



Preserving America's Heritage

Native American Traditional Cultural Landscapes and the Section 106 Review Process: Questions and Answers

The consideration of Native American traditional cultural landscapes in Section 106 reviews has challenged federal agencies, Indian tribes, and Native Hawaiian organizations for some time. There has been confusion regarding what makes a place a traditional cultural landscape, whether they can be considered historic properties, and whether the size of such places influences their consideration under the National Historic Preservation Act. While these are all critical issues worthy of much thought and deliberation among federal agencies, Indian tribes, and Native Hawaiian organizations, the Advisory Council on Historic Preservation (ACHP) wishes to advance this dialogue by first addressing common questions about how such historic properties should be considered in the Section 106 process. While we anticipate that further dialogue will be necessary to resolve these and other issues, this Q and A is offered to move the dialogue forward and improve the consideration of these places in the Section 106 process.

This guidance assumes that readers have a basic understanding of the Section 106 review process. For more information, go to www.achp.gov.

Since this is not an exhaustive list of the issues related to Native American traditional cultural landscapes that one might encounter in a Section 106 review process, we would welcome suggestions for additional questions the ACHP should consider addressing. Further, please send us additional information or sources regarding Native American traditional cultural landscapes that you believe would be helpful for others.

1) What is a traditional cultural landscape?

The term “traditional cultural landscape” has not yet been formally defined by the National Park Service, the agency responsible for defining historic properties and maintaining the National Register of Historic Places (NRHP). While there is currently no formal NRHP definition of a traditional cultural landscape, the recent interest in these places has led the National Park Service to launch an initiative regarding updating National Register (NR) Program guidance for identifying, evaluating, and documenting properties that are historically significant as Traditional Cultural Properties (TCPs) and/or Native American landscapes. NPS will be soliciting written comments and suggestions through October 31, 2012, and may be submitted to nr_info@nps.gov. Respondents should identify their submission(s) as a “TCP/NAL Comment” in their e-mail “subject” box. Responses submitted via email will be posted on an ongoing basis beginning the first week of June 2012 on the NR website located at: http://www.nps.gov/history/nr/publications/guidance/TCP_comments.htm. Respondents who do not want their names and/or e-mail addresses posted on the NR website along with their comments, or do not want their comments published at all, should clearly indicate that preference in their e-mail.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@achp.gov • www.achp.gov

2) Can traditional cultural landscapes be considered historic properties under Section 106 of the National Historic Preservation Act?

Traditional cultural landscapes are considered by the NRHP to be a type of significance rather than a property type. Property types are limited to those specified in the NHPA and the NRHP regulations and include districts, buildings, structures, sites, and objects. Traditional cultural landscapes can and often do embrace one or more of these property types. It is important to note that the size of such properties or the potential challenges in the management of them should not be considerations in the evaluation of their significance. Any questions regarding eligibility for listing in the National Register of Historic Places should be referred to the National Register of Historic Places. Information about the National Register can be found at www.nps.gov/nr. See question 8 for additional resources.

3) How are traditional cultural landscapes identified in the Section 106 review process?

Traditional cultural landscapes, because they are often a property type such as a district or site, are identified in the same manner in the Section 106 process as other types of historic properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations. The regulations at 36 CFR Section 800.4 outline several steps a federal agency must take to identify historic properties. In summary, to determine the scope of identification efforts, a federal agency, in consultation with the State Historic Preservation Officers (SHPO)/Tribal Historic Preservation Officer (THPO), must:

1. Determine and document the area of potential effect for its undertaking;
2. Review existing information; and,
3. Seek information from consulting parties including Indian tribes or Native Hawaiian organizations.

Based on the information gathered through these efforts, the federal agency, in consultation with the SHPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by the undertaking, develops and implements a strategy to identify historic properties within the area of potential effects. Identification efforts may include background research, oral history interviews, scientific analysis, and field investigations.

A federal agency's consultation with Indian tribes or Native Hawaiian organizations is intended to ensure historic properties that may be of religious and cultural significance to them are both identified and appropriately considered in the Section 106 review process. In fact, the Section 106 regulations at Section 800.4(c)(1) require federal agencies to acknowledge the special expertise of Indian tribes and Native Hawaiian organizations in assessing the eligibility of historic properties that may be of religious and cultural significance to them.

4) Why is it important for federal agencies to consult with Indian tribes or Native Hawaiian organizations regarding traditional cultural landscapes?

Many assume that archaeologists can identify, through archaeological surveys, those properties that are of significance to Indian tribes or Native Hawaiian organizations. However, unless an archaeologist has been specifically authorized or permitted by an Indian tribe or Native Hawaiian organization to speak on its behalf, or has been determined by that entity to be qualified to conduct such surveys, it should not be assumed that the archaeologist possesses the appropriate expertise to determine what properties are or are not of religious and cultural significance to an Indian tribe or Native Hawaiian organization. The appropriate individual to make such a determination is the representative designated by the tribe or Native Hawaiian organization for this purpose. Efforts to identify these types of properties may include site visits and interviews with tribal elders or cultural experts.

Additionally, unless such traditional cultural landscapes have already been publicly identified, frequently the only entities aware of these landscapes are either an Indian tribe or a Native Hawaiian organization. Since such places are often comprised of related locations across some distance and for which the connections may not be obvious to those outside of the culture that holds them significant, it stands to reason that the most appropriate entity to inform such identifications and evaluations are either Indian tribes or Native Hawaiian organizations.

5) How can issues of confidentiality be addressed when traditional cultural landscapes may be affected by an undertaking?

Many Indian tribes or Native Hawaiian organizations have belief systems that require the location and even the existence of properties of traditional religious and cultural significance, including traditional cultural landscapes, not be divulged. Therefore, it is vital that the federal agency work with tribes or Native Hawaiian organizations to identify sensitive locations while respecting desires to withhold specific information about such sites. The Section 106 regulations at 36 CFR Section 800.4(b)(1) state, in part, that “[t]he agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.”

The NHPA and the Section 106 regulations also provide a vehicle for protecting information that an Indian tribe or Native Hawaiian organization has disclosed for the purpose of identification and evaluation of historic properties in the Section 106 process. Section 304 of the NHPA (16 U.S.C. 470w-3(a)) and the regulations at 36 CFR Section 800.11(c)(1) provide that the head of an agency, after consultation with the Secretary of the Interior, “shall withhold from disclosure to the public” information about the location, character, or ownership of a historic property when the agency head determines that the disclosure of such information may cause a significant invasion of privacy; risk harm to the historic property; or, impede the use of a traditional religious site by practitioners. After such a determination, the Secretary of the Interior, in consultation with the relevant agency, will determine who, if anyone, may have access to the information for purposes of the NHPA. When the information in question has been developed in the course of an agency’s compliance with Section 106, the Secretary shall consult with the ACHP in reaching determinations on the withholding and release of information.

One important caveat: the Section 304 confidentiality provisions only apply to properties that are listed or eligible for listing in the NRHP. Thus, it is possible that information disclosed prior to an eligibility determination may not be protected. Therefore, the ACHP suggests that agencies and Indian tribes or Native Hawaiian organizations contact NR staff for guidance regarding the amount of information and detail needed to make a determination of eligibility when such information may be at risk of disclosure. It may be possible for a tribe or Native Hawaiian organization to share just enough information for the agency to identify the existence of a site and make a determination of eligibility without compromising the site or the beliefs associated with it. Such information might include general aspects of the historic property’s attributes, i.e., that an important yearly ceremony takes place in a certain general location, that quiet is required in the area, that visual impacts will impede the ability to properly perform a required ritual, or that important ceremonial harvesting activities must occur at a particular place, time, or under certain conditions, as well as basic information about the relationship of the property to the project area. However, if there are questions about the adequacy of such information in making determinations of eligibility, the NR staff should be consulted.

Issues of confidentiality and sensitivity of information require flexibility and cooperation among the consulting parties. There may be situations where a tribe or Native Hawaiian organization is only willing to share information with the federal agency and not with the other non-federal consulting parties. This can challenge the traditional Section 106 process where the federal agency also consults with the SHPO to

determine eligibility of properties. In such cases, it is recommended that the agency promptly talk with the ACHP or the NR staff about how to resolve such a situation.

6) What types of features may be part of a traditional cultural landscape?

There is no single defining feature or set of features that comprise a traditional cultural landscape. Such places could be comprised of natural features such as mountains, caves, plateaus, and outcroppings; water courses and bodies such as rivers, streams, lakes, bays, and inlets; views and view sheds from them, including the overlook or similar locations ; vegetation that contributes to its significance; and, manmade features including archaeological sites; buildings and structures; circulation features such as trails; land use patterns; evidence of cultural traditions, such as petroglyphs and evidence of burial practices; and markers or monuments, such as cairns, sleeping circles, and geoglyphs.

7) What is the role of the Advisory Council on Historic Preservation in the consideration and protection of traditional cultural landscapes in the Section 106 process?

A federal agency must afford the ACHP an opportunity to participate in consultation regarding the resolution of adverse effects to any historic property, including a traditional cultural landscape, if the property is listed or determined eligible for listing on the NRHP. The ACHP can also offer its advisory opinion on the substance of any finding, determination, or decision regarding the adequacy of an agency's compliance with the Section 106 regulations at any time at the request of any individual, agency, or organization. The ACHP cannot, however, comment on the eligibility of a property for listing on the NRHP. Therefore, an Indian tribe or Native Hawaiian organization can request that the ACHP review an agency's finding, determination, or decision regarding the potential effects of its undertaking and the resolution of effects to historic properties of significance to them.

8) Where can I get more information on cultural landscapes in general?

The U.S. National Park Service (NPS) provides additional information on cultural landscapes at:

http://www.nps.gov/history/hps/hli/landscape_guidelines/index.htm

http://www.nps.gov/history/hps/hli/landscape_guidelines/using.htm

NPS also provides additional information on traditional cultural properties, which can also be landscapes at:

<http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf>

International sources of information:

<http://unesdoc.unesco.org/images/0013/001331/133121e.pdf>

http://www.international.icomos.org/centre_documentation/bib/culturallandscapes.pdf

<http://whc.unesco.org/en/news/588>

Issued on July 11, 2012