

## STEP ONE: INITIATE THE CONSULTATION PROCESS

### A: Define undertaking and Area of Potential Effect

#### Federal Law and the Definition of Undertaking

In this section, we review the first step in consultation with the Montana SHPO: identifying and defining the undertaking. The National Historic Preservation Act (NHPA Section 301 16 U.S.C. 470w) defines Undertakings requiring consideration under the NHPA as follows:

Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including -

- (A) *those carried out by or on behalf of the agency;*
- (B) *those carried out with Federal Financial assistance;*
- (C) *those requiring a Federal permit, license, or approval; and*
- (D) *those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.*

Clearly, as defined, undertakings range from federal technical assistance projects, loan guarantees and property transfers, various special use permits, and 404 permits, on up to large-scale ground disturbing activities such as coal mining. But the regulations further recognize the possibility that many undertakings have no potential to affect Historic Properties and that must be resolved first, sometimes with advice from SHPO. Placement of an ATM cash teller in a supermarket that is less than 50 years old is an obvious example. However, the potential for effects is not so easily assessed for all undertakings. Weed control projects in some areas, while not likely to affect most archaeological sites, could have the potential to negatively effect traditional plant gathering sites. The ACHP decided not to provide regulatory criteria in the present regulations but promises to provide supplementary guidance regarding undertakings and “the potential to affect” in the future. In the interim the SHPO *recommends* consultation as a proper means to assess potential to cause effects whenever there is some question. Many agencies and proponents routinely consult with SHPO informally regarding our opinion regarding an undertaking’s potential to cause effects. Most agencies that prepare environmental impact documents will address potential to cause effects to cultural resources in scoping or assessment documents. This information can be useful in determining appropriate consultation under Section 106 as well. If you are unsure whether you have an undertaking or are unsure if your undertaking has a potential to effect Historic Properties, please contact the SHPO as early in your planning as possible. Prescribed fires and “boring under” are two current areas where standards are in development. Since it is the approval, not just the action, decisions such as those made in EAs and EISs need to be carefully considered in this light.

#### Define Area of Potential Effect

Once an agency has determined that a proposed action is an "undertaking" under Federal law that has the potential to affect historic properties in Montana, consideration of and definition of the "Area of Potential Effect" logically follows. The Area of Potential Effect (or APE) is defined as:

*...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 (36 CFR 800.16(d))."*

The Area of Potential Effect is not constrained by administrative boundaries, ownership, or to discretionary actions. An effect may be direct or indirect. Direct effects are caused by the action and occur at the same time and place. Indirect effects include those caused by the undertaking but that are later in time or further removed in distance, being reasonably foreseeable. The APE includes all locations where the undertaking may result in effects. It may or may not be the same as an area of impact as defined under the National Environmental Protection Act (NEPA), need not be a single area, and is determined by the potential that an undertaking could result in changes anywhere that would affect historic properties that may be subsequently found to exist. It is not just the ditch, or the ROW for example but should include consideration of Historic Properties nearby which could be effected by staging, access roads and indirect effects. The more completely and accurately a project can be described the more effectively potential effects can be identified and assessed.



**The APE is determined in consultation with the SHPO/THPO:**

- (a) *Determine scope of identification efforts. The Agency official shall consult with the SHPO/THPO to:*  
(1) *Determine and document the area of potential effects, as defined in §800.16(d); (36 CFR 800.4(a)(1))*

Because the definition of the APE is critical to all later steps, we strongly recommend the earliest agency consultation with SHPO regarding the APE definition, the identification of known cultural resources within the APE, and the possible need for further identification efforts before conducting any field work or deciding no further identification efforts are warranted.

Similar considerations should be used to define the project area under State law (State Antiquities Act and MEPA) with the exception that in most cases consideration is confined to State Lands. DEQ permitted actions on private lands follow DEQ rules except for delegated 106 approval such as coal mining – double check with DEQ and SHPO early.

To Define the APE it is important to assess information needs in consultation with SHPO and others. In some cases the Federal or State agency may require its licensees, grantees or borrowers, or project proponents to initiate some of the agency's historic preservation responsibilities. In this document, we refer to agency responsibility even though the applicants or their professional consultants may be directly involved in interaction with the SHPO regarding cultural resource identification during the early stages of project review.

Most Federal agencies and some state agencies have rules or procedures guiding their compliance with cultural resource requirements which may not always appear to mesh well with the 36 CFR 800 regulations or this guidance document. When in doubt check with SHPO and we will attempt to work with the agency and its guidance to resolve any differences. 36 CFR 800 regulations determine SHPO procedures. Revised 36 CFR 800 regulations made final in 2001 greatly enhance the requirements for agency consultation with others during the initial stages of an undertaking.

The public, THPO, tribes, local governments, other agencies, and all others with a recognized interest in cultural resources, which *might* exist in an APE, should be consulted regarding Information needs (36 CFR 800.3 -.4). Reasonable and good faith efforts to identify Historic Properties in an APE may include field survey, but may also include oral history

interviews and consultation with others likely to have knowledge of, or concerns with, Historic Properties in the area. Agencies are responsible for seeking out information from Tribes about Historic Properties that might be affected, whether those properties are located on reservation lands (36 CFR 800:4). The SHPO may assist an agency in identifying parties to be consulted, but it is an agency responsibility to identify and consult with the appropriate parties.

Determining the undertaking and defining the Area of Potential is the beginning of consultation with SHPO and others. Most project sponsors begin with a request for a file search from SHPO.