

The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106

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Introduction

This guidance statement addresses the relationship between the requirements of 36 CFR Part 800, "Protection of Historic Properties," regulations implementing Section 106 of the National Historic Preservation Act (Act) and Executive Order 13007 regarding Indian Sacred Sites (E.O. 13007). This is intended as guidance regarding the intersection of the requirements of the executive order and the Section 106 regulations with respect to proposed actions that may affect historic properties of religious and cultural significance to Indian tribes.

What Section 106 Requires

Section 106 requires Federal agencies to take into account the effects of an undertaking on historic properties and to afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment. A historic property is defined in the Act as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property" (16 U.S.C 470w).

Section 101(d)(6)(A) of the Act clarifies that properties of traditional religious and cultural significance to an Indian tribe or Native Hawaiian organization may be eligible for the National Register of Historic Places.

ACHP's regulations outline the process by which Federal agencies meet the requirements of Section 106. The process includes the identification and evaluation of historic properties, the assessment of a proposed project's effects on such properties, and the resolution of adverse effects, including consideration of measures to avoid, minimize or mitigate adverse effects. At each step of the process, the Federal agency must consult with others and where historic properties are of religious and cultural significance to Indian tribes or Native Hawaiian organizations, the agency must consult with such tribes and organizations accordingly.

What E.O. 13007 Requires

E.O. 13007 requires Federal land managing agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sacred sites. It also requires agencies to develop procedures for reasonable notification of proposed actions or land management policies that may restrict access to or ceremonial use of, or adversely affect, sacred sites.

Sacred sites are defined in the executive order as "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site." There is no review of such determinations by a Federal agency.

How E.O. 13007 and Section 106 Relate

It is important to note that a sacred site may not meet the National Register criteria for a historic property and that, conversely, a historic property may not meet the criteria for a sacred site. However, in those instances where an undertaking may affect a historic property that is also considered by an Indian tribe to be a sacred site, the Federal agency should, in the course of the Section 106 review process, consider accommodation of access to and ceremonial use of the property and avoidance of adverse physical effects in accordance with E.O. 13007.

To the extent that the requirements of the executive order and ACHP's regulations are similar, Federal agencies can use the Section 106 review process to ensure that the requirements of E.O. 13007 are fulfilled. For example, E.O. 13007 requires that agencies contact Indian tribes regarding effects and the Section 106 regulations require consultation with Indian tribes to identify and resolve adverse effects to historic properties.

Consultation regarding the identification and evaluation of historic properties of religious and cultural significance to an Indian tribe could include identification of those properties that are also sacred sites. Similarly, consultation to address adverse effects to such historic properties/sacred sites could include discussions regarding access and ceremonial use.

While a Federal agency is not required to integrate the requirements of the executive order in the Section 106 review process, it may be beneficial for both the agency and the tribe to do so. Not only would it be more efficient to integrate the requirements, but it might also ensure that all issues and values are given appropriate and timely consideration.

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