

I. THE LAW: THE LEGAL FRAMEWORK FOR HISTORIC PRESERVATION

Federal Laws and Regulations

Early Legislation

The Antiquities Act of 1906

The documentation and treatment of historic resources, archaeological sites, buildings and other areas has been the subject of a number of federal laws beginning with the passage of the Antiquities Act of 1906. The Antiquities Act authorizes the President to designate historic and natural resources, of national significance on federally owned or controlled lands, as National Monuments. The Act also protects all historic and prehistoric ruins and objects of antiquity located on federal lands, by providing criminal sanctions against excavation, injury, or destruction of such antiquities.

The Historic Sites Act of 1935

The Historic Sites Act of 1935 established the preservation of historic resources for public use as national policy. It gives the Secretary of the Interior the power to make historic surveys and to document, evaluate, acquire and preserve archaeological and historic sites across the country. This legislation fostered the creation of the Historic American Building Survey (HABS), the Historic American Engineering Record (HAER) and the Historic Sites Survey in the National Park Service to identify National Historic Landmarks.

The National Trust for Historic Preservation, 1949

In 1947, the National Council for Historic Sites and Buildings was organized, based on Great Britain's National Trust. The Council, which included persons associated with the arts, the National Park Service and historic preservation, fostered congressional action, which established the National Trust for Historic Preservation in 1949. The Trust was charged with facilitating public participation in historic preservation and was empowered to receive donations of sites, buildings and objects significant in American history as well as to administer gifts of money, securities and other property for carrying out a preservation program.

The National Historic Preservation Act of 1966 as Amended (NHPA)

In 1966, Congress passed the National Historic Preservation Act, which authorizes the Secretary of the Interior to expand and maintain a National Register of districts, sites, buildings, structures and objects of NHPA, particularly those sections addressing federal actions, was passed in response to growing public concern that so many of our nations resources were not receiving adequate attention from the federal government, in the course of the massive public works projects of the 1950's and 1960's. NHPA has become the principal legislation governing preservation programs. The critical elements of this Act are used daily by historic preservation professionals, property owners, government agency personnel and others.

The National Register of Historic Places

The National Register of Historic Places is the official list of the nation's cultural resources worthy of preservation. Authorized under NHPA, the Register is administered by the National Park Service. Properties on the National Register include districts, sites and buildings, structures and objects that are significant in American history, architecture, archaeology, engineering and culture. The Register includes all historic areas in the National Park System, National Historic Landmarks, and properties significant to the nation, state or community that have been nominated by the states, federal agencies and others and have been approved by the National Park Service.

Nominations to the National Register are reviewed based on specific criteria for evaluation of significance. Significance may be attributed to a site's association with events, with the lives of persons, with distinctive architectural style or works of a master, or to sites that have yielded or are likely to yield archaeological information important to history or prehistory. Nominations may be made by the state to the National Park Service based on forms prepared by local citizens or by the State Historic Preservation Office. The Montana State Historic Preservation Review Board then reviews them. Federal agencies may nominate properties directly to the Park Service but must provide the State Historic Preservation Officer an opportunity to comment prior to submitting the nomination.

Before a property may be listed in the National Register of Historic Places, the owner or owners must be given an opportunity to concur with or object to the nomination.

Benefits of National Register Listing

- Recognition that a property is of significance to the nation, state or community.
- Consideration in the planning for federal or federally assisted projects.
- Qualification for federal tax benefits for income producing properties.
- Qualification for federal assistance for historic preservation when funds are available.
- Qualification for participation in the National Register Sign Program

Facts about National Register Listing

- The listing of a property on the National Register of Historic Places does not interfere with the rights of a private owner in any way. Simply *listing* a property does not limit the right of the owner to alter or use it in any manner permitted under local zoning or land use law. However, if the owner is a government entity, the entity must follow appropriate measures outlined in federal, state and local statues regarding properties listed in the National Register or determined to be eligible for listing.
- Listing a property on the National Register of Historic Places does not obligate an owner to make any repairs or improvements or to open their property to the public.
- Listing of a property on the National Register of Historic Places *does not guarantee* that it will receive financial assistance. Properties, which are listed in the National Register must compete for limited preservation funds from a variety of sources. Listing, however, does indicate the significance of a particular site and enhances its potential to secure funds and other incentives preservation related activity.
- For those National Register properties receiving financial assistance from federal (and often

local, state) agencies, there are added responsibilities. If an individual, business, government entity or nonprofit organization receives public funds for the development of a National Register property, then the owner is responsible for preserving and maintaining the property with respect to those qualities which make it eligible for listing. The state or local historic preservation office will review restoration projects during various stages of development to assure compliance with the Secretary's Standards for Rehabilitation (see below).

Rehabilitation Standards, Secretary of the Interior

As an outgrowth of the NHPA, the Secretary of Interior Standards for Rehabilitations used to encourage or guide preservation in any situation. They are also used as a tool for enforcing various aspects of the law. This is true particularly regarding the use of historic preservation funds for rehabilitation projects and in evaluating the effect of a federal undertaking on properties eligible for the National Register. The Secretary's Standards, originally published in 1977 and revised in 1990 as part of the Department of the Interior regulations, pertain to historic buildings of all materials, construction types, sizes and occupancy, and encompass both exterior and interior elements. The Standards also include related landscape features as well as attached, related new construction.

The Standards are to be applied to specific rehabilitation projects in a reasonable manner taking into consideration economic and technical feasibility.

The Standards are:

- A property should be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.
- The historic character of a property should be retained and preserved, and the removal of historic materials or alteration of features and spaces that characterize a property must be avoided.
- Each property will be recognized as a physical record of its time, place and use. Changes that create a false sense of historical development such as adding conjectural features or architectural elements from other buildings should not be undertaken.
- Most properties change over time. Those changes that have acquired historic significance in their own right should be retained and preserved.
- Distinctive features, finishes and construction techniques, or examples of craftsmanship that characterizes a property, should be preserved.
- Deteriorated historic features should be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature should match the old in design, color, texture and other visual qualities, and where possible materials. Replacement of missing features must be substantiated by documentary, physical or pictorial evidence.
- Chemical or physical treatments, such as sandblasting, that cause damage to historic materials should not be used. The surface cleaning of structures, if appropriate, should be undertaken using the gentlest means possible.
- Significant archaeological resources affected by a project should be protected and preserved. If such resources must be disturbed, mitigation measures should be undertaken.
- New additions, exterior alterations or new related construction should not destroy historic materials

that characterize the property. The new work will be differentiated from the old and should be compatible with the massing, size, scale and architectural features to protect the historic integrity of the property and its environment.

- New additions and adjacent or related new construction should be undertaken in such a manner that if removed in the future the essential form and integrity of the historic property and its environment would be unimpaired.
- Literature available at the Montana State Historic Preservation Office offers examples demonstrating the standard.

Federal Agencies and Historic Preservation: Sections 106, 110 and 111

The National Historic Preservation Act includes a series of provisions regarding federal agency historic preservation responsibilities.

Section 106

Section 106 of the NHPA and its implementing regulations found at 36 CFR Part 800 (revised July, 1999) establish an advisory review process designed to ensure historic properties are considered during federal project planning, funding, permitting, approval and execution.

As compliance with Section 106 is the impetus for many historic preservation projects, the process is described in some detail. For the purposes of Section 106, a federal project is one which meets the definition of an undertaking as found at 36 CFR 800.16(y): any activity funded in part or whole by a federal agency, any activity under the direct or indirect jurisdiction of a federal agency by or for the agency, including financial assistance, or requiring a federal permit, license, or approval and any project subject to state or local regulation pursuant to a delegation or approval by a federal agency. Construction, rehabilitation and repair projects, demolitions, permits, loans, guarantees, grants, federal property transfers and many other types of projects are undertakings when a federal agency has direct or indirect jurisdiction or provides assistance. The full text of 36 CFR Part 800 may be found at <http://www/achp.gov/106changes.html>. The review process is administered by the Advisory Council on Historic Preservation (ACHP), an independent federal agency authorized in the NHPA to promulgate implementing regulations.

Section 106 requires that every federal agency, take into account, how an undertaking might affect historic properties. The recently revised implementing regulations still require agencies to allow the ACHP a reasonable opportunity to comment on agency considerations; although the revised regulatory procedures allow a great deal more flexibility and rely on State Historic Preservation Office (SHPO) and/or Tribal Historic Preservation Office (THPO) review for most routine actions. Authority for THPO review in lieu of SHPO is found at Section 101(d)(2) of the NHPA. The revised regulations permit applicants for federal assistance or approval to initiate the Section 106 process but the federal agency remains responsible for meeting the requirements of the NHPA and for making all final decisions regarding historic properties.

The responsible federal agency first must determine whether an undertaking could affect (directly or indirectly) historic properties, which by definition include prehistoric as well as historic resources. The agency must identify the appropriate SHPO, or for lands within the exterior boundaries of a reservation, the Tribal Historic Preservation Office, (if so established), to consult with during the process. The agency must also identify other interested parties with which to consult including other agencies, the public, and Indian Tribes (whether or not the project occurs on tribal lands). Both the SHPO and appropriate THPO can provide initial information on known historic properties, the probability of unidentified historic properties, tribal contacts, and other critical information at this stage. At the

Montana SHPO this is often in the form of a file search. If the agency determines that the undertaking has no potential to directly or indirectly affect historic properties (whether known or unknown) they should notify the SHPO/THPO. Then unless there are outstanding public, tribal or SHPO/THPO concerns, the agency has no further obligations under Section 106. The ACHP, however, can be requested to review a federal decision regarding a project by interested parties at any time.

If the federal agency determines the undertaking could affect historic properties, the agency must make a reasonable and prudent effort in consultation with interested agencies, the public, tribes, and the SHPO/THPO to identify possible historic properties in the Area of Potential Effect (APE). This identification effort will often include a new survey or inventory to locate prehistoric or historic properties. All properties identified in this effort are then evaluated for significance by the agency against the National Register of Historic Places Criteria of Eligibility, published by the National Park Service (NPS, National Register Bulletin 15, "How to Apply the National Register Criteria for Evaluation"), in consultation with the SHPO/THPO and any Indian Tribe which may attach cultural or religious significance to those properties.

If the federal agency determines through this consultation that no eligible properties are present or affected (a Finding of No Properties Affected), the agency must provide that documentation to the SHPO/THPO. If the SHPO/THPO concurs in that determination or does not respond within 30 days, the agency may proceed. If there are unresolved issues regarding the eligibility of historic properties the agency requests a Determination of Eligibility from the Keeper of the National Register in the NPS.

If the agency or the Keeper finds that eligible historic properties are present in the APE, which might be affected, the agency proceeds to assess possible adverse effects as described at 36 CFR 800.5. Examples of Adverse Effects include physical destruction or damage; alterations not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 CFR Part 68); removal from a location; change of character in use or features or setting; visual, atmospheric or audible intrusions; transfer, lease or sale without the adequate protective restrictions; and neglect.

If the agency, SHPO/THPO and consulting parties agree that the effects do not meet the Criteria of Adverse Effect at 36 CFR 800.5, or agree the undertaking is modified or adequate conditions are placed on the treatment of the eligible historic properties so as to reduce those effects, the agency may make a finding of No Adverse Effect. Most often those conditions are met through execution of a Memorandum of Agreement (MOA) that is provided to the ACHP, along with supporting documents. The ACHP may choose to join the consultation or object, or will notify the agency to proceed under the MOA.

Interested parties may request an ACHP review at any time. If the SHPO/THPO or any consulting party objects to the agency finding within 30 days, the agency will consult further or request the ACHP to review the finding under 36 CFR 800.5(c)(3). The agency will then take into account the written comments of the ACHP and make a final decision as to how or whether to proceed. If an Adverse Effect is found, the agency shall consult further to resolve the Adverse Effect pursuant to 36 CFR 800.6.

Programmatic approaches to Sections 106 (and 110) may be used to fulfill an agency's responsibilities for a particular program, a large or complex project, or a class of undertakings that would otherwise require numerous individual requests for comments. Programmatic Agreements (PAs) provide for a series of outcomes or products that address the various effects of complex or multiple undertakings. For example, a PA could be used for a community's entire Community Development Block Grant Program where federal rehabilitation funds will be used in neighborhoods which may contain multiple National Register sites and districts. The PA would likely establish the responsibilities of local officials, the deadlines for required inventories, the design review process and the procedures for conflict resolution. The outcome of a PA may also be the development of a Historic Preservation Plan that then can be used by the agency in lieu of standard review under the Section 106/110 regulations.

Section 110

Section 110 (formally Executive Order 11593) was added to NHPA in 1992. It requires federal agencies to emphasize the preservation and enhancement of cultural resources whether directly under their jurisdiction or affected directly or indirectly by their plans and programs.

The Order directs agencies of the executive branch to administer the cultural properties under their control in a spirit of stewardship and trusteeship for future generations.

- Initiate measures necessary to direct their policies, plans and programs in such a way that federally owned sites, structures and objects of historical architectural or archaeological significance are preserved, restored and maintained for the inspiration and benefit of the people; and
- Institute (in consultation with the Advisory Council on Historic Preservation), procedures to assure that federal plans and programs contribute to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural and archaeological significance.

Section 111

Section 111 of NHPA authorizes federal agencies to lease and exchange historic properties to other parties and to enter into contracts for the management of historic properties provided the head of the agency finds that the lease, exchange or management contract adequately ensures preservation of the properties involved.

The National Environmental Policy Act (NEPA)

Enacted by Congress in 1969, the National Environmental Policy Act (NEPA), takes a comprehensive approach to environmental quality and in doing so, calls on the federal government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs and resources so that the nation may:

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

NEPA further states that a systematic, interdisciplinary approach must be used to insure the integrated use of the natural and social sciences, the environmental design arts in planning and in decision making that may have an impact on our environment.

NEPA and NHPA

Federal agencies must coordinate National Environmental Protection Act (NEPA) compliance with the separate responsibilities of the National Historic Preservation Act (NHPA) to ensure that historic and cultural properties are given proper consideration in the preparation of Environmental Assessments (EAs) and Environmental Impact Statements (EISs). Agency obligations pursuant to NHPA, however, are independent from NEPA requirements and must be complied with, even when an EIS is not required. Agencies must be aware that the threshold for compliance with Sections 106 and 110 of NHPA is less than that for preparation of an EIS. The former applies to any federal, federally assisted or federally licensed undertaking having an effect on a National Register or eligible property while the latter extends only to major federal actions significantly affecting the human environment.

Where both NEPA and NHPA are applicable, the Council on Environmental Quality directs that draft EISs prepared under Section 102 (2)(c) of NEPA shall, to the fullest extent possible, be prepared with and integrated with other environmental impact analysis and related surveys and studies required by other authorities including NHPA.

The revised 36CFR800 regulations for Section 106 of NHPA also encourage early consideration of Historic properties in all NEPA scoping, planning and analysis while viable alternatives to avoid historic properties are most possible. NHPA Section 106 obligations should be considered before an agency issues a Finding of No Significant Impact or Record of Decision under NEPA in order to afford the ACHP a meaningful opportunity to comment. Moreover, many actions, which could be Categorically Excluded from NEPA review still require agency consideration under the NHPA. In many cases they may meet the regulatory definition of “undertaking” as given above, requiring agencies to proceed under Section 106 of the NHPA. If an agency proposes to use a NEPA Environmental Assessment (EA) or Environmental Impact Statement (EIS) documentation to comply with Section 106, the agency must notify the SHPO/THPO and the ACHP in advance and meet the standards given at 36 CFR 800.8(c)(1). All parties appropriate to consultation under Section 106 requirements, should be consulted in the development of an EA, Draft EIS or EIS. Every Draft EIS and EIS used in lieu of 36 CFR 800 must be submitted to the ACHP for review and any consulting party may object that an EA, DEIS or EIS does not meet the standards at 800.8(c)(1), in which case the agency will refer the matter to the ACHP.

The Native American Graves Protection and Repatriation Act

The Native American Graves Protection and Repatriation Act was passed in 1990 to protect the human remains and associated cultural objects of Native Americans. The Act calls for the identification, inventory and repatriation of Native American human remains and objects possessed or controlled by federally assisted federal agencies and museums. The Act also identifies punitive actions to be taken against those who knowingly sell, purchase, use for profit, or transport for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Act.

Other Major Federal Historic Preservation Law

Laws Governing National Historic Landmarks

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Section 1(a) of the National Park Service Organic Act
Section 9 of the Mining in the National Parks Act of 1976

Laws Governing Federal Archaeology Program

Archaeological and Historic Preservation Act of 1974
Archaeological Resources Protection Act of 1979
Abandoned Shipwreck Act of 1987

Laws Governing Federal Preservation Tax Incentives

Rehabilitation Credit: Section 47 of the Internal Revenue Code

Conservation Easements: Section 170(h) of the Internal Revenue Code

Montana Laws

Montana Antiquities Act, as amended (1995)

The Montana Antiquities Act addresses the responsibilities of the State Historic Preservation Office and other state agencies regarding historic and prehistoric sites including buildings, structures, paleontological sites, or archaeological sites on state owned lands. Each state agency is responsible for establishing rules regarding historic resources under their jurisdiction, which address National Register eligibility, appropriate permitting procedures and other historic preservation goals. The Department of Natural Resources and Conservation (Trust Lands) and Montana Fish, Wildlife and Parks have written rules for implementing the Antiquities Act. All other agencies are responsible for following the administrative rules written by the State Historic Preservation Office in 1999. The State Historic Preservation Office also issues antiquities permits for the collection of archaeological or paleontological remains on state owned lands under the Act.

Montana Human Skeletal Remains and Burial Site Protection Act (1999)

The Human Skeletal Remains and Burial Site Protection Act is the result of years of work by Montana Tribes and state agencies and organizations interested in assuring that all graves within the State of Montana are adequately protected.

The law passed in 1991, provides legal protection to all unmarked burial sites regardless of age, ethnic origin or religious affiliation by preventing unnecessary disturbance and prohibiting unregulated display of human skeletal remains. Anyone who discovers human skeletal remains on public or private lands should immediately contact the county coroner.

The Act created a thirteen-member Burial Preservation Board that determines the treatment and final disposition of any discovered human remains and associated burial materials. The Act establishes the preference that human remains be left undisturbed where they are found (Reference: 22-3-801, MCA).

For additional information on the Burial Law, contact:

CONFEDERATED SALISH & KOOTENAI TRIBES
PO BOX 278
PABLO MT 59855
PHONE: (406) 675-2700
FAX: (406) 675-2800

Or:
STATE ARCHAEOLOGIST
MONTANA STATE HISTORIC PRESERVATION OFFICE
PO BOX 201202
HELENA MT 59620
PHONE: (406) 444-7715
FAX: (406) 444-6575

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For more information on compliance with Section 106 of the National Historic Preservation Act and the Montana State Antiquities Act, See [Consulting with Montana SHPO](#).