Preserving America's Past

Lynne Sebastian

Supplemental materials on cultural resource management and federal historic preservation laws

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Preserving America's Heritage

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Lynne Sebastian, Ph.D., RPA
Director of Historic Preservation Programs
The SRI Foundation

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Introduction

The protections afforded to historic and cultural properties in the United States consist of a patchwork of federal and state laws and local ordinances. The laws cover different kinds of resources, offer different levels of protection, and apply widely varying standards and processes. Some laws only apply on lands of a particular type – federal and tribal land or state land, for example – or to specific kinds of properties – shipwrecks or archaeological sites, for example. Some laws or ordinances apply only to places listed on the National Register of Historic Places or on state registers or to properties with local landmark status; others apply to a broader range of significant properties.

In order to help you make sense of this confusing patchwork of preservation legislation, the following discussion provides a brief overview of preservation-related federal laws and Executive Orders, then a more detailed discussion of the four most important federal preservation laws from an archaeological point of view (the four laws that will be covered in more detail later are marked with an * in the overview). It is important, however, that you also take the time to become familiar with state laws and local ordinances in your area. In many cases, state and local laws and ordinances provide the strongest and most effective tools for preserving the past, and often they provide the *only* legal protections, since federal laws apply only in specific circumstances.

Brief Overview of Federal Historic Preservation Laws

Antiquities Act, 1906 (PL 59-209; 16 USC 431-433)

The first federal legislation passed specifically to protect historic properties – in this case, archaeological sites on public land – was the Antiquities Act of 1906. This law does three things: makes it illegal to excavate sites on the public lands without a permit from the land-managing agency; provides for a permitting process; and authorizes the President to designate national monuments. The resource protection functions of the Antiquities Act have largely been taken over by the Archeological Resources Protection Act (see below), but the Antiquities Act is still the source of the President's power to designate monuments.

Historic Sites Act, 1935 (PL74-292; 16 USC 461-467)

The Historic Sites Act authorizes the National Park Service to record, document, acquire, and manage places that are important in the interpretation and commemoration of the nation's history. Under this statute a number of the New Deal employment programs became permanent components of the NPS preservation mission – the Historic American Buildings Survey (HABS) and Historic American Engineering Record (HAER), for example. The National Historic Landmarks program was originally established under the Historic Sites Act.

Reservoir Salvage Act, 1960 (PL 86-523; 16 USC 469-469c)

In the 1950s, huge water-impoundment projects were designed and built by the federal government for flood control and power generation. The National Park Service and the Smithsonian Institution set up the River Basin Salvage Program to collect archaeological data before sites were lost to the rising waters. In 1960 Congress authorized NPS to seek appropriations to support this work in the Reservoir Salvage Act. Recognizing that many other categories of federally sponsored construction were destroying huge numbers of archaeological sites, the archaeological community worked to broaden the kinds of projects covered by the law beyond reservoirs; this campaign ultimately resulted in passage of the Historic and Archeological Data Preservation Act of 1974 (see below).

***Department of Transportation Act, 1966** (PL 89-680; 49 USC 303; 23 USC 138)

This statute, which created the federal Department of Transportation, contained a provision designed to protect significant prehistoric and historical sites from damage or destruction in the course of DOT funded projects unless there was no alternative to that destruction. In the original version of the law, that provision was found in section 4(f), and this preservation requirement is still called the Section 4(f) process (see more detailed discussion below).

***National Historic Preservation Act, 1966** (PL 89-665; 16 USC 470)

The cornerstone of the historic preservation process in the United States, the National Historic Preservation Act was the result of a grassroots effort initiated by the US Conference of Mayors and supported by a wide variety of preservation organizations and communities across the country. In large part, the NHPA was a

response to the destruction of great swaths of historic downtowns and neighborhoods under the auspices of "Urban Renewal" and construction of the interstate highway system. The provisions of NHPA, and especially of Section 106 of the act, are discussed in more detail below.

***National Environmental Policy Act, 1969** (PL 91-190; 42 USC 4331-4347)

The National Environmental Policy Act was created to ensure that federal agencies carefully evaluate the impacts of their actions on the human environment and examine the relative impacts of the various alternatives available to them. Impacts to historic and cultural resources are only a small part of the broad range of resources and impacts examined in the NEPA process (which is discussed in more detail below), but because all federal actions require compliance with NEPA, it provides an important tool for ensuring that impacts on heritage resources are consider in agency decision-making.

Historic and Archeological Data Preservation Act, 1974 (PL 93-291; 16 USC 469-469c)

Often called "the Moss-Bennett Act," after the sponsors of the legislation, the Historic and Archeological Data Preservation Act expanded the provisions of the earlier Reservoir Salvage Act so that it also applied to federal projects other than reservoirs. The law requires agencies to report to the Secretary of the Interior any projects that may cause the loss of significant scientific, prehistoric or historical archaeological data and offers agencies the option of recovering those data themselves or transferring funds to the National Park Service to have NPS recover the data. This law is now largely redundant with Section 106 of the National Historic Preservation Act, and is usually only invoked when archaeological properties are discovered after the project has already begun and the agency wishes to have NPS salvage the data.

American Indian Religious Freedom Act, 1978 (PL 95-341; 42 USC 1996)

AIRFA is a joint resolution of Congress affirming that, as a matter of policy, the United States will protect and preserve the right of Indian tribes and other indigenous people to practice their traditional religions. This policy covers both access to sacred places and the use and possession of sacred object, as well a protecting the right to worship through the conduct of traditional ceremonies. Because the law is focused on religious practice rather than on management of

places of religious significance, efforts to protect and preserve sacred places generally focus on the National Historic Preservation Act rather than on AIRFA.

***Archeological Resources Protection Act, 1979** (PL 96-95; 16 USC 470aa-470ll)

Because of its lack of specificity, the Antiquities Act of 1906 proved to be ineffective as a tool for prosecuting looters of archaeological sites on the public lands. In response to increasing problems of commercial looting in the 1970s, the archaeological community worked with Congress to secure passage of the Archeological Resources Protection Act. ARPA regulates the practice of archaeology on federal and Indian lands, requires permits from the land-managing agency or tribe for excavations, and establishes substantial penalties for vandalism, destruction, and unpermitted excavations (see more detailed discussion below).

Native American Graves Protection and Repatriation Act 1990 (PL 101-601; 25 USC 3001-3013)

NAGPRA establishes a process through which Native American human remains, funerary objects, sacred objects, and items of cultural patrimony are to be repatriated to lineal descendants or culturally affiliated groups. There are two major components to this process. The first is a requirement that federal agencies and federally funded museums inventory their collections and report the results to culturally affiliated tribes, who may then claim remains and objects if they wish. The second is a process for consultation with Native American groups concerning the disposition of human remains, sacred and funerary objects, or items of cultural patrimony found in discovery or during archaeological excavations on federal or tribal lands.

The Abandoned Shipwrecks Act, 1988 (PL 100-298; 43 USC 2101-2106)

The Abandoned Shipwrecks Act applies to nonmilitary ships on or in submerged lands of the United State that have been abandoned by their legal owners. Wrecks on federal or Indian lands are under the jurisdiction of the US; for the rest, jurisdiction is given to the state in whose water they lie. The act does not forbid salvage of wrecks but does direct the National Park Service to prepare guidelines for positive management of shipwrecks. These guidelines are required to balance the claims of preservationists, recreational divers, and salvors. The guidelines are voluntary, so the degree of actual protection varies, depending on individual state procedures for managing wrecks.

Preservation-Related Executive Orders

E.O. 11593 Nomination of federal properties to the National Register of Historic Places. When the National Historic Preservation Act was passed in 1966, only properties actually listed on the National Register were given consideration under the law. This led to a situation in which agencies were often reluctant to nominate properties, however important, to the Register. This 1972 executive order instructed the National Park Service to provide guidance for evaluating the eligibility of historic properties to the Register, and instructed agencies to survey their land and property holdings and to begin the process of nominating the eligible properties. It also instructed the agencies, as part of their compliance with Section 106, to evaluate the Register eligibility of previously unevaluated properties and to treat the eligible ones as if they were registered for the purposes of Section 106. These provisions have since been incorporated into the NHPA and into the Section 106 regulations, but this executive order was extremely important in shaping the Section 106 process as we know it today.

E.O. 12898 Environmental justice. This executive order instructs federal agencies to ensure that their programs neither exclude minority and low-income citizens from participating in beneficial programs nor impose a disproportionate share of negative environmental impacts on minority and low-income people. In terms of cultural resources, compliance with E.O. 12898 means that, where cultural resource will be negatively impacted, the agency should try to spread the impacts and not concentrate them only on resources of concern to minority or low-income communities.

E.O. 12072 Siting federal activities in urban areas. This executive order instructs federal agencies to give preference to central business areas when selecting locations for offices. Although intended as an economic development initiative for the nation's downtowns, rather than as a historic preservation measure, this E.O. has potential for encouraging adaptive reuse of historic buildings and economic revitalization of our historic downtowns.

E.O. 13006 Locating federal facilities in historic buildings. Building on the preservation potential of E.O. 12072, this executive order specifically instructs federal agencies to give preference to historic buildings in historic districts in central business areas when choosing the location for offices and other space needs. Where such space is not available or doesn't meet the agency's needs, compatible new construction in historic districts is given second preference and use of historic buildings outside of historic districts is given third preference.

E.O. 13007 Indian sacred sites on federal land. This executive order instructs federal agencies to accommodate use of Native American sacred sites on federal lands and to avoid physically damaging such sites unless essential agency functions require restricting access or damaging the site. Agencies are required to develop procedures for implementing this executive order, including providing notice to tribes of activities that might affect sacred sites and maintaining appropriate levels of confidentiality for information about sacred sites.

E.O. 13175 Consultation and coordination with Indian tribal governments. This executive order instructs federal agencies to be mindful of the sovereignty of Indian tribes and to develop processes for consultation with tribes that will give the tribes meaningful opportunities for input in the development of federal regulatory processes. This order also instructs agencies not to place unfunded mandates on tribes and to make the process through which tribes can receive waivers of compliance with federal regulations more flexible.

E.O. 13274 Environmental stewardship and transportation infrastructure project reviews. Popularly known as the "streamlining" executive order, E.O. 13274 instructs agencies involved in developing transportation infrastructure to formulate and implement procedures and policies that will enable them to conduct project environmental reviews in a "timely and environmentally responsible" manner. The Secretary of Transportation is instructed to develop a list of high-priority transportation infrastructure projects that will receive expedited agency review. This order was signed in September of this year (2002); the practical effects of the streamlining directive are not yet know.

Archaeology and Historic Preservation Laws

The Archeological Resources Protection Act

Like the Antiquities Act of 1906, ARPA requires permits for excavation or removal of archaeological resources from public or tribal land and makes it a crime to do so without a permit. Unlike the Antiquities Act, however, ARPA is very specific about what constitutes a criminal violation of the law and establishes serious criminal and civil penalties.

ARPA applies to "archeological resources," which are defined as "material remains of past human life or activities," that are at least 100 years old and are found on public or Indian land. The law establishes certain basic requirements for

permitting – qualified personnel, tribal consultation, federal ownership of recovered artifacts – but the details of the permitting process are contained in the regulation, 43 CFR part 7.

Violations of ARPA, that is, "unauthorized excavation, removal, damage, alteration, or defacement of archaeological resources" or trafficking in such resources, are punishable by fines of up to $10,000 or up to one year in prison, or both. If the value of the resource involved plus the cost of restoration of the damaged site is greater than $500, the maximum penalties increase to $20,000 and two years. For repeat offenders, the maximums increase to $100,000 and five years. The law also makes provisions for federal land-managers to assess civil penalties and to bring civil suit if the violator fails to pay the penalties. Any equipment, vehicles, etc., used in the commission of an ARPA violation are subject to forfeiture if the individual is convicted – a substantial additional penalty for commercial looters who use a backhoe or other heavy equipment.

One potentially important provision of ARPA that is not well known is Section 470ee(c), which makes interstate trafficking in archaeological materials that were acquired in violation of state or local laws a violation of ARPA. Under this provision, if items were recovered illegally – say in violation of trespass laws protecting state or private property – transporting them across state lines for the purpose of selling them becomes an ARPA violation.

Section 4(f) of the Department of Transportation Act

As noted above, the term "Section 4(f)" refers to the original section number in the Department of Transportation Act of 1966. Because of subsequent revisions to the law, the original language is now found in slightly different forms at 49 U.S.C. 303(c) and at 23 U.S.C. 138; the version at 49 U.S.C. 303 reads:

> The Secretary may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if (1) there is no prudent and feasible alternative to using that land, and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

Although the law is restricted to projects funded by federal transportation dollars, it is very important because this is the strictest standard of historic preservation to be found anywhere in federal law. The term "use" generally means taking even the smallest amount of land from a historic site; the term "feasible" means anything that is possible as a matter of engineering; and the term "prudent" means anything that won't cause extraordinary problems. State Departments of Transportation are required to complete a very rigorous process of demonstrating that there are no prudent and feasible alternatives and that they have done all possible planning to minimize harm for projects that will "use" historic sites.

In terms of archaeology, however, Federal Highway Administration guidelines say that Section 4(f) does not apply to archaeological sites unless they warrant preservation in place. According to the guidelines, sites that are of value only for their potential to yield information about the past will not trigger the Section 4(f) process.

National Environmental Policy Act

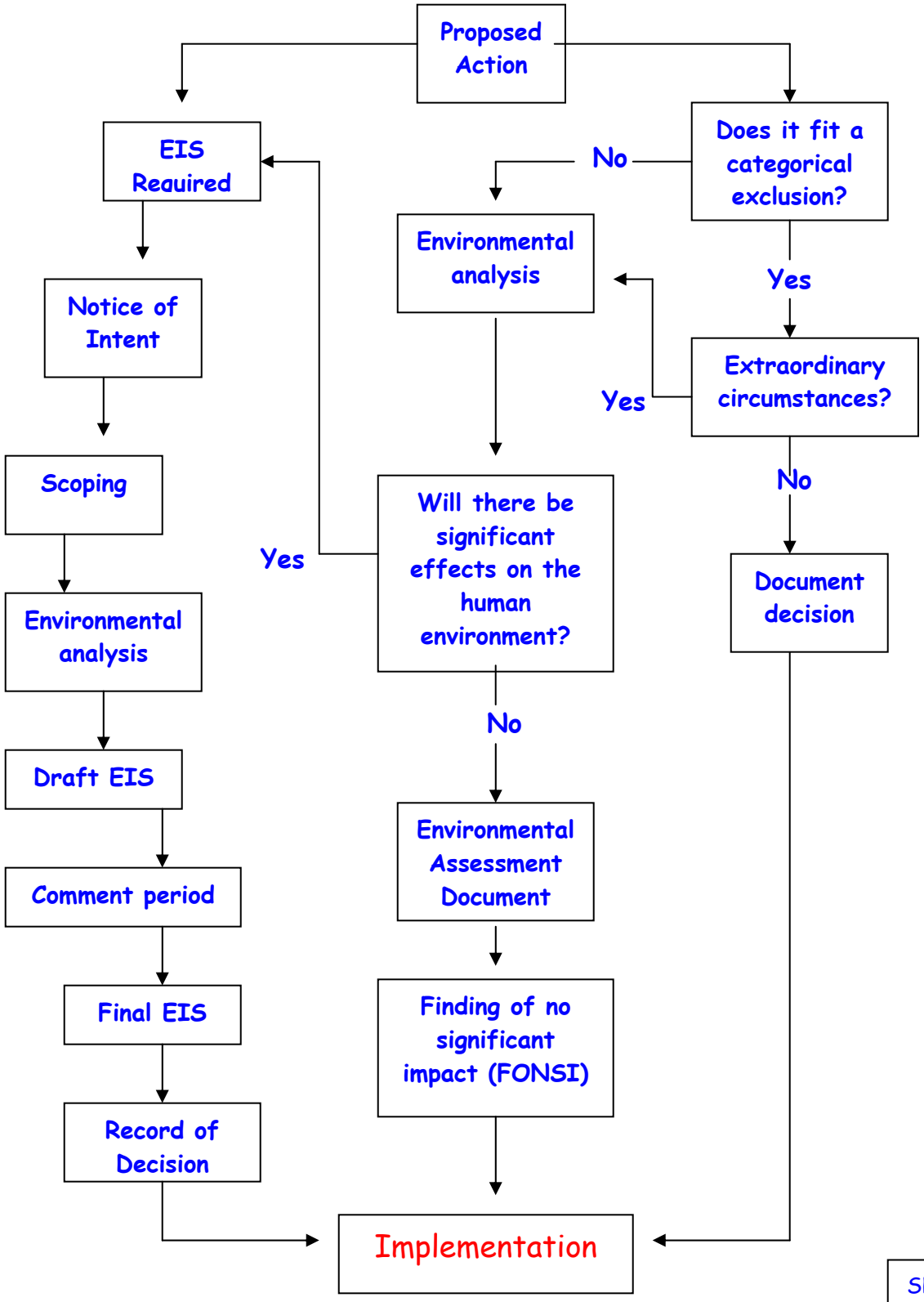
The National Environmental Policy Act requires federal agencies to gather and evaluate data about different aspects of the human environment that may be affected by their actions and to use what they learn from this process to inform decision making. NEPA is the "umbrella" law under which agencies manage their compliance with a whole variety of environmental and historic preservation laws.

There are three basic paths for an agency to take to comply with NEPA (Figure 1). The great majority of the routine things that an agency does are treated as "categorical exclusions," classes of actions that require no further consider under the law unless there are "exceptional circumstances." Each agency has its own NEPA procedures, which include a list of kinds of actions that are categorical exclusions and a list of kinds of things that constitute exceptional circumstances.

Most of the rest of the actions that an agency takes are analyzed for their effect on the human environment through an "environmental assessment" process. In this process the agency gathers data about how various alternatives available to it for completing a project would affect a whole variety of resources, including cultural resources. The agency then determines whether its chosen course of action will have a "major" impact on the human environment. Again, the definition of what constitutes a "major" impact is specific to the agency's own NEPA procedures. If there is no major impact, the agency documents this finding and proceeds with the

Figure 1

The NEPA Process



action; if there will be a major impact, the agency enters the third possible path for NEPA compliance and develops an environmental impact statement (EIS).

Some federal actions -- for example, construction of new natural gas pipelines or new highways in previously undisturbed areas – have such high potential for significant environmental impacts that the agency will plan to complete the EIS process without going through any preliminary NEPA evaluation. Other actions will be found, as a result of an environmental assessment, to have a significant impact and to require an EIS.

No matter how the agency arrives at the decision to prepare an EIS, the actual process of data gathering, consultation, analysis, and decision making is the same. The agency first engages in a process known as "scoping," which involves not only agency personnel and consultants, but other concerned or affected agencies, Indian tribes, local governments, affected communities and property owners, and other interested parties – collectively often referred to as "stakeholders"—as well as the general public. In the scoping process, the agency determines what aspects of the human environment are likely to be affected, what data are available or will be needed to assess the nature of those effects, how to go about gathering and evaluating those data, and what alternatives are available to the agency for carrying out the proposed action.

Based on the decisions reached during the scoping process, the agency gathers and analyzes data and completes a preliminary evaluation of the impacts of the various alternatives on the different components of the human environment. The agency publishes this preliminary evaluation as a draft EIS, which is then made widely available for stakeholder and public comment. When the comment period is over, the agency considers and responds to all comments received, revises the EIS as necessary, and publishes a final EIS. This document is then used as the basis for an agency decision about how to – or whether to – carry out the proposed action. The decision is documented in a "record of decision," which explains how the agency used the information and analyses in the EIS in reaching that decision.

National Historic Preservation Act

The best-known provision of NHPA is Section 106 of the act, which requires that federal agencies take into account the effects of things that they do, fund, or authorize on historic properties – that is, on places listed on or eligible for listing on the National Register of Historic Places. And indeed, most of the rest of this

overview of federal laws is concerned with Section 106. But a few words about what else is in NHPA are in order here.

The NHPA consists of four parts or "titles." Title I sets up the outlines of a national historic preservation process involving states, local governments, and Indian tribes as partners with federal agencies. This title also places affirmative responsibilities on federal agencies to be good stewards of historic properties under their jurisdiction and to consider carefully the effects of their actions on all historic properties, whether under their jurisdiction or not. This title also establishes the National Register of Historic Places as the standard for the significance of historic places; provides funding through the Historic Preservation Fund for state, local, and tribal preservation programs; establishes professional standards for the historic preservation fields; and instructs the Secretary of the Interior to advise Congress about the problem of illegal trafficking in antiquities.

Title II of the act establishes the Advisory Council on Historic Preservation, an independent federal agency comprising heads of various agencies and organizations, plus preservation professionals and members of the public appointed by the President. The Council's duties include advising the President and Congress on historic preservation matters; encouraging the preservation of historic places through review of federal agency programs and projects; providing historic preservation training and guidance; and carrying out public outreach efforts.

Title III includes definitions and other housekeeping measures, establishes the National Museum for the Building Arts, and authorizes federal agencies to withhold information about historic properties from disclosure if disclosing the information would put those properties at risk, cause a significant invasion of privacy, or impede the use of a traditional religious site by practitioners.

Title IV of NHPA establishes the National Center for Preservation Technology and Training. The NCPTT develops and distributes information about preservation and conservation techniques, provides and encourages training for preservation professionals and maintenance staffs, and works with international preservation and conservation organizations. NCPTT also administers a grants program to encourage the development and dissemination of preservation technologies.

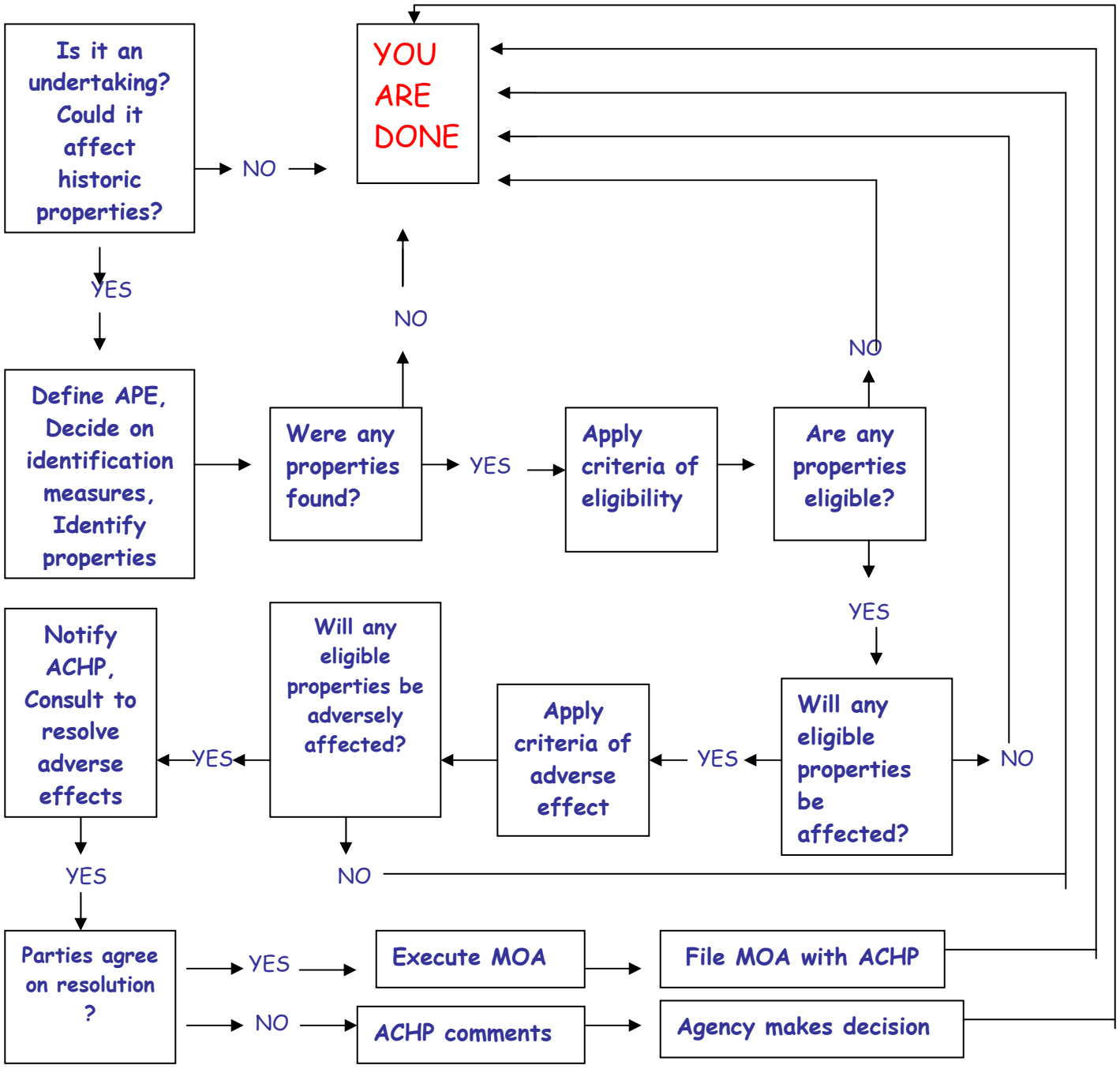


Figure 2

THE SECTION 106 PROCESS STEP BY STEP

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Section 106 of the NHPA

The workhorse section of the National Historic Preservation Act is 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 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 effects 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.

Just reading over this text, it doesn't necessarily seem like many historic places would be preserved as a result of compliance with this section of law. "Take into account the effects?" Compared with the very strong preservation requirement of Section 4(f) of the Department of Transportation Act, for example, which forbids expenditure of transportation funds on a project that will "use" a historic property unless there is no prudent and feasible alternative, this is a pretty weak requirement.

But the surprising truth is that many, many more historic properties are preserved every year as a result of agency compliance with Section 106 than are ever preserved because of Section 4(f). This paradox is a result of the great breadth of coverage provided by Section 106. Section 106 applies to all federal agencies – not just those who manage public lands or fund construction or development projects, but also agencies that provide licenses, permits, and other authorizations. Section 106 applies to all federal "undertaking," not just to those that occur on federal lands or using federal money. And Section 106 provides consideration to all "historic properties," not just to places actually listed in the National Register of Historic Places, but also to properties that are eligible for listing in the Register.

The Section 106 process is intended to establish an accommodation between the development projects that are necessary to our modern way of life and preservation of the physical traces of our past. On the one hand, we need new roads and pipelines and power lines, new landfills and housing developments. On the other hand, our history and heritage are very important to us as Americans,

and the physical remains of that history are precious because they are so rare. And once they are gone, they are gone for good.

Section 106 is successful at achieving this balance between preservation and development because it combines an inclusive definition of federal projects that require compliance with the law, a very broad scope of historic places that must be considered, and a relatively weak level of protection. Agencies must consider the effects of their actions on historic properties, but they are not required to preserve historic places or to abandon the project if there is a conflict between preservation and development.
The Advisory Council on Historic Preservation has published a regulation (found in the Code of Federal Regulations at 36 CFR part 800) that establishes the process through which federal agencies can meet their responsibilities under Section 106. This process consists of four basic steps (Figure 2):

Step 1: Identifying historic places. If an agency is going to take into account the effects of a project on historic properties, it must first find out what historic properties there are within the area that will be affected by the project. That is, the agency must identify sites, buildings, neighborhoods, commercial districts, or places of traditional cultural importance that are already listed on or might be eligible for listing on the National Register of Historic Places.

The first question to be addressed is: How large is the area within which the project might affect historic properties (called the "area of potential effect" or APE). The answer to this question depends on two things: the kinds of effects the project will create and the kinds of historic properties that may be in the area. For example, an archaeological site that is important principally for the information that it contains will usually only be affected by physical ground disturbance within the site itself. Places of traditional cultural importance to Native Americans, on the other hand, can be negatively affected by noise or by visible intrusions within a previously pristine landscape, even when the more direct effects of the project are at some distance away.

Once the agency decides what constitutes the area of potential effect, it then makes a series of decisions about how to go about looking for places that might be historic properties. The first step is to check records to determine whether there are any properties already listed on the Register. The agency may then decide to require some or all of the following: research using historical records, architectural survey of historic buildings and neighborhoods, interviews with elders in Native American and other traditional communities, or archaeological survey.

Finally, agency cultural resource professionals, or cultural resource consultants hired by the agency or by the private developer who needs agency funding or approval, complete all the identification activities that the agency has decided are appropriate. The cultural resource professionals then prepare a report documenting their work and making recommendations about the potential National Register eligibility of the historic places that they have identified. If no historic places of any sort are found, the agency has completed its responsibilities under Section 106.

Step 2: Evaluating historic places. If an agency is going to take into account the effects of a project on *historic properties*, that is, properties that are listed on or eligible for listing on the National Register, it must evaluate the significance of the historic places identified in step 1.

The agency evaluates the Register eligibility of historic places by applying the "criteria of eligibility" established by the National Park Service (these are found in the Code of Federal Regulations at 36 CFR 60.4). There are four criteria: A association with significant events in the past; B association with significant people in the past; C exemplifying an important architectural type, construction technique, or other qualities; and D potential to yield important information about history or prehistory. To be eligible, properties generally must be at least 50 years old and exhibit integrity of location, design, setting, materials, workmanship, association, or feeling.

Following the guidance in the regulation, the agency evaluates each of the historic places identified within the area of potential effect and determines which ones are eligible for listing on the National Register. If none of the historic places identified are found to be eligible to the Register, this completes the agency's responsibility under Section 106.

Step 3: Determining what the effects are. If an agency is going to take into account the effects of a project on historic properties, it has to know what the effects will be for each of the National Register eligible properties.

What the agency is looking for in this step is any effects on historic properties that will adversely affect their integrity of location, design, setting, materials, workmanship, association, and feeling -- that is, those qualities that make the property eligible to the Register. In order to make this decision, the agency considers the kinds of effects the project will generate – noise, physical disturbance

of the ground, new construction that is visible from a distance – and the qualities are that make a particular historic property eligible to the National Register.

For example, archaeological sites that are eligible to the Register only under criterion D (because of their potential to yield information about the past) generally will not be adversely effected by a project unless it will physically damage the site. For archaeological sites that are also eligible under other criteria – under criterion A, for example, because the site has historically been used by a tribe as a location for vision quests or a coming of age ceremony – other kinds of impacts, such as noise or visual intrusions, may adversely affect those qualities that make the site eligible to the National Register.

The agency examines the effects that the project would have on each of the historic properties within the area of potential effect and decides whether any of the properties will be adversely affected. If none of them will be adversely affected, this completes the agency's responsibility under Section 106.

Step 4: Deciding what to do about adverse effects. If an agency determines that a project will have an adverse effect on one or more of the historic properties within the area of potential effect, in order to complete the Section 106 process, the agency must decide what should be done to "take into account" those effects.

In Section 106 parlance, this process is called "resolving the adverse effects." The agency evaluates alternatives or modifications to the project and other measures that could avoid, minimize, or mitigate the adverse effects. The possibilities include redesigning the project or even deciding not to do it, coming up with things that could be done to lessen the effect, and accepting that there will be effects that can't be avoided or even decreased. The agency then codifies the decisions that it has reached in a formal, legally binding document called a Memorandum of Agreement (MOA).

For archaeological sites that are eligible to the Register under Criterion D, scientific excavation or "data recovery" is the most commonly chosen "mitigation" measure, although syntheses of existing information, public outreach projects, block surveys, and other measures are sometimes combined with more limited data recovery in a mitigation package. For historic properties where noise or visual intrusions constitute adverse effects, common approaches include planting of trees or construction of walls to lessen the noise or make new construction less visible. Measures to resolve adverse effects are limited only by the creativity of the cultural

resource professionals who design them and by the consultation process described below.

Once the agency has decided what to do to resolve the adverse effects, agency cultural resource professionals or consultants carry out the decisions, and the agency approves or completes the project. This completes the agency's responsibility under Section 106.

Section 106 as a Consultative Process

In order to focus the preceding discussion specifically on the steps in the Section 106 process, those steps were presented as if federal agencies gather all the information and make all the decisions without any input from anyone else, but in fact every step in the Section 106 process involves considerable discussion with and input from other individuals, groups, and agencies. Federal agencies make the final decisions about their Section 106 compliance, but the decision-making process involves consultation with many partners, as discussed below.

State Historic Preservation Officer. One of the key participants in the Section 106 process is the State Historic Preservation Officer (SHPO), who serves as the state's representative in Section 106 discussions. The SHPO's role is to review the decisions that the federal agency makes when defining the area of potential effect, determining what must be done to identify historic properties, applying the criteria of eligibility to the National Register, and applying the criteria of adverse effect. If the SHPO agrees with the agency's decision, the agency goes to the next step in the Section 106 process; if the SHPO doesn't agree, agency and SHPO work together to reach an agreement or, sometimes, ask the Advisory Council on Historic Preservation to assist them in working things out.

The SHPO is also integrally involved in the discussions about how to resolve any adverse effects. The SHPO and the agency are the two required signatories to the Memorandum of Agreement (MOA) about how those effects will be resolved.

Tribal Historic Preservation Officer. Some Indian tribes have developed historic preservation programs of their own and, with the approval of the National Park Service, have taken over the duties of the SHPO on their tribal lands. In those cases, federal agencies work with the THPO instead of the SHPO in completing the Section 106 process. The THPO is a required signatory to the MOA for any project on or affecting historic properties on tribal land.

Advisory Council on Historic Preservation. As the text of Section 106 provided above indicates, agencies are required not only to take into account the effects of their projects on historic properties, but also to provide the Advisory Council on Historic Preservation with an opportunity to comment on those effects. The ACHP's regulation, 36 CFR part 800, provides agencies with guidance about how to meet those two responsibilities.

Although the ACHP may be asked to participate in discussions about any step in the Section 106 process, particularly if there is a disagreement between the agency and another consulting party, generally they only review projects if the agency has decided there will be an adverse effect on historic properties. The agency informs the ACHP about the adverse effect situation, and ACHP then decides whether to participate in discussions about resolving those adverse effects or not. If they do participate, they will sign the MOA; if they don't participate, the agency simply files the MOA with the ACHP when the other signatories have signed it.

If the agency and consulting parties are unable to reach agreement about how to resolve adverse effects, the ACHP provides formal comments to the agency, and the agency must then take those comments into consideration in making its final decision about what to do about the effects of the project.

Indian tribes and Native Hawaiian organizations. All Native Americans have the right, under the Section 106 regulations, to be consulted by federal agencies about any projects that might affect historic places that are of religious or cultural significance to them. Agencies consult with Native Americans at each step in the Section 106 process and take those comments into account in reaching their decisions. Tribes or Native Hawaiian groups may be invited to sign or to concur in an MOA if historic properties of concern to them will be adversely affected.

Other consulting parties. Many other groups, agencies, and individuals may be involved in discussions about Section 106 projects. These consulting parties can include private developers who need federal agency approvals for their projects, local government officials, historical societies and historic preservation organizations, owners of historic properties, and private citizens who are concerned about preserving the past. These consulting parties may be invited to sign or concur in the MOA for a project which will adversely affect historic properties.

Useful Resources

The Advisory Council on Historic Preservation has published numerous guidance documents that are useful in understanding specific aspects of the Section 106 process. For information see the "Working with Section 106" section of the ACHP website at www.achp.gov and especially the "User's Guide to Section 106." Two important ACHP guidance documents for archaeology that are not available on the web are the ACHP Policy Statement on the Treatment of Human Remains (and the accompanying interpretive memorandum) and "Treatment of Archaeological Properties: a Handbook." The latter, though somewhat out of date, is still the major reference for development of archaeological research designs in cultural resource management. Contact the Advisory Council for copies of these documents.

The National Register of Historic Places publishes a series of National Register Bulletins that provide guidance on identifying and evaluating historic properties. Particularly germane to archaeology are the bulletins on

- How to Apply the National Register Criteria for Evaluation (#15)
- Guidelines for Evaluating and Registering Archeological Properties (#36)
- Guidelines for Identifying, Evaluating and Registering Historic Mining Properties (#42)
- Guidelines for Evaluating and Documenting Rural Historic Landscapes (#30)
- Guidelines for Evaluating and Documenting Traditional Cultural Properties (#38)
- Nominating Historic Vessels and Shipwrecks to the National Register of Historic Places (#20)

The bulletins and other information are available on the National Register's website at www.cr.ns.gov/nr/ .

The Council on Environmental Quality, the federal agency that oversees NEPA compliance, provides a great deal of useful NEPA-related information on its website at http://ceq.eh.doe.gov/nepa/nepanet.htm.

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Supplemental Information Attached

36 CFR part 800 – the regulation implementing Section 106 of the National Historic Preservation Act

36 CFR 60.4 - the criteria of eligibility to the National Register of Historic Places