

**Why ACHP Should Review The I-5:  
Glendale – Hugo Paving/Sexton Climbing Lane  
Project Section 106 Process**

**Section 106 Consulting Party  
Hugo Neighborhood Association & Historical Society**



**October 2012**

# **Why ACHP Should Review The I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project Section 106 Process**

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### ACRONYMS

§	Section
ACHP	Federal Advisory Council on Historic Preservation
APE	Area of Potential Effects
CE	Categorical Exclusion
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
EA	Environmental Assessment
EIS	Environmental Impact Statement
GLO	General Land Office
HA	Highway Agency
HETC	Hugo Emigrant Trails Committee
HNA&HS	Hugo Neighborhood Association & Historical Society
HNAT	Hugo Native American Team
HTAC	Oregon Historic Trails Advisory Council
JA-14	GLO Surveyed Applegate Trail/Road Site, Maple Creek
JA-15	GLO Surveyed Applegate Trail/Road Site, South Rat Creek
JA-16	GLO Surveyed Applegate Trail/Road Site, Old Stage Road
FHWA	Oregon Division - Federal Highway Division (Federal Highway Administration)
OCTA	Oregon-California Trails Association
OHTAC	Oregon Historic Trails Advisory Council
OMNCH	Oregon Museum of Natural and Cultural History
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
ODOT	Oregon Department of Transportation
SHPO	Oregon State Historic Preservation Office
SOU	Southern Oregon University
SOULA	Southern Oregon University Laboratory of Anthropology
THPO	Tribal Historic Preservation Officer

### SYNONYMS/DEFINITIONS

§ 800.2(d)(1-2)	Opportunity For Public To Examine Results Standard
§ 800.4(b)	Shall Take the Steps Necessary Standard
§ 800.4(b)(1)	Reasonable and Good Faith Effort Standard
§ 800.4(b)(1)	Must Consider Standard
§ 800.4(b)(1)	Honest Effort Standard
§ 800.11(a)	Documentation Standard
§ 800.11(c)	Confidentiality Standard
310	310' Segment Of <i>Applegate Road</i> South Sexton Pass
1060	1,060' Segment of the Applegate Trail/Road = 1,060' Applegate Trail I For North Sexton Pass I-5 East
Act	National Historic Preservation Act of 1966 as amended
Applegate Trail	Historic Trails Part of the National Historic California Trail

Consulting Party	Section 106 Consulting Party
Counsel	Federal Advisory Council on Historic Preservation
Dak'ts!asin	Mrs. Johnson's native village = Dak'ts!asin in the Neighborhood of Jumpoff Joe Creek, and near a Local Medicine Rock ( <u>dan-mologol</u> ) as Her Native Village.
Dan Mologol	Rock Old Woman
Eligible Property	Eligible for Inclusion in National Register Includes Properties that Are Formally Designated As Such and Other Properties That Meet the National Register Criteria
Historic Property	Included in, or Eligible for Inclusion in the National Register of Historic Places
Johnson, Frances	Lowland Takelma Indian Informant, Native Name is Gwisgwashan
Military Road	<i>United States Military Wagon Road From Myrtle Creek to Camp Stewart: 1853 - 1880</i>
<i>Project</i>	Federal "Undertaking" Project = "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project"
Regulations	U.S. Code of Federal Regulations
Rib Creek	Grave Creek
Section 106	Section 106 Process, Section 106 of the National Historic Preservation Act
<i>Trail</i>	Applegate National Historic Trail = Trail/Road
National Register	National Register of Historic Places
Undertaking	Federal "Undertaking" Project = "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project"
Yellow Line	<i>Project's</i> (i.e., Undertaking's) Proposed Slope Cut (i.e, Project Design)

## **BIBLIOGRAPHY**

### **APPENDICES**

Appendix A.	Federal Agency's Section 106 Consulting Parties' Process
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Appendix C.	Hugo Neighborhood Association & Historical Society's Applegate Trail Inventory "Educational Resources"
Appendix D.	36 CFR PART 800 – Protection of Historic Properties
Appendix E.	ODOT Categorical Exclusions
Appendix F.	ODOT Mitigation Measures
Appendix G.	CEQs 40 Most Frequently Asked Questions: Question 40

### **FLOW CHARTS**

Flow Chart No. 1: Section 106 Regulations

**Edited/Web Published:** This October 2012 paper is final for its purposes, and is web published at the HNA&HS's web site at Appendix B, Web Link 19B. However, this paper has not been edited. A final edited paper will be developed during November 2012 and web published.

# Why ACHP Should Review The I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project Section 106 Process

## EXECUTIVE SUMMARY

*Why ACHP Should Review The I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project Section 106 Process* is a plea to the Federal Advisory Council on Historic Preservation (ACHP) for the Hugo Neighborhood Association & Historical Society's (HNA&HS) historical preservation issues to be heard in a different forum beyond the local Federal undertaking, "I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project" (Project) Section 106 Process dominated by the Oregon Division - Federal Highway Division (FHWA), Oregon Department of Transportation (ODOT), and the Oregon State Historic Preservation Office (SHPO).

The rationale for the plea covers the normal outline of a resource problem by defining the issues, the purpose, the players, and the planning process, as well as the standards and errors not in compliance with the law, but mostly it is about the chilling effect upon a Section 106 Consulting Party attempting to participate in a bureaucratic process not able to consider its concerns.

In this case the substantive issues are three: 1. historic properties of potential significance to Indian Tribes (i.e., a Lowland Takelma Indian Trail and a Medicine Woman's spirit embodied as Rock Old Woman at Sexton Mountain Pass), 2. the original location of a 1,060' segment of the Applegate Trail/Road (i.e., Class 1 Unaltered Trail/Class 2 Used Trail) at Sexton Mountain Pass as a historic property eligible for the National Register of Historic Places, and 3. view that an environmental assessment versus a categorical exclusion is the required National Environmental Policy Act analysis instrument for the undertaking. The significant Section 106 Process issues are three: 1. inadequate implementation of the standards promoting public participation of responsible agencies, 2. lack of an opportunity to be heard in the sense that a Section 106 Consulting Party's historical properties issues are analyzed, considered, and publicly documented before being deemed "*not sufficient*" with a couple of conclusory statements, and 3. inadequate to no public record documentation of required Section 106 Process inventory and analysis steps.

As background the National Historic Preservation Act's (NHPA) Section 106 Process appears well designed to facilitate meaningful public participation with its many public involvement and inventory procedures and standards.

- § 800.2(d)(1-2) Opportunity For Public To Examine Results Standard
- § 800.4(b) Shall Take the Steps Necessary Standard
- § 800.4(b)(1) Reasonable and Good Faith Effort Standard
- § 800.4(b)(1) Must Consider Standard
- § 800.4(b)(1) Honest Effort Standard
- § 800.11(a) Documentation Standard (*Adequacy of documentation*)
- § 800.11(c) Confidentiality Standard

The problem is the implementation of the Section 106 Process public involvement and inventory procedures and standards. As one issue, of many identified in this paper, is the issue that the FHWA, ODOT, and SHPO failed in their agency's obligations to protect historic properties by complying with the NHPA's Section 106 Process. For example, it appears to us that the

agencies' written public record was to, in effect, bypass completing some of the required historic properties inventory steps prior to § 800.4 (d)(1) and its § 800.11(d) Documentation of "*Finding of No Historic Properties Affected*". Without this objection to the finding it would be a "foreclosure" which means an action taken by an agency official that effectively precludes the ACHP from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking. The above problem is addressed in detail later in this paper.

1. maintaining a final project undertaking (§ 800.3(a)),
2. determining and documenting the APE (§ 800.4(a)(1)),
3. identifying historic properties (§ 800.4(b)),
4. evaluating historic significance (§ 800.4(c)(1)), and
5. completing results of identification and evaluation (§ 800.4(d)).

The rest of this executive summary is the specific example of the "*Finding of No Historic Properties Affected*" non-compliance with the Section 106 Process. During the last year the HNA&HS shared extensive inventories supporting its determination that the original location of a 1,060' segment of the Applegate Trail/Road at Sexton Mountain Pass was a historic property eligible for the National Register of Historic Places. It had produced hundreds of pages of research documentation published on its web page, the following are some significant examples, but are not all inclusive of the inventories.

- *1964 Collins Telegraph Line*
- *1874 Josephine County Surveyed Road*
- *1886 - 1887 Postal Telegraph Line*
- *1940 Right of Way Map, Sexton Mt. Section. Pacific Highway, Josephine County*
- *Smith Hill Pass*
- *Location Of Applegate Trail in Upper Rat Creek: A Work In Progress*
- *Applegate Trail I North Sexton Pass I-5 East: I*
- *Draft Applegate Trail I North Sexton Pass I-5 East: II*
- *Telegraph Lines and Applegate Trail at Smith Hill Pass*
- *John Peabody Harrington's Takelma Indian Field Notes: Outline*
- *Lowland Takelma Indian Trail & Rock Old Woman At Sexton Mountain Pass*

How did the FHWA, ODOT, and SHPO implement the Section 106 Process *Must Consider Standard*? This standard at § 800.4(b)(1-2) is that the responsible agencies "shall make a reasonable and good faith effort" of providing a reasonable response acknowledging and considering a Section 106 Consulting Party's historic properties inventory evidence. The finding's answer is that consideration was two conclusory sentences.

*"Background research, sites visits, and an examination of the documents provided by the HNAHS were not sufficient to support their claim that the Applegate Trail is present within the I-5: Glendale – Hugo Paving / Sexton Climbing Lane Project APE. ODOT archival records indicate that the road bed or area of concern to the HNAHS was constructed or enhanced by the Oregon Department of Forestry sometime, between 1948 and 1952, to facilitate an access road with a grade that could be used by modern equipment to reach the lookout tower on the Sexton Mountain Summit."*

There are no public records with supporting rationale purporting that the SHPO, ODOT or FHWA reviewed and considered historical properties inventories the HNA&HS had provided. What we know from the public record is that ODOT developed the two sentence conclusory statements and that SHPO and FHWA representatives concurred with their signatures.

## **I. INTRODUCTION: HNA&HS ISSUES**

### **A. Historic Properties Of Potential Significance To Indian Tribes**

The HNA&HS's interest in historic properties of potential significance to Indian Tribes started out because of Thomas Doty, Story Teller, *Doty & Coyote: Stories from the Native West* ([http://www.dotycoyote.com/biography/programs\\_projects.html](http://www.dotycoyote.com/biography/programs_projects.html)). A few years ago he wrote a story about his decades-long search for the Lowland Takelma Indian medicine woman Dan Mologol (i.e., Rock Old Woman). Her home was a sacred Takelma site along the old Lowland Takelma Indian Trail near what is now Interstate 5 at Sexton Mountain Pass (*Waiting for Rock Old Woman*, <http://www.dotycoyote.com/library/rock.html>) in Southern Oregon. Doty more recently noted that "Although most of the ancient Dan Mologol site was destroyed years ago by road building, including the Pacific Highway, Highway 99, and Interstate 5, the spirit of the area remains sacred. There are instances when government agencies have protected "invisible" indigenous sites. The Songlines, or Dreaming Tracks, in Australia come to mind. Should the traditional home of Rock Old Woman be one of those instances? Her story continues to evolve...." (Appendix B, Web Link 12 ).

As of August 2012 new significant historical properties evidence to the Hugo Native American Team (HNAT) finds a 1,060' segment of the old 1855 Lowland Takelma Indian Trail over the present north Sexton Mountain Pass as being under the old Applegate Trail/Road (Appendix B, Web Link 17; Section II.B).

### **B. Applegate Trail/Road A Historic Property**

The ODOT and the HNA&HS, a Section 106 Consulting Party, have publicly disagreed on the identification of historic properties in the area of potential effects (APE) for the "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project" (*Project*) (36 CFR 800.4, Identification of Historic Properties) since February 1, 2012. This was the first day representatives of the HNA&HS were provided a *Project* boundary by ODOT in the form of a slope cut line, and, therefore, potential impacts of the proposal/undertaking on any historic properties within the boundary line.

A detailed description of this disagreement is at the Hugo Emigrant Trails Committee's (HETC's) Applegate Trail inventories identified in Appendix C, especially the May 1, 2012 field trip meeting minutes (Appendix B, Web Link 8) and the June 15, 2012 review and comments by ODOT of the May 1 meeting minutes (Appendix B, Web Link 9). Also see the June 26, 2012 Email/Letter from the HNA&HS to FHWA (Appendix B, Web Link 12).

Part of the HNA&HS's issue is that the minimum standards for public involvement (36 CFR Part 800.2(d)) have not been met (i.e., "At a minimum, the Agency Official has to provide an opportunity for the public to examine the results of the agency's effort to identify historic properties, evaluate their significance and assess the undertaking's effects upon them." Section 106 Regulations, ACHP, Section-by-Section Questions and Answers, Updated May 26, 2010, <http://www.achp.gov/106q&a.html#intro>; also see Sections IV.A. - IV.H.). As of this date



ODOT had not provided HNA&HS any written consideration that invalidates its comprehensive historic properties inventories in the APE, especially its survey inventories, including what it believes is substantial evidence for a 1,060' segment of the Applegate Trail/Road at north Sexton Mountain Pass being a history property. In February 2012 the Hugo Emigrant Trails Committee (HETC) had classified this historic emigrant trail/road as a Class ② Used Trail under the Oregon-California Trails Association's (OCTA) trail identification system (Appendix C, *Telegraph Lines and Applegate Trail at Smith Hill Pass*). The importance of the 1,060 trail/road segment was refined on October 13, 2012 with a classification of Class ① Unaltered Trail/Class ② Used Trail by the Co-Project Leaders for the Hugo Applegate Trail Marking & Mapping Project (Appendix B, Web Link 18B).

What HNA&HS believes is that ODOT's Section 106 Process requirements consideration of HNA&HS's historic properties inventories has not occurred yet because it understands ODOT is relying entirely on a confidential reconnaissance report completed by Southern Oregon University (SOU) unavailable to HNA&HS. A reconnaissance report by definition is meant to be a broad identification of potential environmental and social issues. Therefore, without a public record, the HNA&HS doubts that ODOT has evaluated the Section 106 Process significance of the HNA&HS's inventories (Appendix C), especially its site specific survey inventories (i.e., Oregon General Land Office surveys (i.e. 1855 and 1893), the 1874 Josephine County surveyed road, the 1901 - 1902 USGS topographic map of the road, the 13' roll-out 1940 Oregon State Highway Department Right-of-Way Map for the Sexton Mt. Section Pacific Highway identifying the 1864 Collins Telegraph Line, the *Telegraph Lines and Applegate Trail at Smith Hill Pass* paper, and the *Lowland Takelma Indian Trail and Rock Old Woman at Sexton Mountain Pass* paper. Together these inventories are conclusive evidence that the 1,060' Trail was part of the original emigrant Applegate Trail/Road from ca., 1853 - 1880. What is known is that ODOT has not provided a public record that it has considered these inventories per the Section 106 Process standards.

### **C. Categorical Exclusion Not In Compliance With NEPA**

The HNA&HS's position is that a categorical exclusion (CE) process for the *Project* is not in compliance with NEPA (Section V). According to ODOT's own regulations for major construction projects (i.e., total *Project* budget estimated to be \$49.6 million, including the northbound Sexton Mountain climbing lane) do not qualify as CEs. The appropriate NEPA analysis tool for a major new earth moving construction project, versus paving, would be an environmental assessment (EA). The HNA&HS speculates that the CE process now being utilized was partially the result of the original split of the paving project from the passing lane project, where a CE was appropriate for the paving portion of the project, and not needed for the construction of the climbing lane project as it was originally fully state funded. What was the ODOT and FHWA's rationale for approving a CE process for a Federal undertaking which included the construction of a multi-million dollar 2.8 mile long, 12 feet wide climbing lane up and over the rugged Sexton Mountain Pass which will require some significant bedrock blasting and cut-slopes?

## II. PURPOSE AND PARTICIPANTS (36 CFR Section 800.1 - 2)

Significant is that there is a “Section 106 Process” with standards that the responsible agencies must comply with when seeking to accommodate historic preservation concerns.

### A. Purpose of Section 106 Process (36 CFR Section 800.1) One of the purposes of the Section 106 Process follows.

*“The section 106 process seeks to accommodate historic preservation concerns with the needs of **Federal undertakings** through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to **identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.**”* [emphasis added]

§ 800.3(a)	Initiation of the Section 106 Process & Establish Undertaking.
§ 800.4 (a)(1)	Identification of Historic Properties: Determine & Document Area of Potential Effects
§ 800.4 (b)	Identification of Historic Properties: Identify Historic Properties
§ 800.5	Assessment of Adverse Effects

The point of this section is to explore when ODOT had a Federal undertaking and a defined APE from which to identify and assess historic properties potentially affected by the undertaking. The next step in the Section 106 Process was to identify historic properties followed by the step of assessing the effects on any historic properties (Section III.A.). It is unknown to the HNA&HS when the *Project* was defined by ODOT as a project/undertaking with a known APE. In hindsight it was at least by the summer of 2010 before that same year’s study by SOU (*‘On and Onwards’: A Comprehensive Study for the Applegate Trail, The Southern Route to Oregon*) being used to support the position that there are no historic properties at north Sexton Mountain Pass (Appendix B, Web Link 14CA, References Cited). The SOU study recorded the following for the *Project* and APE (page 6).

*“In June, 2010 the Oregon Department of Transportation (ODOT) hired Southern Oregon University Laboratory (SOULA) to undertake a comprehensive study of the Applegate Trail where it intersected with the Interstate-5 corridor in southern Oregon. The ODOT Jumpoff Joe to Glendale Paving and Climbing Lanes Project Area of Potential Effect (APE) consisted of the Interstate-5 Right of Way between MP 66.3 - MP 81.5.”*

The ODOT did contract with SOU for an inventory of historic properties within the APE. It also contacted the HNA&HS in 2010 about the general I-5 project and asked whether HNA&HS would like to share its Applegate Trail inventories. HNA&HS enthusiastically shared what it knew at the time. However, the ODOT did not share any specifics about the project in which to understand it on the ground, and in 2010 the HNA&HS had never heard of the Section 106 Process.

In early 2012 the HNA&HS’s finally arrived at an understanding of the project’s on-the-ground proposed slope cut (i.e, project design) for the passing lane along the east bound lane of I-5 near Mount Sexton Pass, and that it could potentially damage or destroy what HNA&HS believed to

be a historic property within the ODOT right-of-way at Sexton Mountain Pass (i.e., approximately 1,000 feet of the Applegate Trail/Road's original location).

On February 1, 2012, a meeting was held between members of the HNA&HS and ODOT to discuss these concerns. At that time ODOT shared a large aerial photo (3' - 4' long) with the project footprint of the northbound Sexton Mountain Climbing Lane Project in order to try and understand any potential impacts. Of concern to the HNA&HS was a yellow line that depicted road slope cuts needed to support the expansion of I-5 to include the passing lane. Not clear to the ODOT and HNA&HS participants from the aerial photo was the location of the cut line when compared to the HETC Applegate Trail inventory (Appendix B, Web Link 3, page 4). It appeared to the members of the HETC that a significant portion of the HETC's inventoried 1,060' Applegate Trail I For North Sexton Pass I-5 East (1060) would be impacted by the project. If true, the project would significantly affect the Applegate National Historic Trail, a branch of the significant California National Historic Trail.

Even though ODOT had not provided any specific written *Project* description (i.e., Federal Undertaking) or specific APE to the HNA&HS, the HNA&HS believes that up to February 1, 2012 the ODOT and FHWA were in compliance with the "Section 106 Process" and its standards that the responsible agencies must comply with when seeking to accommodate historic preservation concerns (i.e., it had identify a project, a general impact area, and was working toward the goal of identifying any historic properties through a completed 2010 contract with SOU, and consulting with the HNA&HS concerning its *Trail* inventories.

*The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.*

The "Section 106 Process" steps after identifying historic properties were to assess any effects of the undertaking and seek ways to avoid, minimize or mitigate any adverse effects.

## **B. Historic Properties of Potential Significance to Section 106 Indian Tribe Consulting Parties (36 CFR Section 800.2(c)(2))**

New significant historical properties information as of August 2012 finds the old 1855 Lowland Takelma Indian Trail over the present Sexton Mountain Pass as being under the old Applegate Trail/Applegate Road according to the 1933 *John Peabody Harrington's Takelma Indian Field Notes* (Appendix C).

While conducting research on the 1933 *John Peabody Harrington's Takelma Indian Field Notes*, the HNAT discovered additional information from Frances Johnson, a Lowland Takelma Indian informant to ethnographer and linguist John Peabody Harrington. In 1933 Harrington brought her to the Rogue River region on a short automobile trip to assist in place name identification. During that trip Frances reported that the 1,060' segment of the Applegate Trail/Road at Sexton Mountain Pass was originally the location of the old Indian Trail/old emigrant road, and that Rock Old Woman had been located at Sexton Mountain Pass (*John Peabody Harrington's Takelma Indian*

*Field Notes: Outline; Appendix B, Web Link 17*). From this research another HNAT paper was developed entitled *Lowland Takelma Indian Trail and Rock Old Woman at Sexton Mountain Pass* (Appendix B, Web Link 17).

Frances Johnson was a Lowland Takelma Indian informant. Her Takelma name was Gwisgwashan and her native village was located somewhere north of the Rogue River. Sapir gives the name of Dak'ts!asin in the neighborhood of Jumpoff Joe Creek, and near a local medicine rock (dan-mologol) as her native village. The rock was at the Sexton Mountain Summit. She identified medicine rock, the old Indian Trail/old road downhill from U.S. 99/old Pacific Highway during the 1933 Harrington place name identification trip while at Sexton Mountain Pass on the old paved Pacific Highway. Harrington recorded her statements in three sketch maps (Maps 3 - 5 of *Lowland Takelma Indian Trail & Rock Old Woman At Sexton Mountain Pass* paper).

Frances was born at Grave Creek (Sunny Valley?) or Rainie Falls on the Rogue River. Her village was in the Jumpoff Joe Creek drainage and she would have personally traveled over the Sexton Mountain Pass along the Indian Trail by medicine rock. She had many personal memories of the Rogue River, her village, Rainie Falls, the medicine rock, and Grave Creek. She was 21 years old in 1856 when she and some of her tribe walked to the Siletz reservation, she was 98 years old in 1933 when she was interviewed by Harrington. Of critical importance was that Francis Johnson was accepted as a credible informant on the Lowland Takelma Indians by two professional ethnographers/linguists: in 1933 by John Peabody Harrington (Harrington 1981) and in 1906 by Edward Sapir (Sapir 1907a, 1907b, 1909), as well as Historian and Anthropologist Stephen Dow Beckham (Beckham 1971 & 1993), and Archaeologist Dennis Gray (Gray 1985 & 1987).

We do not disagree that representatives of ODOT contacted the applicable tribal representatives and none expressed concern with the *Project scope* (Appendix A). We are concerned that there is nothing in the public record to suggest that the Indian Tribes were aware of the Native American historic properties (i.e., the Lowland Takelma Indians' Indian Trail and Rock Old Woman) associated with the ODOT and FHWA project.

### **C. Section 106 Consulting Parties (36 CFR Section 800.2(c)(5))**

In June 2012 ODOT sent letters to individuals and organizations with a demonstrated interest in the *Project* pursuant to the ACHP's Section 106 regulations of the National Historic Preservation Act (NHPA) (Appendix A). One outcome was that three Section 106 Consulting Party representatives were identified.

- Glenn Harrison, Oregon Historic Trails Advisory Council
- Stafford Hazelett, Individual
- Mike Walker, Hugo Neighborhood Association & Historical Society

This was late in the Section 106 process, but the HNA&HS appreciates the effort of the ODOT to avoid the area of concern to the HNA&HS by minimizing the extent of the cut slope needed to accommodate a passing lane over Sexton Mountain Pass. We informed the ODOT representatives on July 17, 2012 meeting that we were satisfied that the freeway cut wouldn't adversely impact our area of concern.

### **III. APPLICABLE SECTION 106 PROCESS STANDARDS**

Section 106 of the NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties, and to afford the ACHP a reasonable opportunity to comment. The historic preservation review process mandated by Section 106 is outlined in regulations issued by the ACHP. The revised regulations, "Protection of Historic Properties" (36 CFR Part 800), became effective January 11, 2001, and are summarized below for the "Initiate Section 106 Process" and "Identify Historic Properties" requirements (Flow Chart No. 1).

**Initiate Section 106 process** The responsible Federal agency first determines whether it has an undertaking that is a type of activity that could affect historic properties. Historic properties are properties that are included in the National Register of Historic Places or that meet the criteria for the National Register. If so, it must identify the appropriate SHPO/Tribal Historic Preservation Officer (THPO) to consult with during the process. It should also plan to involve the public, and identify other potential consulting parties. If it determines that it has no undertaking, or that its undertaking is a type of activity that has no potential to affect historic properties, the agency has no further Section 106 obligations.

**Identify Historic Properties** If the agency's undertaking could affect historic properties, the agency determines the scope of appropriate identification efforts and then proceeds to identify historic properties in the area of potential effects. The agency reviews background information, consults with the SHPO/THPO and others, seeks information from knowledgeable parties, and conducts additional studies as necessary. Districts, sites, buildings, structures, and objects listed in the National Register are considered; unlisted properties are evaluated against the National Park Service's published criteria, in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious or cultural importance to them.

If questions arise about the eligibility of a given property, the agency may seek a formal determination of eligibility from the National Park Service. Section 106 review gives equal consideration to properties that have already been included in the National Register as well as those that have not been so included, but that meet National Register criteria. If the agency finds that no historic properties are present or affected, it provides documentation to the SHPO/THPO and, barring any objection in 30 days, proceeds with its undertaking.

If the agency finds that historic properties are present, it proceeds to the next step required by the CFR for the "The Section 106 Process" – "Assess Possible Adverse Effects".

#### **A. Agencies Protect Historic Properties as Part of Section 106 Process - Identification of Historic Properties (36 CFR Section 800.4)**

Subpart B of 36 Code of Federal Regulations (CRF) Part 800 – Protection of Historic Properties is identified as "The Section 106 Process". It is easy to understand that it is a process from initiation of the process, to protect historic properties, to program evaluation (i.e., post-review discoveries) after the decisions (i.e., determinations, findings, or agreement). It is a planning process part of our National Historic Preservation Planning Program. The method of protection of historic properties

is outlined in Subpart B of 36 CRF PART 800. This code (hereinafter “The Section 106 Process”) spells out the process and lays out a priority scheme that is to be followed in the protection of historic properties (Flow Chart No. 1).

<b>§ 800.3</b>	<b>Initiation of the Section 106 Process</b>
§ 800.3(a)	Initiation of the Section 106 Process & Establish Undertaking
<b>§ 800.4</b>	<b>Identification (ID) of Historic Properties</b>
§ 800.4 (a)(1)	ID of Historic Properties: Determine & Document Area of Potential Effects
§ 800.4 (b)	ID of Historic Properties: Identify Historic Properties
§ 800.4 (c)	ID of Historic Properties: Evaluate Historic Significance
§ 800.4 (c)(1)	ID of Historic Properties: Evaluate Historic Significance by Applying National Register Criteria
§ 800.4 (c)(2)	ID of Historic Properties: Evaluate Historic Significance by Determining Whether a Property is Eligible
§ 800.4 (d)	ID of Historic Properties: Results of Identification & Evaluation
§ 800.4 (d)(1)	ID of Historic Properties: Results of Identification & Evaluation No Historic Properties Affected Because No Historic Properties Present [Eligible]
§ 800.4 (d)(1)	ID of Historic Properties: Results of Identification & Evaluation No Historic Properties Affected Because Historic Properties Present [Eligible] Have No Effect From Undertaking
§ 800.4 (d)(2)	ID of Historic Properties: Results of Identification & Evaluation Historic Properties Affected From Undertaking
<b>§ 800.5</b>	<b>Assessment of Adverse Effects</b>

It is first determined if there is an undertaking that could affect historic properties. If the FHWA determines that it has no undertaking, or that its undertaking is a type of activity that has no potential to affect historic properties, the agency has no further Section 106 obligations.

If the agency's undertaking could affect historic properties, the agency determines the scope of appropriate identification efforts and then proceeds to identify historic properties in the area of potential effects (APE). It must evaluate historic significance of historic properties for eligibility (§ 800.4 (d)).

If questions arise about the eligibility of a given property, the agency may seek a formal determination of eligibility. If the agency finds that no historic properties are present or affected, it provides documentation to the SHPO/THPO and, barring any objection in 30 days, proceeds with its undertaking. However, if the agency finds that historic properties are present, it proceeds to the next step required by the CFR for the “The Section 106 Process” – “Assess Possible Adverse Effects”.

**B. Section 800.3(f); Section 800.5(c); Section 800.11(e). Agency's Obligations to All Consulting Parties in the Review of a Finding and Documentation**

The following Section 106 Process Standards (Sections III.B. - III.I.) were developed by ACHP (Section 106 Regulations; ACHP Section-by-Section Questions and Answers, Updated May 26, 2010/Downloaded June 23, 2012, <http://www.achp.gov/106q&a.html#intro>).

How are "other consulting parties" to be identified and involved (§800.3(f))?

The objective of this provision is to bring other consulting parties into the process at an early point. This is particularly important in the case of local governments with jurisdiction over the area where effects may occur and Indian tribes or Native Hawaiian organizations that may subsequently be entitled to participate as consulting parties because they attach religious and cultural significance to affected historic properties. The Agency Official should consult with the SHPO/THPO to identify those additional parties who meet the regulatory criteria. The Agency Official should make a "reasonable and good faith effort" to identify Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to historic properties that may be affected by the undertaking. (emphases added)

While Section 800.3(f) requires that this be done at the initiation of the review, the Agency Official should also be sensitive to the need to involve additional consulting parties at later stages in the process, as potential project impacts become better understood and the interests of other parties become clearer. The objective is to ensure that the Federal agency has adequately consulted with those who have significant interests in historic preservation issues. Doing this early is in everyone's best interest, to avoid having problems emerge later in the Section 106 process.

What are the agency's obligations to other consulting parties in the review of a finding of no adverse effect (§800.5(c))?

The Federal agency is required to provide all consulting parties with the proposed finding and the documentation specified in Section 800.11(e) at the same time it is provided to the SHPO/THPO for their 30-day review. Each consulting party has the right to disagree with the finding within that 30-day review period. If the agency cannot resolve the disagreement, it must seek ACHP's opinion, which is binding upon the agency. If the consulting party is an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a historic property, the agency "should seek" the concurrence of that party. This means that the agency is encouraged, but not legally required, to obtain such concurrence. If the tribe or organization does not concur and disagrees with the proposed finding, it can refer the matter directly to ACHP for resolution.

**C. Section 800.4(d)(1)(i). Section 106 Consulting Parties to Provide Their Views Regarding a Finding and Documentation Within 30 days Of Finding and Documentation Made Available to Consulting Parties**

What are the agency's obligations to other consulting parties in the review of a finding of no historic properties affected (§ 800.4(d)(1))? (Section III.B.)

The Federal agency is required to provide all consulting parties with the proposed finding and the documentation specified in § 800.11(d) at the same time it is provided to the SHPO/THPO for their 30-day review (§ 800.4(d)(1)(i)).

**D. Section 800.2(d)(1-2). Agency Official to Provide an Opportunity for the Public to Examine the Results of the Agency's Effort to Identify Historic Properties In Compliance With Information Standards**

What are the minimum standards for public involvement (§800.2(d))?

At a minimum, the Agency Official has to provide an opportunity for the public to examine the results of the agency's effort to identify historic properties, evaluate their significance and assess the undertaking's effects upon them. When adverse effects are found, the Agency Official must also make information available to the public about the undertaking, its effects on historic properties and alternatives to resolve the adverse effects, and must provide the public an opportunity to express their views on resolving adverse effects. The precise method of meeting these standards is left up to the Agency Official and may be guided by other applicable agency public involvement procedures. The agency can adjust the level and method based on the circumstances of the undertaking, as provided for in Sections 800.2(d) and 800.6(a)(4).

What is the minimum public notice and information standard (§800.2(d)(2))?

At a minimum, public notice should be designed to effectively inform the public about the nature of the undertaking, its effects and the public's likely interest in it. As for information, the documentation standards of Section 800.11 set requirements for the record at various steps in the process. These materials should be available to the public, unless constrained by legitimate confidentiality concerns. Other than Section 800.11's documentation standards, there is no special prescribed public notice and information standard for Section 106. Efforts to inform the public for other planning and environmental review purposes should be a guide to adequate efforts to meet Section 106 needs.

**E. Section 800.3(g). Consulting Parties and the Public Have an Adequate Opportunity to Express Their Views as Provided in Section 800.2(d)**

What does "adequate opportunity" for consulting parties and the public to express their views mean – is there a minimum standard (§800.3(g))? How does that work with "expediting consultation," and if agreement is reached that expediting consultation is appropriate, can that later be reversed if the SHPO/THPO has second thoughts or someone raises objections?

There is no minimum standard—beyond an "adequate opportunity"—specifically prescribed in the regulations. However, as noted previously, the agency must afford the public the opportunity to get adequate information about the undertaking and its historic preservation aspects (affected properties, nature of effects and proposed resolution of adverse effects) in the Section 106 process. These minimum needs are not compromised by agreements expediting consultation. If there is a subsequent question about the adequacy of public involvement, ACHP will look to what actually was provided for the public.



If the agency and the SHPO/THPO agreed but ACHP finds the result deficient, ACHP will make that view known to the agency and expect the agency to correct the shortcoming. A simple change of heart by the SHPO/THPO is not sufficient to require the agency to revert to the normal process, if the basic needs of public involvement are being met. However, the agency should be sensitive to the SHPO/THPO's views and honor them if good reason exists for departing from the agreed-upon expedited process.

**F. Section 800.4(a)(1). Agency to Determine and Document the Area of Potential Effects As Defined in Section 800.11 and Section 800.16(d)**

How does an Agency Official "document" the area of potential effects (APE) in accordance with § 800.4(a)(1)?

Section 800.11 sets a general standard requiring that a determination, such as the APE, be "supported by sufficient documentation to enable any reviewing parties to understand its basis." The specific provisions of Section 800.11 require, "as necessary," photographs, maps and drawings. This suggests that the Agency Official should use appropriate graphic materials to describe the APE, so that ACHP, the SHPO/THPO, another consulting party or a member of the public could readily comprehend its scope. (emphases added)

**G. Sections 800.4(b)(1-2). The "Shall Make a Reasonable and Good Faith Effort" Standard of Providing a Reasonable Response Acknowledging and Considering a Section 106 Party's Historic Properties Inventory Evidence**

Is there a minimum or basic standard for what constitutes a "reasonable and good faith effort" to identify historic properties (§800.4(b)(1), (2))? How is this adjusted according to the degree of Federal involvement or other factors?

There is no fixed minimum standard for this term. Note, though, that the fundamental obligation of a Federal agency is stated in the first paragraph of Section 800.4(b): "the Agency Official shall take the steps necessary to identify historic properties within the area of potential effects." This sets a fairly clear performance standard that the Federal agency must meet. How the agency fulfills this obligation is by making a "reasonable and good faith effort," which by its nature will vary depending upon the circumstances of the undertaking. The regulations acknowledge this and provide guidance on what is an appropriate level of effort.

Section 800.4(b)(1) states that the Agency Official must consider [§ 800.4(b)(1) actually states: "The agency official shall take into account . . ." ] "past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." These factors are to be read together; one cannot be singled out to justify a lesser or greater obligation. The outcome of the equation should be a reasonable response that acknowledges all of the factors cited.

The agency should carry out an identification effort that is "reasonable" for the undertaking in question and that has been designed and is carried out in "good faith," that is, an honest effort to meet the objectives of Section 106. Note also that the Federal agency is obligated to consult with the SHPO/THPO (and Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to historic properties within the area of potential effects) when carrying out these identification efforts.

#### **H. Section 101(d)(6)(A) of NHPA, Properties of Traditional Religious and Cultural Importance to an Indian Tribe or Native Hawaiian Organization May Be Determined Eligible for Inclusion on the National Register.**

Can a property of traditional religious and cultural significance to Tribes or Native Hawaiian organizations be determined eligible for the National Register?

Yes. Section 101(d)(6)(A) of NHPA states, "Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined eligible for inclusion on the National Register." This language was intended to lay to rest any questions that such properties could qualify for the National Register. Several National Register criteria (36 C.F.R. Part 63) might be the basis for an eligibility determination.

Criterion (a) addresses properties "associated with events that have made a significant contribution to the broad patterns of our history." A mountain, a lake or another geological feature may figure prominently in a tribal belief system as a place of creation or entry into the world. Another example could be a traditional vision quest site or the source of plant materials important to tribal culture and practices. Criterion (b) addresses properties associated with the lives of persons significant in the past. This could encompass sites that have close association with past tribal leaders or other important cultural figures. Finally, criterion (c) covers properties that embody distinctive characteristics of a type, period or method of construction, or high artistic value. Ancient village sites, such as pueblos or cliff dwellings in the Southwest or mound complexes in the Midwest, could certainly qualify under this criterion.

It is important to note that significance based on religious and cultural importance to an Indian tribe or Native Hawaiian organization could be sufficient to meet National Register eligibility requirements, even though a particular property may meet more than one criterion and its significance derive from other reasons as well.

#### **I. Public Involvement Standards**

The following public involvement Standards are summarized from the proceeding sections IIIA. - III.H.

**§ 800.2(d)(1-2) Opportunity For Public To Examine Results Standard** According to the ACHP (Section III.D), at a minimum, the Agency Official has to provide an opportunity for the public to examine the results of the their effort to identify historic properties, evaluate their

significance and assess the undertaking's effects upon them. As for information, the documentation standards of § 800.11 set requirements for the record at various steps in the process. These materials should be available to the public, unless constrained by “legitimate” confidentiality concerns.

**§ 800.4(b) Shall Take the Steps Necessary Standard** According to the ACHP (Section III.G), the fundamental obligation of a Federal agency is stated in the first paragraph of §800.4(b): "the Agency Official shall take the steps necessary to identify historic properties within the area of potential effects." This sets a fairly clear performance standard that the Federal agency must meet.

**§ 800.4(b)(1) Reasonable and Good Faith Effort Standard** According to the ACHP (Section III.G), the Agency Official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.

**§ 800.4(b)(1) Must Consider Standard** According to the ACHP (Section III.D), the Must Consider Standard states: Section 800.4(b)(1) states that the Agency Official must consider past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." These factors are to be read together; one cannot be singled out to justify a lesser or greater obligation. The outcome of the equation should be a reasonable response that acknowledges all of the factors cited.

This Must Consider Standard is especially significant because ACHP’s quote modifies the § 800.4(b)(1) standard of “*shall take into account*” into “*must consider*”.

**§ 800.4(b)(1) Honest Effort Standard** According to the ACHP (Section III.G), the agency should carry out an identification effort that is "reasonable" for the undertaking in question and that has been designed and is carried out in "good faith," that is, an honest effort to meet the objectives of Section 106.

**§ 800.11(a) Documentation Standard (*Adequacy of documentation*)** According to the ACHP (Section III.F; Flow Chart No. 1), the agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis.

**§ 800.11(c) Confidentiality Standard** Section 106 Process records can be withheld from the public record when disclosure of information about the location, character, or ownership of a historic property may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners.

## **J. Confidentiality**

The § 800.11(c) Confidentiality Standard covers several concepts: 1. authority to withhold information, 2. consultation with the ACHP, and 3. other authorities affecting confidentiality. The central idea is that information can be withheld from the public when its disclosure risks harm to a historic property (Appendix D). For example, § 800.11(c)(1) provides in relevant part.

“(1) *Authority to withhold information.* Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners.”

#### IV. SECTION 106 PROCESS ERRORS CONTRIBUTE TO QUESTIONABLE FINDING

The HNA&HS is confused for why it is so difficult to understand the SHPO, ODOT and FHWA's implementation of the Section 106 Process. We now assume it must be the agencies' culture of bureaucracy and the normal management objective to be efficient and effective.

**Culture** – We view the problem for the agencies as involving several cultural factors. In general, agencies feel they never have enough time and resources to perform their responsibilities. They take short cuts and risks to manage projects efficiently and effectively. These short cuts and risks become part of the culture that are rarely questioned. For example, the HETC identified a risk to ODOT at their joint February 1, 2012 meeting (Section VII. Requests, Risk 13, page 13; Appendix B, Web Link 3).

*“13. What if significant impacts are identified during the CE process? What is the next phase in the process? It appears the “NEPA risk” the ODOT is taking in proceeding concurrently on several phases of the project (e.g., inventories, assessments, impacts, project design, CE process, etc.) could trigger the CEQ and ODOT’s own requirements to prepare an environmental impact statement (EIS) if significance is identified.”*

Agencies rarely hearing from the public can become insulated and perhaps isolated from public concerns. Conversely, agencies feeling continually battered by the concerned public can become numbed by the continuous interest, which in turn can isolate the agencies toward a fortress mentality. However, the bottom line is that we have no idea about the “why” of agencies' actions. We only observe the actual actions.

**Questionable Finding** – ACHP Preamble to Section 106 Regulations (pages 25 - 26).

*Public Comment:* “The ACHP should be required to keep and report statistics, as a part of its annual report, on the number of **times the federal agencies have bypassed the Section 106 process** by maintaining initial findings of no effect and no adverse effect despite SHPO/THPO and ACHP objections.” (emphasis added)

*ACHP Response Leading to Section 800.4(d)(1)(iv)(D):* “This and similar comments reflected the opinion that certain Federal agencies, knowing that the ACHP could no longer “overturn” their findings of effect, would take advantage of the situation and be more willing to make **questionable findings of “no historic properties affected”** or “no adverse effects.” The ACHP has changed the proposed amendments so that they now include a requirement for the ACHP to keep track of how agencies respond to ACHP opinions regarding effects, and make a report of such data available to the public. This will help the ACHP in overseeing the Section 106 process. The ACHP intends to use this information in order to, among other things, bring any recurring problems to the heads of the relevant agencies and suggest ways in which they can improve the effectiveness, coordination, and consistency of their policies and programs with those of the NHPA.” (emphasis added)

#### **Section 800.4(d)(1)(iv)(D)**

§ 800.4(d)(1)(iv)(D) “(D) The Council shall retain a record of agency responses to Council opinions on their **findings of no historic properties affected**. The Council shall make this information available to the public.” (emphasis added)

**HNA&HS Concern: Non-compliance With Law** Much of the problem is non-compliance with some Section 106 Process requirements (36 CFR Section 800.4) and its documentation standards (36 CFR Section 800.11). The findings and documentation are so brief that it is impossible to understand if compliance occurred. In some cases, it is obvious that it did not (e.g., describing APE, steps taken to identify historic properties, basis for determining that no historic properties are present, etc.; Sections IV.A. - IV.H.)

The following errors are the result of non-compliance with Section 106 Process standards III.A. - III.I. and they contributed to the faulty finding of no historic properties affected (Section VI).

**A. Agencies Failed to Protect Historic Properties as Part of Section 106 Process - Identification of Historic Properties (36 CFR Section 800.4)**

Subpart B of 36 CRF PART 800 – Protection of Historic Properties is identified as “The Section 106 Process”. It is easy to understand that it is a process from the sections on the initiation of the process, to identify and protect historic properties to program evaluation (i.e., post-review discoveries) after the decisions (i.e., determinations, findings, or agreement). It is a planning process part of our National Historic Preservation Planning Program.

**Subpart B -- The Section 106 Process**

- 800.3 Initiation of the section 106 process.
- 800.4 Identification of historic properties.
- 800.5 Assessment of adverse effects.
- 800.6 Resolution of adverse effects.
- 800.7 Failure to resolve adverse effects.
- 800.8 Coordination with the National Environmental Policy act.
- 800.9 Council review of Section 106 compliance.
- 800.10 Special requirements for protecting National Historic Landmarks.
- 800.11 Documentation standards.
- 800.12 Emergency situations.
- 800.13 Post-review discoveries.

The SHPO, ODOT, and FHWA failed in their agency's obligations to protect historic properties by non-compliance with the NHPA’s Section 106 Process. This failure is the root of many of the HNA&HS’s issues. For example, it appears to us that the agencies’ written public record was to, in effect, bypass completing some of the required historic properties inventory steps prior to § 800.4 (d)(1) and its § 800.11(d) “*Finding of No Historic Properties Affected*”, and/or not documenting them in the findings. Without this objection to the finding it would be a “foreclosure” which means an action taken by an agency official that effectively precludes the ACHP from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

1. maintaining a final project undertaking (§ 800.3(a)),
2. determining and documenting the APE (§ 800.4(a)(1)),
3. identifying historic properties (§ 800.4(b)),
4. evaluating historic significance (§ 800.4(c)(1)), and
5. completing results of identification and evaluation (§ 800.4(d)).

§ 800.3(a)	Initiation of the Section 106 Process & Establish Undertaking
<b>§ 800.4</b>	<b>Identification (ID) of Historic Properties</b>
§ 800.4 (a)(1)	ID of Historic Properties: Determine & Document Area of Potential Effects
§ 800.4 (b)	ID of Historic Properties: Identify Historic Properties
§ 800.4 (c)	ID of Historic Properties: Evaluate Historic Significance
§ 800.4 (c)(1)	ID of Historic Properties: Evaluate Historic Significance by Applying National Register Criteria
§ 800.4 (c)(2)	ID of Historic Properties: Evaluate Historic Significance by Determining Whether a Property is Eligible
§ 800.4 (d)	ID of Historic Properties: Results of Identification & Evaluation
<b>§ 800.4 (d)(1)</b>	<b>ID of Historic Properties:</b> Results of Identification & Evaluation No Historic Properties Affected Because Historic Properties Present [Eligible] Have No Effect From Undertaking
§ 800.4 (d)(2)	ID of Historic Properties: Results of Identification & Evaluation - Historic Properties Affected From Undertaking

The apparent bypass strategy was to favor the resolution of potential adverse effects by informally redesigning the undertaking and “minimizing” the required public record Section 106 steps prior to the finding “No Historic Properties Affected” (§ 800.4 (d)(1)). It needs to be emphasized that we do not know if the agencies actually had a bypass strategy. We have no choice but to assume this was their intent because there is nothing in the public record to suggest otherwise. Therefore, “minimizing” means that there was no information in the public Section 106 Process record shared by the agencies to the Section 106 Consulting Parties.

Many times in informal oral discussions references were made by ODOT representatives about the confidentiality of the information. This is a legitimate concern by ODOT (§ 800.2 (d)(1 - 2); § 800.11 (c)). It is also an area where the easy simple solution for the responsible agencies is to be “safe” and deny information based on the potential confidentiality of the information. This answer can also be an abuse of the goal of protecting confidentiality versus the legitimate needs of the public and consulting parties for information. Hence, ACHP’s position that materials can be withheld from the public only for “legitimate” confidentiality concerns.

*“At a minimum, public notice should be designed to effectively inform the public about the nature of the undertaking, its effects and the public's likely interest in it. As for information, the documentation standards of Section 800.11 set requirements for the record at various steps in the process. **These materials should be available to the public, unless constrained by legitimate confidentiality concerns.**”* (emphasis added; Section III.D.)

The bypass strategy creates non-compliance with one of the purposes of the Section 106 Process which is to accommodate historic preservation concerns, in this case the identification of historic properties (36 CFR Section 800.1). The strategy of informally redesigning the undertaking and “minimizing” the required public record Section 106 steps prior to the finding No Historic Properties Affected (§ 800.4 (d)(1)) avoids the idea that the agencies are utilizing mitigating measures to avoid potential impacts and the requirements for more intensive analysis. Stated in another way, if it appears there are no known significant impacts the agencies can avoid developing an EA to determine if there are any significant impacts and/or an environmental impact statement (EIS) identifying significant impacts, and be in compliance with NEPA with a minimal CE process. The bypass strategy certainly fits the needs of agencies without the necessary time and

resources to fulfill the public mandate for disclosure, and it justifies management short cuts and risks for the goals of efficiently and effectively.

The agencies' failure to protect historic properties as part of the Section 106 Process, in favor of avoiding a comprehensive identification of historic properties within the APE, avoids acknowledging the potential to probable historic properties in the APE that it could be managing as significant historic properties. It is also not in compliance with the law.

**B. 36 CRF 800.4(d)/800.11(d); 36 CRF 800.5(c)/800.11(e). Agency's Obligations to All Consulting Parties in the Review of a Finding and Documentation**

Contrary to my September 20, 2012 email/letter (Appendix B, Web Link 15), we now realize that the finding was actually for 36 CRF 800.4(d)/800.11(d), a finding of "No Historic Properties Affected", not a finding for 36 CRF 800.5(c)/800.11(e), a finding of "No Adverse Effect". However, the 30 day review standard is still applicable per 800.4(d)(1)(i).

The agencies failed in their obligations to the consulting parties in the review of the proposed finding and the documentation (36 CRF 800.4(d)/800.11(d)) by failing to provide them with the finding and documentation at the same time it was provided to the State Historic Preservation Officer/Tribal Historic Preservation Officer (SHPO/THPO) (Section III.B.).

This is a serious issue potentially costing time and money to correct the process. We were assured by ODOT that HNA&HS, as a Section 106 Consulting Party, would receive the findings and determinations when they became available. We received them on September 17, 2012, approximately 40 days after they were provided to the SHPO/THPO for their 30-day review (Appendix B, Web Links 14A, 14B, & 14CA).

You can become paranoid and start believing in conspiracies, or you can form the opinion that the responsible agencies made an honest mistake, or you can come to the conclusion that the agencies don't care enough about meaningful public involvement. They may have been honest, but, in this case, their culture (Section IV.G) lead to the failure of the agencies to meet the minimum standards for public involvement and the fundamental obligation of a Federal agency as stated in the first paragraph of §800.4(b): "the Agency Official shall take the steps necessary to identify historic properties within the area of potential effects." This sets a fairly clear performance standard that the Federal agency failed to meet.

**C. Section 800.4(d)(1)(i). Section 106 Consulting Parties to Provide Their Views Regarding a Finding and Documentation Within 30 days Of Finding and Documentation Made Available to Consulting Parties**

The failure of the agencies to provide all consulting parties with the proposed finding and the documentation specified in 36 CRF 800.4(d)/800.11(d) at the same time it was provided to the SHPO/THPO for their 30-day review (Section IV.B) is remedied by the three Section 106 consulting party representatives (Appendix A) commenting on the "No Historic Properties Affected" finding within 30 days of actually receiving it.



The Section 106 Consulting Party representative for HNA&HS received his finding on September 17, 2012. It is unknown when, or if, the other Section 106 Consulting Party representatives received their copies. The FHWA was notified that, per the ACHP regulations HNA&HS, as a Section 106 Consulting Party, would be providing its view within a minimum of 30 days of the September 17, 2012 availability of findings and determinations (Appendix B, Web Link 15).

**D. Section 800.2(d)(1-2). Agency Official to Provide an Opportunity for the Public to Examine the Results of the Agency’s Effort to Identify Historic Properties In Compliance With Information Standards**

At a minimum, the Agency Official has to provide an opportunity for the public to examine the results of the agency’s effort to identify historic properties (Section III.D). On February 1, 2012 the ODOT & HNA&HS met to discuss the *Project*. One of the purposes of the meeting was for ODOT to present an aerial photo overlaid with the project footprint to give the HNA&HS a better idea of the *Project’s* impact to the area (Appendix B, Web Link 3). The HNA&HS appreciated this opportunity to learn of the agency’s effort to identify historic properties.

The ODOT notes it had consulted with HNA&HS regarding the *Project* since January of 2010. The HNA&HS certainly had shared its written opinions and Applegate Trail/Road inventories since then (Appendix C). We were happy, even grateful, to share. The problem was no specifics were shared by ODOT on what the *Project* design entailed and for a couple of years until around February 1, 2012, the HNA&HS did not know it was involved in a Section 106 Process, nor a CE process. During 2012 the ODOT shared many oral statements about historic properties, but never in writing for the public record.

The failure of the agencies to comply with Section 800.2(d)(1-2) denies the public the opportunity to examine the results of the agency’s effort to identify historic properties (Sections IV.A., IV.F, IV.G., V., and VI).

**E. Section 800.3(g). Consulting Parties and the Public Have an Adequate Opportunity to Express Their Views as Provided in Section 800.2(d)**

The HNA&HS had certainly expressed its views to the responsible agencies (Appendix B). Has its effort satisfied the ACHP’s standards for consulting parties and the public having an adequate opportunity to express their views per § 800.3(g) and § 800.2(d)? We conclude in the negative because ACHP defined adequate opportunity as “*the agency must afford the public the opportunity to get adequate information about the undertaking and its historic preservation aspects (affected properties, nature of effects and proposed resolution of adverse effects) in the Section 106 process.*” (Section III.E.; Sections IV.A., IV.F, IV.G., V., and VI).

**F. Section 800.3(a) Establish Undertaking & Section 800.4(a)(1) Area of Potential Effects**

Federal Undertaking, § 800.3(a); Agency to Determine and Document the Area of Potential Effects, § 800.4(a)(1), As Defined in § 800.11 and § 800.16(d)

Understanding the proposed project or undertaking is critical to all the steps that follow. A poor project design will cause later planning steps to fail or be poorly executed (e.g., contracts identifying the environmental setting of the area of potential effects, identifying historic properties, effects from undertaking, etc.).

The APE as defined in § 800.16(d) means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist (Appendix D). The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking. The identification of the final 2010 Federal Undertaking *Project* design was mismanaged as it continued to change to avoid impacts (i.e., NEPA violation), but it and the APE remained the same in terms of the 2010 university contracts, and the fact that the 1,060' segment of the *Trail/Road* is within the APE.

The APE was not understood by the HNA&HA for quite some time. It is now understands that the APE is the Interstate-5 Right of Way between MP 66.3 - MP 81.5. However, the I-5 right-of-way is a political boundary and has little to do with potential impacts. Therefore, the ODOT's APE is not in compliance with the law at § 800.16(d).

It was unknown for sometime to the HNA&HS when the *Project/Federal Undertaking* was defined by ODOT as a project with a known APE. In hindsight it was at least by the summer of 2010 before that same year's study by SOU which referenced the undertaking and defined the APE as the Interstate-5 right-of-way between MP 66.3 - MP 81.5 (Section II.A).

On February 1, 2012 the ODOT & HNA&HS had a meeting in White City, Oregon on the *Project* (Appendix B, Web Link 3). One of the purposes of the meeting was for ODOT to present an aerial photo overlaid with the project footprint to give the HNA&HS a better idea of the I-5 Northbound Sexton Mountain Climbing Lane's impact to the area.

The *Project/undertaking's* footprint area was not identified as the APE. However, the members of the HETC reviewed the large aerial photo (3' - 4' long) with the *Project* footprint of the northbound Sexton Mountain Climbing Lane Project's geographic impact to the area. Of concern was a yellow line that depicted road cuts needed to support the expansion of I-5 to include the passing lane. Not clear to the participants from the aerial photo was the location of the cut line when compared to the HETC's Applegate Trail/Road inventory. It appeared to the members of the HETC that a significant portion of the HETC's inventoried 1,060' Applegate Trail I For North Sexton Pass I-5 East (1060) would be impacted by the project. If true, the project will significantly affect the Applegate National Historic Trail, a branch of the significant California National Historic Trail.

The February 1, 2012 meeting was the start of a process to redesign the cut line that ended on July 17, 2012 when it appeared to the HNA&HS that the cut line had been moved to avoid the 1,060' segment of the Applegate Trail. For example, on May 1, 2012 Sam Dunnivant, Environmental Coordinator, ODOT, provided an history of the new cut-slope staking for the *Project* since ODOT's February 1, 2012 with the HNA&HS. He stated that the design of the project cut-slope had been redesigned several times reducing the destruction of the 1,060 roadbed from approximately 800' to approximately 150' (Appendix B, Web Link 8). The final redesign of the cut-slope occurred after a June 12, 2012 email from Glenn Harrison, representing himself, to Tobin Bottman, ODOT, with statement that plans for the last part of the 1060 of the Applegate Trail as it comes down the hill to I-5 should be modified (Appendix B, Web Link 8B).

The Section 107 process problem was that the ODOT representatives' summary conclusion was that its internal cultural analysis (i.e., Rose, Chelsea E., Katie Johnson, and Mark A. Tveskow. 2012. *'On and Onwards': A Comprehensive Study for the Applegate Trail, The Southern Route to Oregon*) for the CE meet its due diligence standard, and that there are no Applegate Trail cultural resources that will be significantly impacted by the project because the 1060 was not identified as a historic property. Therefore, it was not required to mitigate any adverse impacts, significant or otherwise to the 1,060 (Appendix B, Web Link 8). Per the public record the ODOT relied entirely on its internal cultural resources analysis and did not provide any public written Section 106 Process consideration, analysis, and documentation of the HNA&HS Applegate Trail inventories at north Sexton Mountain Pass.

One of the agencies' early Section 106 Process responsibilities was to take into account the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the APE (§ 800.4 (b)(1)). All parties intuitively agreed that the Sexton Mountain Pass was within the APE and that the pass's topography severely constricted the historical travel corridor of the Indian Trail and Applegate Trail/Road to a narrow pathway of approximately 300' - 400'. In light of the great focus by the HNA&HS that a historic property (i.e., 1060) was located at north Sexton Mountain Pass, it is strange that § 800.4 (b)(1) did not carry more weight with the agencies, especially as one of the considerations of § 800.4 (b)(2) was the potential to consider corridor alternatives.

**ODOT's APE is Political Boundary** The HNA&HS's opinion is that the § 800.16(d) definition of the APE is very close to NEPA's cumulative impact area and can be geography significantly beyond the proposal's development area (i.e., this is an impact area boundary not a political boundary). However, as was previous noted in the SOU study the ODOT defined the APE for the SOU contract as the ground administered by ODOT (i.e., Interstate-5 Right of Way between MP 66.3 - MP 81.5). The I-5 right-of-way is a political boundary and has little to do with potential impacts. Therefore, the ODOT's APE is not in compliance with the law at § 800.16(d).

**G. Sections 800.4(b)(1-2). The “Shall Make a Reasonable and Good Faith Effort” Standard of Providing a Reasonable Response Acknowledging and Considering a Section 106 Party’s Historic Properties Inventory Evidence**

Is there a minimum or basic standard for what constitutes a "reasonable and good faith effort" to identify historic properties (§ 800.4(b)(1); Section III.G.)? The history of this project is that there is no public record of written demonstration that either SHPO, ODOT, or FHWA had reviewed and considered our views concerning the evidence we have provided on identifying historic properties (§ 800.4(b)(1), (2)) within the APE (§ 800.4(a)(1)). For example, the ACHP’s § 800.4(b)(1) standard is that the Agency Official must consider "past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects." The HNA&HS believes it has provided overwhelming evidence for the likely nature and location of historic properties within the APE and that the agencies had not considered these views per the Section 106 Process standards (Sections IV.A., IV.F, IV.G., V., and VI).

The issue is that the SHPO, ODOT, and FHWA are not in compliance with the “must consider” standard of providing a reasonable response acknowledging and considering HNA&HS’s historic properties inventory evidence. For example, the only evidence in the public record of consideration by the SHPO, ODOT, or the FHWA is a conclusory opinion without any supporting evidence offered (page 6 of 15 of the August 1, 2012 request for concurrence to the SHPO from ODOT; Appendix B, Web Link 14CA/14CB). For the first time we received a copy of this request and ODOT position on September 17, 2012.

*“Background research, sites visits, and an examination of the documents provided by the HNAHS were not sufficient to support their claim that the Applegate Trail is present within the I-5: Glendale – Hugo Paving / Sexton Climbing Lane Project APE. ODOT archival records indicate that the road bed or area of concern to the HNAHS was constructed or enhanced by the Oregon Department of Forestry sometime, between 1948 and 1952, to facilitate an access road with a grade that could be used by modern equipment to reach the lookout tower on the Sexton Mountain Summit.”*

**V. NATIONAL ENVIRONMENTAL POLICY ACT  
Use Of CE Not In Compliance With NEPA Standards**

We do not believe that a CE process for the *Project* is in compliance with NEPA. According to ODOT’s own regulations for major construction projects (i.e., total *Project* budget estimated to be \$49.6 million, including the northbound Sexton Mountain climbing lane) do not qualify as CEs (Appendix E; <http://www.oregon.gov/ODOT/HWY/REGION3/Pages/glendale-hugo1.aspx>). The appropriate NEPA analysis tool for a major construction project, versus paving, would be an environmental assessment (EA). We speculate that the CE process now being utilized was partially the result of the original split of the paving project from the passing land project, where a CE was appropriate, from the construction of the climbing lane project which did not require NEPA compliance as it was originally fully state funded. What was the FHWA’s rationale for approving a CE process for the construction of a multi-million dollar 2.8 mile long, 12 feet wide climbing lane up and over the rugged Sexton Mountain Pass which will require some significant bedrock blasting and cut-slopes?

We feel there is already substantial public controversy on environmental grounds over the identification of historic properties in the APE and that this unusual circumstances should require FHWA, in cooperation with ODOT, to conduct appropriate environmental studies to determine if the CE classification is proper.

The ODOT is wonderfully pursuing some extraordinary design changes to the *Project* while continuing to maintain that there are no (zero) historic properties in the APE at north Sexton Mountain Pass, let alone any significant historic properties that would have been significantly adversely affected by the original *Project* (i.e., approximately 600' of the Applegate Trail/Road would have been destroyed by the original February 1, 2012 design of the *Project*). After several ODOT design changes to the *Project* the HNA&HS's interest was originally for ODOT to mitigate the remaining significant adverse effects by preparing archaeological documentation of the resource before approximately 150' was destroyed. It now appears that ODOT might mitigate the "non-impacts" to the Applegate Trail/Road by avoiding it entirely even though it is denying its design changes are a mitigating measure.

An applicable section concerning ODOT's view of a mitigating measure is identified in its June 15, 2012 review and comments on the May 1, 2012 field trip meeting minutes follows (Page 25) ([http://www.hugoneighborhood.org/miscellaneous\\_research\\_papers\\_and\\_documents.htm](http://www.hugoneighborhood.org/miscellaneous_research_papers_and_documents.htm)).

*"ODOT Response: The above commitment by ODOT is not a "mitigating measure". ODOT is not required to mitigate for anything at this location. The above measure is an act of goodwill by ODOT that we have agreed to do in order to minimize impacts throughout the area of concern to the HETC."*

We believe "CEQ's 40 Most Frequently Asked Questions" apply to CEs (Appendix E), and if so, we question the propriety of issuing a CE when mitigation (Appendix F) after the original project design reduces significant impacts to historic properties (Appendix G). In this case it is obvious that, in light of the reconnaissance report by *Southern Oregon University*, that the ODOT's internal CE scoping process did not identify any historic properties or impacts, nor any needed mitigation for the Applegate Trail/Road at Sexton Mountain Pass. This was ODOT's position until at least February 1, 2012 when members of the HETC first met with ODOT in White City (February 1, 2012 Meeting Minutes For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project" (Appendix B, Web Link 3).

Further, ODOT's own regulations on CEs state that "If significant impacts are likely to occur, an EIS must be prepared (23 CFR 771.123(a)). This would have been the case on February 1, 2012 if ODOT had considered our inventories and arrived at our determination that the 1060 was a historic property. If the likelihood of significant impacts is uncertain even after studies have been undertaken, the HA [highway agency] should consult with the FHWA to determine whether to prepare an EA or an EIS" (Appendix E).

**VI. FINDING OF NO HISTORIC PROPERTIES AFFECTED FAILED TO COMPLY WITH DOCUMENTATION STANDARDS 36 CFR SECTION 800.11**

The finding of “no historic properties affected” is inadequate and not supported by substantial evidence in the record. The likely culprit is probably because the agencies had bypassed (foreclosure) the Section 106 Process. This section addresses the non-compliance of the finding (Appendix B, Web Link 14CA/14CB; questionable findings preamble at Section IV) with Section 106 Process standards § 800.11(d) and & § 800.4.

**A. Documentation Standards § 800.11(d) & § 800.4 (Appendix D).**

**§ 800.11“(d) Finding of no historic properties affected. Documentation shall include:**

- (1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;*
- (2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and*
- (3) The basis for determining that no historic properties are present or affected.”*

**§ 800.4 Identification of Historic Properties**

**§ 800.11“(d)(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;**

- § 800.4 (a) Determine Scope of Identification Efforts
- § 800.4 (a)(1) Determine & Document Area of Potential Effects (§ 800.16(d))

**§ 800.11“(d)(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and**

- § 800.4 (a)(2) Review Existing Information on Historic Properties Within APE, Including Any Data Concerning Possible Historic Properties Not Yet Identified
- § 800.4 (a)(3) Seek Information from Consulting Parties Likely to Have Knowledge Of, or Concerns With, Historic Properties in the Area
- § 800.4 (a)(4) Gather Information from Any Indian Tribe to Assist in Identifying Properties
- § 800.4 (b) Identify Historic Properties: Shall Take Necessary Steps to Identify Historic Properties
- § 800.4 (b)(1) Level of Effort. The Agency Official Shall Make a Reasonable and Good Faith Effort to Carry out Appropriate Identification Efforts
- § 800.4 (b)(1) Level of Effort. The Agency Official Shall Take into Account past Planning, Research and Studies, the Magnitude and Nature of the Undertaking and the Degree of Federal Involvement
- § 800.4 (b)(1) Level of Effort. The Agency Official Shall Take into Account the Nature and Extent of Potential Effects on Historic Properties, and the Likely Nature and Location of Historic Properties Within the APE
- § 800.4 (b)(2) Phased Identification and Evaluation. Where Alternatives under Consideration Consist of Corridors the Agency Official May Use a Phased Process to Conduct Identification and Evaluation Efforts

**§ 800.11“(d)(3) The basis for determining that no historic properties are present or affected.”**

§ 800.4 (c)	Evaluate Historic Significance
§ 800.4 (c)(1)	Apply National Register Criteria
§ 800.4 (c)(2)	Determining Whether a Property is Eligible
§ 800.4 (d)	Results of Identification & Evaluation
§ 800.4 (d)(1)	No Historic Properties Affected Because No Historic Properties Present [But not Eligible]. Finding per § 800.11(d).
§ 800.4 (d)(1)	No Historic Properties Affected Because [Eligible] Historic Properties Present Have No Effect From Undertaking. Finding per § 800.11(d).

**§ 800.11“(d) Finding of no historic properties affected.**

§ 800.4 (d)(1)	Agency Official to Provide Finding per § 800.11(d) to SHPO/THPO and All Consulting Parties
§ 800.4 (d)(1)(I)	No Objections Within 30 Days Responsibilities Under Section 106 Fulfilled
§ 800.4 (d)(1)(ii)	Objections Within 30 Days Agency Official Must Consult With Objecting Party To Resolve Disagreement or Forward to ACHP for Review
§ 800.4 (d)(1)(iii)	ACHP My Object to Finding During 30 Day Review by SHPO/THPO
§ 800.4 (d)(1)(iv)(A)	ACHP Will Have 30 Days to Review the Finding and Provide its Opinion; No Response Within 30 Days Responsibilities under Section 106 Fulfilled
§ 800.4 (d)(1)(iv)(B)	Person to Whom the ACHP Addresses its Opinion Shall Take into Account the ACHP's Opinion Before the Agency Reaches a Final Decision on the Finding
§ 800.4 (d)(1)(iv)(C)	Agency Prepares Summary of Decision with Rationale and Evidence of Consideration of the ACHP's Opinion, and Provide it to ACHP, SHPO/THPO, and Consulting Parties. If Initial Finding Will Be Revised Agency Shall Proceed in Accordance with Revised Finding. If the Final Decision Is to Affirm the Initial Finding of No Historic Properties Affected, Once the Summary of the Decision Has Been Sent to ACHP, SHPO/THPO, and Consulting Parties, Responsibilities under Section 106 Are Fulfilled
§ 800.4(d)(1)(iv)(D)	Record of Agency Responses to Council Opinions on Findings of No Historic Properties Affected

**B. Finding No Historic Properties Affected (Appendix B, Web Link 14CA & 14CB)**

The HNA&HS, a Section 106 Consulting Party, believes it has provided overwhelming evidence for the nature and location of historic properties (i.e., historic Applegate Trail/Road) within the APE. The issue is that the SHPO, ODOT, and FHWA are not in compliance with the “shall make a reasonable and good faith effort” standard of providing a reasonable response acknowledging and considering HNA&HS’s historic properties inventory evidence (Section 800.4(b)(1)). For example, the only evidence in the public record of consideration of these inventories by the SHPO, ODOT, or the FHWA is a conclusory opinion without any supporting evidence offered (Appendix A; page 6 of 15 of the August 1, 2012 request for concurrence from the SHPO). We received a copy of this August 1, 2012 request and ODOT’s written position for the first time on September 17, 2012.

*“Background research, sites visits, and an examination of the documents provided by the HNAHS were not sufficient to support their claim that the Applegate Trail is present within the I-5: Glendale – Hugo Paving / Sexton Climbing Lane Project APE. ODOT archival records indicate that the road bed or area of concern to the HNAHS was constructed or enhanced by the Oregon Department of Forestry sometime, between 1948 and 1952, to facilitate an access road with a grade that could be used by modern equipment to reach the lookout tower on the Sexton Mountain Summit.”*

### C. Analysis § 800.11(d) Of Documentation For Finding of No Historic Properties Affected

**1. Undertaking and APE** Except for the above finding statement, there is inadequate documentation in the public record for § 800.4 (i.e., undertaking and APE). Therefore, the § 800.11(d)(1) requirement of “*shall include: (1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary*” is not met for § 800.11(a) Documentation Standard (*Adequacy of documentation*) (Sections IV.A.; IV.F.).

1. maintaining a final project undertaking (§ 800.3(a))
2. determining and documenting the APE (§ 800.4(a)(1))

**2. Identifying & Evaluating Historic Resources** Except for the conclusory finding statement, there is inadequate documentation in the public record for § 800.4 (i.e., identifying and evaluating historic resources), therefore the § 800.11(d)(2) requirement of “*shall include: (2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b)*” is not met for § 800.11(a) Documentation Standard (*Adequacy of documentation*).

1. identifying historic properties (§ 800.4(b))
2. evaluating historic significance (§ 800.4(c)(1))

The SHPO, ODOT, and FHWA failed in their agency's obligations to protect historic properties by not complying with the NHPA's Section 106 Process (Section VI.D.). This failure is the root of many of our issues. For example, the agencies' written public record was to, in effect, bypass (foreclosure) completing some of the required historic properties inventory steps prior to § 800.4 (d)(1) and its § 800.11(d) “*Finding of No Historic Properties Affected*”, and/or not documenting them in the findings.

Notwithstanding the difference between the ACHP rules and NEPA on actions that might significantly affect the environment, the HNA&HS's opinion is that the § 800.16(d) definition of the APE is similar to NEPA's cumulative impact area and can be geography significantly beyond the proposal's/undertaking's development area.

Difference (page 49 of preamble to ACHP rules): “ACHP rules seek to require agencies to examine all effects of any intensity, whether or not the effects are significant. Where there is an alteration of a historic property, any diminishment of any aspect of its historical integrity, however measured and however great or small, can support a finding of adverse effect. While the NEPA statute itself contains the limiting factors of “major” Federal actions and “significant” effects, the NHPA does not.”

The APE is an impact area boundary not a political boundary. However, as was previous noted in the SOU study the ODOT defined the APE for the SOU contract as the ground administered by ODOT (i.e., Interstate-5 Right of Way between MP 66.3 - MP 81.5). The I-5 right-of-way is a



political boundary and has little to do with potential impacts. Therefore, the ODOT's APE is not in compliance with the law at § 800.16(d) (Section III.F.).

**3. Contracted Studies** The finding describes ODOT contract steps taken by the Oregon Museum of Natural and Cultural History (OMNCH) and Southern Oregon University Laboratory of Anthropology (SOULA) for ODOT. The credibility of the HETC's Applegate Trail/Road research, mapping, and marking historical properties was identified in the OMNCH contract study with its corroboration of HNA&HS's public and internal Applegate Trail/Road and Harris Donation Land Claim inventories in the OMNCH's contract study area (Appendix C).

From oral communications by ODOT representatives, apparently the SOULA contract study is in conflict with the HNA&HS Applegate Trail/Road substantial evidence inventories for the 1060 and its and Oregon Historic Trails Advisory Council's (OHTAC's) position that the 1,060' segment of the Applegate Trail/Road at Sexton Mountain Pass is a historic emigrant trail/road. The OHTAC and the HNA&HS believe the 1060 is at a minimum a Class ② Used Trail and qualifies as a historic property eligible for the National Register of Historic Places. However, there is no reference in the redacted SOULA study or the finding disputing the position of the OHTAC and the HNA&HS. Therefore, the § 800.11(d)(2) requirement of "(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b)" is not met for § 800.11(a) Documentation Standard (*Adequacy of documentation* - The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis). It is simple. There is nothing in the public record that demonstrates that the responsible agencies considered the HNA&HS's Applegate Trail/Road substantial evidence inventories.

**4. Basis for Determining That No Historic Properties Are Present § 800.11 (d)(3)** The conclusory opinion in the findings, without any supporting evidence offered, that the "*Background research, sites visits, and an examination of the documents provided by the HNAHS were not sufficient to support their claim that the Applegate Trail is present within the I-5: Glendale – Hugo Paving / Sexton Climbing Lane Project APE*" certainly does not meet the § 800.11(a) Documentation Standard nor the § 800.4(b)(1) Must Consider Standard.

The only other statement in the finding about HNA&HS's position that the 1060 is Class ② Used Trail and qualifies as a historic property eligible for the National Register of Historic Places follows: "*ODOT archival records indicate that the road bed or area of concern to the HNAHS was constructed or enhanced by the Oregon Department of Forestry sometime, between 1948 and 1952, to facilitate an access road with a grade that could be used by modern equipment to reach the lookout tower on the Sexton Mountain Summit.*" This statement may be true, but there is nothing in the written public record to support the statement. Therefore, it also fails the "Documentation Standard" that a finding must be supported by sufficient documentation to enable any reviewing parties to understand its basis. Also, without any rationale this statement does not make any sense because there was a paved Pacific Highway that had replaced the function of the 1060 (i.e., old Indian Trail/old Applegate Trail/Road). An access road downhill or to the west of the existing paved Pacific Highway in 1948 - 1952 uphill to the lookout tower was not needed as the Pacific Highway performed that function quite well. It could make sense to build an access

road uphill or to the east of the existing 1948 - 1952 paved Pacific Highway to the lookout tower, but again no supporting evidence was provided.

The finding's conclusory opinion (i.e., summary statement) that "*Background research, sites visits, and an examination of the documents provided by the HNAHS were not sufficient to support their claim that the Applegate Trail is present within the I-5: Glendale – Hugo Paving / Sexton Climbing Lane Project APE.*" is not adequate to satisfy the § 800.4(b)(1) Must Consider Standard. There is just no public record evidence that the agencies considered HNA&HS's views in its extensive historic properties inventory documents (Appendix C).

- *1964 Collins Telegraph Line*
- *1874 Josephine County Surveyed Road*
- *1886 - 1887 Postal Telegraph Line*
- *1920s - 1950s AT&T Overhead Long Distance Telephone Lines*
- *Interview: Howard Banks Crown Jewels of the Wire*
- *1940. Right of Way Map, Sexton Mt. Section. Pacific Highway, Josephine County*
- *Smith Hill Pass: 1940*
- *Location Of Applegate Trail in Upper Rat Creek: A Work In Progress*
- *Applegate Trail I North Sexton Pass I-5 East: I*
- *Draft Applegate Trail I North Sexton Pass I-5 East: II*
- *Telegraph Lines and Applegate Trail at Smith Hill Pass*
- *John Peabody Harrington's Takelma Indian Field Notes: Outline*
- *Lowland Takelma Indian Trail & Rock Old Woman At Sexton Mountain Pass*

#### **D. Confidentiality**

This section is about one known applicable redacted study, parts of which are not public to the HNA&HS, and any other internal documents not part of the public record that ODOT has considered in supporting its conclusion that the 1,060' segment of the Applegate Trail/Road (Appendix C) is not a historic property.

The following background information on confidential documents is from the May 1, 2012 field trip meeting minutes (May 1, 2012 Field Trip Meeting Minutes For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project": Field Trip Meeting Between ODOT & Hugo Emigrant Trails Committee (Appendix B, Web Link 8). It was about the SOU contract study entitled '*On and Onwards': A Comprehensive Study for the Applegate Trail, The Southern Route to Oregon. Southern Oregon.*

#### **1. HNA&HS's Comment: SHPO's Cultural Resource Documents Do Not Exist To Civic Minded Public** (Appendix B, Web Link 8, page 12)

"The HETC does not see the option of obtaining a copy of any cultural resource report from the State Historic Preservation Office (SHPO) as a viable option. The HETC already knows that the SHPO will not provide this type of secret/confidential information to average, dedicated, honest, civic minded citizens. In HETC's opinion, it would be a waste of time to discuss with the SHPO why this information is not available. HETC's issue is not about how some neighbors are vandals, trespassers, and destroyers of cultural resources. HETC's goal is to meaningfully participate in the ODOT project. However, it appears meaningful public involvement under this confidential system is impossible.

The HETC does not understand the communication from the SHPO regarding the release of the complete SOU report to the HNA&HS. ODOT was advised to not share the complete report, because if the information were to become public and site(s) were damaged as a result, ODOT could be held liable (December 21, 2011 ODOT email, Appendix C). If this assertion was true it appears to the HETC that OCTA's entire MET program would be in jeopardy as one of its main objectives is to publicly research, map, and mark emigrant trails. SHPO's position implies that the OCTA would be liable for any damage to emigrant trail sites because OCTA placed a marker on the site and that this public marking was illegally used by an unscrupulous person and group.

As a footnote the HETC also does not understand how making a SHPO cultural resource report [available] could damage a non-significant cultural resource per ODOT's conclusory position that any roads at Mount Sexton are not significant (i.e., potentially eligible for the National Historic Register) and, therefore, can not be significantly impacted under NEPA compliance standards (Section III.C.)."

## **2. ODOT's Response** (Appendix B, Web Link 9).

*"ODOT's Response: In this section, the HETC addresses processes that are outside the control of ODOT and seem to be issues between SHPO, HETC, and OCTA. ODOT cannot comment on any issues that the HETC has with SHPO, but will continue to work within the regulatory guidelines and policies we are provided."*

**3. Copy of Redacted SOU Study** A redacted copy of *'On and Onwards': A Comprehensive Study for the Applegate Trail, The Southern Route to Oregon. Southern Oregon* was provided to the HNA&HS by ODOT. We thank ODOT for this copy. There was no written explanation for the pages missing and certain portions of the text redacted (i.e., it is assumed that sensitive details were removed for various reasons).

**4. Analysis** The HNA&HS's inventory position is that the 1,060' segment of the Applegate Trail/Road is a historic property. In the finding ODOT states otherwise, but continues to withhold whatever evidence it has per the § 800.11(c) Confidentiality Standard. The HNA&HS continues to believe ODOT's position to withhold alleged confidential information for a property which it strongly adheres is a non-historic property is illegal, especially when ODOT provides no public record that public disclosure information about the location, character, or ownership of the historic property (1060), that when disclosed may cause a significant invasion of privacy; risk harm to the historic property (1060); or impede the use of a traditional religious site by practitioners (Section III.J.).

**5. Conclusion** There is no public written record for the position of withholding information because disclosure of information about the location, character, or ownership of a historic property may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. Therefore, there is no need for utilizing the confidentiality authority for, per ODOT's position, a non-historic property. The ODOT's use of the § 800.11(c) Confidentiality Standard per ACHP is not a legitimate confidentiality concern (Section III.D.).

## **E. Conclusion**

The agencies' finding that either there are no historic properties present or there are historic properties present, but the undertaking will have no effect upon them and that the project meets the standards as established in 36 CFR Part 800 is inadequate, and not supported by substantial evidence in the whole record.

The finding of "no historic properties affected" has been objected to per § 800.4(d)(1)(i) - (ii) and is insufficient to demonstrate compliance with § 800.11(a), § 800.11(d), and § 800.4(b)(1). Therefore, the Federal Agency Official "shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council [ACHP] and request that the Council review the finding . . ." § 800.4(d)(1)(ii).

## **VII. RECOMMENDATION**

We do not believe the non-compliance issues and our disagreement on historical properties will be resolved by SHPO, ODOT or FHWA, and to save time and money we refer this matter directly to the ACHP for its opinion because the ACHP may evaluate the operation of the Section 106 Process of how participants have fulfilled their legal responsibilities, and how effectively the outcomes reached advance the purposes of NHPA. We understand the ACHP could enter the section 106 process at the steps specified in the regulations for a Federal undertaking (Appendix A to 36 CFR Part 800 – Criteria for Council Involvement in Reviewing Individual section 106 Cases – Protection of Historic Properties):

1. *Has potential to substantially impact important historic properties from future projects.*
2. *Presents important questions of policy or interpretation.*
3. *Has identified procedural problems to avoid.*
4. *Potentially presents issues of concern to Indian tribes.*

*Has Potential to Substantially Impact Important Historic Properties from Future Projects.* This issue is not about substantial impacts to important historic properties from the I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project. It is about the violation of the Section 106 Process and it is about the potential for substantial impacts on important historic properties (i.e., historic Applegate Trail/Road) from future projects because the present project was not in compliance with the Section 106 Process. The responsible Federal agency was not in compliance with the "reasonable and good faith effort" standard of providing a reasonable response acknowledging and considering a Section 106 Consulting Party's inventory evidence for historic properties being present, and, therefore, it arrived at a finding and documentation of no historic properties within the APE of our concern, and no adverse effect. An unchallenged finding of no historic properties within the APE of the project by the SHPO, ODOT, and the FHWA will create the elusion of a credible finding and the potential to substantially impact important historic properties from future projects.

*Presents Important Questions of Policy or Interpretation.* This issue includes questions about how the ACHP's regulations are being interpreted and applied by SHPO, ODOT, and FHWA, a situation where we believe the outcomes over a cumulative time period have already established an adverse precedent unfavorably affecting how ACHP's Section 106 Process regulations are being applied to Federal highway projects in Oregon (e.g, bypassed process, foreclosure, etc.) the Section 106 Process. For example, what process was used resulting in us, as a Section 106 Consulting Party, receiving a copy of the finding and documentation approximately 40 days after the SHPO/Tribal Historic Preservation Officer (THPO)? What about the other 106 consulting parties? When did they receive their copies of the finding for comment?

*Has Identified Procedural Problems to Avoid.* This *I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project* already has substantial public controversy that is related to historic preservation issues; with disputes between consulting parties and the findings of the SHPO, ODOT, and FHWA which the ACHP's involvement could help resolve; that are involved or could be involved in litigation on the basis of the Section 106 Process; or carried out by a Federal agency, in a State or locality, where there are identified problems with Section 106 compliance pursuant to Section 800.9(d)(2).

*Potentially Presents Issues of Concern to Indian Tribes.* There is significant historical properties evidence that finds the old 1855 Lowland Takelma Indian Trail over the present Sexton Mountain Pass as being under the old original location of the Applegate Trail/Road. In 1933 Frances Johnson, a Lowland Takelma Indian informant, identified a spiritual Medicine Rock (i.e., Rock Old Woman or dan-mologol), and the old Indian Trail/old emigrant road downhill from U.S. 99/old Pacific Highway. Her testimony was unique in identifying the old Indian Trail and old Applegate Trail/Road as being the same pathway. We do not disagree that representatives of ODOT contacted the applicable tribal representatives and none expressed concern with the project scope. We are concerned that there is nothing in the public SHPO, ODOT, and FHWA record to suggest that the Indian Tribes were aware of the historic properties (i.e., the Lowland Takelma Indians' Indian Trail and spiritual Rock Old Woman) associated with the *Project*.

We feel that ACHP involvement in reviewing the findings and documentation for the *I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project* could improve the operation of the Section 106 Process for future FHWA's projects. We believe there is a pattern of compliance failure with the Section 106 Process by the SHPO, ODOT, and FHWA. If our significantly adverse Section 106 Party experience of non-compliance with the Section 106 Process is not limited to this project, and we do not believe it is, an evaluation of the Section 106 Process by ACHP could lead to improving the efficiency and effectiveness of the process.

## BIBLIOGRAPHY

Beckham, Stephen Dow. September 30, 1993. *Takelman And Athapascan Lifeways And History, Rogue River Corridor – Applegate River To Grave Creek: Investigations For Interpretive Programs*. Submitted to BLM Medford District. Heritage Research Associates, Inc. Eugene, OR.

Beckham, Stephen Dow. 1971. *Requiem For a People: The Rogue Indians and the Frontiersmen*. University of Oklahoma Press. Norman, OK.

Guardino III, Constance M. March 9, 2006. *Confederate Tribes of Siletz Burials*. Combined Enumeration Of Paul Washington Cemetery, Riverside VFW Cemetery, Siletz Valley, Logsdon-Rock Creek Cemetery, Lower Siletz, Fr. Felix List. Compiled By M. Constance Guardino III, Last Updated March 9, 2006. <http://users.wi.net/~census/lesson14.html>

Gray, Dennis J. 1985. *The Takelma and their Athapascan Kin: an Ethnographic Synthesis of Southwestern Oregon*. A Thesis submitted to Oregon State University in partial fulfillment of the requirements for the degree of Master of Arts in Interdisciplinary Studies. Corvallis, OR  
([http://scholarsarchive.library.oregonstate.edu/xmlui/bitstream/handle/1957/7902/Gray\\_Dennis\\_J\\_1985.pdf?sequence=1](http://scholarsarchive.library.oregonstate.edu/xmlui/bitstream/handle/1957/7902/Gray_Dennis_J_1985.pdf?sequence=1))

Gray, Dennis J. 1987. *The Takelmas and Their Athapascan Neighbors: A New Ethnographic Synthesis for the Upper Rogue River Area of Southwestern Oregon*, University of Oregon Anthropological Papers, No. 37. Eugene: Department of Anthropology, University of Oregon.  
(<http://soda.sou.edu/awdata/021104a1.pdf>)

Harrington, John Peabody. 1981. The Papers of John Peabody Harrington in the National Anthropological Archives of the Smithsonian Institution, 1907-1957. Reel number 28, Frames (Pages) Nos. 0001 - 0889. Kraus International Publications. Millwood, New York.

Hugo Native American Team. August 2012. *John Peabody Harrington's Takelma Indian Field Notes: Outline*. For Hugo Neighborhood Association & Historical Society & Josephine County Historical Society. Hugo, OR ([http://www.hugoneighborhood.org/Harrington\\_Papers\\_Outline\\_082312.pdf](http://www.hugoneighborhood.org/Harrington_Papers_Outline_082312.pdf))

Hugo Native American Team. August 2012. *Lowland Takelma Indian Trail & Rock Old Woman At Sexton Mountain Pass*. For Hugo Neighborhood Association & Historical Society & Josephine County Historical Society. Hugo, OR  
([http://www.hugoneighborhood.org/Harrington\\_Papers\\_Sexton\\_Pass\\_Indian\\_Trail\\_Aug\\_2012.pdf](http://www.hugoneighborhood.org/Harrington_Papers_Sexton_Pass_Indian_Trail_Aug_2012.pdf)).

Rose, Chelsea E., Katie Johnson, and Mark A. Tveskov. 2010. 'On and Onwards': A Comprehensive Study for the Applegate Trail, The Southern Route to Oregon. *Southern Oregon*. University Laboratory of Anthropology. Ashland, OR.

Sapir, Edward. 1907a. *Notes on the Takelma Indians of Southwestern Oregon*, American Anthropologist. Volume 9, Number 2:251-275. (<http://www.jstor.org/stable/659586>)

Sapir, Edward. 1907b. *The Religious Ideas of the Takelma Indians of Southwestern Oregon*, Journal of American Folklore. Volume 20:33-49. (<http://www.jstor.org/stable/534724>)

Sapir, Edward. 1909. *Takelma Texts*. Anthropological Publications, Volume 2. University of Pennsylvania.

## APPENDICES

- Appendix A. Federal Agency's Section 106 Consulting Parties' Process
- Appendix B. Web Links 1 - 18. Hugo Neighborhood Association & Historical Society's Applegate Trail Inventory "Educational Resources" Web Page for the Applicable History of the ODOT's I-5 Glendale to Hugo Paving & Sexton Climbing Lane Project
- Appendix C. Hugo Neighborhood Association & Historical Society's Applegate Trail Inventory "Educational Resources"
- Appendix D. 36 CFR PART 800 – Protection of Historic Properties
- Appendix E. ODOT Categorical Exclusions
- Appendix F. ODOT Mitigation Measures
- Appendix G. CEQs 40 Most Frequently Asked Questions: Question 40

### APPENDIX A. Federal Agency's Section 106 Consulting Parties' Process

Hugo Neighborhood Association & Historical Society's (HNA&HS) Applegate Trail Inventory "Educational Resources" Web Page for the Applicable History of the ODOT's I-5 Glendale to Hugo Paving & Sexton Climbing Lane Project (Web Links 14CA; 14CB, pages 5 - 7 of 15; [http://www.hugoneighborhood.org/miscellaneous\\_research\\_papers\\_and\\_documents.htm](http://www.hugoneighborhood.org/miscellaneous_research_papers_and_documents.htm))

Web Link 14CA. August 9, 2012 Section 106 Finding of Effect Document for the I-5: Glendale-Hugo Paving/Sexton Climbing Lane Project/Preliminary No Historic Properties Affected Findings. From Rebecca Littau, Geo-Environmental Administrative Staff, ODOT, to Section 106 Consulting Party Representatives. Document 14CA was a one page document that included Document 14CB that follows.

Web Link 14CB. August 1, 2012 Request For Concurrence; Finding of No Historic Properties Affected; I-5: Glendale-Hugo Paving/Sexton Climbing Lane Project. From James B. Norman, Environmental Planning Unit Manager, ODOT Geo-Environmental Section, to Roger Roper, Deputy State Historic Preservation Officer, State Historic Preservation Office. Ian Johnson, SHPO Official (built environment) concurred August 2, 2012 and another SHPO Official (Archaeology) (signature not legible) concurred August 6, 2012.

**Consultation** In June of 2012, James Collins, ODOT Region 3 Environmental Manager, sent letters to the following individuals and organizations with a demonstrated interest in the project pursuant to the Advisory Council on Historic Preservation's (ACHP) 36 CFR Part 800 regulations implementing Section 106 of the National Historic Preservation Act:

- Mr. Mike Walker with the Hugo Neighborhood Association & Historical Society (HNAHS)
- Dr. Jim Tompkins, Northwest Chapter Vice President, with the Oregon-California Trails Association (OCTA)
- Mr. John Hayes, Chair, with the Oregon Historic Trails Advisory Council (OHTAC).

Mike Walker from the HNAHS and Glen Harrison with the OHTAC requested consulting party status as did Stafford Hazelett who independently contacted ODOT.

Ms. Bochart-Leusch, ODOT Archaeologist, has consulted with the HNAHS, a voluntary citizens group, regarding this project since January of 2010. In December of 2011, the HNAHS

expressed concern that the proposed cut for the passing lane along the east bound lane of I-5 near Mount Sexton Pass could potentially damage or destroy what they believe to be approximately 1000 feet of the Applegate Trail within the ODOT right-of-way. On February 1, 2012, a meeting was held between members of the HNAHS and ODOT to discuss these concerns. Background research, sites visits, and an examination of the documents provided by the HNAHS were not sufficient to support their claim that the Applegate Trail is present within the I-5: Glendale – Hugo Paving / Sexton Climbing Lane Project APE. ODOT archival records indicate that the road bed or area of concern to the HNAHS was constructed or enhanced by the Oregon Department of Forestry sometime, between 1948 and 1952, to facilitate an access road with a grade that could be used by modern equipment to reach the lookout tower on the Sexton Mountain Summit.

As part of a good faith effort, ODOT has attempted to avoid the area of concern to the HNAHS by minimizing the extent of the cut slope needed to accommodate a passing lane along Sexton Pass. On-site meetings between members of HNAHS took place on May 1, 2012 and July 17, 2012. At the July 17, 2012 meeting, the HNAHS indicated that they felt satisfied that the freeway cut wouldn't adversely impact their area of concern. ODOT also agreed to mark everything east of the proposed cut line as a no work zone on the design plans and in the field during construction.

On June 19, 2012, Mr. John Hayes of the OHTAC contacted James Collins and accepted the invitation to be a Section 106 consulting party on behalf of this organization. He indicated that Glenn Harrison would represent OHTAC. Subsequently, Mr. Harrison was invited to participate in the July 17, 2012 on site meeting to examine the proposed cut line for the I-5: Glendale – Hugo Paving / Sexton Climbing Lane Project. Mr. Harrison responded that he would be unable to make the meeting; however, he did request that the cut line be moved a few feet below the road bed that he considers to be the Applegate Trail. The extent of the freeway cut along Sexton Pass, in the vicinity of the area of concern to Mr. Harrison, is located several feet from the road bed and on an artificially formed freeway berm associated with the construction of I-5.

Mr. Stafford Hazelett also attended the July 17, 2012 on site meeting. He did not express concern with the proposed cut line for the I-5: Glendale - Hugo Paving/Sexton Climbing Lane Project.

ODOT didn't receive written correspondence from a representative of OCTA to participate in the Section 106 as a consulting party for the I-5: Glendale-Hugo Paving/Sexton Climbing Lane Project.

Ms. Bochart-Leusch contacted Robert Kentta, Cultural Resources Director with the Confederated Tribes of Siletz, Eirik Thorsgard, Cultural Protection Coordinator with the Confederated Tribes of the Grand Ronde Community of Oregon, David Harrelson , Cultural Protection Specialist With the Confederated Tribes of the Grand Ronde Community of Oregon, Briece Edwards, Tribal Archaeologist with the Confederated Tribes of the Grand Ronde Community of Oregon, and Jessie Plueard, Archaeologist with the Cow Creek Band of Umpqua Tribe of Indians, to notify them of the intent and scope of this project. No tribal representatives expressed concern with the project scope.



**APPENDIX B. Web Links. Hugo Neighborhood Association & Historical Society's Applegate Trail Inventory "Educational Resources" Web Page for the Applicable History of the ODOT's I-5 Glendale to Hugo Paving & Sexton Climbing Lane Project**

([http://www.hugoneighborhood.org/miscellaneous\\_research\\_papers\\_and\\_documents.htm](http://www.hugoneighborhood.org/miscellaneous_research_papers_and_documents.htm))

1. December 7 2011. Letter From Frank Reading, Regional Manager, Region 3, ODOT To Glenn Harrison, Chair, Oregon Historic Trails Advisory Committee For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project". Roseburg, OR
2. February 1, 2012. Email/Letter From Walker, Hugo Emigrant Trails Committee, To Jessica Bochart-Leusch, Archaeologist For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project".
3. February 1, 2012 Meeting Minutes For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project".
4. February 17, 2012. Email/Letter Hugo Emigrant Trails Committee To Mark Leedom, Project Manager, ODOT For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project".
5. February 22, 2012. Email/Letter From Hugo Emigrant Trails Committee To Mark Leedom, Project Manager, ODOT For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project".
6. February 27, 2012. Email from Sam Dunnivant, Region 3 Environmental Coordinator, ODOT, to Hugo Emigrant Trails Committee, For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project". This communication was ODOT's response to the opportunity to review and comment on the February 16, 2012. February 1, 2012 Meeting Minutes For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project".
7. March 5, 2012. Email/Letter From Hugo Emigrant Trails Committee To Mark Leedom, Project Manager, ODOT, For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project".
8. May 1, 2012 Field Trip Meeting Minutes For "I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project": Field Trip Meeting Between ODOT & Hugo Emigrant Trails Committee. These minutes were provided to ODOT for review and comment on May 18, 2012.
- 8.B. June 12, 2012 Email From Glenn Harrison, Representing himself, to Tobin Bottman, Archaeologist ODOT, With Statement That Plans for the Last Part of the 1,060 Foot Portion of the Applegate Trail as it Comes down the Hill to I-5 Should Be Modified.
9. June 15, 2012 Review And Comments By ODOT On May 1, 2012 Field Trip Meeting Minutes.
10. June 15, 2012 Letter From James Collins, Region 3 Environment Manager, ODOT, To Mike Walker, Hugo Neighborhood Association & Historical Society. Reference: I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project Invitation to Participate as a Section 106 Consulting Party.

11. June 22, 2012 Letter From Mike Walker, Hugo Neighborhood Association & Historical Society, To James Collins, Region 3 Environment Manager, ODOT, Accepting Responsibility to Participate as a Section 106 Consulting Party.

12. June 26, 2012 Email/Letter From Mike Walker, Section 106 Consulting Party Representative, Hugo Neighborhood Association & Historical Society, To Chris Bucher, Operations Engineer, Oregon Division - Federal Highway Division (FHWA).

13. June 26 - July 19, 2012. Federal Highway Administrations Responsible For Compliance with Federal Regulations For I-5: Glendale - Hugo Paving/Sexton Climbing Lane Project.

14A. September 17, 2012 Email. Jessica Bochart-Leusch, Archaeologist, Cultural Resources Tribal Liaison, Oregon Department of Transportation, to Mike Walker, Section 106 Consulting Party Representative, Hugo Neighborhood Association & Historical Society. Documents 14B and 14BA and 14CA were attachments to the September 17, 2012 Email.

14B. August 8, 2012 Categorical Exclusion Closeout Document for the I-5: Glendale-Hugo Paving/Sexton Climbing Lane Project. From Jim Collins, Geo/Environmental Manager, ODOT, to Chris Bucher, Federal Highway Administration. The Categorical Exclusion was approved by Chris Bucher, FHA, on August 14, 2012.

14CA. August 9, 2012 Section 106 Finding of Effect Document for the I-5: Glendale-Hugo Paving/Sexton Climbing Lane Project/Preliminary No Historic Properties Affected Findings. From Rebecca Littau, Geo-Environmental Administrative Staff, ODOT, to Section 106 Consulting Party Representatives. Document 14CA was a one page document that included Document 14CB that follows.

14CB. August 1, 2012 Request For Concurrence; Finding of No Historic Properties Affected; I-5: Glendale-Hugo Paving/Sexton Climbing Lane Project. From James B. Norman, Environmental Planning Unit Manager, ODOT Geo-Environmental Section, to Roger Roper, Deputy State Historic Preservation Officer, State Historic Preservation Office. Ian Johnson, SHPO Official (built environment) concurred August 2, 2012 and another SHPO Official (Archaeology) (signature not legible) concurred August 6, 2012.

15. September 20, 2012 Email/Letter From Mike Walker, Section 106 Consulting Party Representative, Hugo Neighborhood Association & Historical Society, To Chris Bucher, Operations Engineer, Oregon Division - Federal Highway Division (FHWA).

16. Hugo Native American Team. August 2012. *John Peabody Harrington's Takelma Indian Field Notes: Outline*. For Hugo Neighborhood Association & Historical Society & Josephine County Historical Society. Hugo, Oregon.

17. Hugo Native American Team. August 2012. *Lowland Takelma Indian Trail & Rock Old Woman At Sexton Mountain Pass*. For Hugo Neighborhood Association & Historical Society & Josephine County Historical Society. Hugo, Oregon.

18. September 27, 2012 Email/Letter From Mike Walker, Section 106 Consulting Party Representative, Hugo Neighborhood Association & Historical Society, To:

- Robert Kentta, Cultural Resources Director With the Confederated Tribes of Siletz
- Eirik Thorsgard, Cultural Protection Coordinator With the Confederated Tribes of the Grand Ronde Community of Oregon
- David Harrelson, Cultural Protection Specialist With the Confederated Tribes of the Grand Ronde Community of Oregon
- Briece Edwards, Tribal Archaeologist With the Confederated Tribes of the Grand Ronde Community of Oregon
- Jessie Plueard, Archaeologist With the Cow Creek Band of Umpqua Tribe of Indians

18B. October 13, 2012 Email/Letter From Jim & Rene Ford, Co-Project Leaders for Hugo Applegate Trail Marking & Mapping Project, Hugo Neighborhood Association & Historical Society, to Henry Pittock, Mapping and Marking Chair, NW Oregon-California Trails Association. The topic is authentication of 1,060' Segment of the Applegate Trail/Road at North Sexton Mountain Pass as OCTA Trail Classification of Class ① Unaltered Trail/Class ② Used Trail.

19A. October 15, 2012 Email/Letter From Mike Walker, Section 106 Consulting Party Representative, Hugo Neighborhood Association & Historical Society, To:

- Milford Wayne Donaldson, Chairman  
Advisory Council on Historic Preservation
- Chris Bucher, Operations Engineer  
Oregon Division - Federal Highway Division
- James Collins, Region 3 Environmental Manager, Oregon Department of Transportation  
Chris Bucher, Operations Engineer, Oregon Division - Federal Highway Division

19B. Section 106 Consulting Party, Hugo Neighborhood Association & Historical Society. October 2012. *Why ACHP Should Review The I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project Section 106 Process*. Hugo, OR.

**APPENDIX C. HETC Applegate Trail Inventories For “I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project”- Reference 3 (<http://www.hugoneighborhood.org/applegat.htm>)**

<u>Trail Site Or Segment</u>	<u>Trail Classification</u>
1. JA-14 Maple Creek	Class ④ Verified Altered Trail
2. 310' Segment Of <i>Trail</i> South Mt. Sexton Pass	Class ② Used Trail
3. 1,060' <i>Trail I</i> North Sexton Pass I-5 East	Class ② Used Trail
4. JA-15 South Rat Creek	Class ③ Verified Trail
5. JA-16 Old Stage Road	Class ③ Verified Trail

**Hard-copy Applegate Trail Inventories Not Web Published**

1. Josephine County Public Works. 1997. *1874 Josephine County Surveyed Road*. On July 11, 1997, Bob Chard, Engineering Technician III, Josephine County Public Works, developed a report on a road established by the Josephine County Commissioners on April 9, 1874 (Commissioner’s Book 2, Page 261). Alex Watts, County Surveyor at that time, did a survey of the route. It is recorded as part of the Road Viewers Report as Road Number 12 (Book 1, Pages 40-45, May 20, 1874).
2. Oregon State Highway Department. August 1940. *Right of Way Map, Sexton Mt. Section. Pacific Highway, Josephine County*. Scale 1" = 100'. Part 1 of 2, Drg. No. 5B-28-11.

**HETC’s Web Published Applegate Trail/Road Inventories**

([http://www.hugoneighborhood.org/miscellaneous\\_research\\_papers\\_and\\_documents.htm](http://www.hugoneighborhood.org/miscellaneous_research_papers_and_documents.htm))

1. Drake, M. & Walker, M. September 15, 2011. *Gradient Measurement Field Trip: 310' Segment Of Applegate Trail At Mt. Sexton Pass*. For Hugo Neighborhood Association & Historical Society. Hugo, OR.
2. Drake, M. & Walker, M. November 7, 2011. *Field Trip to Mt. Sexton Pass*. Hugo, OR.
3. Drake, M., Rarey K., & Walker, M. December 28, 2011. *Smith Hill Pass: 1940*. For Hugo Neighborhood Association & Historical Society. Hugo, OR.
4. Walker, M., Rarey K., & Rose. K. September 30, 2010. *Location Of Applegate Trail in Upper Rat Creek: A Work In Progress*. For Hugo Neighborhood Association & Historical Society. Hugo, OR.
5. Walker, M., Rarey K., & Rose. K. January 30, 2012. *Applegate Trail I North Sexton Pass I-5 East: I*. For Hugo Neighborhood Association & Historical Society. Hugo, OR; *Draft Applegate Trail I North Sexton Pass I-5 East: II*. (Appendices)
6. Boling, Rarey, Rose, & Walker. February 22, 2012. *Telegraph Lines and Applegate Trail at Smith Hill Pass*. For Hugo Neighborhood Association & Historical Society & Josephine County Historical Society. Hugo, OR.

**HETC’s Web Published Hugo Native American Program Inventory Brochures**

[http://www.hugoneighborhood.org/Hugo\\_Native\\_American\\_Program.htm](http://www.hugoneighborhood.org/Hugo_Native_American_Program.htm)

Gray’s Hugo Lowland Takelma Sites  
Ceremonies and Spiritual Beliefs of the Takelma  
Prairies and Open Woodlands along Applegate Trail  
Applegate Trail’s Open Valleys & Wagon Routes In Hugo Region: 1846 - 1855  
Gray’s Dan-mologol or Medicine Rock  
Sapir’s *The Religious Ideas of the Takelma Indians of Southwestern Oregon*  
Sapir’s Old Rock Woman: *Takelma Texts*

Settlement Patterns Of Takelma Villages  
Takelma Village: Daktsasin or Daldani  
Hugo's Indian Trail  
Hugo's Primary Indian Trail  
Ritchie's Indian Trail: Hugo, Oregon  
Sexton Mt. Pass Rock

**HETC's Web Published Native American Trail & Applegate Trail/Road Inventory Papers**  
([http://www.hugoneighborhood.org/Hugo\\_Native\\_American\\_Program.htm](http://www.hugoneighborhood.org/Hugo_Native_American_Program.htm))

1. *Takelma Indians: An Essay on Native Americans in the Rogue River Area*  
[http://www.hugoneighborhood.org/BROCHURE\\_NA2%20Native%20Americans%20In%20Rogue%20Valley%20081811.pdf](http://www.hugoneighborhood.org/BROCHURE_NA2%20Native%20Americans%20In%20Rogue%20Valley%20081811.pdf)
2. *John Peabody Harrington's Takelma Indian Field Notes: Outline*  
[http://www.hugoneighborhood.org/Harrington\\_Papers\\_Outline\\_082312.pdf](http://www.hugoneighborhood.org/Harrington_Papers_Outline_082312.pdf)
3. *Lowland Takelma Indian Trail & Rock Old Woman At Sexton Mountain Pass*  
[http://www.hugoneighborhood.org/Harrington\\_Papers\\_Sexton\\_Pass\\_Indian\\_Trail\\_Aug\\_2012.pdf](http://www.hugoneighborhood.org/Harrington_Papers_Sexton_Pass_Indian_Trail_Aug_2012.pdf)

**HETC's Web Published Applegate Trail/Road Inventories**  
(<http://www.hugoneighborhood.org/inventorybrochures.htm>)

Hugo Emigrant Trail Committee, Hugo Neighborhood Association & Historical Society: Inventory Brochures.

- Applegate Trail: Mt. Sexton Pass JA-14B
- JR Of Applegate Trail: 1853 Military Road At Mt. Sexton Pass JA-14C
- JR Of Applegate Trail: 1864 Collins Telegraph Line At Mt. Sexton Pass JA-14D
- JR Of Applegate Trail: 1886 - 1887 Postal Telegraph Line At Mt. Sexton Pass JA-14E
- JR Of Applegate Trail: 1941 At Mt. Sexton Pass JA-14F
- JR Of Applegate Trail: 2005 Metal Detection Survey At Mt. Sexton Pass JA-14G
- JR Of Applegate Trail: 2010 Big Tree At Mt. Sexton Pass JA-14H
- JR Of Applegate Trail: Topography & Grade At Mt. Sexton Pass JA-14I
- JR Of Applegate Trail: 2010 Chain At Mt. Sexton Pass JA-14J
- JR Of Applegate Trail: OCTA Trail Classification For Mt. Sexton Pass 310' Trail Segment JA-14K
- 1940 Right-of-Way Map, South Sexton Pass Trail, & Pacific Highway JA-15L

**HETC's Web Published Applegate Trail/Road Inventories: Insulators**  
([http://www.hugoneighborhood.org/Insulator\\_Brochure\\_Series.htm](http://www.hugoneighborhood.org/Insulator_Brochure_Series.htm)).

Hugo Emigrant Trail Committee, Hugo Neighborhood Association & Historical Society: Inventory Brochures.

- 1964 Collins Telegraph Line (Brochure 5)
- 1886 - 1887 Postal Telegraph Line (Brochure 7)
- 1920s - 1950s AT&T Overhead Long Distance Telephone Lines (Brochure 8)
- Mike Walker, Education Chair, HNA&HS. February 24, 2006. *Interview: Howard Banks Crown Jewels of the Wire*. For Hugo Neighborhood Association & Historical Society. Hugo, OR

## **Other Inventories**

Hugo Native American Team, Hugo Neighborhood Association & Historical Society. August 31, 2011. *Minutes of Field Trip To Sexton Mt. Pass Trail Rock (Trail Rock) of Applegate Trail*. Mike Walker for HNA Team. Hugo, OR.

Hugo Neighborhood Association & Historical Society. March 2006. *Historical Auto Camps And Service Stations, Hugo Oregon Region*. Hugo, OR

Hugo Neighborhood Association & Historical Society and Josephine County Historical Society. January 13, 2008, Updated August 3, 2011. *John Smith Family: Hugo Pioneers*. Very Draft Brochure 73 in Hugo's Pioneers Brochure Series. Hugo, OR (<http://www.hugoneighborhood.org/hugospioneerseriesbro.htm>).

## Appendix D. 36 CFR PART 800 – Protection of Historic Properties

This appendix includes the sections of 36 CFR PART 800 – Protection of Historic Properties applicable to this paper.

### Subpart A – Purposes and Participants

- Sec.
- 800.1 Purpose.
- 800.2 Participants in the Section 106 process.

### Subpart B – The Section 106 Process

- 800.3 Initiation of the section 106 process.
- 800.4 Identification of historic properties.
- 800.5 Assessment of adverse effects.
- 800.6 Resolution of adverse effects.
- 800.7 Failure to resolve adverse effects.
- 800.8 Coordination with the National Environmental Policy act.
- 800.9 Council review of Section 106 compliance.
- 800.10 Special requirements for protecting National Historic Landmarks.
- 800.11 Documentation standards.
- 800.12 Emergency situations.
- 800.13 Post-review discoveries.

### Subpart C -- Program Alternatives

- 800.14 Federal agency program alternatives.
- 800.15 Tribal, State and Local Program Alternatives. (Reserved)
- 800.16 Definitions.
- Appendix A – Criteria for Council involvement in reviewing individual section 106 cases.

**Authority:** 16 U.S.C. 470s.

## Subpart A - Purposes and Participants

### § 800.1 Purposes.

**(a) *Purposes of the section 106 process.*** Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. **The procedures in this part define how Federal agencies meet these statutory responsibilities.** The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties. [emphasis added]

**(b) *Relation to other provisions of the act.*** Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies and procedures

issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference. [emphasis added]

(c) **Timing.** The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking. [emphasis added]

## **§ 800.2 Participants in the Section 106 process.**

(a) **Agency official.** It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) **Professional standards.** Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary. [emphasis added]

(2) **Lead Federal agency.** If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part. [emphasis added]

(3) **Use of contractors.** Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines. [emphasis added]

(4) **Consultation.** **The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process.** The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the **National Environmental Policy Act**, the **Native American Graves Protection and Repatriation Act**, the **American Indian Religious Freedom Act**, the **Archeological Resources Protection Act** and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part. [emphasis added]



**(b) Council.** The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties. [emphasis added]

**(1) Council entry into the section 106 process.** When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part. [emphasis added]

**(2) Council assistance.** Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process. [emphasis added]

**(c) Consulting parties.** The following parties have consultative roles in the section 106 process. [emphasis added]

**(1) State historic preservation officer.**

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3). [emphasis added]

**(2) Indian tribes and Native Hawaiian organizations.**

**(i) Consultation on tribal lands.**

**(A) Tribal historic preservation officer.** For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

**(B) Tribes that have not assumed SHPO functions.** When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO. [emphasis added]

**(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations.** Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches **religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property.** Such Indian tribe or Native Hawaiian organization shall be a consulting party.

**(A)** The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a **reasonable opportunity to identify its concerns about historic properties,** advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. **It is the responsibility of the agency official to make a reasonable and good**

**faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process.** Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties. [emphasis added]

(B) - (F) See 36 CFR PART 800 – Protection of Historic Properties.

(3) *Representatives of local governments.* See 36 CFR PART 800 – Protection of Historic Properties.

(4) *Applicants for Federal assistance, permits, licenses and other approvals.* See 36 CFR PART 800 – Protection of Historic Properties.

(5) ***Additional consulting parties.*** Certain individuals and organizations with a demonstrated interest in the undertaking **may participate as consulting parties** due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties. [emphasis added]

**(d) *The public.***

(1) ***Nature of involvement.*** The **views of the public are essential to informed Federal decisionmaking** in the section 106 process. The agency official **shall seek and consider the views of the public** in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) ***Providing notice and information.*** The agency official **must**, except where appropriate to protect confidentiality concerns of affected parties, **provide the public with information about an undertaking and its effects on historic properties and seek public comment and input.** Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) ***Use of agency procedures.*** The agency official may use the agency's procedures for public involvement under the **National Environmental Policy Act** or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart. [emphasis added]

## **Subpart B-The section 106 Process**

### **§ 800.3 Initiation of the section 106 process.** [emphasis added].

(a) ***Establish undertaking.*** The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties. [emphasis added]

(1) ***No potential to cause effects.*** If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) ***Program alternatives.*** [such as NEPA, See 36 CFR PART 800 – Protection of Historic Properties]

(b) ***Coordinate with other reviews.*** See 36 CFR PART 800 – Protection of Historic Properties

(c) ***Identify the appropriate SHPO and/or THPO.*** See 36 CFR PART 800 – Protection of Historic Properties

(1) *Tribal assumption of SHPO responsibilities.* See 36 CFR PART 800

(2) *Undertakings involving more than one State.* See 36 CFR PART 800

(3) *Conducting consultation.* See 36 CFR PART 800

(4) *Failure of the SHPO/THPO to respond.* [See 36 CFR PART 800]

(d) **Consultation on tribal lands.** [Emphasis added; See 36 CFR PART 800]

(e) **Plan to involve the public.** In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with §800.2(d). [Emphasis added]

(f) **Identify other consulting parties.** In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward. [Emphasis added]

(1) *Involving local governments.* [See 36 CFR PART 800]

(2) *Involving Indian tribes and Native Hawaiian organizations.* [See 36 CFR PART 800]

(3) *Requests to be consulting parties.* [See 36 CFR PART 800]

(g) **Expediting consultation.** A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate **as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).** [emphasis added]

#### **§ 800.4 Identification of historic properties.** [emphasis added]

(a) **Determine scope of identification efforts.** In consultation with the SHPO/THPO, the agency official shall: [emphasis added]

(1) **Determine and document the area of potential effects, as defined in § 800.16(d);**

(2) **Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;**

(3) **Seek information,** as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, **and identify issues** relating to the undertaking's potential effects on historic properties; and

(4) **Gather information from any Indian tribe or Native Hawaiian organization** identified pursuant to § 800.3(f) to assist in identifying properties, **including those located off tribal lands,** which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c). [emphasis added]

(b) **Identify historic properties.** Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the **agency official shall take the steps necessary to identify historic properties within the area of potential effects.** [emphasis added]

(1) **Level of effort.** The agency official shall make a reasonable and good faith effort to carry out **appropriate identification efforts,** which may include background research, consultation, oral history interviews, sample field investigation, and field survey. **The agency official shall take into account past planning, research and studies,** the magnitude and nature of the undertaking and the degree of Federal involvement, **the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.** The Secretary's Standards and Guidelines for Identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal and local laws, standards and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process. [emphasis added]

**(2) Phased identification and evaluation.** Where **alternatives under consideration consist of corridors** or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14 (b), or the documents used by an agency official to comply with the **National Environmental Policy Act pursuant to §800.8**. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section. [emphasis added]

**(c) Evaluate historic significance.** [emphasis added]

**(1) Apply National Register criteria.** In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's Standards and Guidelines for Evaluation, **the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility.** The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to **reevaluate properties previously determined eligible or ineligible.** The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the **eligibility of historic properties** that may possess religious and cultural significance to them. [emphasis added]

**(2) Determine whether a property is eligible.** If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered **eligible** for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to **36 CFR part 63**. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to **obtain a determination of eligibility.** [emphasis added]

**(d) Results of identification and evaluation.** [emphasis added]

**(1) No historic properties affected. If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO.** The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

**(i)** If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

**(ii)** If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

**(iii)** During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the

head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(c) of this section. [emphasis added]

(iv)(A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) **Historic properties affected.** If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

## § 800.5 Assessment of adverse effects.

(a) Apply criteria of adverse effect. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public. [emphasis added]

(1) Criteria of adverse effect. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative. [emphasis added]

(2) *Examples of adverse effects.* [See 36 CFR PART 800]

(3) *Phased application of criteria.* [See 36 CFR PART 800]

(b) **Finding of no adverse effect.** [See 36 CFR PART 800]

(c) *Consulting party review.* If the agency official proposes a finding of no adverse effect, **the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e).** The SHPO/THPO shall have 30 days from receipt to review the finding. [emphasis added]

(1) *Agreement with, or no objection to, finding.* [See 36 CFR PART 800]

(2) *Disagreement with finding.* [See 36 CFR PART 800]

(3) *Council review of findings.* [See 36 CFR PART 800]

§ 800.5 Assessment of adverse effects regulations not covered. [See 36 CFR PART 800]

**§ 800.6 Resolution of adverse effects.** [See 36 CFR PART 800]

**§ 800.7 Failure to resolve adverse effects.** [See 36 CFR PART 800]

**§ 800.8 Coordination with the National Environmental Policy Act.**

Important, but time restraints prevented coverage.

**§ 800.11 Documentation standards.**

(a) *Adequacy of documentation.* The agency official shall ensure that a **determination, finding, or agreement** under the procedures in this subpart **is supported by sufficient documentation to enable any reviewing parties to understand its basis.** The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. **If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information needed to meet the standard.** At the request of the agency official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties. [emphasis added]

(b) *Format.* [See 36 CFR PART 800]

(c) *Confidentiality.*

(1) *Authority to withhold information.* Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, **shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners.** When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act. [emphasis added]

(2) *Consultation with the Council.* When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern. The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

(3) *Other authorities affecting confidentiality.* Other Federal laws and program requirements may limit public access to information concerning an undertaking **and its effects on historic properties.** Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency official to protect the privacy of non-governmental applicants. [emphasis added]

(d) *Finding of no historic properties affected. Documentation shall include:*

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;

- (2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and
- (3) The basis for determining that no historic properties are present or affected.

**(e) Finding of no adverse effect or adverse effect. Documentation shall include:**

- (1) A description of the undertaking, specifying the Federal involvement, **and its area of potential effects**, including photographs, maps, and drawings, as necessary;
- (2) A description of the steps taken to identify historic properties;
- (3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;
- (4) A description of the undertaking's effects on historic properties;
- (5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and
- (6) Copies or summaries of any views provided by consulting parties and the public. [emphasis added]

§ 800.11 Other regulations not covered. [See 36 CFR PART 800]

## **§ 800.16 Definitions.**

**(d) Area of potential effects** means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking. [emphasis added]

**(f) Consultation** means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

**(j) Foreclosure** means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

**(l)(1) Historic property** means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the **National Register of Historic Places** maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the **National Register criteria**.

- (2) The term **eligible for inclusion in the National Register** includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria. [emphasis added]

**(r) National Register criteria** means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

§ 800.16 Other § 800.11 regulations not covered. [See 36 CFR PART 800]

## **APPENDICES E -G**

- APPENDIX E. ODOT Categorical Exclusions**  
**APPENDIX F. ODOT Mitigation Measures**  
**APPENDIX G. CEQs 40 Most Frequently Asked Questions: Question 40**

Appendices E - G in this paper are Appendices E - G of the May 1, 2012 field trip meeting minutes and the June 15, 2012 review and comments by ODOT of the May 1, 2012 field trip meeting minutes (Appendix C. Links 8 - 9). ODOT's view of the disagreement is identified in its June 15, 2012 review and comments. Also see the June 26, 2012 Email/Letter from the HNA&HS to FHWA (Appendix B. Link 12).

## **SECTION 106 PROCESS WEB LINKS**

### **National Historic Preservation Act**

<http://www.nps.gov/history/local-law/nhpa1966.htm>

### **Protection of Historic Properties (36 CFR Part 800)**

<http://www.achp.gov/regs-rev04.pdf>

### **Preamble to Protection of Historic Properties (36 CFR Part 800)**

<http://www.achp.gov/regspreamble-rev04.pdf>

### **Advisory Council on Historic Properties (ACHP)**

<http://www.achp.gov/about.html>

### **Working with Section 106**

<http://www.achp.gov/work106.html>

### **Section 106 Regulations Users Guide**

<http://www.achp.gov/usersguide.html>

### **Section 106 Regulations Flow Chart**

<http://www.achp.gov/regsflow.html>

### **Section 106 Regulations, Section by Section Question and Answers**

<http://www.achp.gov/106q&a.html>



# Flow Chart No. 1: Section 106 Regulations

<http://www.hcd.ca.gov/fa/cdbg/manual/5HistoricPreservationInfoFlowChart.pdf>

Initiate Section 106 Process  
Establish undertaking  
Identify appropriate SHPO/THPO  
Plan to involve the public  
Identify other consulting parties

➔ *No undertaking/no potential to cause effects*



*Undertaking is type that might affect historic properties*

Identify Historic Properties  
Determine scope of efforts  
Identify historic properties  
Evaluate historic significance

➔ *No historic properties affected*



*Historic properties are affected*

Assess Adverse Effects  
Apply criteria of adverse effect

➔ *No historic properties adversely affected*



*Historic properties are adversely affected*

Resolve Adverse Effects  
Continue consultation

➔ *Memorandum of Agreement*



**FAILURE TO AGREE**

➔ *Advisory Council on Historic Preservation Comment*

## **THE REVISED SECTION 106 PROCESS : A SUMMARY**

### **Introduction**

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. The historic preservation review process mandated by Section 106 is outlined in regulations issued by the Council. Revised regulations, "Protection of Historic Properties" (36 CFR Part 800), became effective January 11, 2001, and are summarized below.

### **Initiate Section 106 process**

The responsible Federal agency first determines whether it has an undertaking that is a type of activity that could affect historic properties. Historic properties are properties that are included in the National Register of Historic Places or that meet the criteria for the National Register. If so, it must identify the appropriate State Historic Preservation Officer/Tribal Historic Preservation Officer (SHPO/THPO) to consult with during the process. It should also plan to involve the public, and identify other potential consulting parties. If it determines that it has no undertaking, or that its undertaking is a type of activity that has no potential to affect historic properties, the agency has no further Section 106 obligations.

### **Identify Historic Properties**

If the agency's undertaking could affect historic properties, the agency determines the scope of appropriate identification efforts and then proceeds to identify historic properties in the area of potential effects. The agency reviews background information, consults with the SHPO/THPO and others, seeks information from knowledgeable parties, and conducts additional studies as necessary. Districts, sites, buildings, structures, and objects listed in the National Register are considered; unlisted properties are evaluated against the National Park Service's published criteria, in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious or cultural importance to them.

If questions arise about the eligibility of a given property, the agency may seek a formal determination of eligibility from the National Park Service. Section 106 review gives equal consideration to properties that have already been included in the National Register as well as those that have not been so included, but that meet National Register criteria. If the agency finds that no historic properties are present or affected, it provides documentation to the SHPO/THPO and, barring any objection in 30 days, proceeds with its undertaking.

If the agency finds that historic properties are present, it proceeds to assess possible adverse effects.

### **Assess adverse effects**

## **Resolve adverse effects**

### **Implementation**

#### **Tribes, Native Hawaiians, and the public**

### **Advisory Council On Historic Preservation Web Site: Section 106 Regulations Flow Chart Explanatory Material**

<http://www.achp.gov/flowexplain.html>

#### **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)**

##### **ACHP comment and agency response**