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Chapter 7
SECTION 106

7.1 SECTION 106 COMPLIANCE PROCEDURES

Section 106 of the National Historic Preservation Act (NHPA) requires that proposed federally funded or approved undertakings, including undertakings on federal lands or undertakings with federal permits, consider effects on properties included in, or eligible for inclusion in, the National Register of Historic Places (NRHP). Generalized step-by-step activities for complying with Section 106 are presented in Figure 7-A – Section 106 Compliance Procedures Flowchart. Prior to starting the process, the Cultural Resource Section (CRS) confers with the project manager to determine whether the project is a federal undertaking or involves a federal action. Depending on the outcome, a determination may be made that 1) the project does not involve a federal undertaking, 2) the project has no potential to cause effect, or 3) that the project is subject to Section 106. If there is FHWA federal-aid involved, the process detailed in the 2014 Transportation Programmatic Agreement will be followed.

Additional information on Section 106 consultation can be found in the American Association of State Highway and Transportation Officials (AASHTO) Practitioner’s Handbook 06, Consulting Under Section 106 of the National Historic Preservation Act.

Regulations and Guidance

Programmatic Agreement among the Federal Highway Administration, the Nevada Department of Transportation, the Nevada State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Implementation of Federal-Aid Transportation Projects in the State of Nevada – 2014
Consulting Under Section 106 of the National Historic Preservation Act – August 2016
AASHTO Practitioner’s Handbook 06, August 2016 Consulting Under Section 106 of the National Historic Preservation Act
1. Determine Area of Potential Effect (APE)
2. Obtain Right-of-Way Entry Permits
3. Identify Historic Resources
4. Identify Properties Eligible for NRHP
5. Assess Effects on Eligible Properties
6. Assess Adverse Affects
7. Resolve Adverse Affects
8. Implement Compliance Commitments

Figure 7-A—SECTION 106 COMPLIANCE PROCEDURES FLOWCHART
The CRS will determine the need for Section 106 evaluation and/or need for Native American Consultation for each project. The CRS monitors the Project Scheduling and Management System (PSAMS), materials site requests, and maintenance activities to identify NDOT projects or actions involving federal funding, federal approvals/permits or federal lands that have the potential to affect sites on or eligible for the NRHP (i.e., “historic property,” per 36 CFR Part 800.16(l)(1)). The CRS determines the Area of Potential Effect (APE) and documents the APE (i.e., the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties) for FHWA. There are three separate APEs: the direct APE, the indirect APE, and the Native American Consultation/Coordination APE (see Chapter 15). The direct APE is defined as the area in which direct impacts to resources may occur. The indirect APE includes the area that may be indirectly affected by auditory, visual and atmospheric impacts on resources. The CRS will negotiate with the FHWA, the SHPO/THPO, and other federal agencies, if necessary, to determine the APE and to seek concurrence on the adequacy of the APE.

Upon consultation with the CRS, Local Planning Agencies (LPA) may be required to contract with a consultant to complete Section 106 reports or studies. Any consultant reports or studies will be submitted to the CRS for review and forwarding on to FHWA.

The CRS will coordinate with the NDOT Right-of-Way Survey Services Division to determine ownership of the properties in the APE (e.g., privately-owned, state-owned, federal lands). The Native American Consultation Coordinator will determine which, if any, Native American tribes/organizations claim an interest in lands within the APE that would require consultation/coordination.

If a Cultural Resource consultant is hired, the CRS will coordinate with the Cultural Resource Consultant to conduct background research to determine the extent of information available on historic properties within the APE and the need for, and extent of, further identification efforts. The background research will include the following components:

- reviewing existing information on historic properties within the APE (e.g., previous/current surveys, previously recorded sites, existing clearance status of areas within the APE);
- seeking information, as appropriate from individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area; and
- the Native American Consultation Coordinator will solicit information from consulted Native American tribes/organizations to assist in identifying historic properties, including those off tribal lands, that may be of traditional religious and cultural significance and that may be eligible for the NRHP.

Regulations and Guidance

36 CFR Part 800 “Protection of Historic Properties”
ACTIVITY NO. 2: Obtain Right-of-Entry Permits

1. **Private Property.** The CRS will work with the NDOT Right-of-Way Survey Services Division to obtain written clearance/permission for right-of-entry to the property.
2. **Federal Property.** The CRS will obtain a Permit or Fieldwork Authorization for access to a property managed by a federal agency.
3. **Native American Lands.** NDOT Right-of-Way Division will work with the tribe to obtain written clearance/permission for right-of-entry to the property. The Native American Consultation Coordinator and the Project Manager will consult with the affected tribal officials to inform them of the planned field work and to determine if there are tribal standards or guidelines (e.g., additional environmental and business ordinances, confidentiality concerns) that would affect how the work is to be performed. The FHWA Environmental Program Manager or Native American Consultation Coordinator will provide the tribal officials a map of the APE and other available information (e.g., survey reports, information on known sites). NDOT will be sensitive to who the legal representative of the tribe is and will ensure that appropriate parties are involved in the consultations/negotiations.

Regulations and Guidance

Bureau of Land Management (BLM) – [Obtaining a Cultural Resource Use Permit for BLM-Managed Lands](#)

36 CFR Part 251.54 US Forest Service (USFS) “Land Uses, Proposal and Application Requirements and Procedures”

Bureau of Land Management, Nevada – [Cultural Resources Inventory General Guidelines](#)

ACTIVITY NO. 3: Identify Historic Resources

Based on the results of the background research and consultation accomplished in Activity 1, the CRS, or the Cultural Resource consultant, will conduct further studies/surveys needed to identify historic resources within the APE for the reasonable alternatives under study. This may involve any or all of the following:

- further background research, consultation, and/or oral history interviews;
- archaeology surveys and/or testing for evaluation of identified sites for NRHP eligibility determination;
- historic structures surveys/evaluations of identified structures for NRHP eligibility determination; and
- Native American Consultation/Coordination.

The CRS will determine whether field surveys will be conducted by consultants. If consultants will be used, the CRS may initiate the process of securing consultant services for performing the work, or the engineering consultant will hire a sub-consultant to do the cultural work. The field survey must be supervised by a fieldwork supervisor who meets the Secretary of the Interior’s (SOI) professional standards for the appropriate area of expertise required for the survey. All work
performed by people not meeting the SOI’s professional standards must be reviewed and approved by the fieldwork supervisor. In consultation with the SHPO/THPO, the CRS will determine if there are other “consulting parties” and/or local governments that have an interest in the APE that should be invited to participate in the Section 106 process. The CRS also will consult with the SHPO/THPO on planning for public involvement to provide information about the undertaking and its effects on historic properties, and to seek comment and input. The CRS will give due consideration to confidentiality concerns of affected parties in planning for public involvement.

Regulation and Guidance

36 CFR Part 800 “Protection of Historic Properties”
Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation

ACTIVITY NO. 4: Identify Properties Eligible for the NRHP

The CRS will initiate field surveys to identify historic properties within the APE that may be eligible for the NRHP.

After completing the resource identification research/studies/surveys and documenting the findings, the CRS will initiate consultation and negotiations with the FHWA, the SHPO/THPO and, as applicable, the affected federal land management agencies (FLMAs) and Native American groups/tribes to apply the NRHP eligibility criteria to the identified resources within the APE that have not been previously evaluated for NRHP eligibility, or that require an updated evaluation.

Upon conclusion of the preliminary consultation and negotiations, the CRS will prepare documentation of the recommended findings regarding resource eligibility and will submit it through FHWA and/or the FLMA to the SHPO/THPO. The CRS will negotiate, as necessary, with the SHPO/THPO to achieve concurrence with the eligibility recommendations approved and submitted by FHWA and/or the FLMA as the responsible “Agency Official” for the Section 106 compliance process. In some instances, a request for a formal determination of eligibility from the Keeper of the National Register will be necessary.

Resources determined to meet the NRHP eligibility criteria will be treated as “historic properties” subject to further compliance with the Section 106 process. If the CRS and the FHWA, or appropriate FLMA, have not determined the NRHP eligibility of a historic property (e.g., eligibility is undetermined) it will be treated as eligible until such time as the determination is final. Historic properties on or eligible for the NRHP are determined to warrant preservation in place are subject to Section 4(f) requirements. See Chapter 8 for information on Section 4(f) properties and procedures.

If the APE changes as project development progresses, the CRS will ensure appropriate identification and consideration of “historic properties” in the altered APE. This may include issuing new task orders for additional surveys and background research.
Regulations and Guidance

36 CFR Part 800 “Protection of Historic Properties”
36 CFR Part 60.4 “Criteria for Evaluation”
36 CFR Part 63 “Determinations of Eligibility for Inclusion in the National Register of Historic Places”
36 CFR Part 65 “National Historic Landmarks Program”
Standards and Guidelines for Archeology and Historic Preservation, Secretary of the Interior
Environmental Guidebook/Historic Preservation/Archaeology, FHWA

ACTIVITY NO. 5: Assess Effects on Eligible Properties

The CRS will work with the Project Management Team (PMT) to determine the potential effects of the undertaking on historic properties in the APE (e.g., direct construction/maintenance impacts, indirect visual and atmospheric impacts, impacts from temporary easements, utility easements, staging and storage areas, access roads, material sources, waste areas).

The assessment of effects will result in one of the following findings:

1. No Historic Properties Affected.
   - no historic properties are present, or
   - historic properties are present but the undertaking will have no effect on them.

   If it is determined that no historic properties will be affected, the CRS will prepare documentation of this finding (see 36 CFR Part 800.11(d)) and submit it to FHWA and/or the FLMA for forwarding to the SHPO/THPO.

2. Historic Properties Affected. The CRS will initiate coordination with the PMT to determine if adjustments can be made to eliminate potential adverse effects. Adjustments that are reasonable and feasible should be incorporated in the undertaking. If historic properties are still affected, NDOT will coordinate with FHWA and/or the FLMA to notify the consulting parties, including Native American groups/tribes, to invite their views on the effects and will then assess identified adverse effects (see Activity 7).

Regulations and Guidance

36 CFR Part 800 “Protection of Historic Properties”

ACTIVITY NO. 6: Assess Adverse Effects

In consultation with the SHPO/THPO and Native American groups/tribes that attach religious or cultural significance to identified historic properties, the CRS, with FHWA and/or the FLMA, will apply the criteria of adverse effect (36 CFR Part 800.5) to historic properties that the undertaking will affect. Application of the criteria will result in one of the following findings:
1. **Finding of No Adverse Effect.** If NDOT and FHWA and/or the FLMA propose a finding of no adverse effect, NDOT will initiate steps, with FHWA and/or the FLMA, to notify consulting parties of the finding and provide them with supporting documentation.

   If the SHPO/THPO agrees with the finding, and no consulting party has objected, the undertaking may proceed under the No Adverse Effect finding, provided the Advisory Council on Historic Preservation (ACHP) is not reviewing the finding (see 36 CFR Part 800.5).

   If the SHPO/THPO or other consulting party provides written notification indicating that it disagrees with the finding, NDOT and FHWA and/or the FLMA will either consult with the party to resolve the disagreement or request the ACHP to review the finding.

2. **Finding of Adverse Effect.** If an adverse effect is found, NDOT, with FHWA and/or the FLMA, will continue consultation to resolve the adverse effect.

**Regulations and Guidance**

36 CFR Part 800 “Protection of Historic Properties”

*Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements With Historic Sites*

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<th>ACTIVITY NO. 7:</th>
<th>Resolve Adverse Effects</th>
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NDOT, with FHWA and/or the FLMA, will confer with the SHPO/THPO, interested persons and, as appropriate, the ACHP to seek ways to avoid, minimize or mitigate adverse effects that an undertaking may have on a historic property. NDOT and FHWA and/or the FLMA will make information available to the public and afford an opportunity for members of the public to provide their views on resolving the adverse effects. The information provided will be tailored to meet confidentially concerns regarding the historic properties. A Memorandum of Agreement (MOA) outlining the measures that NDOT/FHWA will take to avoid, minimize or mitigate the adverse effects will be prepared and executed.

After execution of the final MOA, the CRS will prepare a mitigation plan for implementing the measures to avoid, minimize and mitigate the undertaking’s adverse effects on historic properties.

Note that, in some cases, the consulting parties may be unable to resolve the adverse effects. See 36 CFR Part 800.7 for a description of the procedural options to address this situation.

If changes occur in the APE after completion of the compliance process, the CRS will determine if the Section 106 process will need to be reopened. If NDOT determines that the changes in the APE will result in an adverse effect on a historic property, the CRS will consult with the SHPO/THPO and FHWA and proceed with the process for resolution of the Adverse Effects.

See Section 2.3 “Preparing an Administrative Record”. 
Regulations and Guidance

36 CFR Part 800 “Protection of Historic Properties”
Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects with Minor Involvements With Historic Sites
43 CFR Part 7 “Protection of Archaeological Resources”
43 CFR Part 10 “Native American Graves Protection and Repatriation Regulations”
Environmental Guidebook/Historic Preservation/Archaeology, FHWA

ACTIVITY NO. 8: Implement Compliance Commitments

The CRS will coordinate with the PMT to ensure avoidance stipulations, as well as compliance commitments (e.g., minimization and mitigation measures) are explained in the Construction Contract Documents.

NDOT will implement mitigation commitments as the project moves toward construction. During and after the project’s construction, the CRS will monitor the activities to ensure fulfillment of avoidance stipulations and compliance commitments, including timely completion of agreed to mitigation reports, documents, etc.

See Section 2.1 “Project Development Process.”

Regulations and Guidance

AASHTO Practitioner’s Handbook 04, November 2006 – Tracking Compliance with Environmental Commitments/Use of Environmental Monitors