
CHAPTER I

Federal Management of Cultural Property

Introduction

The federal government has enormous land management responsibilities. Approximately one-third of this country's land base is owned by the federal government, and additional land is under federal management or control. Many federal agencies, including, but not limited to, the National Park Service, the United States Forest Service, the Bureau of Land Management, the United States Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and various agencies of the United States Department of Defense, are charged with carrying out the federal government's significant land management responsibilities.

In general, federally owned and controlled lands (federal lands) are withdrawn or designated for particular purposes or uses. Management decisions over how federal lands will be used are guided by the agencies' legal authority, with decisions made by the various land management agencies with input from the public and other interested parties. The result is a management plan that is analogous in concept to a "comprehensive plan" developed by local government officials for zoning and other public planning purposes.

The statutes covered under the first part of this chapter can be logically divided into two types of laws: (1) statutes that apply to certain federal government *activities*, regardless of whether those activities occur on federally owned or managed lands; and (2) statutes that address the way in which federally owned or controlled *lands and resources* are to be managed. Statutes that fall under the first category are addressed at the

outset of this chapter, and those that fall under the second are subsequently addressed. The second part of this chapter addresses federal permits, and the end of this chapter includes a section on enforcement laws and remedies, both criminal and civil. The goal of presenting the reader with all of these sections is to provide an appreciation for the vast land and resource management responsibilities of the federal government with regard to cultural property, an understanding of how land management decisions are made, and an awareness of the enforcement tools that can be used to protect cultural property from unauthorized use and harm.

1.1 Compliance Laws

Cultural property law has enjoyed a long history in the United States. The first of many cultural property statutes enacted into law was the Antiquities Act,¹ which was passed in 1906—long before the traditional environmental law statutes were passed in the late 1960s and 1970s.

Likewise, the importance of historic preservation has been recognized in this country for many, many years.² For example, an early prototype of a house preserved as a museum is the home of George Washington at Mount Vernon, managed by the Mount Vernon Ladies' Association continuously since 1859.³ Over time, the scope of protected sites has grown from preservation of houses and monuments to districts and more recently to historic landscapes, altered and unaltered by humans. As a reflection of this evolution in scope, in 1992 amendments to the National Historic Preservation Act added traditional religious and cultural properties to those potentially eligible for protection under the law.⁴

Early interest in historic preservation has also been demonstrated by the courts. This can be seen in *United States v. Gettysburg Electric Railway Company*,⁵ where the Supreme Court held that the preservation of battlefields serves a public purpose. Federal courts then dealt with various issues of historic preservation, such as resolving the authority of the

1. 18 U.S.C. § 1866

2. For a background of historic preservation and management of cultural property in the United States, see Richard Waldbauer & Sherry Hutt, "Cultural Property" Begins: the Centennial of the Antiquities Act, *THE YEARBOOK OF CULTURAL PROPERTY LAW*, 2006, p. 147.

3. See James Marston Fitch, *Historic Preservation* 88 (2001).

4. 16 U.S.C. § 470a(d)(6)(A).

5. 16 U.S. 668 (1896).

federal government to condemn property for historic sites,⁶ until the Supreme Court again took up historic preservation in the landmark case of *Penn Central Transportation Company v. City of New York*,⁷ where it held that zoning for a historic district and the resulting limitation on use of private property was not a violation of the Fifth Amendment “takings” provision. The Supreme Court held that the permissive waste of historic property can give rise to monetary damages for a breach of fiduciary duty in the case of trust assets.⁸ A notable anti-historic preservation case is that of *Kelo v. City of New London*.⁹ *Kelo* is actually a state case in condemnation of private property for the public purpose of redevelopment. It is well established that public land managers may preserve historic properties without causing a “taking,” and they can eviscerate historic neighborhoods to make way for roads, public utilities, hospitals, sports arenas, and redevelopment districts without a “taking” of private property in the historic homes and businesses asserted to be blight. Although it can be done, the question remains: Should it be done? More than ten years after *Kelo*, the area of historic homes leveled to become a redevelopment area remains a weed-covered empty lot, with only a net loss of revenue to the city.¹⁰

1.1.1 Judicial Review of Compliance: The Administrative Procedure Act

Waiver of Sovereign Immunity

As a sovereign, the United States is immune from suit except when it consents to be sued.¹¹ Consent of the United States to be sued must be found in a clear, unequivocal, specific jurisdictional statement found in a statute enacted by Congress.¹² This waiver of sovereign immunity “cannot be implied but must be unequivocally expressed.”¹³ Moreover, “limitations and conditions upon which the government consents to be sued must be strictly observed and exceptions thereto are not to be implied.”¹⁴

6. *Barnidge v. United States*, 101 F.2d 295 (8th Cir. 1939).

7. 438 U.S. 104 (1978).

8. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465 (Case No. 01-1067, March 4, 2003).

9. 268 Conn. 1, 843 A.2d 500 (2004), *aff'd*, 545 U.S. 469, 125 S. Ct. 2655 (2005).

10. George Zvara, *Were Bulldozers a Public Benefit?*, THE FINANCIAL TIMES, August 26, 2013.

11. *Lehman v. Nakshian*, 453 U.S. 156 (1981); *United States v. Testan*, 424 U.S. 392 (1976); *United States v. Sherwood*, 312 U.S. 584, 590 (1941).

12. *Id.*

13. *Army and Air Force Exchange v. Sheehan*, 456 U.S. 728, 734 (1982) (*quoting United States v. Testan*, 424 U.S. 392, 399 (1976)).

14. *Soriano v. United States*, 352 U.S. 270, 272 (1957).

Federal Rule of Civil Procedure 8(a)(1) requires that a plaintiff bringing suit against the United States must allege both a basis for the court's jurisdiction and a specific statutory waiver of sovereign immunity. The appropriate statutory waiver of sovereign immunity to challenge final federal agency action is the Administrative Procedure Act¹⁵ (APA). A prerequisite to judicial review under the APA, however, is that there be a *final* agency action.¹⁶ The term "final agency action" under the APA is a term of art, which means that an action becomes "final" under the APA only after the agency's decision-making process has been consummated and the rights and obligations of the parties have been fixed, as the Court established in *Bennett v. Spear*.¹⁷ "The core question is whether the agency has completed its decision-making process, and whether the result of that process will directly affect the parties."¹⁸ Examples of final agency action include the issuance of a record of decision (ROD), a federal license or permit, federal financial assistance, and a determination of cultural affiliation in a Native American Graves Protection and Repatriation Act (NAG-PRA) inventory.¹⁹ It is important, however, to keep in mind that both parts of the *Bennett v. Spear* finality test—(1) that the agency has completed its decision-making process, and (2) that the complaining parties are directly affected by the outcome of that process—must be met for the APA to serve as a waiver of sovereign immunity to challenge federal agency action. The Court found no waiver of sovereign immunity, however, when the relief requested was to avoid use of a federal statutory process.²⁰

By itself, the APA does not create a private right of action to sue a federal agency for noncompliance with the statutes discussed in this chapter. Such a private right of action is permissible only if the challenging party invokes both the APA and a separate, substantive statute, such as some of the statutes cited in the following sections. The reason for requiring that both a substantive statute and the APA be invoked is so a claimant can demonstrate that he or she "has suffered a 'legal wrong,' such that there is federal jurisdiction to address that wrong."²¹

15. 5 U.S.C. §§ 501, *et seq.*

16. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no adequate remedy in a court are subject to judicial review.").

17. *Bennett v. Spear*, 520 U.S. 154 (1997).

18. *Franklin v. Massachusetts*, 505 U.S. 788, 829 (1992).

19. *Fallon-Paiute Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207 (D. Nev. 2006).

20. *Navajo Nation v. U.S. Department of the Interior*, 2013 U.S. Dist. LEXIS 18706 (D. Ariz., Feb. 12, 2013).

21. *Califano v. Sanders*, 430 U.S. 99, 104 (1977).

Constitutional requirements such as the need to demonstrate standing and ripeness must, of course, also be met in federal cultural property law cases. Plaintiffs seeking relief from federal agency actions must not assert injuries that are speculative in nature. For example, the court found no “injury in fact” in the case of *Wyoming Sawmills, Inc. v. United States Forest Service*.²² The land managing agency developed a Historic Preservation Plan that called for consultation with certain tribes should future activity impact the prehistoric site known as *Medicine Wheel*. The court considered plaintiff’s hope of future timber leases too speculative to provide a cause of action, where granting such leases is within the discretionary action of the land manager. Further, voluntary compliance with park policy lacks the “concrete adverseness” required to confer standing to maintain an action.²³

The Administrative Record

Once a final agency action has been established, “the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”²⁴ The administrative record is the “paper trail” leading up to and including the final agency decision. This paper trail should consist of memoranda, correspondence, including letters and e-mails, technical studies, records of public participation, including public comments solicited by the agency, notes, and any other documentation that was considered, either directly or indirectly, by the decision maker in making his or her final agency decision. Privileged documents, of course, may be excluded from the administrative record; however, a privilege log should be prepared and included with the administrative record. Once in litigation, the administrative record is assembled, indexed, and lodged with the reviewing court.

The administrative record provides the entire basis for judicial review. Parties prepare dispositive motions, that is, summary judgment motions, and cite documents in the administrative record in support of their arguments. In general, no extra-record material is permissible in these cases, and no trial is held. This general prohibition on discovery is intended to protect the sanctity of the administrative process and to preclude the reviewing court from conducting a *de novo* trial and substituting its opinion for that of the agency.

22. 383 F.3d 1241 (10th Cir. 2004), *cert denied*, 126 S. Ct. 330 (2005).

23. *Natural Arch and Bridge Society v. Alston*, 98 Fed. Appx. 711 (10th Cir. 2004), *cert denied sub nom.* *De Waal v. Alston*, 125 S. Ct. 1294 (2005).

24. *Camp v. Pitts*, 411 U.S. 138 (1973).

In very limited circumstances, a reviewing court may look beyond the four corners of the administrative record. These very limited exceptions include: (1) when the administrative record is ambiguous and requires additional explanation;²⁵ (2) when it appears that an agency has relied on documents or materials that are not part of the administrative record;²⁶ (3) when evidence is offered to demonstrate bad faith on the part of the agency;²⁷ and (4) when the court requests additional testimony by experts to understand complex or technical matters in the record.²⁸ These exceptions are indeed exceptions, and not the rule. Because judicial review is limited to the administrative record, it is very important that agencies document their decision-making process so that an accurate explanation of that process can be presented to the court.

Standard of Review

Courts review cases brought under the APA to challenge final federal agency action pursuant to the APA's standard of review provision.²⁹ Under this standard, an agency's decision will be upheld unless it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or contrary to statutory right or authority. From a practical standpoint, most of these cases are reviewed under the arbitrary or capricious standard, which means that the reviewing court, after according deference to the agency's construction of the statutory scheme it administers,³⁰ must uphold the agency decision unless there is no articulated "rational connection between facts found and the choice made."³¹

Another important point to remember is that agency decisions are entitled to a presumption of validity.³² This presumption of validity, however, is not intended "to shield [the agency's] action from a thorough, probing, in-depth review" by the reviewing court.³³ In addition, courts should generally defer to an agency's technical expertise and are not to substitute their judgment for that of the agency.³⁴ As a result, the party

25. See *Camp v. Pitts*, 411 U.S. at 142–43.

26. See, e.g., *Havasupai Tribe v. Robertson*, 943 F.2d 32, 33–34 (9th Cir. 1991).

27. See, e.g., *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986).

28. See, e.g., *Asarco, Inc. v. U.S. EPA*, 616 F.2d 1153 (9th Cir. 1980).

29. 5 U.S.C. § 706.

30. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842–45 (1984).

31. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

32. See *Wilderness Public Rights Fund v. Kleppe*, 608 F.2d 1250, 1254 (9th Cir. 1979), *cert. denied*, 446 U.S. 982 (1982).

33. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1981).

34. See *Baltimore Gas & Elec. Co.*, 462 U.S. at 98; and *Overton Park*, 401 U.S. at 416.

challenging final federal agency action has a rather difficult burden to overcome. If the challenging party is able to successfully demonstrate that the agency action is not sustainable on the administrative record, the proper remedy is for the court to remand the agency action to the agency for further consideration.³⁵

1.1.2 Statutes Applicable to Certain Federal Activities

1.1.2.1 *The National Historic Preservation Act*

Purpose

The National Historic Preservation Act of 1966 (NHPA)³⁶ represents the cornerstone of federal historic and cultural preservation policy and remains the most widely litigated federal statute in the area of cultural property law. Enacted during the building boom of the 1960s, and amended significantly in 1980, the purpose of the NHPA is “to encourage the preservation and protection of America’s historic and cultural resources.” The law seeks to preserve from development irreplaceable heritage in the public interest. Recognizing that not all structures and places can be preserved, the law sets forth a process to balance heritage protection with the economic needs of the community and private land-owners. The NHPA created the National Register of Historic Places³⁷ to give recognition to places of “significance in American history, architecture, archaeology, engineering, and culture,” and to provide properties not officially listed with a heightened protection status if they are “eligible” for listing on the National Register.³⁸ Landscapes and cultural places may also be protected by the NHPA.

The NHPA was amended in 1992 to provide enhanced opportunities for Indian tribes to establish preservation programs and to operate under the law in a manner analogous to that for the states. Also added at that time was the explicit recognition that properties of traditional religious and cultural importance to Indian tribes or Native

35. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978); and *Pitts*, 411 U.S. at 143.

36. 54 U.S.C. §§ 300101, *et seq.* (formerly codified at 16 U.S.C. §§ 470, *et seq.*). (Note that the recodification was intended to address organizational issues in the United States Code; specifically, the NHPA was recodified to join other National Park Service related statutes. The NHPA’s implementing regulations, however, remain in effect under the new codification: “[a] regulation, order, or other administrative action in effect under a source provision continues in effect under the corresponding title 54 provision.” Pub. L. No. 113-287, sec. 6(f).)

37. 54 U.S.C. § 302101

38. 36 C.F.R. Part 63; see also *CTIA-Wireless Ass’n v. FCC*, 466 F.3d 105 (D.C. Cir. 2006).

Hawaiian organizations may be eligible for listing in the National Register,³⁹ and therefore subject to consideration under Section 106 of the NHPA.

Components of the NHPA

The NHPA contains several major components that establish both the backbone for the consultation process, which is more fully set forth in the Act's implementing regulations, and the entities needed to carry out that consultation process. The entities are described first, followed by an explanation of the consultation process.

First, as mentioned above, the NHPA created the National Register of Historic Places. Since the Act is invoked only if federal undertakings involve National Register listed or eligible properties, the NHPA charges the Secretary of the Interior with the responsibility to establish, through implementing regulations, criteria for properties to be listed on the National Register, and for the designation of properties as National Historic Landmarks.⁴⁰

Second, the NHPA provides for the designation of a State Historic Preservation Officer (SHPO),⁴¹ who shall, as part of a federally approved state historic preservation program, carry out the following nonexhaustive list of functions:

1. direct and conduct a comprehensive statewide survey of historic properties and maintain inventories of such properties;
2. identify and nominate eligible properties to the National Register;
3. prepare and implement a comprehensive statewide historic preservation plan;
4. administer the state program of federal assistance for historic preservation on a statewide basis;
5. advise and assist federal, state, and local agencies in carrying out their historic preservation responsibilities;
6. cooperate with the Secretary of the Interior, the Advisory Council on Historic Preservation, and other federal, state, and local agencies, as well as organizations and individuals, to ensure that historic properties are taken into consideration at all levels of planning and development;

39. 54 U.S.C. § 302706

40. 54 U.S.C. § 302103

41. A list of SHPOs can be found at www.ncshpo.org/find/index.htm.

7. provide public information, education and training, and technical assistance in historic preservation;
8. consult with the appropriate federal agencies on qualified undertakings that may affect historical properties; and
9. consult with the appropriate federal agencies on the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to historical properties.⁴²

As will be discussed later, the SHPO's role in the consultation process is critical.

The third major entity created by the NHPA is the designation of a Tribal Historic Preservation Officer (THPO).⁴³ A THPO essentially serves the same function with regard to tribal lands' historic properties and preservation programs as does an SHPO with regard to state lands' historic properties and preservation programs.⁴⁴

The fourth key player in the consultation process created by the NHPA is the Advisory Council on Historic Preservation (ACHP). This independent agency of the United States government is comprised of a Chairman selected by the President, the Secretary of the Interior, the Architect of the Capitol, the Secretary of Agriculture, and several other agency heads, one governor and one mayor appointed by the President, the President of the National Conference of State Historic Preservation Officers, the Chairman of the National Trust for Historic Preservation, four experts from the disciplines of architecture, history, archeology, and other appropriate disciplines, appointed by the President, three at-large members from the general public appointed by the President, and one member of an Indian tribe or Native Hawaiian organization appointed by the President.⁴⁵ The NHPA sets forth the ACHP's responsibilities to include advising the President and Congress on historic preservation matters, and to recommend measures to coordinate the activities of federal, state, and local agencies, as well as those of private institutions and individuals relating to historic preservation and the dissemination of related information.⁴⁶ In addition,

42. 54 U.S.C. §§ 302301-302303.

43. Contact information for THPOs can be found at grants.cr.nps.gov/THPO_Review/index.cfm.

44. 54 U.S.C. § 302702. The United States District Court for the District of New Mexico has made clear that the NHPA requires federal agencies to consult with the THPO, not every individual tribal group. *San Juan Citizens Alliance v. Norton*, 586 F.Supp.2d 1270, 1293 (D.N.M. 2008).

45. 54 U.S.C. § 304101(a).

46. 54 U.S.C. § 304102(a)(1).

the ACHP is charged with providing training and education concerning historic preservation issues to both public and private agencies and institutions.⁴⁷ Yet another critical role of the ACHP is to review the historic preservation policies and programs of federal agencies for the purpose of recommending methods to improve the effectiveness, coordination, and consistency of those policies and programs.⁴⁸ Perhaps the single most important role of the ACHP affecting practitioners in cultural property law is its authorization by Congress to promulgate rules and regulations necessary to carry out the consultation process set forth in Section 106 of the Act (discussed later).⁴⁹ The NHPA's implementing regulations were challenged in the matter *National Mining Ass'n v. Slater*,⁵⁰ in which the plaintiffs argued that the ACHP exceeded its scope of authority under the Act. In that case, however, the court upheld the ACHP's regulations as being lawful, except for two provisions,⁵¹ which were deemed to be substantive in nature; that is, the court found that those provisions impermissibly gave the ACHP a "veto power" over the agencies' determinations regarding the effects of their undertakings on historic properties.⁵² On appeal, the United States Court of Appeals for the District of Columbia found another infirmity with the 2001 regulations in that Section 106 does not apply to "undertakings" that are merely "subject to State or local regulation administered pursuant to a delegation or approval by a federal agency."⁵³ No other provisions of the regulations, however, were invalidated by the *National Mining Ass'n* case. In response to these decisions, the ACHP amended its regulations in 2004, which remain in full force and effect.⁵⁴ Summaries of this and other major NHPA cases, and significant and very helpful additional information, are available to the practitioner by accessing the ACHP's official website at www.achp.gov.

NHPA's Consultation Process

Two sections of the NHPA, Sections 106 and 110, deserve an in-depth discussion as they form the basis of most of the compliance activity under the law. These sections, codified at 54 U.S.C. § 306108 and 54 U.S.C. § 306101(a), respectively, are explained below.

47. 54 U.S.C. § 304102(a)(5)

48. 54 U.S.C. § 304102(a)(6)

49. 54 U.S.C. § 304108

50. 167 F. Supp. 2d 265 (D.D.C. 2001).

51. 36 C.F.R. § 800.4(d)(2)(2001) and 36 C.F.R. § 800.5(c)(3)(2001).

52. *Nat'l Mining Ass'n v. Slater*, 167 F. Supp. 2d at 288–89.

53. 324 F.3d 752, 760 (D.C. Cir. 2003).

54. 69 Fed. Reg. 40544–40555 (Jul. 6, 2004) (codified at 36 C.F.R. Part 800).

Section 106

Section 106 and its implementing regulations describe the step-by-step procedural obligations imposed on federal agencies⁵⁵ to consider the effect of their undertakings on National Register listed or eligible properties. The NHPA is regarded as a procedural, not a substantive, statute. In *Morris County Trust for Historic Preservation v. Pierce*,⁵⁶ the Third Circuit Court of Appeals stated: “NHPA, like NEPA [the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, discussed later in this chapter], is primarily a procedural statute, designed to ensure that federal agencies take into account the effect of Federal or Federally-assisted programs on historic places as part of the planning process for these properties.”⁵⁷ The law neither forbids destruction of historic properties, nor commands their preservation.⁵⁸

Definitions: “Undertaking”

The Section 106 process is triggered by a federal “undertaking.” This term is defined in both the statute⁵⁹ and the NHPA’s implementing regulations.⁶⁰ Pursuant to these authorities, an “undertaking” means a project, activity, or program carried out, in whole or in part, under the direct or indirect jurisdiction of a federal agency. An undertaking also includes such projects, activities, or programs carried out with federal financial assistance, and those requiring a federal permit, license, or approval.⁶¹ As mentioned previously, another type of “undertaking” that previously

55. If no federal agency has jurisdiction over a project, then Section 106 does not apply to the project. *Business and Residents Alliance of East Harlem v. Jackson*, 430 F.3d 584, 594 (2d Cir. 2005). Similarly, “[n]on-federal agencies are not liable for violations of the NHPA.” *Preservation Coalition of Erie County v. FTA*, 356 F.3d 444, 455 (2d Cir. 2004). “NHPA addresses its obligations solely to federal agencies and the recipients of federal funding.” *Shanks v. Dressel*, 540 F.3d 1082, 1092 (9th Cir. 2008). (Under the new codification of the NHPA, Section 106 now appears with slightly modified language at 54 U.S.C. § 306108.)

56. 714 F.2d 271 (3rd Cir. 1983).

57. *Id.* at 280.

58. *See United States v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981); *Valley Community Preservation Com’n v. Mineta*, 373 F.3d 1078, 1085 (10th Cir. 2004); *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 242 (5th Cir. 2006).

59. 54 U.S.C. § 300320

60. 36 C.F.R. § 800.16(y).

61. For example, the Ninth Circuit concluded that the issuance of lease extensions is an “undertaking,” requiring NHPA analysis to be completed. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 787 (9th Cir. 2006). Resumption of a uranium mining operation under an original approved mining plan, however, was deemed by a U.S. district court to not constitute a new “undertaking.” *See Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044, 1066 (D. Ariz. 2015).

triggered Section 106 responsibilities was a project, activity, or program that was merely subject to state or local regulation and administered pursuant to a delegation or approval of a federal agency. This subdefinition of the term “undertaking,” however, was struck down by the United States Court of Appeals for the District of Columbia in *National Mining Ass’n v. Fowler*.⁶² The ACHP does hold that the federal agency approval or funding of such a program delegation to the state is, in itself, an “undertaking” subject to Section 106.⁶³ A general rule of thumb for the practitioner trying to determine whether there is an undertaking is to look at whether the project at issue is proposed to be completed with the use of *any* federal funds, or whether it requires the issuance of a federal permit, license, or other approval.⁶⁴

Definitions: “Eligible Properties”

As the NHPA concerns only National Register eligible and listed historic properties, a discussion of the eligibility criteria is in order. In general, properties that are fifty years old or older may be eligible for listing on the National Register so long as they have (1) historic significance and (2) retain their integrity (that is, their ability to convey significance). The regulations governing eligibility demonstrate the scope of potentially eligible properties: “The quality of significance in American history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures and objects, that possess integrity of location, design, setting, materials, workmanship, feeling, and association.”⁶⁵ Thus, although prehistoric archaeological sites and Civil War battlefield sites may be obvious examples of eligible properties, some sites that are not yet fifty years old may still fall within this definition, so long as they are of “exceptional importance” (such as certain baseball fields and the Apollo 11 launchpad at Cape Canaveral). In addition, less tangible traditional cultural properties, such as areas where Native Americans have performed traditional dances or areas where herbs have been collected for traditional medicinal purposes, may, likewise, be deemed eligible for inclusion in the National Register.

The National Park Service, which is the federal agency charged with determining National Register eligibility, lists four basic significance

62. 324 F.3d 752, 758–60 (D.C. Cir. 2003).

63. See 69 Fed. Reg. at 40546.

64. See also *Sheridan Kalorama Historical Ass’n v. Christopher*, 49 F.3d 750, 755 (D.C. Cir. 1995).

65. 36 C.F.R. § 60.4.

criteria in its regulations pertaining to National Register eligibility. The significance criteria, with examples, are:

- a. properties that have an association with events that have made a significant contribution to the broad patterns of our history (for example, historic battlefields; visible vestiges of the Underground Railway; and sites of the “Trail of Tears”); or
- b. properties that have an association with the lives of persons significant in our past (for example, Mount Vernon, the home of George Washington); or
- c. buildings that embody distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction (for example, Talesin; the Empire State Building; and Mary Colter’s Harvey Houses); or
- d. sites that have yielded, or may be likely to yield, information important in prehistory or history (for example, Mesa Verde, Chaco Canyon).⁶⁶

Again, properties qualifying under one or more of these significance criteria must also retain sufficient integrity to be eligible for the National Register.

The Section 106 Consultation Process

After determining that an undertaking is involved, the next step for the federal agency is to determine whether the undertaking has an effect on National Register listed or eligible properties (for the purposes of Section 106, such historic, archaeological, and cultural properties are called “historic properties”). If the agency determines that the undertaking is generally a type of activity that does not have the potential to affect historic properties, then its Section 106 obligations have been completed, and nothing further needs to be done.⁶⁷ If, however, the agency determines that the type of undertaking does have the potential to cause effects, then the agency needs to advance to the next step in the Section 106 consultation process. The agency should at this point identify the appropriate SHPO or THPO;⁶⁸ plan, in consultation

66. *See Id.*

67. 36 C.F.R. § 800.3(a)(1); *Town of Marshfield v. FAA*, 552 F.3d 1, 5 (1st Cir. 2008).

68. 36 C.F.R. § 800.3(c).

with the SHPO/THPO, to involve the public as appropriate;⁶⁹ and identify other consulting parties, including local governments,⁷⁰ applicants, if one is involved,⁷¹ and Indian tribes⁷² and Native Hawaiian organizations that attach significance to a historic property that could be affected by the undertaking.⁷³ The agency can decide whether or not to approve requests from other parties to be included in the process as consulting parties.⁷⁴

Note: It is highly advisable to include all interested parties and the SHPO/THPO as early on in the process as possible.⁷⁵ Such early involvement will afford all concerned with more time to resolve any issues that may arise and reduce the agency's risk of being subject to potentially costly and protracted litigation.⁷⁶

The next obligation for the federal agency is to determine, in consultation with the SHPO/THPO, the area of potential effects (APE), as defined in 36 C.F.R. § 800.16(d); conduct a review of existing information on historic properties within the APE; and inquire of consulting parties and others potentially knowledgeable about historic properties within the APE.⁷⁷ Based on this information, the agency then must make a reasonable and good-faith effort to identify the historic properties within the APE.⁷⁸ The level of effort that is expected of the federal agency in making this identification is an important part of the

69. 36 C.F.R. § 800.3(e).

70. 36 C.F.R. § 800.3(f)(1).

71. *Id.*

72. The Ninth Circuit Court of Appeals and the ACHP generally recognize that only federally recognized Indian tribes must be involved in consultation. The ACHP, however, counsels that at times it may be appropriate to consult with non-federally recognized tribes. *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1216 (9th Cir. 2008); ACHP, *CONSULTATION WITH INDIAN TRIBES IN THE SECTION 106 REVIEW PROCESS: A HANDBOOK* (2008), at 9-10. Also note that even though a tribe may not approve of a decision, the NHPA is satisfied when the administrative record demonstrates that its views were considered. *See Public Employees for Environmental Responsibility v. Jewell*, 25 F. Supp. 3d 67, 120-21 (D.D.C. 2014).

73. 36 C.F.R. § 800.3(f)(2).

74. 36 C.F.R. § 800.3(f)(3).

75. *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 608 F.3d 592, 608 (9th Cir. 2010).

76. Conversely, the failure to consult with parties entitled to consultation may result in significant delay. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp.2d 1104, 1108-11 (S.D. Cal. 2010).

77. 36 C.F.R. § 800.4(a).

78. 36 C.F.R. § 800.4(b).

Section 106 process and is governed by the ACHP's regulations at 36 C.F.R. § 800.4(b)(1).⁷⁹

The next step in the Section 106 process is for the federal agency to evaluate the identified properties to determine whether they meet the National Register criteria.⁸⁰ Again, it is important to keep in mind that the NHPA is concerned only about National Register listed or eligible properties, and, thus, this is a critical step in the process. If the results of the identification and evaluation phase of the process are that there are no historic properties affected by the undertaking, then the agency is required to provide documentation of this finding to the SHPO/THPO, and provide notification to all consulting parties.⁸¹ The agency is also required to make the documentation available for public inspection *before* approving the undertaking.⁸² If the SHPO/THPO does *not* object within thirty days of receipt of the agency's adequately documented finding, then the agency has fulfilled its Section 106 consultation responsibilities.⁸³ If the SHPO/THPO or the ACHP timely objects to the agency's finding, then the agency must consider that objection in determining how to proceed next.⁸⁴ (It should be noted that in *National Mining Ass'n v. Slater*,⁸⁵ as explained previously, the United States District Court for the District of Columbia invalidated an earlier version of this regulation insofar as it provided the ACHP with a "veto power" over the agency's ability to move forward in the Section 106 process.) The practitioner should keep in mind that, under this scenario, if the agency moves forward with the undertaking without demonstrating that it considered the objection of the SHPO/THPO or the ACHP, then the agency's decision to proceed is vulnerable to a challenge under the "arbitrary and capricious" standard. Accordingly, the agency is well advised to document its consideration of any such objection.

79. See also ACHP, MEETING THE "REASONABLE AND GOOD FAITH" IDENTIFICATION STANDARD IN SECTION 106 REVIEW (2011). The ACHP cautions that "the regulations require that a reasonable and good faith effort to identify historic properties *include some level of effort*—at a minimum, a review of existing information on historic properties that are located or may be located within the APE (36 C.F.R. § 800.4(a)). Such an effort may consist of one or more methodologies and should be designed so that the federal agency can ensure that it produces enough information, in enough detail, to determine what the undertaking's effects will likely be on historic properties."

80. 36 C.F.R. § 800.4(c).

81. 36 C.F.R. § 800.4(d)(1).

82. *Id.*

83. *Id.*

84. *Id.*

85. 167 F. Supp. 2d 265 (D.D.C. 2001).

If the agency determines that historic properties may be affected, then the agency must notify all consulting parties and invite their views on the effects and assess whether the effects are adverse in accordance with 36 C.F.R. § 800.5.⁸⁶ The next step is for the agency to consider any views provided by consulting parties and the public concerning whether such effects on properties within the APE are adverse.⁸⁷ “Adverse effects” are defined by the regulations as occurring when the proposed undertaking alters—either directly or indirectly—any of the characteristics of the property that qualify it 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.”⁸⁸ Adverse effects may also include effects that are reasonably foreseeable, which may occur at a later time, be more removed in distance, or are cumulative.⁸⁹ The regulations provide some examples of adverse effects, including:

1. physical destruction of or damage to all or part of the property;
2. alteration of the property inconsistent with the Secretary of the Interior’s standards for the treatment of historic properties (36 C.F.R. Part 68) as a result of restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access;
3. removal of the property from its location;
4. change in the use of the property or its physical features that contribute to its historic significance;
5. use of visual, atmospheric, or audible elements that diminish the integrity of the property’s historic features of significance;
6. neglect of the property resulting in deterioration (except where such deterioration is a recognized quality of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization); and
7. transfer, lease, or sale of the property out of federal ownership or control without adequate safeguards to preserve the property’s historic significance.⁹⁰

If the effects of the undertaking do not meet the criteria set forth in 36 C.F.R. § 800.5(a)(1), then the agency, after consulting with the SHPO/THPO,

86. 36 C.F.R. § 800.4(d)(2).

87. 36 C.F.R. § 800.5(a).

88. 36 C.F.R. § 800.5(a)(1).

89. *Id.*

90. 36 C.F.R. § 800.5(a)(2).

may propose a finding of no adverse effect.⁹¹ If this occurs, then the agency must notify all consulting parties of the proposed finding and provide them with the supporting documentation. The SHPO/THPO then has thirty days from receipt of the documentation to review the proposed finding.⁹² If the SHPO/THPO agrees with the finding and no consulting party has objected, then the agency has satisfied its Section 106 obligations and may proceed with the undertaking. In addition, if the SHPO/THPO does not respond within the thirty-day time period, then the lack of response is deemed to be concurrence with the proposed finding of no adverse effect.⁹³ If, however, the SHPO/THPO, or any consulting party, disagrees within the thirty-day time frame, it shall specify the reasoning for its disagreement and then the agency shall either consult with the party to resolve the issue(s) or request the involvement of the ACHP to review the finding.⁹⁴ (Of course, this same process applies to any Indian tribe or Native Hawaiian organization that has notified the agency that it attaches religious or cultural significance to a historic property, because such an Indian tribe or Native Hawaiian organization would, under such circumstances, be a “consulting party” in the Section 106 process.⁹⁵) The ACHP may also, on its own initiative, request a copy of the finding and supporting documentation within the thirty-day review period.⁹⁶ In the event that the ACHP is provided with the finding and supporting documentation under the scenarios outlined above, it has fifteen days to notify the agency of its position as to whether the adverse effect criteria have been properly applied.⁹⁷ If the ACHP does not respond within this fifteen-day window, then the ACHP’s concurrence with the agency’s finding is presumed.⁹⁸ If the ACHP does respond within fifteen days and concurs with the agency’s finding, then the agency’s obligations under Section 106 have been met. If the ACHP does not concur, then the agency must consider the ACHP’s position; however, it may proceed if it deems it appropriate to do so.⁹⁹ Again, the practitioner should be cognizant of the fact that such a decision to proceed in the face of the ACHP’s opposition would be reviewed under the APA’s arbitrary and capricious standard with the court according deference to the ACHP’s interpretation

91. 36 C.F.R. § 800.5(b).

92. 36 C.F.R. § 800.5(c).

93. 36 C.F.R. § 800.5(c)(1).

94. 36 C.F.R. § 800.5(c)(2)(i).

95. 36 C.F.R. §§ 800.2(c); 800.5(c)(2)(iii).

96. 36 C.F.R. § 800.5(c)(2)(ii).

97. 36 C.F.R. § 800.5(c)(3).

98. *Id.*

99. *See Nat’l Mining Ass’n v. Slater*, 167 F. Supp. 2d at 289.

of its own regulations. Thus, the agency should ensure that this type of decision is well documented.

If, following consultation on the agency's finding of no adverse effect, there is concurrence with the finding, or the agency decides to go forward despite an adverse position issued by the ACHP, it must maintain a record of the finding and provide information on the finding to the public upon request.¹⁰⁰ If an adverse effect is found, then the agency shall consult further to attempt to resolve the adverse effect. The agency may also engage in further consultation if, after consultation on a proposed finding of no adverse effect, there is revealed opposition to the finding and the agency decides not to go forward with the undertaking until that opposition is resolved.¹⁰¹

Continuing consultation when an adverse effect is found centers on whether alternatives or modifications to the undertaking can be developed and evaluated such that the adverse effects could be avoided, minimized, or mitigated.¹⁰² This continued consultation may take place with or without the participation of the ACHP; however, the ACHP must be notified of the adverse effect finding by the agency.¹⁰³ During this consultation stage of the process, additional individuals and organizations may be invited to participate.¹⁰⁴ Members of the public, however, *shall* be provided an opportunity to express their views on how the adverse effects can be resolved.¹⁰⁵ Resolution of the adverse effects typically results in the execution of a memorandum of agreement.¹⁰⁶ While others may be invited to sign, the mandatory signatories to the memorandum of agreement are the agency and the SHPO/THPO; if the ACHP is involved, then the ACHP is also a mandatory signatory.¹⁰⁷ Such a memorandum of agreement that is executed and implemented pursuant to Section 106

100. 36 C.F.R. § 800.5(d)(1).

101. 36 C.F.R. § 800.5(d)(2). Note, however, that the NHPA consultation process must be capable of addressing concerns regarding historic properties. *See, e.g.,* Center for Biological Diversity v. Hagel, 80 F. Supp. 3d 991, 994 (N. D. Cal. 2015) (in lawsuit over NHPA challenge to construction of United States military base including in Okinawa, Japan, court dismissed challenge due to the American and Japanese governments' final and irreversible decision to construct the challenged military base; the NHPA, as a procedural statute, would not have the capability to allow for the redress of any alleged injury).

102. 36 C.F.R. § 800.6(a).

103. 36 C.F.R. § 800.6(a)(1).

104. 36 C.F.R. § 800.6(a)(2).

105. 36 C.F.R. § 800.6(a)(4).

106. 36 C.F.R. § 800.6(b).

107. 36 C.F.R. § 800.6(c)(i), (ii).

“evidences the agency official’s compliance with section 106.”¹⁰⁸ If such an agreement is reached, this concludes the requirements of the Section 106 compliance process.

In some circumstances, a resolution of adverse effects cannot be reached through a memorandum of agreement, and alternative procedures set forth in the NHPA regulations may provide a more appropriate mechanism. For example, when a proposed project is particularly complex or multiple undertakings are at issue, a “programmatic agreement” may be a useful tool.¹⁰⁹

If, however, an agreement is not reached and the agency proceeds with the undertaking, as in *Mid States Coalition for Progress v. Surface Transportation*,¹¹⁰ it is vulnerable to a finding that the NHPA was violated. If such an agreement cannot be reached, the agency must, under 36 C.F.R. § 800.7, conclude its Section 106 responsibilities by requesting the ACHP’s formal comments on the undertaking, and considering them prior to final approval of the undertaking. By statute (16 U.S.C. § 470h-2(1)) and regulation, the task of considering the ACHP’s formal comments falls on the head of the agency and cannot be delegated.¹¹¹

Section 110

Section 110 of the NHPA codifies the Section 106 responsibilities of federal agencies for properties owned or controlled by the agency.¹¹² The law directs federal agencies to develop preservation programs designed to identify, evaluate, and nominate to the National Register eligible properties subject to their jurisdiction or control. This is analogous to the SHPOs’ responsibilities with regard to historic properties located within their states. Specifically, the law provides that these programs, among other things, ensure that such properties under the jurisdiction or control of an agency that are listed in or may be eligible for listing in the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 106. In addition, special consideration should

108. 36 C.F.R. § 800.6(c). Note that the conclusion of the Section 106 consultation process has been held to constitute a final agency action for APA purposes. *See Grand Canyon Trust v. Williams*, 38 F. Supp. 3d 1073 (D. Ariz. 2014).

109. 36 C.F.R. § 800.14(b). *See also* *Quechen Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of the Interior*, 755 F. Supp.2d 1104 (S.D. Cal. 2010).

110. 345 F.3d 520, 554–55 (8th Cir. 2003).

111. 36 C.F.R. § 800.7(c)(4)

112. 54 U.S.C. § 306101

be given to the preservation of such values in the case of properties designated as having national significance.¹¹³

National Historic Landmarks (NHLs) are owed a higher standard of preservation than other historic properties.¹¹⁴ Thus, prior to approving undertakings that may adversely affect NHLs, federal agencies must, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to NHLs and provide the ACHP a reasonable opportunity to comment on such undertakings. Normally, this higher standard is applied during the Section 106 step of consulting to resolve adverse effects through a memorandum of agreement. The National Park Service, under 36 C.F.R. § 800.10(c), is invited to join such consultation.¹¹⁵

Although federal agencies are required by Section 110 to develop preservation plans to manage historic properties under their jurisdiction, they do not have an *affirmative duty* to expend funds to maintain such historic properties and to plan for historic preservation in the absence of an undertaking. This point was made in the case of *National Trust for Historic Preservation v. Blanck*,¹¹⁶ which involved the National Park Seminary Historic District, a National Register listed property, located within the Department of the Army's Walter Reed Medical Center. The army had chosen to retain the buildings as historic properties of the government but did not have plans to expend funds for their preservation. The National Trust brought the action to halt deterioration of the structures and require preservation. The court affirmed that the NHPA is a process statute that does not require affirmative responsibilities for preservation;¹¹⁷ however, the court required the army under Section 110 to consider preservation in its planning process. Nevertheless, the ultimate decision as to how historic properties are to be managed rests with the agency and, thus, the managing agency may decide to allow buildings to deteriorate, albeit subject to the arbitrary and capricious standard of judicial review under the APA. The court in *National Trust for Historic Preservation v. Blanck* ultimately determined that the army had instituted a cultural resource management plan consistent with its guidelines, and found it to be in compliance with Section 110 of the NHPA.

113. 54 U.S.C. § 306102(b)(2)

114. *See* Coliseum Square Ass'n, Inc., 465 F.3d at 242.

115. 36 C.F.R. § 800.10(c)

116. 938 F. Supp. 908 (D.D.C. 1996). *See also* Presidio Historical Ass'n v. Presidio Trust, 811 F.3d 1154 (9th Cir. 2016) (Presidio Trust's procedural undertakings during the planning process met the heightened standard of care imposed by Section 110).

117. *See also* Wilderness Watch v. Iwamoto, 853 F.Supp.2d 1063, 1070–71 (W.D. Wash. 2012).

Although it may play a lesser role in federal agencies' compliance activities, one additional section of the NHPA requires consideration and that is the extra-territorial application of the NHPA.

Section 402

Added to the NHPA in 1980, Section 402 governs federal agencies' obligations to consider the effects of undertakings that occur outside of the United States. Section 402 instructs federal agencies to determine whether such undertakings "may directly and adversely affect a property which is on the World Heritage List or on the applicable country's equivalent of the National Register." It is codified at 54 U.S.C. § 307101(e).¹¹⁸

In *Dugong v. Rumsfeld*,¹¹⁹ the United States District Court for the Northern District of California examined Section 402 and concluded that it applied to the construction of a military air station off the coast of Okinawa Island.¹²⁰ Subsequently, the court held that the Department of Defense did not comply with Section 402, and failed to consider whether the construction would affect the dugong or whether mitigation was needed. In later litigation, the court ultimately concluded that an order of compliance would not address the plaintiffs' alleged injuries as a decision to build the base had already been made by the United States and Japanese governments.¹²¹

1.1.2.2 The Department of Transportation Act

Scope

The Department of Transportation Act of 1966, as subsequently amended,¹²² and formerly cited and commonly referred to as "Section 4(f)," remains one of the strongest preservation statutes in existence. The NHPA and, as discussed later, the National Environmental Policy Act are procedural in nature, whereas Section 4(f) is result-oriented. Although it is indeed a strong tool, Section 4(f) is limited in scope; it applies only to transportation

118. See also Emily Monteith, Comment, *Lost in Translation: Discerning the International Equivalent of the National Register of Historic Places*, 59 DPLLR 1017 (2010).

119. 2005 WL 522106 (N.D. Cal. Mar. 2, 2005).

120. In doing so, the court held that the Japanese Law for the Protection of Cultural Properties is equivalent to the National Register of Historic Places, and that the Okinawa dugong, "an animal protected for cultural, historical reasons," qualified as property under Section 402.

121. *Okinawa Dugong v. Gates*, 543 F. Supp.2d 1082 (N.D. Cal. 2008); *Center for Biological Diversity v. Hagel*, 80 F. Supp. 3d 991, 994 (N.D. Cal. 2015).

122. 49 U.S.C. § 303.