15-15754-cv, 15-15857-cv

United States Court of Appeals

for the

Ninth Circuit

HAVASUPAI TRIBE,

Plaintiff-Appellant,

GRAND CANYON TRUST; CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB,

Plaintiffs,

- v. -

BILL WESTBROOK,* Forest Supervisor, Kaibab National Forest; UNITED STATES FOREST SERVICE, an agency in the U.S. Department of Agriculture,

Defendants-Appellees,

ENERGY FUELS RESOURCES (USA), INC.; EFR ARIZONA STRIP LLC,

Intervenor-Defendants-Appellees,

(Case caption for consolidated case on following page.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

PLAINTIFF-APPELLANT HAVASUPAI TRIBE'S OPENING BRIEF

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(Case caption for consolidated case.)

GRAND CANYON TRUST; CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB,

Plaintiffs-Appellants,

HAVASUPAI TRIBE,

Plaintiff,

- v. -

BILL WESTBROOK, Forest Supervisor, Kaibab National Forest; UNITED STATES FOREST SERVICE, an agency in the U.S. Department of Agriculture,

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I. JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1362 because this is a civil action brought by a federally recognized Indian tribe arising under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq*. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from a final order of the district court. This appeal is timely, in that the district court entered a final order granting summary judgment to the United States on April 7, 2015, ER-1–41, and the Plaintiff-Appellant Havasupai Tribe filed a Notice of Appeal on April 14, 2015, ER-56–58. Plaintiffs-Appellants Grand Canyon Trust, Center for Biological Diversity, and the Sierra Club filed a Notice of Appeal on April 27, 2015, ER-53–55. Both Notices were filed within 60 days of the district court's April Order, ER-1–41, as required by Fed. R. App. P. 4(a)(1)(B). The district court's April 7, 2015 Order was a final order disposing of all Parties' claims. *See* ER-1–41; ER-42.

II. ISSUES PRESENTED FOR REVIEW

1. Did the United States Forest Service fail to fulfill its obligations under Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306108, when it allowed a mining company to resume drilling a 1,400-foot uranium mine on a historic property with tremendous religious and cultural significance to nearby Indian tribes without first consulting with the tribes to

determine ways to avoid or mitigate the adverse effects of the mine?

2. Did the Forest Service's decision to apply the "emergency" NHPA consultation process under 36 C.F.R. § 800.13(b)(3) violate Section 106 of the NHPA, 54 U.S.C. § 306108, where (a) the agency allowed destructive mining activity to resume before initiating the consultation process, (b) there was no emergency or need for expedited action because mining had been shut down for twenty years, and (c) the tribes, the Arizona State Historic Protection Officer and the Advisory Council on Historic Preservation all advised the agency that it should conduct a full Section 106 consultation?

An addendum containing the pertinent statutes and regulations is attached.

III. STATEMENT OF THE CASE

Mit taav Tiivjuudva, as it is called by the Plaintiff-Appellant Havasupai Tribe ("Tribe" or "Havasupai"), is a small meadow located six miles south of Grand Canyon National Park that has tremendous religious and cultural importance to the Havasupai. In June 2012, Defendants-Appellees Forest Supervisor and U.S. Forest Service (collectively, "Forest Service") allowed a Canadian mining company, Intervenors-Defendants-Appellees Energy Fuels Resources (USA), Inc. and EFR Arizona Strip LLC (collectively, "Energy Fuels"), to resume blasting a 1,400-foot-deep uranium mine shaft in the meadow without first complying with the agency's obligations under the National Historic Preservation Act ("NHPA"),

54 U.S.C. § 300101, *et seq*., to consult with the Tribe (and other concerned Indian tribes) on measures to avoid or mitigate adverse effects on this sacred place. *Ten months* after it learned that Energy Fuels intended to resume mining, and after it had determined to allow mining operations to resume, the Forest Service *then* purported to initiate an abbreviated "emergency" consultation process with the Tribe, even though there was no need for expedited action because mining had been shut down for twenty years, and even though the Tribe repeatedly requested that the agency instead halt mining and conduct a full Section 106 consultation. The Forest Service's conduct violated its obligations under the NHPA, including its obligations to undertake "good faith" "government-to-government" consultations with Indian tribes. The Tribe, therefore, respectfully requests that the Court reverse the district court's denial of its motion for summary judgment on Claims 2 and 3 of its Amended Complaint, ER-41; ER-98–99, and direct issuance of an injunction prohibiting any further mining activity until the Forest Service complies with its NHPA obligations.

A. The Religious and Cultural Significance of *Mit taav Tiivjuudva* and the Forest Service's Approval of the Canyon Mine Plan of Operations

Since time immemorial, the meadow, *Mit taav Tiivjuudva*, has been a sacred place used by the Havasupai for pilgrimages, ceremonies, gathering of medicinal plants, and prayer. ER-130; ER-474–91; ER-192–93; ER-156. The meadow's significance is inexorably tied to Red Butte, *Wii gdwiisa*, a prominent, thousand-

foot-high topographical feature of the central Coconino Plateau, which is located four miles south of the meadow. ER-1–2. Respected Havasupai elders have explained that within the religious beliefs or "Way" of the Tribe, the meadow is:

> . . . the "Abdomen" of the Earth. It is sacred to us. It should not be violated. That area is where the "Baby" rests, immediately after its birth and while the umbilical cord is still attached to it and the Earth. The "Baby" is the Life Spirit of renewal.

ER-357. These elders have also explained that the meadow is "in the path traveled by the Cohonino who travels through and rests on the 'Abdomen' on its annual journey of renewal to the Hopi Mesas, and at other times." *Id.* Rex Tilousi, a religious and cultural leader of the Tribe, and its current chairman, has stated that the meadow is "where the Grandmother and her Grandson meet every year to renew life for all Havasupai. . . . We hold our babies up to face *Mit taav Tiivjuudva* and meet the Grandmother." ER-130–31; *see also* ER-366–73 (oral testimony from Tribe regarding significance of site).[1]

Much of the Havasupai's aboriginal territory, including the meadow, was taken from the Havasupai during the western expansion of the United States. *See Havasupai Tribe v. United States*, 20 Ind. Cl. Comm. 210 (1968). The meadow is now located in the Kaibab National Forest. In 1986, the Forest Service approved

[1] Although the Havasupai religion ordinarily prohibits description of the Tribe's religious beliefs to outsiders, when the threat to these sites posed by the Canyon Mine became imminent, the Tribe's elders believed it was necessary to disclose this information in order to protect this sacred place and "to save our right to practice or exercise our religion in our 'Way.'" ER-354–55, 358.

Energy Fuels' predecessor's Plan of Operations for a 1400-foot-deep breccia pipe uranium mine in the meadow (the "Canyon Mine"), over the Tribe's strong objections. ER-375–89. The Forest Service's Record of Decision acknowledged that the agency's understanding of the religious significance of the Canyon Mine site to the Havasupai was incomplete, due to the confidential nature of the Tribe's religious beliefs. ER-383. The Record of Decision also provided that consultation with the Tribes would continue throughout the construction and operation of the Canyon Mine. ER-379, 383. The Tribe challenged the Forest Service's decision on religious freedom and other grounds, but was unsuccessful. *See Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991). The Tribe did not challenge the decision under the National Historic Preservation Act because at that time tribal cultural sites did not qualify as "historic properties" eligible for listing on the National Register, and therefore they were not protected under the NHPA. After a brief period of mining activity, the mine was placed on standby status in 1992, due to a fall in the price of uranium. ER-3; ER-309. The mine shaft had only been sunk 50 feet of a planned 1,400-foot depth. ER-232; ER-391–92.

B. The Forest Service's Recognition of Red Butte as a Traditional Cultural Property and the Mining Withdrawal

The mine remained shut down for 20 years, during which time two important events occurred. First, in 1992, the NHPA was amended to recognized tribal cultural sites as eligible for listing on the National Register of Historic Places

("National Register"), and thus eligible for protection as "historic properties" under the NHPA. *See* 16 U.S.C. § 470a(d)(6)(A) (now at 54 U.S.C. § 302706(a)). In 2010, the Forest Service issued a formal determination that Red Butte and the surrounding area, including the site of the Canyon Mine, constituted a Traditional Cultural Property ("TCP") eligible for listing on the National Register, due to its cultural and religious significance to the Havasupai and several other Indian tribes. ER-474–91; ER-192–93, 203. Second, in January 2012, after a two year "segregation" period, the Secretary of the Interior withdrew approximately one million acres of public land surrounding Grand Canyon National Park, including the Canyon Mine site, from location and entry under the Mining Law, subject to "valid existing rights" (the "Withdrawal"). ER-265–88. The Withdrawal was significantly motivated by the potential damage that mining could cause to tribal cultural and religious sites. ER-269–70, 274, 276.

C. The Forest Service's Refusal to Consult Prior to Allowing Mining to Resume

In August, 2011, Energy Fuels' predecessor informed the Forest Service that it intended to recommence mining activity at the Canyon Mine. ER-293-329. Forest Supervisor Michael Williams informed Energy Fuels that the Forest Service was going to do an "information review" and a valid existing rights determination, a "requirement" following a withdrawal, which needed to be completed prior to the

agency approving the plan of operations. ER-290.[2] The Forest Service then spent ten months preparing a mineral validity report (the "VER Determination"), which found that Energy Fuels possessed valid existing rights in Canyon Mine, ER-227–52, and a Canyon Uranium Mine Review (the "Mine Review"), which concluded that no modifications were required to the previously approved Plan of Operations at the Canyon Mine. ER-179–224, 453. In the Mine Review, the Forest Service determined that it was not required to undertake an ordinary consultation under Section 106 of NHPA ("Section 106"), 54 U.S.C. § 306108, to determine possible adverse effects of the mine on the Red Butte TCP. ER-187–95. The Forest Service did, however, decide that the abbreviated "emergency" consultation process under 36 C.F.R. § 800.13(b)(3) ("Section 800.13(b)(3)") was applicable. *Id.* On June 25, 2012, the Forest Service notified the Regional Forester that "operations at the Canyon Mine may continue." ER-179. On the same day, the Forest Service sent "consultation initiation letters" to the Tribe and to other nearby tribes, and to the Advisory Council on Historic Preservation ("ACHP"), *see, e.g.*, ER-175-76; ER-225-26, thereby allowing destructive mining activities to resume *before* the abbreviated consultation process had even begun.

[2] The valid exiting rights determination was to determine whether Energy Fuels' mining claims contained a discovery of a valuable mineral deposit, as of both the date of the Withdrawal and the date of the valid existing rights determination, which included determining whether the mineral deposits could be mined at a profit. ER-330–31; ER-231, 244–251.

The Tribe, the ACHP, the Arizona State Historic Preservation Office ("AZSHPO"), and other nearby tribes all objected to the expedited process under Section 800.13(b)(3) and instead urged that the Forest Service was required to undertake a full Section 106 consultation before mining operations resumed. *See, e.g.*, ER-166–67; ER-164; ER-289; ER-256–58. The ACHP also informed the Forest Service that it should refrain from "destructive activities" at the mine "prior to the completion of the Section 106 process." ER-143–44. The Forest Service disregarded this advice. The Forest Service's "consultation" ultimately amounted to little more than an exchange of letters and one meeting at the Canyon Mine site, occurring seven months after the Forest Service had already allowed mining operations to resume. ER-439-46. The Tribe once again objected to the Forest Service's approach to consultation and urged the agency to halt mining and conduct a full Section 106 consultation, but the agency refused. *See* ER-139–42.

D. The Procedural History of this Litigation

In March, 2013, after the Tribe concluded that the "consultation" the Forest Service proposed to engage in was not meaningful and did not comply with the regulations, *see id.*, the Tribe and three environmental groups filed this lawsuit against the Forest Service under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, for failure to comply with the NHPA, the National Environmental Protection Act ("NEPA") and other federal statutes. ER-96–101. The Plaintiffs

immediately moved for a preliminary injunction to halt ongoing destructive mining activities. The district court denied that motion, and the plaintiffs appealed the denial to this Court, but while that appeal was pending, Energy Fuels again voluntarily suspended operations at the mine due to depressed uranium prices. ER-108. On August 7, 2014, the district court denied the Forest Service and Energy Fuels' partial motion to dismiss. ER-73. On April 7, 2015, the district court granted the Forest Service's and Energy Fuels' motions for summary judgment and denied the Plaintiffs' motion for summary judgment. ER-41. The Tribe appealed the dismissal of its NHPA claims, and the environmental groups separately appealed the dismissal of the claims under NEPA and other federal statutes. ER-56; ER-54. This Court consolidated the appeals and denied the Plaintiffs' motion for an injunction pending appeal on June 30, 2015. Mining operations have since resumed at the Canyon Mine.

IV. SUMMARY OF ARGUMENT

Section 106 of the NHPA and its implementing regulations require federal agencies to conduct consultations with Indian tribes that attach religious or cultural significance to a historic property, such as Red Butte TCP, that could be adversely affected by an undertaking, such as the Canyon Mine. *See* 36 C.F.R. §§ 800.3–800.13. These consultation obligations continue throughout an undertaking and are triggered whenever an agency has the opportunity to implement measures to

avoid or mitigate adverse effects on the historic property. *See, e.g., Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1445 (5th Cir 1991); *Apache Survival Coal. v. United States*, 21 F.3d 895, 911 (9th Cir. 1994). Section 106 also expressly requires that the consultation must be completed "prior to" an agency's approval of an undertaking. 54 U.S.C. § 306108; 36 C.F.R. § 800.1(c). The Forest Service failed to fulfill its obligations under Section 106 when it allowed destructive mining activity to resume at the Canyon Mine without first completing, or even initiating, a Section 106 consultation with the Tribe. The Forest Service failed to understand that it had continuing obligations under the NHPA that were triggered when it learned of Energy Fuels' intent to resume mining.

The Forest Service also violated the NHPA when, after it had already allowed destructive mining activities to resume, it initiated what it acknowledged to be an "emergency" consultation process under Section 800.13(b)(3), even though there was no emergency because mining had been suspended for twenty years. The Forest Service waited ten months from the time it learned of Energy Fuels' plan to resume operations before it even purported to initiate this "emergency" procedure. The Forest Service failed to recognize that it was improper to apply this abbreviated consultation process when there was no need for expedited action. Applying this emergency process also violated the "good faith" and "government-to-government" nature of the consultation process under

Section 106. *See, e.g.*, 36 C.F.R. §§ 800.2(c)(2)(ii)(A), 800.2(c)(2)(ii)(C). The Forest Service's subsequent failure to follow any of the unique procedural requirements of Section 800.13(b)(3) further belies the agency's claim that it was appropriate to apply this provision to the Canyon Mine. This Court should issue an injunction prohibiting the resumption of destructive mining activities at the Canyon Mine until the Forest Service fully complies with its obligations under the NHPA.

V. ARGUMENT

This Court reviews the district court's summary judgment decision *de novo*. *See Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (*en banc*); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006).

The Tribe brings two claims against the Forest Service in this appeal under 5 U.S.C. § 706 of the APA. Claim 2 of the Amended Complaint asserts that the Forest Service failed to undertake a full NHPA Section 106 consultation prior to allowing mining to resume. ER-98–99. Claim 3 asserts that the Forest Service improperly applied the emergency consultation process under Section 800.13(b)(3) of the NHPA regulations. ER-99-100. Section 706 of the APA provides that this Court "shall compel agency action unlawfully withheld or unreasonably delayed" and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of

procedure required by law." 5 U.S.C. § 706. The Tribe is entitled to summary judgment on both of its claims.

A. The Forest Service Violated NHPA by Failing to Conduct a Full Section 106 Consultation Prior to Allowing Mining to Resume

The NHPA is designed to "'encourage preservation of sites and structures of historic, architectural, or cultural significance.'" *Pit River Tribe*, 469 F.3d at 787 (quoting *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093–94 (9th Cir. 2005)). This goal is accomplished through the Section 106 consultation process, which requires agencies to consult with Indian tribes that attach religious and cultural significance to historic properties, such as Red Butte TCP, that may be affected by an undertaking, such as the Canyon Mine. *See* 36 C.F.R. §§ 800.3–800.13. The intended product of the consultation process is a memorandum of agreement ("MOA") that sets forth the agreed-on measures to "avoid, minimize, or mitigate the adverse effects" on the historic property. 36 C.F.R. §§ 800.6(a); 800.6(c). This process is not a mere formality. As this Court has found, federal agencies have an "obligation[] to minimize the adverse effect" of an undertaking on historic properties. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809 (9th Cir. 1999). The requirements set forth in the MOA, moreover, are legally enforceable. *Tyler v. Cuomo*, 236 F.3d 1124, 1134–35 (9th Cir. 2000). Importantly, the statute clearly requires that the Section 106 process must be *completed before* the agency acts to allow the undertaking to go forward. 54

U.S.C. § 306108.

Section 106 of NHPA imposes *continuing* obligations on federal agencies that are triggered "at any stage of an undertaking" at which the agency "has the ability to require changes that could conceivably mitigate any adverse impact." *Vieux Carre Prop. Owners*, 948 F.2d at 1445; *see also Morris Cty. Tr. for Historic Pres. v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983); *WATCH (Waterbury Action to Conserve Our Heritage Inc.) v. Harris*, 603 F.2d 310, 326 (2d Cir. 1979). This Court has recognized this well-established principle of NHPA law. *See Apache Survival Coal.*, 21 F.3d at 911.

The Forest Service's obligation to undertake a Section 106 consultation was thus triggered when it learned of Energy Fuels' intention to restart operations at the Canyon Mine in August 2011. At that time, mining operations had been suspended for twenty years, during which period the site of the mine was recognized as part of the Red Butte TCP and also became subject to the Withdrawal. The Forest Service had the ability to require modifications of the Plan of Operations to mitigate the adverse impacts on Red Butte TCP at this time, but it declined to do so. ER-179, 187–95 (determining that no "modification or amendment" to the original Plan of Operations was necessary[3]). The Forest Service's VER

[3] This determination by the Forest Service was made without any consideration of how to avoid or minimize the mine's adverse effects on the Red Butte TCP through a Section 106 process, so it was obviously and hopelessly flawed.

Determination also presented an opportunity for the agency to make modifications to mitigate adverse impacts of the mine, particularly since the agency should have determined the costs of any required mitigation measures to include in its required analysis of the "profitability" of the mine. ER-231, 244–251. The Forest Service also had the ability to require mitigation measures under its 1986 Record of Decision, which expressly reserved the power to do further consultations with the Tribe and to require mitigation measures to address unforeseen impacts of mining. ER-377, 379–80, 383. Forest Service regulations also expressly permit modifications to the Plan of Operations. *See, e.g.*, 36 C.F.R. § 228.4(e).

There is no dispute, however, that the Forest Service failed to conduct a full Section 106 consultation with the Tribe after it learned of Energy Fuels' intent to resume mining. This failure to comply with the agency's continuing NHPA obligations, alone, entitles the Tribe to summary judgment on Claim 2. This failure to consult was particularly troubling because, as the Forest Service recognized in the Mine Review, the Forest Service had not previously considered the effects of mining on Red Butte TCP because the site had not been recognized as a "historic property" when the original Plan of Operations was approved, *see* ER-189–90, 195, and because the Forest Service acknowledged in the Mine Review that mining operations could affect Red Butte TCP's continued eligibility for listing on the National Register by damaging the religious and sacred values

that the Havasupai and other tribes ascribe to the site, ER-194.

Not only was the Forest Service required to undertake a full Section 106 consultation, but this consultation process was required to be *completed* prior to allowing the resumption of destructive activities at the mine. *See Pit River Tribe*, 469 F.3d at 787 (finding the Forest Service "violated NHPA by failing to *complete* the necessary review *before* extending the leases" for a geothermal project) (emphasis added). Section 106 has express timing requirements that "[t]he agency official *must complete* the section 106 [consultation] process '*prior to* the . . . issuance of any license.'" 36 C.F.R. § 800.1(c) (emphasis added) (quoting 54 U.S.C. § 306108). The ACHP also informed the Forest Service that its Section 106 consultation with the Tribe should be completed prior to the resumption of "destructive activities" at the mine. ER-143–44. The Forest Service failed to comply with these timing requirements. Indeed, the Forest Service's decision to do the VER Determination prior to undertaking any Section 106 consultation was exactly backwards, since any avoidance or mitigation measures required under Section 106 should have been included in the VER Determination's required analysis of the "profitability" of Energy Fuels' Mining Claims. ER-231, 244–251.

The district court and the Forest Service both erred by failing to recognize that agencies have continuing NHPA consultation obligations that are triggered whenever the agency has an opportunity to require changes to mitigate adverse

impacts, as described above. The district court recognized this fundamental principle of NHPA law when it ruled in the Tribe's favor at the motion to dismiss stage, *see* ER-71, but it inexplicably failed to acknowledge or apply this principle in its summary judgment ruling in favor of the Forest Service. The Forest Service, likewise, failed to recognize this principle when it analyzed its NHPA obligations in the Mine Review. ER-187–95. These errors warrant reversal of the district court and a ruling that the Forest Service acted "not in accordance with law" and "without observance of procedure required by law." 5 U.S.C. § 706.

The Forest Service explained in the Mine Review that it was not obligated to conduct a full Section 106 consultation because there was no "new" federal undertaking at the Canyon Mine. ER-188. The district court based its summary judgment decision in favor of the agency largely on the same grounds. ER-28-29. This reasoning fails to appreciate the continuing nature of an agency's consultation obligations. The relevant consideration is not whether there is a "new" undertaking, but whether the agency has an opportunity to require changes to mitigate adverse impacts. *See Apache Survival Coal.*, 21 F.3d at 911; *Vieux Carre Prop. Owners*, 948 F.2d at 1445; *Morris Cnty. Tr.*, 714 F.2d at 280; *WATCH*, 603 F.2d at 326. Nowhere does the NHPA or its accompanying regulations require a "new" undertaking to trigger consultation, and such a rule would be inconsistent with the historic-protection goals of the NHPA.

Even were the Forest Service correct that a "new" undertaking is required to trigger Section 106, the resumption of mining activity would have qualified as a "new" undertaking. The Forest Service Manual, the Forest Service's statements to Energy Fuels, and the VER Determination itself all make clear that the VER determination was required before mining operations could resume. *See* ER-254 (Forest Service Manual directing the agency to "[e]nsure that valid existing rights *have been established before* allowing mineral or energy activities in congressionally designated or withdrawn areas.") (emphasis added); ER-290 (letter from Forest Supervisor Michael Williams informing Energy Fuels that a VER determination "is a requirement" for lands withdrawn from mineral entry); ER-231 ("It is Forest Service policy ([Forest Service Manual] 2803.5) to only allow operations on mining claims within a withdrawal that have valid existing rights (VER)."); ER-177 (same).[4] The resumption of mining thus meets the definition of an "undertaking" under the NHPA because it was a "project" or "activity" requiring a "Federal permit, license, or approval," in the form of the VER

[4] *See also* ER-262 (assuring Kaibab Paiute representatives that Energy Fuels' predecessor "will not be doing any 'shaft sinking' at the site until the [VER Determination] is completed.).

Determination. *See* 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y).[5] Since this litigation began, the Forest Service has claimed that the VER Determination was just an internal opinion without practical or legal significance, but this turn-about is flatly contradicted by the Administrative Record and the Forest Service's prior representations to the tribes that it was a legal requirement for mining to resume. *See, e.g.*, ER-466 (assuring the Hualapai tribe that if Energy Fuels could not show valid existing rights they "would no[t] be able to move forward" with mining); ER-472 (assuring the Havasupai that Energy Fuels "will need to show Valid Existing Rights"); ER-464 (assuring Navajo Nation representative that Energy Fuels "will need to show valid existing rights.").

This Court's decision in *Pit River Tribe*, which involved facts strikingly similar to those in this case, is instructive. In *Pit River Tribe*, the Court ruled that the Bureau of Land Management violated the NHPA by failing to do a Section 106

[5] The district court determined that the VER Determination was a "practical requirement" but not a "legal requirement" for mining to resume, and from this it concluded that the resumption of mining was not a "new" undertaking. ER-7–12, 28-29. The Forest Service authorities cited above show that this ruling was incorrect and that even the Forest Service itself unquestionably understood the VER Determination to be a legal requirement before mining could resume. Even if a VER determination had not been *legally required*, however, the fact that the Forest Service chose to do one and prohibited Energy Fuels from resuming mining until it was complete, was sufficient to make the VER Determination a "Federal permit, license, or approval," as required for a new undertaking under the NHPA. Discretionary actions by agencies are included in the "wide range of direct and indirect means of federal support" that can make a project an undertaking. *Dugong v. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106, at *13, *16 (N.D. Cal. Mar. 2, 2005) (noting that agency's discretionary use of funds could transform project into undertaking). The district court erred in its presumption that only legally required actions by federal agencies can make a project an undertaking. ER-28.

consultation before renewing leases that allowed an energy company to drill for and extract geothermal resources in an area of religious significance to Indian tribes, even though the leases had been previously approved and there had been no change in the character of the project. 469 F.3d at 775–77, 787. Similarly, in this case, the Forest Service violated the NHPA by failing to do a Section 106 consultation before allowing Energy Fuels to resume mining at the Canyon Mine, notwithstanding that the Plan of Operations had been previously approved and Energy Fuels did not propose any change in how it would proceed.

Finally, the Forest Service's failure to conduct a full Section 106 consultation was not cured by the Forest Service's subsequent "consultation" with the Tribe under Section 800.13(b)(3), which was itself a violation of the NHPA, as described below. Section 800.13(b)(3) provides a separate, truncated, and highly expedited process that cannot adequately substitute for a full consultation under Section 106. *Apache Survival Coal.*, 21 F.3d at 911 (recognizing these two processes as distinct). Furthermore, the Forest Service did not even purport to initiate the Section 800.13(b)(3) process until after it had allowed Energy Fuels to resume mining. *See* ER-175-76; ER-225-26; ER-179. This post hoc process could not remedy the Forest Service's failure to do a full Section 106 consultation. *See Pit River Tribe*, 469 F.3d at 787 (finding that agency's failure to consult prior to renewing leases could not be cured by subsequent NHPA review).

B. The Forest Service Also Violated NHPA by Improperly Applying the Emergency Consultation Process of 36 C.F.R. § 800.13(b)(3)

Unlike the detailed process for consulting with Indian tribes set forth in the ordinary Section 106 regulations, *see* 36 C.F.R. §§ 800.3–800.12, Section 800.13(b)(3) provides a highly abbreviated and discretionary consultation process that applies when a historic property is discovered after an undertaking has been approved and construction has commenced, such as when a historic artifact is dug up at a construction site. Among other things, Section 800.13(b)(3) requires the consultation between the agency and the Tribe to be completed within only four days, and it gives the Agency great authority and discretion to "carry out appropriate actions" to resolve adverse effects to the historic property. 36 C.F.R. § 800.13(b)(3). As the district court recognized, the terms of Section 800.13(b)(3) indicate that it was "designed primarily for emergency situations." ER-36. This emergency process may be useful for quickly implementing mitigation measures in situations where the undertaking has already commenced and there is limited time for consultation, but this expedited procedure substantially limits the Tribes' opportunity to provide meaningful input to an agency and does not afford any opportunity for the interested parties to reach an MOA implementing necessary mitigation measures, which is how the ordinary Section 106 process commonly concludes. *See* 36 C.F.R. §§ 800.6(b), 800.6(c). In short, it is not a substitute for the Section 106 process.

In the Mine Review, the Forest Service determined that it was not required to undertake a full Section 106 consultation, but that it could follow the abbreviated consultation process under Section 800.13(b)(3). ER-187-95. The Forest Service acknowledged that Section 800.13(b)(3) is an "emergency measure" intended to protect historic properties discovered "during project implementation," ER-190, but it nonetheless decided to apply this emergency provision to the Canyon Mine, even though there was no emergency, in that mining operations had been dormant for twenty years. The Forest Service did not even decide to apply this provision until ten months after it learned of Energy Fuels' intent to resume mining, further highlighting the absence of any emergency. The ACHP, which promulgated the Section 106 regulations, as well as the Tribe, the AZSHPO, and other tribes all specifically urged the Forest Service to instead conduct a full Section 106 consultation, noting, among other reasons, the need to determine the adverse effects of the mine on the newly-recognized Red Butte TCP, but the Forest Service refused. *See* ER-164; ER-166–67; ER-139–42; ER-289; ER-256–58. The Forest Service's decision to apply Section 800.13(b)(3) constituted a further violation of the NHPA.

Not only was it improper for the Forest Service to apply this provision to the Canyon Mine, the Forest Service did not even initiate the Section 800.13(b)(3) process until after it had allowed mining operations to resume, and it did not

require Energy Fuels to refrain from destructive activities while this process was taking place. The same day that the Forest Service sent letters purporting to initiate the Section 800.13(b)(3) process with the Tribe and the ACHP, *see* ER-175-76; ER-225-26, the Forest Service notified the Regional Forester that "operations at the Canyon Mine may continue." ER-179. This was a clear violation of Section 106's timing requirements. *See* 36 C.F.R. § 800.1(c) (requiring that an agency not restrict its ability to consider means to avoid, minimize, or mitigate adverse effects before completing compliance with Section 106); *see also* 54 U.S.C. § 306108. It was also contrary to the advice of the ACHP, which specifically informed the Forest Service that its Section 106 consultation should be completed prior to the resumption of "destructive activities" at the mine. ER-143–44.

The Forest Service's decision to allow mining to resume before mitigation measures could even be identified, let alone implemented, also demonstrated to the tribes that the agency did not intend to take their concerns and comments about protecting Red Butte TCP seriously. This view among the tribes was compounded by the Forest Service's insistence on applying the abbreviated Section 800.13(b)(3) process notwithstanding that the tribes specifically and repeatedly urged that the agency instead do a full Section 106 consultation. *See* ER-166–67; ER-289; ER-256–58; ER-139–42. The Forest Service's conduct contravened the required

"government-to-government" nature of the consultation process with Indian tribes. 36 C.F.R. § 800.2(c)(2)(ii)(C), and it violated the agency's obligations to make "reasonable and good faith effort[s]" during consultation, *see* 36 C.F.R. §§ 800.2(c)(2)(ii)(A), 800.3(f)(2), 800.4(b)(1).[6]

The Forest Service's stated justification for applying Section 800.13(b)(3) rested on its claim that the undertaking had been "approved" and "construction ha[d] commenced" at the Canyon Mine. ER-189-90.[7] This reading of the regulation was incorrect. As a threshold matter, the Forest Service should not have

[6] The Forest Service's obligation to take seriously the tribes' insistence on a full consultation is further evident from the executive orders and presidential memorandums directing federal agencies to engage in "meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." Memorandum on Tribal Consultation, 74 Fed. Reg. 57881, 57881 (Nov. 5, 2009); *see also* Exec. Order No. 13,175, 65 Fed. Reg. 67249, 67249 (Nov. 6, 2000) (same); Exec. Order No. 13,007, 61 Fed. Reg. 26771, 26771 (May 24, 1996) (directing federal land management agencies, including the Forest Service, to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites). The Forest Service also did not meet its obligation to undertake consultation in a manner consistent with the fiduciary duty that federal agencies owe Indian tribes. *See Pit River Tribe*, 469 F.3d at 788; *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F. Supp. 2d 1104, 1120 (S.D. Cal. 2010).

[7] The district court applied a "highly deferential" standard of review to the Forest Service's decision to apply this provision. ER-32. This was improper because (1) the Forest Service's interpretation of the regulation is a question of law, *see* 5 U.S.C. § 706 ("the reviewing court shall decide all relevant questions of law"); *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009) (heightened deference not appropriate for legal determinations by agencies), (2) the Forest Service is not the agency primarily charged with administering Section 106 of NHPA, *see Karuk Tribe of Cal.*, 681 F.3d at 1017 (*en banc*) (agency's interpretation of statute outside statutes it is charged with administering reviewed *de novo*), and (3) the Forest Service has conceded its unfamiliarity with the applicable regulations, *see, e.g.*, ER-264 ("This is a new process for us and we are learning as we go."); ER-12 ("The Forest Service concedes that the legal understanding of some of its employees was incorrect[.]").

applied the Section 800.13 "[p]ost-review discoveries" portion of the regulations because no new historic properties had been "discovered" at the Canyon Mine. 36 C.F.R. § 800.13(b). The Tribe had informed the Forest Service of the religious and cultural significance of this site decades earlier, and the Forest Service itself acknowledged at a tribal meeting that Section 800.13(b) was "not a great fit" for the situation at the Canyon Mine. *See* ER-460. The more appropriate analysis, as described above, would have been for the Forest Service to determine that its continuing Section 106 consultation obligations had been triggered by its opportunity to require changes to mitigate the adverse impacts of the mine, when it first learned that Energy Fuels wanted to resume operations. *See Apache Survival Coal.*, 21 F.3d at 911 (distinguishing these different sources of Federal agencies' continuing NHPA obligations). Even accepting the Forest Service's erroneous determination that the Section 800.13 "[p]ost-review discoveries" portion of the regulations was applicable, however, the Forest Service should have followed the ACHP's advice and done a full Section 106 consultation under Section 800.13(b)(1), rather than apply the emergency process under 800.13(b)(3). *See*

ER-164.[8]

To the extent there was any ambiguity about the correct interpretation of Section 800.13(b)(3), the ACHP specifically informed the Forest Service that this provision was not applicable to this Canyon Mine situation because "[t]he intent of Section 800.13(b)(3) is to provide *an expedited review process* where construction activities have begun and *would be ongoing*, and thus, the agency has *limited time and opportunity* for consultation." ER-164 (emphasis added). ACHP's interpretation is entitled to deference because ACHP is the agency that promulgated the Section 106 regulations. *See Karuk Tribe of Cal.*, 681 F.3d at 1017 ("we defer to an agency's interpretation of its own regulations").[9] The

[8] Section 800.13(b)(1) demonstrates the preference for a full Section 106 consultation whenever it is feasible. Like Section 800.13(b)(3), Section 800.13(b)(1) applies in situations where "historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process." 36 C.F.R. § 800.13. But Section 800.13(b)(1) provides that when the undertaking has not been approved or if construction has not commenced the agency should undertake a full Section 106 consultation process pursuant to Section 800.6. The regulatory history of Section 800.13(b)(1) shows that ACHP intended this provision, rather than Section 800.13(b)(3), to apply in circumstances that "provide opportunity for [a full] consultation." *See* 64 Fed. Reg. 27044, 27058 (May 18, 1999). The Forest Service plainly had such an opportunity in August, 2011.

[9] *See also Stinson v. United States*, 508 U.S. 36, 45 (1993) ("[P]rovided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (quotation marks omitted); *CTIA–The Wireless Assoc. v. Fed. Communications Comm'n*, 466 F.3d 105, 115–17 (D.C. Cir. 2006) (affirming appropriateness of agency deference to ACHP's interpretation of Section 106); *Sayler Park Vill. Council v. U.S. Army Corps of Eng'rs*, No. C-1-02-832, 2002 WL 32191511, at *6 n.5 (S.D. Ohio, Dec. 30, 2002) (deferring to ACHP's interpretation of Section 106 regulations). The district court declined to accord the ACHP's interpretation of the regulation any deference, however, finding that Section 800.13(b)(3) unambiguously applied to the Canyon Mine, regardless of how long work had been suspended at the mine. ER-34–38. As

history of the regulations further confirms ACHP's view that it was only intended to apply when construction was ongoing. *See, e.g.*, 44 Fed. Reg. 6068, 6077 (Jan. 30, 1979) (provision was previously titled "Resources discovered *during construction*") (emphasis added); 51 Fed. Reg. 31115, 31123 (Sept. 2, 1986) (provision was previously titled "Properties discovered *during implementation* of an undertaking") (emphasis added). Even today, Section 800.13 refers to historic properties discovered "*during the implementation* of an undertaking." 36 C.F.R. § 800.13(a)(1) (discussing programmatic agreements governing post-review discoveries) (emphasis added).

Lastly, the Forest Service's claim that Section 800.13(b)(3) was applicable to the Canyon Mine is further contradicted by the agency's own conduct, which did not comply with *any* of the unique procedural requirements contained in the provision. *See* ER-140. The Forest Service took ten months to even decide that this provision applied, which is entirely inconsistent with the expedited process under Section 800.13(b)(3). *Cf. All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011) (finding Forest Service's determination that an "emergency situation" permitted logging was undermined by agency's two-year

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described above, this interpretation is contrary to the historic-preservation goals of Section 106 and to the express terms of Section 800.13(b)(3), in particular the 48-hour deadlines, which demonstrate that Section 800.13(b)(3) is intended to provide an expedited process for emergencies when there is no time or opportunity for a full consultation.

delay in making the decision). The Forest Service then disregarded the required 48-hour periods for notice and responses, *see* 36 C.F.R. § 800.13(b)(3), waiting ten months after it learned of EFR's intention to resume mining to provide notice to the Tribe and unilaterally extending the Tribe's time to respond to thirty days, *see* ER-176, which further demonstrated that expedited action was not required or appropriate. The Forest Service also did not implement any mitigation measures, even though the regulation directs the agency to "take into account" the actions proposed by the Indian tribes "and then carry out appropriate actions." 36 C.F.R. § 800.13(b)(3). It also did not provide a report on its actions to the Tribe or the ACHP, as it was required to do. *Id*. The Forest Service's failure to follow any of the Section 800.13(b)(3) procedures belies its claims that this process was appropriate for the Canyon Mine situation, and it strongly indicates that this provision was used as a pretense to avoid a full Section 106 consultation with the Tribe.[10]

[10] The Forest Service's evasion of its NHPA consultation obligations was not an anomaly. The Administrative Record revealed a separate incident in which the Forest Service approved a request by EFR to thin trees and burn the slash along 4.8 miles of power line that access the uranium mine without complying with its Section 106 consultation obligations. ER-451. The Forest Service acknowledged that there were seven archeological or historic sites within the power line right-of-way, three of which would be affected by the project, but nonetheless the Forest Service approved the project with minor "mitigation measures" regarding the manner of piling and burning the trees. *Id.* The Forest Service then stated that "this concludes the Section 106 evaluation for this project," even though the Forest Service had not consulted with any of the tribes, the AZSHPO, ACHP or any other potentially interested parties, as Section 106 requires, nor had it considered any potential adverse effects on Red Butte TCP. *Id.* The Forest Service did not even inform the Tribe of the tree-thinning proposal until weeks after the Forest Service

C. The Tribe is Entitled to Injunctive Relief

This Court should issue an injunction prohibiting the resumption of destructive mining activities at the Canyon Mine until the Forest Service fully complies with its obligations under the NHPA. *See Muckleshoot Indian Tribe*, 177 F.3d at 815; *Pit River Tribe*, 469 F.3d at 779; *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988); *Rogue Riverkeeper v. Bean*, No. 1:11-cv-3013-CL, 2013 WL 1785778, at *3 (D. Or. Jan. 23, 2013); *Colo. Envtl. Coal. v. Office of Legacy Mgmt.*, 819 F. Supp. 2d 1193, 1223-24 (D. Colo. 2011). Blasting a 1,400 foot mine shaft into one of the most sacred places in the Havasupai culture and religion has caused, and will continuing to cause, irreparable injury to Red Butte TCP and to the religious, cultural, and historical practices of the Tribe and its members. *See* ER-192–93; ER-130-32; ER-117; ER-354–59; *see also Quechan Tribe of Fort Yuma Indian Reservation*, 755 F. Supp. 2d at 1120. There are no remedies at law that would compensate the Tribe for these injuries, and the Tribe does not seek any monetary relief in this action. ER-101–02. The balance of equities tips sharply in favor of the Tribe because Congress has expressly provided in Section 106 that Federal agencies must comply with NHPA before allowing destructive undertakings to proceed. 54 U.S.C. § 306108. The Forest Service will

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had already approved the project. ER-448. The Forest Service employees who failed to consult with the Tribe for this tree-thinning project were the same employees who failed to consult with the Tribe prior to allowing mining to resume.

not suffer any injury from being required to comply with its statutory obligations, and any injury to Energy Fuels is likely to be minimal, given that the mine has been shut down almost continuously for the past 23 years. An injunction would also serve the public interest by preserving the Nation's historic properties, *see* 16 U.S.C. § 470(b)(4),[11] by ensuring compliance with federal laws and regulations, *see All. for the Wild Rockies*, 632 F.3d at 1138, and by furthering the cultural and historic preservation objectives of the Withdrawal, *see* ER-269–70, 274, 276; *Yount v. Salazar*, No. 11-cv-8171, 2014 WL 4904423, at *19–*20, *25–*26 (D. Ariz. Sept. 30, 2014). The public interest in an injunction is further evident from the numerous letters the Forest Service received from the public expressing opposition to the Canyon Mine. *See, e.g.*, ER-157.

VI. CONCLUSION

Notwithstanding the long and convoluted history of this case, the simple fact remains that in 2012, after taking ten months to undertake a detailed investigation of the terms under which the project could resume, the Forest Service allowed Energy Fuels to resume drilling a 1,400-foot uranium mine on top of one of the most important religious and cultural sites of the Havasupai without consulting

[11] Now cited as Section 1 of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515; *see also* 54 U.S.C. § 300101 ("It is the policy of the Federal Government . . . to . . . administer federally owned, administered, or controlled historic propert[ies] in a spirit of stewardship for the inspiration and benefit of present and future generations").

with the Tribe and without implementing any measures to avoid or mitigate the adverse effects of the mine on a recently recognized historic property. This conduct did not satisfy the Forest Service's consultation obligations to the Tribe, nor did it satisfy the historic protection requirements of the NHPA.

For all of the reasons stated above, the Tribe respectfully requests that the Court reverse the denial of its motion for summary judgment on Claims 2 and 3 of the Amended Complaint and direct that the Forest Service and Energy Fuels be enjoined from authorizing, approving, or engaging in any further mining activity at Canyon Mine until the Forest Service has complied with its NHPA obligations, including its obligation to complete a full Section 106 consultation with the Tribe and other interested parties.

Respectfully submitted,

Dated: September 25, 2015

/s/ Richard W. Hughes

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STATEMENT OF RELATED CASES

The case captioned *Grand Canyon Trust v. Williams*, No. 15-15857, which was consolidated with this case by Order of this Court on June 30, 2015, is an appeal of the same district court decision at issue in this case, filed by the three environmental organization Plaintiffs. The case captioned *Havasupai Tribe v. Williams*, No. 13-16994, was a prior interlocutory appeal in this litigation, which was voluntarily dismissed by the Parties on April 14, 2015.

CERTIFICATE OF COMPLIANCE

I hereby certify on September 25, 2015, that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,796 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, 14 point, Times New Roman.

/s/ Richard W. Hughes
Attorney for Havasupai Tribe

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2015, I electronically filed Plaintiff-Appellant Havasupai Tribe's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard W. Hughes
Attorney for Havasupai Tribe

ADDENDUM

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5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 470(b), now cited as Section 1 of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515

(b) The Congress finds and declares that--

(1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;

(2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(3) historic properties significant to the Nation’s heritage are being lost or substantially altered, often inadvertently, with increasing frequency;

(4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;

(5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;

(6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and

(7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

54 U.S.C. § 300101. Policy

It is the policy of the Federal Government, in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals, to--

(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) provide leadership in the preservation of the historic property of the United States and of the international community of nations and in the administration of the national preservation program;

(3) administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4) contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6) assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust to expand and accelerate their historic preservation programs and activities.

54 U.S.C. § 300320. Undertaking

In this division, the term "undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including--

(1) those carried out by or on behalf of the Federal agency;

(2) those carried out with Federal financial assistance;

(3) those requiring a Federal permit, license, or approval; and

(4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

54 U.S.C. § 302706. Eligibility for inclusion on National Register

(a) In general.--Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

(b) Consultation.--In carrying out its responsibilities under section 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).

(c) Hawaii.--In carrying out responsibilities under section 302303 of this title, the State Historic Preservation Officer for Hawaii shall--

(1) consult with Native Hawaiian organizations in assessing the cultural significance of any property in determining whether to nominate the property to the National Register;

(2) consult with Native Hawaiian organizations in developing the cultural

component of a preservation program or plan for the property; and

(3) enter into a memorandum of understanding or agreement with Native Hawaiian organizations for the assessment of the cultural significance of a property in determining whether to nominate the property to the National Register and to carry out the cultural component of the preservation program or plan.

54 U.S.C. § 306108. Effect of undertaking on historic property

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

36 C.F.R. § 800.1 Purposes.

(a) Purposes of the section 106 process. Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) Relation to other provisions of the act. Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of

access and are not incorporated by reference.

(c) Timing. The agency official must complete the section 106 process "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license." This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

36 C.F.R. § 800.2 Participants in the Section 106 process.

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official 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.

(1) Professional standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) Lead Federal agency. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to

prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) Consultation. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) Council. The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) Council entry into the section 106 process. When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) Council assistance. Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) Consulting parties. The following parties have consultative roles in the section 106 process.

(1) State historic preservation officer.

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In

accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) Indian tribes and Native Hawaiian organizations.

(i) Consultation on tribal lands.

(A) Tribal historic preservation officer. For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) Tribes that have not assumed SHPO functions. When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on

the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to

participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) Applicants for Federal assistance, permits, licenses, and other approvals. An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) The public.

(1) Nature of involvement. The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) Providing notice and information. The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide

the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) Use of agency procedures. The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

36 C.F.R. § 800.3 Initiation of the section 106 process.

(a) Establish undertaking. The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) No potential to cause effects. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) Program alternatives. If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) Coordinate with other reviews. The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) Identify the appropriate SHPO and/or THPO. As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if

so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) Tribal assumption of SHPO responsibilities. Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) Undertakings involving more than one State. If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) Conducting consultation. The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

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

(d) Consultation on tribal lands. Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe’s lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO’s participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) Plan to involve the public. In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) Involving local governments and applicants. The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

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

(3) Requests to be consulting parties. The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) Expediting consultation. A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

36 C.F.R. § 800.4 Identification of historic properties.

(a) Determine scope of identification efforts. In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's

potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) Identify historic properties. Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) Level of effort. The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) Phased identification and evaluation. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background

research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) Evaluate historic significance.

(1) Apply National Register criteria. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) Determine whether a property is eligible. If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) Results of identification and evaluation.

(1) No historic properties affected. If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation

available for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv) (A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has

been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) Historic properties affected. If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

36 C.F.R. § 800.5 Assessment of adverse effects.

(a) Apply criteria of adverse effect. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) Criteria of adverse effect. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) Examples of adverse effects. Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) Phased application of criteria. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) Finding of no adverse effect. The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) Consulting party review. If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) Agreement with, or no objection to, finding. Unless the Council is reviewing the finding pursuant to papagraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) Disagreement with finding.

(i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the

agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) Council review of findings.

(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii) (A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the

consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) Results of assessment.

(1) No adverse effect. The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) Adverse effect. If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

36 C.F.R. § 800.6 Resolution of adverse effects.

(a) Continue consultation. The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.

(1) Notify the Council and determine Council participation. The agency official shall notify the Council of the adverse effect finding by providing the documentation specified in § 800.11(e).

(i) The notice shall invite the Council to participate in the consultation when:

(A) The agency official wants the Council to participate;

(B) The undertaking has an adverse effect upon a National Historic Landmark; or

(C) A programmatic agreement under § 800.14(b) will be prepared;

(ii) The SHPO/THPO, an Indian tribe or Native Hawaiian organization, or any other consulting party may at any time independently request the Council to participate in the consultation.

(iii) The Council shall advise the agency official and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council shall provide written notice to the agency official and the consulting parties that its decision to participate meets the criteria set forth in appendix A to this part. The Council shall also advise the head of the agency of its decision to enter the process. Consultation with Council participation is conducted in accordance with paragraph (b)(2) of this section.

(iv) If the Council does not join the consultation, the agency official shall proceed with consultation in accordance with paragraph (b)(1) of this section.

(2) Involve consulting parties. In addition to the consulting parties identified under § 800.3(f), the agency official, the SHPO/THPO and the Council, if participating, may agree to invite other individuals or organizations to become consulting parties. The agency official shall invite any individual or organization that will assume a specific role or responsibility in a memorandum of agreement to participate as a consulting party.

(3) Provide documentation. The agency official shall provide to all consulting parties the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c), and such other documentation as may be developed during the consultation to resolve adverse effects.

(4) Involve the public. The agency official shall make information available to the public, including the documentation specified in § 800.11(e), subject to the confidentiality provisions of § 800.11(c). The agency official shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking. The agency official should use appropriate mechanisms, taking into account the magnitude of the undertaking and the nature of its effects upon historic properties, the likely effects on historic properties, and the relationship of the Federal involvement to the undertaking to ensure that the public's views are considered in the consultation. The agency official should also consider the extent of notice and information concerning historic preservation issues afforded the public at earlier steps in the section 106 process to determine the appropriate level of public involvement when resolving adverse effects so that the standards of § 800.2(d) are met.

(5) Restrictions on disclosure of information. Section 304 of the act and other authorities may limit the disclosure of information under paragraphs (a)(3) and (a)(4) of this section. If an Indian tribe or Native Hawaiian organization objects to the disclosure of information or if the agency official believes that there are other reasons to withhold information, the agency official shall comply with § 800.11(c) regarding the disclosure of such information.

(b) Resolve adverse effects.

(1) Resolution without the Council.

(i) The agency official shall consult with the SHPO/THPO and other consulting parties to seek ways to avoid, minimize or mitigate the adverse effects.

(ii) The agency official may use standard treatments established by the Council under § 800.14(d) as a basis for a memorandum of agreement.

(iii) If the Council decides to join the consultation, the agency official shall follow paragraph (b)(2) of this section.

(iv) If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement. The agency official must submit a copy of the executed memorandum of agreement, along with the documentation specified in § 800.11(f), to the Council prior to approving the undertaking in order to meet the requirements of section 106 and this subpart.

(v) If the agency official, and the SHPO/THPO fail to agree on the terms of a memorandum of agreement, the agency official shall request the Council to join the consultation and provide the Council with the documentation set forth in § 800.11(g). If the Council decides to join the consultation, the agency official shall proceed in accordance with paragraph (b)(2) of this section. If the Council decides not to join the consultation, the Council will notify the agency and proceed to comment in accordance with § 800.7(c).

(2) Resolution with Council participation. If the Council decides to participate in the consultation, the agency official shall consult with the SHPO/THPO, the Council, and other consulting parties, including Indian tribes and Native Hawaiian organizations under § 800.2(c)(3), to seek ways to avoid, minimize or mitigate the adverse effects. If the agency official, the SHPO/THPO, and the Council agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.

(c) Memorandum of agreement. A memorandum of agreement executed and implemented pursuant to this section evidences the agency official’s compliance

with section 106 and this part and shall govern the undertaking and all of its parts. The agency official shall ensure that the undertaking is carried out in accordance with the memorandum of agreement.

(1) Signatories. The signatories have sole authority to execute, amend or terminate the agreement in accordance with this subpart.

(i) The agency official and the SHPO/THPO are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(1) of this section.

(ii) The agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section.

(iii) The agency official and the Council are signatories to a memorandum of agreement executed pursuant to § 800.7(a)(2).

(2) Invited signatories.

(i) The agency official may invite additional parties to be signatories to a memorandum of agreement. Any such party that signs the memorandum of agreement shall have the same rights with regard to seeking amendment or termination of the memorandum of agreement as other signatories.

(ii) The agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties.

(iii) The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.

(iv) The refusal of any party invited to become a signatory to a memorandum of agreement pursuant to paragraph (c)(2) of this section does not invalidate the memorandum of agreement.

(3) Concurrence by others. The agency official may invite all consulting parties to concur in the memorandum of agreement. The signatories may agree to invite others to concur. The refusal of any party invited to concur in the memorandum of agreement does not invalidate the memorandum of agreement.

(4) Reports on implementation. Where the signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on its implementation.

(5) Duration. A memorandum of agreement shall include provisions for termination and for reconsideration of terms if the undertaking has not been

implemented within a specified time.

(6) Discoveries. Where the signatories agree it is appropriate, a memorandum of agreement shall include provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking.

(7) Amendments. The signatories to a memorandum of agreement may amend it. If the Council was not a signatory to the original agreement and the signatories execute an amended agreement, the agency official shall file it with the Council.

(8) Termination. If any signatory determines that the terms of a memorandum of agreement cannot be or are not being carried out, the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it. The agency official shall either execute a memorandum of agreement with signatories under paragraph (c)(1) of this section or request the comments of the Council under § 800.7(a).

(9) Copies. The agency official shall provide each consulting party with a copy of any memorandum of agreement executed pursuant to this subpart.

36 C.F.R. § 800.7 Failure to resolve adverse effects.

(a) Termination of consultation. After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation. Any party that terminates consultation shall notify the other consulting parties and provide them the reasons for terminating in writing.

(1) If the agency official terminates consultation, the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities shall request that the Council comment pursuant to paragraph (c) of this section and shall notify all consulting parties of the request.

(2) If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.

(3) If a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on its tribal lands, the Council shall comment pursuant to paragraph (c) of this section.

(4) If the Council terminates consultation, the Council shall notify the agency official, the agency's Federal preservation officer and all consulting parties

of the termination and comment under paragraph (c) of this section. The Council may consult with the agency's Federal preservation officer prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties.

(b) Comments without termination. The Council may determine that it is appropriate to provide additional advisory comments upon an undertaking for which a memorandum of agreement will be executed. The Council shall provide them to the agency official when it executes the memorandum of agreement.

(c) Comments by the Council.

(1) Preparation. The Council shall provide an opportunity for the agency official, all consulting parties, and the public to provide their views within the time frame for developing its comments. Upon request of the Council, the agency official shall provide additional existing information concerning the undertaking and assist the Council in arranging an onsite inspection and an opportunity for public participation.

(2) Timing. The Council shall transmit its comments within 45 days of receipt of a request under paragraph (a)(1) or (a)(3) of this section or § 800.8(c)(3), or termination by the Council under § 800.6(b)(1)(v) or paragraph (a)(4) of this section, unless otherwise agreed to by the agency official.

(3) Transmittal. The Council shall provide its comments to the head of the agency requesting comment with copies to the agency official, the agency's Federal preservation officer, all consulting parties, and others as appropriate.

(4) Response to Council comment. The head of the agency shall take into account the Council's comments in reaching a final decision on the undertaking. Section 110(l) of the act directs that the head of the agency shall document this decision and may not delegate his or her responsibilities pursuant to section 106. Documenting the agency head's decision shall include:

(i) Preparing a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments and providing it to the Council prior to approval of the undertaking;

(ii) Providing a copy of the summary to all consulting parties; and

(iii) Notifying the public and making the record available for public inspection.

36 C.F.R. § 800.8 Coordination With the National Environmental Policy Act.

(a) General principles.

(1) Early coordination. Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner. The determination of whether an undertaking is a "major Federal action significantly affecting the quality of the human environment," and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties. A finding of adverse effect on a historic property does not necessarily require an EIS under NEPA.

(2) Consulting party roles. SHPO/THPOs, Indian tribes, and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) Inclusion of historic preservation issues. Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.

(b) Actions categorically excluded under NEPA. If a project, activity or program is categorically excluded from NEPA review under an agency's NEPA procedures, the agency official shall determine if it still qualifies as an undertaking requiring review under section 106 pursuant to § 800.3(a). If so, the agency official shall proceed with section 106 review in accordance with the procedures in this subpart.

(c) Use of the NEPA process for section 106 purposes. An agency official may use the process and documentation required for the preparation of an EA/FONSI or an EIS/ROD to comply with section 106 in lieu of the procedures set forth in §§ 800.3 through 800.6 if the agency official has notified in advance the SHPO/THPO and the Council that it intends to do so and the following standards are met.

(1) Standards for developing environmental documents to comply with Section 106. During preparation of the EA or draft EIS (DEIS) the agency official

shall:

(i) Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f);

(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5, provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors;

(iii) Consult regarding the effects of the undertaking on historic properties 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;

(iv) Involve the public in accordance with the agency's published NEPA procedures; and

(v) 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.

(2) Review of environmental documents.

(i) The agency official shall submit the EA, DEIS, or EIS to the SHPO/THPO, Indian tribes, and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, and other consulting parties prior to or when making the document available for public comment. If the document being prepared is a DEIS or EIS, the agency official shall also submit it to the Council.

(ii) Prior to or within the time allowed for public comment on the document, a SHPO/THPO, an Indian tribe or Native Hawaiian organization, another consulting party or the Council may object to the agency official that preparation of the EA, DEIS, or EIS has not met the standards set forth in paragraph (c)(1) of this section or that the substantive resolution of the effects on historic properties proposed in an EA, DEIS, or EIS is inadequate. If the agency official receives such an objection, the agency official shall refer the matter to the Council.

(3) Resolution of objections. Within 30 days of the agency official's referral

of an objection under paragraph (c)(2)(ii) of this section, the Council shall review the objection and notify the agency as to its opinion on the objection.

(i) If the Council agrees with the objection:

(A) The Council shall provide the agency official and, if the Council determines the issue warrants it, the head of the agency with the Council's opinion regarding the objection. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the issue of the objection.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council. The head of the agency may delegate his or her duties under this paragraph to the agency's senior Policy Official. If the agency official's initial decision regarding the matter that is the subject of the objection will be revised, the agency official shall proceed in accordance with the revised decision. If the final decision of the agency is to affirm the initial agency decision, once the summary of the final decision has been sent to the Council, the agency official shall continue its compliance with this section.

(ii) If the Council disagrees with the objection, the Council shall so notify the agency official, in which case the agency official shall continue its compliance with this section.

(iii) If the Council fails to respond to the objection within the 30 day period, the agency official shall continue its compliance with this section.

(4) Approval of the undertaking. If the agency official has found, during the preparation of an EA or EIS that the effects of an undertaking on historic properties are adverse, the agency official shall develop measures in the EA, DEIS, or EIS to avoid, minimize, or mitigate such effects in accordance with paragraph (c)(1)(v) of this section. The agency official's responsibilities under section 106 and the procedures in this subpart shall then be satisfied when either:

(i) A binding commitment to such proposed measures is incorporated in:

(A) The ROD, if such measures were proposed in a DEIS or EIS; or

(B) An MOA drafted in compliance with § 800.6(c); or

(ii) The Council has commented under § 800.7 and received the agency's response to such comments.

(5) Modification of the undertaking. If the undertaking is modified after approval of the FONSI or the ROD in a manner that changes the undertaking or alters its effects on historic properties, or if the agency official fails to ensure that the measures to avoid, minimize or mitigate adverse effects (as specified in either the FONSI or the ROD, or in the binding commitment adopted pursuant to paragraph (c)(4) of this section) are carried out, the agency official shall notify the Council and all consulting parties that supplemental environmental documents will be prepared in compliance with NEPA or that the procedures in §§ 800.3 through 800.6 will be followed as necessary.

36 C.F.R. § 800.9 Council review of section 106 compliance.

(a) Assessment of agency official compliance for individual undertakings. The Council may provide to the agency official its advisory opinion regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance with the procedures under this part. The Council may provide such advice at any time at the request of any individual, agency or organization or on its own initiative. The agency official shall consider the views of the Council in reaching a decision on the matter in question.

(b) Agency foreclosure of the Council's opportunity to comment. Where an agency official has failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of an undertaking, the Council's opportunity to comment may be foreclosed. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the agency official and the agency's Federal preservation officer and allow 30 days for the agency official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the agency official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties.

(c) Intentional adverse effects by applicants.

(1) Agency responsibility. Section 110(k) of the act prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant

adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. Guidance issued by the Secretary pursuant to section 110 of the act governs its implementation.

(2) Consultation with the Council. When an agency official determines, based on the actions of an applicant, that section 110(k) is applicable and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property. This documentation shall include any views obtained from the applicant, SHPO/THPO, an Indian tribe if the undertaking occurs on or affects historic properties on tribal lands, and other parties known to be interested in the undertaking.

(i) Within thirty days of receiving the agency official's notification, unless otherwise agreed to by the agency official, the Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects.

(ii) The agency official shall consider the Council's opinion in making a decision on whether to grant assistance to the applicant, and shall notify the Council, the SHPO/THPO, and other parties known to be interested in the undertaking prior to granting the assistance.

(3) Compliance with Section 106. If an agency official, after consulting with the Council, determines to grant the assistance, the agency official shall comply with §§ 800.3 through 800.6 to take into account the effects of the undertaking on any historic properties.

(d) Evaluation of Section 106 operations. The Council may evaluate the operation of the section 106 process by periodic reviews of how participants have fulfilled their legal responsibilities and how effectively the outcomes reached advance the purposes of the act.

(1) Information from participants. Section 203 of the act authorizes the Council to obtain information from Federal agencies necessary to conduct evaluation of the section 106 process. The agency official shall make documentation of agency policies, operating procedures and actions taken to comply with section 106 available to the Council upon request. The Council may request available information and documentation from other participants in the section 106 process.

(2) Improving the operation of section 106. Based upon any evaluation of

the section 106 process, the Council may make recommendations to participants, the heads of Federal agencies, and the Secretary of actions to improve the efficiency and effectiveness of the process. Where the Council determines that an agency official or a SHPO/THPO has failed to properly carry out the responsibilities assigned under the process in this part, the Council may participate in individual case reviews conducted under such process in addition to the SHPO/THPO for such period that it determines is necessary to improve performance or correct deficiencies. If the Council finds a pattern of failure by a Federal agency in carrying out its responsibilities under section 106, the Council may review the policies and programs of the agency related to historic preservation pursuant to section 202(a)(6) of the act and recommend methods to improve the effectiveness, coordination, and consistency of those policies and programs with section 106.

36 C.F.R. § 800.10 Special requirements for protecting National Historic Landmarks.

(a) Statutory requirement. Section 110(f) of the act requires that the agency official, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to any National Historic Landmark that may be directly and adversely affected by an undertaking. When commenting on such undertakings, the Council shall use the process set forth in §§ 800.6 through 800.7 and give special consideration to protecting National Historic Landmarks as specified in this section.

(b) Resolution of adverse effects. The agency official shall request the Council to participate in any consultation to resolve adverse effects on National Historic Landmarks conducted under § 800.6.

(c) Involvement of the Secretary. The agency official shall notify the Secretary of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect. The Council may request a report from the Secretary under section 213 of the act to assist in the consultation.

(d) Report of outcome. When the Council participates in consultation under this section, it shall report the outcome of the section 106 process, providing its written comments or any memoranda of agreement to which it is a signatory, to the Secretary and the head of the agency responsible for the undertaking.

36 C.F.R. § 800.11 Documentation standards.

(a) Adequacy of documentation. The agency official shall ensure that a determination, finding, or agreement under the procedures in this subpart is supported by sufficient documentation to enable any reviewing parties to understand its basis. The agency official shall provide such documentation to the extent permitted by law and within available funds. When an agency official is conducting phased identification or evaluation under this subpart, the documentation standards regarding description of historic properties may be applied flexibly. If the Council, or the SHPO/THPO when the Council is not involved, determines the applicable documentation standards are not met, the Council or the SHPO/THPO, as appropriate, shall notify the agency official and specify the information needed to meet the standard. At the request of the agency official or any of the consulting parties, the Council shall review any disputes over whether documentation standards are met and provide its views to the agency official and the consulting parties.

(b) Format. The agency official may use documentation prepared to comply with other laws to fulfill the requirements of the procedures in this subpart, if that documentation meets the standards of this section.

(c) Confidentiality.

(1) Authority to withhold information. Section 304 of the act provides that the head of a Federal agency or other public official receiving grant assistance pursuant to the act, after consultation with the Secretary, shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners. When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.

(2) Consultation with the Council. When the information in question has been developed in the course of an agency's compliance with this part, the Secretary shall consult with the Council in reaching determinations on the withholding and release of information. The Federal agency shall provide the Council with available information, including views of the SHPO/THPO, Indian tribes and Native Hawaiian organizations, related to the confidentiality concern.

The Council shall advise the Secretary and the Federal agency within 30 days of receipt of adequate documentation.

(3) Other authorities affecting confidentiality. Other Federal laws and program requirements may limit public access to information concerning an undertaking and its effects on historic properties. Where applicable, those authorities shall govern public access to information developed in the section 106 process and may authorize the agency official to protect the privacy of non-governmental applicants.

(d) Finding of no historic properties affected. Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, drawings, as necessary;

(2) A description of the steps taken to identify historic properties, including, as appropriate, efforts to seek information pursuant to § 800.4(b); and

(3) The basis for determining that no historic properties are present or affected.

(e) Finding of no adverse effect or adverse effect. Documentation shall include:

(1) A description of the undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary;

(2) A description of the steps taken to identify historic properties;

(3) A description of the affected historic properties, including information on the characteristics that qualify them for the National Register;

(4) A description of the undertaking's effects on historic properties;

(5) An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effects; and

(6) Copies or summaries of any views provided by consulting parties and the public.

(f) Memorandum of agreement. When a memorandum of agreement is filed with the Council, the documentation shall include, any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1), an evaluation of any measures considered to avoid or minimize the undertaking's adverse effects and a summary of the views of consulting parties and the public.

(g) Requests for comment without a memorandum of agreement. Documentation

shall include:

(1) A description and evaluation of any alternatives or mitigation measures that the agency official proposes to resolve the undertaking's adverse effects;

(2) A description of any reasonable alternatives or mitigation measures that were considered but not chosen, and the reasons for their rejection;

(3) Copies or summaries of any views submitted to the agency official concerning the adverse effects of the undertaking on historic properties and alternatives to reduce or avoid those effects; and

(4) Any substantive revisions or additions to the documentation provided the Council pursuant to § 800.6(a)(1).

36 C.F.R. § 800.12 Emergency situations.

(a) Agency procedures. The agency official, in consultation with the appropriate SHPOs/THPOs, affected Indian tribes and Native Hawaiian organizations, and the Council, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or which respond to other immediate threats to life or property. If approved by the Council, the procedures shall govern the agency's historic preservation responsibilities during any disaster or emergency in lieu of §§ 800.3 through 800.6.

(b) Alternatives to agency procedures. In the event an agency official proposes an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property, and the agency has not developed procedures pursuant to paragraph (a) of this section, the agency official may comply with section 106 by:

(1) Following a programmatic agreement developed pursuant to § 800.14(b) that contains specific provisions for dealing with historic properties in emergency situations; or

(2) Notifying the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

(c) Local governments responsible for section 106 compliance. When a local government official serves as the agency official for section 106 compliance, paragraphs (a) and (b) of this section also apply to an imminent threat to public health or safety as a result of a natural disaster or emergency declared by a local government's chief executive officer or legislative body, provided that if the Council or SHPO/THPO objects to the proposed action within seven days, the agency official shall comply with §§ 800.3 through 800.6.

(d) Applicability. This section applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. An agency may request an extension of the period of applicability from the Council prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of section 106 and this part.

36 C.F.R. § 800.13 Post-review discoveries.

(a) Planning for subsequent discoveries.

(1) Using a programmatic agreement. An agency official may develop a programmatic agreement pursuant to § 800.14(b) to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking.

(2) Using agreement documents. When the agency official's identification efforts in accordance with § 800.4 indicate that historic properties are likely to be discovered during implementation of an undertaking and no programmatic agreement has been developed pursuant to paragraph (a)(1) of this section, the agency official shall include in any finding of no adverse effect or memorandum of agreement a process to resolve any adverse effects upon such properties. Actions in conformance with the process satisfy the agency official's responsibilities under section 106 and this part.

(b) Discoveries without prior planning. If historic properties are discovered or unanticipated effects on historic properties found after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section, the agency official shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties and:

(1) If the agency official has not approved the undertaking or if construction on an approved undertaking has not commenced, consult to resolve adverse effects pursuant to § 800.6; or

(2) If the agency official, the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property agree that such property is of value solely for its scientific, prehistoric, historic or archeological data, the agency official may comply with the Archeological and Historic Preservation Act instead of the procedures in this part and provide the Council, the SHPO/THPO, and the Indian tribe or Native Hawaiian organization with a report on the actions within a reasonable time after they are completed; or

(3) If the agency official has approved the undertaking and construction has commenced, determine actions that the agency official can take to resolve adverse effects, and notify the SHPO/THPO, any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to the affected property, and the Council within 48 hours of the discovery. The notification shall describe the agency official's assessment of National Register eligibility of the property and proposed actions to resolve the adverse effects. The SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council shall respond within 48 hours of the notification. The agency official shall take into account their recommendations regarding National Register eligibility and proposed actions, and then carry out appropriate actions. The agency official shall provide the SHPO/THPO, the Indian tribe or Native Hawaiian organization and the Council a report of the actions when they are completed.

(c) Eligibility of properties. The agency official, in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property's eligibility so that information can be used in the resolution of adverse effects.

(d) Discoveries on tribal lands. If historic properties are discovered on tribal lands, or there are unanticipated effects on historic properties found on tribal lands, after the agency official has completed the section 106 process without establishing a process under paragraph (a) of this section and construction has commenced, the agency official shall comply with applicable tribal regulations and procedures and obtain the concurrence of the Indian tribe on the proposed action.

36 C.F.R. 800.16 Definitions.

(a) Act means the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470–470w–6.

(b) Agency means agency as defined in 5 U.S.C. 551.

(c) Approval of the expenditure of funds means any final agency decision authorizing or permitting the expenditure of Federal funds or financial assistance on an undertaking, including any agency decision that may be subject to an administrative appeal.

(d) Area of potential effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

(e) Comment means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.

(g) Council means the Advisory Council on Historic Preservation or a Council member or employee designated to act for the Council.

(h) Day or days means calendar days.

(i) Effect means alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.

(j) Foreclosure means an action taken by an agency official that effectively precludes the Council from providing comments which the agency official can meaningfully consider prior to the approval of the undertaking.

(k) Head of the agency means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency.

(l) (1) Historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term eligible for inclusion in the National Register includes both

properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

(m) Indian tribe means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(n) Local government means a city, county, parish, township, municipality, borough, or other general purpose political subdivision of a State.

(o) Memorandum of agreement means the document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.

(p) National Historic Landmark means a historic property that the Secretary of the Interior has designated a National Historic Landmark.

(q) National Register means the National Register of Historic Places maintained by the Secretary of the Interior.

(r) National Register criteria means the criteria established by the Secretary of the Interior for use in evaluating the eligibility of properties for the National Register (36 CFR part 60).

(s) (1) Native Hawaiian organization means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

(2) Native Hawaiian means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(t) Programmatic agreement means a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations in accordance with § 800.14(b).

(u) Secretary means the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.

(v) State Historic Preservation Officer (SHPO) means the official appointed or designated pursuant to section 101(b)(1) of the act to administer the State historic preservation program or a representative designated to act for the State historic preservation officer.

(w) Tribal Historic Preservation Officer (THPO) means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

(x) Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

(y) Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

(z) Senior policy official means the senior policy level official designated by the head of the agency pursuant to section 3(e) of Executive Order 13287.