



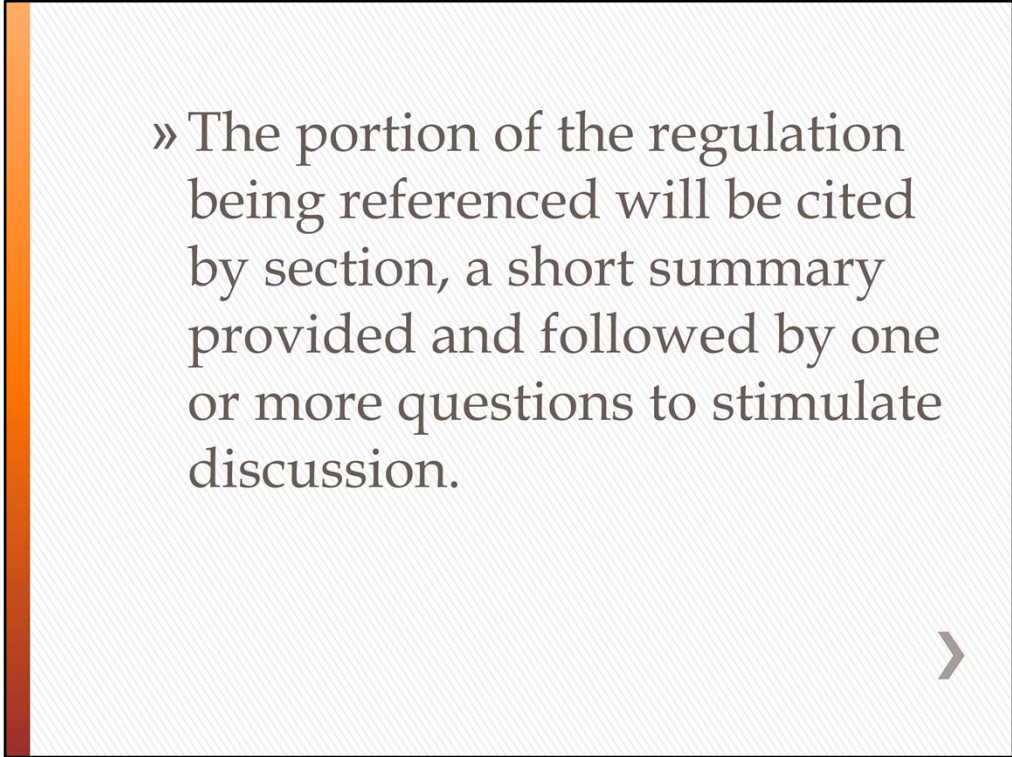
36 CFR 800 a step by step discussion

Today's session will look at Section 106 of the National Historic Preservation Act of 1966 as amended and the steps for its implementation found in the Code of Federal Regulations, 36 CFR Part 800. The focus of this session is to discuss how these regulations have been implemented in the past and what if any adjustments could be made to improve consultation with the tribal historic preservation officers for undertakings affecting historic properties on and off tribal land held in trust.

» The following are the steps which make up the Advisory Council on Historic Preservation guidance found at 36 CFR Part 800 the code of federal regulations. Each step in the process will be introduced and the panel will then discuss both their experiences with implementing that section of the regulations.



Each step which may involve the THPO in its implementation shall be considered and an opportunity to discuss and recommend procedures which might benefit both the consultation process and involvement of the THPOs.



» The portion of the regulation being referenced will be cited by section, a short summary provided and followed by one or more questions to stimulate discussion.

Note the section of the regulations being discussed is shown at the bottom of the slide. A brief summary has been provided at the top of each slide to provide context for discussion. Either following or at the bottom of the slide will be questions for consideration. There are three THPOs with microphones who will be passing through the audience. If you wish to address the question being discussed simply raise your hand and you will be called upon in order. Please note, given time restraints we will allow no more than two minutes per person and a total of no more than five participants for each question or about six to ten minutes for each section of the regulations. Panel members will act as resources to address or attempt to clarify the comments being made.

» Participants in the Section 106
process

36 CFR 800.2



- » When should the THPO participate in the 106 process?
- » On tribal land?
- » Off tribal land?
- » Consulting party status?



THPO participation on and off tribal trust or fee held lands. When, how and in what capacity should a THPO participate in the consultation process.

- » Initiation of the Section 106 Process:
- » Establish an undertaking
- » Coordinate review
- » Failure to respond

36 CFR 800.3



What is the threshold for a federal action to become an undertaking subject to Section 106 review and what happens if the THPO fails to provide comment? Will there be another opportunity to do so?

» How does the THPO wish to be consulted, when, and would developing a protocol between the federal agency and THPO be of benefit? What about a protocol with the SHPO?



Process and procedures, do you have a plan for doing so and would a protocol be of benefit?

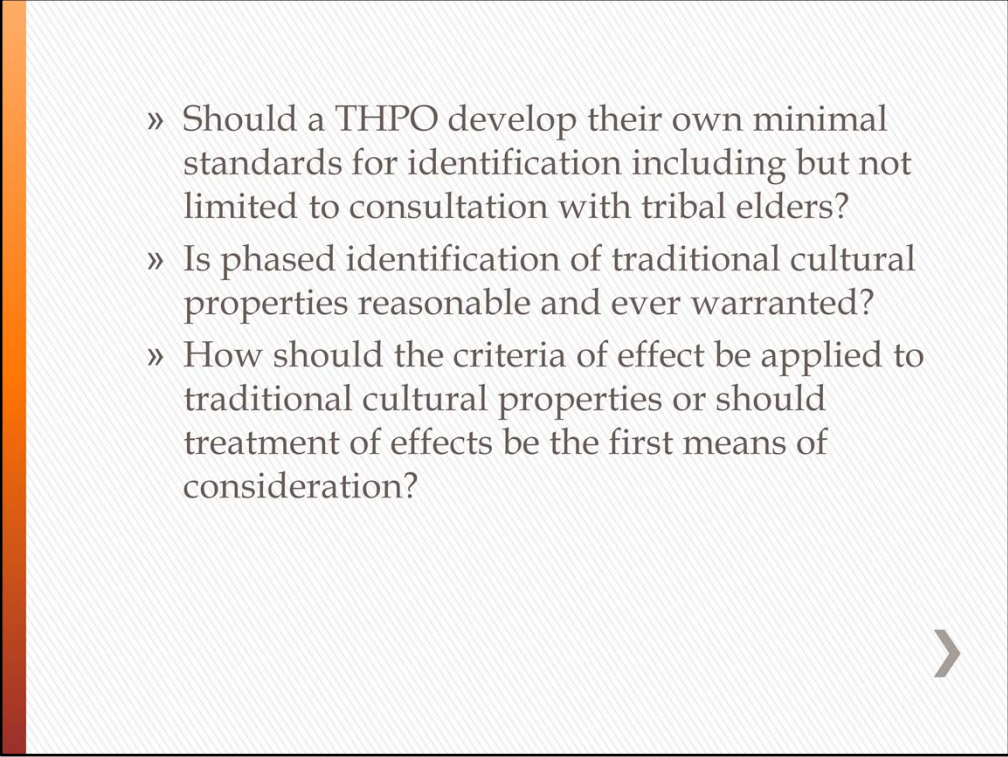
» Identification of Historic Properties

- > Determine scope of effort and review of existing data
- > Phased identification
- > Apply the National Register criteria
- > Historic properties affected

36 CFR 800.4



Once again, do the THPOs have or need special procedures to assure identification, evaluation and determining affects to tribal historic properties?

- 
- » Should a THPO develop their own minimal standards for identification including but not limited to consultation with tribal elders?
 - » Is phased identification of traditional cultural properties reasonable and ever warranted?
 - » How should the criteria of effect be applied to traditional cultural properties or should treatment of effects be the first means of consideration?

Three questions are being asked of those with expertise who should be consulted regarding, traditional cultural properties and determination of effects? Please provide input on one or all questions being discussed.

Assessment of Adverse Effects

Apply the criteria

Finding of no adverse effect

Failure to agree in finding

36CFR 800.5



When is an effect adverse and what are the means for taking those effects into account?

- » Is a determination of effect other than adverse, a reasonable and necessary step for traditional cultural properties?
- » When should a THPO participate in a resolution of adverse effect?
- » When should a THPO sign an agreement document and in what capacity (e.g. concurring party vs. invited signatory)?



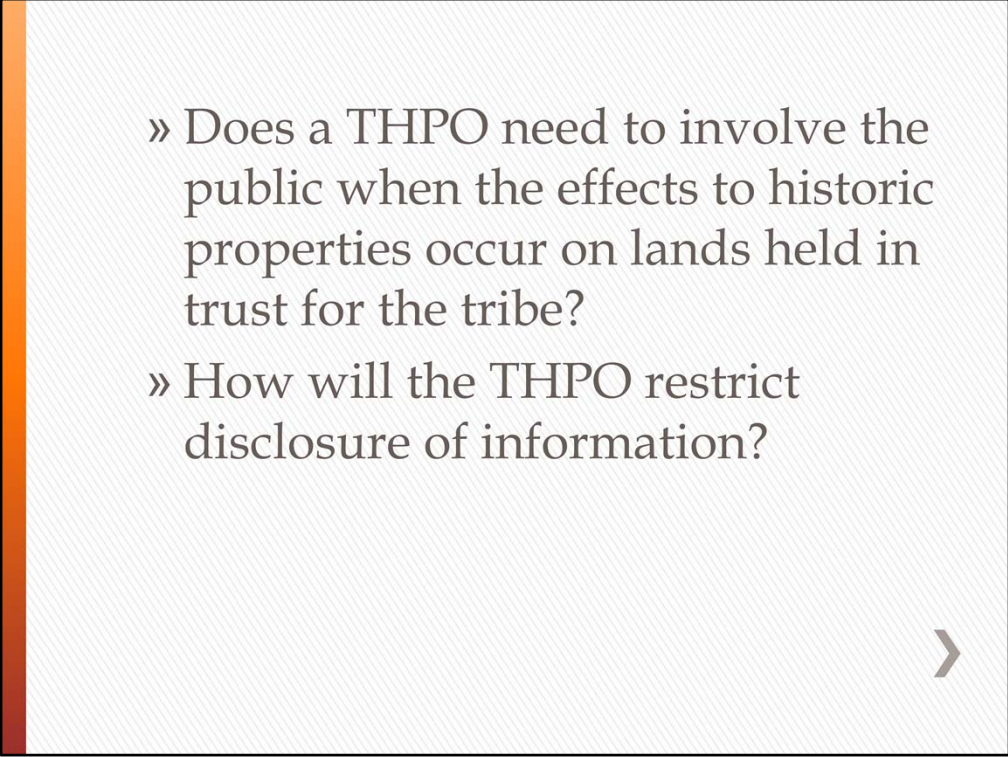
Once again three questions for consideration. Please respond to one or all. The last question, is it ever a benefit for the THPO not to participate in the resolution of adverse effects?

- » Resolution of Adverse Effect
 - > Notify the Advisory Council
 - > Provide documentation
 - > Involve the public
 - > Restrict disclosure of information
 - > Develop an agreement document (i.e. MOA or PA)

36 CFR 800.6



Process and outcome as provided in this section of the regulations.

- 
- » Does a THPO need to involve the public when the effects to historic properties occur on lands held in trust for the tribe?
 - » How will the THPO restrict disclosure of information?

Public involvement on tribal land and how does that affect tribal sovereignty? Possible means to prevent disclosure of sensitive information? Section 304 of the National Historic Preservation Act, Tribal ordinances, or interagency agreements.

What do you believe is the best means for accomplishing this?

» Failure to Agree

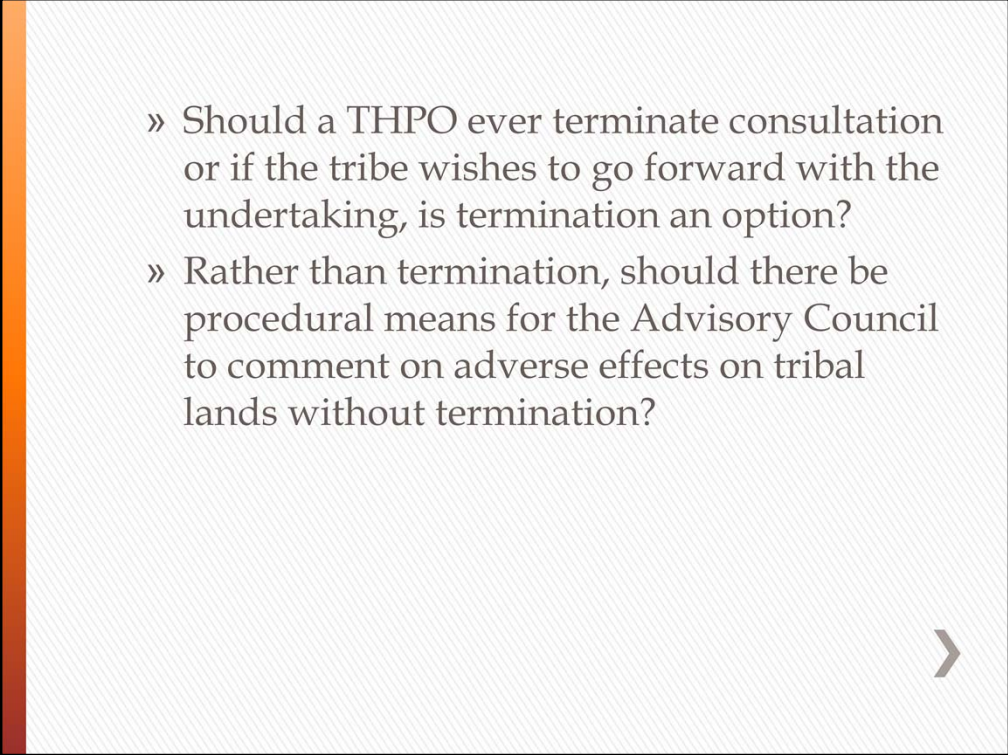
> Termination

> Comments without
Termination

> Advisory Council comments

36 CFR 800.7



- 
- » Should a THPO ever terminate consultation or if the tribe wishes to go forward with the undertaking, is termination an option?
 - » Rather than termination, should there be procedural means for the Advisory Council to comment on adverse effects on tribal lands without termination?

Example: Generic Undertaking [Red Cap Bridge] – tribe wanted this project for the jobs that it would create. Traditional practitioners were adamantly opposed to the project as it would adversely affect a known sacred area. THPO would appear to be in a lose – lose position. Should the THPO terminate consultation and seek the ACHPs comments at this juncture?

Is there a need for counterpart regulations?

» Using NEPA to Comply with Section 106 of the National Historic Preservation Act.

» When is a tribe subject to NEPA and should 36 CFR 800.8 ever be utilized?

36 CFR 800.8



Dwight or Tom Gates: LET DWIGHT ANSWER THIS!

Tribes are never subject to NEPA – only federal agencies that delegate responsibility to tribes. It removes authority from the tribe and delegates it to the federal agency for protecting tribal historic properties. Tribes should never delegate their authority to preserve and protect heritage resources on tribal lands.

Tribes should NEVER consider this option!

» ACHP review of Section 106 Compliance

- » What happens when a foreclosure occurs on tribal land held in trust?
- » Should the requirements to obtain the views of the THPO be more clearly stated?

36 CFR 800.9



Question 1: The THPO is placed in an awkward position of representing both the tribe and the resource. Perhaps there should be a means for the THPO to recuse themselves.

Question 2: In a foreclosure situation, there is no clear path for THPO involvement identified in the regulations. This would suggest counterpart regulations may be appropriate.

» Emergency undertakings

- » Should a tribe have procedures for such and in doing so, if adopted by the tribal council, does the Advisory Council on Historic Preservation need to comment?

36 CFR 800.12



Have any of the THPOs in the room developed such procedures to address emergency undertakings?

» Post Review Discoveries

» How does the THPO wish to participate in such when the discovery is not located on tribal land?

36 CFR 800.13



If you have a THPO in the area being affected, should you have a protocol established in which the SHPO consults with the THPO on the resolution of affects to the resource(s)?

THPOs have no involvement in 800.13b.

Currently, the practice at OHP is: “Agency, have you consulted with the tribes? If not, make sure you do so and let the SHPO know of any comments/concerns.”

[**DWIGHT**] To provide a response

» Definitions

» Should THPOs have definitions for topics such as:

- > Traditional territory
- > Cultural landscape

36 CFR 800.16



Absolutely! Are there other definitions that should be included?

Is there a group that is willing to develop these definitions, because I am willing to participate!

**Criteria for Council Involvement in Reviewing
Individual section 106 Cases**

- » *(4) Presents issues of concern to*
- » *Indian tribes...raised about the identification of, evaluation of or assessment of effects on historic properties to which an Indian tribe attaches religious and cultural significance*
- » *resolution of adverse effects*
- » *questions relating to policy*

Appendix A



As stated above Appendix A, section 4 lays out the thresholds for the Council's involvement when a tribe as so requested. Are there other issues that should be included? What happens when the Council does not participate when requested to do so by a tribe?

» Tribal Program Alternatives

- » Should an alternative program be developed and is what has resulted from today's discussion the beginning for development of such a program?

36 CFR 800.15



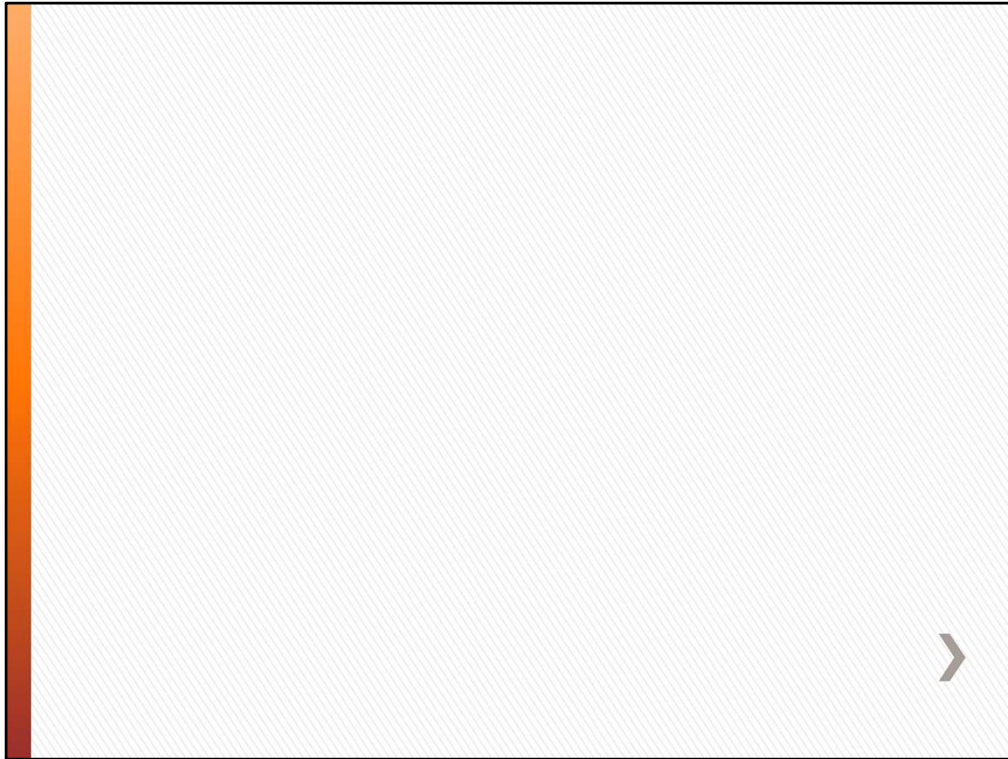
(Maybe Dwight should provide the first response to the question being asked.)



»The END or a New Beginning?

Based on the interactions we've had this morning, I believe we all know the answer to this question.

It appears to me that we have made a reasonable start to discussing and developing counterpart regulations. It also appears it is consistent with tribal sovereignty and tribal self-determination.



RECAP: What I heard in this mornings discussions were the following:

1.

2.

3.

4.

5.