National Historic Preservation Act Initiatives Affecting the Natural Resources Industry

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1 The author would like to thank Tim McCrum for his assistance in presenting and developing this chapter, as well as Ed Green, Tim McCrum, and Steve Quarles of Crowell & Moring, from whose past work on these issues Mr. Kochan has benefited.
New historic preservation regulations issued by the Advisory Council on Historic Preservation ("ACHP" or "Advisory Council" or "Council") on December 12, 2000\(^2\) (after a tortuous 6-plus-year rulemaking process) greatly expand the bureaucratic reach of a regulatory program designed to be only advisory in nature. Historic preservation increasingly intrudes on activities that disturb vacant ground in natural, undeveloped environments. Expenditures in the name of historic preservation may add significantly to — even subsume all other — costs of permitting projects.

For this reason, it is important that the natural resources industry understand this rather arcane area of regulation. This chapter is designed to highlight some of the areas of historic preservation likely to affect the natural resources industry, provide an update on the latest status of this regulatory regime, and outline some of the legal and policy infirmities associated with that regime.

§ 12.01. The Governing Law.

[1] — National Historic Preservation Act.\(^3\)

The National Historic Preservation Act (NHPA or "Act") was enacted in 1966 and subsequently amended eleven times, most recently in 1992. The Act tasks Federal agencies and State governments to inventory Federal and nonfederal lands, respectively, for significant historic properties of national, regional and local interest.\(^4\)

It establishes the National Register of Historic Places and calls upon the Secretary of the Interior ("Secretary") to develop criteria for the designation, and to designate any such significant properties nominated by the Federal agencies, State governments, local governments, or landowners as listed, or as eligible for listing, on the National Register.\(^5\) An "historic property" is not limited to a "building" or "structure;" it can be an entirely undeveloped, natural "site;" it also can be as large as a

\(^{3}\) 16 U.S.C. § 470f, et seq.
\(^{4}\) NHPA §§ 110(a)(2)(B) and 101(b)(3)(B); 16 U.S.C. 470h-2(a)(2)(B) and 470a(b)(3)(B).
\(^{5}\) NHPA § 101(a)(1) and (2); 16 U.S.C. 470a(a)(1) and (2).
“district,” and as small as an “object” or “artifact.” Consequently, the statute’s reach can be quite broad; for example, because many mines are in areas that might be considered “historic districts,” mining businesses can and do see historic preservation obstacles for permits to conduct operations, and, for permits to shut down and reclaim mine sites.

To assist the Secretary in his historic preservation responsibilities and advise the Congress on historic preservation matters, the NHPA established the ACHP (with a Chairman; the Secretary and the heads of five other Federal agencies; a Governor and a mayor; seven experts in historic preservation, including the Chairman of the National Trust for Historic Preservation; a Native American; and three members of the public, all appointed by the President).7


By statute, the nature of the Advisory Council is purely advisory. Most of the historic preservation issues for the private sector center on the requirement in NHPA Section 106 that Federal agencies conduct historic property reviews — the so-called “Section 106 process” — prior to taking any Federal action or to funding or licensing any private activity.8

Section 106 states:

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 the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account 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. The head of any such Federal agency shall afford the Advisory Council on Historic

6 NHPA § 301(5); 16 U.S.C. §470w(5).
7 NHPA Title II; 16 U.S.C. 470i-470v.
Preservation . . . a reasonable opportunity to comment with regard to such undertaking.\textsuperscript{9}

[b] — The Section 211 Rulemaking Authority.

NHPCA Section 211 gave the Advisory Council the authority to write regulations governing the Section 106 process.\textsuperscript{10} Those recently re-issued regulations have established an exhaustive multi-step process for completing the historic properties review.\textsuperscript{11}

[c] — Overview of the Section 106 Consultation Process.

For any federally permitted activity, the Section 106 process begins with a determination whether the activity is an “undertaking.” If it is, the undertaking’s geographic area of potential effects (“APE”) must be determined. These two initial decisions are made by the federal permitting agency.\textsuperscript{12}

Under the new regulations, unless an agency can certify that the undertaking is not of the type that \textit{may} have an effect on historic resources, it must engage in the Section 106 consultation process. Importantly, the new regulations dictate that this determination cannot be site specific. In other words, an agency cannot avoid further review by certifying at the outset that the undertaking will not, in that particular situation, affect historic resources. Next, the agency begins the process of identifying historic properties in the APE that may be affected by the undertaking and gathering sufficient information to evaluate the eligibility of these properties for the National Register.\textsuperscript{13} It is during this process that some of the most burdensome portions of the new Section 106 regulations come into play.

One provision of the new regulations obligates federal agencies “to identify Indian tribes and Native Hawaiian organizations that shall be

\textsuperscript{9} 16 U.S.C. § 470f.
\textsuperscript{10} 16 U.S.C. § 470s.
\textsuperscript{11} 36 C.F.R. Part 800.
\textsuperscript{12} 36 C.F.R. § 800.4(a).
\textsuperscript{13} 36 C.F.R. § 800.4(b).
consulted in the section 106 process,” and consult with them “in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.”14 In doing so, federal agencies must consider “look[ing] beyond reservations and tribal lands in the project’s vicinity to seek information on tribes that had been historically located in the area, but are no longer there.”

Furthermore, the regulations oblige federal agencies to consult with State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs) to (1) “[d]etermine and document the area of potential effects;” (2) “[r]eview existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;” (3) “[s]eek information” from consulting parties – “and other individuals likely to have knowledge of, or concerns with, historic properties in the area” – and “identify issues relating to the undertaking’s potential effects on historic properties;”15 The regulations further mandate that federal agencies “take the steps necessary to identify historic properties within the area of potential effects,” such as conducting “background research, consultation, oral histories and reviews, sample field investigation, and field survey.”16

Once the survey is completed, the federal permitting agency must decide whether any properties identified during the survey qualify as “eligible” for listing in the National Register and whether they will be “adversely affected” by the project. The determination of eligibility for Section 106 purposes is entirely separate from such determinations for formal listing or proposal for eligibility in the National Register itself. As part of this process, the new regulations require federal agencies to identify properties that “have not been previously evaluated for National Register eligibility,” as well as “to reevaluate properties previously determined eligible or ineligible,” by applying National Register criteria and determining whether “the property shall be considered eligible for the

14 36 C.F.R. § 800.2(c)(2)(ii)(C).
15 36 C.F.R. § 800.4 (emphasis added).
16 Id.
National Register for section 106 purposes.” In undertaking this process, federal agencies must “acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.”

When an eligible property is found and a determination is made that the undertaking may affect it, the federal permitting agency, in consultation with the State Historic Preservation Officer (SHPO), must determine whether the proposed undertaking will cause an “adverse effect” to the historic property. The regulations’ conception of an “adverse effect” is extremely broad and leaves enormous discretion for the agency and consulting parties. “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.” Moreover, “[a]dverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.”

When the property is found to be adversely affected, the agency is required to notify the Advisory Council and consult with the SHPO to seek ways to avoid or reduce the effects on historic properties. If the federal permitting agency and the SHPO concur on “how the effects will be taken into account,” they are required to sign a Memorandum of Agreement (MOA) memorializing the agreement. The Advisory Council must be given an opportunity to participate in the consultation and the MOA.

Finally, if no agreement is reached on how the adversely affected properties will be treated, the federal permitting agency must prepare the

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17 36 C.F.R. § 800.4(c)(1).
18 Id.
19 36 C.F.R. § 800.5 (emphasis added).
20 Id.
21 36 C.F.R. § 800.6.
22 Id.
documentation and request the Advisory Council’s comments. After the Advisory Council has commented, the “head of the agency shall take into account the Council’s comments in reaching a final decision on the undertaking.”\textsuperscript{23} Importantly, NHPA Section 110(g) allows a Federal agency to charge the “reasonable costs” of its “preservation activities” to a permittee “as a condition to the issuance of such . . . permit.”\textsuperscript{24} Finally, NHPA Section 110(k) directs each Federal agency to ensure that [it] will not grant a loan, . . . permit, . . . or other assistance to an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely [sic] affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Advisory Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.\textsuperscript{25}

\section*{§ 12.02. The Latest ACHP Rulemaking Process.}

As previously mentioned, new Section 106 regulations were promulgated in December, 2000, by the ACHP. The promulgation of those regulations was the culmination of a seven-year rulemaking process, with much struggle along the way.

The process started in 1994 with a notice of proposed rulemaking from the ACHP.\textsuperscript{26} Significant opposition from the regulated community, Congress, and others followed. The process started over again with slightly less prescriptive regulations in 1996.\textsuperscript{27} Regulations were ultimately promulgated in May 1999.\textsuperscript{28}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{23} 36 C.F.R. § 800.7(c)(4).
\item \textsuperscript{24} 16 U.S.C. § 470h-2(g).
\item \textsuperscript{25} 16 U.S.C. § 470h-2(k).
\item \textsuperscript{26} 59 Fed. Reg. 50396 (Oct. 3, 1994).
\item \textsuperscript{27} 61 Fed. Reg. 48580 (Sept. 13, 1996).
\item \textsuperscript{28} 64 Fed. Reg. 27044 (May 18, 1999).
\end{enumerate}
\end{footnotesize}
The National Mining Association (NMA) sued, charging, *inter alia*, that the prescriptive regulations were beyond the agency’s authority and that they violated the Appointments Clause of the U.S. Constitution.\(^{29}\)

So, the ACHP proposed to repromulgate the rules with members not appointed by the President recusing themselves.\(^{30}\) The ACHP then proposed to suspend the regulations while considering its repromulgation proposal and concurrently proposed to adopt the existing regulations as guidelines. On June 23, 2000, the ACHP voted to repromulgate its existing regulations and found suspension and adoption as guidelines unnecessary in light of that vote (with members who recused themselves sitting on risers looking down on the voting members). The final rules were then repromulgated on December 12, 2000.\(^{31}\)

NMA filed an amended complaint in February of 2001, and briefing on motions for summary judgment followed. On September 18, 2001, the U.S. District Court for the District of Columbia ruled on the parties’ summary judgment motions, generally upholding the new regulations against the regulated community’s challenges.\(^{32}\)

§ 12.03. **Court Rules that ACHP Regulations May Only Impose Procedural — Not Substantive — Regulations on Agency Activity, But Avoids the Fact that the ACHP Has Only Advisory Authority.**

There was one important holding in the *NMA* decision, which lead to the invalidation of two of the ACHP’s new regulations. The court held:

This [requirement that agencies “take into account the effect” of undertakings on historic properties], therefore, is both the duty and the right that Congress has explicitly delegated to each federal agency. Any regulation by the Council that directly interferes with that right, or prevents the agency from acting in furtherance of

\(^{29}\) National Mining Ass’n v. Babbitt, D.D.C. No. 1:00CV00288 (Feb. 15, 2000).


that duty, would be substantive and consequently invalid, because it violates the plain language of the statute. Other regulations are procedural and do not exceed the scope of authority granted to the Council under the NHPA.33

Despite this hopeful holding, the court proceeded to define “procedure” very broadly. It found that regulations that “require” public participation, “instruct[]” agencies to seek and consider public views, “compel” the evaluation of alternatives to mitigate effects, and “mandate” agencies to set up onsite inspections at the request of the ACHP were all procedural. The court explained:

While these provisions contribute to the procedural complexity of the section 106 process by requiring consultation with interested parties or inspection of the site in question – and may ultimately delay approval of an undertaking, they do not directly interfere with the agency’s ultimate decision on the undertaking, nor do they impose limitations that prevent the agency from acting at all.34

The court also found that regulations which “compel” and “require” agency documentation “do not prevent or directly impact the substance of agencies’ decisions; they simply impose procedural hurdles, and they are therefore permissible under the Act.” 35

The court did, however, find that two provisions in the new regulations “cross[ed] the line from procedure into substance.” 36 Section 800.4(d)(2) of the new regulations required “an agency to continue the Section 106 process at the Council’s request if the Council objects to that agency’s determination that there are no historic properties present, or that the existing historic properties will not be affected by the undertaking;” and Section 800.5(c)(3) granted “the Council the authority to review an agency finding of no adverse effects when either an SHPO/THPO or other

33 NMA, 2001 WL 1241957 at *15.
34 Id.
35 Id.
36 Id.
consulting party disagrees with that finding." 37 With respect to each of these provisions, the court concluded that, as a practical matter, these provisions interfered with the statutory right and duty of agencies to “take into account the effects” of undertakings on historic resources:

Both of these provisions plainly give the ACHP the authority to review and effectively reverse – at least for the purpose of continuing the section 106 process – the agency’s determination with respect to the effects of an undertaking on historic properties. Making that determination, however, is the one substantive role that is expressly delegated to the agency in Section 106 of the Act. Sections 800.4(d)(2) and 800.5(c)(3) thereby enable the Council to interfere directly with the agency’s responsibility in this respect, and as such, they are impermissible substantive regulations. 38

As a result, Section 800.4(d)(2) was declared invalid, while Section 800.5(c)(3) was declared invalid “insofar as it requires that ‘[t]he agency official shall proceed in accordance with the Council’s determination’ regarding the adverse effects of an undertaking on historic property.” 39

As a result of the court’s ruling invalidating these sections, the Advisory Council on October 15, 2001, issued interim guidance indicating that these provisions would continue to exist, but as voluntary and non-binding (but strongly encouraged) parts of the consultation process:

[T]he Council plans to provide opinions to Federal agencies regarding their “no historic properties affected” findings, pursuant to Section 800.9(a) of its regulations, whenever appropriate. However, such opinions will be advisory and will not require the Federal agencies to continue to the next step in the Section 106 process. 40

In the event that a SHPO/THPO does not agree with a finding of “no historic properties affected,” the agency official should notify the Council and seek an advisory opinion. The Council believes this interim step, while

37 Id. at *16.
38 Id.
39 Id. at *24.
40 ACHP, Interim Guidance for Section 106 Cases Involving “No Historic Properties Affected” and “No Adverse Effect” Findings (Oct. 15, 2001).
not mandatory, would help resolve disputes and avoid the potential for litigation or other delays.

The Council will continue reviewing “no adverse effect” disputes referred to it under Section 800.5(c)(2) within the allotted 15-day period. Nevertheless, the Council’s opinion on such matters will be advisory and will not require agencies to proceed to the next step in the process.41

The ACHP interim guidance illustrates the reluctance of the Council to allow limitation on its ability to influence federal undertakings.

The court’s “procedure v. substance” distinction in the NMA decision is far from convincing. Many of the requirements and mandates in the regulations it upheld can be just as obstructive to an agency’s ability to “take into account” adverse effects and make a decision when it has sufficiently done so.

Moreover, the court misses the point of the role the NHPA gives to the ACHP when it focuses on “procedural rules” rather than “advisory” ones. NHPA’s procedural obligations “are aimed solely at discouraging Federal agencies from ignoring preservation values in projects they initiate, approve funds for or otherwise control.” 42 But the NHPA assigns to the ACHP advisory functions only. Although the NHPA has been amended 12 times since 1966, nothing has changed the limited advisory function of the Council. Among its important provisions, NHPA Section 20143 establishes the Council as “an independent agency of the United States Government,” and NHPA Section 202(a) invests the Council with the following responsibilities:

(1) advise the President and Congress on matters relating to historic preservation, recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation; and advise on the dissemination of information pertaining to such activities;

41 Id.
43 16 U.S.C. § 470I.
(2) encourage, in cooperation with the National Trust for Historic Preservation and appropriate private agencies, public interest and participation in historic preservation;

(3) recommend the conduct of studies in such areas as the adequacy of legislative and administrative statutes and regulations pertaining to historic preservation activities of State and local governments and the effects of tax policies at all levels of government on historic preservation;

(4) advise as to guidelines for the assistance of State and local government in drafting legislation relating to historic preservation;

(5) encourage, in cooperation with appropriate public and private agencies and institutions, training and education in the field of historic preservation;

(6) review the policies and programs of Federal agencies and recommend to such agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out under this Act; and

(7) inform and educate Federal agencies, State and local governments, Indian tribes, and other nations and international organizations and private groups and individuals as to the Council’s authorized activities.44

Thus, the ACHP’s responsibilities are to “advise;” “encourage;” “recommend;” “review;” “inform;” and “educate.” Nowhere in NHPA Section 202(a) do the words “mandate;” “require;” “direct” or any other such obligatory words appear. Regardless of whether ACHP-compelled action on the part of agencies is procedural compulsion or substantive compulsion, either is still compulsion rather than advice. It could not be more plain that the Council’s role is just what its name implies — advisory.

The views of Congress forcefully expressed after the ACHP’s October 1994 proposed regulations confirm the limited, advisory authority held

by the ACHP. Congress’ views were articulated clearly in the reports of the House of Representatives and the Senate on H.R. 1977, the fiscal year 1996 Department of the Interior and Related Agencies Appropriations legislation. The House Appropriations Committee Report stated that the Council’s mandate was to further the national policy of preserving historic and cultural resources for the benefit of present and future generations. The Council advises the President and Congress on preservation matters and provides consultation on historic properties threatened by Federal action.

* * *

The Council has no authority to unilaterally alter Federal actions that will affect historic properties nor can it impose solutions on non-Federal parties. Its function is purely advisory.45

Similarly, the Senate Appropriations Committee, in its report accompanying H.R. 1977, stated that the Council:

provides review, coordination, mediation, education, and advice on historic preservation matters. It does not have responsibility for designating historic properties, providing financial assistance, overriding other Federal agencies’ decisions, or controlling actions taken by property actions [sic]. The Advisory Council works closely with Federal agencies and State historic preservation officers. The Committee is concerned that some of the Advisory Council’s work is duplicative of preservation activities conducted by other entities.46

Strict requirements by the ACHP, whether procedural or substantive, do not fit within such an advisory framework.

In 1996, Congress again responded by enacting Section 509 of the Omnibus Parks Act entitled “Advisory Council on Historic Preservation Reauthorization.” The Managers on the part of the House and Senate at the conference explained Section 509(b) as follows:

The Managers are aware that under the current Section 106 process for implementation of [NHPA], the Advisory Council plays an important role in assessing and mitigating the impacts of Federal actions on significant historic properties. The Managers are also aware that in the recent past, the Advisory Council has attempted to promulgate regulations which could have led to significant increases in the cost of compliance with [NHPA], and which would have provided little additional benefit in terms of resource protection. While the Advisory Council has subsequently withdrawn those regulations in the face of overwhelming public opposition, the Managers remain concerned about the nature of the final regulations to be adopted.

The Managers agreed to a four-year extension of the reauthorization of the Advisory Council, but within that time frame have directed that the Council provide recommendations for modifying the overly complex historic preservation compliance process. In particular, the Managers are seeking alternative ways to carry out the Historic Preservation Act which will be less burdensome on both the public and private sectors.47

By holding valid many of the burdensome “procedural” regulations now imposed by the ACHP, the court in the NMA case has only strengthened the ability for the Advisory Council to exercise its zeal to complicate the regulatory process. Had the court in NMA focused its review on the ACHP’s advisory authority rather than its ability to promulgate procedural rules, many of the provisions it upheld as procedural likely would have failed scrutiny, and the historic preservation process could have been redirected toward the original purposes of the NHPA.

§ 12.04. The Ongoing Debate on the Scope of “Undertakings.”

For any federally permitted activity, the Section 106 process begins with a determination whether the activity is an “undertaking.” There is a continuing debate over whether and the extent to which Section 106 covers state permits issued under a delegated federal program, including under programs such as those authorized in the Surface Mining Control and Reclamation Act (SMCRA), the Resource Conservation Recovery Act (RCRA), and the Clean Water Act, and whether and to what extent it applies in agency acceptance of voluntary actions such as habitat conservation plans (HCPs) taken under the Endangered Species Act (ESA).

The confusion lies in the fact that the 1992 amendments to the NHPA append the concepts of “licensing” and “approval” to the definition of “undertaking,” including projects, activities, and programs “subject to State and local regulation administered pursuant to a delegation or approval by a Federal agency.”48 Section 106 of the NHPA, by its plain meaning, however, applies only to what some have argued is a “subset” of all undertakings – only those undertakings that are federally funded or federally licensed. The new regulations engrafted Section 106 responsibilities on all “undertakings” as defined in the 1992 amendment of the definition, not just those undertakings that are federally funded or federally licensed.

In the NMA decision, the court closed the debate a little, but left open a very serious legal question regarding delegated state programs. The court rejected NMA’s facial challenge to the ACHP’s broad regulatory definition of undertakings that trigger Section 106 responsibilities, finding the regulations consistent with the NHPA because they tracked the definition of undertaking adopted in the 1992 amendments (even though Section 106 itself was not amended).

The court punted on declaring whether the regulations apply “to regulate individual state-issued permits authorized by state statutes” under delegated federal programs such as those authorized by SMCRA, the Clean Water Act, and RCRA:

[P]laintiffs have challenged the Final Rule on its face, rather than as it is applied to specific situations. And on its face, the Final Rule does not speak to whether programs authorized by these statutes are “undertakings.” Therefore, the Court cannot address plaintiffs’ request for a declaratory judgment in the context of this lawsuit.\footnote{NMA, 2001 WL at 1241957 at *18 n.30.}

The court’s explanation for not deciding the issue on its face is unavailing. The definition of undertaking in the regulations, which it earlier held valid, clearly does include those projects, activities, or programs “subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.”\footnote{36 C.F.R. § 800.16(y).} Perhaps the court was concluding that the regulations do not speak to \textit{individual state permits} themselves rather than the federal decision to delegate a program to an authorized State.

The ACHP only added to the confusion when it claimed in the preamble to the proposed rule, that “The proposed rule does not mandate State, local, or tribal governments to participate in the Section 106 process. Instead, State, local, and tribal governments may decline to participate.”\footnote{65 Fed. Reg. at 42835.} The ACHP also claims that the Unfunded Mandates Reform Act and Regulatory Flexibility Act did not apply to its rules because it does not regulate states.

Thus, the question of whether consultation must occur when a state issues a permit under a delegated federal program remains open after the NMA decision, and subject to an as-applied challenge should a party wish to litigate the issue. Only then or after ACHP or individual agency clarification will state regulators and their constituents know the scope of their Section 106 responsibilities.
§ 12.05. The Problem with Prescriptive Historic Preservation Procedures.

When a process is filled with difficult and potentially lengthy procedures, as the Section 106 process has become with the validation of complicated and prescriptive regulations, those subject to the process seek ways to avoid it and those in control of the process seek ways to extract payments from the regulated entity in return for avoidance mechanisms. Thus, the truly astute administrator crafts rules that are so tough that the compliance costs are higher than the costs associated with acquiescing in regulatory demands made during the rule’s application in the field. In order to make such a scheme work to advance the interest of the regulator, he must have at his disposal both a stick to back the regulated in a corner and the authority to offer a carrot to exact promises from the regulated (often beyond his legal obligations) in return for a smoother pass through the procedures. For the ACHP, the stick lies in its prescriptive rules, and the carrot in its power to enter into Memoranda of Agreement and Programmatic Agreements.


The public choice or economic theory of legislation explains governmental behavior as the result of interest-group processes. In part, the theory holds that legislation, including the receipt of governmental “permission” to act, is a commodity supplied and demanded much the same as any other economic good. As such, permission or legislative protection passes to those that gain the greatest value from it — i.e., those who are willing to pay the most for it — independent of any concerns for overall social welfare. Politicians and regulators can receive benefits


through concessions to increased regulatory control, political support, political favors, honoraria for speaking engagements, promises of future employment (in lobbying or elsewhere), or anything else of value to the government official.\footnote{Macey, supra note 53.} Both the preservationist lobby and industry play the special interest game.

The primary phenomenon in the process described by this theory is that of “rent-seeking,” the process of expending resources in an effort to obtain favors from government.\footnote{See Posner, supra note 53.} Special interests — including both those in favor of and opposed to the natural resources industry — seek to use the government to obtain higher prices for goods or services than would otherwise be obtainable under competitive market conditions.\footnote{See generally, Fred S. McChesney, “Rent Extraction and Rent Creation in the Economic Theory of Regulation,” 16 J. Legal Stud. 101 (1987).} By successfully lobbying to impose regulations (and, therefore, costs) on a competitor, the interest group can make it too expensive for their competitor to act. The higher prices are called “economic rents.” Similarly, a market participant may seek to obtain goods (e.g., historic preservation or regulatory leniency) directly from the government at a lower cost than they might otherwise need to pay on the open market.

Thus, the preservationist lobby no doubt has an interest in a tough system of regulation — obtaining historic preservation without paying for it on the market and imposing costs on its competitors, those who would develop resources at the expense of preservationist-valued historic resources. The natural resources industry has an interest in lobbying for a more lenient system of regulation.

However, once a system of regulation is in place, there are also means by which special interests can lobby for beneficial government treatment — and there are means by which regulators can use the system in place to
extract favors from the regulated community to approve their projects (or from the opposition – here the preservationist community – to deny them). Interest groups not only seek out affirmative acts by government officials, but may often bargain to block legislation or to receive regulatory forbearance. Realizing this, regulators have an incentive to engage in rent-extraction — where negative regulatory action is threatened to occur unless the regulator receives a payment, or positive regulatory action is conditioned upon a payment. (“I will approve your project now rather than later if only you agree to do X”).

Thus, one of the types of payments that may be extracted from the regulated community includes an agreement by a permittee to an increased sphere of regulatory control beyond that which is strictly required by law, which benefits the government agent, when the payment is efficient to avoid an alternative level of control. Agencies are likely to exhibit the self-perpetuating tendencies exhibited in bureaucracies — i.e., an incentive for the agency to justify its existence and growth. If an agency can use the permitting process to expand the outcomes it generates, the agency creates more work and influence for itself. It makes sense for an agency, even if it plans to grant the permit or eventually approve a plan of action to protect historic resources, to use its weapons to at least require some changes in a proposal and gain the most that it can from the transaction in terms of its own influence. These favors are traded for governmental action beneficial to the interest group – such as a payment for the guarantee by the government of an expedient approval of a permit in exchange for the government forgoing the requirement of an otherwise lengthy approval process that would impose great costs to the permittee (both in compliance costs and lost revenue from an inoperative project).

57 See id.
So, when armed with the stick of strict regulations, but also holding authority to offer a carrot of forbearance (and to condition the same), a regulator has a good deal of control to extract a payment from the regulated entity. Under the NHPA and the ACHP Section 106 regulations, the tools by which these payments are extracted are known as Memoranda of Agreement and Programmatic Agreements.


Memoranda of Agreement (MOAs) and Programmatic Agreements (PAs) are the means — established solely by Advisory Council regulations — by which Federal agencies, SHPOs, and the Advisory Council impose many legally suspect duties and costs on Federal permittees in the Section 106 process. The Advisory Council’s regulations provide that consultation requires that agencies upon discovery of an adverse effect on historic properties in the Section 106 process, must notify the Advisory Council and consult with the SHPO “to seek ways to avoid, minimize or mitigate any adverse effects.” 59 If the federal agency and SHPO/THPO “agree upon how the effects will be taken into account,” they are required to, “shall,” execute a Memorandum of Agreement. 60 The Advisory Council may also get involved, and its involvement is mandated if the agency and SHPO/THPO do not agree on the resolution of adverse effects. 61 Additional “consulting parties” are invited to become involved in the formulation of Memorandum of Agreements and become signatories to an MOA, but they do not have power to nullify the effectiveness of a Memorandum of Agreement. 62 A signed Memorandum of Agreement, with Advisory Council acceptance, is very valuable to a permittee because it “evidences the agency official’s compliance with Section 106,” i.e., concludes the Section 106 process. 63

59 36 C.F.R. § 800.6(b).
60 36 C.F.R. § 800.6(b)(1)(iv).
61 36 C.F.R. §§ 800.6(b)(1) – (2).
62 36 C.F.R. § 800.6(c)(1) – (4).
63 36 C.F.R. § 800.6(c).
If agreement cannot be reached and no Memorandum of Agreement is signed — that is, if no agreement is reached on how to treat adverse effects — the Advisory Council’s regulations guarantee the possibility of an extended procedural evaluation and commenting process for the federal agency and, by extension, the federal permittee.\textsuperscript{64} Then the Federal agency must request Advisory Council comment, provide the Advisory Council with detailed information, arrange a site visit for the Advisory Council, and hold a public meeting.\textsuperscript{65} Finally, the procedurally-challenged agency is directed to “take into account the Council’s comments in reaching a final decision on the undertaking,” document its decision, and notify consulting parties and the public.\textsuperscript{66}

Programmatic Agreements are offered to federal agencies to “govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.”\textsuperscript{67}

Programmatic Agreements may be used, according to the ACHP:

(i) When effects on historic properties are similar and repetitive or are multi-State or regional in scope;

(ii) When effects on historic properties cannot be fully determined prior to approval of an undertaking;

(iii) When nonfederal parties are delegated major decisionmaking responsibilities;

(iv) Where routine management activities are undertaken at Federal installations, facilities, or other land-management units; or

(v) Where other circumstances warrant a departure from the normal section 106 process.\textsuperscript{68}

The Advisory Council and the Federal agency are to develop the Programmatic Agreement together, with extensive requirements for public

\textsuperscript{64} 36 C.F.R. § 800.7.  
\textsuperscript{65} 36 C.F.R. § 800.7.  
\textsuperscript{66} 36 C.F.R. § 800.7(c).  
\textsuperscript{67} 36 C.F.R. § 800.14(b).  
\textsuperscript{68} 36 C.F.R. § 800.14(b)(1)(i) – (v).
participation and participation by additional consulting parties, as well as commenting opportunities. As with the Memorandum of Agreement, a Programmatic Agreement (PA) satisfies the Federal agency’s Section 106 process responsibilities, and failure to comply with a PA reinstates the tedious Advisory Council commenting procedures applicable when no Programmatic Agreement exists.

A Memorandum of Agreement or Programmatic Agreement, thus, is a valuable way to ensure completion of what can otherwise seem like an endless Section 106 consultation process. In fact, agencies typically will agree to burden themselves with significantly enhanced Section 106 process duties and costs to obtain the safe harbor of a Memorandum of Agreement or Programmatic Agreement.

The next step is shifting these expanded duties and costs from the federal agency to the permittee, typically through a condition in the Memorandum of Agreement or Programmatic Agreement. The federal agency, aided by threats from the SHPO/THPO and the Advisory Council, induces the permittee to agree to take on costs and duties to avoid suffering intolerable delays in the final approval of his project. Suddenly, out of expedience, the permittee is essentially forced into accepting the terms of a Memorandum of Agreement or Programmatic Agreement and taking actions that, under the NHPA, are really those assigned as an agency responsibility.

When a permittee objects to a term of the Memorandum of Agreement or Programmatic Agreement as not authorized by law or regulation, the agencies, SHPO/THPO’s, and the Council may claim that the agreement document creates a binding contractual obligation and demand permittee compliance with its terms. Regardless of whether the permittee signs

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69 36 C.F.R. § 800.14(b).
70 36 C.F.R. §§ 800.1 (b)(2)(iii).
71 The Advisory Council regulations make no reference to the Memorandum of Agreement or Programmatic Agreement as a binding contractual agreement, but at least one court has interpreted these documents as such. Don’t Tear It Down, Inc. v. Pennsylvania Avenue Devel. Corp., 642 F.2d 527 (D.C. Cir. 1980). But see Waterford Citizens’ Ass’n v. Reilly, 970 F.2d 1287, 1300 (4th Cir. 1992)(“In our view, Federal
the MOA/PA or whether it is entirely enforceable as a lawful contract, the
difficulty in challenging its legality of the agreement, and the delays that
will undoubtedly result if the permittee doesn’t “go along” are powerful
tools for the permittee’s submission.

This incentive to cooperate within an extractive system is only
exacerbated by the fact that, so long as a permit approval is caught up in
a procedure like Section 106 consultation and no final agency action has
been taken either approving or denying the project, the possibility of
judicial review is nearly nonexistent.72 Furthermore, if the permittee
refuses to accept Memorandum of Agreement or Programmatic Agreement
conditions and the agency takes the actions required on its own, the agency
can impose on the permittee the cost of fulfilling those requirements even
if the permittee refrains from signing the document, given NHPA Section
110(g)’s authorization to federal agencies to “charge” federal permittees
“reasonable costs” for carrying out the agency’s “preservation
responsibilities . . . as a condition to the issuance of” the permits.73 The
possibility of facing such costs even if one refuses to sign a Memorandum
of Agreement or Programmatic Agreement is another inducement to reach
an agreement, strike the best possible deal, sign a Memorandum of
Agreement or Programmatic Agreement, and accept the costs.

licensing or funding is required for there to be a statutory undertaking. The EPA’s
obligation under the Memorandum of Agreement is simply not sufficient.”).72

The first legal hurdle that a plaintiff must overcome to challenge an agency action is
the duty to establish to a court’s satisfaction that it has jurisdiction to hear a lawsuit. That
means that the plaintiff must persuade the court that, among other things, the claims in
the lawsuit are ripe for the court’s consideration. See Ohio Forestry Ass’n, Inc. v. Sierra
Club, 523 U.S. 726, 732-33 (1998). The ripeness requirement has both constitutional
and prudential components sharing one common feature — the requirement that the
decision on a project is caught up in Section 106 review, it is unlikely a permittee will be
able to establish that there is a final agency action that can justify judicial review, even
when the process that may be filled with questionable agency tactics is the very same
process precluding the finality necessary to obtain judicial review of that process.
73 16 U.S.C. 470h-2(g).
But bargained-for finality can come at a significant price, where a permittee agrees to undertake a variety of mitigation actions or accepts surveying responsibilities, many of which are only marginally, if at all, related to the actual adverse impact of the project on historic resources. It may be unfortunate that the regulators have this power to extract such payments, but the harsh realities of limited judicial review and ACHP power (together with its cadre of SHPOs, THPOs, and preservationist groups) mean that, with prescriptive regulations held valid and without legislative or regulatory reform, regulated entities may be forced to work within this extractive system. To avoid these consequences, a system should be designed which eliminates the extractive power of the ACHP and its team.

§ 12.06. The Glamis Imperial Mine: One Example of Section 106’s Potential Impact on Natural Resource Projects.

One example of the extreme reach of the historic preservation laws came in January 2001 with the denial of the plan of operations for the Glamis Imperial Project – a gold mining operation planned within the California Desert Conservation Area. In 1987, a Department of Interior report found “no evidence” of religious use of the site for the Glamis Imperial Project in the California Desert. In 1991, Glamis initiated mineral exploration and development leading to a full draft Environmental Impact Statement by 1997 for its proposed gold mine, investing more than $14 million. Then came the Section 106 process.

In 1998, the Bureau of Land Management (BLM) requested the Advisory Council on Historic Preservation to review the potential effects of the Imperial Project on historic or cultural properties pursuant to Section 106. Although BLM had found in 1987 in a formal land management document implementing the CDCA Plan that there was “no evidence” that the “Indian Pass” area near the Glamis Imperial project lands “is used today by contemporary Native Americans” (BLM, “Indian Pass ACEC Management Plan” Section III (1987)), by letter dated October 19, 1999, the Advisory Council advised the Secretary of the Department that, inter alia:

If implemented, the [Imperial] Project would be so damaging to historic resources that the Quechan Tribe’s ability to practice their
sacred traditions as a living part of their community life and development would be lost. Overall, the Council is convinced that the cumulative impacts of the proposed mine . . . even with the mitigation measures proposed by the company, would result in a serious and irreparable degradation of the sacred and historic values of the [land] that sustain the tribe. Therefore the Council concludes that the Glamis Imperial Project would effectively destroy the historic resources in the project area, and recommends that Interior take whatever legal means available to deny approval for the project. 74

The testimony and statements offered to the Advisory Council and BLM in 1999 confirm that the alleged concerns of the Quechan Tribe expressed in the context of the Imperial Project extend to a broad region in Southern California which ranges from Arizona west to Los Angeles and south into Mexico. For example, Mr. Lorey Cachora, the tribal historian, testified to the Advisory Council on March 11, 1999, that: “It is a region we are discussing. It just so happens that this area, Indian Pass, is right in the path of one of the regions . . ., but this trail follows west to the present town of Los Angeles, then down to San Juan Capistrano, then it goes into Catalina Island, and then comes back and trails into Mexico.” Similarly, in a January 29, 1999, letter to the BLM El Centro, California, office, the Tribe’s counsel alleged that “Quechan sacred lands include the Indian Pass area and clearly encompass the proposed Imperial Project site, but also extend towards the north up to Blythe, towards the south connecting with Pilot Knob, towards the west and the Cargo Mucachos Mountains and east to the Colorado River and along portions of what is now western Arizona.” 75

In 1998, the ACHP held a field hearing and a representative of the Quechan Tribe described a broad regional “Trail of Dreams” – running from Arizona to San Diego and down to Mexico – that it felt would be disrupted by the Imperial Project. As a result, in 1999, the ACHP expressed
its view to Interior Secretary Babbitt pursuant to Section 106 that the site for the Imperial Project was a traditional cultural property of premier importance to Native American culture and religious practices, and thus urged denial of the proposed mine.

The Section 106 process led to not only the denial of Glamis’ plan of operations in January, 2001 based on new interpretation of authority under the Federal Land Policy and Management Act to deny mine plans to protect such cultural and historic resources, but also resulted in a BLM decision to withdraw approximately 9,360 acres of public lands from multiple use.

The Glamis denial is being challenged in federal court in Washington, D.C., and should provide an opportunity to test the validity of some of the broad claims of authority in the name of historic preservation. Some relief also came on October 23, 2001, in an opinion by the new Interior Solicitor, William Meyers, in which the new Secretary of Interior, Gale Norton, concurred, explaining that the legal basis (asserted under FLPMA by Clinton Administration officials) for denying the plan of operations as a result of its alleged impairment of historic and cultural resources was invalid. Nonetheless, no matter the authority or lack thereof to deny a permit at the end of the process, the Glamis example illustrates just how taxing that Section 106 process can be.

§ 12.07. Conclusion.

Importantly, regulated entities should recognize that the NHPA and its Section 106 process are not alone in the milieu of historic preservation laws. The Historic Sites Act for example, creates an entirely separate regime for designating historic landmarks. Such designations may seem benign by themselves, but once something is deemed a landmark, it can make actions there all the more difficult when it comes to other environmental and historic preservation reviews in the future.

The new Section 106 regulations rest unparalleled subjectivity with State, tribal, and federal officials and read out the “advisory” in Advisory

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77 16 U.S.C. § 461 et seq.
Council. In practice, there is no specified end to consultation, and companies facing a long delay in getting a project approved often find it necessary to cave in to demands in order to cut their losses. There is also a lack of agency sensitivity to the costs imposed by the Section 106 process. Nonetheless, with little power in the process, project proponents in most cases will be forced to work with the Section 106 process to seek project approvals on a timely basis.

There are possibilities for relief. Despite the NMA decision, other facial and as-applied litigation challenges to the new regulations may ultimately succeed. Moreover, although there are no serious legislative reform proposals currently being pursued, legislative relief may be an avenue some can consider pursuing. Administrative relief may lie in the appointment of four members to the Council by the new Bush Administration, including the new Chairman and Vice-Chairman (plus the cabinet level seats on the Council now being filled with the new Administration’s appointees), but it is likely too soon to tell whether the change in Administrations will mark a change in the regulatory approach of the ACHP.

Historic preservation is often a noble pursuit, but the new Section 106 regulations represent rulemaking gone wrong, rather than a sensible way for federal agencies and good citizens to fill their legal and civic duties to protect truly significant historic resources. As such, the historic preservation regulations in place represent yet another layer of obstacles that the natural resources industry must remain cognizant of as its members plan their projects.