

Consulting with Indian Tribes in the Section 106 Review Process

(from Advisory Council on Historic Preservation website)

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The Section 106 Review Process

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Introduction

This guidance is a clarification of the requirements for Federal agencies to consult with Indian tribes in the Advisory Council on Historic Preservation's (ACHP's) regulations, "Protection of Historic Properties" (36 CFR Part 800), implementing Section 106 of the National Historic Preservation Act (NHPA). Accordingly, it outlines when Federal agencies must consult with Indian tribes and what the consultation must address. It is not meant to be a comprehensive guide on consultation and, thus, does not address how Federal agencies conduct consultation or which Indian tribes to contact regarding specific projects.

The National Historic Preservation Act

The National Historic Preservation Act, amended in 1992, is the basis for the tribal consultation provisions in ACHP's regulations. The two amended sections of NHPA that have a direct bearing on the Section 106 review process are Section 101(d)(6)(A), which clarifies that historic properties of religious and cultural significance to Indian tribes may be eligible for listing in the National Register, and Section 101(d)(6)(B), which requires Federal agencies, in carrying out their Section 106 responsibilities, to consult with any Indian tribe¹ that attaches religious and cultural significance to historic properties that may be affected by an undertaking. ACHP's regulations incorporate these provisions and reflect other directives about tribal consultation from Executive orders, Presidential memoranda, and other authorities.

Section 106

Section 106 of NHPA requires Federal agencies to consider the effects of their actions on historic properties and to seek comments from ACHP. The purpose of Section 106 is to avoid unnecessary harm to historic properties from Federal actions. Commonly known as Section 106 review, the procedure for meeting Section 106 requirements is defined in ACHP's regulations, "Protection of Historic Properties" (36 CFR Part 800). The regulations include both general direction regarding consultation and specific requirements at each stage of the review process.

What ACHP's regulations say about consultation with Indian tribes

Section 800.2(c)(2) of the regulations outlines important principles and general directions to Federal agencies regarding consultation:

- The regulations remind Federal agencies that historic properties of religious and cultural significance to an Indian tribe may be located on ancestral, aboriginal, or ceded lands of that tribe. Accordingly, agencies must make a *reasonable and good faith effort* to identify Indian tribes that attach such significance but may now live at great distances from the undertaking's area of potential effect.
- Federal agencies should be respectful of tribal sovereignty in conducting consultation and must recognize the government-to-government relationship that exists between the Federal Government and federally recognized Indian tribes.
- The regulations also provide for an Indian tribe to enter into an agreement with a Federal agency regarding any aspect of tribal participation in the review process. The agreement may provide the Indian tribe with additional participation or concurrence in agency decisions under Section 106 provided that no modification is made to the roles of other parties without their consent.

Is consultation with Indian tribes required only when an undertaking will occur on or affect historic properties on tribal lands?

No, NHPA and ACHP's regulations require Federal agencies to consult with Indian tribes when they attach religious and cultural significance to a historic property *regardless of the location of that property*. The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance. It is also important to note that while an Indian tribe may not have visited a historic property in the recent past, its importance to the tribe or its significance as a historic property of religious and cultural significance may not have diminished for purposes of Section 106.

Does a property of traditional cultural and religious importance requiring agency consultation with tribes under Section 101(d)(6) of NHPA have to be determined eligible for the National Register or meet the National Register criteria?

Yes. NHPA only requires consultation with Indian tribes and Native Hawaiian organizations regarding those properties of traditional religious and cultural importance that are listed in or eligible for the National Register. However, agencies should be aware that Sections 800.4(a) and (b) require them to consult with Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to a property when the agency carries out the identification and National Register evaluation of potential historic properties. Likewise, Executive Order 13007, the American Indian Religious Freedom Act, or other authorities may impose obligations, independent of Section 106 and NHPA, with regard to Indian sacred sites that do not meet the National Register criteria. Agencies should review their own internal policies in that regard.

If there are no federally recognized Indian tribes in the State where the project is located, does the Federal agency still have to consult with any tribes?

The Federal agency has to make a reasonable and good faith effort to identify Indian tribes that may have an interest. The present absence of federally recognized Indian tribes in a State does

not absolve the agency of its obligations to make a reasonable and good faith effort to identify Indian tribes that should be consulted. The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance.

What is a Federal agency's responsibility to consult with a State-recognized Indian tribe or non-recognized Native American group?

Under ACHP's regulations at Section 800.2(c)(5), the Federal agency may invite such groups to participate in consultation based on a demonstrated interest in the undertaking's effects on historic properties. However, the term "Indian tribe" in NHPA refers only to Federally recognized Indian tribes. Accordingly, under NHPA and ACHP's regulations, only a federally recognized Indian tribe has the right to participate in Section 106 consultation.

Where can I find information on Indian tribes?

The Department of Interior, Bureau of Indian Affairs (BIA) maintains a list of federally recognized Indian tribes and posts this information on its Web page at www.doi.gov/bureau-indian-affairs. There are also BIA regional offices throughout the country.

How does a Federal agency consult with an Indian tribe that does not want to divulge information about a historic property of religious and cultural significance?

An Indian tribe may not wish to divulge information, or may be prohibited from disclosing certain kinds of information, about certain historic properties. Therefore, the Federal agency should remain flexible in its approach to identification and evaluation of historic properties and consultation to resolve adverse effects.

Section 304 of NHPA provides protection from public disclosure of information about a historic property that might result in harm to the property, a significant invasion of privacy, or impediments to traditional religious practice at a site. ACHP's regulations include reminders of the need for Federal agencies to consider tribal and public concerns regarding sensitivity of information.

Several Indian tribes assert that they have an interest in a historic property. Is the Federal agency obligated to consult with all of them? What if the tribes disagree?

Federal agencies should keep in mind that there may be multiple Indian tribes that attach significance to a historic property. There may also be Indian tribes that attach significance to historic properties on another Indian tribe's lands. The Federal agency is obligated to consult with each of the Indian tribes and may have to approach the consultation with flexibility. It is often the case that all consulting parties do not agree. Federal agencies should approach all such consultation with an open mind, carefully weighing the views of all parties in concluding the Section 106 review process.

If the Federal agency has not identified an Indian tribe nor invited that tribe to participate, what can the Indian tribe do?

The tribe may write to the Federal agency requesting to be a consulting party. If the tribe is one that attaches religious and cultural significance to a historic property in the area of potential effect, the tribe must be considered a consulting party by the agency.

The Section 106 Review Process

The following guidance is divided into two major sections: consultation on tribal lands and consultation off tribal lands. While the basic steps of the review process are the same for undertakings on or affecting properties on tribal lands and undertakings off tribal lands, there are some differences in the consultation requirements. The guidance is structured this way to help clarify consultation requirements for instructional purposes only.

Consultation with Indian Tribes for Undertakings On or Affecting Tribal Lands

Federal agencies should recognize that in addition to the consultation requirements embodied in ACHP's regulations, tribal sovereignty and other authorities also influence consultation, may dictate additional consultation, and further strengthen an Indian tribe's position in the Federal decisionmaking process.

ACHP's regulations recognize an Indian tribe's sovereign authority on its tribal lands in several ways. The regulations require the Federal agency to provide an Indian tribe an opportunity to review, and, thus, to concur in or object to, agency findings and determinations. The regulations also require Federal agencies to invite the tribe to sign memoranda of agreement (MOAs), and if the tribe terminates consultation, ACHP must comment to the head of the agency rather than execute an agreement without the tribe. Federal agencies should be aware, however, that the sovereign status of Indian tribes on their lands may dictate other obligations and requirements in addition to those outlined in ACHP's regulations.

I. Initiation of the Section 106 Process

One of the first steps a Federal agency takes is to determine if the undertaking may occur on or affect historic properties on tribal lands and, if so, whether the Indian tribe has assumed the duties of the State Historic Preservation Officer (SHPO) under Section 101(d)(2) of NHPA².

If a tribe has assumed the duties of the SHPO, does the SHPO still participate in consultation for undertakings on tribal lands?

Only if a non-tribal property owner within the exterior boundaries of the reservation requests that the SHPO participates, or if the Tribal Historic Preservation Officer (THPO) and agency agree to invite the SHPO to participate, does the SHPO still participate in consultation for undertakings on tribal lands. In all other cases, the Federal agency consults with the THPO *in lieu of* the SHPO on tribal lands.

What is the purpose of the provision that allows property owners on tribal lands to request SHPO participation in addition to the THPO?

The provision, following the express language of Section 101(d)(2)(D)(iii) of NHPA, provides that a non-tribal property owner who owns lands within the exterior boundaries of a reservation can request the SHPO to participate in a Section 106 consultation even when the tribe has assumed the role of the SHPO. It is designed to provide an opportunity for a property owner, whose interests in historic preservation may not necessarily be represented by the THPO, to include the SHPO in the consultation.

Does the THPO have the same role and responsibilities in the Section 106 process on tribal lands as the SHPO does off tribal lands?

Yes, the THPO carries out all of the Section 106 review functions of the SHPO and is bound to respond to requests to review an agency's findings and determinations within the time frames set by the regulations. Failure of a THPO to respond when there is such a time frame permits the agency to assume concurrence with a finding or determination or to consult with ACHP in the THPO's absence. Subsequent involvement by the THPO is not precluded but the THPO cannot reopen a finding or determination that it failed to respond to in a timely manner earlier in the process.

When there is no THPO, who represents the tribe in consultation for an undertaking on tribal land, including signing an MOA on behalf of the tribe?

Tribal participation in the Section 106 process is conducted through the tribe's official governmental structure. The formal representation, including designation of the tribal signatory for the tribe, is determined by the tribe in accordance with tribal law, internal structure, and governing procedures. Other tribal members who wish to participate in the Section 106 process must do so as members of the public and may seek to become consulting parties with the consent of the Agency Official. However, the views of the Indian tribe are provided only by an officially designated representative of the tribal government.

When there is no THPO, does the agency also consult with the SHPO?

Yes, the agency consults with the tribal designated representative *and* the SHPO when there is no THPO. If the SHPO withdraws from consultation, the Federal agency and the tribal representative may complete the review process. An Indian tribe may enter into an agreement with the SHPO specifying the SHPO's participation in the Section 106 review process on tribal lands.

Does the Federal agency have to consult with other Indian tribes when the undertaking is on tribal lands?

A Federal agency must make a reasonable and good faith effort to identify Indian tribes that attach religious and cultural significance to historic properties affected by the undertaking. Some tribes may attach such significance to historic properties located on another tribe's lands. The Federal agency must consult with them as well. While this may present challenges in carrying out consultation, it does not absolve the Federal agency from the obligation to consult. The Federal agency must respect a tribe's sovereignty in matters such as access to historic properties within the reservation. Accordingly, it may be necessary for the agency to consult with each tribe individually and to do so off the reservation.

II. Identification of Historic Properties

What are the consultation requirements at this stage of the process?

The Federal agency is required to consult with the THPO/tribal representative: 1) to determine and document the area of potential effects;
2) to review existing information;
3) to seek information from consulting parties and gather information from Indian tribes to assist in identifying historic properties which may be of religious and cultural significance; and

4) to carry out identification and to evaluate the National Register eligibility of identified historic properties.

What happens if there is a disagreement between the SHPO and tribal representative on National Register eligibility?

The concurrence of both the SHPO and the tribal representative is required for an agency's determination of eligibility or ineligibility to stand. If either disagrees, the Federal agency is obligated to seek a formal determination of eligibility from the Keeper of the National Register.

What happens if there is a disagreement between the THPO and the agency on National Register eligibility?

The agency must seek a formal determination of eligibility.

III. Assessment of Adverse Effects

What are the consultation requirements at this step?

The Federal agency consults with the THPO/tribal representative: 1) to apply the *Criteria of Adverse Effect* to historic properties within the area of potential effects, and 2) in reaching a finding of "no adverse effect."

What happens if there is a disagreement between the THPO/tribal representative and the agency on a finding of "no adverse effect"?

If the THPO/tribal representative disagrees within the 30-day review period, the agency must either consult with the THPO/tribal representative to resolve the disagreement or request ACHP to review the finding.

IV. Resolution of Adverse Effects

What are the consultation requirements at this step?

The Federal agency consults with the THPO/tribal representative and other consulting parties in an attempt to develop and evaluate alternatives or modifications to the undertakings to avoid, minimize, or mitigate adverse effects. Any consulting party may request ACHP to participate in this consultation.

What happens if agreement is reached?

The Federal agency and consulting parties, including Indian tribes, develop an MOA outlining how the adverse effects will be resolved. The Federal agency must invite the THPO/tribal representative to be a signatory to an MOA.

What happens if the Federal agency and the THPO/tribal representative fail to agree?

The agency must then invite ACHP to join the consultation. The THPO/tribal representative may determine that further consultation will not be productive and terminate consultation. The tribe must then notify the agency and other consulting parties of the determination and the reasons for terminating. ACHP must comment when the Indian tribe terminates consultation since the agency and ACHP cannot execute an agreement without the tribe.

When an undertaking takes place or affects historic properties on tribal lands, can a two-party agreement be concluded between an agency and an Indian tribe when the SHPO opts out of consultation even though the tribal representative is not a THPO?

Yes, because such a tribe has the same rights as a THPO. An Indian tribe may reach agreement with a Federal agency on the terms of an MOA. Execution of the MOA by a tribal representative and the Agency Official (along with filing the MOA with ACHP) would complete the Section 106 process.

Consultation with Indian Tribes for Undertakings off Tribal Lands

I. Initiation of the Section 106 Process

If the undertaking will not occur on or affect historic properties on tribal lands, is the Federal agency required to consult with Indian tribes?

Yes, Section 101(d)(6)(B) of NHPA requires consultation with Indian tribes that attach religious and cultural significance to historic properties (hereinafter "relevant Indian tribes"). The Federal agency must make a reasonable and good faith effort to identify such Indian tribes and invite them to be consulting parties. If such Indian tribes have not been invited by the agency to consult, the tribes may request in writing to be consulting parties and must be considered as such by the agency.

II. Identification of Historic Properties

In the initial information gathering steps, does the Federal agency consult with Indian tribes?

The Federal agency consults with the SHPO to determine and document the area of potential effects, review existing information, seek information from consulting parties, and gather information from Indian tribes to assist in identifying historic properties that may be of religious and cultural significance.

Does the Federal agency consult with Indian tribes to carry out identification and evaluation of historic properties?

Yes, the Federal agency consults with the SHPO *and* relevant Indian tribes to carry out identification and to evaluate the National Register eligibility of identified historic properties.

Does the Federal agency need to obtain a relevant Indian tribe's concurrence with eligibility findings?

No, but the Federal agency must acknowledge that Indian tribes possess special expertise in assessing the eligibility of historic properties that may be of significance to them. Also, if an Indian tribe disagrees with an agency's determination of eligibility, the Indian tribe may ask ACHP to request the agency to obtain a determination from the Keeper of the National Register. However, ACHP retains the discretion as to whether or not it should make the request of the Federal agency.

Does an agency consult with a relevant Indian tribe in determining if there are historic properties affected?

No, but the agency does provide notification of the finding to relevant Indian tribes and makes the documentation available for public inspection.

What happens when the Federal agency finds that there are historic properties which may be affected by the undertaking?

The agency notifies relevant Indian tribes, invites their views on the effects, and proceeds to assess adverse effects, if any.

III. Assessment of Adverse Effects

Which parties does the Federal agency consult with to apply the *Criteria of Adverse Effect* to historic properties within the areas of potential effect?

The agency consults with the SHPO and relevant Indian tribes to apply the Criteria of Adverse Effect to historic properties within the areas of potential effect.

When proposing a finding of "no adverse effect," does the agency consult with Indian tribes?

No, the agency consults with the SHPO in reaching a finding of "no adverse effect" and notifies consulting parties including relevant Indian tribes and provides them with documentation.

What happens if a relevant Indian tribe disagrees with a finding of no adverse effect?

If a relevant Indian tribe disagrees with a finding of no adverse effect, it must specify in writing the reasons within the 30-day review period. When a timely filing of disagreement is received, the Federal agency must either resolve the disagreement or request ACHP to review the "no adverse effect" finding. Relevant Indian tribes can also request ACHP to review an agency's finding. The agency should seek the concurrence of Indian tribes that attach religious and cultural significance to the historic property subject to the finding. This means that the agency is encouraged, but not legally required, to obtain such concurrence. If the relevant Indian tribe does not concur and disagrees with the proposed finding, it can refer the matter directly to ACHP for resolution.

IV. Resolution of Adverse Effects

Which parties does the Federal agency consult with to develop and evaluate alternatives or modifications to the undertakings to avoid, minimize, or mitigate adverse effects?

The Federal agency consults with the SHPO, relevant Indian tribes, and other consulting parties. The Federal agency must provide project documentation to all consulting parties at the beginning of consultation. Any consulting party may request ACHP to participate in consultation.

What happens if agreement is reached?

If agreement is reached, the Federal agency and consulting parties, including relevant Indian tribes, develop an MOA outlining how the adverse effects will be addressed.

Is the Federal agency obligated to invite a relevant Indian tribe to sign or concur with the MOA?

No, the agency may, but is not required to, invite the relevant Indian tribe to sign or concur. An Indian tribe that signs the MOA has the same rights with regard to seeking amendment or termination of the agreement as the other signatories. Refusal by a relevant Indian tribe to sign or concur, however, does not invalidate the MOA.

What happens if agreement is not reached?

If agreement is not reached, the Federal agency, SHPO, or ACHP, if participating, may terminate consultation. Other consulting parties, including relevant Indian tribes, may decline to participate but they cannot terminate consultation. After consultation is terminated, ACHP issues its formal comments to the agency head.

Other Opportunities and Consultation Requirements

Requests from Indian Tribes for ACHP Participation in Consultation

Any party, including Indian tribes, may request that ACHP review the substance of any agency's finding, determination, or decision on the adequacy of an agency's compliance with the regulation. An Indian tribe may request that ACHP enter the Section 106 review process because of concerns about the identification of, evaluation of, or assessment of effects on, historic properties. An Indian tribe may request ACHP involvement in the resolution of adverse effects or where there are questions about policy, interpretation, or precedent under Section 106 or its relation to other authorities such as the Native American Graves Protection and Repatriation Act (see Appendix A of the regulations).

Consultation with Indian Tribes in the Development of Program Alternatives

The Federal agency must conduct government-to-government consultation with affected THPOs or tribal representatives, and relevant Indian tribes in the development of program alternatives.

If a program alternative includes undertakings that would affect historic properties on tribal lands, the agency must identify and consult with the Indian tribes having jurisdiction over such lands. A Programmatic Agreement only takes effect on tribal lands when the THPO, Indian tribe, or designated tribal representative is a signatory to the agreement.

If a program alternative may affect historic properties of religious and cultural significance to an Indian tribe located off tribal lands, the agency must identify those Indian tribes and consult with them.

When the proposed program alternative has nationwide applicability, the agency must develop and implement appropriate government-to-government consultation with Indian tribes in accordance with existing Executive orders, Presidential memoranda, and applicable laws.

In all cases, the agency and ACHP must take into account the views of Indian tribes in reaching a final decision.

'NHPA defines "Indian tribe" as "an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which

is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (16 U.S.C. 470w).

²The 1992 amendments included provisions for Indian tribes to assume the responsibility of the SHPO on tribal lands. The regulations use the term "THPO" to mean the Tribal Historic Preservation Officer under Section 101(d)(2).

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