# THE NATIONAL HISTORIC PRESERVATION ACT AT FIFTY: SURVEYING THE FOREST SERVICE EXPERIENCE

BY

JESS R. PHELPS*

*Milestone anniversaries provide a unique opportunity for reflection. Enacted in 1966, the National Historic Preservation Act fundamentally transformed the field of historic preservation—particularly at the federal level. This Article explores the evolution of National Historic Preservation Act compliance from an agency perspective and provides a comprehensive survey of all appellate litigation involving the United States Forest Service. To this end, this Article profiles litigation trends and how cultural resource management practices have been shaped by the courts over the past five decades. Ultimately, an understanding of how cultural resource management has evolved as historic preservation has become more inclusive is critical to thinking about how to address future challenges.*



* Attorney, United States Department of Agriculture, Office of the General Counsel, Natural Resources and Environment Division. The views expressed in this Article are solely those of the author and do not reflect the views of the United States Department of Agriculture, the United States Forest Service, or the federal government. The Author would like to thank Kelly Yasaitis Fanizzo and Wendy John for their valuable input and suggestions, but any remaining errors and omissions remain solely the responsibility of the Author.

*"The coyote skulks among the scrub, the buzzard flaps heavily through the air, and the clumsy grizzly bear lumbers through the dark ravines, and picks up such sustenance as it can amongst the rocks. These are the sole dwellers in the wilderness."*[1]

## I. INTRODUCTION

2016 marked the fiftieth anniversary of the enactment of the National Historic Preservation Act[2] (NHPA). As the largest and most transformative

---

1 ARTHUR C. DOYLE, *A Study in Scarlet*, *in* THE ANNOTATED SHERLOCK HOLMES 143, 196–97 (William S. Baring-Gould ed., 1967) (1887).

2 Act of Oct. 15, 1966, Pub. L. No. 89-665 (current version codified at 54 U.S.C. §§ 300301–307108 (Supp. II 2015)); *Preservation50 is Focus for 2016*, ADVISORY COUNCIL ON HISTORIC

federal preservation law, the NHPA laid the essential groundwork of the modern structure of historic preservation—including establishing the National Register of Historic Places, the Advisory Council on Historic Preservation, and broadening the field to move beyond consideration of only nationally significant properties to encompass those places important to local communities.[3] Most importantly for federal agencies, the NHPA also created the section 106 process which requires agencies to consider the impacts of their actions on historic properties.[4] This process, although imperfect, has led to thousands of consultations involving the consideration and frequent avoidance or mitigation of adverse effects to historic resources.[5] Equally important, this process has given historic preservation advocates a critical voice for influencing and shaping federal undertakings that did not previously exist.[6]

---

PRESERVATION, https://perma.cc/QU8K-K9T6 (last visited Apr. 15, 2017) (discussing the upcoming anniversary and the Council's commemorative events to mark the occasion). Congress moved the National Historic Preservation Act from Title 16 of the *United States Code* to Title 54 in 2014. National Park Service and Related Programs, Pub. L. No. 113-287, 128 Stat. 3094 (2014).

3 Max Page & Marla R. Miller, *Introduction* to BENDING THE FUTURE: 50 IDEAS FOR THE NEXT 50 YEARS OF HISTORIC PRESERVATION IN THE UNITED STATES 1, 1–3 (Max Page & Marla R. Miller eds., 2016) (profiling the importance of the Act in developing much of this current framework); Jerry L. Rogers, *The National Historic Preservation Act: Fifty Years Young and Still Going Strong*, *in* THE NATIONAL HISTORIC PRESERVATION ACT: PAST, PRESENT, AND FUTURE 9, 9 (Kimball M. Banks & Ann M. Scott eds., 2016) (discussing the impacts of the NHPA on the preservation movement generally); John M. Fowler, *The Federal Preservation Program*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY 35, 37 (Robert E. Stipe ed., 2003) [hereinafter Fowler, *Preservation Program*] (discussing the funding of state historic preservation officers under the NHPA). For a contemporary view of the Act, see generally Comm. on New Devs. in Real Estate Practice, *Historical Districts*, 1 REAL PROP. PROB. & TR. J. 204 (1966); Comm. on New Devs. in Real Estate Practice, *Historical Districts and Other Real Property Developments*, 2 REAL PROP. PROB. & TR. J. 347 (1967).

4 54 U.S.C. § 306108 (Supp. II 2015); John M. Fowler, *Federal Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31, 31 (1976) [hereinafter Fowler, *Preservation Law*] (discussing the origins and role of the section 106 process).

5 Thompson Mayes, *The National Historic Preservation Act at 50: "A Living Part of Our Community Life and Development,"* 31 F.J. (D.C.), Fall 2016/Winter 2017, at 3, 7, https://perma.cc/QGS6-FGZW (discussing the influence of the Act); *see also* STEPHANIE MEEKS, THE PAST AND FUTURE CITY: HOW HISTORIC PRESERVATION IS REVIVING AMERICA'S COMMUNITIES 37–41 (2016) (summarizing the impact of the NHPA); WILLIAM J. MURTAGH, KEEPING TIME: THE HISTORY AND THEORY OF PRESERVATION IN AMERICA 66–74 (1990) (detailing the history behind the legislation's enactment and its influence on preservation generally); Marilyn Ursu Bauriedel, *Federal Historic Preservation Law: Uneven Standards for Our Nation's Heritage*, 20 SANTA CLARA L. REV. 189, 199–01 (1980) (describing duties imposed on federal agencies in order to avoid or mitigate a project's effect on historic property).

6 SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 106–07 (2012). As far as terminology, there is a bit of a tendency amongst even practitioners to use the terms cultural resources and historic properties interchangeably. The jurisdictional term for NHPA purposes is "historic properties" and it is the type of resource that is the focus of this Article. *See* Thomas F. King, *Cultural Resources in Environmental Impact Assessment*, 18 ENVTL. PRAC. 227, 227–29 (2016) [hereinafter King, *Cultural Resources*] (discussing terminology issues).

As a federal land managing agency, section 106 of the NHPA applies to a wide variety of the United States Forest Service (the Forest Service) actions involving either National Forest System lands or other agency activities that potentially impact historic properties.[7] Given the number of decisions the Forest Service makes that could potentially impact historic resources, the agency, over the past fifty years, has periodically been involved in litigation over the nature of its responsibilities. In some instances, this litigation has helped to improve the agency's care and management of historic resources—independent of other legal obligations under the existing statutory and regulatory structures that guide the operation and management of the national forests and their significant cultural resources.[8] Notably, these cases have also had more far-reaching impact on section 106 practice as a whole—particularly in the area of tribal resources.[9]

To provide a lens into how the NHPA has impacted agency practice over the past fifty years, this Article will explore the full history of Forest Service NHPA appellate litigation. This Article will use these decisions to draw conclusions regarding what this history has meant and to provide a basis for considering what challenges the agency may face going forward. To this end, Part II provides a short working overview of the Forest Service and section 106 of the NHPA. Part III examines the appellate decisions involving

---

7 Press Release, U.S. Forest Serv., U.S. Forest Service Response to the National Trust for Historic Preservation Report, "The National Forest System: Cultural Resources at Risk—An Assessment and Needs Analysis" 1 (May 15, 2008), https://perma.cc/7ZU5-SB8D (discussing the size and scale of the challenges facing the Forest Service in addressing resource protection within its holdings).

8 *See, e.g.*, *Heritage—It's About Time: A National Strategy*, U.S. FOREST SERV., https://perma.cc/PD5D-ZTGN (last updated Feb. 25, 2016) (discussing the evolving growth of the heritage program). Beyond the NHPA, the other principal laws that directly apply to Forest Service's work in managing cultural resources are the Archaeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. §§ 470aa–470mm (2012), and the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013 (2012). ARPA addresses the regulation and protection of cultural resources on federally-owned lands, while NAGPRA addresses the treatment of human remains—whether in a museum collection or discovered. Elise Foster, *How the Government Can Create Incentives for Archeological Site Protection Without an Increase in Spending: Allow Federal Land Managers to Retain Civil Penalties and Restitution Collected in ARPA Cases; Make Restitution in ARPA Cases Mandatory*, 13 GREAT PLAINS NAT. RESOURCES L.J. 29, 34, 36, 38 (2010) (profiling the impacts, and limitations, of ARPA in protecting archaeological sites, specifically limitations on the use of appropriated funds collected from violations); Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND, RESOURCES & ENVTL. L. 256, 264–66 (2005) (discussing the role NAGPRA was intended to play).

9 *See, e.g.*, Sherry Hutt, *The Evolution of Federal Agency Authority to Manage Native American Cultural Sites*, 26 GEORGE WRIGHT F., no. 1, 2009, at 45, 45 (discussing the integration of greater consideration of Native American sites over the history of federal agency management); *see also Protecting Traditional Cultural Places on Public Lands: Mount Shasta*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, https://perma.cc/4H77-M5Y6 (last visited Apr. 15, 2017) (discussing the section 106 process in the context of the Forest Service's management decisions on this important landscape). For additional background on the incorporation of efforts to consider tribal cultural resources, see generally Paul E. Wilson & Elaine Oser Zingg, *What is America's Heritage?: Historic Preservation and American Indian Culture*, 22 KAN. L. REV. 413 (1974).

the Forest Service under this statute. Finally, Part IV provides some general observations about this litigation history and considers the future challenges that the agency will likely need to address. Ultimately, an examination of where the agency has been and where it is going in its treatment of historic properties is a fitting commemoration of this fiftieth anniversary of the NHPA.

## II. THE NATIONAL HISTORIC PRESERVATION ACT AND THE FOREST SERVICE

To provide context for evaluating resource compliance within the Forest Service and the various litigation matters that the agency has experienced requires some background on both the Forest Service and the NHPA more generally, which are addressed in turn.

### *A. The Forest Service and Cultural Resource Management*

The Forest Service, a federal land management agency, can be regarded as being formed within the United States Department of Agriculture (USDA) in 1905.[10] The holdings of the Forest Service consist of over 193 million acres of land organized into 154 national forests and 20 national grasslands.[11] The organization of the Forest Service, beyond the Washington office, is broken into nine regions which are responsible for the supervision of various ranger districts and forests scattered across their defined jurisdictions.[12] The vast majority of the Forest Service's holdings are in the western United States,[13] although significant Forest Service holdings exist nationwide as a result of acquisition programs during the Great Depression and the New Deal.[14] Given

---

10 Act of Feb. 1, 1905, ch. 288, 33 Stat. 628 (transferring the forest reserves from the General Land Offices of the United States Department of the Interior to the Division of Forestry within USDA. The history of the Forest Service goes back even further to 1876 (the appointment of a "special agent" for evaluating forestry conditions), and the expansion of this office to the division of forestry in 1881. Harold K. Steen, *The Origins and Significance of the National Forest System*, *in* THE ORIGINS OF THE NATIONAL FORESTS: A CENTENNIAL SYMPOSIUM 3, 4–5, 7 (Harold K. Steen ed., 1992) (discussing the western roots of the agency).

11 *By the Numbers*, U.S. FOREST SERV., https://perma.cc/2AG8-KK3N (last updated Nov. 2013).

12 *Agency Organization*, U.S. FOREST SERV., https://perma.cc/XV58-Z5TS (last visited Apr. 15, 2017); *see also* KATIE HOOVER, CONG. RESEARCH SERV., R43872, NATIONAL FOREST SYSTEM MANAGEMENT: OVERVIEW, APPROPRIATIONS, AND ISSUES FOR CONGRESS 1–17 (2016) (providing a working overview of agency structure and management).

13 U.S. FOREST SERV., FS-1035, U.S. FOREST RESOURCE FACTS AND HISTORICAL TRENDS 8–14 (SONJA N. OSWALT & W. BRAD SMITH EDS., 2014), https://perma.cc/KB73-FDV5; Steen, *supra* note 10, at 3, 4–5, 7 (discussing the western roots of the agency)

14 During these economic downturns, the Forest Service acquired suboptimal or abandoned farmlands and restored them to their current condition DAVID E. CONRAD, U.S. FOREST SERV., THE LAND WE CARED FOR: A HISTORY OF THE FOREST SERVICE'S EASTERN REGION 68–69 (Jay H. Cravens et al. eds., 1997) (discussing the growth of the Forest Service's Region Nine during this period); William E. Shands, *The Lands Nobody Wanted: The Legacy of the Eastern National Forests*, *in* THE ORIGINS OF THE NATIONAL FORESTS: A CENTENNIAL SYMPOSIUM, *supra* note 10, at 19, 19–21 (considering the Forest Service's stewardship of eastern forests); John M. Vandlik, *Waiting for Uncle Sam to Buy the Farm, or Wetland?: A Call for New Emphasis on State and*

the sheer land mass involved, projects carried out by the Forest Service often involve consideration of a wide variety of differing objectives/goals by virtue of their statutory multiple-use mission.[15] This has required the Forest Service, since the 1970s at least, to hire an array of resource specialists to help the agency meet its statutory duties, including compliance with cultural resource laws.[16]

Within each region and generally each forest, the heritage program of the Forest Service coordinates and assists decision makers with overall compliance with the NHPA.[17] The heritage program has a small Washington office presence—currently the Federal Preservation Officer (FPO) and deputy and a few other program staff—with the vast majority of staff being in the regions and field to oversee fieldwork and consultation efforts on specific projects.[18] Heritage staff oversee a wide array of consultations and work with the state historic preservation officers (SHPOs), tribal historic preservation officers (THPOs), and other entities to ensure that the agency's obligations are being met through formal consultation or compliance with any applicable program alternatives designed to streamline these efforts.[19] In a given year, the agency is involved in thousands of undertakings, a considerable task given the small size of the heritage program overall.[20] Beyond the heritage program, other programs' staff—for example, USDA's Office of Tribal Relations (OTR)—also play important roles in ensuring that the agency's obligations in this area are being met.[21]

---

*Local Land Controls in Natural Resources Protection*, 8 FORDHAM ENVTL. L. REV. 691, 694–95 (2011) (discussing the Forest Service's acquisition history and its ongoing efforts).

15 16 U.S.C. § 1604(e) (2012); *see also* Michael J. Gippert & Vincent L. Dewitte, *The Nature of Land and Resource Planning under the National Forest Management Act*, 3 ENVTL. LAW. 149, 166–67 (1996); *About the Agency*, U.S. FOREST SERV., https://perma.cc/C28T-HVEG (last visited Apr. 15, 2017) ("The agency's mission is to sustain the health, diversity, and productivity of the nation's forests and grasslands to meet the needs of present and future generations.").

16 JAMES G. LEWIS, FOREST HISTORY SOCIETY THE FOREST SERVICE AND THE GREATEST GOOD: A CENTENNIAL HISTORY (2005) (discussing this shift within the agency); SAMUEL P. HAYES, THE AMERICAN PEOPLE AND THE NATIONAL FORESTS: THE FIRST CENTURY OF THE U.S. FOREST SERVICE 23–24 (2009); *see also* Marilyn Phelan, *A History and Analysis of Laws Protecting Native American Cultures*, 45 TULSA L. REV. 45, 51–55 (2009) (discussing the evolution of such laws during this period).

17 U.S. FOREST SERV., U.S. FOREST SERVICE MANUAL § 2360.4 exhibit 1 (2008) [hereinafter FOREST SERVICE MANUAL] (charting agency responsibilities and overall delegations within these areas of responsibilities).

18 *Id.* § 2360.6 (discussing the overall role of the heritage program and the responsibilities of agency officials in this area). For more information on the Forest Service Heritage Program, see generally U.S. FOREST SERV., ANNUAL REPORT TO CONGRESS ON THE FEDERAL ARCHEOLOGY PROGRAM: HERITAGE PROGRAM "IT'S ABOUT TIME" (2003), https://perma.cc/N283-CARR.

19 *Id.* §§ 2361.21–.26 (outlining consultation requirements).

20 *Heritage—It's About Time: A National Strategy*, *supra* note 8 (noting that the agency may review some 10,000 undertakings in a given year).

21 U.S. FOREST SERVICE MANUAL, *supra* note 17, § 2360.81 (explaining the interaction and related efforts of the Forest Service Heritage Program and Tribal Government Relations Program). One of the most important initiatives of the Forest Service, in conjunction with OTR, was the issuance of the agency's sacred sites report in 2012 which provided context on how to better integrate compliance with Executive Order 13,007 into the agency's forest planning. U.S. DEP'T OF AGRIC. OFFICE OF TRIBAL RELATIONS & U.S. FOREST SERV., USDA POLICY AND

The predominance of western land holdings and the nature of the agency's real estate holdings fundamentally shape and influence the agency's practice in this area.[22] By virtue of its land holdings, the majority of the undertakings the agency evaluates involve archaeological sites as the Forest Service has hundreds of thousands of resources scattered across the National Forest System.[23] A large number of these archaeological sites involve tribal resources, but the mix is considerably broader—encompassing old farms and ranches, mining resources, abandoned towns, and the ruins of historic lodges and camps.[24] Beyond archaeological resources, however, the Forest Service also protects a significant number of extant resources—often pre-dating Forest Service acquisition—that remain intact on the landscape.[25] Interestingly, a growing number of these historic resources are resources that the Forest Service actually built to house their own activities—including structures from 1930s-era Civilian Conservation Corps initiatives.[26] These resources present unique challenges to the agency as they often require a greater level of capital investment, and many of these resources may no longer serve a direct public need.[27] Overall then, the Forest Service's mission encompasses many historic properties with different maintenance and protection needs.

### *B. The National Historic Preservation Act*

The law that shapes much of the Forest Service's work in the cultural resources arena is the NHPA, which is often coordinated with the environmental evaluation process of the National Environmental Policy Act[28]

---

PROCEDURES REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 7, 18, 27–28, 40–41 (2012), https://perma.cc/7RU5-9T96. Consideration of sacred sites is outside of the NHPA realm, but there is often confusion regarding the intersection of these sites and TCPs given the degree of overlap. *See* Hutt, *supra* note 9, at 47–48, 51, 53–55 (explaining this distinction and the legal effects).

22 T. DESTRY JARVIS, NAT'L TRUST FOR HISTORIC PRES., THE NATIONAL FOREST SYSTEM: CULTURAL RESOURCES AT RISK: AN ASSESSMENT AND NEEDS ANALYSIS 6–7 (2008), https://perma.cc/Y6K6-UBUV.

23 *Id.* at 6.

24 *E.g.*, Fred Wong, *Chinese Cultural History in the American West Put in Spotlight by Forest Service, Partners*, U.S. FOREST SERV.: BLOG (Apr. 11, 2016), https://perma.cc/8UPU-7R46 (discussing efforts to document and preserve Chinese heritage within the forest system).

25 *E.g.*, *Mark Twain National Forest—Cultural Resources*, U.S. FOREST SERV., https://perma.cc/S9M4-DJN9 (last visited Apr. 15, 2017) (discussing the mix of sites located on the forest—including interpreted sites).

26 JARVIS, *supra* note 22, at 6 ("[P]erhaps more than any other federal agency, the Forest Service has taken measures to identify the places and structures important to its own history . . . .").

27 To address this challenge, the Forest Service is increasingly relying on partners, such as HistoriCorps, to assist with restoration efforts. *E.g.*, *A Month's Worth of Work Wraps Up at Forest Lodge*, HISTORICORPS: BLOG (July 12, 2016), https://perma.cc/7PED-QMWA (discussing the nonprofit's work on Forest Lodge, a property located on the Chequamegon-Nicolet National Forest in Wisconsin).

28 42 U.S.C. §§ 4321–4370h (2012).

(NEPA), which fuels much of the agency's decision making from a compliance perspective.[29]

*1. Overview*

As enacted and subsequently amended, the NHPA is the hallmark of the modern preservation movement, shaping its current structure and defining the overall relationship between the federal government and important historic properties more generally.[30] Initially drafted in response to concerns about increasing losses of historic structures[31]—often with regard to large-scale urban renewal projects during the post-World War II build-out—the NHPA was designed to incorporate public involvement in urban renewal efforts and to force some consideration of these impacts within the larger calculus of federal agency project planning.[32] As noted, the primary thrust of the NHPA is the section 106 process, which requires the federal agency responsible for licensing, permitting, assisting, or carrying out an undertaking to consider the impacts of their projects on historic resources before proceeding with a given project.[33] This process of consultation will be

---

29 *See* U.S. FOREST SERVICE MANUAL, *supra* note 17, at § 2364.11; *see also* COUNCIL ON ENVTL. QUALITY & ADVISORY COUNCIL ON HISTORIC PRES., NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND NHPA (2013) [hereinafter NEPA/NHPA HANDBOOK], https://perma.cc/WC8V-NZWU (discussing how these statutes potentially align and can work in tandem).

30 Donald Dworsky et al., *Federal Law*, *in* A HANDBOOK ON HISTORIC PRESERVATION LAW 191, 195 (Christopher J. Duerksen ed., 1983); J. Peter Byrne, *Historic Preservation and Its Cultured Despisers: Reflections on the Contemporary Role of Preservation Law in Urban Development*, 19 GEO. MASON L. REV. 665 (2012) (reviewing the impacts of the NHPA); *see also* Melissa A. MacGill, Comment, *Old Stuff is Good Stuff: Federal Agency Responsibilities under Section 106 of the National Historic Preservation Act*, 7 ADMIN. L.J. AM. U. 697, 705 (1994) (explaining the transformative role of this legislation in federal preservation efforts).

31 *National Historic Preservation Act*, NAT'L PARK SERV., https://perma.cc/5P98-H479 (last visited Apr. 15, 2017) (explaining that by 1966, half of the structures that had been documented under the HABS program had been lost over that thirty year period); *see also* BARRY MACKINTOSH, NAT'L PARK SERV., THE NATIONAL HISTORIC PRESERVATION ACT AND THE NATIONAL PARK SERVICE: A HISTORY 79 (1986) (discussing the motivations behind the NHPA's enactment); Fowler, *Preservation Law*, supra note 4, at 38–39 (discussing the language of the NHPA's preamble).

32 The NHPA flowed out of this policy mix and set of concerns. NORMAN TYLER ET AL., HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES AND PRACTICE 46–49 (2d ed. 2009). Before its enactment, the United States Council of Mayors published an influential book—*With Heritage So Rich*—which spoke to the need for a more comprehensive national preservation policy and is generally credited as having contributed heavily to the passage of this legislation. U.S. COUNCIL OF MAYORS, WITH HERITAGE SO RICH (1966); Laura A. Watt et al., *On Preserving Ecological and Cultural Landscapes*, 9 ENVTL. HIST. 620, 622–24 (2004) (explaining the development of the NHPA). *But see* JOHN H. SPRINKLE, JR., CRAFTING PRESERVATION CRITERIA: THE NATIONAL REGISTER OF HISTORIC PLACES AND AMERICAN HISTORIC PRESERVATION 18–20 (2014) (discussing this evolution within the context of earlier historic preservation legislation).

33 MICHAEL A. TOMLAN, HISTORIC PRESERVATION: CARING FOR OUR EXPANDING LEGACY 105–08 (2015). This Article's focus on section 106 does not mean, however, that other sections of the act do not also influence agency operations. For example, section 110 of the NHPA requires federal agencies to develop historic preservation plans and programs for identifying, evaluating, and protecting those resources under its ownership or control, which also shapes agency

discussed in considerable depth in the following Parts. To provide the necessary context, however, this Part will briefly survey several discrete components of the Act that impact or tie into this consultation structure.

*a. The National Register of Historic Places*

One of the primary functions of the NHPA was the creation of the National Register of Historic Places[34] (National Register)—the official designation or status that may trigger an agency's obligations under the Act.[35] As a planning tool, the National Register provides criteria for identification of historic significance and serves as a starting point for evaluation efforts.[36] For the purposes of section 106, the National Register provides the formal standards for determining whether the Act and its consultation requirements are actually triggered.[37] Ultimately, for the purposes of section 106 and triggering consultation, formal designation is not actually required, only that the property is eligible for this status.[38]

To qualify for the National Register of Historic Places, a resource first has to fit within a qualifying typology—as a historic property, it has to be either a district, building, site, structure, or object.[39] The National Register criteria provide context for these definitions and guidance on their application, including eligibility as a traditional cultural property (TCP).[40]

---

practice in this area. *See Federal Preservation Institute*, NAT'L PARK SERV., https://perma.cc/4NHN-TGUF (last visited Apr. 15, 2017).

34 NHPA, 54 U.S.C. § 302101 (Supp. II 2015).

35 *See, e.g.*, 54 U.S.C. § 306108; Carol Shull, *The Future of the National Register*, F.J. (D.C.), Fall 2012, at 5; *see also* John H. Sprinkle, Jr., *To Expand and Maintain a National Register of Historic Places*, *in* BENDING THE FUTURE: 50 IDEAS FOR THE NEXT 50 YEARS OF HISTORIC PRESERVATION IN THE UNITED STATES *supra* note 3, at 231, 231–35 (discussing the National Register's creation and some of the current challenges).

36 Angus E. Crane, *In Search of Timely Compliance with the National Historic Preservation Act*, 4 TUL. ENVTL. L.J. 199, 201–02 (1990) (discussing identification and evaluation under the NHPA).

37 54 U.S.C. § 306108.

38 *Id.* § 300308; 36 C.F.R. §§ 800.4(c)(2), .16(l)(2) (2016). The regulations for formally nominating a property are located at 36 C.F.R. §§ 60.6–.10. The specific form that nominations take will largely not be discussed as the threshold for NHPA consideration is not listing, but is instead a determination of eligibility by the agency involved in the undertaking.

39 36 C.F.R. § 60.3 (providing definition of the property types established by the National Park Service); J. Peter Byrne, *Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 GEO. INT'L ENVTL. L. REV. 343, 349–51 (2015) (discussing designation criteria).

40 36 C.F.R. § 60.3; PATRICIA L. PARKER & THOMAS F. KING, NATIONAL REGISTER BULLETIN 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 5–6 (rev. ed. 1998) [hereinafter NATIONAL REGISTER BULLETIN 38], https://perma.cc/LNU2-ZC2U (discussing the eligibility of this form of resource if it qualifies as a property); *see also* AM. INDIAN LIAISON OFFICE, NAT'L PARK SERV., NATIONAL REGISTER OF HISTORIC PLACES - TRADITIONAL CULTURAL PROPERTIES (TCPS): A QUICK GUIDE FOR PRESERVING NATIVE AMERICAN CULTURAL RESOURCES 1 (2012), https://perma.cc/DP6F-JBVD (explaining that "[t]here are no special criteria for TCPs. In order to be eligible for listing in the NRHP a TCP must still meet one of the four basic Criteria for Evaluation, as outlined in *36 CFR Part 60.4 (a, b, c, d)* and must retain integrity (*see National*

For the purposes of the Forest Service, the most common resource type is the historic site classification—which is defined as "the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical or archaeological value regardless of the value of any existing structure."[41] This encompasses a wide range of cultural resources—including many resources frequently encountered across the National Forest System.[42]

Beyond fitting into a resource type, the property must also fit within the relevant evaluative criteria.[43] Properties can qualify under one or more of the following criteria: A) their associations with broad patterns of U.S. history; B) association with famous persons; C) architectural importance; and D) ability to convey or yield information about the past.[44] Although these criteria are fairly broad, there are also additional requirements and characteristics which can impact a property's eligibility, such as if the property has been moved or is less than fifty years old.[45] These exclusions are not hard and fast rules as there are exceptions that allow some of these properties to qualify[46]—as blanket application would have negative and unintended preservation consequences. For the Forest Service, criterion D (archaeological sites) is probably the most common, although resources in all of these categories can be found under the agency's jurisdiction.[47]

Last, in addition to meeting the eligibility criteria, a property also has to have sufficient historic integrity.[48] Integrity is defined under the Act as a resource's having the ability to convey the property's significance; in short, the resource has to be sufficiently intact in order to still merit designation.[49] Generally, if a property has been considerably altered or damaged, the property will not merit listing or consideration within the section 106

---

*Register Bulletin 15, Chapter VIII*). A TCP is simply a different way of grouping or looking at historic resources, emphasizing a place's value and significance to a living community."). There are, however, still challenges that advocates face in using TCP as a concept to designate important places. *See* NED KAUFMAN, PLACE, RACE, AND STORY: ESSAYS ON THE PAST AND FUTURE OF HISTORIC PRESERVATION 65–67 (2009).

41 36 C.F.R. § 60.3(l).

42 *See* TOMLAN, *supra* note 33, at 104 (providing more information on the types of nominations and the current mix of the National Register).

43 36 C.F.R. § 60.4; *see also* NAT'L PARK SERV., NATIONAL REGISTER BULLETIN 15, HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 1–2 (rev. ed. 1997) [hereinafter NATIONAL REGISTER BULLETIN 15], https://perma.cc/GA5J-Y5D8 (providing more detail regarding what is required for designation/eligibility).

44 36 C.F.R. § 60.4.

45 TOMLAN, *supra* note 33, at 102–104 (discussing the application of these criteria).

46 36 C.F.R. § 60.4.

47 NATIONAL REGISTER BULLETIN 15, supra note 43, at 21; *see also* Hutt, *supra* note 9, at 47–48 (explaining the consequences of being eligible under criterion D and the importance of considering other potentially applicable criteria). For a more thorough discussion of the application of section 106 to archaeological sites, *see* BRONIN & BYRNE, *supra* note 6, at 467–74.

48 36 C.F.R. § 60.4.

49 *Id.*

consultative process, but this will depend on the property type and why the resource is significant in the first place.[50]

To summarize, the National Register criteria provide the standards for determining whether properties merit consideration within federal project planning, as well as for eligibility for various incentives.[51] As of October 2016, there are more than 90,000 discrete listings on the National Register, which include over 1.4 million resources.[52] Given that this number includes only listed, not eligible, properties, one can get a sense of how many resources the Act's scope potentially encompasses.

### *b. State Historic Preservation Officers and Tribal Historic Preservation Officers*

Another feature of the NHPA was to fund the SHPOs, which eventually evolved to use this state network as a platform to better incorporate preservation planning and resource management nationwide.[53] In a devolved network, the SHPOs are critical to the NHPA process as they are involved in eligibility determinations and in resolving adverse effects through the section 106 consultation process which will be discussed in more detail.[54] The SHPOs also play important roles in overseeing tax credit programs, providing outreach at the state level, and myriad other activities as dictated by state funding and priorities.[55] In the 1992 amendments to the NHPA, the role of Tribal Historic Preservation Officer (THPO) was established to allow tribes to replace the SHPOs for undertakings involving tribal land, an important step in making the federal preservation program more responsive to tribal considerations.[56] Overall, the SHPOs and THPOs play a vital role in

---

50 *See id.* (explaining the limited circumstances in which altered properties may be eligible for inclusion).

51 *See e.g.*, 26 U.S.C. § 47(c)(3) (2012) (limiting eligibility for federal historic rehabilitation tax credits to properties listed on the National Register or contributing to a registered historic district); *see also* BRONIN & BYRNE, *supra* note 6, at 592–95 (providing an overview of the operation of this important development incentive).

52 *National Register of Historic Places Program: About Us*, NAT'L PARK SERV., https://perma.cc/534R-DBNL (last visited Apr. 15, 2017) (summarizing the National Register's current numbers).

53 TOMLAN, *supra* note 33, at 105; *see also* THOMAS F. KING, CULTURAL RESOURCE LAWS & PRACTICE 25–27 (4th ed. 2013) (discussing the evolving role of SHPOs, which was defined in the 1980 amendments to the NHPA).

54 Elizabeth A. Lyon & David L.S. Brook, *The States: The Backbone of Preservation*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 3, at 81, 81–83.

55 *What is a State Historic Preservation Officer (SHPO)?*, NAT'L CONF. ST. HISTORIC PRESERVATION OFFICERS, https://perma.cc/98ZD-XKBY (last visited Apr. 15, 2017) (discussing the role of SHPOs generally).

56 National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, § 4006(a)(2), 106 Stat. 4600, 4755–57 (current version codified at 54 U.S.C. § 302702 (Supp. II 2015)); Alan Downer, *Native Americans and Historic Preservation*, *in* A RICHER HERITAGE: HISTORIC PRESERVATION IN THE TWENTY-FIRST CENTURY, *supra* note 3, at 405, 415–17; *see also About THPOs*, NAT'L ASS'N TRIBAL HISTORIC PRESERVATION OFFICERS, https://perma.cc/F8XB-

the section 106 consultation process and in the preservation movement generally.[57]

*c. Advisory Council on Historic Preservation*

The Advisory Council on Historic Preservation (ACHP) was also created under the NHPA to advise federal agencies on their compliance with the NHPA and to help improve preservation outcomes at the federal level.[58] Consisting of federal agency representatives and presidential appointees, this independent federal agency's regulations establish the requirements for agency compliance with section 106 of the NHPA.[59] Additionally, ACHP staff is heavily involved in the section 106 consultation process—either informally or formally—depending upon the specific project and the evolution of the consultation.[60] The large majority of undertakings do not directly involve ACHP, as the agency has to be strategic and focused to achieve the most positive benefit.[61] ACHP also provides input on federal actions impacting historic resources, significant training on the section 106 process, and generally serves as a resource beyond agencies and to the public by virtue of its statutory/regulatory role.[62] Beyond section 106, ACHP also plays a role in advising the President and Congress on historic preservation matters, including legislation and other initiatives.[63]

---

U97R (last visited Apr. 15, 2017) (profiling the role that THPOs play and the funding levels associated with the creation of these officers). Currently, there are 171 NPS-recognized THPOs, who cover a landmass of more than 50 million acres across thirty states. *Find a THPO*, NAT'L ASS'N TRIBAL HISTORIC PRESERVATION OFFICERS, https://perma.cc/PZ3A-L5JN (last visited Apr. 15, 2017).

57 Craig Potts, *Section 106 from the SHPO Perspective*, F.J. (D.C.), Winter 2012, at 40 (discussing the SHPO's role and corresponding issues); Alan Downer, *Section 106 in Indian Country*, F.J. (D.C.), Winter 2012, at 47 (discussing this process from the tribal perspective).

58 NHPA, 54 U.S.C. §§ 304101–304102 (Supp. II 2015); *About the ACHP: General Information*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, https://perma.cc/W9CY-8WMV (last updated Dec. 21, 2015); *see also* Fowler, *Preservation Program*, supra note 3, at 38–40 (profiling the creation and role of ACHP).

59 54 U.S.C. §§ 304101; Fowler, *Preservation Program*, *supra* note 3, at 39–40. Since its creation, ACHP has established regulations applicable to agency compliance under the Act. This Article, unless otherwise indicated, will refer to the current version of the agency's regulations. Protection of Historic Properties, 69 Fed. Reg. 40,544 (July 6, 2004) (codified at 36 C.F.R. §§ 800.4, .5, .6. 14, .16 (2016)). For previous versions of the regulations, see Protection of Historic Properties, 65 Fed. Reg. 77,698 (Dec. 12, 2000); Protection of Historic Properties, 51 Fed. Reg. 31,115 (Sept. 2, 1986); Protection of Historic and Cultural Properties, 44 Fed. Reg. 6,068 (Jan. 30, 1979); Procedures for the Protection of Historic and Cultural Properties, 39 Fed. Reg. 3,366 (Jan. 25, 1974). For background on some of the more recent history of ACHP's regulations, see BRONIN & BYRNE, *supra* note 6, at 108–11 (summarizing the controversy over the 2000-era revisions culminating with the United States Court of Appeals for the District of Columbia's decision in *National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003).

60 36 C.F.R. § 800.2(b) (describing ACHP's role generally).

61 *Id.* pt. 800 app. A (laying out ACHP's factors in deciding when to intervene).

62 Fowler, *Preservation Program*, *supra* note 3, at 35, 38–40 (detailing the role of ACHP).

63 *Id.*

Overall then, the NHPA laid the groundwork for the contemporary historic preservation movement nationwide, including the criteria and parties involved in this process.[64]

*2. Section 106: The Process*

Beyond the various functions outlined in abbreviated fashion above, the most litigated component of the NHPA (and the focus of this Article) is compliance with section 106, the requirement that federal agencies consider historic preservation among other public interests in determining whether and how to proceed with a given undertaking. Section 106 of the NHPA provides that:

> The head of any Federal agency having *direct or indirect jurisdiction* over a proposed *Federal or federally assisted undertaking* in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of Federal funds on the undertaking . . . take into account the effect of the undertaking on any historic property. . . .[65]

In short, section 106 requires the proponent of a project involving federal assistance to consider the impacts of its project before proceeding with the undertaking.[66]

It should first be noted that section 106 is not a substantive mandate and does not dictate a specific outcome.[67] For instance, a federal agency could identify a historic property as eligible for the National Register and still demolish or destroy the resource, but it would first have to consult with various concerned parties before proceeding with an action.[68] Allowing the public and a range of consulting parties to have access to decision makers and to be included within the calculus behind a given project has had beneficial impacts, and the majority of consultations are successfully resolved through a Memorandum of Agreement (MOA) that addresses the impacts of the project (i.e., without an agency unilaterally deciding to move

---

64 *See, e.g.*, *NHPA 50th Anniversary*, NAT'L PARK SERV., https://perma.cc/9TFW-GKSS (last visited Apr. 15, 2017) (characterizing the NHPA as a "cornerstone of American historic preservation").

65 NHPA, 54 U.S.C. § 306108 (Supp. II 2015) (emphasis added). Initially, the NHPA only included listed properties, but was later expanded through an executive order to eligible properties, Protection and Enhancement of the Cultural Environment, Exec. Order No. 11,593, 3 C.F.R. at 559 (1971–1975), which was later codified through the Act of Sept. 28, 1976, Pub. L. No. 94-422, sec. 201, § 3, 90 Stat. 1313, 1320 (codified at 16 U.S.C. 470f (1976)). The NHPA has been recently recodified as positive law within the newly created Title 54 of the *United States Code*. For more information, see *The National Historic Preservation Act Has Moved!*, ADVISORY COUNCIL ON HISTORIC PRESERVATION (Jan. 7, 2015), https://perma.cc/8QX9-7QW3.

66 SHERRY HUTT ET AL., HERITAGE RESOURCE LAWS: PROTECTING THE ARCHEOLOGICAL AND CULTURAL ENVIRONMENT 40 (1999).

67 *See, e.g.*, Gettysburg Battlefield Pres. Ass'n v. Gettysburg Coll., 799 F. Supp. 1571, 1580 (M.D. Pa. 1992), *aff'd*, 989 F.2d 487 (3d Cir. 1993).

68 United States v. 162.20 Acres of Land, 639 F.2d 299, 302 (5th Cir. 1981).

forward with a project with a particularly adverse result).[69] Federal policymakers and preservation advocates can rightly point to many examples of where this consultation has led to avoided impacts to important historic resources.[70] Conversely, critics of the NHPA can rightly point to examples of where the consultation process, in their view, failed or resulted in an incomplete or inadequate consideration of a project's impacts.[71] Regardless of one's position on the merits of the process, it is important to note what section 106 actually requires—consideration of effects and not specific agency action.

Second, before discussing the section 106 consultation process in greater depth, it is worth noting the role that cultural resource management, or thinking about archaeological and tribal resources, fits within the context and scope of this important legislation. While section 106 has incorporated preservation planning within the context of larger decision making at the agency level, it is not without issue and controversy, even among those within the preservation community.[72] For one, tribal and archaeological interests were largely absent from the creation of the NHPA.[73] While the 1992 amendments addressed some of this gap, section 106, in particular, is still criticized by some as being too focused on architecture and archaeology, and not fully representative of many other important aspects of our cultural heritage.[74] Consultation and, in turn, resolving adverse effects remains a place-based concept, which limits section 106's protective scope and the lens through which federal agencies typically view their responsibilities.[75] It is, however, the current operative structure.

---

69 36 C.F.R. § 800.6(b)(1)(i)–(iv) (2016); *Guidance on Section 106 Agreement Documents*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, https://perma.cc/A3AZ-8V25 (last updated Aug. 18, 2015) (discussing agreement documents generally).

70 *Section 106 Success Stories*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, https://perma.cc/2V4R-MCBC (last updated Feb. 28, 2017) (profiling the results of successful consultations); *see also* Frances P. MacManamon, *Protection of Archaeological Resources in the United States: Reconciling Preservation with Contemporary Society*, *in* CULTURAL RESOURCE MANAGEMENT IN CONTEMPORARY SOCIETY: PERSPECTIVES ON MANAGING THE PAST AND PRESENTING THE FUTURE 40, 51 (Frances P. MacManamon & Alf Hatton eds., 2000) (discussing the importance of this Act in protecting archaeological resources).

71 LESLIE BARRAS, NAT'L TR. FOR HISTORIC PRES., 2 SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT (2010), https://perma.cc/9PB8-H8QH 47–73 (discussing concerns with agency compliance with the requirements of the act as having adverse impacts to heritage resources).

72 Thomas F. King, *Repeal the National Historic Preservation Act*, *in* BENDING THE FUTURE: 50 IDEAS FOR THE NEXT 50 YEARS OF HISTORIC PRESERVATION IN THE UNITED STATES *supra* note 3, at 128 [hereinafter King, *Repeal NHPA*] (critiquing the NHPA's current role and arguing for its repeal to broaden the scope and effectiveness of preservation planning within federal agencies).

73 Kurt E. Dongoske & Theresa Pasqual, *Steps Towards Decolonizing the National Historic Preservation Act*, *in* BENDING THE FUTURE: 50 IDEAS FOR THE NEXT 50 YEARS OF HISTORIC PRESERVATION IN THE UNITED STATES, *supra* note 3, at 67 (discussing the history of the NHPA and its relationship to tribal cultural heritage generally).

74 *See* King, *Repeal NHPA*, *supra* note 72, at 129–30.

75 Julianne Polanco, *Culture as the Catalyst: Broadening Our History, Intangible Heritage, and Enlivening Historic Places*, *in* BENDING THE FUTURE: 50 IDEAS FOR THE NEXT 50 YEARS OF HISTORIC PRESERVATION IN THE UNITED STATES *supra* note 3, at 201.

To provide a short overview of how section 106 works in practice, this Section will provide an overview of the parties involved, the threshold which triggers this review, and the procedural steps involved in most consultations.

*a. The Parties*

Several parties are typically involved in a standard consultation. The responsible party or actor within the section 106 process is the federal agency as the ultimate decision maker for approving the undertaking.[76] The federal agency is the only party with direct responsibilities and obligations within the consultation process, and even if some of the compliance obligations are shifted to another party (i.e., the project proponent), the final decision-making authority must be retained by the agency.[77] Working with Forest Service projects, consultation is largely coordinated or led by the agency's heritage program with a line officer (such as a forest supervisor) retaining the agency's decision-making authority.[78]

As noted, the SHPOs/THPOs have a large role in the section 106 process under the NHPA framework and are parties by right in the consultation.[79] Depending upon the nature of the land involved, the THPO/SHPO will have jurisdiction over that resource, and thus will be critical to completing the consultation.[80]

Beyond the SHPOs/THPOs, ACHP is entitled to consult on all undertakings at its discretion.[81] Although there is a large volume of undertakings, ACHP is not involved in the majority because most are resolved with a finding of no historic properties impacted or no adverse effect—but depending on the progress of a project, ACHP may become involved or offer to provide guidance on moving the undertaking forward to its ultimate resolution.[82]

Beyond the standard participants, there can be other consulting parties involved—which can be divided into those entitled to consult versus

---

76 36 C.F.R. § 800.2(a) (2016).

77 *Id.*

78 FOREST SERVICE MANUAL, *supra* note 17, §§ 2360.4 exhibit 1, 2361.1–2.

79 36 C.F.R. §§ 800.2(c)(1)–(2).

80 *Id.* § 800.3(c). Generally, if a resource is on tribal lands, the THPO will have jurisdictional control. *Id.* There is an exception, however, for nontribal owners of property on tribal lands to request the SHPO's involvement for consultations impacting their resources. *Id.* § 800.3(c)(1). Tribal consultation, however, extends beyond tribal lands. *Id.* § 800.2(c)(2)(ii) (requiring agencies to consult with Indian tribes and Native Hawaiian organizations if they attach "religious and cultural significance to historic properties that may be impacted by an undertaking" regardless of its location). The scope of tribal consultation and involvement in off-tribal lands undertakings has been somewhat contentious. *See* Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L.J. 483, 524–27 (1999) (profiling the debate over the nature of this role in revisions to ACHP regulations).

81 36 C.F.R. § 800.2(b)(1).

82 *See id.* pt. 800 app. A (providing the criteria for council involvement in a specific undertaking).

discretionary invitees. The list of entitled consultees will vary by undertaking,[83] but can include entities such as: local governments with authority over the project area; applicants for a federal license, approval or funding; and tribes or Native Hawaiian organizations for projects located off tribal lands upon which they place religious and cultural significance.[84] Discretionary invitees are largely up to the agency, but ACHP's regulations expressly provide that interested parties may request to become consulting parties if they have a "demonstrated interest in the undertaking . . . 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."[85] Again, a determination to allow a discretionary party consulting party status is largely up to the agency after consultation with the SHPO/THPO, but it is typical, for some agency and project types, to reach out to historic organizations and other groups with knowledge and interest to try to get their input in order to benefit from their timely participation.[86]

Last, the public has a right to be involved and the agency is required to reach out beyond the consulting parties to attempt to get their input and to consider their views.[87] The nature, scope, and ultimate success of the public outreach efforts will depend upon the project being considered, but the statute and regulations provide some detail on the timing and information that should be made publicly available.[88] Beyond these general guideposts, the agency also has fairly broad discretion in its fulfillment of this obligation under the Act.[89]

### *b. Defining the Undertaking*

After consideration of which parties might potentially be involved, the threshold consideration is determining when section 106 review is actually triggered; in short, when is there an undertaking with the potential to affect historic properties? Under the NHPA, an undertaking is defined as:

> [A] project, activity, or program funded in whole or part under the direct or indirect jurisdiction of a Federal agency, including—(1) those carried out by or on behalf of the agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license or approval; and (4) those subject

---

83 *Id.* § 800.3(f).

84 *Id.* § 800.2(c)(2)–(4).

85 *Id.* § 800.2(c)(5).

86 ADVISORY COUNCIL ON HISTORIC PRES., PROTECTING HISTORIC PROPERTIES: A CITIZEN'S GUIDE TO SECTION 106 REVIEW 11 (2015), https://perma.cc/AT9Z-L7HD.

87 36 C.F.R. § 800.2(d).

88 *Id.* § 800.2(d)(1)–(2).

89 *Id.* § 800.2(d); *see also* Milford Wayne Donaldson, *Section 106: Responding Successfully to New Challenges*, F.J. (D.C.), Winter 2012, at 6, 6–9 (discussing the importance of public involvement in shaping successful preservation outcomes).

> to a State or local regulation administered pursuant to a delegation or approval by a Federal agency.[90]

This is a fairly broad definition that can cover a considerable amount of federal agency practice.[91] There are certainly definitional disputes regarding whether this threshold is met, and the scope of section 106's application has been one of the more common sources of litigation.[92] For example, consider the area of federal funding where the broad nature of this language could seemingly cover any program. Despite this broad language, courts have not generally viewed this requirement as expansively—many courts have required a degree of control over the use of the funds within the project to actually trigger the Act's application.[93] The status of many, if not most, undertakings is more clear cut. Ultimately, the determination of whether an agency action qualifies as an undertaking is up to the agency, but it does extend to a wide variety of actions taken by the Forest Service as a land managing agency.[94] Once an undertaking has been established, the Forest Service will then need to begin consultation with the parties involved with that specific proposed action, which must occur early in the planning process to allow consulting parties and the public an appropriate degree of input and to not artificially limit the possible project alternatives.[95]

### *c. Identification*

Once it is determined that there is an undertaking, the consultation actually begins. One of the most important steps in a section 106

---

90 54 U.S.C. § 300320 (Supp. II 2015). This definition comes from the 1992 amendments to the NHPA. National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, § 4019(a)(5), 106 Stat. 4600, 4764. Prior to 1992, there was no direct definition of the term undertaking, but only a circular reference to those activities falling under the scope of section 106. Litigation involving decisions made pursuant to delegated programs led to ACHP further revising its undertakings definition under 36 C.F.R. 800.16(y). Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 755 (D.C. Cir. 2003) (discussing the 1992 amendments).

91 Fowler, *Preservation Program*, *supra* note 3, at 47, 499 n.21 ("Though any federal action is technically covered by the definition of 'undertaking,' the reality is that the more tenuous the federal nexus, the less likely an agency will take its Section 106 duties seriously.").

92 ADINA W. KANEFIELD, ADVISORY COUNCIL ON HISTORIC PRES., FEDERAL HISTORIC PRESERVATION CASE LAW, 1966–1996: THIRTY YEARS OF THE NATIONAL HISTORIC PRESERVATION ACT 13–33 (1996).

93 BRONIN & BYRNE, *supra* note 6, at 132–34 (discussing threshold application of the NHPA in federal funding cases); *see also* Fowler, *Preservation Law*, *supra* note 4, at 50–51 (noting that "[s]ection 106 applies to 'those cases where the administrative agencies have real discretion to say yea or nay'").

94 THOMAS F. KING, CULTURAL RESOURCES LAW AND PRACTICE 117 (4th ed. 2013) (discussing the federal agency's discretion and responsibility in making this determination); *see also* 1 ENVIRONMENTAL LAW PRACTICE GUIDE § 2.02[2][e][iii][A] (Michael B. Gerrard ed., 2016) (listing various actions falling under the jurisdiction of the Forest Service to which courts have held section 106 applies).

95 *See* 36 C.F.R. § 800.1(c) (describing the timing for initiating the section 106 process).

consultation is to identify any historic properties that might be impacted by the undertaking.[96]

The first step in this process is determining the area of potential effects (APE).[97] The agency is required to make a defensible decision as to the geographic footprint of the impacts that might flow out of its project—either direct or indirect.[98] The APE must be developed in conjunction with the SHPO/THPO and must include some documentation or rationale to establish the geographic extent of the impacts on the area in which the undertaking will be occurring.[99]

Once the APE is set, the agency is then required to make a "reasonable and good faith effort" to identify any historic resources located within that geographic context.[100] This requires an assessment of known historic sites as well as an examination of the eligibility of other possible historic properties located within the APE.[101] Where archaeological sites are known or likely, this often involves a reconnaissance survey and field work to evaluate what exists on the ground and working with the consulting parties to determine the location and eligibility of these resources.[102]

Within the context of this effort, agencies are required to determine whether or not historic properties within the APE meet the eligibility criteria—would the resource qualify under the National Register criteria?[103] If the property is not already listed, this determination requires consultation with the SHPO or the THPO.[104] If the parties are in agreement, this determination of eligibility will prevail.[105] If, however, there is disagreement, the agency must request a determination from the Keeper of the National Register, who will have the final decision.[106] Overall then, this stage involves both establishing the APE as well as identifying the eligibility of historic resources that might be impacted by a proposed undertaking.

---

96 *Id.* § 800.4 (describing the steps for identifying potentially affected historic properties).

97 *Id.* §§ 800.4(a)(1), 800.16(d) (defining area of potential effect).

98 *Id.* §§ 800.4(a)(1), 800.16(d).

99 *Id.* § 800.4(a) (establishing the scope of the identification effort).

100 *Id.* § 800.4(b); *see also* ADVISORY COUNCIL ON HISTORIC PRES., MEETING THE "REASONABLE AND GOOD FAITH" IDENTIFICATION STANDARD IN SECTION 106 REVIEW 1 (2011), https://perma.cc/7CK7-TGSS (providing guidance for agencies in meeting the review requirements).

101 36 C.F.R. § 800.4(a)–(c) (2016).

102 ADVISORY COUNCIL ON HISTORIC PRES., SECTION 106 ARCHAEOLOGY GUIDANCE 7, 16–17 (2009), https://perma.cc/8M3M-5YU7 (explaining that surveys may be necessary for some undertakings, but the degree of this involvement will depend upon the undertaking that is being evaluated).

103 36 C.F.R. § 800.4(c)(1)–(2) (2016).

104 *Id.* § 800.4(c)(1).

105 *Id.* § 800.4(c)(2).

106 *Id.*

*d. Assessment*

After conducting a reasonable and good faith identification effort, if the agency has determined that there are historic resources within the APE, it must then evaluate and consult with regard to whether the undertaking may affect these resources.[107]

> 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.[108]

If there are no adverse effects, the process and the consultation concludes.[109] The Forest Service will provide notification to the consulting parties and officially conclude the consultation.[110] If a consulting party, however, objects to this finding within thirty days from being notified that the agency has found no adverse effects, the consulting party can work with the Forest Service to resolve this dispute or the agency can request that ACHP help to resolve this issue.[111] ACHP will then give its opinion, which the agency will have to consider, but not necessarily adopt in making its ultimate determination on whether any adverse effect exists.[112] If the parties agree that there is an adverse effect, the consultation will continue to the next and last stage, resolving the adverse effects.

*e. Resolving Adverse Effects*

Finally, if there is an undertaking that will have an adverse effect to a historic property, the federal agency will need to discuss with the consulting parties how to resolve the adverse effects.[113] This typically involves a discussion about whether alternative solutions or routes can avoid the impacts to the historic resource.[114] In many instances, and for some project types in particular, if avoidance (the preferred option) is not feasible, the discussion will turn to minimization and then mitigation—including potentially documentation—as a way to mitigate the project's impacts.[115] "An

---

107 *Id.* § 800.5(a).
108 *Id.* § 800.5(a)(1).
109 *Id.* § 800.5(c)(1).
110 *Id.* § 800.5(c).
111 *Id.* § 800.5(c)(2)(i).
112 *Id.* § 800.5(c)(3)(i)–(ii)(A).
113 *Id.* § 800.6(a).
114 *See id.* § 800.6(b).
115 *See, e.g.*, FOREST SERVICE MANUAL, *supra* note 17, § 2364.11(15)–(16). For better or worse, documentation of a historic site that is being removed is a fairly common form of mitigation. Virginia B. Price, *Drawing Details: Taking Measure of the HABS Collection*, 4 PRESERVATION EDU. & RESEARCH, Winter 2011, at 53, 54 (discussing mitigation's role in driving documentation of historic sites).

agreed-upon outcome under Section 106 is not usually a pure preservation solution. . . . Rarely is the 'no-build' option given serious consideration, and the economic realities of the project are almost always dominant."[116] Consultation ideally is a two-way street, with both sides essentially working together to achieve an agreed upon solution.[117] To do this, the agency and the consulting parties have a fair amount of latitude to craft an appropriate way to address the effects of the undertaking and conclude the consultation.[118] The overall concept behind the consultation requirement is to allow public input into this decision making and force the federal agency to take into consideration the value of the historic resources before moving too far forward with a proposed undertaking, and this includes the process of working to resolve or address adverse effects.[119]

Successful consultations conclude in either an MOA or—for more complex undertakings—a project programmatic agreement signed by the parties that records the decisions made and the steps the agency has agreed to take to avoid, minimize, or mitigate the adverse effects flowing from the undertaking.[120] Occasionally, however, the parties are unable to come to an agreement to complete the undertaking and one of the parties will move to terminate the consultation.[121] Depending upon which party terminates the consultation, ACHP will provide its comments to the agency, who will have to respond and address those comments in making their final decision on the undertaking.[122] This is a rare occurrence, however, as agencies typically try to avoid the political impacts of termination and council comment.[123] Despite this incentive to agree on a resolution—as the NHPA is generally not a substantive statute—the decision ultimately made by the federal agency may still have a considerable impact on historic resources.[124] The current section 106 process at least partially accomplishes this goal, and there have

116 Fowler, *Preservation Program*, *supra* note 3, at 49.

117 *Id.* at 38–40.

118 *See, e.g.*, Susan Chandler, *Innovative Approaches to Mitigation*, *in* ARCHAEOLOGY AND CULTURAL RESOURCE MANAGEMENT: VISIONS FOR THE FUTURE 115, 121–22 (Lynne Sebastian & William D. Lipe eds., 2009) (discussing the potential of this trend and providing examples of alternative mitigation that have been utilized).

119 36 C.F.R. § 800.6(a)(4).

120 *Guidance on Section 106 Agreement Documents*, *supra* note 69. Beyond the standard consultation process, to streamline compliance or to address specific project types, the agency may develop a program alternative for its compliance. For more information regarding program alternatives, see 36 C.F.R. § 800.14.

121 36 C.F.R. § 800.7.

122 *See, e.g.*, Letter from Ken Salazar, Sec'y, U.S. Dep't of the Interior, to John L. Nau III, Chair, Advisory Council on Historic Pres. (Apr. 28, 2010), https://perma.cc/E5CG-UHWN (responding to ACHP's comments on the project and considering this perspective in making its final decision on the undertaking).

123 Michael C. Blumm & Andrea Lang, *Shared Sovereignty: The Role of Expert Agencies in Environmental Law*, 42 ECOLOGY L.Q. 609, 628 (2015) (explaining that few projects receive ACHP comments because of the associated political ramifications).

124 TOMLAN, *supra* note 33, at 97–100.

been notable successes in mitigating or avoiding impacts to irreplaceable historic properties.[125]

## III. SECTION 106 APPELLATE LITIGATION AND THE FOREST SERVICE

An overview of the appellate litigation is useful to evaluate how this process has influenced the agency's decision making to include greater consideration of historic properties.[126] This study will solely focus on appellate litigation and provide a comprehensive survey of the issues that have been evaluated by various courts of appeal in the fifty years since the Act's enactment. Overall, there have been nine principal appellate decisions involving the Forest Service, and this review will proceed chronologically.[127]

### *A. Introduction*

Forest Service litigation in the section 106 arena got off to a relatively slow start for a number of reasons. First, in its earliest years, section 106 applied only to properties actually designated on the National Register, which initially included few properties and was somewhat slow to expand.[128]

---

125 *See, e.g.*, *Section 106 Success Story: Key Battlefield of the American Revolution Saved from Nuclear Threat*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, https://perma.cc/4AXX-NTPM (last visited Apr. 15, 2017) (discussing the section 106 consultation involving a nuclear reactor near the Saratoga Battlefield in upstate New York; as a result of the section 106 consultation, an alternative site was located to avoid the adverse effects to the national park).

126 Several of the cases discussed have been highly influential as far as shaping section 106 practice and the regulation's current form. *See, e.g.*, BRONIN & BYRNE, *supra* note 6, at 507–20 (discussing *Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223 (9th Cir. 1999), and *Muckleshoot Indian Tribe v. United States Forest Service*, 177 F.3d 800, 803 (9th Cir. 1999), with regard to treatment of tribal resources).

127 This summary is only intended to touch upon the major appellate litigation under the NHPA involving the Forest Service. As previously noted, there are a few other significant cultural resource decisions involving the agency during this period as well as decisions that did not make the appellate level. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441 (1988) (ruling on the application of the Free Exercise Clause to land management decisions impacting tribal sacred sites); *see also* Kristin A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 DENV. U. L. REV. 981, 985–87 (2006) (contextualizing the case within the trajectory of the incorporation of sacred site protection into federal land management). Additionally, there have been major changes in agency policy as a result of litigation and settlement agreements that are also not addressed within this summary. *See, e.g.*, Kristine O. Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 J. ENVTL L. & LITIG. 47, 99–101 (1987) (discussing the lawsuit filed by Save the Jemez regarding agency cultural resource management); Kristine O. Rogers, *Native American Collaboration in Cultural Resource Protection in the Columbia River Gorge National Scenic Area*, 17 VT. L. REV. 741, 755 n.91 (1993) (citing the settlement reached with regard to these issues). Last, within the context of each appellate decision discussed, this analysis is only focused on the NHPA issues addressed in the recorded decisions unless some discussion of the other causes of action is necessary to provide context as far as the ultimate holding in the case or otherwise has a bearing on the NHPA claims.

128 KING, *supra* note 53, at 106 (discussing the slow development of section 106 review); *see also* Fowler, *Preservation Law*, *supra* note 4, at 46 n.54 (noting that as of February 1, 1976, twelve thousand properties had been designated as historic on the National Register).

The Nixon Administration, however, issued an executive order expanding the scope of this review to include eligible properties, which would later be codified through amendments to the NHPA.[129] This added an element to the agency's work to evaluate whether historic properties would, in fact, be eligible for the National Register, rather than allowing an agency to only look at the properties which had already been recognized.[130] The relatively limited scope of the NHPA during its earliest years had some measure of direct influence on the overall litigation trends—both in intensity and location.[131]

Additionally, the process of section 106 consultations itself would also need to develop. Growing somewhat out of its architectural (through its tie in to the National Register) and later its archaeological context, cultural resource management and archaeological survey work soon became synonymous with section 106 review.[132] Understanding how to evaluate and consult on other resource forms, particularly those significant to tribes, were slower to develop.[133] Relatedly, the Forest Service as a land management agency simply had different resource challenges than other federal agencies, which further influenced this litigation trend. In many ways, it would take some time for cultural resource management to evolve; this is exemplified by the fact that most early cases were in the eastern United States and involved built structures.[134] Thus, from 1966 through 1983 (spanning more than a decade and a half from Act's adoption), there were no appellate decisions involving the Forest Service.[135]

---

129 Protection and Enhancement of the Cultural Environment, Exec. Order No. 11,593, 3 C.F.R. at 559 (1971–1975); *see also* Fowler, *Preservation Program*, *supra* note 3, at 35, 71–72 (discussing this evolutionary process).

130 King, *Cultural Resources*, *supra* note 6, at 228.

131 KANEFIELD, *supra* note 92, at 195–201 (listing, chronologically, all the litigation under the NHPA). The first case was decided in 1969 and less than thirty were decided by the courts in the decade following its enactment. *Id.* Relatedly, this focus on listed properties is also demonstrated by the concentration of most of the early cases within the eastern United States. *See id.*

132 *See* Thomas F. King, *Rethinking Traditional Cultural Properties?*, 26 GEORGE WRIGHT F., no 1, 2009, at 28, 33–34 (discussing the origins of the National Register and its influence on section 106 practice).

133 *See, e.g.*, Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623 (2004); S. Rheagan Alexander, Note, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895, 899–900 (2012).

134 Rhiannon Jones & Donald Weir, *Developing Responsible Stewardship: Section 106 and 110 Compliance in Midwestern National Forests, 1966–Present, in* THE NATIONAL HISTORIC PRESERVATION ACT: PAST, PRESENT AND FUTURE, *supra* note 3, at 213, 222–24 (profiling the evolution of agency efforts in this sphere).

135 Several important district court opinions involving the agency's NHPA were also issued in or around this period. Paulina Lake Historic Cabin Owners Ass'n v. U.S. Dep't of Agric. Forest Service, 577 F. Supp. 1188 (D. Or. 1983); Nw. Indian Cemetery Protective Ass'n. v. Peterson, 552 F. Supp. 951, 955 (N.D. Cal. 1982); Black Hills All. v. Reg'l Forester, 526 F. Supp. 257, 259 (D.S.D. 1981).

### *B. The 1980s:* Wilson v. Block

The first case to reach the circuit courts was *Wilson v. Block*.[136] In *Wilson*, a number of Tribes challenged the Forest Service's approval of a special use permit for the Arizona Snowbowl ski area.[137] This is the first of two major lawsuits surrounding the use of this important area as the San Francisco Peaks have particular significance for many tribes.[138] Located amongst these peaks, the Arizona Snowbowl on the Coconino National Forest has been a ski resort area since the 1930s.[139] In 1977, the Forest Service issued a special use permit to a new operator, Northland Recreation Company (Northland) who subsequently sought to expand their operations.[140] In considering whether and how to permit this expansion, the Forest Service began scoping and considering alternatives under NEPA.[141] Upon review, the alternatives considered ranged from terminating all operations at the site to allowing Northland's full proposed expansion—adding ski runs to an additional 120 acres.[142] In early 1979, the Forest Supervisor issued a decision in favor of an option that had not been considered during scoping, and allowed Northland to expand by 50 acres instead of the 120 acres that had been initially proposed.[143] The Regional Forester essentially stayed this decision, temporarily requiring the status quo to be maintained, but in late 1980, the Chief of the Forest Service reversed the Regional Forester and reinstated the Forest Supervisor's approval of the more limited expansion on the site.[144]

Various tribal entities challenged this decision under a variety of causes of action—including the American Indian Religious Freedom Act,[145] violation of the government's tribal trust obligations, the Endangered Species Act,[146] the Multiple-Use Sustained-Yield Act,[147] the Administrative Procedure Act[148] (APA), and the NHPA.[149] In mid-1981, the district court granted summary judgment to the Forest Service on all claims, except for the NHPA claims.[150] With regard to NHPA compliance, the Forest Service had not yet entered into consultation, and the court stayed the case to allow the agency to come into compliance.[151] The Forest Service then began conducting archaeological

136 708 F.2d 735 (D.C. Cir. 1982).

137 *Id.* at 737–38.

138 *Id.* at 738. The other major law suit is *Navajo Nation v. United States Forest Service*, 479 F.3d 1024 (9th Cir. 2007), *on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008).

139 *Wilson*, 708 F.2d at 738.

140 *Id.*

141 *Id.*

142 *Id.* at 738–39.

143 *Id.* at 739.

144 *Id.*

145 42 U.S.C. §§ 1996–1996a (2012).

146 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544.

147 Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531.

148 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521.

149 *Wilson*, 708 F.2d at 739.

150 *Id.*

151 *Id.* at 753.

survey work (covering approximately 35% of the permit area) and ultimately, with the SHPO's concurrence, found that there were no eligible sites within the APE and ended the consultation.[152] By May 1982, the Forest Service had, in its view, fulfilled its obligations under the Act, and the district court granted summary judgment to the agency on all issues.[153]

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the Tribes raised three issues: 1) failure to identify all eligible properties, 2) error in determining that the project would have no adverse effects to historic properties, and 3) error in its conclusion that the San Francisco Peaks were not eligible for the National Register.[154] The first challenge was dismissed as the court found that the agency's survey effort exceeded what was required, concluding that the appropriate scope of a survey varies based upon the facts and details of a specific undertaking.[155]

The Tribes' second claim alleged error in the determination of no adverse effect—related to the agency's conclusion that the expansion would not impact the neighboring Fern Mountain Ranch, which is located one and a half miles from the Snowbowl.[156] The ranch had been listed on the National Register for its architectural significance, its role in the development of the tourist industry around the Grand Canyon, and for its early promotion/development of Arabian horse breeding in Arizona.[157] The Forest Service determined that the expansion of the ski area would have some impact to the natural setting of the ranch, but as this was not a factor that supported the initial designation, the court affirmed the agency's no adverse effect determination.[158] Last, the appellants challenged the Forest Service's conclusion that the San Francisco Peaks were not themselves eligible for the National Register.[159] The court dismissed this claim as the determination of eligibility is typically up to the agency and the SHPO, and as both had concurred, there was no basis for reversal.[160]

In all, *Wilson* is perhaps most interesting in light of contemporary preservation practice. The ultimately unsuccessful tribal arguments to halt the expansion of the Arizona Snowbowl focused first on impacts to a neighboring historic ranch as it was actually listed on the National Register and second in trying to convince the agency and SHPO of the eligibility of peaks themselves. In assessing the agency's procedural compliance, it should be noted that this decision came before the issuance of National

---

152 *Id.* at 753–54. The SHPO and the Forest Service agreed that there would be no impact to the historic sites, but had differing opinions with regard to why. *Id.* at 756.

153 *Id.* at 753–54.

154 *Id.* at 754.

155 *Id.*

156 *Id.* at 755. At the district court level, the plaintiffs also alleged failure to consider the effects to the C. Hart Merriam Camp, but this claim was dropped on appeal. *Id.* at 754 n.16.

157 *Id.* at 755.

158 *Id.*

159 *Id.* at 755. The court found that a question of eligibility only exists when the SHPO/THPO and the agency disagree on a property's eligibility. Absent that, there was nothing for the court to review under the then existing 36 C.F.R. § 800.4(a)(3). *Id.* at 756.

160 *Id.*

Register Bulletin 38 and the adoption of the concept of TCPs which fostered consideration of a wider range of historic property types.[161] For example, in *Navajo Nation v. United States Forest Service*,[162] a decision addressing cultural resources in this sensitive area over twenty years later, the Forest Service treated the San Francisco Peaks as an eligible property in conducting its consultation and made a determination of adverse effect, which allowed the consultation to continue (which allowed additional tribal input into the project's design).[163] Notably, *Wilson v. Block* was the only case to reach the appellate stage before the 1990s, which saw increased activity and attention to Forest Service management decisions within the heritage arena.[164]

### *C. The 1990s*

As noted, the 1990s saw expanded attention to the impact of Forest Service activities on cultural resources.[165] This attention carried over to the courts as this decade was the most active period for NHPA litigation, with circuit courts hearing five discrete matters, which are addressed in turn.[166]

#### *1.* Yerger v. Robertson

*Yerger v. Robertson*[167] also involved a special use permit, but had a slightly different focus as it addressed a historic property that was being operated under a concessionaire agreement.[168] In *Yerger,* the appellant objected to the Forest Service's decision not to renew a special use permit related to a historic resort—the Horsethief Basin Resort—which was located on the Prescott National Forest in Arizona.[169] This resort was constructed

---

161 *See* NATIONAL REGISTER BULLETIN 38, *supra* note 40, at 5–6. It also came before the 1992 amendments to the NHPA and the current version of ACHP regulations which give tribes, even off tribal lands, a greater role in evaluating historic significance. 36 C.F.R. § 800.4(c)(1)–(2) (2016).

162 479 F.3d 1024 (9th Cir. 2007), *on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008).

163 *Id.* at 1029, 1060.

164 *See* Hutt, *supra* note 9, at 49–51 (discussing *Wilson v. Block* and the subsequent legislative response in the 1990s).

165 *Id* at 46 (explaining the impact of the 1992 amendments to the NHPA as "[j]ust how to work with tribes, to determine the places representing places of significance, was not specified in the law. Bringing places of customary and traditional use by tribes in to the rubric of public lands management, including those which may not be on tribal land, was left to the development of consultation practices and guidance from the courts.").

166 One additional circuit court decision was issued in *Native Americans for Enola v. United States Forest Service*, 60 F.3d 645 (9th Cir. 1995), but this brief decision is not separately analyzed. In *Native Americans for Enola*, various Native American and environmental groups challenged the Forest Service's decision to grant a logging company access across a national forest for logging purposes. *Id.* at 646. As the permit had already expired by the time it reached the court on appeal, in a very short decision, the Ninth Circuit dismissed the case on mootness grounds. *Id.*

167 981 F.2d 460 (9th Cir. 1992).

168 *Id.* at 461.

169 *Id.* at 463.

during the 1930s through a collaborative arrangement between the Forest Service and the City of Phoenix—intending to provide a summer retreat for citizens in the area.[170] By 1966, however, the City of Phoenix had given up its interest and the Forest Service had issued permits to various operators seeking to manage the resort as a commercial enterprise.[171] In 1981, Donald Yerger received a five-year permit, which included a term requiring removal of all structures and improvements upon the permit's termination, revocation, or cancellation.[172] When Yerger's permit came up for review in 1986, the Forest Service, after concluding that the resort had extremely low occupancy and was no longer needed, declined to renew the special use permit and ordered Yerger to remove the structures, but not until consultation under the NHPA was completed.[173] In an attempt to continue his use of the property, after exhausting internal agency appeals, Yerger challenged this decision under the APA, NHPA, and estoppel theories.[174]

As far as the NHPA challenges, there were two primary and related components to Yerger's arguments. First, Yerger argued that the Forest Service's failure to complete NHPA consultation prior to its decision not to renew the permit violated the Act.[175] The Forest Service clearly had not entered into consultation but had deferred decision making until after the process of terminating the special use permit had already begun.[176] In the Forest Service's view, which the United States Court of Appeals for the Ninth Circuit affirmed, there was no undertaking at the termination decision because the only impact of this decision was a change in ownership or operational structure, which did not in itself necessarily adversely impact historic resources.[177] The only impact of terminating the special use permit was resumption of Forest Service's occupancy over the property.[178] Yerger's second argument related to the component of the order that required him to remove the structures as, in his view, this had a clear adverse effect on the historic resources.[179] This order, however, was itself conditioned upon completion of the NHPA process, which the court found to comport with the requirements of the Act.[180]

In all, *Yerger* concludes that a change in ownership (at least into federal control) does not necessarily result in an undertaking that triggers the consultation requirements of the NHPA,[181] and that an order conditioned

170 *Id.* at 462.

171 *Id.*

172 *Id.* at 461–62.

173 *Id.* at 462–63.

174 *Id.* at 463. The APA challenge to the findings made to support the cancellation decision did not involve the historic attributes of the resort. *Id.* at 463–65.

175 *Id.* at 465.

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.* Earlier district court decisions involving of the Forest Service also reached this conclusion. *E.g.*, Paulina Lake Historic Cabin Owners Ass'n v. U.S. Dep't of Agric. Forest Serv.,

upon completion of the consultation requirements under the NHPA is, in some instances, permissible.[182] This case, within the Forest Service appellate court decisions, further highlights an area of specific tension between the Forest Service and the public relating to special use permits associated with residential/resort uses. *Yerger* also potentially demonstrates the early use of the NHPA as a mechanism to try to stop an agency decision for reasons that may or may not be directly tied to the resource's historic character. From the facts presented, it is not clear that the plaintiff's primary motivation was necessarily the retention of the resort's historic structures (although this is admittedly not discernable from the decision itself) but likely was centered on the appellant's ability to continue to operate his business on the site. In such an instance, section 106 can serve as potential mechanism to secure a result somewhat distinct from the NHPA's intended focus.

*2.* Apache Survival Coalition v. United States

The litigation involving the construction of the Mount Graham International Observatory is perhaps the most litigated undertaking involving the Forest Service. This dispute involves a multi-year project fraught with issues—both within and outside of the Forest Service's compliance with the NHPA.[183] In the early 1980s, a consortium of research institutions began looking to construct facilities ("the most sophisticated array of telescopes ever assembled") on the Coronado National Forest in Arizona.[184] Two of the peaks in the area—Emerald Peak and High Peak—were particularly desirable given the lack of development in the area and their elevation relative to the desert floor.[185] In response to the consortium's proposal (headed by the University of Arizona), the Forest Service began its NEPA process to determine what level of development, if any, to allow on the site.[186] In a parallel track, the Forest Service also worked to comply with the Endangered Species Act and prepared a biological assessment of their preferred NEPA alternative (which was a more limited project than that

577 F. Supp. 1188, 1190, 1193 (D. Or. 1983) (ruling in favor of the Forest Service on NHPA compliance where the only impact was change in ownership). A transfer of a property out of federal ownership, however, would qualify as an undertaking. 36 C.F.R. § 800.5(a)(2)(vii) (2016) (Adverse effects on historic properties include . . . [t]ransfer, lease, or sale of property out of Federal ownership").

182 3 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 28.10 (2d ed. 2016).

183 Apache Survival Coal. v. United States (*Apache Survival I*), 21 F.3d 895, 898–800 (9th Cir. 1994 (explaining the history of the Mount Graham International Observatory project and related litigation).

184 *Id.* at 898 (quoting Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1444 (9th Cir. 1992)).

185 *Apache Survival I*, 21 F.3d at 899 (describing a proposal to construct telescopes on Emerald Peak and High Peak); *Mt. Graham Red Squirrel*, 954 F.2d at 1444 (noting that at the time, astrophysicists considered Mount Graham the best available site for astronomical research in the United States).

186 *Apache Survival I*, 21 F.3d at 898; *Mt. Graham Red Squirrel*, 954 F.2d at 1444.

proposed by the consortium).[187] About this time, the United States Fish and Wildlife Service listed the Mount Graham red squirrel (*Tamiasciurus hudsonicus grahamensis*) as endangered, which led the Forest Service to further adjust its preferred alternative, and the consortium to object as it viewed this alternative as not allowing for a viable project to proceed.[188] To overly simplify what happened next, Congress enacted legislation—the Arizona–Idaho Conservation Act[189] (AICA)—mandating construction of the observatory, which was challenged by environmental organizations under a number of causes of action.[190] After three separate Ninth Circuit decisions,[191] a tribal organization challenged the proposed construction of the observatory under NHPA and other cultural resource laws.[192]

> The crux of the Coalition's argument . . . was that the Forest Service violated the NHPA by failing to recognize that the entirety of Mt. Graham, not just specific "shrines" the Service identified in its environmental impact statement (EIS), is sacred to practitioners of the traditional Western Apache religion.[193]

By 1985, the Forest Service had located what it termed three "shrines" on the two summits during its environmental review.[194] The Forest Service began consultation and as mitigation recommended that the three sites be avoided entirely along with other mitigation efforts to be determined upon further input from area tribes and the research consortium.[195] To move this project forward, the consortium as project proponent, had contacted nineteen tribes for input on the project, but only received comments from two.[196] Based upon this information, the Arizona SHPO concurred with the agency's no adverse effect determination as the state felt that any impacts could be successfully mitigated through excavation and documentation; ACHP concurred.[197] In 1988, in the process of preparing its biological assessment, the Forest Service performed additional survey work and did not locate any additional sites.[198] In late 1988, the Forest Service completed its EIS and issued its record of decision (ROD) in favor of the project in early 1989 (after the AICA essentially selected amongst the various project

187 *Apache Survival I*, 21 F.3d at 899.

188 *Id.*

189 Arizona–Idaho Conservation Act of 1988, Pub. L. No. 100-696, 102 Stat. 4571.

190 *Id.* §§ 601–607. *See generally* Victor M. Sher & Carol Sue Hunting, *Eroding the Landscape, Eroding the Laws: Congressional Exemptions from Judicial Review of Environmental Laws*, 15 HARV. ENVTL. L. REV. 435, 449–52 (1991) (discussing the AICA).

191 Mt. Graham Red Squirrel v. Espy, 986 F.2d 1568 (9th Cir. 1993); *Mt. Graham Red Squirrel*, 954 F.2d 1441; Mt. Graham Red Squirrel v. Yeutter, 930 F.2d 703 (9th Cir. 1991).

192 *Apache Survival I*, 21 F.3d at 900 & n.5.

193 Apache Survival Coal. v. United States (*Apache Survival II*), 118 F.3d 663, 664 (9th Cir. 1997) (characterizing the Coalition's argument in *Apache Survival I*).

194 *Apache Survival I*, 21 F.3d at 898.

195 *Id.*

196 *Id.* at 898–99.

197 *Id.* at 899.

198 *Id.* at 899–900.

alternatives).[199] In April 1989, the Forest Service issued a special use permit to the consortium to proceed with development.[200] In August 1990, the chairman of the San Carlos Apache Tribe wrote to the Forest Service regarding the importance of the area and asked that construction be halted.[201] When construction continued, the tribal coalition sought an injunction to block development.[202] The district court, however, denied the Tribe's request for an injunction and granted summary judgment to the United States on all claims.[203]

The tribal coalition had two arguments on appeal: first, that the AICA authorizing the development of the observatory was unconstitutional as it violated separation of powers principles (in the Ninth Circuit's view, it did not); and second, relating to NHPA compliance.[204] The agency made three arguments regarding the NHPA's application to this project: 1) that the NHPA did not apply as it was a congressionally mandated project and there was no agency discretion; 2) that even if NHPA was triggered, the agency had complied through its consultation efforts; and 3) that laches applied as the tribal coalition had waited too long in raising their concerns regarding this undertaking (waiting nearly two years after the administrative record had been closed).[205]

The Ninth Circuit did not address the first two merits arguments as it found that laches barred the coalition's efforts despite strong precedent for leniency in the context of environmental/public interest litigation.[206] Under the court's laches analysis, the court assessed two factors: 1) was the delay inexcusable, and 2) would permitting the claims to advance be prejudicial?[207] On both issues, the Ninth Circuit sided with the agency. On the issue of delay, the court found that the Tribe had been repeatedly contacted and had been aware of the undertaking for years, and more than two years had elapsed between the challenged agency action and the filing of this lawsuit.[208] On the second issue, prejudice or harm to the nonmoving party, the court noted that consortium had already completed 35% of the project and had invested $4 million, and that the potential costs of further delay had caused congressional action to expedite the project (i.e. that further delay might result in partners withdrawing funding).[209] As a result, the court affirmed the district court's decision in favor of the Forest Service—permitting construction to continue at the site.[210]

---

199 *Id.* at 900.
200 *Id.*
201 *Id.*
202 *Id.* at 900–01.
203 *Id.* at 901.
204 *Id.*
205 *Id.* at 905.
206 *Id.*
207 *Id.* at 907.
208 *Id.* at 907–12.
209 *Id.* at 912–13.
210 *See id.* at 914. As a brief coda, three years later in *Apache Survival II*, after an injunction that had been obtained against the construction of a telescope on a site outside of the original

Overall, the Mt. Graham litigation involved a highly controversial project within a sensitive cultural area, which continues to have impacts decades after its construction.[211] From an NHPA litigation perspective, however, the decision itself perhaps is not overly instructive other than demonstrating that delay in seeking relief may be a potential defense or bar to a challenge. The litigation, however, does fit within the evolutionary spectrum with regard to relationship between tribes and the Forest Service as far as managing the forests in a manner more sensitive to cultural concerns and considerations (particularly TCPs and cultural landscapes more generally).

*3.* Pueblo of Sandia v. United States

A somewhat similar dispute also involved the agency's consideration of TCPs. In *Pueblo of Sandia v. United States*[212], a variety of Native American and environmental groups challenged the Forest Service's management of the Las Huertas Canyon, located within New Mexico's Cibola National Forest.[213] This canyon was important to various tribes in the area as a source of evergreen boughs for cultural and religious ceremonies, and for other spiritual practices (in addition to including a number of important historic sites).[214]

In the late 1980s, the Forest Service began work to consider recreational improvements within the canyon.[215] The Forest Service issued a draft environmental impact statement in 1988 and, after considerable public input, selected an alternative that involved the reconstruction and realignment of the primary access road, and would add substantial recreational infrastructure (including more picnic grounds and sanitary facilities).[216] Despite having information about the value placed on the canyon, the Forest Service had determined that the canyon did not qualify as a TCP.[217]

The plaintiffs filed suit in the United States District Court for the District of New Mexico, arguing that the Forest Service had failed to conduct

---

project area as defined by the legislative act authorizing the observatory, the Coalition sought an injunction based upon NHPA grounds. In rejecting this argument, in the court's view, the Coalition brought forth no new arguments or different facts from *Apache Survival I*, and given the similarity of the issues, the court declined to issue an injunction as the Coalition was unlikely to prevail. *Apache Survival II*, 118 F.3d 663, 665–66 (9th Cir. 1997).

211 *See* Leandra A. Swanner, Mountains of Controversy: Narrative and the Making of Contested Landscapes in Postwar American Astronomy 437 n.284, 440–43 (Oct. 8, 2013) (unpublished Ph.D. dissertation, Harvard University), https://perma.cc/2D6C-239T.

212 50 F.3d 856 (10th Cir. 1995).

213 *Id.* at 857. In addition to the tribe, Sandoval Environmental Action Community, Earth First!, Sandia Mountain Wildlife & Conservation Association, Sierra Club, and Wildlife Rescue of New Mexico were also named plaintiff-appellants.

214 *Id.*

215 *Id.* at 857–58.

216 *Id.* at 858.

217 *Id.* at 857–58.

a reasonable and good faith effort to identify eligible resources.[218] The Forest Service had reached out to potentially interested tribes through form letters and had attempted to gather information on potential TCPs at public meetings.[219] The district court granted summary judgment to the Forest Service because the Forest Service had received concurrence from the SHPO regarding the lack of historic sites within the APE, and on the basis of the agency's assertion that "it would diligently pursue information on the potential historic value of other individual sites" during the undertaking.[220] Despite not having taken NHPA consultation "very seriously" in the district court's view, the district court found that the agency had technically complied with the Act's procedural requirements.[221]

On appeal, the United States Court of Appeals for the Tenth Circuit reversed the lower court on two grounds. In the court's view, the fact that the Forest Service had reached out to obtain information regarding potential TCPs in the APE was not sufficient to meet the reasonableness standard.[222] Although the information that the agency had been provided by the tribes was not particularly detailed, it was sufficient to at least require additional effort.[223] In short, the Forest Service had generalized knowledge that TCPs existed within the APE and that tribal members had expressed concerns about revealing the specific details of these sites, which should have led to further investigation by the agency.[224]

In ruling on the good faith prong, it is significant that—at least in the court's view—it appeared that the Forest Service had withheld important information from the SHPO which would have potentially impacted its decision to concur with the agency's determination.[225] In its investigation of eligible sites, the agency had taken affidavits from tribal elders, which indicated that TCPs were present in the APE.[226] These affidavits were not provided to the SHPO until after his intial concurrence with the Forest Service's conclusions.[227] After receiving these affidavits, the SHPO withdrew his concurrence and recommended that additional investigation—specifically an ethnological analysis—be performed in order to complete the evaluation effort.[228] The court viewed this failure as undermining the agency's consultation;[229] as a result, the reversal is not overly surprising.

---

218 *Id.* at 858.

219 *Id.* at 860.

220 *Id.* at 858.

221 *Id.*

222 *Id.* at 860.

223 *Id.* at 861–62.

224 *Id.* at 860–62. Concerns regarding confidentiality and revealing the nature of practices and activities remain an issue within consultation today. *See generally Advisory Council on Historic Preservation's Frequently Asked Questions on Protecting Sensitive Information about Historic Properties under Section 304 of the National Historic Preservation Act*, ADVISORY COUNCIL ON HISTORIC PRESERVATION (Aug. 16, 2016), https://perma.cc/82JJ-5538.

225 *Pueblo of Sandia*, 50 F.3d at 862–63.

226 *Id.* at 860–61.

227 *See id.* at 858.

228 *Id.* at 858–59.

229 *Id.* at 862.

In one way, *Pueblo of Sandia* may represent a partial shift, or at least a broadening, in the judicial treatment of Forest Service consultation for TCPs. In earlier cases, if the agency made some demonstrated form of effort, this was generally enough to comply with the Act's procedural requirements.[230] Here, the Forest Service had engaged in consultation and had not located specific sites so concluded its evaluation efforts, which the court held to be insufficient. While this is a more thorough level of judicial review, it is unclear how much the agency's failure to provide relevant information to the SHPO also contributed to the ultimate decision (the failure to comply with the good faith requirement as well as the reasonableness prong). *Pueblo of Sandia* is, however, important in concluding the NHPA requires the agency to consult with tribes to try to determine the impacts of their projects on TCPs—including working more diligently to address tribal concerns regarding the sensitivity of this knowledge.

*4.* Hoonah Indian Ass'n v. Morrison

In the 1990s, appellate level NHPA challenges moved to Alaska. In *Hoonah Indian Ass'n v. Morrison*,[231] two tribal entities challenged the Forest Service's decision to sell timber on the Tongass National Forest arguing that the agency had failed to comply with the Alaska National Interest Lands Conservation Act[232] (ANILCA) and the NHPA.[233]

On its NHPA claim, the Sitka Tribe of Alaska alleged that there were historic sites located within a proposed timber sale on Baranof Island.[234] In the late 18th century, Baranof Island was settled by Russian colonists at New Archangel, now Sitka, Alaska.[235] Relationships between the Russian settlers and the Tlingits native to the area were extremely hostile, and in 1802, Tlingits overtook this settlement.[236] In 1804, Russian troops came back in sufficient strength to retake the fort and settlement, forcing the Tlingits to retreat north.[237] The NHPA issue in this case was whether the route or routes that one of the Tlingit clans (the Kiks.adi) took on their retreat should have been evaluated as an eligible resource under the NHPA.[238]

The Forest Service, early on in consultation with regard to the proposed timber sale, had determined that the retreat route might be an eligible

---

230 *See* Bradford J. White, *Recent Developments in Land Use, Planning and Zoning Law: Historic Preservation and Architectural Control Laws*, 28 URB. LAW. 879, 879–85 (1996) (discussing *Pueblo of Sandia* within the context of the development of case law in this area).

231 170 F.3d 1223 (9th Cir. 1999).

232 16 U.S.C. §§ 3101–3233 (2012).

233 *Hoonah Indian Ass'n*, 170 F.3d at 1225. The Hoonah Indian Association brought only an ANILCA claim. The Sitka Tribe of Alaska, a coplaintiff, joined the Hoonah Indian Association on the ANILCA claim and also brought an NHPA claim.

234 *See id.* at 1230–31.

235 *Id.* at 1230.

236 *Id.*

237 *Id.*

238 *Id.*

historic property.[239] The agency, after three years of consultation with the Tribe and specialists, ultimately concluded that it was not eligible as they could not determine where it was located with any degree of precision.[240] The Alaska SHPO concurred with the Forest Service's determination—finding the trail was not eligible as it needed to have identified physical features.[241] The district court denied the Tribe's motion for summary judgment as well as its motion for permanent injunction from which the Tribe appealed.[242]

On appeal, the Ninth Circuit affirmed the lower court's decision to deny the injunction, concluding that the Forest Service did not act arbitrarily in determining that it could not identify an eligible historic site—noting that generalized information or historical understandings are not sufficient, but specific geographical information and context would be needed to trigger this obligation.[243] To bolster this point, the court noted that the Historian for the National Register of Historic Places wrote in opposing the listing that the National Register, staff consistently rejected "nominating such a wide swath of land with little if any identified physical features."[244] In short, the tribe needed to be able to provide information regarding specific sites to trigger compliance.[245]

In all, the *Hoonah Indian* case is an interesting decision in that it helped to define what information is needed to identify historic properties in order to assess eligibility across section 106 practice. Ultimately, the Forest Service was able to prevail by demonstrating that it had made a rigorous effort to identify the proposed resource (meeting the reasonable and good faith requirements under the Act and implementing regulations).[246] This case also perhaps demonstrates the increasing attention that the agency began paying to compliance—resulting in better consultations and more defensible agency decision making. From a tribal perspective, however, it is a somewhat difficult result as it partially undermines oral history as a basis for qualifying a specific property, and to the degree that sites may not have physical attributes, this could be a challenge.[247]

---

239 *Id.* at 1231.

240 *Id.*

241 *Id.*

242 *Id.* at 1225.

243 *Id.* at 1232.

244 *Id.* The court also noted the availability of a mechanism to appeal this determination and the tribe's failure to exhaust administrative remedies under 36 C.F.R. § 60.12(e). *Id.* at 1231.

245 *See Hoonah Indian Ass'n*, 170 F.3d, at 1232.

246 *Cf.* Part III.C.3 (discussing an example of where the Forest Service failed to meet the requirements of 36 C.F.R. 800.4(b)(1)(2016)).

247 Here, the agency and the court discounted oral history evidence and pointed to conflicts amongst the tribe as far as the location as a part of its rationale for concluding that no eligible sites were present. *Id.* at 1231–32. Whether more specific information or uniform agreement amongst the tribal members would have been more compelling is unclear.

*5.* Muckleshoot Indian Tribe v. United States Forest Service

The last 1990s-era dispute centered on a land exchange; specifically in 1999, the Muckleshoot Tribe challenged the Forest Service's decision to enter into a land exchange involving portions of the Huckleberry Divide Trail, located on Washington's Mt. Baker-Snoqualmie National Forest.[248] As part of the historic pattern of checkerboard landownership that typifies many of the national forests, private interests, including Weyerhaeuser Company, owned about 13% of the forest as inholdings.[249] In the 1980s, the Forest Service and the company began negotiating a series land exchanges to address some of the ownership issues.[250] One deal eventually struck between the Forest Service and Weyerhauser involved the Forest Service transferring 4,362 acres to Weyerhauser in exchange for 30,253 acres around Mt. Baker.[251] The lands that the Forest Service conveyed to Weyerhauser included a portion of the Huckleberry Divide Trail—a site that the Forest Service had determined eligible for the National Register.[252] Prior to agreeing to this exchange, the Forest Service had developed multiple exchange proposals and had open meetings regarding its proposed decision-making process before making the final deal with the company.[253]

The Muckleshoot Tribe, however, objected to this exchange, as the lands being turned over to Weyerhauser were part of the Tribe's ancestral lands.[254] On appeal, the Tribe's NHPA claims fell into three general categories: 1) failure to adequately consult; 2) inadequate mitigation of the impacts stemming from the transfer; and 3) failure to nominate specific sites to the National Register of Historic Places (which the court did not address on appeal).[255]

The district court concluded that the Forest Service had adequately consulted with the Tribe and denied the Tribe's motion for summary judgment.[256] Although the case drew comparisons to the earlier *Pueblo of Sandia* litigation, the appellate court found that the issues with the consultation were not as profound.[257] In the court's view, the Forest Service

---

248 Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 803 (9th Cir. 1999). For a tribal perspective of this litigation and land exchange, see Randel Hanson & Giancarlo Panagia, *Acts of Bureaucratic Dispossession: The Huckleberry Land Exchange, The Muckleshoot Indian Tribe, and the Rational(ized) Forms of Contemporary Appropriation*, 7 GREAT PLAINS NAT. RESOURCES J. 169 (2002).

249 *Muckleshoot Indian Tribe*, 177 F.3d at 803.

250 *Id.*

251 *Id.* at 804. Weyerhauser also donated an additional 1,996 acres to the Forest Service as part of the exchange. *Id.*

252 *Id.*

253 *Id.* at 803.

254 *Id.* at 804–05. The Forest Service lands being turned over to Weyerhauser included some old growth forest while the lands being received had been largely logged over. As a result, several environmental groups, including the local chapter of the Audubon Society were also plaintiffs in this case. *Id.* at 804.

255 *Id.* at 805, 809.

256 *Id.* at 804.

257 *Id.* at 806.

had made a reasonable effort to identify TCPs, had altered the exchange in response to tribal concerns, and had reversed its decision on whether the Huckleberry Divide Trail was eligible after receiving comments from the SHPO.[258] In all, although the court clearly thought the Forest Service could have done more to be sensitive to tribal input, the court found that its efforts were sufficient.[259]

The larger issue, however, for the NHPA analysis centered on how to mitigate the impacts to historic properties stemming from the land exchange. Under ACHP regulations at the time, 36 C.F.R. § 800.9(c) included the transfer, sale, or lease as examples of federal actions that could adversely impact a historic property.[260] The regulations, however, also provided several options for mitigating these effects—which would essentially mean that the action would no longer have negative consequences and would not require further consultation.[261] Two lanes were essentially available for the Forest Service under this section of the regulation. Section 800.9(c)(1) provided that when a historic property is only significant for research purposes, the adverse effects can be mitigated if this research is properly completed.[262] Section 800.9(c)(3) provided that when the lease, transfer or sale of a property is contemplated, the adverse effects can be mitigated if sufficient legal protections, including deed restrictions, are included within the transferring instrument.[263]

The Forest Service, with the concurrence of the SHPO, proceeded under § 800.9(c)(1) to document the historic trail as it had concluded that imposing a deed restriction on the property was prohibitively expensive and onerous and that this documentation would be sufficient—thus concluding no adverse effect.[264] The court, however, rejected this approach concluding that the Forest Service had not done enough to offset the harms from the land exchange and that the agency had improperly determined no adverse effect.[265] Specifically, the court viewed § 800.9(c)(1) as not covering this project, and that the agency should have looked more closely at deed restrictions.[266] To enforce this order, even though the exchange was complete and was being logged by Weyerhaeuser, the court enjoined further

258 *Id.*

259 *Id.* at 807.

260 The regulations in place at the time were issued in 1986. Protection of Historic Properties, 51 Fed. Reg. 31,115, 31,123 (Sept. 2, 1986) (codified at 36 C.F.R. § 800.9(c) (1987)). This regulation was amended in 1999. Protection of Historic Properties, 64 Fed. Reg. 27,044, 27,079 (May 18, 1999) (codified as amended 36 C.F.R. § 800.9(c) (2016)).

261 36 C.F.R. § 800.9(c) (1987); *see also* 51 Fed. Reg. at 31,116 (providing information on the rationale supporting this approach).

262 36 C.F.R. § 800.9(c)(1).

263 *Id.* § 800.9(c)(3).

264 *Muckleshoot Indian Tribe*, 177 F.3d at 808.

265 *Id.* at 808–09. For a critique of the Forest Service's environmental compliance with regard to this project, see Scott K. Miller, *Missing the Forest for the Trees: Lost Opportunities for Federal Land Exchanges*, 38 COLUM. J. ENVTL. L. 197, 236–38 (2013).

266 *Muckleshoot Indian Tribe*, 177 F.3d at 808–09.

activities pursuant to the land exchange agreement until the agency came into compliance with its NHPA (and NEPA) obligations.[267]

*Muckleshoot Indian Tribe v. United States Forest Service* is an important case for a few reasons. First, it perhaps best reflects evolving views of how to evaluate agency compliance with the Act. Here, the court was not satisfied with the Forest Service's compliance as agreed to with the SHPO and looked beyond the agreement to the merits of what the agency had actually agreed to perform to find procedural error.[268] Given the relatively deferential review of other earlier decisions, this may not have been a given. *Muckleshoot Indian Tribe* also demonstrates the need for close compliance with ACHP's regulations. While the Forest Service likely could have complied with the Act by carrying out the terms of its agreement with the SHPO, its procedural compliance was flawed in that it incorrectly determined that its mitigation efforts obviated the adverse effect, effectively concluding the consultation. An appropriate process would have been for the Forest Service to conclude that the transfer would, in fact, have impacts, and then consult with regard to how these effects should be addressed. This may not seem like a large distinction, but it would have allowed for additional consultation and input and was enough for the court to issue an injunction. Last, the case is also somewhat notable in that the action being evaluated had already happened (i.e., the land had already been exchanged and logging had commenced). Given the prior case law,[269] it would not have been an anomalous result for the court to have simply ruled that this case was rendered moot and beyond its review under laches or other equitable principles.

### *D. The 2000s*

NHPA litigation continued into the 2000s with three different disputes reaching the appellate courts.

#### *1.* Wyoming Sawmills Inc. v. United States Forest Service

Although not directly a NHPA case, it is worth including in this review because it challenged the Forest Service's management of a forest to protect a TCP, a decision that directly resulted from an agreement reached within the context of a NHPA consultation.[270] To briefly summarize, Wyoming

---

267 *Id.* at 815.

268 For information regarding the aftermath of this consultation, see Hanson & Panagiad, *supra* note 248, at 193–94. (explaining that the Forest Service purchased back some of the land that had been exchanged and a settlement agreement was reached between the tribe and other interested parties).

269 *See infra* note 166 (discussing *Native Ams. for Enola v. United States Forest Service*, 60 F.3d 645 (9th Cir. 1995)).

270 Wyo. Sawmills, Inc. v. U.S. Forest Serv., 383 F.3d 1241, 1243 (10th Cir. 2004). The Medicine Wheel Coalition on Sacred Sites joined the Forest Service as a defendant-intervenor-appellant, and amicus briefs were filed by the National Congress of American Indians, the National Trust for Historic Preservation, and the Becket Fund for Religious Liberty.

Sawmills challenged the management of a TCP under a forest plan as violating the establishment clause (favoring or advancing tribal religious practice) and alleged harm in that the company had lost a timber sale contract by virtue of the changed management regime within the protected area.[271]

In the late 1980s, the Forest Service began to consider how to better manage the Medicine Wheel National Historic Landmark, located on the Bighorn National Forest.[272] Through its NEPA analysis, the agency issued a draft EIS with a preferred alternative that would have expanded vehicular access and changed the use of the area.[273] After receiving hundreds of comments (the vast majority opposed to the degree of proposed changes), the Forest Service withdrew its proposal and entered into consultation with the Wyoming SHPO, ACHP, and other consulting parties.[274] In the MOA and subsequent programmatic agreement, the Forest Service agreed to not approve any additional undertakings in the area until it had developed a historic preservation plan for the area.[275] The historic preservation plan, finalized in 1996, provided that the agency would consult with the SHPO and consulting parties for any projects in the area of consultation (as defined within the plan) to minimize historic impacts associated with future management decisions.[276] Notably, this plan detailed how management of the forest to protect the historic resources was consistent with its statutory authorities and an appropriate management decision.[277]

Wyoming Sawmills, a local timber company long involved in logging operations on the Bighorn National Forest, challenged the development of this plan as violating the First Amendment's Establishment Clause and the National Forest Management Act[278] (NFMA).[279] The Forest Service had put a timber sale in the impacted area out for bid, but canceled the sale after consulting with regard to its NHPA obligations, which led to this litigation.[280]

At the district court level, the court found that the company lacked standing on its constitutional claims as the injuries alleged were not

---

271 *Id.* at 1243, 1247.

272 The Medicine Wheel National Historic Landmark is a prehistoric stone circle approximately seventy-five feet in diameter with twenty-eight radial rows extending from a central cairn. Although the precise date of construction is unknown, the site interrelates with a larger complex of sites that "express 7000 years of Native American adaptation to and use of the alpine landscape that surrounds Medicine Mountain." *See National Register of Historic Places: Medicine Wheel/Medicine Mountain National Historic Landmark*, WYO. ST. HISTORIC PRESERVATION OFF., https://perma.cc/GC2Y-K2LH (last visited Apr. 15, 2017). The Forest Service had withdrawn 200 acres surrounding the site in 1957 for its protection, and the national historic landmark designation came in 1969. *Wyo. Sawmills*, 383 F.3d at 1243–44.

273 *Wyo. Sawmills*, 383 F.3d at 1244.

274 *Id.*

275 *Id.*

276 *Id.* at 1244–45.

277 *Id.* at 1245.

278 National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (2012).

279 *Wyo. Sawmills*, 383 F.3d. at 1245–46.

280 *Id.* at 1245.

readdressable under constitutional standing principles—as even if the historic preservation actions were found unconstitutional, the economic harm would not necessarily be redressed because the Forest Service had no obligation to offer this specific timber sale contract.[281] The district court did find that Wyoming Sawmills had standing on the NFMA claims to argue that the Forest Service had failed to follow its own standards when developing the historic preservation plan for the Medicine Wheel National Historic Landmark (by concluding that this was an insignificant change which did not require public involvement).[282] The court, however, rejected this argument on the merits, concluding that the Forest Service's decision that this management change was not significant and was not an abuse of discretion.[283]

On appeal, the Tenth Circuit affirmed the district court's ruling on standing for the constitutional claims.[284] On the NFMA claims, the Court concluded that the agency had not abused its discretion in concluding that the historic preservation plan was not a significant amendment as it impacted only 1.6% of the forest and did not actually impact overall logging targets or even foreclose logging in the area of consultation determined by the plan (it only imposed additional consultation and standards and guidelines to work being carried out in these areas).[285]

Overall, *Wyoming Sawmills* gives support to the Forest Service's efforts to protect a TCP through its general management authorities. In the end, this case further demonstrates the evolving landscape and treatment of TCPs within the Forest Service's holdings as the agency changed its management based upon input it received and considered through consultation.

*2.* Pit River Tribe v. United States Forest Service

The next NHPA decision involved a challenge to proposed geothermal development in the area of the Medicine Lake Highlands on the Modoc National Forest in northeastern California.[286] From the early 1970s through the early 1980s, the Forest Service and Bureau of Land Management (BLM) conducted multiple environmental evaluations regarding the potential impact of opening up this area for geothermal development.[287] In 1984, BLM committed to leasing out 41,500 acres in the area and, issued a ROD approving the proposed action in 1985.[288] In June 1988, the BLM entered into several leases with a private company for the exclusive rights to develop this area.[289] Despite having valid leases, the development company did not submit a plan of operations for exploration until the mid-1990s, which was also

281 *Id.* at 1246.
282 *Id.*
283 *See id.*
284 *Id.* at 1249.
285 *Id.* at 1250–52.
286 Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 772 (9th Cir. 2006).
287 *Id.* at 773–74.
288 *Id.* at 775.
289 *Id.*

approved.[290] In 1995, the project proponent submitted a plan for a large geothermal plant and the agencies began preparing an EIS in 1996.[291] In May 2000, the agencies issued a ROD allowing this project to proceed.[292] In May 2002, BLM unilaterally extended the existing leases by an additional forty years without additional environmental review.[293]

The Pit River Tribe and associated parties, after exhausting administrative remedies, brought suit in the United States District Court for the Eastern District of California, which granted summary judgment to the agencies on all claims.[294] On appeal, the appellants claimed that the agencies violated NEPA, NFMA, and NHPA (along with their tribal trust obligations) in approving the lease extension without additional input and consideration of the appellants' concerns.[295] The primary arguments in the case related to the agencies' NEPA compliance. The two-pronged challenge by the tribal and environmental litigants alleged that NEPA compliance was required for the lease extension—i.e., the extension did not lock in the status quo but actually renewed the rights of the entity to develop the site—and that a subsequent EIS was not legally sufficient to cure other deficiencies.[296] The court agreed and concluded that the "lease extensions—and the entire Fourmile Hill Plant approval process for development of the invalid lease rights—violated NEPA."[297]

Addressing the NHPA claims, it was undisputed that consultation had not occurred in connection with the issuance or the lease extension, but the agencies argued that the 1998 EIS had addressed all cultural resource issues and, in the alternative, that no consultation was required as the extensions of the lease simply retained the status quo with regard to the existing leases.[298] Both arguments were rejected by the Ninth Circuit.[299] The court concluded that a lease extension is a new undertaking requiring new consultation, and that postdecisional NHPA could not cure the earlier NHPA violations since the decision to lease the land had already been made and could not be addressed at this late stage.[300] In all, the court reversed the district court and ordered summary judgment to be entered in favor of the

290 *Id.* at 776.

291 *Id.* at 776–77.

292 *Id.* at 777. As part of this mitigation, in the ROD, BLM placed a five-year moratorium on energy development in the area until the impacts from geothermal development could be studied. BLM later lifted this moratorium without additional consultation. *Id.* at 778.

293 *Id.* at 778.

294 Pit River Tribe v. Bureau of Land Mgmt., 306 F. Supp. 2d 929, 951–52 (E.D. Cal. 2004), *rev'd sub nom.* Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768 (9th Cir. 2006). The other plaintiffs in the case were the Native Coalition for Medicine Lake Highlands Defense and the Mount Shasta Bioregional Ecology Center.

295 *Pit River Tribe*, 469 F.3d at 772.

296 *Id.* at 781.

297 *Id.* at 787.

298 *Id.*

299 *Id.*

300 *Id.*

tribal and environmental litigants, undoing the lease extensions and much of the basis for the project's approval.[301]

On the NHPA spectrum, *Pit River Tribe* is perhaps not the most instructive decision given its relatively brief discussion of these issues, but does demonstrate some of the challenges associated TCPs and oil, gas, and mineral leasing, where long-term interests are in play and considerable time lags can run between an initial project approval and the actual implementation of the project.[302] The case also perhaps demonstrates some of the challenges associated with postdecisional attempts to comply with the NHPA and suggests that such attempts are not always going to be successful—at least in addressing prior procedural defects.

*3.* Navajo Nation v. United States Forest Service

The most recent decision involving the Forest Service centers on another challenge to the special use permit issued for the operation of the Arizona Snowbowl.[303] In this case, the impacted tribes brought challenges under the Religious Freedom Restoration Act (RFRA), NEPA, and the NHPA related to the Forest Service's authorization of the creation of artificial snow made from recycled sewage for use on the ski resort.[304] This "snow" was to be applied to the San Francisco Peaks, an area of great importance to tribes, which the Forest Service had already found to be eligible for the National Register as a TCP.[305] As discussed above, permittees had long been allowed to operate a commercial ski resort in this area.[306] In 2004, the permittee sought to expand and improve its facilities, and to use recycled wastewater to create artificial snow—which also would require the construction of an over-fourteen-mile pipeline to carry the water up to the ski resort from Flagstaff.[307] In connection with this application, the Forest Service consulted

---

301 *Id.* at 788. This was not the end of the litigation with regard to this proposed project. *See, e.g.*, Pit River Tribe v. Bureau of Land Mgmt., No. 2:02-CV-1314 JAM-JFM, 2008 WL 5381779 (E.D. Cal. Dec. 23, 2008), *aff'd in part, rev'd in part sub nom.* Pit River Tribe v. U.S. Forest Serv., 615 F.3d 1069 (9th Cir. 2010).

302 *See, e.g.*, James L. Noles, *When Future Meets Past: Energy Development and NHPA Compliance*, NAT. RESOURCES & ENV'T, Summer 2016, at 38, 38 (discussing the issues faced in this sphere); Meredith A. Wegener, *Changing Federal Priorities Midstream in Upstream Development: Federal Energy Development Lease Cancellations, Environmental Policy, Historic Preservation and Takings*, 46 ENVTL. L. 979, 982–88 (2016) (discussing the cancellation of an oil lease due to NEPA and NHPA concerns forty-four years after it was issued).

303 Navajo Nation v. U.S. Forest Serv. (*Navajo Nation II*), 479 F.3d 1024, 1029 (9th Cir. 2007), *on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008). The Ninth Circuit held a rehearing en banc to clarify its interpretation of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb–4 (2012). Navajo Nation v. U.S. Forest Serv. (*Navajo Nation III*), 535 F.3d at 1067 (9th Cir. 2008). The Ninth Circuit adopted the three-judge panel's opinion in *Navajo Nation II* with respect to the NHPA claim. *Id.* at 1080.

304 *Navajo Nation II*, 479 F.3d at 1030–31 The full list of plaintiffs includes the Navajo Nation, Havasupai Tribe, Sierra Club, White Mountain Apache Nation, Flagstaff Activist Network and several individuals.

305 *Id.* at 1029–30.

306 *See supra* Part III.B.

307 *Navajo Nation II*, 479 F.3d at 1030–31.

with the SHPO and impacted tribes for two years and determined that there would be adverse effects to historic resources associated with this undertaking.[308] To address these effects, the Forest Service entered into a MOA with the required parties as well as several tribes, which laid out various mitigation measures.[309] In its NHPA consultation, the Forest Service reported making over 200 phone calls, holding 41 meetings, and exchanging nearly 250 letters with tribal representatives before concluding the consultation.[310]

In challenging the Forest Service's decision to authorize expanded use under the NHPA, the Tribes argued that the consultation on this proposed project was not in good faith and was essentially postdecisional as the Forest Service had already decided to permit the use of the reclaimed water on the Arizona Snowbowl area.[311] Additionally, the Tribes argued that signing of the MOA to address the adverse effects prior to the conclusion of the NEPA process further demonstrated the postdecisional nature of the Forest Service's consultation.[312]

The district court found that given the depth of involvement of the Tribes in this matter, in its view, the consultation requirement had been met and the NHPA consultation could conclude before NEPA analysis was completed.[313] In 2007, the Ninth Circuit affirmed the district court on the NHPA claim, rejecting arguments relating to the inadequacy of the consultation.[314] The Tribes' best evidence came from a letter sent to the tribes on consultation.[315] In the Tribes' view, this letter demonstrated that the Forest Service believed that it did not have the authority to reject the expanded proposal and had unduly narrowed the scope of the agency's consultation.[316] The court disagreed—as the letter also specifically noted that many of the newly proposed elements, including the artificial snow, fell outside of the earlier ruling and could be consulted upon, therefore the court affirmed the district court's grant of summary judgment to the agency on the NHPA claims.[317] In the court's view, "[a]lthough the consultation process did not end with a decision the tribal leaders supported, this does not mean that the Forest Service's consultation process was substantively and procedurally inadequate."[318] The Tribes prevailed on their remaining claims,

---

308 Navajo Nation v. U.S. Forest Serv. (*Navajo Nation I*), 408 F. Supp. 2d 866 (D. Ariz. 2006), *aff'd in part*, *rev'd in part and remanded*, 479 F.3d 1024 (9th Cir. 2007), *on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008), *and aff'd*, 535 F.3d 1058 (9th Cir. 2008).

309 *Id.* at 880.

310 *Id.* at 879, n.11.

311 *Navajo Nation II*, 479 F.3d at 1059.

312 *Id.* at 1060.

313 *Id.* at 1060–61.

314 *Id.* at 1060.

315 *Id.* This letter stated that the resort "now wishes to complete the development, and it is important to stress that the scope of the proposal, with a few exceptions, is within the concept approved by [*Wilson v. Block*]." *Id.*

316 *See id.*

317 *Id.* at 1060–61.

318 *Id.* at 1060 (quoting *Navajo Nation I*, 408 F. Supp. 2d 866, 879 n.11 (D. Ariz. 2006)). On the whole, however, the court found that the Forest Service's decisions violated NEPA for failing to

but this decision was subsequently reversed on rehearing en banc, allowing the project to proceed.[319]

In many ways, *Navajo Nation* is a fairly straightforward NHPA decision within the larger context of a complicated and controversial dispute between recreational development and tribal concerns in a highly significant cultural area.[320] The Tribes made an argument that the agency's consultation was insufficient and the agency was able to demonstrate that significant outreach had, in fact, occurred. This case demonstrates the value of substantial compliance effort as the court seemed to give the agency credit for its work in addressing the adverse effects associated with the project and for working on mitigation measures.

## IV. EVALUATING THE FOREST SERVICE'S APPELLATE LITIGATION EXPERIENCE

Over the past fifty years, nine separate disputes have ultimately reached the appellate courts. While the cases relate to different resources and procedural claims, there are a few lessons that can be learned from the issues that have generally reached this level of review. In looking at these decisions, several topics merit special attention: the nature of the resources involved, the litigants challenging the agency's compliance, the overall causes of actions asserted, the specific NHPA claims, and the evolving consideration of cultural resources within the Forest Service and other land-managing agencies.

### *A. The Historic Properties*

Not surprisingly, almost all (eight out of nine decisions) of the NHPA appellate litigation involving the Forest Service has focused on archaeological and cultural sites—rather than on the built environment.[321] As discussed above, this makes sense when one considers the nature of the resources that the Forest Service is typically working with by virtue of the land that it administers.[322] This litigation mix obviously is very different from other agencies; for example, it would be less common, although not certainly unprecedented, for the United States General Services Administration (GSA) or the United States Department of Housing and Urban Development to encounter tribal archaeological sitesrather than

address possible health risks posed by the possibility of human ingestion of the artificial snow and RFRA for impinging on the tribe's religious freedom. *Id.*

319 On rehearing en banc, the circuit reversed the panel's holdings on the RFRA and NEPA aspects of the case and granted summary judgment to the Forest Service—allowing the use of artificial snow created with recycled water to proceed. *Navajo Nation III*, 535 F.3d 1058, 1080 (9th Cir. 2008) (en banc).

320 *See, e.g.*, Boone Cragun, Note, *A Snowbowl Déjà Vu: The Battle Between the Native American Tribes and the Arizona Snowbowl Continues*, 30 AM. INDIAN L. REV. 165 (2005) (profiling this ongoing dispute).

321 Of the nine, only *Yerger* involved the built environment. *See supra* Part III.

322 *See supra* Part II.A.

contextual historic structures within the scope of their respective mission and real estate holdings.[323] The predominance of this resource form correlates to the types of consultation that the Forest Service is involved with and ultimately responsible for, which necessarily involves a large degree of tribal input and government-to-government consultation. To the extent that Forest Service decisions have shaped NHPA practice, it is similarly not surprising that these decisions have largely involved consideration of tribal cultural resources.

### *B. The Litigants*

As noted with regard to the properties involved in these cases, the litigants have typically been tribal entities. In the remaining two cases, parties with direct economic interests (the holder of a special use permit and a potentially impacted company) challenged Forest Service management decisions which impacted or had the potential to impact their business operations.[324] This mix is interesting for a few reasons. First, it shows the balance in play within forest management generally given that the national forests are designated for multiple uses or to achieve multiple policy objectives.[325] As a result, many diverse stakeholders may have a direct personal or financial interest in the selected management decision, which may or may not be aligned with one another or the agency's management preferences.[326] Second, the litigant mix puts the nature of the parties' specific interests in the forest into a clearer focus, exposing the tension between protecting an individual or tribal entity's traditional use of the land versus the potential for future economic activity.[327] Competing values and priorities underlie much of this litigation and are often difficult to reconcile; in some instances, it is difficult to imagine acceptable mitigation measures to address the adverse effects. Last, in many instances, particularly in more recent decisions, it is common to have multiple parties collectively challenging a management decision—notably, the cases demonstrate particularly strong alignment between environmental and tribal interests.[328] This demonstrates long-term collaborative efforts in historic preservation matters, since the management regime favored by a tribal entity will often promote the

323 Beth L. Savage, *Sustaining Section 106 into the 21st Century—GSA's Perspective*, F.J., Winter 2012, at 22 (discussing GSA's experience under the Act). *But cf. The African Burial Ground*, GEN. SERVS. ADMIN., https://perma.cc/9NMV-JXKN (last visited Apr. 15, 2017) (discussing generally the issues associated with the GSA's predevelopment work in lower New York City and the discovery of the African Burial Ground, which has subsequently been designated as a National Historic Landmark).

324 *See supra* Parts III.C.1, III.D.1 (*Yerger* and *Wyoming Sawmills*).

325 JOHN FEDKIW, U.S. FOREST SERV., MANAGING MULTIPLE USES ON NATIONAL FORESTS, 1905–1995: A 90-YEAR LEARNING EXPERIENCE AND IT ISN'T FINISHED YET 189–268 (1998) (profiling these challenges).

326 *See, e.g.*, *supra* Part III.D.1 (*Wyoming Sawmills*).

327 *See, e.g.*, *supra* Part III.C.1 (*Yerger*).

328 *See, e.g.*, *supra* Part II.D. 2 (*Pit River Tribe*).

environmental objective that is being pursued by nongovernmental organizations.

### *C. The Causes of Action*

Another common theme from the appellate decisions is that the NHPA is not typically the only statute under which a claim is asserted against the agency in cases involving impacts to cultural heritage. Within these cases, it is not uncommon to see an NHPA claim alongside numerous other statutory objections. In particular, the appellate litigation demonstrates the close interrelationship between NEPA and the NHPA; both statutes address cultural resources within their evaluative processes.[329] The degree to which constitutional issues are also present in these cases is also noteworthy, typically associated with the management of sacred sites or TCPs.[330] This trend may, however, also suggest that the NHPA is not always a perfect mechanism for addressing the outcomes that parties are trying to achieve through their litigation strategies, but still presents a potential avenue towards challenging agency decision making and is thus asserted.

### *D. The National Historic Preservation Act Claims*

With regard to the NHPA challenges, there are several common themes which can be roughly characterized as split between disputes over what is actually an undertaking (triggering compliance with the Act) and whether the agency's procedural obligations had been fulfilled.[331]

#### *1. Undertakings*

In *Yerger* and *Pit River Tribe*, the primary issues essentially related to whether the agency had properly concluded that an undertaking had not occurred. In *Yerger*, the court agreed that there was no undertaking upon the termination of the special use permit because there was essentially no effect from the change in ownership (moving from private to federal control), and the only required consultation concerned the proposed removal of the structures.[332] In *Pit River Tribe,* the challenge centered on whether a lease extension fell under the Act.[333] In the court's view, this extension did require consultation as there was discretion and the extension

---

329 *See, e.g.*, supra Part III.C.5 (*Muckleshoot Indian Tribe*) (involving evaluation under both the NHPA and NEPA); *see also* NEPA/NHPA HANDBOOK, *supra* note 29 (exploring this intersection and discussing ways to more closely integrate planning under both regimes).

330 *See* Hutt, *supra* note 9, at 51–53 (summarizing the recent trends in this area and discussing several of these decisions within the TCP/sacred sites framework).

331 *Wyoming Sawmills*, as a constitutional claim based upon a management decision agreed to within the context of a consultation, is sort of off to the side, but again, it merits inclusion as the basis for the legal challenge flowed out of an MOA negotiated in NHPA consultation. 383 F.3d 1241, 1244 (10th Cir. 2004).

332 981 F.2d 460, 465 (9th Cir. 1992).

333 469 F.3d 768, 787 (9th Cir. 2006).

did not just merely preserve the status quo.[334] Whether or not something is an undertaking is a frequent point of litigation challenging an agency's decision—given the broad language of the statute on this definitional term and that this decision must be made for the consultation to commence—so it is not surprising to see two cases address this threshold issue.

*2. Failure to Identify and Evaluate Historic Properties*

Another common theme relates to claims that the agency failed to properly identify and evaluate historic properties. In *Wilson*, *Pueblo of Sandia*, and *Hoonah Indian*, the tribal entities challenged the agency's compliance on this specific issue.[335] In *Wilson* and *Hoonah Indian Ass'n*, the Forest Service's efforts to consult, although not perfect, were enough to survive judicial scrutiny.[336] Only in *Pueblo of Sandia*, where the agency had generalized knowledge of historic properties but did not investigate further, and also appeared to have withheld important information from the consulting parties did the court actually require additional consultation to identify historic properties.[337] This may lead one to conclude that the courts are fairly deferential where the agency has made a fair and documented effort, and this appears to be at least partially supported by decisions both within and outside of the Forest Service's experience.

As far as other lessons on the need to appropriately identify and evaluate historic properties, *Hoonah Indian Ass'n* demonstrates the difficulty of relying on oral history exclusively and the need for specific place-based information.[338] In *Hoonah Indian Ass'n*, the affected tribe could or was only willing to point to generalized locations and not specific places to trigger further consultation towards resolving the adverse effects stemming from the proposed timber sale.[339] While *Hoonah Indian Ass'n* reflected conventional NHPA and National Register principles, it will be interesting to see whether there will be future evolution within efforts to identify those properties significant to tribes.

*3. Other Procedural and Substantive Challenges*

One last category of appellate decisions focuses more on procedural and substantive compliance with the Act. Two cases fit within this category: *Muckleshoot Indian Tribe* and *Navajo Nation*.

---

334 *Id.* at 784, 787.

335 *Wilson*, 708 F.2d 735, 738, 756 (D.C. Cir. 1983); *Pueblo of Sandia*, 50 F.3d 856, 857 (10th Cir. 1995); *Hoonah Indian Ass'n*, 170 F.3d 1223, 1230–31 (9th Cir. 1999).

336 *Wilson*, 708 F.2d at, 756; *Hoonah Indian Ass'n*, 170 F.3d at 1232. *Apache Survival I* also presented these issues, but this case was decided on laches given the delay between the agency's decision and the appellant's filing of the initial lawsuit. 21 F.3d 895, 905, 907–08 (9th Cir. 1994).

337 50 F.3d at 861–62.

338 170 F.3d at 1231–32.

339 *Id.* at 1230, 1231–32.

*Muckleshoot Indian Tribe* is also noteworthy because, at first glance, it seems to go beyond the procedural compliance dictated by the NHPA, into the substance of the agency's decision—essentially requiring the Forest Service to resolve adverse effects more effectively.[340] As explained above, however, this case largely hinges upon the failure to comply with the procedural requirements in place for assessing adverse effects at the time, rather than a direct critique of the agency's ultimate decision.[341] If the agency had not determined that its documentation could eliminate the adverse effect associated with the land exchange, but had instead moved into consultation regarding how these effects would be addressed, the agency would likely have complied with the Act.[342] *Muckleshoot Indian Tribe* then stands, in part, for the need to pay close attention to how compliance is obtained or achieved.

In a slightly different, but still related vein, the *Navajo Nation* appellants alleged error in the Forest Service's consultation having essentially predetermined the outcome: having strictly complied with the Act's procedural requirements, the agency failed to give the tribes an opportunity to meaningfully participate.[343] Given the extensive documented consultation efforts that the agency used, it was able to rebut these claims on appeal,[344] but this challenge goes back to the first principles—that consultation should occur early in project planning before too many potential alternatives have been foreclosed. There, however, can still be disputes about the scope of what is actually discretionary and subject to consultation that, if possible, should be addressed early on in the process to avoid this sort of argument.

To summarize, in a given NHPA case, there are a number of decision points where an agency's compliance can be challenged. The fact that section 106 establishes a process allowing for consulting party input, but generally does not have direct substantive effect, fundamentally shapes the nature of the litigation and, in turn, the claims that are ultimately raised against agency action.[345] As this Part demonstrates, several areas of this process are more likely to be challenged than others based upon the very nature of the consultation process and the steps that the agency needs to complete to meet its statutory requirements.

---

340 177 F.3d 800, 806–07, 809, 815 (9th Cir. 1999); *see also* Yablon, *supra* note 133, at 1643 (discussing this case and the court's view of the agency's compliance with regard to the Weyerhaeuser land exchange).

341 *See supra* Part III.C.3.

342 *See Muckleshoot Indian Tribe,* 177 F.3d at 807–09, 815.

343 At the district court level, the claims were that the fact that NHPA consultation concluded earlier than the NEPA analysis showed that the NHPA consultation was lacking, and that the agency failed to make good faith efforts to involve the tribes—both arguments were rejected. *Navajo Nation I*, 408 F. Supp. 2d 866, 878–80 (D. Ariz. 2006*), aff'd in part*, *rev'd in part and remanded*, 479 F.3d 1024 (9th Cir. 2007), *on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008), *and aff'd*, 535 F.3d 1058 (9th Cir. 2008).

344 *Navajo Nation II*, 479 F.3d 1024, 1060 (9th Cir. 2007), *on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008).

345 This does not, however, mean that the section 106 process fails to influence agency decision making, but again, the statute is procedural and does not require a specific outcome. *See* Nat'l Tr. For Historic Pres. v. Blanck, 938 F. Supp. 908, 925 (D.D.C 1996).

### *E. The Evolution of Cultural Resource Management*

Over the past five decades, cultural resource practice has evolved, meriting specific mention in the context of this litigation review. One of the largest shifts involves the consideration of TCPs and tribal resources.[346] For example, the 1992 NHPA amendments expanding the NHPA to increase the role of tribes concerning these important resources has had substantial impact on the agency's section 106 practice.[347] Thus, some of the cases discussed within this summary have to be evaluated within the context of the legal framework and practice standards that existed at the time of the NHPA consultation and subsequent appellate decision.

From this vantage point, it is likely that evolving normative cultural understandings will continue to shape the efforts of federal land managers to identify, evaluate, consider and address adverse effects to historic resources. If the scope of resources that the agencies are asked to review is expanded (e.g., to include greater consideration of intangible cultural heritage), developing meaningful approaches will take some time and judicial review will likely influence the ultimate nature of this process.[348] More broadly, as our collective cultural understandings have become more inclusive, cultural resource management has made adjustments and will necessarily have to continue to do so. While the challenges that the Forest Service faces may differ from those it has faced in the past, its efforts to comply with section 106 has revealed a willingness and a capability to adapt and evolve as new resources and procedural requirements demand.

## V. CONCLUSION

In conclusion, it is not surprising that the Forest Service has, as a significant manager of federal lands, been involved in litigation regarding the agency's impacts to historic properties under section 106 of the NHPA. This survey reveals that this litigation is largely centered on archaeological and cultural sites significant to tribal entities. Through periodic challenges, appellate litigation has played a role in shaping the Forest Service's current management of its historic properties. The general litigation trend, and the nature of the cases reaching appellate review, could support an argument that there is more current awareness of the importance of these sites within the agency's decision-making processes, but the agency's task on this front is by necessity unending and must be given continual attention. The real challenge for the agency in the future is to continue to think and act conscientiously and holistically about these resources within the context of

346 Lydia T. Grimm, *Sacred Sites and the Establishment Clause: Indian Religious Practices on Federal Lands*, NAT. RESOURCES & ENV'T, Summer 1997, at 19, 24.

347 National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, 106 Stat. 4753; Paul R. Lusignan, *Traditional Cultural Places and the National Register*, 26 GEORGE WRIGHT F., no. 1, 2009, at 37, 38–39.

348 *See generally* Polanco, *supra* note 75, at 201, 202–03 (discussing the issues associated with intangible cultural values).

the agency's statutory mandates. This fifty year experience provides a benchmark for moving forward and evaluating the agency's ability to continue to meet the challenge of protecting a significant component of the nation's cultural patrimony.