

National Park Service



EXPERIENCE
YOUR
AMERICA

National Historic Preservation Act, Section 106

Skipping & Tripping Along the Process Path

National Land and Water Conservation Fund State Grant Training
Denver, Colorado

April 7-11, 2013



Why do we have to do this anyway?

- National Historic Preservation Act of 1966
- National Environmental Policy Act of 1969
- Treaty responsibilities
- Manual 4-9



Well, because it's the law (though despite the law's name, it doesn't actually require preservation of historic resources). And it's also the right thing to do. Plus you don't want this to happen...

<http://www.youtube.com/watch?v=41tOoxwSsco>

The following clip contains both strong language and disturbing imagery. Viewer discretion is advised.



While the end result might be a bit far fetched, the premise isn't, unfortunately. This is from an LWCF conversion where they discovered that the headstones from the cemetery that predated the park had been moved, but some of the bodies had been left behind.

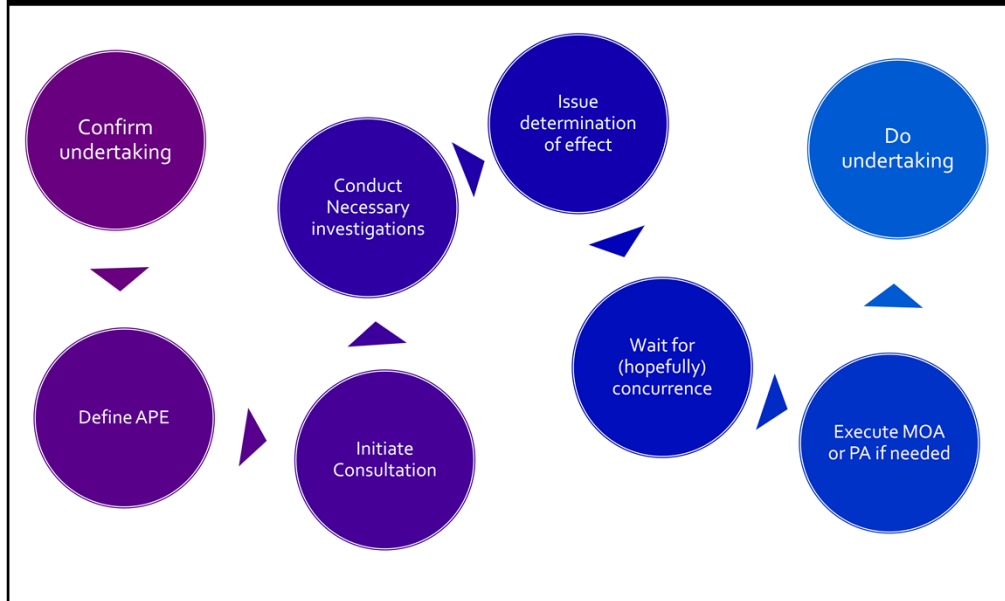
And digging up bodies or demolishing old buildings isn't the only hazard. Without careful investigation we risk damaging traditional cultural properties, historic landscapes, and resources that aren't obvious to the untrained eye.

And it's part of the NPS mission

The National Park Service preserves unimpaired the natural and cultural resources and values of the national park system for the enjoyment, education, and inspiration of this and future generations. The Park Service **cooperates with partners** to extend the benefits of natural **and cultural resource conservation** and outdoor recreation throughout this country and the world.

Primarily, of course, the LWCF program is about outdoor recreation but the NPS as a whole also has other programs that help our same partners conserve cultural resources. Many of you work with these programs as well as LWCF.

106 Process in a nutshell



The players

- SHPO = State Historic Preservation Officer
- ACHP = Advisory Council on Historic Preservation
- Tribes = federally recognized, at a minimum
- Consulting parties



The SHPO is the person tasked with overseeing cultural resources in each state. They are like the SLO of historic properties. The ACHP is a federal agency with oversight of the bodies of laws that aim to protect cultural and historic resources, including the 106 process. They are kind of like the CEQ of historic properties. In general, NPS makes a practice of consulting with all potentially interested and affected parties and this can include non-recognized tribes as well as other history minded civic groups and local non-profits. Any other parties that are interested and or affected should also be contacted and invited to participate. Others will self identify through the public process.

Federal undertaking

- What is an undertaking anyway?
 - *"An undertaking is a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency, those carried out with Federal financial assistance, and those requiring a Federal permit, license or approval."*
 - Contract or amendment required?
 - Or just agreement there is no action?
- What's the NPS nexus here?
 - New grant vs. conversion
 - Local decision vs. federal



An undertaking is how Section 106 calls something that requires NPS to do something official, meaning to sign a grant agreement or amendment. You can check the PDESf for those items because they also require NEPA review. There are an awful lot of things that happen in LWCF parks that are not an undertaking and how you phrase your inquiry to NPS is really important in order to avoid confusion among parties not familiar with the nuances of the program. Are you really asking for us to approve something, for example, or are you just checking with us to make sure we agree that something doesn't require us to do anything.

Is this an undertaking?

You've sent in a new grant package for replacing an existing playground with something newer that meets ADA standards. It will be in the exact same location as the old one, built 15 years ago and contaminated with creosote.



Yes. NPS will be funding this project and an official signature is required to approve the grant. Unless you have an overarching agreement in place with the SHPO and NPS that lays out exclusions to the 106 process, whether or not this is in a previously disturbed area, or is the same kind of development, doesn't change the necessity of going through the process. Even if the project is for all great reasons (environmental, accessibility, etc.) we still have to go through the process.

Is this an undertaking?

The last LWCF grant at this park closed 10 years ago and the sponsor calls you because they want to replace some historic buildings with new athletic fields.



Probably not unless development of athletic fields represents a significant change in use as compared with the general concept for the park when it received its LWCF funding. Assuming athletic fields in general are consistent with the types of activities envisioned for the park, this is a local sponsor decision to make and because they are developing outdoor recreation facilities, no NPS approval is needed. The demolition of the historic buildings may be subject to local permitting requirements that would protect them, but unless a permit from another federal agency is needed, or unless another federal agency is funding the development of the fields, Section 106 will not apply.

Is this an undertaking?

You're out inspecting a park on its regular 5 year cycle and (uh-oh!) the sponsor built a fire station in the boundary since you were here last.



Yes and no. This is a conversion of course, so NPS approval will be required, but NPS is only agreeing that the fire station is not an outdoor recreation use and approving the proposed replacement as meeting the equivalency requirements. NPS is **not** approving construction of the fire station, or the process by which the proposed replacement property was selected.

Area of Potential Effect (APE)

- What is it?
 - *"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 use properties exist. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking."*
- Concurrence by consulting parties
- Size matters



This is a fancy way of depicting the extent to which your project has the potential to impact historic resources if they exist. Technically, concurring parties do not have to agree to your APE but you should listen to them if they don't and make sure you're accounting for their concerns in a reasonable manner. Make it big enough to include historic properties that could be affected, but small enough to be both in scale with the project and not include every historic property nearby that there's no potential to impact. Don't forget soundscapes and night sky.

APE Scope

Back to that playground example from earlier
how would you define the APE? What if –



It's a .025 acre playground in a .10 acre park



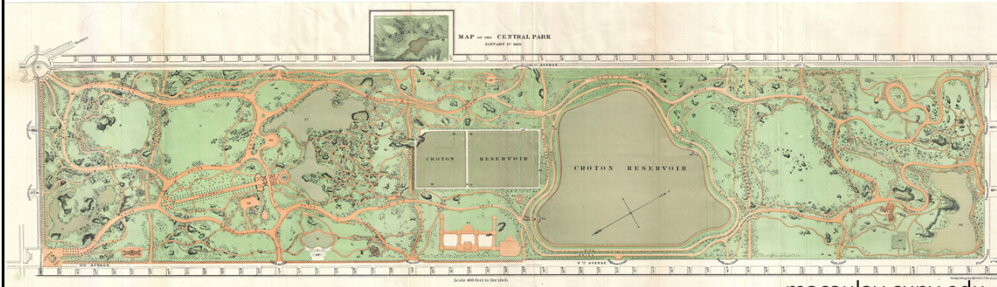
It's a .25 acre playground in a 100 acre park



The park includes an historic district



The park itself is historic



APE Scope

Cell tower
conversion!
What's your APE?



Does it matter if the cell tower is disguised?



What about the context of the park?



NEPA coordination

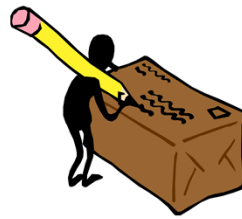
- Public comment required
- Don't overdisclose
- Can be concurrent if it's clear
- Sequencing is important



Typically 106 goes first, but if you're far enough along you might wrap up NEPA before every 106 "t" is crossed.

Initiate consultation

- Who?
 - Required = SHPO, Tribes, other native groups
 - Ideal = any interested and affected parties
- Write a letter
- Include required state specific SHPO forms
- Wait at least 30 days
- Do this well



Invited consulting parties might include historic societies, relevant local agency officials, traditional user groups, etc. The more information you can gather at this point, the less chance you'll have for something cropping up down the road. It can save you time and headaches.

The handouts include a template letter for initiating consultation. You should define the undertaking clearly and include enough materials to show where the undertaking is located, its context, and a map of the APE.

Further investigation needed

- Survey: reconnaissance or intensive
- Eligible pre-agreement cost
- Check your files for previous undertakings



The response you receive from a consulting party (particularly SHPO) may recommend that the site be surveyed because they don't have enough information to figure out whether or not there are eligible resources, or if they suspect there are eligible resources on site but they're not exactly sure where or to what extent. Typically, if a site has never been surveyed, you'd start with a reconnaissance survey to get a better handle on whether there's a chance anything is there.

If there's been a prior federal undertaking at the park (like an earlier LWCF grant or USACE permit) there may already be a 106 determination or have been investigation that can be built on.

How to review a survey report when you don't know anything about historic properties

- Check to make sure the APE in the report is what you expected it to be
- The person authoring the report should have a relevant qualification to do so
- Check for obvious omissions
- When in doubt, check in with the SHPO & NPS



You can't, not really, but there are some things that you can catch as an LWCF expert. This is one reason our template determination of effect letter is careful to say the report hasn't been reviewed for technical adequacy, but only for LWCF purposes. You can look for inconsistencies, like seeing that a wildlife biologist wrote the section on historic buildings, or that the APE is for a park a mile away from where the project is located. Do they mention Tribes? Do they talk about ancient history as well as more recent history? If you think something is wrong, check in with your SHPO, and if needed, with NPS who might be able to get some technical review done.

The Register

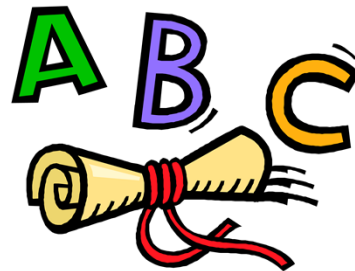
- List of historically significant properties
 - www.nps.gov/hp
- There are specific criteria for inclusion
 - Who files if you find something new?
 - Is eligible good enough?
- Local vs. national designations



Let's say you find something, or some known resource is identified on your property. The criteria for inclusion will be applied by a qualified individual, probably the consultant preparing the report but maybe the SHPO. If the found or known resource meets one or more of the criteria for inclusion it will be said to be "eligible". The sponsor may then choose to prepare an application for inclusion on the Register but it's not required as long as the project proceeds treating the eligible resource as though it were included on the Register already. A property may be eligible for local or state listing, but not eligible for national listing. What NPS needs to be concerned with is the national listing. Local listings may affect the sponsor's ability to get things permitted but doesn't factor into the 106 determination of effect.

Some more terms you might bump into

- Traditional Cultural Property
- Cultural Landscape
- Historic District
- Archaeological resource
- Paleontological resource
- Historic building
- Historic property
- Lithic scatter
- Midden





Traditional cultural property = a place whose significance is derived from the role the property plays in a community's historically rooted beliefs, customs, and practices.



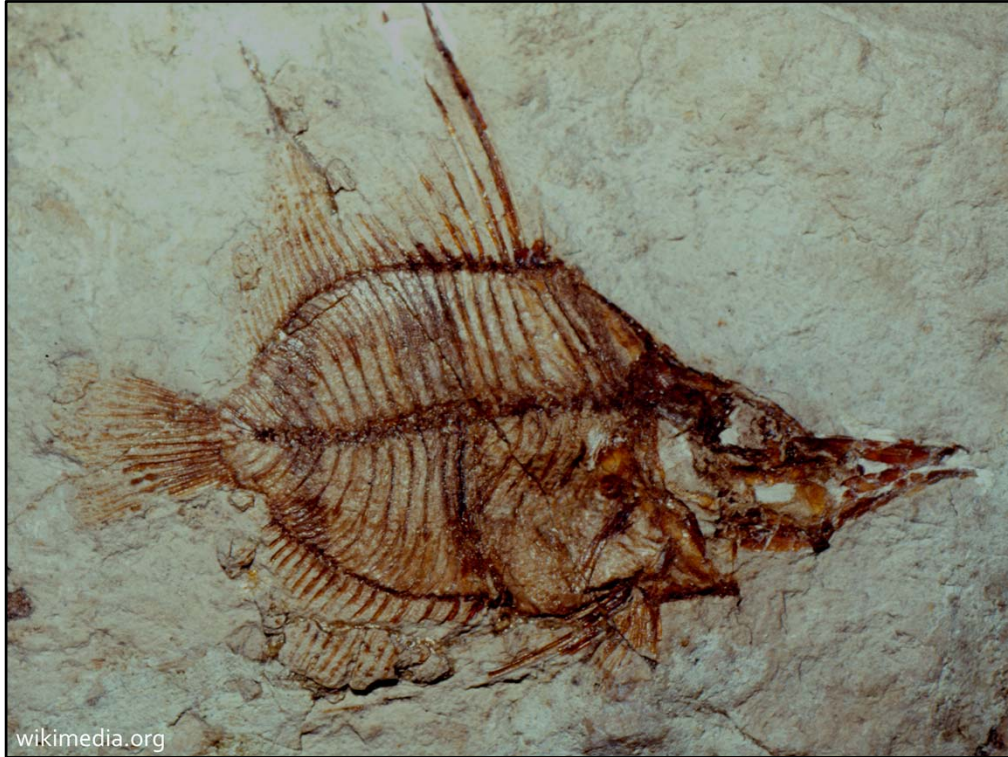
Cultural landscape = a landscape defined by a combination of people and nature that has some historic significance.



Historic district = a group of buildings, properties, and/or sites that have been designated as historically, culturally, and/or architecturally significant.



Archeological resource = physical evidence of past human life or activity - may be a site or individual objects manufactured by humans



Paleontological resource = fossilized remains, traces, or imprints of organisms, preserved in or on the earth's crust that provide information about the history of life on earth



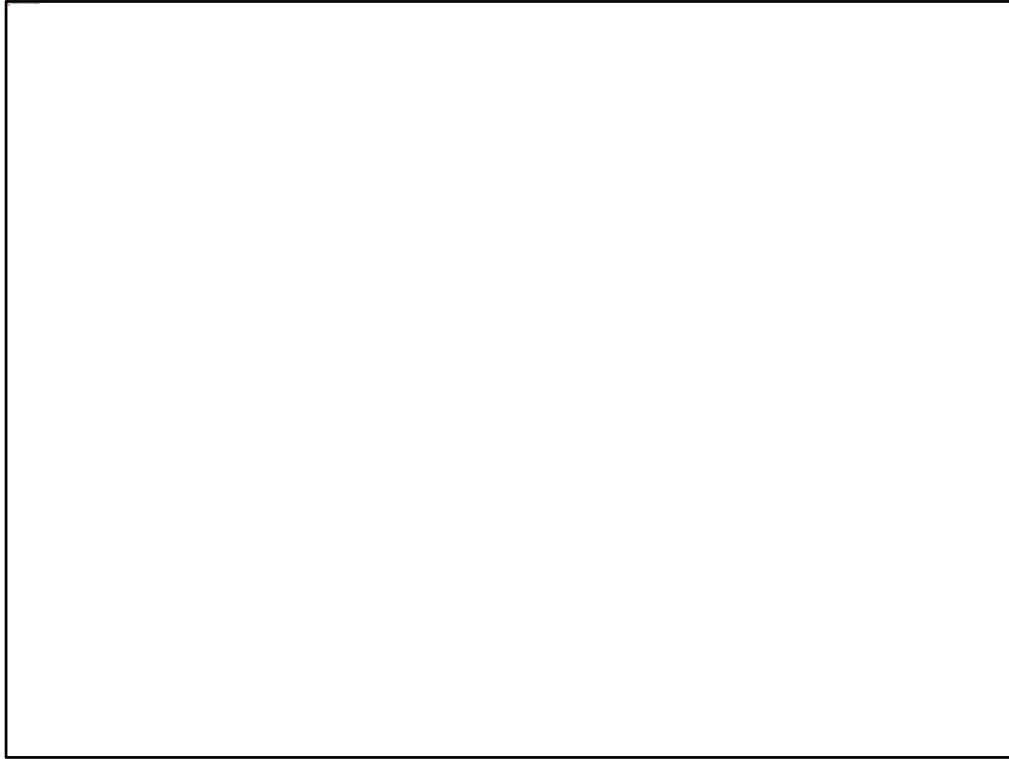
Historic building = a structure that is connected with significant events of our history, or associated with the lives of people significant to our past. Alternatively, a structure that includes or demonstrates distinctive characteristics of a type, period, or method of construction, or is the work of a master.



Historic property = anything eligible for or listed on the National Register of Historic Places

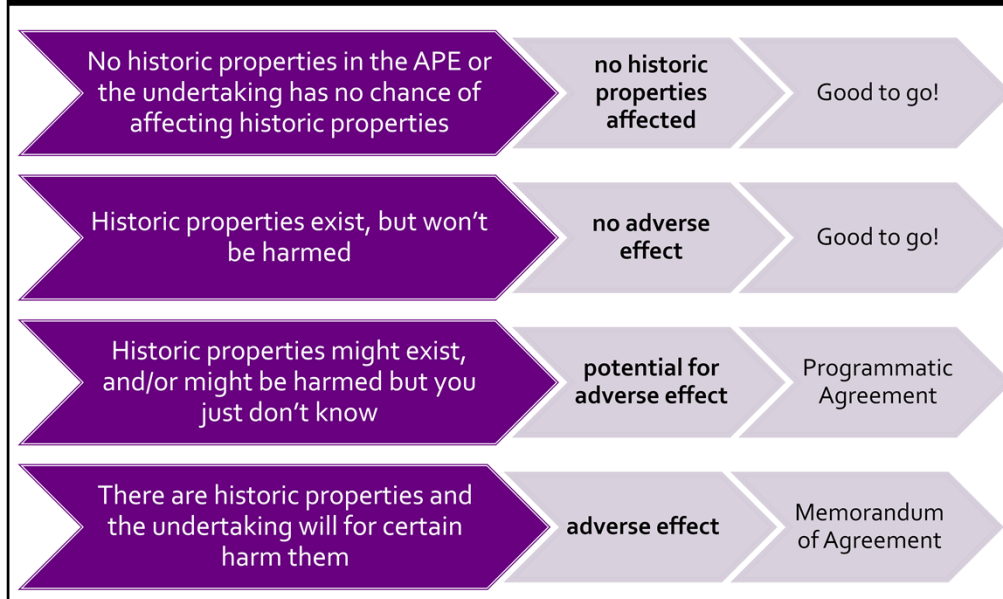


Lithic scatter = A small scatter of worked stone tools and/or the remains of their manufacture.



Midden = a really old trash heap. Not so really old, but pretty old trash heaps may also be eligible for the Register.

Finding of Effect



Who's job is it?

SLO

- Define APE
- Initiate consultation
- Shepherd process
- Determine effect

SHPO

- Provide technical guidance
- Concur (or not) with a determination of effect
- Participate in agreement documents as needed

NPS

- Consult with Tribes
- Review documentation to ensure it complies with 106 requirements before proceeding with the undertaking

You have the power

"...the state liaison, or designee, is authorized by NPS to initiate the Section 106 consultation process...and to determine whether the LWCF proposals have the potential to affect historic properties within the APE"

- LWCF Manual 4-10



Don't let anyone tell you that you lack the authority to do this on NPS' behalf. And (as I've fallen victim to) don't let anyone tell you NPS lacks the authority to give you this power.

Lead federal agency

- NPS needs to delegate, or parallel 106 processes will have to be completed.
- Most likely to come up in a conversion.
- For new grants, check to see if there have been previous federal undertakings to help you streamline.



When things go wrong

- Undertaking disagreement



- Foreclosure of comment & section 110



- Unanticipated discoveries



It may be really difficult for people to understand the subtle nuances of the NPS undertaking, particularly when it comes to conversions because it's such a unique situation (in the general scheme of federal grant programs – not to us, of course). And because 106 is one of the only tools the historic community has for getting resources identified and protected they may try to convince you to do more than is strictly required. This is why it's so important both to know the NHPA and 106 well, and to be as clear as possible in your communications. It's also a good reason to take your SHPO out to lunch once in awhile. Develop an ongoing working relationship so they'll feel comfortable picking up the phone and calling you with questions rather than escalating a situation they see as violating the law.

Which brings us to foreclosure of comment. This is the SHPO and ACHP's official way of saying that in their opinion, you messed up and didn't follow the process correctly. There's nothing left for them to tell you about avoiding impact because you've done something that makes their comments moot. If we really have screwed up (maybe the sponsor started construction on a new grant before the 106 process was complete, for example) then a new set of regs kick in that require us to figure out whether the action was taken in ignorance or in malice. Just call NPS if this happens because it's going to take a bunch of conference calls to get it all sorted out. Remedies might include terminating the agreement, developing mitigation, or imposing sanctions of some kind on the sponsor.

Finally, even if you do everything right, you might find something out there in the course of your project. The first thing to do is to stop the project. Next contact NPS, the SHPO, the

sheriff (if it's a body), and any other consulting parties (like the Tribes). There may be additional state specific requirements.

After the Fact Conversions

Clearly define the undertaking
(pssst...it's administrative in nature)

1. NPS can decide whether or not the sponsor use of their land is an outdoor recreation activity as defined by LWCF
2. If NPS decides it is not, NPS can determine whether the sponsor's proposed replacement meets the CFR's equivalency requirements
3. And that's it



It's really, really important to clearly define for the consulting parties what is, and is not, the NPS undertaking for all conversions but especially for after the fact conversions. The NPS undertaking for conversions is administrative, not construction related and this will be a difficult thing for people to understand. Your letter needs to explain that NPS cannot approve or disapprove the construction of a structure or the sale of property. The undertaking is to transfer contract related restrictions from one property to another.

What NPS doesn't do

And therefore is not part of the undertaking

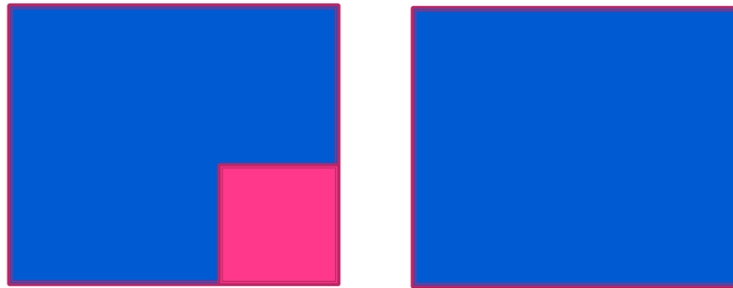
1. Approve construction of whatever is triggering the conversion
2. Choose from multiple replacement properties
3. Forbid conversions that meet the requirements even if we think it's a bad idea
4. Own or manage any of the properties in question
5. Pay for any of the development at either the conversion or replacement



These are all areas that other agencies (like SHPOs and the ACHP) assume we do as part of a conversion and it's important for them to understand that we do not. We are neither paying for nor permitting construction of a cell tower, school, fire station, or whatever.

Conversion APE

- Footprint of conversion + maybe the remaining park
- AND the replacement property



If the park being partially converted is itself an eligible resource, or contains a TCP, historic district, cultural landscape or other eligible resource that could be negatively impacted by the change in viewshed or soundscape as a result of the conversion, then your APE needs to include it.

Agreement Documents

MOA

- There's a known adverse effect at a known historic resource.
- No minimum mitigation requirements, just what the parties agree to

Project PA

- You aren't really sure the extent of the historic resources or the extent of the impacts the undertaking will have on them
- Spells out next steps, what will happen if then, who does what, and who will pay for it

State PA

- Useful if you want to outline some state specific diversions from the generic 106 process for a whole program
- This could mean spelling out when surveys will be conducted, if there are any actions that won't be subject to review, and who will handle what if different from the standard.

Body of an agreement

- Whereas this and whereas that
- Then what we're going to do
- Boilerplate stuff
 - APE graphic
 - Unanticipated discovery plan
 - Treatment plan
- Signatories, invited signatories & consulting parties signatures



The whereas clauses line up why we're signing this document in the first place and should help the cold reader get from point A to point B logically. Why is there a federal undertaking? Why does NPS have jurisdiction? Why is the SLO's agency involved? Whose park is this anyway? Is this a new grant? A conversion? What's triggering the unknown or adverse effect on an historic resource?

There is no minimum (or maximum) level of required mitigation for section 106. It is all and only what the parties negotiate and agree to. Recognize that the parties at the table are there for specific reasons and expect them to act accordingly.

There are three required signatures for any agreement document: NPS, SHPO and the ACHP (if they choose to participate). Anyone who has to do something or pay for something in order for the document to be executed should be included as an invited signatory. Anyone who is interested in participating in the process of crafting the document, but doesn't have an active role in executing it, should be listed as a consulting party. Their signature is not required but the ACHP will wonder why they didn't sign after they asked to be part of the process.

Where to get more training

- The National Preservation Institute
 - Offers classes all over the country
 - Covers basics and in depth depending on class
 - Official NPS training partner
 - www.npi.org
- The Advisory Council on Historic Preservation
 - Offers classes all over the country
 - Basic & advanced 106
 - Good written guidance on their website too
 - www.achp.gov

Questions?

