

**DEPARTMENT OF THE INTERIOR****National Park Service****36 CFR Part 61**

RIN 1024-AC79

**Procedures for State, Tribal and Local Government Historic Preservation Programs****AGENCY:** National Park Service, Interior.**ACTION:** Proposed rule.

**SUMMARY:** The National Park Service (NPS) proposes to establish the requirements for an Indian Tribe to assume the duties as State Historic Preservation Officer (SHPO) pursuant to section 101(d)(2) of the National Historic Preservation Act (NHPA). The 1992 amendments to the NHPA include a provision that enables a Tribe to assume any or all of the duties of a SHPO on tribal lands. The proposed rule establishes the formal process by which a Tribe may secure the Secretary of the Interior's (Secretary) approval to assume SHPO duties on tribal land.

**DATES:** The NPS will accept written comments through December 10, 2002. The NPS will hold public meetings on September 20, 2002, at 9 a.m. in Albuquerque, New Mexico; on September 18, 2002, at 9 a.m. in Phoenix, Arizona; on September 16, 2002, 9 a.m. in Reno, Nevada; on September 13, 2002, at 9 a.m. in Seattle, Washington; on October 4, 2002, at 10 a.m. in Oklahoma City, Oklahoma; on October 9, 2002, at 9 a.m. in Lac du Flambeau, Wisconsin; on October 22, 2002, at 9 a.m. in Washington, DC; on September 11, 2002, at 9 a.m. in Polson, Montana; and on October 2, 2002 at 9 a.m. in Fort Yates, North Dakota, to present the proposed rule and to receive oral comments.

**ADDRESSES:** Comments should be addressed to: Chief, Heritage Preservation Services Division, National Center for Cultural Resources, National Park Service, 1849 C Street, NW., NC 330, Washington, DC 20240; Attention: H. Bryan Mitchell. You may hand carry your comments or send them by overnight mail to 800 North Capitol Street, NW., Suite 330, Washington, DC 20002. Fax: (202) 343-3921. E-mail: [Bryan\\_Mitchell@nps.gov](mailto:Bryan_Mitchell@nps.gov). The public meetings noted in **DATES** will be at the Indian Pueblo Cultural Center, Inc. (Antelope Room) 2401 12th Street, NW., in Albuquerque, New Mexico; Intertribal Council of Arizona, El Encanto Building, Suite 130, 2214 North Central Avenue, in Phoenix, Arizona; University of Nevada at Reno,

Continuing Education Bldg., Room 109, 1041 North Virginia Street, in Reno, Nevada; Daybreak Star Indian Cultural Center (Lounge Room), Discovery Park, 34th Avenue West and West Government Way, in Seattle, Washington; Shepherd Mall, Suite 65, NW 23rd Street and Villa, in Oklahoma City, Oklahoma; Lake of the Torches Resort Hotel (3rd Floor Conference Room), 510 Old Abe Road, in Lac du Flambeau, Wisconsin; Department of the Interior (Room 7000-B) 1849 C Street, NW., in Washington, DC; KwaTaqNuk Resort Hotel (Charlo Room), 303 U.S. Highway 93 East, in Polson, Montana; and Prairie Knights Casino and Lodge (Prairie View Room), 7932 Highway 24, in Fort Yates, North Dakota.

**FOR FURTHER INFORMATION CONTACT:** H. Bryan Mitchell, National Park Service, 1849 C Street, NW. (NC 330), Washington, DC 20240. Telephone: (202) 343-9558. Fax: (202) 343-3921. E-mail: [Bryan\\_Mitchell@nps.gov](mailto:Bryan_Mitchell@nps.gov).

**SUPPLEMENTARY INFORMATION:****Background**

The NPS has promulgated 36 CFR part 61 pursuant to the NHPA (16 U.S.C. 470 *et seq.*) that implemented the national historic preservation program as a partnership among Federal, State, Tribal, and local governments, non-profit organizations, and private individuals. The NHPA also created the mechanism for funding this partnership, the Historic Preservation Fund. This partnership promotes and carries out the preservation of irreplaceable historic and archeological resources that provide the foundation of the Nation's heritage. Through this partnership the vital legacy of cultural, educational, aesthetic, inspirational, and economic benefits of our historical patrimony will be maintained and enriched for future generations of Americans. 36 CFR part 61 provides the regulatory framework for voluntary participation by State, Tribal, and local governments in the national historic preservation program. The Secretary, operating through the Director of the National Park Service (Director), administers these programs.

The specific objects of this proposed rule are §§ 61.8 and 61.9 of 36 CFR part 61. These two sections, which the NPS reserved for future development in the recent overall revision of Part 61 (published for effect in the **Federal Register** on March 9, 1999), are specific to tribal participation in the national historic preservation program. Where a Tribe assumes responsibilities on tribal lands pursuant to this section of the NHPA, the SHPO does not have

responsibility for those functions, except in those cases where a non-tribal land owner requests the State's participation in addition to the Tribe's. Prior to the enactment of the 1992 amendments, the NHPA included no provision by which a Tribe could formally assume these duties in the national program. Issuance of these two sections will complete the revision of Part 61 in response to the 1992 amendments to the NHPA.

Federally recognized Tribes that exercise governmental jurisdiction over tribal lands are eligible for this program. The NHPA defines tribal lands as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities (16 U.S.C. 470w).

As of the date of publication of this proposed regulation, the Secretary has already approved 31 Tribes to assume SHPO duties pursuant to section 101(d)(2) of the NHPA. In the absence of a regulation specifically implementing that new section of the NHPA, the NPS has reviewed tribal proposals to date in accordance with and in reliance upon the existing statutory and regulatory requirements for SHPOs. The NPS has based this review process on the broad requirements that ensure a certain level of quality, consistency, and public participation in the delivery of the national program. The current review process has demonstrated the need for rules that establish a formal assumption process for Tribes and that respond more specifically to those values and needs of Tribes that are distinct from those of the States. Further, section 101(d)(2) of the NHPA, itself, specifically anticipates that the NPS will promulgate regulations that are specific to tribal assumption of SHPO duties.

**Section by Section Analysis***Section 61.8 Tribal Programs*

Taken as a whole, the section includes the process by which a Tribe can gain approval from the Secretary, acting through the Director, to assume SHPO duties on tribal lands. This section affirms that a Tribe must meet existing broad requirements for level of quality, consistency, and public participation in order to be deemed fully capable of assuming SHPO duties. However, an important purpose of this section is to distinguish tribal participation in the national program from state participation in the national program, where such distinctions are appropriate and consistent with the purposes of the NHPA. The section:

- Provides the necessary guidance for what a Tribe must include in a proposal;
- Establishes deadlines by which the NPS must respond to a tribal proposal;
- Implements the provisions of section 101(d)(1)(B) of the NHPA that allow for waivers and modifications of the requirements of the NHPA, in order to accommodate tribal values and the cultural setting of tribal heritage preservation goals and objectives;
- Provides a process by which a Tribe can request review by the Director of any decision to disapprove a tribal proposal or to deny a tribal request for a waiver or modification of requirements, or of any failure to act within certain deadlines; and
- Establishes the process for periodic review by the NPS of approved tribal programs, in accordance with sections 101(d)(2) and 101(b)(2) of the NHPA.

(a) What Is the Purpose of the Section?

This paragraph makes clear that the procedures and requirements set out in § 61.8 apply only to tribal assumption of SHPO responsibilities in the national historic preservation program. The procedures and requirements of this rule do not apply to tribal historic preservation programs and activities that are created and carried out solely pursuant to tribal ordinances.

For example, if a Tribe assumes the responsibility for nominating properties to the National Register of Historic Places, the Tribe must follow the National Register's nomination procedures, and it must use the National Register's evaluation criteria to assess the significance of the property being nominated. On the other hand, if the Tribe proposes to establish and maintain its own tribal register—either instead of or in addition to nominating properties to the National Register—the Tribe may establish whatever procedures and evaluation criteria it feels best meet the Tribe's needs. If a Tribe chooses only to establish and maintain a tribal register, then the responsibility for nominating properties to the National Register remains with the SHPO.

In another example, if a Tribe assumes the SHPO's responsibility for commenting on the possible effects of proposed Federal undertakings, the Tribe must carry out that responsibility in accordance with the regulations (36 CFR 800) of the Advisory Council on Historic Preservation. The Tribe's authority within that arena is set out in that regulation. On the other hand, if a Tribe adopts an ordinance requiring tribal approval and a permit for activities on tribal land that may affect historic or cultural resources, the terms

of that ordinance are set out by the Tribe to meet its own needs. The two processes are separate and do not substitute for each other.

(b) What Policies Govern Tribal Participation in the National Historic Preservation Program?

The statements of policy affirm that:

- (1) tribal assumption of SHPO duties is a governmental function and so is a part of the government-to-government relationship between the United States and Indian Tribes;
- (2) tribal participation will strengthen the national historic preservation program [16 U.S.C. 470–1(2)]; and
- (3) the program should encourage and facilitate tribal participation [16 U.S.C. 470–1(d)(1)(A)];

(c) How Will the NPS Implement These Policies in Carrying Out the Procedures and Requirements for Tribal Assumption of SHPO Duties?

The NPS will administer this rule in a manner sufficiently flexible to respond to the varying scopes of tribal programs and to tribal values while remaining consistent with the intent and purposes of the NHPA.

(d) What Terms Do I Need To Know?

The NHPA defines most of the terms used in this rule. Those definitions are not repeated here. This paragraph defines one very important term not defined elsewhere: “tribal traditional cultural authority.” The definition affirms two important ideas for the purposes of this program. First, the only test for determining that someone is a tribal traditional cultural authority is whether the Tribe recognizes that person as such. Second, the NPS attributes the same professional standing and credibility to a tribal traditional cultural authority as he or she does to an individual who meets the Secretary of the Interior's Professional Qualifications Standards. This equivalent standing does not mean that a tribal traditional cultural authority is necessarily qualified to assess the archeological, historical, or architectural significance of a site. Likewise, a professionally qualified archeologist, historian, or architectural historian is not necessarily competent to assess the traditional cultural significance of that same site. The NPS recognizes each of these individuals as competent within a specific sphere of knowledge.

(e) How Does Our Tribe Seek Approval To Assume SHPO Functions?

This paragraph reiterates the NHPA's three fundamental procedural requirements that a Tribe must meet

when it proposes to assume SHPO duties on tribal lands:

- (1) submit an appropriate resolution from the Tribe's chief governing authority;
- (2) duly designate a Tribal Historic Preservation Officer (THPO) who will be responsible for carrying out these duties; and
- (3) submit a Program Plan that describes how the Tribe will carry out the duties it proposes to assume.

(f) What Are the General Requirements for Our Tribe's Program Plan?

This paragraph establishes the basic framework for a Program Plan. It refers to the SHPO functions as they are set out in the NHPA and calls on a Tribe to indicate in its Program Plan which functions the Tribe will assume and which ones it will not assume. The paragraph also makes clear that a Tribe must include in its Program Plan sufficient descriptive information on the Tribe's current historic preservation activities and on how the Tribe will carry out the functions it proposes to assume, so that the NPS can determine whether the Tribe is, in the words of the NHPA, “fully capable” of carrying out the functions it proposes to assume.

The paragraph also indicates that a Tribe may, at its discretion, include other materials in its Program Plan, such as a request for a waiver or modification of requirements, a request for technical assistance, and any other background information the Tribe wishes to include.

(g) What Are the Specific Elements That Must Be in a Tribal Program Plan?

This paragraph provides more detailed guidance on the descriptive information a Tribe must provide in its Program Plan. The NPS bases the required information directly on existing statutory and regulatory requirements for SHPO duties. The Tribe must demonstrate its familiarity with those requirements and describe how it will meet them, so that the NPS can determine, pursuant to section 101(d)(2)(D)(i) of the NHPA, whether the Tribe is “fully capable of carrying out the functions specified in the plan.” However, the paragraph also modifies some of the requirements imposed on States, in order to take into account tribal values and to recognize that tribal programs may vary in scope from state programs.

The paragraph is divided into two parts. The first part concerns information about the Tribe's overall program:

- (a) Information on how the Tribe will include professionally qualified individuals in its program;

(b) Information on how the Tribe will include an adequate and qualified review board in its program; and

(c) Information on how the Tribe will provide for adequate public participation in its program.

Two examples of how these overall requirements are modified for Tribes are:

(1) The NHPA requires an SHPO to employ or appoint "such professionally qualified staff as may be necessary \* \* \*". Existing regulations (36 CFR 61.4) require that such State staff include a professionally qualified architectural historian, a professionally qualified historian, and a professionally qualified archeologist. The Secretary recognizes that unique cultural settings, smaller workloads, more limited program scopes, and limited funding may make such full-time staffing requirements both unnecessary and infeasible for a Tribe. Therefore, this proposed rule offers a Tribe greater flexibility to arrange for access to professionally qualified individuals as necessary to meet the specific needs of a Tribe's program.

(2) The NHPA requires SHPO programs to include "an adequate and qualified" review board to review National Register nominations and to provide general programmatic advice to the SHPO. Existing regulations (36 CFR 61.4) require that a majority of the members of such State boards meet the Secretary's Professional Qualifications Standards. However, the Secretary recognizes that, like many local historic preservation programs that the Secretary has certified, Tribes may not have access to professionally qualified individuals who are locally available and willing to serve on the board. Further, the Secretary recognizes that the nature and scope of THPO programs may be such that they are better served by board members who are traditional cultural authorities, elders, and others experienced in the preservation of tribal culture. Therefore, this proposed rule only requires that tribal review board members be interested and experienced in historic preservation and/or tribal culture, in order for the board to be deemed "adequate and qualified."

The second part of the paragraph concerns information on the specific SHPO functions the Tribe may assume, with emphasis on the following three functions:

(a) The National Register nomination process;

(b) Consultation with Federal agencies pursuant to section 106 of the NHPA; and

(c) Review of proposals for rehabilitation of historic properties that may qualify for Federal tax credits.

The required information for these three functions makes clear that a Tribe that assumes any or all of these three functions must carry them out in a manner that is consistent with existing regulations applicable to SHPOs. However, the paragraph also makes clear that a Tribe that finds these existing regulations to be contrary to tribal values may seek and receive a waiver or modification of those regulations from the Secretary.

(h) How Does Our Tribe Obtain a Waiver or Modification of the Requirements of the NHPA or of This Rule?

This paragraph implements the provision of section 101(d)(1) of the NHPA that allows for waivers and modifications of existing legal requirements applicable to SHPOs in order to take into account tribal values and to conform to the cultural setting of tribal heritage goals and objectives. A Tribe may include such a waiver or modification request as a part of its Program Plan. While the NPS neither requires nor expects that a Tribe include or divulge any information that is sensitive or culturally inappropriate for the Tribe, the Tribe must explain why a waiver or modification is appropriate, and it must propose a specific alternative.

(i) How Will the NPS Consult With Us on Our Proposed Program Plan?

This paragraph makes clear that, when the NPS receives a proposed Program Plan from a Tribe, it will consult with the Tribe in an effort to clarify any ambiguities and remedy any deficiencies in that Plan. The paragraph also establishes deadlines by which the NPS must:

(a) Acknowledge receipt of a Tribe's Program Plan;

(b) Notify a Tribe of any ambiguities or apparent deficiencies in its Program Plan;

(c) Notify a Tribe of any ambiguities or apparent deficiencies remaining in its Program Plan following consultation with the NPS.

(j) Will the NPS Consult With Anyone Else About Our Proposed Program Plan?

This paragraph makes clear that the NHPA requires NPS to consult with the appropriate SHPO(s), any other Tribes whose traditional homelands may be affected, and, if you are assuming responsibilities pursuant to section 106, the Advisory Council on Historic Preservation. The paragraph establishes

a deadline by which NPS must contact these other consulting parties, as well as a deadline by which the consulting parties must return any comments to NPS.

(k) On What Basis Will the Secretary Review Our Proposed Program Plan?

This paragraph makes clear that the NPS must decide to approve or not to approve a Tribe's Program Plan based on the statutory test of whether the Tribe is "fully capable" of carrying out the SHPO functions it proposes to assume. The paragraph binds the NPS to determine whether the Tribe is fully capable based on whether the Tribe has met the requirements set out in § 61.8(f) through § 61.8(i) of this rule.

The paragraph also affirms that, in any case where a Tribe has requested a waiver or modification of existing requirements applicable to SHPOs, the NPS will approve that request upon finding that such a waiver or modification is feasible, necessary to accommodate tribal values, and consistent with the purposes of the NHPA.

(l) How Will the NPS Make a Decision on Our Program Plan?

Item (1) of this paragraph requires the NPS to provide the Tribe with a written finding as to whether the Tribe is fully capable of carrying out its proposed duties and whether the NPS has approved any requested waivers or modifications.

Item (2) indicates that the finding must include an explanation for the NPS' decisions, a description of the necessary steps to correct any deficiencies that resulted in denial of the Tribe's request, an offer of technical assistance as appropriate, and a notice of the Tribe's right to request the Director's review of certain adverse decisions or actions.

Items (3) and (4) establish that the NPS may approve a Tribe's entire plan, disapprove the entire plan, or approve parts of the plan and disapprove other parts. The basis for partial approval of a plan by the NPS and/or partial assumption of duties by the Tribe is section 101(d)(2) of the NHPA, which provides that, "A tribe may assume *all or any part* of the functions of a State Historic Preservation Officer \* \* \* [emphasis added]"

Item (5) makes clear that a Tribe that assumes only a portion of the SHPO duties at first may at any subsequent time assume any or all of the remaining duties upon approval by the NPS. Any Tribe that wants in the long term to assume all SHPO duties but feels that it

should take on those duties gradually or in phases may do so.

(m) How Can We Obtain a Review of a Negative Decision by the NPS?

This paragraph establishes a clear process by which a Tribe can request the Director to review any decision that disapproved in whole or in part the Tribe's proposal to assume SHPO duties, any decision to deny the Tribe's request for a waiver or modification of requirements, or any failure to act by the deadlines established by this rule. The paragraph indicates what a Tribe should include in its request to the Director, and it establishes a 60-day deadline for making such a request. The paragraph calls for a meeting between the Tribe and the Director if the Tribe requests such a meeting, or if the Director believes that a meeting would be helpful. The paragraph requires that the Director's decision be in writing and that it include an explanation for the Director's action. Finally the paragraph requires the Director to act within 60 days of receiving the Tribe's request.

(n) May a Tribe That Assumes SHPO Functions Obtain Relevant Materials From the SHPO?

Existing survey inventories and archives of the SHPOs often include significant information on sites within the boundaries of Indian reservations, as well as on aboriginal lands now outside the reservation. A Tribe that assumes SHPO duties needs that information very much, not only so that it can build upon rather than duplicate previous work carried out pursuant to the NHPA, but also so that it can effectively and efficiently work with the Federal agencies that consult with the Tribe pursuant to the NHPA.

A few of the Tribes that have already assumed SHPO duties have reported some difficulties in acquiring copies of SHPO records. Those tribes have requested that the NPS require SHPOs to turn over their original records to the Tribes at no cost to the Tribes.

The NPS cannot require SHPOs to divest their archives of these official state records. In addition, the SHPOs will have a continuing need to refer to those records for their own planning purposes. The NPS also cannot require that an SHPO bear all the costs of making duplicate records for a Tribe.

On the other hand, the NPS recognizes the critical importance of these records for THPOs. This paragraph affirms that the State, if the Tribe requests, must provide the Tribe with original records or legible duplicates for sites on tribal lands or on a Tribe's aboriginal lands. While a State may

charge the Tribe a fee not to exceed actual costs for transferring or duplicating materials, the NPS encourages the States to give whatever assistance they can to a Tribe that is assuming SHPO duties, so that the Tribe can obtain the necessary records quickly at the lowest possible cost.

(o) How Does the NPS Review the Performance of a Tribe That Has Assumed SHPO Functions?

Section 101(d)(2) of the NHPA says that a tribe may assume SHPO duties "in accordance with" section 101 (b)(2) of the NHPA. This latter section requires periodic review, not less often than once every 4 years, of each SHPO program to ensure that it remains consistent with the NHPA. 36 CFR 61.4 establishes the basic procedure by which the NPS carries out this review of state programs.

Accordingly, paragraph 61.8(o) of this rule establishes a basic process for review of each THPO program that is identical to the procedure for review of SHPO programs as set out in 36 CFR 61.4

The principal features of the review process are:

1. It is collegial;
2. It focuses on identifying both strengths and weaknesses;
3. It provides a Tribe with a reasonable opportunity to correct any problems;
4. It allows a Tribe to request a review by the Director of any findings or required actions; and
5. It results in a formal continuation of a Tribe's approved status, or, where major deficiencies remain uncorrected, in a revocation of approved status and suspension of any financial assistance.

(p) What Is the Effect of This Rule on Tribal Sovereignty, Treaty Rights, and Other Tribal Rights?

This paragraph affirms that nothing in this rule is intended to modify tribal sovereignty or to preempt any treaty rights or other rights in any way.

(q) What Is the Effect of This Rule on Tribes Previously Approved To Assume SHPO Functions?

This paragraph "grandfathers" those Tribes that have been approved to assume SHPO duties prior to the effective date of this rule, so that they retain their approved status without reapplying to the NPS for approval.

*Section 61.9 Grants to Tribal Programs*

(a) Are Tribes That Have Assumed SHPO Functions Eligible for Financial Assistance To Carry Out Those Functions?

Item (1) of this paragraph affirms that a Tribe that is approved to assume SHPO duties is eligible to receive financial assistance from the Historic Preservation Fund (HPF), just as SHPOs are eligible to receive financial assistance from the HPF.

Item (2) establishes the first day of the Federal fiscal year (October 1) as the deadline by which a tribal program must have been approved in order to be eligible for financial assistance in any given fiscal year. This deadline is important and necessary for two reasons:

1. The number of Tribes participating in this program is growing and will continue to grow for the foreseeable future. A Tribe may submit a program plan to the NPS for approval at any time during the year.

2. The NPS provides annual financial assistance to approved Tribes based on an apportionment formula very soon after Congress appropriates the funds. Each approved Tribe needs to know as early as possible what its funding level will be for the year. The Tribe also needs access to its funds as early in the fiscal year as possible to meet ongoing costs. Already-approved Tribes would suffer unfairly, if apportionment were delayed in order to wait for possible additional Tribes.

*Section 61.9(b) What Requirements Govern the Financial Assistance for Tribes That Have Assumed SHPO Functions?*

This paragraph affirms that the various departmental and government-wide requirements for receiving and spending Federal grant-in-aid money apply to the funds a Tribe receives through this program. This paragraph also affirms the provisions of section 101(e)(5) of the NHPA that the matching-share requirements normally attached to the HPF may be modified for Tribes.

**Drafting Information**

The primary author of this rule is H. Bryan Mitchell, Heritage Preservation Services, National Center for Cultural Resources, National Park Service.

**Compliance With Laws, Executive Orders and Department Policy**

*Regulatory Planning and Review (Executive Orders 12866)*

This document is not a significant rule and is not subject to review by the

Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The proposed rule provides the framework for the voluntary participation of individual Indian tribes in the national historic preservation program. Current grant funding available to participating tribes is under \$5 million nationwide.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This rule establishes the formal relationship between the NPS and participating tribes. Consultation between Federal agencies and Indian tribes concerning Federal undertakings on tribal lands is already required by section 110 of the NHPA and by the regulations (36 CFR part 800) of the Advisory Council on Historic Preservation.

(3) This rule does not alter any existing budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This rule does make clear that Indian tribes that choose to participate in the national historic preservation program are eligible for additional grant funding from the Historic Preservation Fund to assist the tribe in carrying out the activities of that program. The rule establishes an annual deadline by which a tribe must be approved in order to be eligible for the next funding cycle; it also affirms that various government-wide and departmental requirements apply to grants received by participating tribes.

(4) This rule does not raise novel legal or policy issues. The programmatic requirements established by this proposed rule for tribes that choose to participate in the program are consistent with the broad programmatic requirements that have been in place for states for over 25 years. At the same time, the proposed rule recognizes the differences in scope, workload, and program emphasis that exist between states and tribes, as well as among tribes.

#### *Regulatory Flexibility Act*

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). As noted above, the proposed rule only establishes

procedures and requirements for Indian tribes that voluntarily choose to participate in the national historic preservation program. Total grant funding available for participating tribes is less than \$5 million annually.

#### *Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of \$100 million or more. As noted above, the proposed rule only establishes procedures and requirements for Indian tribes that voluntarily choose to participate in the national historic preservation program. Total grant funding available for participating tribes is less than \$5 million annually. The proposed rule establishes no new requirements for small businesses.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Federal agencies are already required by section 110 of the NHPA and by the regulations (36 CFR part 800) of the Advisory Council on Historic Preservation to consult with Indian tribes concerning proposed Federal undertakings. Where a tribe has assumed SHPO functions pursuant to this proposed rule, the costs to Federal agencies may actually be reduced in some cases, because consultation with the SHPO in addition to the tribe would no longer be required.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. The proposed rule establishes the procedures and requirements for any Indian tribe that chooses to enter into a formal relationship with the Secretary in which the tribe carries out the national historic preservation program on tribal lands.

#### *Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments, or the private sector. Tribal assumption of SHPO duties pursuant to the NHPA and this proposed rule is completely at the discretion of individual tribal governments with jurisdiction over tribal lands, so that no mandate of any

kind arises from this proposed rule. In addition, the proposed rule creates no significant or unique effect on any unit of government.

#### *Takings (Executive Order 12630)*

In accordance with Executive Order 12630, the rule does not have significant takings implications. The rule creates administrative procedures for the organization of Tribal historic preservation offices. This rule does not affect private property owners. The SHPO duties a tribe may assume pursuant to the NHPA and this proposed rule do not include any responsibilities or activities that affect property rights protected by the Constitution or that pose any risk of being a compensable taking. A takings implication assessment is not required.

#### *Federalism (Executive Order 13132)*

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Tribal participation in the national program is voluntary. Nonetheless, the NPS has consulted with participating tribes in drafting this proposed rule. This proposed rule has evolved directly from a draft prepared by the participating tribes and provided to the NPS in July, 1997. Later in the drafting process the NPS met with the participating tribes in October, 1998 to discuss the draft at that point. The NPS also solicited written comments from the participating tribes following that meeting but received none. While the proposed rule has undergone a series of editorial refinements since the 1998 meeting, it remains substantively the same. The proposed rule has no significant effect on states' abilities to make their own decisions. Where a tribe is approved by the NPS to assume SHPO functions on tribal lands, the state no longer has those responsibilities on tribal lands. However, the level of SHPO activity on tribal lands is relatively small and consists of providing technical assistance requested by tribes and consulting with Federal agencies on the potential impacts of their undertakings. Allowing tribes to assume SHPO functions with regard to tribal lands is mandated by the NHPA and not created by this proposed rule. The NHPA also calls for promulgation of regulations to implement the mandate, so that there is no alternative to publishing the proposed rule. A Federalism Assessment is not required.

*Civil Justice Reform (Executive Order 12988)*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

*Paperwork Reduction Act*

The Office of Management and Budget has approved the collection of information contained in this rule under 44 U.S.C. 3507 *et seq.* and has assigned clearance number 1024–0038. The information collected is part of the process for reviewing the procedures and programs of State, Tribal, and local governments participating in the national historic preservation program and the Historic Preservation Fund grant program. The NPS will use the information to evaluate those programs and procedures for consistency with the National Historic Preservation Act of 1966, as amended, and compliance with government-wide grant requirements. Participating State, Tribal, and local governments must respond in order to obtain a benefit under these programs. Note that a Federal agency may not conduct or sponsor, nor must a person respond to, a collection of information unless it displays a currently valid OMB control number. The NPS provides no assurance of confidentiality to respondents with the exception for the information concerning the location of some properties included in government historic preservation property inventories. Pursuant to Section 304 of the National Historic Preservation Act of 1966, as amended, the NPS tightly controls the release of information, when such release could have the potential of damaging those qualities that make a property historic or of vital cultural or religious significance.

We estimate the public reporting burden for the collection of this information averages 14.06 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden to Ms. Diane M. Cooke, Information Collection Officer, National Park Service, 1849 C Street NW., MS 3317, Washington, DC 20240 and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Desk Officer for the Department of the

Interior (1024–0038), Washington, DC 20503.

*National Environmental Policy Act*

This rule does not constitute a major Federal action significantly affecting the quality of the human environment.

*Government-to-Government Relationship With Tribes*

In accordance with the Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249) and President’s memorandum of April 29, 1994, “Government to Government Relations with Native American Tribal Governments” (59 FR 22951) and 512 DM 2:

We have evaluated the possible effects on federally recognized Indian tribes. The proposed rule does not, in and of itself, have any effect on tribal trust resources, as contemplated by 512 DM 2. However, the proposed rule is of particular concern to those tribes. The proposed rule formalizes the process established by the National Historic Preservation Act, whereby a tribe can voluntarily choose to assume certain responsibilities pursuant to that Act. If a tribe chooses not to assume those duties and therefore takes no action to request approval to do so, this proposed rule has no effect upon the tribe. There is no consequence to the tribe that chooses not to assume these duties. Even where a tribe does choose to assume these responsibilities in accordance with this proposed rule, the tribe is assuming responsibilities previously assigned to a State Historic Preservation Officer, not to an agency of the Federal government, so that the trust relationship between the tribe and the Federal government is unaltered. The overall policy goal of this proposed rule and of section 101(d)(2) of the National Historic Preservation Act is the enhancement of tribes’ abilities to identify, evaluate, and protect those cultural and historic resources that are of particular importance to the tribes.

*Clarity of This Regulation*

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to

understand if it were divided into more (but shorter) paragraphs? (5) Is the description of the rule in the “Supplementary Information” section of the preamble helpful in understanding the proposed rule? What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW, Washington, DC 20240.

*Public Comment Solicitation*

If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to Heritage Preservation Services, National Center for Cultural Resources, National Park Service, 1849 C Street, NW (NC 330), Washington, DC 20240. You may also comment via the internet by sending your comments to the following e-mail address: [Bryan\\_Mitchell@nps.gov](mailto:Bryan_Mitchell@nps.gov). Please include “Attn: RIN 1024–AC79” and your name and return address in your message. In addition, any interested person will have the opportunity to make oral comments at one of the public meetings noted at the beginning of this rulemaking. Finally, you may hand-deliver comments to Heritage Preservation Services, National Center for Cultural Resources, National Park Service, 800 North Capitol Street, Room 330, Washington, DC. Our practice is to make comments, including names and home addresses or respondents, available for public review during regular business hours. Individual respondents may request that we withhold their name or home address from the rulemaking record, which we will honor to the extent allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

**List of Subjects in 36 CFR Part 61**

Grant programs—natural resources, Historic preservation, Indians—tribal government, Reporting and recordkeeping requirements.

We propose to amend 36 CFR part 61 as set forth below:

## PART 61—PROCEDURES FOR STATE, TRIBAL, AND LOCAL GOVERNMENT HISTORIC PRESERVATION PROGRAMS

1. The authority citation for part 61 continues to read as follows:

**Authority:** 16 U.S.C. 470 *et seq.*

2. Revise § 61.8 to read as follows:

### § 61.8 Tribal programs.

(a) *What is the purpose of this section?* This section sets out procedures and requirements for the assumption by Indian Tribes of any or all functions of a State Historic Preservation Officer (SHPO) with respect to tribal lands, in accordance with section 101(b)(2) and (b)(3) of the NHPA. A Tribe that has assumed any or all functions of an SHPO in accordance with the NHPA shall have the same authority and discretion accorded to an SHPO by the NHPA for the purpose of carrying out those functions.

(b) *What policies govern tribal participation in the national historic preservation program?* (1) Congress has recognized that the national historic preservation program will be strengthened by providing Indian Tribes with the opportunity to become full partners in the program.

(2) Our program and regulations should assist Indian Tribes in expanding and accelerating their historic preservation programs to protect their historic properties.

(3) The program to assist Tribes in their preservation activities shall ensure that tribal values are taken into account to the extent feasible.

(4) Qualified tribes are encouraged to assume all or any part of the functions of a SHPO and to plan, conduct, and administer programs, functions, services and activities for which they have assumed responsibility.

(5) An Indian Tribe has an inherent legal right to self-determination and the distinctive rights that flow from its inherent sovereignty. Assuming responsibility for functions in accordance with the NHPA and this regulation is an exercise of the government-to-government relationship between the United States and the Indian tribes.

(6) To the extent feasible, the National Park Service (NPS) will construe this section so as to facilitate tribal assumption of functions pursuant to the NHPA.

(c) *How will the NPS implement these policies in carrying out the procedures and requirements for tribal assumption of SHPO duties?* (1) The NPS will consult with each Indian Tribe

proposing to assume SHPO duties on a government-to-government basis, in a manner respectful of tribal sovereignty, and with the aim of building an effective working relationship between the two governments.

(2) In accordance with section 101(d)(1)(B) of the NHPA, the NPS will recognize the need for flexibility, in order to respond to the varying scopes of tribal historic preservation programs, and in order to accommodate tribal values and the cultural setting of tribal heritage preservation goals and objectives.

(d) *What terms do I need to know?* For the purposes of this section:

*Tribal traditional cultural authority* means any individual recognized as such by an Indian Tribe. For the purposes of this section, a tribal traditional cultural authority has standing equivalent to that of an individual who meets the Secretary of the Interior's Professional Qualifications Standards. For example, in determining the overall historic significance of a property or site, a tribal traditional cultural authority's assessment of the traditional cultural value of that property or site has the same standing as a professionally qualified archeologist's assessment of the archeological value of that property.

(e) *How does our Tribe seek approval to assume SHPO functions?* A Tribe that seeks to assume SHPO functions must do three things:

(1) Submit a resolution to the NPS from the Tribe's chief governing authority requesting the assumption of SHPO functions by the Tribe;

(2) Designate a Tribal Historic Preservation Officer (THPO), through appointment by the Tribe's chief governing authority or as a tribal ordinance may otherwise provide, who shall be responsible for administering the tribal historic preservation program; and

(3) Submit a Tribal Historic Preservation Program Plan (hereinafter the Program Plan) to the NPS.

(f) *What are the general requirements for Tribal Program Plans?* (1) When submitting a Tribal Program Plan for review and approval, you must include the following in your Program Plan:

(i) A clear list of the SHPO functions set out in section 101(b)(3) of the NHPA that you propose to assume.

(ii) Sufficient descriptive information on your current historic preservation program or activities and on the individual functions you propose to assume to allow the NPS to determine whether you are fully capable of carrying out the functions you propose to assume (see paragraph (g) of this

section for further guidance on this requirement).

(iii) A clear list of the SHPO functions, if any, that you propose will remain the responsibility of the SHPO.

(2) You may include the following in your Program Plan:

(i) A request for any waiver or modification of the requirements of the NHPA or of this rule that you believe is necessary to accommodate tribal values or the cultural setting of tribal heritage preservation goals and objectives (see paragraph (h) of this section for further guidance).

(ii) Any additional information you believe will assist the NPS in determining that you are fully capable of carrying out the functions you propose to assume.

(iii) A request for any technical assistance you believe would benefit the Tribe in carrying out the functions you propose to assume.

(g) *What are the specific elements that must be in a Tribal Program Plan?* (1) In describing the overall assumption of SHPO functions set out in your Program Plan, your Program Plan must include:

(i) Information on how the THPO will employ or appoint such professionally qualified individuals as may be necessary for carrying out those functions the Tribe proposes to assume. Such employment or appointment must be through establishment of full or part-time staff positions, or through other arrangements suitable to the workload of the THPO and to the scope of the tribal program. A professionally qualified individual meets the Secretary of the Interior's Professional Qualifications Standards or is recognized by the Tribe as a traditional cultural authority.

(ii) Information on how the THPO will include an adequate and qualified tribal historic preservation review board in the operations of the tribal historic preservation program. The THPO appoints such a board, unless tribal ordinance or the Tribe's chief governing authority provides for another appointment process. Members of the board must have sufficient interest and experience in historic preservation and/or tribal culture to provide the THPO with meaningful advice. The board's duties include providing general advice and guidance to the THPO, reviewing appropriate documentation submitted to the NPS in connection with the Historic Preservation Fund, reviewing National Register nominations where the Tribe has assumed responsibility for that nomination process, and such other duties as may be appropriate.

(iii) Information on how the THPO will provide for adequate participation



in the historic preservation program by Tribal traditional cultural authorities, representatives of other Tribes whose traditional lands are under the jurisdiction of the Tribe, and the interested public. At a minimum, adequate participation of the interested public means that, no less frequently than annually, the THPO solicits and considers comments on the goals and activities of the tribal historic preservation program. The THPO solicits these comments through means such as locally publishing a notice, holding an open meeting, or some other process consistent with the routine procedures of the tribal government.

(iv) An affirmation that on tribal land that is neither owned by a member of the Tribe nor held in trust by the Secretary for the benefit of the Tribe, at the request of the owner of such land, the State Historic Preservation Officer, in addition to the Tribal Historic Preservation Officer, may exercise the historic preservation responsibilities in accordance with section 101(b)(2) and (b)(3) of the NHPA.

(2) In setting out each of the duties in section 101(b)(3) of the NHPA that the Tribe proposes to assume, your Program Plan must include a description of how the Tribe will carry out each of those duties, and a description of how those duties are related to the Tribe's current historic preservation program or activities. If the Tribe proposes to assume responsibility for administering the National Register nomination process, for advising and assisting in the evaluation of proposals for rehabilitation of historic properties that may qualify for Federal tax credits, and/or for consulting with Federal agencies pursuant to section 106 of the NHPA, your Program Plan must include the following:

(i) Information on the process the Tribe proposes for considering and submitting such nominations where the Tribe proposes to assume responsibility for submitting nominations to the National Register of Historic Places. The Tribe's process must be consistent with the National Register process set out in 36 CFR part 60 as it applies to State Historic Preservation Officers. The THPO must ensure that the tribal historic preservation review board has access to advice from appropriately qualified individuals in accordance with paragraph (g)(1)(i) of this section carrying out its responsibilities for reviewing National Register nominations. In the event that the process in 36 CFR part 60 is incompatible with tribal values and/or cultural preservation goals and objectives, the Tribe may propose an

alternative process that provides at a minimum for review of nominations by professionally qualified individuals, review of nominations by a qualified advisory board or other independent, qualified entity, and reasonable opportunity for public comment on nominations before they are submitted to the National Register (*see* paragraph (h) of this section on waivers and modifications of requirements).

(ii) Information on the Tribe's process for reviewing such projects and submitting them to the NPS where the Tribe proposes to assume responsibility for advising and assisting in the evaluation of proposals for rehabilitation of historic properties that may qualify for Federal tax credits or other Federal assistance. The Tribe's process must be consistent with the process set out in 36 CFR part 67 as it applies to State Historic Preservation Officers. In the event that the process in 36 CFR part 67 is incompatible with tribal values and/or cultural preservation goals and objectives, the Tribe may propose an alternative process that provides at a minimum for professional review and timely submission of project documentation to the NPS in a manner that is consistent with the overall purposes of 36 CFR part 67 (*see* paragraph (h) of this section on waivers and modifications of requirements).

(iii) Information that indicates how the Tribe will carry out this responsibility in accordance with the regulations of the Advisory Council on Historic Preservation at 36 CFR part 800, or in accordance with alternate tribal procedures that have been specifically approved by the Council pursuant to section 101(d)(5) of the NHPA where the Tribe proposes to assume responsibility for consulting with Federal agencies for the purposes of section 106 of the NHPA.

(h) *How does our Tribe obtain a waiver or modification of the requirements of the NHPA or of this section?* (1) If, in preparing your Program Plan, you determine that the requirements of the NHPA and/or of this regulation that are applicable to SHPOs are incompatible with tribal values or with the cultural setting of your tribal heritage goals and objectives, you may include as a part of your Program Plan a request that the NPS waive or modify those requirements in order to conform to tribal values and/or the cultural setting of tribal heritage preservation goals and objectives.

(2) Your request must include:

(i) An explanation of the inconsistency between the pertinent requirements and tribal values and/or

the cultural setting of tribal heritage preservation goals and objectives.

(ii) The specific remedy or alternate tribal procedures you propose.

(3) Nothing in this paragraph (h) authorizes the waiver or modification of the duties and responsibilities of the Secretary.

(i) *How will the NPS consult with us on our proposed Program Plan?* (1) Within 21 days of receipt, the NPS will notify you in writing that it has received your proposal. In accordance with section 101(d)(2) of the NHPA and paragraph (g) of this section, a complete proposal includes the formal resolution from the Tribe's chief governing authority, the official designation of a Tribal Historic Preservation Officer, and the Program Plan. If your proposal is incomplete, the NPS will indicate which parts are missing. The consultation process set out in paragraph (j) of this section will begin upon receipt of the missing parts.

(2) Within 45 days of receipt of a complete proposal, the NPS will notify the Tribal Historic Preservation Officer, or other representative specifically designated by the Tribe, in writing of any ambiguities or apparent deficiencies that remain in the proposal and indicate how those ambiguities or apparent deficiencies may be remedied. Within 30 days of receipt of a written response from the Tribe, the NPS will notify the Tribe in writing whether or not the ambiguities or apparent deficiencies have been remedied.

(j) *Will the NPS consult with anyone else about our proposed Program Plan?*

(1) Unless the Tribe notifies the NPS that it wishes to have additional time to revise its proposal, within 21 days of completion of the consultation process in paragraph (i) of this section, the NPS, pursuant to section 101(d)(2)(D) of the NHPA, will provide copies of the Tribe's proposal, including any revisions, to the appropriate SHPO(s), to any other Tribes whose tribal or aboriginal lands may be affected by the conduct of the tribal historic preservation program and, if the Tribe proposes to assume Section 106 responsibilities, to the Advisory Council on Historic Preservation.

(2) The SHPO(s), other Tribes, and the Advisory Council will have 30 days in which to provide written comments to the NPS on the Tribe's proposal.

(k) *On what basis will the Secretary review our proposed Program Plan?* (1) Following the consultation process set out in paragraph (j) of this section, the NPS must review the Program Plan in accordance with section 101(d)(2)(E) of the NHPA. That review must determine:



(i) Whether the Tribe's chief governing authority has requested to assume SHPO functions.

(ii) Whether the Tribe has duly designated a THPO to carry out the functions assumed by the Tribe.

(iii) Whether the Tribe has submitted a Program Plan that demonstrates that the Tribe is fully capable of carrying out the functions it proposes to assume in accordance with the requirements of the NHPA and of this section.

(2) Where the Program Plan includes a request for waiver or modification of requirements in accordance with paragraph (h) of this section, the NPS will review the Tribe's request as a part of its review of the Tribe's Program Plan, pursuant to section 101(d)(1)(B) of the NHPA. Upon finding that a waiver or modification of the requirements of the NHPA is consistent with the purposes of the NHPA, feasible, and necessary to accommodate tribal values and/or the cultural setting of tribal heritage preservation goals and objectives, the NPS will waive or modify such requirements.

(1) *How will the NPS make a decision on our Program Plan?* (1) Within 30 days of completion of the consultation process set forth in paragraph (j) of this section, the NPS must send to the Tribal Historic Preservation Officer or other designated representative of the Tribe a written finding as to:

(i) Whether or not the Tribe is fully capable of carrying out the functions specified in the proposed program plan, including any modifications to that plan as were mutually agreed upon by the NPS and the Tribe pursuant to the consultation process set forth in paragraph (j) of this section; and

(ii) Whether any requested waivers or modifications have been approved.

(2) The written finding must:

(i) Explain the basis for finding that the Tribe is or is not fully capable of carrying out a function or functions. The explanation for any finding that the Tribe is not fully capable must include a reference to the specific requirements(s) of this section and/or of the NHPA that the Tribe has failed to meet.

(ii) Explain the basis for approving or denying any requested waiver or modification.

(iii) Describe the steps the Tribe can take to correct any deficiency the NPS has identified as the basis for a finding that the Tribe is not fully capable of carrying out a function or functions.

(iv) Identify the technical assistance available to the Tribe to correct any noted deficiency.

(v) Clearly specify the Tribe's right to request a review of the decision by the

Director and provide appropriate information on the procedure for filing such a request in accordance with paragraph (m) of this section.

(3) If the NPS finds that the Tribe is fully capable of carrying out the functions specified in the program plan, including any mutually agreed upon modifications to the plan, the NPS must approve the program plan as it may have been modified and transmit the approved plan to the Tribe.

(4) If the NPS finds that the Tribe is not fully capable of carrying out the functions specified in the program proposal as it may have been modified by mutual agreement between the NPS and the Tribe, the NPS will either:

(i) Approve the tribal program plan in part for those portions that the Tribe is fully capable of carrying out; disapprove those portions of the program plan for which the Tribe is not fully capable of carrying out the function(s); and transmit to the Tribe the approved portions of the program plan; or

(ii) Disapprove the entire program plan.

(5) In any case where a Tribe initially assumes only a portion of the responsibilities of section 101(b)(3) of the NHPA, the Tribe may at any subsequent time request approval to assume any or all of the remaining responsibilities in accordance with this section.

(m) *How can we obtain a review of a negative decision by the NPS?* (1) You may request a review by the Director of:

(i) Any decision to disapprove in whole or in part your Program Plan to assume any or all of the functions of an SHPO.

(ii) Any decision to deny your request for a waiver or modification of requirements.

(iii) Any failure to act within the deadlines specified by this section.

(2) You must make your request to the Director within 60 days of the adverse decision or missed deadline. Your request must be in writing, must come from the Tribe's chief governing authority, and must include:

(i) A statement of the decision to be reviewed by the Director.

(ii) A statement of the issues involved in the request for review.

(iii) An explanation of why the Tribe believes the decision is wrong.

(iv) Any appropriate supporting documentation.

(3) If the chief governing authority of your Tribe asks for a meeting with the Director to discuss its request, or, if the Director on his or her own initiative desires such a meeting, the Director will convene a meeting with the designated representatives of the Tribe.

(4) The Director must either meet with the Tribe's representatives or issue a decision in writing within 60 days of receipt of the Tribe's request. In any case where the Director and the Tribe's representatives have met in accordance with paragraph (m)(3) of this section, the Director must issue a decision in writing either within 60 days of receipt of the Tribe's request or within 30 days of the meeting, whichever is later. The Director and the Tribe may agree to extend these deadlines for reasons of mutual convenience or to allow for additional efforts to resolve the disagreement between the Tribe and the NPS. The Director's decision may affirm or overrule the previous decision, either in whole or in part. The Director must base his or her decision on the relevant provisions of this section and/or of the NHPA and must include an explanation that refers specifically to those provisions. The Director's decision is the final administrative decision on the appeal. No person shall be considered to have exhausted administrative remedies with respect to the decision described in this part until the Director has issued a final administrative decision pursuant to this section.

(n) *May a Tribe that assumes SHPO functions obtain relevant materials from the SHPO?* (1) Upon formal assumption of SHPO responsibilities, a Tribe is entitled to receive from the affected SHPO(s) those records, data, maps, and reports, or legible copies thereof, that pertain to sites on tribal land, as well as to those sites on the Tribe's aboriginal lands to which the Tribe attaches religious and cultural significance.

(2) The NPS will foster communication and cooperation between the Tribe and the affected SHPO(s) to ensure that the Tribe receives the information necessary to carry out its responsibilities.

(3) The SHPO may charge the Tribe a fee not to exceed the actual cost of transferring or duplicating the materials.

(o) *How does the NPS review the performance of a Tribe that has assumed SHPO duties?* (1) Pursuant to section 101(b)(2) and (d)(2) of the NHPA, the NPS periodically will evaluate each tribal program for consistency with the NHPA and with the Tribe's approved program plan. The review will occur at least once every four years. The NPS may use on-site and/or off-site inquiries to perform such evaluation. The review will provide the Tribe with written findings and analyses that highlight program strengths and weaknesses.

(2) To the greatest extent feasible the review will be a collegial process that involves both the NPS and the Tribe in

a mutual evaluation and assessment of the program. The NPS will approve the Tribe's program if the NPS determines that it continues to meet the program requirements of the NHPA and of this section.

(3) Each Tribe with a program determined to be consistent with the NHPA will receive timely written notice from the NPS that its approved status is continued.

(4) Any Tribe found to have major program aspects not consistent with the NHPA or with its approved program plan will receive timely written notice of deficiencies from the NPS, along with the required actions for correcting them. Unless circumstances warrant immediate action, the NPS will defer making a decision on program approval for a specified period to allow the Tribe to correct deficiencies or present a justifiable plan and timetable for correcting deficiencies. During this period the Tribe may request that the Director review any findings and required actions.

(5) A Tribe that successfully resolves deficiencies will receive timely written notice from the NPS of continued approved status. Once the NPS renews a Tribe's approved status, the NPS generally will not review that Tribe's program again until the next regular evaluation period, although the NPS

may conduct evaluations more often if the NPS deems it necessary.

(6) A Tribe with deficiencies that warrant immediate action or that remain after the expiration of the period specified pursuant to paragraph (o)(4) of this section will receive notice from the NPS that its approved status is revoked. The NPS will then initiate financial suspension and other actions in accordance with applicable regulatory requirements and applicable related guidance issued by the Secretary.

(p) *What is the effect of this section on tribal sovereignty, treaty rights, and other tribal rights?* Nothing in this section is intended to alter, amend, repeal, interpret, or modify tribal sovereignty, or to preempt treaty rights, or other rights of an Indian Tribe, or modify or limit the exercise of such rights.

(q) *What is the effect of this section on Tribes previously approved to assume SHPO functions?* Any Tribal Historic Preservation Program approved prior to [the effective date of the final rule]:

(1) Retains that status in accordance with the terms of the previously executed Memorandum of Agreement, and

(2) May, at the Tribe's request, modify its existing agreement in accordance with this section.

3. Revise § 61.9 to read as follows:

#### **§ 61.9 Grants to tribal programs.**

(a) *Are Tribes that have assumed SHPO functions eligible for financial assistance to carry out those functions?*

(1) Each Tribe with an approved tribal program is eligible for grants-in-aid from the Historic Preservation Fund.

(2) A Tribe must have an approved program not later than the first day of the Federal fiscal year (October 1), in order to be eligible for a grant-in-aid during that same fiscal year.

(b) *What requirements govern the financial assistance for Tribes that have assumed SHPO functions?* (1) The HPF will administer HPF grants-in-aid in accordance with the NHPA, OMB Circular A-133 (For availability, see 5 CFR 1310.3.), and 43 CFR part 12, and related guidance issued by the Secretary. Pursuant to section 101(e)(5) of the NHPA, the Secretary may modify matching fund requirements for Tribes.

(2) Failure by a Tribe to meet the applicable requirements will be cause for comment and appropriate action by the NPS.

Dated: April 16, 2002.

**Craig Manson,**

*Assistant Secretary, Fish and Wildlife and Parks.*

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