NHPA § 106 Consultation: A Primer for Tribal Advocates

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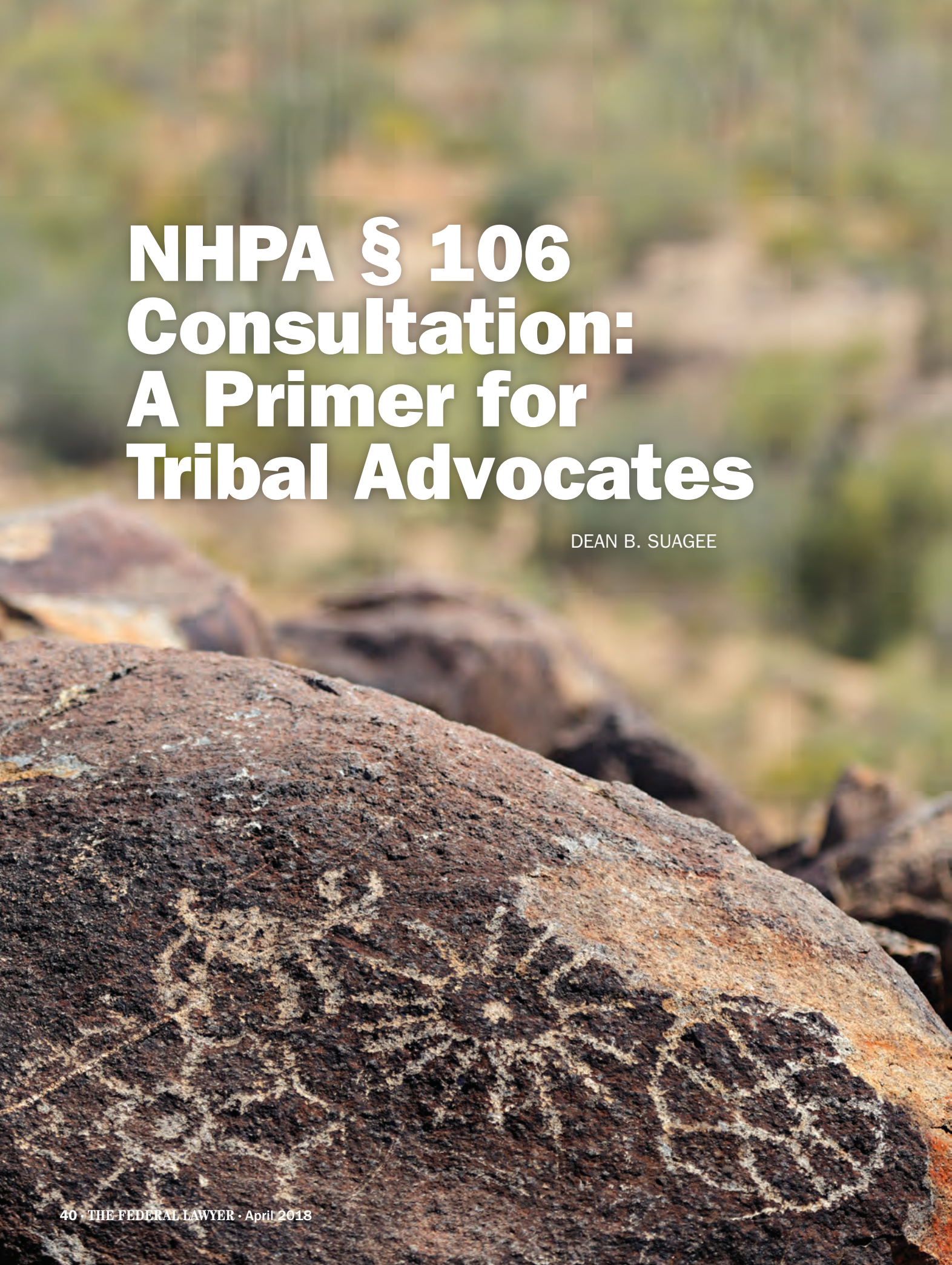

The National Historic Preservation Act (NHPA)[1] is the main federal law that established our national program for the preservation of historic properties. Some historic properties are places that hold religious and cultural significance for Indian tribes. As such, the NHPA process for reviewing proposed federal and federally assisted undertakings has become the primary procedural mechanism through which tribes have opportunities to advocate for the protection of tribal sacred places.

The NHPA was originally enacted in 1966[2] and has been amended several times. Major provisions relating to Indian tribes were included in amendments enacted in 1992,[3] creating the framework for tribal historic preservation programs. Amendments enacted in 2014 changed the way the NHPA is codified in the United States Code.[4] The 2014 law made some minor changes in wording but no substantive changes. It did, however, make some major changes in the organization of the statute. Despite the way it has been rearranged, it is still common practice to refer to various provisions by the section numbers as originally enacted, such as the "§ 106 process."

Governmental Agencies With Roles in Historic Preservation

The national historic preservation program involves roles for federal government agencies, as well as for state, local, and tribal governments. For most aspects of the national program, the National Park Service (NPS) is the lead agency, acting under the authority of the secretary of the interior.[5] NPS administers the National Register of Historic Places and the National Historic Landmarks program and has issued regulations and guidance documents on various aspects of the national program. NPS administers a number of financial assistance programs, including grants to state historic preservation officers (SHPOs) for statewide preservation programs and to tribal historic preservation officers (THPOs) for tribal preservation programs.

Each federal agency is required to have a preservation program to identify, evaluate, and manage historic properties under its jurisdiction and control.[6] Many of the responsibilities of federal agencies were added to the statute as § 110, which was enacted by the 1992 amendments. The 2014 act codified the various subsections of § 110 as distinct sections.[7] It is still the common practice, however, to refer to these federal agency responsibilities as "§ 110."

The NHPA also created the Advisory Council on Historic Preservation (ACHP), a federal agency with authority to review and comment on proposed federal undertakings that affect historic properties. The review process overseen by the ACHP is based on § 106 of the act,[8] and is often referred to as the "§ 106 process." The process is carried out pursuant to regulations issued by ACHP, codified at 36 C.F.R. part 800.[9]

The § 106 process is discussed in more detail below. The regulations feature a prominent role in the process for the SHPOs, a role that is based on statutory language.[10] The NHPA amendments of 1992 enacted authorization for Indian tribes to establish THPOs and perform functions within their "tribal lands" that the SHPOs perform elsewhere in their states, including a comparable role in the § 106 process.[11] For purposes of the NHPA, the term "tribal land" is defined as:

(1) all land within the exterior boundaries of any Indian reservation; and

(2) all dependent Indian communities.[12]

To take over functions that would otherwise be performed by the SHPO, a tribe's THPO program must be approved by NPS. Approved THPO programs receive financial assistance from NPS, although the amount of funding has not kept pace as the number of THPO programs has grown.

'Historic Properties' and the National Register of Historic Places

As defined in the statute, a "historic property" is "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register [of Historic Places], including artifacts, records, and material remains relating to the district, site, building, structure, or object."[13] The National Register is an inventory of "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."[14] Regulations setting out the criteria of eligibility for the National Register are codified in 36 C.F.R. part 60. There are four basic criteria for eligibility, stated in the regulations as follows:

> *National Register Criteria for Evaluation*. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:
>
> (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
> (b) that are associated with the lives of persons significant in our past; or
> (c) 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 significance; or
> (d) that have yielded, or may be likely to yield, information important in prehistory or history.[15]

To be eligible for the National Register, a property needs to meet at least one of the four criteria. In addition to the criteria for eligibility, the regulations also specify seven "criteria considerations" that

set some limits on the eligibility of certain kinds of properties.[16] For example, a property that has achieved historic significance within the past 50 years is generally not eligible. NPS has issued a number of guidance documents on various kinds of historic properties.[17]

There are two ways in which a property may be determined to be eligible for the National Register. One way is to be nominated to the National Register. Nominations are made by the SHPO or by a federal agency (for sites under the jurisdiction or control of the agency).[18] For sites within an Indian reservation where the tribal government has a THPO, nominations are made by the THPO instead of the SHPO.[19] If there is a dispute over whether a property is eligible (or about issues such as how to draw the boundaries of a National Register site), the ultimate decision is made by an official in NPS known as the keeper of the National Register.[20]

The other way in which a property may be determined to be eligible for the National Register is when it is identified and evaluated in the context of the NHPA § 106 review process. The federal agency that is proposing an undertaking must take a number of procedural steps, as provided in the ACHP's regulations. One of the steps is to identify properties in the area of potential effects that may be eligible for the National Register and to evaluate them for eligibility.

Traditional Cultural Properties

Places that hold religious or cultural importance for Indian tribes may be eligible for the National Register. Many such places fit within a category of historic properties known as "traditional cultural properties" (TCPs), a term coined by NPS in a guidance document first published in 1990. As defined by NPS in the guidance document, *National Register Bulletin 38,* a TCP is a property that is:

> eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that:
> (a) are rooted in that community's history, and
> (b) are important in maintaining the continuing cultural identity of the community.[21]

A TCP must be an identifiable place, but physical evidence of human activity is not necessary. Rather, a place such as a spring, a river, a mountain peak, or some other relatively undisturbed feature in the natural environment may be a TCP if invested with historic significance and ongoing cultural value. Oral tradition is typically an important source of information. While the living community that gives a TCP its significance need not be an Indian tribe, attention to TCPs has grown in recent years as an increasing number of tribes have become engaged in historic preservation.

Properties of Traditional Religious and Cultural Importance

The 1992 NHPA amendments added new statutory language regarding properties that hold religious and cultural importance for Indian tribes. This new statutory language (as slightly revised by the 2014 act) states:

> (a) In General.—Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.
> (b) Consultation.—In carrying out its responsibilities under § 302303 of this title [i.e., NHPA § 106], a federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural importance to property described in subsection (a).[22]

This language, first enacted in 1992, can be seen as an endorsement of the NPS practice of treating tribal traditional cultural properties as eligible for the National Register, as explained in *Bulletin 38* in 1990. It should be noted that the statutory language does not use the term "traditional cultural properties." A site that holds religious and cultural importance for a tribe may be eligible for the National Register without being a TCP.

The "(b)" clause in the statutory language quoted above is particularly important—it requires any federal agency that is considering a proposed federal or federally assisted undertaking that might affect a historic property that holds religious and cultural importance for a tribe to consult with that tribe in the framework of the § 106 process. This requirement applies regardless of where the historic property is located. It does not matter if the historic property is beyond the boundaries of a tribe's reservation. This statutory requirement is implemented through numerous provisions in the ACHP regulations, as discussed below.

The § 106 Process and the ACHP Regulations

The § 106 process is based on statutory language, and so, in this article, the discussion of the process begins with the statutory language, which was slightly revised by the 2014 act:

> The head of any federal agency having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking in any state and the head of any federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the federal agency shall afford the council a reasonable opportunity to comment with regard to the undertaking.[23]

There are essentially two parts to this mandate: before an agency decides to proceed with a federal or federally assisted undertaking it must: (1) take into account the effect of the undertaking on any historic property; and (2) afford the ACHP an opportunity to comment. Of course, there are some complications beneath the surface of the statutory text.

One set of issues has to do with the wording "federal or federally assisted undertaking." As defined in the statute:

> The term "undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including—
> (1) those carried out by or on behalf of the federal agency;
> (2) those carried out with federal financial assistance;
> (3) those requiring a federal permit, license, or approval; and
> (4) those subject to state or local regulation administered pursuant to a delegation or approval by a federal agency.[24]

Federal court decisions, however, have ruled that the fourth clause of this definition is not subject to the § 106 process.[25] The bottom line appears to be that if the proponent of a project, activity,

or program can lawfully proceed without the approval of a federal agency, then § 106 does not apply.

Another set of issues concerns properties that are eligible for the National Register but have not formally been determined to be eligible. Prior to the 2014 act, the wording of § 106 expressly included eligible properties. As revised in 2014, § 106 still implicitly applies to eligible properties, since, as previously discussed, the term "historic property" includes properties that are eligible as well as those that are listed. Thus, the "take into account" prong of the two-part mandate includes making an effort to identify eligible properties. While many places that hold religious and cultural significance for a tribe may be eligible, unless and until such places are threatened by a proposed federal or federally assisted undertaking, there may not have been any reason to evaluate and document eligibility. As discussed below, such evaluation and documentation can be a time-consuming process.

The § 106 process is governed by regulations issued by the ACHP, codified at 36 C.F.R. part 800. The process consists of a number of steps, which the federal agency official takes in consultation with other "consulting parties." While consultation occurs at each step, the agency with jurisdiction over the proposed undertaking is responsible for each of the determinations that must be made at the various steps in the process. In most cases, the ACHP does not participate directly, leaving the SHPO and/or THPO to perform the role of advising the federal agency. Compliance with ACHP regulations fulfills the second prong of agency's statutory duty under § 106 and affords the ACHP the opportunity to comment on an undertaking. There are, however, several points at which the SHPO, THPO, or other consulting parties can ask the ACHP to become involved. In addition, the council can become involved on its own initiative. Appendix A to the ACHP regulations sets out criteria that the ACHP will use in deciding whether to become involved. Criterion (4) in that appendix applies to undertakings that present "issues of concern to Indian tribes or Native Hawaiian organizations."

The basic steps in the process are: initiation of the process; identification of historic properties; assessment of adverse effects; resolution of adverse effects. These steps comprise what is often called the "standard" § 106 process. The regulatory requirements of the standard process are set out in 36 C.F.R. subpart B, especially in §§ 800.3, 800.4, 800.5, and 800.6. These sections are discussed below, with an emphasis on provisions of interest to tribal officials and staff. Guidance documents on many aspects of the § 106 process are available on the ACHP's website,[26] including a guidance document entitled *Consultation with Indian Tribes in the Section 106 Process: A Handbook* (herein "*Tribal Consultation Handbook*").[27] The ACHP website also features an interactive flow chart of the standard § 106 process.[28]

Initiating the Process: § 800.3

The process begins when the federal agency official determines that a proposed federal action is an "undertaking" and that it has the potential to affect historic properties. If the agency official determines that there is no potential to affect historic properties, the agency has no further obligations. If the action is an undertaking that does have the potential to affect historic properties, the agency official must check to see if the undertaking is covered by a "program alternative" such as a programmatic agreement; if so, the agency official must follow the alternative instead of the standard § 106 process. Programmatic agreements are discussed below.

Having determined that an undertaking is subject to the standard § 106 process, the agency official must identify the appropriate SHPO and/or THPO and initiate consultation. If the undertaking would occur on, or affect historic properties within, a reservation where the tribe has a THPO, the agency official must consult with the THPO in lieu of the SHPO.[29] If the area of potential effects includes land on either side of a reservation boundary, the agency official must consult both the SHPO and THPO. For some undertakings, more than one SHPO and/or more than one THPO must be consulted. To avoid unnecessary wordiness, the regulations use the term "SHPO/THPO." This article adopts that practice, except where greater specificity is needed.

At the identification step in the process, there is no specified timeframe for the SHPO/THPO to respond to communication from an agency official seeking to initiate consultation. However, it is important to be aware of § 800.3(c)(4), captioned "Failure of the SHPO/THPO to respond," which provides:

> If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the § 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

In some cases, the first communication from an agency official may include a finding, such as "no historic properties affected." In such a case, failure of a THPO to respond within the timeframe will have consequences.

In addition to contacting the SHPO/THPO, § 800.3(f)(2) provides that the agency official:

> shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

This regulatory language is based on the statutory requirement discussed earlier. If the agency fails to identify and contact a tribe that does attach religious and cultural significance to a historic property that would be affected and the tribe finds out about the undertaking and makes a written request to be a consulting party, the tribe "shall be one."

When the proponent of an undertaking is an applicant for a license or other authorization from a federal agency, the regulations provide that the agency official "may" authorize the applicant "to initiate consultation with the SHPO/THPO and others."[30] This subsection of the regulations also provides that "federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes."[31] The ACHP has issued a guidance document to clarify the use of this subsection regarding consultation with tribes.[32] This guidance document reminds federal agencies that the requirement to consult with tribes is based on § 101(d)(6) of the statute and concludes:

> Accordingly, the authorization to applicants to initiate § 106 consultation does not apply to the initiation of consultation with Indian tribes unless expressly authorized by the Indian tribe to do so. Indian tribes may certainly choose to meet with applicants that would like to initiate § 106 early in project planning. However, federal agencies cannot unilaterally delegate their tribal consultation responsibilities to an applicant nor presume that such discussions substitute for federal agency tribal consultation responsibilities.[33]

A recent ACHP report indicates that many tribal representatives regard agency reliance on applicants as an ongoing problem, particularly when federal agencies fail to enter the process when tribes ask them to.[34] In a variation on this theme, tribal officials may expect that a federal agency will engage the tribe in government-to-government consultation on a proposed undertaking prior to engaging in NHPA § 106 consultation.[35] Tribal officials and legal counsel should be aware that, to the extent that government-to-government consultation is based on Executive Order 13,175, "Consultation and Coordination with Indian Tribal Governments,"[36] and associated agency policies, failure to consult is generally not subject to judicial enforcement, while NHPA § 106 consultation is based on a statutory requirement and implementing regulations and, as such, is judicially enforceable through the Administrative Procedure Act.[37] If a tribe declines to respond to an agency's requests to engage in § 106 consultation, however, a reviewing court may well hold that the steps an agency did take amounted to a "reasonable and good faith effort" and, as such, fulfilled its obligations under § 106.[38]

Identification of Historic Properties: § 800.4

The second step in the process is the identification of historic properties. From a tribal perspective, this step is particularly important, since many places that hold religious and cultural significance have not yet been evaluated for National Register eligibility. Section 800.4 of the regulations is divided into four subsections, discussed below. The federal agency official is directed to proceed through each of the first three subsections in consultation with the SHPO/THPO. In subsection (d), the agency official makes a finding, and the SHPO/THPO has an opportunity to object.

(a) *Determine the Scope of Identification Efforts*. This begins with determining and documenting the area of potential effects (APE), a key concept for carrying out the § 106 process. The agency official is then supposed to review existing information on historic properties in the APE, specifically including "possible historic properties not yet identified." The agency official is also directed to seek information from others, including tribes, who may have knowledge regarding historic properties that could be affected by the undertaking.

(b) *Identify Historic Properties*. This subsection directs the agency official to "take the steps necessary to identify historic properties" within the APE, and to do so in consultation with the SHPO/THPO and with any tribe that "might attach religious and cultural significance to properties" within the APE. The agency official is not required to identify every historic property that may be affected. Rather, what this subsection requires is a "reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey." The ACHP has issued a guidance document on what it takes to be a "reasonable and good faith" effort.[39] For some undertakings, such as those that would affect a large geographic area or where alternative corridors are being considered, a phased approach to identification and evaluation may be appropriate.

During the identification phase, an agency, or an applicant for federal funding or permission, may enter into a contract with a tribe to develop information on particular properties or to conduct a survey. If an undertaking might affect a TCP, such a contract may include conducting interviews with elders and others who hold traditional knowledge. A contract for a tribe's services might also be appropriate in the evaluation phase. While the ACHP encourages such contracts, there is no legal mandate for an agency or applicant to pay for tribal involvement. As explained in the *Tribal Consultation Handbook*:

> In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by tribes. The agency is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable means.[40]

Subsection 800.4(b)(1) directs the federal agency official to "take into account any confidentiality concerns raised by Indian tribes." Confidentiality is addressed in more detail in § 800.11, "Documentation standards," in subsection (c), which, referencing § 304 of the NHPA,[41] notes that an agency is authorized to withhold information if "disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners." Tribal officials and staff should also keep in mind that, for the § 106 process, what an agency needs is information about historic significance, not information about religious traditions.

There is no specific time frame for concluding the step of identifying historic properties. If the APE includes TCPs or other historic places that hold religious and cultural importance for tribes that have not been previously documented and evaluated, a reasonable and good faith effort to complete this step in the process may take a considerable amount of time.

(c) *Evaluate Historic Significance*. This step includes applying the National Register criteria of eligibility to the properties that have been identified and making a determination for each such property on whether it is eligible for the National Register. Sites that have been evaluated previously may need to be evaluated again in light of new information, such as information provided by tribes that may not have been known to federal officials or the SHPO/THPO during the earlier evaluation.

Subsection 800.4(c)(2) sets out the process for deciding whether to treat any given property as eligible, which mainly turns on whether the agency official and SHPO/THPO agree. If they do not agree, the agency official is supposed to refer the issue to the secretary for a determination. In addition, the ACHP can ask for a determination. If a tribe disagrees with a determination that a property of religious

and cultural importance not on tribal lands is not eligible, the tribe cannot itself refer the issue to the secretary, but it can ask the ACHP to do so.

(d) *Results of Identification and Evaluation*. Section 800.4 concludes with a finding by the federal agency official on whether historic properties may be affected. A "no historic properties effected" finding may be based on a finding that there are no historic properties in the APE or a finding that although historic properties are present none will be affected. If the finding is that historic properties may be affected, then the process moves on to the next step, § 800.5, assessment of adverse effects, discussed below.

If the agency official makes a "no historic properties effected" finding, the agency must: document the finding; provide the documentation to the SHPO/THPO; notify all consulting parties, including tribes; and make the documentation available to the public. When the federal agency makes such a finding, the SHPO/THPO and the ACHP have 30 days to file an objection. If no objection is filed, the federal agency's responsibilities under § 106 are fulfilled.

At this point, if the SHPO/THPO objects, the agency official "shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the [ACHP] and request that the Council review the finding," which may include providing its opinion to the head of the federal agency. The process for ACHP review of the finding is set out in §§ 800.4(d)(1)(iv)(A) through (C). The agency is not required to change its finding but, if it does not, it must prepare a written explanation of its decision including evidence that it did consider the council's opinion. The ACHP can invoke this review process on its own, even if there is no SHPO/THPO objection. While the regulations do not expressly say so, a tribe could ask the ACHP to invoke this review process.

Assessment of Adverse Effects: § 800.5

If the federal agency official finds that historic properties will be affected, the next step is to determine whether the effects will be adverse. The agency official applies the criteria of adverse effect to historic properties in the area of potential effects, in consultation with the SHPO/THPO and any tribe that attaches religious and cultural significance to identified historic properties. The criteria of adverse effect are stated in rather broad terms. As stated in § 800.5(a)(1), an effect is considered adverse if the undertaking:

> may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register.

Thus, for example, if during the step of identifying and evaluating historic properties, a property listed on the National Register as an archaeological site is determined to also be eligible as a TCP, then an effect that would diminish the integrity of the property as a TCP would be adverse. If a property is eligible for the register because of its importance to a tribe, including but not limited to importance as a TCP, then, given that § 800.4(c)(2) recognizes that tribes have "special expertise in assessing the eligibility" of such properties, the tribe may be uniquely qualified to assess adverse effects on those characteristics of the property.

If the federal agency finds that the effects will be adverse, then the process moves on to the next step—resolution of adverse effects. However, if the federal agency makes a "finding of no adverse effect," then the process ends at this step, unless a written disagreement with the finding is filed within a 30-day review period. The SHPO/THPO or any consulting party can file a disagreement. Thus a tribe can exercise this option, if it is a consulting party. The agency can either consult with the party to resolve the disagreement or ask the ACHP to review the finding.

If so requested, the ACHP will review the finding and provide a written opinion to the agency. The agency must then consider the ACHP opinion and, if it does not revise its initial finding, it must prepare a written explanation of its decision, including evidence that it considered the ACHP opinion.

Resolution of Adverse Effects: § 800.6

If the agency official finds that the effects will be adverse, the next step, as stated in § 800.6(a), is "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." Like the other steps in the process, this step is required to be taken in consultation with the SHPO/THPO and other consulting parties, including any tribes that consider affected historic properties to hold religious and cultural significance.

The ACHP must be notified, and it may decide to enter the process at this step, in its discretion. As noted earlier, criterion (4) in Appendix A to the ACHP regulations provides that the ACHP may decide to become involved in undertakings that present "issues of concern to Indian tribes or Native Hawaiian organizations." The SHPO/THPO and any other consulting party may request the ACHP to participate.

The objective of this step is to reach an agreement on acceptable measures to resolve the adverse effects. If an agreement is reached it is recorded in a memorandum of agreement (MOA) that includes stipulations on what measures are to be taken and which agencies are responsible for carrying them out. Reaching agreement on the terms of an MOA involves professional judgment regarding ways to avoid, minimize, or mitigate adverse effects. For an undertaking for which the APE includes tribal land of a tribe with a THPO, an MOA cannot be concluded unless the THPO signs the MOA.[42]

Subsection 800.6(c) provides for three categories of parties to sign an MOA. The "signatories" are the parties with "authority to execute, amend, or terminate the agreement in accordance with this subpart." These are the federal agency official and the SHPO/THPO—and the ACHP, if it is involved. "Invited signatories" have the power to amend or terminate an MOA, but not to bring it into existence—if an invited signatory declines to sign on it does not invalidate the agreement. The agency official has authority to invite parties to be invited signatories, which may include an Indian tribe that "attaches religious and cultural significance to historic properties located off tribal lands" and a party that "assumes a responsibility" under an MOA. The agency official may invite other consulting parties to concur in an MOA. Concurring parties do not have the power to amend or terminate an MOA.

Programmatic Agreements: § 800.14

In some circumstances, the § 106 process may conclude with a programmatic agreement (PA) rather than an MOA. Subsection 800.14(b)(1) lists five situations in which a programmatic agreement may be appropriate:

A programmatic agreement may be used:

1. When effects on historic properties are similar and repetitive or are multi-state or regional in scope;
2. When effects on historic properties cannot be fully determined prior to approval of an undertaking;
3. When nonfederal parties are delegated major decision-making responsibilities;
4. Where routine management activities are undertaken at federal installations, facilities, or other land-management units; or
5. Where other circumstances warrant a departure from the normal § 106 process.

Subsection 800.14(b)(2)(iii) provides that "a programmatic agreement shall take effect on tribal lands only when the THPO, Indian tribe, or a designated representative of the tribe is a signatory to the agreement." Subsection 800.14(b)(2)(i) states: "If the programmatic agreement has the potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization, the agency official shall also follow paragraph (f) of this section." Paragraph (f) of § 800.14 sets out requirements for consultation with tribes in developing any "program alternative," including but not limited to programmatic agreements. In proposing a program alternative, "the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes."

Failure to Resolve Adverse Effects: § 800.7

If no agreement is reached, the final step in the process is to document the failure to resolve adverse effects. The NHPA does not authorize the ACHP to block an agency from going ahead with an undertaking that will result in adverse effects on a historic property. Rather, even if the ACHP tells the agency that it should not go ahead, the agency can proceed. In such a situation, however, the statutory language of the NHPA does empower the ACHP to raise the decision to the level at which it must be made by a political appointee. The statutory basis for this is NHPA § 110, which imposes a requirement that, if the undertaking would result in adverse effects and there is neither an MOA nor a programmatic agreement, then the agency can only proceed if the decision to do so is made by the head of the agency.[43] The ACHP regulations include procedural steps for ensuring that this requirement is met.

Coordination With the National Environmental Policy Act: § 800.8

The § 106 process is, in some ways, similar to the federal review process required by the National Environmental Policy Act (NEPA).[44] NEPA requires every federal agency to prepare an environmental impact statement (EIS) before going ahead with any proposed federal action that would result in a significant impact on the quality of the human environment. The process of preparing an EIS is governed by regulations issued by the president's Council on Environmental Quality.[45] If an EIS is prepared, the agency's decision based on the EIS is called a "record of decision." For the vast majority of proposed federal agency actions that have the potential to cause environmental impacts, an EIS is not prepared. Rather, agencies usually prepare a kind of less-detailed document known as an environmental assessment (EA) to determine whether the proposed federal action would be likely to cause significant environmental impacts and thus require an EIS. If the environmental assessment supports a conclusion that the impacts will not be significant, the responsible federal official signs a document known as a "finding of no significant impact" and an EIS is not required.

One of the key similarities between NHPA and NEPA is that both statutes are triggered by proposed actions by federal agencies. While the two statutes use different terms—NEPA uses the term "federal action" and NHPA uses the term "federal or federally-assisted undertaking"—there is much overlap between these two terms. In most cases, a proposed action that triggers NEPA is also an undertaking for purposes of NHPA, and the federal agency must consider whether it has the potential to affect historic properties.

In light of the overlap between NHPA and NEPA, the ACHP's regulations encourage agencies to coordinate the § 106 process with the NEPA process, while recognizing that § 106 is a separate requirement. Section 800.8 of the ACHP regulations provides that the process and documentation used for compliance with NEPA—whether the NEPA documentation consists of an environmental assessment and a finding of no significant impact or an EIS and record of decision—can be used for compliance with NHPA § 106, but only if the agency notifies the SHPO/THPO and the ACHP in advance that it intends to do so.

In the event that NEPA documents are used for § 106 purposes, § 800.8(c)(1) of the ACHP regulations sets out standards that must be met. In essence, the conditions are designed to ensure that efforts to identify historic properties and assess the effects of the proposed undertaking are carried out in a manner consistent with the ACHP regulations, including consultation with the SHPO/THPO and any tribe that attaches religious and cultural significance to any historic property that might be affected. In practice, agencies do not always live up to the standards in the ACHP regulations, and may nevertheless seek to use NEPA documents to satisfy § 106. Tribal officials and staff should consider paying close attention to agency NEPA announcements and participate in the NEPA scoping process for proposed actions that may affect lands and resources of concern to them. ⊙

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Endnotes

[1]54 U.S.C. §§ 300101-307107.

[2]Pub. L. No. 89-665.

[3]Pub. L. No. 102-575, title XL.

[4]Pub. L. No. 113-287 (Dec. 19, 2014). The NHPA was formerly codified at 16 U.S.C. §§ 470-470x-6. The 2014 act moved the statutory text to a new title 54 of the U.S. Code, captioned "National Park Service and Related Programs."

[5]The statutory language of the NHPA defines the term "Secretary" as "the Secretary acting through the director." 54 U.S.C. § 300316. For purposes of title 54 of the U.S. Code, including NHPA, "Director" is defined as "the Director of the National Park Service" and "Secretary" is defined as "the Secretary of the Interior." 54 U.S.C. § 100102.

[6]54 U.S.C. § 300102.

[7]54 U.S.C. §§ 306101-306107, 306109-306114.

[8]54 U.S.C. §§ 306108, formerly codified at 16 U.S.C. § 470f.

[9]The regulations can be accessed on the Government Printing Office's Federal Digital System website. Part 800—Protection of Historic Properties, Gov't Printing Off. (July 1, 2016), https://www.gpo.gov/fdsys/pkg/CFR-2016-title36-vol3/pdf/CFR-2016-title36-vol3-part800.pdf. The regulations can also be found, along with numerous guidance documents, on the ACHP website. Advisory Council on Historic Preservation [ACHP], http://www.achp.gov (last visited Jan. 18, 2018) [hereinafter ACHP website].

[10]54 U.S.C. § 302303, commonly referred to as NHPA § 101(b)(3).

[11]54 U.S.C. § 302702, commonly referred to as NHPA § 101(d)(2).

[12]54 U.S.C. § 300319.

[13]54 U.S.C. § 300308.

[14]54 U.S.C. § 302101.

[15]36 C.F.R. § 60.4.

[16]*Id*.

[17]*National Register of Historic Places Program: Publications*, Nat'l Park Dist., http://www.cr.nps.gov/nr/publications (last visited Jan. 13, 2018).

[18]*See* 36 C.F.R. §§ 60.5, 60.6, 60.9, 60.10.

[19]This point is specified in the agreement between NPS and the tribe approving the THPO program; it is not addressed in the regulations at 36 C.F.R. part 60, which have not been updated to reflect the 1992 NHPA amendments.

[20]36 C.F.R. §§ 60.12, 63.2, 63.3, 63.4.

[21]Patricia L. Parker & Thomas F. King, *National Register Bulletin: Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1990; revised 1998), https://www.nps.gov/nr/publications/bulletins/nrb38.

[22]54 U.S.C. § 302706, often referred to as NHPA § 101(d)(6). Subsection (c) of § 302706, which is specifically concerned with Native Hawaiian organizations, has not been reproduced above, since Native Hawaiian organizations are beyond the scope of this article.

[23]54 U.S.C. § 306108.

[24]54 U.S.C. § 300320.

[25]*National Mining Ass'n v. Fowler*, 324 F.3d 752, 758-60 (D.C. Cir. 2003) (holding that § 106 limits the authority of the ACHP, in promulgating regulations, to undertakings that are federal, federally funded, or federally licensed); *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 757 (D.C. Cir. 1995) (project subject to authority of the secretary of state to disapprove held not subject to § 106 since affirmative approval by the secretary was not required).

[26]ACHP website, *supra* note 9; ACHP Off. of Native Am. Aff., http://achp.gov/nap.html (last visited Jan. 13, 2018).

[27]ACHP, *Consultation with Indian Tribes in the Section 106 Process: A Handbook* (Dec. 2012), http://www.achp.gov/docs/consultation-indian-tribe-handbook.pdf. *See also* ACHP, *Recommendations for Improving Tribal-Federal Consultation* (Sept. 14, 2015), http://www.achp.gov/docs/improving-tribal-federal-consultation.pdf.

[28]*Section 106 Regulations Flow Chart*, ACHP, http://achp.gov/regsflow.html (last visited Jan. 13, 2018). Clicking on parts of the flow chart brings up more detailed information, including references to specific provisions in the regulations.

[29]36 C.F.R. § 800.3(c)(1). This subsection of the regulations notes that the statutory language provides that, if an undertaking would affect property that is not held in Indian trust or restricted status, the property owner may ask the SHPO to participate in the § 106 process in addition to the THPO. 54 U.S.C. § 302702. Given the definition of "tribal land" as including all lands "within the exterior boundaries of any Indian reservation," 54 U.S.C. § 300319, this situation may arise wherever a reservation includes land that is not in trust status.

[30]36 C.F.R. § 800.2(c)(4).

[31]*Id*. *See also* 36 C.F.R. § 800.2(c)(2)(ii)(B) (acknowledging the federal government's "unique legal relationship with Indian tribes).

[32]ACHP, Limitations on the Delegation of Authority by Federal Agencies to Initiate Consultation Under Section 106 of the National Historic Preservation Act (July 1, 2011), http://www.achp.gov/delegationmemo-final_7-1-11.pdf.

[33]*Id*.

[34]ACHP, Improving Tribal Consultation in Infrastructure Projects 4 (May 24, 2017), http://www.achp.gov/docs/achp-infrastructure-report.pdf.

[35]*E.g*., *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4,19 (D.D.C. 2016) (noting that the Standing Rock THPO declined to participate in site visits to the area of potential effects "until government-to-government consultation has occurred," which the court interpreted as meaning a requested meeting between the tribal chairman and the Corps' district commander).

[36]Exec. Order No. 13,175 (Nov. 6, 2000), *reprinted* 65 Fed. Reg. 67249 (Nov. 9, 2000).

[37]5 U.S.C. §§ 701-706.

[38]*Standing Rock Sioux Tribe*, 205 F. Supp. 3d. at 35.

[39]ACHP, Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review (Nov. 10, 2011), http://achp.gov/docs/reasonable_good_faith_identification.pdf.

[40]ACHP, Consultation with Indian Tribes in the Section 106 Process: A Handbook 13 (June 2012), http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf.

[41]54 U.S.C. § 307103.

[42]*See* 36 C.F.R. § 800.7(a)(3) (if the THPO "terminates" consultation, the review of the undertaking concludes with ACHP comment pursuant to § 800.7).

[43]54 U.S.C. § 306114.

[44]42 U.S.C. §§ 4321-4347.

[45]40 C.F.R. parts 1500-1508.