Preserving America's Heritage

TABLE OF CONTENTS
Federal Agency Programs Committee

Agenda

Implementing the Action Plan to Support State and Tribal Historic Preservation Officers

Request for Development of Program Alternative by the Rural Utilities Service, USDA, to Address Sequencing Problem Arising from Obligation of Funding for Loans and Loan Guarantees in RUS Telecommunications Program and Compliance with Section 106
Attachment: Potential Program Alternative

Update on Major Activities

Please see the following papers in Tab 1 for the Federal Agency Programs Committee discussion:

Tribal Consultation and Section 106 Reviews on Infrastructure Projects

Standard Treatment for Telecommunications Projects on Federal Land
Attachments: Letter from Department of Homeland Security
FAQs: Proposed Standard Treatment for Telecommunications Projects on Federal Land
Draft Telecom Standard Treatment Comment Matrix

Section 11504 of the Fixing America's Surface Transportation Act Development of a Section 106 Exemption for Railroad Rights of Way

The ACHP's Policy Statement on Historic Preservation and Community Revitalization
Attachment: Final Policy Statement

Preserving America's Heritage

MEETING
FEDERAL AGENCY PROGRAMS COMMITTEE
Wednesday, November 30, 2016
9:30 a.m.–Noon
National Building Museum, Room 337

PROVISIONAL AGENDA

I. Call to Order

II. Transition Planning

III. Update on Section 106 Reviews for Infrastructure Projects

IV Standard Treatment for Broadband on Federal Property

V. Department of Transportation Request for a Railroad Exemption

VI. Update on Implementation of Action Plan to Support State and Tribal Historic Preservation Officers

VII. Adoption and Dissemination of ACHP Policy Statement on Historic Preservation and Community Revitalization

VIII. Request for Program Alternative for the Rural Utility Service Granting Programs

IX. Adjourn

ADVISORY COUNCIL ON HISTORIC PRESERVATION
401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

Preserving America's Heritage

IMPLEMENTING THE ACTION PLAN TO SUPPORT STATE AND TRIBAL HISTORIC PRESERVATION OFFICERS
Office of Federal Agency Programs

Introduction. At the July 2015 business meeting the members adopted an Action Plan designed to encourage federal agencies to identify ways they could better support State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs) as they assist them in carrying out their Section 106 responsibilities. Federal agencies consult with SHPOs and THPOs in Section 106 reviews when identifying historic properties, assessing effects to them, and resolving any adverse effects caused by the federal project or program. The goal of the Action Plan is to strengthen SHPO and THPO capacity to participate in the Section 106 review process when doing so benefits the agency and SHPO/THPO.

Update. A draft of a new guidance document, "ACHP Guidance on Reimbursement of Consulting Parties in the Section 106 Review Process," will be shared with Federal Agency Programs (FAP) Committee members after it is reviewed by the National Park Service (NPS), National Conference of State Historic Preservation Officers (NCSHPO), and National Association of Tribal Historic Preservation Officers (NATHPO). The committee's input will assist in finalizing this document. The ACHP staff expects the guidance will clarify and expand opportunities for partnerships between federal agencies and SHPOs and THPOs that can address Section 106 review workload burdens.

With respect to identifying additional efficiencies in the Section 106 process that might reduce SHPO/THPO workloads, another objective of the plan, ACHP staff plans to query SHPOs, THPOs, federal agency staff, and other readers in the forthcoming November OFAP e-newsletter about their experiences in working with Programmatic Agreements as the most commonly used Section 106 program alternative. At the July meeting, FAP Committee members also discussed what other steps, aside from program alternatives, the ACHP might take to encourage further efficiencies in Section 106 reviews. Reid Nelson and John Fowler participated in additional discussion on this topic at a SHPO/THPO meeting in Denver in September hosted by NPS and NCSHPO. Recognizing that requests for additional information also consume time and effort in the Section 106 review process, ACHP staff is working on a new webinar about the documentation required for findings of adverse effect and how to submit the required documentation using the ACHP's e-106 system. While the webinar will focus specifically on 36 CFR §800.11(e) and findings of adverse effect, much of the information will be transferable to situations where agency officials propose findings of no historic properties affected or no adverse effect.

Finally, during the September FAP Committee call, members acknowledged the importance of engaging Federal Preservation Officers (FPO) on this topic. ACHP staff will be working with the FPO Forum to identify other ways of getting feedback from federal agency staff about their Section 106 workloads and where they find opportunities for improvement and greater efficiency.

Action Needed. None.

November 15, 2016

ADVISORY COUNCIL ON HISTORIC PRESERVATION
401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

Preserving America's Heritage

REQUEST FOR DEVELOPMENT OF PROGRAM ALTERNATIVE BY THE RURAL UTILITIES SERVICE, USDA TO ADDRESS SEQUENCING PROBLEM ARISING FROM OBLIGATION OF FUNDING FOR LOANS AND LOAN GUARANTEES IN RUS TELECOMMUNICATIONS PROGRAM AND COMPLIANCE WITH SECTION 106
Office of Federal Agency Programs

Introduction. The Rural Utility Service (RUS) has approached the ACHP requesting guidance on development of a program alternative, pursuant to 36 C.F.R. § 800.14, to address a sequencing issue it encounters regarding completion of Section 106 review and the obligation of funding for projects assisted by grant and loan funding through its Telecommunications Program. These projects are intended to help improve the quality of life in rural America by providing capital for the deployment or improvement of rural telecommunications infrastructure to ensure that rural areas have access to affordable, reliable, advanced telecommunications services comparable to those available throughout the rest of the United States. Because of the nature of the funding process, RUS typically must approve and obligate a loan design which contains the projects for telecommunications infrastructure construction that a borrower proposes to carry out over a five-year period. However, it is difficult for RUS to complete Section 106 review for each of the projects in the loan design prior to obligating the funds, as required by the Section 106 regulations.

At the time of RUS review, approval, and obligation of funds, the projects proposed in the loan design are not designed in detail. Further, over the course of the five years, the project proponent may decide not to build one or more of the projects in the loan design. As such, the financial burden of carrying out Section 106 review for all the projects in the loan design prior to obligation of the funding would place a tremendous financial burden on RUS' borrowers. In the past, RUS has obligated the funding for a loan design and then carried out Section 106 and other federal reviews, including compliance with the National Environmental Policy Act, prior to release of funds for each included project, as it was more fully designed and the proponent indicated commitment to follow through. The obligation of funding provided assurance of funding and helped to support necessary research and design work. However, recently in order to ensure compliance with Anti-Deficiency Act Requirements and the update of Rural Development's Environmental Regulation, RUS has determined it must complete all environmental reviews, including Section 106, prior to obligating funding for loan designs.

ACHP Involvement. RUS has approached the ACHP to seek guidance about a possible Program Alternative that would enable the agency to obligate funding for loan designs, and subsequently carry out appropriate Section 106 review for individual projects when they are more fully formulated, while staying in compliance with Section 106. RUS borrowers are mostly not-for-profit cooperatives or underserved communities that do not have the financial reserves to accept the expense of Section 106 review without some level of confidence that RUS low-interest funding will be available to them. As such, RUS needs to be able to obligate funding for a multi-year period, prior to the complete design of projects that will be assisted and prior to the availability of more precise information about the magnitude and nature of the undertaking and the nature and extent of potential effects on historic properties. RUS has recently

published a Programmatic Environmental Assessment (PEA), scheduled to go into effect this fall, for its Telecommunications Program. A program alternative for Section 106, combined with the PEA, would help to expedite the preparation and evaluation of environmental reviews for applicant submittals to facilitate the deployment and expansion of broadband infrastructure to rural America, while facilitating appropriate Section 106 review when project details are available.

Next Steps. ACHP staff will provide a summary of its discussions with RUS and introduce a representative of the agency who will provide further information about the program and RUS' interest in a program alternative. Staff will seek the Federal Agency Programs Committee's views on appropriate resolution of this issue and the appropriate vehicle to meet RUS' needs. RUS has suggested that a Program Comment, pursuant to 36 C.F.R. § 800.14(e), might be an appropriate and efficient solution to its dilemma. However, it may be that other program alternatives, such as a Nationwide Programmatic Agreement or Prototype Programmatic Agreement to be executed in each state, would also be applicable. The staff invites the views of the committee members on the appropriate vehicle.

Staff will continue to work with RUS to analyze their funding protocols for the Telecommunications Program and consider a program alternative that will address the issues RUS has raised. Staff will keep the members informed about the progress of the initiative and seek further FAP Committee guidance as appropriate.

Action Needed. Member guidance on the approach to a program alternative is sought. No formal action is necessary at this time.

Attachment: Potential Program Alternative for the Rural Utilities Service, USDA, to Resolve the Section 106 Sequencing Conflict for RUS Telecommunications Program

November 15, 2016

Potential Program Alternative for the Rural Utilities Service, USDA, to Resolve the Section 106 Sequencing Conflict for RUS Telecommunications Program

What is the Rural Utilities Service Telecommunications Program?

- U.S. Department of Agriculture Rural Utilities Service (RUS), is authorized under the Rural Electrification Act of 1936, as amended, to provide financial assistance for the development, expansion and improvement of telecommunications infrastructure, including broadband, to eligible rural communities in the United States.
- Our current program applications are exclusively for constructing broadband infrastructure projects that can be completed in one or more years, or "*loan designs*" which is composed of multiple projects to be constructed over the course of four to five years within the borrower's service territory. Often, projects are not "staked," or located precisely prior to obligation of funds nor is the nature and magnitude of the undertaking clear.

How has RUS Sequenced Section 106 for the Telecommunications Program in the Past?

- RUS previously conditionally sets aside funding (loans with some grant) for use by a specific applicant to provide some level of assurance of federal assistance, but it is not absolute because the agency can de-obligate funding if conditions are not met and specify completion of Section 106 prior to release of funds in a letter of condition.
- This sequencing (obligation first, then finalizing Section 106) did not alter or change the roles and responsibilities of any party in Section 106 review, including Indian tribes, and in fact, provides all consulting parties adequate time and the information needed to appropriately complete Section 106.

The Anti-Deficiency Act Requirements, Rural Development Environmental Policies and Procedures Regulation and the Section 106 Sequencing Conflict

- Both identification of issues with the Anti-Deficiency Act Requirements and the update of Rural Development's Environmental Regulation now require that RUS complete both environmental and Section 106 consultations prior to approval of financial assistance.
- The Anti-Deficiency Act prohibits federal agencies from obligations or expending federal funds in advance or in excess of an appropriation, and from accepting voluntary services.
- Compliance with the Anti-Deficiency Act and Rural Development's Environmental Regulation requires that Section 106 be complete prior to the obligation of funds, and is not flexible such that the agency can de-obligate funding nor specify completion of Section 106 in a letter of conditions.

The Need for a Program Alternative

- RUS borrowers are mostly not-for-profit cooperatives or underserved communities that do not have the financial reserves to accept the expense of Section 106 review without some level of confidence that RUS low interest funding is available to them.
- RUS has published a Programmatic Environmental Assessment (PEA), scheduled to go into effect this fall, for its Telecommunications Program to expedite the preparation and evaluation of environmental review for applicant submittals to facilitate the deployment and expansion of broadband infrastructure to rural America.
- The PEA is intended to save RUS and applicants substantial time, resources, and funds; ensure consistent and accurate evaluation of broadband projects and efficient compliance with pertinent laws and regulations; and avoid unnecessary duplication and repetitive efforts in planning, environmental review, regulatory compliance, permitting, and decision-making. A Section 106 Program Alternative is a critical component of implementing this PEA.
- This simple sequencing issue, if corrected, will ensure better and more efficient decision making in the Section 106 process, particularly if more precise information is known about the magnitude and nature of the undertaking, and the nature and extent of potential effects on historic properties.

Program Alternatives Considered: Nationwide PAs, Individual PAs, Program Comment

- The agency has considered developing individual PAs or a nationwide PA to correct the obligation-Section 106 sequencing conflict, but has reservations as these alternatives exceed the complexity and narrow focus of the timing issue. PAs are also not constrained in their timing which will delay resolution of this issue and potentially delay implementation of the agency's PEA and deployment of valuable telecom and broadband services in unserved or underserved areas.

- A Program Comment may be a better suited alternative because its development occurs in mandated time frames and is overseen directly by the Advisory Council on Historic Preservation (ACHP).

Is There Support For A Program Alternative To Address This Issue?

- RUS has initiated discussions about a program alternative with: the National Trust for Historic Preservation (NCSHPO), CTIA – The Wireless Association, the National Association of Tribal Historic Preservation officers (NATHPO), the PCIA – The Wireless Infrastructure Association (PCIA), the National Trust for Historic Preservation (NT), NTCA – the Rural Broadband Association, and over 300 federally recognized tribes. In general those organizations that responded were supportive.

Preserving America's Heritage

UPDATE ON MAJOR ACTIVITIES
Office of Federal Agency Programs
July-November 2016

Updates are provided on the following topics:

- **Guidance on Section 304 of the NHPA**
- **Guidance on Bulletin 38 and Section 106**

Protecting Sensitive Information about Historic Properties under Section 304 of the NHPA
The ACHP issued a new guidance document on protecting sensitive information about historic properties under Section 304 of the National Historic Preservation Act (NHPA) in August 2016. Federal agency officials, State Historic Preservation Officers, Tribal Historic Preservation Officers, Indian tribes, Native Hawaiian organizations, and other stakeholders in the Section 106 process often ask the ACHP staff how sensitive information about historic properties can be protected from public disclosure. In response, the ACHP developed a webinar that describes how Section 304 of the NHPA works to protect such information and thereby prevent harm to historic properties. This new guidance builds on the questions and discussion from that webinar in a "Frequently Asked Questions" format.

ACHP staff coordinated closely with the Keeper of the National Register of Historic Places to ensure these FAQs identify the most commonly asked questions and provide helpful guidance to Section 106 practitioners as well as members of the public about what information may be withheld from disclosure, under what circumstances, and for what reasons. The guidance is now available on the ACHP website at http://www.achp.gov/304guidance.html.

Bulletin 38 and Section 106
As part of its effort to update Bulletin 38, originally issued in 1990 to provide guidelines on evaluating and documenting Traditional Cultural Properties (TCPs), the National Park Service (NPS) has been working with the ACHP to develop joint guidance on applying Bulletin 38 to Section 106 reviews to accompany the revised Bulletin. The ACHP provided final comments to the NPS on the draft in August 2016 and will work with NPS staff to issue the guidance in the near future.

Over the last several years, ACHP and NPS staff have worked on providing specific recommendations on how to consider TCPs in Section 106 reviews to address issues such as consultation requirements, identification and documentation, and assessing and resolving effects. The forthcoming guidance is framed as a set of "Frequently Asked Questions" based principally on advice provided by staff over the years and gives practical suggestions on how to consider the provisions of Bulletin 38 within a Section 106 context.

November 15, 2016