December 10, 2002

H. Bryan Mitchell
Heritage Preservation Services
National Park Service
1849 C Street, NW (2255)
Washington DC 20240

Re: Comments on Draft Regulations 36 CFR Part 61.8 Tribal Programs

Dear Mr. Mitchell:

The National Association of Tribal Historic Preservation Officers (NATHPO) commends the National Park Service’s efforts to develop long awaited and much needed regulations that provide guidance to Tribes interested in assuming SHPO responsibilities. NATHPO also commends the NPS for conducting national public meetings on regulations of extreme importance to tribal governments.

The NPS stated in the proposed regulations that "building an effective working relationship" with tribal governments is one NPS objective. This laudable goal is very important, but in fact, these regulations by their nature should be to advance tribal and federal historic preservation goals. These rules must recognize this central goal.

The NATHPO board of directors respectfully submits the following recommendations and general comments to the proposed regulations, which accompany a detailed document that is a line-by-line edit, addition, and strikeout on the published NPS proposed regulations.

Recommendation 1: That NPS establish an obligatory review of the published, Final Rule on Part 61.8 within three years of implementation. Each and every Tribe exists with a unique cultural and governmental history. The 1992 amendments ushered in a new era of historic preservation in the official partnership of tribal to federal government. As more and more Tribes create and operate THPO programs, there will undoubtedly be circumstances for which Part 61.8 will not provide enough guidance, contradictory guidance or interpretations that will lead to tribal discrimination. It would be contrary to the intent of Congress to allow the very set of regulations that implement the 1992 amendments to also be the vehicle by which the federal – tribal partnership results in federal discrimination. To avoid this potential problem NPS should impose an obligatory review of Part 61.8 implementation within three years of its final adoption.

Recommendation 2: That NPS consider the unique situation of Alaska Tribes and Tribal Corporations and conduct a consultation meeting in Alaska. NPS should conduct at least one specific and targeted public meeting with Alaska Native tribal governments to ensure that NPS does not exclude this entire community from participating in the National Historic Preservation Act, and the benefits available to states and other tribes. Nothing in the Act suggests that Congress intended to exclude Alaska Tribes from full participation.
Recommendation 3: That the NPS conduct a Tribal Historic Preservation Office consultation meeting specifically targeting the comments of existing THPOs. As you stated during the Washington, DC, public meeting, the NPS offered meetings to the general public, and that the meetings in Montana, Washington, Arizona, Nevada, New Mexico, North Dakota, Oklahoma, Wisconsin, and Washington-DC, were not official tribal government-to-government consultation meetings. NATHPO believes that such consultations are required by Section 101(d)(i)(c) of the Act.

Recommendation 4: That the NPS make substantial changes to the August 12, 2002, draft and republish for comment for an additional comment period of time.

Overall, General Comments
A. Avoid all references to "us"and "you." Such first person plural references unnecessarily personalize a preexisting dichotomy and are needlessly confusing. Simply replace where appropriate with "NPS" and "Tribe."
B. Delete or further define the phrases "to the extent feasible" [(b)(3) and (b)(6)] "same authority and discretion" [(a)], "effective working relationship" [(c)(1)], "adequate" and "adequate and qualified" [(g)(1)(i) and (ii) and (iii)]. Each of these areas would be better clarified by simply adding the clause "in accordance with the principles of Federal Indian law."
C. Define or delete the phrase "Qualified Tribes" [(b)(4)]. If qualified means federally recognized then state "federally recognized." If qualification hinges on having "tribal lands" then the NPS must codify this in a second publishing of these amended regulations or in the Final Rule. The recent NPS decision to allow THPO eligibility for trust lands outside reservation boundaries (or outside "tribal lands") should also be defined as "qualified." Tribes without tribal lands, without any lands, or with only corporate lands or fee lands, should also be included as "qualified."
D. The National Historic Preservation Act does not establish any thresholds that would exclude non-THPO tribal preservation programs and was written with the intent that all tribal governments would have an opportunity to participate in this national program. Therefore a "current preservation program" need not exist in order for a Tribal 61.8 application to merit NPS consideration. The imposition of an additional exclusionary requirement is inconsistent with the Act and must be deleted. Also, NATHPO disagrees with your policy statement made in Phoenix, Arizona, that the NPS interpretation of the Act is that the THPO program is "not intended to create programs when none previously existed."
E. It is not the place of the NPS, nor does the law require, that NPS determine minimum requirements of THPO staff professional qualifications. Tribal employment decisions are a matter of tribal employment systems.
The law does not require that a Tribal Historic Preservation Review Board be similar to a State Historic Preservation Review Board. Therefore the wording “adequate and qualified” [(g)(1)(ii)] is not appropriate. Delete the entire sub-paragraph (g)(1)(ii).

Delete (g)(1)(iii) in entirety. The law does not explicitly require these within Section 101(b)(2) or Section 101(d)(2). Consultation with other Tribes, with the SHPO, and with the general public are matters of each tribe’s individually sanctioned tribal sovereignty and therefore should not be a matter of NPS concern.

Mention of a THPO application is lacking from the overall regulations and needs to be incorporated in a manner that is helpful and that includes timelines and deadlines.

The published proposed timeline and application steps need to be checked for accuracy and clarity. What happens if the NPS misses one of their deadlines?

Tribal governments are still burdened by the lack of a NPS tribal consultation policy. Without such knowledge and guidance, tribal governments are not allowed to understand how their comments and recommendations are interpreted. This important oversight is long overdue and we urge you to address this need and concern as soon as possible.

While NATHPO commends NPS for its efforts to conduct national public meetings, it is understood that NPS tribal consultation efforts are not yet completed. The federal canons of tribal consultation process require mailing, phoning, and face to face meetings. To this end NATHPO is poised to assist NPS in facilitating an all-THPO Tribal meeting as a means of initiating tribal face-to-face requirements.

Attached please find a copy of NATHPO’s line-by-line edits and strikeouts. Thank you for the opportunity to comment on this important set of regulations.

Sincerely,

Alan S. Downer, Chairman

Attachment:

cc: NATHPO Members
    D. Bambi Kraus, NATHPO President
    Fran S. Mainella, NPS Director
    Don Murphy, NPS Deputy Director
    Randy Jones, NPS Deputy Director
    Katherine Stevenson, NPS Associate Director
61.8 (a) **What is the purpose of this section?** The section sets out procedures and requirements for the assumption by Indian Tribes of any or all functions of a State Historic Preservation Officer (SHPO) with respect to tribal lands, in accordance with §§101(b)(2) and (b)(3) of the NHPA. A Tribe that has assumed any or all functions of an SHPO in accordance with the NHPA shall have the same authority and discretion accorded to an SHPO by the NHPA for the purpose of carrying out those functions.

(b) **What policies govern tribal participation in the national historic preservation program?**

(1) Congress has recognized that the national historic preservation program will be strengthened by providing Indian Tribes with the opportunity to become full partners in the national historic preservation program.

(2) Our The NPS's Tribal historic preservation program and regulations should assist Indian Tribes in expanding and accelerating their historic preservation programs to protect their historic properties **by assuming any or all of the functions of the State Historic Preservation Officers on Tribal lands.**

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

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

(5) An Indian Tribe has an inherent legal right of self-determination and the distinctive rights that flow from its inherent sovereignty. Assuming responsibility for functions in accordance with the NHPA and this regulation is an exercise of the sovereign powers of Tribal governments. The NPS will implement the Tribal historic preservation program strictly on a the government-to-government basis relationship between the United States and the Indian tribes.

(6) To the extent feasible, t The National Park Service (NPS) **shall construe the NHPA and these rules in accordance with the recognized canons of construction in Federal**
Indian law so as to facilitate tribal assumption of functions pursuant to the NHPA.

(c) How will the NPS implement these policies in carrying out the procedures and requirements for tribal assumption of SHPO duties?

(1) The NPS will consult with each Indian Tribe proposing to assume SHPO duties on a government-to-government basis, in a manner respectful of tribal sovereignty, and with the aim of building an effective working relationship between the two governments that advances the Tribe’s preservation program goals, objectives and activities and the preservation of the Tribe’s patrimony.

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

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

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

(2) Tribal lands means all lands within the exterior boundaries of an Indian reservation and dependent Indian communities, and includes all lands held in trust by the Secretary for the benefit of a Tribe that are beyond the exterior boundaries of an Indian Reservation.

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

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

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

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

(f) What are the general requirements for Tribal Program Plans?

(1) When submitting a Tribal Program Plan for review and approval, you a Tribe must include the following in your the Tribe’s Program Plan:

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

(ii) Sufficient descriptive information on your current historic preservation program or
activities and on the individual functions you propose to assume to allow the NPS to determine
whether you are fully capable of carrying out the functions you propose to assume (see
paragraph 61.8(g) of this part for further guidance on this requirement):
(iii) A clear list of the SHPO functions, if any, that you propose will remain the
responsibility of the SHPO.
(2) You The Tribe may include the following in your Program Plan:
(i) A request for any waiver or modification of the requirements of the NHPA or of this
rule that you the Tribe believes is necessary to accommodate tribal values or the cultural setting
of tribal heritage preservation goals and objectives (see paragraph 61.8(h) of this part for further
guidance).
(ii) Any additional information you the Tribe believes will assist the NPS in determining
that you are the Tribe is fully capable of carrying out the functions you the Tribe proposes to
assume.
(iii) A request for any technical assistance you the Tribe believes would benefit the Tribe
in carrying out the functions you the Tribe proposes to assume.

(g) What are the specific elements that must be in a Tribal Program Plan?
(1) In describing the overall assumption of SHPO functions set out in your Program Plan;
your The Tribe’s Program Plan must include:
(i) Information on how the THPO will employ or appoint such professionally qualified
individuals as may be necessary for carrying out those functions the Tribe proposes to assume.
Such employment or appointment must be through establishment of full or part-time staff
positions, or through other arrangements suitable to the workload of the THPO and to the scope
of the tribal program. A professionally qualified individual meets the Secretary of the Interior’s
Professional Qualifications Standards or is recognized by the Tribe as a traditional cultural
authority. The Tribe shall certify that it has an established Personnel System. The Tribe’s
Program Plan must include official job titles and job descriptions for key program personnel
to be employed by the Tribal Historic Preservation Officer.
(ii) Information on how the THPO will include an adequate and qualified tribal historic
preservation review board in the operations of the tribal historic preservation program. The
THPO appoints such a board, unless tribal ordinance or the Tribe’s chief governing authority
provides for another appointment process. Members of the board must have sufficient interest
and experience in historic preservation and/or tribal culture to provide the THPO with
meaningful advice. The board’s duties include providing general advice and guidance to the
THPO, reviewing appropriate documentation submitted to the NPS in connection with the
Historic Preservation Fund, reviewing National Register nominations where the Tribe has
assumed responsibility for that nomination process, and such other duties as may be appropriate.
(iii) Information on how the THPO will provide for adequate participation in the historic
preservation program by Tribal traditional cultural authorities, representatives of other Tribes
whose traditional lands are under the jurisdiction of the Tribe, and the interested public. At a
minimum, adequate participation of the interested public means that, no less frequently than
annually, the THPO solicits and considers comments on the goals and activities of the tribal
historic preservation program. The THPO solicits these comments through means such as locally
publishing a notice, holding an open meeting, or some other process consistent with the routine

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procedures of the tribal government.

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

(2) In setting out each of the duties in §101(b)(3) of the NHPA that the Tribe proposes to assume, your the Tribe’s Program Plan must include a description of how the Tribe will carry out each of those duties; and a description of how those duties are related to the Tribe’s current historic preservation program or activities. If the Tribe proposes to assume responsibility for administering the National Register nomination process, for advising and assisting in the evaluation of proposals for rehabilitation of historic properties that may qualify for Federal tax credits, and/or for consulting with Federal agencies pursuant to §506 of the NHPA, your the Tribe’s Program Plan must include the following:

(i) If the Tribe proposes to assume responsibility for submitting nominations to the National Register of Historic Places, the proposed Program Plan must include information on the process the Tribe proposes for considering and submitting such nominations where the Tribe proposes to assume responsibility for submitting nominations to the National Register of Historic Places. The Tribe’s process must be consistent with the National Register process set out in 36 CFR 60 as it applies to State Historic Preservation Officers. The proposed process must ensure that the THPO must ensure that the tribal historic preservation review board has access to advice from appropriately qualified individuals in accordance with (g)(1)(i) of this paragraph in carrying out its responsibilities for reviewing National Register nominations. In the event that the process in 36 CFR 60 is incompatible with tribal values and/or cultural preservation goals and objectives, the Tribe may propose an alternative process that provides at a minimum for review of nominations by professionally qualified individuals, review of nominations by a qualified advisory board or other independent, qualified entity, and provides a reasonable opportunity for public comment on nominations before they are submitted to the National Register (see paragraph 61.8(h) of this part on waivers and modifications of requirements).

(ii) If the Tribe proposes to assume responsibility for advising and assisting in the evaluation of proposals for rehabilitation of historic properties that may qualify for Federal tax credits or other Federal assistance, the proposed Program Plan must include information on the Tribe’s process for reviewing such projects and submitting them to the NPS where the Tribe proposes to assume responsibility for advising and assisting in the evaluation of proposals for rehabilitation of historic properties that may qualify for Federal tax credits or other Federal assistance. The Tribe’s process must be consistent with the process set out in 36 CFR 67 as it applies to State Historic Preservation Officers. In the event that the process in 36 CFR 67 is incompatible with tribal values and/or cultural preservation goals and objectives, the Tribe may propose an alternative process that provides at a minimum for professional review and timely submission of project documentation to the NPS in a manner that is consistent with the overall purposes of 36 CFR 67 (see paragraph 61.8(h) of this part on waivers and modifications of requirements).

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

(h) How does our a Tribe obtain a waiver or modification of the requirements of the NHPA or of this rule?

(1) If, in preparing your a Tribe’s Program Plan, you a Tribe determines that the requirements of the NHPA and/or of this regulation that are applicable to SHPOs are incompatible with tribal values or with the cultural setting of your tribal heritage goals and objectives, you the Tribe may include as a part of your the Tribe’s Program Plan a request that the NPS waive or modify those requirements in order to conform to tribal values and/or the cultural setting of tribal heritage preservation goals and objectives.

(2) Your The Tribe’s request must include:

(i) An explanation of the inconsistency between the pertinent requirements and tribal values and/or the cultural setting of tribal heritage preservation goals and objectives. A certification that the requirement from which a waiver is sought is inconsistent with Tribal values or inconsistent with the cultural setting of the Tribe’s historic preservation program.

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

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

(i) How will the NPS consult with us a Tribe on our the Tribe’s proposed Program Plan?

(1) Within 210 days of receipt, the NPS will notify you a Tribe in writing that it has received your the Tribe’s proposal. In accordance with § 101(d)(2) of the NHPA and paragraph 61.8(g) of this part, a complete proposal includes the formal resolution from the Tribe’s chief governing authority, the official designation of a Tribal Historic Preservation Officer, and the Program Plan. If your the Tribe’s proposal is incomplete, the NPS will indicate which parts are missing. The consultation process set out below will begin upon receipt of the missing parts.

(2) Within 4530 days of receipt of a complete proposal, the NPS will notify the Tribal Historic Preservation Officer, or other representative specifically designated by the Tribe, in writing of any ambiguities or apparent deficiencies that remain in the proposal and indicate how those ambiguities or apparent deficiencies may be remedied, indicate how such apparent deficiencies and ambiguities would result in the Tribe not being fully capable of carrying out the function as proposed, and request that the Tribe provide additional information or an alternative approach to undertaking the relevant functions. The NPS will indicate what technical assistance is available to the Tribe to correct the apparent problem. Within 30 days of receipt of a written response from the Tribe, the NPS will notify the Tribe in writing whether
or not the ambiguities or apparent deficiencies have been remedied.

(j) Will the NPS consult with anyone else about our a Tribe's proposed Program Plan?

(1) Unless the Tribe notifies the NPS that it wishes to have additional time to revise its proposal, within 21 days of completion of the consultation process in paragraph 61.8(i) of this part, the NPS, pursuant to § 101(d)(2)(D) of the NHPA, will provide copies of the Tribe's proposal, including any revisions, to the appropriate SHPO(s), to any other Tribes whose tribal or aboriginal lands may be affected by the conduct of the tribal historic preservation program and, if the Tribe proposes to assume Section 106 responsibilities, to the Advisory Council on Historic Preservation.

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

(k) On what basis will the Secretary review our a decision on the Tribe’s proposed Program Plan?

(1) In accordance with § 101(d)(2)(E) of the NHPA the NPS must make a decision on whether or not to approve the Program Plan. Following the consultation process set out above, the NPS must review the Program Plan in accordance with § 101(d)(2)(E) of the NHPA. That review must and determine whether:

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

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

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

(ii) The proposed Program Plan defines the remaining responsibilities of the SHPO, if any. And

(iii) With respect to properties neither owned by a member of a Tribe nor held in trust by the Secretary for the benefit of the Tribe, at the request of the owner thereof, the SHPO, in addition to the THPO, may exercise historic preservation responsibilities.

(2) Where the Program Plan includes a request for waiver or modification of requirements in accordance with paragraph 61.8(h) of this part, the NPS will review the Tribe’s request as a part of its review of the Tribe’s Program Plan, pursuant to §101(d)(1)(B) of the NHPA. Upon finding that a waiver or modification of the requirements of the NHPA is consistent with the purposes of the NHPA, giving full consideration to established principles of Federal Indian law, feasible, and necessary to accommodate tribal values and/or the cultural setting of tribal heritage preservation goals and objectives, the NPS will waive or modify such requirements.

(l) How will the NPS make a decision on our a Tribe’s Program Plan?

(1) Within 30 days of completion of the consultation process set forth above, the NPS must make a decision to approve or disapprove (in whole or in part) the Tribe’s proposed substitution.
(i) If the Tribe has requested a waiver, the NPS shall first determine whether or not to approve the waiver before proceeding to a decision on the Program Plan as a whole. The NPS shall approve Tribe’s request for a waiver unless the NPS can demonstrate by specific, clear and convincing evidence that granting the waiver will make it impossible for the Tribe to fully carry out the function in a manner consistent with the NHPA.

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

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

(A) Approve the Tribal Program Plan in part for those portions that the Tribe is fully capable of carrying out; disapprove those portions of the Program Plan for which the Tribe is not fully capable of carrying out the function(s); and transmit to the Tribe the approved portions of the Program Plan; or

(B) Disapprove the entire Program Plan.

and send to the Tribal Historic Preservation Officer or other designated representative of the Tribe a written finding as to:

(2) The NPS shall provide the Tribe with a written finding that must:

(i) Explain the basis for finding the NPS’s determination that the Tribe is or is not fully capable of carrying out a function or functions. The explanation for any finding that the Tribe is not fully capable must include a reference to the specific requirements(s) of this rule and/or of the NHPA that the Tribe has failed to meet, and must detail the clear and convincing evidence that lead the NPS to reach this conclusion.

(ii) Explain the basis for approving or denying any requested waiver or modification, including the clear and convincing evidence that approving the waiver would make it impossible for the Program to operate in a manner consistent with the NHPA.

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

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

(v) Clearly specify the Tribe’s right to request a review of the decision by the Director and provide appropriate information on the procedure for filing such a request in accordance with paragraph (m) of this part.

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

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

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

   (ii) Disapprove the entire program plan.

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

(m) How can we a Tribe obtain a review of a negative decision by the NPS?

(1) You A Tribe may request a review by the Director of:

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

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

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

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

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

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

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

   (iv) Any appropriate supporting documentation.

(3) If the chief governing authority of your Tribe asks for a meeting with the Director to discuss its request, or, if the Director on his or her own initiative desires such a meeting, the Director will convene a meeting with the designated representatives of the Tribe. Except at the request of the appellant Indian Tribe or unless the NPS is paying all travel costs for the Tribal representatives, any meeting must be held no more than 50 miles from the Tribal Headquarters.

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

(5) If the Director’s final decision is adverse to the Tribe, the written notice of the
decision shall specify the Tribe’s right to appeal to Federal District Court. Should the Tribe choose to appeal an adverse decision on the part of the Director, the appeal shall be heard in the Federal District in which the Tribe is located.

(n) May a Tribe that assumes SHPO functions obtain relevant materials from the SHPO?
(1) Upon formal assumption of SHPO responsibilities, a Tribe is entitled to receive from the affected SHPO(s) those records, data, maps, and reports or legible copies thereof, that pertain to sites on tribal land, as well as to those sites on the Tribe’s aboriginal lands to which the Tribe attaches religious and cultural significance.
(2) The NPS will foster communication and cooperation between the Tribe and the affected SHPO(s) to ensure that the Tribe receive the information necessary to carry out its responsibilities.
(3) The SHPO may charge the Tribe a fee not to exceed the actual cost of transferring or duplicating the materials.

(o) How does the NPS review the performance of a Tribe that has assumed SHPO duties?
(1) Pursuant to SS 101(b)(2) and 101(d)(2) of the NHPA, the NPS periodically will evaluate each tribal program for consistency with the NHPA and with the Tribe’s approved program plan. The review will occur at least once every four years. The NPS may use on-site and/or off-site inquiries to perform such evaluation. The review will provide the Tribe with written findings and analyses that highlight program strengths and weaknesses.
(2) To the greatest extent feasible the review will be a collegial process that involves both the NPS and the Tribe in a mutual evaluation and assessment of the program. The NPS will approve the Tribe’s program if the NPS determines that it continues to meet the program requirements of the NHPA and this regulation.
(3) Any Tribe found to have major program aspects not consistent with the NHPA or with its approved program plan will receive timely written notice of deficiencies from the NPS, along with the required actions for correcting them. Unless circumstances warrant immediate action, the NPS will defer making a decision on program approval for a specified period to allow the Tribe to correct deficiencies or present a justifiable plan and timetable for correcting deficiencies. During this period the Tribe may request that the Director review any findings and required actions.
(5) A Tribe that successfully resolves deficiencies will receive timely written notice from NPS of continued approved status. Once the NPS renews a Tribe’s approval, the NPS generally will not review that Tribe’s program again until the next regular evaluation period, although the NPS may conduct evaluations more often if the NPS deems it necessary.
(6) A Tribe with deficiencies that warrant immediate action or that remain after the expiration of the period specified pursuant to paragraph (4) of this section will receive notice from the NPS that its approved status is revoked. The NPS will then initiate financial suspension and other actions in accordance with applicable regulatory requirements and applicable guidance issued by the Secretary.
(p) What is the effect of this rule on tribal sovereignty, treaty rights, and other tribal rights? Nothing in these regulations is intended to alter, amend, repeal, interpret, or modify tribal sovereignty, or to preempt treaty rights, or other rights of an Indian Tribe, or to modify or limit the exercise of such rights.

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

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

(2) May, at the Tribe’s request, modify its existing agreement in accordance with these regulations.

Section 61.9(a) Are Tribes that have assumed SHPO functions eligible for financial assistance to carry out those functions?

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

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

(b) What requirements govern the financial assistance for Tribes that have assumed SHPO functions?

(1) The NPS will administer HPF grants-in-aid in accordance with the NHPA, OMB Circular A-133, and 43 CFR 12, and related guidance issued by the Secretary. Pursuant to SS 101(e)(5) of the NHPA, the Secretary may modify matching fund requirements for Tribes.

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