

Today's creature features presentation:

The ESA Incidental Take Permits and NHPA



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Compliance with the Endangered Species Act (ESA) and the National Historic Preservation Act (NHPA) are among the key **environmental compliance responsibilities** for all departments of DOI.



Creatures

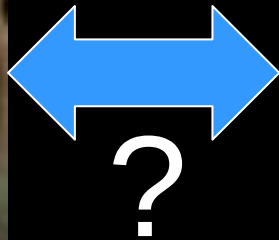


Features



Overarching Questions

- 1) How do we comply with ESA and NHPA to protect TES **and** significant cultural resources?
- 2) Do the ESA and NHPA complement each other?
- 3) Does NHPA help or hinder the objectives of ESA Section 10?



GOALS

- Summary of NHPA and ESA (Section 10).
- The NHPA - ESA connection.
- Issues – practical and policy related.
- Offer practical strategies and recommendations.



The National Historic Preservation Act

The National Historic Preservation Act (NHPA) of 1966 is the **key federal legislation** governing the protection and preservation of **historic properties**.

(Supported by **www.achp.gov**)



Endangered Species Act

- Applies to **everyone** regardless of land status.
- **Section 9**: it is illegal to “take” listed and threatened and endangered species.
- **Section 10**: issuance of incidental take permits on **non-federal lands**.



NHPA and the ESA

- Both deal with **finite, unique resources, that once lost are gone forever.**
- Both are **conservation** oriented.
- Both recognize the **leadership role** of the Federal government in partnership with all other levels of government **and** the private sector.



What is the link between ESA and NHPA?

Federal funding and issuance of an ITP =
federal “undertakings.”

Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties.



What is a Historic Property?

“any prehistoric or historic district, site, building, structure, or object **included in, or eligible for inclusion in**, the National Register of Historic Places.” [36 CFR §800.16]



a.k.a.

significant cultural resources

- the physical remains of past human life.
- at least 50 years of age.
- denotes prehistoric and historic sites, objects, features, structures.
- nonrenewable.



What determines significance?

- Age = 50+ years
- National Register of Historic Places Criteria:
 - a. Associated with significant event
 - b. Associated with significant individual
 - c. Represents outstanding or unique architecture
 - d. Likely to yield important archaeological data
- Integrity



A photograph taken from the interior of a cave, looking out through a large, irregular opening. The foreground is dark and rocky, with a prominent, jagged rock formation in the center. The view outside the cave is a vast, flat, grassy landscape, likely a savanna or prairie, stretching towards a range of low, hazy mountains in the distance. The sky is overcast with soft, grey clouds. The overall scene conveys a sense of isolation and natural beauty.



...and in Region 4.



What triggers Section 106?

When the project or activity is an
undertaking.



Key players of Section 106

- State Historic Preservation Officer (**SHPO**)/Tribal Historic Preservation Officer (**THPO**).
- Federally recognized tribes.
- Federal agency retains decision-making authority for all undertakings.



Defining the APE



- Most critical step of the Section 106 process.
- Area of Potential Effects (APE) is the **geographic area or areas directly/indirectly** affected by the project.



Critical Steps of Section 106

1. Identification

Reasonable and good faith effort to identify historic properties.

Things to take into account:

- ✓ past research and studies;
- ✓ magnitude and nature of the project;
- ✓ degree of federal involvement;
- ✓ potential for effect;
- ✓ likelihood for historic properties.



Critical Steps of Section 106

2. Evaluation

Evaluate cultural resources by applying the National Register of Historic Places Criteria:

- a. Associated with significant **event**.
- b. Associated with significant **individual**.
- c. Represents outstanding or **unique architecture**.
- d. **Likely to yield** important archaeological data.



Critical Steps of Section 106

3. Assessment of Effects

What effect will the project have on historic properties?

- No historic properties affected
- No adverse effect
- Adverse effect

Don't confuse these effects with effects under NEPA!!!



Critical Steps of Section 106

4. Resolution of Adverse Effects

- Mitigate **adverse effects** on **eligible or listed properties**.
- SHPO plays role in advising on scope, scale, type of mitigation.
- Formal agreement (MOA) for carrying out mitigation step.



Section 106 process in a nutshell:

- Are there any **important** archaeological sites or buildings in the area of your project?
- Will this project **destroy** or **damage** them?
- If so, can we do something to **avoid** the damage?
- If not, how can the damage be **minimized** or mitigated?



Pause for station identification



What are the issues?

- Compliance with NHPA on non-federal land.
- Landowners' concerns.
- How to implement Section 106 on landscape scales (10^6 acres).



Issue 1 - Non-federal lands

- Unique challenges.
- Policy: **not** the same as federal lands...close, but not the same.
- Requires careful consideration of Section 106 process.
- National Register criteria still apply!



Issue 2 - Landowners' concerns with NHPA

- Landowners already have to comply with ESA.
- Landowners may already be subject to state/local laws.
- They are not well informed of all the requirements necessary to obtain a permit.



Issue 3 - Implementation

- ✓ Affected areas may **range in size** from <1 acre up to millions of acres.
- ✓ **Specific locations** of where ground disturbing activities will occur may be **unknown**.
- ✓ **Duration of permit** is 50 to 60 years or longer.
- ✓ Landowner **does not want federal involvement** for the life of permit.
- ✓ FWS **lacks full control of non-Federal land** and its uses.



Strategies

1. Integrate Processes

How does Section 106 compliance fit with state/local laws?

- State and local government have their own preservation laws.
- County historic commissions, cities, state governments (e.g. CA, FL).
- Cannot be substituted in lieu of Section 106.



Strategies

2. GIS Technology

- A tool for analyzing known and predicted historic properties.
- Almost all SHPO offices have GIS capability (as do consultants).
- Ideally suited for landscape-scale management.



Strategies

3. Programmatic Agreements

- Allows for phased identification and evaluation of historic properties (36 CFR 800.14 (a)(b).
- Allows for compliance that is project specific.
- Plan early - takes time and effort to do in collaboration with others.



Recommendations

- Get NHPA started **early**.
- **Consult** with SHPO, interested parties, Tribes.
- For larger projects, look at large scale, known history and science.



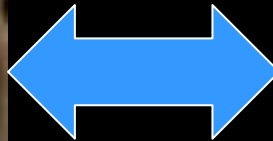
NHPA – HCP/ITPs: Some misconceptions

- HCPs/SHAs are voluntary programs. (yes, but...)
- The “but/for” test. (does not apply)
- Federalization of private property. (not the case)
- NHPA and NEPA. (compliance with NEPA alone **does not** constitute compliance with NHPA)



Overarching Questions

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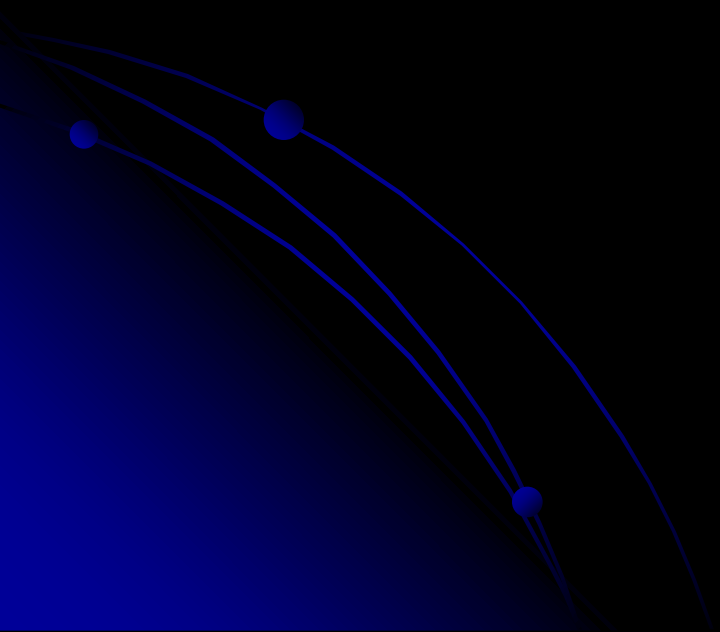


Conclusions

- ✓ Section 106 on non-federal land is not a new concept.
- ✓ Section 106 is **always** negotiable as long as the fundamental legal requirements are met.
- ✓ Cooperation from landowner is key.
- ✓ Educate landowners **and** agency personnel.
- ✓ **Do Section 106 early on!**



Trailers



Why not have one law that preserves all
threatened landscapes?

