

# **THE SECTION 106 REVIEW PROCESS**



**THUNDERBIRD ARCHEOLOGY**



# **HISTORIC PRESERVATION**

**within a Section 106 context**

The National Historic Preservation Act states: "Preservation" or "historic preservation" includes identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, research, interpretation, conservation...and education and training regarding the foregoing activities or any combination of the foregoing activities.



# **NATIONAL HISTORIC PRESERVATION ACT OF 1966 AS AMENDED IN 1992**

**"In the face of ever-increasing  
extensions of urban centers,  
highways, and residential,  
commercial, and industrial  
development, ...**



**...the present governmental and nongovernmental Historic Preservation programs and activities are [CURRENTLY, 1966] inadequate to ensure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation."**



# SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

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 the 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 of Historic Places.



## **SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT**

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.



# **SECTION 106 REVIEW**

## **36 CFR 800**

Section 106 of the National Historic Preservation Act requires Federal agencies that fund, license, permit, or approve programs, projects, and activities to take into account the effects of their undertaking upon significant architectural and archaeological properties listed in or eligible for listing in the National Register of Historic Places as they plan and carry out their undertakings.



## **FEDERAL UNDERTAKINGS SUBJECT TO SECTION 106 REVIEW AS DEFINED AT 36 CFR 800**

All federal funding, licensing, permitting, and approving projects, programs, and activities that might have an effect upon properties listed in or eligible for listing in the National Register of Historic places are undertakings.



## **CONSULTATION UNDER SECTION 106 REVIEW**

AS CODIFIED AT 36 CFR 800, Section 106 includes clearly defined STEPS and a logical PROGRESSION OF ACTIVITIES that allows the Federal agency or applicant for Federal assistance to RECEIVE HELP through CONSULTATION with individuals and groups (consultants and stakeholders).



# A PLANNING PROCESS

Ultimately, the Section 106 process is a planning process. Federal agencies (or applicants for federal assistance are required to:

- SURVEY a specified area (to identify Historic Properties eligible for listing in the National Register of Historic Places)
- EVALUATE (Historic Properties against National Register of Historic Places criteria), and
- TREAT (any National Register-eligible Historic Properties identified) using both standard and innovative measures to avoid, minimize, or mitigate project adverse effects upon those properties.



## **FEDERAL AGENCIES AND SECTION 106**

The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with Section 106 in accordance with Federal law.



# FEDERAL AGENCIES AND SECTION 106

The federal agency official has the **HIGHEST RESPONSIBILITY** for completing the section 106 review.

The agency official has specific authority to:

- fund the project;
- issue the license;
- award the permit or approval;
- make appropriate changes in a funded, licensed, or permitted activity to avoid or minimize project effect;
- approve any mitigation measures needed to resolve adverse effects.



# **PARTIES WITH STANDING HAVE THE RIGHT TO PARTICIPATE IN SECTION 106 REVIEW**

- Groups or individuals with a financial or other stake in the outcome of the undertaking.
- Groups or individuals with a potential injury and/or a possibility of relief from injury caused by the undertaking or by avoiding the undertaking.
- Groups or individuals with a demonstrated interest or legal right to involvement in the undertaking.



# STANDING

Standing ultimately means the ability of a party to demonstrate to a Federal District Court sufficient connection to and possible harm from the federal undertaking being challenged to support that party's participation in the case. In the United States, the current doctrine is that a party cannot bring a challenge to a federal action unless that party can demonstrate that he is (or will imminently be) harmed by the action, or lack of action, and that a Court Order could eliminate that harm. Otherwise, the Court will rule that the party "lacks standing" to bring the challenge.



# PARTICIPANTS

AGENCY OFFICIAL – legal and financial responsibility for the project

ACHP – national mandate to ensure compliance with Section 106

SHPOs – statewide mandate to protect historic properties

THPOs – religious and cultural interest on tribal land

TRIBES – religious and cultural interest off tribal land

LOCAL GOVERNMENTS – local jurisdiction

APPLICANTS for federal assistance – requests for funds, licenses, permits, or approvals

PROPERTY OWNERS – real estate and financial stake in the project

OTHER groups or individuals with a stake in the project



# THE PUBLIC

The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the federal involvement to the undertaking.



# CONSULTATION

The process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process. The Secretary of the Interior's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.



# **A FOUR STEP PROCESS**

- 1) INITIATE SECTION 106 REVIEW**
- 2) IDENTIFY HISTORIC PROPERTIES**
- 3) ASSESS PROJECT EFFECTS**
- 4) RESOLVE ADVERSE EFFECTS**



# ADVERSE EFFECTS

In consultation with the SHPO, the agency official finds an adverse effect when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.



## **AVOID OR MINIMIZE**

The agency official consults with the SHPO and other consulting parties, including Indian tribes, to **DEVELOP AND EVALUATE ALTERNATIVES OR MODIFICATIONS TO THE UNDERTAKING** that could **AVOID** or **MINIMIZE** adverse effects on historic properties.



# MITIGATE

The agency official consults with the SHPO and other consulting parties, including Indian tribes, to DEVELOP a Memorandum of Agreement to MITIGATE adverse project effects.

# POTENTIAL ISSUES IN CONSULTATION

- Who are/are not LEGITIMATE CONSULTING PARTIES;
- How are the VIEWS OF THE PUBLIC to be taken into account;
- What is the correct boundary of an undertaking's AREA OF POTENTIAL EFFECTS;
- What is the correct process for using the National Register of Historic Places "Criteria for Evaluation" in IDENTIFYING AND EVALUATING HISTORIC PROPERTIES;
- What are the proper methods for using the "CRITERIA OF ADVERSE EFFECT" found at 36 CFR 800.5 to decide about project effect;
- What are the accepted methods for examining and evaluating PROJECT ALTERNATIVES intended to avoid, minimize, or mitigate adverse effect; and
- What are the specific conditions or stipulations used to RESOLVE PROJECT ADVERSE EFFECT.



## RESOLUTION OF CONFLICTS

The agency official in consultation with the SHPO and other consulting parties, makes the final decisions.

Disagreements between the SHPO, consulting parties, and the federal agency may be resolved by an appeal to the ACHP.

The ACHP can be overruled by the head of the federal agency.