

What is Tribal Historic Preservation?



A GUIDE TO TRIBAL HISTORIC PRESERVATION IN INDIAN COUNTRY

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About the Great Lakes Indian Law Center

The Great Lakes Indian Law Center at the University of Wisconsin Law School was established in 1992 to improve the practical legal skills of all students interested in Federal Indian Law while providing a legal resources for Native American Tribes. The Center is chartered to: 1) Provide academic and educational atmosphere and opportunity for law students to study Federal, State and tribal laws affecting Indian Tribes and their members; 2) Provide legal assistance on uniquely tribal legal matters; and 3) Encourage and assist Indian Students in obtaining legal education. The Center's strategic proximity to Indian nations, the quality of our students, and an institutional commitment to "law in action" create a synergistic effect that is truly unique. The University of Wisconsin Law School has graduated more practicing Indian lawyers than any other school in the country, and many if not most of those alumni have benefited from the initiatives and programs sponsored by the Center. To find out more about the Great Lakes Indian Law Center visit us on the web at <http://law.wisc.edu/gilc/>

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***This booklet is for general information purposes only. Nothing in this booklet should be construed as an attorney- client relationship. This booklet was produced by UW Law school students as a learning aid, and is not meant to be a comprehensive guide to Tribal Historic Preservation.**

If you have a specific situation need legal advice, please contact an attorney or Tribal Historic Preservation Officer.

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What is Tribal Historic Preservation?

Tribal historic preservation, which is made possible by the National Historic Preservation Act¹, allows federally recognized tribes to assume some or all of the State's historic preservation duties. Tribal historic preservation enables a tribe to protect and identify historic places in ways that conform to tribal values. These duties can include enforcing tribal and federal preservation laws, identifying and nominating historically significant places to the National Register of Historic Places, preserving traditional cultural properties, etc. Moreover, tribal historic preservation provides tribes with an avenue for consulting federal and state agencies regarding impacts to historical sites.

What Does a Tribal Historic Preservation Officer do?

Tribal historic preservation officers (THPO) are responsible for implementing some or all of the state historic preservation officer's (SHPO) responsibilities with respect to tribal lands. Sec. 101(b)(3) of the Act describes the SHPO responsibilities.² Under the Act, the SHPO is responsible for working with agencies and communities to conduct a statewide survey of historic properties and keeping inventories of the properties.³ A SHPO must review National Register applications and identify and nominate eligible properties to the National Register.⁴ The SHPO must develop and implement a statewide historic preservation plan, administer the State program of Federal assistance for historic preservation within the state.⁵ Additionally, the SHPO is responsible for advising and assisting Federal and State agencies and local governments in carrying out their historic preservation responsibilities.⁶ They are responsible for ensuring that historic properties are taken into consideration to all levels of planning and development.⁷

The SHPO must also provide technical assistance and provide the public with information, education, and training regarding historic properties.⁸ A SHPO is responsible assisting local governments in becoming certified so they can effectively implement historic preservation laws.⁹ SHPOs must consult with federal agencies regarding projects that may effect historic properties and develop plans to protect and/or minimize harm to that property.¹⁰ Finally, they are also responsible for advising and assisting in the evaluation of restoration projects that may qualify for federal assistance.¹¹

¹ National Historic Preservation Act Of 1966, 16 U.S.C. § 470 (2000).

² 16 U.S.C § 470a(b)(3).

³ 16 U.S.C § 470a(b)(3)(A).

⁴ 16 U.S.C. § 470a(b)(3)(B).

⁵ 16 U.S.C. § 470a(b)(3)(C)-(D).

⁶ 16 U.S.C. § 470a(b)(3)(E).

⁷ 16 U.S.C. § 470a(b)(3)(F).

⁸ 16 U.S.C § 470a(b)(3)(G).

⁹ 16 U.S.C. § 470a(b)(3)(H).

¹⁰ 16 U.S.C. § 470a(b)(3)(I).

¹¹ 16 U.S.C. § 470a(b)(3)(J).

In addition to assuming the SHPO responsibilities under section 101(b)(3), THPOs can also assume what is referred to as “section 106” duties. Section 106 of the National Historic Preservation Act, provides tribes with review authority over federal undertakings both on and off the reservation.¹² Section 106 review authority, is a major reason tribes create THPO departments. Therefore, THPOs can assume some or all of the SHPO responsibilities with respect to tribal lands and they can also assume section 106 review authority with respect to federal undertakings occurring on and off the reservation.

RECAP: Some Duties the Tribal Historic Officer Could Assume:

1. Working with agencies and communities to conduct a statewide survey of historic properties and keeping inventories of the properties;
2. Reviewing National Register applications and identify and nominate eligible properties to the National Register;
3. Developing and implementing a statewide historic preservation plan, administer the State program of Federal assistance for historic preservation within the state;
4. Advising and assisting Federal and State agencies and local governments in carrying out their historic preservation responsibilities;
5. Ensuring that historic properties are taken into consideration to all levels of planning and development;
6. Providing technical assistance and provide the public with information, education, and training regarding historic properties;
7. Assisting local governments in becoming certified so they can effectively implement historic preservation laws;
8. Consulting with federal agencies regarding projects that may effect historic properties and develop plans to protect and/or minimize harm to that property; and
9. Advising and assisting in the evaluation of restoration projects that may qualify for federal assistance
10. Section 106 review authority—applying both on and off reservation

How Does a Tribe Assume These Responsibilities?

As discussed above, under Section 101(d)(2) of the NHPA, the tribe can assume some or all of the SHPO responsibilities, if they chose. It is important that the tribe develop mechanisms for implementing the responsibilities they chose to assume. In order to assume any NHPA responsibilities, the tribe needs to identify to the National Park Service, which responsibilities they want to assume by writing a Tribal Historic Preservation Plan. The Plan must be submitted and approved by the National Park Service before a tribe can officially assume the State’s jurisdiction. Further, the proposed plan needs to demonstrate how the tribe plans to carry out the historic preservation responsibilities.

What Must a Tribal Historic Preservation Plan Include?

¹² 16 U.S.C. § 470f.

In general, “Tribal historic preservation plans have emphasized the importance of the oral tradition, as well as consulting Tribal elders and spiritual leaders with special knowledge of the Tribe's traditions. They also have given emphasis to the importance of protecting ‘traditional cultural properties,’ places that are eligible for inclusion on the National Register of Historic Places because of their association with cultural practices and beliefs that are: (1) rooted in the history of the community; and (2) are important to maintaining the continuity of that community's traditional beliefs and practices.”¹³ Additionally, some tribes have also assumed responsibility for reviewing Federal undertakings that may affect historical properties and conducting archaeological survey work.

According to the National Historic Preservation Act, a historic preservation plan must 1) demonstrate that the historic preservation program is capable of carrying out the state functions it wants to assume¹⁴; 2) define the remaining responsibilities of the National Park Service and the state historic preservation officer¹⁵; and 3) provide that the SHPO and the THPO will exercise concurrent jurisdiction on non-tribal and/or private land at the request of the owner.¹⁶

It is important to note that not every tribe operates its historic preservation department the same. Each tribal plan is different; therefore the National Park Service does not have a standard application process. One example of how to propose a historic preservation plan is to begin by introducing the tribe. This can be done by giving a brief history of the tribe, the current reservation boundaries, ancestral territory, etc. Next, the tribe can identify what their historic preservation goals are. Followed by what SHPO responsibilities they want to assume and what responsibilities the SHPO/NPS will retain. Next, the proposal must detail how each of these responsibilities will be carried out and by whom. This can be done by giving job descriptions for each person or company the tribe plans hire or contract with.

Further, the plan must describe how the program plans to administratively operate each responsibility they have assumed. Additionally, if the tribal program requires an advisory board, the tribe should explain the role of their advisory board with the historic preservation program. It is recommended the proposal include job descriptions and resumes of the individuals who will be working for the program. This demonstrates that the tribe will be ready to implement the program upon approval of the plan. The tribe should also get letters of support from other tribes in the area. Often tribes will have to work together with federal agencies when projects affect off-reservation areas. Any additional information such as reservation maps, ancestral territory maps that indicate the tribe’s off-reservation areas of concern are also a good idea to include in the plan. Once the plan is approved by the National Park Service, it is the THPO’s job to make sure all of the assumed responsibilities are carried out.

In summary, the plan needs to demonstrate that the historic preservation program is capable of carrying out the state functions it wants to assume.¹⁷ The plan must also define the remaining responsibilities of the National Park Service and the state historic preservation officer.¹⁸ Finally, the plan must provide that the SHPO and the THPO will exercise concurrent jurisdiction on non-tribal and/or private land at the request of the owner.¹⁹ If landowner makes no such request, the THPO exercises jurisdiction over the land. For specific examples of tribal

¹³ www.nathpo.org

¹⁴ 16 U.S.C. § 470a(d)(2)(D)(i).

¹⁵ 16 U.S.C. § 470a(d)(2)(D)(ii).

¹⁶ 16 U.S.C. § 470a(d)(2)(D)(iii).

¹⁷ 16 U.S.C. § 470a(d)(2)(D)(i).

¹⁸ 16 U.S.C. § 470a(d)(2)(D)(ii).

¹⁹ 16 U.S.C. § 470a(d)(2)(D)(iii).

historic preservation plans, the tribe should contact James Bird at the National Park Service. To find out more about the National Park Service and tribal historic preservation programs, visit them on the web at www.nps.gov/history/hps/tribal/.

RECAP: Tribal Historic Preservation Plan Must:

1. Demonstrate that the historic preservation program is capable of carrying out the state functions it wants to assume;
2. Define the remaining responsibilities of the National Park Service and the State Historic Preservation Officer; and
3. Provide that the SHPO and the THPO will exercise concurrent jurisdiction on non-tribal and/or private land at the request of the owner.

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How is a Tribal Historic Preservation Office Created?

There are several steps that must be completed in order to create a tribal historic preservation office. The first step is to obtain what is referred to as, 101(d)(2) status. Specifically, this refers to section 101(d)(2) of the National Historic Preservation Act.²⁰ This section of the Act lays out the steps a tribe must accomplish in order to assume some or all of the state historic preservation responsibilities within reservation boundaries. Additionally, 101(d)(2) status enables a tribe to engage in consultation with federal agencies involved with projects that are within the tribe's aboriginal territory.²¹ This responsibility is referred to as Section 106 duties. (Section 106 will be discussed in greater detail below).

In order to obtain 101(d)(2) status, the tribal government must first be willing to support such a program. If the tribe agrees to develop a historic preservation program, they need to designate a "tribal preservation official" (i.e. the tribal historic preservation officer).²² The tribe should contact the National Park Service to inform them of the decision.²³ Additionally, it is a good idea to discuss with NPS the recommended steps that need to be taken in order to submit a well drafted proposal. Under Section 101(d)(1)(C) the NPS is obligated to talk to tribes interested in assuming historic preservation responsibilities.²⁴

²⁰ 16 U.S.C. § 470a(d)(2).

²¹ 16 U.S.C. § 470a(d)(2)(D).

²² 16 U.S.C. § 470a(d)(2)(B).

²³ 16 U.S.C. § 470a(d)(2)(A).

²⁴ 16 U.S.C. § 470a(d)(1)(C).

The next step is for the tribal preservation official to develop a Tribal historic preservation plan;²⁵ the NPS can provide specific examples of plans developed by other tribes. By law, the plan needs to describe how the tribal official will carry out the state responsibilities.²⁶ Again, the plan needs to demonstrate that the historic preservation program is capable of carrying out the state functions it wants to assume.²⁷ The plan must also define the remaining responsibilities of the National Park Service and the state historic preservation officer.²⁸ Finally, the plan must provide that the SHPO and the THPO will exercise concurrent jurisdiction on non-tribal and/or private land at the request of the owner.²⁹ The THPO will always be able to participate in functions affecting non-tribal and/or private land even if the owner requests that the SHPO be involved.

Once the plan is drafted and approved by the tribe, the tribal preservation official must submit it to the National Park Service for approval. The National Historic Preservation Act requires that prior to approval the NPS consult with the tribe, the State Historic Preservation Officer.³⁰ If the tribe is assuming Section 106 responsibilities, the National Park Service must also consult the Advisory Council of Historic Preservation and other tribes, if their tribal or aboriginal lands may be affected by the tribal preservation program.³¹ Once the plan is approved by the NPS, initial funds are dispersed by the NPS and the tribe can begin carrying out their tribal historic preservation responsibilities.

RECAP: Steps involved in creating a Tribal Historic Preservation Office

1. Obtain 101(d)(2) status under the National Historic Preservation Act
2. Develop a Tribal historic preservation plan
3. Tribal approval of Tribal Historic Preservation plan;
4. Submission to National Park Service;
5. Consultation with National Park Service and State Historic Preservation Office
6. Possible consultation with Advisory Council of Historic Preservation and other Tribes;
7. Receive initial approval and funds from National Park Service

Why Does my Tribe Need a Tribal Historic Preservation Office?

Historic preservation offices are important because they allow the Tribe to protect, preserve, and identify on-reservation properties, in ways that the Tribe wishes. Additionally, a tribe that assumes Section 106 responsibilities has a say in what happens with off-reservations properties as well. Tribal historic preservation offices also enable the tribe to impact federal and state policies by providing Tribes the opportunity to become more involved in the rulemaking process. Again, this involvement with agencies can produce changes in policies that are more

²⁵ 16 U.S.C. § 470a(d)(2)(C). See above section for more detailed information on how to write the plan.

²⁶ 16 U.S.C. § 470a(d)(2)(C).

²⁷ 16 U.S.C. § 470a(d)(2)(D)(i).

²⁸ 16 U.S.C. § 470a(d)(2)(D)(ii).

²⁹ 16 U.S.C. § 470a(d)(2)(D)(iii).

³⁰ 16 U.S.C. § 470a(d)(2)(D).

³¹ 16 U.S.C. § 470a(d)(2)(D).

sensitive to the Tribe's methods of protecting, preserving, and identifying historic properties. When Tribes are more involved with the rulemaking process, regulations can be more compromising and representative of tribal interests.

Who Funds a Tribal Historic Preservation Office?

As a non-profit organization, funding is often one of the main concerns for a tribe operating a tribal historic preservation office. Although the National Park Service provides funding every fiscal year to tribes that comply with the terms of the grant and complete the renewal application, the available funding is low. As more and more tribes assume tribal historic preservation responsibilities, there is less money for each tribe. Therefore, in order to ensure the tribe can properly fund the historic preservation goals, tribes must consider funding alternatives while they developing the tribal historic preservation plan. Alternative funding sources do exist. Most tribal historic preservation offices operate their programs with alternative funds, to supplement the monies received from the National Park Service. There are several different funding options available, depending on the goals of the tribal program.

Many programs are partly funded by the tribe for which they operate. The availability of funding will ultimately depend on the tribe. Typically, however, the tribe is willing to cover the part of the salaries and fringe benefits of the historic preservation staff. There are other alternative sources of funding available if additional staff is needed to carry out the historic preservation plan and the tribe cannot fiscally support all of the staff.

For instance, tribes/THPO's can obtain "638 contracts." One example specific to historic preservation, is where a tribe enters into a 638 contract with the Bureau of Indian Affairs (BIA) to conduct archaeological investigations for forestry activities. The BIA currently provides limited funding for forestry activities, and no funding for realty unless it is a non-tribal member. These contacts are made possible by Public Law 93-638, a statute that authorizes the federal agency to enter into a contract with the tribe, to allow the tribe to carry out the agency's programs.³² As such, the tribes can contract with the BIA in order to provide additional funding.

Also, the federal government funds numerous historic preservation projects. Specific examples include the Save America's Treasures and Preserve America grants. The grants are designed to help fund various historic building restoration projects. For more information about these grants and their funding criteria, visit there websites at www.saveameericastreasures.org and www.preserveamerica.gov. The grants often require non-federal, matching funds. Although, it should be noted that some of these grants are changing their criteria to allow tribes to use federal dollars as for matching funds. Additionally, there are many private organizations/foundations that offer funding for historic preservation projects. More information on funding from private grants can be found online.

Funding Through National Park Service

The National Park Service provides a lot of different funding opportunities. There is the initial funding grant from the National Park Service that helps fund operating costs. Also, there are two different NAGPRA grants available, through the NPS, for tribes interested in repatriation. One type of NAGPRA grant is available to assist tribes and museums in repatriating human remains and other cultural items. The other type of NAGPRA grant applies exclusively to

³² Pub. L. No. 38-638.

the Smithsonian and is also available to assist tribes in repatriating human remains and cultural items. Due to various legislations the Smithsonian is not subject to the same rules that other museums are subject to.

Additionally, there is the Historic Preservation Fund, which also operates through the National Park Service. The Historic Preservation Fund (HPF) contains a line item for tribes. The line item has been divided into two categories. One for THPO's (for those tribes whom have initiated agreements with the National Park Service under §101(d)(2)) and the other category is specifically for tribal historic preservation projects. The National Park Service determines the amounts and method of distribution. There is currently not a line item exclusively for THPO's despite the fact that SHPO have a line item with the fund. On a rare occasion THPO's will receive competitive grants but, NPS will only consider a tribal grant for a THPO if the project is really a good one. For more information on how to apply for these funds, please contact James Bird at the National Park Service.

Something to keep in mind is that when a tribe assumes the responsibilities of the SHPO, it does not mean the tribe is obligated to identify or consult on behalf of an agency. On more than one occasion, agencies have expected tribes to pay for archeological surveys because they receive money from the NPS. Federal agencies are still required to comply with NHPA and are also the fiscally responsible agent for conducting archaeological investigations, oral interviews, and background research.³³ According to federal regulations, agencies are responsible for making “reasonable and good faith efforts” to identify historic properties.³⁴ The tribe is simply the review agency.

RECAP - THPO Funding Sources:

1. National Park Service
2. Tribal government
3. B.I.A. 638 contracts
4. Save America's Treasures and Preserve America (website)
5. Private organizations/foundations

What Laws Apply to Tribal Historic Preservation Offices?

The typical laws used in tribal preservation are of course National Historic Preservation Act (NHPA), both sections 106 and 101(d)(2), and NAGPRA. However, there are several laws that may apply in different circumstances. The laws include: Antiquities Act of 1906, ARPA, AIRFA, National Museum of American Indian Act, NEPA, the Department of Transportation Act Section 303, Coastal Zone Management Act, National Marine Sanctuaries Act, and Public Law 93-638.

- ***National Historic Preservation Act (NHPA)***: Enables tribes to assume state historic preservation responsibilities within the exterior boundaries of the reservations.³⁵ The act

³³ Protection of Historic Properties, 36 CFR § 800.4 (2004).

³⁴ 36 CFR § 800.4(b)(1).

³⁵ 16 U.S.C. § 470a(d)(2).

also provides tribes with the opportunity to review federal projects both on and off the reservation.³⁶

- **36 CFR §800:** Is a federal regulation explaining an agency’s role and responsibility under Section 106 of NHPA.³⁷ Under the regulation, agencies are required to consult interested parties, including tribes.³⁸ Section 106 begins when there is an “established undertaking.”³⁹ An undertaking means a project, activity, or program funded in whole or in part by a federal agency.⁴⁰ Additionally, agencies are required to identify historic properties and the impact a project may have if historic properties are present.⁴¹ In order to fulfill the identification responsibilities, agencies must consult with the SHPO/THPO to determine the area of potential effect, review existing information, seek additional information, and gather information from any tribe attaching affiliation to the project area.⁴² Based on the information gathered, the agency must make a “reasonable and good faith” effort to identify historic properties and their historic significance.⁴³

After making a reasonable and good faith effort to identify historic properties and their historic significance, the agency must determine whether the project will have an adverse effect on the property.⁴⁴ There is often disagreement about the definition of an adverse effect. Therefore, disputes about the adverse effect a project will have on a historic property can arise. The regulations establish a procedure for resolving these disputes.⁴⁵ The agency must continue consultation with the consulting party, notify the Advisory Council of Historic Preservation about the adverse effect, and involve consulting parties in trying to resolve the issue, produce documentation to all consulting parties, and make information available to the public.⁴⁶ Any information released can be limited based on other laws and tribes can also limit the information they give to the agency.⁴⁷ For more details on how to resolve disputes regarding adverse effects, please review the regulatory guidelines. The regulation is an important part of the Section 106 process. It is extremely important that any tribe assuming historic preservation responsibilities be familiar with the regulation.

- ***Native American Graves Protection and Repatriation Act (NAGPRA):*** NAGPRA establishes rights of Indian tribes and native Hawaiian organizations and their lineal descendants to obtain repatriation of certain human remains, funerary objects, sacred objects, and objects of cultural patrimony from federal agencies and museums that are

³⁶ 16 U.S.C. § 470a; 16 U.S.C. § 470f.

³⁷ 36 CFR § 800

³⁸ 36 CFR § 800.2

³⁹ 36 CFR § 800.3(a)

⁴⁰ 36 CFR § 800.16(y)

⁴¹ 36 CFR §§ 800.4, 800.5

⁴² 36 CFR § 800.4(a)(1)-(4)

⁴³ 36 CFR § 800.4(b)-(c)

⁴⁴ 36 CFR § 800.5

⁴⁵ 36 CFR § 800.6

⁴⁶ 36 CFR § 800.6(a)(1)-(4).

⁴⁷ 36 CFR § 800.6(a)(5)

owned or funded by the federal government. NAGPRA also protects items that are located on or within federal land or tribal land from unauthorized excavation or removal. In addition to repatriation and graves protection, NAGPRA also establishes a criminal prohibition on trafficking in Native American human remains and cultural items.⁴⁸ For a more in depth explanation of NAGPRA, see Great Lakes Indian Law Center's, "What are Indigenous Cultural Resource Laws and Regulations?"

- ***Antiquities Act of 1906:*** Places special requirements on who can excavate archeological remains, how they excavate them, and what happens after they are excavated. The act applies to land owned or controlled by the federal government.⁴⁹ This act is significant in that it was the first general statute to address issues regarding archeology and historic preservation thereby laying the foundation for heritage resource laws.⁵⁰
- ***Archeological Resources Protection Act of 1979 (ARPA)***⁵¹: This law imposes additional requirements on an agency doing a project on federal or Indian lands. ARPA prohibits the excavation or removal of archaeological resources from federal lands and Indian lands unless done in accordance with an issued permit. A permit for excavation on Indian lands requires the consent of the tribe with jurisdiction and the Indian landowner. A tribe itself is exempt from the requirement to obtain a permit. A tribal member is exempt from the permit requirement if the tribe has enacted a tribal ordinance that regulates the excavation or removal of archaeological resources on Indian lands. Additionally, ARPA also prohibits the interstate commerce in archaeological resources taken in violation of ARPA itself or any other state, federal, or local law. Obtaining an ARPA permit does not amount to compliance with Section 106 of NHPA. ARPA further authorizes criminal and civil penalties for violations. For a more in depth explanation of ARPA, see Great Lakes Indian Law Center's, "What are Indigenous Cultural Resource Laws and Regulations?"
- ***American Indian Religious Freedom Act of 1978 (AIRFA):*** The general purpose of this law is to affirm the right of American Indians to have access to their sacred places located within federal land.⁵² Additionally, the law provides that agencies must "avoid adversely affecting the physical integrity of such sacred sites."⁵³
- ***National Museum of the American Indian Act of 1989:*** With respect to historic preservation, the National Museum of the American Indian Act is very similar to NAGPRA in that it provides for repatriation. This act applies specifically to the Smithsonian. The act establishes that the Secretary of the Smithsonian must work with tribes to inventory the remains and funerary objects by June 1, 1998.⁵⁴ If the tribal origin of the remains or objects is identified, the act requires that the tribe be notified of the

⁴⁸ Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 – 3008 (2007).

⁴⁹ Antiquities Act of 1906, 16 U.S.C. § 431 (2007).

⁵⁰ *Heritage Resources Law: Protecting the Archeological and Cultural Environment* by Sherry Hutt, Caroline M. Blanco, and Ole Varmer. Pg 6.

⁵¹ Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470aa (2007).

⁵² American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1)(a) (2007).

⁵³ 42 U.S.C. § 1996(1)(a)(2).

⁵⁴ National Museum of the American Indian Act of 1989, 20 U.S.C. § 80q-9(a)

identification.⁵⁵ Upon request of the tribe, any human remains and/or associated funerary objects must be returned to the decedents of the individual or to the tribe.⁵⁶

The act further provides a way for tribes to repatriate unassociated funerary objects, sacred objects, and cultural patrimony. Under section, 80q-9a of the act, where cultural affiliation has been established or where a tribe can show cultural affiliation by the “preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral tradition, historical or other relevant information or expert opinion,” the Secretary must repatriate the items.⁵⁷ The Secretary can repatriate so long as the requesting party: (1) is a direct lineal descendant of the person who owned the object; or (2) can show that the object was owned or controlled by the tribe; or (3) can show that the object was owned or controlled by a member of the that tribe and those lineal descendants have failed to make a claim.⁵⁸ Additionally, if a tribe or lineal descendant can prove that the Smithsonian did not have right to possess the object, the Smithsonian must repatriate it.⁵⁹

- ***National Environmental Protection Act of 1969 (NEPA)***: The act provides that all federal agencies must compile an environmental impact statement for proposed projects.⁶⁰ The statement must describe, the environmental impact, the adverse effects, any alternatives plans, the relationship between short and long term environmental uses of the area, and the effects on resources, the proposed project will have on the area.⁶¹ Many agencies, prefer to comply with cultural resource requirements by using NEPA rather than NHPA. The environmental impact statements do include information regarding effects on historic properties. For more information on NEPA and how it works with NHPA, please see “What are Indigenous Cultural Resource Laws and Regulations?,” by the Great Lakes Indian Law Center.
- ***Department of Transportation Act Section 303***: This section of the act requires that the Secretary of Transportation make special effort to preserve historic sites.⁶² The Secretary may approve projects that may require the use of land with a historic site,⁶³ only if there is no other alternative;⁶⁴ and the project plans minimize all possible harm.⁶⁵ This determination is referred to as a “finding of *de minimis* impact.”⁶⁶ In order to make this finding, the Secretary must comply with the consultation process required under section 106 of NHPA.⁶⁷ To make a finding of *de minimis* impact through consultation, the Secretary must conclude that the project will not have an adverse effect on the historic

⁵⁵ 20 U.S.C. § 80q-9(b).

⁵⁶ 20 U.S.C. § 80q-9(c)-(d).

⁵⁷ 20 U.S.C. § 80q-9a(b).

⁵⁸ 20 U.S.C. § 80q-9a(b)(1-3).

⁵⁹ 20 U.S.C. § 80q-9a(c).

⁶⁰ National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2007).

⁶¹ 42 U.S.C. § 4332(2)(C)(i)-(v).

⁶² Department of Transportation Act, 49 U.S.C. § 303(a) (2007).

⁶³ 49 U.S.C. § 303(c).

⁶⁴ 49 U.S.C. § 303(c)(1).

⁶⁵ 49 U.S.C. § 303(c)(2).

⁶⁶ 49 U.S.C. § 303(d).

⁶⁷ 49 U.S.C. § 303(d)(2)(A).

site⁶⁸; or that there will be no historic properties actually affected by the project.⁶⁹ For the finding to be approved, the Secretary must receive written concurrences from the state historic preservation officer and/or tribal historic preservation officer.⁷⁰ That letter must indicate that the concurrence is a result of consultation.⁷¹

- ***Coastal Zone Management Act:*** Although this act may not directly apply to tribes, the relevant purpose of the act is to protect and assist in restoration of historic and cultural features along the coastal shores.⁷² Additionally, the purpose of the act is to encourage federal agencies to consult, notify and work with the public and state and local governments when federal projects will be affecting coastal zones.⁷³
- ***National Marine Sanctuaries Act:*** This act provides tribes with an additional mechanism for protection cultural resources, if an area is designated a Marine Protected Area (MPA). The purpose of the act is to protect natural and cultural resources within the marine environment.⁷⁴ The act directs specific federal agencies to develop a national system of MPA's through the MPA Center.⁷⁵ Areas designated as MPAs will be afforded extra protections, such as assistance for identifying threats and developing mechanisms to protect the resource from those threats.⁷⁶ The act further establishes that each federal agency must avoid harm to the resources protected by an MPA.⁷⁷
- ***Public Law 93-638:*** Is an executive order (i.e. President made law) that authorizes the Secretary of the Interior to enter into contracts or provide grants to Indian tribes to enable the tribe to plan, conduct and administer federal programs.⁷⁸ The purposes of the law is to promote Indian-self determination and to improve health, education, and welfare of Indian people.⁷⁹ In order to enter into a contract or receive a grant, the tribe must request the funds and be able to demonstrate that they can sufficiently carry out the purpose for which they are seeking funding and be able the keep adequate records of spending.

A useful resource to help understand some of these laws and the way they actually work is: *Heritage Resources Law: Protecting the Archeological and Cultural Environment* by Sherry Hutt, Caroline M. Blanco, and Ole Varmer.

What Laws can a Tribal Historic Preservation Office Enforce?

⁶⁸ 49 U.S.C. § 303(d)(2)(A)(i).

⁶⁹ 49 U.S.C. § 303(d)(2)(A)(ii).

⁷⁰ 49 U.S.C. § 303(d)(2)(B).

⁷¹ 49 U.S.C. § 303(d)(2)(C).

⁷² Coastal Zone Management Act, 16 U.S.C. § 1452(1), (2)(F) (2007).

⁷³ 16 U.S.C. § 1452(2)(H)-(I), (3).

⁷⁴ National Marines Sanctuaries Act, 16 U.S.C. § 1431(1) (2007).

⁷⁵ 16 U.S.C. § 1431(4)(e).

⁷⁶ 16 U.S.C. § 1431(4)(a)(6).

⁷⁷ 16 U.S.C. § 1431(5).

⁷⁸ Pub. L. No. 93-638, 1975 § 102,103,104.

⁷⁹ Pub. L. No. 93-638, 1975, § 3.

The THPO provides review authority pursuant to NHPA under section 106, and any Tribal Laws adopted giving the THPO enforcement authority. THPO also may apply oversight to ensure that both ARPA and NAGPRA are enforced within the exterior boundaries of the reservation. ARPA permits require the approval of the tribal government which allows the tribes direct authority over any archaeological activities that take place on tribal lands. The laws listed in the above section are additional tools that can be applied to protect areas of interests on and off tribal lands.

How Does Tribal Historic Preservation Affect Tribal Economic Development?

Although not much is known about how tribal historic preservation affects tribal economic development, some programs can have some impact on tribal economic development. Some programs develop heritage tourism programs in tribal communities. Heritage tourism involves traveling or visiting places that represent people both past and present. These places can include cultural, historical and natural resources.⁸⁰ The goal of heritage tourism is to provide visitors with a culturally rich experience that they can only receive from that location.

While THPO programs can positively impact tribal economic development, it is important to note that they can also have a negative impact as well. Since it is the goal of many tribes to protect and preserve cultural and historical places, sometimes this goal can prevent an economic project from moving forward. For example, this can happen when there is a culturally significant feature in the middle of a planned forestry timber sale. If the feature is significant and the tribe's desire is to protect the feature, a large section can be taken out of the timber sale; resulting in less acreage for the sale and ultimately less revenue.

Ultimately, however, the actual economic impact depends on goals of tribe. As stated earlier, little is known about the actual impact of historic preservation on tribal economic development. The suggestions in this section are simply some ideas about the impact on development and are not to be regarded as statistics.

What Traditional or Cultural Lessons Does a Tribal Historic Preservation Apply?

Tribal historic preservation offices can be used to facilitate traditional and cultural education for tribal members and non-tribal members alike. Depending on what responsibilities the THPO assumes, the tribe may be required to educate the community. Looking beyond a required responsibility, the THPO can use the program to teach tribal members and non-tribal members different aspects of the tribal traditions and culture.

Some THPO programs do community outreach during certain times of the year to teach generations how a certain traditional foods were gathered, harvested, or produced. Programs are used to teach tribal members non-invasive archeological methods, respect for human remains, etc. THPO programs often emphasize the importance of oral history. Conducting oral histories provides an opportunity for elders to be involved in the program. Working with elders provides opportunities for the interviewers to interact with various elders throughout communities and as a result, interviews learn the culturally appropriate ways to ask for information. On another note, many tribes work with federal and state agencies, an indirect result is that this interaction promotes awareness and enlightenment regarding the Tribes culture and beliefs to non-tribal people.

⁸⁰ http://www.nationaltrust.org/heritage_tourism/index.html

Getting Started with Creating a Tribal Historic Preservation Office

List of Tasks that will help your Tribe to build a Tribal Historic Preservation Office that works:

1. Figure out what functions your tribe wants to assume
2. Develop ways to implement those programs
3. Contact James Bird at the National Park Service
4. Contact Tribes who have developed Historic Preservation Offices for advice. A list of THPO's can be found on the National Association of Tribal Historic Preservation Officer's (NATHPO) website at www.nathpo.org.
5. Obtain 101(d)(2) status under the National Historic Preservation Act
6. Develop a Tribal historic preservation plan
7. Tribal approval of Tribal Historic Preservation plan;
8. Submission to National Park Service;
9. Consultation with National Park Service and State Historic Preservation Office
10. Possible consultation with Advisory Council of Historic Preservation and other Tribes;
11. Receive initial approval and funds from National Park Service

For More Information Contact:

<p><i>National Association of Tribal Historic Preservation Officers</i></p> <p>Mailing Address: P.O. Box 19189 Washington, D.C. 20036-9189</p> <p>Street Address: 1625 K Street, NW, 11th Floor Washington, D.C. 20006</p> <p>Phone: (202)628-8476 Fax: (202)628-2241 E-mail: info@nathpo.org Website: www.nathpo.org</p>	<p>James Bird <i>Tribal Preservation Program Heritage Preservation Services, National Park Service</i> 1201 Eye St. NW, 2255 Washington, DC 20005 Phone: James Bird at (202) 354-1837 Fax: (202) 371-1794 E-mail: james_bird@nps.gov</p>
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