

Section 106 & ECR Entry Points

ECR2008

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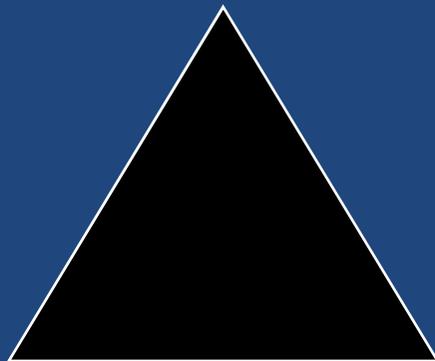
Section 106:

National Historic Preservation Act

Increase awareness of conflict-producing situations in the legal/regulatory context:

substance

process



relationship

Regulatory Context

National Historic Preservation Act of 1996, as amended *(16 U.S.C. 470)*

Relevant Provisions:

- Section 101(d)(6)(B)
- Section 106 *(16 U.S.C 470 f)**
- Section 110
- Section 304 *(16 U.S.C. 470w-3)*

Section 101 of NHPA

Section 101(d)(6)(B)

- Gives Indian tribes and Native Hawaiian organizations “Consulting Party” status
- Federal agencies must consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking.
- Requirement applies regardless of the location of the property.

Section 304 of NHPA

Confidentiality Provisions

- Head of Federal agency has authority to withhold information from the public on location of historic properties:*
 - Significant invasion of privacy
 - Risk of harm to property
 - Impede the use of a traditional site by practitioners

Additional consultation clearances, USDOJ, ACHP

Section 106 of NHPA

Places a requirement on:

- Federal Agency Head having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State to...
- Federal Department Head or Independent Federal Agency having authority to license any undertaking...
- Prior to the approval of the expenditure of any funds on the undertaking or
- Prior to the issuance of any license, permit

Section 106 (cont'd)

- To take into account of the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register and
- To afford the Advisory Council on Historic Preservation an opportunity to comment regarding such undertaking

Section 106 (cont'd)

Applicability:

Depending on the *type and nature* of the undertaking
Section 106 applies to:

- Federal lands
- Non-federal lands
 - State
 - Private
 - Tribal lands (SHPO or THPO)

Section 106

Implementing Regulations

36 CFR 800

- Promulgated by the Advisory Council on Historic Preservation (ACHP)
- Spells out the Section 106 consultation process [800.3 – 800.7]*
- Program Alternatives – Subpart C

Participants & Consulting Parties in the Section 106 Process

Participants:

- Lead Federal agency
- ACHP (may opt in or opt out)
- Secretary of Interior (cases involving Nat'l Historic Landmarks)

Consulting Parties

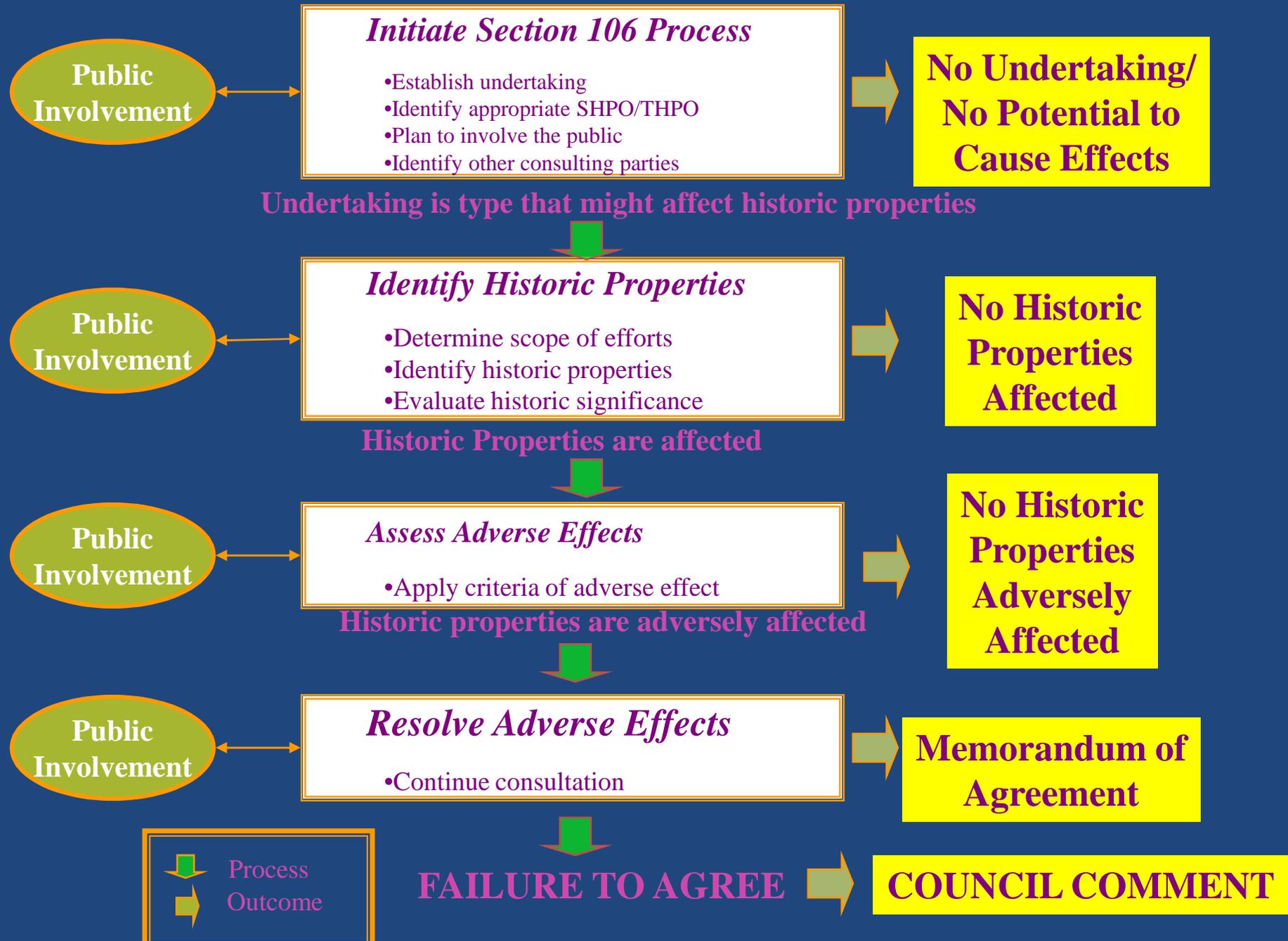
- State Historic Preservation Officer
- Tribal Historic Preservation Officer or designee if the projects affects Indian Tribal lands
- Indian tribes
- Native Hawaiians
- Project sponsors, if applicable
- Other parties based on legal or economic relationship or historic property concerns

-
- Public

Section 106 & 36 CFR 800: *Key Terms & Definitions*

- Undertaking
- Historic Property
 - Both historic and prehistoric heritage resources
- National Register of Historic Places (36 CFR 60.4)
 - distinctions “on” or eligible for the NRHP
- National Historic Landmark (NHL)
- Effect of undertaking on historic property/s
 - no effect
 - “no adverse effect”
 - “adverse effect” *

ACHP's flowchart of the Section 106 process: 36CFR 800



Signatory Status on MOAs

Signatories:

- *Sole authority to execute, amend and terminate*
 - Federal agency
 - SHPO/THPO
 - -ACHP (maybe)
 - "Invited Signatories" by the federal agency
- NHL – Secretary DOI

Concurring Parties:

- *Refusal to concur doesn't invalidate the agreement*
 - Indian tribe
 - Native Hawaiians
 - Legal/economic ties/historic concerns, other.

Dispute Resolution

Resolution of Adverse Effects: 36 CFR 800.6

Agreement Documents:

- Programmatic agreement (PA)
- Memorandum of agreement (MOA)*

Executed MOA (signed by all parties) evidences compliance with 106

Executed MOA governs how the undertaking is carried out

Executed MOA makes Federal agency responsible for implementing MOA

Dispute Resolution

ACHP regulations for 106: 36 CFR 800

- ACHP can enter the process to try to *facilitate* a solution, but not neutral
- ACHP doesn't come in without biases
- Keeper of National Register may enter on DOE's (determinations of eligibility)
- Agreement document (MOAs, PAs) usually contains dispute resolution clause

Failure to Resolve Adverse Effects 36 CFR 800.7

- No agreement-Termination of consultation
 - SHPO terminates (ACHP & Agency may execute MOA)
 - THPO terminates (Full Council shall comment)
- If ACHP terminates, ACHP
 - May appeal to agency Federal Preservation Officer prior to terminating
 - Notifies Agency Head about termination
 - Full Council members issue joint comment

How do multiple parties work
together?

Consultation

- “Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed.”

Secretary of the Interior Standards & Guidelines

Consultation Best Practices

- Occurs early in the project planning process
- Informed by project information given to tribes prior to first consultation session
- Respectful interaction toward preservation of resources
- Government to Government presence
- Multiple meetings, interaction, information

Successful Consultation Results

- Increased communication and ease of contact
- MOA reached by partners
- Efficiencies in future projects
- Appropriate care of resources
- Less likely to have disruption of project
- Resolve issues before they become disputes

Parties' Legal Rights & Obligations

Federal Agency (“Agency official”):

- Required to follow the process to comply with Section 106 under 36 CFR 800
- Must consider the comments of others (SHPO/THPO, Indian tribes and Native Hawaiians attaching religious and cultural significance to historic properties, other 106 participants, and ACHP, when involved)
- Has authority to execute, amend, and terminate an MOA
- May proceed with undertaking as long as it has made a good faith effort, followed the process correctly and taken into account the comments of others, but doesn't have to agree with the comments

Legal Rights & Obligations: 106

SHPO:

- Reflects the interests of the State and its citizens in the preservation of their cultural heritage
- Advises, and assists federal agencies in carrying the agency's 106 responsibilities
- Cooperates with federal agencies, local governments and organizations to ensure historic properties are taken into consideration in all levels of planning and development
- May seek advice, guidance and assistance from the ACHP on specific cases, including the resolution of disagreements, and the conduct of the 106 process
- Has authority to execute, amend and terminate an MOA

Legal Rights & Obligations: 106

THPO:

- Assumes the role of SHPO on tribal lands
- Federal agency consults with the THPO in lieu of SHPO on tribal lands
- Has authority to execute, amend, and terminate an MOA

Tribes that haven't assumed SHPO functions:

- Both tribe and SHPO are consulted
- Tribes have the same rights of consultation and concurrence that are granted THPOs
- If “invited signatories” by the Federal agency, such Indian tribes have the same rights of execution of MOA, etc.

Legal Rights & Obligations: 106

Indian tribes or Native Hawaiians that attach religious and cultural significance to properties:

- Agency official shall consult with the above
- Requirement applies regardless of the location of the historic properties that may be affected
- Full participation granted in assessing and resolving effects
- Tribal sovereignty maintained and rights maintained by the Indian tribe
- Recognition during consultation of government-to-government relationship

Legal Rights & Obligations: 106

Indian tribes or Native Hawaiians that attach religious and cultural significance to properties:

- May develop a separate agreement with the Federal agency for carrying out specific 106 steps
- Agreement cannot change roles of others
- Agreement may cover concerns about confidential information
- An agreement may grant them additional rights to participate or concur in agency decisions beyond those specified in Subpart B of the ACHP regulations

Uniqueness of Conflicts over Historic Property

- Cultural and historic property are reflections and symbols of people's identity
- All people don't share the same identity
- Monuments, artifacts and properties differentiate people's identity

Where's the conflict in historic
preservation disputes?

Sphere of Conflict



Conflict Producing Situations in Heritage Conflicts

“Conflict and disputes exist when people or groups are engaged in competition to meet goals that they perceive to be, or actually are, incompatible.”

Christopher W. Moore

The Mediation Process

2003

Causes of Data Conflicts

- Lack of information
 - No data or no agreement on what data to collect
- Misinformation
 - Errors in collecting the correct information
 - Errors in cultural resources identified and what the information does and doesn't convey by data gatherer
- Different views on what is important culturally
 - Subsistence resources (e.g., fish/diet/health/religious)
- Different interpretation of data
 - Eligible/not eligible for National Register of Historic Places
- Different assessment procedures
 - Wholistic approach to resources (Non-western) vs. resource-specific (Western) approach
 - Intrusive/scientific v. non-scientific tampering with sacred remains

Causes of Interest Conflicts

- Perceived or actual competition over substantive (content) interests
 - Archaeological resources and burial/sacred (e.g., recover vs. preserve in place vs. avoid)
 - Lack of creativity, option-generating, “expanding the pie”
- Procedural interests
 - How Section 106 consultation among all participants will occur, definitions of consensus, etc.
- Psychological interests
 - Parties seek high self esteem, want to be treated with respect by others; want ongoing positive regard for each other if the relationship continues

Causes of Structural Conflicts

- Destructive patterns of behavior or interaction
 - Avoidance, not consulting early or not consulting all Indian tribes potentially affected by undertaking; manner of consultation
- Unequal control, ownership or distribution of resources
 - Federal agency has or perceived to have the better BATNA to proceed with an undertaking than other parties
- Unequal power and authority
 - Different roles, rights and standing in the 106 process
 - Geographical, physical or environmental factors that inhibit cooperation
 - Closeness and distance; physical separation between parties, lack of face to face interaction—106 "paper process"
- Time Constraints
 - Project-driven
 - Pressure to be quick
 - Conform to unilaterally decided time frames to complete 106

Partially from CW Moore

Causes of Value Conflicts

- Different criteria for evaluating ideas or behavior
 - Opposing scientific studies on burial remains based on religious beliefs
- Exclusive intrinsically valuable goals
 - Group rights. “Agree to disagree”
- Different ways of life, ideology or religion
 - Native/Non-native. Find “superordinate goal”

Causes of Relationship Conflicts

- Strong emotions
 - Lack of ground rules, “active listening”, caucusing, legitimatizing other’s feelings
 - Participants cannot be impartial
- Misperceptions or stereotypes
 - “Baggage” from previous encounters on 106 matters
 - Judgmental due to perceived or actual negative behavior (e.g., not responding; “wants to preserve everything”; “burnt in the past by them”)
- Poor communication or miscommunication
 - Lack of clarifying information; not communicating much or at all
 - Multiple players and interests—no systematic process dedicated to sorting out issues and interests and their resolution.
 - “Paper shuffle”—hardening positions on each 106 step on paper.
- Repetitive negative behavior
 - Cyclical
 - Change structure of consultation and encourage positive problem-solving

Environmental Conflict Resolution:
A Tool for Section 106 & Historic
Preservation Conflicts

Environmental Conflict Resolution: *What can be gained?*

Focuses on Interests versus Position

- Position – “My solution to the problem”
- Interests – Reasons behind why one feels strongly about that position
- Looks for mutual gains; building bridges
- Creative problem solving—“outside” the box thinking
- ECR involves the use of a neutral/impartial third-party and collaboration may not involve third-party

ECR and 3-D Negotiation

- Interests-based problem solving
- Setting the Table (Coalition Building)
- Deal Design (Designing the Agreement)

Role of 3rd-Party Neutral: Facilitator or Mediator in ECR

- Assess the situation
- Design the process
- Manage relationships and communication
- Train participants in consensus skills
- Facilitate meetings, prepare for meetings, keep summaries
- Fact finding
- Mediate specific issues, including private caucuses to clarify interests and positions
- Can monitor implementation and revision of agreement

When is ECR *NOT* Needed?

- When trust levels are high
- When the impact of the decision is relatively minor
- When an executive decision must be made right now!
- Parties are collaborating well on their own and don't need an outside hand to manage the process
- Other?



When is ECR Needed?

- When the parties distrust one another
- When the lead agency or the person convening the discussion is not perceived as being impartial
- When confidentiality may be important and parties may want to entrust facilitator or mediator with confidential information
- When the parties are stuck—“Mediation usually turns things around.”

When is a Third Party REALLY Needed?

- When everybody at the table has a stake in the outcome and needs an opportunity to advocate for particular interests
- When the issues are complex and a systematic process is needed for discussion



ECR Entry Points

Section 106

- **Upstream**

- with conception of project/undertaking
- with NEPA planning, integrate Section 106
- identify all interests and participants in NEPA/106
- ECR allows for confidentiality in NEPA process

- **Midstream**

- when issues emerge from carrying out identification, evaluation and effect steps of 106

- **Downstream**

- inadvertent discoveries
- implementing agreement

ECR Entry Points

NAGPRA

- Early in NHPA process when planning undertaking
- Plan for disposition as a part of mitigation Sec. 106
- Inadvertent discoveries
- The museum receives a claim and asserts the right of possession
- The Review Committee recommendation needs action and effect or acceptance
- Disputes between tribes

Resolutions: Fixing Problems

- Courts
 - decisions
 - rulings
 - appeals
- ADR/ECR
 - solutions
 - resolutions
 - relationships
 - closure

ECR Applications: Case Examples

NHPA

- ❑ Badoni v. Higgenson 1980, to Bear Lodge 1998, to Natural Bridge & Arch 2004 – sacred sites and public land use
- ❑ Attakai v. US, site survey and burials
- ❑ Yankton Sioux v. Corps, burial sites
- ❑ Pueblo of Sandia, consultation with tribes
- ❑ Lower Elwa and WashDOT, burial site

ECR Applications (con't)

- NAGPRA
 - Klamath tribes and Corps, fill dirt in burials
 - Yankton Sioux, inadvertent discovery
 - Crow Creek Sioux tribe v. Corps, NAGPRA obligations transfer with the land
 - Bonnicksen v. Corps, ARPA permit and human remains
 - American Museum of Natural History & the Confederated tribe of the Grand Ronde
 - Pueblo San Ildefonso v. Ridlon, collections

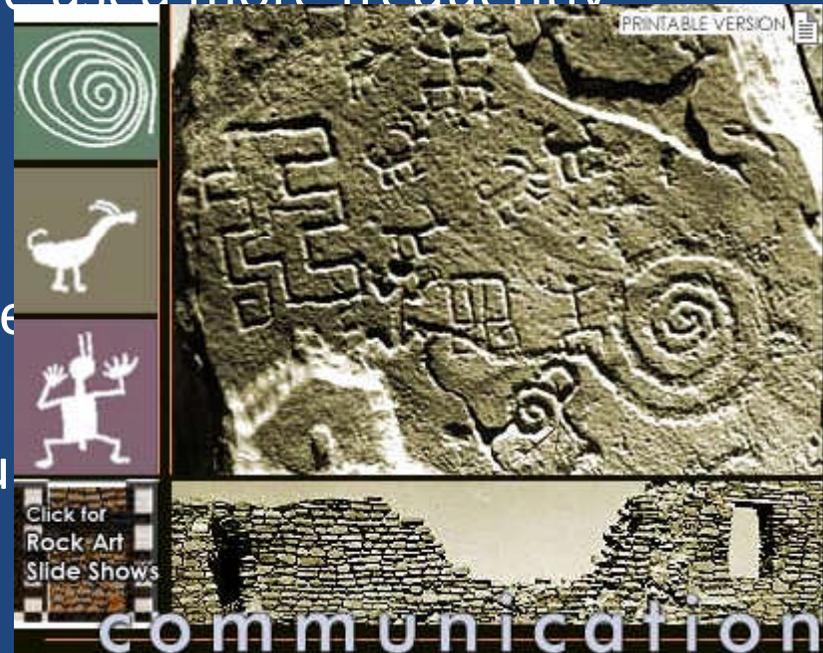
ECR Applications

Section 106

- 4 (f) cases – Dept. of Transportation
 - Formal mediation in courts
 - Highway projects (CA, WV, KY, GA, NM)
 - Bus transfer station in historic preservation district (Savannah, GA)
 - Historic bridge (Great Falls, MT)

ECR and Its Future for Resolving Historic Preservation Conflicts in America

- Will ECR or Court Processes be used more frequently for
 - Historic Properties
 - Cultural Properties
 - Properties that Indian tribes find to have cultural significance
 - Human burial remains & funerary objects
 - Sacred items
 - Cultural patrimony



Perspectives of Participants in ECR: Federal & State Preservation Agencies

VALUE OF ECR & 3rd party neutral:

- Provides framework for meaningful discussions to occur among stakeholders
- Improved communication among various interest groups*
- Trust building and respect were attained
- Lack of mediation would have resulted in the destruction of the historic property
- Allows interest groups (e.g. ACHP) to focus and understand the interests and not have to take on the process role too

“Success or failure in any preservation endeavor is the result of success or failure in understanding where things went well or where they failed—and most important---why.”

Robert Stipe

A Richer Heritage 2003

ECR holds tremendous potential
for the resolution of historic
preservation conflicts!

Further Reference

- www.achp.gov – 106 regulations, consultation guidance
- www.NATHPO.org – THPO & Sec. 106
- www.cr.nps.gov – link to laws & regulations
- www.cr.nps.gov/nagpra - NAGPRA site with consultation database
- www.nationaltrust.org/legal_advocacy/docs. - cases historic preservation
- www.ncshpo.org/about - SHPOs and other news
- www.ecr.gov/naan/naan.htm - Native Network/ECR practitioners