



The World Archaeological Congress

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Testimony of the World Archaeological Congress Before the National Parks Subcommittee of the US House of Representatives Committee on Resources Concerning proposed amendments to the National Historic Preservation Act

The World Archaeological Congress (WAC) appreciates this opportunity to submit testimony to the National Parks Subcommittee concerning proposed amendments to the National Historic Preservation Act (NHPA) of 1966, as amended (16 U.S.C. 470). The World Archaeological Congress has reviewed the discussion draft being considered during the hearing of your committee on April 21st. We are writing to express our concerns about the proposed change to the Section 106 of the NHPA, and urge you to delete this section before a bill is introduced.

The World Archaeological Congress is an international organization, which represents professional archaeologists in tertiary institutions, museums, government agencies, and the private sector from more than 90 countries. It seeks to promote interest in the past in all countries, to encourage the development of regionally based histories and international academic interaction, and has a particular interest in:

- education about the past
- archaeology and indigenous peoples
- the ethics of archaeological enquiry
- the protection of sites and objects of the past
- the effect of archaeology on host communities
- the ownership, conservation and exploitation of the archaeological heritage
- the application of new technologies in archaeology and in archaeological communication.

Beginning with the Antiquities Act of 1906 and extending through laws such as the 1935 Historic Sites Act, the 1966 National Historic Preservation Act, and the 1989 Native American Graves Protection and Repatriation Act, the U.S. government has exercised thoughtful responsibility for its national heritage. As foundation legislation for preserving historic and prehistoric heritage in the USA, the National Historic Preservation Act (NHPA) of 1966 has been an important part of this process. The consideration of not-yet-identified historic and cultural places in planning under Section 106 has been a critical part of this exercise of responsibility.

The National Historic Preservation Act is also of much wider importance than simply the USA, since many of the places protected by this legislation are of international significance. These places are also of great significance to the wider American public and to particular interest groups, such as Native Americans, not only in regards to the pasts that they embody but also in terms of contemporary social and cultural identities. As in other countries, the archaeological heritage of America is irreplaceable, and needs to be protected by appropriate legislation. In our view the proposed changes to the National Historic Preservation Act will seriously diminish protection for archaeological sites in the USA, through placing currently protected sites, and sites not yet identified, outside the 106 process.

Sections 5-7 of the “National Historic Preservation Act Amendments of 2005”

While WAC has serious concerns with the proposed amendment to Section 4 of the “National Historic Preservation Act Amendments of 2005”, we also wish to offer brief comments on Sections 5 and 6:

- WAC offers its strong support for Section 5, the extension of the term of the Historic Preservation Fund (HPF). This program is recognized internationally as highly productive and successful.
- WAC supports the provision in Section 6 that authorizes appropriations for the Advisory Council on Historic Preservation through to 2012.

Section 4 of the “National Historic Preservation Act Amendments of 2005”

Section 4 of the “National Historic Preservation Act Amendments of 2005” would amend the language of Section 106 so that where it now says that Federal agencies must take into account the effects of their undertakings on properties “included in or eligible for inclusion in the National Register [of Historic Places]” it would read instead “included in or determined by the Secretary to be eligible for inclusion in the National Register.”

According to the Advisory Council's regulation (36 CFR part 800), the Section 106 process, “seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties.” Federal agencies are required by NHPA to have procedures for compliance with Section 106 that provide a process for identifying historic properties and evaluating their eligibility for listing in the National Register. To comply with Section 106, Federal agencies and applicants for Federal assistance and permits routinely have archaeological and historical studies done when planning a project, as a part of their environmental impact assessment work, to develop agreements about how the agency will take into account any adverse effects on properties listed on or found through the Section 106 process to be eligible for listing on the National Register. When these studies reveal places that might meet the criteria for eligibility, the agencies and applicants consult with State Historic Preservation Officers, local governments, Indian tribal officials, where appropriate, and the interested public to decide whether places are worth protecting. On occasion, this results in the redesign of projects to protect heritage in situ; at other times buildings are moved, or archaeological sites are excavated, and projects proceed as planned. It is extremely rare for a decision to be made to stop a project altogether.

An integral component of the Section 106 process is the requirement for identification of historic properties and evaluation of their eligibility to the National Register, as this allows Federal agencies to take into account the effects of their actions on historic properties in their planning.

If the proposed amendment to Section 4 is enacted, Federal agencies would be required to take into account only the effects of their actions on properties included in the National Register or determined eligible for the Register by the Secretary of the Interior. However, the United States has a huge historic heritage, and while many sites of significance have been recorded, the great majority have yet to be located, much less evaluated in terms of eligibility for the National Register. By replacing the consensus determination of eligibility with a formal determination of eligibility from the Secretary of the Interior, the proposed amendment to Section 106 would eliminate the current protection that these sites are afforded by the 106 process.

The current situation allows for consensus determinations on whether a site is eligible for consideration in the National Register. Currently, consensus determinations are made through consultation between the agency and State or Tribal Historic Preservation Officers. The process of consensus determination empowers tribes when sites are being evaluated because they are part of a consultation rather than having the initial discussion be part of a formal determination. Consultation is at the heart of ethical cultural heritage management and is part of the process whereby compromises are made. In changing the requirement to "included in or determined by the Secretary to be eligible," the amendment would raise the level of time, expense and effort required prior to deciding whether to consult on a site, while placing another layer of bureaucracy between agencies and the local community to whom the site is of concern.

The process of making a formal determination of eligibility would require American Indian tribes to disclose sensitive information regarding sacred sites or traditional property. The current process allows for flexibility in this regard. The proposed change would have an adverse impact on the relationship between tribes and agencies because a more formal process would be in place. Tribes and federal agencies haven't always worked together well, but the current process and its flexible nature allows for communication and compromise. It would be disastrous for the first discussions regarding a sacred site to require full disclosure of the nature of that locality. In the current situation, such discussions may wait until initial consultations or the "consensus determinations" have been made, thereby allowing agencies to gain the trust of tribes.

The WAC's view is that unintended consequences of the proposed amendment to Section 4 would include:

- That there would be no consistent provision for the preservation of many places of historic heritage.
- That significant but unrecorded places would be overlooked in planning and possibly destroyed without due consideration.
- That there would be untenable delays for development projects funded or approved by Federal agencies.
- That a cumbersome bureaucratic process would have to be established whereby agencies and project proponents would continue to identify significant places, but before decisions could be made about what to do about them, they would have to be reviewed by the Secretary of the Interior to verify their significance.

- That the protection of places of traditional religious and cultural significance to Native Americans would become subject to inappropriate levels of disclosure.
- That efforts to identify historic property would incur significantly increased costs.
- That the National Register of Historic Places would have great difficulty responding to requests for eligibility determinations, and would need substantial additional resourcing to operate at a level commensurate to that operating today.

In sum, WAC's view that the proposed amendment to Section 4 would replace the current consensus determination process which balances historic preservation concerns with the need for development and research projects to move forward in a reasonable timeframe with a burdensome and unwieldy system of formal determination of eligibility that would significantly decrease the protection afforded historic heritage that is of great significance not only to the USA, but internationally.

The World Archaeological Congress strongly urges the National Parks Subcommittee to eliminate Section 4 from the proposed amendments to the National Historic Preservation Act.

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President

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