

LCB File No. R088-06

**PROPOSED REGULATION OF THE OFFICE OF
HISTORIC PRESERVATION OF THE
DEPARTMENT OF CULTURAL AFFAIRS**

NOTICE OF INTENT TO ACT UPON A REGULATION

Notice of Hearing for the Adoption of Regulations of the
Department of Cultural Affairs
State Historic Preservation Office

The Department of Cultural Affairs will hold a public hearing at 9:00 a.m. on May 23, 2006, in Conference Room A of the Nevada State Library and Archives, 100 N. Stewart Street, Carson City, Nevada. The purpose of the hearing is to receive comments from all interested persons regarding the adoption of regulations in accordance with Nevada Revised Statutes 383.400-.440.

The following information is provided pursuant to the requirements of NRS 233B.0603:

- 1) NRS 383.440 permits the State Historic Preservation Office (SHPO) to adopt regulations regarding the contents of agreements between SHPO and state agencies or political sub-divisions in the management of cultural resources on land acquired from the Federal government.
- 2) The regulations to be adopted:
 - Provide state agencies and political subdivisions the opportunity to enter into agreements with SHPO regarding the management of cultural resources so as to facilitate the transfer of land from the Federal government.
 - Define the contents of the agreement that would satisfy Federal government requirements to preserve cultural resources.
 - Establish the process whereby state agencies and political sub-divisions that have entered into such agreements would consider cultural resources in advance of projects and changes in land use.
- 3) State agencies and political sub-divisions have the option of entering into an agreement with SHPO. There may be an economic effect on agencies which choose to enter into such an agreement. Although a state agency or political subdivision could continue to receive land from the Federal government **without** entering into such an agreement, it would have to pay for all cultural resources work to take place prior to the transfer of the land into state or political subdivision jurisdiction.
 - a. Beneficial effects: Currently, a state agency or political sub-division must pay for cultural resource studies up front before a land transfer from a Federal agency can occur. If a state agency or political sub-division chooses to enter into an agreement under these regulations, it can delay conducting required cultural resource inventories, evaluation of resources and treatment until a project is actually proposed and budgeted. If the agency

is receiving land from a Federal agency simply for habitat or open space, cultural resources inventories would not be necessary unless land use were to change.

Adverse effects: A state agency entering into an agreement under these regulations would be obligated to manage cultural resources on land obtained from a Federal agency in accordance with the terms of the agreement. This would involve the expenditure of funds at the time when a change in land use or projects is proposed.

- b. Immediate effects: Effects would only occur if a state agency or political sub-division chooses to enter into an agreement with SHPO. Immediate effects would include the transfer of Federal land to state agencies and its political sub-divisions without lengthy delays waiting for cultural resources work to be completed, including surveys, evaluation and treatment such as data recovery.

Long term effects: State agencies and political sub-divisions entering into agreements would be responsible for long term management of cultural resources on lands obtained from the Federal government.

- 4) There is no cost to the agency for enforcing the proposed regulations.
- 5) The proposed regulations do not duplicate or overlap any other state regulations or federal regulations.
- 6) The proposed regulations do not create a new fee or increase an existing fee.

Persons wishing to comment upon the proposed action of Department of Cultural Affairs may appear at the scheduled public hearing or address their comments, data, views, or arguments in written form to Department of Cultural Affairs, 716 N. Carson Street, Suite B, Carson City, NV 89701.

Written submissions must be received by the Department of Cultural Affairs on or before May 16, 2006. If no person who is directly affected by the proposed action appears to request time to make an oral presentation, the Department may proceed immediately to act upon any written submissions.

A copy of this notice and the regulations to be adopted will be on file at the Nevada State Library and Archives, 100 N. Stewart Street, Carson City, Nevada, for inspection by members of the public during business hours. Additional copies of the notice and the regulations to be adopted and repealed will be available at administrative offices of the State Historic Preservation Office, 100 N. Stewart Street, Carson City, Nevada, and at the main public library in all counties for inspection and copying by members of the public during business hours.

This notice and the text of the proposed regulations are also available in the State of Nevada Register of Administrative Regulations, which is prepared and published monthly by the Legislative Counsel Bureau pursuant to NRS 233B.0653 and on the Internet at <http://www.leg.state.nv.us>. Copies of this notice and the proposed regulation will also be mailed to members of the public upon request. A reasonable fee may be charged for copies if deemed necessary. This does not apply to a public body subject to the Open Meeting Law.

Upon adoption of any regulation, the agency, if requested to do so by an interested person either before adoption or within 30 days thereafter, will issue a concise statement of the principal reasons for and against its adoption or incorporate therein its reason for overruling the consideration urged against its adoption.

This notice of hearing has been posted at the following locations:

Department of Cultural Affairs, 716 N. Carson Street, Suite B, Carson City, NV
State Historic Preservation Office, 100 N. Stewart Street, Carson City, NV
Bureau of Land Management, Nevada State Office, 1340 Financial Blvd., Reno, NV
Bureau of Reclamation, Lahontan Basin Area Office, 705 N. Plaza, Carson City, NV
Department of Conservation and Natural Resources, 901 S. Stewart Street, Carson City, NV
Las Vegas District, Bureau of Land Management, 4701 N. Torrey Pines Drive, Las Vegas, NV
Churchill County Library, 553 S. Maine Street, Fallon, NV
Douglas County Public Library, 165 Library Lane, Minden, NV
Elko-Lander-Eureka Counties Library System, 720 Court Street, Elko, NV
Esmeralda County Libraries, PO Box 128, Silverpeak, NV
Humboldt County Library, 85 East 5th Street, Winnemucca, NV
Las Vegas-Clark County Library, 833 Las Vegas Boulevard North, Las Vegas, NV
Lincoln County Library, 63 Main Street, Pioche, NV
Lyon County Library System, 20 Nevin Way, Yerington, NV
Mineral County Library, 110 First Street, Hawthorne, NV
Pershing County Library, 1125 Central Avenue, Lovelock, NV
Storey County Library, 95 South R Street, Virginia City, NV
Tonopah Library District, 167 South Central Street, Tonopah, NV
Washoe County Library System, 301 S. Center Street, Reno, NV
White Pine County Library, 950 Campton Street, Ely, NV

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Chapter 383 of NAC is hereby amended by adding thereto the provisions set forth as sections 1 to 4, inclusive, of this regulation.

Definitions:

1. *“Agency” in the context of NAC ____ means a political subdivision or State agency which has entered into an agreement with the SHPO regarding land acquired from an agency of the Federal Government.*
2. *“Agreement” means a document that records the terms and conditions agreed upon between a State agency or political subdivision, and SHPO that provides for the protection of historic or prehistoric sites at a level equivalent to the protection provided if the land had remained under federal ownership.*
3. *“Cultural resource” means a structure, place, site or object having historic, archaeological, scientific, architectural or other cultural significance.*
4. *“Historic site” and “prehistoric site” have the meaning ascribed to them in NRS 383.195. Unless the context otherwise requires, “site” means prehistoric or historic site.*
5. *“Interested persons” mean persons with an interest in historic and prehistoric sites, local governments, and adjoining land owners to an area where a project or land use change will occur.*
6. *“Political subdivision” means a county, city, irrigation district or any other local government as defined in NRS 354.474.*
7. *“Project” means a planned undertaking that would be implemented on land acquired from federal agencies and under which a State agency or one of its political subdivisions has entered into an agreement with SHPO.*
8. *“Proposal” means an Agency description of a land use change or project that includes a written description, a map with boundaries indicating the lands affected and the location of proposed facilities or use changes.*
9. *“SHPO” refers to the Office of Historic Preservation of the Department of Cultural Affairs.*
10. *“State Agency” means the State of Nevada or any board, commission, department, division or other public agency of this State.*
11. *“State Register” has the meaning ascribed to it in NRS 383.085. Unless the context otherwise requires, the “Register” means the State Register.*

1. Statement of Purpose: *The intent of this NAC is to provide instruction on how an agency might achieve an alternative and voluntary means of satisfying cultural resource concerns when that Agency seeks to acquire land from a federal agency. Federal agencies must comply with Section 106 of the National Historic Preservation Act, as implemented at 36 CFR 800,*

prior to transferring lands out of federal ownership or control. As an alternative available to state agencies and its political subdivisions, NRS 383.____ provides that an Agency may enter into an agreement with SHPO to:

a. Provide protection to historic and prehistoric sites at a level equivalent to the protection provided if the land had remained under federal ownership;

b. Require the Agency to submit a proposal and consult with the SHPO before changing the use of the land or initiating a project on any portion of the land to determine whether or not such land use change or project might affect historic or prehistoric sites eligible to the State Register;

c. Require that any expenses associated with carrying out the agreement are the responsibility of the state agency or political subdivision.

2. An agency entering into an agreement with SHPO shall follow Sections 2 through 5 of this NAC before changing land use or initiating a project.

2. Identification of Tribes and Other Interested Persons:

(a) The Agency considering a change in land use or a project for a given area shall notify American Indian tribes and other interested persons of the proposal. The Agency shall:

(1) Request assistance from SHPO in identifying American Indian tribes and other parties who may be interested in prehistoric and historic sites in the area.

(2) Confer with any American Indian tribes that may be concerned with sites of religious or cultural importance and other persons interested in prehistoric and historic sites within the project area.

(3) Request tribes and other interested persons provide information on any concerns they might have over a change in land use or project.

(4) Ask each tribal official and interested person for a list of historic and/or prehistoric sites for the project area in which they have an interest.

(5) Provide documentation of these contacts and any responses to SHPO.

3. Identification of historic or prehistoric sites:

(a) The Agency considering a change in land use or a project for a given area shall:

(1) Consult with SHPO to define the area where potential direct and indirect effects might occur to prehistoric and historic sites eligible for the Register, and what kinds of efforts are needed to identify prehistoric and historic sites within that area.

(2) Consult with SHPO to determine what kinds of cultural resources specialists are needed to identify prehistoric and historic sites. Selected specialists must meet the following professional qualifications to identify and make recommendations on the Register eligibility of prehistoric and historic sites:

(I) A Prehistoric Archaeologist will have a graduate degree in anthropology with a specialty in archaeology, at least one year of full time professional experience in prehistoric archaeological research and at least four months of supervised field and analytic experience in general North American archaeology.

(II) A Historic Archaeologist will have a graduate degree in anthropology with a specialty in archaeology, at least one year of full time professional experience in historic archaeological research and at least four months of supervised field and analytic experience in general American historic archaeology.

(III) An Architectural Historian will have a graduate degree in architectural history, art history, historic preservation or a closely related field, or a bachelor's degree with two years full time experience in research, writing or teaching.

(IV) A Historian will have a graduate degree in history or closely related field or a bachelor's degree with two years full time experience in research, writing, teaching or interpretation.

(V) A Cultural Anthropologist will have a graduate degree in Anthropology with a specialization in Applied Cultural Anthropology plus a minimum of two years of full time professional experience in the identification, evaluation, documentation and registration, of sites of religious or cultural importance to an Indian tribe.

(3) Ensure that archaeologists have valid State of Nevada antiquities permits issued under NRS 381.197 and a cultural resources use permit from the federal agency from whom the land has been acquired.

(4) Ensure that cultural resources specialists follow the current guidelines for survey and reporting established by SHPO.

(5) Submit reports of identification activities to SHPO for a 30 day review period. Reports not meeting established guidelines will be returned to the agency for amendment.

4. Evaluation of prehistoric and historic sites:

(a) The Agency, taking into account the recommendations made by its cultural resources specialist recommendations, will determine the eligibility of historic or prehistoric sites for the State Register that have been identified in the project area.

(b) A prehistoric or historic site can be eligible for inclusion in the Register if it is over 50 years in age, the site maintains integrity sufficient to convey its significance and it meets one or more of the following criteria,:

(1) that is associated with events that have made a significant contribution to the broad patterns of our history; or

(2) that is associated with the lives of persons significant in our past; or

(3) that embody the distinctive characteristics of a type, period or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(4) that has yielded, or may be likely to yield, information important in prehistory or history;

(c) The Agency will request the SHPO determine that data is sufficient to determine the eligibility of a prehistoric or historic site to the State Register. If the data is not sufficient, the SHPO shall advise the Agency to gather additional information or conduct test excavations necessary for evaluation. If excavation is needed, the Agency shall cause its cultural resources specialist to prepare and execute a test excavation plan.

(1) Any testing shall be limited to disturbing no more than 25% of the surface area of the resource.

(2) The Agency shall provide a copy of the plan to SHPO for a 30 day review period.

(3) The Agency shall incorporate SHPO comments into the final draft of the plan.

(4) The Agency shall cause its consultant to implement the test excavation and make recommendations to the agency regarding the eligibility of the site to the Register.

(d) The Agency shall notify tribes and interested persons who indicated an interest in sites located in a project or land use change area as per NAC (see above) and request their views on determinations made by the agency.

(e) At the same time the Agency shall send its determinations to SHPO for a 30 day comment period.

(f) If a tribe and/or interested persons do not agree with the Agency's determinations within the 30 day review period, the Agency shall send any documentation of opposing opinions to the SHPO.

(g) At the end of the 30 day comment period, the SHPO will review the Agency's determinations on the State Register eligibility for the cultural resources that will be affected

by the implementation of the proposal. The SHPO may either agree or not agree with the determination made for each cultural resource. The SHPO's decision for each cultural resource will be considered the final determination of eligibility for the State Register.

5. Determination of the effects of the change in use of the land or the project on a historic or prehistoric site that is eligible for inclusion in the State Register.

(a) The Agency shall determine the effects of its change of land use or project on prehistoric and historic sites eligible for inclusion in the Register using the following criteria:

(I) An agency will determine whether or not adverse effects may occur when a project or change in land use may alter, directly or indirectly, any of the characteristics of a prehistoric or historic site that qualify the site for inclusion in the State Register. Effects may include one or more of the following:

(I) Physical destruction of or damage to all or part of the site;

(II) Alteration of a site including restoration, rehabilitation, repair or maintenance not approved by SHPO;

(III) Introduction of visual, atmospheric or audible elements that diminish the integrity of the site's significant features;

(IV) Neglect of a property which causes its deterioration except where such neglect and deterioration are considered qualities of a prehistoric site of religious and cultural importance accepted by an American Indian tribe;

(V) Transfer, lease or sale of the site out of State ownership without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the site's significance.

(b) If the Agency determines that the change of land use or project will not affect Register eligible sites, it will provide documentation demonstrating that properties will not be affected to the SHPO, tribes and interested persons for a 30 day comment period.

(c) If tribes or interested persons disagree with the finding, the Agency will send any documentation of opposing opinions to the SHPO.

(d) If the SHPO disagrees with the Agency's determination that implementation of the proposal will not affect State Register eligible cultural resources or if the agency determines that there will be effects, the agency will follow Section e through j of NAC__.

(e) The Agency will consult with SHPO to determine if effects may be avoided by the implementation of avoidance procedures or the redesign of the project or land use. If the project or land use change can be altered to avoid effecting Register eligible cultural

resources, the changes will be documented in SHPO and Agency files and the SHPO will send a letter to the Agency agreeing that Register eligible sites will not be affected.

(f) If avoidance of effects is not possible and implementation of the proposal will affect Register eligible cultural resources, the Agency shall cause its cultural resource specialist to prepare a treatment plan in accord with current SHPO guidance to address effects to Register eligible sites.

(g) The Agency will notify tribes and interested persons who indicated an interest in sites located in a project or land use change area as per NAC (see above) and request their views on proposed treatment. At the same time the Agency shall send determinations to SHPO for a 30 day comment period.

(h) If a tribe and/or interested persons do not agree with the Agency's findings within the 30 day review period, the state agency shall send any documentation of opposing opinions to the SHPO.

(i) The SHPO will provide comments to the Agency which shall ensure that they are incorporated into the treatment plan.

(j) The Agency shall ensure that treatment has been completed and will provide documentation of its implementation to the SHPO. The Agency may not authorize the project or land use change until the SHPO agrees that treatment is satisfactory.