



# Section 106 Review and HUD Projects

Durant, Oklahoma

July 18, 2018

# Agenda

- Overview of Section 106 Historic Preservation Review
- What makes a property historic
- Consultation
- Evaluating effects on historic properties
- Resolving Adverse Effects
- Documenting the review



# Background

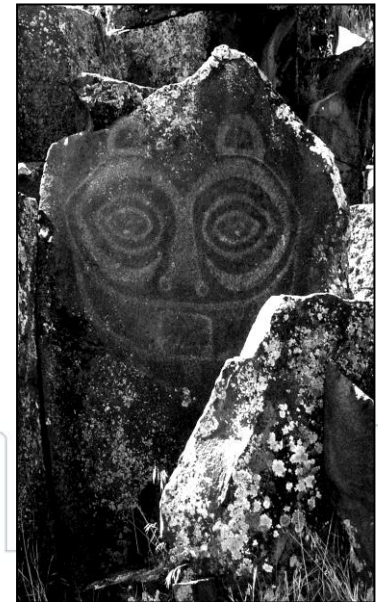
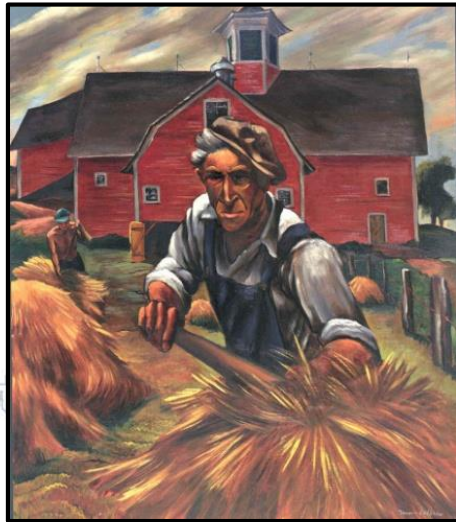
- HUD assists tens of thousands of projects each year
- Projects include new construction and rehabilitation for affordable housing, mortgage and loan guarantees, community planning and development



- Assistance goes to state and local governments, tribal governments, non-profit organizations, and individual recipients

# National Historic Preservation Act

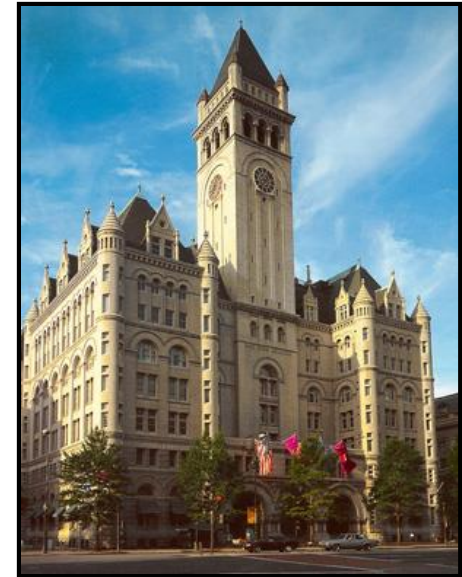
“the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people”



# National Historic Preservation Act

“the spirit and direction of the Nation are founded upon and reflected in its historic heritage”

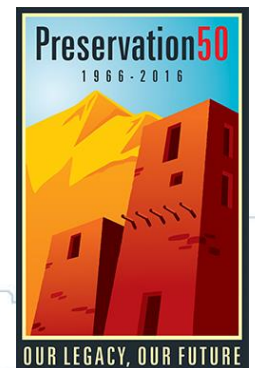
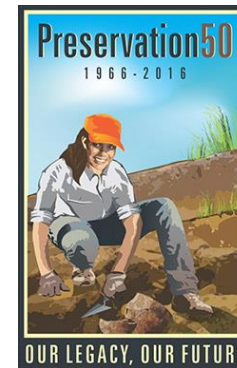
“the preservation of this irreplaceable heritage is in the public interest”





# National Historic Preservation Act

- The National Historic Preservation Act of 1966 requires federal agencies to consider the impact of their projects on historic properties
- Process known as “Section 106” review
- Implementing regulations – 36 CFR Part 800
- Incorporated by reference in 24 CFR Part 50 and 58



# Section 106

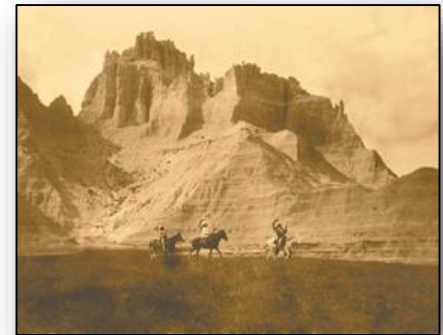
## Regulatory Philosophy

- Framework for problem solving
- Grounded in consultation
- Provides stakeholders access to federal decision-making process
- Historic preservation is not the only useful public purpose
- Results range from full preservation to total loss of historic properties



# Historic Property 36 CFR 800.16(I)

Any prehistoric or historic district, site, building, structure, or object included in, **or eligible for inclusion in**, the National Register of Historic Places. The term includes artifacts, records, and remains that are related to and located within such properties.



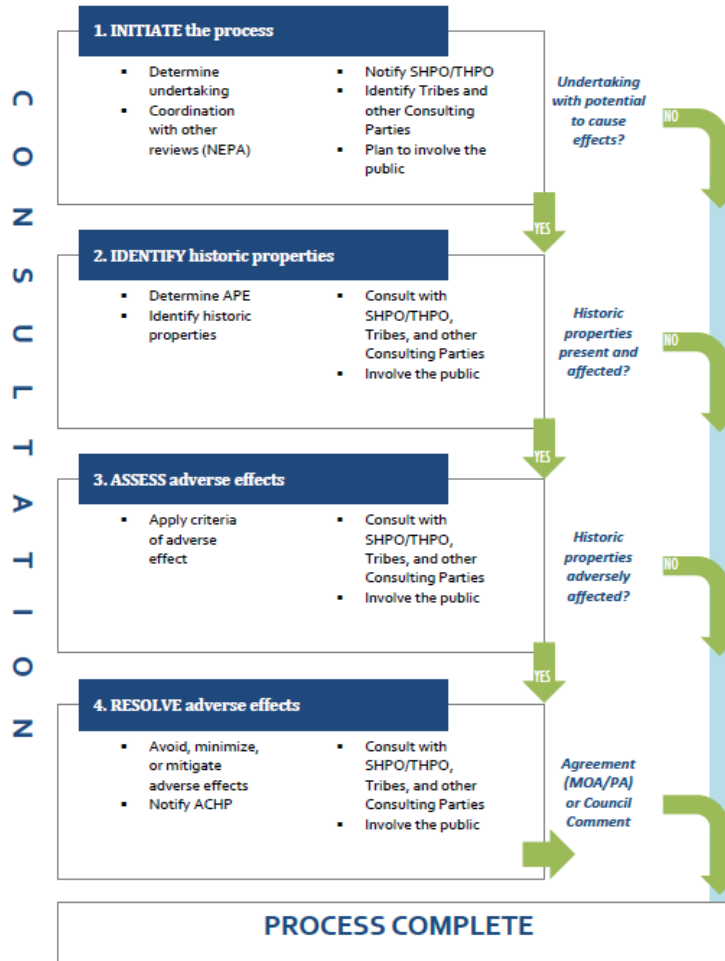
The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.





# Section 106

## Section 106 Process



# Background

## - Exemptions

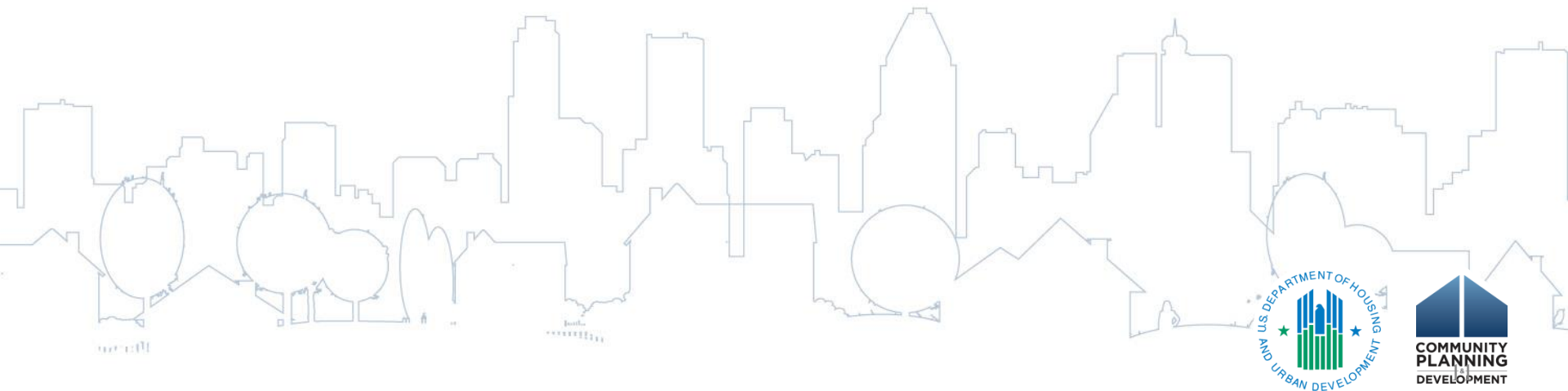
If project activities are limited to those listed in 24 CFR 58.34 (a) (1-11) as Exempt Activities and those listed in 24 CFR 58.35 (b), as Categorical Exclusions not subject to §58.5, no further review and no consultation are required

Examples include: simple maintenance activities, tenant-based rental assistance, administrative activities, operating costs, pre-development costs, studies and plans



# Categorical Exclusions **Not** Subject to §58.5 (CENST) [§58.35(b)]

“Operating costs including ***maintenance***, security, operation, utilities, furnishings, equipment, supplies, staff training and recruitment and other incidental costs”



# Maintenance Notice CPD-16-02

Maintenance activities slow or halt deterioration of a building and do not materially add to its value or adapt it to new uses

May be funded from operating or capital budgets

Simultaneous maintenance work in multiple units or buildings is still considered Maintenance

Maintenance = CENST

Rehabilitation = CEST



# Maintenance Notice

General examples of maintenance activities for environmental review purposes:

Cleaning activities;

Protective or preventative measures to keep a building, its systems, and its grounds in working order;

Replacement of appliances that are not permanently affixed to the building;





# Maintenance Notice

General examples of maintenance activities for environmental review purposes (continued):

Periodic replacement of a limited number of component parts of a building feature or system that are subject to normal wear and tear;

Replacement of a damaged or malfunctioning component part of a building feature or system. Replacement of all or most parts or an entire system is not maintenance.



# Examples of Maintenance Activities

Feature or System	Maintenance Activities <sup>4</sup>	Rehabilitation Activities <sup>5</sup>
Site	<ul style="list-style-type: none"><li>• lawn care (litter pickup, mowing, raking), trimming trees and shrubs</li><li>• snow/ice removal</li><li>• neighborhood cleanup</li><li>• application of pavement sealants, parking lot restriping, directional signage or marking for handicapped accessibility</li><li>• repair of cracked or broken sidewalks</li></ul>	<ul style="list-style-type: none"><li>• new landscaping throughout an area</li><li>• construction of new walkways, driveways or parking areas, or replacement thereof</li></ul>
Building Exterior	<ul style="list-style-type: none"><li>• cleaning and fixing gutters and downspouts</li><li>• repainting previously painted surfaces (including limited wet scraping and low-pressure washing)</li><li>• replacing deteriorated section of siding</li><li>• removal of graffiti</li></ul>	<ul style="list-style-type: none"><li>• cleaning masonry or stripping painted surfaces by sandblasting , acid wash, or high pressure washing</li><li>• applying new exterior siding</li></ul>

# Examples of Maintenance Activities

Feature or System	Maintenance Activities <sup>4</sup>	Rehabilitation Activities <sup>5</sup>
Roof	<ul style="list-style-type: none"> <li>fixing leaks</li> <li>application of waterproof coating to a flat roof</li> <li>replacement of deteriorated flashing</li> <li>in-kind replacement of loose or missing shingles or tiles</li> </ul>	<ul style="list-style-type: none"> <li>complete replacement of roof with new shingles, tiles, roll roofing, membrane, or new metal roof</li> <li>installation of solar panels</li> </ul>
Windows and Doors	<ul style="list-style-type: none"> <li>washing windows</li> <li>caulking, weather stripping, re-glazing windows and doors</li> <li>fixing broken windowpane(s), storm window(s) or damaged entry door</li> <li>replacing broken door lock</li> <li>replacing a vandalized entry door to restore security of a building or unit</li> <li>replacing a single severely damaged window to match</li> <li>annual switch out of storm and screen panels</li> </ul>	<ul style="list-style-type: none"> <li>replacement of windows</li> <li>replacement of exterior doors</li> <li>adding storm windows or storm doors</li> </ul>

# Examples of Maintenance Activities

Feature or System	Maintenance Activities <sup>4</sup>	Rehabilitation Activities <sup>5</sup>
Kitchen	<ul style="list-style-type: none"> <li>• replacement of stoves, refrigerators, and microwaves*</li> <li>• replacing cabinet hardware*</li> </ul>	<ul style="list-style-type: none"> <li>• complete or substantial kitchen remodel</li> </ul>
Bathroom/Laundry	<ul style="list-style-type: none"> <li>• unclogging sink or toilet</li> <li>• replacing deteriorated toilet in an occupied housing unit*</li> <li>• replacing broken medicine cabinet*</li> <li>• replacing washing machines and dryers*</li> <li>• installation of grab bars</li> </ul>	<ul style="list-style-type: none"> <li>• complete or substantial bathroom remodel</li> </ul>
HVAC	<ul style="list-style-type: none"> <li>• servicing and maintenance of mechanical systems</li> <li>• changing air filters</li> <li>• cleaning air ducts</li> <li>• installing or replacing a window air conditioner</li> <li>• replacing a malfunctioning part of a HVAC system like a thermostat *</li> </ul>	<ul style="list-style-type: none"> <li>• installation of new furnace or heat distribution system</li> <li>• installation of central air conditioning</li> </ul>

# Examples of Maintenance vs. Rehab

Issue:

Nonfunctional kitchen



Maintenance ?

Kitchen remodel





# Examples of Maintenance vs. Rehab

Issue:

Deteriorated toilet



Maintenance ?

Replace toilet



# Examples of Maintenance vs. Rehab

## Issue:

Peeling paint



## Maintenance ?

Sandblast to remove  
paint

No!



# Examples of Maintenance vs. Rehab

**Issue:**  
Leaky Window



**Maintenance ?**  
Replace  
Windows



# Examples of Maintenance vs. Rehab

Issue:

Tree falls  
on a  
home



Maintenance ?

Remove tree and  
patch the roof





# Step 1: Initiate the Process

- Determine the undertaking
- Identify the appropriate SHPO/THPO
- Identify other consulting parties, including tribes
- Plan how the public will be involved
- Coordinate with other reviews (NEPA)





# Consultation is a process, not an event

*Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.*

[36 CFR Section 800.16 (f)]



# Consulting Parties

- Agency Official
- State Historic Preservation Officer (SHPO)
- Applicants
- Federally recognized Indian tribes and Native Hawaiian organizations (NHOs)
- Tribal Historic Preservation Officer (THPO)
- Local governments
- Organizations with demonstrated interest
- Public
- Advisory Council on Historic Preservation (ACHP)



# Agency Official

- HUD Official for Part 50 programs
- Responsible Entity (RE) for Part 58 programs
- Must ensure compliance before project approval
- Agency Official is the decision-making party
- Engage historic preservation professionals as needed
- Agency Official must conduct tribal consultation
  - Cannot be delegated to consultant or lender



# Assumption of Review Authority

Housing and Community Development Act of 1974

- First statute that authorized local governments, states and tribes to assume federal responsibility for environmental compliance in CDBG projects

Other statutes and amendments broadened the authority to other HUD programs

The programs where it applies are programs that are selected and carried out at the local, state and tribal levels



# Assumption of Review Authority

## “Agency Official”

- Part 50 projects: HUD staff
  - Applies to 202 Elderly, 223(f) Multi-family Rental, mortgage insurance for nursing homes, etc.
- Part 58 projects: Responsible Entity (RE)
  - Applies to many programs including CDBG, ICDBG, HOME, CNI, Public Housing, and NAHASDA

24 CFR Part 58 directs REs to assume responsibility for all aspects of environmental review, including Section 106 and tribal consultation.





# Assumption of Review Authority

## 24 CFR 58.4 Assumption authority.

(a) *Assumption authority for responsible entities: General.*

**Responsible entities shall assume the responsibility for environmental review, decision-making, and action that would otherwise apply to HUD** under NEPA and other provisions of law that further the purposes of NEPA, as specified in § 58.5. Responsible entities that receive assistance directly from HUD assume these responsibilities by execution of a grant agreement with HUD and/or a legally binding document such as the certification contained on HUD Form 7015.15, certifying to the assumption of environmental responsibilities.



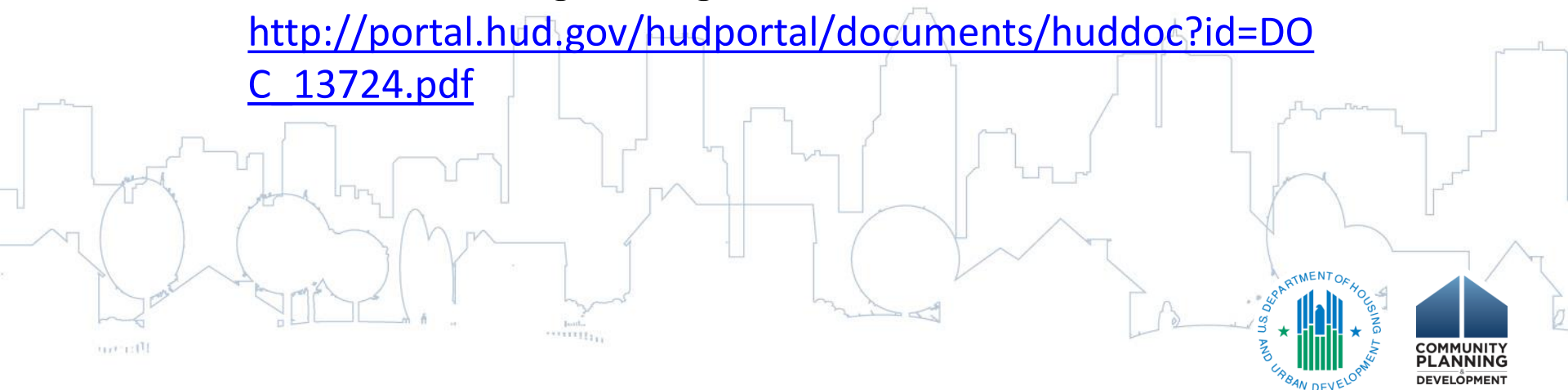
# Assumption of Review Authority

## Responsible Entity (RE) [24 CFR 58.2(a)(7)]

- Local, state or tribal governments that have assumed the federal agency's environmental review authority and responsibility for projects within their jurisdiction, including those for which they are grantees

- HUD memo on legal background

[http://portal.hud.gov/hudportal/documents/huddoc?id=DO C\\_13724.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DO C_13724.pdf)



# Assumption of Review Authority

## Responsible Entity (RE)

[36 CFR Part 800]

- *The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law. [36 CFR 800.2(a)]*
- *Head of the agency means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency. [36 CFR 800.16(k)]*



# Assumption of Review Authority

## “Agency Official”

- Part 50 projects: HUD staff
  - Applies to 202 Elderly, 223(f) Multi-family Rental, mortgage insurance for nursing homes, etc.
- Part 58 projects: Responsible Entity (RE)
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24 CFR Part 58 directs REs to assume responsibility for all aspects of environmental review, including Section 106 and tribal consultation.



# Assumption of Review Authority



- Section 106 regulations require “government to government” consultation, federal agency to sovereign Indian nation
- The REs (state, local, and tribal governments) have assumed the role of the federal agency in tribal consultation



# State Historic Preservation Officer (SHPO)



## Office of History & Archaeology

Alaska Department of Natural Resources, Division of Parks and Outdoor Rec.



Directory of SHPOs available at:

<http://www.ncshpo.org/>





# State Historic Preservation Officer (SHPO)

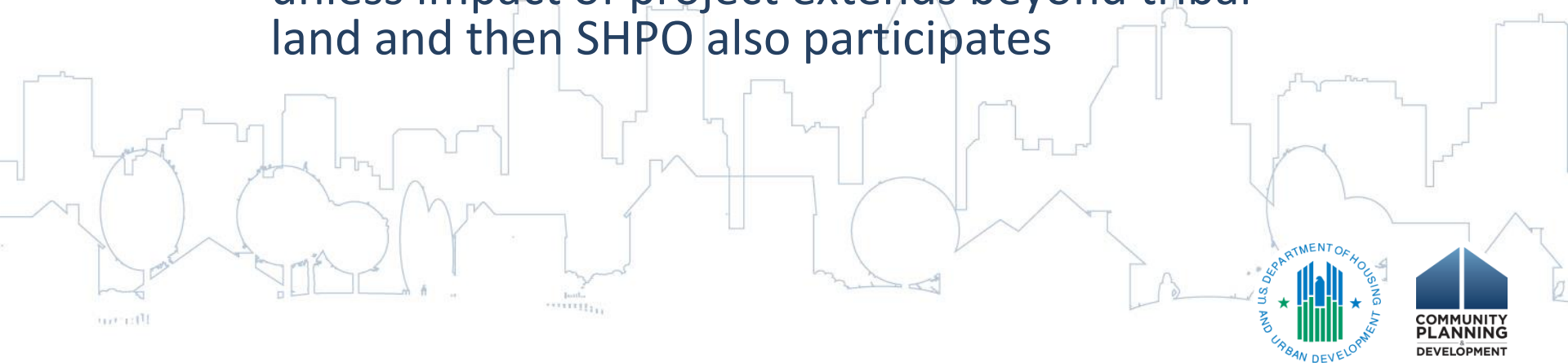
SHPO Role in Section 106 is to:

- Concur in Agency Official's findings
- Provide access to information on known historic properties to the Agency Officials when requested
- Consult with Agency Official regarding evaluation of effects when requested
- Consult with Agency Official to resolve adverse effects
- Review and sign Memorandum of Agreement (MOA) or Programmatic Agreement (PA)



# Tribal Historic Preservation Officer (THPO)

- Designated by National Park Service
- About 1/3 of tribes have a THPO
- THPO consults in lieu of SHPO on tribal lands
  - unless private owner on tribal land requests additional participation by SHPO
  - unless impact of project extends beyond tribal land and then SHPO also participates



# Indian Tribes

- Federally recognized tribes
- Tribal Historic Preservation Officer (THPO)
- Native Hawaiian Organizations (NHOs)
- Agency Official may invite or allow participation by non-federally recognized tribes
- Consultation depends on potential of project to affect historic properties of religious and cultural significance to tribes



# Applicant

Applicant may:

- Assemble complete project description
- Assemble information for the Section 106 review
  - May include initial technical assistance contact with SHPO to identify historic properties
- Obtain studies, historic property surveys, etc. as necessary
- Alert the Agency Official regarding potential adverse effects of the project
- Provide information to Agency Official
- Prevent actions prior to completion of Section 106



# Historic Preservation Professional

- Agency Official must ensure that Section 106 findings meet professional preservation standards
- HP Professional prepares Section 106 documentation for the Agency Official
- Meets academic and experience standards set by the Secretary of the Interior (36 CFR 61)
- Expertise in identifying historic properties, evaluating effects, and preparing Section 106 agreement documents like MOAs
- Eligible project expense



# Advisory Council on Historic Preservation (ACHP)

- Independent federal agency
- HUD Secretary is ACHP member, represented by OEE Director
- Promotes the preservation and use of the country's historic resources
- Advises the President and Congress on national historic preservation policy
- Administers the Section 106 process





# Interested Organizations and Individuals

## 36 CFR 800.2(c)(5)

“Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.”

Examples: local historic preservation organizations, public housing residents, National Trust for Historic Preservation, neighborhood groups

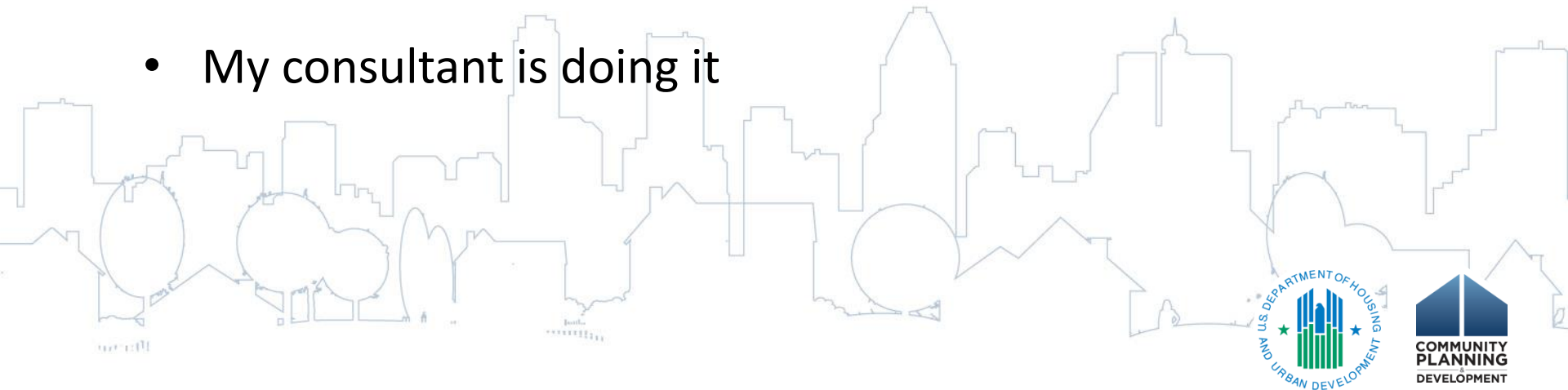




# Avoid These Pitfalls

I don't need to consult with them because:

- We had a public meeting as part of the NEPA process
- I don't even know who might be interested
- I know they are against the project
- My consultant is doing it



# Step 1: Initiate the Process

## 1. INITIATE the process

- Determine undertaking
- Coordination with other reviews (NEPA)
- Notify SHPO/THPO
- Identify Tribes and other Consulting Parties
- Plan to involve the public

*Undertaking with potential to cause effects?*

NO

YES



# Quality consultation begins with quality information



# Step 1: Initiate the Process

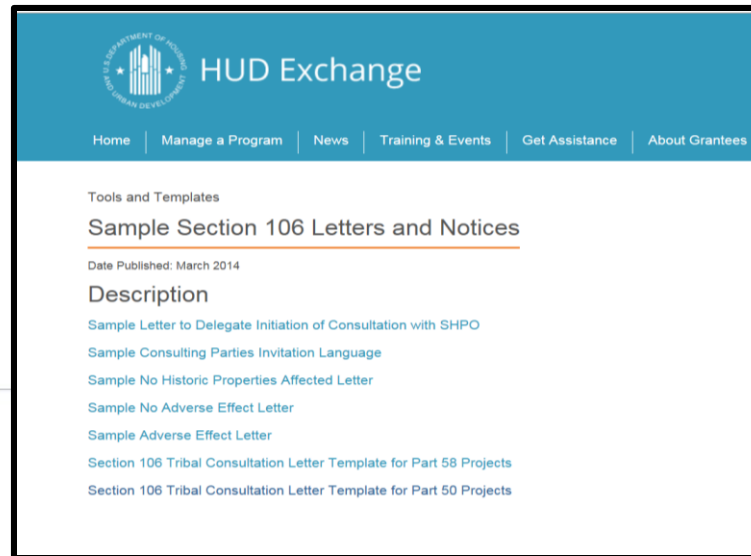
- Provide adequate information to SHPO
  - HUD program, RE contact, description of project, historic properties identified, National Register evaluation, assessment of effects, possible consulting parties, public involvement
  - Map, photos, studies, plans, etc.
  - Some states have forms for Section 106 submittals



# Step 1: Initiate the Process

- RE sends letter to SHPO

Search for “HUD,  
Historic Preservation”



- RE determines need for tribal consultation and sends letter to Tribes





**SHPO DETERMINATION (SHPO USE ONLY)**

☐ There are **NO HISTORIC PROPERTIES** in the Area of Potential Effect

☐ The project will have **NO EFFECT** on historic properties

☐ The project will have **NO ADVERSE EFFECTS** on historic properties:

SHPO REVIEWER: \_\_\_\_\_ DATE: \_\_\_\_\_

**Order Now**

*A Handbook and Resource Guide for Owners of Virginia's Historic House*

[Read a review](#)

**ePIX can be used for the following project types:**

**Federal Projects:** There are several provisions of *Federal regulation* that require consultation with our office. Most commonly, agencies and individuals seek our comment under Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended, which requires all Federal agencies to consider the effects on historic properties of any project for which they are providing funding, a license or a permit. DHR, which serves as Virginia's State Historic Preservation Office (SHPO), assists Federal agencies in meeting this responsibility. ePIX should not be used for FCC projects, such as cell towers. FCC projects should seek DHR's comment through the *FCC*.

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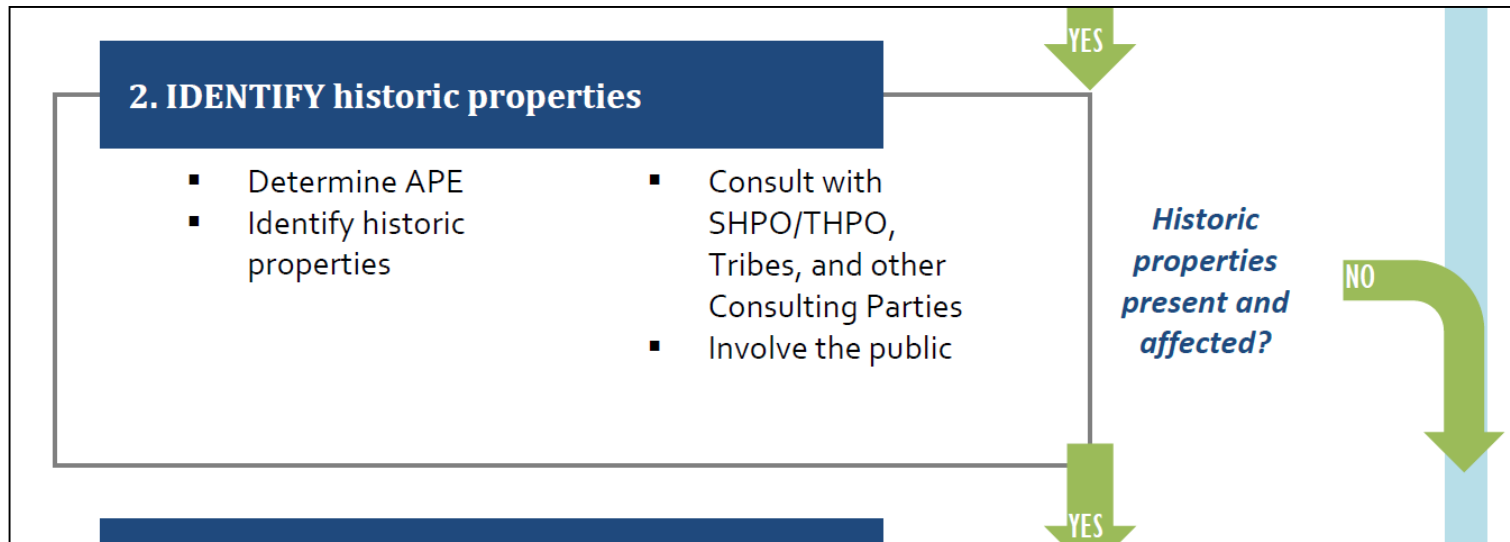
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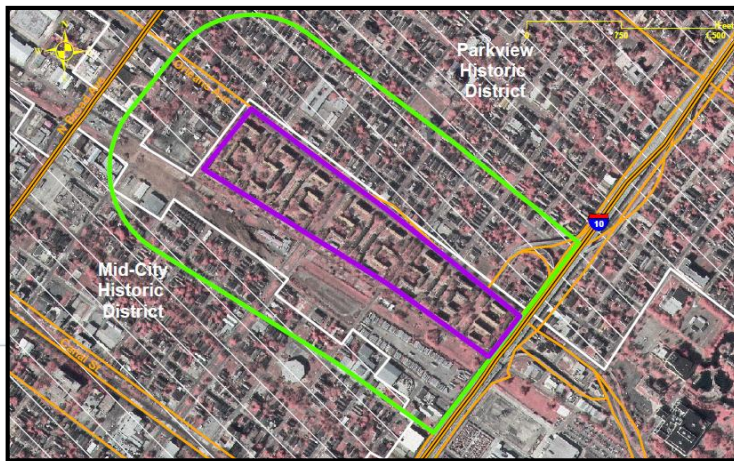
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# Step 2: Identify Historic Properties



# Step 2: Identify Historic Properties

- Listed on **or ELIGIBLE** for the National Register of Historic Places.
- Within the **Area of Potential Effect (APE)**
  - **Direct and Indirect Effects**





# National Register of Historic Places

- Official list of historic properties worthy of preservation
- Maintained by the National Park Service
- 1.75 million properties
- The threshold for Section 106



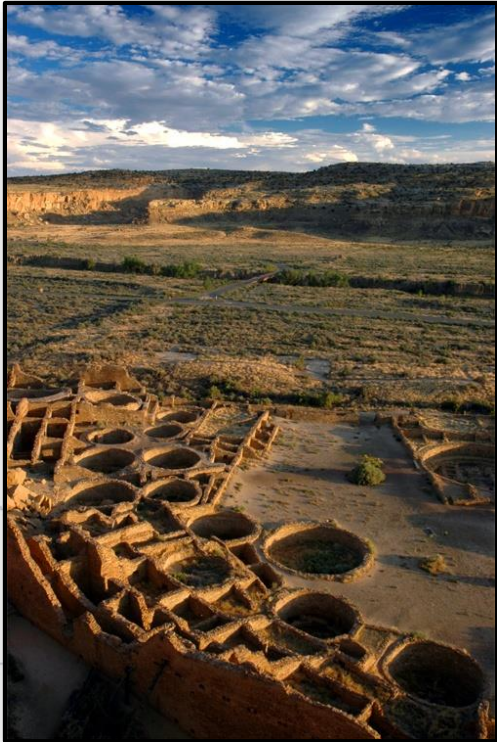
# National Register of Historic Places





# National Register of Historic Places

Age : Over 50 years old, with exceptions



Hilliard Homes Chicago  
1966





# Mid-century Public Housing 1950's - 60's



Riverside Plaza  
Minneapolis 1973



Hilliard Homes, Chicago 1966



Lafayette Towers  
Detroit 1963



# National Register of Historic Places

Criteria 36 CFR Part 60

- A. Historic Significance
- B. Famous Person
- C. Architectural Significance
- D. Ability to Yield Important Information



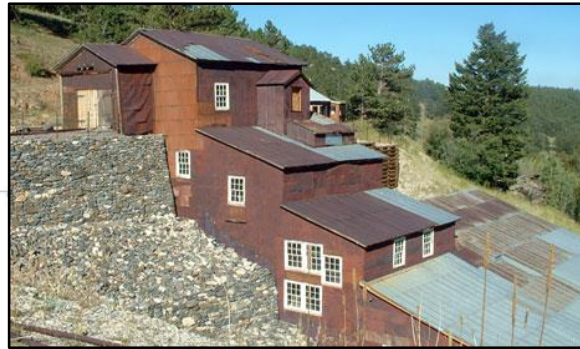
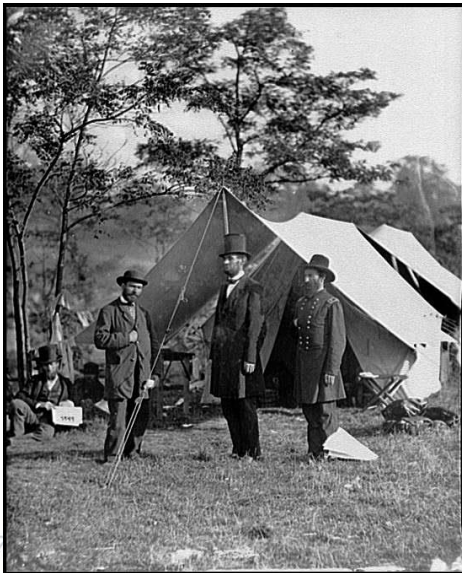
Level of Significance: local, state or national



# National Register of Historic Places

## A. Historic Significance

Associated with events that have made a significant contribution to the broad patterns of our history





# National Register of Historic Places

## B. Important Person

Associated with the lives of significant persons in our past



Lauderdale Courts  
Memphis 1938



Clara Brown  
"Angel of the Rockies"



# National Register of Historic Places

## C. Architectural Significance

Embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction



San Felipe Courts Houston  
1940-44



# National Register of Historic Places

## Historic District

- Individual parts comprise a greater whole





# National Register of Historic Places

## Historic District

- Neighborhood, downtown, landscape or other area with a concentration of historic buildings
- Contributing Buildings
- Non-contributing Buildings
  - Lack age
  - Lack Integrity



Map of New Orleans Historic Districts



# National Register of Historic Places

**Integrity:** location, design, setting, materials, workmanship, feeling, and association



University of Vermont  
Historic Preservation Program



# National Register of Historic Places

**Condition**

**vs.**

**Integrity**



Strawberry Mansion District  
Philadelphia



John Jay Housing 1942  
Springfield, Illinois

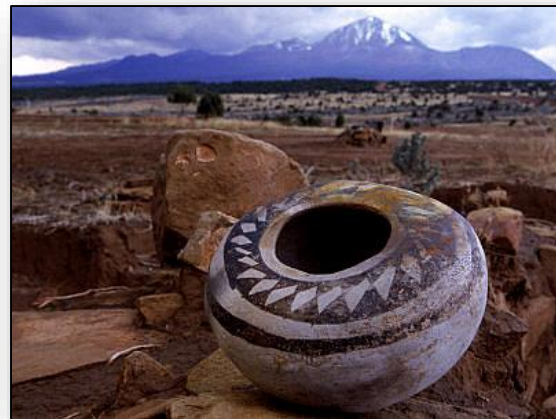
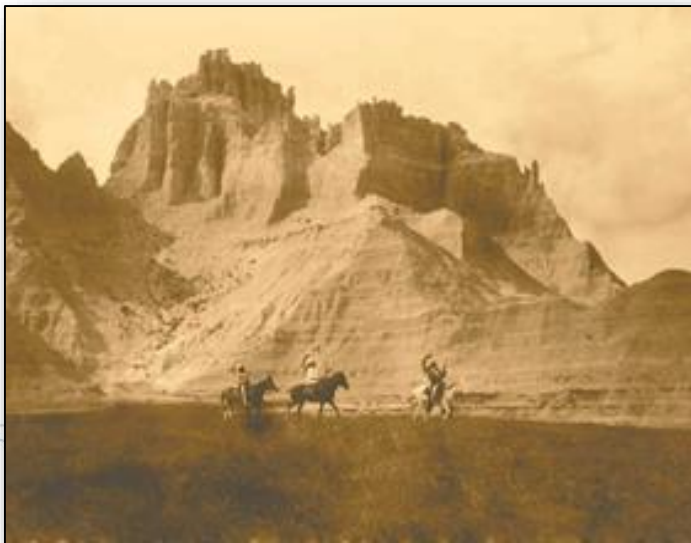




# National Register of Historic Places

## D. Likely to Yield Important Information

Have yielded or may be likely to yield, information important in history or prehistory



# Where to find information on Historic Properties

National Register database

<http://www.nps.gov/nr/index.htm>

State databases

<https://www.hudexchange.info/environmental-review/historic-preservation/historic-property-identification-where-to-start/>

National Historic Landmark (NHL) state lists

<http://www.nps.gov/nhl/designations/listsofNHLs.htm>

Local historical and preservation organizations, local planning departments, internet search



# Archeological Surveys

## If a party requests an archeological survey, use HP Fact Sheet #6 Guidance on Archeological Investigations in HUD Projects **REVISED**

<https://www.hudexchange.info/resource/287/hp-fact-sheet-6-guidance-on-archeological-investigations-in-hud-projects/>

### HP Fact Sheet #6 Guidance on Archeological Investigations in HUD Projects

HUD offers the following guidance on when to do professional archeological investigations in HUD-assisted projects to meet environmental review requirements under Section 106 of the National Historic Preservation Act and 36 CFR Part 800. It is applicable to both Part 50 and Part 58 programs. HUD officials, Responsible Entities (REs) and grantees should honor requests from Federally-recognized Indian tribes (tribes) and Native Hawaiian Organizations (NHOs) to keep information on sensitive sites confidential.

Archeological investigations seek to identify historic properties that may be affected by a project, and/or serve as mitigation prior to their loss if impacts cannot be avoided. Such investigations span a wide range of activities, including background research in existing documents, sample field testing to determine the presence of archeological sites, and full data recovery through excavation to retrieve information and artifacts that would otherwise be lost. Sometimes they occur sequentially, in phases, with the results of one phase determining whether more investigation in a subsequent phase is warranted. Archeological sites that may be encountered range from prehistoric settlements or activity areas, to places and landscapes of traditional religious and cultural significance to tribes or NHOs, to archeological remnants of historic period resources like early settlement sites and industrial sites. Data recovery should be a last resort after avoidance measures have been considered.

36 CFR Part 800.4 requires a Federal agency to make a "reasonable and good faith effort" to identify historic properties that may be affected by a Federal undertaking. If a project includes types of activities that may affect historic properties of religious and cultural significance to tribes and NHOs (see HUD's [Visiting Cultural and Tribal Sites Checklist](#)), you need to consult with them and other knowledgeable parties to identify if there are such historic properties in the project's Area of Potential Effect (APE). The on-line Tribal Directory Assessment Tool (TDAT) identifies where tribes and NHOs have current or ancestral interest.

HUD recognizes that tribes and NHOs have special expertise in assessing the eligibility of historic properties of religious and cultural significance to them for the National Register of Historic Places. National Register listing or eligibility is the threshold for consideration as a historic property under Section 106. Most archeological resources are not immediately visible or apparent. Background research, previous identification efforts and existing National Register documentation may indicate a high likelihood that archeological historic properties may be present in an APE, but a lack of existing information does not indicate a lack of historic properties. In the latter case, predictive modeling and/or consultation with knowledgeable parties like the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) are often used to identify the likelihood of archeological sites in an APE.

Sometimes applicants for HUD assistance undertake archeological investigations prior to application, as part of project planning. Other times, a consulting party may request an archeological investigation to identify historic properties during the consultation process. In this case, the HUD official or RE considers the advice and recommendations received and makes the decision about what further steps to take. The HUD official or RE acting as HUD should consider the factors below when deciding whether to undertake an archeological field investigation in a HUD-assisted project. If approved by HUD and the grantee, an archeological investigation can be an eligible project expense.

Revised June 2012

### Factors to Consider in Deciding to Undertake an Archeological Field Investigation

- Information received** from SHPO, THPO, Federally-recognized Indian tribes, NHOs, local universities, and other tribal organizations and parties with knowledge of potential historic properties in the APE. Do sources corroborate the likelihood of historic properties in the APE? Do recent archeological studies indicate either a presence or absence of sites in the APE or nearby?
- Likely impact.** Will the potential sites be affected or disturbed in the project, such as by significant digging, or introduction of visual, atmospheric or audible elements that may affect landscapes of religious and cultural significance? If adverse effects are avoided, e.g. by designating an archeologically sensitive area as undisturbed green space, it is generally not necessary to fully identify and document resources with an archeological survey.
- Previous ground disturbance.** The potential to have intact archeological sites decreases in areas with more extensive ground disturbance. Is the ground already disturbed through previous construction or use? If so, has it been disturbed to the expected depth of the potential sites? Does the site consist of later fill from previous construction? Have flood deposits buried the potential sites below the depth of expected ground disturbance in the project?
- Likely significance of potential sites.** Do sources provide a basis for concluding that the APE is likely to contain significant sites that would be eligible for the National Register primarily under Criterion D: "That have yielded, or may be likely to yield, information important in prehistory or history?" Can consulting parties identify potential areas and levels of significance based on tribal oral tradition, written sources, or reference to research questions in SHPO State Historic Preservation Plans and similar documents? At the site likely yield important new information that is not available through other means and that expands knowledge of prehistory or history?
- Presence of human remains.** If human remains are anticipated in a location that may be impacted, sample field testing to confirm presence and boundaries is highly recommended, with the advice of consulting parties, especially tribes and NHOs.
- Magnitude and nature of the undertaking and the degree of federal involvement.** The cost of an archeological investigation should relate logically to the value of HUD assistance in the project, while taking into account the expected significance of the sites.
- Policy Statement on Affordable Housing and Historic Preservation.** Does the Advisory Council on Historic Preservation's [Policy Statement on Affordable Housing and Historic Preservation](#) apply? The guidance for Implementation Principle #6 in the Policy Statement "Archeological investigations should be avoided for affordable housing projects limited to rehabilitation and requiring minimal ground disturbance." The Principle applies only to rehabilitation and not new construction.
- Public interest.** Is the expenditure of funds on archeological investigation in a specific project in the public interest in some cases it may be, in other cases, perhaps not. In reaching these decisions, the HUD official or RE should seek to balance with other important public values, such as the program mission, objectives, costs and public benefits.

Contact your local HUD Environmental Officer for further assistance.

Revised June 2012





# Archeological Surveys

## Fact Sheet #6

“Background research, previous identification efforts and existing National Register documentation may indicate a high likelihood that archeological historic properties may be present in an APE, but a lack of existing information does not indicate a lack of historic properties.”



# Archeological Surveys

## Fact Sheet #6 -- Factors to Consider

- Information received from SHPO, THPO, tribes
- Likely impact of the project on potential properties
- Previous ground disturbance
- Likely significance of potential properties
- Magnitude of the project and degree of HUD involvement
- Public interest



# Archeological Surveys

## Fact Sheet #6 -- Factors to Consider

- Presence of human remains
- ACHP Policy Statement on Affordable Housing and Historic Preservation <http://www.achp.gov/afford.html>

“Archeological investigations should be avoided for affordable housing projects limited to rehabilitation and requiring minimal ground disturbance.”

- does NOT apply to new construction



# Step 2: Identify Historic Properties

- If there are no historic properties, or no effect on them, make a **Finding of No Historic Properties Affected**
- Notify SHPO and all consulting parties
- Parties have 30 days to object
- If there are no other areas requiring compliance, project may convert to exempt

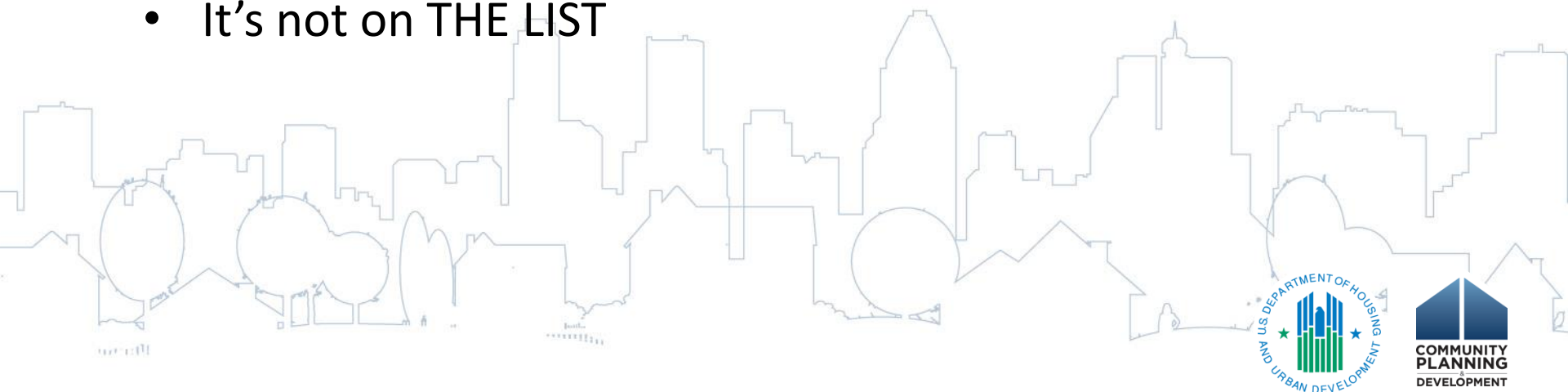




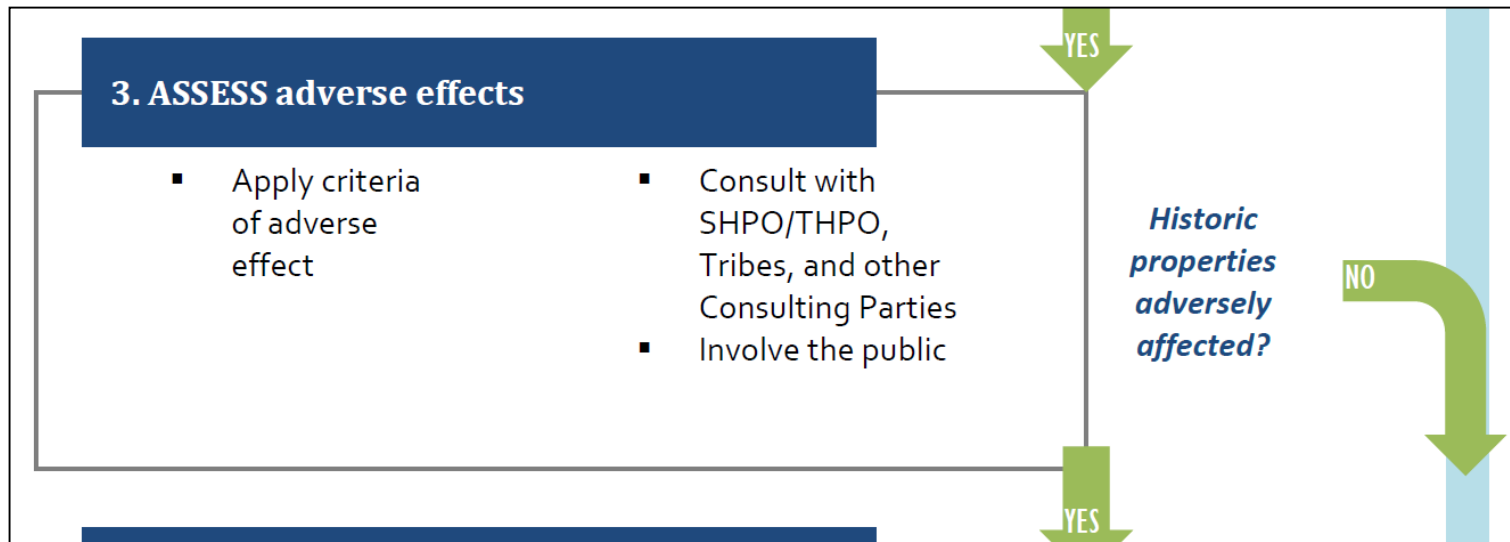
# Avoid These Pitfalls

It can't be "Historic" because:

- It's too ugly
- It's not old enough
- George Washington didn't sleep there
- It's not on THE LIST



# Step 3: Assess Adverse Effects





# Step 3: Assess Adverse Effects

Consider direct and indirect effects

- Make a finding of  
**No Adverse Effect**  
or
- Make a finding of  
**Adverse Effect**



- Notify SHPO and all consulting parties
- Parties have 30 days to object



# Examples of Adverse Effect

- Damage or destruction of historic properties



# Examples of Adverse Effect

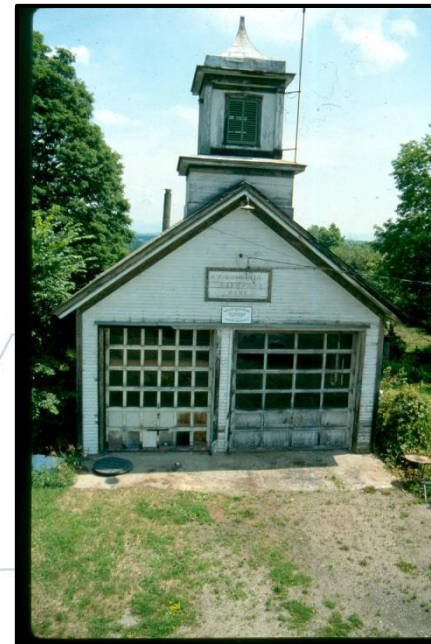
- Removal
- Introduction of visual, audible, or atmospheric elements





# Examples of Adverse Effect

- Change in the character of use/setting
- Alteration not according to the Secretary's Standards



# Secretary of the Interior's Standards for Rehabilitation

- Find a compatible use
- Retain historic materials and features
- Repair rather than replace



# Secretary of the Interior's Standards for Rehabilitation

- If necessary, replace in kind
- Preserve archeological resources
- Distinguish new construction from the old



National Park Service guidance on the Standards

<http://www.nps.gov/tps/standards.htm>

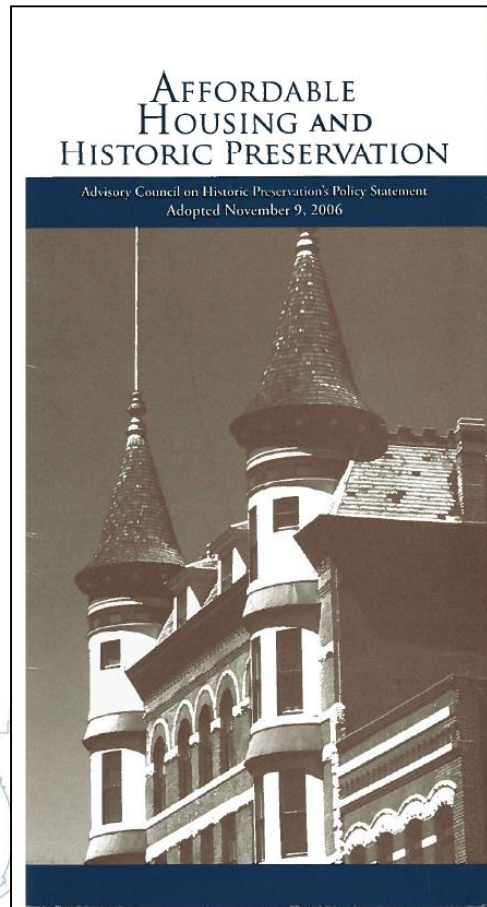
Preservation Briefs

<http://www.nps.gov/tps/how-to-preserve/briefs.htm>





# ACHP Policy on Affordable Housing and Historic Preservation



## IMPLEMENTATION PRINCIPLES

- I. Rehabilitating historic properties to provide affordable housing is a sound historic preservation strategy.
- II. Federal agencies and State and local government entities assuming HUD's environmental review requirements are responsible for ensuring compliance with Section 106.
- III. Review of effects in historic districts should focus on exterior features.
- IV. Consultation should consider the overall preservation goals of the community.
- V. Plans and specifications should adhere to the Secretary's Standards when possible and practical.
- VI. Section 106 consultation should emphasize consensus building.
- VII. The ACHP encourages streamlining the Section 106 process to respond to local conditions.
- VIII. The need for archeological investigations should be avoided.





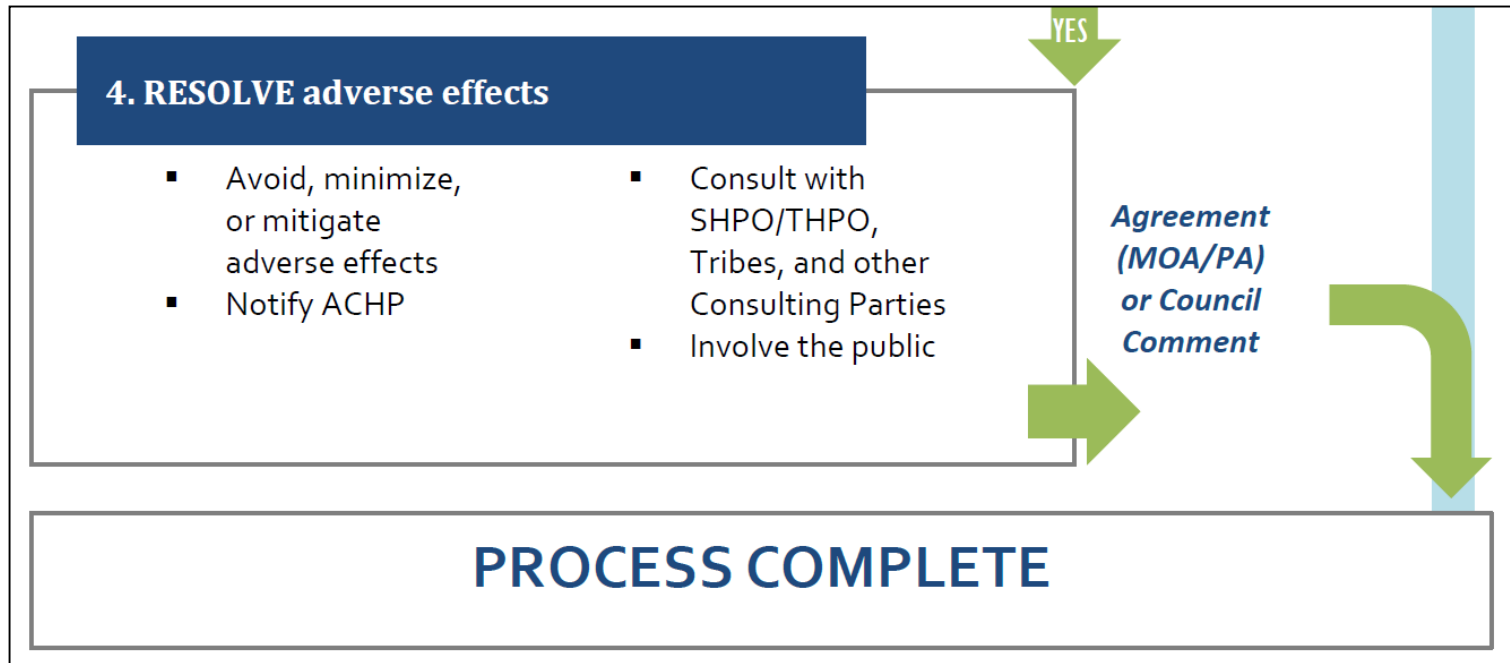
# Avoid These Pitfalls

My project has No Adverse Effect because:

- The historic properties were demolished before the project started
- There were no physical impacts outside the property
- We will only demolish part of the historic building
- We excavated the archeological site on the property before construction started



# Step 4: Resolve Adverse Effects



# Step 4: Resolve Adverse Effects

- If Adverse Effect, RE must notify Advisory Council and invite their participation in consultation
  - Include 36 CFR 800.11 documentation
  - Council will respond within 15 days
  - **e106 Notification online**
- Criteria for Council participation
  - 36 CFR Part 800 Appendix A
    - Substantial impacts on important properties
    - Precedent-setting issues
    - Controversial
    - Tribal concerns
- Notify National Park Service if NHL might be affected



# Step 4: Resolve Adverse Effects

Consult to **avoid, minimize or mitigate** Adverse Effects

- Consider alternatives
- Consider mitigation measures
- Mitigation measures may relate to the specific property that is being affected, or other historic properties in a similar location or of a similar type.



Avoidance  
Documentation  
Education  
Curation  
Monitoring

Modification of project  
Research/Publication  
Interpretation  
Off-site Preservation  
Archeological data recovery

Preservation Fund  
Survey  
Preservation Plan  
Rehab Grants  
Training

- Mitigation measures are an eligible project expense and can be included in a mortgage loan





# Section 106 – Step 4

## Resolve Adverse Effects



## Memorandum of Agreement (MOA)

- **Required signatories** – Agency, SHPO/THPO, ACHP (if participating)
- **Invited signatories** – Applicant, THPO, tribe, other consulting parties with role
- **Concurring signatories** – THPO, tribe, other consulting parties
- Must be executed prior to decision point for project
- Send signed copy to ACHP and HUD





# Avoid These Pitfalls

## ANTICIPATORY DEMOLITION

Section 110(k) of the NHPA:

“Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106 of this Act, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.”





# Avoid These Pitfalls

## FORECLOSURE

### 36 CFR 800.9

Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed.

### 36 CFR 800.16 (j)

*Foreclosure* means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

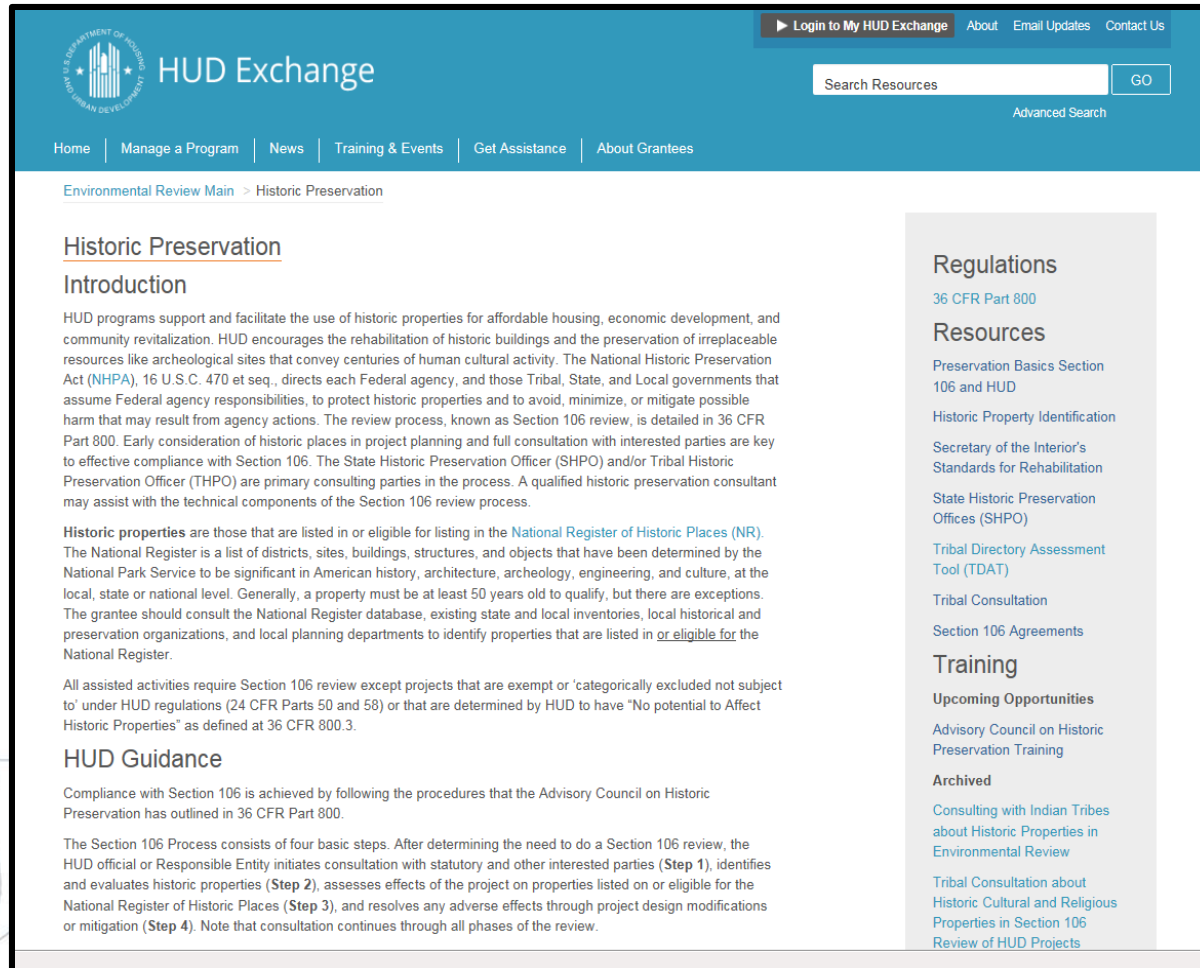
ACHP comments to Agency Official, Head of Agency, Public

ACHP finding of foreclosure can be used in litigation



# HUD Exchange Webpage

## Search for “HUD, Historic Preservation”



The screenshot shows the HUD Exchange website interface. At the top, there is a blue header with the HUD logo and the text 'HUD Exchange'. To the right of the header, there are links for 'Login to My HUD Exchange', 'About', 'Email Updates', and 'Contact Us'. Below the header, there is a search bar with the text 'Search Resources' and a 'GO' button. To the right of the search bar, there is a link for 'Advanced Search'. Below the search bar, there is a navigation menu with links for 'Home', 'Manage a Program', 'News', 'Training & Events', 'Get Assistance', and 'About Grantees'. The main content area is titled 'Environmental Review Main > Historic Preservation'. It features a section for 'Historic Preservation' with an 'Introduction' subsection. The introduction text discusses HUD's support for historic properties and the Section 106 review process. To the right of the introduction, there is a sidebar with links for 'Regulations' (36 CFR Part 800), 'Resources' (Preservation Basics Section 106 and HUD, Historic Property Identification, Secretary of the Interior's Standards for Rehabilitation, State Historic Preservation Offices (SHPO), Tribal Directory Assessment Tool (TDAT), Tribal Consultation, Section 106 Agreements), 'Training' (Upcoming Opportunities: Advisory Council on Historic Preservation Training, Archived: Consulting with Indian Tribes about Historic Properties in Environmental Review, Tribal Consultation about Historic Cultural and Religious Properties in Section 106 Review of HUD Projects), and 'HUD Guidance' (Compliance with Section 106 is achieved by following the procedures that the Advisory Council on Historic Preservation has outlined in 36 CFR Part 800. The Section 106 Process consists of four basic steps. After determining the need to do a Section 106 review, the HUD official or Responsible Entity initiates consultation with statutory and other interested parties (Step 1), identifies and evaluates historic properties (Step 2), assesses effects of the project on properties listed on or eligible for the National Register of Historic Places (Step 3), and resolves any adverse effects through project design modifications or mitigation (Step 4). Note that consultation continues through all phases of the review.

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[Environmental Review Main](#) > [Historic Preservation](#)

### Historic Preservation

#### Introduction

HUD programs support and facilitate the use of historic properties for affordable housing, economic development, and community revitalization. HUD encourages the rehabilitation of historic buildings and the preservation of irreplaceable resources like archeological sites that convey centuries of human cultural activity. The National Historic Preservation Act (NHPA), 16 U.S.C. 470 et seq., directs each Federal agency, and those Tribal, State, and Local governments that assume Federal agency responsibilities, to protect historic properties and to avoid, minimize, or mitigate possible harm that may result from agency actions. The review process, known as Section 106 review, is detailed in 36 CFR Part 800. Early consideration of historic places in project planning and full consultation with interested parties are key to effective compliance with Section 106. The State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer (THPO) are primary consulting parties in the process. A qualified historic preservation consultant may assist with the technical components of the Section 106 review process.

**Historic properties** are those that are listed in or eligible for listing in the [National Register of Historic Places \(NR\)](#). The National Register is a list of districts, sites, buildings, structures, and objects that have been determined by the National Park Service to be significant in American history, architecture, archeology, engineering, and culture, at the local, state or national level. Generally, a property must be at least 50 years old to qualify, but there are exceptions. The grantee should consult the National Register database, existing state and local inventories, local historical and preservation organizations, and local planning departments to identify properties that are listed in or [eligible for](#) the National Register.

All assisted activities require Section 106 review except projects that are exempt or 'categorically excluded not subject to' under HUD regulations (24 CFR Parts 50 and 58) or that are determined by HUD to have "No potential to Affect Historic Properties" as defined at 36 CFR 800.3.

#### HUD Guidance

Compliance with Section 106 is achieved by following the procedures that the Advisory Council on Historic Preservation has outlined in 36 CFR Part 800.

The Section 106 Process consists of four basic steps. After determining the need to do a Section 106 review, the HUD official or Responsible Entity initiates consultation with statutory and other interested parties (**Step 1**), identifies and evaluates historic properties (**Step 2**), assesses effects of the project on properties listed on or eligible for the National Register of Historic Places (**Step 3**), and resolves any adverse effects through project design modifications or mitigation (**Step 4**). Note that consultation continues through all phases of the review.

#### Regulations

[36 CFR Part 800](#)

#### Resources

[Preservation Basics Section 106 and HUD](#)

[Historic Property Identification](#)

[Secretary of the Interior's Standards for Rehabilitation](#)

[State Historic Preservation Offices \(SHPO\)](#)

[Tribal Directory Assessment Tool \(TDAT\)](#)

[Tribal Consultation](#)

[Section 106 Agreements](#)

#### Training

##### Upcoming Opportunities

[Advisory Council on Historic Preservation Training](#)

##### Archived

[Consulting with Indian Tribes about Historic Properties in Environmental Review](#)

[Tribal Consultation about Historic Cultural and Religious Properties in Section 106 Review of HUD Projects](#)



# Environmental Review Record (ERR)

## 1. No Historic Properties Affected

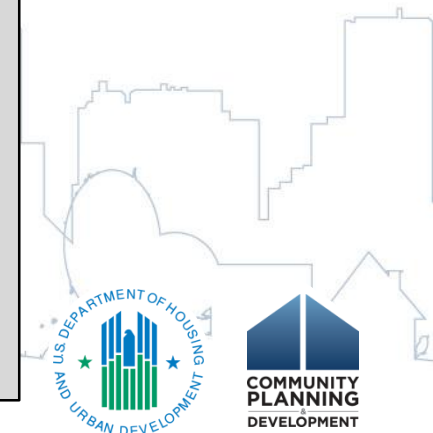
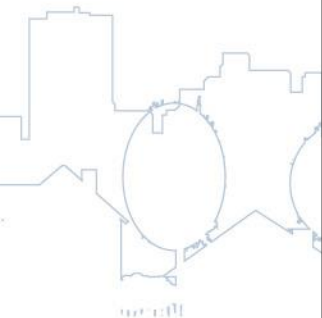
- Letter from SHPO (or THPO on tribal lands\*) that concurs with HUD's or the Responsible Entity's determination of "no historic properties affected"
- With documentation on 1) the undertaking and the APE (including photographs, maps, and drawings, as necessary), 2) steps taken to identify historic properties, 3) the basis for determining that no historic properties are present or affected, 4) evidence of tribal consultation if required; and 5) copies or summaries of any views provided by consulting parties and the public
- If the SHPO has not responded to a properly documented request for concurrence within 30 days of receipt of the request, document the request and lack of response as part of the record

## 2. No Adverse Effect

- Letter from SHPO (or THPO on tribal lands\*) that concurs with HUD'S or the Responsible Entity's finding of "no adverse effect"
- With documentation on 1) the undertaking and the APE (including photographs, maps, and drawings, as necessary), 2) steps taken to identify historic properties, 3) affected historic properties (including characteristics qualifying them for the NR), 4) the undertaking's effects on historic properties, 5) why the criteria of adverse effect were not applicable (§800.5), 6) evidence of tribal consultation if required, and 7) copies or summaries of any views provided by consulting parties and the public
- If the SHPO has not responded to a properly documented request for concurrence within 30 days of receipt of the request, document the request and lack of response as part of the record

## 3. Adverse Effect

- Notification of adverse effect sent to Advisory Council on Historic Preservation
- Letter from SHPO (or THPO on tribal lands\*) that concurs with a finding of "adverse effect"
- With documentation on 1) the undertaking and the APE (including photographs, maps, and drawings, as necessary), 2) steps taken to identify historic properties, 3) affected historic properties (including characteristics qualifying them for the NR), 4) the undertaking's effects on historic properties, 5) why the criteria of adverse effect are applicable (§ 800.5), 6) evidence of tribal consultation if required, and 7) copies or summaries of any views provided by consulting parties and the public
- A Memorandum of Agreement (MOA) or a Programmatic Agreement (PA) signed by the HUD official or Responsible Entity, SHPO/THPO, the Advisory Council on Historic Preservation if participating, and other signatory and concurring parties
- If resolution is not reached in an MOA or PA, provide correspondence and comments between the Advisory Council on Historic Preservation and HUD Secretary (for Part 50 projects) or Responsible Entity's chief elected local official (for Part 58 projects)





# Record of Compliance

Failure to comply could lead to HUD not approving a release of funds for a project or issuing a finding of non-compliance and possible sanctions, corrective actions, or other remedies which may include terminating grants or repayment of federal funds.



# Contact

Nancy E. Boone

Federal Preservation Officer

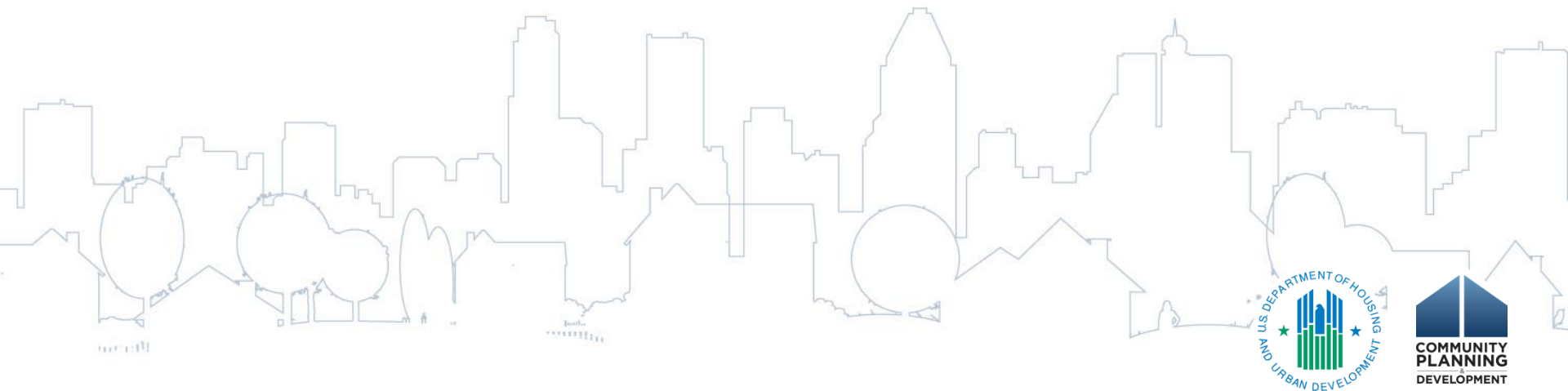
Office of Environment and Energy

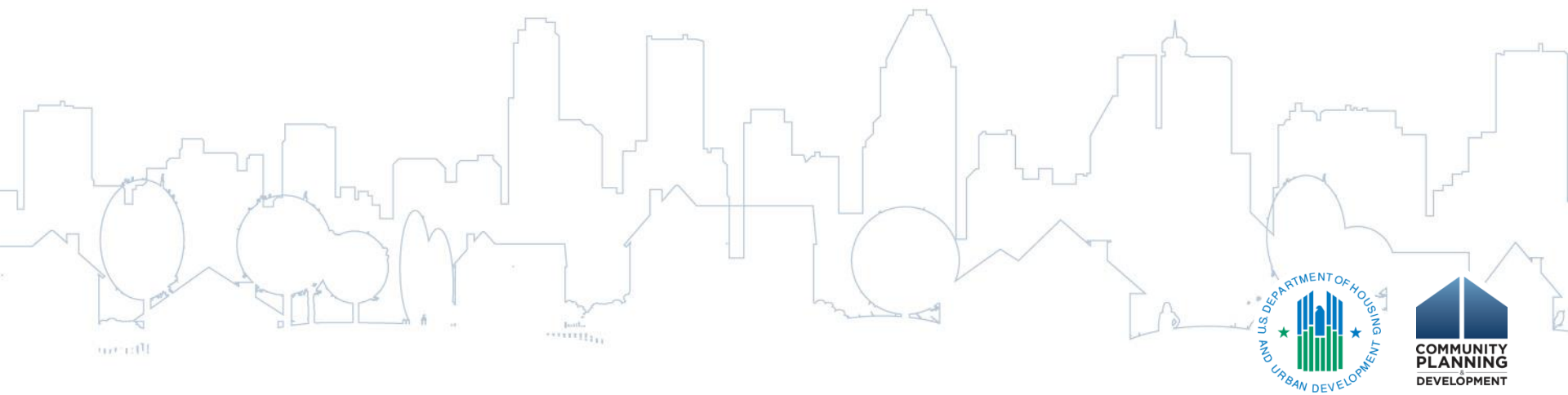
Community Planning and Development

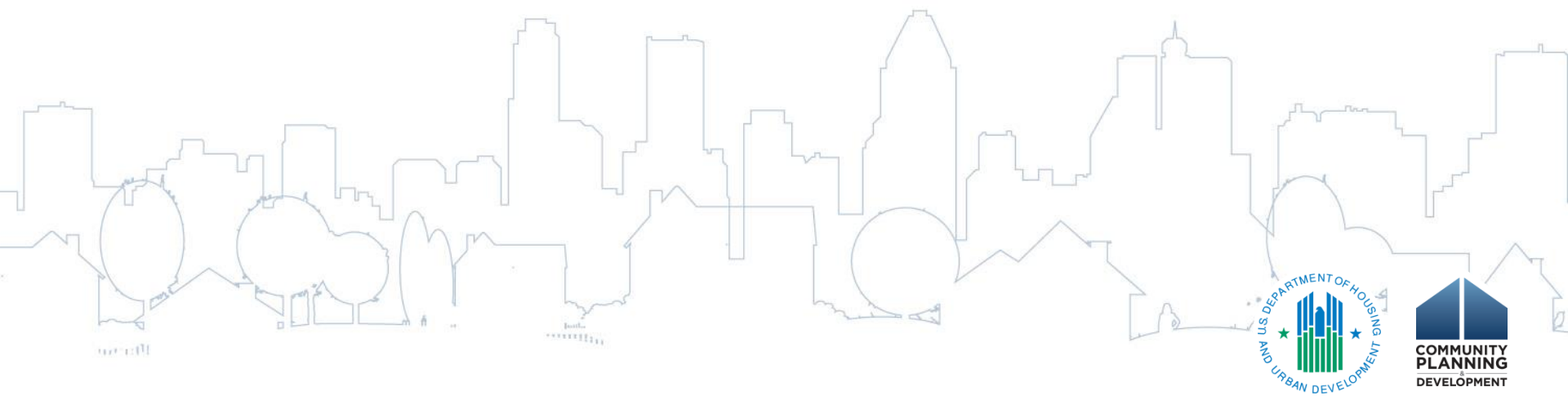
U.S. Department of Housing and Urban Development

[Nancy.E.Boone@hud.gov](mailto:Nancy.E.Boone@hud.gov)

202-402-5718







# Programmatic Agreement (PA)

PA can include:

- exempt activities
- expedited timeframes
- delegation of review authority to qualified professional to make determinations on behalf of SHPO
- standard mitigation measures

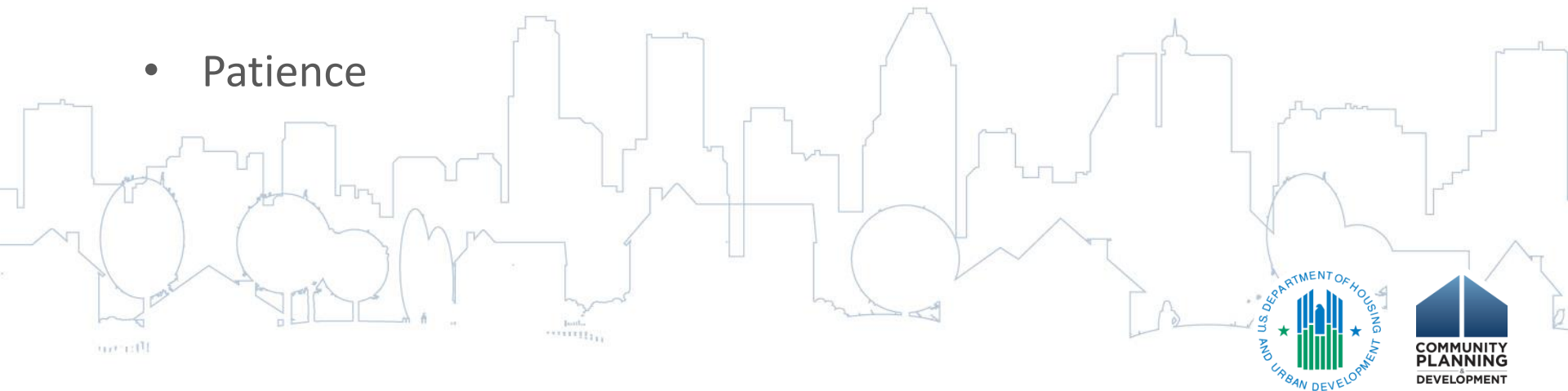




# Programmatic Agreement (PA)

Developing a PA requires:

- Notice to ACHP
- Consultation with SHPO, THPO, tribes, interested organizations and individuals
- Negotiation
- Patience




# PA for Rehabilitation of Ohkay Owingeh



Ohkay Owingeh, New Mexico



# Programmatic Agreement (PA)



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### Historic Preservation Main

#### Section 106 Agreements

This page contains guidance and examples of Section 106 Programmatic Agreement (PA) documents that will be added as they are developed.

##### Section 106 Agreements Database

This database includes existing Programmatic Agreements indexed by state. It is currently being updated with Section 106, list activities that are exempt from review, and give standard mitigation measures.

##### HUD Memo: HUD Environmental Regulations and Section 106 Agreement Documents

This memo describes who must sign HUD Section 106 Agreement Documents.

##### Advisory Council on Historic Preservation HUD Programmatic Agreement Checklist

This checklist is used to review programmatic agreements for completeness.

##### Section 106 Agreement Documents - Samples and Templates

This page contains sample and template Section 106 Memorandum of Agreements and Programmatic Agreements for use as models in creating new agreements.

C13	
A	B
1 State: OHIO	
2 Jurisdiction	Agreement Link
3 Cincinnati	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_cincinnati.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_cincinnati.pdf</a>
4 Cincinnati (2001)	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_cincinnati_2001.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_cincinnati_2001.pdf</a>
5 Cleveland	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_cleveland.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_cleveland.pdf</a>
6 Cleveland Heights (2001)	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_clevelandheights_2001.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_clevelandheights_2001.pdf</a>
7 Cleveland Heights (2006)	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_clevelandheights_2006.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_clevelandheights_2006.pdf</a>
8 Columbus	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_columbus.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_columbus.pdf</a>
9 Dayton	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_dayton.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_dayton.pdf</a>
10 Germantown	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_germantown.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_germantown.pdf</a>
11 Hamilton	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_hamilton.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_hamilton.pdf</a>
12 Toledo	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_toledo.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_toledo.pdf</a>
13 Tuscarawas County	<a href="http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_tuscarawascounty.pdf">http://archives.hud.gov/offices/cpd/environment/section106/pdf/oh_tuscarawascounty.pdf</a>
14	



# Tribal Consultation Protocol Agreements

36 CFR § 800.2(c)(2)(ii)(E)

- developed between the federal agency and one or more federally recognized Indian tribes or Native Hawaiian organizations (NHOs)
- conditions how the agency consults with the tribe or NHO for one, many, or all of its projects or programs
- negotiated between the agency and the tribe or NHO- not SHPO or ACHP
- can include provisions for confidentiality and other specific tribal or NHO concerns
- parties file a copy with the appropriate SHPO(s) and the ACHP
- agreements can go beyond the requirements of the standard Section 106 process and condition other aspects of the agency/tribal/NHO relationship (e.g., who is the point of contact, what kinds of undertakings the tribe or NHO would like to participate in consultation for, etc.)
- the protocol cannot change or condition the role of other Section 106 participants (e.g., the SHPO, ACHP, etc.) without their consent.

