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Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review

S. Rheagan Alexander*

I. Introduction

This year marks the twentieth anniversary of mandatory consultation with Native American tribes under the National Historic Preservation Act of 1966 ("NHPA").[1] The NHPA is the premier land management tool for historic properties that may be affected by construction on federal lands, among other things. Interestingly, the two decades since the implementation of NHPA tribal consultation have also seen a rapid increase in the type of activities the law was designed to mitigate. American cities are becoming more populous and suburbs are expanding into previously unoccupied areas. Federal, state, and local planners are interested in more efficient conventional energy resources, as well as renewable sources of power. All of these alterations to the landscape require vast amounts of infrastructure. As a result, tribal consultation under the NHPA has become a common tool for federal land use planning. However, the same factors have diminished the utility of the NHPA process to serve tribal interests.

Following an overview of the origin and specific requirements of tribal consultation under the NHPA, this Article will attempt to evaluate its effectiveness in the setting of large-scale energy, industrial, and infrastructure projects. Then, the discussion will present alternative practical solutions that may improve the effectiveness of the traditional NHPA tribal consultation model.

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1. 16 U.S.C. § 470 (2006).

A. *History and Purpose of the NHPA*

The NHPA provides an "extensive system of protection for cultural and historic resources."[2] It was enacted by Congress in 1966 in order to protect and enhance "the heritage information that is inherent in our prehistoric and historic resources" and it serves to "tie us to the lessons and achievements of the past."[3] These goals are supported by the federal policy of administering "federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations."[4] During the forty-five years since its enactment, the NHPA has become the central piece of legislation prompting assessment of archaeological sites and historic buildings ahead of development.

On the most basic level, the NHPA requires that federal agents consider the potential impact of federal projects on historic properties. The NHPA establishes a primary administrative body—the Advisory Council on Historic Preservation ("ACHP").[5] The ACHP, composed of twenty appointed members, has the primary responsibility for encouraging efforts on all levels of government for the preservation of cultural resources.[6] The purpose of the ACHP is to "consult with federal agencies regarding the possible effects of their actions . . . on historic properties . . . ."[7]

In addition, the NHPA sets up the main planning tool of historic preservation—a list known as the National Register of Historic Places ("NRHP").[8] The NRHP is a federal registry

2. Emily Monteith, Comment, *Lost in Translation: Discerning the International Equivalent of the National Register of Historic Places*, 59 DEPAUL L. REV. 1017, 1018 (2010).

3. H.R. REP. NO. 96-1457, at 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6378, 6384.

4. 16 U.S.C. § 470-1(3) (2006).

5. 16 U.S.C. § 470i (2006) (establishing the ACHP).

6. 16 U.S.C. § 470j (2006).

7. Donald Dworsky et al., *An Overview of Federal Preservation Law*, *in* A HANDBOOK ON HISTORIC PRESERVATION LAW 193, 194 (Christopher J. Duerksen ed., 1983).

8. 16 U.S.C. § 470a(a)(1)(A) (2006).

overseen by the National Park Service,[9] containing historic properties that have been evaluated and nominated based on a specific set of criteria.[10] Properties listed on the NRHP have been determined to be "significant in American history, architecture, archaeology, engineering, and culture."[11]

B. *The Basic Mechanism of the NHPA*

A portion of the NHP—referred to by historic preservation practitioners as Section 106—outlines a step-by-step review process for identifying, evaluating, and mitigating potential damage to historic properties.[12] Under Section 106, the federal agencies that have jurisdiction over a proposed federal or federally-assisted undertaking must consider the effect of the undertaking on districts, sites, building, structures, or objects that are included in or are eligible for inclusion in the National Register of Historic Places. This consideration may be summarized in three basic steps.[13] First, the federal agency

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9. THE NATIONAL REGISTER OF HISTORIC PLACES, http://www.nps.gov/nr/faq.htm#nr (last visited Sept. 20, 2011).

10. The criteria for evaluation and nomination are as follows:

> The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and
>
> (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
>
> (b) that are associated with the lives of persons significant in our past; or
>
> (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
>
> (d) that have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R. § 60.4 (2011).

11. 16 U.S.C. § 470a(a)(1)(A) (2006).

12. 16 U.S.C. § 470f (2006); *see also* 36 C.F.R. §§ 800.3–800.13 (2011) (describing the process in detail).

13. *See* Kelly Kritzer, Note, *Upper Klamath Lake and the Section 106 Process: Undertakings, Areas of Potential Effect, and Federal Responsibility*,

must determine whether an "undertaking" is involved.[14] If so, the federal agency must attempt to identify and evaluate historic properties within the area of potential effect for the undertaking.[15] This step is accomplished through consultation with State Historic Preservation Offices and Native American tribes. Finally, the federal agency must act to mitigate any adverse effects to historic properties.[16]

II. Tribal Consultation in the NHPA

In summary, the basic mechanism for protecting historic properties involves considering whether any properties in the path of planned development meet the criteria established by the NRHP, then following the mitigation process established by Section 106. Generally, this process takes place along with the planned development, and its three basic steps coordinate with the various phases of the federal undertaking. Tribes are mandatory consulting parties to the Section 106 process, and may become involved electively when significant historic properties may be affected by the undertaking.[17]

The role of tribes in the Section 106 process grants significant power within this "extensive system of protection."[18] Tribal decision-makers have the ability to validate or invalidate property evaluations, to establish standard methods for addressing important tribal resources, to plan for current and future land use, and to steer the course of large-scale development in or near their communities. These actions affect policy on the tribal, federal, state, and local levels, and add to the complex set of relationships tribes have with outside groups. This role was only very recently created and assumed, following important social changes, administrative actions, and

39 WILLAMETTE L. REV. 759, 767 (2003).

14. 36 C.F.R. § 800.3 (2011).

15. 36 C.F.R. § 800.4 (2011).

16. *Id.* As with many areas of administrative law, definitions and court interpretations of many of the terms used to describe the Section 106 process are pivotal to proper implementation of the NHPA.

17. Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 553 (8th Cir. 2003).

18. Monteith, *supra* note 2, at 1018.

amendments to the NHPA itself.[19]

About thirty years ago, following a series of cultural shifts, United States government bodies became aware of the need to consider the cultural and religious interests of Native Americans in land management decisions.[20] The late 1970s were characterized by growing Native American concern over the lack of legal protection and public awareness for their religious practices and freedoms.[21] Native American groups lobbied Congress for greater protections for archaeological artifacts and sites, as well as active cultural and religious practices.[22] Congress responded to these pressure groups with the passage of the American Indian Religious Freedom Act of 1978 ("AIRFA").[23] In part, AIRFA enunciated a policy of Native American self-determination and free exercise that was centered on access to particular sites on the landscape.[24] AIRFA became the catalyst for progressive legislative efforts, court decisions, and social movements that eventually affected Native American communities in a variety of beneficial ways.[25]

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19. This formative process included the 1978 passage of the American Indian Religious Freedom Act, a 1990 National Park Service publication establishing Traditional Cultural Properties, and 1992 amendments to NHPA requiring consultation with Native American tribes, all discussed *infra*.

20. PETER NABOKOV, WHERE THE LIGHTNING STRIKES: THE LIVES OF AMERICAN INDIAN SACRED PLACES xv-xvii (2006). Many commentators place the origin of this type of thought at the time Jimmy Carter signed the American Indian Religious Freedom Act on August 28, 1978. *Id.* at xv.

21. Marilyn Phelan, *A History and Analysis of Laws Protecting Native American Cultures*, 45 TULSA L. REV. 45, 51-52 (2009).

22. *Id.* at 52.

23. 42 U.S.C. § 1996 (2006). AIRFA provided, in part, that:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Id.

24. *See* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 830 (1997).

25. *See id.*

Following the passage of AIRFA, Native American concerns in the public eye shifted from purely "political and economic" to "cultural once again."[26] AIRFA laid the foundation for the current role tribes have in the Section 106 process, because it immediately preceded a pivotal document from the National Park Service,[27] and then amendments to the NHPA itself.[28] In this way, AIRFA was the catalyst that eventually brought Native American interests to the forefront of federal land management for historic properties.

A. *Interpretation: The 1990 Bulletin on Traditional Cultural Properties*

In 1990, the National Park Service issued National Register Bulletin 38—a set of guidelines for identifying and evaluating historic properties designated as "traditional cultural properties."[29] In addition to the four established criteria for evaluating and nominating historic properties to the NRHP,[30] the bulletin recommended this category of properties, whose eligibility depends upon traditional cultural significance. Bulletin 38 defined traditional cultural significance as that which is "derived from the role the property plays in a community's historically rooted beliefs, customs, and practices."[31] Therefore, a traditional cultural property is "one . .

26. NABOKOV, *supra* note 20, at xv. Nabokov gives several examples of cultural battles prompted by AIRFA's passage: repatriation of museum-curated artifacts belonging to the Iroquois and certain California tribes, disposition of tribal land appropriated from Taos Pueblo and the Lakota, prohibitions on the traditional hunting practices of native Alaskans, penalties for possession of sacramental peyote by Native American Church members, public school dress codes that forbade traditional hair styles, and prison regulations that forbade traditional prayer practices. *Id.*

27. PATRICIA L. PARKER & THOMAS F. KING, NAT'L PARK SERV., NAT'L REG. BULL. 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (rev. ed. 1998), *available at* www.nps.gov/history/nr/publications/bulletins/nrb38.

28. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, tit. XL, sec. 4006(a)(2), § 470a, 106 Stat. 4600, 4755-57 (1992). *See also* 64 Fed. Reg. 27,044 (May 18, 1999), republished 65 Fed. Reg. 77,698 (Dec. 12, 2000) (to be codified at 36 C.F.R. pt. 800).

29. PARKER & KING, *supra* note 27, at 5.

30. 36 C.F.R. § 60.4 (2011).

31. PARKER & KING, *supra* note 27, at 1. Bulletin 38 provided the

. eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community."[32]

Bulletin 38 and the recognition that traditional cultural properties were eligible for the NRHP were significant milestones in the development of NHPA tribal consultation. First of all, the bulletin specifically referenced tribal interests by noting that the publication was "meant to assist . . . Indian Tribes, and other historic preservation practitioners who need to evaluate such properties . . . ."[33] Furthermore, Bulletin 38 was purposefully designed to be "responsive" to AIRFA, in order to bring historic properties of religious significance to Native Americans within the protective reach of the NHPA.[34] According to the authors of the bulletin, such properties might otherwise be destroyed by development, "infringing upon the rights of Native Americans to use them in the free exercise of their religions."[35]

Perhaps most importantly, Bulletin 38 was the first organized recommendation that historic preservationists

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following examples of properties with traditional cultural significance:

> [A] location associated with the traditional beliefs of a Native American group about its origins, its cultural history, or the nature of the world;
>
> [A] rural community whose organization, buildings and structures, or patterns of land use reflect the cultural traditions valued by its long-term residents;
>
> [A]n urban neighborhood that is the traditional home of a particular cultural group, and that reflects its beliefs and practices;
>
> [A] location where Native American religious practitioners have historically gone, and are known or thought to go today, to perform ceremonial activities in accordance with traditional cultural rules of practice; and
>
> [A] location where a community has traditionally carried out economic, artistic, or other cultural practices important in maintaining its historic identity.

Id.

32. *Id.*
33. *Id.* at 2.
34. *Id.* at 2-3.
35. *Id.* at 3.

"*consult* with groups and individuals who have special knowledge about and interests in the history and culture of the area to be studied."[36] The bulletin suggested practitioners plan early, conduct background research, contact affected communities directly, carry out detailed fieldwork and recordation, and strive for culturally appropriate and sensitive consultation.[37]

In effect, the procedures described in Bulletin 38 necessitated consultation and close cooperation with Native American groups. This publication was a natural predecessor to the more formal tribal consultation requirements created by amendments to the NHPA just two years later.

B. *Amendment: The 1992 Amendments to the NHPA*

In 1992, the NHPA was amended to require consultation with Native American tribes.[38] Specifically, legislators inserted subsection (d), addressing "Historic Properties of Indian Tribes."[39] The new subsection was added in order to "assist Indian tribes in preserving their particular historic properties . . . ," and to

> [F]oster communication and cooperation between Indian tribes and State Historic Preservation Officers in the administration of the national historic preservation program to ensure that all types of historic properties and all public interests in such properties are given due consideration, and to encourage coordination among Indian tribes, State Historic Preservation Officers, and Federal agencies in historic preservation planning and in the identification, evaluation, protection, and interpretation of

36. *Id.* at 7 (emphasis added).

37. *Id.* at 5, 7-10.

38. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, tit. XL, § 4006(a)(2) (Oct. 30, 1992); s*ee also* 64 Fed. Reg. 27,044 (May 18, 1999), republished 65 Fed. Reg. 77,698 (Dec. 12, 2000) (codified at 36 C.F.R. pt. 800) (implementing regulations for the amendment).

39. 16 U.S.C. § 470a(d) (2006).

historic properties.[40]

The amended NHPA made three important changes to the existing Section 106 process. First of all, the amendments set up the tribal historic preservation program system ("THPO"), which gave tribes the same historic preservation responsibilities previously exercised only by state agencies.[41] Second, the amendments codified the concept of traditional cultural properties.[42] The new subsection provided that "[p]roperties 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."[43] Finally, the amendments mandated that a federal agency carrying out Section 106 responsibilities "consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to [impacted] properties . . . ."[44] This mandate formed the core of the 1992 amendments.

As a result of the amendments to the NHPA, a tribe that attaches religious or cultural significance to an impacted site must become a consulting party to the Section 106 process. Therefore, tribes must be included in the NHPA consultation process as a matter of right.[45] The definition of a consulting tribe was further refined by the regulations at 36 C.F.R. § 800.3[46] and subsequent court decisions. The court in *Narragansett Indian Tribe v. Warwick Sewer Authority*[47]

40. § 470a(d)(1)(A).

41. § 470a(d)(2).

42. *See* PARKER & KING, *supra* note 27 (generally credited with the origins of this concept).

43. § 470a(d)(6)(A).

44. § 470a(d)(6)(B). Section 470a(d)(6)(C) contains a parallel set of procedures for the State Historic Preservation Officer of the State of Hawaii.

45. Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 553 (8th Cir. 2003). By contrast, discretionary parties are not automatically entitled to be consulted because of an economic interest, but they must make a written request to the agency. Discretionary consultation parties would include, for example, ranchers and farmers with land affected by the undertaking. *Id.*

46. 36 C.F.R. § 800.3(c) (2002) (describing procedures for consultation with THPOs). Subsequent sections describe consultation for undertakings on tribal land, consultation with the public, and consultation with "other parties," including local governments and tribes and organizations without a formal THPO program. §§ 800.3(d)-(f).

47. 334 F.3d 161 (1st Cir. 2003).

defined a consulting tribe for purposes of the NHPA as one that "considers a site that might be affected by the undertaking to have religious or cultural significance."[48]

Within Section 106, the consultation process is a complex series of scheduled steps.[49] Courts have interpreted the meaning of the word "consultation" narrowly, and applied the plain meaning of "the act of asking the advice or opinion."[50] The consultation process of Section 106 has been described as a requirement that agency decision makers "'stop, look, and listen,' but not that they reach particular outcomes."[51] More detailed court decisions have drawn a sharp line between "'control over a project'" and the true goal of consultation.[52] Done properly, consultation with Native American groups should develop and "evaluat[e] alternatives to the project 'that could avoid, minimize, or mitigate adverse effects on historic properties.'"[53]

In essence, the NHPA is a procedural law. Like the National Environmental Policy Act ("NEPA"), it requires information gathering and planning in advance of potentially harmful government actions. Because tribes have "special expertise regarding impacts on places that have religious and cultural significance . . . ,"[54] the tribal consultation process is at the heart of the procedural requirements of the NHPA. However, in practice, tribal consultation under the NHPA has not always been carried out efficiently or to the mutual benefit of tribes and federal agencies. Since the 1992 amendments, "[s]ome federal agencies have been quicker and better than

48. *Id.* at 167.

49. Save Our Heritage, Inc. v. FAA, 269 F.3d 49, 62 (1st Cir. 2001).

50. Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 117 (1st Cir. 2002) (quoting BLACK'S LAW DICTIONARY 311 (7th ed. 1999)) (applying the ordinary legal dictionary meaning of "the act of asking the advice or opinion of someone").

51. Neighborhood Ass'n of The Back Bay, Inc. v. Fed. Transit Admin., 407 F. Supp. 2d 323, 332 (D. Mass. 2005) (quoting *Narragansett Indian Tribe*, 334 F.3d at 166), *aff'd*, 463 F.3d 50 (1st Cir. 2006).

52. Nw. Bypass Grp. v. U.S. Army Corps of Eng'rs, 552 F. Supp. 2d 97, 130 (D.N.H. 2008) (quoting *Narragansett Indian Tribe*, 334 F.3d at 168).

53. *Nw. Bypass Grp.*, 552 F. Supp. 2d at 129 (quoting 36 C.F.R. § 800.6(a) (2011)).

54. Dean B. Suagee, *Consulting with Tribes for Off-Reservation Projects,* 25 NAT. RESOURCES & ENV'T 54, 56 (Summer) (2010).

others in learning how to consult with tribes in the NHPA Section 106 process."[55] Also, "[s]ome examples can be cited in which the agency's performance left something to be desired."[56] The following Section describes some of the challenges that arise from the NHPA tribal consultation process. In particular, escalating industrial development, increasingly hard-fought litigation, and more rigorous regulatory review have all affected the efficiency and effectiveness of tribal consultation.

III. Challenges Arising From the NHPA Tribal Consultation Process

In the current atmosphere of urban sprawl and large-scale energy, industrial, and infrastructure projects, the NHPA has become a guidepost for responsible development. The statement of policy associated with the NHPA identifies the national trend of increasing development, and states that "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."[57] In the past two decades, the NHPA tribal consultation process has filled this gap, by creating a process for "documenting and preserving some of the places that are important for tribal cultures."[58] The value of this perspective to the federal decision-making process and to the history of the nation as a whole has recently gained more attention.[59] Including tribes in the NHPA process has also decreased the risk of delays in federal approvals for renewable energy projects, and improved the overall quality of projects.[60]

55. *Id.* at 55-56.

56. *Id.* at 56.

57. 16 U.S.C. § 470(b)(5) (2006). The context for this evaluation is "the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments." § 470(b)(5).

58. Suagee, *supra* note 54, at 56.

59. "The history of each Indian tribe is, after all, an important part of the history of the American people." *Id.*

60. *Id.*

However, engaging tribes in the NHPA review process has not been a seamless process. Accelerating industrial development has created conflicting interests for consulted tribes. Litigation resulting from procedural claims under the NHPA is increasingly hard-fought. An emerging trend of more rigorous federal regulatory review may affect the practice of tribal consultation under NHPA, although it has remained virtually unchanged for two decades. All of these recent developments have the potential to change the way federal agencies consult with tribes.

A. *Conflicting Tribal Interests*

In the forty-five years since the NHPA was enacted, it has created a set of conflicting interests for consulting tribes. First, the NHPA has an undeniable dampening effect on the progress of development. There is often a correlation between the places "where people propose to build utility-scale renewable energy projects and associated transmission lines" and "places, or landscapes, that hold religious and cultural significance for Indian tribes."[61] This correlation may not always be apparent to industry planners, who generally participate in the dominant American culture.[62] In situations where tribes are concerned about or oppose these projects, there is often an

61. *Id.* at 54.

62. *Id.* Suagee, an attorney and member of the Cherokee Nation, further explains this paradoxical interest by stating:

> A landscape that looks empty to someone from a perspective grounded in the dominant American culture might be holy ground for someone rooted in a tribal religious tradition. The sacredness of such a place might have something to do with its apparent emptiness. Maybe the emptiness is important for tribal members to perform certain ceremonies or other religious practices. Maybe medicine plants grow there, or it might be a habitat for culturally important wildlife. The landscape may include unmarked burials, and tribes generally regard the graves of ancestors as sacred. A tribe's oral tradition may include stories about important events that occurred in the landscape, some of which may reach back to the tribe's origin as a people.

Id.

increase in the time and money spent by all parties involved.[63]

On the other hand, tribes have interests in industrial development, green infrastructure, and alternative energy projects.[64] Tribal renewable energy projects stand to contribute significantly to our national energy future. Indeed, many tribes have either already built or are planning utility-scale renewable energy projects on and off their reservations.[65] Renewable energy projects are one of the best ways to address the reduction of greenhouse gases to avoid climate change, and increase energy efficiency. These projects also carry economic benefits associated with local employment opportunities and reduced reliance on conventional energy sources over the long run.[66] Understandably, tribes want to become involved in and benefit from these opportunities.

Therefore, particularly where tribes depend on these construction projects to support their communities and generate income, the requirements of NHPA may effectively pull them in two different directions. Despite the benefits of renewable energy infrastructure, tribes have a countervailing interest in mitigating industrial development. This interest may be embodied by the internal or external religious and cultural significance of the natural landscape. Internal significance is constructed by tribal beliefs; external significance is recognized in legislation, regulations, and case law. The challenges created by these particular conflicting interests are unlikely to diminish over time, as development speeds and tribes gain political and financial power.

B. *Challenges to Tribal Involvement in the NHPA Consultation Process*

Under the current NHPA tribal consultation process, it is difficult for tribes to become involved in consultation or litigation. Moreover, when tribes do become involved in a

63. *Id.* at 55.

64. *Id.*

65. *Id.*; *see also* Michael L. Connolly, *Commercial Scale Wind Industry on the Campo Indian Reservation*, 23 NAT. RESOURCES & ENV'T 25, 26 (Summer) (2008).

66. Suagee, *supra* note 54, at 54.

litigation context, they are frequently unsuccessful in achieving their goals.

Tribes may be involuntarily excluded from the 106 consultation process in two situations. First of all, tribal involvement is not necessary if there are no historic properties in the project area.[67] Second, tribal involvement is not necessary if the federal agency makes a proper finding that there is no possible effect on historic properties. In *Morongo Band of Mission Indians v. FAA*,[68] the Morongo Band attempted to become a consulting party to a federal undertaking—the construction of a new runway at Los Angeles International Airport.[69] The agency involved, the FAA, properly made the determination that there was no possible effect on historic properties.[70] Therefore, the tribe did not have to be involved in the consultation process, and did not have to concur with the determination.[71]

In a common scenario, a tribe may be forcibly precluded from consultation, despite proper involvement in a project with historic properties, and a finding of potential effect by the agency. For example, the Cape Wind Associates project, a proposed wind farm, resulted in the forcible preclusion of tribes.[72] This project, a 130-turbine wind farm planned for construction in the Nantucket Sound, is one of four electricity-generating offshore wind farms in various stages of planning or construction in the United States.[73] In early 2009, the Aquinnah and Mashpee Wampanoag tribes attempted to enter the consultation phase of the project according to the provisions of Section 106.[74] Each tribe sought to have Nantucket Sound

67. Native Ams. for Enola v. U.S. Forest Serv., 832 F. Supp. 297, 300-01 (D. Or. 1993).

68. 161 F.3d 569 (9th Cir. 1998).

69. *Id.* at 572.

70. *Id.* at 582.

71. *Id.* at 582-83.

72. *See* Erica Schroeder, *Turning Offshore Wind On*, 98 CALIF. L. REV. 1631, 1652-53 (2010).

73. Brit T. Brown & Benjamin A. Escobar, *Wind Power: Generating Electricity and Lawsuits*, 28 ENERGY L.J. 489, 502 (2007). The other three are the Long Island Offshore Wind Park Project in Long Island, NY; and two similar projects in Galveston, TX and Padre Island, TX. *Id.*

74. Graham Jesmer, *Federal Decision Could Make or Break Cape Wind's Future*, RENEWABLEENERGYWORLD.COM, (Jan. 20, 2010),

declared a traditional cultural property.[75] Developers and other actors in the process immediately protested, based on the perception that tribal involvement would curtail or halt development.[76] To resolve the conflict, Secretary of the Interior Ken Salazar convened a series of meetings among the project stakeholders, including the Aquinnah and Mashpee Wampanoag tribes.[77] Despite continued disagreement and protest from tribes, Secretary Salazar released a final Record of Decision and Lease to Cape Wind in April of 2010.[78] Unfortunately, the final Record of Decision foreclosed any additional consultation with either tribe.[79]

Even when tribal consultation for a federal undertaking becomes the subject of litigation, tribes are frequently unsuccessful in court. *Winnemem Wintu Tribe v. U.S. Department of Interior*[80] provides an example of a tribe unable to effectively litigate a series of complaints that could have been resolved earlier, and through other means.

In *Winnemem Wintu*, a tribe and tribal leader filed suit against a group of federal agencies and officials involved with the Shasta-Trinity National Recreation Area. Among other claims, the Winnemem alleged that the defendants undertook activities that damaged the cultural and historical value of certain locations in the recreation area, while ignoring the tribe's input and failing to seek comment from the tribe.[81] The claims by the Winnemem failed because the features and

http://www.renewableenergyworld.com/rea/news/article/2010/01/federal-decision-could-make-or-break-cape-winds-future.

75. *Id.*

76. Schroeder, *supra* note 72, at 1652.

77. *Id.*

78. MINERALS MGMT. SERV., U.S. DEP'T OF THE INTERIOR, RECORD OF DECISION: CAPE WIND ENERGY PROJECT (2010), *available at* http://www.boemre.gov/offshore/RenewableEnergy/PDFs/CapeWindROD.pdf.

79. *Id.* The final Record of Decision contained only an emergency provision for tribal involvement, specifying that development would only be halted in the event of an unanticipated archaeological find. Schroeder, *supra* note 72, at 1653.

80. 725 F. Supp. 2d 1119 (E.D. Cal. 2010).

81. *See id.* The features and landmarks included trees and plants used for medicinal and cultural purposes, ancient hearths, and a cemetery that included graves and cremains. *Id.* at 1127-30. Most shockingly, the Forest Service "converted a prayer rock sacred to the Winnemem into a ramp for dirt bikes." *Id.* at 1129.

landmarks were either not described with specificity to the Department of the Interior, or were not appropriately nominated to the NRHP.[82]

The lack of specificity and lack of NRHP nomination that failed the Winnemem in court could have been averted far in advance of the Section 106 process. A good relationship between the land-managing agencies and the tribe, early efforts to categorize the cultural resources in the recreation area, or ongoing communication during the planning phase of the project could have prevented the breakdown in communication that lead to unsuccessful litigation by the Winnemem. Furthermore, although the Winnemem are not a federally recognized tribe, even the court acknowledged that members of the tribe could otherwise have become involved as interested members of the public.[83]

Narragansett Indian Tribe v. Warwick Sewer Authority[84] provides another example of how a preliminary, preventative, and general plan to identify cultural resources could have prevented unsuccessful litigation by a tribe. In *Narragansett*, a consulting tribe's request for an injunction halting construction of a sewer project in Warwick, Rhode Island was denied.[85] The tribe properly entered the consultation process and initially certified that the planned sewer route would not affect significant Native American archaeological material.[86] After the work proceeded as planned, the tribe obtained new information about the archaeology of the area, including eyewitness reports of human remains in the area.[87] The tribe validly and successfully re-entered consultations pursuant to the NHPA. But, the prior determination could not be reversed because of delay and lack of communication.[88]

Section 106 of the NHPA provides tribes with procedural rights. If tribes wait until the legal issues surrounding

82. *See id.* at 1139-42.

83. This is outlined in the Section 470f process. 36 C.F.R. §§ 800.1(a), 800.2(a)(4), 800.2(d)(1)-(2), 800.3(e) (2011).

84. 334 F.3d 161 (1st Cir. 2003).

85. *Id.* at 162.

86. *Id.* at 162-63.

87. *Id.* at 164-65.

88. *Id.* at 167.

consultation procedures become contentious, however, they may face complex litigation. Tribes may have difficulty becoming involved in litigation, or may be unsuccessful in achieving their goals in court. Although the future of Section 106 litigation is uncertain, procedural changes that allow preliminary, preventative, and wide-ranging actions by tribes may prevent unsatisfactory outcomes in the judicial system.

C. *Scrutiny Under Executive Order 13563*

Finally, a major challenge arising from the NHPA tribal consultation process involves potential future problems with regulatory review. There is a significant likelihood that the existing consultation process will fail the scrutiny suggested by the analytical framework of Executive Order 13563. This new order addresses the entire scope of federal regulatory review with retroactive effect.[89] Therefore, it necessarily includes the NRHP tribal consultation process.

Executive Order 13563 focuses on public participation and open exchange of ideas, with the ultimate goal of increasing federal agency efficiency.[90] Although the focus is "ineffective" federal regulations, the order calls for a reassessment of the federal regulatory process as a whole. Specifically, the President calls on the federal government to:

> promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.[91]

Based on the problems identified in this section, it is very likely the existing NHPA tribal consultation process would not

89. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).
90. *Id.*
91. *Id.*

survive the scrutiny suggested by Executive Order 13563.

Although Executive Order 13563 provides "salutary and common-sense directives,"[92] it may hold little influence over federal agencies, and very little power to effect future change. Executive orders are one conduit through which the President may carry out his constitutional obligation to see that the laws are faithfully executed and to delegate certain of his duties to other executive branch officials.[93] However, executive orders cannot give rise to legal requirements when they are inconsistent with the express will of Congress.[94] Therefore, without statutory authority as the basis for implementation, executive orders do not have the force of federal law.[95] Furthermore, executive orders do not create a private right of action whereby citizens may enforce named obligations on executive branch officials.[96] Regarding Executive Order 13563 in particular, the House Subcommittee on Environment and the Economy observed that the retrospective analysis established by the order has no "legal teeth."[97]

Although NHPA tribal consultation was designed as a flexible tool for historic preservation, it is unclear whether the process will be able to adapt to the new challenges of escalating industrial development, increasingly hard-fought litigation, and more rigorous regulatory review. In a survey and synthesis of cases where tribes disputed federal consultation practices, one commentator has concluded that problems primarily arise due to delay, lack of communication, lack of sincerity, and lack

92. *Investigating OSHA's Regulatory Agenda and Its Impact on Job Creation: Hearing Before Subcomm. on Workforce Protections of H. Comm. on Educ. and the Workforce*, 112th Cong. (2011) (statement of Jacqueline M. Holmes, Of Counsel, Jones Day).

93. Utah Ass'n of Cntys. v. Bush, 316 F. Supp. 2d 1172, 1184 (D. Utah 2004).

94. *Id.*

95. Dreyfus v. Von Finck, 534 F.2d 24, 29 (2d Cir. 1976) (internal quotation marks omitted) ("Executive Orders issued without statutory authority providing for presidential implementation are generally held not to be laws of the United States.").

96. *Utah Ass'n of Cntys.*, 316 F. Supp. 2d at 1200; Zhang v. Slattery, 55 F.3d 732, 747 (2d Cir. 1995) (internal citations omitted).

97. *Environmental Regulations, The Economy, and Jobs*: *Hearing Before the Subcomm. on Env't and Econ. of the H. Comm. on Energy and Commerce,* 112th Cong. 7 (2011) (statement of Christopher DeMuth, D.C. Searle Senior Fellow, American Enterprise Institute).

of focus.[98] The entire consultation process may be marred by bureaucratic inertia. The consultation process could be interpreted as mere "lip service" to tribal interests, serving as the ends rather than the means to effective communication.[99] Even when it succeeds, tribal consultation may "mask[] larger problems with the manner in which the United States government deals with Indian nations."[100]

IV. Alternative Solutions

A. *Recommendations from Bulletin 38*[101]

Despite the problems identified above, there may be other ways to improve the effectiveness of the NHPA tribal consultation process. National Park Service Bulletin 38 solidified the "traditional cultural property"[102] as a viable target for preservation in the natural environment. The publication was the first organized recommendation that historic preservationists "consult with groups and individuals who have special knowledge about and interests in the history and culture of the area to be studied."[103] Perhaps most importantly, Bulletin 38 also contains recommendations for the manner in which NHPA tribal consultation should properly proceed. All federal agencies, particularly land-managing agencies, must be familiar with the recommendations contained in Bulletin 38. For land-managing agencies, Bulletin 38 is a mandate and establishes procedures for assessing protected properties on federal land.[104]

The Bulletin 38 recommendations focus on innovation, specifically noting how federal agencies "and others have found

98. Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 48 (2000).

99. *Id.* at 58.

100. *Id.* at 73.

101. PARKER & KING, *supra* note 27.

102. *Id.* at 1.

103. *Id.* at 7.

104. Suagee, *supra* note 54, at 55 (This mandate does not carry the force of law).

a variety of ways to contact knowledgeable parties in order to identify and evaluate traditional cultural properties."[105] The description of methods employed focuses on consideration of and adaptation to "the nature and complexity of the properties under consideration and the effects the agency's management or other activities may have on them."[106] The examples provided in Bulletin 38 are especially informative to this discussion.

Examples in Bulletin 38 fall into two basic categories: consultation programs instituted to change the general operating procedures of the agency, and consultation programs initiated to address a specific project of concern. By way of a general program, the Black Hills National Forest created a new position for a "culturally sensitive engineer" responsible for cooperation with local Native American tribes. The cultural engineer works with the tribes to review all forest projects that potentially affect cultural properties.[107] In a similar approach, the Six Rivers National Forest in California conducted an in-depth study on a portion of the lands they manage. As part of that program, the Forest Service conducted detailed interviews and completed a full-scale ethnography for the Helkau Historic District.[108]

The highly flexible and adaptive approach described in Bulletin 38 has also been applied successfully to specific federal projects that were anticipated to affect cultural properties. For example, in the planning stages for the Four Corners Power Project, the New Mexico Power Authority hired a professional cultural anthropologist to consult with Native American groups within the affected area.[109] Likewise, when the Air Force planned to deploy an intercontinental missile system in Wyoming, the Department of Defense sponsored a conference of local authorities on traditional culture—including members of Native American tribes.[110] The result of the conference was a set of guidelines to minimize effects on traditional cultural

105. PARKER & KING, supra note 27, at 7.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

properties. When the Ventura County, California Flood Control Agency began a flood control project that required exhumation of human remains, the agency undertook specialized tribal consultation that exceeded the requirements of the NHPA.[111] The agency identified those Native American groups recognized by the California State Native American Heritage Commission and coordinated to develop a consensus as to how the exhumed remains should be handled.[112]

B. *Alternative Solutions*

In addition to the consultation programs described in Bulletin 38, federal agencies have developed other methods of seeking the involvement of concerned tribes in the Section 106 process. For example, documents like programmatic agreements, multi-agency memoranda of understanding, and internal tribal policies may provide alternative solutions to traditional methods of consultation. These alternative solutions may help mitigate some of the problems caused by accelerating industrial development, tribal conflicts of interest, hard-fought litigation, and federal regulatory review.

Programmatic Agreements are described in regulations by the Advisory Council on Historic Preservation ("ACHP"), as an alternative to the traditional tribal consultation process. These agreements provide a way to facilitate and streamline the process of consultation. In general, the agency may negotiate with consulting parties to develop "a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations . . . ."[113] Programmatic agreements are legally binding procedural documents created in advance of any undertaking by the federal agency. The documents spell out the exact procedures the agency will use during each phase of the Section 106 process. These procedures may include specific categorical exclusions, standard treatment plans, or programmatic consultation procedures for a specific class of

111. *Id.*
112. *Id.*
113. 36 C.F.R. § 800.14(b) (2011).

resources.[114] As such, programmatic agreements allow the agency to adapt the consultation process to the agency mission, existing agency procedures, and the types of cultural resources that the agency encounters most often on the lands they manage.[115] This gives the agency flexibility when "effects on historic properties cannot be fully determined prior to approval of an undertaking."[116]

In one relatively new technique, even more expansive Memoranda of Understanding ("MOU") are drafted among multiple federal agencies. This allows tribes to become involved early in the consultation process for large-scale projects. The primary purpose of an MOU is to "establish a protocol among land managing agencies."[117] An MOU can establish a lead agency for Section 106 purposes, and coordinate planning activities among developers, federal agencies, states, and tribes. Most importantly, an MOU can provide a single point of contact for a federal undertaking by establishing procedures that can help expedite and adjudicate conflict.[118]

Finally, tribes themselves may have alternative consultation procedures or published best management practices for historic preservation on and near their reservations.[119] Many of these internal publications are based on empirical observations of past consultations that were collaborative, cooperative, and resulted in a completed project that was mutually beneficial and avoided damage to cultural properties. The most frequently cited best management practices publication, produced by the National Association of

114. CTR. FOR ENVTL. EXCELLENCE, AM. ASS'N OF STATE HIGHWAY AND TRANSP. OFFICIALS, WHAT IS A PROGRAMMATIC AGREEMENT? (2011), *available at* http://environment.transportation.org/documents/programmatic_agreement_toolkit/WhatIsPA.html.

115. *Id.*

116. 36 C.F.R. § 800.14(b)(ii) (2011); *see also* Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 554 (8th Cir. 2003).

117. Advisory Council on Historic Preservation, *Nine Federal Agencies Enter into a Memorandum of Understanding Regarding Transmission Siting on Federal Lands,* ACHP.GOV (Oct. 29, 2009), www.achp.gov/news091029.html.

118. *Id.*

119. *See* SHERRY HUTT & JAMIE LAVALLE, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION (NATHPO 2005), *available at* http://www.nathpo.org/PDF/Tribal_Consultation.pdf.

Tribal Historic Preservation Offices ("NATHPO") identifies "mutual respect" and "ongoing channels of communication" as the key components of tribal procedures for NHPA consultation.[120] The NATHPO also concludes that it is "desirable" for tribes to require a consistent agency relationship and consistent agency representatives, and to avoid litigation through alternative dispute resolution.[121]

The commonalities among Bulletin 38 programs, programmatic agreements, MOUs, and tribal policies illustrate several points about the goals of tribal consultation. All four solutions require compromise between the value systems of dominant American culture and traditional cultural practices. Land-managing agencies may have to adjust the way they assess the value of land, as well as the way they undertake the actual procedures that determine how land is valued and used. All four alternative solutions require federal agencies plan for consultation far in advance of undertakings. Programmatic agreements and MOUs both require an existing relationship and advance planning among the federal agency and the consulted tribe; the NATHPO best management practices suggest a "draft scope of project" very early in the planning stages.[122] Finally, all four alternative solutions call for completely open lines of communication among the agency and consulted tribes, with a pre-determined mechanism for conflict avoidance.

V. The Future of Tribal Consultation Under the NHPA

A. *Regulation and Regulatory Review*

Perhaps the strongest analytical framework for the future of tribal consultation under the NHPA comes from the mandates of Executive Order 13563, and similar political rhetoric that is taking place on a national scale. This order includes provisions for retroactive review of existing

120. *Id.* at iv.
121. *Id.* at 34–35.
122. *Id.* at 40.

regulations. These so-called "look back" provisions bring the NHPA within the scope of review suggested by the Order.

There are two ways Executive Order 13563 could effect positive change on the NHPA tribal consultation process. First of all, the Order could increase voluntary compliance by federal land-managing agencies. Second, the Order could establish a cost-benefit protocol that would necessarily include consideration of the challenges and alternative solutions presented above. Because federal administrative agencies are part of the executive branch, executive orders like 13563 create an internal locus of control. It is likely that many agencies will voluntarily comply with the directives to incorporate the best available science, public participation, and cost-benefit analysis into the regulatory process. For example, beginning in February 2011, several agencies published proposed rules responding to Executive Order 13563 and requesting public comment on the effectiveness of agency regulations. The Department of Commerce,[123] Department of Energy,[124] Department of Health and Human Services,[125] Federal Maritime Commission,[126] and Department of Transportation[127]

123. Notice Requesting Comments, 76 Fed. Reg. 5501-01 (Feb. 1, 2011).

124. Notice Requesting Information, 76 Fed. Reg. 6123-02 (Feb. 3, 2011).

125. Student Health Insurance Coverage, 76 Fed. Reg. 7767-01 (proposed Feb. 11, 2011) (to be codified at 45 C.F.R. pts. 144, 147).

126. Sunshine Act Meeting Notice, 76 Fed. Reg. 7849-01 (Feb. 11, 2011).

127. Regulatory Review of Existing DOT Regulations, 76 Fed. Reg. 8940-01 (proposed Feb. 16, 2011). (to be codified in scattered titles of C.F.R.). This document expresses the departmental plan for: "identifying certain significant rules that may be obsolete, unnecessary, unjustified, excessively burdensome, or counterproductive. Comments might address how best to evaluate and analyze regulations in order to expand on those that work and to modify, improve, or rescind those that do not." *Id.* at 8941. Furthermore, the document requests "comments about factors that the Department should consider in setting priorities and selecting rules for review." *Id.* The document includes the following objectives:

> (1) Promote economic growth, innovation, competitiveness, and job creation; (2) eliminate outdated regulations; (3) lessen the burdens imposed on those directly or indirectly affected by our regulations, increase the benefits provided to the public by our regulations, and improve the cost-benefit balance of our regulations; (4) lessen burdens imposed on small entities; (5) eliminate duplicative or overlapping regulations; (6) reduce paperwork by eliminating duplication, lessening frequency, allowing electronic

have all reacted to Executive Order 13563. Therefore, it is likely that the principles outlines in the order will be used to guide the future promulgation of federal regulations.

Executive Order 13565 also establishes a cost-benefit protocol for federal regulation. There is a persuasive argument that, if some of the alternative solutions suggested in this document create benefits for participants in the NHPA process while causing participants to incur fewer costs, federal agencies should adapt. If a cost-benefit analysis is undertaken for the mechanism of tribal consultation under the NHPA in such a way that takes into account the challenges and alternative solutions suggested above, the result could improve the likelihood tribes will succeed in actions involving consultation under NHPA.

"[S]uccessful consultations between tribal liaisons and federal decision makers—far beyond the halls of Congress—can contribute to the creation of more enlightened, better constructed, and more effective federal policies, projects, and regulations."[128]Alternative solutions to traditional tribal consultation—Bulletin 38 programs, programmatic agreements, MOUs, and tribal policies—were developed specifically to address some of the existing problems with the current NHPA process. Aspects of these programs may be the best way for NHPA to adapt to create benefits for participants

> submission, standardizing forms, exempting small entities, or other means; (7) eliminate conflicts and inconsistencies in the Department's regulations and those of its own agencies or other Federal agencies or state, local, or tribal governmental bodies; (8) simplify or clarify language in regulations; (9) revise regulations to address changes in technology, economic conditions, or other factors; (10) determine if matters in an existing regulation could be better handled fully by the states without Federal regulations; (11) reduce burdens by incorporating international or industry consensus standards into regulations; (12) reconsider regulations that were based on scientific or other information that has been discredited or superseded; and (13) expand regulations that are insufficient to address their intended objectives or to obtain additional benefits.

Id. at 8941-42.

128. Haskew, *supra* note 98, at 23.

and reduce costs for federal agencies.

B. *Conclusion*

The NHPA is the premier land management tool for historic properties, and a guidepost for responsible development. The tribal consultation requirements established by the 1992 amendments to NHPA necessitated cooperation and close communication with Native American groups during this process. Courts and commentators have repeatedly stressed that the true goal of consultation is to develop and evaluate "alternatives to the project 'that could avoid, minimize, or mitigate adverse effects on historic properties.'"[129]

The current tribal consultation requirements of the NHPA have been somewhat of a disservice to the varied interests of consulted tribes. The process is not particularly well-suited to large-scale industrial and energy projects. It has created a false dichotomy for tribes, forcing a choice between self-sufficiency and sustainability on the one hand, and cultural preservation on the other. Moreover, tribes experience difficulty becoming involved in consultation or in litigation; when they do participate, they are only rarely successful. Finally, it is very likely that the existing NHPA tribal consultation process would not survive the scrutiny suggested by Executive Order 13563.

But tribal consultation does not have to follow the rigid and often ineffective procedure established by Section 106. Other methods of coordinating and cooperating with Native American groups include specially adapted consultation programs instituted to change agency operating procedures, or to address a specific project. Other successful alternatives have been established by documents like programmatic agreements, multi-agency memoranda of understanding, and internal tribal policies.

In the future, consultation efforts should be evaluated by criteria that reflect the past forty-five years of historic preservation under NHPA and nearly 20 years of mandated tribal consultation. New trends in federal regulatory review,

129. Nw. Bypass Grp. v. U.S. Army Corps. of Eng'rs, 552 F. Supp. 2d 97, 129 (D.N.H. 2008) (citing 36 C.F.R. § 800.6(8)(a) (2008)).

embodied by Executive Order 13563, could reform the NHPA tribal consultation process. The Order could eliminate problems with the traditional framework by increasing voluntary compliance by federal land-managing agencies, or by establishing a cost-benefit protocol. Any cost-benefit analysis of traditional compliance with NHPA would necessarily include consideration of the challenges and alternative solutions presented here.

In the future, the NHPA tribal consultation process should be reevaluated to expedite choices about planning, timing, significance, and the proper level of tribal involvement. Because of the need to centralize and focus these choices, tribal consultation should be managed at the lowest level possible. Programmatic agreements and procedures specific to individual land-managing agencies or tribes typify this approach. In order to coordinate consultation activities, land-managing agencies should develop strong relationships with tribal groups, and cooperate with multi-agency MOUs. Finally, the entire consultation process can be made more efficient if land-managing agencies engage in preliminary, preventative, and general plans to identify cultural resources well before consultation is necessary.

All of these changes to the existing NHPA consultation program would alleviate conflict for tribes, by eliminating the delays and barriers to communication that are the greatest obstacles to successful consultation. Regardless of how it is undertaken, tribal consultation should ultimately achieve cooperation. Time and time again, practice has shown that "the best way to determine the future course of federal-tribal relations must surely be to formulate the solutions in *partnership* with Indian nations."[130]

130. Haskew, *supra* note 98, at 74.