National Register of Historic Places (NRHP), the determine project effects on those significant properties, and finally resolve adverse effects through Memorandum of Agreements which may include Historic Properties Treatment Plans, or avoidance strategies. Although state or local agencies only have to comply with the NHPA if there is federal agency involvement, the REDACTED Environmental Quality Act (CEQA) has a similar process incorporated into the environmental review. REDACTED normally comes into play with project proponents such as private sector builders, contractors, public utilities, and any other entities that might undertake construction related activities. When an agency's project is determined to be a federal undertaking, the federal agency involved is required to initiate the 106 Consultation process (36 CFR 800.3 (a)).

The basic elements to Section 106 are as follows:

Initiating the Section 106 Process

- Identifying and Evaluating Historic Properties
- Assessing Adverse Effects
- Resolving Adverse Effects

Initiating the Section 106 Process (800.3)

Federal agencies should integrate the Section 106 process into agency planning at its earliest stages. A federal agency must determine if their projects are an undertaking (800.3(a)). If the undertaking does not present a type of activity that has the potential to have an effect on an historic property, then the agency is finished with its Section 106 obligations. If the action is subject to a program alternative, such as Programmatic Agreement or an alternate agency procedure, then the agency should follow that process. The federal agency must identify the appropriate SHPO/THPO (800.3 (c)-(d)). If the undertaking is on or affects historic properties on tribal lands, then the agency must determine what tribe is involved. If the relevant tribe has assumed the SHPO's responsibilities for Section 106 under Section 101(d)(2) of NHPA, thereby having a THPO, the agency must consult with such THPO in lieu of the SHPO. For undertakings occurring, or affecting historic properties, on tribal lands, the Section 106 process may be completed even when the SHPO has decided not to participate in the process. The federal agency must also involve the public and other consulting parties: (800.3(e)), (800.3(f)). It is up to the Agency Official to determine if the project constitutes an undertaking. If the Agency Official has determined that the undertaking is the type of activity that has the potential to cause effects on historic properties, the agency proceeds to identify properties that might be affected.

Identification and Evaluation of Historic Properties (800.4(b)), (800.4(c))

A federal agency must identify potential historic properties within the project's APE.

The standard for identification is a "reasonable and good faith effort" to identify historic properties 800.4(b)(1). Appropriate identification may include background research, tribal consultation, oral history interviews, and generally a field investigation or survey and information gained through public consultation. 800.4(b)(2) allows a phased approach to identification or a deferral of identification efforts if agreed to by the SHPO/THPO.

Evaluation of historic significance for properties identified in the APE not previously evaluated for inclusion in the National Register (800.4(c)) needs to occur for any potential resources not previously evaluated for significance. Federal agencies are required to apply the National Register Criteria to properties identified in the area of potential effects, and to acknowledge the special expertise of Indian tribes and Native Hawaiian organizations when assessing the eligibility of a property to which they attach religious and cultural significance 800.4(c)(1). Old determinations of eligibility may need to be re-evaluated due to the passage of time or other factors. The Agency Official makes determinations of eligibility in consultation with the SHPO/THPO (800.4(c)(2)). If there is disagreement or ACHP or Secretary of Interior so requests, the Agency Official must refer the matter to the Keeper of the National

Register. If an Indian tribe or Native Hawaiian organization disagrees with a determination of eligibility involving a property to which it attaches religious and cultural significance, then the tribe can ask ACHP to request that the Agency Official obtain a determination of eligibility. The intention is to provide a way to ensure appropriate determinations regarding properties located off tribal lands to which tribes attach religious and cultural significance. If there are no significant historic properties located/identified in the Area of Potential Effect (APE) that might be affected (36 CFR 800.4 (d)(I)), then consultation is considered complete and the project/undertaking may proceed. The federal agency must proceed to the assessment of adverse effects when it finds that historic properties may be affected (800.4(d)(2)) or if the SHPO/THPO or ACHP objects to a no historic properties affected finding. The agency must notify all consulting parties and invite their views.

Assess Adverse Effects (800.5)

The SHPO/THPO and Indian tribes and Native Hawaiian organizations attaching religious and cultural significance to identified properties, must be consulted when agencies apply the criteria of adverse effect. The Agency Official also needs to consider the views of consulting parties and the public. The agency must apply Criteria of Adverse Effect (800.5(a)), to determine if the undertaking may directly or indirectly alter characteristics of a historic property that qualify it for inclusion in the Register (800.5(a)(1)). The agency must consider reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative also need to be considered. Examples of adverse effects include physical destruction or damage; alteration not consistent with the Secretary of the Interior's Standards; relocation of a property; change of use or physical features of a property's setting; visual, atmospheric, or audible intrusions; neglect resulting in deterioration; or transfer, lease, or sale of a property out of Federal ownership or control without adequate protections (800.5(a)(2)).

Where properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations are involved, neglect and deterioration may be recognized as qualities of those properties and thus may not necessarily constitute an adverse effect. If a property is transferred, leased, or sold out of federal ownership with proper preservation restrictions, then it will not be considered an adverse effect as in the past regulations. Transfer between Federal agencies is not an adverse effect per se; the purpose of the transfer should be evaluated for potential adverse effects, so that they can be considered before the transfer takes place.

Alteration or destruction of an archaeological site is an adverse effect, whether or not recovery of archaeological data from the site is proposed (800.5(a)(3)).

The SHPO/THPO may suggest changes in a project or impose conditions so that adverse effects can be avoided and thus result in a no adverse effect determination (800.5(b)). This subsection emphasizes that a finding of no adverse effect is only a proposal when the Agency Official submits it to the SHPO/THPO for review. This subsection also acknowledges that the practice of "conditional No Adverse Effect determinations" is acceptable.

The ACHP routinely does not review no adverse effect determinations. ACHP will intervene and review no adverse effect determinations if it deems it appropriate based on the criteria listed in Appendix A of

800.5(c), (circumstances warranting ACHP involvement), or if the SHPO/THPO or another consulting party and the Federal agency disagree on the finding and the agency cannot resolve the disagreement. If Indian tribes or Native Hawaiian organizations disagree with the finding, they can request ACHP's review directly, but this must be done within the 30-day review period. If a SHPO/THPO fails to respond to an Agency Official finding within the 30-day review period, then the Agency Official can consider that to be SHPO/THPO agreement with the finding. When the finding is submitted to ACHP, it will have 15 days for review; if it fails to respond within the 15 days, then the Agency Official may assume ACHP concurrence with the finding. When it reviews no adverse effect determinations, ACHP will limit its review to whether or not the criteria have been correctly applied. ACHP's determination is binding. A finding of adverse effect requires further consultation on ways to resolve it under (800.5(d)(2))

Resolving Adverse Effects (800.6)

When adverse effects are determined, the consultation must continue among the Federal agency, SHPO/THPO and consulting parties to attempt to resolve them 800.6(a)(1). The Agency Official must always notify ACHP when adverse effects are found and must also invite ACHP to participate in the consultation when any of the circumstances

in 800.6(a)(1)(i)(A)-(C) exist. A consulting party may also request ACHP to join the consultation. ACHP will decide on its participation within 15 days of receipt of a request, basing its decision on the criteria set forth in Appendix A. Whenever ACHP decides to join the consultation, it must notify the Agency Official and the consulting parties.

800.6(a)(2) allows new consulting parties to enter the consultation if the agency and the SHPO/THPO* (and ACHP, if participating) agree. If they do not agree, it is desirable for them to seek ACHP's opinion on the involvement of the consulting party. Any party, including applicants, licensees or permittees, that may have responsibilities under a Memorandum of Agreement (MOA) must be invited to participate as a consulting party.

In most cases a Memorandum of Agreement (800.6(b)) is developed to resolve adverse effects. When resolving adverse effects without the ACHP, the Agency Official consults with the SHPO/THPO and other consulting parties to develop the MOA 800.6(b)(1). The MOA is executed between the Agency Official and the SHPO/THPO and filed with required documentation with ACHP. Filing of the MOA is the formal conclusion of the Section 106 process and must occur before the undertaking is approved. Standard treatments adopted by ACHP may set expedited ways for completing MOAs in certain circumstances. When the ACHP is involved, the consultation proceeds in the same manner, but the agreement of the Agency Official, the SHPO/THPO and ACHP is required for a MOA

(800.6(b)(2)).

The execution and implementation of a MOA evidences an agency's compliance with Section 106 (800.6(c)). Failure to do so requires the Agency Official to reopen the Section 106 process and bring it to suitable closure as prescribed in the regulations. The rights of signatories to an agreement are spelled out, along with who is required to sign the agreement under specific circumstances (800.6(c)(1)).

The term "signatory" has a special meaning, which is the ability to terminate or agree to amend the Memorandum of Agreement. The term does not include others who sign the agreement as concurring parties 800.6(c)(1). The Agency Official may invite certain parties to be signatories in addition to those specified in Section 800.6(c)(1). They include individuals and organizations that should, but do not have to, sign agreements. It is particularly desirable to have parties who assume obligations under the agreement become formal signatories. However, once invited signatories sign MOAs, they have the same rights to terminate or amend the MOA as the other signatories. Other parties may be invited to concur in agreements (800.6(c)(3)). They do not have the rights to amend or terminate an MOA. Their signature simply shows that they are familiar with the terms of the agreement and do not object to it.

When consulting parties cannot agree or refuse to sign an MOA, or consultation is terminated, the result is a Failure to Resolve Adverse Effects (800.7). Usually when consultation is terminated, ACHP renders advisory comments to the head of the agency, which must be considered when the final agency decision on the undertaking is made. There may be circumstances where ACHP will recommend further discussion to try to resolve the matter.