

STEP FOUR: RESOLVING ADVERSE AFFECTS

As we have seen both the Federal and State laws concerning cultural resources in Montana require agencies to consider alternatives to adversely affecting important Historic Properties. Avoidance should always be the first consideration when dealing with impacts to Historic Properties. Section 1 of the National Historic Preservation Act states very clearly that:

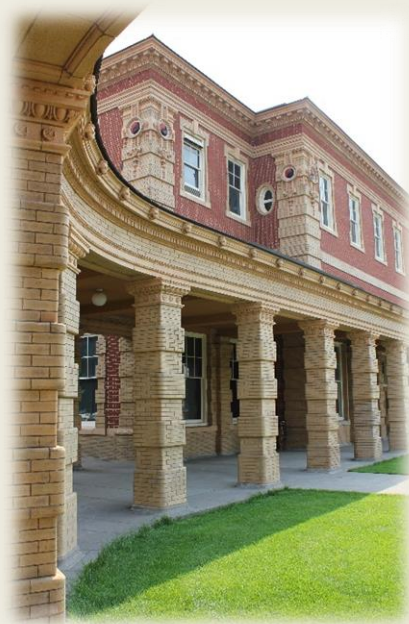
(4) the preservation of [our] irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, esthetics, inspirational, economic and energy benefits will be maintained and enriched for future generations (16 U.S.C. 470).

However, the relevant laws also recognize that is not always reasonable, feasible, prudent or in the best interests of the public to avoid even important historic properties. Once an agency has determined that eligible properties will be affected and that avoidance alternatives are not reasonable, a treatment or mitigation plan to lessen the impact, if possible, must be considered. It is also possible that there are situations where no mitigation is possible, and the agency may still decide to proceed in the public interest.

Adverse Effect Resolution

If the undertaking meets the Criteria of Adverse Effect the effect will be found to be Adverse. Agencies are *required to notify the ACHP* as soon as an Adverse Effect is found and shall consult further to resolve adverse effects under 36 CFR 800.6. The ACHP may decide that its participation is not required. At this time all parties should seek a plan by common agreement that will serve the public good and demonstrate a good faith effort to consider the concerns of interested parties. Findings of Adverse Effect proceed much as No Adverse Effect findings, though there may be additional requests

for documentation of alternatives and consultations with parties interested in the property. A formal Memorandum of Agreement (MOA) stipulating the mitigation or treatment plan agreed upon is the general practice in resolving Adverse Effects. For details on drafting a MOA the reader is referred to the ACHP's *Preparing Agreement Documents*. For MOAs involving archaeological sites, see *Recommended Approach for consultation on Recovery of Significant Information from Archaeological Sites* (Federal Register Vol. 64, No.95:27085- 27087). The Montana SHPO can also provide a ACHP MOA template as a model.



Because an Adverse Effect Finding is by definition a recognition of adverse effect to important Historic Properties, the consultation is more encompassing and the options considered broader than in No Adverse Effect findings. Mitigation options should certainly be sensitive to the qualities making the eligible properties important, but may extend beyond the conditions and treatments common in No Adverse Effect agreements. Moreover, because the scope of consultation broadens with Adverse Effects we refer readers to the ACHP's *Public Participation in Section 106 Review; A Guide for Agency Officials*.

Mitigation Options for Adverse Effects

Consultation on Adverse Effect mitigation should be understood to be a process of negotiation and an open exchange of ideas. There is no “cookbook” for mitigation, nor should there be one. Mitigation depends upon many things, including particularly the property involved and the extent of the Adverse Effect. The more that is known about the property

(what qualities make it Eligible), the easier it will be to balance effects with limitations imposed by the undertaking in a way that is commensurate both with the scale of the undertaking and concerns of the public, Tribes, and others. Agency mitigation options may focus on what can be done to the property, or what can be done to the project, and may even include off-site proposals. There is no simple list of mitigation options or plans. Just as the qualities or characteristics making properties eligible vary, the reasonableness or effectiveness of a treatment or mitigation plan will vary.

It may be useful to offer some suggestions and past treatments that have proven successful. By grouping possible mitigation efforts by significance criteria, we can also focus treatment considerations on the qualities adversely affected. Properties found eligible under multiple criteria will require consideration and use of multiple mitigation options.

For Historic Properties found Eligible under Criterion a - association with events that have made significant contributions to the broad patterns of our history – mitigation options may include treatment of properties or approaches to preserving and interpreting historical events if the property itself cannot be protected. As an example, the effects of urban renewal on contributing historic buildings in an eligible historic district might be lessened by one or more of the following:

- historically sensitive exterior rehabilitation;
- interior modifications for new or reuse of the buildings;
- modification of city codes to allow historic set-back and store front window treatments;
- blending surface treatment of new walkways with repaired historic sidewalks;
- repairing historic street lighting and retention of historic street furniture;
- restrictive easements with tax credits;
- sympathetic landscaping, speed controls, noise walls with historic texturing and coloring and unobtrusive signage to reduce the effects of adjacent modern travel corridors;
- interpretive signage and pamphlets describing the significance of the area and efforts to preserve its qualities;
- completion of National Register nominations for preserved eligible properties in the area; or
- conduct of historic survey in associated neighborhoods.

For Historic Properties found Eligible under Criterion b - association with significant persons - an agency might consider:

- Interpretive signage;
- Publications or educational film;
- Partial reconstruction;
- Relocation, rehabilitation or maintenance covenants.

For Historic Properties found Eligible under Criterion c - embodiment of a type, period or method of construction – recordation may be the only option if the building or structure will be demolished. HABS/HAER or Historic American Building Survey/Historic American Engineering Record documentation (consisting of narrative and archival photographic and blueprint type drawings and specifications) is a standard mitigation treatment. However, recordation in any situation should be considered a basic first step in considering historic properties and as mitigation it should be regarded as a last resort and a very minimal one at best. This is particularly the case where the property is significant under more than one criterion, as is often the case (e.g. both criteria a and c). Other mitigation options to consider for properties eligible under Criterion c might include:

- rehabilitation and design modifications preserving the visual qualities of the structure while meeting upgraded standards;

- relocation and reuse;
- change in use pattern of the building or structure as, for example, changing a vehicular bridge that is undersized for current traffic into a pedestrian walkway and scenic overview or changing the bridge to one way traffic and building a sympathetic bridge to handle traffic in the other direction; and/or
- if a number of examples of a property exist which are subject to similar effects - a programmatic treatment involving additional research, educational publications for the whole set of properties, or documentary films and systematic proactive commitments for preservation of the type elsewhere might also be appropriate.

For Historic Properties (primarily archaeological, but also historical or architectural) found Eligible only under Criterion d – for their information value - consideration of their research potential should typically be carried out within the framework of a data recovery plan. The data recovery plan must be reviewed by and accepted by SHPO and/or the ACHP before any work begins. The research design must be relevant to the targeted site and its identified research potential. Not all archaeological sites are important for the same reason: sites can be significant because they contain different sorts of information and the same data recovery plan will not fit every site. For many archaeological sites, data recovery means excavation, although for others perhaps, additional surface mapping may suffice. In any event, the presentation of the research design should include:



- One or more hypothesis (proposed statement for testing);
- Test Implications (if H is true, then...);
- Data Requirements (collectable information necessary for the test implications);
- Field Techniques (methods to be used to collect data);
- Analytical Techniques (methods to analyze the collected data); and
- Reporting (documentation to describe and share results).

Excavation of archaeological sites - even with the best and most careful work - destroys a nonrenewable resource. It is also often the most expensive option. The destructive nature of excavation is formalized in the ACHP's Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites (Federal Register Vol. 64, No.95: 27085-27087). Excavation should not be accepted as mitigation without careful consideration of avoidance options. At the same time, avoidance must be complete before warranting no further consideration of treatment. Boring-under a site may not constitute avoidance without conclusive evidence about the depth of the site. Burial of archaeological sites under fill will not constitute avoidance in many cases, as changes may occur to sites by putting large volumes of dirt over them. Conservation easements are a relatively new and untried option for archaeological sites in Montana, but will likely become more common especially in land exchanges.

For Traditional Cultural Properties found Eligible (primarily) under Criterion a. It has sometimes been difficult to devise reasonable and feasible mitigation for Traditional Cultural Properties (TCPs). The variety of cultures, lifeways and traditions potentially significant under this category of site adds to the complications involved. Once avoidance is ruled out by an agency there is often a very real problem identifying any acceptable mitigation or even getting parties to identify and discuss the qualities making TCPs significant and to negotiate treatment of adverse effects on those qualities. Boundaries, if not adequately defined at the identification or evaluation stages, may also become points of

controversy in discussing mitigation. Indirect, as much as direct, adverse effects are commonly involved with TCPs. These difficulties do not absolve agencies of their responsibility to attempt to lessen adverse effects to TCPs.

Some past efforts to minimize adverse effects to Native American TCPs have included:

- view shed analysis followed by vegetative or other screening to minimize project intrusiveness;
- timing the proposed undertaking to avoid the most critical traditional use periods;
- use of off-site treatments, for example: providing assistance to Tribes in their efforts to set up Tribal Preservation Offices, providing money for ethnographic study of traditional beliefs of the group involved, language or plant use and funding the means to pass this information on to younger people; and/or
- reintroduction or relocation of traditionally important plants.

Regardless of property type or undertaking, critical to the successful negotiation of mitigation options in almost all discussions is an acceptance of opportunities as well as limitations, an appreciation and respect for the concerns of all those involved, an understanding of the qualities which make the properties significant and a strong willingness on everyone's part to exercise careful thought and creativity.

Additional Reading:

America's Tribal Culture - A Renaissance in the 1990s, 1991 Cultural Resource Management, Vol.14 No. 5, NPS.

Archaeological Inundation Studies: Manual for Reservation Managers, John Ware 1989, US Army Corps of Engineers, Contract Report EL-89-4.

Archaeological Resource Protection, Sherry Hutt Ed. Al., 1992, The Preservation Press, National Trust for Historic Preservation.

Archaeological Sites Protection and Preservation Notebook, US Army Engineer Waterways Experimental Station, Feb. 1989.

Burial as a Method of Archaeological Site Protection, Christopher Mathewson ET. Al. US Corps of Engineers, Contract Report EL-92-1, Jan. 1992.

Common Ground: Archaeology and Ethnography in the Public Interest (Preservation on the Reservation and Beyond, Fall 1999, NPS.

Conservation Easement Handbook, 1988, Janet Dielh and Thomas Barrett, Land Trust Exchange and Trust for Public Lands.

Federal Historic Preservation Case Law, 1966-1996, ACHP.

Historic Property Protection and Preservation at US Army COE Projects, Aug. 1991, Roger Grosser, US Army Corps of Engineers, Technical Report EL-91-11.

Interdisciplinary Workshop on the Physical -Chemical- Biological Processes Affecting Archaeological Sites, Christopher Mathewson, compiler, 1989, US Army Corps of Engineers, Contract Report EL-89-1.

In Situ Archaeological Conservation, Proceedings of Meetings April 6-13, 1986, Henry Hodges, senior Editor, The Getty Conservation Institute.

Mitigation Options related to Historic and Archaeological Properties, 1983, Federal Highway Administration.

Perspectives on Archaeological Site Protection and Preservation, Paul Nickens, ed., US Corps of Engineers, Technical Report EL-91-6, June 1991.

The Power to Preserve, Public Archaeology and Local Government, 1998 Cultural Resource Management, Vol. 21, No. 10, NPS.

Protecting Archaeological Sites on Private Lands, Susan Henry, 1993, NPS.

In the Public Interest, Creative Approaches to Section 106 Compliance, 1999 Cultural Resource Management, Vol. 22 No.3, NPS.

Surface Erosion and Disturbance at Archaeological Sites: Implications for Site Preservation, Anne MacDonald, US Corps of Engineers, Miscellaneous Paper EL-90-6, Feb. 1990.

Traditional Cultural Properties, 1993 Cultural Resource Management Vol. 16, NPS

Visual Impact Assessment for Highway Projects, Federal Highways Administration, Office of Environmental Policy (FHWA-HI-88-054).

Use of Signs as a Protective Measure for Cultural Resource Sites, Paul Nickens, US Army Corps of Engineers, Technical Report EL-93-6, April 1993.