

National Historic Preservation Act Section 106 Compliance Regulatory Program Workshop

Erin E. Hess

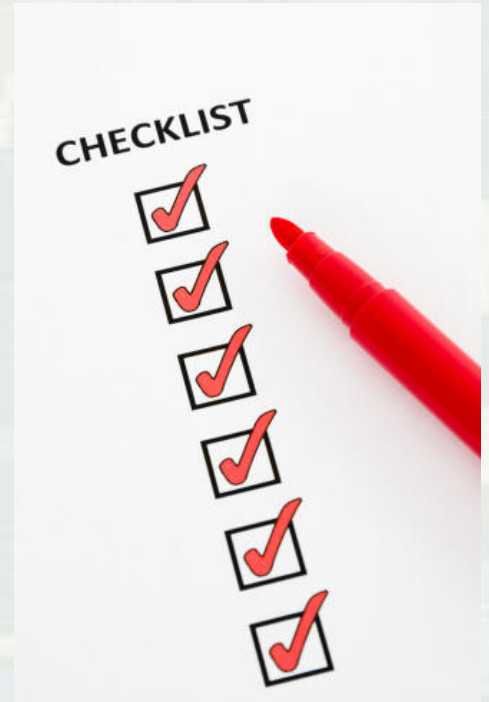
Cultural Resources Specialist
Regulatory Division, Sacramento District
1325 J Street, Room 1350
Sacramento, CA 95814
(916) 557-6740
erin.e.hess@usace.army.mil

Regulatory Program Workshop
November 29, 2018



Overview

- National Historic Preservation Act
- 33 CFR Part 325 Appendix C
- Section 106 Process
 - ▶ Identification
 - ▶ Consultation
 - ▶ Eligibility Determination
 - ▶ Effect Determination
 - ▶ Adverse Effects
 - ▶ Mitigation
 - ▶ Unanticipated Discovery
- Additional Information



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Section 106 of the National Historic Preservation Act of 1966, as amended (now located at 54 U.S.C. 306108)

“The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and **the head of any Federal department or independent agency having authority to license any undertaking**, prior to the approval of the expenditure of any Federal funds on the undertaking or **prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.**”



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Section 101 of the National Historic Preservation Act of 1966, as amended (now located at 54 U.S.C. 302706)

- (a) IN GENERAL.—Property of **traditional religious and cultural importance** to an Indian tribe or Native Hawaiian organization may be determined to be **eligible** for inclusion on the National Register.
- (b) CONSULTATION.—In carrying out its responsibilities under **section 306108** of this title, **a Federal agency shall consult with any Indian tribe** or Native Hawaiian organization **that attaches religious and cultural significance to property described in subsection (a).**



33 CFR Part 325, Appendix C

- Corps' Regulatory Program's implementing regulations to take into account the effect of the undertaking on historic properties
- Provides a process for the review of all proposed permit actions
- Level of review is commensurate with impacts
- Applicants may be required to submit additional information and perform mitigation to compensate for impacts to historic properties



Definitions

- **Project Area**

- ▶ The entire area of work, including all construction, staging, and access areas (this may be larger than the Corps' permit area)

- **Permit Area**

- ▶ The area comprising the waters of the U.S. that will be directly affected by the proposed undertaking and uplands directly affected as a result of authorizing the work or structures
- ▶ The Corps determines the permit area
- ▶ Three tests must be satisfied for an activity occurring outside waters of the U.S. to be included within the “permit area”
 - BUT FOR
 - INTEGRALLY RELATED TO
 - DIRECTLY ASSOCIATED WITH



Definitions

■ Undertaking

- ▶ The work, structure or discharge, including all associated construction, staging, and access areas, that requires a permit from the Corps
- ▶ The extent of the undertaking is encompassed by the permit area

■ Area of Potential Effect (APE)

- ▶ From 36 CFR§800.16(d): “...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.”
- ▶ The Corps’ regulation uses permit area and does not define or use APE
- ▶ The scope of the Corps’ Section 106 review may extend beyond the permit area

■ Study Area

- ▶ The entire area included within the cultural resource investigation, usually the project area, and including the buffer (typically 1/2 mile) area reviewed during the literature search



Section 106 Process-The Beginning

■ Initial Review

- ▶ The Corps has established guidelines for applicants to provide information for our review
 - *Sacramento District Regulatory Division Guidelines for Compliance with Section 106 of the National Historic Preservation Act* (March 24, 2014)

■ Public Notice

- ▶ May be sent to SHPO, NPS regional office, certified local governments, Tribes, interested citizens, and potentially the ACHP
 - Helps assist in identification of interested/consulting parties
 - Sensitive cultural information and/or site location information is excluded from release in a public notice or under FOIA



Gathering Information

■ Investigations

- ▶ Information provided will be examined
- ▶ Corps will conduct, or cause to be conducted, further investigations as necessary
 - Applicant will be required to conduct investigation (usually by third party contract) at their expense in most cases
- ▶ **The identification of previously unidentified cultural resources is strictly limited to the permit area, but the Corps must also consider potential effects to known historic properties outside the permit area**

■ Additional information needed

- ▶ Include the vertical extent of ground disturbance
- ▶ Include professional qualifications
- ▶ Include plans for phased development, if applicable

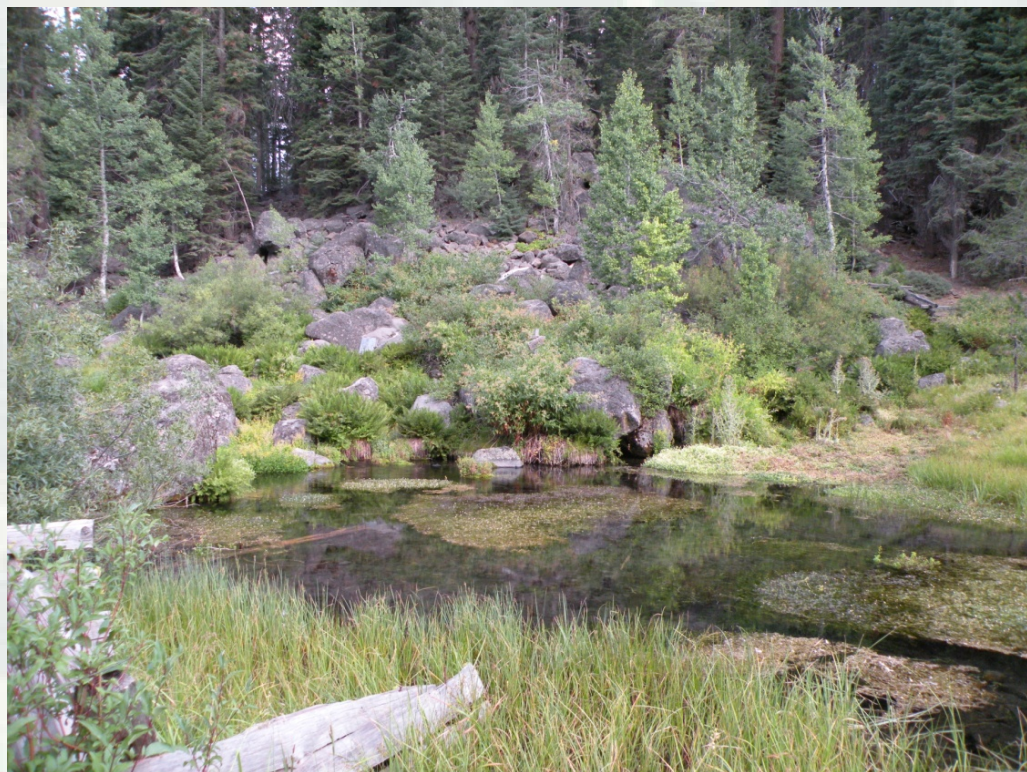


Historic Properties



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New(er) Concepts on Resource Types



Domingo Springs, Lassen National Forest, CA
“Center of the universe” for the Mountain Maidu.



Yampa harvesting on Deadman Creek, near Inyo Craters, California.

These resources are generally documented as sites, buildings, structures, objects, or districts.



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Consultation



- May begin at any time - the earlier the better
 - If not productive, the Corps can terminate at any time, but must notify consulting parties
- Involve interested and consulting parties
 - May have knowledge of cultural resources that may or may not be identified by field surveys
- ALWAYS consider ways to avoid or minimize effects
- No specific process for consultation



Site visit in Rocklin, CA, with United Auburn Indian Community of the Auburn Rancheria representatives



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Tribal Consultation



Important points to remember:

- Federally-recognized Tribes are sovereign nations
- Consultations may take longer due to schedule of internal Tribal discussion
- Many Tribes have been relocated from their traditional homeland



If you don't ask, how will you know?



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Eligibility Determinations

- Criteria for inclusion in the NRHP
 - ▶ Criterion A: associated with **EVENTS** that have made a significant contribution to the broad patterns of our history
 - ▶ Criterion B: associated with the lives of **PERSONS** significant in our past
 - ▶ Criterion C: embody **DISTINCTIVE CHARACTERISTICS** of a type, period, or method of construction, or that represent the **WORK OF A MASTER**, or that possess **HIGH ARTISTIC VALUE**, or that represent a significant and distinguishable **ENTITY** whose components may lack individual distinction
 - ▶ Criterion D: have yielded, or may be likely to yield, **INFORMATION IMPORTANT IN PREHISTORY OR HISTORY**



Effect Determinations



No Potential to Cause Effect – The nature, scope, and magnitude of the undertaking is such that there is very little to no likelihood that a historic property may be affected.



No Effect – No historic properties are identified OR historic properties may be present or are present, but the undertaking will not directly or indirectly impact the historic properties.



No Adverse Effect – A historic property is present and will be impacted by the undertaking, but the impact will not be adverse (negative).



Adverse Effect – A historic property is present and will be impacted by the undertaking, and the impact will be adverse (negative); mitigation may be required.



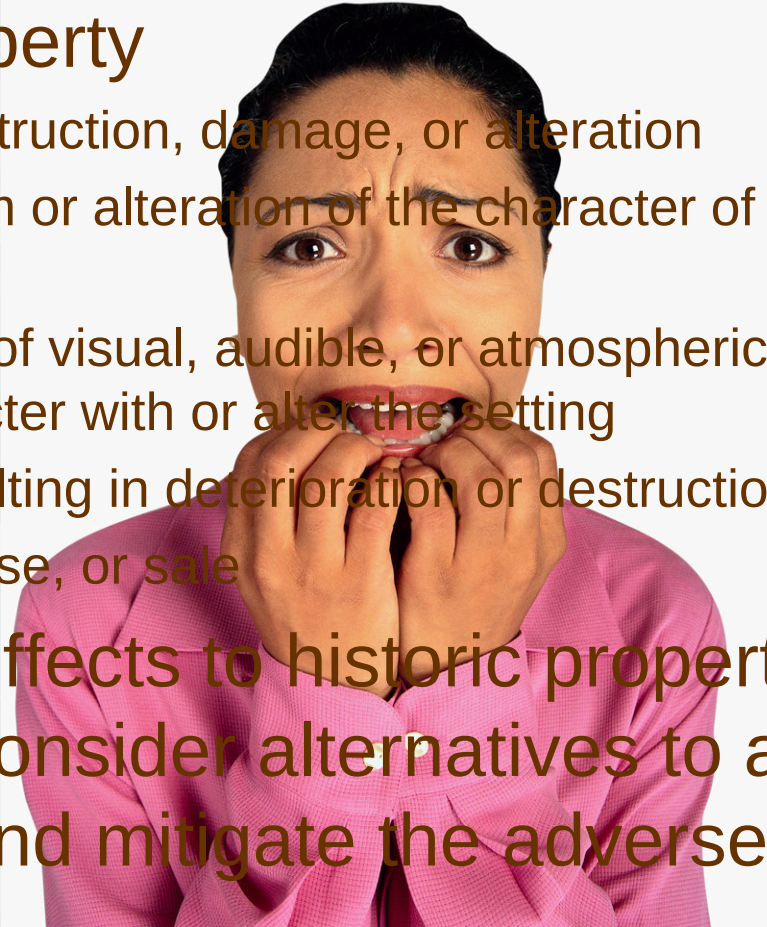
Indirect Effects



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Adverse Effect

- An impact results in diminishing integrity of the historic property
 - ▶ Physical destruction, damage, or alteration
 - ▶ Isolation from or alteration of the character of the property's setting
 - ▶ Introduction of visual, audible, or atmospheric elements that are out of character with or alter the setting
 - ▶ Neglect resulting in deterioration or destruction
 - ▶ Transfer, lease, or sale
- If adverse effects to historic properties are identified, consider alternatives to avoid, minimize, and mitigate the adverse effects



Completing the Process

The Section 106 process is fulfilled when:

- Corps determines the undertaking has no potential to cause effects
 - Corps determines the undertaking will have no effect
 - ▶ With no objection from SHPO/THPO
 - Corps determines the undertaking will have no adverse effect
 - ▶ With no objection from SHPO/THPO
 - Corps determines the undertaking will have an adverse effect and a Memorandum of Agreement (MOA) is executed to resolve the adverse effect
 - ▶ The MOA includes mitigation measures
 - OR, Corps determines the effect cannot be fully evaluated
 - ▶ Resolve through the execution of a Programmatic Agreement
- An effect decision is eventually made



Mitigation Examples

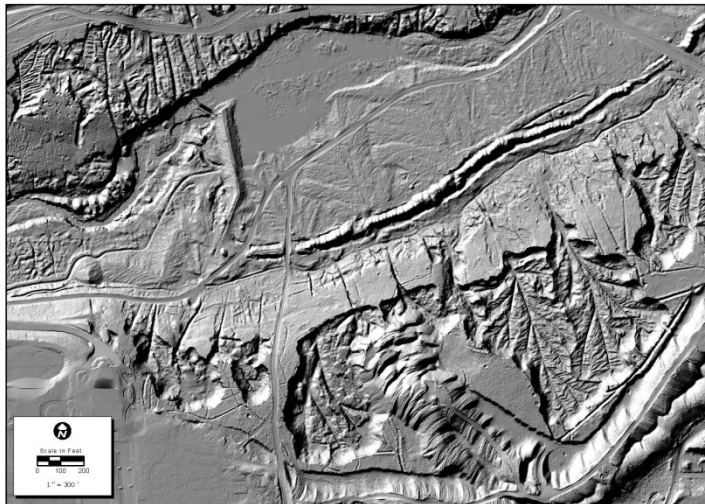


Structure relocation, Fort Rock, OR

Site capping
Sacramento
River, CA



LIDAR
Survey,
Alder
Creek
Mining
District,
CA



8 Points per sqm LIDAR Bare Earth
Glenborough at Easton (Sacramento County, CA)

ECORP Consulting, Inc.
ENVIRONMENTAL CONSULTANTS



Interpretive
signage
Fort Rock, OR



Mitigation Examples



Historic Photograph of Heiner, Utah, ca. 1923.
(Courtesy, Western Mining and Railroad Museum Collection)



Historic Photograph of Martin Perrero's Winning Garden in 1929.
(Courtesy, Western Mining and Railroad Museum Collection)

Utah Professional Archaeological Council 2017 Winter Meeting

Papers and Panels

Thursday, March 23, 2017 1:00 p.m.-4:00 p.m.

1:00 p.m.

Archaeological Investigation of Heiner, Utah: Coal Company Town During the Coal Miner's Heyday. Mark Karpinski.



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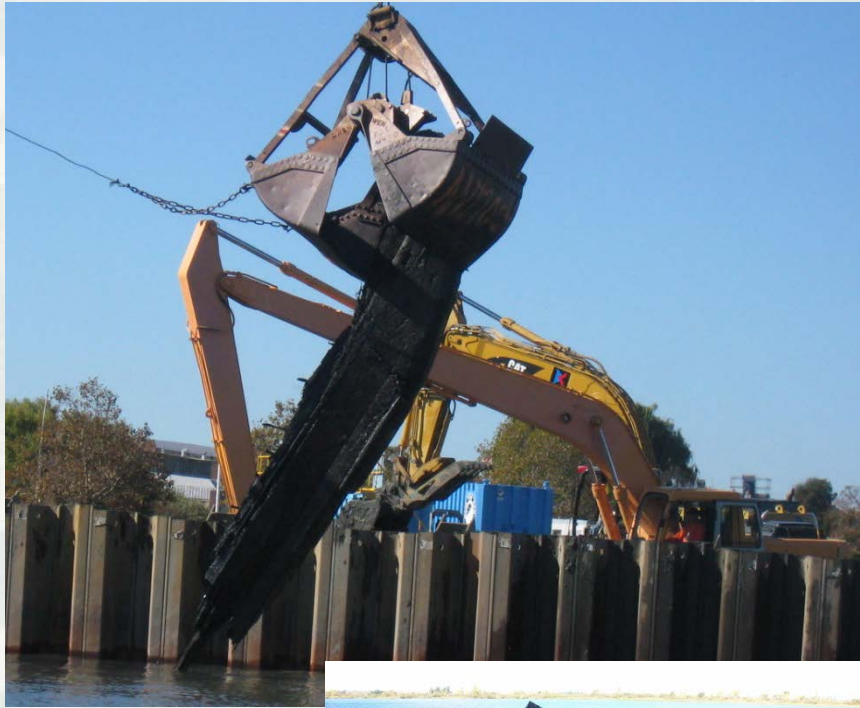
Mitigation Examples

- Visualizations of past environments in various media platforms
- Land purchase/donation to conserving organizations
- Reestablishing or replanting native vegetation
- Use of conservation easements with allowed access privileges
- Funding cultural programs or events



Unanticipated Discoveries

Historic Properties encountered during construction:



- ▶ Avoid further harming site (stop construction in the immediate area, if possible)
- ▶ Notify the Corps immediately
- ▶ Corps will notify SHPO/THPO and ACHP if a potentially eligible historic property is encountered and cannot be avoided
- ▶ Corps will consider the need to suspend, modify, or revoke a permit



Unidentified sunken vessel discovered during marina excavation in Antioch, CA



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- Sacramento District Regulatory Division Guidelines for Compliance with Section 106 posted at:
http://www.spk.usace.army.mil/Portals/12/documents/regulatory/sec-106-tribal/FINAL_2014-03-24_Section-106-Guidelines.pdf
 - ▶ Also posted are:
 - Link to the National Historic Preservation Act
 - Link to 33 CFR Part 325 Appendix C and Interim Guidance
 - Links to our HQ Tribal and Cultural Resources Information
 - Links to the ACHP and SHPO websites
- Importance of early communication and coordination between Federal Agencies
 - ▶ We can take advantage of existing procedures, such as Programmatic Agreements, if coordination occurs **PRIOR** to SHPO consultation
- Addressing impacts to cultural resources, remember to:
 - ▶ Avoid
 - ▶ Minimize
 - ▶ Mitigate



Questions?



Building restoration, Victory Ranch, near Kamas, UT
(courtesy of Jeff Graham)



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Thanks!



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