Preserving America's Heritage

MEETING THE "REASONABLE AND GOOD FAITH" IDENTIFICATION STANDARD IN SECTION 106 REVIEW

The regulations implementing Section 106 of the National Historic Preservation Act ("Protection of Historic Properties," 36 CFR Part 800) require federal agencies to identify historic properties within the Area of Potential Effects (APE) that may be affected by their undertakings. Section 800.4(b)(1) of these regulations states that federal agency officials shall make a "reasonable and good faith effort" to identify historic properties.

The ACHP is regularly asked how to determine when an adequate identification effort has been made—that is, at what point a federal agency has made a reasonable and good faith effort to determine whether historic properties are located within an undertaking's APE, which is the "geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist." Answering this question requires an understanding of what the ACHP's regulations say regarding the identification of historic properties.

Prior to beginning the identification stage in the Section 106 process, the regulations (at 36 CFR § 800.4) require the federal agency to do the following:

- Determine and document the APE in order to define where the agency will look for historic properties;
- Review existing information on known and potential historic properties within the APE, so the agency will have current data on what can be expected, or may be encountered, within the APE;
- Seek information from others who may have knowledge of historic properties in the area. This includes the State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer (THPO) and, as appropriate, Indian tribes or Native Hawaiian organizations who may have concerns about historic properties of religious and cultural significance to them within the APE.

Following these initial steps, the regulations (36 CFR § 800.4(b)(1)) set out several factors the agency must consider in determining what is a "reasonable and good faith effort" to identify historic properties. They call for the agency official to "take into account past planning, research and studies; the magnitude and nature of the undertaking and the degree of federal involvement; the nature and extent of potential effects on historic properties; and the likely nature and location of historic properties within the APE. The Secretary of the Interior's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, state, tribal, and local laws, standards, and guidelines. The regulations note that a reasonable and good faith effort may consist of or include "background research, consultation, oral history interviews, sample field investigation, and field survey."

When asked to provide its advisory opinion (pursuant to 36 CFR § 800.2(b)(2)) on the adequacy of a specific identification effort, the ACHP will evaluate the agency's efforts in light of these factors and the following criteria.

1. The identification effort is reasonable when it is logically designed to identify eligible properties that may be affected by the undertaking, without being excessive or inadequate in light of the factors cited above. While it may be appropriate in some circumstances to identify all historic properties in the APE, it is important to note that the regulations *do not require* identification of all properties. A reasonable identification plan is one that includes the following:

- Documentation of the horizontal and vertical extent of the APE;
- An explanation of how the factors cited above inform the content and intensity of the identification plan. This could include information on past work in the area, scope of federal involvement in the undertaking, and the undertaking's magnitude and anticipated effects on any historic properties that might exist in the APE;
- A review of existing information on historic properties within the APE, including information about possible historic properties not yet identified;
- A cognizance of applicable professional, state, tribal, and local laws, standards, and guidelines;
- A familiarity with methodologies used in other historic property surveys in the area that have been effective in terms of time and cost;
- A clear description of the steps that will be taken during field investigations, during the analysis of field results, and in the subsequent reporting and consultation, to determine the presence or absence of historic properties within the APE.

2. The identification effort is carried out in good faith when it is fully implemented by or on behalf of the federal agency. An identification plan that is appropriate to the nature and scale of the undertaking is carried out in good faith when it meets the following criteria:

- The plan is carried out in consultation with, as appropriate, the SHPO, THPO, and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to historic properties within the APE;
- Is initiated in a timely manner that allows for appropriate analysis and reporting, with adequate time for review by the consulting parties;
- Is carried out by a qualified individual or individuals who meet the Secretary of the Interior's qualification standards and have a demonstrated familiarity with the range of potentially historic properties that may be encountered, and their characteristics;
- Acknowledges the special expertise possessed by Indian tribes and Native Hawaiian organizations in assessing the eligibility of historic properties that may possess religious and cultural significance to them (regardless of whether or not such tribes and organizations meet the Secretary's qualification standards);
- Is fully supported by adequate funding and other necessary resources, and
- Is not compromised by lack of integrity or omission, such as manipulating or ignoring evidence.

Note that the regulations require that a reasonable and good faith effort to identify historic properties *include some level of effort*—at a minimum, a review of existing information on historic properties that are located or may be located within the APE (36 CFR § 800.4(a)(2)). Such an effort may consist of one or more methodologies and should be designed so that the federal agency can ensure that it produces enough information, in enough detail, to determine what the undertaking's effects will likely be on historic properties.

It is also important to keep in mind what a reasonable and good faith identification effort does *not* require:

- The "approval" of a SHPO/THPO or other consulting party. The ACHP, SHPO/THPO and other consulting parties advise and assist the federal agency official in developing its identification efforts, but do not dictate its scope or intensity.
- Identification of every historic property within the APE. One of the reasons the ACHP's regulations contain a post-review discovery provision (36 CFR § 800.13) is that a reasonable and good faith effort to identify historic properties may well not be exhaustive and, therefore, some properties might be identified as the project is implemented.
- Investigations outside of, or below, a properly documented APE. The Section 106 process does not require that the agency search for all historic properties in a given area. Because the APE defines the geographic limits of federal agency responsibility for purposes of Section 106 review, identification efforts are carried out within its boundaries.
- Ground verification of the entire APE. In many cases, areas can be considered to have a certain probability of containing historic properties (e.g., high, medium, low) based on current knowledge. This or similar characterizations can be used to justify where within the APE most identification efforts will or should be targeted. Predictive models that have been tested and found to be reasonably efficient can also assist federal agencies to meet the "reasonable and good faith" identification standard.

In sum, the Section 106 regulations require federal agencies to make a "reasonable and good faith effort" to identify historic properties that may be affected by their undertakings. The regulations set out several factors that need to be considered in making the effort both *reasonable* in terms of intensity and scale, and carried out in *good faith* through its development and execution. The ACHP's online archaeology guidance provides further detailed discussion on how these factors can be applied to archaeological sites to ensure Section 106 identification plans are adequate and appropriate to a given situation (http://www.achp.gov/archguide/). The ACHP's professional staff is also available to assist agencies, SHPOs/THPOs, consultants, and contractors in interpreting the reasonable and good faith standard when questions or disputes arise.