



State Historic Preservation Office Position on the Review of Non-Mandated Compliance Consultations



SHPO Guidance Point No. 11

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Legislatively Mandated Project Reviews by SHPO

The State Historic Preservation Office (SHPO) has mandated responsibilities under Section 106 of the National Historic Preservation Act (NHPA) to review federal undertakings, and to advise agencies on the potential for their projects to adversely affect cultural resources listed on or eligible for the National Register of Historic Places, or “historic properties.” Under Arizona’s State Historic Preservation Act (A.R.S. §41-861 through 41-864), the SHPO provides advice to state agencies on cultural resource issues, makes determinations of eligibility to the Arizona Register of Historic Places (ARHP), and reviews and comments on agency plans that involve properties qualifying for or listed on the Arizona Register.

Non-mandated Projects Reviews by SHPO

The term “non-mandated projects” (also referred to in the past as “Voluntary Compliance Review”) as used in this document refers to projects that do not have federal or state agency involvement, and thus are not required to comply with the state or federal historic preservation laws. These projects fall under two different categories: (1) projects submitted by local governments (i.e., municipalities and counties), usually as the result of some other legal authority such as local ordinances, zoning or re-zoning protocols, etc., and, (2) privately funded projects on private property that have no state, federal, or local government involvement.

Projects by Local Governments

City and county governments, including Certified Local Governments (CLGs), sometimes submit projects to the SHPO that fall into the first category. For most of these projects, the municipality or county is usually consulting with the SHPO on the basis of local laws or regulation, legal interpretations of state laws by municipal legal staff, and/or as part of the local preservation responsibilities and ordinances established under the CLG program.

The SHPO also administers the CLG Program under the NHPA. As part of the requirement to become a CLG, local governments must have preservation ordinances. These communities may, and often do, consult with the SHPO regarding local projects that involve National Register-eligible or -listed

properties, and SHPO compliance reviewers formally review and comment on these submittals.

Projects by Private Developers on Private Land

Consultants acting on behalf of private individuals or companies usually submit the second category of projects. In addition, the SHPO receives numerous telephone calls from developers or their representatives requesting information on their compliance responsibilities for proposed development projects. In the last few years, the SHPO has received a growing number of written requests for review of non-mandated projects. At the same time, federal regulations and growth in Arizona have increased the mandated review workloads of SHPO compliance staff. Thus, it is becoming increasingly difficult for the SHPO to respond to these voluntary requests for review.

Another issue relating to these projects is that they can, and often do, become federal undertakings at a later date due to the necessity of a federal permit, such as an Army Corps of Engineers Section 404 permit or an Environmental Protection Agency permit. The confusion about whether the project is a federal undertaking is due to the sequencing of the process for some federal permits. The application, jurisdictional delineation, and cultural resource reviews associated with the granting of some federal permits often do not happen until the project design phase is completed, and often after construction is underway. Furthermore, under the federal regulations, the federal agency is required to conduct tribal consultation on a government-to-government basis, and to give the public and other interested parties the opportunity to participate in the process – these are important consultations that usually are not conducted by private developers. These critical Section 106 requirements cannot be met if the identification, eligibility determination, and mitigation of impacts to eligible cultural resources have already taken place prior to federal agency involvement.

When a call or submittal from a private developer comes in, the SHPO compliance reviewers will check with the private entity to ascertain if there are, or will be, any federal, state, or local government involvement, such as permits, licenses, approvals, and/or funding (e.g., HUD loans), etc. for the project. If there is a possibility that a government agency will be involved in the future, SHPO will ask the private entity to contact the state or federal agency early in the project planning process in order to obtain information on the requirements for projects that may involve cultural resources. The SHPO compliance staff will NOT do this background work for the private entity. If it is determined that federal involvement will occur, the SHPO will inform the private entity that SHPO needs the federal agency to consult with us under the NHPA. The SHPO staff will also let the private entity know that the Secretary of Interiors' Standards for Professional Qualifications and archaeological investigations must be followed. Thus, private archaeological consultants working with the private developer/entity should conduct work in a manner that meets accepted federal and state standards for field investigations (survey, testing, and data recovery) and reporting.

The SHPO staff will also assist a private entity by providing the following documents and information:

- 1) The Governor’s Archaeology Advisory Commission’s 2006 “Standards for Conducting Archaeological Work on Private Lands” provides useful guidance. Copies of this document are available through the SHPO;
- 2) SHPO’s 2015 Survey Report Standards (<http://www.azstateparks.com/SHPO/review.html>); and
- 3) The Arizona State Museum’s burial laws for private land (A.R.S. 41-865; http://www.statemuseum.arizona.edu/crservices/burials_objects_you.shtml).

SHPO Position on the Review of Non-mandated Projects

The SHPO continues to support and encourage the sensitive treatment of cultural resources during project development, whether or not the project involves a federal or state agency. The SHPO will continue to provide technical assistance to private entities, but SHPO will not provide formal, written reviews for privately funded projects on privately owned land and will not accept any documents from the consultant or the private entity—unless it is confirmed that the project has, or will have, federal, state, or local government involvement.

This review will then be conducted with the state or federal agency as part of its statutory responsibilities, not with the private entity.

Again, provided there is no state or federal involvement, the SHPO will continue to provide formal, written reviews of projects submitted by municipalities and county governments, and will add survey and site information obtained through these latter consultations to the statewide inventory. It is expected that the municipality or county government will explain the regulatory context for their consultation with the SHPO in their cover letter. Sites will be evaluated based on the ARHP eligibility criteria. The SHPO will provide an assessment of project effects that avoids the terms used in the NHPA consultation process (see below).

LOCAL GOVERNMENT FINDING OF EFFECT EQUIVALENTS	
NHPA Term	Municipal Term
No Historic Properties Affected	No sites, therefore unlikely to effect cultural resources; or, no ARHP-eligible sites in project area, so SHPO has no further concerns
No Adverse Effect	Project is unlikely to damage the historic property
Indeterminate Site Eligibility	Testing is recommended to determine the ARHP eligibility of the site; further consultation is requested
Adverse Effect	An ARHP-eligible site is involved; project has the potential to damage a historic property—mitigation/data recovery is recommended

In addition to any eligibility determinations, findings of effect, or treatment recommendations, the SHPO may include the following disclaimer for local government consultations:

It is the SHPO's understanding that, as of this date, there is no known state or federal involvement in this project. If state or federal agencies become involved in the project, such as for permitting, licensing, or funding, those agencies will need to consult with this office in conformity with the Arizona State Historic Preservation Act or the National Historic Preservation Act, as appropriate. This consultation must be conducted prior to any ground-disturbing activities, and ideally as soon as possible in the planning process.

Municipalities and county governments should also be aware that the Arizona Antiquities Act A.R.S. §41-841 through 41-846 also applies to archaeological sites and human remains on all lands under their jurisdiction. The Arizona State Museum administers these acts. For more information, please see their website at <http://www.statemuseum.arizona.edu/crservices/>

For any questions, please contact the SHPO at (602) 542-4009.

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