

How the National Environmental Protection Act (1970) and Section 106 of the National Historic Preservation Act (1966) Work Together

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Under NEPA: Prior to Federal action the Federal agency required to determine if their proposed actions have significant environmental effects and to consider the environmental and **related social** and economic effects of their proposed actions.

NEPA- Section 101(42 USC &4331)

1. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations
2. Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings
3. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences
4. Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice.
5. Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities
6. Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

NEPA- Sec. 102 [42 USC § 4332]. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall

- (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;
- (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;
- (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --
 - (i) the environmental impact of the proposed action,
 - (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
 - (iii) alternatives to the proposed action,

Section 106 of NHPA, (16 U.S. C. 470f) was enacted in 1966. It requires that Federal agencies take into account the impacts of their proposed actions and decisions on historic properties – that is, places that are included in or eligible for the National Register of Historic Places.

The National Historic Preservation Act of 1966, as amended, codified at 54 U.S.C.300101 et seq. is the basis for the tribal consultation provisions in the Advisory Council on Historic Preservation's (ACHP) regulations. The two amended sections of NHPA that have a direct bearing on the Section 106 review process are:

Section 101(d)(6)(A), which clarifies that historic properties of religious and cultural significance to Indian tribes may be eligible for listing in the National Register of Historic Places, and

Section 101(d)(6)(B), which requires that Federal agencies, in carrying out their Section 106 responsibilities, consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking.

Archaeological Resources Protection ACT (ARPA) requires permits for any archaeological work on federal or reservation lands and have to be approved by the jurisdictional land manager. On reservation permits (Trust Lands) are generated through the Bureau of Indian Affairs (BIA). On ancestral lands or allotment lands the lands may be managed by the Bureau of Land Management (BLM) for the BIA.

The Consultation Process

1. The federal agency initiates consultation with the State and/or Tribal Historic Preservation Officer (SHPO/THPO), Indian tribes, and other individuals or organizations interested in the agency's planned action (called an undertaking) and its possible effects on known or unknown historic properties; these people and groups are called consulting parties.
2. With the consulting parties, the agency determines the scope of what it needs to do to find historic properties and learn how they may be affected. One thing they do is to establish the area of potential effects (APE) – the area where the action may affect historic properties.
3. The agency identifies historic places and effects within the APE, usually involving surveys and other kinds of studies, in consultation with the consulting parties.
4. The agency determines whether places in the APE are eligible for the National Register of Historic Places, following National Park Service (NPS) regulations, in consultation with the SHPO/THPO and other consulting parties.
5. The agency determines whether the proposed action will have adverse effects on historic properties, using criteria in the ACHP regulations. If not, it proposes a determination of no adverse effect for concurrence by the SHPO/THPO and other consulting parties.
6. If there may be an adverse effect, the agency continues to work with the consulting parties to try to find ways to resolve the adverse effect. This usually leads to a Memorandum of Agreement (MOA), whose terms the agency makes sure are carried out.
7. If an MOA isn't reached, the ACHP comments to the head of the federal agency (Secretary), who considers the comments in deciding whether and how to carry out or approve the action, but need not follow them.



Section 106 Review Process

36 CFR § 800.3-7

CONSULTATION



INITIATE the process

- Determine undertaking
- Coordinate with other reviews
- Identify SHPO/THPO, Indian tribes/NHOs, and other parties
- Plan to involve the public

No undertaking with potential to affect historic properties?

NO



IDENTIFY historic properties

- Determine APE and scope of effort
- Make reasonable and good faith effort to identify
- Determine National Register eligibility
- Consult SHPO/THPO, Indian tribes/NHOs, and other parties
- Involve the public

No historic properties present or affected?

NO



ASSESS adverse effects

- Apply Criteria of Adverse Effects
- Consult SHPO/THPO, Indian tribes/NHOs, and other parties
- Involve the public

No historic properties adversely affected?

NO



RESOLVE adverse effects

- Develop and consider alternatives or modifications to avoid, minimize, or mitigate adverse effects
- Notify the ACHP
- Consult SHPO/THPO, Indian tribes/NHOs, and other parties
- Involve the public

AGREEMENT or Council Comment

PROCEED

The consultation process is critical to the success of any project on reservations or ancestral lands. All consulting parties are notified by the **Federal Nexus** through a good faith effort including mail, email and followed up by phone. In this process the Tribes are included as they help determine or make mitigation recommendations on historic and prehistoric sites. Once the parties are contacted they have 30 days to comment respond.

Although required there are no clear guidelines for what constitutes “consultation” with the tribes. We can help. (See Slide 8 and 9)

On ancestral lands and on reservations consultation with the Tribes is through the Tribal Historic Preservation Office (THPO). On the reservation the THPO assumes the responsibilities of the SHPO.

Typically the THPO office is guided by a cultural council made up of elders. The relationship between the cultural council and the THPO is different for every tribe.

If the project is on the reservation then all the laws of the reservation apply. Each tribe is different usually there is a tribal environmental section that will need to be at the consultation table as well.

At some point the project will have to be approved by the Tribal Council and it may be in the best interest of the contractor to present the project to the council with the federal nexus.

Traditional Cultural Properties (TCP)

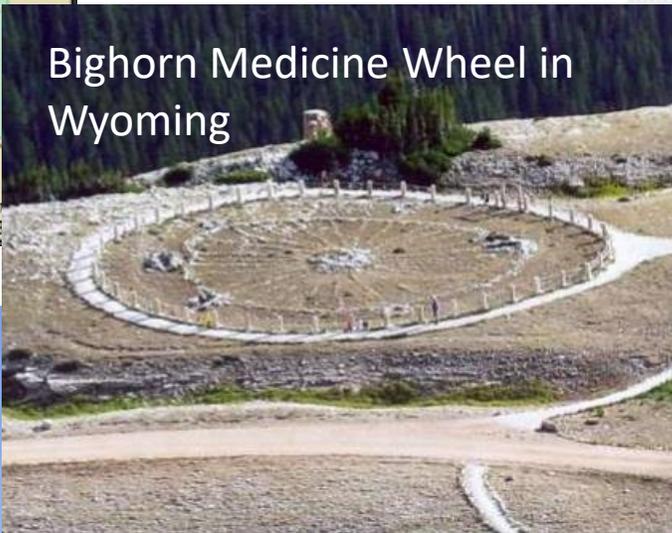
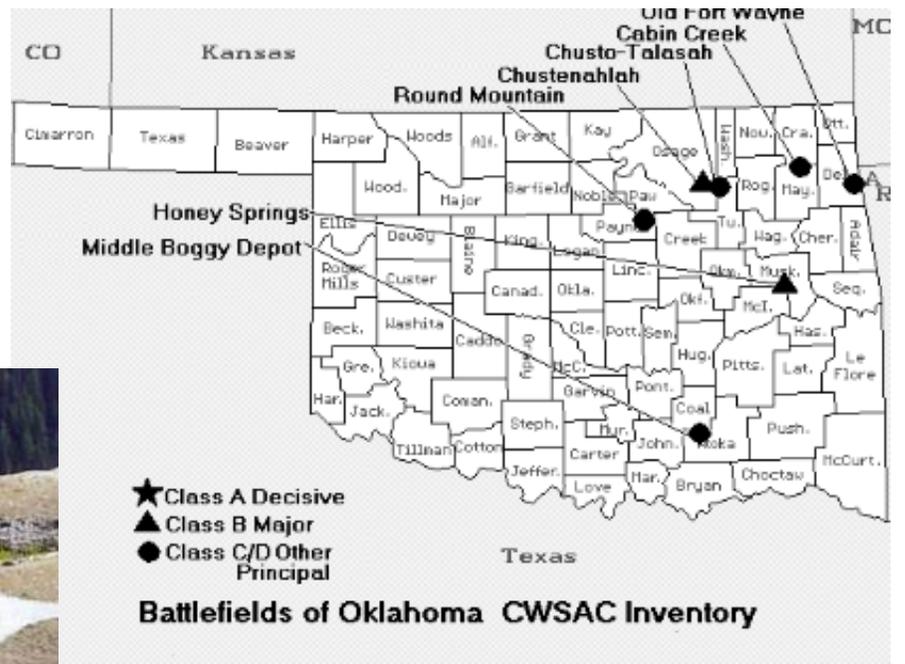
A traditional cultural property can be defined generally as one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. Various kinds of traditional cultural properties will be discussed, illustrated, and related specifically to the [National Register Criteria](#).



Examples of TCPs

← Trail of Tears

Civil War Battlefields →



Bighorn Medicine Wheel in Wyoming



← Mt Taylor , NM



Yankee Stadium →

Principles of Consultation

(Gina D. Richard, personal communication, May 2016)

1. All tribes are not the same, know the differences.
2. Understand the legal standing of the Tribe. Are they federally recognized or state recognized.
3. Understand the Government to Government process and meaning.
4. How does the tribe hold its land. In trust, fee simple, etc.
5. Understand the Tribal government.
6. Form a relationship with the appropriate official.
7. Research and understand the historic background of the Tribe.
8. Understand that consultation is a process and not a single act.
9. Never forget that consultation is based on respect, knowledge, trust.
10. Be culturally sensitive to linguistic and cultural differences
11. Listen to hear and not to tell.

The Process Continued

Typically the THPO, Cultural Committee and Tribal representatives will go over the type of project, the maps of the project area and determine what if any sites or Traditional Cultural Properties TCPs may be impacted. They make recommendations about how they would like specific site types to be treated, recorded, fenced etc.

Mitigation for site types and TCPs are determined through consultation. An MOA is signed by all consulting parties on small projects. A Programmatic Agreement is signed on larger projects that are planned over a longer time period. These documents contain the guidelines for how sites will be treated/mitigated during the project.

Mitigation measures usually include avoidance but may also include monitoring, site testing (shovel tests and excavation) for evaluation by the Federal Nexus, SHPO and THPO for eligibility to the National Register. On reservations eligibility may be determined by the SHPO and THPO or by the SHPO with input from the THPO depending on the status of the THPO office.

Once the consultation has been successfully started and there is a signed MOA or PA and all permits are in place the project can begin.

Identifying previously recorded sites and completing archeological surveys in the early stages of the project allows us to collect valuable information for later stages of the project.

Knowledge of previously recorded sites and a study of the landforms and waterways helps us to produce a predictive model. Collection of this type of data keeps everyone involved with the project informed and prepared when new sites are located. An action plan can be put into place that mitigates the site quickly so the project can stay on track.

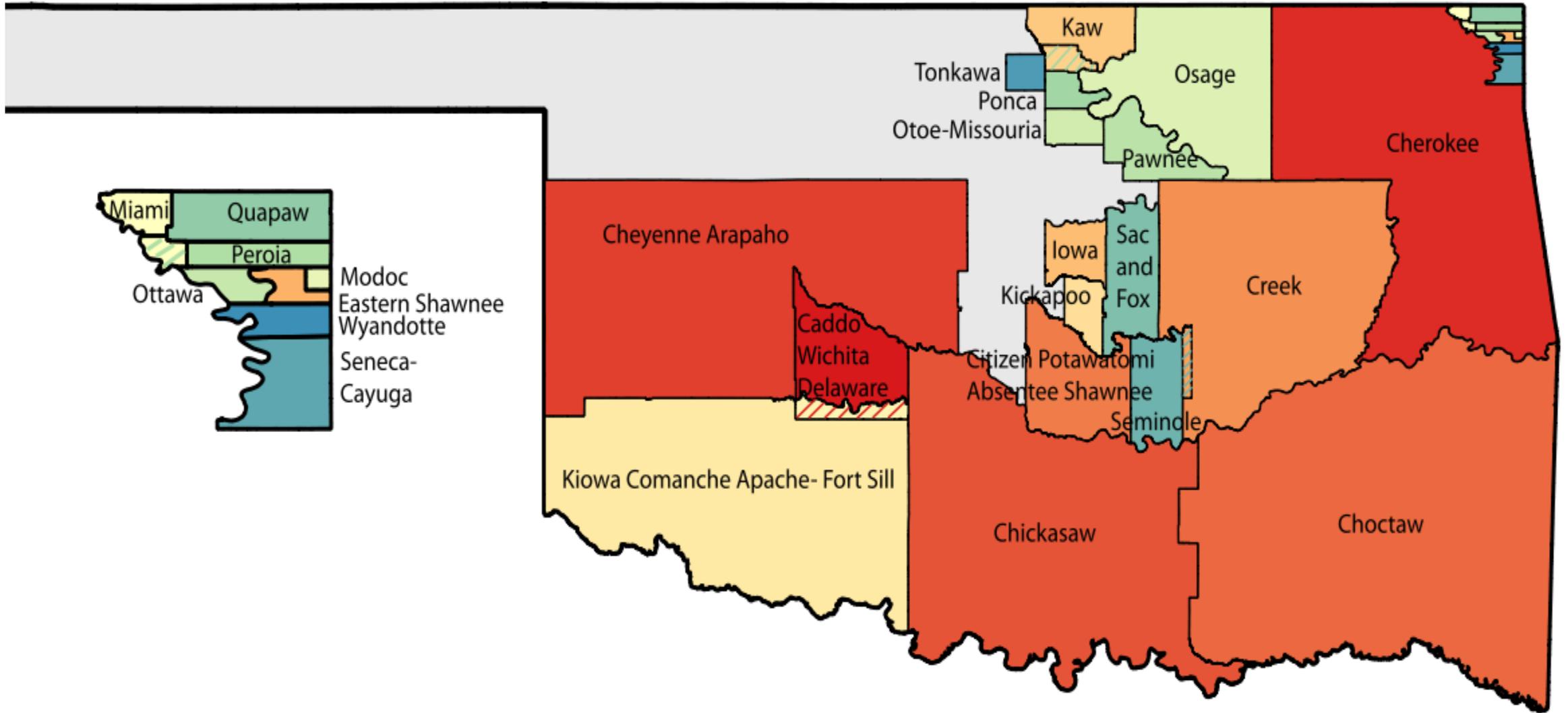
Our role in each project is to act as the lifeguard for contractors so they can stay in compliance with Section 106.

On some projects we teach the basics of 106 and how to work with archaeologists to all field personnel. If needed we also train tribal monitors so when they get in the field they know what to expect.

We work with everyone on the project including contractors for 106 classes prior to operating in the field, contractor workflow, logistics, contacting tribal archaeologists and THPOs so they can schedule their tribal monitors to keep the project on track so it can be completed on time and within budget.

Murphy v. State of Oklahoma

1. Whether the State of Oklahoma lacked jurisdiction to prosecute petitioner, a member of the Muscogee (Creek) Nation, for the murder of another member of the Creek Nation, on the ground that the crime was committed on a restricted Indian allotment within the meaning of 18 U.S.C. 1151(c).
2. Whether the State of Oklahoma lacked jurisdiction to prosecute petitioner on the ground that the crime was committed within the limits of an Indian reservation within the meaning of 18 U.S.C. 1151(a).
 - Jurisdiction, State or Federal?
 - Did Congress explicitly de-establish the Creek Reservation? 10th Circuit ruled NO!
 - Can the intent of Congress be argued? NO!
 - Solem v. Bartlett



Oklahoma Reservations in 1906

Sources

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Sec. 102 [42 USC § 4332].

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