Transmission Policy and Regulation Primer: Overview of Jurisdictional Authorities & Current Policy Trends

Tribal Jurisdiction & Policy Trends

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February 7, 2012
Definition: Transmission

- A transmission line is generally defined as a high voltage electric line operating at or above 22,000 volts used for moving electric energy in bulk between points of supply or generation and points at which it is transformed for delivery over the distribution system lines to consumers or is delivered to other electric systems. Collectively, numerous interconnected transmission lines are the grid or system.

- Natural gas transmission occurs through interstate pipelines regulated by the Federal Energy Regulatory Commission.
Transmission Characteristics

- Transmission lines are most commonly referred to by the voltage as kV (e.g., 230 kV = 230,000 volts). Normal household voltage is 120 volts.

- They are rated in Megawatts (MW) as in thousands of watts. One megawatt will serve about 1,000 homes.

- About 600,000 miles in the United States, about 25% are 230 kV and above.

- Many hundreds of miles of natural gas pipelines
1,000 kV LADWP Line; Ruby Pipeline - Barrel Springs, NV
Transmission History

- 1882 - First grid established in New York City. Served 85 customers, a few lines each about one-mile in length
- 1889 - California Electric Company established grid from Willamette Falls to Portland, Oregon
- 1909 - New record for longest, highest voltage line serving Denver, Colorado; 153-mile line operated at 90kV
Today’s Transmission

- Investor-owned utilities own more than 70% of the grid, and federal and public utilities own roughly 14% and 13% respectively.
- Grid costs represent about 10% of a typical retail electric bill and that’s rising.
- Grid investment peaked in the early 1980s in the U.S. and on a capacity to deliver basis has been declining relations to generation and load growth since. Electric demand far outpaces available transmission.
- It can easily take 10 years to permit and construct a 10-mile transmission line.
Energy Development Requires Transmission

- On average, 10 to 15% of a new generation project capital cost is for Transmission grid additions and upgrades (in the natural gas pipeline project, all the cost is associated with building infrastructure)
- Higher voltage lines with greater capacity are more expensive
- Acquiring rights-of-way for transmission is difficulty and make create delays
What Can a Tribal Leader Do?

- Study and understand the transmission system on and near your lands. Know the owners of that system and their business plans. Know the line capacity, reliability, age and current utilization of the grid and whether it could be easily upgraded.

- Study the regional load growth situation, generation needs and generation potentials from a transmission business perspective.

- Offer solutions to developers and communicate those. Time and $\$$. Permitting can be faster on Tribal Lands. Develop business plan for cost savings, labor potential, etc.
What Can a Tribal Leader Do? Voice Tribal Concerns.

- Electric service to remote areas
- Cultural resource issues
- Tribal employment
- Job training
- Adjacent small business commercial opportunities
What Can a Tribal Leader Do? Get A Good Indian Law Attorney

- **Complex federal regulation:**
  - 25 C.F.R Part 162 - Leases and Permits
  - 25 C.F.R Part 169 - Rights-of-Way over Indian Lands
  - 25 C.F.R Part 211 - Leasing of Tribal Lands for Mineral Development
  - 25 C.F.R Part 212 - Leasing of Allotted Lands for Mineral Development
  - 25 C.F.R Part 216 - Surface Exploration, Mining, and Reclamation of Lands
What Can a Tribal Leader Do? Be Prepared to Provide a “Doing Business with Our Tribe 101”

- At least generally answer the potential developer’s burning questions:
  - Who owns what?
  - Who regulates what?
  - How will disputes be resolved?
  - What’s the tax burden?
Consider Land Ownership Differences

- Tribal Surface Ownership (Yellow)
- Tribal Minerals underlying Others (Blue Cross-hatch)
- Bureau of Land Management (Tan)
- US Forest Service (Bright Green)
- State of Utah (Dark Green)
- Private Fee (Grey)
Who Regulates What?

- Understanding Tribal Sovereignty Under Federal Law
  - Civil Regulatory/Adjudicatory Jurisdiction Generally
Tribal Civil Jurisdiction

- Extending its prior ruling that tribal courts lack any criminal jurisdiction over non-Indians, *Montana* declared that in the civil context, the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” 450 U.S. at 563-565.
Territorial Limitations

- “Neither Montana nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring outside their reservations.” Hornell Brewing Co. v. Rosebud Sioux Tribe, 133 F.3d 1087, 1091 (8th Cir. 1998) (emphasis in original).

- “The mere fact that a member of a tribe or a tribe itself has a cultural interest in conduct occurring outside a reservation does not create jurisdiction of a tribal court under its powers of limited inherent sovereignty.” Id.; see also Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2721 (2008) ("Montana and its progeny permit tribal regulation of nonmember conduct inside the reservation that implicates the tribe’s sovereign interests").
Montana Exceptions

- Montana provides two narrow exceptions to the general rule that Indian tribes lack civil jurisdiction over non-members on tribal lands:

  “To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

450 U.S. at 565-566.
Further Limitations on Tribal Civil Jurisdiction

- *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001), the Court held that the Navajo Nation lacked civil jurisdiction to levy a tax on non-member guests of a hotel located on fee lands within the exterior boundaries of the Navajo Indian Reservation. This despite frequently used emergency response services, to the petitioner hotel and its guests, finding “the generalized availability of tribal services patently insufficient to sustain the Tribe’s civil authority over nonmembers on non-Indian fee land.” *Id.* at 655.
“Montana’s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. In Strate, for example, even though respondent A-1 Contractors was on the reservation to perform landscaping work for the Three Affiliated Tribes at the time of the accident, we nonetheless held that the Tribes lacked adjudicatory authority because the other nonmember “was not a party to the subcontract, and the Tribes were strangers to the accident.” 520 U.S. at 457 (internal quotation marks and citation omitted). A nonmember’s consensual relationship in one area thus does not trigger tribal civil authority in another -- it is not “in for a penny, in for a Pound.” E. Ravenscroft, The Canterbury Guests; Or A Bargain Broken, act v, sc. 1.”

Atkinson’s Limitations Continued . . .

- The Atkinson Court also held the Navajo Nation’s hotel occupancy tax as applied to non-members on non-Indian fee lands within the reservation boundaries was not justified under Montana’s second exception. Acknowledging that the hotel was located within a part of the Navajo Reservation that possessed “an overwhelmingly Indian character,” the Court stated that it nevertheless “fail[ed] to see how petitioner’s operation of a hotel on non-Indian fee land ‘threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.’” 532 U.S. at 657 (quoting Montana, 450 U.S. at 566). The Court ruled that “unless the drain of the nonmember’s conduct upon tribal services and resources is so severe that it actually ‘imperil[s]’ the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.” 532 U.S. at 657-658 n.12 (quoting Montana, 450 U.S. at 566).
Plains Commerce Bank, further limits the applicability of the second Montana exception to extreme circumstances:

The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians’ “conduct” menaces the “political integrity, the economic security, or the health or welfare of the tribe.” Montana, 450 U.S. at 566, 101 S. Ct. 1245, 67 L. Ed. 2d 493. The conduct must do more than injure the tribe, it must “imperil the subsistence” of the tribal community.

128 S.Ct. at 2726
Tribal Jurisdiction Is Exercised In This Framework

- For on-Reservation projects, key issues that non-Indian developers need to understand include:
  - TERO
  - Environmental Enforcement
  - Investment/Asset Protection
  - Dispute Resolution
  - Taxation
Employment Issues

Federal Anti-Discrimination Statute, Title VII of the Civil Rights Act of 1964

American Indian Tribes are specifically exempted from Title VII:

Businesses or enterprises extending preferential treatment to Indians. Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

Employment Issues / TERO

- Many Indian tribes have adopted some form of a Tribal Employment Rights Ordinance to regulate employment and labor practices on their reservations. These ordinances vary significantly from tribe to tribe, but they generally provide for employment preferences for tribal members and other Indians living on reservation as well as some hiring and reporting procedures, and potentially significant fees.
Environmental Enforcement

- What is the Tribe’s permitting process?
- What licenses are required?
- What role does the Tribe have in water/air issues?
- What are the Tribe’s expectations with respect to cultural resource management?
If the Tribe is a business partner, how can a non-Indian protect its investment?

What are the remedies in the event of a contract default?

Can we get a security interest in tribal assets? If so, how do we perfect that interest?

Creative options: set-off provisions, revenue obligations, asset-backed obligations, encumbrance of lease-hold interests, damages accounts

How do we value our investment? Can we lock in a formula?

Does the Tribe have a UCC?

Does the Tribe have an eminent domain ordinance?
How Will Disputes be Resolved?

- Tribal court system and appeals
- Overview of Tribal law, including role of traditional law
- Process for waiver of Tribal sovereign immunity
- Arbitration?
- Enforceability/Forum Issues
What’s the Tax Burden?

- In recent years, American Indian tribes have greatly increased Tribal taxation efforts due to:
  1. A desire to increase social services for tribes during decreasing federal aid budgets
  2. A continued effort to strategically exercise tribal sovereignty through taxation, an inherent power for which federal authorization is not required

- Upheld tribal authority to tax non-Indian purchases of cigarette sales at stores on tribal trust lands

- Non-Indian enterprises had negotiated long-term leases with tribe for oil and gas development
- Twenty years after the leases were negotiated, the tribe enacted and imposed a severance tax
- “[T]he Tribe’s authority to tax non-Indians who conduct business on the reservation . . . Is an inherent power necessary to tribal self-government and territorial management.”
- But, 1989’s *Cotton Petroleum*:
  - federal policy of self-determination for Indian tribes could not preempt New Mexico’s taxation within the Reservation; no preemption because state provided substantial services to the Reservation

- Referencing *Montana*, the Supreme Court held that tribes lack civil authority over non-members on non-Indian fee land within Indian country in all instances except when one of *Montana’s* two exceptions apply.
Ute Mountain Ute Tribe v. Padilla: All Roads Lead to Towaoc?
Key Ute Mountain Ute Tribe Findings

- The District Court’s Findings Included the Following:
  - All of the UMAT tribal lands located within New Mexico are held for the Tribe in trust by the United States.
  - No member of the Tribe, or anyone else, resides within the New Mexico tribal lands.
  - The only economic activities within the New Mexico tribal lands are livestock grazing and oil and gas development (186 wells in 2009).
  - All the roads within the New Mexico tribal lands are unpaved, and no other transportation infrastructure is present.
What happens if the Supreme Court reverses the Tenth Circuit?

- (A) The Tribe could replace New Mexico’s severance tax scheme with an equivalent tax that captures the entire revenue stream that previously went to the state. This would either increase the Tribe’s governmental services to members or cash distributions to them by at least $650 per year - an eight percent increase in per-capita income on a reservation where 38.5 percent of families currently live below the official poverty level.

- (B) The Tribe could impose a Tribal tax whose effective rate is lower than the current combined Tribal-state tax. This would reasonably be expected to enhance the competitiveness of oil and gas development on the Reservation as compared to other Indian lands elsewhere in New Mexico where dual taxation applies. Oil and gas operators could seek to increase production on the New Mexico lands, by drilling infill wells on existing pools, or by bringing back into production wells that are not profitable under the current taxes.
It’s a lot easier to beg forgiveness than ask the U.S. Supreme Court’s permission.

- While per se regulation may not be available, cultivating mutually-beneficial consensual relationships certainly is.
Federal Law Provides Many Opportunities for Tribal Input

- NEPA, NHPA, Executive Orders, Agency Consultation Policies
- All counsel good faith, flexibility and practicality
- More detailed overviews of NEPA and NHPA follow
National Environmental Policy Act (NEPA)

- CEQ’s NEPA regulations set forth in 40 C.F.R. parts 1500 to 1508
NEPA

- **Purpose**
  - Informed decision making
  - Informed public comment

- **Requires preparation of an EIS for major federal actions with significant environmental effects**
What does the federal agency have to do?

- An environmental analysis
  - Levels of analysis
    - EIS
    - EA
    - Categorical Exclusion
Significance

- Agency must consider context and intensity

Intensity factors:
- Effect of proposed action on public health and safety
- Unique characteristics of project area
- Whether effects are controversial
- Degree to which effects are highly uncertain
- Effect to historic sites eligible for listing on National Register.
When is NEPA Compliance Required?

- Regulations apply only to federal actions
  - Must be a federal trigger
  - Examples include rights-of-way across federal land, water contracts with the Bureau of Reclamation, Fish and Wildlife Service Incidental Take Permits and approval of Habitat Conservation Plans

- Federal agencies must comply with NEPA mandates unless there is a specific exemption or “clear conflict” of statutory authority
EIS
Environmental Impact Statement

- **Major Federal Action**

- **Significant effect on human environment**
EIS Components

- Purpose & Need
- Proposed Action & Reasonable Alternatives
- Environmental Baseline
- Environmental Effects
  - Direct, Indirect, Cumulative
- Mitigation Measures
Purpose and Need

- EIS shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.
Proposed Action and Reasonable Alternatives

- Proposed Action
- No Action Alternative
  - The Status Quo
- Reasonable Alternatives
  - Must meet purpose and need
  - Must be feasible
Environmental Baseline

- Describe the environment as it is today for each affected resource

- Geographic scope of area of effect must be carefully considered and explained
Environmental Effects

- Direct - caused by action and occur in same time and place
- Indirect - reasonably foreseeable - caused by action, but are later in time or farther removed in distance
- Cumulative - incremental effect of action when added to other past, present, or reasonably foreseeable future actions
Mitigation Measures

- NEPA requires a “reasonably complete discussion” of possible mitigation measures that mitigate “to the fullest extent possible” harmful effects to the environment.

- Remember: NEPA does not mandate a particular result
EIS process

- Proposal
- Scoping
- Prepare draft EIS
- Public Comment
- Final EIS (Response to Comment)
- Record of Decision
The Typical NEPA Process
Third-Party Contractors

- An agency can permit the applicant to prepare an EA.
  - Must take responsibility for scope and content

- EIS can be prepared by a third-party contractor
  - Must be selected by lead agency
  - Contractor disclosure - no financial interest in the project
  - Must independently evaluate and take responsibility for scope and content
National Historic Preservation Act of 1966

- Sets out national policy on cultural heritage and historic preservation
- Section 106 of NHPA
  - Procedural statute
  - Applies to federal or federally-assisted undertakings in any state on federal, state, local, tribal and private lands
  - Implemented by Advisory Council on Historic Preservation’s (“ACHP’s”) regulations
Purpose of Section 106

Section 106 consultation process is designed to:

- Identify historic properties potentially affected by an undertaking
- Assess the nature of the effects on any such properties
- Seek ways to avoid, minimize or mitigate and such adverse effects
When Section 106 Consultation Process Applies

1. There is an undertaking, and

2. That action has the potential to affect properties listed in or eligible for listing in the National Register

- **Undertaking**: a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency

- **Listed in or Eligible for listing**: properties exhibiting the quality of significance in American history, architecture, archaeology, engineering, and culture present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling and association
Section 106 Consultation Process Requires:

- Identification of historic properties potentially affected by the undertaking
- Assessment of any potential effects to historic properties
- Consultation with the relevant State Historic Preservation Officer ("SHPO")
- Consultation with any Indian tribes attaching religious and cultural significance to historic properties that may be affected by the project, even if not located on tribal lands
- Consultation with local governments
- Consultation with ACHP in some cases
Section 106 Consultation Process (cont.)

- Each federal agency is legally and financially responsible for compliance with section 106 for its own undertakings.
- Governed by ACHP regulations at 36 C.F.R. Part 800.
- In consultation with SHPO, agency must assess affects and determine if proposed undertaking will adversely affect qualified properties.
- If “no historic properties affected” or “no adverse effect” and SHPO concurs → Project may go forward.
- If adverse effects are found for one or more historic properties → Agency must consult further to avoid, minimize or mitigate adverse effects.
- Adverse effects usually resolved with an MOA.
NHPA IS A PROCEDURAL STATUTE

Requiring of Federal Agencies ONLY TWO THINGS:

1. Take into Account the Effects of their Undertakings on Historic Properties,
   and
2. Afford the Advisory Council a Reasonable Opportunity to Comment
Initially, the Agency Official (AO) must establish whether proposed action is an “undertaking,” defined as a project, activity, or program funded by a federal agency, including those requiring a federal permit, license or approval. Sec. 800.3(a)(1)

Is the undertaking the type of activity that has the potential to cause effects on historic properties? Sec. 800.3(a)

AO has no further obligation under Section 106 of the Historic Preservation Act, or ACHP rules. Sec. 800.3(a)(1)
If available, use Program Alternative or Programmatic Agreement.

Sec. 800.3(a)(2)

1) Identify appropriate SHPO(s).

Sec. 800.3(c)

2)(a) If undertaking is on, or APE includes, tribal lands, identify THPO.

Sec. 800.3(c)(1)

2)(b) If no THPO has been designated and qualified, identify appropriate tribal representative.

Sec. 800.3(c)(1)

Initiate consultation with appropriate SHPO or THPO or both. Sec. 800.3(c)(3)

Authorized applicant or group of applicants may initiate consultation. Sec. 800.3(c)(4)

Applicants, consultants and designees may prepare information, analysis and recommendations for the Section 106 processing but AO remains responsible for findings, and documents and studies must meet applicable standards and guidelines.

Sec. 800.2(a)(3)

Program Alternative Shunt

II. INITIATION OF CONSULTATION

1. Identify SHPO and/or THPO

Initiate consultation with SHPO/THPO

III. Identify and Involve other Consulting Parties

1. Indian Tribes

Undertakings on or affecting HPs on Tribal Lands

- Where THPO is designated, consult with THPO in lieu of SHPO. Sec. 800.2(c)(2)(i)(B).

If no THPO designated, consult with tribe in addition to SHPO. Sec. 800.2(c)(2)(i)(B)

Projects off of Tribal Lands

(1) Early in the planning process, make a reasonable and good faith effort to identify tribes or NHOs that might attach religious and cultural significance to HPs in the APE. Sec. 800.2(c)(2)(ii)(A); Sec. 800.3(e)(2)

(2) Invite all identified Indian tribes and NHOs to become consulting parties.

Sec. 800.2(c)(2)(ii)(A); Sec. 800.3(e)(2)

2. Must Invite Local Governments

Identify and invite any local government with jurisdiction over some or all of the APE to be a consulting party.

Sec. 800.2(c)(3); 800.3(f)(1)

3. Must Plan Public Notice and Involvement

In consultation with SHPO, plan for involving the public.

Identify appropriate points for notifying the public and seeking public input. Sec. 800.3(e).

At a minimum, AO must:

(1) provide the public with information about an undertaking and its effects on historic properties; and

(2) seek public comment and input.

Sec. 800.2(d)(2)

4. May Invite Other Consulting Parties

In consultation with the SHPO, consider written requests from groups or individuals seeking to participate, and determine whether and which to include as consulting parties.

Sec. 800.3(f)(3)
IV. Identification of Historic Properties

**Required Preliminary Steps**

**Determine APE**

In consultation with SHPO, determine and document APE.
Sec. 800.4(a)

**Gather Background Information**

1. Review existing information on historic properties within APE, including data on possible HPs not yet identified.

2. (a) Seek information, as appropriate, from consulting parties and others likely to have knowledge of, or concerns with, historic properties in the area; and

   (b) Identify issues relating to the undertaking’s potential effects on HPs; and

3. Gather information from any identified Indian tribe or NHO to assist in identifying properties located off of tribal lands, which: (1) may be of religious and cultural significance to them; and (2) may be eligible for the National Register. Sec. 800.4(a)(4) and 800.11(c)

**Identification - Degree of Effort Required**

Based on the information gathered under the above-listed preliminary steps, make a reasonable and good faith effort to carry out “appropriate identification efforts.”
Sec. 800.4(b)(1)

**Appropriate identification efforts may include:**

1) Research;
2) Consultation;
3) Oral history interviews; or
4) Field surveys

In this regard, the AO shall take into account:

1) Past planning, research and studies;
2) Magnitude and nature of undertaking
3) Degree of federal involvement
4) Nature and extent of potential effects on HPs;
5) Likely nature and location of HPs in APE.

Guidance is available from the Secretary's Standards and Guidelines for Identification. AOs should also consider other applicable professional, state, tribal, and local laws, standards and guidelines. Secs. 800.4(b) and (b)(1)
V. Evaluation of Historic Significance

Apply the National Register Criteria

In consultation with SHPO and any consulting tribe or NHO, and guided by the Secretary's Standards and Guidelines for Evaluation, apply the National Register Criteria for Evaluation to properties within the APE that either:

1. have not been previously evaluated for National Register eligibility; or
2. have previously been determined eligible or ineligible, but require reevaluation due to the passage of time, changing perceptions of significance, or incomplete prior evaluations. Sec. 800.4(c)(1)

Determine Potential Eligibility

Applying the National Register Criteria, determine whether any properties in the APE meet the National Register Criteria. Sec. 800.4(c)(2)

Results of Identification and Evaluation

No Eligible HPs Affected

AO finds and SHPO/THPO agrees there are no listed or eligible properties in APE. Sec. 800.4(c)(2)

No Agreement on Eligibility

AO and SHPO/THPO disagree as to the eligibility of properties in APE. Sec. 800.4(c)(2)

Secretary Determines Eligibility

Obtain a determination of eligibility from the Secretary of the Interior. Sec. 800.4(c)(2); 36 CFR Part 63

No

Yes

Yes, Eligible Properties Affected

AO finds, and SHPO agrees, that there are eligible or listed properties in APE. Sec. 800.4(e)(2)

Proceed to Determination of Effect.

No Eligible HPs Affected

Proceed to Determination of Effect.

Sec. 106 process concluded?

Yes

No

No

Secretary says Not Eligible.

Yes

Secretary says Eligible.

Proceed to Determination of Effect.
VI. Determination of Effect

Determine if undertaking may have an effect on HPs.

"Effect" is defined as "an alteration in the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." Sec. 800.16(i)

No Eligible HPs in APE

Eligible

No possibility of effect on eligible or listed HPs in the APE

AO finds that HPs are or may be affected

1) Provide full documentation to SHPO/THPO, including:
   a) Description of undertaking and APE;
   b) Photos and maps of undertaking and APE;
   c) Description of appropriate steps taken to seek information and identify HPs; and
   d) Basis for determination that no HPs are present or HPs are present but not affected.

2) Notify all consulting parties

3) Make documentation available to public and seek public input. Sec. 800.4(d)(1)

Notification of Proposed Finding of No Effect

No objection

Evaluation Period

SHPO/THPO and ACHP have 30-day period to object. Sec. 800.4(d)(1)

AO agrees with objection, consultation proceeds

HPs are or may be affected.

AO to notify all consulting parties including participating Indian tribes and NHOs and invite their views on the effects. Sec. 800.4(d)(2)

Termination of Consultation

AO disagrees with objection, one or more parties terminates consultation

Proceed to Sec. 800.7 termination procedure, infra.

Section 106 Process Concluded

No further obligation under Section 106 or ACHP rules. Sec. 800.4(d)(1)

New "Off Ramp"

Notification of Finding of Effect

Section 106 Process Concluded

Determine if undertaking may have an effect on HPs.

Effect" is defined as "an alteration in the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." Sec. 800.16(i)

No possibility of effect on eligible or listed HPs in the APE

Eligible

AO finds that HPs are or may be affected

1) Provide full documentation to SHPO/THPO, including:
   a) Description of undertaking and APE;
   b) Photos and maps of undertaking and APE;
   c) Description of appropriate steps taken to seek information and identify HPs; and
   d) Basis for determination that no HPs are present or HPs are present but not affected.

2) Notify all consulting parties

3) Make documentation available to public and seek public input. Sec. 800.4(d)(1)

Notification of Proposed Finding of No Effect

No objection

Evaluation Period

SHPO/THPO and ACHP have 30-day period to object. Sec. 800.4(d)(1)

AO agrees with objection, consultation proceeds

HPs are or may be affected.

AO to notify all consulting parties including participating Indian tribes and NHOs and invite their views on the effects. Sec. 800.4(d)(2)

Termination of Consultation

AO disagrees with objection, one or more parties terminates consultation

Proceed to Sec. 800.7 termination procedure, infra.

Section 106 Process Concluded

No further obligation under Section 106 or ACHP rules. Sec. 800.4(d)(1)

New "Off Ramp"
Assess Effects
In consultation with SHPO/THPO, and/or participating Indian tribes and NHOs, assess effects using Criteria of Adverse Effects. Sec. 800.5(a)

Criteria of Adverse Effects
"An adverse affect 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." Sec. 800.5(a)(1).

Find No Adverse Effect
Find Adverse Effect

Proposed Finding of No Adverse Effect
In consultation with THPO/THPO, propose a finding of No Adverse Effect if:
1) Effect not adverse, or
2) Adverse effect avoided by modifying or imposing conditions on undertaking. Sec. 800.5(b)

1) Notify SHPO/THPO and all consulting parties
2) Provide SHPO/THPO and all consulting parties with full documentation of finding including:
   a. Description of the undertaking, federal involvement and APE, including photos, maps and drawings, as necessary;
   b. Description of steps taken to identify HPs;
   c. Description of HPs and characteristics that qualify them for National Register;
   d. Description of effects on HPs;
   e. Explanation of why criteria of adverse effects found applicable or inapplicable, including conditions to avoid, minimize or mitigate adverse effects; and
   f. Copies or summaries of views from consulting parties or public. Secs. 800.5(e) and 800.11(e)

Notification and Documentation

SHPO/THPO Receipt of Documentation Triggers
30 Day Waiting Period
Tribal Concurrence
AO should seek the concurrence of any participating Indian tribe or NHO that has communicated that it attaches significance to any HPs subject to the finding. Sec. 800.5(c)(2)(ii)

Within 30 day waiting period, Indian tribe or NHO may specify its reasons for disagreeing and request ACHP to review. Sec. 800.5(c)(2)(ii)

SHPO/THPO agrees - No Adverse Effect, or doesn't respond within 30 days. Sec, 700.5(c)(1)

SHPO/THPO or any consulting party disagrees with finding of No Adverse Effect, specifying reasons. Sec. 800.5(c)(2)

ACHP may request to review finding. Sec. 800.5(b)(2)(iii)

Proceed to VII. - Finding of Adverse Effect
Carry out undertaking per finding. Sec. 800.5(d).

AO must maintain record of finding and allow public access to record on request. Sec. 800.5(d).

Notify ACHP of Adverse Effect finding. Sec. 800.6(a)(1).

AO can request ACHP Review. Sec. 800.5(e)(2).

Reach Agreement with Objecting Party - No Adverse Effect.

AO submits to ACHP full documentation of finding. Sec. 800.11(3). Sec. 800.5(e)(2)(iii)

ACHP finds Adverse Effect or does not respond within 15 days. Sec. 800.6(a)(1).

ACHP not invited and not participating.

Section 106 Process Concluded

AO has no further obligation under Section 106 or ACHP Rules. Section 800.5(d).

SWPO/THPO overrules objection, finds no adverse effect. Sec. 800.5(e)(1)(3).

ACS finds No Adverse Effect or does not respond within 15 days. Sec. 800.5(c)(3).

VII. Finding of Adverse Effect.

Sec. 800.5(d)(2)

AO has 15 days from receipt to review finding. Sec. 800.5(c)(3).

ACHP finds No Adverse Effect.

No agreement with objecting party.

No Adverse Effect
With SHPO/THPO, consider involving others as consulting parties. Sec. 800.6(a)(2)

Provide full documentation of undertaking and Adverse Effect finding to all consulting parties.

Ongoing duty to provide any new documentation. Sec. 800.6(a)(3)

Make full documentation available to public.

Provide public a convenient opportunity to express views using appropriate mechanisms to ensure views will be heard. Sec. 800.6(a)(4). In planning scope of public involvement, consider magnitude of undertaking and effects and opportunity for prior comment. Sec. 800.6(a)(4).

Consider other Consulting Parties

Explore Mitigation and Alternatives

With SHPO/THPO and consulting parties to develop alternatives or modifications to undertaking that could:

a) avoid
b) minimize, or
c) mitigate adverse effects on HPs.

Only AO and SHPO/THPO need agree for MOA. Sec. 800.6(a) and (b).

Without ACHP

Consult with SHPO/THPO and consulting parties to develop alternatives or modifications to undertaking that could:

a) avoid
b) minimize, or
c) mitigate adverse effects on HPs.

Only AO and SHPO/THPO need agree for MOA. Sec. 800.6(a) and (b).

Inviting ACHP Participation

AO shall invite ACHP to participate when:

1) AO wants the ACHP to participate
2) A National Historic Landmark is adversely affected
3) A Programmatic Agreement will be prepared. Sec. 800.6(a)(1)(i)

ACHP has 15 days to respond. Sec. 800.6(c)(1)(iii)

ACHP decides to join consultation

ACHP decides not to join consultation

Documentation to Consulting Parties

Public Involvement

ACHP not invited and not participating

ACHP not invited and not participating

Proceed to Consult Without ACHP

Proceed to Consult with ACHP

ACHP Joins

ACHP Disagrees

THPO Disagrees

AO Disagrees

SHPO Disagrees

All Agree

With ACHP

AO, SHPO/THPO and consulting parties, including participating Indian tribes and NHOs, consult with ACHP to seek ways to avoid, minimize or mitigate adverse effects on HPs. Only AO, SHPO/THPO and ACHP need agree for MOA. Sec. 800.6(b)(2).
**VIII. MEMORANDUM OF AGREEMENT STAGE**

 AO, SHPO/THPO and other invited parties execute MOA. Sec. 800.6(6)(iv)

 Must invite ACHP to join consultation. Provide full documentation. Sec. 800.6(b)(8)(v); Sec. 800.11(g)

 AO approves undertaking and ensures that it is carried out in accordance with MOA. Sec. 800.6(b)(1)(iv)

 AO, ACHP, THPO and invite parties execute MOA. Sec. 800.7(a)(2)

 AO ACHP, THPO and invite parties execute an MOA. Sec. 800.7(a)(2)

 ACHP may submit comments. Sec. 800.7(b)

 AO approves undertaking per the MOA. Sec. 800.6(c)

 AO has no further obligation under Section 106 or ACHP rules. Sec. 800.6(c)

 AO ensures that undertaking is carried out in accordance with MOA. Sec. 800.6(c)

 IX. Termination

 AO has no further obligation with Section 106 or ACHP rules. Sec. 800.6(c)

 Notify all parties of termination. If AO terminates, agency head to submit to ACHP Request to Consult under Sec. 800.7(c)

 AO disagrees with proposed method. Sec. 800.7(a)(i)

 AO disagrees with proposed method. Sec. 800.7(a)(3)

 THPO disagrees with proposed method. Sec. 800.6

 SHPO disagrees with proposed method. Sec. 800.7(a)(2)

 All agree

 AO, SHPO, THPO and ACHP all agree on proposal method to resolve adverse effects on HPs. Sec. 800.6(b)(2)

 ACHP disagrees with proposed method of resolving adverse effects on HPs. Sec. 800.6

 ACHP may consult with Agency's Federal Preservation officer. Sec. 800.7(a)(4)

 AO, ACHP, THPO and invite parties execute MOA without SHPO. Sec. 800.7(a)(2)

 SHPO Termination

 AO approves undertaking and ensures that it is carried out in accordance with MOA. Sec. 800.6(b)(1)(iv)

 ACHP decides to join consultation.

 ACHP decides not to join consultation. Sec. 800.6(b)(1)(v)

 AO approves undertaking and ensures that it is carried out in accordance with MOA. Sec. 800.6(b)(1)(iv)

 AO, SHPO/THPO and other invited parties execute MOA. Sec. 800.6(6)(iv)

 Must invite ACHP to join consultation. Provide full documentation. Sec. 800.6(b)(8)(v); Sec. 800.11(g)

 AO approves undertaking and ensures that it is carried out in accordance with MOA. Sec. 800.6(b)(1)(iv)

 AO, ACHP, THPO and invite parties execute MOA. Sec. 800.7(a)(2)

 AO ACHP, THPO and invite parties execute an MOA. Sec. 800.7(a)(2)

 ACHP may submit comments. Sec. 800.7(b)

 AO approves undertaking per the MOA. Sec. 800.6(c)

 AO has no further obligation under Section 106 or ACHP rules. Sec. 800.6(c)

 AO ensures that undertaking is carried out in accordance with MOA. Sec. 800.6(c)

 AO has no further obligation with Section 106 or ACHP rules. Sec. 800.6(c)

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 AO disagrees with proposed method. Sec. 800.7(a)(i)

 AO disagrees with proposed method. Sec. 800.7(a)(3)

 THPO disagrees with proposed method. Sec. 800.6

 SHPO disagrees with proposed method. Sec. 800.7(a)(2)

 All agree

 AO, SHPO, THPO and ACHP all agree on proposal method to resolve adverse effects on HPs. Sec. 800.6(b)(2)

 ACHP disagrees with proposed method of resolving adverse effects on HPs. Sec. 800.6

 ACHP may consult with Agency's Federal Preservation officer. Sec. 800.7(a)(4)

 AO, ACHP, THPO and invite parties execute MOA without SHPO. Sec. 800.7(a)(2)

 AO ACHP, THPO and invite parties execute an MOA. Sec. 800.7(a)(2)

 ACHP may submit comments. Sec. 800.7(b)

 AO approves undertaking per the MOA. Sec. 800.6(c)

 AO has no further obligation under Section 106 or ACHP rules. Sec. 800.6(c)

 AO ensures that undertaking is carried out in accordance with MOA. Sec. 800.6(c)

 AO has no further obligation with Section 106 or ACHP rules. Sec. 800.6(c)

 Notify all parties of termination. If AO terminates, agency head to submit to ACHP Request to Consult under Sec. 800.7(c)
IX. Section 800.7(c) Comment Procedure

ACHP

Transmittal of ACHP Comments

ACHP transmits its comments to:

1) Federal Preservation Officer (FPO);
2) All consulting parties;
3) Head of Agency;
4) AO; and
5) Others as appropriate.

Sec. 800.7(c)(3)

XI. Documenting the Agency’s Decision

Head of Agency must personally (may not delegate) take into account ACHP comments and document any final decision. Documenting means:

1) Preparing a summary of decision and rationale;
2) Including evidence of consideration of ACHP comments;
3) Providing ACHP a copy prior to approving undertaking;
4) Providing a copy to all consulting parties; and
5) Notifying public and making record available.

Sec. 800.7(c)(4)

XII. Final Decision

Agency may approve or deny the undertaking.

Sec. 800.7(c)(1), (2)
Ruby Pipeline Project

- Ruby Pipeline L.L.C. is a project of the El Paso Corporation
  - Part of El Paso Corporation, North America’s largest transporter of natural gas (43,000 miles of pipeline)
  - Experienced operator and builder of natural gas pipelines and associated facilities since 1927
  - Operates pipelines and natural gas storage
  - Provides natural gas in a safe, efficient, and dependable manner
Virtual Tour - A long way to the ROW
Tribal Monitors / Trenching
Tribal Monitors at pipe lowering
Reclaimed ROW, showing micro-realignment
Protecting traditional plants
Tribal Monitors At Every Step
A lot of process to navigate, 100+ Tribal Monitors worked on Ruby
What Can Tribal Leaders Do? Embrace a Traditional Concept of Progress
Thank you!

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