INTRODUCTION TO CULTURAL RESOURCE MANAGEMENT LAWS & REGULATIONS

PRESENTED BY
THE NATIONAL PARK SERVICE INTERAGENCY RESOURCES DIVISION
AND
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

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I. Introduction

A. Target Audience and Purpose of This Class

This class is principally for people who have been assigned the duty of dealing with cultural resources on Department of Defense (DoD) installations or who have this duty as a collateral responsibility while they carry out responsibilities in natural resources management, pollution control or remediation, National Environmental Policy Act (NEPA) compliance, or other fields.

The class is designed with the assumption that you know something about NEPA compliance in general, but little about how NEPA deals with historic and cultural resources, and little about other Federal laws, regulations, and guidelines that apply specifically to such resources.

The purpose of this class is to help you develop the knowledge and skills necessary to meet the requirements of your assignment. The interlocking, overlapping complex of laws and regulations dealing with cultural resource management can be confusing. Compliance requires not only a good faith intent to follow the spirit of the laws, but also an effective working knowledge of the systems the laws create. A procedural mistake, no matter how well-intentioned, can create project delays, increased costs, and legal difficulties for DoD.

The rationale for compliance, however, is not just to keep out of trouble. Cultural resources are valuable parts of our environment, and DoD has an affirmative responsibility to manage them wisely, as part of its overall mission. As Congress declared in the National Historic Preservation Act:

The historical and cultural foundations of the Nation should be preserved as a living part of our community
Cultural resources are basic parts of our national fabric, and it is the responsibility of all Federal agencies to see to it that they are preserved and made good use of, to the extent possible. Being assigned to deal with the cultural resource laws for DoD places you in a key position to make sure that DoD not only "plays by the rules," but also that it becomes more effective at carrying out the overall policy of preserving these resources as a living part of our community life and development.

B. What Are Cultural Resources?

1. We need to begin by making sure we have a shared understanding of the subject matter of this class, which is designed to provide you with an overview of Federal legal requirements dealing with a broad range of what many people call cultural resources. The term "cultural resources," however, is not defined in statute, and in practice it is used by various agencies and groups to mean various things. The term is used:

- As a synonym for "historic property," which is defined in the National Historic Preservation Act to mean any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register [of Historic Places] including artifacts, records, and materials remains related to such a property or resource. (16 U.S.C. 470w[5])

- To mean both historic properties and properties that are not eligible for inclusion in the National Register, but that an agency nevertheless feels obligated to manage.

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1 Italicization of lengthy material indicates a direct quote from a statute, regulation, guideline, or other publication. Sources are given in plain text, enclosed by parentheses.

2 Italicization of lengthy material indicates a direct quote from a statute, regulation, guideline, or other publication. Sources are given in plain text, enclosed by parentheses.
• To include any or all of the following:

— archeological resources besides those eligible for the National Register;

— historic artifacts;

— museums and museum conservation centers;

— museum collections;

— historic documents;

— folklife, tradition, and other social institutions; and

— theater groups, orchestras, and other community cultural amenities.

2. The Department of Defense's Legacy Resource Management Program defines the term as follows:

**Cultural Resource:** Any real or personal property, record, or lifeway that can be defined as follows:

**Historic Real Property:** Any archeological or architectural district, site, building, structure, or object, as well as monuments, designed landscapes, works of engineering, or other property that may meet the criteria for inclusion in the National Register of Historic Places or an equivalent register maintained by a State or local government or agency.

**Historic Personal Property:** Any artifact, relic of battle experience or other military activity, piece of military equipment, weapon, article of clothing, flag, work of art, movable object, or other item of personal property to which historical or cultural significance may be ascribed through professional evaluation of historical associations to persons, events, places, eras, or with military organizations.
Historic Records: Any historical, oral-historical, ethnographic, architectural, or other document that may provide a record of the past, whether associated with real property or not, as determined through professional evaluation of the information content and significance of the information.

Community Resources/Lifeways: Any resource to which a community, such as a neighborhood or Indian tribe, or a community of interest, such as a preservation organization or a veterans' group, may ascribe cultural value. Such resources may include historic real or personal property, such as natural landscapes and cemeteries, or have references to real property, such as vistas or viewsheds which may help define a historic real property, or may have no real property references, such as aspects of folklife, cultural or religious practices, language, or traditions.

3. Federal agencies have responsibilities with regard to all these kinds of resources, but their responsibilities vary from resource type to resource type, and they spring from a number of different laws that we will discuss in this class. For instance, properties eligible for inclusion in the National Register of Historic Places are afforded certain protections by the National Historic Preservation Act, while other kinds of cultural resources are not. However, such other resources may be among the important...cultural...aspects of our national heritage that should be considered under NEPA (§ 101[b][4]), or may be protected under another law.

C. Defining Some Terms

Historic preservation: includes identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, research, interpretation, conservation, and education and training regarding the foregoing activities or any combination of the foregoing activities. [16 U.S.C. 470w(8)]

Preservation treatment: treating a historic property in such a way as to make possible a compatible
contemporary use while preserving its significant elements. Several kinds of preservation treatments of historic buildings and structures are "preservation," "rehabilitation," "restoration," and "reconstruction" (defined and discussed in Section VI).

*Adaptive use:* providing a new and different function for a property that has outlived its original purpose. While adaptive use can sometimes be accomplished without significant changes to a property, most often the property must be rehabilitated to accommodate the new use.

*Preservation technology:* refers broadly to any equipment, methods, and techniques that can be applied to the discovery, analysis, interpretation, restoration, conservation, protection, and management of prehistoric and historic sites, structures, and landscapes.

*Historic records:* any historical, oral-historical, ethnographic, architectural, or other document that may provide a record of the past, whether associated with real property or not, as determined through professional evaluation of the information content and significance of the information. These may include documents that are official, unofficial, or private papers which record DoD's operations, functions, equipment, and people.

*Records management:* the planning, controlling, directing, organizing, training, promoting, and other managerial activities involved with respect to records creation, records maintenance and use, and records disposition in order to achieve adequate and proper documentation of the policies and transactions of the Federal Government and effective and economical management of agency operations.

*Curation:* responsibility for the care of something held in trust for other people. Curatorial services means
managing and preserving an archeological collection according to professional museum and archival practices.³

Archeological collection: material remains that are excavated or removed during a survey, excavation or other study of a prehistoric or historic resource, and associated records that are prepared or assembled in connection with the survey, excavation or other study.

Social impact assessment: professional evaluation of the likely impact of proposed actions (such as construction or operation of a new facility) on the social and cultural characteristics of a community, group, region, or nation, including but not limited to its forms of social interaction, its traditions, its religious systems, its art forms, its economic and subsistence systems, its systems of family and community organization, and its use and perceptions of land and resources.

Community resources/lifeways: any resource to which a community, such as a neighborhood or Indian tribe, or a community of interest, such as a preservation organization or a veterans' group, may ascribe cultural value. Such resources may include historic real or personal property, such as natural landscapes and cemeteries, or have references to real property, such as vistas or viewsheds which may help define a historic real property, or may have no real property references, such as aspects of folklife, cultural or religious practices, language, or traditions.

Section 106 review: Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to consider the effects of their actions on historic properties and seek comments from an independent Federal reviewing agency, the Advisory Council on Historic Preservation. Because so many projects and activities undertaken by DoD require Section 106 review, we will be giving the Section 106 review process quite a bit of attention during this course. Your understanding of the

³ 36 CFR 79.4 (2)(b)
process will enable you to handle compliance more effectively and efficiently.

Consultation: under Section 106 of NHPA, the process of discussion among interested parties to identify historic properties, consider effects on them, consider alternatives to avoid or reduce adverse effects, and seek agreement on a course of action.

D. Case Studies

Throughout the class, we will use hypothetical problems at a hypothetical facility to illustrate how the historic and cultural resource laws work. In each case, we will present the problem first and ask you to discuss it. Then we will discuss the laws and regulations that apply to the problem, and hope they will help you find a solution. However, there is no single solution to any of the problems that is necessarily the only "right" one.

Scenario for the case study workshops

The recently enacted Department of Defense Reorganization Act has created the Maritime Air Cavalry (AirCav), made up of units from the Army, Navy, Air Force, and Marine Corps, whose purpose it is to provide rapid deployment strike forces worldwide for terrorism prevention and contravention, protection of U.S. interests and assets, disaster and humanitarian relief, and environmental protection.

Fort Monitor is an AirCav installation in the State of Washaifornia. Its missions are to house the 17th Maritime Air Cavalry, maintain the 17th at a high level of readiness through constant training, and support its rapid deployment, operations, and redeployment.

Fort Monitor was originally established in 1870 as a cavalry post, to maintain control over the Motomak Indian tribe. Transferred to the Navy and used as a mobilization center during World War I, it returned to Army control in the 1930s and was an important coastal defense airfield during World War II. It was substantially deactivated after the Viet Nam conflict, but
was reactivated when AirCav was created three years ago.

You are Fort Monitor's Environmental Coordinator. Your responsibilities include compliance with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the National Environmental Policy Act (NEPA), the Resource Conservation and Recovery Act (RCRA), Endangered Species Act, and wetlands management. Your professional background is in environmental planning. You have just been assigned cultural resource management as an additional duty.

E. Historical Overview of Cultural Resource Management Laws

You are responsible for knowing and implementing a considerable number of laws, regulations, standards, and guidelines. Knowing where the laws came from and why they were passed may help make this array a little less awesome.

1. The beginnings of cultural resource law.

Historical documents were the first type of resource for which the Federal Government recognized that it had management responsibilities.

- The Library of Congress was established by act of Congress April 24, 1800 [2 Stat. 56], appropriating $5000 "for the purchase of such books as may be necessary for the use of Congress...." The Library's scope of responsibility has been widened by subsequent legislation [2 U.S.C. 131-168d].

- The National Archives Establishment and Office of the Archivist of the United States were created in 1934 [48 Stat. 1122]. The Archivist had the authority to inspect and requisition government records and archives for transfer to the National Archives Establishment. A National Archives Council was created to define the classes of material to be transferred to the Archives. A National Historical
Publications Commission was established to make pubic certain records using public funds.

- The National Archives Establishment was transferred to the Government Services Administration as the National Archives and Records Administration (NARA) in 1949 [63 Stat. 381]. The Archivist of the United States had the authority to survey government records and government records management and disposal practices, and to promote improved records management practice and control, including storage or disposal of records no longer needed by agencies for current use. The Federal Records Act, passed in 1950, requires each agency to establish and maintain adequate and proper documentation of its organization, functions, and activities.

- The National Archives and Records Administration was established by act of Congress October 19, 1984 [44 U.S.C. 2101 et seq.], effective April 1, 1985, as an independent agency in the executive branch of the Government. It is the successor agency to the National Archives Establishment.

Government interest in preserving museum objects has a shorter history. Even with the "carrot" offered by James Smithson's large bequest in 1829, the Federal Government was reluctant to get into the museum business. The Smithsonian Institution was created by act of Congress August 10, 1846 [20 U.S.C. 41 et seq.] After accepting the trust property for the United States, Congress vested responsibility for administering the trust in the Smithsonian Board of Regents, composed of the Chief Justice, the Vice President, three Members of the Senate, three Members of the House of Representatives, and nine citizen members appointed by joint resolution of Congress. To carry out Smithson's mandate, the Institution:

- performs fundamental research;
- publishes the results of studies, explorations, and investigations;
• preserves for study and reference some 139 million items of scientific, cultural, and historical interest;

• maintains exhibits representative of the arts, American history, technology, aeronautics and space exploration, and natural history; and

• engages in programs of education and national and international cooperative research and training, supported by its trust endowments and gifts, grants, contracts, and funds appropriated to it by Congress.

Government concern about historic real property began in the late 19th century, when the War Department was directed by Congress to acquire and preserve the sites of various Revolutionary War and Civil War Battlefields. Generally, though, efforts to preserve historic places during the 19th century were undertaken by individuals and organizations. Private groups preserved Mount Vernon, Independence Hall in Philadelphia, and other major buildings from the Colonial and Revolutionary periods. Initially, these buildings were preserved without any effort to address their surroundings, so it was possible for a historic building to be preserved and yet be completely surrounded by incompatible newer buildings.

In 1878, the Bureau of American Ethnology was established to study Native American cultures. In 1897, it became part of the Smithsonian Institution. Professional societies like the American Folk-Lore Society and American Anthropological Association were established at the turn of the century to promote the study of folklore and culture. However, until the Depression of the 1930s, the Federal Government gave little attention to the impacts of its actions on non-Native American community resources and lifeways of the Nation's cities, neighborhoods, rural areas, and ethnic groups. These social and cultural impacts were largely accepted as part of the Nation's growth and development.
As the 19th century ended and the 20th century began, concern about cultural resources began to be addressed in law for the first time.

- The Organic Administration Act of 1897 authorized the Secretary of Agriculture to protect historic places from theft and destruction, thus recognizing that land-managing agencies have preservation responsibilities.

- A Scandinavian expedition's removal of valuable artifacts from the Southwest led to the passage of the first major Federal preservation law, the Antiquities Act of 1906. The Antiquities Act forbids disturbance of antiquities on Federal land without a permit from the Secretary of the Interior. It allows the President to withdraw public lands to create National Monuments. Declared "fatally vague" by the courts in the mid-1970s, it has largely been superseded by the Archeological Resources Protection Act of 1979, but is still on the books and is still sometimes a useful statute for controlling access to archeological sites, paleontological sites, and other antiquities on Federal land.

- When the Yellowstone area was set aside as the first national park in the late 19th century, the War Department was assigned the responsibility of maintaining it. By the early 20th century, it was recognized that many areas might be designated as National Parks, and that a separate agency was required to manage them. This led to the creation of the National Park Service in 1916.

2. Before the Depression.

- The War Department still administered historic battlefields.

- The Smithsonian Institution had begun to administer a national program of artifact curation.
• The Department of the Interior had permitting authority for excavation of archeological sites on public lands.

• The National Park Service existed, but its preservation-related responsibilities were confined to protecting the few historic and prehistoric parks under its jurisdiction at the time, such as Casa Grande.

• Preservation of historic buildings was largely carried out by private groups. Archeological research was also largely carried out by private groups and museums, including the Smithsonian Institution.

• The Archive of American Folk Song was established in the Library of Congress to collect and preserve American traditional music for scholarly research. Created in 1928, this was the earliest Federal program to document folklife and to advocate for cultural preservation.

3. The Depression years brought important changes.

• The Works Progress Administration (WPA), along with other "make work" agencies, undertook archeological research using the unemployed. Several other WPA programs involved folklife studies to document traditional decorative arts and folk music and to encourage folk festivals. The first national folk festival was held in 1934. Its sponsoring organization was incorporated as the National Folk Festival Association which became the National Council for the Traditional Arts in 1977. In 1937, Congress stabilized the Archive of American Song by providing an appropriation for full time operation and staffing.

• The Tennessee Valley Authority (TVA) undertook major reservoir construction projects, sometimes with salvage archeology carried out in advance.
• The National Park Service:

— undertook historical research with out-of-work historians;

— began to document historic buildings, which was the origin of the **Historic American Buildings Survey (HABS)**, which was created in 1933, and the later **Historic American Engineering Record (HAER)**, which was established in 1969;

— sought to consolidate historic preservation under its authority;

— prevailed upon President Roosevelt to transfer responsibility for historic battlefields from the Department of War to NPS in 1933;

— attained passage of the second major Federal historic preservation law, the **Historic Sites Act of 1935**, which protected nationally significant historic properties, committed Interior to a program that went beyond a mere caretaker role, and which -- along with HABS -- articulated for the first time a role for the Federal Government in preservation of privately-held historic properties. The Historic Sites Act of 1935 authorizes NPS to identify, register, gain title to, document, and preserve properties of significance in the commemoration and illustration of the Nation's history. It is the legal basis for NPS's National Historic Landmark Program, **Historic American Buildings Survey/Historic American Engineering Record (HABS/HAER)** program, and NPS's traditional approach to preservation, which emphasizes registration, commemoration, interpretation, documentation, and preservation of properties of "national significance."

• Meanwhile, at the local level, interest in historic preservation was growing and evolving. Recognizing that it made little sense to preserve individual historic buildings without considering their context, communities like Charleston, SC (1931) and New Orleans, LA (1937) developed the concept
of the historic district -- a neighborhood or other unified whole containing numerous historic structures related in age, style, construction technique, or function. These communities started passing their own ordinances identifying historic districts and establishing standards and procedures for preserving their significant characteristics.

4. **World War II set the stage for further developments.**

- Local and private interests created the National Trust for Historic Preservation, a national non-profit organization, and achieved a Federal charter for the Trust in 1949.

- The Corps of Engineers returned from the War and began construction of reservoirs. The NPS and the Smithsonian Institution formed the Missouri River Basin Survey to do salvage archeology in Corps projects. This evolved into the Reservoir Salvage Act of 1960, which authorized appropriations to support NPS in conducting archeological data recovery in Corps reservoir areas. The Reservoir Salvage Act was later amended and replaced by the Archeological and Historic Preservation Act of 1974.

- The Eisenhower Administration initiated the interstate highway program, and the Kennedy Administration created the Department of Housing and Urban Development (HUD) and its urban renewal program. As new construction increasingly led to demolition and destruction of historic structures and sites, the danger that these programs posed to historic properties began to be recognized.

- NPS remained the dominant force in Federal historic preservation, but had little to do with other Federal agencies.

5. **The Great Society.**

- The Johnson Administration brought revolutionary change to Federal historic preservation law, stimulated by growing concern about damage to
historic resources by such projects as highways, urban renewal, and reservoir construction; increasing respect for social and ethnic diversity and civil rights; and the Administration's commitment to civic beauty and the environment. A critical step along the way was the U.S. Conference of Mayors' Special Committee on Historic Preservation and its publication in January 1966 of "With Heritage So Rich," which provided a blueprint for the National Historic Preservation Act and outlined a legislative program. The Act was enacted with remarkable speed by Congress later in 1966.

- Unlike the Historic Sites Act of 1935, which dealt only with properties significant in the interpretation of the Nation's history, the National Historic Preservation Act of 1966 (NHPA) recognized the importance of historic resources of all types, at all "levels of significance" (i.e. national, State, and local). It also established a system for identifying and registering such resources, created a Federal-State partnership to promote their preservation, and for the first time gave Federal agencies some responsibility for considering them when planning their actions. As passed in 1966, NHPA:

  - authorized NPS to maintain and expand the National Register of Historic Places;
  - authorized NPS to give grants to States for historic preservation programs;
  - established the Advisory Council on Historic Preservation;
  - in Section 106, required agencies to consider the effects of their actions on properties on the National Register of Historic Places, and to give the Advisory Council an opportunity to comment on such actions; and
  - provided funding for the National Trust for Historic Preservation to implement its programs.
Enactment of the National Environmental Policy Act (NEPA) in 1969 created a new context in which the management of all kinds of historic and cultural resources could be addressed. It was only after NEPA's passage that Federal agencies began to address community lifeway resources in any explicit way, and NEPA remains the primary legal authority for considering such resources. NEPA also caused agencies to develop the infrastructure of positions, offices, regulations, and guidelines needed to manage other kinds of cultural resources, notably historic real property.

Among the purposes of NEPA are to:

- assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings [§ 101(b)(2)], and

- preserve important historic, cultural, and natural aspects of our national heritage [§ 101(b)(4)].

NEPA directs agencies to utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking... [§ 102(2)(A)].

NEPA regulations establish that effects on "historic and cultural resources" are to be considered [40 CFR §§ 1502.16(g)].

The mid-1960s also saw the development of the first Federal legislation that specifically encouraged the arts. The National Council of the Arts was established in 1964. In 1965, the National Endowment for the Arts and National Endowment for the Humanities were established as separate government agencies. Folk life was identified as a special area of concern. In 1967, the Smithsonian Institution began the annual Festival of American Folklife.
6. The 1970s.

During the 1970s a variety of adjustments were made in the environmental and historic preservation laws.

- In 1971 President Nixon issued Executive Order 11593, elaborating on Federal agency responsibilities under NHPA and NEPA. Many of Executive Order 11593's responsibilities were folded into NHPA itself by amendment in 1980, while other amendments during the 1970s refined other portions of NHPA:
  - clarified national historic preservation policy;
  - established the general historic preservation responsibilities of Federal agencies;
  - directed agencies to identify historic properties under their jurisdiction or control;
  - extended Section 106 review to effects on properties eligible for the National Register of Historic Places; and
  - gave independent agency status and rule-making authority to the Advisory Council on Historic Preservation.

- In 1973 the Advisory Council published its first non-binding procedures implementing Section 106. These procedures, published in the Code of Federal Regulations (36 CFR Part 800), were soon interpreted by the courts as the standards against which Section 106 compliance must be measured. Later, President Carter directed the Council to issue its procedures in the form of binding regulations. 36 CFR Part 800 was reissued as a true regulation in 1979.

- During the 1970s, NPS grants to States steadily increased, until by the late 1970s some $60 million was appropriated annually for this purpose. Grants had to be matched with State and other funds. State Historic Preservation Office programs grew substantially in size and effectiveness through the
1970s. Meanwhile, archeologists were successful in gaining passage of two laws dealing specifically with archeological resources, the Archeological and Historic Preservation Act of 1974 (the "Moss-Bennett Act") and the Archeological Resources Protection Act of 1979.

- The Archeological and Historic Preservation Act of 1974 (AHPA) directs Federal agencies to report to the Secretary of the Interior when their actions may damage archeological sites, and to conduct or assist in recovery of data from such sites. AHPA authorizes transfer of up to 1% of project funds to Interior to help cover costs of such recovery.

- The Archaeological Resources Protection Act of 1979 (ARPA) forbids disturbance of archeological sites on Federal and Indian land without a permit from the responsible land manager, establishes permit standards, and prescribes penalties for violation.

- During the 1970s, there was growing concern about the human environment beyond historic sites and structures — how human society interacts with and is affected by environmental change, and how social and cultural concerns should be considered in environmental analyses. The field of social impact assessment grew to provide professional analyses of the impacts of Federal and other projects on social institutions and cultural practices. Social and cultural considerations came to be addressed fairly routinely in Environmental Impact Statements and Environmental Assessments under NEPA.

- In 1974, the Folk Arts Program was established in the National Endowment of the Arts to support presentation of community based traditional arts and artists. The American Folklife Preservation Act, enacted in 1976, expressed Congressional support for the documentation, and enhancement/celebration of folklife, established an American Folklife Center in the Library of Congress, and established national policy to document and enhance folk culture. In 1979, the National Preservation Conference at
Williamsburg recommended amending the NHPA to expand the definition of historic property to include such concerns as folk, ethnic, and traditional use patterns.

• Federal support for museums other than specially chartered museums like the Smithsonian increased with the creation in 1976 of the Institute of Museum Services, which provides technical assistance and financial support to public and private museums. (A museum operated by a department or agency of the Federal government is not eligible to apply.)

• Native American groups grew more active and visible in historic and cultural preservation during the 1970s. Their special need for recognition of their religious rights resulted in passage of the American Indian Religious Freedom Act (AIRFA) in 1978, which establishes as U.S. policy to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions... including but not limited to access to sites... (42 U.S.C. § 1996)

The courts have interpreted AIRFA to require Federal agencies to consult with tribes about effects of their actions on the exercise of traditional religions. Many traditional religious sites are historic properties, but AIRFA goes beyond historic preservation, requiring attention to religious practices as well as places.

7. The 1980s.

• Comprehensive amendments to NHPA were passed by Congress in 1980, in the twilight of the Carter Administration. Important, these included the addition of Section 110, which articulates broad, affirmative responsibilities in historic preservation for Federal agencies. Implementing guidelines for Section 110 were jointly published by the National Park Service and the Advisory Council on Historic Preservation in 1989.
The 1980 amendments also directed NPS to issue regulations governing how Federal agencies would manage, or "curate," their collections of artifacts recovered from archeological excavations. These regulations, 36 CFR Part 79, were published in 1990. They provide the basic standards that Federal agencies must meet in managing their artifact collections. In addition, the amendments specified State Historic Preservation Officer (SHPO) responsibilities and established a special program for participation by local governments.

Congress also used the 1980 amendments to direct the Secretary of the Interior and the American Folklife Center to study how better to protect intangible resources such as folklife, social institutions, and traditional arts. The report of this study, entitled Cultural Conservation, was issued in 1983. Among its recommendations was that "cultural and historic resources" should be defined in law and policy "to include historic properties, folklife, and related traditional lifeways." This recommendation, however, was never implemented.

• The Reagan Administration set its mark on cultural resource management in a number of ways:

— It sought to reduce the scope and impact of the Advisory Council's regulations. Although it was not successful in completely undoing the Council's regulatory efforts, 36 CFR Part 800 was revised and reissued in 1986.

— It reduced NPS grants to the SHPOs to around $20 million by the mid-1980s.

— Through the Economic Recovery Tax Act of 1981, it sought to balance this reduction in regulatory control and Federal funding by providing tax incentives for the rehabilitation of income-producing real property. Although the incentives were very effective in promoting
rehabilitation, they were significantly reduced by the Tax Reform Act of 1986.

• In 1984, the National Archives and Records Administration (NARA) became an independent agency. Official agency records must be appraised by NARA through agency record schedule procedures administered by the agency records officer.

• Although one of the 1980 amendments to NHPA authorized NPS to award grants to Native Americans and other ethnic groups for the broad purpose of "preserving their cultural heritage," no funds were appropriated for such grants during the 1980s. Nevertheless, Native American participation in cultural resource management activities intensified during the 1980s. Tribes increasingly used AIRFA, NEPA, NHPA, and other statutes in the courts to try to preserve and protect cultural properties and practices important to them, and became increasingly involved in Section 106 cases. Today, about twenty out of around five hundred tribes have established their own historic and cultural resource management programs.

• Among the most burning issues brought to Congress by Native American groups was treatment of the dead. Many tribes objected vehemently to archeological excavation of their ancestors' remains, and even more to their perpetual retention by museums and universities. Their vehemence prompted Congress to enact the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990.

    NAGPRA requires Federal agencies and museums to inventory their holdings of "Native American cultural items" and return such items to Indian tribes and other Native American groups. It also provides for minimum 30-day delay when a project on Federal or Indian land encounters such an item.
8. The 1990s.

- In 1990, Congress for the first time appropriated funds ($0.5 million) for NPS' NHPA grants to Indian tribes, at the same time directing NPS to conduct a study of tribal historic and cultural resource management needs. The report of this study, *Keepers of the Treasures*, was released in September of 1990, and recommended a broad range of legislative and administrative actions to help preserve Native American cultural resources of all kinds — historic properties, lifeways, language, arts, artifacts, and traditions. Congress has increased the appropriation anywhere from $0.25 to $2.0 million each year since. The NPS grants program has implemented a number of the *Keepers* recommendations, while others have been reflected in the policies and activities of agencies like the Advisory Council. Some were also addressed by amendments to NHPA enacted in 1992.

- The 1992 NHPA amendments were designed to protect and strengthen Section 106 review, stabilize the roles of the SHPO and local governments, increase the roles of Indian tribes (i.e. Native Americans, Native Alaskans, and Native Hawaiians) and the public in the national historic preservation program, and increase the historic preservation responsibilities of Federal agencies. The 1992 NHPA amendments:
  - require Federal agencies to have preservation programs with specifically defined elements;
  - require Federal agencies to have Section 106 procedures meeting specific standards;
  - clarify the authorities of the Advisory Council;
  - clarify the roles of the SHPO, Indian tribes, the public, and others;
  - provide for participation by Indian tribes on an equal footing with SHPOs, and authorize grants to
tribes for this purpose;

— discourage "anticipatory demolition" of historic properties;

— provide for establishment of professional standards for preservation practitioners; and

— establish a new National Center for Preservation Technology and Training.

As the 1992 amendments were working their way toward enactment, the Senate Defense Appropriations Subcommittee included language in the 1991 Defense Appropriations Act directing the Secretary of Defense to create the Legacy Resource Management Program (LRMP). The purpose of the LRMP is to significantly upgrade the way DoD addresses cultural resources as well as natural resources. Funds have been appropriated each year since then to support LRMP projects and program development. Congress also directed DoD, through the LRMP, to assume leadership in managing cultural resources associated with the history of the Cold War. This has caused a significant increase in attention both to DoD historical documents and to real property of relatively recent origin that may have Cold War associations.

• Because a 1988 Supreme Court ruling, Lyng, Secretary of Agriculture v. Northwest Indian Cemetery Protective Association, seriously undercut the power of Indian tribes to protect their religious sites and practices using AIRFA, in 1993 Senator Inouye of Hawaii introduced a bill with the intent of greatly strengthening and enlarging the provisions of AIRFA. This proposed bill -- the "Native American Free Exercise of Religion Act of 1993" -- was not enacted by the 103rd Congress. It remains to be seen whether there will be any efforts to amend AIRFA during the 104th Congress.

• Under the auspices of the Department of the Interior, the National Maritime Heritage Act of 1994 creates a
National Maritime Heritage Grants Program funded from the sale and scrapping of obsolete vessels in the National Defense Reserve Fleet. The National Maritime Heritage Grants Advisory Committee -- which includes the Secretary of the Navy as an ex officio member -- reviews grant proposals, makes funding recommendations, and advises the Secretary of the Interior on policy issues. Annual grants are made on a 50/50 matching basis to the National Trust for Historic Preservation for maritime education programs, and to the State Historic Preservation Officers for maritime preservation projects.

Eligible education programs include conservation, interpretation of artifacts and collections, exhibits, and "experience" programs in historic vessels, maritime archaeology, and maritime history. Eligible preservation projects include identification of historic maritime resources; acquisition, repair, restoration, stabilization, and maintenance; and research, recording, planning studies, and other services that are part of a preservation program.

F. The Players in Cultural Resource Management

1. The Department of Defense is responsible for managing cultural resources under its jurisdiction, considering the effects of its actions on such resources not under its jurisdiction, and complying with the cultural resource laws. Generally, these laws require that DoD:

   • exercise stewardship over cultural resources that it owns or controls;
   
   • consider the effects of its actions on cultural resources, regardless of who owns or controls them; and
   
   • carry out its preservation-related activities in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations, and the private sector.
In addition, every Federal agency is required to have a Federal Preservation Officer, who is directed under the law to carry out preservation responsibilities. Each DoD Service has its own Federal Preservation Officer.

2. Other Federal agencies have the same responsibilities as DoD. Sometimes these responsibilities overlap, conflict with, or complement one another.

3. The State Historic Preservation Officer (SHPO) is responsible for administering a number of programs assisted by the Historic Preservation Fund, which is administered by the National Park Service. DoD must consult the SHPO in connection with many cultural resource management activities. The SHPO is not responsible for issuing "cultural resource management clearances."

4. Many States have State Folklorists, State Archivists, State Museums, and State Commissions on Indian Affairs. These agencies can be helpful to Federal agencies in dealing with folklife resources, Indian tribes, historical records, and museum objects. Other State agencies operate pursuant to their own State laws, and are not affected by Federal cultural resource management requirements except where Federal funds, licenses, or delegations are involved in their programs. State and local regulatory or assistance agencies that issue permits pursuant to Federal laws now must subject their permit decisions to review under Section 106 of NHPA, as a result of amendments to the Act in 1992.

5. The Advisory Council on Historic Preservation (ACHP) is an independent Federal agency that advises the President and Congress on historic preservation matters and oversees the process of compliance with Section 106 of the National Historic Preservation Act (NHPA). The ACHP has two parts:

   • The Council itself, whose 20 members include Presidential appointees, agency heads serving ex officio, and representatives of the National Conference of SHPOs and the National Trust for
Historic Preservation; and

- The staff, headed by an Executive Director and comprising about 35-40 people, with offices in Washington, DC, and Denver.

6. The National Park Service (NPS) maintains the National Register of Historic Places, provides matching grants to the SHPOs, provides grants to Indian tribes to support historic and cultural resource management activities, and provides a wide range of technical services to agencies, States, tribes, local governments, and the public.

7. The National Archives and Records Administration (NARA) oversees compliance with the Federal Records Act.

8. Indian tribes have special rights under NHPA, ARPA, AIRFA and NAGPRA, as well as rights that flow from specific treaties they have executed with the U.S. Government. They must be consulted whenever a DoD undertaking may affect properties of traditional religious or cultural significance to them. NHPA includes provisions for establishing and funding tribal historic preservation programs, which may take over the roles of SHPOs, the ACHP, and NPS under certain conditions.

9. Local governments often have historic preservation programs, which are sometimes certified by the SHPO and NPS as meeting Federal standards. Certified Local Governments (CLGs) receive financial and technical assistance from the SHPO and NPS, and may play special roles in interaction with Federal agencies.

10. The public in general must be given opportunities to participate in cultural resource management activities -- not only because virtually all the cultural resource management laws require it, but because doing so is good policy.
G. Making Public Participation Work for You

1. The importance of public participation in planning for and managing cultural resources as an integral part of the environmental program cannot be overemphasized. Failure to properly inform and involve the public can result in negative news coverage, citizen-generated Congressional interest, adverse public reaction, and a slow-down or complete halt of projects.

2. The primary reasons to involve the public and encourage public participation in the planning process are:

• **It's critical for mission accomplishment.** Whether the environmental issue is rehabilitation of a historic building or mitigation to avoid disturbing an archeological site, the goal is to complete the project. When a community believes its needs and desires have not been considered in project planning, it often has an adverse reaction to the project as a whole, which can lead to a halt of the project through political pressure or the court system.

• **It's the law!** Virtually every environmental law provides for some type of public involvement, and cultural resource laws are no different. Some requirements are more extensive than others, based on the particular situation and the laws that apply. Commanding officers are responsible for knowing the law and complying with the requirements.

3. Bear in mind that **public participation** does not necessarily equal **public relations**.

• **Public relations** is a planned effort to influence opinion through socially responsible performance, based on mutually satisfactory two-way communication.

• **Public participation** [in planning] is a planned, organized effort to involve citizens in the decision-making process and to prevent or resolve citizen conflict through mutual two-way communication.
Some elements that public participation and public relations do have in common are:

- planned effort for mutually satisfactory, two-way communication,
- similar communication skills, and
- similar communication techniques.

4. Most, if not all, of the issues that citizens are concerned about can be easily managed by providing them with all pertinent information and involving them early in the planning process. A progressive and successful public participation program prevents delays and assists, rather than obstructs, the project.

5. Tips for working with the community.

- Understand that an installation and its resources belong to the American public (i.e., the community), and that military personnel are simply the stewards of those resources.

- Plan and implement a progressive public involvement program and integrate the program with your information management systems and environmental review processes.

- Understand the difference between public relations and public participation.

- Understand that, as Federal land and property managers, openness and honesty from the beginning is crucial to the success of the project.

- Don’t take criticism from the public personally.

- Release project and environmental (i.e., cultural or historic resource) information early in the project planning process.

- Offer briefings, site visits, and tours of the facility to the public whenever possible.
• Identify interested groups early on and contact them before they contact you. This sends a message that you welcome comments from the community.

• Focus on community members who truly want to participate, not just complicate. Form constructive working relationships with the public and understand that this is an investment for the facility.

• Make a list of elected officials and learn to effectively use them as tools for communication between the Federal Government and the community. Regularly send them fact sheets or news releases about installation environmental activities.

• Provide the public with the written record of the results of their participation in project planning. Don’t leave them wondering.

• Never, ever, lie or even stretch the truth. It will come back to haunt you!

• Last, but not least, document DoD’s public participation efforts to permit reviewers, including Federal courts in the event of litigation, to review the record and determine whether your efforts have been adequate and reasonable.

We will turn now to our first workshop. This workshop involves planning a change in a facility, and the two laws that most certainly have to be complied with when planning such a change -- NEPA and Section 106 of NHPA. We give first and extensive attention to these laws because they are the ones that you are likely to deal with most often in your work.
Case Study Workshop: Renovation of Building 579

On your first day as Fort Monitor's cultural resource manager, as you sort through the papers on your desk, you find a standard AirCav Form 1776, Project Planning Coordination Form, which describes a planned project to renovate Building 579.

Building 579 is a huge old dirigible hangar, built before World War II. It is to be renovated as the Virtual Reality Training Center (VRTC), in which AirCav personnel will maintain and sharpen their combat skills using a variety of virtual reality simulators. The funding for this project will be derived from the Military Construction Account (MCA).

There is a block on Form 1776 for you to sign, indicating that the project is in compliance with cultural resource laws and regulations.

In terms of cultural resources, what do you need to know and do before you can fill out this form?
II. Cultural Resources and Project Planning

The most common cultural resource problems you have to deal with probably involve considering the effects of needed projects -- like conversion of a building and the resulting impacts to the building itself, its contents, and cultural aspects of its environment. This is not all that cultural resource management entails, but it is a very important thing, and if you can't do it right, it can tangle you up so badly that you don't get anything else done. Therefore, we give it a good deal of attention in this class.

Two laws substantially structure how you deal with cultural resources in project planning: NEPA and Section 106 of NHPA. NEPA is the more general of the two, and also the less directive in terms of precise procedures. Let's look at it first.

A. Summary of the National Environmental Policy Act (NEPA)

NEPA requires all Federal agencies to give appropriate predecisional consideration to the environmental effects of proposed actions in their planning and decisions, and to prepare detailed analyses of the effects of major Federal actions significantly affecting the quality of the human environment. Such analyses are called Environmental Impact Statements. According to regulations issued by the Council on Environmental Quality (CEQ), "major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independently of significantly 4 [Emphasis added] [40 CFR § 1508.18]

Actions subject to review under NEPA include new and continuing projects ranging from the adoption of agency policies through adoption of plans and programs to the approval of particular projects.

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4 The lengthy regulatory definition of "significantly" can be found in CEQ's regulations at 40 CFR § 1508.27.
The NEPA review process is designed (a) to determine whether a given action may significantly affect the environment; (b) to analyze alternatives that may avoid, reduce, or mitigate adverse effects; (c) reveal impacts and alternatives to the public; and (d) to place the results of this analysis and public disclosure before the agency decisionmaker for full consideration before a decision about the action is made.

The NEPA process:

- integrates other environmental processes,
- summarizes technical information,
- documents the analyses and decisions,
- interprets technical information for the public and the decisionmaker, and
- recommends or identifies the preferred course of action.

The NEPA process does NOT fulfill either the procedural or substantive requirements of other environmental statutes and regulations, but should integrate these basic processes so the decisionmaker has a concise and comprehensive view of the major environmental components.

NEPA does not dictate a course of action, but simply ensures that decisionmakers and the public are provided with relevant information about the environmental effects of a proposed action and its reasonable alternatives.

Regulations implementing NEPA can be found at:

- CEQ (Government-wide): 40 CFR 1500-1508
B. Purposes of the NEPA Process

NEPA is a law of disclosure and procedures. Section 101 of NEPA instructs the Federal government to use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. [NEPA, Section 101(a) ]

Section 102 is the mechanism for addressing these national goals and policies. Impact evaluations are detailed in environmental documentation that is made available for public review and to the agency decisionmaker as a basis for making decisions. The key to successful NEPA compliance is to remember that environmental analysis and documentation is not an end in itself; rather, it is intended as a basis for the decisionmaking process and for incorporating the goals of Section 101 of NEPA.

The Federal agency (and/or the agency using Federal land and/or the agency using Federal monies) planning an action is responsible for administering and funding the NEPA review process. The Environmental Coordinator on a facility plays a key role in determining what review is needed and what it will cost.

Proper adherence to the NEPA process can expedite project implementation; noncompliance or inadequate compliance efforts can result in project implementation delays and increased project costs.
C. Three Kinds of NEPA Environmental Analyses

1. A very abbreviated analysis is required if the proposed action falls within a Categorical Exclusion (CATEX or CX). A CATEX action is an action that does not require an Environmental Assessment or Environmental Impact Statement because it has been categorically determined to have little or no potential for environmental effect.

Each agency establishes a list of CATEX action categories in its NEPA regulations, submits the list to the Council on Environmental Quality for approval, and publishes the list in the Federal Register for public comment. Once review and approval are complete, the agency is responsible for applying the list for project review.

2. An Environmental Assessment (EA) is required (1) when the agency does not know beforehand whether or not the proposed action will significantly affect the human environment or be controversial with respect to environmental effects, and (2) to determine if an EIS is necessary.

3. An Environmental Impact Statement (EIS) is necessary for any agency proposing a "major Federal action significantly affecting the quality of the human environment" [NEPA, Section 102 (a)].

D. The NEPA Process

1. When a responsible DoD official determines that an action falls into a CATEX category, and that there is no reason to limit application of the CATEX, DoD can record this determination, prepare the one-page written categorical exclusion determination, and proceed with the action.

2. When it is uncertain whether impacts to the environment are significant, an Environmental Assessment (EA) is prepared. Once complete, this document draws a conclusion about the significance of possible impacts a proposed action
will generate. The EA includes an evaluation of possible impacts to cultural resources. A Finding of No Significant Impact (FONSI) results if the EA determines no significant impacts will result from the action. The FONSI is publicized in the affected area's media and community centers, and published in the Federal Register if nationally significant. After the public has had an opportunity to comment, the undertaking can proceed, subject to monitoring to ensure that the conclusions of the EA were correct. If the conclusions turn out not to have been correct, the agency should supplement the analysis.

3. If the EA determines that there will be significant impacts to the environment, or if it is already known that impacts will be significant, an EIS is required.

- A Notice of Intent (NOI) is published informing the public of the decision to develop an EIS. The NOI initiates the scoping process.

- One or more meetings may be held to determine areas of concern that Federal, State, or local government agencies and private citizens believe the EIS should address, called "scoping" sessions or meetings. Scoping is one of the most important elements of the analytical stage of the process because you are setting the boundaries of the analysis: the geographical boundaries, the time boundaries, and the boundaries of interests.

- A Draft Environmental Impact Statement (DEIS) is prepared and disseminated for public review.

- After public review, a Final Environmental Impact Statement (FEIS) is then prepared incorporating comments received on the DEIS.

- A Record of Decision (ROD) is then promulgated, stating the agency's position on the project after analysis of the EIS. The ROD is published in the
Federal Register, except in cases involving classified information.

• Mitigation and monitoring follow the ROD.

4. Regardless of the level of analysis pursued in meeting NEPA requirements, it is very important to remember that the purpose of environmental documentation is to present and forecast an analysis of environmental impacts and reasonable alternatives to the proposed project. Successful NEPA compliance results from accurate scoping, adequate consideration of alternatives, consideration of the public’s concerns, and a focus on the analysis from a decisionmaker's point of view.

5. NEPA documents often include information required by other laws and regulations, but NEPA documents do not substitute for or guarantee compliance with other laws.

E. Cultural Resources in the NEPA Process

All types of cultural resources must be considered in the NEPA process.

For example, CEQ’s regulations define among "effects" to be analyzed ...aesthetic, historic, cultural, economic, (and) social (effects), whether direct, indirect, or cumulative [40 CFR 1508.8(b)].

However, some types of cultural resources are treated more explicitly than others in the regulations. For example, under all three Services' NEPA regulations, an action cannot be classified as a CATEX if it may affect archeological sites or other historic properties. The potential for impacts to other resources (e.g. historic documents, artifacts, community lifeways) does not automatically prevent an action from being a CATEX; such impacts must be evaluated to see if a CATEX is appropriate.
F. Case Study Application

1. Can we proceed without preparing an EA or EIS?

We can, IF:

- Environmental documentation has been previously prepared on similar actions and found to have no significant environmental impacts. However, if there already is such environmental documentation, we need to consider how recently it was prepared. If it wasn’t prepared recently, the information in the documentation may be "stale," and changes to the existing environment may have occurred that we must address before we can implement the project.

- The action has been exempted from NEPA by law.

- The proposed action is of a type listed as a CATEX in AirCav’s NEPA regulations.

2. Is a historic property present?

In order to answer these questions, we must turn to the other major law that needs to be addressed in considering this action: Section 106 of NHPA. We will return to NEPA from time to time as we work through the Section 106 process.
III. Introduction to the National Historic Preservation Act (NHPA) and Section 106 Review

A. What is Section 106 Review?

1. Don't confuse Section 106 of NHPA with the OMB A-106 process, which is used for tracking environmental projects.

2. Section 106 requires the following:

   The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account 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. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

3. A number of other parts of NHPA affect the Section 106 review process. For example, Section 110(a)(2)(E) of NHPA requires the following:

   Each Federal agency shall establish..., in consultation with the Secretary (of the Interior), a preservation program.... Such program shall ensure...that the agency's procedures for compliance with Section 106--
   (i) are consistent with regulations issued by the Council pursuant to Section 211;
   (ii) provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public, as appropriate, regarding the means by
which adverse effects on such properties will be considered; and

(iii) provide for the disposition of Native American cultural items from Federal or tribal land in a manner consistent with section 3(c) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3002(c)).

Section 211 of NHPA, referenced above, authorizes the Advisory Council on Historic Preservation to issue regulations governing the implementation of Section 106.

4. Section 106 is implemented by following the Council’s regulations, "Protection of Historic Properties," 36 CFR Part 800, or by following a Programmatic Agreement negotiated with the Council and pertinent SHPO(s).

5. It is important to remember that Section 106 requires agencies to consider effects on ALL kinds of historic properties listed on or eligible for listing on the National Register of Historic Places, including buildings, sites, structures, objects, landscapes, traditional cultural properties, and districts made up of multiple properties.

6. It is also important to remember that Section 106 review is not limited only to consideration of properties already determined to be of historic significance.

7. Section 106 does not require that agencies consider effects on historic and cultural resources that are not historic properties as defined by the National Historic Preservation Act. Thus, historic documents, museum collections, folkways, etc., are not covered under Section 106. Any management requirements for these resources spring from such other authorities as NEPA, AIRFA, the Federal Records Act, and agency-specific laws.

8. Section 106 review is often misunderstood by agencies and consultants to require an agency to obtain "clearance" from the State Historic Preservation Officer (SHPO) or some other party. Neither Section 106 nor its
implementing regulations require that "clearance" be obtained from anyone.

9. Keep in mind that, although Section 106 is coordinated with NEPA, compliance with Section 106 does not constitute compliance with NEPA, and vice versa.

B. The Steps in the Section 106 Review Process

In deciding whether you can sign off on Form 1776 for the renovation of Building 579, you need to ask somebody (at least yourself) the following questions.

1. Are we following the Council's regulations?

To comply with Section 106, you follow 36 CFR Part 800 in a formal, step-by-step process. Don't make the mistake of just sending the Council or SHPO a project description or an Environmental Assessment, or Environmental Impact Statement with a request for their comments. That doesn't constitute compliance with Section 106.

Each military service has established its own procedures for implementing the provisions of NHPA, including Section 106 and the Council's regulations:

  — TM 5-801-1, "Historic Preservation Administrative Procedures" (1975)


- Navy: — NAVFACINST 11010.70, 22 March 1983, "Facility Planning and the Protection of Cultural Resources"
You can use an alternative process to comply with 
Section 106 if it has been approved by the Council 
through a Programmatic Agreement (PA), counterpart 
regulation, or State agreement.

2. Is our action an "undertaking"?

Section 106 applies to "undertakings":

NHPA defines an undertaking as any 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.

Undertakings include both new and continuing projects, 
activities, and programs, and any of their elements that 
have not been previously reviewed under Section 106. 
DoD undertakings include, but are not limited to, new 
construction projects, maintenance and rehabilitation of 
buildings or structures, and excessing and leasing of DoD 
real property.

36 CFR Part 800 provides that to be an undertaking, a 
project or program must have the potential to affect 
historic properties. You don't need to know yet whether 
any historic properties are indeed present in order to 
recognize something as an undertaking. What you need 
to ask is, "Is this the kind of activity that could affect 
historic properties, either directly or indirectly?" As a
rule of thumb, something is likely to be an undertaking if it may:

- change a building, structure, or landscape in any way;
- disturb the ground;
- alter noise levels in an area, or change its visual characteristics; or
- change traffic patterns, land use, or the socioeconomic character of an area.

Is the renovation of Building 579 an undertaking?

3. Have we correctly defined the undertaking's area of potential effects (APE)?

The APE, as defined in the regulations, is the area in which you need to consider the undertaking's effects. It may be larger than the project footprint, since it includes all areas where effects on historic properties, such as visual effects, are possible. The APE may include land outside federally owned or managed property. You don't have to know whether any historic properties are present before you can define the APE; the APE is simply the area (or areas) where effects on historic properties may occur as you proceed with your undertaking.

What is the APE of the Building 579 renovation? What do you need to know to define the APE?

4. Have we made a reasonable and good faith effort to identify historic properties in the APE?

Identifying historic properties may require considerable research, or it may be simple. You must identify historic properties in consultation with the SHPO and others. Under the regulations, identification involves the following steps.

a. Assessing information needs

The assessment of information needs means doing
background research into the APE's history, prehistory, geomorphology, archeology, architectural history -- whatever is relevant to figuring out:

- what you already know about the APE;
- what you need to know about it in order to identify historic properties (if any); and
- what you need to do to learn whatever you need to know.

You consult the SHPO during this assessment, in order to get the SHPO's views about what you should do to identify historic properties. Don't make the mistake of just asking the SHPO what's there and assuming that he or she will know and tell you -- that's not the SHPO's job.

You should also consult other concerned parties, such as local governments, Indian tribes, and local community groups such as neighborhood organizations or historical groups. Universities can also be good sources of information.

b. Locating historic properties

Having figured out what you need to do to identify historic properties, you then proceed to do it. Identification may involve:

- field surveys to locate and describe archeological sites, historic buildings and structures, historic landscapes, and other visually identifiable types of properties;
- interviewing concerned parties (e.g., Indian tribes and their traditional leaders, local governments, etc.);
- historical research;
- geomorphological studies; and
• other studies relevant to the kinds of historic properties that may be present, and the nature of the undertaking.

Don't make the mistake of assuming that an archeological survey, an architectural study, or any other kind of fieldwork, in and of itself, is always either required or sufficient; it isn't. The regulations require a reasonable and good faith effort to identify historic properties; what this involves may vary from case to case.

Be sure to try to identify and consult people who may know about the area's historic properties, or who may be concerned about the project's effects on them. Identification involves locating concerned people, not just historic properties.

What do you think you would need to do to identify historic properties subject to effect by Building 579's renovation?

c. Evaluation

The National Register of Historic Places is a roster of historic properties that is maintained by the National Park Service. Some National Register properties are also National Historic Landmarks (NHLs) deemed to have national significance. Many DoD properties have been listed on the National Register, and a number of them -- like Fort Sam Houston, the U.S. Naval Academy, and Rogers Dry Lake at Edwards AFB -- are NHLs.

Remember that Section 106 applies to properties that are eligible for the Register, not just those that are already included. Note, too, that "eligible for" doesn't mean "determined eligible for." A property is eligible if it meets certain criteria published by the National Register. DoD controls many properties that meet the Register criteria which have yet to be formally evaluated. Buildings, structures, districts, vessels, planes, and archeological sites all are types of DoD properties that may be eligible for the National Register.
If you find something that might be a historic property, but which hasn't been formally evaluated yet, you must begin the process of evaluation, in consultation with the SHPO, by applying the National Register Criteria (36 CFR § 60.4).

A property is eligible for the Register if it meets one or more of the following criteria:

*The quality of significance in American history, architecture, archeology, engineering and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:

a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

b) that are associated with the lives of persons significant in our past; or

c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

d) that have yielded, or may be likely to yield, information important in prehistory or history.

[Emphasis added] [36 CFR § 60.4]

Besides meeting one or more of the National Register criteria, a property must also have integrity of location, design, setting, materials, workmanship, feeling, and association in order to be eligible for the National Register. This means, in effect, that if a property has been seriously compromised by unsympathetic alterations, it may not be eligible for the National Register.

Integrity must be judged with reference to the particular criterion or criteria under which a property is thought to be eligible. It must also be recognized that alterations to
a property may themselves have historical or architectural significance, reflecting changing perceptions of style, changing construction techniques, or changing social and cultural processes.

Historic properties are not always old buildings, old structures such as bridges, and archeological sites, though many people tend to think in these terms. Complexes of buildings or structures, and sometimes neighborhoods or communities, can be historic districts. Linear features like roads, trails, and waterways can be historic properties. Designed landscapes like parks and parkways, as well as expansive rural landscapes, can also be historic. In addition, Section 101(d)(6)(A) of NHPA provides that properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register. Such properties may be entirely natural features, such as mountains, lakes, waterfalls, and stretches of seacoast.

It is up to the responsible agency official -- probably your CO, and therefore you -- to apply the National Register Criteria to any unevaluated property in the area of potential effects. You do this in consultation with the SHPO, but don't make the mistake of just asking the SHPO to do it. This isn't the SHPO's job, and surrenders your control to the SHPO.

The SHPO can and should help you apply the Criteria, but remember that the SHPO probably has a very small staff, and a lot of responsibilities. You can ask the SHPO for advice and assistance, but don't ask the SHPO to do your work for you.

You must apply the Criteria objectively, considering only the historical, architectural, or cultural significance of the property. A wetland doesn't become a non-wetland because you need to build something in it, a toxic waste dump doesn't become non-toxic just because you don't have the money to clean it up, and a historic property doesn't become nonhistoric because you want
to demolish or alter it. **Management, mission requirements, and treatment are not to be considered when evaluating properties.**

The National Register has published a great many guidance documents to assist you in evaluation. Most of these are called "National Register Bulletins," and a complete list, order form, and examples are included in your reference materials.

**National Register Bulletin #15: How to Apply National Register Criteria for Evaluation,** which is included in your course materials, is particularly useful because it describes the criteria used to determine which properties within the area of potential effects are included in or eligible for inclusion in the National Register of Historic Places. If a property is not included in or eligible for inclusion in the Register, it is not a historic property for purposes of NHPA and does not need to be considered under Section 106.

If you and the SHPO agree that a property is **not eligible,** you treat it as not eligible. As far as Section 106 is concerned, you can go ahead and do whatever you want to do to the property with no further review.

**Exceptions:**

- If the Council or the National Register requests you to seek a formal determination of eligibility, you must do so. A formal determination of eligibility is made by the Keeper of the National Register, in the National Park Service.

- If you and the SHPO can't agree about eligibility, you must seek a formal determination of eligibility from the Keeper.

If there is nothing that might be eligible for the Register in the APE, or if there is something there but you and the SHPO, or the Keeper, find that it is not eligible, you notify the SHPO and interested persons accordingly and document the finding in the public record. Then, unless
someone asks the Council to consider your finding, you have completed Section 106 review.

If you and the SHPO agree that there is something eligible for the National Register in the APE -- or if the Keeper determines that there is -- then you go on to the next step of the Section 106 review process, determining effect.

Your research on Building 579 reveals that it is one of three similar structures on military installations around the country, and has not been changed very much since it was constructed. Do you think that Building 579 is eligible for the Register? If you're not sure, what should you do to find out?

Do you think there might be anything else eligible for the National Register within the undertaking's APE? If you’re not sure, what should you do to find out?

Meanwhile, under NEPA:

- If you determine there are no historic properties present, and if the proposed action falls into a category identified as a CATEX, you may prepare a CATEX determination and proceed with the project.

- If there are historic properties present, then the action may or may not be considered a CATEX depending on the nature of effects to those properties, and you may have to prepare an EA.

5. Have we determined whether the undertaking will have effects, and whether such effects may be adverse?

You determine the effects of the undertaking on historic properties by applying Criteria of Effect and Criteria of Adverse Effect set forth in 36 CFR Part 800, in consultation with the SHPO and others who may be interested.
a. **Criteria of effect**

An undertaking has an effect on a historic property when the undertaking may alter characteristics of the property that may qualify the property for inclusion in the National Register. For the purpose of determining effect, alteration to features of the property's location, setting, or use may be relevant depending on a property's significant characteristics and should be considered. [36 CFR Part 800.9 (a)]

b. **Criteria of adverse effect**

An undertaking is considered to have an adverse effect when the effect on a historic property may diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects on historic properties include, but are not limited to:

1. Physical destruction, damage, or alteration of all or part of the property;
2. Isolation of the property from or alteration of the character of the property's setting when that character contributes to the property's qualification for the National Register;
3. Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;
4. Neglect of a property resulting in its deterioration or destruction; and
5. Transfer, lease, or sale of the property.

[36 CFR Part 800.9 (b)]

You must make one of the following determinations:

- **No effect**, in which case you notify the SHPO and interested persons and document the finding in the public record. Unless the SHPO objects within 15 days or someone asks the Council to consider your finding, this concludes Section 106 review.

- **No adverse effect**, in which case you provide documentation to the Council, which has 30 days to object. If the Council objects, you may negotiate
changes that will cause it to withdraw its objection. If the Council doesn't object, you have completed Section 106 review, provided you implement any agreement you have reached with the SHPO or Council about how adverse effects will be avoided.

- **Adverse effect**, in which case you notify the Council and begin consultation with the SHPO and others about how the adverse effect will be avoided, reduced, mitigated, or accepted in the public interest. Such consultation is the next step in the Section 106 process.

The regulations allow certain kinds of effects that would normally be regarded as adverse to be treated as not adverse, provided specified conditions are met. These "exceptions to the Criteria of Adverse Effect" are sometimes referred to as the "three R's" -- Research, Rehabilitation, and Restrictions.

- If a property is of value only for research -- that is, it has no public interpretive value, no adaptive use value, and no contemporary cultural value to a community, neighborhood, or cultural group -- and this value can be reliably preserved by conducting research (such as archeological data recovery), then destroying or altering the property after conducting the appropriate research can be treated as having no adverse effect, provided the research is conducted in accordance with plans approved by the Council.

- If an undertaking involves only rehabilitation of a historic building or structure, and an agency demonstrates to the satisfaction of the Council that the work will be done in a manner consistent with the Secretary of the Interior's Standards for Rehabilitation (discussed later in Section V), then the undertaking can be taken to have no adverse effect.

- If the undertaking involves transfer of land or buildings, and the agency guarantees to the Council's satisfaction that in transferring the property it will impose restrictions to protect the property's historic,
archeological, and cultural value, then the transfer can be held to have no adverse effect.

Many types of DoD projects have the potential to cause adverse effects. Examples include insensitive rehabilitation or relocation of buildings and structures, utility trenching, erection of communications antennae, ongoing and/or deferred maintenance, and transferring or excessing historic properties.

Assume that Building 579 is eligible for the National Register. Also assume that there is a National Register-eligible archeological site -- a prehistoric midden -- that will have to be trenched through in order to provide the utility service the building needs.

Do you think the renovation of Building 579 will have an effect on any historic property? An adverse effect?

Meanwhile, under NEPA:

If your finding is no effect, and the SHPO doesn't object, and if there are no significant impacts to other aspects of the environment, you can now prepare a CATEX or EA/FONSI.

If your finding is no adverse effect, and the Council doesn't object, and if there are no significant impacts to other aspects of the environment, you can now prepare a CATEX or EA/FONSI.

If your finding is adverse effect, or if the Council or SHPO objects to your no adverse effect or no effect finding, you need to go through the next step in the Section 106 process -- consultation -- before you can determine what to do under NEPA.

6. Have we consulted to resolve any adverse effects?

If you determine that there will be an adverse effect, or if the Council objects to your determination of no adverse effect and you can't negotiate changes that cause it to withdraw the objection, you consult with the SHPO and
others, and sometimes with the Council, to resolve the adverse effects.

Consultation is a flexible process. It may involve only a few phone calls and exchanges of letters and other documents, or it may require extensive meetings, hearings, studies, site inspections -- whatever is appropriate given the nature of the action, public interest in it, and so on.

You consult, at a minimum, with the SHPO. You or the SHPO may invite the Council to participate, or the Council may decide to participate without such an invitation. NHPA and the Council's regulations also require that other parties be included in consultation -- such as local governments, tribes, applicants for permits, and the interested public:

- As mentioned earlier, Section 110(a)(2)(E)(ii) of NHPA requires agencies to consult with SHPOs, local governments, Indian tribes, Native Hawaiian organizations, and the interested public in developing and implementing agreements regarding the means by which adverse effects on historic properties will be considered.

- Section 101(d)(6) of NHPA requires agencies to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to certain specified properties.

- The Council's regulations state, at 800.5(e), that Interested persons shall be invited to participate as consulting parties...The Agency Official shall provide an adequate opportunity for members of the public to receive information and express their views.

Resolution of adverse effect may involve whatever the consulting parties agree is appropriate, such as:

- eliminating the adverse effect;

- reducing the adverse effect's severity;
• mitigating the adverse effect; or

• accepting the adverse effect in the public interest.

It is during consultation that you can -- and must -- legitimately consider cost factors and mission requirements. Such factors are not to be considered when evaluating properties or determining effects, but now, when you're trying to decide how to carry out the undertaking with the least possible harm to historic properties, it is perfectly appropriate to say "That costs too much money," or "If we do that, we won't be able to carry out our mission effectively." The law doesn't require that we preserve all historic properties in place -- only that we properly consider them and make decisions in the public interest, in accordance with the regulations.

But keep an open mind during the consultation process. It may well be that one of your negotiating partners will come up with an alternative that you haven't thought of, which will do right by the historic property without costing undue amounts of money or interfering with your mission. It is not unusual, in fact, for preservation of a property to save the Government money. For example, it is not uncommon for rehabilitation of an old building to cost far less than constructing an equivalent new one.

**Meanwhile, under NEPA:**

The alternatives you consider in an effort to resolve adverse effects may become part of your EA or EIS.

7. **Have we executed a Memorandum of Agreement?**

NHPA and 36 CFR Part 800 require that you try to reach agreement about how adverse effect will be resolved. Once you and other consulting parties have agreed on what to do, the terms of the agreement are recorded in a **Memorandum of Agreement (MOA).** Once your CO (or whomever your Service designates), the SHPO, and the Council have signed the MOA, and have given any other parties a reasonable opportunity to concur, you
have completed Section 106 review, provided you **implement** the MOA.

**Meanwhile, under NEPA:**

The effect of the proposed action on historic properties and the steps taken to mitigate the action, as provided for in the MOA, should be documented in your EIS or EA.

If everyone has agreed on measures to resolve the adverse effects, and these have been duly recorded in an executed MOA that your installation is committed to implement, then you **may** be able to issue a FONSI on the action, if there is no other reason to do an EIS. You may consult your legal advisor to be sure.

When agreement cannot be reached, the Federal agency, or the SHPO, or the Council may terminate consultation. The Council then renders a **formal comment** on the project to the **head of the Federal agency**, who must respond to the Council recommendations.

When this happens, it is the Council itself -- 20 Federal agency heads, Presidential appointees, and other high-level officials -- that comments, not the Council's professional staff. The Council comments to the Secretary of your Service, or even to the Secretary of Defense.

After receiving the Council's comments following termination, an agency does not necessarily have to follow the Council's recommendations, but under NHPA, the agency head may not delegate the responsibility of responding to the comments. This means that the Secretary must become personally aware of the comments, and involved in responding to them. He or she cannot just delegate this to your CO.

**Meanwhile, under NEPA:**

If you can't reach agreement about how to resolve adverse effects on historic properties, then you are
almost certainly going to have to prepare an EIS. The efforts you made to try to resolve the adverse effects, the Council's comments, and the Secretary's response to the comments should all be documented in the EIS.

C. Foreclosing the Council's Opportunity to Comment

What would happen if you just signed off on Form 1776 and the project went forward without complying with Section 106? You would almost certainly then be responsible for foreclosing the Council's opportunity to comment, which can have serious implications.

1. What the regulations say

The Council may advise an agency Official that it considers the agency has not provided the Council a reasonable opportunity to comment. The decision to so advise the Agency Official will be reached by a majority vote of the Council or by a majority vote of a panel consisting of three or more Council members with the concurrence of the Chairman.

The Agency Official will be given notice and a reasonable opportunity to respond prior to a proposed Council determination that the agency has foreclosed the Council's opportunity to comment. [36 CFR § 800.6(d)]

2. Implications of foreclosure

- Remember that the head of any ... Federal agency shall afford the Advisory Council ... a reasonable opportunity to comment ..., and that agencies are required to carry out their Section 106 responsibilities prior to the issuance of any license... [NHPA Section 106, emphasis added]

- A foreclosure finding by the Council means that, in the Council's opinion, the agency has failed to comply with Section 106, and thus has violated a Federal law. This will be good evidence that you have probably failed to comply completely with NEPA, as well.
- A foreclosure finding will leave your CO, and your Service in general, very vulnerable to citizen lawsuits. Noncompliance with Section 106 has led to litigation, restraining orders, injunctions, and high costs to the Government, both in dollars and in community good will. Federal agencies have lost millions of dollars and experienced years of project delay because of noncompliance.

3. Recommendations

- To minimize the risk of foreclosure, try to initiate Section 106 review as early as possible in the planning process. Always get it done before a final decision is made about whether to proceed with the project, before funds are spent on things like advanced design or purchase of materials, and if possible before your CO or others become fixed on a single preferred alternative.

- Think about compliance needs when you're working on your annual budget, too, or when you're advising your division chief, your director, or your CO on budget matters. Although NHPA does not provide appropriations, Section 110(g) of NHPA authorizes expenditure of project and program funds to support preservation work, such as compliance with Section 106 and doing work called for in an MOA. You will have to meet your compliance requirements through the normal budget process. If you think about what your needs may be when you and others put together the Installation or project budget, you can avoid getting caught short later.

D. Things to Remember

1. The Federal agency and its staff -- that is, you and your superiors -- are responsible for compliance with Section 106. It is not up to the SHPO, the Council, the National Park Service, or anyone else to force you to comply, make decisions or determinations for you, or issue Notices of Violation.
2. You must consider effects not only on properties already included in the National Register, but also on eligible properties. It is your responsibility -- not that of the SHPO, Council, or anyone else -- to see to it that eligible properties are identified, evaluated, and considered.

3. Use the identification process to identify concerned parties, as well as historic properties.

4. Determine eligibility for the National Register solely on the historical, architectural, or cultural significance of a property. Management, mission requirements, and treatment are not to be considered when evaluating properties.

5. Do consider cost factors and mission requirements when negotiating with the SHPO, Council, and others about how historic properties will be managed or treated. The law doesn't require that we preserve all historic properties in place -- only that we properly consider them and make decisions in the public interest, following the Council's regulations.

6. You will be at greatest risk if you fail to follow the steps required by the regulations, and if you fail to consult properly with the SHPO, Council, and other interested parties such as Indian tribes and local groups.

7. Comply with the law early in planning an undertaking. This maximizes the alternatives you can consider to integrate preservation with other mission activities.

8. NHPA provides authority (under Section 110(g) of the Act), but no appropriation, to fund planning, management, and preservation of historic properties. You must meet compliance needs through your normal planning, programming, budgeting, and execution processes.
E. Training in Section 106

- **ACHP and GSA Interagency Training Center:** "Introduction to Federal Projects and Historic Preservation Law." 3-day general introduction, emphasis on Section 106. Contact ACHP, Office of Education and Preservation Assistance, (202) 606-8505.

- **ACHP and University of Nevada, Reno:** "Preparing Agreement Documents." Advanced seminar in preparing MOAs, PAs, etc. under 36 CFR Part 800. Contact Leanne Stone, UNR, Division of Continuing Education, (702) 784-4046.

- **Department of Defense:** "Historic Preservation and Section 106 Compliance." 3-day introduction to historic, cultural, and archeological resource stewardship, and Sections 106 and 110 of NHPA. Contact Ron Johnson, Southern Division, NAVFACENGCOM, PO Box 190010, North Charleston, SC 29419-9010; (803) 743-0990.

- **Special tailored training** available on limited basis from ACHP and University of Nevada, Reno. Contact ACHP, Office of Education and Preservation Assistance, (202) 606-8505.

F. Re-cap of NEPA/Section 106 Integration

1. NEPA and Section 106 reviews can and should be coordinated, though compliance with one statute does not constitute compliance with the other.

2. In order to be sure that an action is a CATEX, you must be sure that no historic properties will be affected. This requires performing the first few steps in the Section 106 process: determining whether the action is an undertaking, defining the Area of Potential Effects, identifying any properties there that might be historic, and applying the National Register Criteria to them.

3. If you're doing an EA or an EIS, you should begin identification of historic properties -- by assessing your
information needs -- when planning the EA or doing scoping for the EIS. You should then identify historic properties and determine whether the action will affect them -- by applying the Criteria of Effect and Adverse Effect -- as part of preparing the EA or DEIS.

4. You can then use the EA or DEIS as documentary support for the determinations you send to the SHPO and/or Advisory Council and others -- determinations of no effect, no adverse effect, or adverse effect.

5. If you have to consult to resolve adverse effects, or negotiate to get acceptance of a no effect or no adverse effect determination, the results -- for example, an MOA -- should be documented in the FEIS, or in supplements to the EA.

6. Section 106 review should always be completed before a CATEX, EA/FONSI, or EIS/ROD is issued.
Figure One: The Section 106 Review Process

1. **Undertaking?**
   - Yes: Proceed to next step.
   - No: End process.

2. **Determine Area of Potential Effects**

3. **Identification**
   - No historic properties: End process.
   - Historic properties present:
     - Assess information needs
     - Good faith effort
     - Evaluate

4. **Determine Effects**
   - No Effect?
     - No Adverse Effect? Review by ACHP
     - Adverse Effect? Consult to Resolve Adverse Effects

5. **Public**
   - MOA
   - ACHP comment
Figure Two: Coordinating Section 106 and NEPA Reviews

**LEGEND**

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>CX</td>
<td>Categorical Exclusion</td>
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<tr>
<td>DEIS</td>
<td>Draft Environmental Impact Statement</td>
</tr>
<tr>
<td>EA</td>
<td>Environmental Assessment</td>
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<tr>
<td>EIS</td>
<td>Environmental Impact Statement</td>
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<tr>
<td>FEIS</td>
<td>Final Environmental Impact Statement</td>
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<tr>
<td>FONSI</td>
<td>Finding of No Significant Impact</td>
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<tr>
<td>MOA</td>
<td>Memorandum of Agreement</td>
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<tr>
<td>ROD</td>
<td>Record of Decision</td>
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</tbody>
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**Diagram Details**

- **CX/EA**
  - Early design
  - Environmental analysis
    - EA
    - Review of EA
    - FONSI

- **SECTION 106**
  - Assess information needs
  - Identification, evaluation
  - Effect determination
    - Review of effect determination
    - Consultation to resolve adverse effect
      - MOA or Council comment

- **EIS**
  - Scoping
    - DEIS preparation
    - DEIS
    - Review of DEIS
    - FEIS preparation
    - FEIS
    - ROD
Case Study Workshop: Use of Historic Properties, Part 1

Your CO receives a letter from the Military History Society of Western Washafornia. The Society is concerned about the condition of Building 12, the World War II-era Operations Center. The building has been underutilized at best for many years. The Society argues that because of its significance in the military history of Washafornia and the Nation, AirCav should either rehabilitate Building 12 and use it for appropriate contemporary mission purposes, or turn it over to the Society for use as a museum.

Your CO routes the letter to your Legal Office and to you, and schedules a briefing.

What do you tell the CO?
IV. General Use of Historic Properties

A. Giving Priority to Use

Section 110(a)(1) of NHPA establishes a specific mandate based on the general policy that historic properties should be viewed as valuable assets to be retained, sensitively managed, and used to best advantage. It requires that prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency [16 U.S.C. 470h-2(a)(1)].

Note that Section 110(a)(1) requires agencies to give priority to the use not only of historic properties that they own or control, but to any such properties that are available to the agency. Available historic properties might include those available for lease, purchase, or exchange.

B. Providing for Unused Historic Properties

Section 111 of NHPA recognizes that agencies cannot always use historic properties for their original purposes. It challenges agencies to find other uses for historic properties, while retaining their significant characteristics. Section 111 contains specific provisions for historic properties an agency doesn’t use, including adaptive use and leasing.

Section 111(a) of NHPA requires that Notwithstanding any other provision of law, any Federal agency, after consultation with the Council, shall, to the extent practicable, establish and implement alternatives for historic properties, including adaptive use, that are not needed for current or projected agency purposes, and may lease an historic property owned by the agency to any person or organization, or exchange any property owned by the agency with comparable historic property, if the agency head determines that the lease or exchange will adequately insure the preservation of the historic property.
Section 111(b) provides that the proceeds of any lease under subsection (a) may, notwithstanding any other provision of law, be retained by the agency entering into such lease and used to defray the costs of administration, maintenance, repair, and related expenses incurred by the agency with respect to such property or other properties which are on the National Register which are owned by, or are under the jurisdiction or control of such agency.

Section 111(c) allows a Federal agency, after consultation with the Advisory Council on Historic Preservation, to enter into contracts for the management of such property.

C. How Historic Properties Can Be Used

"Use" of a historic property can involve continuing an existing use, or putting the property to new use, or adaptive use.

1. Continuing use maintains a property in its traditional use. Examples include:

   • continuing use of a historic administrative building for administrative purposes;

   • continuing use and maintenance of a historic bridge;

   • updating a facility with new technology, provided the property is not drastically altered by the technological change;

   • continuing use of a traditional religious site by Native Americans for religious activities; or

   • continuing use of a plant procurement area by traditional basketmakers.

Continuing use may result in some changes to a property. For example, a historic building may need upgrading of its HVAC systems that could alter some of its significant characteristics, or use of a traditional religious site by practitioners of the religion may alter or
disturb archeological deposits at the site. It is often appropriate to establish mechanisms for controlling such changes, or to document the resource before such changes take place. Guidance for doing so is available in "Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines," and in "The Secretary of the Interior's Standards for Rehabilitation and Illustrated Guidelines for Rehabilitating Historic Buildings." Both are included in your course material.

2. Adaptive use adapts a property to a new purpose. Examples include:

- converting an industrial facility for use as an administrative building;
- using an archeological site for purposes of public education and interpretation;
- using an archeological site as part of a recreational area;
- converting a historic housing unit into an interpretive center;
- converting historic barracks into a technological center; and
- converting a historic hangar into a curation facility.

D. Documenting Changes

1. Both continuing and adaptive use may require that some changes be made in the character or use of a property, usually through rehabilitation. Section 110(b) of NHPA requires that these changes be documented. Examples of such documentation include, but are not limited to:

- conducting historical research and/or engineering documentation before upgrading highly technical or scientific facilities or scrapping ships or aircraft; and
• minimizing and documenting any disturbance of an archeological site while using it for purposes of interpretation.

2. The Federal Records Act (FRA) requires agencies to preserve Federal records of potential historical value, which may include the administrative records of a facility, following procedures promulgated by the National Archives and Records Administration. This requirement needs to be kept in mind during implementation of an adaptive use plan, during which there is a high potential for discarding records. Destruction or removal of Federal records in violation of FRA carries a fine of $2,000 or three years in jail, or both (18 U.S.C. 2071) FRA is discussed more fully in Section IX.

E. Case Study Application

Given what we've just discussed, how will you brief the CO about the Society's letter?
Case Study Workshop: Maintenance of Historic Properties

Your CO receives a letter from the Bumstead Society of America, requesting permission to bring a tour group to Fort Monitor to view and document the Quad. According to the Society, the Quad is a premier example of the work of Herbert B. Bumstead & Associates, a famous 19th-century landscape architecture firm.

The Quad is in the secure part of the base. Originally designed as officer's housing, it is a complex of once-handsome old brick houses, set around an open quadrangle of green space studded with trees and other plantings. The buildings were converted to non-residential uses during the Viet Nam war. However, they now house various supply and administrative functions. Some of them have been heavily modified, for example, by having porches removed or bricked in, wings added or removed, and windows replaced. Some have had their entire interiors removed to make way for the new functions. A number are unused, and are just boarded up.

The open space has not been very consistently maintained; many of the trees and other plantings are dead or dying, or have been removed. A HMVEE parking area occupies the east end of the Quad. Most of the changes took place before AirCav assumed control of Fort Monitor, but some building conversion has occurred since AirCav arrived, and the lack of maintenance has continued.

The CO wants to accommodate the Bumstead Society and directs you to coordinate their visit, but he raises the question, "Are we going to get an NOV or something for the way the Quad's been taken care of?"

What do you think?
V. Maintenance of Historic Buildings, Structures, and Designed Landscapes

A. Introduction

Whether a property is kept in continuing use or is modified for adaptive use, decisions must be made about how it is to be maintained. Maintenance usually involves applying measures that fall within the definition of "preservation" as offered by the National Park Service's Preservation Assistance Division (see B, below). In some cases, elements of rehabilitation, restoration, and reconstruction may be involved. To discuss how a property like the Quad should be maintained, we need first to look at some definitions.

B. Definitions

*Historic property:* any district, site, building, structure, or object included in or eligible for inclusion in the National Register [NHPA § 301(5), emphasis added].

Note that landscapes can be eligible for inclusion in the National Register. This includes designed landscapes such as parade grounds, gardens, parks, and the landscaping surrounding historic buildings and structures, as well as non-designed landscapes that reflect human activities, such as distinctive agricultural patterns.

*Preservation:* the act or process of applying measures necessary to sustain the existing form, integrity, and materials of a historic resource. Work -- including measures to protect and stabilize the property -- generally focuses upon the ongoing maintenance and repair of historic materials and features, rather than extensive replacement and new construction. The limited and sensitive upgrading of mechanical, electrical, and plumbing systems and other code-required work to make properties functional is appropriate within a preservation project.
Rehabilitation: the act or process of making possible a compatible use for a property through repair, alterations, and additions while preserving those portions or features which convey its historical, cultural, or architectural values.

Restoration: the act or process of accurately depicting the form, features, and character of a property as it appeared at a particular period of time by means of the removal of features from other periods in its history and reconstruction period. The limited and sensitive upgrading of mechanical, electrical, and plumbing systems and other code-required work to make properties functional is appropriate within a restoration project.

Reconstruction: the act or process of depicting, by means of new construction, the form, features, and detailing of a non-surviving site, landscape, building, structure, or object for the purpose of replicating its appearance at a specific period of time and in its historic location.

Treatment: those measures applied to a property in order to make it suitable for use.

C. Changes

Decisions regarding the use and treatment of historic resources should first address the fundamental question of whether the proposed use is compatible with the historic resource, or whether the proposed use will require such extensive modification of the resource, or will subject the resource to such extensive wear and tear, that it is likely to lose those characteristics that make it significant.

Making changes in buildings and landscapes are undertakings that must be reviewed under Section 106.
D. Neglect

The Section 106 regulations define neglect as an adverse effect on historic properties, so a decision not to maintain a historic building or designed landscape should be reviewed under Section 106.

E. Section 110(a)(1) of NHPA

Section 110(a)(1) of NHPA specifies that The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency.... Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established [by the Secretary of the Interior] pursuant to Section 101(g), any preservation, as may be necessary to carry out this section.

F. Standards and Guidelines

The Section 110 Guidelines for Section 110(a)(1) provide extensive guidance about how to assume responsibility for historic properties. The specific professional standards referred to in Section 110(a)(1), however, are the Secretary of the Interior’s Standards and Guidelines for Archeology and Historic Preservation [48 FR 44716-44742]. This contains Standards and Guidelines on Historic Preservation Projects that address treatment -- including maintenance -- of historic properties.

G. The Secretary of the Interior’s Standards for Treatment of Historic Properties

The Section 110 Guidelines call on Federal agencies to treat historic properties -- including buildings, structures, and landscapes -- in a manner consistent with the Secretary’s Standards, which are referenced above. Because most major work on historic properties falls in the category of rehabilitation, the ten standards for rehabilitation are summarized as follows:
1. Use historic buildings and landscapes for their historic purposes, or for new purposes that require minimal change to the features that define their character.

2. Retain and preserve materials, features, and spaces that define the character of the property.

3. Recognize the property as a product of its own time, place, and use. Don’t make changes that create a false sense of its historical development.

4. Most properties change over time; respect those changes that have acquired historical significance in their own right.

5. Preserve distinctive features, finishes, and examples of construction techniques and craftsmanship.

6. If possible, repair deteriorated features rather than replacing them. If they are so deteriorated that they must be replaced, make the replacement match the original in design, color, texture, and other visual qualities, and where possible in materials. If original features are missing altogether, replace them based on documentary, physical, or pictorial evidence.

7. Avoid chemical or physical treatments like sandblasting, that damage historic materials. Clean the surfaces of structures using the gentlest means possible.

8. Protect and preserve archeological resources.

9. Design new construction to avoid damage to existing historic materials. Differentiate new from old, but make it compatible with the massing, size, scale, and architectural features of the historic property and its environment.

10. Design new additions and other new construction so that if removed in the future, the form and integrity of the historic property and its environment will still be intact.
Note that the Standards are to be applied in a reasonable manner, taking into consideration economic and technical feasibility [Standards, 1992].

A copy of the National Park Service’s publication, “The Secretary of the Interior’s Standards for Rehabilitation and Illustrated Guidelines for Rehabilitating Historic Buildings,” is included in your course materials in the folder of publications.

H. Common Maintenance Problems

Like the Quad, many properties on installations have been poorly maintained or thoughtlessly modified. Common problems include:

1. Unnecessary and/or inept “mothballing” -- that is, boarding up a building that is not currently needed, and leaving it without maintenance.

2. Cleaning the surface of a building in destructive ways -- for example, by sandblasting.

3. Improper repointing of masonry -- for example, using Portland cement.

4. Gutting a building or removing its interior features to accommodate new uses.

5. Renovation or other insensitive modification of a building or landscape without first considering the alternative of rehabilitation.

6. Deferred maintenance of buildings and landscapes, leading to their deterioration.

7. Replacing original windows with new windows, which are usually visually inconsistent with the historical appearance of a building.

8. Insensitive installation of fire safety, communications, and security equipment through original ceilings, woodwork, wainscots, etc.
9. The cumulative effects of small-scale changes that may ultimately destroy the historic character of a building or landscape.

Such damage is usually unnecessary if planning, construction, and maintenance staff know how to work with historic buildings and landscapes. It is often also the least cost-effective way to deal with historic buildings and landscapes, because it unnecessarily wastes the Government's original investment and because it often creates an unsatisfactory product -- for example, a building that is less energy efficient than it was originally, that costs more to maintain, or that is simply an uncomfortable, unpleasant place in which to live or work.

I. Guidance Material

There is a wealth of guidance material available to assist in maintaining historic buildings, structures, and landscapes properly. Service guidance includes:

  — "Historic Materials Source Book for Army Family Housing" (1975)

- Air Force: "Standards and Guidelines for Rehabilitating Historic Buildings" (proposed)


Other examples include:


Preservation Brief 31: Mothballing Historic Buildings.

Preservation Brief 32: Making Historic Properties Accessible.

J. Examples of Training in Maintenance of Historic Buildings and Landscapes


- Basic Stonework, National Park Service, Southeastern Field Office. Contact Christian C. Bookter, NPS SFO, Appalachian System Support Office, Stewardship Partnership Team 75 Spring Street SW, Atlanta, GA 30303. (404) 730-2211.
• Masonry Stabilization/Plaster Conservation -- Learning and Doing, and Plasters, Adobe, Paint: Conservation of Historic and Prehistoric Wall Surfaces (2 courses). National Park Service, Southwest Region. Contact Jake Barrow, NPS SWRO, Division of Conservation, P.O. Box 728, Santa Fe, NM 87504-0728. (505) 988-6861.

• Building Manager Training on GSA’s Historic Building Preservation Plan (HBPP). Georgia Institute of Technology, Center for Public Buildings, Economic Development Institute. Contact John Myers, 245 4th St. NW, Atlanta, GA 30332-0640. (404) 894-3390. (Note: Oriented primarily toward GSA participants.)


• Historic Plaster Repair. Historic Windsor, Inc. Contact Judy L. Hayward, P.O. Box 1777, Windsor, VT 05089. (802) 674-6752.

K. Case Study Application

Based on what we’ve discussed, what do you tell your CO about the Quad and the Bumstead Society?
Case Study Workshop: Use of Historic Properties, Part 2

The CO receives another letter. This one is from the Native American Litigation Corporation (NALC), representing the Motomak Indian Tribe. The letter asserts that AirCav is violating the constitutional rights of the Motomak by using Training Range Q-2. Range Q-2, according to NALC, contains at least three areas traditionally used by the Motomak for religious and cultural activities:

- Monster Rock, a hilltop where visions have been sought since time immemorial by Motomak religious practitioners;

- Sacred Swamp, where herbal medicines have been collected for generations; and

- The banks of ditch 17-12, constructed in 1972, where the tribe has gathered cattail pollen used in religious rites ever since the ditch drained nearby Muddy Marsh, which used to be the only place such cattails grew.

Citing the First Amendment to the Constitution and the American Indian Religious Freedom Act, NALC insists that Fort Monitor preserve and maintain Sacred Swamp and Ditch 17-12, restrict public access to them, refrain from any activities that could affect them, ensure the Motomak Tribe's full access to them, and restrict public access to information about their religious character in order to protect the Motomaks' ability to use the areas.

The CO asks for a briefing on how to respond to NALC's letter.

What do you tell him?
VI. Laws and Regulations Relating to Native American Uses of Land and Cultural Resources

A. American Indian Religious Freedom Act (AIRFA)

The American Indian Religious Freedom Act (AIRFA) (42 U.S.C. 1996) establishes as the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

AIRFA has been interpreted by the courts to require agencies to consult with Indian tribes and other Native American groups about activities that may impact their exercise of religion, including access to religious sites. Such sites may be eligible for inclusion in the National Register, so effects on them are also subject to Section 106 review.

Although compliance with Section 106 does not substitute for compliance with AIRFA, compliance with both statutes can be coordinated, where both are applicable, by ensuring that potentially concerned Native American groups are contacted and brought into the process of consultation under Section 106. Consultation should be initiated as early as possible in planning (when planning an identification effort, for example), and should be carried out in a manner that is sensitive to the cultural values of the concerned group.

B. Religious Freedom Restoration Act (RFRA)

The Religious Freedom Restoration Act of 1993 augments AIRFA by establishing judicial standards for agency actions. Thus, if Native American religious practitioners show that, for example, low-level aerial training maneuvers over a sacred area substantially burdens their exercise of religion, and the matter were to go to court, the responsible agency would need to demonstrate that (a) the training furthers a compelling
governmental interest, and that (b) there is no alternative way of furthering that interest which would have less burden on the religious practices of the objecting parties.

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest. [P.L. 103-141]

C. National Historic Preservation Act (NHPA)

NHPA, as amended, provides that:

• Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register. [Section 101(d)(6)(A)]

• In carrying out its responsibilities under Section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A). [Section 101 (d) (6) (B)]

• The head of a Federal agency or other public official receiving grant assistance pursuant to this Act, after consultation with the Secretary, shall withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may:

  (1) cause a significant invasion of privacy;
  (2) risk harm to the historic resource; or
  (3) impede the use of a traditional religious site by practitioners. [Section 304(a)]
• When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to subsection (a), the Secretary (of the Interior) in consultation with such Federal agency head or official, shall determine who may have access to the information for the purpose of carrying out this Act. [Section 304(b)]

• When the information in question has been developed in the course of an agency’s compliance with section 106 or 110(f), the Secretary shall consult with the Council in reaching determinations under subsections (a) and (b). [Section 304(c)]

D. Archaeological Resources Protection Act (ARPA)

ARPA requires Federal land managers to notify Indian tribes of possible harm to sites having religious or cultural importance before issuing an ARPA permit. If a permit issued under this section may result in harm to, or destruction of, any religious or cultural site, as determined by the Federal land manager, before issuing such permit, the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of §470hh of this title [16 U.S.C. §470cc(c)].

Section 7.7 of the ARPA regulations (32 CFR Part 229) specify how Federal land managers are to comply with this requirement. In brief, such notice to any tribe or other Native American group must be made at least 30 days before issuing an ARPA permit. An agency must identify tribes with aboriginal or historic ties to the land over which it has jurisdiction and work with them to learn the location and nature of specific sites of religious or cultural importance for land management purposes, and should seek the same information from any Native American group it learns of with similar ties to agency land. An agency may enter into agreement with any Indian tribe or other Native American group for determining locations for which such tribe or group wishes to receive notice under this section. [32 CFR 229 §7.7(b)]
E. Consultation with Native Americans

Each of the above laws will be discussed in greater detail in later chapters. It is important to note here, however, that consultation with Native Americans is a critical component of all of the above statutes and their implementing regulations.

The Air Force has issued guidance on consultation with Native Americans, which can be found in AFI 32-7065, and the Navy is now offering a course on Native American consultation. General guidance is also available in the Advisory Council on Historic Preservation's "Compendium of Policy Statements: Native American Concerns."

F. Case Study Application

Given what we've just discussed, and what we discussed in the previous section, how will you brief the CO about NALC's letter?
Case Study Workshop: Community Resources and Lifeways

The master planners at Fort Monitor are revising the installation Master Plan. Because of increased security needs associated with the training and rapid deployment needs of the 17th AirCav, major changes are proposed in public access routes.

The existing Main Gate, on the east side of the installation, will be closed, and a new main gate will be opened on the south side. This will enhance security by reducing the potential for uncontrolled public access to the installation from the town of Monitorville, adjacent to the east. It will also permit installation of protective berms and electronic surveillance systems in the new main gate complex.

The town of Monitorville has grown up over the last hundred years in intimate association with Fort Monitor. Monitor Boulevard, the town’s main street, ends at the present Main Gate, which was constructed in 1965 but occupies the same site as main gates dating back to the beginning of the Fort’s use. Most of the businesses along Monitor Boulevard cater to the needs and interests of Fort Monitor personnel and dependents.

Every year since 1948, the town has held "Fort Monitor Day" on April 16, the day the Fort was established. Monitor Boulevard is closed to traffic for the day, and a street festival honors the Fort and its contributions to the community.

The three-block neighborhood just south of the Monitor Boulevard commercial area is known as the Grey Wolf Ward. Almost all of its residents are retired military personnel and dependents, with hospital, dispensary, and PX privileges at Fort Monitor. Residents of the Ward are major contributors of time, labor, and money to Fort Monitor Day each year.

You are asked to advise the master planners about how cultural resources should be considered in planning the new main gate complex, and in preparing an EA on the
Master Plan revision. You advise them about the need to identify any historic properties that might be affected, so that they can be addressed under Section 106 and NEPA.

Are there any other cultural resource concerns you ought to make sure the Master Planners consider?
VII. NEPA and Community Resources and Lifeways

A. NEPA

1. General policy

*It is the continuing responsibility of 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 to the end that the Nation may --*

... assure for all Americans safe, healthful, productive, and aesthetically and *culturally* pleasing surroundings ...

... preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which support(s) *diversity* and *variety* of individual choice ... [NEPA § 101(b), emphasis added]

2. Social science studies

*All agencies of the Federal Government shall --*

... utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and *social sciences* and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment... [NEPA § 102, emphasis added]

3. Definition of "human environment"

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the *relationship of people with that environment*. ... This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these
effects on the human environment. [40 CFR § 1508.14, emphasis added]

4. Effects to be considered

Effects to be considered under NEPA include ...aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative (effects). [40 CFR § 1508.8]

B. Integrating Community Resources and Lifeways into Cultural Resource Management and Planning

1. Usually, community resources and lifeways are not effectively dealt with in Federal agency planning. If the effects of Federal actions on lifeways are addressed at all, it is often only in economic terms. Often, community lifeways are not viewed as resources to be explicitly identified and considered, in consultation with the community that may value them.

In contrast, in 1985-86, the American Folklife Center in the Library of Congress, in cooperation with the Utah SHPO, conducted the Grouse Creek Cultural Survey, a coordinated study of both the historic properties and the lifeways of a Mormon cowboy community in northwest Utah. The resulting report provides a solid basis for understanding the values, beliefs, and social institutions of the area's people -- the culture of which historic properties form one small part.

The following quotes are from the final chapter of the Grouse Creek report:

"A planner might ask: 'What actions would encourage the continuation of a community's culture into the future'..."

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"Grouse Creek's Mormon cowboy culture will continue only as long as ranches remain profitable and governmental actions do not adversely affect them."

"Talking to ranchers every day raised the question of the role we might play in preserving their traditional way of making a living."

(As the survey was getting underway) "...the federal agency responsible for overseeing public land, including grazing land -- circulated a draft of the Box Elder (County) Resource Management Plan and Environmental Impact Statement...."

"Five paragraphs under the heading Cultural Resources describe prehistoric archeological sites and historic sites.... The plan does not mention Grouse Creek's Mormon cowboys. Ranching appears only in the section titled Socioeconomics, which describes the overall economic situation of four typical (but hypothetical) cattle and sheep operations and assesses the impact of the (plan's) four management options on their income and capital value..."6

2. The authors of the report go on to provide recommendations:

"How would a plan that includes the ... information from the Grouse Creek Cultural Survey help conserve culture? First, the additional information would enrich the plan's description of cultural resources and link them in an important way to its socioeconomic analysis. And since the draft of the plan is itself a part of a political process -- the solicitation of comments and the round of public hearings that precede decisionmaking -- the inclusion of the survey's findings would have meant that Grouse Creek's Mormon cowboy culture would have been explicitly considered by all participants in the process."7

6 Ibid pp. 64-65

7 Ibid pp. 65
3. A guide to the preparation of EAs and EISs⁸ identifies "Ways of Life" as an aspect of the environment to be considered, and defines this aspect to include:

- subcultural variation;
- leisure and cultural opportunities;
- personal security;
- stability and change;
- basic values;
- symbolic meaning;
- cohesion and conflict;
- community identity; and
- health and safety.

C. Case Study Application

Considering what we've discussed, what should you tell the master planners about the potential effect of the Main Gate relocation project on community resources or lifeways?

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⁸ Larry H. Freeman: How to Write Quality EISs and EAs. Shipley Associates, Bountiful, Utah, 1992:41
As planning for conversion of Building 579 continues, a long unused storeroom in the hangar is opened and found to contain row upon row of file cabinets.

The cabinets turn out to be mostly full of papers that appear to represent the procurement, personnel, and operational files of the 12th Lighter-Than-Air Squadron, which operated out of Fort Monitor between 1937 and 1948. There is also one file drawer labeled "Historic American Buildings Survey drawings: 1957," and another labeled "Archeological studies: 1960." Another drawer contains unlabeled, highly flammable moving picture film.

The file cabinets are a fire hazard, and need to be cleared out right away. A memorandum reporting this "find" has been referred to you for advice on disposing of the materials. What is your advice?
VIII. Documents and Records

A. Introduction

As an official with responsibilities regarding cultural resources, you may not be directly and routinely responsible for managing records, except those of your immediate office. Under the Federal Records Act (discussed below), there is probably an officially designated Federal records officer, or perhaps several such officers, who have general responsibility for overseeing records management.

However, historical records constitute an important cultural resource, so you should be concerned about them and do what you can, in consultation with the Federal records officer, to ensure that they are properly managed.

All records generated by a Federal agency have the potential to document present actions for future generations. Types of records that help to document cultural resources and DoD stewardship of such resources include:

- historic property surveys;
- field notes and reports from archeological excavations;
- drawings and photographs of historic properties prior to alteration or demolition;
- architectural plans and specifications for altering historic properties;
- correspondence and internal memoranda associated with Section 106 consultation; and
- Memoranda of Agreement on DoD undertakings.

Several laws provide more or less mutually supportive direction.
B. The Federal Records Act

1. The Federal Records Act (FRA)\(^9\) requires that Federal agencies establish and maintain records management programs.

2. Management of Federal records is overseen by the National Archives and Records Administration (NARA).

3. NARA's manual\(^10\) on records disposal defines Federal records as follows:

   all books, papers, maps, photographs, machine-readable material, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them.

4. NARA's manual divides Federal records into two categories:

   - Temporary records: those approved by NARA for disposal, either immediately or after a specific retention period; and
   - Permanent records: those appraised by NARA to have sufficient historical or other value to warrant their preservation beyond the time period they are

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needed by the agency that produced or received them.

5. Federal agencies are required by FRA to inventory and evaluate their records holdings and determine which are temporary and which are permanent. They are then to set up disposal schedules, which must be reviewed and approved by NARA.

6. An agency can dispose of records by transferring them to a NARA-approved repository or to one of NARA's Federal record centers, provided the agency fulfills specific requirements set forth in NARA's manual. When an agency transfers records to NARA, it also transfers legal title.

7. Permanent records are to be transferred once they are no longer needed by an agency to conduct its business. According to NARA, this usually occurs after thirty years for paper records, after five to ten years for audiovisual and microfilm records, and as soon as they become inactive or the agency cannot maintain them for electronic records.

8. Only non-record material such as copies of correspondence, duplicates of documents, trade journals, catalogues, routing slips, and forms may be discarded without NARA approval.

9. Unauthorized destruction or removal of Federal records is punishable by a fine of not more than $2,000 or not more than three years in jail, or both.\textsuperscript{11}

C. Section 112(a)(2) of NHPA

Section 112(a)(2) of NHPA, which was added to the statute in 1992, requires that each Federal agency ensure that records and other data, including data produced by historical research and archaeological surveys and excavations are permanently maintained in appropriate data bases and made available to potential users

\textsuperscript{11} 18 U.S.C. 2071.
pursuant to such regulations as the Secretary shall promulgate.

D. Archaeological Resources Protection Act

A similar provision of the Archaeological Resources Protection Act (ARPA), which is discussed in more detail later, says:

...the archeological resources which are excavated or removed from public lands will remain the property of the United States, and such resources and copies of associated archeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution... [16 U.S.C. § 470cc(b)]

E. Section 110(b) of NHPA

Section 110(b) of NHPA requires each Federal agency to ...initiate measures to assure that where, as a result of Federal action or assistance carried out by such agency, a historic property is to be substantially altered or demolished, timely steps are taken to make or have made appropriate records, and that such records then be deposited, in accordance with section 101(a), in the Library of Congress or with such other appropriate agency as may be designated by the Secretary [of the Interior], for future use and reference.

Although DoD officials with responsibility for cultural resources may be confronted with what may seem to be competing mandates, they are all aimed at the permanent preservation of public records. Cultural resource managers should establish cooperative working relationships with their Service's records managers to ensure that all mandates are met in a way that makes the records and data available in reasonable form to potential users.
F. Case Study Application

Considering what we've discussed, what should Fort Monitor do about the records it has discovered?

What should Fort Monitor do about the records it is producing today?
Case Study Workshop: Permitting Excavation of Archeological Sites

The remains of Camp Monitor, the original cavalry post established during the Motomak Wars, lie in a wooded area just inside the southeast boundary of modern Fort Monitor. The site has been designated as open space in Fort Monitor's Master Plan to protect the archeological remnants of the Camp. It has never been excavated, but historical documents and what can be seen on the surface indicate that the camp itself consisted of a cluster of log buildings surrounded by an earth rampart and palisade. Immediately outside the rampart there was an internment camp for pacified Motomaks.

Fort Monitor has just gotten a new CO. After the change of command ceremony, the Mayor of Monitorville sponsors a reception.

At the reception, the Mayor approaches the new CO with a proposal for an exciting cooperative venture. The Mayor is an enthusiastic amateur archeologist, and a member of the Monitorville Archeological and Historical Society. He proposes that Fort Monitor enter into a cooperative agreement with the Society, under which the Society will excavate Camp Monitor. The results of the excavation will form the basis for a major exhibit in the museum the town is planning, helping townspeople and tourists alike understand and appreciate the importance of Fort Monitor in regional and U.S. history without having to compromise security by opening the site of Camp Monitor to visitors.

The CO receives this proposal with interest, and tasks you with finding out what needs to be done to make it happen.

What do you think would need to be done?
IX. Laws Regulating Archeological Excavations

A. The Archaeological Resources Protection Act (ARPA)

1. General policy and scope

a. Purpose

Secure, for the present and future benefit of the American people, the protection of archeological resources and sites which are on public lands and Indian lands...

Foster increased cooperation and exchange of information between governmental authorities, the professional archeological community, and private individuals having collections of archeological resources which were obtained before the date of the enactment of this Act. [16 U.S.C. 470bb(b)].

b. Scope

• Establishes uniform permit procedures for all agencies.

• Establishes the authority for the Secretary of the Interior to promulgate regulations for curation, exchange, and disposition of artifacts.

• Establishes prohibited criminal activities and criminal penalties.

• Establishes a system for rewards that may be given in exchange for information that leads to a civil or criminal sanction.

• Forfeiture may be used to obtain all archeological resources associated with the violation, as well as all vehicles and equipment used in the violation.

• Requests from the Tennessee Valley Authority and the Departments of Interior, Agriculture, and Defense intergovernmental cooperation and the adoption of regulations.
• Promotes cooperation between private individuals and Federal authorities.

• Requires the Secretary of the Interior to report annually to Congress on the progress of and needed amendments to ARPA.

2. Responsibilities of Federal land managers under ARPA include:

• issuance and administration of archeological excavation permits;

• effective monitoring of the condition of archeological resources;

• cooperation between law enforcement and cultural resource personnel on Federal lands;

• obtaining consent of the Indian allottee or Indian tribe owning or having jurisdiction over lands where ARPA permits have been requested;

• setting forth permit requirements for archeological excavations;

• authority to initiate civil proceedings against violators;

• rewarding people who furnish information that leads to a conviction under either civil or criminal ARPA sanction provisions;

• participation and consultation in the development of their agency’s ARPA regulations;

• development of plans for surveying lands for archeological resources;
• preparing a schedule for surveying those lands with the most scientifically valuable resources;

• development and implementation of systems for reporting and recording archeological violations; and

• development and implementation of public awareness programs.

3. What is an "archaeological resource"?

Any material remains of past human life or activities which are of archeological interest, as determined under uniform regulations promulgated pursuant to this Act.

• pottery
• basketry
• bottles
• weapons
• weapon projectiles
• tools
• structures or portions of structures
• pit houses
• rock paintings
• rock carvings
• intaglios
• graves
• human skeletal materials

Nonfossilized and fossilized paleontological specimens...shall not be considered archeological resources...

No item shall be treated as an archeological resource...unless such item is at least 100 years of age. [16 U.S.C. 470cc(1)]

4. Uniform regulations

• Department of Agriculture: 36 CFR Part 296

• Department of the Interior: 43 CFR Part 7
5. **Permit system**

a. A Federal land manager is responsible for administering permits.

b. Permit to "excavate and remove archeological resources" may be issued by land manager only if:

- applicant is qualified to carry out the permitted activity (qualifications are specified in 32 CFR Part 229, Subpart A, § 7.8(a)(1));

- activity is undertaken for the purpose of furthering archeological knowledge in the public interest;

- resources removed from public land will remain the property of the United States, and be preserved by a suitable institution; and

- activity is not inconsistent with applicable management plans. [16 U.S.C. 470dd(b)]

c. If an individual not associated with the DoD takes the initiative to do archeological research on DoD's land, issuance of a permit to that individual is not considered a Federal undertaking subject to Section 106 review. On the other hand, if DoD initiates an excavation, the action becomes an undertaking subject to both Section 106 and ARPA.

6. **Confidentiality**

a. Information on location and nature of archeological resources is:

- exempt from the Freedom of Information Act;

- need not be made available to the public under "any other provision of law"; and
may not be made public unless the land manager determines that disclosure would:

- further the purposes of ARPA or the Archeological and Historic Preservation Act; and
- not create a risk to the resources.

b. Information must be provided to the Governor of a State, with specified safeguards [16 U.S.C. 470hh].

7. Cooperation

The Secretary of the Interior shall take such action as may be necessary...to foster and improve the communication, cooperation, and exchange of information between:

(1) private individuals having collections of archeological resources and data which were obtained before the date of the enactment of this Act; and
(2) Federal authorities...and professional archeologists..." [16 U.S.C. 470kk]

8. Savings

Nothing in this Act shall be construed to repeal, modify, or impose additional restrictions on the activities permitted under existing laws and authorities relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands. [16 U.S.C. 470ll(a)]


We will discuss aspects of NAGPRA in greater detail later, but there are some elements of the statute that must be addressed when considering issuing an ARPA permit.

1. NAGPRA deals with Native American cultural items, defined to include:

a. Human remains: the physical remains of a human body, including but not limited to bones, teeth, hair,
ashes, or mummified or otherwise preserved soft tissues
of a person of Native American ancestry.

b. Associated funerary objects: items that, as part of the
death rite or ceremony of a culture, are reasonably
believed to have been placed intentionally at the time of
death or later with or near individual human remains
that also are currently in the possession or control of a
museum or Federal agency.

c. Unassociated funerary objects: items that, as part of
the death rite or ceremony of a culture, are reasonably
believed to have been placed intentionally, either at the
time of death or later, but for which the associated
human remains are not in the possession or control of a
museum or Federal agency.

d. Sacred objects: items that are specific ceremonial
objects needed by traditional Native American religious
leaders for the current practice of traditional Native
American religion by their present day adherents.

e. Objects of cultural patrimony: items having ongoing
historical, traditional, or cultural importance central to
the Indian tribe itself, rather than property owned by an
individual tribal member.

2. NAGPRA provides that Native American cultural
items found on Federal and Indian lands are the property
of those Native American groups that are culturally
affiliated with them. Cultural affiliation is defined as a
relationship of shared group identity which can
reasonably be traced historically or prehistorically
between a present day Indian tribe or Native Hawaiian
organization and an identifiable earlier group.

3. NAGPRA permits the excavation of Native American
cultural items from Federal land only:

• pursuant to an ARPA permit issued after
consultation with culturally affiliated Native
American groups; and
• provided the disposition of such cultural items is in accordance with NAGPRA, i.e., they are made available for repatriation to the culturally affiliated groups.

C. ARPA, NAGPRA, and Section 106

Ground-disturbing projects on DoD or Indian land can require compliance with ARPA, NAGPRA, and Section 106. Complying with any one of these laws does not constitute compliance with the other laws. However, because the Section 106 consultation process is applicable to all DoD undertakings, it can be used to anticipate and address the procedural requirements of ARPA and NAGPRA as well.

For example, the Section 106 consultation that leads to a Memorandum of Agreement (MOA) governing a proposed undertaking can include the consultation with Native Americans that is required by ARPA and NAGPRA. When an undertaking requires excavation on DoD or Indian land, the MOA can include sufficient information to allow for issuance of the necessary ARPA permit. Even when it is not certain that excavation will recover Native American cultural items, the MOA and ARPA permit can anticipate the possibility of such recovery and can include an agreement with the appropriate tribe on how such items will be treated if found. This latter agreement would meet the requirements of NAGPRA.

In the event that such recovery is not anticipated and dealt with in an MOA and ARPA permit, NAGPRA requires that, upon discovery of such cultural items, project work be suspended for 30 days in order to deal with the discovery.

While each of these three laws imposes distinct requirements on DoD, project planning, consultation, and permitting can address all three in a coordinated fashion that saves time, money, and effort.
D. Case Study Application

Considering what we've discussed, what does Fort Monitor need to do in order to make the project a reality?
Case Study Workshop: Unauthorized Excavation of Archeological Sites

MPs have detected a minor security breach in the southeast corner of the installation. Someone has tunnelled under the perimeter fence and has dug some holes in the wooded open space there. It looks like the work of artifact collectors digging in the remains of old Camp Monitor.

The intrusion is not a serious problem for installation security, because it has occurred well outside the well-protected high security training and mobilization areas. The head of installation security suggests that maybe it is really your responsibility as installation Cultural Resource Officer to handle this infraction.

What should you do?
X. Archeological Resource Protection: Law Enforcement

A. Prohibited Acts Under ARPA

1. Excavation, removal, damage, alteration, defacement of archeological resources on Federal and Indian land without a permit.

2. Sale, exchange, transport, or receipt of any resource removed in violation of ARPA or any other Federal law or offer to do so.

3. Interstate or foreign commerce in any resource excavated, removed, sold, purchased, exchanged, transported, or received in violation of any State or local law. [16 U.S.C. 470ff]

B. Penalties

1. Criminal -- first offense
   • $10,000 fine, one year in jail, or both
   • If cost of restoration or repair of resource exceeds $500, penalty is a $20,000 fine, two years in jail, or both

2. Criminal -- subsequent offenses
   • Up to $100,000 fine, 5 years in jail, or both. [16 U.S.C. 470ff]

3. Civil -- Fine based on:
   • Archeological or commercial value of the resource
   • Cost of restoration and repair [16 U.S.C. 470gg]

4. Forfeiture
   • All archeological resources
   • Vehicles, equipment, etc. [16 U.S.C. 470hh]
C. Exclusions

1. Arrowheads located on the surface of the ground. [16 U.S.C. 470ee(g)]

"Arrowhead" means any projectile point which appears to have been designed for use with an arrow." [36 CFR § 296.3(b)]

2. Coins, bullets, and unworked minerals and rocks [36 CFR § 296.3(a)(4)(ii)]

3. Paleontological remains [36 CFR § 296.3(a)(4)(i)]

D. Other Relevant Laws

ARPA is only one of several legal vehicles that can be used to deter unauthorized digging of archeological sites. Often theft of government property is the most useful, and broadest, charge that can be brought against violators.

In the case of criminal prosecution, the U.S. attorney may decide to proceed using ARPA or other statutes, depending on the circumstances of the case and the local climate. It is also possible to bring multiple charges based on several statutes in prosecuting an incident. For example, a violator might be charged with a violation of ARPA, as well as a violation of statutes prohibiting the theft of Federal property. Other relevant Federal statutes address such things as injury to Federal property, embezzling Indian religious objects, trafficking in Native American human remains and cultural items, and conspiracy to commit these various crimes.

In addition, there may be State and local laws that apply to a violation.

E. Apprehending Violators: A Law Enforcement Activity

The responsibility for investigating violations of these laws, for apprehending the violators, and for referring cases for prosecution lies principally with appropriate
law enforcement personnel. Although managers of cultural resources should be involved in crime scene investigation and other aspects of enforcement, law enforcement personnel must take the lead for several reasons:

- ARPA violators may be armed and dangerous;
- ARPA violators may be involved with other illegal activities (e.g., drugs); and
- crime scene investigation requires special skills.

F. Cultural Resource Manager Involvement

Environmental protection specialists are necessary components of the enforcement team, serving to:

- assist in identifying any archeological resources;
- recognize how such resources may have been disturbed;
- evaluate the resources; and
- help assess the seriousness of damage and cost of repair.

G. Training

1. NPS: 12-hour course, "Overview of Archeological Protection Programs."


H. Additional Information


I. Case Study Application

Considering what we've discussed, what should you tell the head of installation security?
Case Study Workshop: Curation of Artifacts and Museum Collections

Thanks to AirCav's successful apprehension and prosecution of the people who were digging at Camp Monitor in violation of ARPA and NAGPRA, Fort Monitor has acquired the large collection of artifacts that the violators forfeited. This collection includes a great deal of 19th-century military paraphernalia and a large number of artifacts such as stone clubs, knives, shell ornaments, and human bones from the Motomak village site.

Fort Monitor has a small museum, run by volunteers, that displays uniforms, weapons, photographs, maps, journals, and other objects associated with the installation's history. The museum is housed in an otherwise unused World War II temporary building, and has minimal storage space.

The U.S. Marshal's Service backs a van up to your office and unloads 10 large crates of material forfeited by the diggers.

What do you do with this stuff?
XI. Curation of Artifacts and Museum Collections

A. What is "Curation"?

• Long term (often theoretically in perpetuity) care of a collection

• Making collection available for study and analysis

• May involve a wide variety of special procedures, depending on the nature of the collection.

• Involves care of both material items (artifacts, faunal and floral material, etc.) and records (field notes, photographs, digitized information, etc.)

B. Reasons to Curate

1. Results of archeological studies are of little or no value if not:

• translated into usable form through laboratory analysis; and

• retained for future study as new ideas arise and new techniques are developed.

2. Curation is required by ARPA when artifacts are recovered from Federal or Indian land. However, in some instances NAGPRA may require repatriation.

C. Ownership of Archeological Material

1. Federal land

• Native American cultural items are owned by relevant Native American groups, and must be repatriated to such groups in accordance with NAGPRA’s procedural requirements.

• Other material is owned by the Federal Government.

• Records of excavations, etc., are owned by the Federal Government.
2. Indian land

All material on Indian land belongs to the tribe.

3. State land

Unless otherwise provided for by law (e.g., State version of NAGPRA), all material on State land belongs to the State.

4. Private land

- Unless otherwise provided for by State or local law, all material on private land belongs to the landowner.

- Records of excavations, etc., carried out as the result of compliance with Federal law (e.g., compliance with Section 106) belong to the relevant Federal agency.

D. Legal Requirements

1. NHPA

*The Secretary [of the Interior] shall promulgate...regulations...ensuring that significant prehistoric and historic artifacts, and associated records, subject to [NHPA and ARPA] are deposited in an institution with adequate long-term curatorial capabilities. [16 U.S.C. 470(a)(7)(A)]*

- The Secretary of the Interior has issued these regulations as 36 CFR Part 79 (see Section G below). They are binding on all Federal agencies.

- Curation is routinely required in agreements executed under Section 106 and 36 CFR Part 800.

2. ARPA

A Federal land manager may issue a permit under ARPA only upon determining, among other things, that
the archeological resources...will remain the property of
the United States, and such resources and copies of
associated archeological records and data will be
preserved by a suitable university, museum, or other
scientific or educational institution. [16 U.S.C. 470dd(b)]

3. NAGPRA

Each Federal agency and each museum which has
possession or control over holdings or collections of
Native American human remains and associated
funerary objects shall compile an inventory of such
items...in consultation with tribal government and
Native Hawaiian organization officials and traditional
religious leaders...not later than a date that is 5 years
after the enactment of this Act... [25 U.S.C. 3003(b)]

Each Federal agency or museum which has possession
or control over holdings or collections of Native
American unassociated funerary objects, sacred objects,
or objects of cultural patrimony shall provide a written
summary of such objects...in lieu of an object-by-object
inventory...followed by consultation with tribal
government and Native Hawaiian organization officials
and traditional religious leaders...not later than the date
that is 3 years after the date of enactment of this Act... [25
U.S.C. 3004]12

After various consultations and other procedures,
agencies are to repatriate Native American cultural
items to Native American groups. [25 U.S.C. 3005]

E. Where to Curate

While curation of artifacts and records is required by the
laws and regulations, it is not necessary for a DoD
installation to establish its own curation facility. In most
cases, Federal agencies execute long-term loan
agreements with museums and academic institutions

12 NAGPRA was enacted on November 16, 1990. Therefore summaries of collections were due
November 15, 1993, while inventories of human remains and associated artifacts are due November 15,
1995.
that meet the standards set forth in 36 CFR Part 79 (see Section G below). These institutions can curate collections much more efficiently than a government agency usually can, because they can achieve economies of scale. They can also make materials and documents available for study more readily than an agency usually can.

If materials came from Federal land, however, DoD cannot donate them outright to an institution. The law requires that they remain the property of the U.S. Government.

F. Costs of Curation

Because a curatorial institution will incur costs in managing collections for years to come, most institutions charge fees for taking on Federal agency collections. Such fees are usually billed as lump-sum up-front charges, usually computed on the basis of X amount per cubic foot of materials or per linear foot of records.

G. Regulations

1. 36 CFR Part 79: Curation of Federally Owned and Administered Archaeological Collections

These regulations, which are in your course folder, establish the basic minimum requirements for the care of archaeological collections. Basic provisions:

- Handle, store, and clean artifacts and documents so that they are not broken and do not deteriorate. Climate-controlled environments are needed for sensitive artifacts and materials.

- Buildings housing archeological materials must meet basic fire codes. Documents should be in fireproof cabinets.
• Archeological materials should be stored in facilities that have basic security, such as locks on the doors and windows.

• The curation facility must have qualified staff.

• The responsible Federal agency must regularly inspect federal collections to ensure proper care.

• Religious and sacred objects can be used by appropriate Native American tribes.

2. NAGPRA regulations

• Issued in draft by Secretary of the Interior on May 28, 1993.

• Not yet finalized.

H. Other Museum Collections

1. In addition to the above laws and regulations specific to archeological collections and Native American cultural items, certain Government-wide rules apply to all museum collections. These include:

• Preservation, Arrangement, Duplication, Exhibition of Records (44 U.S.C. 2109)

• Disposal of Records (44 U.S.C. 3301 et seq).

2. Each military service also has its own regulations dealing with museum collections. These are:

• Army: AR 870-20

• Navy (& Marine Corps): SECNAVINST 5755.1A

• Air Force: AFR 190-4

According to the services' museum regulations, the primary mission of the military museum is to record and interpret the history of the military presence at a particular installation or the principal command.
associated with the facility. As a consequence, the museums division in each service is completely separate from cultural resource management activities at installations and bases.

In January 1990, the Chief Curator of the Army Center for Military History issued a Handbook for Commanders and Supervisors of Army Museums and Historical Holdings. This publication clearly states that “Army museums exist primarily to support military training and education.” It goes on to explain:

_They do this through a wide variety of programs and services that include exhibitions, demonstrations, tours, interpretative programs, publications, and workshops. Charged with maintaining and preserving the Army’s historical collection, these facilities also assist in various research activities and technological developments, and they serve as resource centers for the surrounding communities._

_Since the first Army museum was established at West Point in 1854, the Army Museum System has grown to include nearly 100 historical facilities in the active Army, National Guard, and Army Reserve. But such activities occasionally are viewed as anomalies in the military, because their functional value is obscured by the perception of an antiquarian agency absorbed with things of the past._ (Preface, _A Handbook for Commanders and Supervisors of Army Museums and Historical Holdings_, January, 1990)

a. Mission Statements

- **Army:** Army museums are required to develop a mission statement and have it approved by the Center for Military History. Included in the mission statement will be the parameters of the historical period covered and the definition of subject matter and its relationship to the missions of other museums with parallel subject areas.
• **Navy:** Navy museums are established to preserve and interpret the history of the United States Navy in order to educate naval personnel and the public in the heritage and traditions of the Navy.

• **Air Force:** In general, U.S. Air Force museums preserve and display the history of the installation and the assigned units and depict the missions performed at these installations and units over the years. Air Force museums are required to develop a collections statement and have it approved by the Secretary of the Air Force, Office of Public Affairs (SAF/PA).

b. **Responsibility**

• **Army:** The Chief of Military History (CMH) is charged with the final responsibility for the care and accountability of the museum’s artifacts. CMH owns the historical property, while the staff and the building belong to the unit or installation commander. Funding and operation of an Army museum is considered a privilege by the Department of the Army, which in turn requires all Army museums to become certified as professional organizations.

• **Navy:** Through the Director of Naval History, the Chief of Naval Operations (CNO) develops policy for and monitors the activities of Navy museums; oversees a cooperative effort by Navy museums to collect and preserve historical properties that best illustrate the themes under which the museums are established; and provides advice on the development of collections, conservation, restoration, exhibitions, and other interpretative programs.

Through the Commander, Naval Facilities Engineering Command, the CNO will administer museum building design and construction contracts. The Director of Naval History shall maintain the central register of all Naval historical properties (i.e., collections, artifacts, and archival materials).
• **Air Force:** The U.S. Air Force Museum Program is an organization under the operational control of the Commander, Air Force Logistics Command. The Secretary of the Air Force, through the Office of Public Affairs (SAF/PA), provides policy guidance for the museums. The Director of the Air Force museum program is also the Director of the museum located at Wright-Patterson Air Force Base.


DoD museum policy in general is to curate only archival materials and artifacts directly related to a museum’s mission and function. Most museums are therefore unable to acquire, collect, and display cultural resources not directly related to unit history or related museum function. Archeological materials and other non-military artifacts are largely barred from curation within museums unless they are directly connected with the military history.

I. **Case Study Application**

Based on what we've discussed, what do you think you can do with the collection that's just been delivered to you?

Does this case raise any questions about Fort Monitor’s overall collections management program?
Case Study Workshop: A Shipwreck

During the Motomak War, a group of Motomak warriors successfully scuttled the S.S. Mercantile, a commercial cargo vessel under charter to the Navy, as she lay off Fort Monitor preparing to resupply the garrison. As a result, Fort Monitor was deprived of vitally needed weapons, munitions, and supplies, and was nearly forced to surrender to the Motomak.

Spoils of War, Inc., a commercial treasure salvage company, claims to have identified the wreck of the Mercantile, and has applied to the State of Washafornia for a permit to excavate the wreck, dividing the material recovered with the State. Spoils of War claims that its salvage is urgently needed and in the public interest because the wreck is about to fall into the access channel to Fort Monitor's fuel pier. The Corps of Engineers dredges this channel periodically.

The State is considering the permit application under its rules implementing the Washafornia State Shipwrecks Code, which in turn implements Washafornia's responsibilities under the U.S. Abandoned Shipwreck Act. The Washafornia SHPO, who administers the State's shipwreck program, writes you inviting your participation in a public meeting to discuss the permit application.

Should Fort Monitor have any interest in this proposed recovery project? If so, what should you do?
XII. Salvage of Shipwrecks


1. The Abandoned Shipwreck Act established U.S. title to all abandoned shipwrecks embedded in submerged lands under U.S. waters, and in all such wrecks included in and determined eligible for the National Register.

2. The Act went on to transfer management responsibility for such wrecks to the States, except where such wrecks are in submerged lands administered by a Federal agency.

3. Guidelines for use by States in establishing shipwreck management programs were issued by NPS in 1990, and are found at 55 FR 50116-50145. The guidelines encourage:

   • identification of wrecks;
   
   • use of wrecks for research and interpretation in the public interest;
   
   • programs to provide nondestructive recreational access to wrecks;
   
   • careful control of activities that could be damaging to wrecks, such as research and commercial salvage; and
   
   • consultation with and partnerships among groups interested in shipwrecks.

4. Both the law itself and the regulations allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites. [43 U.S.C. 2103(a)(2)(C)]
B. Navy Policy on Shipwrecks

1. The Department of the Navy's policy on the wrecks of commercial Naval vessels under the Abandoned Shipwreck Act turns on the question of abandonment. The shipwreck is either formally abandoned by the Navy, or it is still the property of the Navy. Specific actions must be taken by the Navy to formally relinquish title of the vessel under Title 40 of the Property Disposal Statute. Anyone wishing to dive on a sunken Navy ship must first contact the Navy Historical Center at the Washington Navy Yard for permission to access the property.

2. The Navy has been known to “lease” the property or issue removal permits to groups wishing to dive on shipwrecks for academic purposes.

3. The Navy maintains a very cautious approach to allowing any group or individual access to shipwrecks, for several reasons:

   • danger of pollutants;

   • danger of unexploded ordnance; and

   • possibility that the wreck may be a "tomb" by virtue of containing the remains of its crew.

4. The Navy encourages cooperation with other agencies and individuals interested in preserving the Nation's maritime heritage. Documentation of wreck locations allows the Navy to evaluate, manage, and preserve important sites.

5. While the Abandoned Shipwreck Act applies only to sunken vessels, the Navy also maintains ownership of all downed Naval aircraft. Therefore, the Navy is responsible for managing these resources and is developing an inventory of such aircraft. In contrast, the Air Force has formally abandoned Air Force aircraft that crashed prior to 19 November 1961 (this position is based on the fact that records of such aircraft were destroyed by fire on that date.)
6. For a list of laws and regulations relating to submerged aircraft and shipwrecks, see the brochure in your course folder, "Policy Fact Sheet: Sunken Naval Vessels & Naval Aircraft Wreck Sites."

For additional information concerning historic U.S. Navy shipwrecks and aircraft, contact:

Naval Historical Center
Office of the Senior Historian
Washington Navy Yard
901 M Street SE
Washington, DC 20374-5060
(202) 433-7229/7230
Fax: (202) 433-3593

C. Other Laws Pertinent to Shipwrecks

1. As part of its custodial responsibilities under the National Historic Preservation Act (NHPA), DoD is obligated to protect its historic properties, including ship and aircraft wrecks. Theft of material from a DoD wreck should be reported to the U.S. Coast Guard, the Naval Historical Center, and the State Historic Preservation Officer or State Underwater Archeologist.

Wreck sites that are not entire aircraft or ships, but are parts strewn in a debris field, are considered archeological sites that must be managed by DoD in accordance with NHPA. Anyone wishing to recover parts from such a debris field must contact the appropriate Service for review of the project.

2. Wrecked Confederate Naval vessels, and the ships and aircraft of other nations lost to (captured by or surrendered to) the United States in war, are for the most part the property of the U.S. Government and are not subject to the terms of the Abandoned Shipwreck Act. If, however, the foreign government has not relinquished title, it remains the property of that government, even if sunk on U.S. submerged land. The General Services Administration (GSA) is responsible for administering access to such wrecks. Under treasure
trove law [40 U.S.C. 310], GSA is authorized to enter into contracts with potential salvors to recover cargo from such wrecks.

3. Wrecks beyond the boundaries of U.S. waters (which extend, generally, 3 geographical miles from the shore) are not subject to the terms of the Abandoned Shipwreck Act, but are subject to Federal admiralty law. Under admiralty law, a wreck and its cargo can be "arrested" by an admiralty court and placed in the custody of a claimant for purposes of salvage.

D. Case Study Application

What role, if any, do you think Fort Monitor has in the State’s review of Spoils of War’s application?

Does the Navy’s policy apply to this case?

How might laws other than the Abandoned Shipwreck Act apply?
Case Study Workshop: Nomination to the National Register

In order to help acquaint yourself with your job, you invite the Washaforinia SHPO to visit and tour Fort Monitor. The SHPO's architectural historian spends a day with you, and is most impressed with the historical and architectural qualities of Officers' Row, the Old Post Headquarters, and the parade ground and its surrounding buildings. You agree that this complex of buildings and landscaping is probably eligible for the National Register of Historic Places as a "district."

A week later you receive a letter from the SHPO calling upon you to nominate this district immediately to the National Register. The SHPO encloses blank National Register nomination forms, guidelines for nomination, and a list of qualified consultants with whom you might want to consider contracting. The SHPO says that it is AirCav's legal responsibility to nominate all historic properties under its jurisdiction to the National Register, and suggests that the historic district you have agreed is eligible would be a good place to start.

What should you do?
XIII. Nomination to the National Register of Historic Places

A. Section 110(a)(2) of NHPA

1. Section 110(a)(2) of NHPA, as amended in 1992, requires that each Federal agency establish...in consultation with the Secretary (of the Interior) a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties. (Emphasis added)

2. Section 110(a)(2) goes on to require that each such program include, among other things, provisions to ensure that historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register. (Emphasis added)

3. Note, however, that Section 110(a)(2) does not say that:

   • agencies must nominate all historic properties under their jurisdiction or control;

   • agencies must nominate historic properties according to any sort of schedule;

   • agencies must nominate historic properties not under their jurisdiction or control; or

   • agencies must nominate historic properties subject to effect by their actions.

B. Listing in the Register Versus Recognizing a Property as Eligible

Remember that Section 106 of NHPA applies both to properties listed in the Register and to those that are eligible for inclusion. Therefore, nomination and listing are not necessary for Section 106 review -- a property that is eligible for the Register is handled exactly the same way under Section 106 as a property that is included in the Register.
For purposes of agency planning and management, recognizing a property as eligible for the Register accomplishes exactly the same thing as listing the property on the Register: it flags the property for further consideration in planning, and for ongoing treatment as a historic property.

C. Why Nominate a Property to the National Register?

There are several reasons to nominate a property to the National Register:

1. Visibility and recognition. Listing in the Register conveys a formal, public recognition of its historic importance in a way that simply considering the property as eligible may not.

2. Funding. Listing a property in the Register may help attract funding for its maintenance or rehabilitation, whether from agency budgets or from community sources.

3. Publicity. Listing of its historic resources in the Register can be a source of favorable publicity for an agency or installation.

4. Permanence. Because the Register is designed to be a permanent record, it may be more permanent than an installation’s or agency’s inventory or plan.

5. Information. A great deal of information about a property is gathered during the nomination process that is valuable and useful.

6. Inclusion in national data base. Listing a property in the Register means that information about the property will be available to scholars, communities, teachers, schoolchildren, and the public in general.

7. Enhanced protection in non-Federal contexts. When a historic property is not federally owned, or when it may be transferred out of Federal ownership, listing in the Register may confer a level of protection under State
or local law -- or merely because of its status -- that simply recognizing the property as eligible would not.

D. Factors to Consider Regarding Nomination

1. **Cost.** Nomination can be costly. The nomination forms and supporting documents must usually be prepared by professionals, and can be quite extensive.

2. **Time.** Nomination can be time-consuming, both in the preparation of documents and in their processing.

3. **Relevance to agency planning and project review.** National Register nomination documents do not elicit a systematic and complete description of which elements do and do not contribute to a property's eligibility, which is important to know when applying the Criteria of Effect under the Section 106 regulations. Therefore, the nomination process and documents may not provide some of the key information needed for planning and project review.

4. **Unanticipated consequences.** State and local laws may confer levels of protection on registered properties that Federal law does not confer. Thus, by nominating a property not under agency control (for example, a property that is being transferred out of Federal ownership), an agency may impose on its new owner a very high level of control by local or State authorities. While this may be exactly what the agency wants to do, in order to promote the preservation of the property, the decision to impose such controls should be carefully considered, because it may have effects with economic consequences for potential property owners.

E. The Nomination Process

1. Nominations are usually prepared by or under the supervision of a professional in one of the "preservation disciplines" -- history, architectural history, archeology, or sometimes another related discipline.

2. Nominations must be recorded on specific forms, and supported by specific kinds of documentation.
3. Nominations are made to the Keeper of the National Register, in the National Register Branch of the National Park Service, in Washington DC.

4. Most nominations are made by SHPOs, following a specific process set forth in National Register regulations (36 CFR 60).

5. However, Federal agencies are required by the regulations to nominate properties under their jurisdiction and control directly to the National Register, after consultation with the SHPO and notification to any appropriate local government.

6. Agencies can prepare nomination forms themselves if they have the relevant professional expertise. They can also contract for preparation of such forms, or arrange with the SHPO to prepare them, usually with funding provided by the agency.

7. Any member of the public also has standing to nominate a federally owned property to the National Register. In such a case, the nominator submits the nomination to the Federal agency with jurisdiction over the property. The agency reviews the nomination and decides whether to forward it to the Register. If the agency declines to submit the nomination, the nominating party may appeal the agency's decision by submitting the nomination directly to the Register.

F. Guidelines for Nomination

1. Regulations governing nominations to the National Register are found at 36 CFR Part 60.

2. The National Register Branch of the National Park Service publishes National Register Bulletins that provide detailed guidance about how to evaluate and nominate different kinds of properties, how to prepare nomination forms, and how to carry out different aspects of the nomination process. Included in your materials are:
National Register Bulletin #15: How to Apply the National Register Criteria for Evaluation

National Register Bulletin #16 Part A: How to Complete the National Register Registration Form

National Register Bulletin #16 Part B: How to Complete the National Register Multiple Property Documentation Form

National Register Bulletins are available from:

National Register Branch
Interagency Resources Division
National Park Service
P.O. Box 37127
Washington DC 20013-7127

G. Case Study Application

Given the language of Section 110(a)(2), what do you think you're required to do about nominating the district, and when should it be done?

What factors might you consider in deciding how to respond to the SHPO's recommendation?
Case Study Workshop: National Historic Landmarks

Your CO receives a routine memorandum from AirCav HQ, through your Major Command, tasking all AirCav installations with blimp and dirigible facilities with cooperating with the National Park Service in a National Historic Landmark Theme Study entitled "Lighter-Than-Air Warfare." Since Fort Monitor has some such facilities, your CO is concerned, and he calls for a briefing ASAP on the implications of this theme study.

What do you tell him?
XIV. National Historic Landmarks

A. The Historic Sites Act of 1935

1. The Historic Sites Act of 1935 [16 U.S.C. 461 et seq.] established as national policy to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States.

2. The Act went on to authorize and direct the Secretary of the Interior to do a number of things, including making a survey of historic and archaeologic sites, buildings, and objects for the purpose of determining which possess exceptional value as commemorating or illustrating the history of the United States [Sec. 2(b)].

3. The program created in the National Park Service to carry out this responsibility has come to be known as the National Historic Landmark Program, and properties identified as possessing such "exceptional value as commemorating or illustrating the history of the United States" are referred to as National Historic Landmarks, or NHLs.

4. NHLs are designated unilaterally by the Secretary of the Interior, based on recommendations by an advisory board. The Secretary consults with SHPOs, agencies, property owners, and others before making such a designation.

5. NHLs are automatically listed in the National Register of Historic Places.

6. Usually, NHLs are designated as part of a "theme study" undertaken by the National Park Service either on its own or in response to Congressional direction. Recent NHL theme studies have included Women's Rights, War in the Pacific, and Man in Space.

7. NHLs are designated in order to draw attention to their significance, and thus to encourage property owners to protect them. Designation of a property does not
mean that NPS intends to acquire it and convert it into a unit of the National Park system.

B. Section 110(f) of NHPA

Section 110(f) of NHPA requires that prior to the approval of any Federal undertaking which may directly and adversely affect any National Historic Landmark, the head of the responsible Federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. [16 U.S.C. 470h-2(f)]

C. 36 CFR § 800.10

36 CFR § 800.10 of the Advisory Council's Section 106 regulations spells out how agencies are to comply with Section 110(f) of NHPA. Essentially the process is the same as with any other consultation under Section 106, except that:

- the Council must be included in any consultation regarding the resolution of adverse effect on an NHL;

- the Council may ask the Secretary of the Interior to provide a report about the significance of the property, the effects of the undertaking, and what might be done to mitigate such effects;

- the Council reports its comments to the President, Congress, and the Secretary of the Interior, as well as to the agency head; and

- NPS has requested, and the Council has agreed, that NPS should be considered an interested party and included in any consultation under 36 CFR 800.10.
D. Section 8, General Authorities Act

The General Authorities Act for the Department of the Interior requires the Secretary to investigate and report periodically to the Congress on threats to National Historic Landmarks.

E. Case Study Application

Based on what we've discussed, what do you think are the implications of the Lighter-Than-Air Warfare theme study for Fort Monitor?
Case Study Workshop: Documentation of Historic Properties

As review of the renovation of Building 579 continues under Section 106, a question arises about how the existing structure and other historic properties subject to effect should be documented -- that is, recorded -- prior to their alteration. The consulting firm engaged to prepare environmental documents on the conversion of Building 579 says that "Federal law requires 'HABS/HAER' documentation of the building."

By this time it is clear that Building 579 is historic, and exhibits a number of distinctive architectural and engineering features. You have also found that installing underground utilities to service the Virtual Reality Training Center will disturb an archeological site that is eligible for the National Register -- a small midden that dates to the Middle Archaic period of prehistory and lies under the hardstand surrounding the building.

Recently you have heard from the Council on America's Military Past (CAMP) -- a nonprofit group devoted to the preservation of America's military history and historic properties -- that a number of CAMP's members served in the 12th Lighter-Than-Air Squadron and are interested in holding a reunion at Fort Monitor and recording their recollections.

Given this situation, what kind of documentation do you think should be done in connection with the Building 579 renovation?
XV. Documentation

A. HABS/HAER

1. The Historic American Buildings Survey (HABS) was established by the National Park Service during the 1930s as a Depression-era "make work" program. It put unemployed architects, draftsmen, and others to work preparing detailed architectural drawings of historic buildings. The drawings were then placed in the Library of Congress.

2. When the Historic Sites Act of 1935 was enacted, it effectively gave HABS a permanent charter, and the program has continued to this day.

3. During the 1960s, the Historic American Engineering Record (HAER) was established as a sister program to HABS. It documents historic engineering facilities and processes.

4. The two programs are now a single division within the National Park Service, called the HABS/HAER Division.

5. At its discretion, an agency may request that HABS/HAER document a historic structure or engineering facility or process. An agency may also ask HABS/HAER to specify how the agency ought to document such a structure, facility, or process, and to approve the results for deposition in the Library of Congress.

B. Section 110(b) of NHPA

1. Section 110(b) of NHPA requires each Federal agency to initiate measures to assure that where, as a result of Federal action or assistance...an historic property is to be substantially altered or demolished, timely steps are taken to make or have made appropriate records, and that such records then be deposited...in the Library of Congress or with such other appropriate agency as may be designated by the Secretary, for future use and reference. [16 U.S.C. 470h-2(b)]
2. The Section 110 Guidelines [53 FR 4727-46] for Section 110(b) say that:

- agencies should determine whether recordation is needed, and if so, the appropriate level and kind of recordation necessary, in consultation with the SHPO, Advisory Council, and other concerned parties under 36 CFR Part 800.

- The level and kind of documentation required vary depending on the nature of the property, its relative significance and the nature of the undertaking’s effects.

- Documentation includes, but is not limited to:
  
  (i) recording significant historical information...
  
  (ii) recording significant architectural plans and features;
  
  (iii) recording significant engineering details;
  
  (iv) recording significant landscaping details;
  
  (v) acquisition of significant oral historical information;
  
  (vi) archeological data recovery; and,
  
  (vii) preserving original plans and specifications for historic buildings.

3. The Guidelines go on to say that:

- As a rule, and always in the case of an NHL, architectural and engineering records should be deposited in the Library of Congress.

- An alternative repository, such as a State or local archive, may be used if an agency official, the SHPO, and the Advisory Council agree, through the process for compliance with Section 106 of the Act and 36 CFR Part 800, that the nature of a property of
State or local significance and the nature of the necessary documentation so warrant.

- Archeological records...may be filed with...the SHPO, and/or appropriate academic institutions and museums pursuant to agreements reached in accordance with Section 106 of the Act and 36 CFR Part 800...

- Oral historical records...should be filed with the Library of Congress' American Folklife Center, with a similar regional repository, and/or with the State Folklorist. With the concurrence of the American Folklife Center, alternative repositories agreed upon in accordance with Section 106 of the Act and 36 CFR Part 800 may be used...

4. Technical documentation standards can be found in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation [48 FR 44729-44737]. HABS/HAER, NPS's Archeological Assistance Division, and others have produced guidelines for various kinds of documentation.

While the documentation standards known colloquially as "HABS/HAER standards" represent accepted professional practice, they are not regulatory. Section 110(b) of NHPA and the Section 110 Guidelines (discussed in 1 and 2, above) simply call upon the USCG to determine the appropriate level of documentation, in consultation with the SHPO, the Advisory Council, and other interested parties. Such consultation may produce general agreement that some adaptation of HABS/HAER standards -- or even something different altogether -- would achieve appropriate documentation.

5. Documenting a property, as discussed in this unit, is not the same as the survey, identification, and evaluation functions discussed earlier. While documentation may record a property's current physical characteristics in considerable detail, survey and identification include information on a property's history and context, as well as its current appearance.
C. Case Study Application

Given the preceding information, what do you need to do to decide what kind of documentation to perform?

What kind of documentation do you think is appropriate?

What does the consultant mean by "HABS/HAER documentation"? Does Federal law require it?
Case Study Workshop: Discoveries

As Fort Monitor's CERCLA/RCRA Coordinator, you have helped arrange for AirCav's Installation Remediation Program (IRP) to contract for a study of toxic and hazardous materials remediation needs at the installation. This study has revealed a major problem, a dozen leaking underground fuel tanks (LUFTs) near the fuel pier. The LUFTs, installed in the 1930s, must be removed ASAP.

IRP contracts for removal of the LUFTs. Visiting the site on the day the contractor begins work, you are astonished to see human bones and ancient artifacts -- spearpoints, stone bowls, pottery -- coming out of the excavations. Apparently, when the tanks were installed, they were punched right through a prehistoric cemetery. Since the tanks are in rows about 10 feet apart, there are lots of intact graves between the rows, although they are just as impregnated with fuel as the soil that surrounds them.

What should you do?
XVI. Discoveries

A. 36 CFR § 800.11.

1. The Council's Section 106 regulations encourage agencies to develop plans to handle discoveries that may occur after Section 106 review has been completed (for example, discovery of an unidentified archeological site during road construction). These plans should be developed through consultation, and referenced in an MOA or an agreement documenting a determination of no adverse effect.

2. When a discovery occurs in the absence of a plan, the Federal agency has three options under the regulations:

   a. Suspend work that threatens the discovery and carry out the standard process of Section 106 review.

   b. Develop a plan to handle the discovery, request the expedited comments of the Council and SHPO, and implement the plan.

   c. If the property is an archeological site, comply with the Archeological and Historic Preservation Act of 1974 in lieu of compliance with the Section 106 regulations, but in consultation with the SHPO. This means:

      • notifying the National Park Service (NPS) of the discovery; and

      • carrying out any needed archeological data recovery, or assisting NPS in doing so.

3. Although the agency doesn't necessarily have to stop all work following a discovery, the regulations require reasonable efforts to avoid or minimize harm to the property (§ 800.11(b)(3)).

4. 36 CFR § 800.11 can be invoked only on projects that are in compliance with Section 106. In other words, it is not a substitute for the standard process of identification, determination of effect, and consultation.
B. NAGPRA

1. Section 3(d) of NAGPRA addresses discoveries of "Native American cultural items."

§3(d) INADVERTENT DISCOVERY OF NATIVE AMERICAN REMAINS AND OBJECTS -- (1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after the date of enactment of this Act shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management responsibility with respect to Federal lands and the appropriate Indian tribe or Native American organization with respect to tribal lands, if known or readily ascertainable.... If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification. (Emphasis added)

2. NPS' draft NAGPRA regulations say that a 30-day delay is not mandatory if the responsible agency has a prior agreement with the "appropriate Indian tribe or Native Hawaiian organization" about how discoveries will be handled. If such tribe or organization will not sign such an agreement, however, the 30-day delay is mandatory, apparently regardless of how long or short a time is needed to take care of the discovery.

3. Section 3(c) of NAGPRA may provide another way of avoiding the mandatory 30-day work stoppage requirement.
§ 3(c) INTENTIONAL EXCAVATION AND REMOVAL OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS -- The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if --

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 (93 Stat. 721; 16 U.S.C. 470aa et seq.) which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); and

(4) proof of consultation or consent under paragraph (2) is shown.

4. To the extent that NAGPRA and Section 106 overlap, Federal agencies can use the consultation process embodied in the Council’s regulations to address the requirements of both laws, and perhaps to put in place a system for handling discoveries under Section 3(c) instead of Section 3(d) of NAGPRA.

C. Case Study Application

Given the requirements of 36 CFR § 800.11 and NAGPRA, what do you think you should do about the discoveries at the LUFTs?

What do you think it’s practical to do?

If there appear to be any conflicts between what you should do and what’s practical to do, how might you resolve them?
Case Study Workshop: An Emergency

San'd, a desert nation rich in oil resources and friendly to the U.S., is attacked by its neighbor, Storm, and appeals to the U.N. for assistance in repelling the attack. With authority from the U.N Security Council, the U.S. prepares to lead a multi-nation coalition to the defense of San'd.

17th AirCav is among the first units scheduled for deployment. Intelligence suggests that Storm has activated terrorist units in the U.S. to harass U.S. forces before and during deployment, in order to undermine U.S. resolve. These units are reported to be armed with Surface-to-Air Missiles (SAMs), among other weapons.

To protect 17th AirCav and its transport aircraft during takeoff from Fort Monitor, it will be necessary to secure all locations in the vicinity of the installation from which SAMs could be fired. A particular problem is the defunct auto assembly plant adjacent to Fort Monitor to the north. Originally built in the 1920s, it was last used to produce Edsels before being closed in the mid-1960s. An immense complex, it presents many potential hiding places for terrorists.

The town of Monitorville, which has wanted for years to get rid of the blighted old eyesore, suggests that AirCav simply demolish the plant to remove all potential SAM launch sites. The mayor will gladly issue a demolition permit, he says, and ensure public safety during the demolition. AirCav has plenty of bulldozers.

Aroused from a sound sleep by your Department head, you're asked if you have any problem with this proposal.

What do you say?
XVII. Emergencies

A. 36 CFR § 800.12

1. Section 800.12 of the Council's Section 106 regulations provide expedited procedures for handling emergency actions provided:

   a. The action is an essential and immediate response to a disaster declared by the President or a governor, or to a major natural disaster or imminent threat to the national security as defined in 36 CFR Part 78 (NPS regulations providing for waivers of NHPA Section 110 responsibilities), and

   b. The action will be initiated within thirty days after the emergency occurs.

2. The emergency procedures depend on the nature of the emergency.

   a. For emergencies where the Federal agency proposes to waive its Section 110 responsibilities under 36 CFR Part 78, the Federal agency may waive its responsibilities under the Section 106 regulations as well. However, 36 CFR Part 78 requires that the Federal agency take actions to identify and protect historic properties during its emergency actions, in coordination with NPS.

   b. For responses to disasters declared by the President or a governor, the Federal agency may simply carry out such actions as it deems appropriate to protect historic properties, affording the SHPO and the Council seven days to comment if circumstances permit.

B. 36 CFR Part 78

1. 36 CFR Part 78 is an Interior Department regulation that permits agencies to waive their NHPA Section 110 responsibilities in the event of a major natural disaster or imminent threat to the national security. These are defined as follows:
Major Natural Disaster means any hurricane, tornado, storm, flood, high water, tidal wave, earthquake, volcanic eruption, landslide, snowstorm, fire, explosion, or other catastrophe, in any part of the United States which, in the determination of a Federal Agency Head, causes damage of sufficient severity and magnitude such that an emergency action is necessary to the preservation of human life or property, and that such emergency action would be impeded if the Federal Agency were to concurrently meet its historic preservation responsibilities under Section 110 of the National Historic Preservation Act, as amended [36 CFR § 79.2] (Emphasis added).

Imminent Threat to the National Security means the imminence of any natural, technological, or other occurrence which, in the determination of a Federal Agency Head, because of its size or intent, seriously degrades or threatens the national security of the United States such that an emergency action would be impeded if the Federal Agency were to concurrently meet its historic preservation responsibilities under Section 110 of the National Historic Preservation Act, as amended [36 CFR § 79.2] (Emphasis added).

2. As noted, the Council's regulations allow agencies to waive the standard Section 106 process as well, if they elect to follow 36 CFR Part 78.

3. 36 CFR Part 78 requires that:

(a) Federal Agency Heads making use of the waiver authority shall, within 22 days of the effective date of the waiver, notify the Secretary of the Interior, in writing, identifying:

(1) The major natural disaster or imminent threat to the national security necessitating the waiver and the emergency action taken;

(2) The period of effect of the waiver;

(3) Which provisions of section 110 have been waived;
4. If Interior believes the agency's employment of the waiver is inconsistent with the intent of NHPA or the regulations, the Secretary may so notify the agency and the Office of Management and Budget. The agency must respond to the Secretary's notification, either accepting or rejecting any recommendations provided and explaining the reasons for each decision (36 CFR § 79.5).

C. Case Study Application

Do you think that AirCav can invoke any of the emergency provisions of 36 CFR Parts 800 and 78 to permit immediate demolition of the Edsel plant?

What if terrorists in the U.S. weren't involved? What if demolition were needed simply to facilitate deployment in some manner?

What if deployment were in response to an earthquake in San'd, and AirCav were called upon to render humanitarian aid?
Case Study Workshop: Enhancement

Congress has directed DoD to create the Heritage Enhancement Program (HEP), whose purpose it is to make DoD a leader in the conservation of cultural resources worldwide. $20 million is appropriated for the purpose, all of which must be obligated by the end of this fiscal year.

On 01 September of the fiscal year in which the money must be obligated, AirCav HQ sends an urgent message to the field requesting proposals for HEP projects to pass on to DoD for possible funding. All projects must be designed to go "beyond compliance" to enhance conservation of cultural resources, but must be consistent with AirCav's mission and with all pertinent Federal laws.

Your CO directs you to come up with at least one project proposal by 1630 tomorrow.

What are some possibilities, and what do you need to take into account in developing your proposal?
XVIII. Enhancement

A. Examples

Some examples of projects that can enhance the conservation of cultural resources include:

1. General efforts

   • Establishing programs to interpret cultural resources for the public.

   • Establishing cooperative arrangements with nongovernmental entities to help preserve cultural resources, such as:

     — adopt-a-building programs;

     — volunteer programs in archeology;

     — use and maintenance of historic buildings by community organizations; and

     — cooperative projects with Indian tribes or other groups in protecting, enhancing, and interpreting historic properties, museum collections, historic records, or other cultural resources.

2. Historic real property

   • Stabilizing archeological sites that are subject to erosion.

   • Including historic resources in areas given protected status on DoD lands.

   • Erecting barriers to prevent damage to archeological sites or other historic properties by off-road vehicles or training equipment or vandals.

   • Establishing systems for regular access by practitioners of traditional Native American cultures to sacred sites and traditionally important resources (plants, clay, ocher, hot springs, animals).
3. **Historic personal property**

- Planning and installing displays of military life during a specific historical period.

- Developing a brochure in which the personal histories of the people to whom your collection relates are interpreted.

4. **Historic records**

- Creating a program to duplicate a collection of related historic records for use by the installation and local libraries.

- Duplicating a collection of historic photographs and using them in an oral history program documenting the history of the installation.

5. **Community resources and lifeways**

- Encouraging or facilitating the continuation of traditional activities.

- Assisting or participating in programs of Native American language retention or skills retention.

- Developing ethnohistorical exhibits and/or programs, as project mitigation.

- Collaborating with the local historical society and museum to conduct a festival celebrating the history of your installation and the local community's contribution to it.

- Collaborating with the local government's programs for the elderly to develop an oral history program documenting the history of your installation and what it has meant to the community.

- Routinely placing the leaders of neighboring American Indian tribes and of geographically distant tribes culturally affiliated with the land under your
jurisdiction on VIP lists to attend important facility functions.

B. Statutory Authorities

1. NHPA authorizations. NHPA provides broad statutory authority for positive, proactive, public-oriented preservation activities related to historic real property, and perhaps to other kinds of cultural resources:

   It shall be the policy of the Federal Government...in partnership with the States, local governments, Indian tribes, and private organizations, and individuals, to --

   (1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

   (2) provide leadership in the preservation of the prehistoric and historic resources of the United States...

   (3) administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the benefit of present and future generations...

   (5) encourage the public and private preservation and utilization of all usable elements of the Nation’s historic built environment... [Section 2, 16 U.S.C. 470-1]

Consistent with the agency’s mission and mandates, all Federal agencies shall carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this Act and, give consideration to programs and projects which will further the purposes of this Act (§ 110(d)).
The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency [§ 110(a)(1)].

Each Federal agency shall establish ... in consultation with the Secretary, a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties. Such program shall ensure -- (A) that historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register.... (D) that the agency’s preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes, Native Hawaiian organizations carrying out historic preservation planning activities, and with the private sector... [§ 110(a)(2)].

Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency. [§ 110(a)(1)]

Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 101(f), any preservation, as may be necessary to carry out this section. [§ 110(a)(1)]

Notwithstanding any other provision of law, any Federal agency, after consultation with the Council, shall, to the extent practicable, establish and implement alternatives for historic properties, including adaptive use, that are not needed for current or projected agency purposes [§ 111].

Each Federal agency may include the costs of preservation activities of such agency under this Act as eligible project costs in all undertakings of such agency or assisted by such agency. The eligible project costs may also include amounts paid by a Federal agency to any
State to be used in carrying out such preservation responsibilities of the Federal agency under this Act, and reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit [§ 110(g)].

2. Review requirements. Remember that public-oriented projects and programs may be undertakings subject to review under Section 106 and other authorities. The fact that a project is a positive one does not make it exempt from the requirements of Section 106, AIRFA, NAGPRA, and other review authorities.

C. The Legacy Resource Management Program

In 1991, in response to Congressional direction, DoD created the Legacy Resource Management Program (LRMP) to improve DoD stewardship of natural and cultural resources.

The purpose of the LRMP is to promote, manage, research, conserve, and restore the priceless biological, geophysical, and historical resources which exist on public lands, facilities, or property held by the Department of Defense. The Legacy challenge is to create a program of management, conservation, and restoration that encourages proactive stewardship of resources at the installation level.

At the same time, these efforts will be coordinated across the military services, scientific disciplines, and geographic regions. The participation of DoD installations and Legacy partners -- other Federal and State agencies, private organizations, and volunteers -- is a unique and indispensable part of the Legacy program and a major source of its strength.

Legacy focuses on two main areas of activity: demonstration projects and program development. In keeping with Legacy's underlying theme of integrated effort, the activities in these two areas mutually support one another.
1. Legacy demonstration projects

The demonstration projects serve two important purposes:

a. to address resource management needs specified in the Legacy legislation; and

b. to contribute to the broad pool of data, knowledge, and expertise that will form the basis of the Legacy program and support parallel efforts elsewhere throughout government and private sectors.

In the first year alone, more than 100 demonstration projects were funded across all services and all regions of the United States, including Guam, Puerto Rico, and the freely associated Micronesian States. These projects address a broad spectrum of natural and cultural resources and fall into three basic categories:

- preservation/restoration/management,
- data collection, and
- public awareness/education.

Some examples of cultural resource demonstration projects are:

- The Enhancement of Huffman Prairie Flying Field National Historic Landmark
- An “Occupants Handbook” for Historic Military Housing
- DoD Historic Preservation Brochure
- Pearl Harbor Attack Commemorative Self-Guided Interpretive Brochure
- “Training the Troops” -- Archeological Awareness Training Videos
- Rock Art Recording and Protection
• Cost Analysis Study for Maintenance and Repair of Historic Military Structures

• Inventory DoD Archeological Materials and Develop Curation Needs Assessment

2. Program development

In addition to individual demonstration projects, a comprehensive Legacy Resource Management Program was developed. The goal is to integrate the data, knowledge, and expertise -- both technical and managerial -- needed to effectively carry out the legislative purposes of Legacy at all levels of operation. To support program development, several task areas were funded and assigned to lead agencies.

For more information on the Legacy program, contact:

Maj. Robert Maguire
ODUSD (ES)(CI)
400 Army Navy Drive
Arlington, VA  22204-2884

D. Examples of Other Agency Programs

1. Forest Service

The Forest Service's "Windows on the Past" is a broad-based program designed to interpret historic real property and other cultural resources on the National Forests. It involves a high degree of interagency partnership, State and local government and private organization involvement, and public participation. One element of "Windows" -- "Passport in Time" -- is a volunteer program that invites the public to participate in heritage projects on National Forests all across the country. A participant may choose among activities such as archeological excavation, site mapping, collecting oral histories, restoring historic buildings, and library archival research. The projects vary in length from a weekend to one month, or even longer in some cases.
2. The Bureau of Land Management

The Bureau of Land Management (BLM) has an "Adventures in the Past" program that is very similar to the Forest Service's "Windows on the Past" program.

E. State and Local Efforts

1. More and more States are designating official "Archeology Weeks" or "Historic Preservation Weeks," in which major efforts are made to acquaint citizens with cultural resources and issues. Participation in such programs can have important "multiplier effects" for DoD public outreach activities.

2. A number of States and agencies have set up "Site Steward" programs, in which individuals and groups take on quasi-official responsibilities for monitoring sensitive archeological sites and other historic properties to make sure they are not being damaged.

3. Public school systems across the country are establishing "heritage education" programs that use local history and cultural resources in general as educational tools. Such programs may be interested in interacting with military cultural resource management activities, and may also be important ways to get information on DoD's resources out to the public.
F. Case Study Application

Given what we’ve just discussed and what we know about Fort Monitor, can you think of any HEP projects to propose to your CO?
Case Study Workshop: Planning

At a Commanding Officers’ conference, the CO of another installation presents a paper on the development of a Cultural Resources Management Plan. Your CO thinks that it sounds like a lot of time and money was expended for no good purpose. Nevertheless, he’s concerned that Fort Monitor doesn’t have such a plan.

He returns from the conference and directs you to prepare a briefing on this issue. What do you tell him?
XIX. Planning

A. Introduction

1. Planning can help a facility improve the way it manages all kinds of cultural resources, so ideally a cultural resource management plan should be comprehensive.

2. In current practice, however, most cultural resource management activities primarily deal with historic real property. Other kinds of plans, such as records retirement plans and museum plans, may address other kinds of resources.

3. In this part of the class, we will focus primarily on planning that involves historic real property.

B. Direction for Planning Under Section 110 of the National Historic Preservation Act (NHPA)

1. Locate and protect historic properties. Each Federal agency shall establish, ... in consultation with the Secretary [of the Interior], a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties....[§ 110(a)(2)]

   • Installation planning should provide for an ongoing program of identification and protection, addressing at least all kinds of historic properties, if not all kinds of cultural resources. Such a program provides DoD personnel with information about the existence and significance of historic properties that is useful in planning projects and programs.

   • Identification systems and procedures should be developed in consultation with the SHPO, and should be consistent with the Department of the Interior standards. Properties should be nominated to the National Register, but there is no requirement that all properties be nominated, nor is there any particular timetable for nomination. What is required is an identification program that includes
nomination, not necessarily nomination of particular numbers of properties, on any particular schedule.

- **Protection** can involve a wide range of activities. The statute does not require that everything be protected in place, in perpetuity. It **does** require that such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 106. [§ 110(a)(1)(B)]

and

*that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning [§ 110(a)(1)(C)]*

- A **planning program** that enables DoD to consider the value of historic properties in a systematic way, rather than on an ad hoc basis, can facilitate protection of historic resources.

2. **Assume responsibility.** The heads of all Federal agencies shall assume responsibility for the preservation of historic properties which are owned or controlled by such agency. [§ 110(a)(1)]

- Recall that the statutory definition of "preservation" includes identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance research, interpretation, conservation, and education and training regarding the foregoing activities or any combination of the foregoing activities. [16 U.S.C. 470w(8)]

- DoD planning can and should outline how each of the above activities will be carried out.
3. **Use historic properties.** Prior to acquiring, constructing, or leasing buildings for purposes of carrying out agency responsibilities, each Federal agency shall use, to the maximum extent feasible, historic properties available to the agency. [§ 110(a)(1)]

- This section directs agencies to give priority to the use of historic properties (specifically buildings, but the provision is not necessarily limited to buildings) for agency purposes, rather than constructing new facilities for such purposes.

- In developing installation plans, efforts should be made to assess what historic properties -- or what kinds of historic properties -- an installation has available, and what can be done to use them appropriately.

- Use of a historic property should include provision for its preservation, because each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 101(f), any preservation, as may be necessary to carry out this section. [§ 110(a)(1)]

4. **May include costs.** Each Federal agency may include the costs of preservation activities ... as eligible project costs in all undertakings of such agency or assisted by such agency. [§ 110(g)]

- This funding authorization is important to consider when formulating budgets, both for specific projects and for ongoing Federal agency management.

- Federal agency planning with respect to cultural resources should provide a basis for projecting the cost of managing such resources, and a justification for DoD cultural resource management budgets.

5. **May compensate SHPO.** The eligible project costs may also include amounts paid by a Federal agency to any State to be used in carrying out such preservation
responsibilities of the Federal agency under this Act.... [§ 110(g)]

- The authority provided by this subsection can be the basis for a wide range of cooperative arrangements with the SHPO, such as:
  - cooperative planning;
  - cooperative programs of public interpretation or public participation;
  - conduct of surveys;
  - maintenance of inventories; and
  - expediting review of projects.

- It is important not to let cooperative arrangements between DoD and a SHPO create a conflict of interest with the SHPO’s review role under Section 106.

6. May impose reasonable charges. Reasonable costs [for preservation] may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit. [§ 110(g)]

- This subsection provides the authority to require users of DoD land and resources to help defray the cost of cultural resource management.

- In the course of Federal agency planning, once the likely costs of cultural resource management have been projected, it may be appropriate to consider ways to minimize costs to the taxpayer by imposing reasonable charges on users.

7. Act in accordance with NHPA’s purposes. Consistent with the agency’s mission and mandates, ... carry out agency programs and projects (including those under which any Federal assistance is provided or any Federal license, permit, or other approval is required) in accordance with the purposes of this Act and give
consideration to programs and projects which will
further the purposes of this Act.  [§ 110(d)]

- One of the purposes of NHPA, as set forth in its
  preamble sections, is to foster productive harmony
  between modern society and historic resources. This
  very general philosophy should be kept in mind
  when integrating cultural resource management
  into DoD planning.

- Another of NHPA's purposes is to administer
  historic resources in a spirit of stewardship. This
  should be a fundamental tenet of DoD planning.

- Still another NHPA purpose is to contribute to
  preservation of nonfederally owned historic
  resources. DoD planning should consider such
  issues as:

  — preservation of privately owned structures and
    inholdings on an installation; and

  — impacts of DoD activities and decisions on
    historic properties outside the boundaries of DoD
    lands.

- NHPA also directs agencies to assist States and local
  governments in historic preservation activities.
  This provides a rationale for cooperative activities
  with SHPOs and local historic preservation
  programs.

- Finally, NHPA directs that the above policies be
  carried out in cooperation with, among other
  entities, the States, local governments, Indian tribes,
  and private organizations and individuals. Federal
  agency planning can provide the context for a wide
  range of cooperative activities in the management of
  historic and cultural resources.

1. DoD policy requires installations and commands at various levels to develop and implement plans for the identification and management of archeological and historic resources (DoD Directive 4710.1, 21 June 1984, "Archeological and Historic Resources Management.")

2. Each military service has established its own procedures for preparing such plans, each using somewhat different terminology and approaches. Direction is found in:
   - OPNAVINST 5090.1A, "Environmental and Natural Resources Program," Chapter 20 "Historic and Archeological Resources Protection."

3. Why the different names?

   The different Services, and DoD itself, have developed their applicable policies, regulations, and instructions at different points in time, with different kinds of professional and policy input. This has resulted in variations in terminology that can be confusing. Resolving this confusion is one reason the DoD LRMP has adopted a standard definition of "cultural resource" and is developing DoD-wide cultural resource management planning principles.

D. Use of Historic Contexts in Planning

1. The National Park Service, in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation [48 FR 44716-40] and elsewhere,
strongly recommends the formulation and use of "historic contexts" as preservation planning tools.

2. The formulation of historic contexts requires an understanding of the broad patterns of an area’s (e.g., an installation and its surrounding community) history, so that specific historic properties and property types (e.g., prehistoric habitation sites of a particular period, or mining or ranching sites) can be evaluated with reference to their associations with such patterns.

3. Historic contexts may be most relevant to property types whose significance lies largely in their information content, though they may also be used to help structure interpretation and, in some cases, to identify the elements that give character to a community.

4. Historic contexts are sometimes misused in ways that can be damaging to historic properties.

   • For example, the fact that a given property does not happen to relate to a previously defined historic context does not necessarily mean that the property is not historically or culturally significant. However, it may be treated as such if property evaluation adheres too rigidly to a previously established context-based approach.

   • Contexts are also sometimes viewed as the basis for structuring a sample of properties to be preserved. This may be appropriate with respect to some property types that are significant only for their potential contribution to research, but it is obviously inappropriate in other situations (e.g., "ten percent of all Native American sacred sites").

E. Consultation and Coordination

1. DoD installation planning, including planning for cultural resource management, must be carried out in consultation with others who have interests in or responsibilities for cultural resources.
2. Consultation is required because DoD planning does not supersede other requirements of law, notably NHPA, AIRFA, NAGPRA, and 36 CFR Part 800. To avoid conflicts and contradictions during implementation of a master plan, the consultation and coordination requirements of these authorities must be met during the planning process.

F. Proposed DoD Planning Principles

Many Army, Navy, Marine Corps, and Air Force installations have developed historic preservation plans. The usefulness of these plans has been mixed. In a recent study, the following principles were generated to guide future DoD cultural resource management planning:

Proposed DoD Planning Principles (abridged)

A Cultural Resource Management Plan should:

- be responsive to the missions of the installation;
- clearly articulate goals and policies;
- be thoroughly integrated with other installation plans;
- be in a format appropriate to users;
- reflect full understanding of the installation's and area's traditions;
- clearly define the resource classes to which it applies;
- provide a basis for understanding resource significance;

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• reflect full understanding of applicable laws and regulations;

• include procedures to ensure that damage to cultural resources is minimized in installation actions;

• promote the beneficial use of cultural resources;

• establish priorities in compliance with legal requirements;

• establish requirements that can be reflected in budget and decision documents;

• include explicit standards for task accomplishment;

• provide ready access to pertinent databases;

• include procedures for identification of cultural resources if necessary;

• ensure that incomplete information does not lead to faulty decisions;

• ensure active installation and higher headquarters involvement;

• coordinate with outside authorities;

• relate effectively to users through specification of users, design, and training;

• provide for review and updating, coordinated with installation planning cycles and personnel changes; and

• provide for necessary internal and external approvals.
G. Other Agencies' Experiences with Planning

1. A number of Federal land management units, such as National Forests and BLM area offices, have developed historic preservation plans or cultural resource management plans. Some of these have been helpful to management; others have not. The land management agencies are still working to find a good model for cultural resource management planning. Some are now looking toward integrating cultural resource management into ecosystem management.

2. GSA has developed a planning model for use in working with historic buildings. In GSA's "Historic Building Preservation Plan" system, a building is divided into "zones" based on its historic and architectural qualities. Standards for maintenance, repairs, and rehabilitation are then provided for each zone, and for individual architectural elements within each zone. The system is computer-based.

H. Using a Plan to Streamline Section 106 Compliance: A Programmatic Agreement

1. A Programmatic Agreement (PA) is an agreement, executed pursuant to the Section 106 regulations (36 CFR Part 800), which prescribes a process that substitutes for the standard Section 106 review process. A PA can be used by an installation to substitute alternative agreed-upon procedures -- for example, procedures embodied in a masterplan -- for those of the Section 106 regulations.

2. PAs are negotiated by an agency with the Advisory Council, one or more SHPOs or the National Conference of SHPOs, and sometimes others. Every PA must be signed by the Council in order to have legal effect.
3. Typical instances in which a PA may be employed include those:

- in which effects on historic resources are similar and repetitive (e.g., administrative building maintenance or training activities);

- in which effects are multi-State or national in scope;

- in which effects cannot be fully determined prior to an undertaking's approval;

- in which non-Federal parties are delegated major decisionmaking responsibilities (e.g., development of facilities under permits);

- involving regional or land management plans (e.g., timber sales or other resource management planning); and

- involving routine management of Federal installations (e.g., ongoing management and maintenance of facilities).

4. A PA can be:

- a means of adjusting the Section 106 process to meet the particular needs of an installation or DoD Service program; or

- a mechanism for putting in place a system appropriate to a given installation that has been designed through the installation's comprehensive planning process.

5. Negotiating a PA can also provide the context for consulting and coordinating with a variety of interests in accordance with NHPA, AIRFA, and NAGPRA.
6. PAs should be approached with care, however, because:

- they amount to waiving the requirements of the regulations in favor of an alternative process;
- they may not really be needed; and
- they typically take considerable time and effort to develop.

I. Cultural Resources and the Environmental Audit Process

1. What is an environmental audit?

In response to OMB Circular A-106, all the Services have established environmental audit systems. These are designed to identify and lead to the correction of deficiencies in installation compliance with environmental requirements. In the Army, the audit system is called the Environmental Compliance Assessment System (ECAS); in the Air Force, it is the Environmental Compliance Assessment Management Program (ECAMP); the Navy and Marine Corps administer the Environmental Compliance Evaluation (ECE). Although originally designed to track compliance with such laws as CERCLA and RCRA, the audit systems have evolved toward more of a comprehensive review of installation environmental management programs. All three audit systems currently give some attention to cultural resource management requirements.

The audit systems provide for both internal auditing by installation personnel, and external auditing by superior commands. External audits are often performed by outside contractors. Auditors are guided

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by "protocols" that provide questions to ask and advice about sources of information.

2. Challenges posed by audit protocols

- First, the protocols are often written by people without extensive experience in working with cultural resource legal requirements, but who are often quite experienced in fields like pollution prevention and remediation. As a result, they may reflect the requirements of the natural and cultural resource laws inaccurately and assume that these laws work in ways similar to CERCLA and RCRA.

- Second, the protocols appear to reflect the assumption that experts in all pertinent environmental fields will perform the audits, in considerable detail. The Navy's ECE cultural resources protocol, for example, asks questions like, "Has the activity planned, programmed, and budgeted adequate funds to ensure compliance with historic and archeological resources protection requirements?" Answering this question would require the auditor to know what the pertinent requirements are, and to determine what funding would be adequate to address them in the context of the audited activity's mission. In fact, auditors seldom if ever are fully knowledgeable about such requirements, and are unlikely to perform audits in sufficient depth to answer such broadly phrased questions.

3. Potential

Audit systems could have profoundly positive effects on the consistency, effectiveness, and overall quality of the Services' management of cultural resources.

J. Possibilities and Cautions

1. Cautions about planning

- It is easy to spend a great deal of money on historic preservation (or cultural resource management) plans that do not do you much good in managing
your installation. Be sure that the scope of work for your plan (whether embodied in a contract or used by staff) is appropriate to the nature of your installation, its mission, and its resources. Be sure that it makes sense to you and your supervisors, preferably up to and including the CO. The fact that it was prepared by a notable expert or authoritative agency doesn’t necessarily mean that it is right for your installation. Notable experts don’t necessarily know anything about your facility, its management systems, and its missions, nor much about how to meld your mission requirements with the requirements of historic preservation law.

• On the other hand, recognize that Federal law requires you to consider a wide range of cultural resources that you, your department head, or your CO may not personally regard as very important, and these must be addressed in any good plan. The measure of adequacy in a plan should not be merely, "Does it allow me to do what I want to do?" but "Does it allow me to do what I need to do to meet my mission requirements with a minimum of red tape, in a way that meets the substantive requirements of historic preservation (or other) laws?"

2. Approaches to improving your installation’s planning

Review your existing plan (if any). Do you have one? If so, is it the subject of a Programmatic Agreement signed by the relevant State Historic Preservation Officer and the Advisory Council?

K. Case Study Application

What do you tell your CO regarding requirements and direction regarding historic preservation planning?

What do you think you should do in response to Fort Monitor’s lack of a CRMP?
Case Study Workshop: Funding

A few months into your assignment as Fort Monitor's cultural resource specialist, your supervisor directs you to estimate funding needs for supporting the installation's cultural resource management program during the coming fiscal year. You are to cite specific fund sources and authorities, and justify all estimates with reference to specific legal requirements.

What do you do?
XX. Funding

A. Introduction

1. Agencies have different ways of funding cultural resource management activities, which vary considerably from one another. It is important for you to understand how DoD funding, contracting, and related systems work, if you are going to be effective.

2. The details of funding, budgeting, and contracting are beyond the scope of this class, but there are some basic issues that we can address.

B. General Statutory Authority

1. General authority to fund historic preservation activities related to Federal undertakings is found in Section 110(g) of NHPA.

   Each Federal agency may include the costs of preservation activities...as eligible project costs in all undertakings of such agency or assisted by such agency. The eligible project costs may also include amounts paid by a Federal agency to any State to be used in carrying out such preservation responsibilities of the Federal agency under this Act.... Reasonable costs (for preservation) may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit.

2. Since "undertakings " are defined broadly by NHPA to include all projects, programs, and activities under the direct or indirect jurisdiction of Federal agencies, Section 110(g) provides the authority to seek funding for virtually all preservation work that pertains to the ongoing operations of an installation and its missions.

3. The authority to fund work other than historic preservation, such as museum operations, records management, and the identification and consideration of community values and lifeways in planning, is not always so explicitly stated in law.
C. Sources of Funding

1. A wide range of funding sources can be drawn upon to support different kinds of cultural resource management activities. Major accounts include:

   a. Operations and Maintenance/Support (O&M/S)

   b. Defense Environmental Restoration Program (DERP)

   c. Military Construction (MilCon)

   d. Military Family Housing

   e. Base Realignment and Closure

   f. Legacy Resource Management Program

2. Naturally, different sources are appropriate for different things.

   a. O&M/S is an appropriate source of funds for such ongoing activities as planning, historic building maintenance, cultural resource identification activities, collections management, and cultural resource work in support of other resource programs, such as land management and timber management.

   b. DERP funds should be used to support work related to environmental restoration, such as Section 106 and NEPA compliance in connection with toxic and hazardous waste cleanup projects.

   c. MilCon funds can be used to support work connected with military construction, such as compliance with preservation laws in advance of new construction and renovation of buildings, training ranges, and other facilities.

   d. Family Housing funds are, of course, appropriate for use in connection with the construction, maintenance, and rehabilitation or renovation of historic family housing, and for compliance with preservation laws in
connection with family housing construction of all kinds.

e. BRAC funds can be used to support addressing all kinds of cultural resources during the review of BRAC activities under NEPA, NHPA, and other authorities, and for mitigating the effects of BRAC actions by rehabilitating, documenting, marketing, and otherwise preserving historic structures, buildings, and landscapes, preserving or excavating archeological sites, relocating and preserving museum collections and documents, and carrying out programs to ameliorate BRAC impacts on community resources and lifeways.

f. LRMP money can be used for a wide range of cultural resource management activities, provided such activities are not directly required to achieve compliance with such authorities as Section 106 of NHPA for specific undertakings. Activities that are directly related to compliance should be supported using other sources.

D. Prioritizing Funding for Environmental Compliance

1. The Army, the Air Force, and the Navy have established systems for prioritizing proposals for "environmental" funding, including funding for some cultural resource management activities, with relation to their relevance to legal compliance requirements.

2. All budget priority systems are driven by the Office of Management and Budget (OMB) Circular A-106 (not to be confused with Section 106 of NHPA), Reporting Requirements in Connection with the Prevention, Control, and Abatement of Environment Pollution at Existing Federal Facilities (1974). Circular A-106 describes how annual pollution abatement plans are to be prepared and submitted to the Environmental Protection Agency for review. Funding priorities are to be established in these plans. Although initially focussed solely on pollution prevention, the Service budget priority systems have over the years come to embrace more and more compliance-related activities,
and the Army, Air Force, and the Navy now address activities needed to comply with laws relating to the management of historic real property, such as Section 106 of NHPA.

3. The Army's "1383 process," so called because its central document is Standard Form 1383, requires installations and MACOMs to assign activities proposed for funding to one of three categories:

- **Level I:** Fix noncompliance. Projects and services that address conditions already out of compliance with an environmental requirement.

- **Level II:** Avoid noncompliance. Projects and services that address conditions that must be corrected to avoid noncompliance with an existing environmental requirement or a requirement that takes effect in the next budget year.

- **Level III:** Beyond compliance. Projects and services not specifically required to fix or avoid noncompliance. This includes good management practices and compliance with DoD directives and Service regulations.

4. Generally speaking, Level I and certain Level II activities are identified as "must fund" items. These are guaranteed funding through the normal budget process. Other Level II activities, and all Level III activities, are less likely to be funded, at least in the budget year for which funding is requested.

5. The Air Force's environmental compliance budgeting system is similar to the Army's, through it includes a "Recurring operations and services" category that is even higher than Level I, sometimes referred to as what is necessary to "keep the gates open". The Air Force also provides some more specific detail about how to address cultural resource compliance needs. The Navy and Marines budget for historic preservation and other cultural resource management activities outside the environmental compliance budgeting system.
6. The Air Force specifically identifies NHPA Section 106 consultations and curation of archeological collections as "recurring operations and services" that must be funded. It assigns salaries and other support for installation cultural resource staff, staff training, and equipment to Level I. The Army is not nearly as specific about what cultural resource management activities should be assigned to each level, but they specify that "must fund" projects must be legally mandated and be designed to meet specific implementation deadlines.

7. To ensure funding for an installation cultural resource management activity within the environmental compliance account, it is obviously necessary to show that the activity is necessary to "keep the gates open," "fix noncompliance," or "prevent noncompliance." In the Army's 1383 process, it is necessary to identify specific legal mandates and deadlines.

8. Legal mandates that either may or certainly do qualify as bases for assigning projects to Level I status in the 1383 process include NEPA, NHPA Section 106, NAGPRA, and FRA. Of these, only NAGPRA assigns specific deadlines, but it is also possible to establish deadlines through disposal schedules implementing FRA. Arguments can probably be made for assigning projects to implement AIRFA and Sections 110(a)(1), 110(a)(2), 110(b), and 111 of NHPA to Level I, but historically, cultural resource managers in DoD have had difficulty successfully making such arguments.

9. Like the Army, the Department of the Navy Program Objective Memorandum (DON POM) specifies three categories for conservation funding:

- **Class I:** (Must Fund Requirements) Only includes those requirements which are immediate and essential to maintain operational and legal integrity. An existing federal, state, or local regulation, a presidential executive order, or a Navy policy with required actions and compliance
dates must be in force and pertain to these requirements.

- **Class II:** (Baseline Requirements) Includes those requirements which are necessary to maintain operational and legal integrity. Must be an existing federal, state or local regulation, a presidential executive order, or a Navy policy requiring the work, but which do not carry required compliance dates.

- **Class III:** (Non-compliance Enhancement) Includes those requirements which enhance operational and legal integrity of the DON mission but are not specifically required under regulation or executive order and are not of an immediate nature. Also includes pending and future requirements that may become compliance issues in the near future.

The DON specifically identifies NHPA Section 110 and Section 106 actions and NAGPRA inventories as Class I. Staffing, training, management plan updates, and archeological curation are identified as Class II.

**E. Section 111(b) of NHPA.**

Recall that Section 111(b) of the National Historic Preservation Act provides that the proceeds of any lease under subsection (a) may, notwithstanding any other provision of law, be retained by the agency entering into such lease and used to defray the costs of administration, maintenance, repair, and related expenses incurred by the agency with respect to such property or other properties which are on the National Register which are owned by, or are under the jurisdiction or control of such agency....

Thus, proceeds from leasing a Service's historic property may be used for such expenses as administration, maintenance, and repair of either that historic property or other National Register-listed property under the jurisdiction or control of that Service.
F. End-of-Year Funding

1. End-of-year (EOY) operating expense money is sometimes the source of funds to support cultural resource management activities that are not obviously and directly related to compliance requirements. Many historic properties surveys and cultural resource management plans have been funded with EOY money.

2. To be ready to take advantage of EOY funding opportunities, you should try to have projects “on the shelf” and ready to go. This means that you need to do a number of things before the end of the year:

a. Define specific projects; develop scopes of work and budgets.

b. Define how each project advances the installation’s mission so you will be prepared to compete with others.

c. Develop vehicles for obligating funds. This is very important. During the EOY rush, it may be very difficult to find a suitable contractor or other service provider and set up the necessary systems to obligate money. If you have an indefinite services contract or a cooperative agreement in place with an appropriately qualified institution, organization, or firm, you will be ahead of the game.

3. The other side of EOY money is that everybody else wants to get it, too, and they may want it for projects that may adversely effect cultural resources. A CO or engineer who is anxious to let a contract to build a new building with EOY money is likely to be unsympathetic to things like Section 106 review, which has the potential to delay the project until the money disappears.

4. To minimize such problems, you may want to encourage installation and unit planners to identify possible EOY projects in advance, and initiate the
necessary consultation and review before the time when funds may become available.

G. Case Study Application

Given what we’ve just discussed, how will you respond to your supervisor’s request for an estimate of funding needs for Fort Monitor’s cultural resource management program?
XXI. Conclusion and General Discussion
LIST OF ACRONYMS

Introduction to Cultural Resource Management Laws & Regulations

AirCav -- Maritime Air Cavalry [case study]

ACHP -- Advisory Council on Historic Preservation

AFPA -- American Folklife Preservation Act (1976)

AHPA -- Archaeological and Historic Preservation Act (1974)

AIRFA -- American Indian Religious Freedom Act (1978)

APE -- Area of potential effects

ARPA -- Archaeological Resources Protection Act (1979)

BLM -- Bureau of Land Management

BRAC -- Base Realignment and Closures

CATEX or CX -- Categorical exclusion

CEQ -- Council on Environmental Quality

CERCLA -- Comprehensive Environmental Response, Compensation, and Liability Act

CLG -- Certified local government

CMH -- Chief of Military History

CNO -- Chief of Naval Operations

CONUS -- Continental United States

CO -- Commanding Officer

CRM -- Cultural resource management

CRMP -- Cultural Resource Management Plan

DEIS -- Draft Environmental Impact Statement
DoD -- Department of Defense
EA -- Environmental Assessment
EATS -- Environmental Audit Testing System
ECAMP -- Environmental Compliance Assessment Management Program
ECAS -- Environmental Compliance Audit System
ECE -- Environmental Compliance Evaluation
EIS -- Environmental Impact Statement
EOY -- End of year
FEIS -- Final Environmental Impact Statement
FLETC -- Federal Law Enforcement Training Center
FONSI or FNSI -- Finding of no significant impact
FPO -- Federal preservation officer
FRA -- Federal Records Act
HABS -- Historic American Building Survey
HAER -- Historic American Engineering Record
HPP -- Historic preservation plan
HVAC -- Heating/ventilation/air conditioning system
HUD -- Department of Housing and Urban Development
JAG -- Judge Advocate General
LRMP -- Legacy Resource Management Program
LUFT -- Leaking underground fuel tank
MACOM -- Major command
MCA -- Military Construction Account
MILCON -- Military Construction
MOA -- Memorandum of Agreement
NAFERA -- Native American Free Exercise of Religion Act (proposed)
NAGPRA -- Native American Graves Protection and Repatriation Act
NARA -- National Archives and Records Act
NEPA -- National Environmental Policy Act
NHL -- National Historic Landmark
NHPA -- National Historic Preservation Act
NOI -- Notice of Intent
NOV -- Notice of Violation
NPS -- National Park Service
NTHP, Trust -- National Trust for Historic Preservation
OCONUS -- Off Continental United States
OEBGD -- Overseas Environmental Baseline Guidance Document
OMB A-106 -- Office of Management and Budget guidelines for pollution abatement
O&M/S -- Operations and Maintenance/Support
PA -- Programmatic Agreement
RCRA -- Resource Conservation and Recovery Act
ROD -- Record of Decision
SAF/PA -- Secretary of Air Force, Office of Public Affairs
SAMs -- Surface-to-air missiles
SHPO -- State Historic Preservation Officer
40 CFR 1500-1508 -- Government-wide NEPA regulations