

Advisory Council on Historic Preservation (ACHP) Policy Statement Regarding ACHP's Relationships with Indian Tribes

(from ACHP website 8/28/05)

*Adopted by the Advisory Council on Historic Preservation
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Introduction

The Federal Government has a unique relationship with Indian tribes derived from the Constitution of the United States, treaties, Supreme Court doctrine, and Federal statutes. It is deeply rooted in American history, dating back to the earliest contact in which colonial governments addressed Indian tribes as sovereign nations. The Advisory Council on Historic Preservation (ACHP), as a Federal agency, recognizes the government-to-government relationship between the United States and federally recognized Indian tribes and acknowledges Indian tribes as sovereign nations with inherent powers of self-governance. This relationship has been defined and clarified over time in legislation, Executive Orders, Presidential directives, and by the Supreme Court.

The ACHP's policy pertains to Indian tribes as defined in the National Historic Preservation Act of 1966:

Indian tribe means 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).

I. Purpose

The basis for the ACHP's policy regarding its role, responsibilities, and relationships with individual Indian tribes derives from the Constitution, treaties, statutes, executive orders, regulations, and court decisions. It specifically ensures the ACHP's compliance with and recognition of its tribal consultation responsibilities under certain authorities, including:

National Historic Preservation Act (Act)

National Environmental Policy Act (NEPA)

American Indian Religious Freedom Act (AIRFA)

Native American Graves Protection and Repatriation Act (NAGPRA)

Executive Order 13007--Indian Sacred Sites (EO 13007)

Executive Order 13175--Consultation & Coordination with Indian Tribal Governments

Executive Order 12898--Executive Order on Environmental Justice (EO 12898)

and the implementing regulations for these authorities.

This policy establishes the framework by which the ACHP integrates the concepts of tribal sovereignty, government-to-government relations, trust responsibilities, tribal consultation, and respect for tribal religious and cultural values into its administration of the Section 106 process and its other activities. The policy sets forth general principles that will guide the ACHP's interaction with Indian tribes as it carries out its responsibilities under the Act. It also provides guidance to the ACHP and its staff and serves as the foundation for ACHP policies and procedures regarding specific Indian tribal issues. Upon adoption of the policy, the ACHP will develop an implementation plan to assist members and staff with integrating principles of respect for tribal sovereignty, government-to-government consultation, the ACHP's trust responsibilities, and tribal values into the conduct of ACHP business.

II. Statements of Policy

Tribal Sovereignty

- A. Recognition of tribal sovereignty is the basis upon which the Federal Government establishes its relationships with Federally recognized Indian tribes. The sovereignty of Indian tribes was first recognized by the United States in treaties and was reaffirmed in the 1831 landmark Supreme Court opinion of Chief Justice John Marshall that tribes possess a nationhood status and retain inherent powers of self-governance (*Cherokee Nation vs. Georgia*, 30 U.S. (5 Pet.) 1 (1831)).
- B. The ACHP, recognizing that each federally recognized Indian tribe retains sovereign powers, shall be guided by principles of respect for Indian tribes and their sovereign authority.
- C. Additionally, the ACHP acknowledges that the sovereign status of tribes means that each tribe has the authority to make and enforce laws and establish courts and other legal systems to resolve disputes.

Government-to-Government Consultation

- A. The relationship between the United States and federally recognized Indian tribes was reaffirmed in the President's Memorandum on "Government to Government Relations with Native American Tribal Governments" (April 29, 1994). The memorandum directs Federal agencies to operate "within a government-to-government relationship with federally recognized tribal governments." It also directs agencies to consult with tribes prior to making decisions that affect tribal governments and to ensure that all components in the agency are aware of the requirements of the memorandum. In addition, Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," directs Federal agencies to consult with tribal governments regarding issues which "significantly or uniquely affect their communities."
- B. In recognition of the status of Federally recognized Indian tribes as sovereign authorities and in accordance with the President's Memorandum on "Government to Government Relations with Native American Tribal Governments" (April 29, 1994), the ACHP is committed to operating on the basis of government-to-government relations with Indian tribes. Together with other executive departments, the ACHP acts on behalf of the Federal Government to fulfill the intent of the President and Congress regarding government-to-government consultation. The ACHP acknowledges that Federal-tribal consultation is a bilateral process of discussion and cooperation between sovereigns.

Trust Responsibilities

- A. Trust responsibilities emanate from Indian treaties, statutes, Executive orders, and the historical relationship between the Federal Government and Indian tribes. The trust responsibility applies to all executive departments and Federal agencies that may deal with Indians. This responsibility is rooted, in large part, in the treaties through which tribes ceded portions of aboriginal lands to the United States government in return for promises to protect tribal rights as self-governing communities within the reserved lands and certain rights to use resources off of the reserved lands.

In general, the trust responsibility establishes fiduciary obligations to the tribes including duties to protect tribal lands and cultural and natural resources for the benefit of tribes and individual tribal members/land owners. This trust responsibility must guide Federal policies and provide for government-to-government consultation with tribes when actions may affect tribes and their resources.

- B. The ACHP recognizes that it has a trust responsibility to federally recognized Indian tribes and views this trust responsibility as encompassing all aspects of historic resources including intangible values. The ACHP shall be guided by principles of respect for the trust relationship between the Federal Government and federally recognized Indian tribes. The ACHP will ensure that its actions, in carrying out its responsibilities under the Act, are consistent with the protection of tribal rights arising from treaties, statutes, and Executive orders.

Tribal Participation in Historic Preservation

The ACHP will consult with tribal leaders, and, as appropriate, their representatives including Tribal Historic Preservation Officers (THPOs), in its consideration and development of policies, procedures, or programs that might affect the rights, cultural resources, or lands of federally recognized Indian tribes. The ACHP will pursue consultation in good faith and use methods and protocols that are best suited to meet the goals of this policy and the proposed action. In doing so, the ACHP will recognize and maintain direct government-to-government consultation with tribes in lieu of consortiums, unless so requested by said tribes.

In fulfilling its mission and responsibilities, the ACHP will endeavor to develop strong partnerships with federally recognized Indian tribes. To achieve this objective, the ACHP, in its implementation plan, will develop strategies for better understanding and considering the views of Indian tribes in the work of the ACHP. The ACHP will also develop means for ensuring that Indian tribes are provided the opportunity to understand their rights and roles in the Section 106 process and in any ACHP actions which might affect them. When decisions involve resources on tribal land, the ACHP, exercising its trust responsibility, will attempt to give deference to tribal resource values, policies, preferences, and resource conservation and management plans.

The ACHP fully supports the participation of federally recognized Indian tribes in the national historic preservation program and acknowledges the significant contributions of tribes in our understanding and protection of our nation's heritage resources. The ACHP also recognizes the important role of Tribal Historic Preservation Officers (THPOs) that have assumed the role of the State Historic Preservation Officers (SHPOs) on tribal lands. The ACHP will work with Indian tribes to enhance tribal participation in historic preservation and to further the development of tribal preservation programs.

Sympathetic Construction

The principle of sympathetic construction is a consequence of the disadvantages Indian tribes faced in negotiating treaties with the United States. Treaties were negotiated and written in English often under threats of force, and dealt with concepts such as land ownership which were unfamiliar to Indian tribes. Accordingly, the Supreme Court has ruled that treaties must be interpreted as tribes would have understood the terms and to the benefit of the tribes.

The Supreme Court has also ruled that statutes passed for the benefit of tribes are to be interpreted in favor of tribes. While the application of this rule to statutes that address Indian tribes but that was not necessarily passed for their benefit has not been consistent, the ACHP acknowledges the importance of this principle to tribes. Accordingly, the ACHP, in carrying out its charges under the Act, will liberally interpret those provisions that address Indian tribes.

Respect for Tribal Religious and Cultural Values

The ACHP recognizes and respects that certain historic properties retain religious and cultural significance to federally recognized Indian tribes and that preservation of such properties may be imperative for the continuing survival of traditional tribal values and culture. Therefore, the

ACHP shall develop and implement its programs in a manner that respects these traditional tribal values and customs and strives to recognize that certain historic properties may be essential elements of actual living cultures and communities.

Furthermore, the ACHP recognizes and respects that certain information about religious or sacred places can be highly sensitive and that in certain situations, traditional tribal laws prohibit disclosure about actual function, use, religious affiliation to a specific society or group, or even precise location. Accordingly, the ACHP is, to the maximum extent feasible under existing law, committed to withholding from public disclosure such information that may be revealed in the course of a Section 106 review. The ACHP will carry out its responsibilities in a manner that respects those restrictions imposed by cultural beliefs or traditional tribal laws. In doing so, the ACHP will interpret and use the Section 106 review process in a flexible manner.

III. Implementation of the ACHP's Policy

Implementing the policy is the responsibility of the ACHP leadership, membership, and staff. The implementation plan will provide the necessary guidance to ensure satisfactory adherence to the policy by staff and members.

Within the Executive Office, the Native American Program was formed to:

- develop and coordinate ACHP policies pertaining to Indian tribes;
- provide ACHP members and staff with information, materials, and training on the principles of tribal sovereignty, government-to-government relations, and trust responsibilities;
- assist Indian tribes in fully realizing their roles and rights in the Section 106 process; and
- assist Federal agencies in understanding and carrying out their responsibilities to Indian tribes in the Section 106 review process.

The Native American Program will take steps to ensure that staff understands tribal issues and is aware of protocols. The Native American Program Coordinator will be available to assist ACHP staff in the ACHP's review of projects and programs that affect Indian tribes. The Native American Program and its staff will provide technical assistance with the Section 106 process to Indian tribes. Technical assistance includes guidance materials, workshops, and communication through direct mail and email, as appropriate. It also includes responding to specific requests to provide assistance to tribes who are working with Section 106.

The Native American Program will also establish appropriate systems for communicating with the tribal representatives identified by each tribe's leadership to ensure the widest possible distribution of information on Section 106 and ACHP initiatives. In doing so, the ACHP and its Native American Program will recognize and maintain direct government-to-government consultation with tribes.

ACHP Updated April 4, 2003

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