



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

## *Tribal Jurisdiction & Policy Trends*

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# **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 difficult 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?

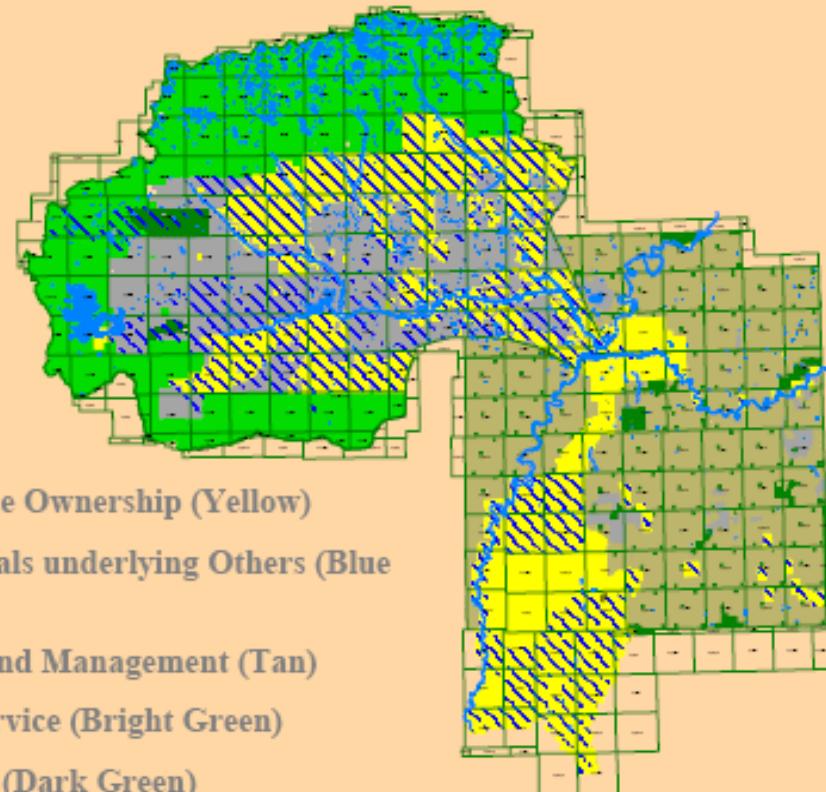


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# Consider Land Ownership Differences



## U&O Ownership Layers



# Who Regulates What?

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



# Tribal Civil Jurisdiction

- Supreme Court's implicit divestiture approach, *Montana v. United States*, 450 U.S. 544 (1981).
- 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.



# Atkinson Trading Continued:

“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.”

532 U.S. at 656. The quoted reference to “*Strate*” refers to *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (Indian tribes lack civil jurisdiction over non-Indians on state highway right-of-way).

# 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.

42 U.S.C. § 2000e-2(i).

# 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

- 1980: *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)
  - Upheld tribal authority to tax non-Indian purchases of cigarette sales at stores on tribal trust lands



- *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)
  - 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



- 2001: *Atkinson Trading Co.*, 532 U.S. at 652-653.
  - 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 UMUT 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)

- Pub. L. No. 91-190, 83 Stat. 852, codified at 42 U.S.C. §§ 4321 *et seq.*
- 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

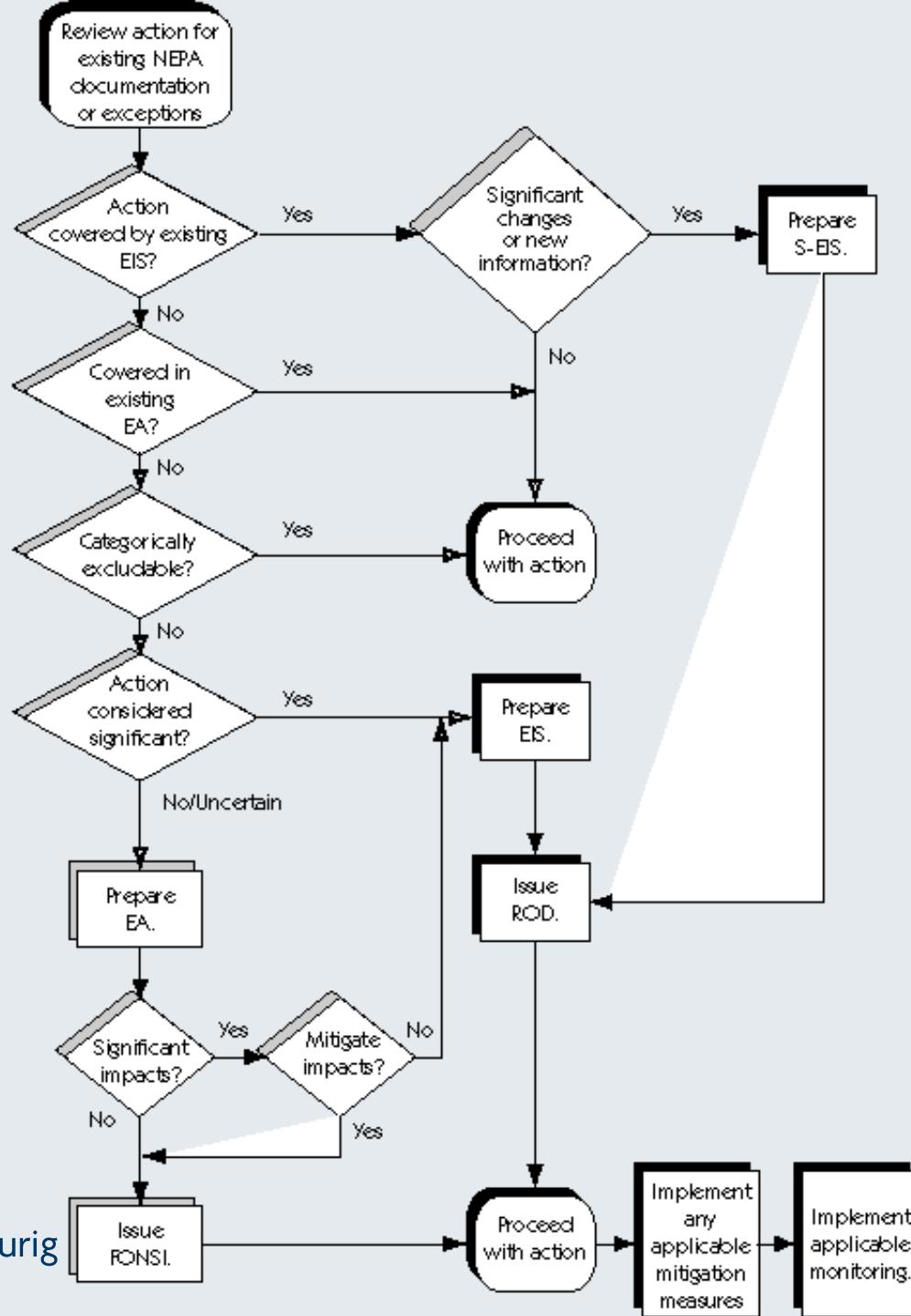
# Mitigation Measures

- 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 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 affect by the project, even if not located on tribal lands
- Consultation with local governments
- Consultation with ACHP in some cases

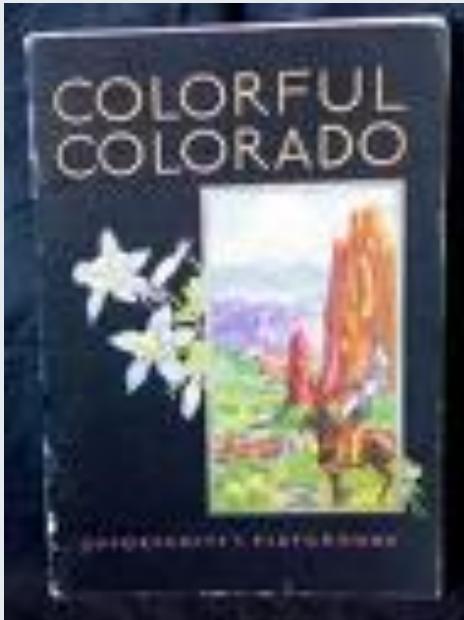
## Section 106 Consultation Process (cont.)

- 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:



- Properties,
- and
- Comment
1. Take into Account the Effects of their Undertakings on Historic Properties,
  2. Afford the Advisory Council a Reasonable Opportunity to Comment

## THE SECTION 106 PROCESS

### Historical Preservation Consultation for Federal Agencies and License Applicants

#### **Section 106 Flow Chart**

The following is a schematic diagram of the principal procedures in the Section 106 process of consultation for federal undertakings. This process is described as provided in the rules adopted by the Advisory Council on Historic Preservation, effective January 11, 2001, found at 36 CFR Part 800.

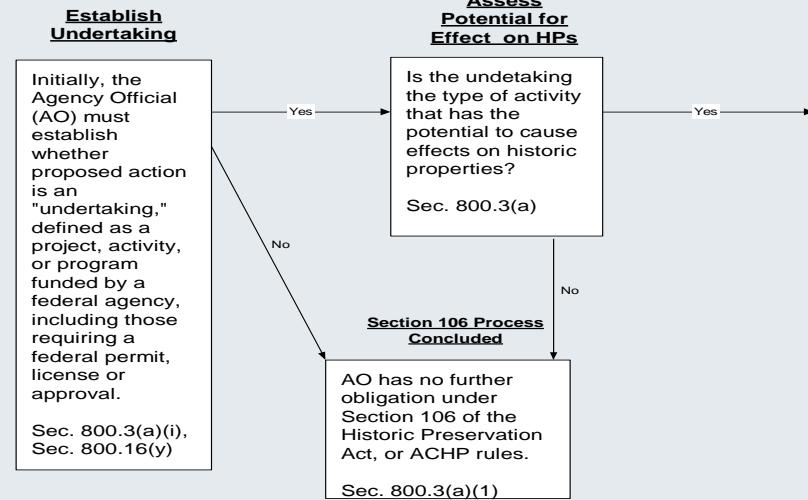
All code references are to sections in 36 CFR Part 800 unless noted.

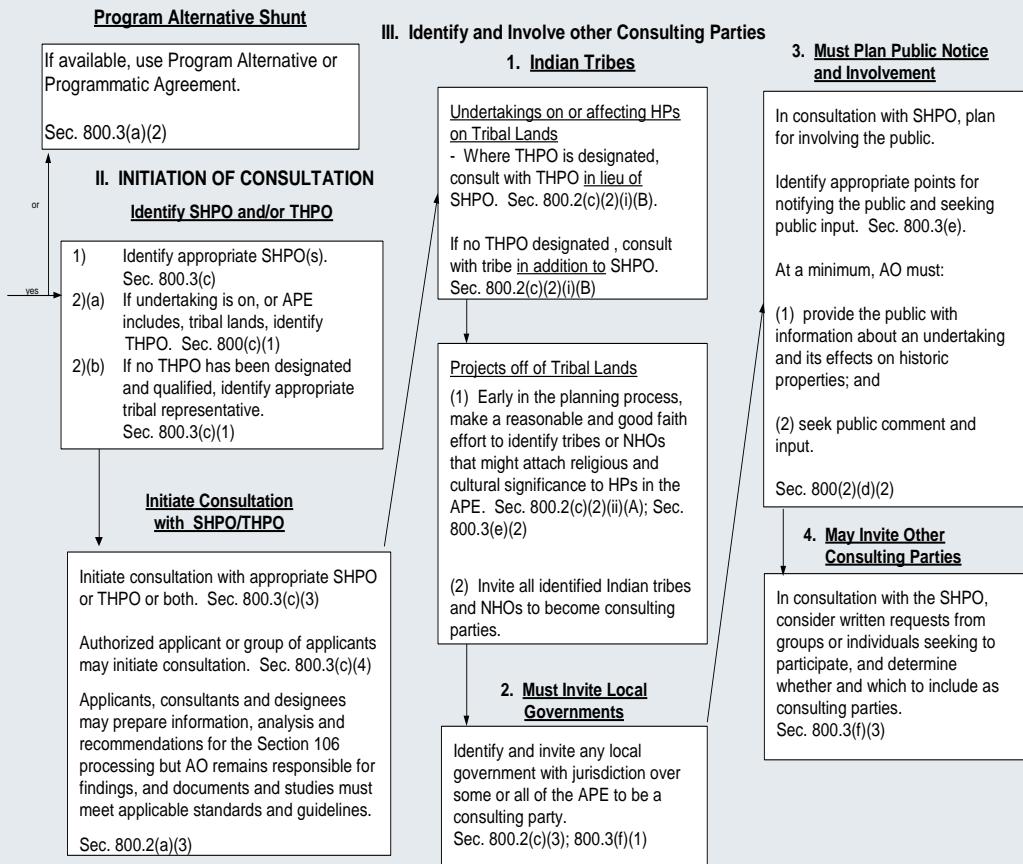
#### **Abbreviations**

ACHP	Advisory Council on Historic Preservation
APE	Area of Potential Effects
AO	Agency Official
EA	Environmental Assessment
FCC	Federal Communication Commission
FPO	Federal Preservation Officer
HP	Historic Property
MOA	Memorandum of Agreement
NHO	Native Hawaiian Organization
SHPO	State Historic Preservation Officer
THPO	Tribal Historic Preservation Officer

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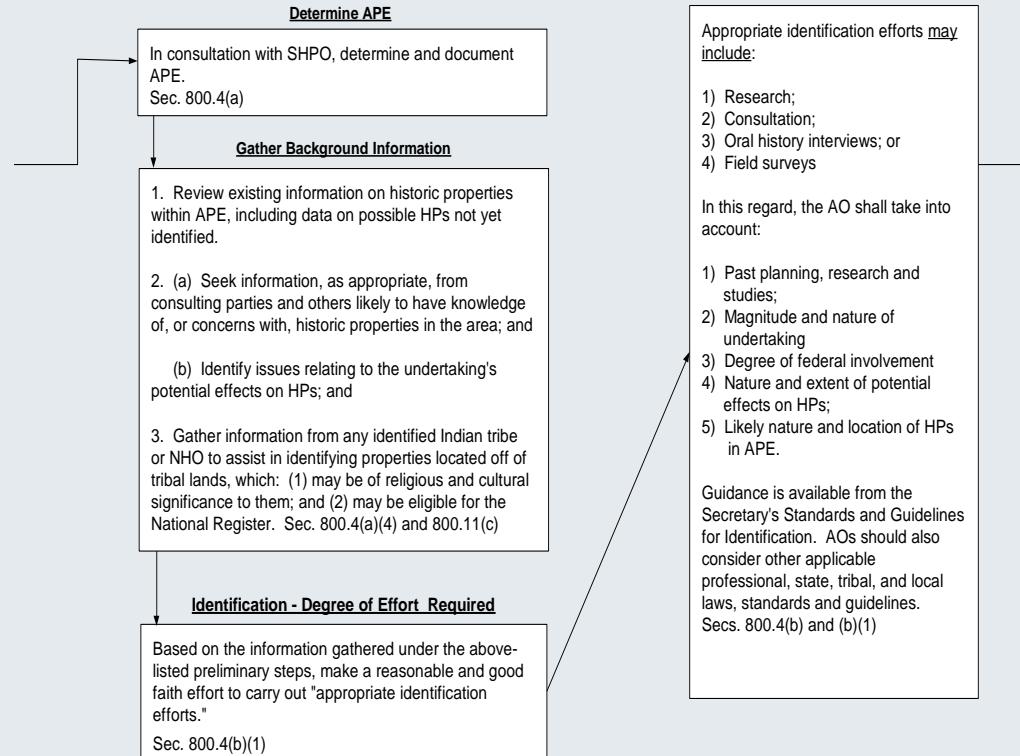
#### I. Initiating the Process



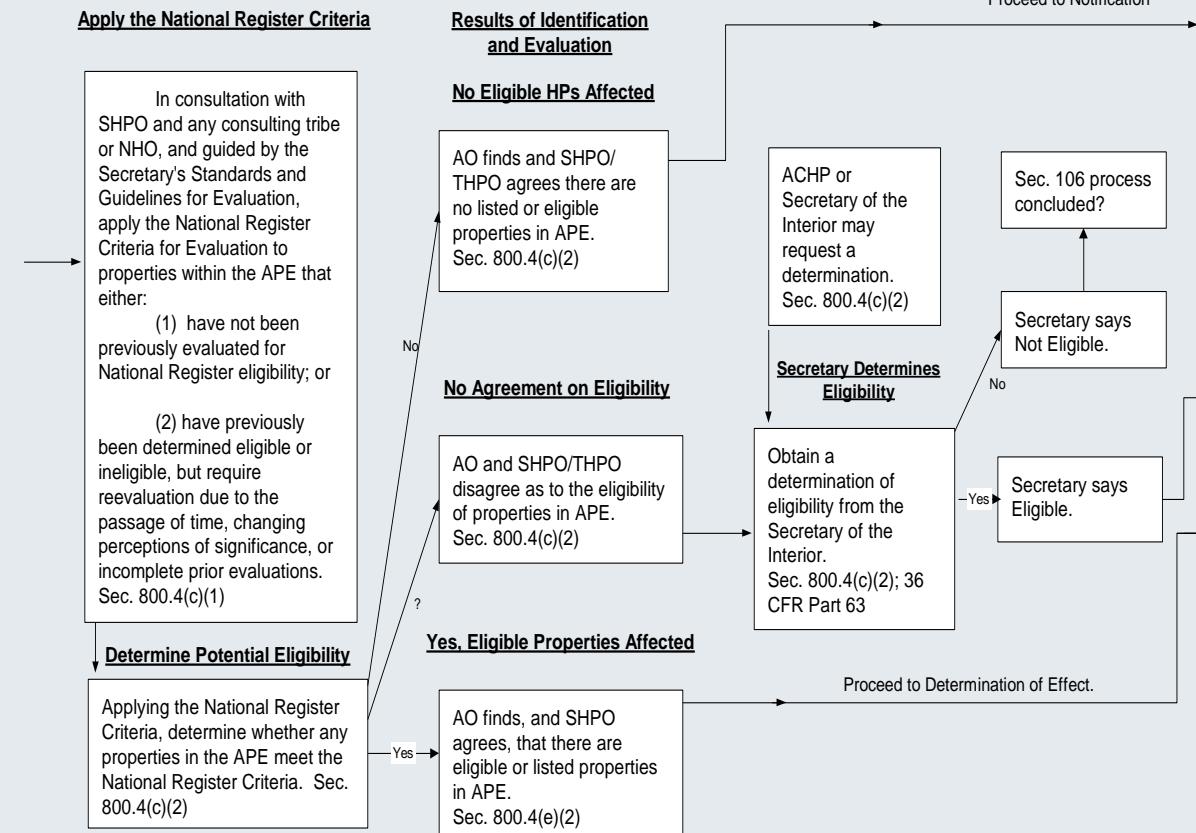


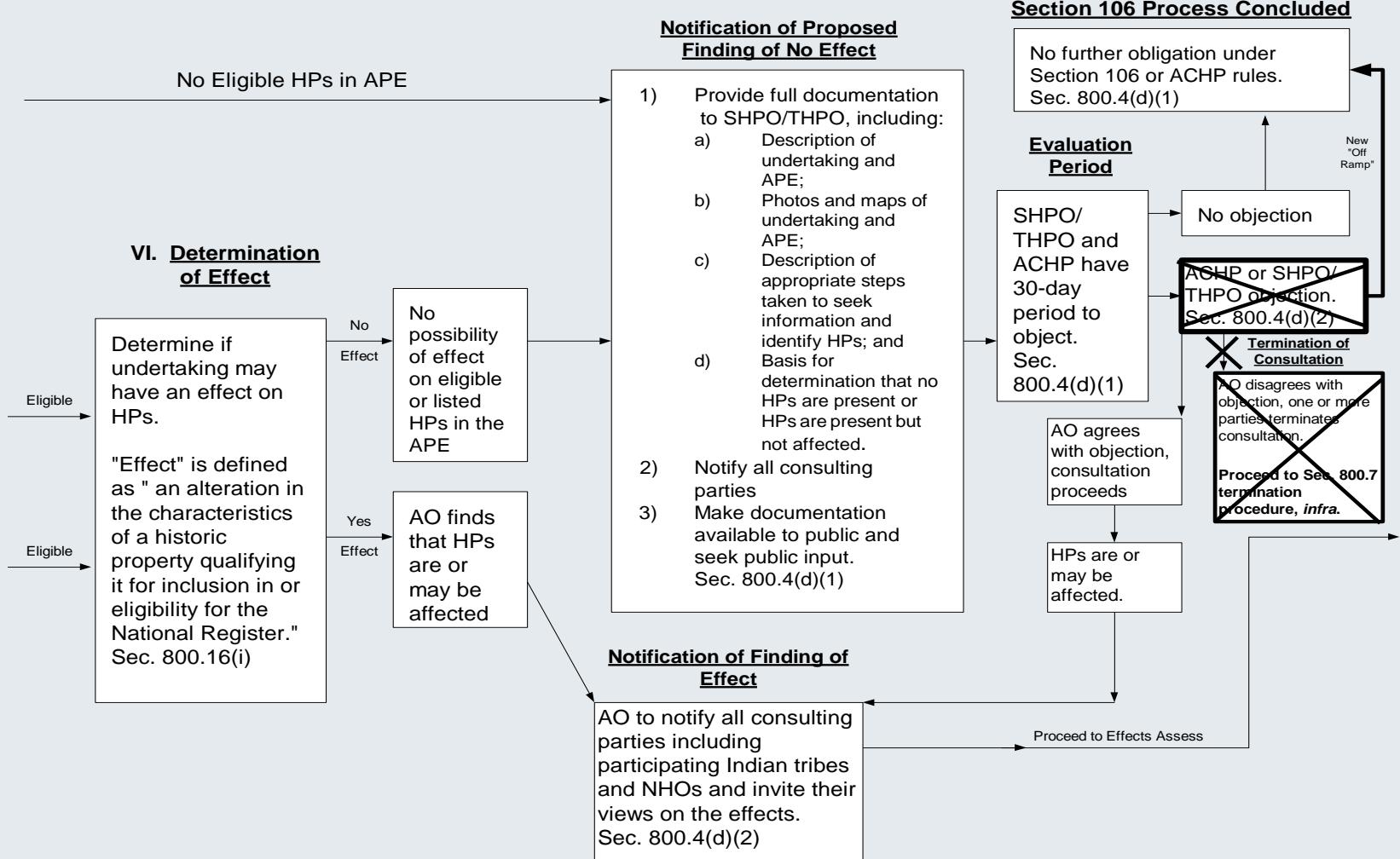
#### IV. Identification of Historic Properties

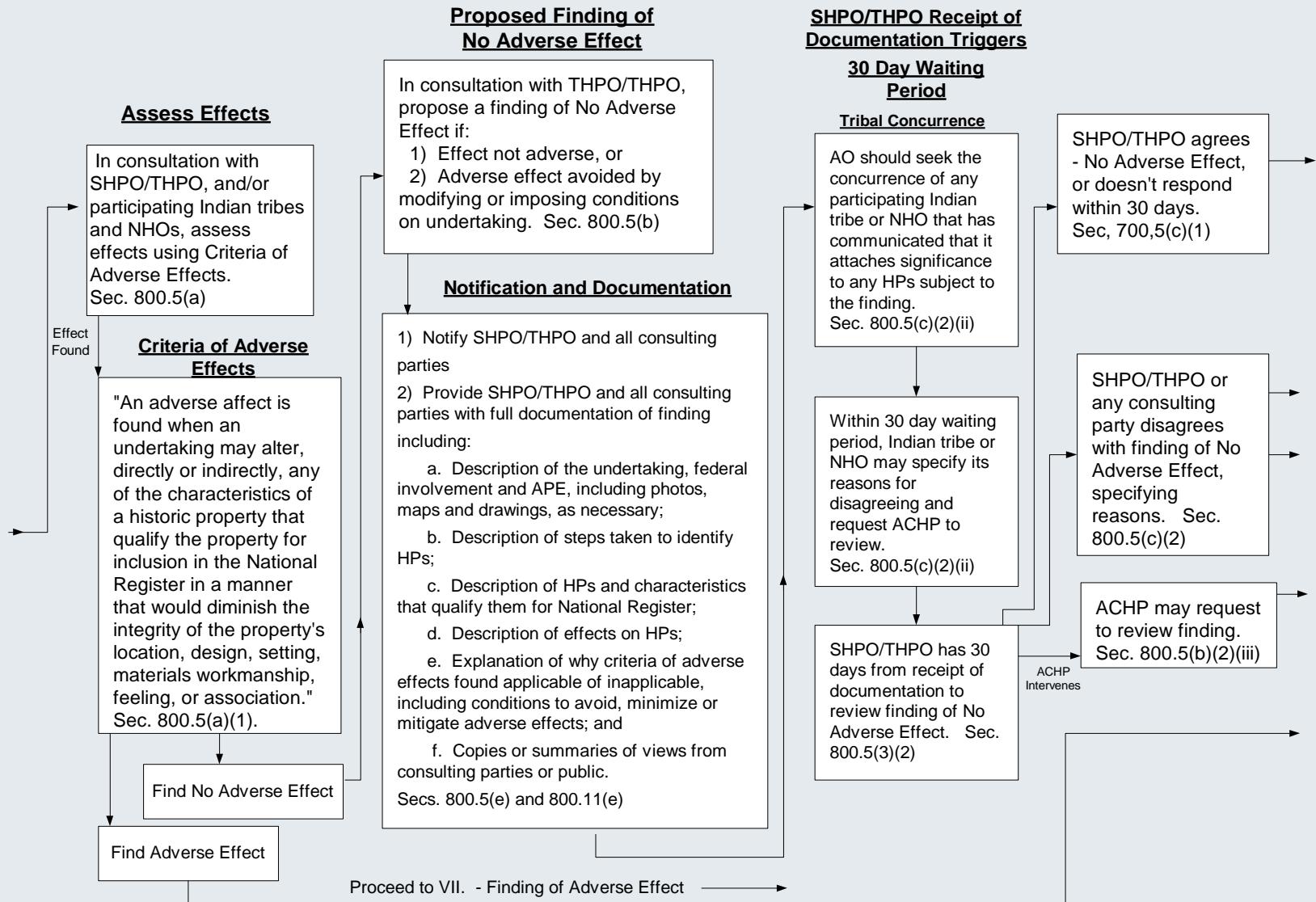
##### Required Preliminary Steps

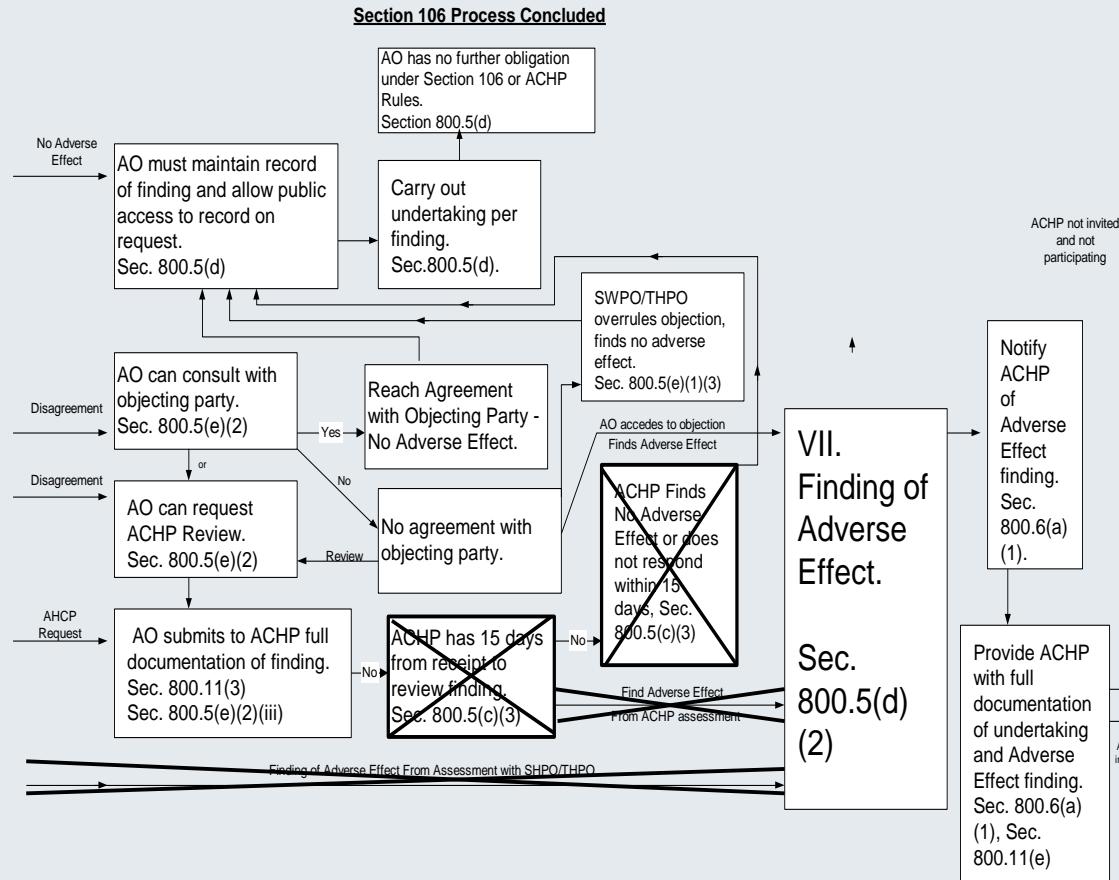


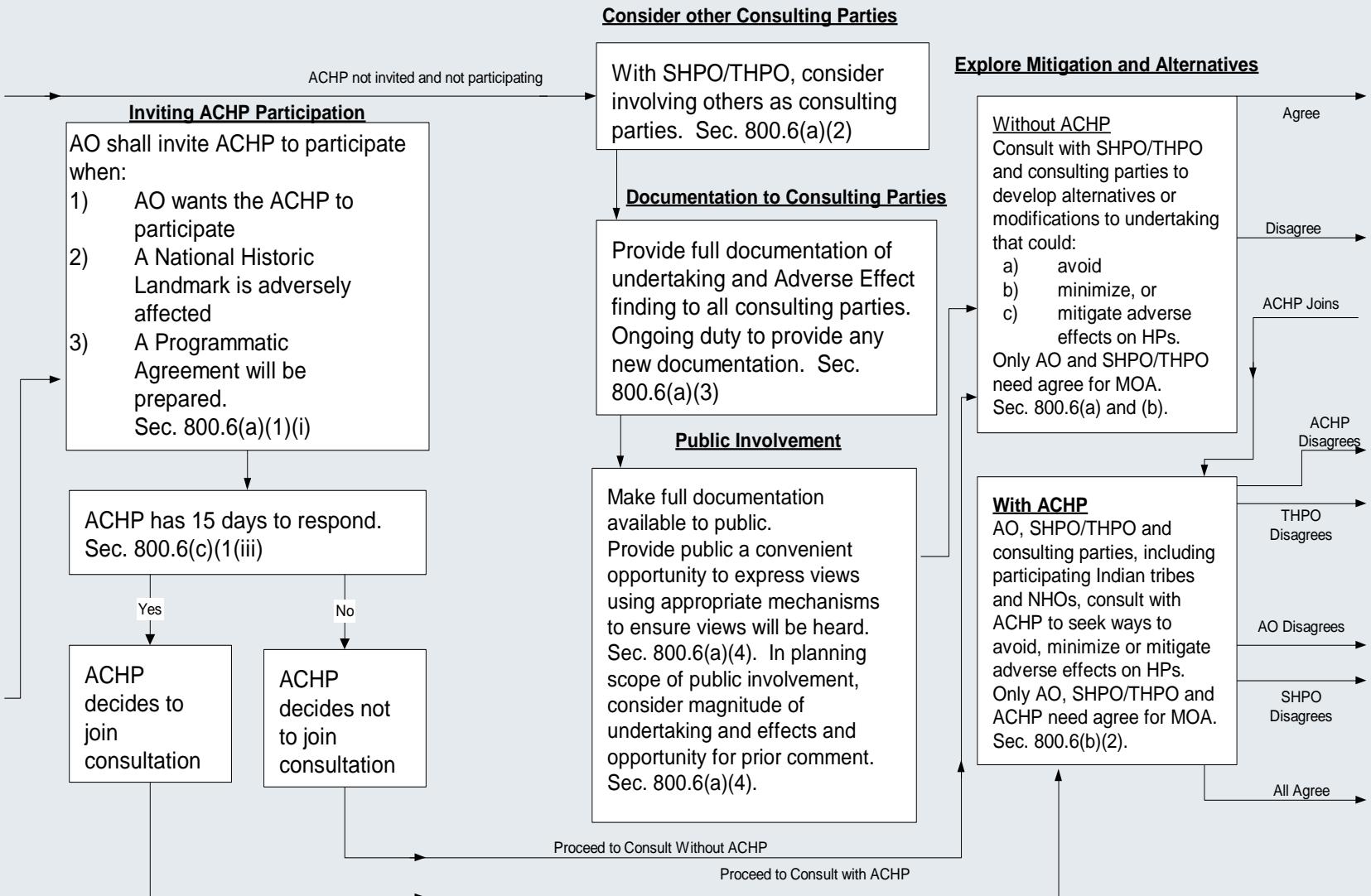
## V. Evaluation of Historic Significance

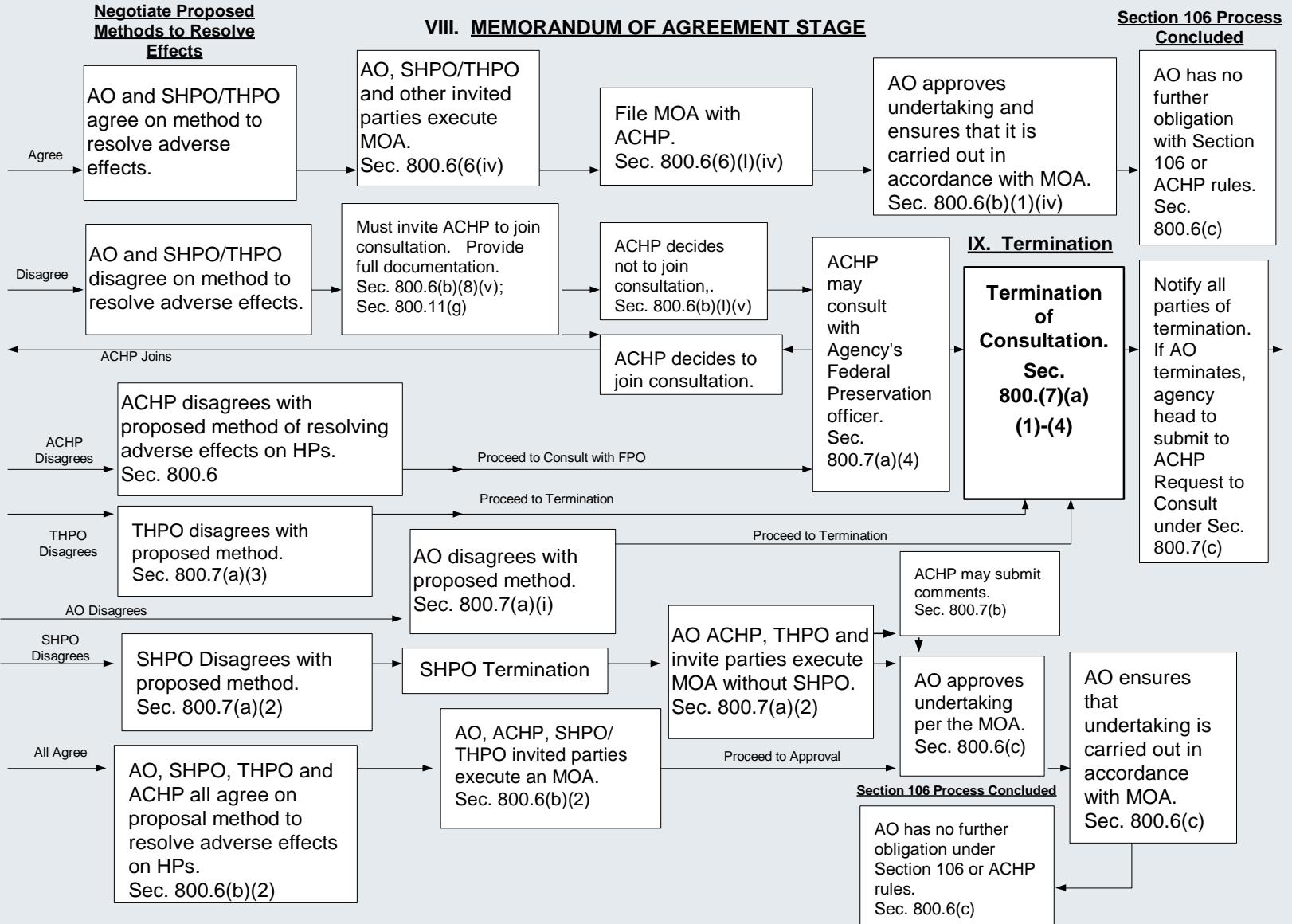












## **IX. Section 800.7(c) Comment Procedure ACHP**

Within 45 days of either: (1) receipt of request from head of agency or (2) date of termination of consultation (AO can agree to extend time):

- 1) Council must provide opportunity for AO, all consulting parties, and the public to provide their views.
- 2) AO must:
  - A) Provide additional existing information regarding undertaking; and
  - B) Assist the ACHP in arranging:
    - i) on site inspection; and
    - ii) an opportunity for public participation.

Sec. 800.7(c)(1), (2)

### **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.

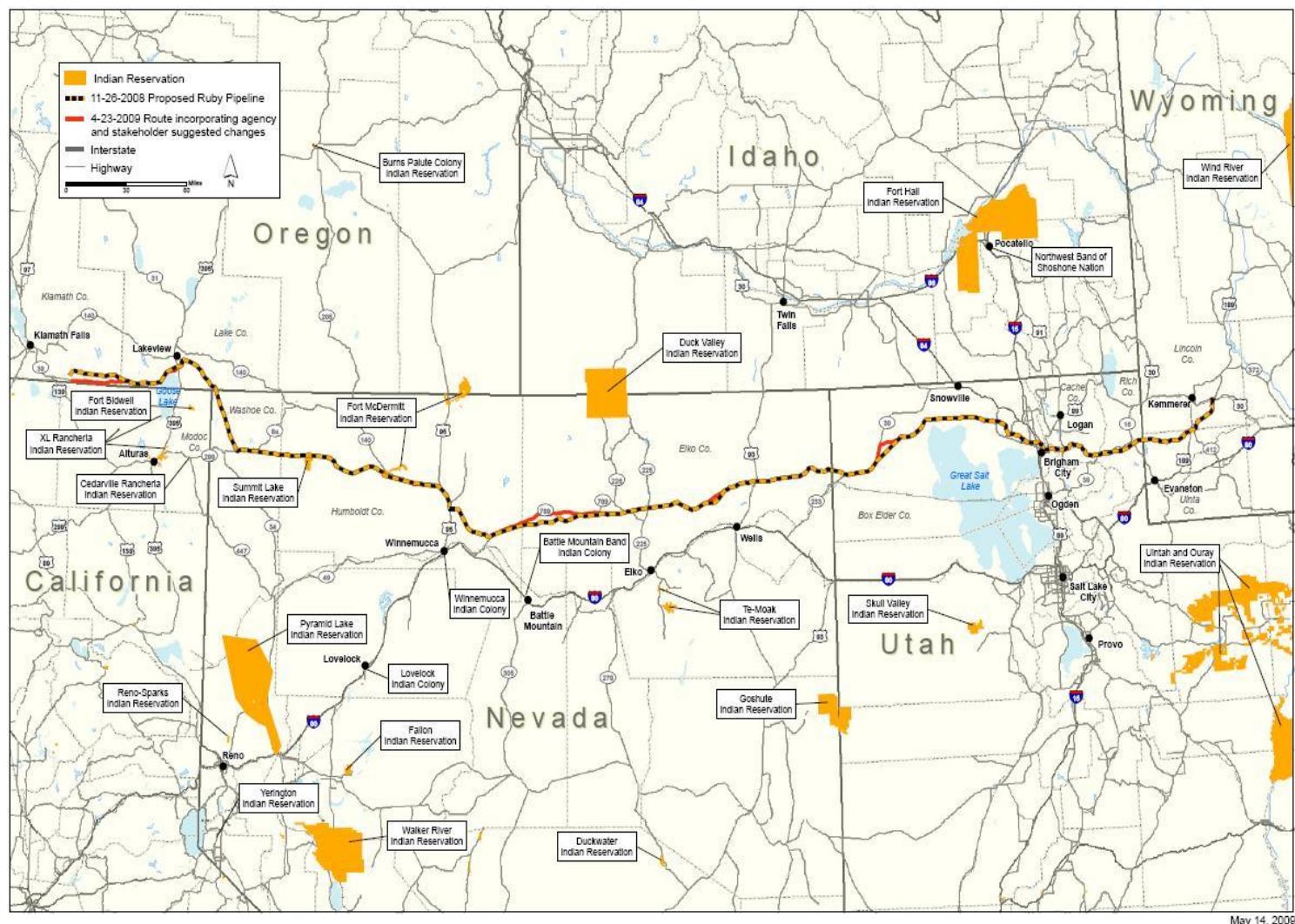
Sec. 800.7(c)(4)

## **XII. Final Decision**

Agency may approve or deny the undertaking .

# 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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