



California Office of Historic Preservation



Native American Involvement in the Section 106 Process

Section 106 of the National Historic Preservation Act requires federal agencies to take into account the effects of their undertakings upon historic properties. The Code of Federal Regulations at 36 CFR 800 explains how federal agencies demonstrate their compliance.

What are Historic Properties?

Historic Properties, for purposes of Section 106, are buildings, structures, sites, districts, or objects that are eligible or listed on the National Register of Historic Places (NRHP). In order to be eligible for listing, a property must possess integrity of location, design, setting, materials, workmanship feeling, and association, and meet one of the four eligibility criteria:

- A: Associated with events which have made a significant contribution to the broad patterns of history.
- B: Associated with the lives of persons significant in our past.
- C: Embodies the distinctive characteristics of a type, period, or method of construction, or represents the work of a master, or possesses high artistic values, or represents a significant and distinguishable entity whose components may lack individual distinction.
- D: Has yielded, or may be likely to yield, information important in prehistory or history.

What is an undertaking?

An undertaking is when a federal agency (Agency) directly implements a project or funds a project, issues a permit or license, or approves a project (referred to as the undertaking). The Agency determines whether the undertaking is the type of activity that has the potential to cause effects to historic properties should any be present.

How does a Tribe find out about an undertaking?

The regulations require Agencies to invite participation from consulting parties, specifically calling out the State Historic Preservation Officer (SHPO) and Tribal Historic Preservation Officer (THPO) and federally recognized tribes. Non-federally recognized tribes may participate as “additional consulting parties” because they have a demonstrated interest in the undertaking due to their relation to the affected properties. Some Agencies may use the NEPA process to solicit input because they do not understand that Tribes should not be treated as members of the general public. Monitoring public notices in newspapers ensures opportunities to get involved are not inadvertently missed. The Agency determines the level of effort necessary for Section 106 outreach relative to the scale and scope of the undertaking. In practice, “inviting participation” means the Agency (often their consultant) sends letters and often makes follow up phone calls. **Tribes therefore must respond to let the Agency know they want to participate.**

How does a Tribe participate in the process?

Once a Tribe has notified the Agency of its intent to participate, participation can take many forms. Emails, phone calls, meetings, and site visits are all possible. Tribes should request a site visit if they want to better understand how the project will impact the existing landscape. Early involvement is crucial to helping the Agency identify tribal resources that need to be considered and perhaps protected from a project's effects. For federally recognized tribes, the regulations state the Tribe must designate a representative. It will help if the Tribal Council is able to explain to the Agency the degree of authority and independent decision-making they have granted to their representative. Participation may continue throughout project construction and completion of any mitigation measures, or may end whenever the Tribe finds that conditions are such that their concerns have been addressed.

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Who makes sure the Agency has carried out their consultation responsibilities?

The regulations require Agencies to consult with the SHPO at various steps throughout the Section 106 process. The SHPO will look for evidence of tribal participation (including NAHC Sacred Lands File search and request for contacts) and how the Agency responded to any tribal comments. The SHPO does not issue a permit or have any “policing” authority and can only respond based on the information the Agency has provided. If Tribes find that Agencies are not acting in good faith, the Tribe can certainly contact the SHPO to determine if other remedies might help. Not acting in good faith also can influence the SHPO’s decision to concur with an Agency’s proposed Finding of Effect.

What are the steps in the 106 Process and how do Tribes engage in those steps?

- Step 1 is to establish an Area of Potential Effects (APE). Tribes can ask to review APE maps and point out areas where properties may be subject to indirect effects that the Agency may not have considered.
- Step 2 is to identify possible historic properties and determine their National Register status. Tribes can ask to participate in archaeological surveys and excavations. Agencies should explain their eligibility determinations to Tribes before finalizing their documents and submitting them to the SHPO for concurrence. Agencies are not required to agree with Tribes, but must be able to explain when they disagree and how they resolved the situation.
- Step 3 is to assess effects of the undertaking upon historic properties. Tribes might request protection measures such as avoidance (including fencing, flagging, establishment of Environmentally Sensitive Areas, etc.) or precautionary measures such as monitoring. Where effects are adverse, the Agency must enter into a Memorandum of Agreement (MOA) with the SHPO. The Agency might invite Tribes to be concurring parties to that agreement which documents the outcome of the consultation process and any mitigation measures that must be completed in order to resolve adverse effects.

How does a Tribe explain that a site has “religious or cultural significance”?

This is a very complicated concept for some Agency staff and consultants to grasp. Because the National Register is the standard for determining what is a historic property under Section 106, tribes can best explain their perspective by using the NRHP terminology and following National Register Bulletins (see web guidance at the end of this handout).

How does a Tribe get Tribal Monitoring required?

There is no statutory requirement for tribal monitoring. Rather, monitoring is the outcome of the consultation process. If the Tribe believes the presence of Monitors will help protect sites or minimize effects, the Agency might agree to them being present during construction. Each Agency has contracting requirements that will govern how they obtain monitors. The number of monitors, their roles, pay rates, reporting requirements, etc. are all decided during the consultation process.

Helpful Guidance:

- Advisory Council on Historic Preservation Web Page:
 - o Working with Section 106: www.achp.gov/protecting-historic-properties
 - o Tribal Programs: <http://www.achp.gov/indian-tribes-and-native-hawaiians>
- OHP Section 106 Checklist (what OHP wants to see in Agency submittals): www.ohp.parks.ca.gov/section106
- NR Bulletin 36: Guidelines for Evaluating and Registering Archaeological Properties: www.nps.gov/nationalregister/upload/RB36-Complete.pdf
- Secretary of the Interior’s Standards for Archaeological Documentation (Originally published in 1983, these Standards are still relevant for appropriately documenting efforts to comply with Section 106): www.nps.gov/history/local-law/arch_stnds_7.htm
- Society for California Archaeology Professional Qualification Standards: www.scahome.org/about-sca/society-for-california-archaeology-professional-qualifications-for-principal-investigator/
- Office of Historic Preservation: www.ohp.parks.ca.gov, calshpo.ohp@parks.ca.gov, 916-445-7000