

Hugo Neighborhood Association & Historical Society

3388B Merlin Road #195
Grants Pass, Oregon 97526
541-471-8271

Email: hugo@jeffnet.org

Web Page: <http://www.hugoneighborhood.org/>

June 26, 2012 Email/Letter

Chris Bucher, Operations Engineer
Oregon Division - Federal Highway Division (FHWA)
530 Center Street NE, Suite 420
Salem, Oregon 97301
503-316-2555
Email: chris.bucher@dot.gov



Reference: I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project/Section 106 Consulting Party Queries

Dear Chris:

The Oregon Department of Transportation (ODOT) identified you as the contact for the National Environmental Policy Act (NEPA) categorical exclusion (CE) determination for the “I-5: Glendale – Hugo Paving/Sexton Climbing Lane Project” (*Project*). We assume this means that you are also the Federal Highway Administration (FHWA) representative ultimately responsible for completing or approving the Section 106 review of the *Project* (36 CFR Part 800).

We offer our comments for your consideration in the spirit of public involvement in the Section 106 process as identified on the web site of the Advisory Council on Historical Preservation (ACHP; <http://www.achp.gov/usersguide.html>). We are interested in how the FHWA is going to comply with Section 106, NEPA, and what is the status of FHWA’ involvement in *Project* planning.

In a nut-shell, we are currently trying to understand the roles and responsibilities of the *Project* participants in the Section 106 process as well as some of the processes (e.g., agency official (36 CFR 800.2(a)); participants (36 CFR 800.2); identify historic properties (36 CFR 800.4); NEPA coordination (36 CFR 800.8; etc.). For example, we assume the ODOT initiated the Section 106 process (36 CFR Part 800.3) of the National Historic Preservation Act (NHPA) for the *Project* on June 15, 2012 with its invitation to us and others to consider accepting the responsibility of a consulting party (36 CFR Part 800.2(c)). True? In its June 15, 2012 invitation letter ODOT shared information that it was acting on behalf of the FHWA. What does “on behalf” mean? We originally assumed that it means that James Collins, Region 3 Environmental Manager, ODOT, has been delegated the legal responsibility in accordance with law to act as the FHWA’s agency official who takes legal and financial responsibility for section 106 compliance (36 CFR Part 800.2(a)). True? Another alternative is that James Collins is the agency official acting on behalf of the FHWA, but the Section 106 process remains a responsibility of the FHWA in some sort of approval capacity

(i.e., legal and financial responsibility for section 106 compliance remains with FHWA). What are the roles and responsibilities of the ODOT and the FHWA?

We have similar questions about the role of the Oregon State Historic Preservation Officer (SHPO) in the Section 106 process. Per the above we assume that Section 106 compliance remains exclusively a preservation responsibility of the FHWA. We assume the SHPO role is one of assisting the federal agency in the Section 106 process, and not one of assuming “responsibility” for it, making decisions for federal agencies, or replacing independent federal agency judgment (National Historic Preservation Act Authorization for Federal Agency Assistance to SHPOs; <http://www.achp.gov/docs/LegalOpinionFederalFundingforStates.pdf>).

A significant issue for us is that ODOT and the Hugo Neighborhood Association & Historical Society (Hugo Neighborhood), Section 106 Consulting Party, presently disagree on the identification of historic properties in the area of potential effects (APE) for the *Project* (36 CFR 800.4, Identification of Historic Properties).

For a detailed clarification on this disagreement please see the HETC’s Applegate Trail inventories identified in Appendix A, especially 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. ODOT’s view of the disagreement is identified in its June 15, 2012 review and comments (Page 1; http://www.hugoneighborhood.org/miscellaneous_research_papers_and_documents.htm).

“ODOT Response: Analysis and conclusions completed by Southern Oregon University on behalf of ODOT differ from the HETC’s claim that the 1060’ section adjacent to the northbound lands of I-5 just north of the Sexton Pass summit can be definitively identified as part of the Applegate Trail. ODOT considers HETC’s reference to this section throughout this document as “Applegate Trail” to be inconclusive. However, ODOT is still trying to minimize impacts to this area, or even to avoid this area altogether. ODOT will set up another site visit with the HETC in the very near future to go over the updated impact area.”

At issue is that we do not believe that the minimum standards for public involvement (36 CFR Part 800.2(d)) have been met yet (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, <http://www.achp.gov/106q&a.html#intro>, Updated May 26, 2010). As of this date ODOT has not provided the Hugo Neighborhood any written consideration that invalidates its comprehensive historic properties inventories in the APE, especially its survey inventories, including what we believe is substantial evidence for a 1,060 segment of the Applegate Trail/Road at Sexton Mountain Pass as a historic emigrant trail (i.e., Class ② Used Trail) and as a history property (*Telegraph Lines and Applegate Trail at Smith Hill Pass*; http://www.hugoneighborhood.org/miscellaneous_research_papers_and_documents.htm).

What we believe is that ODOT's consideration of our historic properties inventories has not occurred yet because ODOT is relying entirely on a confidential reconnaissance report completed by Southern Oregon University (SOU). A reconnaissance report by definition is meant to be a broad identification of potential environmental and social issues.

We doubt that either SOU or ODOT has evaluated the significance of the Hugo Neighborhood's inventories, especially our 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 (Map 1), 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 very draft *United States Military Wagon Road From Myrtle Creek to Camp Stewart: 1853 - 1880* paper (Appendix D), and the *Telegraph Lines and Applegate Trail at Smith Hill Pass* analysis paper which tied all these inventories together as conclusive evidence that the 1,060' *Trail I* North Sexton Pass I-5 East trail segment and the 310' Segment Of *Trail* South Mt. Sexton Pass trail segment were part of the original emigrant Applegate Trail/Road from ca., 1854 - 1880 (Appendices A - D). We looking forward to compliance with 36 CFR Part 800.2(d)) at the next stage of the Section 106 process.

We question whether 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 B). 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, 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? (<http://www.oregon.gov/ODOT/HWY/REGION3/Pages/glendale-hugo1.aspx>)

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 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 Hugo Neighborhood'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).

“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 are interested in whether “CEQ’s 40 Most Frequently Asked Questions” might apply to CEs (Appendix B), and if so, the propriety of issuing an EA [CE] when mitigation (Appendix C) after the original project design reduces significant impacts (Appendix D)? 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" web published at http://www.hugoneighborhood.org/MEETING_MINUTES_Between_ODOT_and_HNAHS_020112.pdf). 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)). 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 D).

We assume that in order to consider and identify historic properties in the APE for the *Project* that written testimony will have to be submitted by the Hugo Neighborhood to the Section 106 process. We assume this testimony can be submitted via PDF email attachments to ODOT with references to the HETC’s PDF web published Applegate Trail inventory documents. For example, the answer to the question “*Who, and how, does the Agency Official notify when authorizing an applicant, or group of applicants, to initiate consultation (800.2(c)(5))?*” allowed the agency official to notify the SHPO/THPO via written or e-mail form (ACHP Section 106 Regulations-by-Section Questions and Answers, updated May 26, 2010 <http://www.achp.gov/106q&a.html#intro>). We request that these comments become part of the official record of the Section 106 process.

We are also interested that some information be shared with the contacts for the applicable “federally recognized Indian tribes”. Who are they? We assume that two applicable Indian tribes are the Confederated Tribes of the Siletz Indians and the Confederated Tribes of Grand Ronde Community. Our interest is because of the view of Thomas Doty, Story Teller, Doty & Coyote: Stories from the Native West (http://www.dotycoyote.com/biography/programs_projects.html). A few years ago he wrote a story about his decades-long search for the Lowland Takema Indian medicine woman Dan Mologol (Rock Old Woman). Her home is a sacred Takelma site along the

old Indian trail near what is now Interstate 5 at Sexton Mountain Pass in Southern Oregon (*Waiting for Rock Old Woman*, <http://www.dotycoyote.com/library/rock.html>). Doty notes 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....”

Thank you in advance for any assistance you can provide.

Sincerely,

Mike :)

Mike Walker, Section 106 Consulting Party Representative
Hugo Neighborhood Association & Historical Society
3388B Merlin Rd #195
Grants Pass, Oregon 97526
541-471-8271
Email: hugo@jeffnet.org
Web Site: <http://www.hugoneighborhood.org/>

Mike Walker, Co-Project Leader
Hugo Emigrant Trails Committee
Hugo Neighborhood Association & Historical Society

Email copies:

Applegate Trail Smith Hill Group
Hugo Neighborhood Association & Historical Society

Boyd Peters
Legacy Lands Project

Charlene Dwin Vaughn, Assistant Director
Advisory Council on Historical Preservation

Dennis Griffin, State Archeologist
Oregon State Preservation Office

Glenn Harrison, Representative
Oregon Historic Trails Advisory Council

James Collins, Region 3 Environmental Manager
Oregon Department of Transportation

Jim Tompkins, President
Northwest Chapter, Oregon-California Trails Association

Lee Kreutzer
National Park Service

Thomas Doty, Story Teller
Doty & Coyote: Stories from the Native West

Appendices

- Appendix A. HETC Applegate Trail Inventories
- Appendix B. ODOT Categorical Exclusions
- Appendix C. ODOT Mitigation Measures
- Appendix D. CEQs 40 Most Frequently Asked Questions: Question 40

Appendix A. HETC Applegate Trail Inventories

<http://www.hugoneighborhood.org/applegat.htm>

Miscellaneous Research Papers & Documents

http://www.hugoneighborhood.org/miscellaneous_research_papers_and_documents.htm

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.

ODOT'S I-5: Glendale to Hugo Paving & Sexton Climbing Lane Project

http://www.hugoneighborhood.org/miscellaneous_research_papers_and_documents.htm

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.

June 15, 2012 Review And Comments By ODOT on May 1, 2012 Field Trip Meeting Minutes.

Appendix B. ODOT Categorical Exclusions

Oregon Department of Transportation. May 2002. *Draft Environmental Procedures Manual Volume 1.* Chapter 5: Environmental Documentation, Section 502. Categorical Exclusions. Pages 39 - 43. Prepared by ODOT Environmental Services. Salem, Oregon
(http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/docs/Env_Procedures_Manual_Vol-1.pdf?ga=t).

502. CATEGORICAL EXCLUSIONS

Definition (23 CFR Sec. 771.117 and FHWA Technical Advisory T6640.8A, 10/30/1987) pages 39 - 40.

Categorical exclusions (CEs) are actions which meet the definition contained in 40 CFR 1508.4, and, based on past experience with similar actions, do not involve significant environmental impacts. (emphasis added) They are actions which:

- ! do not induce significant impacts to planned growth or land use for the area;
- ! do not require the relocation of significant numbers of people;
- ! **do not have a significant impact on any natural, cultural, recreational, historic or other resource;** do not involve significant air, noise, or water quality impacts; (emphasis added)
- ! do not have significant impacts on travel patterns; or,
- ! do not otherwise, either individually or cumulatively, have any significant environmental impacts.

Any action which normally would be classified as a CE but could involve unusual circumstances will require FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper. Such unusual circumstances include: (emphasis added)

- (1) **Significant environmental impacts;** (emphasis added)
- (2) **Substantial controversy on environmental grounds;** (emphasis added)
- (3) Significant impact on properties protected by section 4(f) of the DOT Act or **section 106 of the National Historic Preservation Act;** or (emphasis added)
- (4) Inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action.

The following actions meet the criteria for CEs in the CEQ regulation (section 1508.4) and 23 CFR 771.117(a) and normally do not require any further NEPA approvals by the Administration: (emphasis added)

1. Activities which do not involve or lead directly to construction, such as planning and technical studies; grants for training and research programs; research activities as defined in 23 U.S.C. 307;

approval of a unified work program and any findings required in the planning process pursuant to 23 U.S.C. 134; approval of statewide programs under 23 CFR part 630; approval of project concepts under 23 CFR part 476; engineering to define the elements of a proposed action or alternatives so that social, economic, and environmental effects can be assessed; and Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.

2. Approval of utility installations along or across a transportation facility.
3. Construction of bicycle and pedestrian lanes, paths, and facilities.
4. - 20. Pages 40 - 41.

Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and 23 CFR Section 771.117(a) may be designated as CEs only after Administration approval. (emphasis added)

The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

1. Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (e.g., parking, weaving, turning, climbing).
2. - 12. Page 41.

Where a pattern emerges of granting CE status for a particular type of action, the Administration will initiate rulemaking proposing to add this type of action to the list of categorical exclusions in 23 CFR Part 771. 117 paragraphs (c) or (d), as appropriate.

If no significant impacts are likely to occur, the results of environmental studies and any agency and public involvement should adequately support such a conclusion and be included in the request to the FHWA for CE approval. Page 42. (emphasis added)

If significant impacts are likely to occur, an EIS must be prepared (23 CFR 771.123(a)). 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. Page 42. (emphasis added)

Process

Part 3 of the Project Prospectus recommends the classification of a project. If a project is recommended as a CE, ODOT Environmental Services approves the classification if the project is state funded, or recommends the classification to FHWA for approval if federal funds are involved. The following outlines ODOT's procedure for preparing CEs.

- ! The REC [ODOT Regional Environmental Coordinator] prepares Part 3 of the project prospectus and its attachment (Regional Environmental Checklist). (emphasis added)

- ! The Part 3 is then sent to the STIP coordinator who prepares a cover letter for the Region Manager to sign and a copy of the prospectus is sent to the Funds and Grants Unit to be keyed into the Project Control System (PCS).
- ! The original prospectus remains in the Region project file and copies are forwarded to the Project Leader, Team Members, Salem Environmental Services Section, affected local agencies, agreement writer, and FHWA for concurrence of the environmental classification.

Content

23 CFR Section 771.117 requires that: The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result.

Information required in the Part 3 includes:

There is a list of 19 information items required, including “*Estimated archeological and historical impacts.*” Pages 42 - 43.

Oregon Department of Transportation. May 2002. *Draft Environmental Procedures Manual Volume 1.* Chapter 5: Environmental Documentation, Section 500. Introduction & Environmental Reconnaissance Reports. Page 36. Prepared by ODOT Environmental Services. Salem, OR.
http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/docs/Env_Procedures_Manual_Vol1-1.pdf?ga=t

500. INTRODUCTION

The purpose of this chapter is to provide a description of the environmental documentation ODOT prepares as part of the NEPA and ODOT’s process for preparing the documents.

Note: Examples of all of the transmittal letters, forms, and signature pages mentioned in this chapter are included in Chapter 7.

501. ENVIRONMENTAL RECONNAISSANCE REPORTS

Definition

As discussed in Chapter 4, Environmental Reconnaissance reports are often prepared to aid in developing project design alternatives. They are meant to be a broad identification of potential environmental and social issues.

Appendix C. ODOT Mitigation Measures

CEQ Regulations

40 CFR 1508.20 Mitigation. "Mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

Oregon Department of Transportation. May 2002. *Draft Environmental Procedures Manual Volume I*. Mitigation. Pages 122 - 123. Prepared by ODOT Environmental Services. Salem, OR. http://www.oregon.gov/ODOT/HWY/GEOENVIRONMENTAL/docs/Env_Procedures_Manual_Vol-1-1.pdf?ga=t

Mitigation

The ODOT's mitigation measures are the federal CEQ regulations of mitigation (40 CFR 1508.20). "Mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments (40 CFR Sec. 1508.20).

Appendix D. CEQs 40 Most Frequently Asked Questions: Question 40
(<http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>). **Propriety of Issuing EA When Mitigation Reduces Impacts. If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?**

[N.B.: Courts have disagreed with CEQ's position in Question 40. The 1987-88 CEQ Annual Report stated that CEQ intended to issue additional guidance on this topic. Ed. note.]

A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original

proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. Sections 1508.8, 1508.27.

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed **during the scoping or EA stages**, the existence of such possible mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.