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## Twenty-Five Years Later: The Amendments to the National Historic Preservation Act and Tribal Consultation

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## COMMENTS

### TWENTY-FIVE YEARS LATER: THE AMENDMENTS TO THE NATIONAL HISTORIC PRESERVATION ACT AND TRIBAL CONSULTATION\*

*Brody Hinds* \*\*

#### *Introduction*

America is regarded as having some of the world's greatest natural wonders.<sup>1</sup> While most Americans consider places like Yosemite and Yellowstone special, these places are much more than special to American Indians, they are sacred.<sup>2</sup> Native Americans have a unique relationship to their land and this relationship is often "central and indispensable to their religion, culture, and way of life."<sup>3</sup> Many sites that American Indians consider sacred and culturally significant are controlled by the federal government.<sup>4</sup> These sacred and culturally significant sites are not always secure under the control of the federal government and have often been subject to grave modification or even destruction. The government's failed stewardship has been occurring more frequently as federally controlled sacred sites like Effigy Mounds and the Trail of Tears have been damaged beyond repair.<sup>5</sup> The federal managers in charge of sacred sites are frequently unaware of their significance to Native peoples and often do not

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\* This Comment was written before the Dakota Access Pipeline was completed in 2017.

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1. *U.S. National Parks – In the Beginning*, NAT'L GEOGRAPHIC, <http://travel.nationalgeographic.com/travel/national-parks/early-history/> (last visited Sept. 21, 2016).

2. Alysa Landry, *Native History: Yellowstone National Park Created on Sacred Land*, INDIAN COUNTRY TODAY (Mar. 1, 2017), <http://indiancountrytodaymedianetwork.com/2014/03/01/native-history-yellowstone-national-park-created-sacred-land-153807>.

3. Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 *ECOLOGY L.Q.* 795, 801 (1992).

4. *Id.* at 797.

5. Travis Loller & Erik Schelzig, *APNewsBreak: Docs Detail Government Damage of Trail of Tears*, AP NEWS (Sept. 17, 2016), <http://bigstory.ap.org/article/09a7b06873364d7fa019d635472fa82d/apnewsbreak-docs-detail-government-damage-trail-tears>; Clay Masters, *Park Service Construction Damaged Native American Burial Sites*, NPR.ORG (Oct. 23, 2014), <http://www.npr.org/2014/10/23/358353690/park-service-construction-damaged-native-american-burial-sites>.

know the best way to preserve them.<sup>6</sup> The federal government should ensure that sacred sites are secure because Native Americans “have a unique ethical claim for preservation of their culture due to the history of aggression against them.”<sup>7</sup> It is crucial to protect the sacred sites of Native peoples because once a sacred site has been altered, the site often loses its religious or cultural significance.<sup>8</sup>

For the past fifty years, the National Historic Preservation Act of 1966 (“Preservation Act”)<sup>9</sup> has provided support for the preservation of historically and culturally significant properties.<sup>10</sup> The key provision of the Preservation Act is section 106, which mandates that federal agencies “stop, look and listen” before proceeding with a project.<sup>11</sup> Section 106 requires federal agencies that oversee a project to consider “the effect of the undertaking on any district, site, building structure, or object that is included in or eligible for inclusion in the National Register.”<sup>12</sup> In 1992, Congress significantly amended the Preservation Act to increase the level of protection for properties that are historic and culturally significant to Indian tribes.<sup>13</sup> Federal agencies must now consult with Indian tribes regarding land that is culturally or religiously significant to tribes.<sup>14</sup>

Given twenty-five years have passed since the amendments to the Preservation Act, it is important to reflect on section 106 and the impact it has had on preservation efforts, particularly concerning Native American tribes. The changing political climate of the United States is guaranteed to test the effectiveness of the Preservation Act, and it is critical to determine the strengths and weaknesses of the act as well as how it could be improved. This Comment reviews the Preservation Act as well as the amendments to the act to determine their effectiveness. Part I examines the

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6. Ward, *supra* note 3, at 797.

7. *Id.*

8. *Id.* at 802.

9. Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 54 U.S.C. §§ 300101-307108 (Supp. III 2015)).

10. Danielle E. Horgan, *Reconciling the Past with the Future: The Cape Wind Project and the National Historic Preservation Act*, 36 VT. L. REV. 409, 416 (2011).

11. Stephanie Meeks et al., *Section 106 Uncensored: The Insider’s Perspective*, FORUM J., Winter 2012, at 3.

12. Horgan, *supra* note 10, at 417-18.

13. Melissa Lorentz, *Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers’ Section 106 Regulations Are Invalid*, 40 WM. MITCHELL L. REV. 1580, 1586 (2014).

14. S. Rheagan Alexander, *Tribal Consultation for Large-Scale Projects: The National Historic Preservation Act and Regulatory Review*, 32 PACE L. REV. 895, 903 (2012).

background and motivation for the Preservation Act as well as the evolution of the tribal role under the Act. Part II examines and reviews the section 106 consultation process. Part III looks at challenges that the Preservation Act is currently facing, specifically the Dakota Access Pipeline and the Army Corps of Engineers' compliance with the Act. Part IV explores success under the Preservation Act. Part V provides recommendations as to how the Preservation Act could be strengthened.

### *I. A Brief History of the Preservation Act*

The Preservation Act has had a dramatic effect on the preservation of tribal properties since the amendments to the Act in 1992. A true understanding of the Preservation Act today requires looking briefly at the motives for its creation as well as the evolution of the role of tribes under the Act.

#### *A. Background and Motivation for the Preservation Act*

Historic preservation in the United States is a relatively new concept.<sup>15</sup> It took the destruction of irreplaceable historic sites and the demolition of entire neighborhoods to spur Americans into thinking about the preservation of historic sites.<sup>16</sup> The destruction of historic sites continued to rapidly increase as the country began to expand and industrialize. However, by the beginning of the twentieth century, the federal government started to increase its preservation efforts.<sup>17</sup> Federal preservation measures began with the passage of the Antiquities Act of 1906,<sup>18</sup> which gave the president the authority to preserve historic landmarks on federal lands.<sup>19</sup> Over the next fifty years, Congress continued to pass legislation that attempted to preserve historic landmarks and culturally significant properties.<sup>20</sup> During

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15. Roger K. Lewis, *Historic Preservation Doesn't Have a Long History in U.S.*, WASH. POST (Sept. 11, 2015), [https://www.washingtonpost.com/realestate/historic-preservation-doesnt-have-a-long-history-in-us/2015/09/10/36458684-50c4-11e5-8c19-0b6825aa4a3a\\_story.html?utm\\_term=.7c1d11cda7ed](https://www.washingtonpost.com/realestate/historic-preservation-doesnt-have-a-long-history-in-us/2015/09/10/36458684-50c4-11e5-8c19-0b6825aa4a3a_story.html?utm_term=.7c1d11cda7ed).

16. *Id.*

17. Melissa A. MacGill, *Old Stuff Is Good Stuff: Federal Agency Responsibilities Under Section 106 of the National Historic Preservation Act*, 7 ADMIN. L.J. AM. U. 697, 703 (1994).

18. Pub. L. No. 59-209, 34 Stat. 225 (current version at 54 U.S.C. §§ 320301-320303 (Supp. III 2015)).

19. *Id.* § 2 34 Stat. at 225 (codified as amended at U.S.C. §§ 320301(a)).

20. MacGill, *supra* note 17, at 703.

this time period, Congress passed the Historic Sites Act of 1935<sup>21</sup> and established the National Trust for Historic Preservation.<sup>22</sup>

By the 1960s, everyday Americans believed that the federal government was not doing enough to adequately protect historical sites throughout the country.<sup>23</sup> The public outcry primarily stemmed from the growth of infrastructure that occurred in the country during the 1950s and 1960s. As cities grew and highways were built, Congress became concerned about the growth of infrastructure without regard to historical properties.<sup>24</sup> Congress had previously taken steps to protect historic sites of national significance but had not taken any steps to protect local historic sites.<sup>25</sup> To combat the potential destruction of culturally and historically significant properties, Congress passed the Preservation Act,<sup>26</sup> which forced federal agencies to consider the consequences that their proposed actions might have on historic properties.

To lead preservation efforts, the Preservation Act established the Advisory Council on Historic Preservation (“Advisory Council”).<sup>27</sup> Congress created it to promote the preservation of historic and cultural sites as well as oversee the section 106 process.<sup>28</sup> The Advisory Council works to advise both the president and Congress on the current national historic preservation policy.<sup>29</sup> The Council is the only federal entity that possesses the legal obligation to encourage all federal agencies to consider historic preservation when determining the requirements for newly approved federal projects.<sup>30</sup> Congress also gave the Advisory Council the power to review the decisions of all federal agencies that could pose a threat to historic sites.<sup>31</sup> As the overseer for historic preservation, the Advisory Council is in

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21. Pub. L. No. 292-74, 49 Stat. 666 (codified as amended at 54 U.S.C. § 320101 (Supp. II 2015)).

22. Act of Oct. 26, 1949, Pub. L. No. 81-408, 63 Stat. 927.

23. MacGill, *supra* note 17, at 703.

24. Horgan, *supra* note 10, at 416.

25. MacGill, *supra* note 17, at 704.

26. Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 54 U.S.C. §§ 300101-307108 (Supp. III 2015)).

27. 54 U.S.C. § 304101(a) (Westlaw through Pub. L. No. 115-132).

28. *Id.*; Lorentz, *supra* note 13, at 1583.

29. Horgan, *supra* note 10, at 419.

30. *Id.* at 419-20.

31. MacGill, *supra* note 17, at 705.

charge of implementing and interpreting the section 106 consultation requirements of the Preservation Act.<sup>32</sup>

*B. The Evolution of the Tribal Role Under the Preservation Act*

The sacred sites of Native Americans have been subjected to destruction since westward expansion of the United States began.<sup>33</sup> Indian tribes were effectively excluded from the original Preservation Act.<sup>34</sup> For almost thirty years after the passage of the Preservation Act, Indian tribes did not have a say in agency action that impacted land that they held to be culturally significant. It was not until the early 1990s that Congress began to consider the need to protect sites of historical significance to Indian tribes.<sup>35</sup> Congress instructed the National Park Service to research how best to protect Indian sites.<sup>36</sup> The National Park Service issued Bulletin 38, which provided Congress with guidance on the best preservation methods for Indian sites.<sup>37</sup> In 1992, Congress took the guidance that the National Park Service supplied and amended the Preservation Act, incorporating provisions of Bulletin 38, specifically the definition of traditional cultural properties, into the Act.<sup>38</sup>

Since the 1992 amendments, the Preservation Act has required that all federal agencies try to mitigate any potential harm that could occur to sites that are historically and culturally significant to Indian tribes.<sup>39</sup> The primary way that harm is mitigated is through consultation. Consultation is now mandated by the Preservation Act to occur between the federal agency overseeing the proposed project and any parties interested in the project, including tribes.<sup>40</sup>

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32. *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 166 (1st Cir. 2003).

33. *Ward*, *supra* note 3, at 807-08.

34. *Lorentz*, *supra* note 13, at 1584.

35. *Id.* at 1585.

36. *Id.*

37. PATRICIA L. PARKER & THOMAS F. KING, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL REGISTER BULLETIN: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES (rev. ed. 1998), <https://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf>.

38. 54 U.S.C. § 302706 (Westlaw through Pub. L. No. 115-132).

39. *Id.* § 306107.

40. *Horgan*, *supra* note 10, at 418.

Consultation is not unique to the Preservation Act, but permeates throughout a number of federal statutes and proclamations.<sup>41</sup> The requirement for consultation with Indian tribes stems from the recognition of tribal sovereignty by the United States government.<sup>42</sup> This obligation originates in Article I, Section 8 of the United States Constitution, which grants Congress the power to regulate commerce, including commerce between the United States and Indian tribes.<sup>43</sup> This constitutional power has been expressed in various federal statutes and laws.<sup>44</sup> Besides the Preservation Act, consultation provisions are found in the Archaeological Resources Protection Act,<sup>45</sup> the Native American Graves Protection and Repatriation Act,<sup>46</sup> and numerous executive orders.<sup>47</sup> These consultation provisions demonstrate the evolution that has taken place in the process used by the United States to interact with Indian tribes, and consultation now represents the official policy of the United States.<sup>48</sup>

The consultation amendment to the Preservation Act impacted Native Americans in several ways. First, the amendment established the tribal historic preservation program system.<sup>49</sup> This program works with tribes to protect both resources and traditions that are important to tribes by providing them access to sustainable programs.<sup>50</sup> Second, the consultation amendment recognized that there were properties that were “religious[ly] and cultural[ly] significan[t]” to Indian tribes.<sup>51</sup> Finally, it required that a federal agency consult with tribes before initiating a project on land that could be significant to Indian tribes.<sup>52</sup> However, consultation has its limits and is often underutilized by federal agencies. Some agencies attempt to minimize or eliminate consultation with Indian tribes, which often results in disagreements between the federal agency and the consulting party

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41. SHERRY HUTT & JAIME LAVALLEE, NAT'L ASS'N OF TRIBAL HISTORIC PRESERVATION OFFICERS, TRIBAL CONSULTATION: BEST PRACTICES IN HISTORIC PRESERVATION 6 (2005), [https://www.nps.gov/thpo/downloads/NATHPO\\_Best\\_Practices.pdf](https://www.nps.gov/thpo/downloads/NATHPO_Best_Practices.pdf).

42. *Id.*

43. *Id.* (referencing U.S. CONST. art. I, § 8).

44. *Id.*

45. 16 U.S.C. § 470cc(c) (Westlaw through Pub. L. No. 115-132).

46. 25 U.S.C. § 3003(b) (2012).

47. HUTT & LAVALLEE, *supra* note 41, at 6-8.

48. *Id.* at 6.

49. Alexander, *supra* note 14, at 903.

50. *Working with Native Americans*, NAT'L PARK SERV. (June 6, 2016), [https://www.nps.gov/history/tribes/tribal\\_history\\_preservation\\_officers\\_program.htm](https://www.nps.gov/history/tribes/tribal_history_preservation_officers_program.htm).

51. Alexander, *supra* note 14, at 903.

52. *Id.*

concerning what constitutes proper consultation. The implications surrounding the difficulties of establishing proper consultation is demonstrated by the current battle between the Army Corps of Engineers and the Standing Rock Sioux Tribe over the Dakota Access Pipeline. The conflict over the location of the pipeline is one of the most public and contentious events involving the Preservation Act and could result in important changes to the Act.

While the consultation provision of section 106 of the Preservation Act has played a major role in increasing the involvement of Native Americans in modern archeological research, Native peoples have long contributed to this area of study.<sup>53</sup> Native Americans were often employed by scholars during the nineteenth and twentieth centuries to help in the field and to interpret archeological records.<sup>54</sup> The twentieth century also saw Native American archeologists Arthur Parker and Edmund Ladd contribute heavily to the field of archeology in their own right.<sup>55</sup> The number of Native Americans working in the field of archeology to preserve their cultures and heritages has only continued to increase after the passage of the Preservation Act.<sup>56</sup> The increase in the number of Native Americans who work in archeology originates from tribes being afforded the opportunity under the Preservation Act to be directly involved in the process of conducting and studying archeological research.<sup>57</sup>

### *III. Section 106 and Consultation*

Consultation is the major requirement of section 106 of the Preservation Act. Federal agencies must consult with tribes and other consulting parties. There are four general elements that must be met to successfully complete the consultation process: (1) initiate the section 106 process,<sup>58</sup> (2) identify any historic properties that could be affected,<sup>59</sup> (3) consider any impacts on

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53. T.J. Ferguson, *Working Together - NHPA: Changing the Role of Native Americans in the Archaeological Study of the Past*, SOC'Y FOR AM. ARCHAEOLOGY BULL. (Jan. 1999), <http://www.saa.org/Portals/0/SAA/publications/SAAbulletin/17-1/SAA24.html>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. 36 C.F.R. § 800.3 (2000).

59. *Id.* § 800.4.

historic properties,<sup>60</sup> and (4) resolve any adverse effects to those properties.<sup>61</sup>

*A. Section 106: Consultation Process*

To complete the section 106 review process required under the Preservation Act, an agency head that is going to commence a project on federally controlled land must first consider the effect that the project would have on any properties that are listed or eligible to be listed in the National Register.<sup>62</sup> The section 106 review process is only initiated if the agency performs an “undertaking.”<sup>63</sup> An undertaking is defined as a “project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency.”<sup>64</sup> Section 106 is understood to require federal agencies to “consult and consider” the actions of their respective projects.<sup>65</sup> Consultation includes seeking the views of others and forming an agreement with them concerning those historic properties.<sup>66</sup>

Under the Preservation Act, federal agencies must make “a reasonable and good faith effort to identify historic properties.”<sup>67</sup> The Preservation Act provides that a reasonable and good faith effort could include research, consultation, history interviews, and a field survey.<sup>68</sup> Federal agencies are required to determine if properties are included or eligible for listing on the National Register.<sup>69</sup> The agency is obligated to determine how its undertaking would impact the property and if the undertaking would have an adverse effect on properties that are “traditional and culturally significant” to Indian tribes.<sup>70</sup> If the undertaking would result in adverse effects on the property, the federal agency is required to mitigate, or where possible, avoid the adverse effects.<sup>71</sup>

A tribe becomes a consulting party in the section 106 review process “when it considers a site that might be affected by the undertaking to have

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60. *Id.* § 800.5.

61. *Id.* § 800.6.

62. 54 U.S.C. § 306108 (Westlaw through Pub. L. No. 115-132); MacGill, *supra* note 17, at 708.

63. 54 U.S.C. § 306108.

64. *Id.* § 300320.

65. Nat’l Tr. for Historic Pres. v. Blanck, 938 F. Supp. 908, 918 (D.D.C. 1996).

66. 36 C.F.R. § 800.16(f) (2009).

67. *Mont. Wilderness Ass’n v. Connell*, 725 F.3d 988, 1005 (9th Cir. 2013).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

religious or cultural significance.”<sup>72</sup> If a federal agency reaches out to a tribe to begin consultation, the tribe must respond to the agency in order to become part of the consultation process.<sup>73</sup> If the tribe does not respond to the agency within thirty days of receiving the agency’s request, the agency is permitted to proceed in the consultation process without the tribe.<sup>74</sup> Even if the tribe fails to respond to the agency’s consultation request within the thirty-day period, it is still permitted to join the consultation process later on.<sup>75</sup> However, if a tribe joins the consultation process later on, the agency is not required to reconsider findings it has already made.<sup>76</sup> Once a tribe joins the section 106 consultation process, it is entitled to a reasonable opportunity to discover concerns about the property in question, to have a role in identifying and evaluating properties, to express its view on the effect the undertaking will have on a property, and to participate in the process of mitigating any adverse effects to the property.<sup>77</sup> While tribes have the ability and the right to participate in the discussion of the historic property, tribes do not have complete control over the project and the final decision rests with the agency in charge of the undertaking.<sup>78</sup> If no “traditional and culturally significant” properties are found, tribes lose their right to demand agency action over the project.<sup>79</sup>

*B. Section 106: Undertaking*

The section 106 review process is only initiated when a federal agency performs an “undertaking.” Undertakings under the Preservation Act can take many forms and, for the purposes of section 106 review, an undertaking is an action that is “carried out by, for, with the assistance of, or under the direct or indirect regulatory authority of a federal agency and has the potential to affect historic properties.”<sup>80</sup> If a project receives some or all of its funding from a federal agency and the project is the type that requires a federal permit, license, or approval, then it will be considered an

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72. *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 167 (1st Cir. 2003).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. Kelly Kritzer, *Upper Klamath Lake and the Section 106 Process: Undertakings, Areas of Potential Effect, and Federal Responsibility*, 39 WILLAMETTE L. REV. 759, 771 (2003).

undertaking for the purposes of the Preservation Act.<sup>81</sup> Federal courts have also recognized that an undertaking is any activity “that can result in changes in the character or use of historic properties.”<sup>82</sup>

In addition to new projects by federal agencies, continuing projects can also be considered an undertaking.<sup>83</sup> Due to the possibility of ongoing projects qualifying as an undertaking for the purposes of section 106, the federal agency must continue to be observant when projects are ongoing.<sup>84</sup> The section 106 review process will be “applied to ongoing Federal actions as long as a Federal agency has opportunity to exercise authority at any stage of an undertaking where alterations might be made to modify its impact on historic preservation goals.”<sup>85</sup>

The nature of the project or activity largely determines if the section 106 review process is required.<sup>86</sup> In *Grand Canyon Trust v. Williams*, a federal district court determined that when a uranium mine in Arizona resumed operation it was not considered an undertaking.<sup>87</sup> The court came to this conclusion because the original plan for the mine was approved in 1986 in accordance with the Preservation Act and that the resumption of mining operations under the same plan could not constitute an additional undertaking which would require a new section 106 review.<sup>88</sup> Section 106 review is initiated solely by undertakings. Once it has been established that there is an undertaking, federal agencies then become obligated to consider and mitigate any adverse effects on a property.

### C. Section 106: Adverse Effect

Section 106 of the Preservation Act requires that federal agencies attempt to mitigate any adverse effect that the project may have on the historically or culturally significant property.<sup>89</sup> The Preservation Act, however, provides no clear definition of what constitutes an adverse effect. The United States Court of Appeals for the First Circuit determined

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81. *Grand Canyon Tr. v. Williams*, 98 F. Supp. 3d 1044, 1065 (D. Ariz. 2015).

82. *Nat'l Tr. for Historic Pres. v. Blanck*, 938 F. Supp. 908, 919 (D.D.C. 1996), *aff'd*, 203 F.3d 53 (D.C. Cir. 1990) (quoting 36 C.F.R. § 800.2).

83. *Id.*

84. *Id.*

85. *Id.* (quoting *Vieux Carre Prop. Owners v. Brown*, 948 F.2d 1436, 1444-45 (5th Cir. 1991)).

86. *Id.*

87. *Grand Canyon Tr. v. Williams*, 98 F. Supp. 3d 1044, 1066 (D. Ariz. 2015).

88. *Id.*

89. 36 C.F.R. § 800.6 (2012); *see* 54 U.S.C. § 306108 (Westlaw through Pub. L. No. 115-132).

[a]n 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 . . . .<sup>90</sup>

Once it has been determined that an undertaking by a federal agency will result in an adverse effect to a historically or culturally significant property, the federal agency is mandated by the Preservation Act to attempt to mitigate the adverse effects.<sup>91</sup> The mitigation of an adverse effect is done by requiring the federal agency overseeing the project to consult with both the Advisory Council as well as the State Historic Preservation Officer and discuss ways to reduce the effects of the proposed undertaking.<sup>92</sup> Under the Preservation Act, the agency has no duty to abandon the project or activity if the adverse effect cannot be mitigated or avoided.<sup>93</sup> The federal agency is only obligated to follow the procedures set forth in the Preservation Act.<sup>94</sup> If, however, the proposed undertaking will affect a property that is listed as a National Historic Landmark, the agency has a higher burden to meet and must minimize the potential harm.<sup>95</sup> National Historic Landmarks are held in higher regard than other historic properties and are specifically recognized under the Preservation Act as being “specially designated historic properties.”<sup>96</sup> When drafting the Preservation Act, Congress recognized the importance of these landmarks by protecting them with more stringent requirements.<sup>97</sup> While the statute does put a higher burden on federal agencies when the undertaking is to affect a historic landmark, the statute only requires that a federal agency “make maximum efforts to minimize harm, not that efforts be made to completely prevent harm befalling a historic landmark.”<sup>98</sup> Under the current version of the Preservation Act, tribes cannot force a federal agency to abandon an action that might have an a adverse effect on a culturally or historically significant

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90. *Neighborhood Ass'n of the Back Bay v. Fed. Transit Admin.*, 463 F.3d 50, 61 (1st Cir. 2006) (quoting 36 C.F.R. §§800.5(a)(1)).

91. *Id.*

92. *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 242 (5th Cir. 2006).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Horgan, *supra* note 10, at 419.

property, but only have the right to participate in the section 106 consultation process.

### *III. Challenges Under the Preservation Act*

The Preservation Act was a step in the right direction and its passage has increased both the awareness of preservation efforts as well as the role that tribes have in the section 106 review process. Even with these benefits, however, the Preservation Act, especially the tribal consultation provision in section 106, has several shortcomings and does not always provide adequate protection for sites that are both historically and culturally significant to American Indian tribes.

#### *A. General Challenges Under the Preservation Act*

In its current state, tribes face five major problems with the Preservation Act. The first major problem is in the section 106 consultation process. Tribes can be excluded from joining the consultation process in a variety of ways. The most common way for a tribe to be excluded is if the property is determined to not be a historic property.<sup>99</sup> Even when there is a historic property involved, tribes can be excluded from the consultation process if the federal agency determines that the undertaking would not have any effect on the property.<sup>100</sup> If tribes are able to join the section 106 consultation process, they can still be forcibly removed from the consultation process before it is complete.<sup>101</sup> Due to the discretionary nature of the Preservation Act, the federal agency ultimately has the final say on a project, not tribes, and can continue on with a harmful project even if tribes express concerns during the consultation period.<sup>102</sup> When a wind turbine farm was in the process of being built in the Nantucket Sound, the project continued even after tribes had expressed their concerns about the impact that the project would have.<sup>103</sup> Tribal leaders continued to disagree over the proposed plans to build the wind turbine farm when a final Record of Decision was released by the Secretary of the Interior.<sup>104</sup> Once the final Record of Decision was entered, the consultation process ended and

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99. Alexander, *supra* note 14, at 908.

100. *Id.*

101. *Id.*

102. MacGill, *supra* note 17, at 706.

103. Alexander, *supra* note 14, at 908-09.

104. *Id.* at 909.

prevented the tribes involved in the process from taking any further action.<sup>105</sup>

The second major problem with the Preservation Act is that the section 106 review process does not apply to states that administer federal programs under delegated authority.<sup>106</sup> This is because section 106 of the Preservation Act only applies to undertakings that are financed by the federal government or have received licenses from the federal government.<sup>107</sup> Section 106 and the review process that it entails does not apply to undertakings that are solely subjected to state or local regulation through the act of delegation or approval by a federal agency.<sup>108</sup> Even if federal funds are used on an undertaking, if a state or local government is the principle that is in charge of administering the expenditure of the funds, the section 106 review process will not be triggered because the project will not be considered to be federally funded.<sup>109</sup>

The third major problem with the Preservation Act is the level of deference that federal agencies have under the Act. Unless a National Historic Landmark is involved, federal agencies have sole discretion when mitigating the adverse effects on a historic property. The Preservation Act has no procedure in place to stop a “rogue agency” from refusing to mitigate adverse effects on a historic property.<sup>110</sup> Under the Preservation Act, federal agencies are not even required to examine alternative projects that could help to minimize the effects of an undertaking upon a historic property.<sup>111</sup> Federal agencies are only mandated to consider the effects of the undertaking upon the property, not to resolve those effects.<sup>112</sup> The head of a federal agency that is performing the project is responsible for beginning the section 106 review process.<sup>113</sup> There is no oversight over these agencies to make sure that they do not continue on with a project that

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105. *Id.*

106. Gussie Lord, *Federal Delegation to States of Clean Water Act Section 404 Permitting May Result in Reduced Consultation with Tribes Regarding Historic Preservation* NATIVE AM. RESOURCES COMM. LETTER (ABA Section of Env't, Energy & Res.), Aug. 2016, at 1, 13.

107. *Id.* at 14.

108. *Id.*

109. *Id.*

110. Marc Dadigan, *Rogue Agencies Can Ignore Historic Preservation Law*, INDIAN COUNTRY TODAY (Feb. 3, 2016), <http://indiancountrytodaymedianetwork.com/2016/02/03/rogue-agencies-can-ignore-historic-preservation-law-163267>.

111. MacGill, *supra* note 17, at 706.

112. *Id.*

113. *Id.* at 709.

could result in damage to a historic property.<sup>114</sup> Without proper oversight, federal agencies are permitted to harm historically and culturally significant sites. Through mismanagement and a lack of oversight, the National Park Service built sidewalks and trails through an Indian burial ground at the Effigy Mound National Monument.<sup>115</sup> In a similar situation, the United States Forest Service built trenches through a portion of the Trail of Tears, without authorization and in violation of the Preservation Act.<sup>116</sup> The section 106 review process is often extremely neglected on the part of the federal agencies. Commonly, the extent of consultation that federal agencies perform with tribes is a vague letter that is sent to the tribe describing the project.<sup>117</sup>

The fourth major problem with the Preservation Act is that tribes are rarely successful when they bring suit challenging the section 106 process. It is common for courts to uphold the decisions of federal agencies, even when the undertaking is likely to result in harm to a historic site.<sup>118</sup> Courts have very little power under section 106 of the Preservation Act to restrain the heads of federal agencies in regard to the preservation of historic sites.<sup>119</sup> Courts tend to side with the federal agency over the tribe so long as the agency has followed the section 106 process or has made a good faith effort to follow the mandates of the Preservation Act.<sup>120</sup> In *National Indian Youth Council v. Watt*, the United States Court of Appeals for the Tenth Circuit gave deference to federal agencies in their compliance with the Preservation Act so long as the “participating agencies made a good faith, objective, and reasonable effort to satisfy [the Preservation Act].”<sup>121</sup> The Act gives federal agencies wide discretion throughout the section 106 review process and limits the amount of influence that tribes can actually have in that process.

The fifth major problem with the Preservation Act is the limited role that the Advisory Council, whose job it is to interpret and implement the requirements of section 106, has in the review process.<sup>122</sup> The Advisory Council is supposed to comment on the proposed undertakings of federal

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114. *Id.* at 700.

115. Masters, *supra* note 5.

116. Loller & Schelzig, *supra* note 5.

117. Dadigan, *supra* note 110.

118. MacGill, *supra* note 17, at 705-06.

119. *Id.* at 718.

120. *Id.* at 719.

121. *Nat'l Indian Youth Council v. Watt*, 664 F.2d 220, 227 (10th Cir. 1981).

122. MacGill, *supra* note 17, at 706.

agencies. Nothing in the Preservation Act, however, requires that the federal agency performing the undertaking implement any of the Advisory Council's comments or suggestions into its plans.<sup>123</sup> The Advisory Council can only encourage federal agencies to consider historic preservation when developing the plans for an undertaking that could result in an adverse effect to a historic property.<sup>124</sup>

### *B. The Dakota Access Pipeline*

One of the most pressing situations that has recently confronted the limitations of the Preservation Act and the section 106 consultation process is the conflict regarding the Dakota Access Pipeline and the Army Corps of Engineers ("Corps"). The construction of the pipeline is a contentious issue and has resulted in severe criticism from various environmental and tribal groups. The pipeline could result in changes in how the Preservation Act is interpreted and applied to similar construction projects.

#### *1. Background of the Dakota Access Pipeline*

The Dakota Access Pipeline runs through four states and is designed to carry hundreds of millions of gallons of crude oil per day.<sup>125</sup> The pipeline runs largely without issue until it comes within half a mile of the Standing Rock Sioux Tribe's Reservation located in North and South Dakota.<sup>126</sup> This location is where the Standing Rock Sioux Tribe fears that the pipeline will destroy cultural and historical sites.<sup>127</sup> The Tribe claims that the Corps, which is responsible for issuing permits for the pipeline's construction, did not comply with the section 106 consultation provision of the Preservation Act before allowing the pipeline to be built.<sup>128</sup> While the United States District Court for the District of Columbia declined to grant an injunction against the pipeline, the Advisory Council expressed several concerns about the Corps' compliance with the Preservation Act.<sup>129</sup> Specifically, the Advisory Council articulated concerns regarding how the Corps defined the

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123. *Id.* at 707.

124. Horgan, *supra* note 10, at 419-20.

125. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 7 (D.D.C. 2016).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 7; *Advisory Council on Historic Preservation, DAKOTA ACCESS PIPELINE PROJECT* (May 19, 2016), <https://assets.documentcloud.org/documents/3036069/Ex-32-ACHP-Objection-Letter-DAPL.pdf>.

project area of the pipeline as well as the level of consultation between the varying parties that took place.<sup>130</sup>

Oil pipelines, like the Dakota Access Pipeline, are unique in that no federal agency is required to issue a permit for their construction.<sup>131</sup> President Barack Obama issued a Presidential Memorandum in 2012 stating that the federal government's process of approving oil pipelines needed to be streamlined and that is essentially what has occurred.<sup>132</sup> Oil pipelines stand in contrast to other types of pipelines, such as a natural gas pipelines which require permits to be issued for their construction by the Federal Energy Regulatory Commission.<sup>133</sup> Most of the Dakota Access Pipeline, all but one percent of it, runs over private land and therefore does not require consultation with the federal government at all.<sup>134</sup> Federal regulation becomes necessary when the pipeline crosses federally regulated waters at hundreds of points along the route.<sup>135</sup> The Corps is needed in order to permit the construction to occur in federally-regulated waters.<sup>136</sup> The Corps chose to permit the Dakota Access Pipeline through a general permit that is known as the Nationwide Permit 12.<sup>137</sup> The Nationwide Permit 12 exists within a larger Nationwide Permit Program that the Corps uses for categories of projects that "will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effects on the environment."<sup>138</sup> The Nationwide Permit Program was designed to streamline the permit process for large pipelines and other utility projects.<sup>139</sup> The program consists of activities that have been pre-approved by the Corps and as a result, there is minimal involvement of the

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130. Kellam Throgmorton, *DAPL Is the Biggest Issue in Public Archaeology Right Now*, MASTER OF ARTS IN PUBLIC ARCHAEOLOGY AT BINGHAMTON UNIV.: MAPA BLOG (Sept. 9, 2016), <http://mapabing.org/2016/09/09/dapl-is-the-biggest-issue-in-public-archaeology-right-now/>.

131. Doug Hayes, Jon Eagle, Sr., Will Cook & Elizabeth Merritt, *Webinar: The Legal Landscape of the Dakota Access Pipeline in Standing Rock Sioux Tribe vs. U.S. Army Corps of Engineers*, NAT'L TRUST FOR HISTORIC PRESERVATION: PRESERVATION LEADERSHIP F. (Oct. 25, 2016), <http://forum.savingplaces.org/viewdocument/slide-deck-dakota-access-pipeline?>

132. *Id.*

133. *Id.*

134. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 7.

135. *Id.*

136. *Id.*

137. *Id.*

138. Hayes et al., *supra* note 131, at 10.

139. Samantha L. Varsalana, *Pipelines, Protests and General Permits*, GEO. ENVTL. L. REV. ONLINE (2016), <https://gelr.org/2016/10/28/pipelines-protests-and-general-permits/>.

federal government once the permit has been approved.<sup>140</sup> The Nationwide Permit 12 is the type of permit that is used for pipelines and other utility projects that would result in “loss” up to one half acre of water controlled by the United States for each “single and complete” project.<sup>141</sup> Under the Nationwide Permit 12 program, the Corps has the sole discretion to define what constitutes a “single and complete” project.<sup>142</sup> The Corps defines a “single and complete” project as “[the] portion of the total linear project proposed or accomplished by one owner/developer . . . that includes all crossings of a single water of the United States (i.e., a single waterbody) at a specific location.”<sup>143</sup> However, the entire project can be federalized, but this categorization depends on the scope of the Corps’ involvement and the decision rests solely with the local district engineer for the project.<sup>144</sup>

The Nationwide Permit 12 program allows the Corps to segment pipelines and other utility projects into individual “single and complete” projects each time the pipeline or utility project comes into contact with waters belonging to the United States.<sup>145</sup> The Corps’ segmentation of pipelines allows each pipeline water crossing to qualify for a permit under the Nationwide Permit Program, essentially creating many “single and complete” projects along a proposed route.<sup>146</sup> There is no limit as to how many times a Nationwide Permit 12 can be issued for a particular pipeline project.<sup>147</sup> This lack of limitation allows permits to be “stacked” numerous times along a single pipeline.<sup>148</sup> The Corps regularly issues thousands of permits for a specific pipeline project. For instance, the construction of the Gulf Coast Pipeline, which was a 485-mile-long pipeline used for crude oil, was considered as 2227 “single and complete” projects for the purposes of the Nationwide Permit Program.<sup>149</sup> A similar situation occurred again with the construction of the Flanagan South Pipeline, which stretched over 600 miles and consisted of 1950 “single and complete” projects, per the Corps.<sup>150</sup> Through its permit program, the Corps essentially allows the

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140. *Id.*

141. Hayes et al., *supra* note 131, at 11.

142. *Id.*

143. Varsalana, *supra* note 139, at 5.

144. *Id.*

145. Hayes et al., *supra* note 131, at 11.

146. *Id.*; Varsalana, *supra* note 139, at 6.

147. Hayes et al., *supra* note 131, at 11.

148. Varsalana, *supra* note 139, at 6.

149. Hayes et al., *supra* note 131, at 11.

150. *Id.* at 11.

construction of pipelines to be “piecemeal[ed]” into smaller individual projects.<sup>151</sup>

The permit issued by the Corps for the Dakota Access Pipeline is the only involvement that the project has with the federal government. The issuance of the permit, however, also puts the Dakota Access Pipeline under the scope of the Preservation Act because the issuance of a federal permit for a project is considered an undertaking under the Act.<sup>152</sup> While the Advisory Council administers the Preservation Act, it has allowed federal agencies, like the Corps, to declare their own internal section 106 compliance systems, so long as the federal agency gets approval from the Advisory Council.<sup>153</sup> The Corps declared its own section 106 regulations in the 1980s.<sup>154</sup> These regulations were codified in Appendix C, and there is no record that the Advisory Council ever provided the Corps with its approval.<sup>155</sup>

## 2. Appendix C

Appendix C of the Corps’ regulations conflicts with the Advisory Council’s regulations regarding section 106 in several crucial ways.<sup>156</sup> The first conflict concerns the way that the Corps defines the “area of potential effects” for its projects.<sup>157</sup> Under Appendix C, the Corps limits the “area of potential effects” solely to the permit area.<sup>158</sup> The “area of potential effects” that has been established is in stark contrast to Congress’s intentions when it amended the Preservation Act in 1992. When Congress amended the Preservation Act, its intent was to require “federal agencies to consider impacts to [traditional cultural properties which] effectively expanded their jurisdictional authority, ensuring federal programs are consistent with the United States’ trust responsibility towards tribes.”<sup>159</sup> The Corps cannot claim it is jurisdictionally limited from considering traditional cultural properties present outside of the original permit area in their “area of potential effects” analysis because the federal government has constitutional power over Indian affairs.<sup>160</sup>

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151. Varsalana, *supra* note 139, at 6.

152. Kritzer, *supra* note 80, at 768.

153. Lorentz, *supra* note 13, at 1582.

154. *Id.*

155. *Id.*

156. *Id.* at 1592-93.

157. *Id.* at 1593.

158. *Id.*

159. *Id.* at 1594-95.

160. *Id.* at 1595-96.

The second way that Appendix C conflicts with the Advisory Council's section 106 regulations is in the identification of historic properties.<sup>161</sup> There are three situations in which Appendix C allows a district engineer, who is assigned to a project by the Corps, to decide that there is little likelihood that a historic property exists or that a historic property may be affected by a project.<sup>162</sup> First, a district engineer may declare that no historic properties are present in areas that have been significantly modified by previous work.<sup>163</sup> This declaratory power means that if a district engineer believes that a previous project by the Corps has greatly disturbed an area, the engineer may unilaterally declare that no historic properties exist in that area, without doing a proper investigation, due to the disturbance. However, not all areas lose their historic value purely because they have been modified. Traditional cultural properties retain their cultural significance even after modification and could be wrongfully excluded under Appendix C.<sup>164</sup> Appendix C does not mention traditional cultural properties at all, thus increasing the risk that they will be completely forgotten.<sup>165</sup> Second, a district engineer may declare that no historic properties are present simply because the area was created in modern times.<sup>166</sup> The Corps presumes that because an area was created in modern times, it cannot be historically or culturally significant. Finally, a district engineer can declare that there are no historic properties in the project area or that historic properties are not likely to be affected because the project is of limited scope.<sup>167</sup> The Advisory Council provides for the final exception that is present in Appendix C; however, the first two exceptions present in Appendix C are not permitted by the Advisory Council.<sup>168</sup>

Appendix C also prevents the Corps from properly engaging in tribal consultation as mandated under the Preservation Act. Under Appendix C, tribes are to be consulted only as part of the district engineer's investigations.<sup>169</sup> The regulations that the Corps has in place do not mention tribes in the process of identifying historic properties.<sup>170</sup> The only

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161. *Id.* at 1596.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1598.

170. *Id.* at 1599.

requirements for the district engineer under Appendix C are that they consult State Historic Preservation Officers as well as “other appropriate sources of information.”<sup>171</sup> Appendix C also limits consultation with tribes in the way that notice is provided to the tribes. Once the district engineer determines that there are no historic properties or that historic properties that are present will not be adversely affected, the district engineer must only explain their decision in a public notice.<sup>172</sup> Tribes may not find out that a project will affect a traditional cultural property until a public notice has been given.<sup>173</sup> A general notice to the public does not qualify as adequate consultation under the Preservation Act.<sup>174</sup> Due to the conflicting nature of Appendix C, it must be entirely replaced or supplemented with something that does not conflict with the Preservation Act or the Advisory Council’s recommendations.

### 3. Compliance with Section 106

Prior to the Corps issuing a Nationwide Permit, it must consider the effects the proposed construction would have on culturally and historically significant properties.<sup>175</sup> Pipeline construction, however, often begins without even notifying the Corps.<sup>176</sup> The Nationwide Permit Program allows construction to commence without notice or approval by the Corps because the activities have already been pre-approved when the permit was issued.<sup>177</sup> Due to this conflict of timelines, there could be no consultation with potentially affected parties per section 106 of the Preservation Act because the federal agency responsible for initiating consultation did not have notice that construction was occurring.<sup>178</sup> The Nationwide Permit Program allows the Corps to consult with potentially affected parties on very limited portions of its jurisdiction.<sup>179</sup> Additionally, the segmentation of projects that is allowed under the Nationwide Permit Program grants the Corps the power to drastically limit the reach and effectiveness of section 106 of the Preservation Act.<sup>180</sup> Because the Corps allows pipelines and other utility projects to be considered as thousands of individual

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171. *Id.*

172. *Id.* at 1599-1600.

173. *Id.* at 1600.

174. *Id.*

175. Varsalana, *supra* note 139, at 6.

176. Hayes et al., *supra* note 131, at 10.

177. Varsalana, *supra* note 139, at 4.

178. Hayes et al., *supra* note 131, at 14.

179. *Id.*

180. *Id.*

undertakings, it is able to avoid considering the potential effects the project as a whole would have on various historic properties.

Regarding the Dakota Access Pipeline, the Corps asserts that it has fully complied with all federal laws and regulations, including the Preservation Act and the section 106 consultation provision.<sup>181</sup> The Corps and the district engineer in charge of the project both agreed that they fulfilled their obligation under section 106 of the Preservation Act to make a “reasonable effort” to consult with parties affected by the construction of the pipeline.<sup>182</sup> This “reasonable effort” included the Corps sending notification letters, and eventually inviting the Tribe to attend consultation sessions.<sup>183</sup> The Standing Rock Sioux Tribe, however, disagrees and claims the Corps has not followed the proper steps required by federal law.<sup>184</sup>

The Advisory Council has weighed in on the issue and stated that it does not believe that the Corps complied with federal law.<sup>185</sup> In its objection letter, the Advisory Council stated its belief that the Corps had not properly described the undertaking or the “area of potential effects” for the pipeline.<sup>186</sup> The Advisory Council also expressed disagreement with the Corps’ compliance with section 106 of the Preservation Act.<sup>187</sup>

The Advisory Council stated that an undertaking is defined by section 106 of the Preservation Act as being the larger project and the “area of potential effects” as being the area within the larger undertaking that may affect any historic properties that are present.<sup>188</sup> The Advisory Council considers the entire pipeline as the undertaking that engages section 106 consultation.<sup>189</sup> For the “area of potential effects,” the Advisory Council stated that it should include any areas where the entire pipeline could affect historic properties.<sup>190</sup> The opinion of the Advisory Council is starkly different than the opinion of the Army Corps of Engineers.

Unlike the Advisory Council, the Corps does not consider the entire Dakota Access Pipeline to be one single undertaking as defined by the

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181. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4, 19 (2016).

182. Varsalana, *supra* note 139, at 8.

183. *Id.*

184. *Standing Rock Sioux Tribe*, 205 F. Supp. 3d at 7.

185. *Advisory Council on Historic Preservation*, *supra* note 129.

186. *Id.*

187. *Id.*

188. *Id.* at 2.

189. *Id.*

190. *Id.*

Preservation Act.<sup>191</sup> The Corps believes that each time the Dakota Access Pipeline crosses a body of water, that crossing creates its own single and unique undertaking.<sup>192</sup> This belief has drawn contention from a number of groups, including the Advisory Council, who feel that by considering each time the Dakota Access Pipeline crosses a body of water as its own undertaking, the Corps is not properly taking into account the effect that the entire pipeline is having on historic properties.<sup>193</sup> The Advisory Council has stated that because the Corps has not properly considered the entire Dakota Access Pipeline to be one large undertaking, it has neglected its responsibilities under the Preservation Act.<sup>194</sup> To support the one-undertaking view, the Advisory Council points to the large number of water crossings involved in the construction of the pipeline and that the pipeline could not be constructed “but for” the issuance of the necessary permits for each water crossing.<sup>195</sup> The Advisory Council also points to the numerous federal agencies involved in the project, such as the Corps, the Fish and Wildlife Service, and the Farm Service Agency, to demonstrate the need for a more comprehensive approach to complying with section 106 of the Preservation Act.<sup>196</sup>

The Advisory Council also took issue with how the Corps complied with the consultation provision under section 106. The Advisory Council believes that because the Corps has viewed each separate water crossing as an individual undertaking, this segmentation has resulted in inadequate consultation with Indian tribes who may have some religious or cultural significance in properties that are related to the undertaking.<sup>197</sup> The Advisory Council stated that it does not believe that the Corps adequately consulted with Indian tribes to determine what historically and culturally significant properties could be affected when the pipeline crosses a certain body of water.<sup>198</sup> One specific area where the Dakota Access Pipeline crosses a body of water is the main contention for the Standing Rock Sioux Tribe.

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191. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 11 (2016).

192. *Advisory Council on Historic Preservation*, *supra* note 129.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 3.

The Dakota Access Pipeline crosses Lake Oahe and the Standing Rock Sioux Tribe asserts that this body of water is ceremonial and a site that the Tribe considers sacred.<sup>199</sup> The Standing Rock Sioux Tribe asserts that the Corps did not consult or reach out to its leaders to determine whether this particular site was significant to the Tribe.<sup>200</sup> Further, the Advisory Council stated that the Corps failed to properly consult and facilitate the use of tribal experts in determining and locating potentially historically or culturally significant properties.<sup>201</sup> The Advisory Council also pointed out that tribes had limited access to the areas where the Dakota Access Pipeline crosses a body of water and therefore could not properly consult with the Corps when determining if a historic or culturally significant property would in fact be affected by the pipeline.<sup>202</sup> The Advisory Council notified the Corps of its concerns and advised the Corps to take the Council's concerns into account when making its final decisions about the Dakota Access Pipeline.<sup>203</sup>

The battle between the Corps and the Standing Rock Sioux Tribe over the Dakota Access Pipeline is one that could have major effects on the way that the Preservation Act is viewed and interpreted. The pipeline is a major area of concern for the Preservation Act because the environmental effects of large-scale projects are not truly understood unless the entire project is analyzed, rather than considering the environmental effects of each piece of the project.<sup>204</sup> Because the Corps issues permits for numerous pipelines and other large-scale projects in the United States, it must be determined whether the Preservation Act allows the Corps to view the Dakota Access Pipeline as individual undertakings or rather, whether it must be viewed as one single and large undertaking.

#### *IV. Success Under the Preservation Act*

The entire purpose of the Preservation Act was to decrease the destruction of historic sites as well as provide those who are most connected with historic sites an opportunity to voice their concerns about a government project.<sup>205</sup> Specifically, the Act's goal was also to increase the

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199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *See* *Sierra Club, Inc. v. Bostick*, 539 F. App'x 887, 897-99 (10th Cir. 2013) (Martinez, J., dissenting).

205. MacGill, *supra* note 17, at 703.

involvement of Native Americans in the field of archeology and give tribes a greater role in the management of their heritage resources.<sup>206</sup>

*A. General Success*

Since the Preservation Act added consultation with Indian tribes, tribes are now afforded the opportunity to provide their services, including preservation and excavation methods, to federal agencies to ensure compliance with federal law.<sup>207</sup> This increased ability has allowed tribes to take a greater role in the regulation of cultural research.<sup>208</sup> The greater involvement of tribes has resulted in the establishment of many tribal historical and cultural preservation offices.<sup>209</sup> Tribes are now permitted to assume the functions that were once done by State Historic Preservation Officers.<sup>210</sup> These Tribal Historic Preservation Officers now have the responsibility of “inventorying resources, determining the eligibility of places for the National Register, education, and planning and compliance review pursuant to section 106 of the [Preservation Act].”<sup>211</sup> Each individual tribe is now able to form programs that best fit its needs and approach cultural and historical preservation in its own particular way.<sup>212</sup> While the Preservation Act has many shortcomings and cannot always protect historic sites from destruction or alteration, it has indeed saved many historically and culturally significant sites. For example, tribes were able to save the culturally significant prehistoric rock art panels located along the walls of Nine Mile Canyon located in Utah.<sup>213</sup>

The images that are etched along the walls of Nine Mile Canyon are the remnants of the Native people that lived in the region for thousands of years.<sup>214</sup> The images depict animals, humans, and other scenes from the daily lives of the individuals who painted them.<sup>215</sup> The prehistoric art is highly sacred to Indian tribes located in the area.<sup>216</sup> These images became

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206. Ferguson, *supra* note 53.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. ADVISORY COUNCIL ON HISTORIC PRESERVATION, NINE MILE CANYON (WEST TAVAPUTS PLATEAU): A MODEL FOR BALANCING PRESERVATION AND ENERGY DEVELOPMENT (n.d.), <http://www.achp.gov/docs/Section106SuccessStoryNineMilev4.pdf>.

214. *Id.*

215. *Id.*

216. *Id.*

endangered in the early 2000s when oil and natural gas exploration began in the area.<sup>217</sup> As the exploration increased, numerous vehicles used the unpaved roads located near the prehistoric art.<sup>218</sup> The exhaust from the vehicles combined with the dust from the unpaved roads to form an erosive particulate that posed a grave danger to the ancient art.<sup>219</sup> In 2005, the Bureau of Land Management released a proposal for the development of 800 new natural gas wells that would result in increased traffic in the area where the prehistoric art was located.<sup>220</sup> Since the Bureau of Land Management was the federal agency that was permitting the project, it was its obligation under the Preservation Act to conduct the section 106 consultation process.<sup>221</sup> In 2008, the Advisory Council became involved in the project and encouraged the Bureau of Land Management to expand the consultation process to a number of other actors.<sup>222</sup> The Bureau of Land Management, the Advisory Council, the Ute Indian Tribe, energy manufacturers, and other historical preservation groups met for over ten months to develop a plan that would minimize the amount of damage that was done to the prehistoric art.<sup>223</sup> In January of 2010, the Programmatic Agreement was signed and it created a plan to safeguard the fragile rock artwork while allowing for the development of natural gas wells.<sup>224</sup> Through section 106 consultation, the prehistoric artwork was preserved and the needs of the energy company were met.

Another area of success has been the increased involvement of tribes in the development of roads and minimizing the effects that infrastructure has on culturally significant properties. Since the 1992 amendments to the Preservation Act, many state department of transportation agencies have sought to reach out to local tribes and gain their input on upcoming projects that could impact places that are culturally significant.<sup>225</sup> In North Dakota, an area of the country that has experienced rapid infrastructure growth due to increased energy production, the North Dakota Department of Transportation has partnered with the Federal Highway Administration to

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217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. ADVISORY COUNCIL ON HISTORIC PRESERVATION, TCC: A BETTER MODEL FOR TRIBAL INVOLVEMENT IN TRANSPORTATION PROJECTS (n.d.), [http://www.achp.gov/docs/Section106SuccessStory\\_TCC.pdf](http://www.achp.gov/docs/Section106SuccessStory_TCC.pdf).

incorporate more tribes into the consultation process for roadway construction projects.<sup>226</sup> The North Dakota Department of Transportation consulted with tribal elders and archeologists for the U.S. Highway 2 project in order to locate and avoid culturally significant sites.<sup>227</sup> Beginning in 2008, the North Dakota Department of Transportation started to place tribal monitors into the field with archeologists.<sup>228</sup> Also in 2008, the North Dakota Department of Transportation and the Federal Highway Administration formed a Programmatic Agreement that was drafted by the Tribal Consultation Committee.<sup>229</sup> This agreement involves tribes early on in the planning and development of transportation projects in an attempt to avoid any problems that could arise before they actually occur.<sup>230</sup> This agreement was created through numerous meetings between tribal and agency leaders.<sup>231</sup> The Tribal Consultation Committee meets twice a year to discuss any issues that could affect the tribes and their heritage.<sup>232</sup> In 2014, the Programmatic Agreement was expanded from the original eight tribes that were involved in the process to nineteen tribes.<sup>233</sup> The agreement is extremely important because federal agencies and tribes often do not work with each other early enough in the planning process to properly deal with issues. Here, both the North Dakota Department of Transportation and the Federal Highway Administration sought to create a system that would allow for tribes to not only resolve current issues but future ones as well.<sup>234</sup> The system that was created has also provided a blueprint that other states and agencies can duplicate in the future.

#### *B. Mitigation of an Adverse Effect*

Section 106 consultation is invaluable to tribes. In some instances, this consultation provides the only legal method a tribe has to influence decisions affecting its sacred places.<sup>235</sup> While section 106 consultation is not perfect, it does often mitigate harmful effects to significant tribal properties. One successful example was an AT&T project located in the

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226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. Meeks et al., *supra* note 11, at 47.

San Francisco Peaks of Arizona.<sup>236</sup> The San Francisco Peaks mark the boundary of the traditional Navajo homeland and are extremely sacred to the Navajo people.<sup>237</sup> However, the San Francisco Peaks are located just off the Navajo Nation and are managed by the United States Forest Service.<sup>238</sup>

AT&T began the process of replacing some of its telephone wires and one of the lines it was replacing ran through the foothills of the San Francisco Peaks.<sup>239</sup> The replacement process included finding the wire, digging it up, and replacing it with new fiber optic cable.<sup>240</sup> The project needed approval from the Federal Communications Commission, the federal agency that initiated the section 106 consultation process.<sup>241</sup>

Early in the project, AT&T contacted the Navajo Nation Historic Preservation Department and provided it with a report detailing where the project would occur.<sup>242</sup> The Navajo informed AT&T that they needed to determine if any traditional cultural properties existed in AT&T's project area.<sup>243</sup> There was a substantial amount of discussion between AT&T and the Navajo Nation Historic Preservation Department regarding the identification of traditional cultural properties.<sup>244</sup> AT&T also employed numerous tribal staff to aid in the determination of traditional cultural properties.<sup>245</sup> Eventually, the tribal staff located a Navajo hataathli, commonly referred to as a medicine man, who had special knowledge of the cultural significance of the San Francisco Peaks.<sup>246</sup> He stated that AT&T's project would reduce the healing power that was present in the San Francisco Peaks and would qualify as an adverse effect under section 106.<sup>247</sup>

AT&T worked with the Navajo to try and mitigate this harm and returned to the hataathli to determine the best way to proceed with the project.<sup>248</sup> The hataathli determined that a traditional tribal ceremony would be the appropriate way to mitigate the spiritual harm caused by the AT&T

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236. *Id.* at 48.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 49.

project to the San Francisco Peaks.<sup>249</sup> AT&T agreed to fund the ceremony and company representatives even attended the ceremony.<sup>250</sup>

The success of the consultation between AT&T and the Navajo Nation over the project in the San Francisco Peaks illustrates that effective section 106 consultation is possible.<sup>251</sup> Successful consultation with Indian tribes “requires open dialogue and acceptance of the fact that only tribal traditional cultural experts have the necessary knowledge and experience to identify and determine which [traditional cultural properties] are significant.”<sup>252</sup> This successful consultation also shows that the presence of traditional cultural properties does not have to upend a project and that it is possible to use traditional methods to mitigate adverse effects to historically and culturally significant properties.<sup>253</sup>

#### *V. Recommendations*

Through the 1992 amendments, Congress recognized the importance of protecting sites that were “traditional and culturally significant” to Indian tribes. However, Congress has not given these sites an adequate level of protection due to some of the shortcomings of the Preservation Act. To ensure that sites that are sacred to Indian tribes remain protected for future generations, Congress should increase the amount of protection afforded to Indian tribes in the section 106 consultation process.

Before making modifications to the Preservation Act, Congress should understand that there are differences in how tribes and agencies view effective consultation. For tribes, consultation is effective when it involves listening to and exchanging views, as well as tribes having a meaningful level of input in the final agency decision.<sup>254</sup> In contrast, federal agencies view consultation as a time to meet with tribes and ensure that the agency listens to the tribe.<sup>255</sup> Consultation between Indian tribes and federal agencies is often ineffective in producing results that are satisfactory to tribes. Various tribal leaders have expressed their concerns about the effectiveness of consultation with the federal government, as have some

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249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 50.

253. *Id.* at 49.

254. LESLIE E. BARRAS, SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT: BACK TO BASICS 29-30 (2010).

255. *Id.*

federal officials.<sup>256</sup> To ensure effective consultation between tribes and federal agencies, Congress should set uniform consultation standards for all federal agencies. While the Preservation Act requires consultation with Indian tribes, it does not specify how this consultation is to take place. Studies conducted by the National Association of Tribal Historic Preservation Officers, the Advisory Council, and the National Park Service, found that tribal consultation was most effective when it was true government-to-government contact, agencies contacted tribes in the early stages of the project, and consultation consisted of both formal and informal meetings between agency officials and tribal leaders.<sup>257</sup> Most importantly, effective consultation occurs early on in a project, before significant amounts of money have been spent on plans for the federal project.<sup>258</sup> Congress should officially mandate that federal agencies are required to begin consultation in the initial phase of their projects rather than leaving the timeline for consultation up to the specific agency.

Congress should also reduce the level of discretion that federal agencies have under the Preservation Act. Agencies are entitled to a great deal of deference under the Preservation Act so long as they make a “good faith” effort to comply with the law.<sup>259</sup> The most common method for a tribe to stop agency action is to seek an injunction against the agency.<sup>260</sup> However, courts largely look at the procedure the agency followed during its consultation with the tribe and whether it made a “good faith” compliance with federal law. If the court finds that the agency did not use the proper consultation procedure, the court will grant the injunction and send the matter back to the agency to resolve.<sup>261</sup> There is nothing in place to stop the agency from making the same decision it made with little to no consultation once “proper” consultation with the tribe occurs.<sup>262</sup> Congress should place an affirmative burden on federal agencies to comply with the Preservation Act instead of permitting agencies to rely on the “good faith” compliance standard that is currently in place.

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256. Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 886 (2014).

257. BARRAS, *supra* note 254, at 39.

258. Eitner, *supra* note 256, at 886.

259. Nat'l Indian Youth Council v. Watt, 664 F.2d 220, 227 (10th Cir. 1981).

260. Eitner, *supra* note 256, at 892.

261. *Id.* at 894.

262. *Id.*

The Advisory Council should also be given a larger and more mandatory role by Congress in ensuring compliance with the Preservation Act. The Advisory Council is in the best position to protect historic sites, but it currently has limited authority under the Preservation Act. Nothing in the Act requires federal agencies to implement any of the suggestions that the Advisory Council provides them.<sup>263</sup> Congress should mandate that federal agencies work directly with the Advisory Council when undertaking projects that are likely to impact historic properties. The Advisory Council should have the authority to delay or cancel a project if the federal agency refuses to comply with the Preservation Act.

Congress should reform the ability of federal agencies to craft their own internal systems to ensure compliance with the Preservation Act. Congress should not permit federal agencies to have systems in place that directly conflict with the advice of the Advisory Council or with provisions of the Preservation Act, like the Appendix C of the Corps regulations does. Congressional reform would ensure that all federal agencies are uniformly complying with the Preservation Act and are unable to use their own regulations to circumvent the protections of the Preservation Act.

The Preservation Act is a crucial part of protecting historic sites and providing Indian tribes with a voice in federal agency action. However, congressional action is needed to fix the discretionary nature of the Act. By guaranteeing effective consultation, reducing the discretion afforded federal agencies, and increasing the role and authority of the Advisory Council, Congress can strengthen the Preservation Act and better guarantee the protection of “traditional and culturally significant” Indian sites.

#### *VI. Conclusion*

In the twenty-five years since the passage of the amendments to the Preservation Act requiring consultation between federal agencies and tribes, tribes have gained a greater role in preserving their culturally and historically significant sites. Even with the consultation provision of the Preservation Act, tribes still struggle to protect their sacred sites from destruction. The struggle that tribes face with historic preservation largely results from the limitations of the Preservation Act. Under the current version of the Act, federal agencies are granted a great deal of deference and are permitted to make the final decision regarding projects that affect tribal sacred sites. Federal agencies have been allowed to ensure their own compliance with the Preservation Act without any additional government

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263. Horgan, *supra* note 10, at 420.

oversight. This self-governance has resulted in federal agencies, like the Corps, being able to avoid compliance with the Act. While the Preservation Act mandates that federal agencies must consult with tribes when a project could involve sites that are culturally and historically significant to tribes, federal agencies are not mandated by the Act to prevent harm to these sites. In many cases, federal agencies are permitted to continue with their undertaking even when it is likely to have an adverse effect on land that is culturally significant to tribes. Through the shortcomings of the Preservation Act, tribes have seen some of their most sacred sites desecrated by government action.

Congress had the right intentions when it amended the Preservation Act twenty-five years ago and required that tribes be consulted when a federal agency performs an undertaking on land that is culturally or religiously significant to tribes. However, the consultation process needs to be reformed to ensure that tribal sacred sites are fully protected. As the section 106 process stands now, federal agencies have too much of an advantage over tribes in the consultation process. Congress should make additional amendments to the Preservation Act to make sure that tribes have an adequate voice during consultation. Federal agencies cannot be allowed to continue a project when it is known that the project will adversely impact a sacred tribal site. A reform of the Preservation Act consultation process will help tribes have a more influential role in the preservation of their culturally significant sites and ensure that these sites are not destroyed by acts of the federal government.