



## FACT SHEET #10: FREQUENTLY ASKED QUESTIONS ABOUT SECTION 106 REVIEW

Section 106 of the National Historic Preservation Act requires federal agencies and their authorized designees to consider the effects of their undertakings on archeological and historic properties listed in or eligible for the National Register of Historic Places. The State Historic Preservation Office assists these agencies to meet their responsibilities under the Act. Following are several frequently asked questions about the Section 106 process. For simplicity, several acronyms/short forms are used including: Act=National Historic Preservation Act, Council=Advisory Council on Historic Preservation, Register=National Register of Historic Places, OAS=Oklahoma Archeological Survey, and applicant=any nonfederal entity dealing with Section 106.



Central Fire Station, Lawton, Comanche County



Lake Ponca Duck Pond Park, Ponca City, Kay County

### A. FAQ/TIMING AND PROCEDURES:

#### 1. What projects should be submitted to the SHPO for review?

Projects that have been determined by a federal agency to be federal undertakings (involve federal funding, a federal license or permit, or some other federal assistance) must be submitted to the SHPO for review under Section 106 of the Act and the Council's regulations (36 CFR Part 800) which implement the review process. If there is no federal involvement in the project, it should not be submitted to the SHPO under Section 106.

#### 2. What should we do if we are applying for a federal grant, learn that there is little time before the application deadline, and have not requested the SHPO's review?

First, verify that you need to contact the SHPO at this point. It is the federal agency that is responsible for completing the Section 106 process, and, depending on the program, the federal agency may carry out the consultation process for the projects it decides to fund. Unless the federal agency has delegated certain of its Section 106 responsibilities to an applicant or class of applicants or federal regulations (such as for some HUD programs) have delegated Section 106 responsibilities to nonfederal entities, you may have no responsibility for consulting the SHPO. If you do determine that you need SHPO review of your application within a very short timeframe, call the SHPO to discuss the situation.

#### 3. Since we are not a federal agency, do we consult with the SHPO about our project?

If your project is a federal undertaking, consultation with the SHPO will be necessary. However, the federal agency is responsible for the consultation process. The Council's regulations provide that federal agencies can delegate certain of their Section 106 responsibilities to an applicant or a class of applicants.

If this situation exists, you are responsible for initiating consultation with the SHPO. The federal agency is required to notify the SHPO in writing about its delegation of Section 106 responsibilities to a specific applicant or a class of applicants. It is your responsibility to determine how the federal agency expects the Section 106 process to be conducted. Some federal programs, such as the Community Development Block Grant Program (CDBG), are structured in such a way that the primary recipient of funding has the full responsibility for compliance with Section 106.

#### **4. What will happen if we did not consult with the SHPO before project work began?**

Upon receipt of a request to review a project for which the expenditure of funds has been approved or construction has begun, the SHPO will provide a written statement that it declines to review the project. The federal agency/applicant should then review the Council's regulations and determine if it is appropriate to request the Council's review under 36 CFR Part 800.9(a), (b), or (c). The Council's regulations require an agency to complete the Section 106 process prior to the approval of the expenditure of federal funds on the undertaking or prior to the issuance of any license. Additionally, the regulations provide that the agency shall initiate the Section 106 process early in the planning of the undertaking so that a broad range of alternatives may be considered.

#### **5. How long will it take the SHPO to "clear" our project?**

The Council's regulations provide that the SHPO has 30 days from the receipt of adequate documentation to respond to a request for project review. The SHPO reviews projects as quickly as possible in the order of receipt, and it is important to keep in mind that several hundred requests will be proceeding through the SHPO at any given time. If the SHPO fails to respond within 30 days of its receipt of your request, you may proceed with your project. The SHPO cannot "hold up" a project. If you are concerned about the date the SHPO actually receives your request, you may want to send it by certified mail. Keep in mind that the SHPO may have to request additional information from you, so the first response you receive might not be a "clearance." The Council's regulations are quite clear that consultation with the SHPO should begin early in the project planning stages and that adequate project information must be provided to the SHPO. The better your project information, the faster the SHPO can "clear" your project.

#### **6. If we have already completed the NEPA process, do we still have to go through Section 106?**

Yes. NEPA does not substitute for project review under Section 106. Agencies are encouraged to coordinate NEPA and Section 106 as early as possible in their planning process. The Council's regulations (36 CFR Part 800.8) now make it possible for a federal agency to substitute its NEPA process for Section 106. But the NEPA process must be consistent with the Council's regulations and must receive the Council's approval.

#### **7. What if we have an emergency situation that prevents us from adhering to the timeline in the Council's regulations?**

If you have a true emergency situation, you should call the SHPO immediately to discuss the problem. The SHPO will make every effort to accommodate you. Remember that the SHPO reviews requests in order of receipt. When the SHPO moves a project up in the review schedule due to an emergency, responses to other agencies are delayed. The Council's regulations (36 CFR Part 800.12) address issues concerning declared emergencies.

#### **8. If we have received a response from the Oklahoma Archeological Survey but not yet from the SHPO, is there a problem?**

How quickly the SHPO issues a response to your request depends on workload and the nature of your request. The SHPO and the OAS are each responsible for different resource types in accordance with a National Park Service-approved cooperative agreement. OAS may clear your project quickly because there are no known archeological sites in the area and an archeological survey is not considered necessary for the project area; however, there may be a number of standing structures that the SHPO must evaluate, or your project may require the review of work that impacts a Register-listed or eligible property which requires a longer review period. In other circumstances, you may receive the SHPO's response first.

**9. If our agency is responsible for a program that will assist a large number of properties that are unlikely to meet the Register criteria or the work planned is unlikely to have any significant effect on historic properties, can we avoid a case-by-case review with the SHPO?**

Yes. The Council's regulations offer several streamlining options, such as development of a Programmatic Agreement (PA). You should explore the use of a PA for this situation with the SHPO. The SHPO is as anxious as your agency to eliminate nonproductive paperwork. Under a PA we can identify specific kinds of project work that can occur without SHPO review or eliminate classes of properties from review. For example, the Oklahoma SHPO and the U.S. Department of Housing and Urban Development entered into a PA to streamline their tribal housing rehabilitation program. Many of the houses eligible for the funding were constructed after 1960 and are obviously not eligible for the Register. The PA eliminates the need for tribes to submit anything to the SHPO when a house in this category is rehabilitated with HUD funds.

**10. Are there any National Historic Landmarks in Oklahoma and what does this mean for federal undertakings that may impact any such properties?**

Yes, as of August 2017 there are 22 National Historic Landmarks (NHL) in Oklahoma. A list is available from the SHPO, or you can consult *Oklahoma's National Register Handbook* and note those entries with the "NHL" code. When a federal undertaking will have an adverse effect on an NHL, the Council's regulations stipulate that the federal agency must request the Council to consult and notify the Secretary of the Interior of the potential adverse effect (36 CFR Part 800.10).

**11. Why do we send our requests for review to the SHPO and to the OAS?**

The SHPO and OAS operate under a cooperative agreement approved by the National Park Service, the agency that funds the SHPO and monitors its performance. To maintain its approved program status, the SHPO must have on staff or have a contractual arrangement with an entity that has on staff professionally qualified prehistoric archeologists and historic archeologists. OAS has the prehistoric archeologists, and the SHPO has the historic archeologist on staff. Additionally, OAS has long been Oklahoma's repository for the records of prehistoric sites. The only cost effective and timely way to conduct the Section 106 review process in Oklahoma in accordance with federal laws, regulations, and standards is through this arrangement.



L to R: Oil Capital Historic District, Tulsa, Tulsa County; Depew Segment of Route 66, Creek County; and Osler Building, Oklahoma City, Oklahoma County

**B. FAQ/NATIONAL REGISTER LISTING AND ELIGIBILITY**

**1. If there are no properties listed on the National Register of Historic Places in the project area, is it necessary to consult with the SHPO?**

Yes. Section 106 requires federal agencies to consider the effects of their undertakings on properties listed in or eligible for the Register. It is the federal agency's responsibility to document and evaluate buildings, structures, sites, districts, and objects within the area of the potential effect of its undertaking and to request the SHPO's review of the documentation and the federal agency's opinion on Register eligibility. Once Register eligibility is established, the Section 106 process continues, and the eligible property is treated the same as a listed property.

**2. If we do not agree with the SHPO's opinion that a property is eligible for the National Register of Historic Places, what should we do?**

If you do not agree with the SHPO's opinion of eligibility, you should either provide the SHPO more documentation to support your position or submit documentation to the Keeper of the Register, National Park Service, for resolution of the disagreement. The SHPO does not conclude that a property meets the Register's Criteria for Evaluation unless it firmly believes it does on the basis of available information. Additionally, the National Park Service periodically reviews the SHPO's decisions to ensure its consistent and appropriate application of the criteria. However, the SHPO does not want a federal agency or applicant to "just go along with an eligibility opinion" to move the review process forward.

**3. Can a federal agency or applicant just say a property is eligible for the National Register of Historic Places to avoid doing the research and evaluation of its significance to speed the Section 106 process?**

If you take this approach, you are skipping perhaps the most important step in the Section 106 process. The SHPO may simply refuse to review your project until you provide adequate documentation to support your determination. Information about why a property is eligible and which of its features are the most important will help determine the effect an undertaking may have on the property. The purpose of Section 106 is to ensure that archeological and historic properties worthy of preservation receive consideration during the planning of federal undertakings.

**4. If we need to retain a consultant to conduct an archeological or an architectural/historic survey or prepare documentation on individual properties, does it matter who we hire?**

The SHPO does not recommend any particular consultant or consulting firm. However, the Council's regulations stipulate that agencies carry out their Section 106 responsibilities in accordance with the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation* which includes professional qualification standards. If you need an archeological survey, then you should retain a consultant that meets these standards for archeology. If you need to document a building, then you should retain a consultant who meets these standards for architectural history, history, or architecture. Before hiring a consultant or consulting firm, review their credentials and ask questions. Make sure their expertise is what you need for your project. You may request a list of consultants from the SHPO, but you are under no obligation to use anyone on that list.

**5. What if we do not want a property listed in the National Register of Historic Places, but the SHPO has issued an opinion that it is eligible for the Register?**

A determination of a property's eligibility for the Register during the Section 106 process will not result in listing the property in the Register. The Council's regulations require that Register eligibility must be assessed as part of the review of federal undertakings. The formal nomination and listing process for the Register is a totally separate action under National Park Service regulations (36 CFR Part 60).

**6. If our project area was surveyed several years ago and no National Register eligible properties were identified, can we just assume the area contains no listed or eligible properties now?**

No. It will depend on how much time has passed since the survey was completed and the nature of the properties evaluated. The Council's regulations acknowledge that properties may require reevaluation due to the passage of time or changing perceptions about the significance of events, individuals and other factors. For example, suppose the original survey work was completed twelve years ago, and at that time several buildings were determined ineligible for the Register because they were only about 40 years old? Now that they are over 50 years old, they may meet the register criteria. Age alone is not enough to establish Register eligibility, but the buildings may be eligible now when they were previously considered ineligible because their significance did not meet the Register criteria's test for "exceptional merit" for the eligibility of less than 50-year old buildings.

## **7. Is it possible that a property listed in the Register or previously determined eligible for listing could now be ineligible?**

Yes. The most common reason that a property may no longer meet the Register criteria is loss of integrity. Over the years a property owner may have made major alterations to the property that destroyed its character defining features, or a fire or other disaster may have caused tremendous damage. The Section 106 process allows for evaluation of properties when circumstances warrant even though the property is formally listed in the Register. If it is clearly documented that the property no longer possesses the qualities necessary to meet the Register criteria, it is possible to treat the property as ineligible for the Register.

## **C. FAQ/EFFECTS ON HISTORIC PROPERTIES**

### **1. If our project will result in alteration of a historic property, what will happen?**

If a project requires alteration, rehabilitation, removal, demolition, or any other modification of a property that is listed on or eligible for the Register, the federal agency or applicant must then consult with the SHPO to determine whether or not there will be an adverse effect. The majority of projects will have either "no effect" or "no adverse effect" on the historic property, and the project work can proceed as soon as either of these conclusions is reached. The SHPO may issue a "conditional no adverse effect" opinion which means that, if the agency or applicant agrees to make certain changes to the project plans, the work may proceed without further SHPO review. If it is determined that the project will have an "adverse effect" on the property, then the agency must consult with the SHPO to determine how these effects can be eliminated or reduced and mitigated. Guidance about assessment of effect is found in the Council's regulations (36 CFR Part 800.5).

### **2. If our project will have an adverse effect on a historic property, what happens?**

An adverse effect determination does not stop your project. The agency will need to notify the Council about the adverse effect determination and invite them to participate in the review process. The Council's regulations include the criteria it applies to determine whether or not it will elect to participate. The vast majority of adverse effect determinations will be resolved without Council involvement. The agency and the SHPO may ask other parties to participate as well. The Council's regulations (36 CFR Part 800.6) address the resolution of adverse effects. The consulting parties usually enter into a Memorandum of Agreement (MOA) which will stipulate what actions the agency shall take to mitigate the adverse effect. For example, if a building will be demolished, the MOA will stipulate a documentation program, such as high quality photographic documentation. It is also possible that the consultation may result in modification of project design to completely eliminate the adverse effect. For example, the path of a new sewer line is relocated to avoid an important archeological site.

### **3. Do we have to have the SHPO review our project if it is only for interior modifications to a building?**

The use of federal assistance triggers SHPO review of projects under Section 106 and not what the project work entails. Remember that the SHPO will only review your proposed work if the building is listed in or eligible for the Register. When the SHPO does review a proposed rehabilitation project, it follows the Secretary of the Interior's Standards for Rehabilitation, and the Secretary's Standards apply to the interior as well as the exterior of the historic building.

### **4. If our project involves a building that is listed on or eligible for the Register, does that mean we have to restore it?**

No. It means that your project work should meet the Secretary of the Interior's Standards for Rehabilitation. Rehabilitation is not the same thing as restoration. Rehabilitation calls for the retention of as much historic fabric as possible but allows for changes to accommodate a new use.



## 5. What if we do not think it is necessary to provide any additional information that the SHPO has requested about our project?

The SHPO does not request additional project information unless it is necessary for an accurate assessment of the effect of your project on a Register-listed or eligible property. Of course, you have the option to decline to provide the information and consult with the federal agency assisting the project or the Council as may be appropriate. The SHPO can issue an adverse effect determination if adequate information about a project is not provided. The SHPO's Review and Compliance Manual provides easy-to-follow guidance about what kind of information should be provided for review (<http://www.okhistory.org/shpo/106/rcmanual2015.pdf>).



L to R: Keel Creek Bridge, Coal County; Rosamund, Tahlequah, Cherokee County; and Vici M-K-T Depot, Vici, Dewey County

## D. FAQ/GENERAL INFORMATION

### 1. Where can we find information about the Section 106 review process?

You may reference the SHPO's Review and Compliance Manual which is available upon request from the SHPO or on the SHPO's web site at <http://www.okhistory.org/shpo/shpom.htm> (click on Programs and then on Section 106). Other sources of information include the Council at <http://www.achp.gov> and the OAS at <http://www.ou.edu/archsurvey/>. The SHPO and OAS also present free workshops at least twice a year (May and December) and provide special presentations for agencies upon request.

### 2. If we need information about a particular federal agency's policies and procedures about compliance with Section 106, who do we contact?

You should contact that agency's Federal Preservation Officer (FPO). A directory of FPOs is available on the Council's web site at <http://www.achp.gov>.

### 3. If we do not accept what the SHPO tells us about our project or the Section 106 process, who do we contact?

If you are an applicant for federal assistance, you should consult the federal agency from which you requested assistance. Questions can also be directed to the Council at 202/606-8503. The SHPO encourages federal agencies and applicants to contact the Council if they are not satisfied with its actions or opinions. Most times the best way to deal with your concerns about the SHPO's review is to simply call the SHPO staff member referenced in the comment letter.

### 4. Can we email or fax requests for SHPO comments?