

# National Historic Preservation Act: Section 106



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# Section 106 Requirements Prompt Most Archaeological Work in United States



# Regulatory History



**WHAT IS NHPA AND WHERE DOES IT COME FROM?**



## **Legal Underpinnings of Cultural Resource Protection**

NHPA Section 106  
works together with  
other laws and  
guidance.



- **20 Laws Passed by Congress Address Protection of Cultural Resources**
- **8 Executive Orders**
- **Many Sets Of Regulations, Sets of Standards and Guidelines, BLM Handbook 8111, FS Handbook, IMs...**
- **Programmatic Agreements**

# Cultural Resource Legislation



- **The Antiquities Act of 1906**
- **The Historic Sites Act of 1935**
- **National Historic Preservation Act of 1966 (NHPA) as amended 1992 and with 1999 revisions**
- **The Archaeological Data Preservation Act of 1974**
- **The Archaeological Resources Protection Act of 1979 (ARPA)**
- **The American Indian Religious Freedoms Act of 1978 (AIRFA)**
- **Executive Order 13007 “Indian Sacred Sites”**
- **Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)**

# National Environmental Policy Act of 1969, as amended (42 USC 4371) – Umbrella Legislation

## Policy and Goals:

- “Continuing responsibility of the Federal Government to use all practical means to improve and coordinate Federal plans, functions, programs, and resources.”
- “Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.”
- Revisions to NHPA were designed to help streamline process with NEPA (particularly in terms of consultation)

# What is “Section 106”



**WHAT DOES IT REQUIRE AND WHO IS RESPONSIBLE?**

# NHPA (National Historic Preservation Act )

passed 1966, 1992 amendments, last revisions effective 1999



## Purpose

- “. . .the increased knowledge of our historic resources, the establishment of better means of **identifying and administering** them, and the encouragement of their preservation will improve the **planning and execution of Federal and federally assisted projects** and will assist economic growth and development...”

# Section 106 of the National Historic Preservation Act



- Requires all federal agencies to take into account the effect of their undertakings on any district, site, building, structure, or object that is included in, or eligible for inclusion in, the National Register of Historic Places.
- NHPA 106 Undertakings are reviewed by the SHPO, the Tribal Historic Preservation Officer (THPO) when and where appropriate, and interested members of the public.

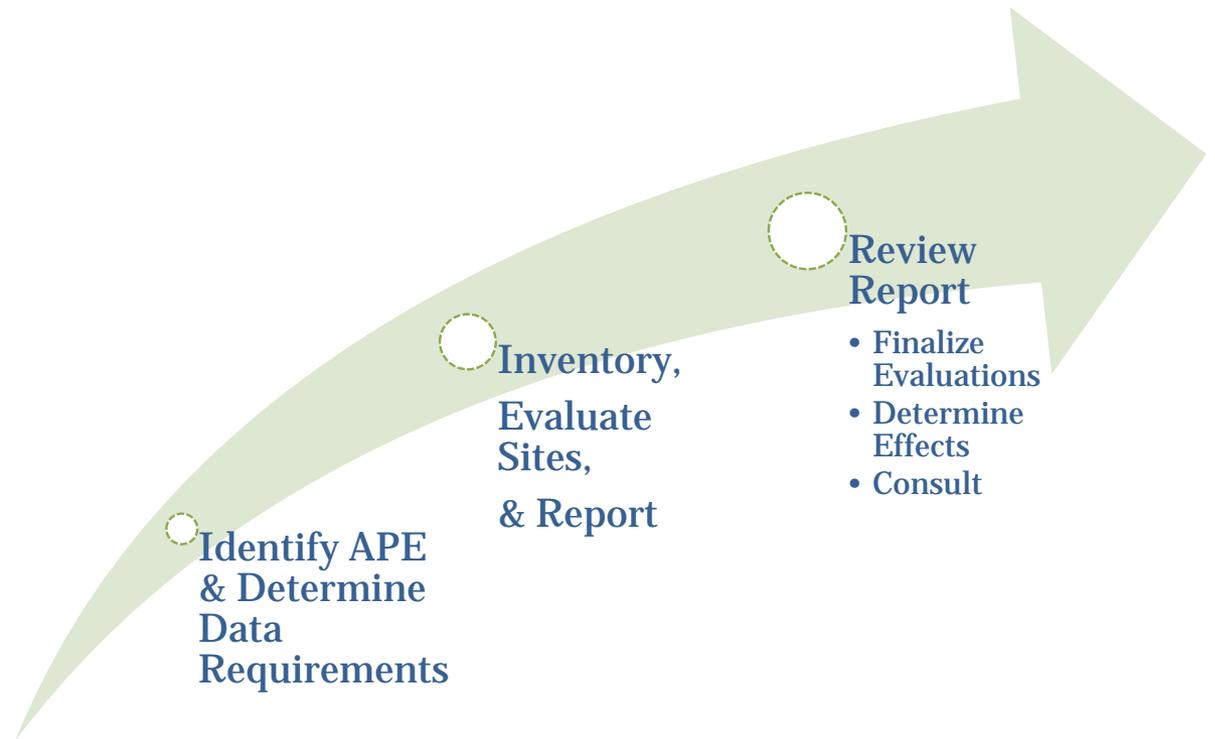
# 106 Legal Requirements

Consider cultural properties within APE (area of potential effect)

Can Require Inventory & Site Evaluation

Determinations of effect(s)

Consultation with SHPO & Tribes (as needed)



# Who Has to do 106 Review?



- The head of any **Federal agency** with direct or indirect jurisdiction over...
  - Proposed Federal or federally assisted undertaking
  - In any state (59 jurisdictions)
- The head of any **Federal Department or independent agency** having authority to license any undertaking.



# Section 106



- **Goals**

- Ensure that historic places are inventoried, evaluated & documented
- Ensure that public interests in historic places are considered
- Consider the effects of federal actions on cultural resources

- **Not Goals**

- Protect every single historic site
- Delay Federal projects
- Make work for consultants



# Cultural Resources

Community Values

Sacred Sites

Religious Practices

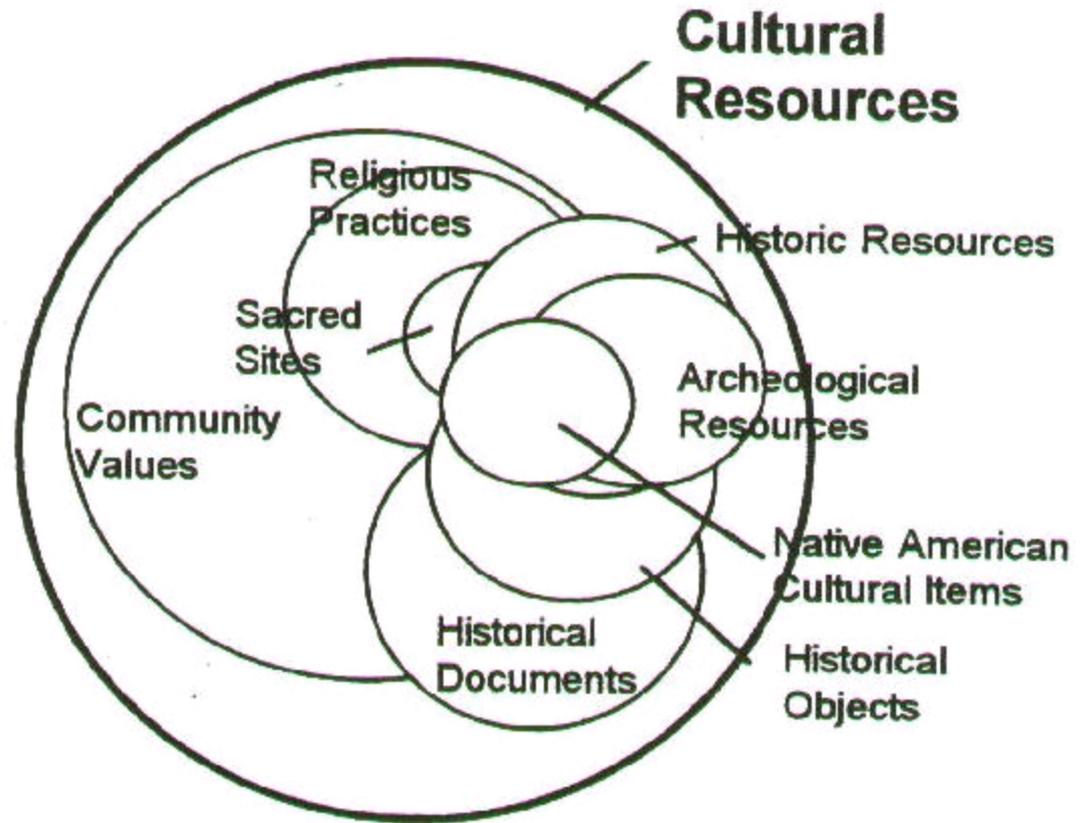
Historical Documents

Historical Objects

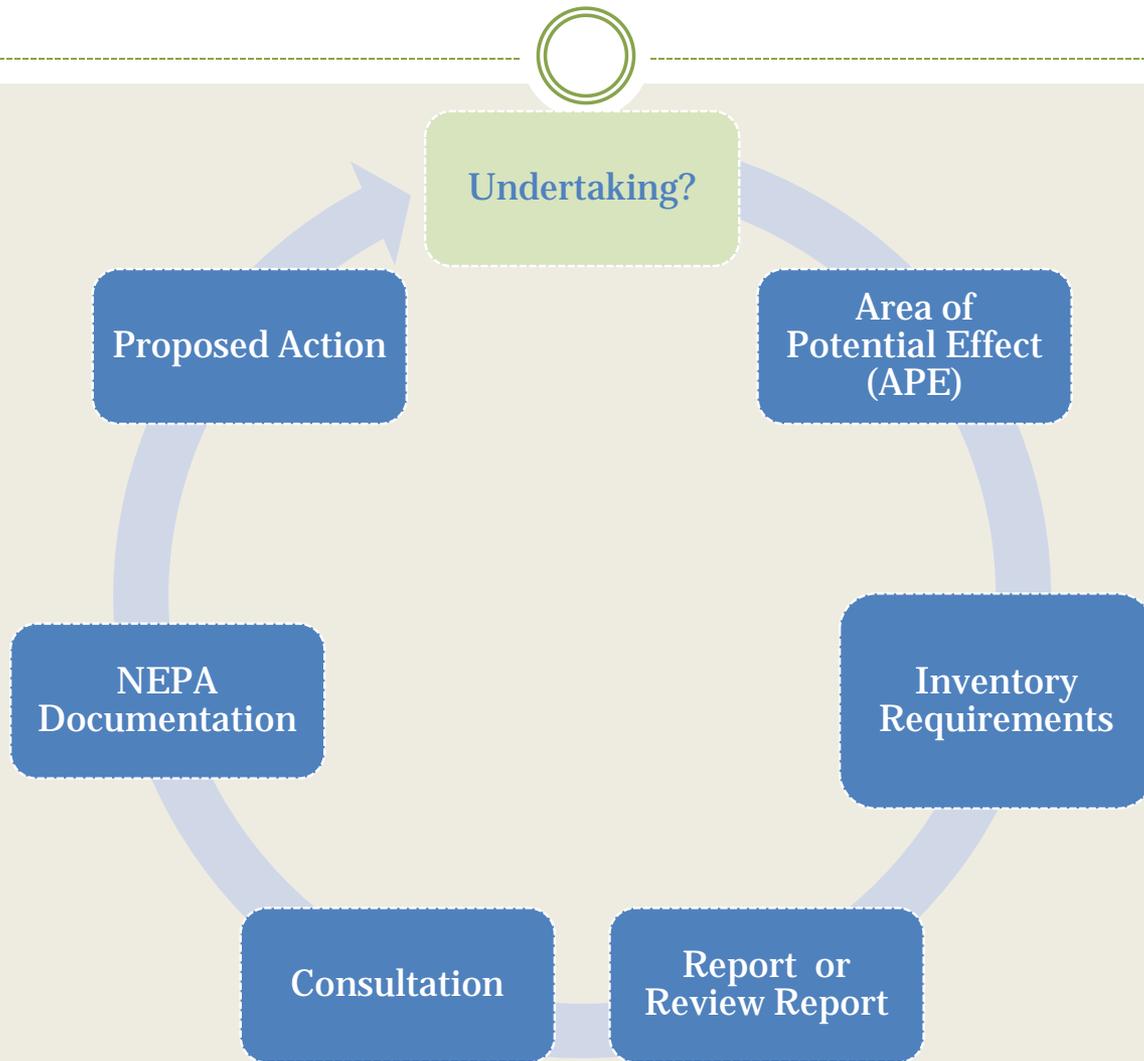
Native American Cultural Items

Historic Resources

Archaeological Resources



# The Process



# What Is An Undertaking?



## **Undertakings subject to Section 106 reviews include:**

- Land altering activities on or partially on federal land
- Capital financing that alters buildings or the landscape
- Issuance of federal permits

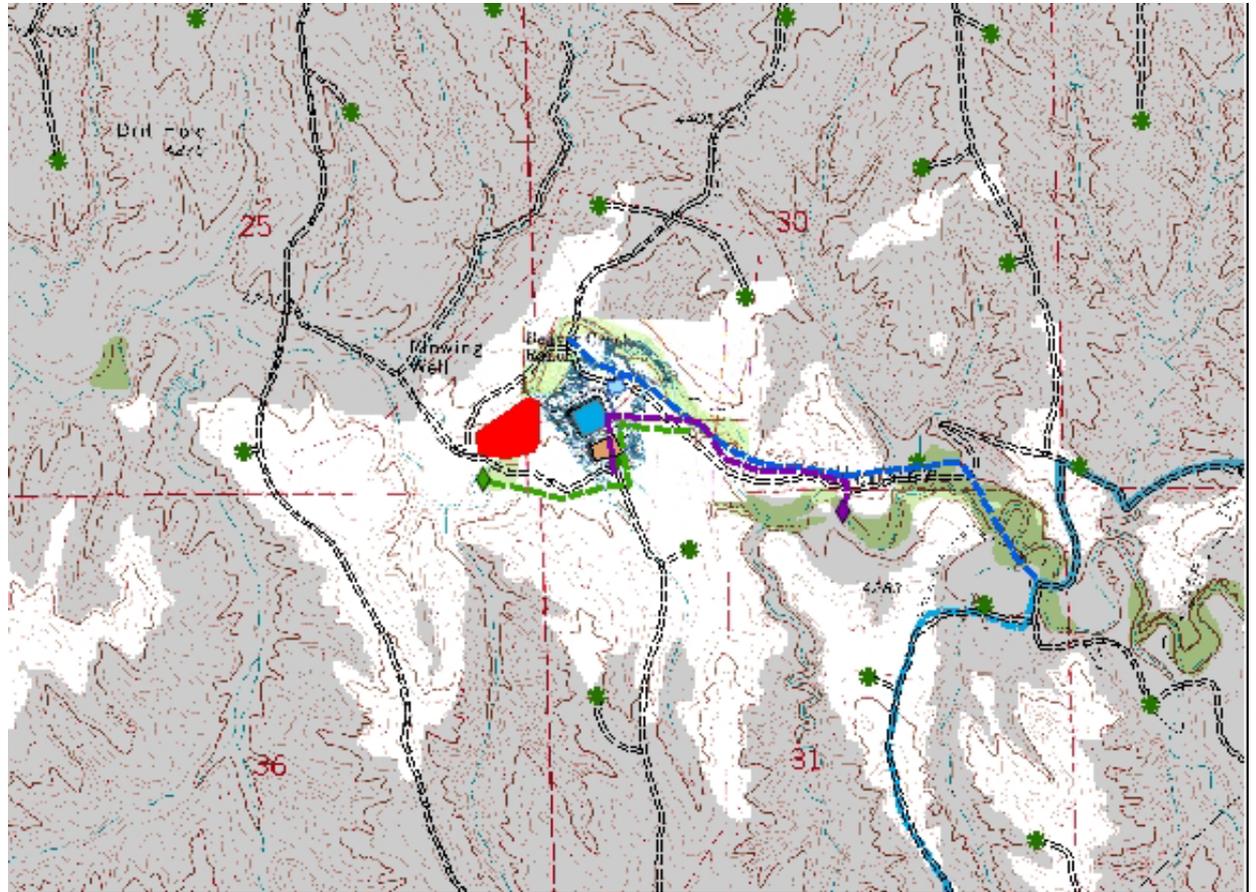
# The Process



## “Rule of Reason”

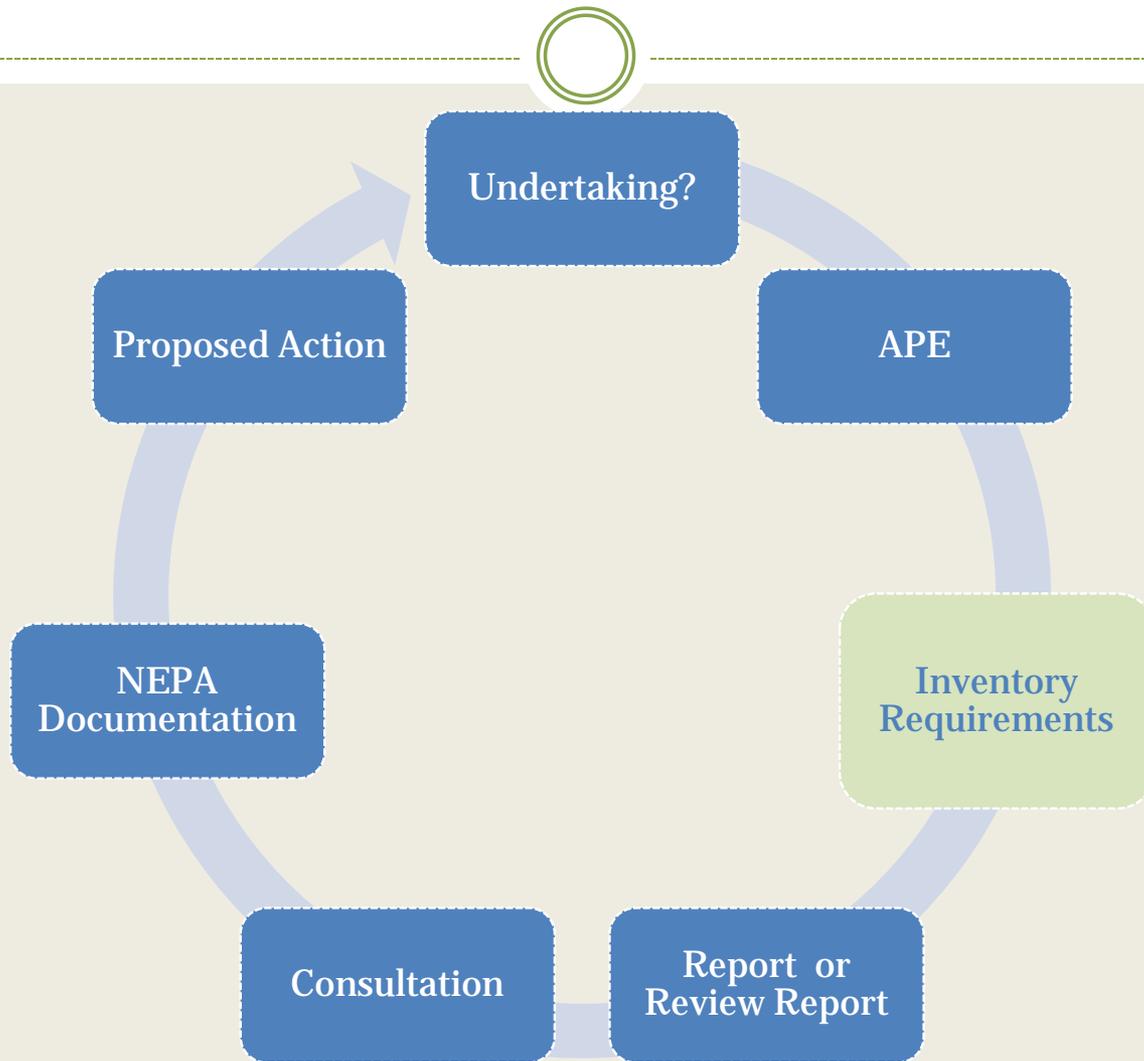
If the federal action would not be possible without disturbing an area, affects to that area will be considered

The archaeologist generally decides what areas are considered



**The Extent of the APE**  
**How Large an Area do we Consider?**

# The Process



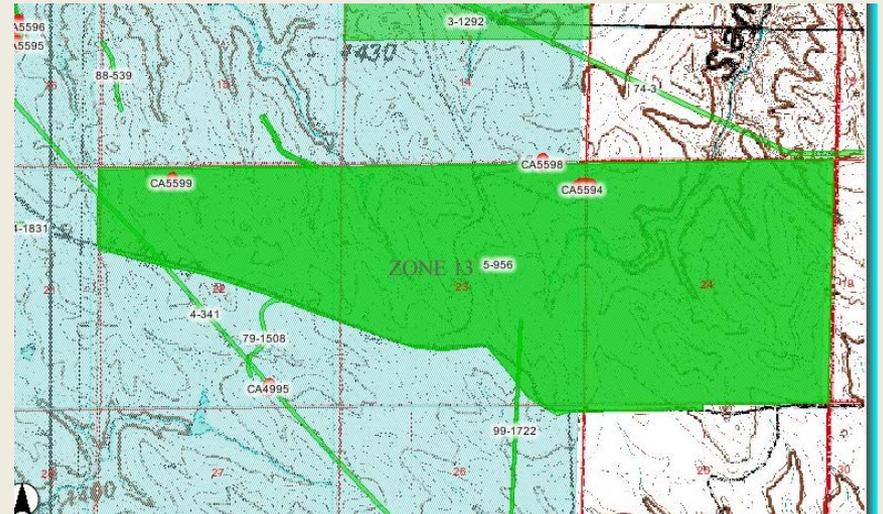
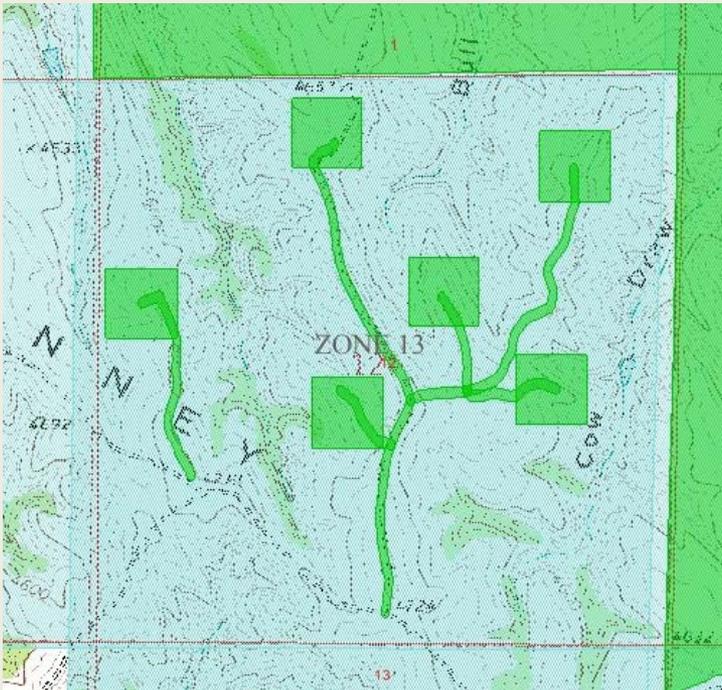
# Inventory

## Class III (15M Transects)



**Footprint**

**Block**





Inventory conducted by  
contractors or Federal  
Archaeologists

Contractors are  
permitted – credentials  
have been reviewed

Pedestrian inventory  
(Class III) requires  
doing literature review  
and walking area in 15  
meter transects

Testing and Evaluating  
sites

Reports



## **Cultural Resource Inventory (Class III)**



# Materials Recorded During Inventory

Prehistoric

Historic

Multicomponent

Sites

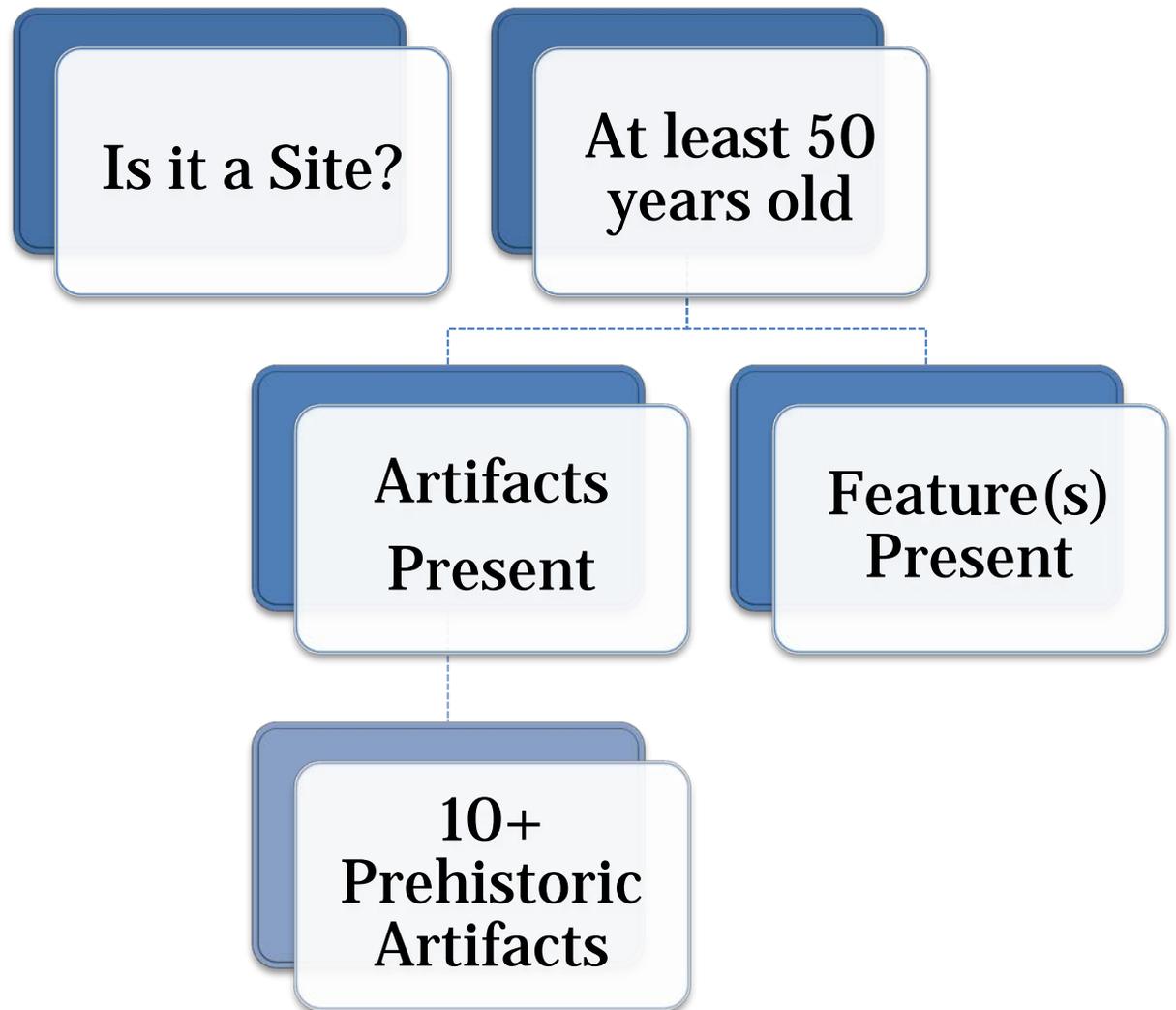
Isolates



## Record Sites and Isolates

This flowchart shows how sites are defined on the RGNF. This is similar to how many other states define sites.

Paperwork is required, regardless of eligibility, for both sites and isolates.



# Testing Sites



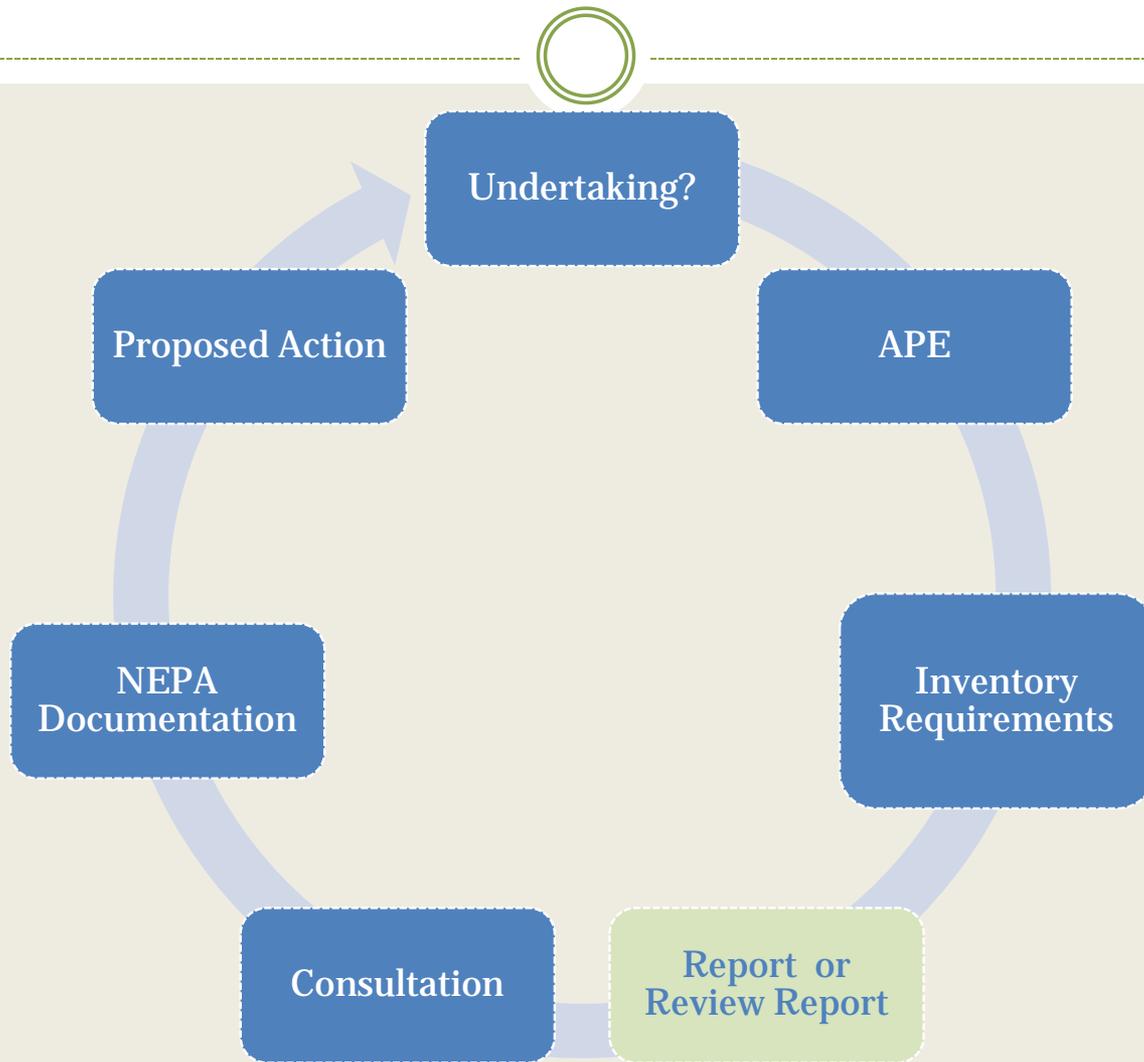


## Documenting & Mapping Sites

Every hour of fieldwork  
requires approximately  
3 hours of write-up!



# The Process



# National Register Criteria

## Is the site Significant?



- **Criterion A: Events that have made a significant contribution to patterns in history**
- **Criterion B: Person(s) significant in our past**
- **Criterion C: Embody the distinctive characteristics of a type of design or the work of a master, or possess high artistic values**
- **Criterion D: Information Potential**
- **Not surprisingly, most archeological sites are nominated under Criterion D.**
- **Significance can be national, regional, or local.**
  
- **Eligible sites may have contributing and non-contributing portions/aspects of integrity**

# Historic Integrity



- **Materials**
- **Location**
- **Design**
- **Workmanship**
- **Setting**
- **Feeling**
- **Association**

# Criterion?



## Provancher Ranch



## Palmer Homestead



# Criterion?



## Prehistoric Camp & Quarry



## Prehistoric Lithic Scatter



# Determinations of Effect



- No Historic Property Affected/ “No Effect”
- No Adverse Effect
- Adverse Effect  
(can be accepted but need to be mitigated - \$\$\$)

There are only three determinations of effect. In order to reach a determination sites within the APE must be evaluated.

7 Aspects of integrity – visual effects may need to be addressed for some historic properties and Traditional Cultural Properties

Federal agency ultimately responsible for eligibility and determination of effects

## Management Strategies

If not eligible no mitigation is required (can bulldoze through it)

Eligible sites may be avoided or mitigated

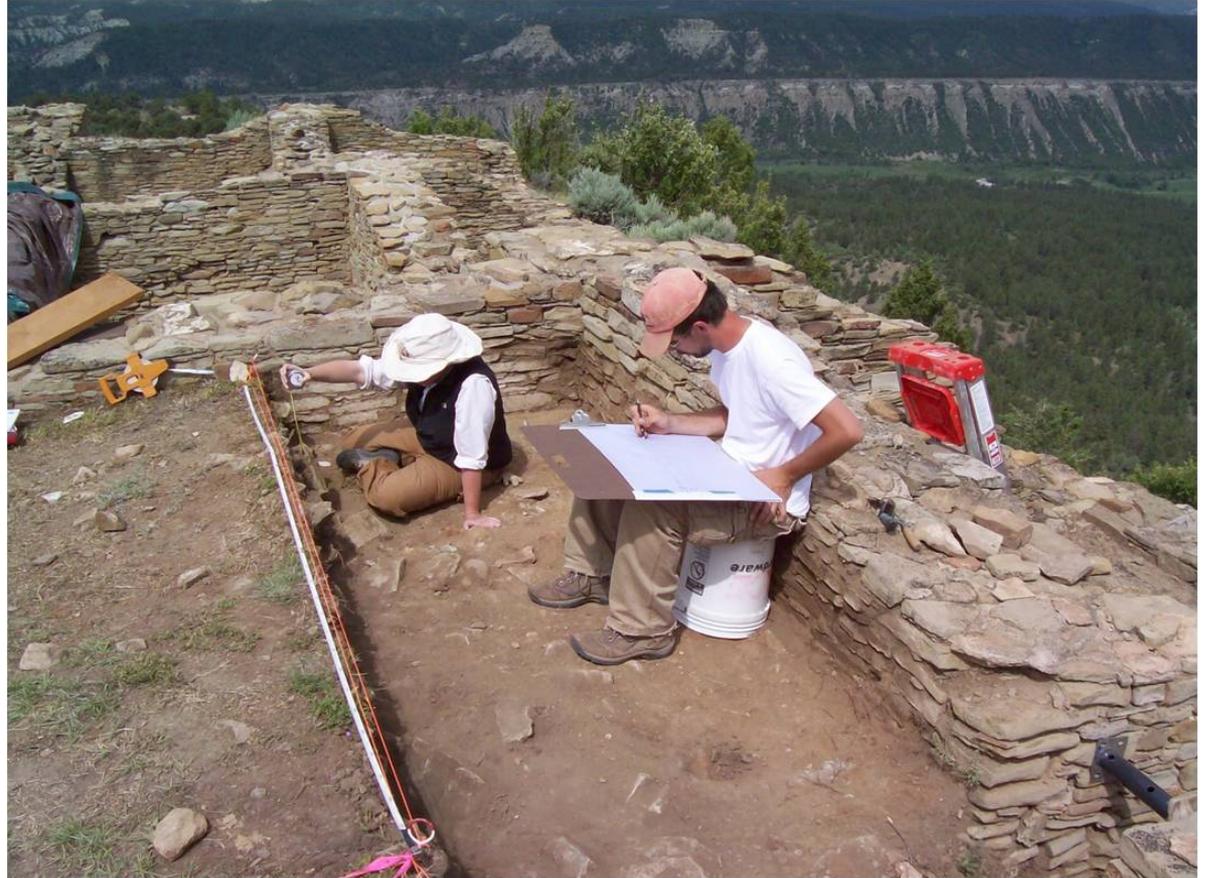
Impacts to eligible sites may be visual (e.g., TCPs, Historic Trails)

# Mitigation

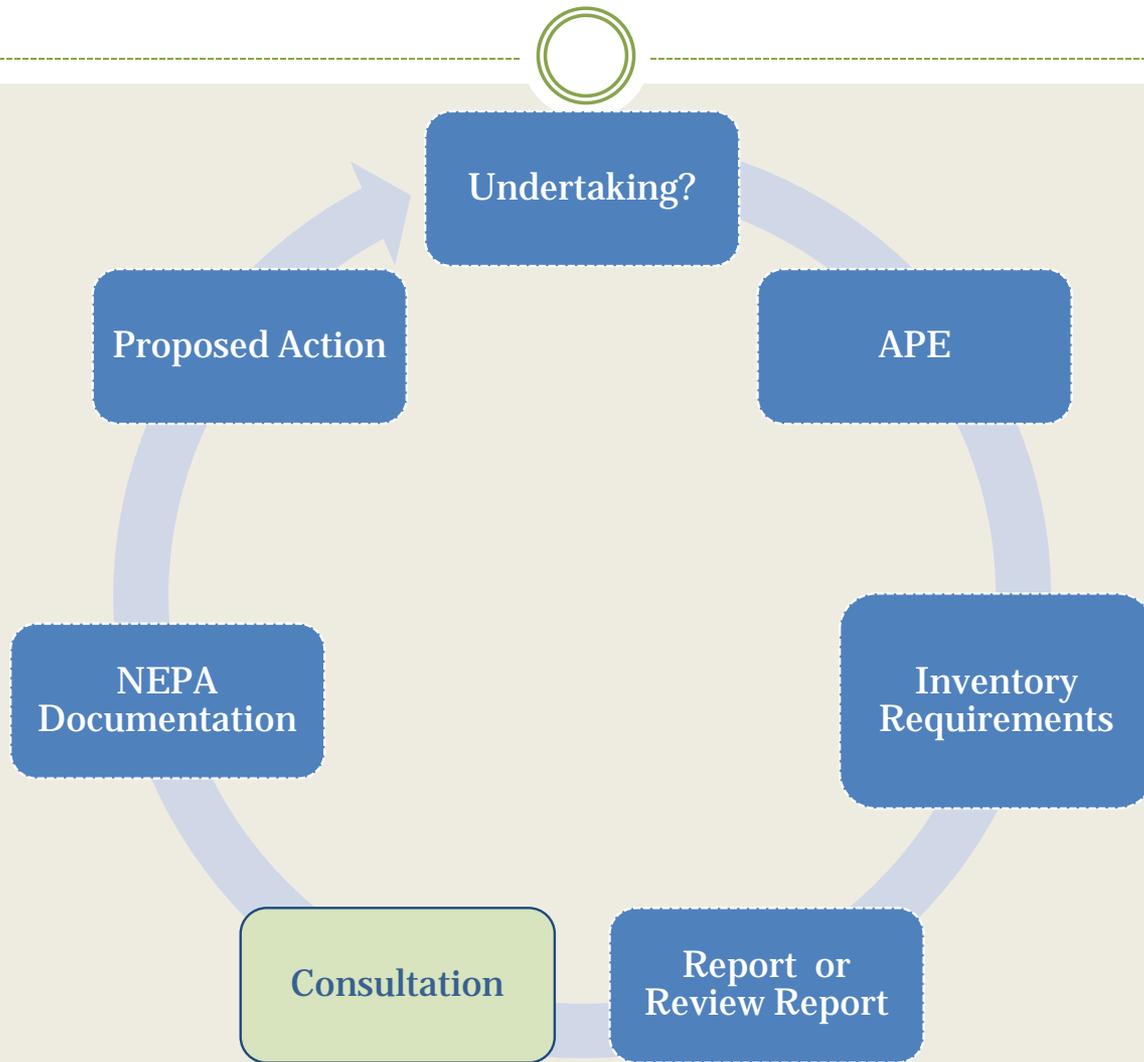


## Mitigation & Data Recovery

Development of Mitigation Plan (e.g., excavation) generally requires consultation. MOAs are used to address timing and treatment. Consulting Signatories include SHPO/THPO, agency and others responsible for project completion. Concurring parties include may include other interested parties.



# The Process



# Consulting Parties (Section 106)



- SHPO/THPO
  - Indian tribes/Native Hawaiian groups
  - Local Governments
  - Applicants for assistance, permits
  - Other “parties entitled to be consulting parties”
  - Consider requests to consult
  - Public
- 
- NEPA has a scoping requirements that can be used to fulfill part of this requirement

# Why Do Agencies Consult?



- **Because it's the law**
- Because the relationship of the Native Americans to the United States is established in American History as a trust responsibility, which is not the same as the relationship with the public or other agencies.
- There are 565 Federally recognized Indian tribes
- Tribes may have access to information that is not available to agency when making decisions

# When it goes wrong...



- Agencies are responsible for consulting with SHPO, Tribes, and other interested parties
- If steps required by NHPA are not followed, decisions can be challenged = legal vulnerability
- Disagreements and violations of NHPA can be taken to the Advisory Council on Historic Preservation
- Default and sanctions

# Sources for more information



- National Register Bulletin (National Park Service):  
<http://www.nps.gov/nr/publications/>
- National Historic Preservation Act:  
<http://www.achp.gov/nhpa.html>
- NEPA and NHPA Handbook; how the laws work together:  
[http://www.achp.gov/docs/NEPA\\_NHPA\\_Section\\_106\\_Handbook\\_Mar2013.pdf](http://www.achp.gov/docs/NEPA_NHPA_Section_106_Handbook_Mar2013.pdf)
- Erin Hegberg [enhegberg@fs.fed.us](mailto:enhegberg@fs.fed.us)

# NAGPRA - Origins



- **Native American Graves Protection and Repatriation Act**
- **Signed by George Bush in 1990**
- **NAGPRA was created**
  - To protect cemeteries on federal and tribal lands
  - To provide a way to return the human skeletal material and associated funerary objects in the nation's scientific and museum collections to culturally affiliated tribes.
- **1976 - Maria Pearson (Yankton Sioux of Iowa) succeeded in getting the Iowa Reburial Law passed in 1982**

# NAGPRA Basics



- Native Americans have rights to certain cultural materials (religious/burial)
- These materials go to related tribes

## In the case of inadvertent discovery of burial...

- Work stops (depending on State, Coroner is brought in)
- Tribes must be notified within hours
- Plan of action should be worked out between agency and tribes

# NAGPRA



## Excavations can find burials

- When there is an excavation on Federal lands and excavation of burials might be anticipated a discovery plan is agreed to prior to excavation

# If a burial is found...



- Confidentiality is key
- Do not speak with visitors or press about a find (Don't let the Pueblos hear about a find from the newspaper)
- You need to close and secure site
- Get in touch with cultural resource staff! (Don't use radio)
- Often it is the public that makes an inadvertent find. Try to ask them to keep quiet and proceed quickly.