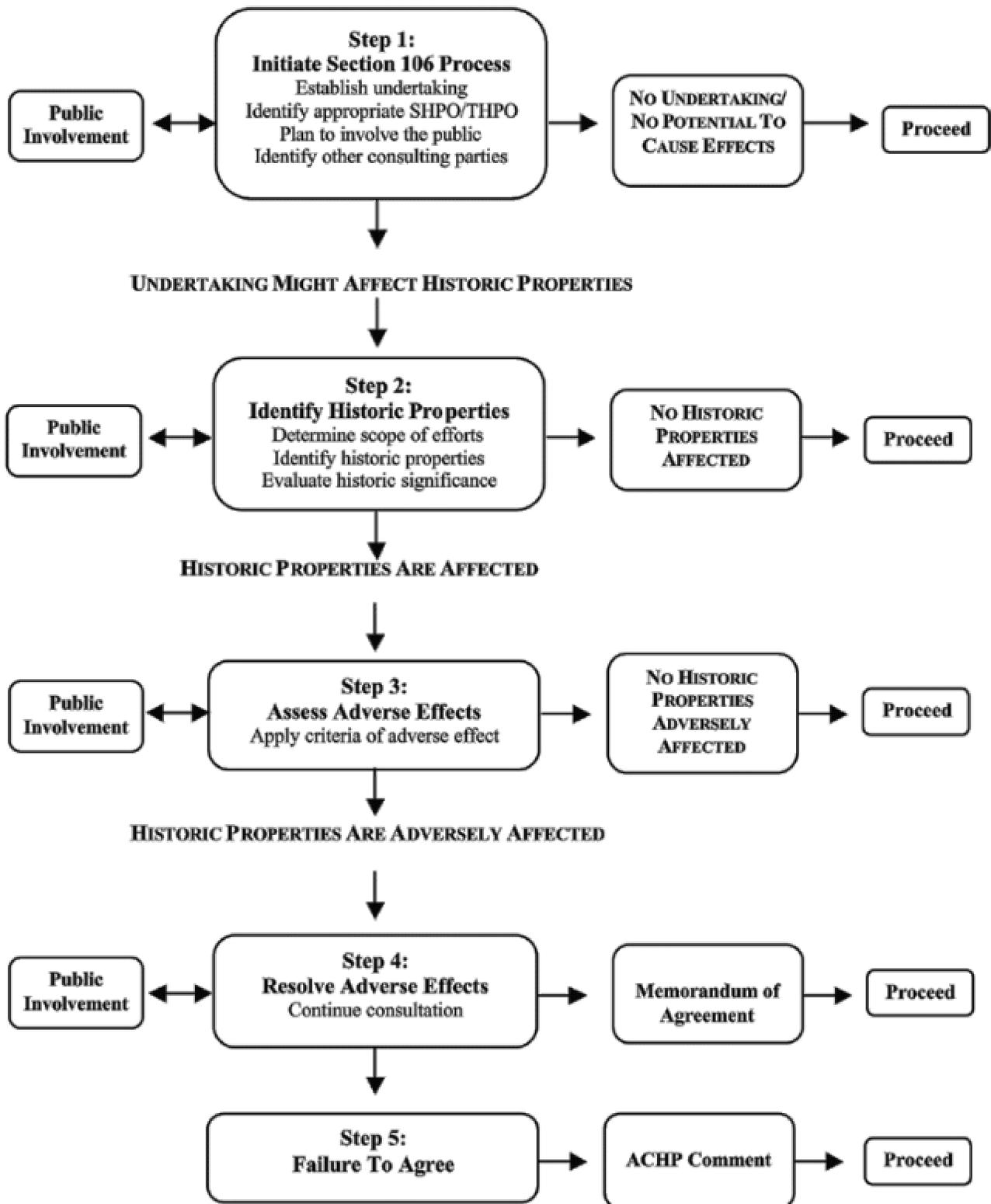


Section 106 Flowchart (prepared by ACHP)

The Section 106 Compliance Process



Initiate the Section 106 process (800.3)

- Establish undertaking (800.3(a))
- Identify appropriate SHPO/THPO (800.3 (c)-(d))
- Plan to involve the public (800.3(e))
- Identify other consulting parties (800.3(f))
- 800.3(g)

No undertaking/no potential to cause effects (800.3(a)(1))

Undertaking might affect historic properties

Identify historic properties (800.4)

- Determine scope of efforts (800.4(a))
- Identify historic properties (800.4(b))
- Evaluate historic significance (800.4(c))

No historic properties affected (800.4(d)(1))

Historic properties are affected (800.4(d)(2))

Assess adverse effects (800.5)

- Apply criteria of adverse effect (800.5(a))

No historic properties are adversely affected (800.5(d)(1))

Historic properties are adversely affected (800.5(d)(2))

Resolve adverse effects (800.6)

- Continue consultation

Memorandum of Agreement (800.6(b))

Failure to resolve adverse effects (800.7)

Council comment and agency response

Initiate the Section 106 process (800.3)

Federal agencies are encouraged to integrate the Section 106 process into agency planning at its earliest stages.

Establish undertaking (800.3(a))

The determination of whether or not an undertaking exists is the Agency Official's decision. However, the Council may render advice on the existence of an undertaking. If there is an undertaking, but it does not present a type of activity that has the potential to have an effect on an historic property, then the agency is

finished with its Section 106 obligations. If the action is subject to a program alternative, such as Programmatic Agreement or an alternate agency procedure, then the agency should follow that process.

800.3(b) This section emphasizes the benefit to an agency of coordinating compliance with related statutes to increase efficiency and avoid duplication of efforts. However, this coordination is not mandatory and is up to the Agency Official. Although agencies are encouraged to use the information gathered for these other processes to meet Section 106 needs, the information must meet the standards in these regulations.

*** (800.3 (c) - (d))**

The Federal agency has the responsibility to properly identify the appropriate State Historic Preservation Officer (SHPO) and/or appropriate Tribal Historic Preservation Officer * (THPO) that must be consulted. If the undertaking is on or affects historic properties on tribal lands, then the agency must determine what tribe is involved. If the relevant tribe has assumed the SHPO's responsibilities for Section 106 under Section 101(d)(2) of NHPA, thereby having a THPO*, the agency must consult with such THPO* **in lieu of** the SHPO. A list of THPOs is available from the National Park Service. Certain owners of property on tribal lands can request SHPO involvement in addition to the THPO in a Section 106 case in accordance with NHPA. If the relevant tribe has not assumed SHPO responsibilities for Section 106 under Section 101(d)(2) of NHPA, the agency consults with such tribe **and** the SHPO.

Other related points include:

- A group of SHPOs may agree to designate a lead SHPO to act on their behalf for a specific undertaking.
- The manner of consultation may vary depending on the agency's planning process, the nature of the undertaking, and the nature of its effects.
- Failure of a SHPO/THPO* to respond within the time frames set by the regulation permit the agency to assume concurrence with the finding or to consult about the finding or determination with the Council in the SHPO/THPO*'s absence. Subsequent involvement by the SHPO/THPO* is not precluded, but the SHPO/THPO* cannot reopen a finding or determination that it failed to respond to earlier.

For undertakings occurring, or affecting historic properties, on tribal lands, the Section 106 process may be completed even when the SHPO has decided not to participate in the process. A SHPO and a THPO* may develop tailored agreements for SHPO participation in reviewing undertakings on the tribe's lands.

Plan to involve the public (800.3(e))

The Agency Official must decide early how and when to involve the public in the Section 106 process. A formal "plan" is not required, although that might be appropriate depending upon the scale of the undertaking and the magnitude of its effects on historic properties.

Identify other consulting parties (800.3(f))

The Agency Official, at an early stage of the Section 106 process, is required to consult with the SHPO/THPO* to identify those organizations and individuals that will have the right to be consulting parties under the terms of the regulations. These may include local governments, Indian tribes, and Native Hawaiian organizations, and applicants for Federal assistance or permits. Others may request to be consulting parties, but that decision is ultimately up to the Agency Official.

800.3(g) An Agency Official can combine individual steps in the Section 106 process with the consent of the SHPO/THPO*. Doing so must protect the opportunity of the public and consulting parties to participate fully in the Section 106 process as envisioned in Section [800.2](#).

No undertaking/no potential to cause effects (800.3(a)(1))

If the Agency Official determines that there is no undertaking as defined in Section 800.16(y), or there is an undertaking but it is not the type of activity that has the potential to cause effects on historic properties, there are no further obligations under Section 106 or the Council's regulations. Agencies are strongly advised to keep appropriate records of such findings in case questions are raised by members of the public or other parties at a later date.

Undertaking might affect historic properties

Assuming that the Agency Official has determined that the undertaking is the type of activity that has the potential to cause effects on historic properties, the agency proceeds to identify properties that might be affected.

Identify historic properties (800.4)

The step known as "identification" includes preliminary work, actual efforts to identify properties, and an evaluation of identified properties to determine whether they are "historic;" i.e., they are listed on, or eligible for inclusion in, the National Register of Historic Places.

Determine scope of efforts (800.4(a))

At the beginning stages of the identification process, the Agency Official must consult with the SHPO/THPO* on the scope of its identification efforts and in fulfilling the steps in subsections (1) through (4). These steps include (1) determining and documenting the area of potential effects; (2) reviewing existing information about historic properties; (3) seeking information from parties likely to have knowledge of or concerns about the area; and (4) gathering information from Indian tribes and Native Hawaiian organizations about properties to which they attach religious and cultural significance, while remaining sensitive to any concerns they may have about the confidentiality of this information.

The SHPO/THPO* should be consulted at all steps in the scoping process. The determination of the area of potential effects is made unilaterally by the Agency Official, after such consultation. Where Federal agencies are engaged in an action that is on or may affect ancestral, aboriginal or ceded lands, Federal agencies must gather information from Indian tribes and Native Hawaiian organizations regarding properties that may be of traditional religious and cultural significance to them, and that may be eligible for the National Register, on such lands.

Identify historic properties (800.4(b))

This section sets out the steps an Agency Official must follow to identify historic properties. Reminders scattered throughout the section emphasize the need for consultation with various parties.

800.4(b)(1) The standard for identification is a "reasonable and good faith effort" to identify historic properties, depending on a variety of factors (including, but not limited to, previous identification work). Appropriate identification may include background research, consultation, oral history interviews, sample field investigation, and field survey.

800.4(b)(2) Phased identification may be done when alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, and the nature of the undertaking and its potential scope and effect have therefore not yet been completely defined. Final identification and evaluation may also be deferred if provided for in an agreement with the SHPO/THPO* or other circumstances. Under this approach, Agency Officials are required to follow up with full identification and evaluation once project alternatives have been refined or access has been gained to previously restricted areas. Any further deferral of final identification would complicate the process and jeopardize an adequate assessment of effects and resolution of adverse effects.

Evaluate historic significance (800.4(c))

This section sets out the process for determining the National Register eligibility of properties not previously evaluated for historic significance.

800.4(c)(1) Federal agencies are required to apply the National Register Criteria to properties identified in the area of potential effects, and to acknowledge the special expertise of Indian tribes and Native Hawaiian organizations when assessing the eligibility of a property to which they attach religious and cultural significance. Old determinations of eligibility may need to be re-evaluated due to the passage of time or other factors.

800.4(c)(2) The Agency Official makes determinations of eligibility in consultation with the SHPO/THPO*. If there is disagreement or the Council or Secretary of Interior so requests, the Agency Official must refer the matter to the Keeper of the National Register. If an Indian tribe or Native Hawaiian organization disagrees with a determination of eligibility involving a property to which it attaches religious and cultural significance, then the tribe can ask the Council to request that the Agency Official obtain a determination of eligibility. The intention is to provide a way to ensure appropriate determinations regarding

properties located off tribal lands to which tribes attach religious and cultural significance.

No historic properties affected (800.4(d)(1))

If no historic properties are found or no effects on historic properties are found, the Agency Official provides appropriate documentation to the SHPO/THPO* and notifies consulting parties. Members of the public need not receive direct notification, but the Federal agency must place its documentation in a public file prior to approving the undertaking, and provide access to the information when requested by the public.

Once adequate documentation is received, the SHPO/THPO* has 30 days to object to the determination. The Council may also object on its own initiative within the time period. Lack of such objection within the 30 day period means that the agency has completed its Section 106 responsibilities.

Historic properties are affected (800.4(d)(2))

The Federal agency must proceed to the assessment of adverse effects when it finds that historic properties may be affected or the SHPO/THPO* or Council objects to a no historic properties affected finding. The agency must notify all consulting parties and invite their views.

Assess adverse effects (800.5)

The SHPO/THPO*, and Indian tribes and Native Hawaiian organizations attaching religious and cultural significance to identified properties, must be consulted when agencies apply the criteria of adverse effect. The Agency Official also needs to consider the views of consulting parties and the public.

Apply criteria of adverse effect (800.5(a))

800.5(a)(1) Adverse effects occur when an undertaking may directly or indirectly alter characteristics of a historic property that qualify it for inclusion in the Register. Reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative also need to be considered.

800.5(a)(2) Examples of adverse effects include physical destruction or damage; alteration not consistent with the Secretary of the Interior's *Standards*; relocation of a property; change of use or physical features of a property's setting; visual, atmospheric, or audible intrusions; neglect resulting in deterioration; or transfer, lease, or sale of a property out of Federal ownership or control without adequate protections.

If a property is restored, rehabilitated, repaired, maintained, stabilized, remediated or otherwise changed in accordance with the *Secretary's Standards*, then it will not be considered an adverse effect (assuming that the SHPO/THPO* agrees). Where properties of religious and cultural significance to Indian tribes or Native Hawaiian organizations are involved, neglect and deterioration may be recognized as qualities of those properties and thus may not necessarily constitute an adverse effect.

If a property is transferred leased or sold out of Federal ownership with proper preservation restrictions, then it will not be considered an adverse effect as in the past regulations. Transfer between Federal agencies is not an adverse effect *per se*; the purpose of the transfer should be evaluated for potential adverse effects, so that they can be considered before the transfer takes place.

Alteration or destruction of an archaeological site is an adverse effect, whether or not recovery of archaeological data from the site is proposed. The Council has issued guidance to help agencies and others reach agreement on the treatment of such properties.

800.5(a)(3) This section is intended to allow flexibility in Federal agency decision making processes and to recognize that phasing of adverse effect determinations, like identification and evaluation, is appropriate in certain planning and approval circumstances, such as the development of linear projects where major corridors are first assessed and then specific route alignment decisions are made.

800.5(b) The SHPO/THPO* may suggest changes in a project or impose conditions so that adverse effects can be avoided and thus result in a no adverse effect determination. This subsection emphasizes that a finding of no adverse effect is only a proposal when the Agency Official submits it to the SHPO/THPO* for review. This subsection also acknowledges that the practice of "conditional No Adverse Effect determinations" is acceptable.

800.5(c) The Council will not review no adverse effect determinations on a routine basis. The Council will intervene and review no adverse effect determinations if it deems it appropriate based on the criteria listed in Appendix A (circumstances warranting Council involvement), or if the SHPO/THPO* or another consulting party and the Federal agency disagree on the finding and the agency cannot resolve the disagreement. If Indian tribes or Native Hawaiian organizations disagree with the finding, they can request the Council's review directly, but this must be done within the 30 day review period.

If a SHPO/THPO* fails to respond to an Agency Official finding within the 30 day review period, then the Agency Official can consider that to be SHPO/THPO* agreement with the finding. When the finding is submitted to the Council, it will have 15 days for review; if it fails to respond within the 15 days, then the Agency Official may assume Council concurrence with the finding. When it reviews no adverse effect determinations, the Council will limit its review to whether or not the criteria have been correctly applied. The Council's determination is binding.

No historic properties are adversely affected (800.5(d)(1))

Agencies must retain records of their findings of no adverse effect and make them available to the public. The public should be given access to the information when they so request, subject to Freedom of Information Act (FOIA) and other statutory limits on disclosure, including the confidentiality provisions in Section 304 of NHPA. Failure of the agency to carry out the undertaking in accordance with the finding requires the Agency Official to reopen the Section 106 process and determine whether the altered course of action constitutes an adverse effect.

Historic properties are adversely affected (800.5(d)(2))

A finding of adverse effect requires further consultation on ways to resolve it.

Resolve adverse effects (800.6)

The process for resolving adverse effects has been changed to reflect the altered role of the Council and the consulting parties.

Continue consultation

800.6(a)(1) When adverse effects are found, the consultation must continue among the Federal agency, SHPO/THPO* and consulting parties to attempt to resolve them. The Agency Official must always notify the Council when adverse effects are found and must also invite the Council to participate in the consultation when any of the circumstances in 800.6(a)(1)(i)(A)-(C) exist. A consulting party may also request the Council to join the consultation. The Council will decide on its participation within 15 days of receipt of a request, basing its decision on the criteria set forth in Appendix A. Whenever the Council decides to join the consultation, it must notify the Agency Official and the consulting parties. It must also advise the head of the relevant Federal agency of its decision to participate. This is intended to keep the policy level of the Federal agency apprized of those cases that the Council has determined present issues significant enough to warrant its involvement.

800.6(a)(2) New consulting parties may enter the consultation if the agency and the SHPO/THPO* (and the Council, if participating) agree. If they do not agree, it is desirable for them to seek the Council's opinion on the involvement of the consulting party. Any party, including applicants, licensees or permittees, that may have responsibilities under a Memorandum of Agreement must be invited to participate as a consulting party.

800.6(a)(3) The Agency Official is obligated to provide project documentation to all consulting parties at the beginning of the consultation to resolve adverse effects. Particular note should be made of the reference to the confidentiality provisions.

800.6(a)(4) The Federal agency must provide an opportunity for members of the public to express their views on an undertaking. The provision embodies the principles of flexibility, relating the agency effort to various aspects of the undertaking and its effects upon historic properties. The Federal agency must provide them with notice such that the public has enough time and information to meaningfully comment.

If all relevant information was provided at earlier stages in the process in such a way that a wide audience was reached, and no new information is available at this stage in the process that would assist in the resolution of adverse effects, then a new public notice may not be warranted. However, this presumes that the public had the opportunity to make its views known on ways to resolve the adverse effects.

800.6(a)(5) Although it is in the interest of the public to have as much information as possible in order to provide meaningful comments, this section acknowledges that information may be withheld in accordance with Section 304 of the NHPA.

Memorandum of Agreement (800.6(b))

If the Council is not a part of the consultation, then a copy of the executed Memorandum of Agreement must be sent to the Council so that the Council can include it in its files to have an understanding of a Federal agency's implementation of Section 106. This does not provide the Council an opportunity to reopen the specific case, but may form the basis for other actions or advice related to an agency's overall performance in the Section 106 process.

800.6(b)(1) When resolving adverse effects without the Council, the Agency Official consults with the SHPO/THPO* and other consulting parties to develop a Memorandum of Agreement. If this is achieved, the agreement is executed between the Agency Official and the SHPO/THPO* and filed with required documentation with the Council. This filing is the formal conclusion of the Section 106 process and must occur before the undertaking is approved. Standard treatments adopted by the Council may set expedited ways for completing memoranda of agreement in certain circumstances.

800.6(b)(2) When the Council is involved, the consultation proceeds in the same manner, but the agreement of the Agency Official, the SHPO/THPO* and the Council is required for a Memorandum of Agreement.

800.6(c) The execution and implementation of a Memorandum of Agreement evidences an agency's compliance with Section 106. Failure to do so requires the Agency Official to reopen the Section 106 process and bring it to suitable closure as prescribed in the regulations.

800.6(c)(1) The rights of signatories to an agreement are spelled out, along with who is required to sign the agreement under specific circumstances. The term "signatory" has a special meaning as described in this section, which is the ability to terminate or agree to amend the Memorandum of Agreement. The term does not include others who sign the agreement as concurring parties.

800.6(c)(2) The Agency Official may invite certain parties to be signatories in addition to those specified in Section 800.6(c)(1). They include individuals and organizations that should, but do not have to, sign agreements. It is particularly desirable to have parties who assume obligations under the agreement become formal signatories. However, once invited signatories sign MOAs, they have the same rights to terminate or amend the MOA as the other signatories.

800.6(c)(3) Other parties may be invited to concur in agreements. They do not have the rights to amend or terminate an MOA. Their signature simply shows that they are familiar with the terms of the agreement and do not object to it.

800.6(c)(4) - (9) These sections set forth specific features of a Memorandum of Agreement and the way it can be terminated or amended.

Failure to resolve adverse effects (800.7)

What happens when the consulting parties cannot reach agreement? Usually when consultation is terminated, the Council renders advisory comments to the head of the agency, which must be considered when the final agency decision on the undertaking is made. There may be circumstances where the Council will recommend further discussion to try to resolve the matter.

Council comment and agency response

800.7(a)(1) The head of the agency or an Assistant Secretary or officer with major department-wide or agency-wide responsibilities must request Council comments when the Agency Official terminates consultation. Section 110(l) of the NHPA requires heads of agencies to document their decision when an agreement has not been reached under Section 106.

800.7(a)(2) The Council and the Agency Official may conclude the Section 106 process with a Memorandum of Agreement between them if the SHPO terminates consultation.

800.7(a)(3) If a THPO* terminates consultation, there can be no agreement with regard to undertakings that are on or affect properties on tribal lands. In such cases, the Council will issue formal comments. This provision respects the tribe's unique sovereign status with regard to its lands.

800.7(a)(4) In cases where the Council terminates consultation, the Council has the duty to notify all consulting parties prior to commenting. The role given to the Federal Preservation Officer is intended to fulfill the NHPA's goal of having a central official in each agency to coordinate and facilitate the agency's involvement in the national historic preservation program.

800.7(b) The Council may provide advisory comments even though it has signed a Memorandum of Agreement. This provision is intended to give the Council the flexibility to provide comments even where it has agreed to sign an MOA. Such comments might elaborate upon particular matters or provide suggestions to Federal agencies for future undertakings.

800.7(c) The Council has 45 days to provide its comments to the head of the agency for a response by the agency head. When submitting its comments, the Council will also provide the comments to the Federal Preservation Officer, among others, for information purposes.

800.7(c)(4) This section specifies what it means to "document the agency head's decision" as required by Section 110(l) when the Council issues its comment to the agency head.

* The regulations define the term "THPO" as those tribes that have assumed SHPO responsibilities on their tribal lands and have been certified pursuant to Section 101(d)(2) of the NHPA. Nevertheless, remember that tribes that have not been so certified have the same consultation and concurrence rights as THPOs when the undertaking takes place, or affects historic properties, on their tribal lands. The practical difference is that during such undertakings, THPOs would be consulted *in lieu of* the SHPO, while non-certified tribes would be consulted *in addition to* the SHPO.