

What is Section 106?

The National Historic Preservation Act (NHPA) was passed by Congress in 1966 to help protect the Nation's cultural heritage as preserved in archaeological, historical, and architectural sites. The federal regulations implementing NHPA are given in 36CFR800.

Section 106 of NHPA requires federal agencies to take into account the effects that their federally funded activities and programs have on significant historic properties. "Historic property" is a term of art which includes archaeological, historic, and architectural sites.

Who Must Comply:

36 CFR 800.16 (y:) "*Undertaking* means a project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval."

Triggers for Section 106 compliance:

The project involves:

- Federally-owned land and/or,
- Federal money (direct or indirect) and/or
- Federal permit, license, or approval

Does Project Cause a Problem?:

36 CFR §800.3(a): When there is an undertaking the Federal agency is obligated to determine whether the undertaking "is a type of activity that has the potential to cause adverse effects on historic properties."

36CFR800.9 (a): "An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of a property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered."

Steps to Be Taken:

If the project has the potential to cause adverse impacts to a historic property then the Federal agency must:

- 36CFR800.4(b): Make a systematic effort to identify potential historic properties within the project area (area of potential effect). Accomplished through cultural resource inventories – intensive pedestrian searches.
- 36CFR800.4(c): In consultation with the State Historic Preservation Officer and/or Tribal Historic Preservation Officer, the Federal agency must make a determination of whether the sites located during the inventories are eligible for listing on the National Register of Historic Places.
 1. Ineligible: No further steps need to be taken
 2. Eligible: In 36 CFR §800.6 the Federal Agency is instructed to resolve adverse effects to historic properties through mitigation and/or protection.
 - Avoid
 - Protect
 - Mitigate (data recovery)

Consultation:

The Federal agency must consult with the SHPO or THPO whose jurisdiction includes the project area.

In addition, the Federal agency must consult with Indian Tribes on projects which may affect properties of traditional religious and cultural significance on or off Tribal lands. Section 36 CFR 800.2(c)(2)(ii)(A) states that "the agency official shall ensure that consultation in the Section 106 process provides the Indian Tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects" (see Traditional Cultural Properties – Bulletin 38).

Disagreements Between Federal Agency and SHPO/THPO:

The Advisory Council on Historic Preservation was created to help resolve disagreements between Federal agencies and SHPOs and/or THPOs.

U.S. Army Corps of Engineers Compliance with Section 106 on the Standing Rock Reservation:

1. The Corps needs to identify the “undertaking.”
2. The Corps has failed to make a formal determination of effects.
3. The Corps has failed to complete the needed cultural resource inventories.
4. The Corps has failed to complete National Register evaluations of recorded sites.
5. The Corps has failed to protect and/or sites that are eligible for the National Register.
6. The Corps has failed to consult with those Tribes, including Standing Rock, that did not sign the Programmatic Agreement