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Circumventing Consultation Under the National Historic Preservation Act: How Judicial Misapplication of Section 106 is Putting Historic and Cultural Resources at Risk

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Circumventing Consultation Under the National Historic Preservation Act: How Judicial Misapplication of Section 106 is Putting Historic and Cultural Resources at Risk

SAMUEL W. GIERYN*

The Advisory Council on Historic Preservation's website proudly features "Section 106 Success Stories" where broad and meaningful consultation led to exemplary outcomes. But what if the consultation process that led to those successes was never triggered? Unfortunately, there are too many stories of far less success because of legal opinions that mistakenly determined federal actions not to be "undertakings" under Section 106 of the National Historic Preservation Act. This article attempts to settle the question of "What is an 'undertaking' in Section 106?" Through an analysis of statutory and regulatory changes, legislative history, and legal opinions, this article demonstrates that courts have misapplied "undertaking" to federal actions by interpreting the term narrowly, failing to follow Congress's more broad intent. Congress did not intend for each word in Section 106 to be interpreted as individual prerequisites. Instead, Congress intended the undertaking determination as dependent on amount of federal involvement -- more specifically whether the federal agency has discretionary approval authority over a proposed action. While reconstructing the legislative and judicial history of Section 106, this article also reveals an interesting tussle between the three branches of government related to the triggering of federal historic preservation's most significant compliance process.

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INTRODUCTION.....	17
PART I: THE NATIONAL HISTORIC PRESERVATION ACT: PURPOSES, POLICIES AND PROCEDURES OF FEDERAL HISTORIC PRESERVATION.....	20
A. THE STATUTE AND ITS AMENDMENTS.....	20
B. SECTION 106: HOW IT WORKS	24
C. A HISTORY SECTION 106 REGULATORY REVISIONS	27
PART II: ESTABLISHING CONGRESSIONAL INTENT UNDER THE NATIONAL HISTORIC PRESERVATION.....	32
PART III: WHEN EXACTLY DOES SECTION 106 APPLY? THE COURTS’ MANUFACTURED PLAIN LANGUAGE INTERPRETATION OF “ANY LICENSE”	39
A. CASELAW INTERPRETATIONS OF SECTION 106 OVER TIME	39
B. <i>MENOMINEE TRIBE V. U.S. EPA</i> : THE LATEST JUDICIAL MISAPPLICATION.....	49
PART IV: AN APPROPRIATE CHEVRON ANALYSIS FOR “UNDERTAKING” AND “SECTION 106.”	52
A. <i>CHEVRON</i> STEP ZERO: THE ACHP HAS CLEAR AND EXPRESS INTERPRETIVE AUTHORITY UNDER THE ACT.	52
B. <i>CHEVRON</i> STEP ONE FINDS AMBIGUITY IN SECTION 106 NECESSITATING <i>CHEVRON</i> STEP TWO	54
C. <i>CHEVRON</i> STEP TWO AS APPLIED TO <i>FOWLER</i> : ACHP’S INTERPRETATION OF “UNDERTAKING” IS REASONABLE.....	55
D. <i>CHEVRON</i> STEP TWO AS APPLIED TO <i>MENOMINEE</i> : DEFERENCE TO THE ACHP UPHOLDS THE PURPOSE OF THE ACT.....	58
CONCLUSION.....	60

INTRODUCTION

In 1966, Congress established the National Historic Preservation Act¹ (NHPA or the Act) to “encourage the public and private preservation and utilization of all usable elements of the Nation’s historic built environment.”² The Act’s various funding, educational, and consultation requirements have resulted in the preservation of breathtaking structures, increased protection of culturally significant resources, and a demonstrable collaborative effort between federal, tribal, state, and local governments along with national and local advocacy groups. However, as with any legal framework, the “devil is in the details” and subtle nuances can put cultural and historic resources at risk.

Central to the NHPA is Section 106 consultation. Section 106 requires federal undertakings to be reviewed for potential adverse effects to historic

1. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (1966).

2. 54 U.S.C. § 300101(5).

resources through consultation processes. However, due to statutory amendments, the language requiring Section 106 consultation³ is no longer directly linked with the statutory definition of “undertaking,” located in a different part of the Act. Over time, this inconsistency was discovered, debated and, as this article argues, incorrectly exploited. Over time, caselaw has determined that only a subset of federal activities that meet the definition of “undertaking” require Section 106 consultation. This article argues that such a narrowing of applicability is not only improper, but damaging, as it reduces the number of projects requiring consultation and thus creates potential adverse effects to historic and cultural resources. The common understanding in historic preservation circles seems to be that all federal undertakings must complete Section 106 consultation; however, as explained here, successive misapplications of Section 106 by various courts undermine this assumption.

Most litigation under the NHPA involves federal agencies’ alleged failures to properly consult under 36 C.F.R. pt. 800, the federal regulations implementing Section 106.⁴ By following the evolution of statutory interpretation related to the discrepancy between the definition of “undertaking” and Section 106 in the Act, we see an increase of consultation being determined inapplicable. The interpretations in these legal opinions allow federal actions to circumvent the requirements of 36 C.F.R. pt. 800, by declaring that only activities meeting the definition of “undertaking” *that are either federally funded or require a federal license* necessitate consultation at all. Through a “plain reading” of the Act, courts have limited Section 106 consultation only to federally funded or federally licensed projects, using an extremely narrow and literal meaning of “license.” The recent *Menominee v. EPA* case builds on a narrow reading of Section 106 to restrict “federally licensed” projects even further.⁵ Under *Menominee*, Clean Water Act Section 404 permits issued by states (who have assumed the U.S. EPA’s permitting authority) do not require Section 106 consultation.⁶ This reading takes away individual project considerations for historic or cultural sites, such as appropriate mitigation measures for the construction and operation of a mine, as in *Menominee*, raising the risk of adverse effects to protected resources.

This ongoing statutory word parsing has resulted in activities with the potential to adversely affect historic and culturally significant resources proceed unchecked. The intent of this article is to expose the tussle between all three branches of government related to the interpretation of the NHPA and Section 106 specifically. In doing so, the article hopes to demonstrate that current triggers for Section 106 consultation, as interpreted by courts, rely on

3. 54 U.S.C. § 306108.

4. 36 C.F.R. § 800.3 (2019).

5. *See generally*, *Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065 (7th Cir. 2020).

6. *Id.*

an untenable legal foundation and that action, either through judicial reinterpretation or by Congress, is necessary. Only when individual agency actions undergo proper due diligence to evaluate potential impact on historic resources (particularly tribal resources) will the purpose of the Act be realized. Proper interpretation will also realign the understanding of the Act among all three branches making compliance clearer and more understandable.

Part I of this article explains the purpose and procedures found in the original Act, highlighting important subsequent statutory amendments. This section also chronicles the Advisory Council on Historic Preservation's (ACHP) regulatory revisions to the federal regulation implementing Section 106, 36 C.F.R. pt. 800. Highlighting the Section 106 process and how changes to the statute related to tribal entities--and to the definition of "undertaking" --lays the groundwork for misapplication by the judiciary. Part II of this article provides a deep dive into the legislative history of Section 106. The goal of this section is to establish that courts have misapplied Section 106, straying from congressional intent. Through an analysis of congressional hearing minutes, this section argues that Congress did not intend a narrow application of undertakings in Section 106 but instead advocated for a much broader "federal involvement" test to determine applicability.

Part III reviews the developing judicial interpretation of Section 106 leading to the current and most restrictive application of "license" under the Act. The section begins with one of the court's first interpretations of "license" in Section 106 and then progresses through legal opinions that have created a dangerously narrow legal precedent by overextending or misapplying the legal holdings related to Section 106 inapplicable. This part culminates in a detailed explanation of the recent *Menominee* case, as the latest and arguably most impactful deviation from congressional intent for Section 106. Part IV proposes a reinterpretation of Section 106 based on a hypothetical Chevron Doctrine analysis of Section 106 using the facts and opinions of two cases: *National Mining Association v. Fowler* and *Menominee*. The section walks through three Chevron steps (Zero, One and Two) to find that proper deference should be given to the ACHP's interpretation of Section 106 undertakings, which are much broader than those found in current case law. In conclusion, the article proposes congressional action to amend Section 106. This change would end the government's struggle to interpret and apply Section 106 while upholding the lofty goals envisioned during the Act's 1966 enactment.

PART I: THE NATIONAL HISTORIC PRESERVATION ACT: PURPOSES,
POLICIES AND PROCEDURES OF FEDERAL HISTORIC PRESERVATION

A. THE STATUTE AND ITS AMENDMENTS

In 1966, Congress enacted the National Historic Preservation Act after President Lyndon B. Johnson's special committee on historic resources discovered rampant destruction of sites with meaning and value to the country. The committee's report, *With Heritage So Rich*, poignantly outlined the value of historically significant resources but also warned of their destruction.⁷ At the time of the committee's report, over half of the 12,000 structures in the historic American building survey were already destroyed.⁸

Mere months after the committee's report was issued, legislation was passed. Preceded by the Antiquities Act of 1905 and the Historic Sites Act of 1935, the Act was not the first national law on historic preservation; however, it was certainly the most comprehensive. The Act formalized a national policy for historic preservation and created new avenues for resource protection. In a way similar to the National Environmental Policy Act⁹, the Act includes lofty policy aspirations:

- (1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;
- (2) provide leadership in the preservation of the historic property of the United States and of the international community of nations and in the administration of the national preservation program;
- (3) administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations;
- (4) contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means;

7. Sen. Edmund S. Muskie (ME), *With Heritage So Rich: Report of Special Committee on Historic Preservation*, BATES (Feb. 9, 1966), <http://abacus.bates.edu/muskie-archives/ajcr/1966/Heritage%20so%20Rich.shtml> [https://perma.cc?JV98-ZWT8].

8. *Id.*

9. National Environmental Policy Act of 1970, Pub. L. No. 91-190, 83 Stat. 852 (1970).

- (5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and
- (6) assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust to expand and accelerate their historic preservation programs and activities.¹⁰

The NHPA had immediate impact in the late 1960s and 1970s, at the federal and state levels. Contentious issues emerged, ranging from early interpretation of impacts on property rights to social policy conflict associated with the effects of preservation on vulnerable populations. For example, in the historic preservation world's most famous case, *Penn Central Transportation v. City of New York*, application of New York's preservation ordinances was litigated to determine if the restrictions amounted to an unconstitutional "taking."¹¹ Penn Central Transportation Company wanted to construct a multistory building that would destroy the historic above-ground Pennsylvania Station in midtown Manhattan. In this landmark case, the Supreme Court of the United States found that New York's prohibition on the specific development proposal, not a prohibition on development above Penn Central Station in perpetuity, was reasonable.¹² Therefore, the proposed project did not amount to a "regulatory taking" in violation of the Fifth and Fourteenth Amendments.

The Act created the Advisory Council on Historic Preservation (ACHP), "an independent federal agency that promotes the preservation, enhancement, and productive use of our nation's historic resources, and advises the President and Congress on national historic preservation policy."¹³ The Act also created the National Register of Historic Places, "the official list of the Nation's historic places worthy of preservation."¹⁴ In order to qualify for inclusion in the National Register, a place must meet certain criteria.¹⁵ Under supervision by the National Park Service, the National Register of Historic Places currently includes over 95,000 resources, including buildings, districts, objects, and archeological sites.¹⁶

In addition to the creation of the nation's agency for historic preservation and a list of protected places, the Act also provided new mandates for

10. 54 U.S.C. § 300101(2018).

11. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

12. *Id.*

13. *About the ACHP*, ADVISORY COUNCIL OF HIST. PRES., [achp.gov/about](https://perma.cc/Q4JP-QX5U) [https://perma.cc/Q4JP-QX5U].

14. *What is the National Register of Historic Places?*, NAT'L PARK SERV., <http://www.nps.gov/subjects/nationalregister/what-is-the-national-register.htm> [https://perma.cc/Y5M6-4U871].

15. 54 U.S.C. § 302103.

16. *Id.*

states and federal agencies. States were required to establish State Historic Preservation Offices responsible for, in part, identification of properties eligible for inclusion on the National Register and creating comprehensive statewide historic preservation plans.¹⁷ Important for the argument presented here, the Act requires federal agencies to evaluate potential effects from certain preservation activities through a process called Section 106 consultation.¹⁸ Named for its original location in Section 106 of the Act¹⁹, this provision requires federal agencies to evaluate whether their federal action, or “undertaking,” will have an adverse effect on a historic resource prior to moving forward. The text of the Act’s Section 106, itself, has remained substantially the same throughout the history of the Act. In 1976, an amendment added a reference to require consultation for properties eligible for the National Register (not only those already listed in the National Register).

When the NHPA was enacted in 1966, there was not a statutory definition of “undertaking.” The statute’s original definition section at Section 101(b) defined only the terms “State,” “project,” “historic preservation,” and “Secretary.”²⁰ In 1980, Congress amended the Act at Section 101(b) to provide the first definition of “undertaking.” Undertaking was defined in 1980 as “any action as described in section 106.”²¹

Congress hoped to provide clarification on Section 106 implementation through this amendment. This article is built on the premise that “undertaking” and Section 106 have always been linked; accordingly, the first statutory definition in 1980 marks an unambiguous and express connection between the two. At least in 1980, any undertaking was to undergo consultation. Without a deep analysis of the Act’s legislative history (as provided in Part II), this definition amendment is an initial indicator that Congress has always intended explicitly to link the term “undertaking” with the Act’s consultation requirements.

After the 1980 amendment, other congressional amendments moved the Act’s purpose beyond architecture to address early social issues in preservation related to the displacement of low-income residents and minorities.²² Until the Act’s next amendment in 1992, the opinion of a federal agency trumped a tribe’s opinion when determining a potential effect on a historic

17. 54 U.S.C. § 302303.

18. 54 U.S.C. § 306108.

19. The Act has undergone at least 23 amendments and provisions have changed citations routinely, most recently in 2016.

20. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915-16 (1966).

21. National Historic Preservation Act of 1980, Pub. L. No. 96-515, 94 Stat. 2987 (1980).

22. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473 (1980).

resource. In 1992, Congress amended the Act primarily to address social issues related to federally recognized tribes. Preservation issues surrounding cultural resource protection were already being litigated, further emphasizing the need for congressional action.²³ Section 106 regulations at 36 C.F.R. § 800.3 emphasize that it is each federal agency that must determine whether the proposed undertaking will have an effect on a protected resource.²⁴ Accordingly, the federal agency can determine – unilaterally – that its action will not cause an effect on a cultural resource without any input from the tribe. The U.S. government’s troubled history with tribes, along with centralizing authority in a federal agency during consultation, provided a recipe for undermining tribal interests. In addition to quelling tribal mistrust, meaningful tribal involvement allows representatives of the tribes to become better informed about the Section 106 process, leading to a better fulfilment of the goals of the NHPA.²⁵

In 1989, S.Rep. No. 101-85 directed the National Park Service to "report to the Committee on Appropriations on the funding needs for the management, research, interpretation, protection and development of sites of historical significance on Indian lands."²⁶ Accordingly, the National Park Service published *Keepers of the Treasures: Protecting Historic Properties and Cultural Traditions on Indian Lands*.²⁷ In this document, tribal perspectives on the inadequacy of the Section 106 process were explained. Additionally, concrete recommendations were made on how to better incorporate tribes. These recommendations eventually made their way into the Act and the Section 106 regulations. For example, tribes now serve as invited consultation parties.²⁸

After persistent lobbying by Native American groups, the National Park Service published Bulletin 38 in 1990.²⁹ Bulletin 38 explains the unique place tribal and cultural resources have on the National Register and advocates for their inclusion.³⁰ With evidence and knowledge related to tribal impacts, Congress amended the Act in 1992 according to the principles in Bulletin 38.

Although not the main goal of the 1992 Amendment, Congress also re-defined “undertaking.” As a result, the 1992 Amendment creates a potential conflict between activities covered by the definition of “undertaking” and

23. *Id.*

24. 36 C.F.R. § 800.3(a) (2019).

25. Patricia L. Parker, *Keepers of the Treasures: Protecting Historic Properties and Cultural Traditions on Indian Lands*, NAT’L PARK SERV. (May 1990), <http://npshistory.com/publications/keepers-of-the-treasures.pdf> [<https://perma.cc/6AXD-3HKK>].

26. *Id.*

27. *Id.*

28. 36 C.F.R. § 800.3(f) (2019).

29. Patricia L. Parker & Thomas F. King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, NAT’L REG. BULL. (1988), <https://www.nps.gov/subjects/nationalregister/upload/NRB38-Completenessweb.pdf> [<https://perma.cc/Q5HA-RGMT>].

30. *Id.*

activities subject to Section 106. As this article presents in Part III, legal challenges have capitalized on this potential conflict. The revised definition of “undertaking” became:

a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including – “(A) those carried out by or on behalf of the agency; “(B) those carried out with Federal financial assistance; “(C) those requiring a Federal permit license, or approval, and “(D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.³¹

As we will see throughout this article, no court has been willing to take a deep analytic approach to determine the congressionally intended breadth of Section 106 from 1966 through 1992. The rest of this article does just that with a focus on discerning congressional intent behind the evolving Act, then highlighting different judicial interpretations running counter to that history. Each courts’ rationale is too often conclusory and reliant on distinguishable legal or factual bases. Opinions include little to no reference to congressional intent and no detailed evidence from congressional debates and hearings prior to enactment. Like many other legal disciplines, individual applications of law to fact patterns can result in different outcomes. However, this article’s lengthy discussion of courts’ improper interpretation of Section 106 demonstrates a troubling trend in historic preservation law.

B. SECTION 106: HOW IT WORKS

This subsection provides a primer on the actions federal agencies must take to comply with Section 106 under current legal authorities. Subsection B will recount the history of the Section 106 regulations which will be aided by an understanding of how historic preservation compliance reviews currently operate.

The ACHP’s Section 106 implementing regulations at 36 CFR part 800 describe compliance requirements beginning with an “undertaking” determination.³² An “undertaking” is defined by the regulation as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”³³ The definition of “undertaking,”

31. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, 106 Stat. 4600, 4764 (1992).

32. 36 C.F.R. § 800.3 (2020).

33. *Id.* § 800.16(y).

including the relationship between the regulatory definition, the statutory definition, and language in Section 106 itself, is the crux of this article. Between Congress, the ACHP, and the courts, no uniform understanding of the different consultation triggers has emerged.

Once it is determined that the proposed action is an undertaking, the federal agency must identify the potential effects to historic resources. An “area of potential effects” (APE) is created based on the scope of the federal undertaking. By definition, the APE can be greater than the undertaking’s direct geographic area and includes areas with indirect impacts. Section 800.4 then directs the federal agency to identify protected resources within the APE that could be affected by the undertaking. Protected resources include “any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”³⁴ A property or resource is considered “eligible” for the National Register if it meets the National Register criteria. A determination by the Secretary of the Interior or the ACHP is not necessary.³⁵ The federal agency must determine the scope of the APE; however, ACHP regulations, guidance, or professional historic preservation consultancy services are often used to ensure adequacy.

The four National Register criteria are identified in Bulletin 15. Bulletin 15 is an influential National Park Service publication intended to assist with understanding “the Criteria for Evaluation, historic contexts, integrity, and Criteria Considerations, and how they apply to properties under consideration for listing in the National Register.”³⁶ The criteria outline elements necessary to include in the National Register places:

- A. That are associated with events that have made a significant contribution to the broad patterns of our history; or
- B. That are associated with the lives of persons significant in our past; or
- C. That embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

34. *Id.*

35. *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985).

36. The guidelines provided here are intended to help understand the National Park Service’s use of the Criteria for Evaluation, historic contexts, integrity, and Criteria Considerations, and how they apply to properties under consideration for listing in the National Register.

D. That have yielded, or may be likely to yield, information important in prehistory or history.³⁷

If any listed or eligible resources are identified in the APE, the federal agency must determine if the undertaking will affect them and if the effect could be adverse. If there are no protected resources within the APE, the federal agency can make a determination that no historic properties are affected.³⁸ If the evaluation identifies historic properties, the federal agency must engage in an effects analysis to determine whether the effects are adverse.³⁹

An adverse effect occurs when the undertaking “may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.”⁴⁰ Examples provided by the regulation include, but are not limited to, “physical destruction of or damage to all or part of the property” or “alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary’s standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines.”⁴¹ The result of the effects assessment will either be a “no adverse effect” or an “adverse effect” determination.⁴²

Once the federal agency makes an effect determination, the consultative aspect of Section 106 begins. The federal agency must prepare documentation that includes information on the property and the “effects finding.” The finding and associated documentation will be submitted to the State Historic Preservation Office (SHPO) and any other consulting parties for evaluation. Consulting parties include the SHPO, federally recognized Indian Tribes and Native Hawaiian Organizations (including the Tribal Historic Preservation Office, when appropriate), representatives of local governments, and applicants for federal assistance, permits, licenses and other approvals.⁴³ Additionally, consulting parties may include certain individuals and organizations with a demonstrated interest in the undertaking.⁴⁴ During the consultation period, the SHPO has thirty days to concur with or object to the effect determination. If the SHPO concurs with the finding, the Section 106 process is

37. NAT’L REG. BULL., HOW TO APPLY THE NATIONAL REGISTER CRITERIA FOR EVALUATION 1 (1995), https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf [<https://perma.cc/2DAK-WA38>].

38. 36 C.F.R. § 800.4(d)(1) (2020).

39. 36 C.F.R. § 800.5(a) (2020).

40. 36 C.F.R. § 800.5(a)(1) (2020).

41. 36 C.F.R. § 800.5(a)(2) (2020).

42. 36 C.F.R. § 800.5(d) (2020).

43. 36 C.F.R. § 800.2(c) (2020).

44. 36 C.F.R. § 800.2(c)(5) (2020).

complete. If the finding itself, or the SHPO identify adverse effects to a historic property, the federal agency and the consulting parties must resolve those adverse effects.⁴⁵

Resolution of an adverse effect determination is uniquely tailored to the individual undertaking.⁴⁶ However, in general, the process includes continued consultation and the development of a Memorandum of Agreement establishing how the adverse effects to the historic properties can be minimized or mitigated. During this resolution process, the ACHP is invited to participate; however, most projects reach a resolution without their involvement. Minimization and mitigation efforts vary tremendously, but can include, most obviously, the preservation and use of the historic property to more community focused engagements such as development of websites, managing and enhancing heritage tourism, interpretive or wayside panels, or articles and white papers.⁴⁷

Throughout the Section 106 process, federal agencies are required to “make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey.”⁴⁸ This reasonable and good faith effort also extends to the identification and invitation of tribes and Native Hawaiian Organization with an interest in the APE.⁴⁹ While the federal agency is not expected to leave no stone unturned, the prevalence of qualified Historic Preservation Professionals should allow most historic resources to be identified and properly accounted for during the Section 106 process.

C. A HISTORY SECTION 106 REGULATORY REVISIONS

The ACHP’s Section 106 regulations have been consistently revised in response to legislative and judicial matters. This subsection charts the progression of 36 CFR part 800’s changing definition of “undertaking.” As the definitions change, two aspects remain constant: 1) ACHP has always understood Section 106 to be triggered by a broad set of activities; and 2) the term “undertaking” is like a tug-of-war rope between all three branches of government, being pulled back and forth. With statutory amendments, regulatory

45. 36 C.F.R. § 800.6(a) (2020).

46. *Reaching Agreement on Appropriate Treatment*, ADVISORY COUNCIL ON HIST. PRES., https://www.achp.gov/Section_106_Archaeology_Guidance/Questions%20and%20Answers/Reaching%20agreement%20on%20Appropriate%20Treatment [https://perma.cc/S586-CBJK].

47. *Guidance on Agreement Documents: Community Engagement*, ADVISORY COUNCIL ON HIST. PRES., <https://www.achp.gov/sites/default/files/guidance/2018-10/Guidance%20on%20Agreement%20Documents%20Community%20Engagement.pdf> [https://perma.cc/4Y74-3A2K].

48. 36 C.F.R. § 800.4(b)(1) (2020).

49. 36 C.F.R. § 800.3(f)(2) (2020).

revisions, and judicial opinions all interpreting the relationship between Section 106 and “undertaking,” there is a noticeable tussle between Congress, the ACHP, and the courts exemplified in the regulation’s changing definition.

The first set of federal regulations implementing Section 106 were promulgated by the ACHP in 1974.⁵⁰ These regulations provide a lengthy definition of “undertaking”:

(c) "Undertaking" means any Federal action, activity, or program, or the approval, sanction, assistance, or support of any other action, activity or program, including but not limited to:

(1) Recommendations or favorable reports relating to legislation, including requests for appropriations. The requirement for following these procedures applies to both: Agency recommendations on their own proposals for legislation and agency reports on legislation initiated elsewhere. In the latter case only the agency which has primary responsibility for the subject matter involved will comply with these procedures.

(2) New and continuing projects and program activities: directly undertaken by Federal agencies; or supported in whole or in part through Federal contracts, grants, subsidies, loans, or other forms of funding assistance; or involving a Federal lease, permit, license, certificate, or other entitlement for use.

(3) The making, modification, or establishment of regulations, rules, procedures, and policy.⁵¹

By using synonyms for “license” such as approval or permit, the ACHP interpreted Section 106 triggering undertakings broadly. The 1974 regulation expands the scope of Section 106 to the extent that any loosely-defined “support” from a federal agency appears sufficient to trigger the consultation process. Surprisingly, this first regulatory definition does not actually include the Section 106 term “license.” License is referenced in other parts of the regulation, most notably 37 CFR § 800.4, but not in the definition of “undertaking” itself.

In 1979, the regulations, including the definition of “undertaking,” were again amended. The ACHP intended to clarify the scope of undertakings re-

50. Procedures for the Protection of Historic and Cultural Properties, 39 Fed. Reg. 3366 (Jan. 25, 1974) (to be codified at 36 C.F.R. pt. 800).

51. *Id.*

lated to activities proposed by Federal agencies from Congressional authorization or appropriation; however, nearly the entire definition changed.⁵² The 1979 definition of “undertaking” morphed into the following:

"Undertaking" means any Federal, federally assisted or federally licensed action, activity, or program or the approval, sanction, assistance, or support of any non-Federal action, activity, or program. Undertakings include new and continuing projects and program activities (or elements of such activities not previously considered under Section 106 or Executive Order 11593) that are:

- (1) Directly undertaken by Federal agencies;
- (2) supported in whole or in part through Federal contracts, grants, subsidies, loans, loan guarantees, or other forms of direct and indirect funding assistance;
- (3) carried out pursuant to a Federal lease, permit, license, certificate, approval, or other form of entitlement or permission; or,
- (4) proposed by a Federal agency for Congressional authorization or appropriation. Site specific undertakings affect areas and properties that are capable of being identified at the time of approval by the Federal agency. Non-site-specific undertakings have effects that can be anticipated on National Register and eligible properties but cannot be identified in terms of specific geographical areas or properties at the time of Federal approval. Non-site-specific undertakings include Federal approval of State plans pursuant to Federal legislation, development of comprehensive or area-wide plans, agency recommendations for legislation and the establishment or modification of regulations and planning guidelines.⁵³

This definition is even more expansive than the 1974 original, adding Congressional authorizations and appropriations, but also now including to a list of synonyms the actual word “license.” Specifically, undertaking includes those activities “carried out pursuant to a Federal lease, permit, license, certificate, approval, or other form of entitlement or permission.”⁵⁴

After the 1980 statutory amendment, the ACHP similarly revised the Section 106 regulations. The regulations promulgated in 1986 again significantly changed the definition of “undertaking”:

52. Protection of Historic and Cultural Properties, 44 Fed. Reg. 6068 (Jan. 30, 1979) (to be codified at 36 C.F.R. pt. 800).

53. *Id.*

54. *Id.*

“Undertaking” means any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under section 106.⁵⁵

There is perhaps no clearer demonstration of the ACHP’s beliefs on what activities trigger Section 106 than in the Federal Register notice comments associated with the 1986 revision. After receiving public comments on the Notice of Proposed Rulemaking that the “undertaking” definition was ambiguous, the ACHP responded that “[t]he Council’s regulations are general purpose regulations, intended to apply to all kinds of undertakings, all kinds of effects, and all kinds of historic properties. The proposed revised regulations used general language to permit flexibility in the application of the regulations.”⁵⁶ The ACHP uses the word “flexibility” throughout the Federal Register notice, but the intent remains clear. The ACHP envisions its Section 106 regulations applying to a broad array of “undertakings.”

While the 1986 regulatory revisions clearly demonstrate ACHP’s intent to broaden applicable undertakings, the 1999 revision provides the closest alignment to what will be described in this article’s next Part as Congressional intent in 1966. After the 1992 statutory amendments, the ACHP needed to update their regulations once again. Most of the revisions included provisions highlighting the importance of tribal involvement, but the definition of “undertaking” was also clarified. Now codified at 36 CFR § 800.16(y), the “undertaking” definition is slightly refined to read as:

a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to state or local regulation administered pursuant to a delegation or approval by a Federal agency.⁵⁷

55. Protection of Historic Properties, 51 Fed. Reg. 31,115 (Sept. 2, 1986) (to be codified at 36 C.F.R. pt. 800).

56. *Id.*

57. Protection of Historic Properties, 64 Fed. Reg. 27,044 (May 18, 1999) (to be codified in 36 C.F.R. pt. 800).

This definition keeps some synonyms to “license,” but not nearly as many as the preceding definitions in the 1974 and 1979 regulations. Now aligned identically with the 1992 statutory definition of “undertaking” the broadened activity types are limited to “permit” and “approval.” The ACHP comments in the revision’s Federal Register publication mark the first time that the ACHP clearly reinforced Congress’ intent to determine an “undertaking” based on federal involvement. Specifically, the ACHP notes:

"[u]ndertaking” is defined exactly as in section 301(7) of the statute. The Agency Official is responsible, in accordance with Sec. 800.3(a), for making the determination as to whether a proposed Federal action is an undertaking. As appropriate, an agency should examine the nature of its Federal involvement taking into consideration factors such as the degree of Federal agency control or discretion; the type of Federal involvement or link to the action; and whether or not the action could move forward without Federal involvement. An agency should seek the advice of the Council when uncertain about whether or not its action falls within the definition of an undertaking. The pre-existing regulatory definition of undertaking included new and continuing projects, activities, or programs and any of their elements not previously considered under section 106. It is intended that the new definition includes such aspects of a project, activity, or program as undertakings.⁵⁸

Up to this point, the definition of undertaking changed and adapted because of statutory amendments to the NHPA. In 2000, the ACHP revised the regulations again spurring legal challenge in the case *NMA v. Slater* and its appellate decision *NMA v. Fowler*. These influential cases are considered in Part III of this article—the present subsection is limited to the resulting regulatory text changes.

The 2000 regulatory revisions made no changes to the 1999 definition of “undertaking;” however, the ACHP knew that there were issues brewing. In the 2000 Federal Register notice, ACHP noted the legal challenge from the National Mining Alliance in what would be decided in *Fowler*. Even with the pending lawsuit, ACHP voted to uphold the 1999 language for “undertakings” in the 2000 rule. By 2004, the legal opinion in *Fowler* forced the ACHP’s hand – requiring yet another regulatory revision.

The impact of the *Fowler* decision on future Section 106 interpretations was immense. Shortly after *Fowler*, the ACHP revised their regulatory definition of “undertaking” at 36 CFR § 800.16(y). The 2004 revision removed

58. *Id.*

the phrase “and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.”⁵⁹ The change was made to comport with the ruling in *Fowler*⁶⁰ as the ACHP felt bound by the decision. Clearly disappointed, the ACHP expressed their opinion on the case during the rulemaking’s public comment process. Specifically, the ACHP stated that they “disagree[] with the *NMA v. Fowler* interpretation of the NHPA” explaining “[i]t is difficult for us to understand the basis for the proposed rule change given that the rule’s definition of ‘undertaking’ was taken verbatim from the 1992 revisions to the NHPA.”⁶¹ ACHP’s statements during rulemaking are consistent with their interpretation of the 1992 Amendment, principally, that all activities defined by Section 301 in the Act as “undertakings” trigger Section 106 and there should be a “federal involvement” test to determine whether an action is an undertaking.

In sum, the conflict between Congress, the ACHP and the courts, most notably in *Fowler*, on the application of Section 106 is exemplified in the revisions to 36 CFR part 800. In the early regulations following NHPA’s enactment in 1966, it is clear that the ACHP desires to include broad “undertakings” under Section 106. As the statute is amended in 1980 and 1992, ACHP is forced to reduce the explicit regulatory mentions of “license” synonyms (e.g., removing federal “support” for an action) while incorporating more vague language noting the section’s “flexibilities.” By the 1999 revision, ACHP is clearly explaining their belief that undertakings triggering Section 106 should be determined by the amount of “federal involvement.” In 2004, the impact of the legal challenge in *Fowler* forces ACHP to narrow the regulatory definition slightly; however, broad application of “undertaking” is likely their continued, preferred outcome.

PART II: ESTABLISHING CONGRESSIONAL INTENT UNDER THE NATIONAL HISTORIC PRESERVATION

As originally drafted, the consultation process in Section 106 was a “notification and review” procedure in which the ACHP would review each undertaking.⁶² However, Section 106 was debated frequently as the legislation

59. Protection of Historic Properties, 65 Fed. Reg. 77,698 (Dec. 12, 2000) (to be codified at 36 C.F.R. pt. 800).

60. Protection of Historic Properties, 69 Fed. Reg. 40,544 (July 6, 2004) (to be codified at C.F.R. pt. 800).

61. *Id.*

62. *To Establish a Program for the Preservation of Additional Historic Properties Throughout the Nation: Hearing on S. 3035, H.R. 13491, H.R. 13491, H.R. 13790, H.R. 13792 and H.R. 14018 Before the Subcomm. on Nat'l Parks and Recreation, and H. Comm. On Interior and Insular Affairs*, 89th Cong. 18 (1966) (statement of George B. Hartzog, Jr., Director, National Park Service, Department of the Interior and Gordon Gray, Chairman, National Trust for Historic Preservation).

began to take shape during the 89th Congress in 1966 and changes were made. Discussion of Section 106 during the legislative hearings centered primarily around three issues: 1) the types of properties that were to be reviewed via Section 106; 2) what review action should be taken; and 3) the scope of actions covered by the section. This discussion focuses on the third issue: scope. The purpose of this Part is to create a framework for what Congress believed the application of Section 106 should be, not necessarily focusing on the exact language that ended up in the statute. This discussion will establish Congress's original understanding of Section 106, and particularly the scope of "undertakings" that trigger its requirements. Part III of this paper will then recount how judicial opinions have strayed from the original intent of Congress, ruling instead on the narrow, plain reading of individual words.

As originally drafted, Section 106 required "a 60-day waiting period beginning on the date a report is made to the National Advisory Council on Historic Preservation before Federal funds may be expended for the project concerned."⁶³ However, the Senate expressed a concern with this timeline fearing that "a 60-day waiting period in these circumstances could seriously interfere with the execution of important Federal programs."⁶⁴ Accordingly, it was suggested and ultimately accepted into the Act's text that notification to the ACHP with "reasonable opportunity to comment" would suffice.⁶⁵ This statutory requirement has now been passed on to the SHPO's with a shortened timeline for response of thirty days.

In its first draft iteration, Section 106 applied only to federal or federally funded actions. No reference to "license" or "licensing" was included in the draft Section 106 language. The first mention of expanding Section 106 activities was found in the Act's first Senate Report. The Senate Report included a reference to additional Section 106 protection for properties in "Federal ownership" and the applicability of Section 106 to "federally assisted properties."⁶⁶ While the Senate Report itself does not reveal the applicable actions subject to Section 106, subsequent congressional hearings continued to shed light on the issue.

Also of note, the first draft text of Section 106 did not use the word "undertaking" at all, instead using "project."⁶⁷ During the 1966 hearings, the precise meaning of "project" was discussed. Mr. T. Richard Witmer, identified as an attorney and consultant working on national parks issues,⁶⁸ began the discussion about the difference between the term "project" (used instead of "undertaking" at that time) and whether it was to be given the same meaning as the definition presented in the Act of:

63. S. REP. NO. 89-1363, at 1 (1966).

64. *Id.*

65. National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915.

66. S. REP. NO. 89-1363.

67. *Id.*

68. H.R. REP. NO. 90-113 (1967).

programs of State and local governments and other public bodies and private organizations and individuals for the acquisition of title or interests in, and for the development of, any district, site, building, structure, or object that is significant in American history, architecture, archeology, and culture, or property used in connection therewith, and for its development in order to assure the preservation for public benefit of any such historical properties or something more broad.⁶⁹

Mr. Witmer stated, “[t]his is being technical but I wanted to be sure that I am correct. That, therefore, is not the word project as defined in the ‘Act’ to which Mr. George Hartzog, Director, National Park Service, Department of Interior, responded bluntly, ‘No, sir, it is not.’”⁷⁰ Mr. Witmer again raised his concern and preference for changing the word “project” in Section 106 to “undertaking” for clarity: “Will that section apply to any project, using its word, and *I really think that ought to be changed in view of the definition*, to undertaking or something like that - - would that apply to any undertaking which has been directly and immediately authorized by Congress.”⁷¹ Mr. Hartzog continued by providing an illustrative example related to highway construction and approval by state agencies when compelled by Congress to act. Mr. Hartzog explained that the word “project” (shortly thereafter changed to “undertaking”) in Section 106 was to ensure consultation when a federal project’s plan reached federal and state agency approval.⁷² Mr. Witmer agreed, stating what this article proposes to be Congress’s true intent under Section 106: “[i]n other words, those cases where the administrative agencies have real discretion to say yea or nay.”⁷³ federal activity that should be used when defining an “undertaking” -- that triggers Section 106 review Federal activity that should be used when defining an “undertaking” -- that triggers Section 106 review.

With a de facto “test” being established by Congress for Section 106 triggers, conversations turn to those instances where there is federal agency involvement but no direct funding or action. It is this conversation that most

69. S. REP. NO. 89-1363, at 1 (1966).

70. *To Establish a Program for the Preservation of Additional Historic Properties Throughout the Nation, and for Other Purposes: Hearing Before the Subcomm. on Nat’l Parks and Recreation, 89th Cong.* 19 (1966).

71. *Id.*

72. *Id.* at 20 (“In other words, nobody has passed on whether or not you are going to put this highway right through the view between Independence National Historic Park and the river except the State Highway people and the Bureau of Public Roads. Our point was that this should be a decision that would be evaluated by the [ACHP].”).

73. *Id.*

closely relates to the interpretation of “license.” At this point in the legislative discussion, the term “license” had not yet been added to Section 106. Accordingly, to say that “undertaking” is qualified by a literal “federal license” runs counter to congressional intent during drafting of Section 106. Congress’s discussions on the applicability of Section 106 (e.g., Mr. Witmer’s “yea or nay” involvement test) were settled before the word “license” was explored. As this article subsequently presents, judges have disregarded Congress’s intent and focused, mistakenly, on the word “license.”

The specific language relating to federal funds and licenses is addressed during the July 1966 subcommittee hearings.⁷⁴ Mr. Witmer, admitting that he first applied the section only to projects that are “monetarily assisted,” raised the question of whether projects not federally funded deserve the same Section 106 review process.⁷⁵ The discussion then introduces the Federal Power Commission’s “licensing” process as an example: “Suppose the Federal Power Commission licenses a project which is going to flood out Indian remains, for instance -- something near and dear to this committee's heart -- that would not be covered by this, am I correct? And if not, ought it not be for this review?”⁷⁶ The July 15, 1966, hearing leaves the question unanswered; instead committee members apparently researched the issue and discussed out of chambers---returning to it in August’s hearings.

On August 9, 1966, the committee accepted the amendment to revise “project” to “undertaking”⁷⁷ and inserted the phrases “and the head of any Federal department or independent agency having authority to license any undertaking,” “or prior to the issuance of any license, as the case may be,” and “or any license” where they exist in the Act’s current state.⁷⁸

Mr. Witmer then explained that discussion after the July hearing resulted in a consensus answer to:

whether the requirement for a 60-day layover period if a Federal construction or lending agency found the construction would interfere with or impair an historic site should or should not include work done by such agencies as the Federal Power Commission and so on in licensing. The general feeling seemed to be it would be desirable for them to have the same 60-day layover as Federal construction agencies

74. *To Establish a Program for the Preservation of Additional Historic Properties Throughout the Nation, and for Other Purposes: Hearing Before the Subcomm. on Nat’l Parks and Recreation, 89th Cong. 19, 22 (1966).*

75. *Id.* at 22.

76. *Id.* at 24.

77. *Id.* at 63.

78. *Id.* at 58.

are required to observe or such agencies as the Bureau of Public Roads and FHA are required to observe.⁷⁹

Mr. Hartzog and Mr. Gordon Gray, Chairman of the National Trust of Historic Preservation, were asked for their reaction to which they responded positively: "[W]e agree with his interpretation of it and think it is an excellent addition to the legislation."⁸⁰ Mr. Hartzog and Mr. Gray presented "no disadvantages" and even suggested some benefits to property owners from an expanded Section 106 process.⁸¹ The last word on the issue during the August 9th hearings came from Congressman O'Brien. After clarifying that it does not matter how much federal monetary assistance is in a project to trigger Section 106, the congressman inquired, "[W]ould this affect the jurisdiction of a quasi-judicial agency like the Federal Power Commission where it would not be a federally assisted project? Would that notification be required in such a project?"⁸² Mr. Witmer's affirmative response elicited yet another positive response with the congressman stating "[t]hen I am very strongly in support of the pending amendment."⁸³

At the conclusion of the August 9th hearing, the term "project" was replaced with "undertaking," and references to "license" – such as those issued by federal agencies like the Federal Power Commission – were included. These amendments expanded Section 106 from purely activities with federal monetary assistance to those activities that required "real discretion" by a federal agency to approve or disapprove the action. Note that the term "license" is never discussed narrowly, as a specific type of agency action—but instead, as an example of review or approval activities by a federal agency that are not directly financial. The Federal Power Commission's licensing process is merely an example where the federal government has a discretionary opportunity to review a project's impact and decide "yea" or "nay," in part based on impacts to historic properties, but certainly before any adverse effects occur. There is no evidence in the congressional record that the word "license" was chosen because of its specific meaning (like issuing a permit that could hang on a wall). Instead, it appears that Congress intended to use "license" as a "catch-all" for federal discretionary decision-making, and the type of action used by the Federal Power Commission's process is merely one illustrative example.

Similarly, as applied to the courts' current interpretation of Section 106 applicability for the state-delegated permit program, Congress did not discuss

79. *To Establish a Program for the Preservation of Additional Historic Properties Throughout the Nation, and for Other Purposes: Hearing Before the Subcomm. on Nat'l Parks and Recreation, 89th Cong. 19, 58 (1966).*

80. *Id.* at 59.

81. *Id.*

82. *Id.* at 65.

83. *Id.* at 24.

the issue. The failure to raise potential complications from delegated programs implies that it was not on Congress's radar in 1966.

While the 1992 amendment made an important change to the statutory definition of "undertaking," the legislative history did not further expand on Congress's intent related to the range of triggers requiring consultation. The failure of Congress to provide an express statement on the matter is likely because all three branches: Congress, the courts, and the ACHP, agreed in their understanding of the current application of Section 106 to all undertakings. Bolstered by the then-recent court decision in *Indiana Coal Council*, which required Section 106 consultation for individual permitting actions even though the review and approval process had been delegated from the federal to the state level, all stakeholders felt relatively comfortable with the current language. Accordingly, Congress explained that "the definition of 'undertaking' would be changed to add more specificity to the definition than is currently there."⁸⁴ "Clarification" signals congressional intent to keep the status quo and that the word changes were intended to reflect current judicial interpretation. Prior to the 1992 amendments, "undertaking" was defined as "any action as described in section 106." The clarification then is presumed here to be a more specific listing of activities in Section 106. The legislative history related to the definitional change to "undertaking" in 1980 provides no explanation for the changes.

During the 1992 amendment process, concerns were raised in Congress relating to altering the current understanding of what is considered an "undertaking." The Senate Report in 1992 foresaw a potential risk in fracturing the definition of "undertaking" (ironically, by adding clarifying language) from Section 106. Specifically, the concern was raised by then Secretary of Interior Lujan that:

[e]ven though the current definition of "undertaking" is not specific, over the years it has been defined by regulations, and by a number of court cases. Therefore, a great body of law has developed to give the definition specificity and certainty. Any legislative change would only throw the definition into disarray, and would require years for "redefinition" to take place.⁸⁵

As a response to the secretary, Congress reported that "[c]ontrary to the Secretary's assertion, the definition of undertaking is consistent with the settled body of case law and the regulatory interpretation by the [ACHP]. [. . .] Rather the definition makes clear that Federal responsibility under section 106 is not waived where a State assists a Federal agency in implementing

84. S. REP. NO. 102-336, at 1 (1992).

85. *Id.*

Federal authorities.”⁸⁶ This statement by Congress indirectly links the amendment with the decision in *Indiana Coal Council*, discussed in full in Part III of this article.

Testimony provided by the acting president of the National Trust for Historic Places in the Congressional Record further explains the purpose of inserting an expanded “undertaking” definition:

A related key provision of the National Historic Preservation Act Amendments is the definition of the term "undertaking." Whether or not a federal action is an undertaking determines whether Section 106 review is required under the NHPA. Courts have determined in case after case that actions such as permits, grants, and approvals all fall within this category. However, some federal agencies persist in claiming that such actions are not classified as undertakings requiring the agencies to consider the consequence of their actions on historic resources. As a result, private citizens are forced time and time again to take the federal government to court in an expensive, if nearly always successful, effort to make federal agencies accountable for their effect on local communities. The provision in H.R. 1601 that gives a clear statutory definition consistent with these court decisions will put an end to this wasteful litigation.⁸⁷

Contextually, Congress’s inclusion of “those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency[,]” along with the legislative history surrounding the amendments, indicates that it was Congress’s intent all along to expand the universe of undertakings subject to Section 106 and align the NHPA with the ACHP’s Section 106 regulations (36 CFR part 800).⁸⁸ Conversations during congressional hearings in 1966 about the scope of Section 106 culminated in the development of a de facto “federal involvement” test to evaluate whether an action is an “undertaking” under Section 106. By 1992, as demonstrated in the Congressional Record associated with the statutory amendment, all three branches of government agreed on a broad application of “undertaking” to trigger Section 106. However, as alluded to by Secretary Lujan, the inclusion of more specificity to the definition of “undertaking” in the Act resulted in

86. S. REP. NO. 102-113 (1992).

87. *Historic Preservation Act Amendments: Hearing on H.R. 3905, H.R. 1601, and H.R. 4801 Before the Subcomm. on Nat'l Parks and Public Lands of the Comm. on Interior and Insular Affairs*, 102nd Cong. 120 (1992).

88. *Id.*

the opposite of their intent. Instead of clarity, courts have examined each precise word in both provisions to create and expand a division within the statute, demonstrating a false interpretation that restricts the Act's consultation triggers.

PART III: WHEN EXACTLY DOES SECTION 106 APPLY? THE COURTS' MANUFACTURED PLAIN LANGUAGE INTERPRETATION OF "ANY LICENSE"

I now review and analyze the caselaw surrounding the interpretation of Section 106 and the triggers for consultation. Practitioners have a right to be confused about project planning and Section 106 compliance. As we discussed in Part I of this article, defining an "undertaking" under Section 106 is a threshold issue and the legal sources, both legislative and regulatory, have undergone a significant number of changes. In general, I would assume that practitioners primarily rely on agency guidance instead of diving directly into laws and regulations. The Advisory Council on Historic Preservation's Section 106 Applicant Toolkit states: "Section 106 requires federal agencies to consider the effects on historic properties of projects they carry out, assist, permit, license, or approve (undertaking)." ACHP training webinars, State Historic Preservation Office guidance, and other instructional material support an understanding that all federal actions must consult under Section 106. Some legal opinions⁸⁹ and the Advisory Council on Historic Preservation's interpretation⁹⁰ state that all "undertakings" require Section 106 consultation. Still, this judicial history will show that through a succession of decisions, the circumstances triggering a Section 106 consultation have been narrowed in a way that departs from congressional intent and consistent interpretations from the ACHP.

A. CASELAW INTERPRETATIONS OF SECTION 106 OVER TIME

One must look to the courts for insight into the application of the term "undertaking," particularly since the Act has undergone substantive amendments related to Section 106. Based on the discussion so far, the expectation would be that the courts would analyze a case's unique fact patterns to determine whether an agency's action is an undertaking triggering Section 106. This legal analysis should focus on federal involvement, perhaps more specifically, on whether there is discretionary authority related to a proposed action. Unfortunately, as this section will unravel, courts have trended toward a much more simplistic analysis, one that this article argues is contrary to congressional and ACHP intent.

89. See *Ind. Coal Council v. Lujan*, 774 F. Supp. 1385 (D.C. Cir. 1991).

90. Advisory Council on Historic Preservation, 69 Fed. Reg. 40,544, 40,550 (July 6, 2004) (to be codified at 36 C.F.R. pt. 800).

One early case to address the term “license” in Section 106 is *Weintraub v. Rural Electrification Administration* in 1978. In *Weintraub*, the Pennsylvania SHPO sued the Rural Electrification Administration (REA) for “planning to and beginning the demolition of the Telegraph Building” without consultation.⁹¹ The REA maintained that the action was done without federal funds or a federal license, so Section 106 is not applicable. “REA has supervisory control over surplus revenues accumulated by cooperatives such as the members of [Allegheny Electric Cooperative, Inc. (AEC)];”⁹² accordingly, the REA’s regulations become triggered. “As of January 11, 1978, AEC was a borrower of REA. The Locust Court Building is a headquarters building for AEC. The Telegraph Building is being demolished to provide parking in part for the needs of AEC and its headquarters building.”⁹³ Since REA regulations require “approval of plans for the construction of a headquarters building and certain adjuncts to it such as a garage,”⁹⁴ the Pennsylvania SHPO argued that this regulation served as a “license” under Section 106 and should also apply to the demolition for a parking lot. The court disagreed and found that Congress’s intended “license” had a technical meaning under the NHPA and specifically required “written document[ation] constituting a permission or right to engage in some governmentally supervised activity.”⁹⁵

Weintraub is also one of the earliest cases in which a court fails to provide an analysis of congressional intent, instead substituting their own interpretation for that of the legislative branch. In *Weintraub*, the opinion remarks that the legislative history clearly supports the statute’s application “to licenses issued to TV stations by the FCC,” but provides no evidence as to why. Research for this article did not uncover any reference to the FCC in the Act’s legislative history. As stated previously, discussion by Congress on the addition of “license” to the statute involved the Federal Power Commission. Further, there is no discussion of the word “license” in the legislative history to support the court’s statement that “the House Report strongly indicates that the amendment was designed to affect only federal agencies which engaged in licensing activities.” Instead, the House Report uses the term “license” in a much broader, looser sense, as described in Part II. The *Weintraub* opinion is correct that “Congress did not intend to affect every action which required federal approval[;]” as even the ACHP interprets it to only apply to discretionary federal approval actions, an interpretation compatible with the Congressional Hearings in 1966.

91. *Weintraub v. Rural Electrification Admin.*, U.S. Dep’t of Agric., 457 F. Supp. 78, 80 (M.D. Pa. 1978).

92. *Id.* at 84.

93. *Id.* at 92.

94. *Id.*

95. *Id.*

In 1989, the District of Columbia Court of Appeals addressed the relationship between “undertaking” and Section 106 in the case *Lee v. Thornburgh*.⁹⁶ This decision is used in subsequent cases, but perhaps incorrectly. The case involved the building of a prison in the District of Columbia. The court summarized that the NHPA statute has a “narrower reach and is triggered only if a federal agency has the authority to license a project or to approve expenditures for it,”⁹⁷ which on its face appears to align with other narrow judicial applications of Section 106. However, the term “license” is never actually fleshed out by the court. Instead, most of the opinion relies on a unique set of facts that may not apply as universally as it may seem.

In *Lee*, the proposed construction of a prison in D.C. would be funded by congressional appropriation. The statutory analysis then turns to how Section 110 and Section 106 apply. The case notes “ambiguity” in the statute but then clarifies that “such terms shed their ambiguity; agency “action” refers to the granting of a license or other required approval such as agency ‘assistance’ to approving the expenditure of funds.”⁹⁸ “Other required approval” is important to note here as it becomes lost in Section 106 case progeny. While this case is summarily used as a “narrowing” of Section 106 application, the holding itself is relatively narrow. The opinion finds that there is actually no federal agency involved with this project; instead, Congress itself retains “approval” authority.⁹⁹ In the end, the court determined that NHPA’s reach is up for Congress to decide. The Act’s “main thrust is to encourage preservation of historic sites and buildings rather than to mandate it.”¹⁰⁰ Accordingly, in *Lee*, the court put the onus on Congress to make changes to the statute if its intent was not to “expressly delimit”¹⁰¹ Section 106.

The question of whether an action by a state agency, having been delegated authority to administer a federal program, is subject to the National Historic Preservation Act has been addressed with differing results. In *Lee*, the court found that “approval” by Congress itself was insufficient to trigger Section 106, because there was no federal agency undertaking. In 1991, the District of Columbia District Court addressed this question related to mining permit programs in the case *Indiana Coal Council v. Lujan*. Here, the court determined that individual federal permit decisions, delegated to state agencies under the Surface Mining Control and Reclamation Act, were indeed subject to Section 106. *Indiana Coal Council* is a pivotal case in that it momentarily reversed the judicial trend of a narrower Section 106 interpretation, and also aligned the interpretation of Section 106 in the courts with this article’s proposed congressional intent.

96. See *Lee v. Thornburgh*, 877 F.2d 1053 (DC Cir. 1989).

97. *Id.* at 1055.

98. *Id.* at 1057.

99. *Id.* at 1057-58.

100. *Id.* at 1058.

101. See *Lee v. Thornburgh*, 877 F.2d 1053, 1058 (DC Cir. 1989).

In *Indiana Coal Council*, preservation groups led by the National Trust for Historic Preservation filed suit against the Office of Surface Mining (OSM) claiming, in part, that OSM's regulations allowing for the assumption of the mine permitting process by states did not go far enough in implementing the National Historic Preservation Act. It should be remembered, however, that in 1986 Section 106 regulation itself did not yet directly and expressly include delegated federal actions either. This regulatory revision was made later in 1999. Specifically, plaintiffs argued that the Act was not fully implemented because individual permit decisions by state agencies did not undergo Section 106 consultation.¹⁰² OSM admitted that approval of the state program, periodic review and approval of program amendments by OSM, and granting of federal monies constitute an "undertaking" under NHPA, therefore requiring consultation. However, OSM denied that individual permit decisions by states once they assume the permitting programs are federally assisted undertakings;¹⁰³ accordingly, individual permit consultation is not required. During OSM's rulemaking to establish the process for states to manage federal mining permits, OSM noted:

[m]ost of the comments on this section suggested that additional detail be added, consistent with the [NHPA] and the regulations which implement that Act. As explained above, [they] do not apply directly to permits to conduct surface coal mining operations issued by [States]. Therefore, it is not appropriate to add such terminology.¹⁰⁴

The D.C. District Court disagreed with OSM's position citing the inclusion of "indirect jurisdiction" in 36 CFR § 800.2(o)'s definition of "undertaking"¹⁰⁵ and OSM's substantial oversight role for programs assumed by States.¹⁰⁶ The *Indiana Coal Council* opinion states "[a]lthough OSM does not dictate primacy states' decisions on individual mining permits, OSM retains indirect jurisdiction over the state programs. It has been delegated approval functions and is statutorily required to review state permitting programs to ensure compliance[;]"¹⁰⁷ accordingly, "OSM cannot escape the duties imposed under Section 106 of the NHPA simply by delegating some of its duties to the states and yet still maintaining a powerful oversight role. Despite

102. *Lujan*, 774 F. Supp. at 1387.

103. *Id.* at 1400-01.

104. *Id.* at 1401.

105. *Id.* at 1400.

106. *Id.* at 1403.

107. *Lujan*, 774 F. Supp. at 1401.

the indirect nature of OSM's jurisdiction in primacy states, ultimately the responsibility for compliance falls on OSM.”¹⁰⁸ Thus, the *Indiana Coal Council* decision suggests a momentary convergence between the courts and the ACHP over the applicability of Section 106. As noted above in Part II, during the 1992 Amendments to the NHPA, Congress hoped to “clarify” the applicability of Section 106 to such individual, delegated permit decisions.

Shortly after the *Indiana Coal Council* decision, Congress enacted the 1992 Amendments, expanding the definition of “undertaking” now codified in Section 301. The 1992 Amendments expressly served to provide more tribal rights under the National Historic Preservation Act, but other changes to the Act were also enacted.¹⁰⁹ Based on the legislative history,¹¹⁰ and explained with more detail in Part II of this article, the specific change to the definition of “undertaking” was done as a response to the *Indiana Coal Council* decision.¹¹¹ *Indiana Coal Council* was appealed to the Circuit Court, but the merits of the District Court opinion were never addressed. In the appeal, *Indiana Coal Council v. Babbitt*,¹¹² the Circuit Court vacated the district court’s opinion as moot because of the 1992 amendment to the definition of “undertaking.” Unfortunately, since *Indiana Coal Council* was vacated, it cannot be relied upon in future cases. In vacating the decision, it is assumed by the appellate court that the amended statute would speak clearly on the issue and supersede interpretations in the 1991 *Indiana Coal Council* case. However, from this moment going forward, the courts have consistently chosen to narrow the consultative application of Section 106, in part because they are able to ignore the much broader reading in the *Indiana Coal Council* district court case.

One case in particular has been used often by courts to restrict the kind of federal activities that trigger Section 106 is *Sheridan Kalorama Historical Association v. United States*, decided by the District of Columbia Circuit Court in 1995. In this case, the National Trust for Historic Preservation (National Trust) sued the U.S. Secretary of State (State Department) under Section 106 of the National Historic Preservation Act for failing to consult the Advisory Council on Historic Properties (ACHP) when it implicitly approved the replacement of Republic of Turkey’s chancery building. The replacement would result in the demolition of the Turkey’s chancery at 2523 Massachusetts Ave, N.W., Washington, D.C. The District Court decided that the State Department’s failure to disapprove replacing the Turkish chancery

108. *Id.* at 1403.

109. Brody Hinds, *Twenty-Five Years Later: The Amendments to the National Historic Preservation Act and Tribal Consultation*, 42 AM. INDIAN L. REV. 141 (2017).

110. S. REP. NO. 102-336 (1992).

111. Protection of Historic Properties, 63 Fed. Reg. 77,495, 77,725 (Dec. 12, 2000) (to be codified at 7 C.F.R. pt. 800).

112. *Ind. Coal Council, Inc. v. Babbitt*, U.S. Dep’t of Interior, Nos. 91-5397, 91-5405, 91-5406, 1993 WL 184022 (D.C. Cir. Apr. 26, 1993).

did not constitute a “license” under Section 106. The National Trust appealed this decision.

The District Court relied on the earlier definition of “license” in *Weintraub* to find that such a broad definition of license (specifically, failing to disapprove) was improper. Accordingly, the State Department’s inaction was not a “license” and therefore could not be a “licensed undertaking.” Although the reliance on *Weintraub*’s narrow view of “license” is not proper because it unjustifiably expands the holding, *Sheridan Kalorama* could as easily have been decided with the same result stating that inaction is not the type of federal involvement necessary to trigger Section 106. Principally, the State Department did not have a discretionary approval or disapproval role and therefore the action did not merit consultation. The clearest and most accurate description of this case holding is that the State Department’s “inaction” is not a license and therefore not an activity subject to Section 106.

Sheridan Kalorama also mistakenly relies on *Lee*. The court notes that in “*Lee* we held that ‘clearing’ a project with a federal agency that did not have ‘the authority to grant or refuse permission’ did not amount to a federal licensing of the project.” The term “federal agency” is key here. *Lee* is distinguishable from *Sheridan* in that no federal agency was involved in *Lee*. It is Congress, not the State Department as in *Sheridan*, who’s action is being evaluated. Accordingly, *Lee* should be used as an example of when there is no “federal involvement” Section 106 is not triggered, instead of the principal that “clearing” a project by a federal agency is insufficient to trigger Section 106.

While this article argues that *Sheridan Kalorama*’s holding is generally incorrect, there is dictum related to delegated state actions that outline an approach closer to Congressional intent. The court stated that “[a]ctions carried out on behalf of a federal agency are subject to NHPA as are activities administered by a state or local entity pursuant to a delegation or approval by a federal agency.”¹¹³ This rationale aligns squarely with the Act’s legislative history. Specifically, an Agency’s “licensed undertaking” requires the Agency to have “discretionary” approval authority. The *Sheridan* court’s understanding of delegable actions also reinforces the holding in *Indiana Coal Council*, the interpretation of which is now established in the Act after the 1992 Amendments.

Notably, the appellate decision in *Sheridan* made no comment on the unanswered question of what constitutes a “license” under the NHPA. It is important to highlight that *Sheridan Kalorama*’s appellate decision affirmed the district court opinion and focused on the State Department’s “inaction” as not constituting a “license.” Accordingly, the holding should be limited rather than applied universally. The Appellate Court’s explanation related to

113. Nat’l Trust for Hist. Pres. v. Dep’t of State, 834 F. Supp. 443, 449 (D.C. Cir. 1993).

the ACHP's expansive definition of "undertaking" is dictum and should be given only that amount of deferential weight in future legal cases. As we will see in cases like *NMA v. Fowler*, this does not happen. *Sheridan Kalorama* will provide a precedent for limiting Section 106 to a subset of the "undertaking" activities added with the 1992 Amendment.

It was not until the 2001 district court case *NMA v. Slater* that the complexity of *Sheridan Kalorama* and the 1992 Amendments were significantly addressed in court.¹¹⁴ In *Slater*, the National Mining Association (NMA) challenged the ACHP's promulgation of their 36 CFR part 800 regulations implementing Section 106. The NMA represented a wide variety of mining industry members whose work routinely requires federal or state permits, approval, licensing, funding, or assistance in order to operate. The mining industry generally advocates to limit the number of regulatory hurdles before mining operations can commence work. In this case, that meant advocating for the inapplicability of Section 106 consultation to State-issued mining permits through legal challenge to the ACHP's part 800 promulgation.

The opinion summarizes NMA's first complaint as "did the ACHP exceed the scope of its authority under the Act?" when promulgating the regulations.¹¹⁵ An answer requires analysis of the substantive and procedural nature of these federal rules. The court determined that the ACHP has the power to promulgate binding procedural regulations governing Section 106¹¹⁶, but found two sections of the regulation §§ 800.4(d)(2) and 800.5(c)(3) to be substantive and therefore beyond the scope of what the ACHP can include in their rulemaking.

The central component of NMA's second complaint is whether the rule "impermissibly expands Section 106 to include state and local government activities within the ambit of undertakings."¹¹⁷ The NMA, using *Sheridan Kalorama*, argued that such state and local actions were not "undertakings." Specifically, the NMA claimed that the proposed regulation's definition of "undertaking" at § 800.16(y) demonstrated that the ACHP "clearly intended section 106 to govern only a subset of undertakings." The language in 800.16(y) is nearly identical to the statutory definition of "undertaking" as amended in 1992.¹¹⁸ Further, as Part I of this article presents, ACHP has consistently expressed a belief that "undertakings" triggering Section 106 should be determined by federal involvement, not the term associated with a specific federal action such as "license."

114. National Min. Ass'n v. Slater, 167 F. Supp. 2d 265 - Dist. Court, Dist. of Columbia 2001 National Min. Ass'n v. Slater, 167 F. Supp. 2d 265 - Dist. Court, Dist. of Columbia 2001 Nat'l Mining Ass'n v. Slater, 167 F. Supp. 2d 265 (D.C. Cir. 2001).

115. *Id.* at 281.

116. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

117. *Slater*, 167 F. Supp. 2d at 289.

118. Except it excluded "Federal or federally assisted."

In *Slater*, the court found that reliance on *Sheridan Kalorama* to classify what “undertakings” trigger Section 106 is “misplaced.” The *Slater* court agreed with Defendants that the Secretary of State’s “failure to act” in *Sheridan* (or put more specifically, the agency’s decision not to veto the action) was not an “undertaking.” *Slater* then highlights the *Sheridan* court’s inference that the 1992 Amendment’s *expanded* “undertaking,” clarifying that “section 106 applied to the full range of undertaking defined in 16 U.S.C. 470w(y).” This interpretation aligns with the progression of “undertaking” through the Act’s amendments and remains consistent with all regulatory revisions to 36 CFR part 800.

In footnote 27, the *Slater* opinion expounds:

The Court's holding in *Sheridan Kalorama* was limited to a finding that the meaning of "license" in that particular instance was not 'so broad as to encompass failure to disapprove a proposal.' *Id.* at 756. Yet the Court expressly reserved judgment on whether a ACHP Final Rule that defined "undertaking" to include any project that "requires a Federal permit, license, or approval, including agency authority to disapprove or veto the project" would be permissible under the NHPA. *Id.* at 755. At that time, the Council had proposed such a definition, but the Court decided that it should not 'defer to an agency's proposed interpretation, upon which it is still considering public comments.' *Id.* As it turns out, the Court's restraint was prescient, because the current Final Rule does not go so far as to include within the definition of undertaking a project over which a federal agency retains veto — but not approval — power.

Accordingly, the *Slater* court found that the facial challenge to the proposed regulatory definition of “undertaking” must fail because the language is nearly identical and therefore consistent with the statute’s definition. Since the definition of an “undertaking” under a legally promulgated regulation implementing Section 106 is valid, it is difficult to understand how Section 106 is not triggered by all of the same activities that are defined both by statute and regulation instead of only a subset of such activities. But as we see in the next subsection, *Slater*’s appellate decision in *NMA v. Fowler* does just that through a dubious “reinterpretation” of *Sheridan Kalorama*.

In a confusing reversal, the appellate court in *NMA v. Fowler* overturned *Slater*, also relying on *Sheridan Kalorama*.¹¹⁹ The *Fowler* appellate court found the *Sheridan Kalorama* holding “dispositive,” specifically stating that the Secretary’s inaction in *Sheridan* “constituted neither federal funding nor

119. Nat’l Mining Ass’n. v. Fowler, 324 F.3d 752 (D.C. Cir. 2003).

federal licensing;” and Section 106 only applies to “licensed undertaking.”¹²⁰ This is the first instance where an appellate court broadens the holding in *Sheridan*, perhaps unintentionally, to disjoin the definition of “undertaking” at Section 301 and Section 106—an action neither Congress, through multiple amendments, nor the ACHP had contemplated. The *Fowler* court creates a multipart prerequisite for Section 106 requiring either federal funds or license and an “undertaking.”¹²¹ As explained through the history of the Act, Congress needed to clarify the definition of undertaking. Congress then added “those requiring a Federal permit, license, or approval” because the original Act did not include a definition of undertaking and it hoped to establish, once and for all, that all actions in ACHP’s definition of “undertaking” were required to undergo the Section 106 process.

By not addressing what Congress (or ACHP) believed the appropriate Section 106 triggers to be during the enactment of Section 106 in 1966 or in the 1992 Amendments, specifically whether “any license” is broad enough to include all approvals in the statutory definition of “undertaking,” the *Fowler* court short circuits the required legal analysis. As the *Slater* court explains, it remains an open question as to whether the definition of “undertaking” triggering Section 106 was to be interpreted broadly – even to include inaction – such as the State Department’s inaction in the definition of “licensed undertaking.”¹²² The *Fowler* court fails to answer this question, and Part IV of this article will propose a *Chevron* doctrine analysis in a hypothetical application.

But the *Fowler* court fails to perform a *Chevron* analysis of whether “license” in Section 106 is meant to cover all activities defined as “undertakings” in Section 301. Instead the court relies on *Sheridan Kalorama* broadly, previously interpreted in *Slater* as a limited holding (that an agency’s failure to veto is not a “licensed undertaking”) to reverse the district court. As a result, the *Fowler* case takes “inaction” as described in *Sheridan Kalorama* and applies the rationale that Section 106 is not triggered to a much wider range of activities, creating Section 106 applicability only when there are federal funds or a federal license.¹²³ This application expands the schism between the statutory definition of “undertaking” and Section 106 from a crack to a chasm.

The *Fowler* court’s attempt to distinguish the *Slater* court’s interpretation of *Sheridan* is limited only to an attack on the following *Slater* interpretation: “[w]e infer, therefore, that the amending Congress [in 1992] intended to expand the definition of an ‘undertaking’-formerly limited to federally

120. *Id.* at 759.

121. *Id.* at 760.

122. *Slater*, 167 F. Supp. 2d at 290.

123. *Fowler*, 324 F.3d at 759.

funded or licensed projects-to include projects requiring a federal ‘permit’ or merely federal ‘approval.’”¹²⁴

The *Fowler* court reasons that the 1992 Amendment to “undertaking” does expand Section 106 triggering activities, but only as far as to include “license” to remain consistent with Section 106. Stating directly, “it explains that Congress would not have amended section 301's definition of “undertaking” to exclude federally licensed projects, since doing so would rob section 106's application to ‘federally funded or licensed’ undertakings of its full disjunctive scope.”¹²⁵ Confusingly, this explanation seems to agree with the *Slater* premise that the 1992 Amendment broadened Section 106 applicability by aligning the statutory definition with Section 106, agreeing that the purpose was to include “licenses” as “undertakings,” but the court’s plain-text analysis stops there. The court does not provide any meaningful analysis into what Congress actually intended as the scope of Section 106 activities related to the definition of “undertakings.” Put in simple terms, “what is a license in Section 106?”

Fowler comes to the conclusion that the statutory definition of “undertaking” must be at least as broad as Section 106 (otherwise reading part of Section 106 out of existence), but does not analyze whether Congress intended to interpret “any license” broad enough to include all Section 301 “undertakings” activities during the 1992 Amendment.

The *Fowler* interpretation raises a puzzling question: if all courts agree that Section 301 was amended to better align with Section 106, why wouldn’t Congress limit language to the addition of “license” in the definition? With the deep analysis of the statute and regulation in Part II, we see that Congress expanded Section 301 as a reaction to *Indiana Coal Council* with the intent to include delegated permitting actions. Accordingly, Congress added many activities. Did Congress intend to expand the meaning of “any license” to those activities added to the definition of “undertaking” in 1992 as well? Or is the *Fowler* court correct that “license” is used only in its narrow form? This is a question best left to Congress, as courts have not ruled on the issue in a manner consistent with original Congressional intent.

These questions are ones of Congressional intent and should have been reviewed by *Fowler* using the *Chevron* Doctrine. Instead, the *Fowler* court confuses *Sheridan Kalorama* while setting judicial precedent. The *Fowler* court correctly reasons that since the failure to veto is not a “license” it cannot be a “licensed undertaking.” However, the court then substitutes its own opinion that “any license” in Section 106 does not include delegated federal permits. Without a *Chevron* Doctrine analysis, connecting the language back to *Indiana Coal Council* and Congressional intent as evidenced in the statu-

124. *Id.*

125. *Id.* at 759-60.

tory amendment process, the judiciary substitutes its opinion on what activities constitute a “license” triggering Section 106 consultation instead of following Congress or the ACHP. The *Fowler* court arguably violates *Chevron*’s underlying premise that “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”¹²⁶

B. *MENOMINEE TRIBE V. U.S. EPA: THE LATEST JUDICIAL MISAPPLICATION.*

In 2017, the Menominee Tribe began to formally oppose the placement of an open pit mine.¹²⁷ This opposition resulted in litigation and two opinions that serve to narrow the court’s application of Section 106 even further. The Menominee Tribe’s failed consultation efforts during the permitting of the Back Forty Mine is significant both legally and culturally. The Tribe’s relationship with the Menominee River is fundamental to their culture.¹²⁸ As the Tribe’s namesake and the catalyst in the Tribe’s origin story, the river has remained a constant cultural influence.¹²⁹ At issue in the *Menominee* case is a proposed open pit metallic sulfide mine located along the Menominee River, merely 150 feet from the river’s edge, operated by the Canadian company Aquila Resources, Inc.¹³⁰ The Menominee River, itself, has tribal significance, but there are also burial mounds and other places of significance that could be adversely effected by the proposed Back Forty Mine.¹³¹ The merits of the Tribe’s concerns, Aquila’s proposed protections and mitigation, and the environmental justice issues ensnared in the Back Forty debate are beyond the scope of this article. However, the failure to consult with the Tribe on construction and operation of the mine inarguably raises the risk of devastating adverse effects on the Tribe’s historic and cultural resources. Much like the Dakota Access Pipeline NEPA litigation, the story of the Menominee River and the Back Forty mine provides a very recent and dramatic backdrop for this article’s inspection of a narrowing legal interpretation put in place by the courts of the NHPA and its amendments specifically designed to secure and protect tribal rights.

126. *Slater*, 167 F. Supp. 2d at 280 (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

127. *Menominee Nation’s Opposition to the Proposed Back Forty Mine*, MENOMINEE INDIAN TRIBE WIS., <http://www.noback40.org/Documents/Back40Handout.pdf> [<https://perma.cc/M2PZ-FB28>].

128. Tia Rowe, *The Fight for Ancestral Rivers: A Study of the Maori and the Legal Personhood Status of the Whanganui River and Whether Maori Strategies Can Be Used to Preserve the Menominee*, 27.3 MICH. ST. INT’L L. REV. 594 (2019).

129. *Id.*

130. *Home Page of No Back 40 Mine*, NO BACK 40 MINE, <http://www.noback40.org/> [<https://perma.cc/8PEU-ZTMW>].

131. *Menominee Nation’s Opposition to the Proposed Back Forty Mine*, *supra* note 111.

Unfortunately, after *Menominee*, the narrowing interpretation of Section 106 triggers continues with potentially damaging consequences. As expected, the D.C. Circuit Court contains the most legal opinions on environmental and administrative issues, including historic preservation; however, through *Menominee*, *Sheridan Kalorama*'s interpretation has jumped to the Seventh Circuit. On January 27, 2020, the Seventh Circuit Court of Appeals decided *Menominee Indian Tribe of Wisconsin v. Environmental Protection Agency*¹³² holding that no Section 106 consultation was required for a Clean Water Act 404 (CWA 404) permit because the EPA had previously delegated permitting authority to the State of Michigan. Therefore, the requirements of the NHPA "do not apply to projects for which no federal support has been sought."¹³³ The primary holding in this case relates to the federal courts' inability to opine on informal discussions between the EPA and the Tribe based on a lack of "final agency action" required by the Administrative Procedure Act. Buried in the story, and as explained below, is that the Seventh Circuit's narrow interpretation of Section 106 removed the Tribe's ability to consult on the proposed mine under the NHPA.

The Seventh Circuit did not discuss Section 106 at length; however, the opinion nonetheless goes beyond *Sheridan Kalorama*'s "failure to approve" to introduce even more restrictions on applicability of the Act. After *Menominee*, Section 106 could be considered inapplicable for any federal permit delegated to a State agency. The Court determined that "the Tribe alleged neither federal funding nor federal assistance [;]" therefore, their position is mistaken that Section 106 applies.¹³⁴ The case relies on *Old Town v. Kauffman* in its decision.

At issue in *Old Town* was the widening of Third Street in Goshen, Indiana. Appellees believed expansion would "damage or destroy buildings of historic or architectural significance[.]"¹³⁵ The City of Goshen did not seek any expenditure of federal funds for the road widening. While the Department of Transportation may approve programs or projects, in this case the Secretary of Transportation was never asked to approve Third Street's expansion.¹³⁶ The District Court in *Old Town* was concerned with segmentation of the project and that once the historic structures were razed, federal monies would be sought and historic preservation issues would be moot due to the lack of buildings. The *Menominee* opinion's reliance on *Old Town* to demonstrate that Section 106 applies only to federally funded or licensed undertakings follows the case law in *Sheridan*; however, it avoids *Indiana Coal Council*'s analogous fact pattern and opposite result.

132. *Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065 (7th Cir. 2020).

133. *Id.* at 1074.

134. *Id.*

135. *Old Town Neighborhood Ass'n v. Kauffman*, 333 F.3d 732, 734 (7th Cir. 2003).

136. *Id.* at 736.

As discussed earlier, the effect of federal permitting assumption by a State on Section 106 requirements was addressed in *Indiana Coal Council v. Lujan*, and that court reached an opposite conclusion.¹³⁷ The 1992 Amendments then codified this determination. Like the U.S. EPA's State assumption process for CWA 404 permitting, the U.S. Department of Interior's Office of Surface Mining (OSM) provides States the ability to assume OSM's role in the surface mine permit issuance and enforcement process.¹³⁸ So, consultation privileges should have been accorded to the Menominee Tribe, had the law and relevant procedures been fully reviewed and understood correctly.

Despite the similarities between the U.S. EPA's CWA 404 State assumption program and OSM's State assumption program, the court in *Menominee* made no reference to *Indiana Coal Council v. Lujan* - likely because of the regulatory changes to 800.16(y) and subsequent vacation of the district court opinion as moot. Notwithstanding the vacation, the factual and legal similarities should be noted. Like OSM, the U.S. EPA maintains a significant oversight role in permitting for State approved programs.¹³⁹ Admittedly, the D.C. District Court issued the opinion in *Indiana Coal Council v. Lujan* in 1991 - shortly before NHPA's impactful 1992 amendments. Although, with a clear understanding of the 1992 Amendment's context, namely, codifying *Indiana Coal Council*, the cases could be addressed similarly. When compared directly with *Indiana Coal Council*, the *Menominee* Court's reliance on *Old Town* appears misplaced. The *Menominee* court should have relied on the more factually analogous case in *Indiana Coal Council's* rationale.

The *Menominee* case serves as another missed opportunity to clarify Section 106 applicability and a prime example of a court's failure to use legislative history resulting in a decision that does not match Congressional intent. This case could have served as the vehicle to analyze the term "any license" in Section 106 under the *Chevron* doctrine. Instead, the court in *Menominee* interpreted, on its own, that the NHPA's use of the term "any license" in Section 106 does not include federal permits issued by States under applicable legal assumption program frameworks without an analysis of Congress's intent or the ACHP's federal agency interpretation. As established earlier in this Article, Congress's 1992 Amendment to the act rendered the factually analogous *Indiana Coal* case moot because the statutory language was intended to establish the applicability of Section 106 to individual delegated permit decisions.

137. *Ind. Coal Council v. Lujan*, 774 F. Supp. 1385 (D.C. Cir. 1991).

138. 30 U.S.C. § 1253(a).

139. 40 C.F.R. §§ 233.50-53.

PART IV: AN APPROPRIATE CHEVRON ANALYSIS FOR “UNDERTAKING”
AND “SECTION 106.”

Exclusive reliance on murky caselaw (such as *Sheridan* and *Fowler*) to interpret applicability of Section 106 does not serve the public good. This section argues that courts should apply the *Chevron* Doctrine, using the Act’s legislative history, to determine the scope of federal activities that trigger consultation. Much like the term “stationary sources” in the Clean Air Act, Section 106’s triggering terms “undertaking” and “any license” would benefit the *Chevron* Doctrine’s analytic process to provide a clear understanding. In *Chevron*, the court gave deference to the EPA’s regulatory plant-wide definition, known as the “bubble concept,” because it was a permissible interpretation of an ambiguous statutory term. Similar to the “bubble concept,” a *Chevron* analysis of the ACHP’s interpretation would likely find that *all* “undertakings” are subject to Section 106 consultation. The ACHP has made its interpretation clear through promulgation of § 800.16(y), which defines “undertaking” in Section 106 as the activities defined in Section 301’s “undertaking.” Subsequently, ACHP have attempted to enforce their understanding in legal proceedings as in *Fowler*.

As a foundation for application of *Chevron* to *Fowler* and *Menominee*, this Part first addresses *Chevron* Step Zero. In order to progress to an ambiguity analysis, this subsection first establishes that the National Historic Preservation Act itself provides the ACHP with interpretive authority over Section 106. The issue of deference to agency decision making under Section 106 is unique, as each individual federal agency is responsible for determining what activities are subject to consultation under the Act. While each agency must identify and evaluate potential undertakings for itself, the ACHP must be given deference in interpreting the requirements.

Next, this subsection recounts the Act’s legislative history to reveal ambiguity if analyzed during *Chevron* Step One. Lastly, this subsection includes a hypothetical application of *Chevron* Step Two to *Fowler* and *Menominee*. This section argues that both cases would likely have had different results if *Chevron* had been applied. The *Chevron* Step Two analysis to *Fowler* argues that the ACHP’s promulgation and application of the definition of “undertaking” in Part 800 is reasonable. This subsection recalls the underlying purpose of the Act, and more specifically the 1992 Amendments, to demonstrate the appropriateness of deference to the ACHP’s interpretation under *Chevron* Step Two as applied to *Menominee*.

A. *CHEVRON* STEP ZERO: THE ACHP HAS CLEAR AND EXPRESS
INTERPRETIVE AUTHORITY UNDER THE ACT.

How does the *Chevron* Doctrine relate to the National Historic Preservation Act? *Chevron* is arguably limited to carefully specified administrative

actions. Before the “*Chevron* Two Step,” the statute in question must first pass “*Chevron* Step Zero.”¹⁴⁰ At Step Zero, the court must first determine if Congress has given the agency interpretive authority for the statute at issue. As Justice Scalia stated in *Adams Fruit Co. Inc. v. Barrett*, a “precondition to deference under *Chevron* is a congressional delegation of administrative authority.”¹⁴¹ Accordingly, “it is plausible to think that the legislative grant of rulemaking power implicitly carries with it the grant of authority to interpret ambiguities in the law that the agency is entrusted with administering.”¹⁴² Without this delegation of interpretive authority, courts could not apply deference to an agency’s interpretation.

Congress explicitly gave interpretive authority to the Secretary of the Interior throughout the Act. The Secretary of the Interior has authority for a wide array of actions including those involved in the National Register nomination process and grantmaking.¹⁴³ However, Congress explicitly delegated Section 106 authority to the ACHP. The ACHP, not the Secretary of Interior in general, is provided the authority to “promulgate regulations as it considers necessary to govern the implementation of [Section 106] of this title in its entirety.”¹⁴⁴ Congress goes further by also providing that “undertakings may be exempted from any or all of the requirements of this division when the exemption is determined to be consistent with the purposes of this division, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic property.”¹⁴⁵ Congress has determined that the ACHP, uniquely positioned as the independent agency with substantive knowledge in a complex area of niche public policy, should interpret which activities require examination under Section 106 and which should be exempt based on the “likelihood of impairment of historic property.” Not only did Congress provide interpretive authority to the ACHP for Section 106, it expounds on its authority, connecting their interpretation to policymaking.

In a plain reading of the statute, Congress undoubtedly delegated interpretive authority for Section 106 to the ACHP. Unfortunately, the ACHP appears unable to translate interpretive authority into consistent enforcement of agency regulations. For example, the U.S. Army Corps of Engineers promulgated Appendix C to 33 CFR 325 to implement the National Historic Preservation Act, including Section 106, but without ACHP involvement. Section 800.14(a) in the ACHP’s Section 106 regulations require the ACHP’s consent in the promulgation of historic preservation regulation by

140. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

141. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2072, 2094 (1990).

142. *Id.* at 2093.

143. 54 U.S.C. § 302903; 54 U.S.C. § 302014.

144. 54 U.S.C. § 304108(a).

145. 54 U.S.C. § 304108(c).

each agency. In this case there is no record showing that the ACHP consented to the Corps' regulations. It is troubling that there are strong indications that the regulations exceed the parameters of the Act itself.¹⁴⁶

Instances do arise where Congress provides multiple agencies the authority to interpret a statute. In those cases, complicated issues of interpretive supremacy can arise.¹⁴⁷ Although the U.S. Army Corps, for example, has promulgated its own regulations on other matters that have gone unchallenged for years, there is no doubt the ACHP is the proper agency for interpretation of Section 106. The ACHP's interpretive authority was confirmed by the judiciary in *Slater*, where the court firmly held that the ACHP is provided the authority to implement Section 106 (while overturning the lower court's interpretation of "undertaking").¹⁴⁸ At Step Zero, there is no doubt that the ACHP has the "pedigree that is a prerequisite for deference" under the *Chevron* Doctrine.¹⁴⁹

B. *CHEVRON* STEP ONE FINDS AMBIGUITY IN SECTION 106 NECESSITATING *CHEVRON* STEP TWO

Chevron instructs courts to use "traditional canons of statutory construction" to determine whether the statute is "clear and unambiguous."¹⁵⁰ Although not definitively settled, most circuit courts and the Supreme Court have, at minimum, allowed the use of legislative history to assess the ambiguity of a statute.¹⁵¹ But as the result of many *Chevron* deference cases throughout the country, an apparent middle ground has emerged surrounding the use of legislative history.¹⁵² It is permitted, but courts "may not use legislative history to contradict the statute's ordinary meaning."¹⁵³ *Weintraub* is one of the few cases to attempt to define "license" under the Act, but did not use the "ordinary" meaning of the word. Instead, "[the] Court believes that Congress intended the word 'license' in that statute have its technical meaning; that is, that it refers to a written document constituting a permission or right to engage in some governmentally supervised activity."¹⁵⁴ Accordingly,

146. Melissa Lorentz, *Engineering Exceptions to Historic Preservation Law: Why the Army Corps*, 40 WM. MITCHELL L. REV. 1580 (2014).

147. William Weaver, *Multiple-Agency Delegations & One-Agency Chevron*, 67 VAND. L. REV. 275 (2014).

148. Nat'l Mining Ass'n v. Slater, 167 F. Supp. 2d 265, 293 (D.D.C. 2001).

149. Weaver, *supra* note 141, at 275.

150. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

151. Melina Forte, *May Legislative History Be Considered at Chevron Step One: The Third Circuit Dances the Chevron Two-Step in United States v. Geiser*, 54 VILL. L. REV. 727, 729 (2009).

152. John F. Manning, *Chevron and Legislative History*, 82 GEO. WASH. L. REV. 1517, 1519 (2014).

153. *Id.* at 1519.

154. Weintraub v. Rural Elec. Admin., 457 F. Supp. 78, 92 (M.D. Pa. 1978).

this subsection's reliance on the Congressional Hearings noted above in Part II is a permissible part of a hypothetical *Chevron* analysis.

Deliberation by Congress on Section 106 in 1966 is muddled. Congress did not imagine the specificity at which Section 106 would later be read and perhaps did not appreciate its importance at that time. Prior to the *Chevron* Step One analysis, it is important to properly frame the question: did Congress clearly express a limitation on Section 106 triggers by tying them to federal funds or to a "federal license" as narrowly interpreted? This is indeed the finding of the appellate court in *Fowler*, interpreting *Sheridan Kalorama*. However, based on the discussion between Congress's lawyer, Mr. Whitmer, Mr. Herzog of the Department of the Interior, and Mr. Gray of the National Trust for Historic Preservation, it is highly unlikely that that Congress clearly answered this crucial question. The legislative hearings analyzed in Part II show the extent of ambiguity in those activities that trigger Section 106.

The *Chevron* doctrine is relatively simple to apply to unambiguous statutory language. Unfortunately, this is not the case for Section 106. The answer to whether Congress clearly and unambiguously intended Section 106 to be applied narrowly rests on the interpretation of the statute's phrase "any license." Is "license" meant to be interpreted narrowly (or "technically"), as in *Weintraub*, applying only when the agency grants an actual "federal license?" Or is "license" an umbrella term for discretionary approval? The 1996 Act's legislative history and subsequent amendments fails to establish a narrow interpretation of "license." Instead, the hearings substitute guidance focused on an "discretionary approval" test. Just as Congress wrestled with the types of activities that should require consultation (eventually relying on subject matter experts), the *Fowler* and *Menominee* courts should have turned to the ACHP for guidance on interpretation.

C. *CHEVRON* STEP TWO AS APPLIED TO *FOWLER*: ACHP'S INTERPRETATION OF "UNDERTAKING" IS REASONABLE.

At first blush, the *Fowler* court appears ready to apply *Chevron*. The court established that "section 211 [of the Act] unambiguously limits the [ACHP] to promulgating regulations that 'govern the implementation of [section 106].'"¹⁵⁵ Unfortunately, *Chevron* is applied only to the ACHP's interpretative authority – not to the scope of Section 106. As stated previously, *Slater* and *Fowler* confirm that the ACHP is provided interpretive authority directly by Congress under *Chevron* Step Zero, leading to the availability of deference at Step Two. The ACHP, armed with interpretive authority, "[con]tends] that 36 C.F.R. § 800.3 lawfully implements section 106 because 'the

155. *Nat'l Mining Ass'n. v. Fowler*, 324 F.3d 752, 758 (D.C. Cir. 2003).

section 106 process applies to the full range of undertakings defined in section 301.”¹⁵⁶

However, after the court finds the ACHP to have unambiguous authority to interpret Section 106 through regulation, it confuses the matter by using a previous judicial opinion to trump their interpretation. The court claims that *Sheridan Kalorama* “squarely holds” against the ACHP’s interpretation of Section 106. The misplaced reliance in *Sheridan Kalorama*, as explained in Part III, will not be rehashed here. In *Fowler*, the court determined that *Sheridan Kalorama*’s decision should be used as precedent instead of reviewing the reasonableness of ACHP’s interpretation. This approach substitutes the court’s interpretation of the Act and thus bypasses agency deference.

If the court in *Fowler* properly analyzed Section 106 under Step One, it likely would have looked at the Congressional Hearing conversations among legislators, their legal counsel, and prominent advocates for historic preservation which did not include discussions on a narrow interpretation of “license.”

Accordingly, this subsection turns to a *Chevron* Step Two analysis of whether the ACHP’s interpretation in *Fowler* that all undertaking identified in Section 301 and 24 C.F.R. § 800.16(y) trigger consultation is reasonable.

In *Chevron*, after the court determined the statute to be ambiguous, it found EPA’s interpretation of the “bubble concept” as “permissible” – clarified later as “reasonable,” creating the second prong of the *Chevron* doctrine. The agency’s interpretation need not be the only interpretation of the statutory language at issue, merely one that was given reasoned consideration.¹⁵⁷ Courts have reviewed agency interpretations at Step Two under an “arbitrary and capricious” standard and with higher scrutiny when an agency flips its interpretation.¹⁵⁸ This would not have been the case if a court had completed a *Chevron* analysis of ACHP’s interpretation. As we see in *Fowler* and the history of revisions to the Section 106, the ACHP has always believed that Section 106 applies to a broader set of actions, extending the statutory term “license” to permits, approvals or even “support.”

In *Fowler*, the court addressed the ACHP’s authority to promulgate Section 106 regulations. The decision in that case strengthens the argument that ACHP’s interpretation: all Section 301 and 800.16(y) activities trigger Section 106. If the *Fowler* court was willing to cede interpretive authority over Section 106 to the ACHP this also comes with interpreting the scope of activities that trigger consultation.

156. *Id.* at 759.

157. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 859 (1984).

158. Kent Barnett & Christopher J. Walker, *Chevron Two Step Domain*, 93 NOTRE DAME L. REV. 1441, 1466 (2018).

Prior to the appeal in *Fowler*, the district court clearly held that “section 106 applie[s] to the full range of undertakings defined in [section 301].”¹⁵⁹ In the *Fowler* opinion, the court provided insight into the reasonableness of ACHP’s interpretation before it invalidated the application of Section 106 in a questionable Step One analysis. During a “ripeness” inquiry, the court found that the ACHP’s interpretation is already “crystallized” with their intent to have all Section 301 undertakings trigger Section 106.¹⁶⁰

In a short analysis of § 800.3, the *Fowler* court restated the ACHP’s interpretation of Section 106 triggering activities which, as we have seen, aligns with Congress’s true intent: require Section 106 when there is appropriate “federal involvement” in a proposed action. Specifically, the ACHP argued in its brief that to “determine whether the proposed Federal action is an undertaking as defined in § 800.16(y), 36 C.F.R. § 800.3(a) (emphasis added), the regulation leaves room for individual agencies to decide whether the term ‘Federal action’-- defined in neither the regulation nor the statute--limits the regulation’s application to a subset of section 301 ‘undertakings.’”¹⁶¹ Here, we see the ACHP interpreting the relationship between undertakings and Section 106 by distinguishing not “undertaking” from “Section 106,” as the court in *Sheridan Kalorama* followed by *Fowler* do, but highlighting that it is each Federal agency’s role to determine whether an activity is an “undertaking.” *Fowler* itself recognized the Office of Surface Mining’s interpretation of 800.3 related to Section 106 application as in line with ACHP’s interpretation. Multiple other courts have found a more expansive set of activities triggering Section 106 as well.¹⁶²

Using the facts in *Fowler*, it is difficult to understand how the ACHP’s interpretation that individual mine permitting actions, delegated through state agencies, would not trigger Section 106. The court was already willing to provide interpretative authority to the ACHP and this is certainly a reasonable interpretation. Although a vacated opinion, the *Fowler* court could lean on the inference that the changes in statute during the 1992 Amendments codified Congress’s understanding of the applicability of Section 106 to delegated permits, as held in *Indiana Coal Council*. The aim of leaving applicable statutory language substantially untouched during the 1992 Amendments was to clarify its application, not alter it. Furthermore, as the ACHP argued in *Fowler*, it is difficult to find the use of nearly identical wording to the Act itself “unreasonable” if provided in the Agency’s regulation implementing the same statute.

159. Nat’l Mining Ass’n v. Slater, 167 F. Supp. 2d 265, 290 (D.D.C. 2001)

160. Nat’l Mining Ass’n v. Fowler, 324 F.3d 752, 757 (D.C. Cir. 2003).

161. *Id.*

162. See generally *Morris Cty. Trust for Historic Pres. v. Pierce*, 714 F.2d 271 (3d Cir. 1983); *Waterbury Action to Conserve Our Heritage Inc. v. Harris*, 603 F.2d 310 (2d Cir. 1979).

D. *CHEVRON* STEP TWO AS APPLIED TO MENOMINEE: DEFERENCE TO THE ACHP UPHOLDS THE PURPOSE OF THE ACT.

The preceding section establishes ambiguity at Step One and Section 106's need for Step Two. In a hypothetical Step Two to *Fowler*, the ACHP's interpretation would be found reasonable. This subsection also finds the ACHP's interpretation reasonable but uses a "hyperpurposivism"¹⁶³ approach. Hyperpurposivism refers to a court's "extended inquiry in the purpose of the statute" to determine the reasonableness of an agency interpretation at Step Two.¹⁶⁴ *Menominee*'s facts and the underlying contextual purpose of the 1992 Amendments to promote more tribal involvement under the Act create an enlightening hyperpurposivist analysis at Step Two.

A purpose-driven analysis of ACHP's interpretation in *Menominee* is even more persuasive than the hypothetical Step Two for *Fowler*. The Act's express purpose of providing a more meaningful role for federal tribes is subverted by the decision in *Menominee* and the misapplication of Section 106 generally. In a hypothetical application of *Chevron* Step Two to ACHP's interpretation of Section 106, the contextual backdrop of the Menominee Tribe's failed consultation efforts highlights that the ACHP's interpretation is not only reasonable, but necessary. This interpretation would provide the opportunity for tribal consultation where the current judicial interpretation excludes it.

A purposivist approach to *Chevron* Step Two addresses *Chevron*'s attempt at keeping interpretation out of the hands of judges when the issue is related to policy – particularly as applied to a complex field such as historic preservation.¹⁶⁵ As put by Professor Mark Seidenfeld, "when an agency administers a regulatory scheme, legislative intent seems too tenuous a concept for reviewing courts to use at *Chevron*'s step one to exclude *entirely* the more technically expert and politically accountable agency from the interpretive process."¹⁶⁶ The NHPA created the ACHP for the purpose of resolving difficult questions on historic preservation policy. The legislative history even alludes to this as Congressmen ask whether the ACHP would be on hand to resolve difficulties experienced in Pennsylvania and federal highway destruction of historic resources.¹⁶⁷

163. Barnett & Walker, *supra* note 158.

164. *Id.*

165. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

166. Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 115 (1994).

167. *To Establish a Program for the Preservation of Additional Historic Properties Throughout the Nation: Hearing on S. 3035, H.R. 13491, H.R. 13491, H.R. 13790, H.R. 13792 and H.R. 14018 Before the Subcomm. on Nat'l Parks and Recreation, and H. Comm. On In-*

Congress is not all-knowing and cannot be expected to foresee the application of a statute to all factual circumstances. Accordingly, a Step Two analysis focusing on the purpose of a statute, instead of the textual, plain meaning of individual words, allows the statute to evolve with changing factual scenarios.¹⁶⁸ As noted earlier, Congress elected to use the word “license” because the issue of expanding Section 106 to federal activities beyond those funded or directly undertaken by a federal agency was presented in the context of the Federal Power Commission. The Federal Power Commission issued “licenses” for its projects so Congress, without any deep analysis or thought demonstrated in the Congressional record, used “any license” in the Act. There is no discussion or contemplation of the word “license” – only that Section 106 depends on an agency’s discretionary decision making. Since 1966, the Federal Power Commission has become defunct and federal agencies influence proposed activities through myriad ways including permits, approvals, agreements, and “licenses” as narrowly defined. By using the purpose of the Act, and its amendment in 1992, deference to agency expertise better places a statute’s ambiguous language with contemporary understanding and usage.

Historic preservation is rooted in a belief that protecting resources is a vital public interest. Like the National Environmental Policy Act, the NHPA outlines the purpose of the legislation with rosy eyes. Balance between public interests in historic preservation is paramount. The Act notes that “the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans[.]”¹⁶⁹ This emphatic language certainly signals Congress’s hope to act swiftly and comprehensively to protect historic resources. Accordingly, it is expected that purposivist approach in Step Two would find ACHP’s more expansive application of Section 106 reasonable. An application of Section 106 to a wide set of federal activities would result in more consultation and potential protection of historic resources that would likely otherwise be lost or adversely effected.

More directly applicable to *Menominee*, Congress’s goal to involve tribal entities under the Act is directly undermined by the court’s failure to look to the Act’s policy in its Section 106 decision making.¹⁷⁰ The 1992

terior and Insular Affairs, 89th Cong. 18 (1966) (statement of George B. Hartzog, Jr., Director, National Park Service, Department of the Interior and Gordon Gray, Chairman, National Trust for Historic Preservation).

168. Barnett & Walker, *supra* note 158, at 1453.

169. 16 U.S.C. § 470(a)(1-7).

170. As noted earlier, the decision in *Menominee* is a culmination of reliance on judicial mismanagement along with heightened attention played to the delegation process for 404 permits under the CWA. Accordingly, a Step Two analysis would likely not have swayed the decision on the merits.

Amendments were substantial, explicitly providing a role for Indian tribes under the Act. Importantly, for the case of Section 106, Section 7 of the Act was amended to expressly require consultation with tribes: "In planning an undertaking in compliance with Section 106, a Federal agency shall consult with an Indian tribe or Native Hawaiian organization that may attach religious and cultural values to properties described in subparagraph (A)."¹⁷¹ Members of Congress unanimously agreed for such an increased role by tribes under the Act.¹⁷² In 1992, testimony was even provided by David Cole, President, Board of Directors, Keepers of the Treasures on behalf of the Menominee Tribe of Wisconsin stating, "[t]he enactment of this bill would be a major step toward enabling tribal governments to become full partners in our national historic preservation programs."¹⁷³

Based on the legislative history of both the original Act and its 1992 Amendments, it is indisputable that Congress intended to expand the consultation role for Indian tribes. Accordingly, an interpretation by the ACHP that Section 106 applies to individual federal permit decisions, including those permit decisions through a program delegated to a State agency, is reasonable under Step Two when relying on the purpose of the statutory requirements. The *Menominee* appellate court's misplaced reliance on *Old Town* and the U.S. Army Corps of Engineer's failure to address Section 106 concerns left the court with no choice but to concur with the District Court and find consultation inapplicable. In his concurring opinion, Judge Hamilton writing for the court noted, "[t]he Menominee Indian Tribe of Wisconsin's sincere efforts to protect its cultural heritage ran into a legal labyrinth and regulatory misdirection."¹⁷⁴ Unfortunately, some of the legal labyrinth could have been avoided if one of the previous courts interpreting Section 106 properly evaluated the ACHP's interpretation through *Chevron*.

CONCLUSION

As addressed in Part IV, a proper *Chevron* analysis substantially impacts the applicability of Section 106 in court proceedings and in federal agency decision making. It is not likely that the legislative history could demonstrate a clear and unambiguous interpretation to the scope of Section 106; however, after finding the statutory provision vague, deference to the interpretation of the ACHP could without a doubt be determined as "reasonable." While this Article argues that the *Menominee* fact pattern and legal opinions provide a vehicle for such a change in legal interpretation, an appeal

171. *National Historic Preservation Act Amendments of 1991*, 102nd Cong. (1992).

172. *Id.*

173. *Id.*

174. *Menominee Indian Tribe of Wis. v. EPA*, 947 F.3d 1065, 1074 (7th Cir. 2020).

and successful argument is not the only solution. In conclusion, this Article proposes a simple, legislative solution: statutory amendment to Section 106.

A. STATUTORY AMENDMENT TO SECTION 106 TO CLARIFY
APPLICABILITY

If the confusion on what activities trigger Section 106 stems from the 1992 Amendments, as purported by the D.C. Circuit in *Sheridan Kalorama*, then the most logical solution is to enact another statutory amendment to remove the confusion. The two sections of the Act that must align through a proposed amendment are: 1) the Definitions section¹⁷⁵ and 2) Section 106¹⁷⁶ itself. As noted throughout the Article, the language in Section 106 has remained nearly unchanged since 1966, while the definition of “undertaking” has been modified. The two provisions were clearly linked in 1980 when “undertaking” was defined as “any action as described in section 106.”¹⁷⁷ However, judicial interpretations created a divide between the sections based on the 1992 amendment’s textual alignment of the statutory and regulatory definition of “undertaking.” The judiciary has taken this definitional realignment to mean that Congress intended to narrow the applicability of Section 106 to a subset of actions,¹⁷⁸ while the ACHP appears to have interpreted the 1992 amendments to broaden applicability to all undertakings defined in Part 800. This section proposes a textual addition to Section 106, not to Section 301, to close the loophole created by the schism in interpretation.

Section 106 has only been substantively modified once since 1966¹⁷⁹ to include properties eligible for the National Register of Historic Properties.¹⁸⁰ Accordingly, the text of this section should be updated to provide a clear understanding of the evolution of Section 106 consultations and the actions that require review. If the purpose of the Act is to provide review for potential adverse effects to historic resources, backstopped by subject matter experts, then Section 106, one of the most important tools in the Act, must be updated in light of judicial decisions in *Sheridan Kalorama*, *Fowler*, and *Menominee*.

This Article’s proposed amendment is simple. In the same vein as the original definition of “undertaking,” this Article suggests a simple cross reference to the definition of “undertaking” be inserted to Section 106, as shown below.

175. 54 U.S.C. § 300101.

176. 54 U.S.C. § 306108.

177. Findings and Policy of National Historic Preservation Act, Pub. L. No. 96-515, § 501, 94 Stat 2987 (1980), <https://www.govinfo.gov/content/pkg/STATUTE-94/pdf/STATUTE-94-Pg2987.pdf#page=1> [<https://perma.cc/4WRX-FBCP>].

178. *Sheridan Kalorama Hist. Ass’n v. Christopher*, 49 F.3d 750, 753 (1995 D.C. Cir.).

179. Land and Water Conservation Fund Act, Pub. L. No. 94-422, 90 Stat. 1319 (1976).

180. *Id.* at 1320.

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking, *as defined in 54 U.S.C. 300320*, in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Although only a small textual addition, this language provides clarity. By referencing back to the statutory definition, federal agencies will no longer have to determine the precise definition applying to Section 106 and they can instead focus on whether there is discretionary approval authority for the activity in question. After all, this is the ACHP's understanding of the process as explained in *Fowler* and what this Article argues to be Congress's intent. As a clarification bonus, this reference back to the statutory definition will align Section 106's implementing regulations with the statute without ambiguity.

In the current political climate, this proposed amendment would likely be viewed as an unfavorable expansion of regulatory requirements. Significant pushback against the current administration's attempt to revise historic preservation regulations is instructive. On March 1, 2019, the National Park Service published a proposed rule revising 36 CFR parts 60 and 63 and sought public comment.¹⁸¹ The proposed changes were vilified by preservation advocacy groups as negatively impacting the National Register nomination process.¹⁸² The ACHP itself even found flaws in the proposed rule.¹⁸³ Over 3,000 comments were received on the proposed rule and no final rule has been published.¹⁸⁴ While predominantly viewed as a hinderance to

181. Land and Water Conservation Fund, 84 Fed. Reg. 6996 (Mar. 1, 2019).

182. Sharee Williamson & Elizabeth S. Merritt, *Action Alert: Comment on Proposed Rule Changes to National Register of Historic Places Nominations*, NATIONAL TRUST FOR HISTORIC PRES. (Apr. 5, 2019), https://forum.savingplaces.org/blogs/special-contributor/2019/04/05/alert-proposed-rule-changes-national-register?_ga=2.41116576.340992187.1583856060-1125848062.1561733015 [<https://perma.cc/RL6Z-7TYE>].

183. John M. Fowler, *Regulation Identifier Number 1024-AE49*, ADVISORY COUNCIL ON HISTORIC PRES. (Apr. 26, 2019), <https://www.achp.gov/sites/default/files/2019-04/achpnr-letter.pdf> [<https://perma.cc/U6V4-7TTM>].

184. *National Register of Historic Places*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=NPS-2019-0001> [<https://perma.cc/4EUL-26R3>].

preservation, the proposed rule highlights how government gridlock would make even the smallest statutory clarification difficult.

The history of the NHPA, the ACHP regulations implementing Section 106, and legal opinions reveal how intertwined and tangled the three branches of American government can become on one issue. At the time of enactment in 1966, the nation was destroying historic structures at an alarming rate. Today, historic preservation is viewed differently. Historic tax credits breathe life into downtown Main Streets and the historic character of an area can be a catalyst for gentrification.¹⁸⁵ As a legal matter, much like the National Environmental Policy Act, the NHPA has also become a litigation tool routinely employed in environmental law suits to delay or prevent action on social issues.¹⁸⁶ As with most public policy issues, historic preservation should have a developing and growing history; however, the legal framework used as a backdrop for social action should be clear and consistent.

As this Article suggests, clarification of Section 106 triggering activities would come from two sources: judicial reinterpretation using *Chevron* or legislative amendment. The *Menominee* case is the latest opportunity for judicial action, but as of this Article's writing, an appeal has not been submitted to the Supreme Court. Similarly, no statutory amendment aligning Section 106 with Section 301 has been introduced. Hopefully, with increased awareness of courts' deviations from Congress's intent for Section 106, the current judicial interpretation can be revisited so consultation will be required for more federal actions.

185. See generally STEPHANIE MEEKS WITH KEVIN C. MURPHY, *THE PAST AND FUTURE CITY* (2016).

186. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91 (D.D.C. 2017).