NATIONAL HISTORIC PRESERVATION ACT (NHPA)

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The National Historic Preservation Act (NHPA)[1] provides the legislative authority for a multi-faceted national program to identify, evaluate, and preserve historic properties. Under NHPA the terms ***"historic property"*** and ***"historic resource"*** share a single statutory definition, namely, a "district, site, building, structure or object" that is included in, or is eligible for, the National Register.[2] These materials explain the procedural mechanism mandated by NHPA section 106,[3] commonly known as the "section 106 process," which provides a measure of protection for historic properties that would be affected by a proposed federal or federally-assisted undertaking.

a. What is the basic statutory requirement?

The section 106 process, triggered by a proposed federal or federally-assisted undertaking or the issuance of a federal license, is based on section 106 of the statute, which provides:

> 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 shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, 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. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.[4]

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[1] 16 U.S.C. §§ 470 – 470x-6. *See generally* Adina W. Kanefield, *Federal Historic Preservation Case Law, 1966 – 1996; Thirty Years of the National Historic Preservation Act* (Advisory Council on Historic Preservation, 1996) and Javier Marques, *Federal Historic Preservation Case Law Update 1996-2000* (Advisory Council on Historic Preservation, 2002), both of which are available from the Advisory Council. *See* www.achp.gov. *See also* Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145 (1996).

[2] 16 U.S.C. § 470w(5). The statutory definition also includes "artifacts, records, and material remains related to such a property or resource."

[3] 16 U.S.C § 470f.

[4] 16 U.S.C. § 470f.

NHPA section 106 has been implemented through regulations[5] issued by the Advisory Council on Historic Preservation (ACHP or Advisory Council), an independent agency established by NHPA section 201.[6] The mandate of section 106 must be read in conjunction with other provisions of the Act, some of which are discussed in these materials. With respect to the preservation of Native sacred places, the key statutory language is found in section 101(d)(6), which provides, in part:

> In carrying out its responsibilities under section 106, a federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties [that may be eligible for inclusion on the National Register].[7]

In addition, NHPA section 110 mandates that each federal agency "shall establish" a program for the "identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties" and that each agency's program "shall ensure … that the agency's preservation-related activities are carried out in consultation with … Indian tribes [and] Native Hawaiian organizations…"[8] Section 110 also provides that each agency's preservation program "shall ensure" that "the agency's procedures for compliance with section 106 … "are consistent with regulations issued by the Council" and "provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with … Indian tribes [and] Native Hawaiian organizations … regarding the means by which adverse effects on such properties will be considered."[9]

b. What is an "Undertaking"?

As defined in the statute, the term "undertaking":

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[5] 36 C.F.R. part 800. Revised final rules implementing the NHPA Amendments of 1992 were published in December 2000. Advisory Council on Historic Preservation, Protection of Historic Properties, 65 Fed. Reg. 77697 (Dec. 12, 2000). In July 2004, the Council published final amendments to certain provisions of the regulations, 69 Fed. Reg. 40544 (July 6, 2004), in response to the court decision of *National Mining Ass'n v. Slater*, 167 F.Supp.2d 265 (D. D.C. 2001), *rev'd in part sub nom National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003).

[6] 16 U.S.C. § 470i. The Advisory Council is composed of 23 members, all but two of which are appointed by the President (including the Secretaries of Interior and Agriculture and the heads of four other federal agencies or their designees). Information on the Advisory Council is available on its internet site at: www.achp.gov.

[7] 16 U.S.C. § 470a(d)(6)(B).

[8] 16 U.S.C. § 470h-2(a)(2).

[9] *Id.*

means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including –

(A) those carried out by or on behalf of the agency;
(B) those carried out with Federal financial assistance;
(C) those requiring a Federal permit, license, or approval;
(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.[10]

A number of court decisions have addressed the question of whether any particular "project, activity, or program" is an undertaking. Some of the trends among these cases are that federal financial assistance generally does render a non-federal project an undertaking as does a federal permit, license or other approval.[11] Some court decisions have strictly construed the word "required" in clause (C), holding that where a federal approval is not a legal prerequisite for a project, the approval does not render the project an undertaking.[12] Similarly, a project for which federal agency action was viewed as a ministerial act was held not to be an undertaking.[13]

Clause (D) of the statutory definition has been deleted from the definition in the ACHP regulations[14] in response to a decision by the D.C. Circuit.[15] The court reasoned that it had previously held that the jurisdiction of the ACHP under section 106 is limited to "federally funded or federally licensed undertakings" and did not apply to a situation in which a federal agency had discretionary authority to stop a project but the agency's approval was not a legal requirement.[16] Relying on this earlier holding, the court held that regardless of how expansively Congress defines the term "undertaking," the authority that Congress conferred on the ACHP in section 106 is limited to federally funded or licensed undertakings.[17] In the preamble to its rulemaking document changing its regulations in response to this court decision, the ACHP

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[10] 16 U.S.C. § 470w(7).

[11] *See generally* Kanefield, *supra* note 1, at 16-21; *see also, e.g*, *Pit River Tribe* v. *U.S. Forest Service*, 469 F.3d 768, 787 (9th Cir. 2006).

[12] *National Trust for Historic Preservation v. Department of State*, 834 F. Supp. 443 (D.D.C.), *recons. denied*, 834 F. Supp. 453 (D.D.C. 1993), *aff'd in part. rev'd in part sub nom*. *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995); *Ringsred v. City of Duluth*, 828 F.2d 1305 (8th Cir. 1987).

[13] *Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n*, 959 F.2d 508 (4th Cir., 1992). In addition, a federal permit that authorized activities considered to be inconsequential was held not to be an undertaking. *Vieux Carré Property Owners, Residents & Assocs. v. Brown*, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990).

[14] 36 C.F.R. § 800.16(y) as amended at 69 FED. REG. 40555 (July 6, 2004).

[15] *National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003).

[16] *Id.* at 759, *citing Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 755-56 (D.C. Cir. 1995).

[17] *Id.* at 760.

expresses the view that clause (D) undertakings should not be exempt from section 106 review and that, rather:

> [I]t is the opinion of the ACHP that the Federal agency approval and/or funding of such State-delegated programs does require Section 106 compliance by the Federal agency, as such programs are 'undertakings' receiving Federal approval and/or funding. Accordingly, Federal agencies need to comply with their Section 106 responsibilities regarding such programs before an approval and/or funding decision on them. Agencies that are approaching a renewal or periodic assessment of such programs may want to do this at such time.[18]

c. What are the criteria for eligibility?

The criteria of eligibility for the National Register, as set out in regulations issued by the National Park Service (NPS),[19] specify that "districts, sites, buildings, structures, and objects" may be eligible for the National Register if they "possess integrity of location, design, setting, materials, workmanship, feeling, and association" and if they:

> (a) are associated with events that have made a significant contribution to the broad patterns of our history;
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> (b) are associated with the lives of persons significant in our past;
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> (c) embody the distinctiveness of a type, period, or method of construction, or … represent the work of a master, or … possess high artistic values, or … represent a significant and distinguishable entity whose components may lack individual distinction; or
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> (d) have yielded, or may be likely to yield, information important in prehistory or history.[20]

The regulations also say that certain kinds of properties ordinarily are not considered eligible for the National Register, including cemeteries, graves of historical figures, and properties that are owned by religious institutions or used for religious purposes, but if such a property fits within one of seven "criteria

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[18] 69 FED. REG. at 40546 (July 6, 2004).

[19] 36 C.F.R. part 60. Statutory authorization is NHPA § 101(a)(2), 16 U.S.C. § 470a(a)(2).

[20] 36 C.F.R. § 60.4. The regulations also set out six "criteria considerations" to be applied to certain kinds of properties that ordinarily are not considered eligible. In addition to the regulations, NPS has issued a number of guidance documents on a variety of topics, which are available on an internet site maintained by NPS: www2.cr.nps.gov.

considerations" set out in the regulations, then such a property may nevertheless be eligible.[21] The "criteria consideration" for religious properties reads as follows: "A religious property deriving primary significance from architectural or artistic distinction or historical importance."[22] Similarly, a cemetery may be eligible if it "derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events."[23]

These "criteria considerations" serve to highlight one of the conceptual problems in using NHPA to protect tribal sacred places: it is a round peg – square hole kind of problem. From the perspective of Native religious practitioners, the primary significance of a sacred place is that it is sacred, but for a place to qualify as a historic property it is its historic significance that matters. For the most part, this is a problem of terminology and perception that can be overcome by emphasizing that what makes NHPA applicable to such places is their historic significance. It is also worth noting that the criteria of eligibility have not been amended since the enactment of the NHPA Amendments of 1992,[24] which added section 101(d)(6), see discussion of traditional cultural properties below.

Whether a property is eligible for the National Register involves judgment by one or more federal, state or tribal government officials, judgment that may be exercised in several different contexts. One context is through the formal nomination of a property. A State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO) may nominate a property for listing on the National Register, or a federal agency may nominate a property under its ownership or control, or a federal agency and SHPO or THPO can jointly nominate a property.[25] Nominations may be made as part of a state, tribal or federal agency historic preservation program, regardless of whether there is any pending threat to such a property.

Determinations of eligibility may also be made during the section 106 process. In this context, the federal agency that is considering a proposed undertaking is responsible, in consultation with the SHPO or THPO and other consulting parties, for identifying properties that may be eligible for the National Register and determining whether they are eligible.[26] Final authority for determinations of eligibility – and thus whether a property is a "historic

[21] 36 C.F.R. § 60.4.
[22] *Id.*
[23] *Id.*
[24] Pub. L. No. 102-575, title XL.
[25] 36 C.F.R. §§ 60.6, 60.9, 60.10.
[26] 36 C.F.R. § 800.4.

property" – is vested in a National Park Service official known as the "Keeper of the National Register."[27] To be eligible, a property need only qualify on one criterion, although historic properties often qualify on more than one. When considering effects on historic properties in the section 106 process, all of the characteristics that invest a property with historic significance must be considered, including characteristics that may not have been considered when a property was initially determined to be eligible for the National Register.[28]

d. What are traditional cultural properties?

NPS has a long-standing policy of treating places that hold religious or cultural importance to Indian tribes as potentially eligible for the National Register, using a category of historic properties known as ***"traditional cultural properties"*** (TCPs). As defined by NPS in *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.[29]

A TCP need not be characterized by some physical evidence of human activity, but rather may be a place in which the natural environment is relatively undisturbed. While there must be an identifiable place,[30] the cultural values that invest a place with historic significance may be intangible, and oral tradition is usually important in evaluating the historic significance of TCPs.[31] While the living community that gives a TCP its significance need not be an Indian tribe,

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[27] 36 C.F.R. §§ 60.6(l), 60.12, 800.4(c)(2).

[28] 36 C.F.R. § 800.5(a)(1).

[29] National Park Service, National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (no date, but first issued in 1990) (hereinafter *Bulletin 38*), available at http://www.nps.gov/history/nr/publications/bulletins/nrb38/. Although not a regulation, failure to follow the guidance in Bulletin 38 has been held to violate the ACHP regulations. *Pueblo of Sandia v. United States*, 50 F.3d 856, 860-62 (10th Cir. 1995) (holding that failure of Forest Service to follow Bulletin 38 guidance after having been given information indicating that TCPs existed in the area affected by a proposed undertaking amounted to a failure to make a "reasonable and good faith effort" to identify historic properties, as required by ACHP regulations). *Cf*., *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999) (acknowledging Bulletin 38 as the "recognized criteria" for identification and assessment of TCPs, finding no violation of ACHP regulations in that regard, but enjoining action of private party for other violations of ACHP regulations by Forest Service).

[30] In *Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1230 (9th Cir. 1999), although the historic significance of a trail referred to as the "survival march" was not in dispute, no violation of NHPA occurred since location of the trail could not be established despite Forest Service efforts to do so.

[31] *Bulletin 38*, *supra* note 29, provides guidance on methods for documenting and evaluating places that may qualify as TCPs, including consultation with persons who have knowledge of oral traditions.

attention to TCPs has grown in recent years as an increasing number of tribes have become engaged in historic preservation.

The provisions in the NHPA Amendments of 1992 relating to tribes no doubt also have contributed to the increased attention to TCPs. In particular, section 101(c)(6) of the NHPA, added in 1992, provides for the following:

> Properties 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.[32]

This statutory language constitutes legislative recognition of the use of the TCP category as applied to historic properties that hold religious and cultural importance for tribes and Native Hawaiian organizations. It must be stressed, however, that a historic property may hold religious and cultural importance for a tribe without qualifying as a TCP. For example, an archaeological site may be eligible for the National Register under criterion d (for the information it could yield), and a tribe or Native Hawaiian may regard the site as holding religious and cultural importance regardless of whether the property is also eligible for the National Register as a TCP. The statutory duty under NHPA section 101(d)(6) quoted earlier [33] for federal agencies to consult with tribes in the section 106 process is triggered by a tribe (or Native Hawaiian organization) attaching "religious and cultural significance" to a property that may be eligible for the National Register. Such a property does not need to be a TCP for the duty to consult to apply.

Tribal sacred places that have been in use for at least several generations and that continue to be used by traditional practitioners generally can be determined eligible for the National Register as TCPs, as long as they meet at least one of the criteria and retain sufficient "integrity," as that term is used in the NPS regulations. Tribes and practitioners may not always agree with other governmental entities (e.g., NPS, federal land managing agencies, SHPOs) regarding the boundaries for TCPs. A tribe may believe that an entire mountain should be considered a TCP, or the landscape that can be seen from a vision quest site. Other governmental entities may sometimes tend to take a more restrictive approach to setting the boundaries of a TCP. [34]

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[32] 16 U.S.C. § 470a(d)(6).

[33] 16 U.S.C. § 470a(d)(6), *see* text accompanying note 7 *supra*.

[34] Although this is sometimes true, it is not always the case. For example, the Bighorn National Forest recently submitted a National Historic Landmark nomination to expand the Medicine Wheel NHL to include all of Medicine Mountain based upon its traditional cultural values.

Many, perhaps most, "Indian sacred sites" as that term is used in Executive Order 13,007 could also be determined eligible for the National Register as TCPs, if practitioners and others concerned about such sites are willing and able to compile the necessary documentation. Such documentation is not needed for such sites to be treated as sacred sites under the Executive Order. The Executive Order, however, does not provide a basis for judicial relief, while eligibility for the National Register can in instances where the procedural requirements of the NHPA have not been met.

e. What entities have roles in the Section 106 process?

As provided in statutory language, the federal agency with direct or indirect jurisdiction over, or with authority to issue a license for, the proposed undertaking has the lead responsibility for carrying out the section 106 process. A variety of other entities can become involved in the process for a given proposed undertaking, some of which are required to be involved, some have a right to be consulting parties if they so choose, and others may become involved if the federal agency official approves their request for consulting party status.

i.) Federal Agency Officials

The regulations require the agency to designate an official with "approval authority for the undertaking and [authority to] commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance."[35] In some cases the "agency official" may not be a federal employee, but, rather, may be a "State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law."[36] If more than one federal agency is involved in an undertaking, the agencies may designate a lead agency.[37] The agency may use contractors to prepare documents for use by the agency, but the agency official "remains legally responsible for all required findings and determinations." [38]

ii.) Advisory Council on Historic Preservation

[35] 36 C.F.R. § 800.2(a).
[36] 36 C.F.R. § 800.2(a).
[37] 36 C.F.R. § 800.2(a)(2). The lead agency bears the compliance responsibility for other agencies that sign on to such an arrangement; any agency that does not designate another agency as lead remains responsible for its own compliance.
[38] 36 C.F.R. § 800.2(a)(3).

The statutory language requires the federal agency to afford the Advisory Council an opportunity to comment, but under the regulations, the Council does not participate in the review of most undertakings. The Council retains the discretion to become involved in the review of any particular undertaking, but for the most part it relies on the State Historic Preservation Officer(s) (SHPO) for the state(s) where an undertaking is planned to perform the lead role in reviewing the proposed undertakings. An Appendix to the ACHP regulations sets out "Criteria for Council Involvement in Reviewing Individual section 106 Cases.[39] One of the four criteria for Council involvement is when an undertaking:

> Presents issues of concern to Indian tribes or Native Hawaiian organizations. This may include cases where there have been concerns raised about the identification of, evaluation of, or assessment of effects on historic properties to which an Indian tribe or Native Hawaiian organization attaches religious or cultural significance; where an Indian tribe or Native Hawaiian organization has requested Council involvement to assist in the resolution of adverse effects; or where there are questions relating to policy, interpretation or precedent under section 106 or its relation to other authorities, such as the Native American Graves Protection and Repatriation Act.[40]

iii.) State Historic Preservation Officers

State Historic Preservation Officers (SHPOs) perform a prominent role in reviewing proposed federal undertakings. In most of the cases in which the ACHP does not participate, the SHPO has the lead responsibility for reviewing the federal agency's findings and determinations. The duties the SHPO are set out in section 101(b)(3) of the statute,[41] including consulting with federal agencies in carrying out the section 106 process.[42]

iv.) Tribal Historic Preservation Officers

Since the enactment of the 1992 NHPA Amendments, Indian tribes have had the option of designating a Tribal Historic Preservation Officer (THPO) and, with respect to their "tribal lands," taking over all or part of the functions that would otherwise be performed by the SHPO. As defined in statutory language, the term "tribal lands" means "all lands within the exterior boundaries of any

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[39] 36 C.F.R. part 800, Appendix A.
[40] 36 C.F.R. part 800, Appendix A., §(c)(4).
[41] 16 U.S.C. § 470a(b)(3).
[42] 16 U.S.C. § 470a(b)(3)(I).

Indian reservation; and … all dependent Indian communities."[43] As of February 2011, one hundred eleven tribes have THPO programs that have been approved by the Secretary of the Interior to perform some or all of the functions that would otherwise be performed by the SHPO.[44] In recognition of the fact that this lead role in reviewing undertakings may be performed by either the SHPO or the THPO, the regulations routinely refer to both kinds of officers, as "SHPO/THPO."[45]

If a tribe has an approved THPO, the SHPO may nevertheless participate in the section 106 process as a consulting party in certain situations: if the undertaking would affect historic properties not on tribal lands; if the tribe agrees to participation of the SHPO as a consulting party; or if a landowner other than the tribe or a tribal member invites the SHPO to participate in addition to the THPO.[46]

v.) Tribes

On tribal lands. For an undertaking within an Indian reservation where the tribe does not have a THPO who has assumed SHPO functions, the ACHP regulations provide that the tribal government has the right to be a consulting party with the "same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part [i.e., the standard section 106 process, 36

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[43] 16 U.S.C. § 470w(14). This definition incorporates two of the three clauses of the statutory definition of "Indian country," 18 U.S.C. §1151.

[44] A list of THPOs, with contact information, is available at an internet site managed by the National Park Service. http://grants.cr.nps.gov/THPO_Review/index.cfm The National Association of Tribal Historic Preservation Officers (NATHPO) also provides information on the internet: www.nathpo.org.

[45] This choice of terminology is explained in the preamble to the version of revised final rules published in May 1999: "By using this reference, Federal agencies will be reminded that they must not only determine if their actions are on or will affect historic properties on tribal land, but they must also determine whether or not the tribe's THPO has formally assumed the role of SHPO." 64 FED. REG. 27043, 27053 (Dec. 18, 1999). As explained in the preamble to the December 2000 final rule, the May 1999 final rule was challenged in court by the National Mining Association, which argued, in addition to substantive issues, that the final rule was invalid as a violation of the Appointments Clause of the Constitution, in that two members of the Council (President of the National Conference of State Historic Preservation Officers and Chairman of the National Trust for Historic Preservation) are not appointed by the President. 65 FED. REG. 77699. The Council responded to this argument by repeating the rule-making process, using the May 1999 final rule as a proposed rule, with the two non-appointed members recusing themselves from the voting. *Id.* The December 2000 final rule adopted some changes from the May 1999 rule, but the preamble to the May 1999 rule remains a key source for discussion of public comments and the Council's responses to comments.

[46] 36 C.F.R. § 800.2(c)(1)(ii), cross-referencing 36 C.F.R. § 800.3(c)(1) (requests by landowners for the SHPO to participate in addition to the THPO, citing statutory provision of NHPA § 101(d)(2)(D)(iii), 16 U.S.C. § 470a(d)(2)(D)(iii)) and 36 C.F.R. § 800.3(f)(3) (decision on request to be consulting party to be made by federal agency official, in consultation with SHPO/THPO and any tribe "upon whose tribal lands an undertaking occurs or affects historic properties").

C.F.R. §§800.3 – 800.13], except that such consultations shall be in addition to and on the same basis as consultation with the SHPO."[47] This provision reflects the ACHP's response to concerns expressed by tribes during the rule-making process that the role of the SHPO within reservation boundaries where a tribe has no THPO is an intrusion on tribal sovereignty.[48]

Not on tribal lands. When a proposed undertaking might affect a historic property to which the tribe attaches religious and cultural importance outside reservation boundaries, NHPA section 101(d)(6) provides that the tribe has a statutory right to be a consulting party, and the federal agency has a statutory duty to invite the tribe to be a consulting party.[49] The ACHP regulations provide that the federal agency has a duty to make a reasonable and good faith effort to identify any such tribe(s)[50] and that any such tribe that asks in writing to be a consulting part "shall be one."[51] Historic places that hold religious and cultural significance for a tribe may be traditional cultural properties (TCPs), which, as discussed earlier, are places that are eligible for the National Register in part because of their ongoing significance for a living community, but a place need not be a TCP to trigger the requirement for consultation. Rather, the legal requirement is triggered by the tribe or Native Hawaiian organization attaching religious and cultural significance to a property that may be affected by a proposed undertaking.

The American Indian Religious Freedom Act (AIRFA) of 1978 declares it to be national policy to protect and preserve religious freedom for American Indians and recognizes that this must include access to sacred places.[52] AIRFA, however, does not establish a procedural mechanism to ensure that federal agencies consider whether their actions are consistent with its policy declaration.[53] To some extent, the NHPA review mechanism has evolved to serve this function, at least in the context of tribal sacred places that qualify for treatment as historic properties.

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[47] 36 C.F.R. § 800.2(c)(2)(B).

[48] 65 FED. REG. at 77702 (Dec. 12, 2000). In essence, the Advisory Council interprets the statute as authorizing SHPOs to perform their role in the section 106 process and provides a way for tribes to perform this role in lieu of the SHPO. *Id*. For the statutory basis of the SHPO role in the section 106 process, *see* NHPA § 101(b)(3)(I), 16 U.S.C. § 470a(b)(3)(I).

[49] 16 U.S.C. § 470a(d)(6). The statutory language states this right to be a consulting party broadly and does not does not limit it to historic properties that are not located on tribal lands. Accordingly, a tribe that attaches religious and cultural importance to a historic property located on the tribal lands of another tribe has a right to be a consulting party in the section 106 process for a proposed undertaking that would affect such a property.

[50] 36 C.F.R. §§ 800.2(c)(2)(ii)(A), 800.3(f)(2).

[51] 36 C.F.R. § 800.3(f)(2).

[52] Pub. L. No. 95-341 (codified in part at 42 U.S.C. § 1996). *See* Section II.1.A

[53] *See Lyng v. Northwest Indian Cemetery Assn.* 485 U.S. 439, 455 (1988) (noting floor statement by congressional sponsor that AIRFA "has no teeth").

vi.) Native Hawaiian Organizations

Native Hawaiian organizations (NHOs) have a set of rights comparable to those of tribes with respect to places outside reservation boundaries.[54]

vii.) Other Interested Persons and Entities

In addition to the federal agency and the SHPO/THPO, a number of other kinds of entities may become consulting parties for a given proposed undertaking. In many cases, more than one federal agency may be involved, as proponents, regulators, or providers of funding. State agencies other than the SHPO and local government agencies are often involved as well. Local governments with jurisdiction over the area where the effects of an undertaking will occur are entitled to be represented as consulting parties.[55] State, local and tribal government agencies carrying out projects funded by federal agencies, particularly projects funded by the Department of Housing and Urban Development (HUD), may have been delegated the legal responsibility for performing the functions that would normally be the role of the federal agency official.[56]

Applicants for federal assistance, permits, licenses, and other approvals are entitled to be consulting parties.[57] Federal agencies may authorize applicants to initiate consultation with the SHPO/THPO and others, although if it does so, the agency remains responsible for its government-to-government relationship with tribes.[58] Organizations and individuals with particular interests in an undertaking may ask to be consulting parties.[59] The National Trust for Historic Preservation, a private non-profit national preservation organization, frequently joins in the section 106 process as a consulting party, as do similar organizations at the state and local level. Persons whose property interests may be affected may also ask to be consulting parties. With the exception of entities that are entitled to be consulting parties, the federal agency official decides whether or not to grant such requests, in consultation with the SHPO/THPO and with any tribe whose tribal lands would be affected.[60]

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[54] NHPA § 101(d)(6), 16 U.S.C. § 470a(d)(6); 36 C.F.R. §§ 800.2(c)(2)(ii)(A), 800.3(f)(2). With respect to Native Hawaiian organizations, the statute imposes some specific responsibilities on the SHPO for the State of Hawaii. 16 U.S.C. § 470a(d)(6)(C).
[55] 36 C.F.R. § 800.2(c)(3).
[56] 36 C.F.R. § 800.2(a).
[57] 36 C.F.R. § 800.2(c)(4).
[58] *Id.*
[59] 36 C.F.R. § 800.2(c)(5).
[60] 36 C.F.R. § 800.3(f)(3).

In the context of historic properties that are tribal sacred places, Native religious leaders and organizations representing traditional practitioners would be appropriate candidates for consulting party status.

f. What are the steps in the section 106 process?

The section 106 process consists of a number of steps, which the federal agency official takes in consultation with other consulting parties. The basic steps are: initiation of the process; identification of historic properties; assessment of adverse effects; resolution of adverse effects.[61]

There is no specific time frame for concluding the step of identifying historic properties. If the area of potential effects includes traditional cultural properties (TCPs) or other historic places that hold religious and cultural importance for tribes (or Native Hawaiian organizations) that have not been previously documented and evaluated for National Register eligibility, a reasonable and good faith effort to complete this step in the process may take a considerable amount of time.

i.) Initiation of the Process, § 800.3.

The process begins with the federal agency official determining whether the proposed action is an undertaking and whether it has the potential to cause effects on historic properties. The regulations leave this determination to the federal official with no procedure for second guessing by the SHPO/THPO or ACHP. The agency may be challenged in court, though.[62] Having determined that the proposed action is an undertaking subject to section 106, the agency official must identify the appropriate SHPO and/or THPO. For an undertaking that may affect historic properties on "tribal lands," if the tribe does not have a THPO performing the functions of the SHPO, the agency must nevertheless consult with the tribe.[63] The agency official must also make a "reasonable and good faith effort to identify any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to historic properties in the

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[61] 36 C.F.R. §§ 800.3, 800.4, 800.5, 800.6. The Council's regulations encourage agencies to coordinate the section 106 process with the NEPA process, while recognizing that section 106 is a separate requirement. 36 C.F.R. § 800.8. In the event that NEPA documents are used for section 106 purposes, the regulations set out standards that must be met. 36 C.F.R. § 800.8(c)(1). The regulations also authorize agencies to adopt "alternate procedures," subject to review and approval by the Advisory Council. 36 C.F.R. § 800.14(a).

[62] *E.g., Montana Wilderness Ass'n v. Fry*, 310 F.Supp.2d 1127, 1153 (2004) (holding that a lease sale for oil and gas extraction on public lands is an undertaking subject to NHPA section 106, setting aside the determination by the Bureau of Land Management that the lease sale itself was not an undertaking because the agency believed that effects on historic properties could be taken into account at the stage of considering an application for a permit to drill).

[63] 36 C.F.R. § 800.3(d).

area of potential effects and invite them to be consulting parties."[64] Any such tribe or NHO that requests in writing to be a consulting party "shall be one."[65] For other individuals and organizations that request to be consulting parties, the federal agency official makes the determination in consultation with the SHPO/THPO and, if the undertaking would occur or affect historic properties on tribal lands, the tribe.[66]

ii.) Identification of Historic Properties, § 800.4

The step of identifying historic properties consists of several component parts, including: (a) determining the level of effort that is required; (b) identifying properties that are listed on or known to be eligible for the National Register as well as properties that have not yet been evaluated for eligibility; (c) evaluating historic significance, including determining eligibility; and (d) determining whether historic properties may be affected by the undertaking. All of these components are carried out by the agency official in consultation with the SHPO/THPO. The level of effort will vary according to factors such as the geographic scope of the project (the "area of potential effects") and how much information already exists about historic properties within that area. For some undertakings, a phased approach to identification and evaluation may be acceptable.

The identification and evaluation effort is always supposed to include gathering information from, and consultation with, any tribe or NHO that has been identified as being concerned that the undertaking may affect historic properties to which it attaches religious and cultural significance.[67] Gathering the necessary information may require oral history interviews and other techniques suggested in *Bulletin 38*.[68] Expertise in identifying and evaluating TCPs varies widely among agencies (and from region to region for particular agencies). While it is the federal agency's responsibility to identify historic properties, the section 106 process is more effective in protecting TCPs when tribes know how to get information about TCPs into the record at this step of the process.

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[64] 36 C.F.R. § 800.3(f)(2).
[65] *Id.*
[66] 36 C.F.R. § 800.3(f)(3).
[67] 36 C.F.R. § 800.4(a)(4), (b).
[68] 36 C.F.R. § 800.4(b). This subsection specifically lists oral history interviews among the kinds of efforts that may be appropriate and says that the "Secretary's standards and guidelines for identification provide guidance on this subject." *Bulletin 38* is one such guidance document issued by the Secretary.

This step concludes with a determination by the federal agency official that historic properties may be affected or that none will be.[69] If the former, then the process moves on to the next step, the assessment of adverse effects. If the agency official makes a "no effect" determination, the agency must document the determination, provide the documentation to the SHPO/THPO, notify all consulting parties, and make the documentation available to the public.[70] The regulations had previously provided that either the SHPO/THPO or ACHP could object to a "no effect" determination and require the federal agency to move on to the next step,[71] but this provision was struck down in litigation as exceeding the authority of the ACHP.[72] Under the revised procedure, the ACHP can object to the agency official's determination and provide a written opinion to the agency (which may be directed to the head of the agency), and the agency is then required to prepare a summary of its decision which contains "a rationale for the decision and evidence of consideration of the Council's opinion" and provide the summary to the ACHP, SHPO/THPO, and all consulting parties.[73] If, after receiving the ACHP's opinion, the federal agency changes its determination and finds that historic properties may be affected, the process moves on to the next step. If the agency does not change its determination, the regulations provide that, once the summary of the decision has been sent to the ACHP and others as required, the agency's "responsibilities under section 106 are fulfilled."[74] An agency decision to end the section 106 process at this step over an objection by the ACHP would seem to be subject to judicial review under the arbitrary and capricious standard of the Administrative Procedure Act (APA),[75] but this point has not yet been litigated.

iii.) Assessment of Adverse Effects, § 800.5

At this step in the section 106 process, the federal 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 or NHO that attaches religious significance to identified historic properties. The criteria of adverse effect are stated broadly, and followed with examples. 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.

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[69] 36 C.F.R. § 800.4(d).
[70] 36 C.F.R. § 800.4(d)(1), as amended at 69 FED. REG. 40553 (July 6, 2004).
[71] As promulgated on December 12, 2000, 65 FED. REG. at 77729 (Dec. 12, 2000).
[72] *National Mining Ass'n v. Slater*, *supra* note 5.
[73] 36 C.F.R. § 800.4(d)(1)(iv)(C), as amended at 69 FED. REG. at 40553 (July 6, 2004).
[74] *Id.*
[75] 5 U.S.C. § 706.

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."[76] 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 or NHO, including but not limited to importance as a TCP, then the tribe or NHO 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 step of resolution of adverse effects. The process may end at this step if the federal agency makes a "finding of no adverse effect."[77] Like the identification step, the regulations had previously provided that the SHPO/THPO, any consulting party, or ACHP could disagree with a "finding of no adverse effect" and the ACHP could require the federal agency to move on to the next step,[78] but this provision was struck down in litigation as exceeding the authority of the ACHP.[79] The recently revised regulations maintain the provision authorizing the SHPO/THPO, any consulting party, or ACHP to disagree with such a finding, but now the ACHP can only provide a written opinion to the agency rather than require the agency to move on to the next step.[80] The revised regulations specifically provide that the agency should seek concurrence of any tribe or NHO that attaches religious and cultural significance to a historic property and that, if the tribe or NHO disagrees with a no adverse effect finding, it may ask the ACHP to review and object to the finding.[81]

As with a "no historic properties affected" finding, an agency must prepare a summary of its decision with a rationale for the decision and evidence that it considered the ACHP's objection.[82] An agency decision to end the section 106 process at this step over an objection by the ACHP would seem to be subject to judicial review under the arbitrary and capricious standard of the Administrative Procedure Act (APA),[83] but this point too has not yet been litigated.

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[76] 36 C.F.R. § 800.5(a)(1).
[77] 36 C.F.R. § 800.5(b).
[78] As promulgated on December 12, 2000, 65 FED. REG. at 77730 (Dec. 12, 2000).
[79] *National Mining Ass'n v. Slater*, *supra* note 5.
[80] 36 C.F.R. § 800.5(c)(3), as promulgated at 69 FED. REG. 40554 (July 6, 2004).
[81] 36 C.F.R. § 800.5(c)(2)(iii), as promulgated at 69 FED. REG. 40553-54 (July 6, 2004).
[82] 36 C.F.R. § 800.5(c)(3)(B), as promulgated at 69 FED. REG. 40554 (July 6, 2004).
[83] 5 U.S.C. § 706.

iv.) Resolution of Adverse Effects, § 800.6

If the agency official finds that the effects will be adverse, the next step is "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties."[84] Like the other steps in the process, this step is to be taken in consultation with the SHPO/THPO and other consulting parties, including any tribes or NHOs. The ACHP must be notified and may decide to enter the process at this step, provided that the undertaking fits criteria set out in an appendix to the regulations.[85] The SHPO/THPO, and Indian tribe or NHO, or any other consulting party may request the ACHP to participate.[86] The objective of this step is to reach an agreement on acceptable measures to resolve the adverse effects, recorded in a Memorandum of Agreement (MOA). If no agreement is reached, the final step in the process is to document the failure to resolve adverse effects. Provisions of the regulations regarding MOAs and failure to resolve adverse effects are noted below under the heading "Outcomes of the Process."

g. What if NEPA Documents Are Used for Section 106

Many undertakings subject to the section 106 process are also federal actions subject to the review under the National Environmental Policy Act (NEPA)[87] as implemented though the regulations issued by the President's Council on Environmental Quality (CEQ).[88] The CEQ NEPA regulations require that, "To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental analyses and related surveys and studies required by … the National Historic Preservation Act … other environmental review laws and executive orders."[89] If the NEPA documentation is not an environmental impact statement (EIS) and Record of Decision (ROD) but is rather an environmental assessment (EA) and finding of no significant impact (FONSI), there is no corresponding requirement, except that those agencies that have been consulted in the preparation of an EA must be listed in the EA.[90]

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[84] 36 C.F.R. § 800.6(a).
[85] 36 C.F.R. part 800, App. A. Criterion (4) applies to undertakings that present "issues of concern to Indian tribes or Native Hawaiian organizations."
[86] 36 C.F.R. § 800.6(a)(1)(ii).
[87] 42 U.S.C . §§ 4321 – 4370e.
[88] 40 C.F.R. parts 1500 – 1508.
[89] 40 C.F.R. § 1502.25.
[90] 40 C.F.R. § 1508.9.

The ACHP regulations include a section on "Coordination with the National Environmental Policy Act."[91] This section provides that the process and documentation used for compliance with NEPA – whether an EA and FONSI or an EIS and ROD – can be used for compliance with NHPA §106, but only if the agency notifies SHPO/THPO and the Council in advance that it intends to do so and if the following standards are met requiring the federal agency official to:

(1) Identify consulting parties either pursuant to §800.3(f) or through the NEPA scoping process with results consistent with §800.3(f);
(2) Identify historic properties and assess the effects of the undertaking … in a manner consistent with the standards and criteria of §§800.4 through 800.5, provided that the scope and timing may be phased …;
(3) Consult … with the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;
(4) Involve the public in accordance with the agency's published NEPA procedures;
(5) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS.[92]

This section of the regulations also sets out requirements for: review of environmental documents, resolution of objections,[93] approval of the undertaking, and modification of an undertaking after approval of the FONSI or ROD. In any case in which the review process identifies adverse effects on historic properties, then section 106 compliance has been achieved if either: (1) a binding commitment to measures to avoid, minimize or mitigate adverse effects, is incorporated into the ROD (if such measures were proposed in the draft or final EIS) or into an MOA in compliance with §800.6(c); or (2) the Advisory Council has commented under §800.7 and received the agency's response.[94]

h. What are the possible outcomes of the process?

i.) Early Endings

[91] 36 C.F.R. § 800.8.
[92] 36 C.F.R. § 800.8(c).
[93] The provisions for resolving objections in 36 C.F.R. § 800.8(c)(3) were revised in July 2004, to correspond with changes in the provisions in the regulations for objections to findings of no historic properties affected and findings of no adverse effect. 69 FED. REG. 40554 (July 6, 2004).
[94] 36 C.F.R. § 800.8(c)(4).

As discussed above, the process may end with a determination by the federal agency that no historic properties will be affected, either because there are no historic properties within the undertaking's area of potential effects or because, although historic properties are present, they will not be affected.[95] Another way in which the process may come to an early end is if the federal agency official makes a finding of "no adverse effect" at the conclusion of the step of assessment of adverse effects.[96]

ii.) Memorandum of Agreement (MOA)

If the process does not end with a finding of no historic properties affected or a finding of no adverse effect, then the most common outcome is a Memorandum of Agreement (MOA), through which the "signatories" agree on acceptable measures to avoid, minimize, or mitigate adverse effects.[97] The "signatories" are the federal agency, SHPO/THPO, Advisory Council (if it has chosen to participate), and tribe (if the undertaking would affect historic properties on tribal lands of a tribe without a THPO).[98] The federal agency official may invite other consulting parties to be "invited signatories," but such invited parties, including tribes that attach religious and cultural importance to historic properties that are not on tribal lands, do not have the authority to insist on changes in the terms of the MOA and cannot prevent an MOA from taking effect by refusing to sign.[99] If a tribe or other consulting party assumes responsibilities for helping to carry out an MOA, then the federal agency "should" invite that party to be a signatory.[100] An example of such assumption of responsibilities would be where a tribe and a federal land managing agency enter into an agreement through which the tribe and agency cooperatively manage an area where a sacred place is located.

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[95] 36 C.F.R. § 800.4(d).
[96] 36 C.F.R. § 800.5(b), (c), (d).
[97] 36 C.F.R. § 800.6.
[98] 36 C.F.R. § 800.6(c)(1). While this subsection does not expressly provide that a tribe is a required signatory for an MOA for an undertaking affecting tribal lands, this requirement is stated in 36 C.F.R. § 800.2(c)(2)(B). In addition, if the SHPO terminates consultation, the federal agency official and ACHP may continue to consult and execute an MOA without the SHPO, but if a THPO terminates consultation, an MOA without the THPO's signature is not an option. 36 C.F.R. § 800.7(a)(2), (3).
[99] 36 C.F.R. § 800.6(c)(2). A consulting party that is an invited signatory may be able to increase its leverage over the terms of an MOA by offering to assume some responsibility for carrying out the terms of the MOA. 36 C.F.R. § 800.6(c)(2)(iii).
[100] 36 C.F.R. § 800.6(b)(2)(iii).

Where an MOA has been executed pursuant to the Council's regulations, that agreement "shall govern the undertaking and all of its parts."[101] Failure of an agency to comply with the terms of an MOA may be challenged in court.[102]

iii.) Programmatic Agreement (PA)

In a variety of circumstances, the section 106 process may be concluded with a programmatic agreement (PA) rather than an MOA, particularly situations that are regional in scope and those for which all of the effects on historic properties cannot be fully determined before approval of the undertaking.[103] A PA can only be applied to tribal lands if the tribe is a signatory. In cases where a tribe has a THPO, it is essential that the THPO sign the PA.[104] For a proposed PA affecting historic properties not on tribal lands but to which tribes attach religious and cultural importance, the regulations include requirements to consult with tribes and Native Hawaiian organizations.[105]

iv.) Failure to Resolve Adverse Effects

For any undertaking for which an agreement (either MOA or PA) has not been executed pursuant to the Council's regulations, the statute allows the federal agency to proceed with the undertaking, but the decision to proceed in the absence of an agreement can only be made by the head of the agency – it cannot be delegated.[106]

i. Additional Requirements in Certain Cases

In addition to the procedural requirements that give the section 106 process some semblance of "teeth," there is one situation that imposes specific substantive requirements upon agencies. If the historic property is a National Historic Landmark, the agency has a duty to "minimize harm" to such landmark.[107]

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[101] NHPA § 110(l), 16 U.S.C. § 470h-2(l).

[102] *See* Kanefield, *supra* note 1, at 30. *Don't Tear It Down, Inc. v, Pennsylvania Ave. Dev. Corp.*, 642 F.2d 527 (D.C. Cir. 1980); *West Branch Valley Flood Protection Ass'n v. Stone*, 820 F. Supp. 1 (D.D.C. 1993); *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287 (4th Cir. 1992).

[103] 36 C.F.R. § 800.14(b).

[104] 36 C.F.R. § 800.14(b)(2)(iii). While the regulations say that the THPO "or" tribe must sign on, in light of the duties of THPOs under the statute and regulations, it is imperative that the THPO be a signatory – either as a representative of a tribe or as a separate signatory in addition to the tribe.

[105] 36 C.F.R. § 800.14(f).

[106] NHPA § 110(l), 16 U.S.C. § 470h-2(l). The regulations establish procedures for documenting the comments of the Council in such situations and for documenting that the decision to proceed is made by the head of the agency.

[107] NHPA § 110(f), 16 U.S.C. § 470h-2(f). See 36 C.F.R. § 800.10, special requirements for protecting National Historic Landmarks.

j. Judicial Review and Attorney Fees

NHPA does not expressly create a private right of action or waive federal sovereign immunity, but in an extensive body of case law[108] courts have issued rulings in cases that have challenged federal agency actions, applying the standards of judicial review in the Administrative Procedure Act.[109] The NHPA does explicitly authorize recovery of attorney fees to any person who substantially prevails in a civil action to enforce the provisions of the Act.[110]

k. Confidentiality

National Register Bulletin 38, which provides guidance for how agencies should deal with traditional cultural property, recognizes that

> Particularly where a property has supernatural connotations in the minds of those who ascribe significance to it, or where it is used in ongoing cultural activities not readily shared with outsiders, it may be strongly desired that both the nature and the precise locations of the property be kept secret...However concerned one may be about the impacts of…a project on a traditional cultural property, it may be extremely difficult to express these concerns to an outsider if one's cultural system provides no acceptable mechanism for doing so.[111]

Section 304 of the NHPA[112] authorizes federal agencies or any other public official that is the recipient of a grant to:

> withhold from disclosure to the public, information about the location, character or ownership of a historic resource if the Secretary and the agency determine that disclosure may—
>
> (1) cause a significant invasion of privacy;

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[108] *See generally* SHERRY HUTT, ET AL., HERITAGE RESOURCES LAW: PROTECTING THE ARCHAEOLOGICAL AND CULTURAL ENVIRONMENT (1999); Kanefield, *supra* note 1, and Marques, *supra* note 1.

[109] 5 U.S.C. § 704. The scope of judicial review is generally limited to the administrative record, see Kanefield, *supra* note 1, at 57 (collecting cases), although under certain circumstances a court will allow plaintiffs to supplement the agency record. *National Trust for Historic Preservation v. Blanck*, 928 F.Supp. 908 (D. D.C. 1996).

[110] 16 U.S.C. § 470w-4. Attorney fees in NHPA cases are based on market rates, in contrast to attorney fee awards authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412. See Kanefield, *supra* note 1, at 37-39.

[111] Bulletin 38, *supra* note 29, at 17.

[112] 16 U.S.C. § 470w-3(a).

(2) risk harm to the historic resources; or
(3) impede the use of a traditional religious site by practitioners.

This is the primary mechanism for addressing the confidentiality concerns of Native Americans within the context of the NHPA. If these provisions are not sufficient to satisfy the confidentiality needs raised by Native Americans, however, Bulletin 38 also recognizes that an agency may choose "not to seek formal determinations of eligibility [in regard to a specific site or area], but simply to maintain some kind of minimal data in planning files.[113]

[113] Bulletin 38, *supra* note 29, at 17.