

Federal Planning and Historic Places: The Section 106 Process¹

By Thomas F. King²

Reviewed by Darby C. Stapp³

When *Federal Planning and Historic Places: The Section 106 Process* by Thomas F. King first appeared in 2000, it quickly became a valuable tool for those involved in cultural resource legal compliance. Specifically, the book focuses on one of the primary compliance drivers, Section 106 of the National Historic Preservation Act of 1966 (NHPA) as amended, which requires federal agencies to consider potential impacts to important cultural resources when planning new projects. The book is recommended to federal agency officials responsible for Section 106, professionals doing the cultural resource work, and developers trying to comply with all the requirements imposed on them by various federal authorities. I also think anthropologists interested in policy-making will find value in this book as a case study of how cultural policy is created, implemented, and evolves.

Section 106 is in many ways the most significant piece of cultural resource legislation yet promulgated. Most federal agencies have active Section 106 programs established to review projects (“undertakings,” in the government lexicon) that they conduct, fund, or permit. By far, federal agencies are more compliant with Section 106 than any other cultural resource-specific legislation because projects can actually get stopped if the agency does not comply with Section 106. As a result, cultural resource professionals in the public and private sectors obtain much of their funding from Section 106-related work.

What makes this book especially valuable is the author. Thomas F. King has been involved in the Section 106 process since its inception, has taught Section 106 classes for years, and has probably thought more about the regulation’s evolution than any other person alive. He has been and continues to be a consultant with agencies, tribes, and other groups on getting through the process. During much of the 1980s, he oversaw Section 106 reviews for the President’s Advisory Council on Historic Preservation (ACHP), the independent agency responsible for issuing the implementing regulations, among other things. Most important, King looks at the regulations as they are implemented with a critical eye and is not shy about

expressing his opinions on how implementation is progressing and how it can be improved.

The book is organized into three parts. Part One provides background on the development of the 106 Process. Section 106 first appeared in 1966 with the passage of the NHPA. Compliance lagged, as agencies had no direction on how to “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]” (Section 106, National Historic Preservation Act, 16 United States Code 470f). If agencies did anything, they checked the National Register of Historic Places to see if anything in the proposed project area might be already be listed there. Not surprisingly, most places had never been surveyed or inventoried before, so of course nothing was listed. Untold numbers of cultural resources continued to be destroyed. In 1979, the ACHP issued binding regulations (36 CFR 800) which provided the step-by-step process known as “the Section 106 process.” Congress made significant changes to the NHPA in 1992; the ACHP revised the regulations in 1986, 1999, and 2000.

Part Two is a step-by-step discussion of how to get a project through the Section 106 process. Chapters focus on initiating the review, finding sites, evaluating for the National Register, determining if there will be adverse effects, resolving adverse effects, and integrating with the National Environmental Policy Act of 1969 (NEPA). Another chapter reviews the other aspects of Section 106, such as how to document information, how to deal with emergencies and new discoveries, and how to develop alternatives to the standard review process.

Part Three provides tools to assist the practitioner. Chapter 13 on public participation is excellent and provides much food for thought. To King and many of us, the hallmark of Section 106 is consultation with the public and interested parties. Here he presents tools such as the Vroom-Yetton model, which can help determine the level of participation needed for a particular project. In Chapter 14, King provides helpful

hints for writing a Memorandum of Agreement (MOA). MOAs are needed whenever an adverse effect to an historic property is expected. The MOA identifies future actions on which the parties agree that will mitigate the adverse effects. Because MOAs detail the actions that will be taken, it is critical that they are written as they are intended to be implemented, and King shares his many lessons learned to help others avoid mistakes. The many examples provided make this a particularly valuable chapter.

Chapter 15, the longest chapter in the book, details the standard MOA stipulations developed by the ACHP so that people do not have to reinvent the wheel, so to speak. King explains each one and discusses ways to apply them to specific situations. An epilogue is included that details King's view of the future. He would like to see the entire process overhauled, but he sees little chance of that happening. King has since published more of his thoughts in *Thinking About Cultural Resource Management: Essays from the Edge* (2002), which is included in this multi-review. Finally, an appendix is included on ACHP's archaeological guidance, and the updated printing includes an addendum describing adjustments made to Section 106 in 2000.

This book is an important addition to the canon of cultural resource literature because it helps decipher the Section 106 process. In theory, Section 106 is straightforward. A project is proposed that is funded or permitted by the federal government. The responsible agency makes a good-faith effort to determine if historic properties (defined as places eligible for listing or listed in the National Register of Historic Places) might be impacted by the proposed project. In identifying historic properties and evaluating the impacts, the agency consults with any group that has an interest in the lands and resources potentially being affected as well as the state historic preservation officer (SHPO) or tribal historic preservation officer (THPO). Based on what is found and the results of consultation, the agency decides whether the project should proceed as planned or be modified in some way. Sadly, it is not quite so simple.

As Tom King writes:

The work of Section 106 review has become highly routinized and bureaucratized. For many practitioners it's become stale. For many supposed

beneficiaries it's become irrelevant. For many who pay the bills it's become far too expensive for the value of its product. There's nothing surprising about this; it's the way institutions often seem to evolve if left to their own devices. But an institution that's going to survive has to rethink itself from time to time – reconceive its purposes, and reconfigure its inventory of tools accordingly (p. 175).

There is a tremendous amount of misunderstanding on all sides about Section 106, and King's book will help reduce much of the confusion. For example, I have had tenured archaeology professors tell me that sites listed in the National Register of Historic Places cannot be destroyed by a project. Nothing could be further from the truth. Agencies are not required to protect National Register properties, but they are required to make informed decisions based on research and consultation and, if appropriate, conduct some form of mitigation; that is, they are required to follow the Section 106 process.

Consultation with American Indian tribes and others is another great fear of many agency officials. The law is quite clear on this point. Notify people of your intentions, ask them if they know of any resources in the area that could be impacted and whether they have any concerns, and consider what they say when you make your decision. That is a good system. I have been in many situations where pertinent suggestions have indeed improved the project. The process does not have to be complicated, time consuming, or delimiting, but for some reason, time and time again, agencies want to make their decision in a vacuum and give the consultation process the short shrift, ending up penny wise and pound foolish because of lawsuits or complaints later.

Especially perplexing is the reluctance many agency officials have about initiating Section 106. Many would rather spend more time in meetings trying to fight initiating the process than it takes to complete the process. Inevitably, officials want to jump to the end of the process, determine that there are no impacts, and then say there is no need to start the process. They have not analyzed the project, the area to be disturbed, or consulted with anyone, but they just can not see why they have to do something when they already know the answer. Of course, they do not know the answer, which is why the series of steps are detailed in the implementing regulations. If one looks at the cases

where substantial damage had occurred inadvertently but unnecessarily during a project, one would find failure to go through with the 106 consultation process as the main problem. I am constantly reminded of the words of a tribal colleague who regularly feels the need to respond whenever an agency tries to suggest a short cut: "Just go through the process." Unfortunately, there seems to be something in bureaucrats' nature that prevents them from doing that.

I think much of the confusion originates from the poor language choices made by those who wrote the implementing regulations. For example, in 36 Code of Federal Regulations 800.3(a), titled "No potential to cause effects," we are told this actually means that if an undertaking is the type of activity that has potential to cause effects on historic properties, then the Section 106 process must be initiated. Unfortunately, many only read the title, decide that there are no sites in the project area, and stop the process. Even Tom King fails to clarify this point (pp. 34-35), although he does say something about it later (p. 197).

In 36 CFR 800.4, we are told to look for cultural and historic sites, but that we are only concerned with ones that are eligible for the National Register of Historic Places, which we then call "historic properties." Tom King adds to the confusion (p. 65) when he says, "If the agency finds that there are historic properties in the APE (area of potential effect), that they're eligible, and that they'll be affected, then it goes on to determine whether there will be an adverse effect." Historic properties are by definition eligible, so is he using "historic properties" as a generic term for cultural sites which, if eligible, become historic properties? I suspect this was just a slip, as it is easy to substitute the term "historic properties" for "cultural resources," but such a slip leads to confusion. It happens all the time.

In 36 CFR 800.4, we need to ascertain if historic properties are not affected (which really means that none were found); if historic properties are affected (which really means not that they will be affected, but that they exist) then we must start the process to determine if they would be adversely affected. The ACHP definition of an adverse effect is confusing in and of itself, and King advises us to "ignore it as a bureaucratic disconnect from the real world" (p. 67).

My only real criticism of the book is the index. I use all of Tom King's books routinely and am always

frustrated by the poor index that each has. Part of the fault goes to Alta Mira Press, which places the responsibility for the index in the author's hands. King apparently chose to do the index himself, and it shows. The alternative is to hire a professional indexer at a cost of about \$500, the equivalent of about one year's royalties. I think it would be money well spent for Alta Mira to have truly useful indexes prepared. Indexes are worth the money, especially for books like King's which are used as references.

In closing, I would like to see more anthropologists look at this important legislation and its implementation with a critical eye for two reasons. First, as policy, most would conclude that Section 106 has been successful. It has done much to protect important cultural places, and as such it has helped communities and cultural groups for whom these resources are important, if not vital. Additionally, because the regulations require agencies to consult with American Indian tribes, interested parties, and the public, Section 106 has established a seat at the table for many different parties who otherwise would effectively be excluded. Still, as King points out repeatedly, there is much we can do to improve the process. We can rest assured that Tom King will continue to think and write about Section 106 and other cultural legislation, but change is more likely to come if others join the fight.

Second, if anthropologists and anthropology students spent more time looking at the origins and implementation history of Section 106, we could learn a lot about cultural policy-making. Policy-making is a way to bring our anthropological knowledge to bear on real problems, and we need to get better at it. *Federal Planning and Historic Places: The Section 106 Process* contains a lot of grist for this mill.

Notes

1. Walnut Creek, California: Alta Mira Press, A Division of Rowman and Littlefield Publishers, 2000. Second in the Heritage Resources Management Series, sponsored by the University of Nevada at Reno. Updated printing, 2001. Series edited by Don Fowler. 200 pages, acknowledgements, three parts, fifteen chapters, epilogue, figures, bibliography, appendix, index, addendum. Cloth, \$62.00 U.S. Paperback, \$23.95 U.S.
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