



*Preserving America's Heritage*

CONSULTATION WITH INDIAN TRIBES  
IN THE  
SECTION 106 REVIEW PROCESS:  
A HANDBOOK

November 2008

An independent federal agency, the Advisory Council on Historic Preservation (ACHP) promotes the preservation, enhancement, and productive use of our nation's historic resources and advises the President and Congress on national historic preservation policy. It also provides a forum for influencing federal activities, programs, and policies that affect historic properties. In addition, the ACHP has a key role in carrying out the Administration's Preserve America initiative.

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# **Consultation with Indian Tribes in the Section 106 Review Process: A Handbook**

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## I. About This Handbook

Many different statutes, regulations, executive orders, and federal policies direct the responsibilities of federal agencies regarding Indian tribes. Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. Section 470f, requires federal agencies to take into account the effects of their undertakings on historic properties and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on those undertakings. The ACHP has issued the regulations implementing Section 106 (Section 106 regulations), 36 CFR Part 800, "Protection of Historic Properties." The NHPA requires that, in carrying out the requirements of Section 106, each federal agency must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the agency's undertakings.

The ACHP offers this handbook as a reference for federal agency staff responsible for compliance with Section 106. Tribal Historic Preservation Officers (THPOs) and cultural resource managers may also find this handbook helpful. Readers should have a basic understanding of the Section 106 review process. This document focuses only on Section 106 tribal consultation and is not a source for understanding the full breadth of Section 106 responsibilities, such as consulting with State Historic Preservation Officers (SHPOs), involving the public, or consulting with Native Hawaiian organizations (NHOs).<sup>1</sup>

This handbook will be periodically updated by the ACHP when new information is obtained or laws or policies change. Agencies should also supplement this document with their own agency-specific regulations, directives, policies, and guidance pertaining to tribal consultation. Federal agencies should also be aware that many Indian tribes have developed their own statutes, regulations, and policies that apply to undertakings on tribal lands, and federal agency officials, applicants, and contractors must comply with them while on tribal lands.

In addition, federal agency staff may refer questions on the Section 106 review process, and the requirements to consult with Indian tribes within this process, to their agency's Federal Preservation Officer (FPO).

Finally, agency staff may obtain assistance from the ACHP in understanding and interpreting the requirements of Section 106, including tribal consultation. For general information on the requirements of Section 106, access the ACHP website at <http://www.achp.gov>. For additional questions about tribal consultation, contact:

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<sup>1</sup> For information on the requirements to consult with NHOs, visit <http://www.achp.gov>

## **II. Federal Government Consultation with Indian Tribes**

### **A. The Government-to-Government Relationship between the United States and Indian Tribes**

The federal government's unique relationship with each and every Indian tribe is embodied in the U.S. Constitution, treaties, court decisions, federal statutes, and executive orders. This relationship is deeply rooted in history, dating back to the earliest contact between colonial and tribal governments. As the colonial powers did, the United States acknowledges federally recognized Indian tribes as sovereign nations; thus, their interaction takes place on a "government-to-government" basis.

Legally, there is a distinction between Indian tribes who are federally recognized and those who are not. Federal recognition signifies that the U.S. government acknowledges the political sovereignty and Indian identity of a tribe and from that recognition flows the obligation to conduct dealings with that tribe's leadership on a "government-to-government" basis. When federally recognized tribes speak of "government-to-government" consultation, they are often referring to consultation between a designated tribal representative and a designated representative of the federal government.

Executive Order 13175 (2000), *Consultation and Coordination with Tribal Governments* lists as one of its purposes "to strengthen the United States' government-to-government relationships with Indian tribes..." President George W. Bush's 2004 *Presidential Memorandum on Government-to-Government Relationship with Tribal Governments* reaffirmed this policy, stating, "[m]y administration is committed to continuing to work with federally recognized tribal governments on a government-to-government basis and strongly supports and respects tribal sovereignty and self-determination for tribal governments in the United States." Thus, the government-to-government consultation process continues to embody the unique relationship between the United States and Indian tribes.

Federal agency staff responsible for carrying out tribal consultation should be familiar with the history of the relationship between the U.S. government and Indian tribes because that history may influence the context of consultation.

### **B. The Federal Trust Responsibility Toward Indian Tribes**

The federal government's trust responsibility emanates from the Constitution, Indian treaties, statutes, case law, executive orders, and the historic relationships between the federal government and Indian tribes. It applies to all federal agencies. Each agency defines the scope of its own trust responsibility towards tribes.

This trust responsibility is rooted, in large part, in the treaties through which Indian tribes ceded large portions of their aboriginal lands to the United States in return for promises to protect tribal rights as self-governing nations within the reserved lands (reservations) and certain reserved rights (i.e. aboriginal hunting, fishing, and gathering rights) to resources outside of those reserved lands.

Trust responsibility is legally construed in different forms, depending on the context in which it is invoked and includes: full fiduciary, which arises in the context of federal agency management of tribal assets; the "Indian canons of statutory construction," by which ambiguities in legislation dealing with tribal issues are to be construed liberally in favor of tribes; and, general, which is fulfilled by a federal agency's compliance with general regulations and statutes.

Each agency defines the scope of its trust responsibility to Indian tribes. The ACHP's trust responsibility is to ensure that its regulations implement the requirements of Section 106 of the National Historic Preservation Act and that such regulations incorporate the procedural requirement that federal agencies consult with Indian tribes that attach religious and cultural significance to historic properties that may be affected by their undertakings.

Questions regarding your agency's trust responsibility to Indian tribes should be directed to your tribal liaison/Native American coordinator or office of general counsel. The ACHP neither defines such a scope for others nor advises agencies on this issue.

## C. Legal Requirements and Directives to Consult with Indian Tribes

### 1) Statutes

A number of federal statutes require federal agencies to consult or coordinate with Indian tribes. This section will address only those applicable in the areas of historic preservation, natural resource protection, and cultural resource protection. It is useful to be familiar with these various statutory requirements not only to ensure compliance, but also to explore opportunities to maximize consultation opportunities. For instance, if a project requires compliance with both the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA), it may be helpful to carry out consultation in a comprehensive manner by including discussions about historic properties and natural resources in the same meetings. (Note: The ACHP regulations at 36 CFR, Section 800.8 set out principles and requirements for coordinating or combining NHPA and NEPA procedures.)

In addition, federal agencies should talk with interested Indian tribes as *early in the planning process as possible* to identify any special legal authorities that carry additional requirements for consultation or consideration, such as a treaty that reserves certain tribal rights that could be impinged upon by a proposed project.

### Historic Preservation, Natural Resource Protection, and Cultural Resource Protection Statutes

The following are broad summaries of key federal historic preservation, natural resource protection, and cultural resource protection statutes that require agencies to consult with Indian tribes or accommodate tribal views and practices. This is not an exhaustive list of requirements, nor does it imply that each of these statutes is applicable to each proposed project.

- Amended in 1992, the **National Historic Preservation Act of 1966 (NHPA)** is the basis for tribal consultation in the Section 106 review process. 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 properties of religious and cultural significance to Indian tribes may be eligible for listing in the National Register of Historic Places; and
  - Section 101(d)(6)(B), which requires that federal agencies, in carrying out their Section 106 responsibilities, consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking.

The Section 106 regulations incorporate these provisions and reflect other directives about tribal consultation from executive orders, presidential memoranda, and other authorities.

- Section 106 requires federal agencies to consider the effects of their undertakings on historic properties and to provide the ACHP an opportunity to comment. Also known as the Section 106 review process, it seeks to avoid unnecessary harm to historic properties from federal actions. The procedure for meeting Section 106 requirements is defined in the Section 106 regulations, 36 CFR. Part 800, “Protection of Historic Properties.”<sup>2</sup>

The Section 106 regulations include both general direction regarding tribal consultation and specific requirements at each stage of the review process. (Section 106 is discussed more fully in the next section, “Consultation with Indian Tribes under Section 106 of NHPA.”)

For more information about the NHPA and the ACHP’s regulations, visit [www.achp.gov](http://www.achp.gov)

- **The National Environmental Policy Act of 1969 (NEPA)** requires the preparation of an environmental impact statement (EIS) for any proposed major federal action that may significantly affect the quality of the human environment. While the statutory language of NEPA does not mention Indian tribes, the Council on Environmental Quality (CEQ) regulations<sup>3</sup> and guidance<sup>4</sup> do require agencies to contact Indian tribes and provide them with opportunities to participate at various stages in the preparation of an environmental assessment or EIS. CEQ has issued a Memorandum for Tribal Leaders encouraging tribes to participate as cooperating agencies with federal agencies in NEPA reviews.<sup>5</sup>
- **The American Indian Religious Freedom Act of 1978 (AIRFA)** establishes the policy of the federal government “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”
- **The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)**, Section 3(c) requires federal land-managing agencies to consult with federally recognized Indian tribes prior the intentional removal or excavation of Native American human remains and other cultural items as defined in NAGPRA from federal lands.
  - On tribal lands, planned excavation requires the consent of the appropriate Indian tribe (43 CFR § 10.3).

In instances where a proposed project that is funded or licensed by a federal agency may cross federal or tribal lands, it is the federal land managing agency that is responsible for compliance with NAGPRA. Detailed information about NAGPRA and its implementing regulations is available at the National Park Service (NPS) National NAGPRA Web site.<sup>6</sup>

## 2) Executive Orders

In many instances, presidential executive orders apply to agencies on an agency-wide or program-wide basis rather than on a project-by-project basis. However, staff responsible for working or coordinating

<sup>2</sup> Available at <http://www.achp.gov/regs-rev04.pdf>

<sup>3</sup> Available at <http://ceq.hss.doe.gov/nepa/regs/ceq/1506.htm>

<sup>4</sup> Available at <http://ceq.hss.doe.gov/nepa/regs/ej/justice.pdf>

<sup>5</sup> Available at <http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesdistributionmemo.html>

<sup>6</sup> Available at <http://www.cr.nps.gov/nagpra/>

with Indian tribal governments should be familiar with the applicable executive orders and act in accordance with the intent of the directives. Several of the orders specific to consultation with federally recognized Indian tribes include:

- **Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”** (2000), directs federal agencies to respect tribal self-government and sovereignty, tribal rights, and tribal responsibilities whenever they formulate policies “significantly or uniquely affecting Indian tribal governments.” The executive order applies to all federal agencies other than those considered independent federal agencies, encouraging “meaningful and timely” consultation with tribes, and consideration of compliance costs imposed on tribal governments when developing policies or regulations that may affect Indian tribes.
- **Executive Order 13007, “Indian Sacred Sites”** (1996), applies to all federally owned lands except “Indian trust lands.” It encourages land managing agencies to:
  - accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners; and
  - avoid adversely affecting the physical integrity of such sites.
- **Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”** (1994), is designed to focus federal attention on the environmental and human health conditions in minority communities and low-income communities. It is also designed to promote non-discrimination in federal programs substantially affecting human health and the environment.
  - Section 6-606 of the order states that, “each federal agency responsibility set forth under this order shall apply equally to Native American programs.”

### III. Consultation with Indian Tribes in the Section 106 Process

*Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.* (36 CFR Section 800.16 (f)).

Consultation constitutes more than simply notifying an Indian tribe about a planned undertaking. The ACHP views consultation as a process of communication that may include written correspondence, meetings, telephone conferences, site visits, and e-mails.

The requirements to consult with Indian tribes in the Section 106 review process are derived from the specific language of Section 101(d)(6)(B) of NHPA. They are also based on the unique legal relationship between federally recognized Indian tribes and the federal government embodied in the U.S. Constitution, treaties, court decisions, federal statutes, and executive orders.

Agencies are required to consult with Indian tribes at specific steps in the Section 106 review process. A common misunderstanding is that tribal consultation is only required for undertakings on tribal lands, when, in fact, consultation is also required for undertakings that occur off tribal lands. Tribal consultation for projects off tribal lands is required because the NHPA does not restrict tribal consultation to tribal lands alone and those off tribal lands may be the ancestral homelands of an Indian tribe or tribes, and thus may contain historic properties of religious and cultural significance to them.

#### A. Role of the Tribal Historic Preservation Officer (THPO)<sup>7</sup> in the Section 106 Process

NHPA's 1992 amendments include provisions for Indian tribes to assume the responsibilities of the State Historic Preservation Officer (SHPO) *on tribal lands*, and establish the position of a Tribal Historic Preservation Officer (THPO). The Section 106 regulations use the term "THPO" to mean the Tribal Historic Preservation Officer under Section 101(d)(2) of the NHPA. *Tribal lands* are defined in the NHPA and the ACHP's regulations (36 CFR Part 800) as, 1) all lands within the exterior boundaries of any Indian reservation; and 2) all dependent Indian communities.<sup>8</sup>

As the tribal counterpart to the SHPO, the THPO may assume some or all of the duties for historic preservation *on tribal lands* that the SHPO performs on private, state, or federal lands. These responsibilities may include maintaining an inventory of historic properties under its jurisdiction and assisting federal agencies in the review of federal undertakings.

THPOs have been delegated authority by the Secretary of the Interior to serve as the historic preservation officer for tribal lands; however, they may not have been designated by their tribal governments to function as the sole point of contact for federal undertakings on and off tribal lands. Therefore, agencies should contact both the tribal governmental leaders and the THPO prior to formal initiation of Section 106 consultation in order to determine the appropriate point(s) of contact.

<sup>7</sup> The National Park Service (NPS) administers the national THPO program and maintains an up-to-date listing of all tribes who have established 101(d)(2) Tribal Historic Preservation Officers and the contact information of their Tribal Historic Preservation Officers, available at [www.nps.gov/history/hps/tribal/thpo.htm](http://www.nps.gov/history/hps/tribal/thpo.htm)

<sup>8</sup> The U.S. Supreme Court decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) held that "dependent Indian communities" refers to a limited category of Indian lands that are neither reservations nor allotments and that must satisfy two requirements: first, they must have been set aside by the federal government for the use of the Indians as Indian land; second, they must be under federal superintendence.

Under the Section 106 regulations, a THPO who has assumed Section 106 review functions is subject the time frames set forth in the Section 106 regulations for responding to requests to review an agency's Section 106 findings and determinations *for undertakings on or affecting tribal lands*. Failure of a THPO to respond when there is such a time frame permits an agency to proceed with its finding or determination, or to consult with the ACHP in the THPO's absence in accordance with the Section 106 regulations. Subsequent involvement by the THPO is not precluded, but the agency is not required reopen a finding or determination that a THPO failed to respond to in a timely manner earlier in the process.

Once a tribe has established a THPO, the SHPO may still participate in consultation for undertakings on tribal lands if: 1) the THPO requests SHPO participation; 2) the undertaking takes place on tribal lands but affects historic properties located off tribal lands; or 3) a non-tribal member who owns lands within the exterior boundaries of a reservation requests that the SHPO participate in Section 106 consultation. This provision, located at Section 101(d)(2)(D)(iii) of NHPA and in the Section 106 regulations at 36 CFR Section 800.3(c)(1), is intended to provide a property owner an opportunity to include the SHPO in the consultation if that property owner feels that his/her interests in historic preservation may not necessarily be represented by the THPO. This inclusion of the SHPO in the consultation *does not*, however, replace the role of the THPO, who still participates fully and retains its Section 106 role. .

### **B. Role of the THPO: *Off Tribal Lands***

The THPO's role for federal undertakings *off tribal lands* (in other words, on non-tribal lands such as private, state, or federal lands) is different from its role on its own tribal lands. If the proposed undertaking's area of potential effect (APE) is *located outside of the tribal lands it oversees*, the THPO does not supplant the jurisdiction or have the same rights as the SHPO, but rather may serve as the official representative designated by his/her tribe to represent its interests as a consulting party in Section 106 consultation.

### **C. When there is no THPO**

For proposed undertakings *on or affecting the tribal lands* of an Indian tribe that *has not* assumed THPO responsibilities, the federal agency carries out consultation with that tribe's designated representative in addition to—and on the same basis as—consultation with the SHPO. The tribe retains the same consultation right regarding agency findings and determinations, and to execute a Memorandum of Agreement (MOA) or Programmatic Agreement (PA), as it would if it had a THPO.

For proposed undertakings *off tribal lands*, a tribe designates who will represent it in consultation regarding historic properties of religious and cultural significance to it. A tribe that does not have a THPO has the same rights to be a consulting party as tribes that do have THPOs when the proposed federal undertaking is not on or affecting tribal lands.

### **D. Regulatory Principles and General Directions for Section 106 Tribal Consultation**

The procedures for meeting Section 106 requirements are defined in the Section 106 regulations, "Protection of Historic Properties" (36 CFR Part 800).<sup>9</sup> Under the NHPA, "historic properties" are defined as those properties that are listed on the National Register of Historic Places, or are eligible for such listing.

The regulations provide both overall direction as well as specific requirements regarding consultation at each step of the Section 106 review process. The Section 106 regulations at 36 CFR Section 800.2(c)(2)

<sup>9</sup> Available at <http://www.achp.gov/regs-rev04.pdf>

outline the following important principles and general directions to federal agencies regarding consultation with tribes:

- The agency shall ensure that consultation provides the Indian tribe a reasonable opportunity to identify its concerns about historic properties; advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance to them; articulate its views on the undertaking's effects on such properties; and participate in the resolution of adverse effects.
- Tribal consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and plan how to address concerns about confidentiality of information obtained during the consultation process.
- Historic properties of religious and cultural significance to an Indian tribe may be located on ancestral (also referred to as aboriginal) homelands, or on officially ceded lands (lands that were ceded to the U.S. government by the tribe via treaty). In many cases, because of migration or forced removal, Indian tribes may now be located far away from historic properties that still hold such significance for them. Accordingly, the regulations require that agencies make a *reasonable and good-faith effort*<sup>10</sup> to identify Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the undertaking, even if tribes now are located a great distance away from such properties and undertakings.
- The agency official shall ensure that consultation under the Section 106 review process 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.
- An Indian tribe may enter into an agreement with a federal agency regarding any aspect of tribal participation in the review process. The agreement may specify a tribe's geographic area of interest, types of projects about which they wish to be consulted, or 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.

The Section 106 regulations recognize an Indian tribe's sovereign authority regarding proposed undertakings *on or affecting its tribal lands* in several ways. The regulations require the federal agency to provide the THPO, as appropriate,<sup>11</sup> an opportunity to review, and thus to concur with or object to, agency findings and determinations. The regulations also require federal agencies to invite the THPO (or designated tribal representative, if the tribe has not assumed THPO duties) to sign a Memorandum Of Agreement (MOA) as well as a Programmatic Agreement (PA). If the THPO/tribe terminates consultation, the ACHP must provide comment to the head of the agency rather than execute an agreement without the tribe.

While the Section 106 regulations are fairly prescriptive in nature, they only direct agencies on what to do and at which stages of the process to engage in consultation. They do not direct exactly how to carry out

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<sup>10</sup> Tips on how to fulfill this requirement are provided under the heading "How do I identify tribes that must be invited to consult," at Section V(A)(3) of this handbook.

<sup>11</sup> Note that the regulations clarify that THPOs and those tribes that do not have a 101(d)(2) THPO have the same rights in the process for undertakings on or affecting tribal lands, for purposes of Section 106. The difference is whether the SHPO participates. Where there is a THPO, the SHPO only participates in consultation if the THPO invites the SHPO to participate, if an undertaking on tribal lands affects a historic property off tribal lands, or if a non-tribal member who owns a parcel within the exterior boundaries of the reservation so requests. For undertakings on tribal lands where there is no THPO, the agency consults with both the designated tribal official and the SHPO.

consultation. Thus, the following questions and answers are designed to clarify the most common questions and issues regarding tribal consultation under the Section 106 review process.

## IV. General Questions and Answers

The following list of questions is meant to address general issues that commonly arise in the Section 106 review process, typically before an agency begins the review process or very early in the process. Section V addresses questions that might arise at each step of the Section 106 review process.

### 1) When are federal agencies required to consult with Indian tribes?

The 1992 amendments to NHPA require federal agencies, in carrying out the Section 106 review process, to consult with Indian tribes when a federal undertaking may affect historic properties of traditional religious and cultural significance to them. An “undertaking” means 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; or those requiring a federal permit, license or approval. This requirement applies to all undertakings regardless of whether they are located on or off tribal lands.

### 2) Which Indian tribes must be consulted?

Federally recognized tribes that attach religious and cultural significance to historic properties that may be affected by undertakings must be consulted. Federal agencies must make “a reasonable and good faith” effort<sup>12</sup> to identify each and every such Indian tribe and invite them to be consulting parties.

This includes Indian tribes that no longer reside in a given area but may still have ancestral ties to an area. Many Indian tribes were removed from their homelands, while others traditionally moved from place to place. Consequently, an Indian tribe may very well attach significance to historic properties located in an area where they may not have physically resided for many years. If an Indian tribe that may attach significance to a historic property that may be affected by the undertaking has not been invited by the agency to consult, the tribe may request in writing to be a consulting party. The NHPA and the Section 106 regulations require that the agency grant consulting party status to such a tribe.

### 3) How would I know if an Indian tribe is federally recognized?

Consult the list maintained by the U.S. Department of the Interior’s Bureau of Indian Affairs (BIA).<sup>13</sup> The list is regularly published in the *Federal Register*. Another way to determine if a tribe is federally recognized is to contact BIA headquarters in Washington, D.C. or one of the BIA regional offices throughout the United States.

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

Even when there are no federally recognized Indian tribes with tribal lands in the state where the project is located, the agency must still make a reasonable and good faith<sup>14</sup> effort to identify and consult with any Indian tribes that attach religious and cultural significance to historic properties that may be affected by the undertaking. 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. Therefore, agencies are required to

<sup>12</sup> Tips on how to fulfill this requirement are provided under the heading “How do I identify tribes that must be invited to consult,” at Section V(A)(3) of this handbook.

<sup>13</sup> Available at <http://library.doi.gov/internet/native.html>

<sup>14</sup> Tips for fulfilling this requirement are provided under the heading “How do I identify tribes that must be invited to consult,” at Section V(A)(3) of this handbook.

identify Indian tribes that may attach religious and cultural significance to historic properties in the area of the undertaking, even if there are no tribes near the area of the undertaking or within the state.

**5) What is the federal agency’s responsibility to consult with state recognized Indian tribes or tribes who have neither federal nor state recognition?**

Under the Section 106 regulations at 36 CFR Section 800.2(c)(5), a federal agency *may* invite such groups to participate in consultation as “additional consulting parties” based on a “demonstrated interest” (discussed below) in the undertaking’s effects on historic properties. However, the term “Indian tribe” as it appears in the NHPA refers only to federally recognized Indian tribes, which includes Alaska Native Villages and Village and Regional Corporations. In other words, only federally recognized Indian tribes that attach religious and cultural significance to historic properties that may be affected by the proposed undertaking have a statutory right to be consulting parties in the Section 106 process.

The question of inviting non-federally recognized tribes to participate in consultation can be both complicated and sensitive and thus deserves careful consideration. For example, some tribes may not be federally recognized but may have ancestral ties to an area. Other non-federally recognized tribes may have lost their recognition as a result of federal government actions in the 1950s to terminate relationships with certain tribes.<sup>15</sup> In other cases, such as in California,<sup>16</sup> the situation is complicated because there are more than 100 federally recognized tribes and more than 100 non-federally recognized tribes; again, the result of historical circumstances.

While non-federally recognized tribes do not have a statutory right to be consulting parties in the Section 106 process, the agency may invite them to consult as an “additional consulting party” as provided under the ACHP’s regulations at 36 CFR Section 800.2(c)(5), if they have a “demonstrated interest.”

The agency should consider whether the non-federally recognized tribe can meet the threshold of a “demonstrated interest”—for example, whether the tribe can demonstrate it has ancestral ties to the area of the undertaking, or that it is concerned with the effects of the undertaking on historic properties for other reasons. In some cases, members of a non-federally recognized tribe may be direct descendants of indigenous peoples who once occupied a particular Native American site to be affected by the undertaking, or they might be able to provide the federal agency with additional information regarding historic properties that should be considered in the review process.

The inclusion of non-federally recognized groups in consultation may raise objections from some federally recognized tribes. Yet, there are other tribes who routinely support the invitation of non-recognized tribes into consultation, recognizing their interests as well.

The ultimate decision on whether to consult with non-federally recognized tribes, however, rests with the federal agency. The decision should be given careful consideration and made in consultation with the SHPO (or if on or affecting tribal lands, with the THPO or designated tribal official). In addition, the federal agency may elicit input on the question from any federally recognized Indian tribes that are consulting parties. If the agency decides that it is inappropriate to invite non-federally recognized tribes to consult as “additional consulting parties,” those tribes can still provide their views to the agency as members of the public under 36 CFR Section 800.2(d).

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<sup>15</sup> During the “Termination Period” of the 1950s, Congress ended the federal government’s relationship with more than 100 tribes in an attempt to assimilate members of Indian tribes into the broader society. Many, but not all, tribes regained their recognition. Some Indian tribes, however, are still seeking restoration of their federal recognition. For more information on this topic, visit [www.epa.gov/indian](http://www.epa.gov/indian)

<sup>16</sup> For more information about Indian tribes in California, their history, and a list of federally and state recognized tribes, visit the California Native American Heritage Commission website at <http://ceres.ca.gov/nanc>

**6) The federal agency believes a state recognized tribe should be included in the consultation process, but the federally recognized tribes object. How should the agency proceed?**

It is important to remember that the federal agency ultimately makes the decision regarding the involvement of other consulting parties, including non-federally recognized tribes. However, reasonable objections raised by any parties should always be considered.

Not granting consulting party status to parties that have a demonstrated interest in the affected historic properties (see 36 CFR Section 800.2(d)) is legally allowable but may not be consistent with the spirit and intent of the Section 106 process. The Section 106 process is intended to provide both the public and certain individuals or groups with the opportunity to provide their views so that the federal agency can make an informed decision. Because non-federally recognized tribes may have information that assists the Section 106 process, consulting with them may enhance the agency's decision-making process.

Rather than denying a party the opportunity to participate in consultation, there may be ways in which every party can be accommodated. For instance, separate consultation meetings can be held, with information and views shared amongst all the consulting parties, as appropriate. However, there may be instances where an Indian tribe's leadership is only willing to share sensitive information with the federal agency (as part of the government-to-government relationship) and not with the other consulting parties, including other tribes. If confidentiality concerns are foreseeable, the federal agency should have a plan in place for how to handle these concerns in accordance with applicable law as the Section 106 process moves forward. Such a plan would also provide parties with clear expectations on how with these issues will be handled. The issue of confidentiality is a very important one in Section 106 tribal consultation and is discussed in greater detail at Section V(B)(4) of this handbook.

**7) What are appropriate consultation methods for individual undertakings?**

The consultation process must provide an Indian tribe a reasonable opportunity to identify its concerns about historic properties; advise on the identification and evaluation of historic properties, including those of religious and cultural significance to the tribe; articulate views on the undertaking's effects on such properties; and participate in the resolution of adverse effects. (See 36 CFR Section 800.2(c)(2)(ii)(A).

Once it has accepted the agency's invitation to consult, the tribal leadership may find it acceptable for consultation to take place between the agency and designated tribal staff, such as the THPO or, if the tribe has not established a THPO, the cultural resource officer, for instance. In some cases tribal leadership may want to remain directly involved in the consultation process as well.

Face-to-face meetings or on-site visits may be the most practical way to conduct consultation. In all cases, consultation should be approached with flexibility that respects the tribe's role within the overall project planning process and facilitates its full participation.

A federal agency and an Indian tribe may enter into an agreement in accordance with the Section 106 regulations at 36 CFR Section 800.2(c)(2)(ii)(E) regarding how Section 106 consultation will take place. Such agreements can cover all potential agency undertakings, or apply only to a specific undertaking. They can establish protocols for carrying out tribal consultation, including how the agency will address tribal concerns about confidentiality of sensitive information. Such agreements also can cover all aspects of the Section 106 process, provided that no modification is made in the roles for other parties to the Section 106 process without their consent. Determining the types of undertakings and the potential geographic project areas on which a tribe wants to be consulted, and how that consultation will take place can lead to tremendous efficiencies for both the federal agency and the Indian tribe. Filing such agreements with both the appropriate SHPO and the ACHP is required per 36 CFR Section

800.2(c)(2)(ii)(E), and can eliminate questions about tribal consultation when either the SHPO or the ACHP is reviewing a proposed undertaking.

Documentation of consultation is important because it allows consulting parties to more accurately track the stages of the Section 106 process. Federal agencies should document all efforts to initiate consultation with an Indian tribe or tribes, as well as documenting the consultation process once it has begun. Such documentation, in the form of correspondence, telephone logs, e-mails, etc., should be included in the agency's official Section 106 record. Agencies should also keep notes so that the consultation record documents the *content* of consultation meetings, site visits, and phone calls in addition to information about dates and who participated. Doing so allows agencies and consulting parties to review proceedings and correct any errors or omissions, thus facilitating better overall communication. Keeping information confidential can present unique challenges (see Section V(B)(4) of this handbook.

### **8) Can a federal agency pay for expenses that facilitate consultation with Indian tribes?**

Yes, the ACHP encourages federal agencies to take the steps necessary to facilitate tribal participation at all stages of the Section 106 process. These steps may range from scheduling meetings in places and at times that are convenient for Indian tribes, to paying travel expenses for participating tribal representatives. Indeed, agencies are strongly encouraged to use available resources to help overcome financial impediments to effective tribal participation in the Section 106 process. Likewise, if a tribe has consented (in advance and in writing) to allow an applicant for federal assistance or federal permit to carry out tribal consultation, the applicant is encouraged to use available resources to facilitate and support tribal participation. However, federal agencies should not expect to pay a fee to an Indian tribe or any consulting party to provide comments or concurrence in an agency finding or determination.

### **9) Can a federal agency pay a fee to an Indian tribe for services provided in the Section 106 process?**

Yes, though it should be noted that while the ACHP encourages agencies to utilize their resources to facilitate consultation with Indian tribes, this encouragement is not a legal mandate; nor does any portion of the NHPA or the ACHP's regulations require an agency or an applicant to pay for any form of tribal involvement.

However, during the identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor. Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by tribes. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable methods.

### **10) What specific activities might be reimbursed?**

Examples of reimbursable costs may include those costs associated with expert consultants to identify and evaluate historic properties as outlined in the immediately preceding answer. This may include field visits

to provide information about specific places or sites, monitoring activities, research associated with historical investigation, documentation production costs, and related travel expenses.

For more information, see “Fees in the Section 106 Review Process” on the ACHP Web site.<sup>17</sup>

**11) Aside from applicable federal statutes, are there specific tribal laws the agency must comply with for undertakings on tribal lands?**

The agency should be aware that the sovereign status of Indian tribes on their tribal lands may dictate other obligations and requirements in addition to those outlined in Section 106 and other federal laws. Many tribes have developed their own statutes, regulations, and policies that may apply to undertakings on their own lands and federal agency officials, staff, applicants, and contractors must comply with them as applicable. Inquiring about such legal requirements early in the planning process demonstrates a respect for tribal sovereignty.

**12) If a proposed undertaking is on tribal lands, but the tribe has not assumed THPO duties, does the agency consult with the tribe’s designated representative and the SHPO?**

Yes, the agency carries out consultation with the non-THPO Indian tribe regarding undertakings on or affecting that tribe’s lands *in addition to—and on the same basis as*—consultation with the SHPO. If the SHPO withdraws from consultation, the agency and the tribal representative may complete the review process with any other consulting parties. While the SHPO may participate in consultation, the tribe maintains the same rights of consultation for agency findings and determinations, and the same rights to be signatories to MOAs and PAs that would apply on their tribal lands, as it would if it had a THPO.

Be aware that some Indian tribes may not wish to consult with the SHPO, thus, requiring the agency to approach consultation with flexibility and understanding. In fact, some tribes may not welcome the SHPO to meetings or site visits on tribal lands, and they are within their rights to do so. However, the agency will still be responsible for carrying out consultation with the SHPO.

**13) Can Indian tribes, as well as federal agencies, request ACHP involvement in the Section 106 review process?**

Yes. Any party, including Indian tribes, may request that the ACHP review the substance of any federal agency’s finding, determination, or decision or the adequacy of an agency’s compliance with the Section 106 regulations.

An Indian tribe may request that the ACHP enter the Section 106 review process for any number of reasons, including concerns about the identification, evaluation or assessment of effects on historic properties of religious and cultural significance to them. It may also request ACHP involvement in the resolution of adverse effects or where there are questions about policy, interpretation, or precedent under Section 106. The ACHP has discretion in determining whether to become involved in the process.

**14) Does the ACHP have a policy on the treatment of Native American burials that are located on state or private lands (and thus not subject to the disinterment provisions of NAGPRA)?**

Yes. On February 23, 2007, the members of the Advisory Council on Historic Preservation unanimously adopted its revised “Policy Statement Regarding the Treatment of Burial Sites, Human Remains and Funerary Objects.” This policy is designed to guide federal agencies in making decisions about the

<sup>17</sup> Available at <http://www.achp.gov/regs-fees.html>

identification and treatment of burial sites, human remains, and funerary objects encountered in the Section 106 process in various instances including those where federal or state law does not prescribe a course of action. The policy is not exclusively directed toward Native American burials, human remains or funerary objects, but those would be included under the policy. In accordance with Section 106, the policy does not recommend a specific outcome from the consultation process, but rather focuses on issues and perspectives that federal agencies ought to consider when making their Section 106 decisions. The policy is available at <http://www.achp.gov/docs/hrpolicy0207.pdf>

## V. Consultation with Indian Tribes for Proposed Undertakings Off—and On—Tribal Lands

As noted earlier in the handbook, under the NHPA, tribal consultation is required for *all* federal undertakings, regardless of whether the undertaking’s Area of Potential Effect (APE) includes federal, tribal, state, or private lands so long as the undertaking may affect historic properties of religious and cultural significance to an Indian tribe. However, different Section 106 consultation requirements do exist, depending on whether the proposed undertaking may affect non-tribal, or tribal, lands.

This section outlines tribal consultation requirements for proposed undertakings that will occur:

- “off” tribal lands (in other words, on non-tribal land such as federal, state, or private lands outside tribal lands);
- “on” or affecting tribal lands. Tribal lands are defined in the NHPA and the Section 106 regulations (36 CFR Part 800) as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.<sup>18</sup>
- Where the required steps are the same both off and on (or affecting) tribal lands, a single response is provided.

This section of the handbook is presented to correspond with the Section 106 review process’s four steps of initiation, identification, assessment, and resolution.

### A. Initiation of the Section 106 Process

#### 1) How would I know if historic properties of traditional religious and cultural significance to Indian tribes may be affected by the proposed undertaking?

Unless such properties have already been identified and the information is readily available, you probably will not know in advance. As with any undertaking that might affect historic properties, you must determine whether the proposed undertaking is generically the kind that might affect historic properties assuming such properties are present. Therefore, if the undertaking is the kind of action that might affect places such as archaeological sites, burial grounds, sacred landscapes or features, ceremonial areas, or plant and animal communities, then you should consult with Indian tribes that might attach significance to such places. Please note that this list of examples is not all-inclusive, as the histories, cultures, and traditions of Indian tribes vary widely. It is through consultation with Indian tribes themselves that such properties can be properly identified and evaluated.

#### 2) If a federal undertaking will not occur on or affect historic properties on tribal lands, is the agency still required to identify Indian tribes and invite them to consult?

Yes, NHPA requires consultation with Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the proposed undertaking, *regardless of the location of the proposed undertaking*. At this stage of the process, the federal agency identifies any Indian tribes that

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<sup>18</sup> The U.S. Supreme Court decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) held that “dependent Indian communities” refers to a limited category of Indian lands that are neither reservations nor allotments and that must satisfy two requirements: first, they must have been set aside by the federal government for the use of the Indians as Indian land; second, they must be under federal superintendence.

might attach religious and cultural significance to historic properties that may exist in the proposed undertaking's Area of Potential Effect (APE), and invites them to consult.

### 3) How do I identify the Indian tribes that must be invited to consult?

#### *a) Off Tribal Lands*

Identification of Indian tribes that must be invited to consult could entail a number of initiatives. For instance, it might be useful to check with other federal agencies and their cultural resource specialists in the state or region for a list of tribes with whom they have consulted in past Section 106 reviews. The SHPO and Indian tribes in the region might also be able to suggest which tribes to contact. Other sources for such information may include ethnographies, local histories, experts at local universities, and oral accounts.

While we cannot vouch for their accuracy, certain websites may be useful references as part of a broader agency effort to identify relevant Indian tribes. The National Park Service maintains the Native American Consultation Database (NACD), which may be helpful in identifying Indian tribes with an interest in an area.<sup>19</sup> Other Internet sources include MAPS: GIS Windows on Native Lands, Current Places, and History,<sup>20</sup> which provides maps on current and ancestral locations of Indian lands, and the Library of Congress Indian Land Cessions document Web site,<sup>21</sup> which has information on historic Indian land areas.

National and regional intertribal organizations, such as the National Congress of American Indians,<sup>22</sup> the United South and Eastern Tribes,<sup>23</sup> the National Association of Tribal Historic Preservation Officers,<sup>24</sup> the Michigan Anishinaabek Cultural Preservation and Repatriation Alliance,<sup>25</sup> and the Affiliated Tribes of Northwest Indians<sup>26</sup> may also be able to provide assistance in identifying tribes with ancestral connections to an area.

Keep in mind that identification of Indian tribes with ancestral connections to an area is not a "one stop shopping" endeavor in which any single source can be depended upon to fulfill the agency's legal responsibilities. Agency officials should bear in mind that while Internet sources are convenient and can be useful, their informational content may be incomplete.

Once the agency has identified a tribe or tribes that may attach religious and cultural significance to any historic properties that may exist in the APE, the agency must invite them to consult.

Finally, it is important to remember that documentary or other sources of information that do not clearly support a tribe's assertions should not be used to deny a tribe the opportunity to participate in consultation. A common misunderstanding is that an Indian tribe needs to document its ties to historic properties in the area of the undertaking. Instead, the NHPA requires agencies to consult with any federally recognized Indian tribe that attaches religious and cultural significance to a historic property. It stands to reason that the best source for determining what historic properties have significance for a tribe

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<sup>19</sup> Available at <http://www.cr.nps.gov/nacd/>

<sup>20</sup> Available at <http://www.kstrom.net/isk/maps/mapmenu.html>

<sup>21</sup> Available at <http://www.memory.loc.gov/ammem/amlaw/lwss-ilc.html>

<sup>22</sup> Official website at <http://www.ncai.org>

<sup>23</sup> Official website at <http://www.usetinc.org>

<sup>24</sup> Official website at <http://www.nathpo.org>

<sup>25</sup> Official website at <http://www.macpra.org>

<sup>26</sup> Official website at <http://www.atnitrines.org>

would be the experts designated by the tribe to determine the tribe's own interest. Such experts might include elders, traditional practitioners, tribal historians, the THPO or tribal cultural resource staff. The tribe will designate the appropriate tribal representative(s) to represent its interests in the Section 106 consultation process.

#### ***b) On Tribal Lands***

Undertakings on tribal lands that are carried out by a federal agency, that use federal funds, or that require federal approval/licensing/permitting are also subject to Section 106 review. The federal agency will consult with the THPO, or, if the tribe has not assumed THPO duties, with its cultural resource officer, or another designated tribal official. The tribe may also wish to have one or more representative of its tribal government directly involved in the consultation process.

It may be easy to assume that because the proposed undertaking is located on tribal lands, there is no need to identify additional Indian tribes that may attach religious and cultural significance to historic properties within the APE. However, the responsibility for the agency to identify additional tribes that may attach religious and cultural significance to any historic properties within the APE applies *even when an undertaking is on tribal land*. Therefore, the suggestions given above in part (a) of this question are also applicable here.

The need to identify tribes that may attach significance to sites within an APE on another tribe's lands is rooted in history. When the U.S. government established Indian reservations, it often set boundaries where they did not previously exist. Many tribes were removed to reservations far from their traditional homelands and relocated onto the homelands of other tribes. In other instances, territories that were shared by several tribes became the reservation of one exclusively. The end result is the possibility that an undertaking on Tribe A's tribal lands (within the exterior boundaries of its reservation) may contain historic properties that hold religious and cultural significance for Tribe B and Tribe C, as well.

Therefore, the agency carrying out, or providing the funding or approval/licensing/permitting, for the undertaking on Tribe A's tribal lands still has a responsibility to identify any other tribes that may attach religious and cultural significance to historic properties within the proposed undertaking's APE and invite them to consult. Accordingly, it may be necessary to consult with each tribe individually and to do so off the reservation where the undertaking is proposed.

#### **4) Who initiates the consultation process with an Indian tribe?**

Consultation with an Indian tribe or tribes should be initiated by the agency official<sup>27</sup> through a letter to the leadership of each tribe, with a copy going to each tribe's THPO, or for a tribe without a THPO, its cultural resource officer. Indian tribes are sovereign nations and their leaders must be shown the same respect and formality given to leaders of other sovereign nations. Since tribal elections often result in changes in leadership, agency officials should contact the tribe prior to executing the letters in order to ascertain that the correspondence is correctly addressed to the appropriate points of contact. It is helpful to follow up such correspondence with direct telephone communication to ensure the letter has been received.

If the agency official has correspondence from tribal leadership designating a person or position within the tribe to act on the tribe's behalf in the Section 106 process, the agency may initiate consultation

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<sup>27</sup> As defined in Section 800.2 of the ACHP regulations, an agency official is one who has jurisdiction over the undertaking and takes legal and financial responsibility for Section 106 compliance.

accordingly. It is good practice, in this instance, to send a copy of all correspondence to tribal leadership as well.

**5) Can applicants for federal permits or contractors hired by the agency initiate and carry out tribal consultation?**

No, federal agencies cannot unilaterally delegate their responsibilities to conduct government-to-government consultation with Indian tribes to non-federal entities. It is important to remember that Indian tribes are sovereign nations and that their relationship with the federal agency exists on a government-to-government basis. For that reason, some Indian tribes may be unwilling to consult with non-federal entities associated with a particular undertaking. Such non-federal entities include applicants<sup>28</sup> for federal permits or assistance (which would include any contractors hired by the applicant), as well as contractors who are not government employees but are hired to perform historic preservation duties for a federal agency. In such cases, the wishes of the tribe for government-to-government consultation must be respected, and the agency must carry out tribal consultation for the undertaking.

However, *if an Indian tribe agrees in advance*, the agency may rely, where appropriate, on an applicant (or the applicant's contractor), or the agency's own historic preservation contractor to carry out day-to-day, project-specific tribal consultation. In order to ensure that the tribe, the agency, and the applicant or contractor all fully understand that the tribe may request the federal agency to step in and assume consultation duties if problems arise, the agency should obtain the tribe's concurrence with the agency's delegation in writing.

Even when an Indian tribe agrees to consult with an applicant, the federal agency remains responsible for ensuring that the consultation process is carried out properly, meeting the letter and spirit of the law, as well as resolving any issues or disputes. Therefore, any agreement between the agency and an Indian tribe documenting the tribe's willingness to consult with a non-federal entity should contain a provision that explains the agency's responsibility to assume consultation responsibilities at the tribe's request. The government-to-government relationship requires that the federal agency is ultimately responsible for tribal consultation.

**6) What are the consultation responsibilities for undertakings that involve more than one federal agency?**

The Section 106 regulations at 36 CFR Section 800.2 (a)(2) provide that, if more than one agency is involved in an undertaking, some or all of the agencies may designate a lead federal agency who will act on their behalf to fulfill their collective responsibilities under Section 106, including tribal consultation. Those agencies that do not designate a lead agency remain individually responsible for their Section 106 compliance; thus, they each would need to initiate and carry out tribal consultation duties for their Section 106 compliance for their undertaking.

**B. Identification of Historic Properties**

**1) Does the federal agency consult with Indian tribes to carry out identification and evaluation of historic properties?**

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<sup>28</sup> An applicant may be a state agency, local government, organization, or individual seeking federal assistance, permits, licenses, and other approvals.

***a) Off Tribal Lands***

Yes, the agency consults with Indian tribes to carry out identification efforts and to evaluate the National Register eligibility of identified properties for proposed undertakings located off tribal lands.

Many agencies assume that agency or contract archaeologists can identify which properties are of significance to which Indian tribes when they conduct archaeological surveys. However, unless an archeologist has been specifically authorized by a tribe to speak on its behalf on the subject, it should not be assumed that the archaeologist possesses the appropriate expertise to determine what properties are or are not of significance to an Indian tribe. The appropriate individual to carry out such a determination is the representative designated by the tribe for this purpose. Identification efforts may include site visits to assist in identifying these types of properties.

The Section 106 regulations state that the agency official shall acknowledge that Indian tribes possess special expertise in assessing the National Register eligibility of historic properties that may possess religious and cultural significance to them (36 CFR § 800.4(c)(1)).

The agency should provide Indian tribes with the same information that is provided to the SHPO during consultation, including information on buildings and other standing structures that may be affected by the proposed undertaking. A common assumption is that Indian tribes are not interested in historic buildings and structures. However, a federal agency should not assume to know what is of significance to a particular tribe unless it has been advised by that tribe. For instance, there may be a historic school in the path of a proposed undertaking. The school might have originally served as an Indian boarding school in its early history and may be of significance to a tribe or tribes.

***b) On Tribal Lands***

The same points made regarding “off tribal lands” above, apply on tribal lands. In addition, on tribal lands, the agency consults with that tribe’s THPO, or other tribal official designated for this purpose. The tribe may also involve other tribal experts that assist the THPO in both the identification and evaluation of the National Register eligibility of any historic properties. When a tribe has a THPO, the SHPO does not participate in the Section 106 process for proposed undertakings on tribal lands. The few exceptions to this rule occur when the THPO invites the SHPO to participate; when an undertaking on tribal lands affects a historic property located off tribal land; and when a non-tribal member who owns land in fee simple within the exterior boundaries of the tribe’s reservation so requests. In those limited instances, the SHPO participates in consultation in addition to the THPO.

If the tribe has not assumed THPO responsibilities, the agency will carry out identification and evaluation in consultation with both the tribe’s cultural resource officer (and any other parties designated by the tribe for this purpose) and the SHPO. In this situation, the tribal cultural resource officer (or other such designated tribal official) has the same rights as a THPO would have in eligibility determinations.

As noted in Section V(A)(3) above, it is possible that the APE for a proposed federal undertaking on one tribe's lands may contain historic properties that are of religious and cultural significance to other tribes. To continue the hypothetical model introduced in Section V(A)(3), a proposed undertaking is located on Tribe A’s tribal lands. Once the agency has identified the other tribes that may attach significance to historic properties within the APE and invited them to consult, the agency must determine the best way to afford those tribes an opportunity to participate in the identification and evaluation of any such historic properties. In such cases, it is the prerogative of Tribe A, in keeping with its status as a sovereign nation, whether to grant access to the APE within its tribal lands to other consulting parties. If Tribe A decides not to grant access, the agency must still consult with the other tribes in order to provide them a

reasonable opportunity to identify their concerns about historic properties, advise on the identification and evaluation of historic properties, articulate their views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. Accordingly, it may be necessary to consult with each tribe individually and to do so off the reservation.

In such cases, concerns may arise about confidentiality and protection of sensitive information that may be provided to the federal agency by one or more of the consulting parties. This issue is a very important one in Section 106 tribal consultation and is discussed in greater detail in Section (V)(B)(4) of this handbook.

## **2) How can I identify historic properties that may possess traditional religious and cultural significance to Indian tribes and determine their National Register eligibility?**

The identification of those historic properties that are of traditional religious and cultural significance to a tribe must be made by that tribe's designated representative as part of the Section 106 consultation process. This is true regardless of whether the proposed undertaking is off or on tribal lands.

## **3) What are Traditional Cultural Properties?**

The term "Traditional Cultural Property" (TCP) is used in the National Park Services (NPS) Bulletin 38, entitled "*Guidelines for Evaluating and Documenting Traditional Cultural Properties.*"<sup>29</sup> That bulletin explains how to identify a property "that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that a) are rooted in that community's history, and b) are important in maintaining the continuing cultural identity of the community." For a TCP to be found eligible for the National Register, it must meet the existing National Register criteria for eligibility as a building, site, structure, object, or district. TCPs are defined only in NPS guidance and are not referenced in any statute or regulation, and **refer to places of importance to any community, not just to Indian tribes.** Therefore, this terminology may be used when an agency is considering whether any property is eligible for the National Register.

Within the Section 106 process, the appropriate terminology for sites of importance to Indian tribes is "**historic property of religious and cultural significance to an Indian tribe.**" Unlike the term TCP, this phrase appears in NHPA and the Section 106 regulations. **It applies (strictly) to tribal sites, unlike the term TCP.** Furthermore, Section 101(d)(6)(A) of the NHPA reminds agencies that historic properties of religious and cultural significance to Indian tribes may be eligible for the National Register. Thus, it is not necessary to use the term TCP when considering whether a site with significance to a tribe is eligible for the National Register as part of the Section 106 process. The NPS Bulletin 38 guidelines are helpful, however, in providing an overview of how National Register criteria are applied.

Another issue with the term TCP is that Bulletin 38 has sometimes been interpreted as requiring an Indian tribe to demonstrate continual use of a site in order for it to be considered a TCP in accordance with Bulletin 38. This requirement could be problematic in that tribal use of a historic property may be dictated by cyclical religious or cultural timeframes that do not comport with mainstream conceptions of "continuous" use; while in many other cases, tribes have been geographically separated from and/or denied access to historic properties of religious and cultural significance to them. It is important to note that under the NHPA and the Section 106 regulations, the determination of a historic property's religious and cultural significance to Indian tribes is **not** tied to continual or physical use of the property.

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Available at <http://www.cr.nps.gov/nr/publications/bulletins/nrb38/nrb38%20introduction.htm>

**4) What procedures should be followed if an Indian tribe does not want to divulge information to the federal agency regarding places of traditional religious and cultural significance?**

Many Indian tribes have belief systems that require the location and even the existence of traditional religious and cultural properties not be divulged. It is thus vital that the federal agency work with tribes to identify sensitive locations while respecting tribal desires to withhold specific information about such sites. The ACHP's regulations at 36 CFR Section 800.4(b)(i) state, in part, that "[t]he agency official shall take into account any confidentiality concerns raised by Indian tribes during the identification process."

The NHPA and the Section 106 regulations also provide a vehicle for protecting information that an Indian tribe has disclosed for the purpose of identification and evaluation in the Section 106 process. Section 304 of the NHPA (16 U.S.C. 470w-3(a)) and the regulations at 36 CFR Section 800.11(c)(1) provide that an agency, after consultation with the Secretary of the Interior, "*shall* withhold from disclosure to the public" information about the location, character, or ownership of a historic property when the agency and the Secretary determine that the disclosure of such information may cause a significant invasion of privacy; risk harm to the historic property; or, impede the use of a traditional religious site by practitioners. After such a determination, the Secretary of the Interior will determine who, if anyone, may have access to the information for purposes of the NHPA.

One important caveat: the Section 304 confidentiality provisions only apply to properties that have been determined eligible for the National Register. Thus, it is possible that information disclosed prior to an eligibility determination may not be protected. Therefore, the ACHP suggests that agencies and Indian tribes contact National Register staff for guidance regarding the amount of information and detail needed to make a determination of eligibility when such information may be at risk of disclosure. It may be possible for a tribe to share just enough information for the agency to identify the existence of a site and make a determination of eligibility without compromising the site or the tribe's beliefs. Such information might include general aspects of the historic property's attributes, i.e., that an important yearly ceremony takes place in a certain general location, that quiet is required in an area where spirits reside, that visual impacts will impede the ability to properly perform a required ritual, or that important ceremonial harvesting activities must occur at a particular place, time, or under certain conditions. However, if there are questions about the adequacy of such information in making determinations of eligibility, the National Register staff should be consulted.

Issues of confidentiality and sensitivity of information require flexibility and cooperation among the consulting parties. There may be situations where a tribe is only willing to share information with the federal agency and not with the other non-federal consulting parties. This can challenge the traditional Section 106 process where the federal agency also consults with the SHPO to determine eligibility of properties off tribal lands or on tribal lands where the tribe has not assumed THPO responsibilities. In such cases, it is recommended that the agency promptly talk with the ACHP or the National Register staff about how to resolve such a situation.

**5) Is the federal agency required to verify a tribe's determination of significance with archaeological or ethnographic evidence before making a National Register eligibility determination?**

No. The agency is not required to verify a tribe's determination that a historic property is of religious and cultural significance to the tribe. The ACHP regulations at 36 CFR 800.4(c)(1) state, in part, that "[t]he agency official shall acknowledge that Indian tribes...possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." The National Register considers the information obtained from a tribe's recognized expert to be a valid line of evidence in

considering determinations of significance. For additional guidance on making eligibility determinations, the agency should consult with the staff of the National Register.<sup>30</sup>

**6) Does the federal agency need to obtain an Indian tribe's concurrence with the agency's determination of National Register eligibility?**

***a) Off Tribal Lands***

No. The agency does not need to obtain an Indian tribe's concurrence with eligibility determinations when the undertaking is not on tribal lands or the affected property is not on tribal lands. The agency only needs the concurrence of the SHPO for a determination and, absent such concurrence, the matter goes to the Keeper of the National Register for final resolution. The federal agency must acknowledge, however, that Indian tribes possess special expertise in assessing the eligibility of historic properties that may be of significance to them, as required in the Section 106 regulations at 36 CFR Section 800.4(c)(1).

Also, if an Indian tribe disagrees with the federal agency's determination of eligibility, the Indian tribe may, per the Section 106 regulations at 36 CFR 800.4(c)(2), ask the ACHP to request that the federal agency obtain a formal eligibility determination from the Keeper of the National Register.

***b) On Tribal Lands***

On tribal lands, the THPO (or the tribe's designated official) have rights of concurrence on National Register eligibility determinations. If the agency and the THPO/tribal official do not agree on a site's eligibility, the ACHP regulations at 800.4(c)(2) state that the agency shall obtain a determination of eligibility from the Keeper of the National Register.

**7) Once the required identification and evaluation efforts are completed, does the federal agency need to consult with an Indian tribe in reaching a finding that there are no historic properties that will be affected by the undertaking, or that there are historic properties present but the undertaking will have no effect on them?**

***a) Off Tribal Lands***

Despite the requirements for tribal consultation up to this point in the process, the agency does not need to consult with an Indian tribe in reaching a finding that there are no historic properties present, or that the proposed undertaking will not affect an identified historic property. However, the agency must provide notification and documentation supporting its finding on these questions to any consulting Indian tribe.

If a consulting tribe disagrees with the agency's finding, it should immediately contact the ACHP and request that the ACHP object to the finding, per CFR 800.4(d)(1)(iii). If, upon the review of the finding, the ACHP also objects to the finding, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP objects to a finding, it must do so within 30 days of the agency's issuance of that finding.

***b) On Tribal Lands***

On tribal lands, a finding of no historic properties present or no historic properties affected requires the agency to provide the THPO (or designated tribal official, if the tribe has not assumed THPO duties)

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<sup>30</sup> Contact information for National Register headquarters in Washington, D.C., available at <http://www.cr.nps.gov/nr/about.htm#contactus>

documentation of this finding. The agency also provides this documentation to other consulting parties. Upon receipt of an adequately documented finding, the THPO/tribe has 30 days to object. If the THPO/tribe does not object within 30 days, the agency's Section 106 responsibilities have been fulfilled. If the THPO/tribe does object to the finding, the agency shall either consult with the THPO/tribe to resolve the disagreement, or forward the finding to the ACHP and request that it be reviewed. When the agency makes such a request, it is also required to concurrently notify all consulting parties of the request and make the request and documentation available to the public. The ACHP then has 30 days to review the finding and provide the agency official, and, if the ACHP determines the issue warrants it, the head of the agency, with the ACHP's opinion regarding the finding.

### **C. Assessment of Adverse Effects**

#### **1) Which parties does the federal agency consult with to apply the criteria of adverse effect to historic properties within the APE?**

##### ***a) Off Tribal Lands***

The agency consults with the SHPO and Indian tribes in applying the criteria of adverse effect to historic properties within the APE. Again, federal agencies must recognize the special expertise of Indian tribes to determine the religious and cultural significance of historic properties to them per 36 CFR 800.4(c)(1), and 36 CFR 800.5(a) requires that agencies apply the criteria of adverse effect in consultation with Indian tribes. Therefore, in assessing how a proposed undertaking might affect historic properties of religious and cultural significance to tribes located off tribal lands, federal agencies need to consider the views of tribes.

##### ***b) On Tribal Lands***

On tribal lands, the agency consults with the THPO (or the designated tribal representative and the SHPO if the tribe has not assumed THPO duties)—and with any other Indian tribe that attaches religious and cultural significance to identified historic properties within the APE—in applying the criteria of adverse effect to historic properties, as is required by 36 CFR 800.5(a).

#### **2) When proposing a finding of “no adverse effect,” does the federal agency consult with Indian tribes?**

##### ***a) Off Tribal Lands***

No, the agency consults with the SHPO in proposing a finding of “no adverse effect,” but notifies consulting parties such as Indian tribes, and provides them with documentation supporting that finding. The agency is encouraged, but not required, to seek the concurrence of Indian tribes that attach religious and cultural significance to the historic property subject to the finding.

##### ***b) On Tribal Lands***

The agency consults with the THPO (or designated tribal official and the SHPO if the tribe has not assumed THPO duties) in proposing a finding of “no adverse effect,” and provides other consulting parties with documentation supporting that finding, as described above.

#### **3) What happens if an Indian tribe disagrees with a finding of “no adverse effect”?**

### ***a) Off Tribal Lands***

If a consulting Indian tribe disagrees with an proposed agency finding of “no adverse effect,” it must specify the reasons for its objection in writing within 30 days of receipt of the agency’s issuance of the proposed finding. Once a timely written objection is received, the agency must either consult with the objecting tribe to resolve the disagreement or request ACHP review of the “no adverse effect” finding, per 36 CFR 800.5(c)(2)(i). The agency must concurrently notify all other consulting parties that it has requested ACHP review of the finding.

Consulting Indian tribes can make a direct request to the ACHP to review the finding, specifying, in writing and within the 30 day review period, the reasons for its objection, per 36 CFR 800.5(c)(2)(iii).

After review of the objection, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP objects to a finding on its own initiative, it must do so within 30 days of receipt of the agency’s issuance of that finding.

### ***b) On Tribal Lands***

If the THPO (or designated tribal official if the tribe has not assumed THPO duties) disagrees with a finding of “no adverse effect” within the 30 day review period, the THPO notifies the agency in writing that it disagrees and specifies the reasons for the disagreement like any other consulting party. Once a timely written objection is received, the agency must either consult with the THPO to resolve the disagreement or request ACHP review of the “no adverse effect” finding. The agency must concurrently notify all other consulting parties that it has requested ACHP review of the finding.

Consulting parties have the same rights to disagree with a “no adverse effect” finding on tribal lands as they do off tribal lands. Should another Indian tribe that is a consulting party (i.e., a tribe who attaches religious and cultural significance to a historic property located on another tribe’s lands) object to a finding of “no adverse effect,” that tribe may, just as in the case for non-tribal lands (above), file an written objection with the federal agency within the 30 day review period. Again, once a timely written objection is received from any consulting party, the agency must either consult with the objecting tribe to resolve the disagreement or request ACHP review of the “no adverse effect” finding, per 36 CFR 800.5(c)(2)(i). The agency must concurrently notify all other consulting parties that it has requested ACHP review of the finding.

Just as is the case off tribal lands, consulting Indian tribes can also make a direct request to the ACHP to review the finding, specifying, in writing and within the 30 day review period, the reasons for its objection, per 36 CFR 800.5(c)(2)(iii).

Regardless of whether the THPO (or designated tribal official) or a consulting party makes the objection to the agency finding, the ACHP’s response is the same: after review of the finding, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP objects to a finding on its own initiative, it must do so within 30 days of receipt of the agency’s issuance of that finding.

## **D. Resolution of Adverse Effects**

**1) 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?**

***a) Off Tribal Lands***

The agency consults with the SHPO, Indian tribes, and other consulting parties at this phase of the Section 106 process. The agency must provide project documentation to all consulting parties and invite the ACHP into consultation. Any consulting party may request ACHP participation in consultation to facilitate the resolution of adverse effects.

In fact, the Section 106 regulations at 36 CFR Section 800.2(b) stipulate that the ACHP may enter into the consultation at any point in the Section 106 process without invitation when it determines that its involvement is necessary to ensure that the purposes of Section 106 are met. As specified in Appendix A to 36 CFR Part 800, the ACHP may elect to enter the consultation if, among other things, an undertaking presents issues of concern to Indian tribes.

***b) On Tribal Lands***

On tribal lands, the process and requirements are the same as for proposed undertakings off tribal lands, except that agency consults with the THPO (or designated tribal official and SHPO if the tribe has not assumed THPO duties), and other consulting parties. Again, the agency should continue to be cognizant of any confidentiality issues—see the discussion of confidentiality at Section V(B)(4) of this handbook.

**2) What happens if agreement is reached on how to resolve adverse effects?*****a) Off Tribal Lands***

If agreement is reached, the agency, SHPO and consulting parties, including Indian tribes, develop a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) outlining how the adverse effects will be addressed

***b) On Tribal Lands***

The agency and the THPO (or designated tribal official and the SHPO, if the tribe has not assumed THPO duties) and consulting parties develop an MOA or a PA outlining how the adverse effects will be addressed (the decision to prepare a PA requires the agency to invite the ACHP to participate). The agency must invite the THPO/tribe to be a signatory to an MOA or PA. 36 CFR 800.2(c)(2)(ii)(F) provides that an Indian tribe that has not assumed THPO duties may notify the agency in writing that it is waiving its rights to execute an MOA for undertakings on its tribal lands.

**3) Is the federal agency obligated to invite an Indian tribe to be a signatory or a concurring party to an MOA or PA?*****a) Off Tribal Lands***

No, the agency may, but is not required, to invite an Indian tribe to become a signatory or concurring party when the undertaking or affected historic properties are not on tribal lands. A signatory to an MOA or PA possesses the same rights with regard to seeking amendments to or terminating the agreement as all other signatories, which include the agency official, the SHPO, and the ACHP, if participating. Those that sign as a concurring party do not have such rights to amend or terminate the MOA or PA. Refusal by an Indian tribe to become a signatory or concurring party to an MOA or PA for an undertaking on non-tribal lands, however, does not invalidate it. Certainly, agencies are encouraged to invite Indian tribes that attach religious and cultural significance to affected historic properties to sign the agreement. If a tribe is

assuming review or other responsibilities under the MOA or PA, the agency should consider inviting the tribe to become a signatory.

***b) On Tribal Lands***

MOAs and PAs for undertakings on tribal lands require that the THPO (or the designated tribal official if the tribe has not assumed THPO duties) be a signatory, with the same rights to seeking amendments to or terminating the agreement as all other signatories. The agency and the signatories may invite other consulting parties to be signatories or sign as concurring parties. Those that sign as a concurring party do not have such rights to amend or terminate the MOA or PA. 36 CFR 800.2(c)(2)(ii)(F) provides that an Indian tribe that has not assumed THPO duties may notify the agency in writing that it is waiving its rights to execute an MOA for undertakings on its tribal lands.

**4) What happens if agreement is not reached on how to resolve adverse effects?**

***a) Off Tribal Lands***

If agreement is not reached, the agency, the SHPO, or the ACHP (if participating), may terminate consultation. Other consulting parties, including Indian tribes, may decline to participate, but they cannot terminate consultation. After consultation is terminated, the ACHP prepares its formal comments to the head of the agency, who must consider the ACHP's comments in reaching a final decision. Per the Section 106 regulations at 36 CFR Section 800.7 (c), the ACHP must provide an opportunity for the agency, all consulting parties, and the public to provide their views to the ACHP during the time in which the comments are being developed. When the ACHP issues comments, it means the full ACHP membership issues the comments, not the ACHP staff. In addition to providing the comments to the head of the agency, the ACHP shall provide copies of those comments to each of the consulting parties. Once the head of the agency has received the ACHP's comments, he or she is required to prepare a summary of his or her final decision regarding the proposed federal undertaking that contains both the rationale for its decision as well as evidence that it had considered the ACHP's comments when making that decision. In addition, the agency must provide copies of this summary to all consulting parties.

***b) On Tribal Lands***

If the agency and the THPO (or designated tribal official, if the tribe has not assumed THPO duties) fail to agree, the agency must invite the ACHP to join the consultation.

The THPO/tribe may determine that further consultation will not be productive and terminate consultation. The THPO/tribe must then notify the agency and other consulting parties of the determination and the reasons for terminating. The ACHP must then issue its comments to the head of the agency when the THPO/tribe terminates consultation because the federal agency and the ACHP cannot execute an agreement without the THPO/tribe for undertakings on or affecting historic properties on tribal lands. The procedure for the development of the ACHP's comments and the requirements to provide copies of both ACHP comments and the agency's summary of its final decision to consulting parties is identical to that explained in answer A) (above) for undertakings affecting historic properties off tribal lands.

**5) When an undertaking takes place or affects historic properties on tribal lands, can a Section 106 agreement be concluded between the federal agency and the Indian tribe when the SHPO opts out of consultation, even though the designated tribal representative is not a THPO?**

Yes, an agreement can be concluded in this circumstance because such a tribe has the same rights as a THPO, per 36 CFR 800.2(c)(2)(i)(B). An Indian tribe may reach agreement with a federal agency on the terms of a Section 106 agreement (MOA or PA). Execution of the agreement by a designated tribal representative and the agency (along with filing the agreement with the ACHP), and agency compliance with the terms of the agreement, would complete the Section 106 process.

## VI. Consultation Tools

While federal authorities direct agencies to consult and coordinate with Indian tribes on proposed actions, little guidance exists on how to carry out such consultation. On a national level, such guidance is general because of the differences between federal agencies, Indian tribes, and local circumstances.

### Agreements

The Section 106 regulations at 36 CFR Section 800.2©(2)(ii)(E) provide for agreements between federal agencies and Indian tribes that tailor how consultation will be carried out. Such agreements are not project-specific but, instead, are more general and are focused on the relationship between an agency and an Indian tribe. An agreement can cover all aspects of the consultation process and could grant an Indian tribe additional rights to participate or concur in agency decisions in the Section 106 process beyond those specified in the regulations. The only restriction on the scope of such agreements is that the role of other parties in the process may not be modified without their consent.

A common misunderstanding is that such agreements are required before an agency and a tribe can enter into Section 106 consultation for individual undertakings. In fact, consultation agreements are not required but are meant to facilitate consultation.

A number of federal agencies have entered into such agreements with Indian tribes as a means not only to ensure that consultation would be carried out to the satisfaction of both parties but also as a workload management tool. Agreements can outline the areas of a state or region in which a tribe has an interest or the types of undertakings that might not require consultation with the tribe.

If an Indian tribe agrees in advance to such delegation, an agreement with the tribe would be the vehicle through which an agency could delegate the day-to-day consultation and coordination with the tribe to an applicant.<sup>31</sup> The agreement itself illustrates recognition of the government-to-government relationship between the federal agency and an Indian tribe. However, absent prior agreement by a tribe, an agency cannot delegate its government-to-government consultation responsibilities to an applicant.

The negotiation process to develop an agreement with an Indian tribe does not require participation by any other parties outside of the agency (there may be other entities within the agency, such as the agency's office of legal counsel that must participate). These agreements are, in fact, between the federal government and a sovereign nation. Therefore, unless the tribe agrees, it would be inappropriate to invite another party to participate. The only requirements for such agreements under the ACHP's regulations are that:

- the role of other parties is not modified without their consent; and
- the agreement is filed with both the ACHP and appropriate SHPO.

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<sup>31</sup> An applicant may be a state agency, local government, organization, or individual seeking federal assistance, permits, licenses, and other approvals.

## Summits and Meetings

Some agencies have hosted summits with Indian tribes and continue to do so on a regular basis. These meetings provide a means for agencies to share information about proposed undertakings and for Indian tribes to voice their views and talk with agency personnel. They also serve to develop trust and build relationships.

Some agencies host annual or regular meetings with Indian tribes to ensure that the consultation relationships are working and to address any outstanding issues. These gatherings are separate from Section 106 consultation meetings. They provide a forum for airing more general concerns, a means for recharging the relationship, and an opportunity to meet new agency personnel and tribal representatives.

## Guidance Materials and Training

Many agencies have published or are currently developing various guidance materials for their staff and leadership on consultation with Indian tribes. Most of these materials are intended to serve as department or agency-wide guidance.

Training is also extremely useful in that it ensures that both federal agencies and Indian tribes have a common understanding of legal requirements, organizational structures, decision-making, and other important mechanics of the consultation relationship. Training can also address cultural issues to help foster greater mutual understanding. Some agencies have hosted joint training sessions, while others require new personnel to receive training specific to their new duties. For instance, the ACHP has an internal requirement to train all staff and members regarding tribal consultation within the Section 106 process.

On-line training resources are also becoming more prevalent. The ACHP played a large role, along with several other departments and agencies,<sup>32</sup> in the development of the “Working Effectively With Tribal Governments” on-line training program that is available through the U.S. Office of Personnel Management’s GoLearn website.<sup>33</sup> This course provides content useful to all federal employees, including information essential to understanding the unique political status of federally recognized Indian tribes, an overview of federal Indian law and policies, and cultural information that can increase the quality of cross-cultural communications. Other agencies have developed agency specific on-line training, such as the course that the Federal Emergency Management Agency (FEMA) has developed for its employees on working with Indian tribes.

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<sup>32</sup> Other federal departments and agencies involved in the development of the “Working Effectively With Tribal Governments” on-line training course include the Environmental Protection Agency, the Department of Justice, the Department of Interior, the U.S. Forest Service, the Small Business Administration, the General Services Administration, the Department of Health and Human Services and the Department of Energy.

<sup>33</sup> Available at: <http://www.golearn.gov>

## VII. Principles and Tips for Successful Consultation

The key to success in any consultation relationship is building trust, having common goals, and remaining flexible. There is no “one size fits all” model for consultation with Indian tribes—all tribes are unique, and different undertakings present different challenges. There are, however, central principles that should be kept in mind when conducting tribal consultation, and this final section of the Tribal Consultation Handbook provides helpful tips on how to put them into practice.

### Respect is Essential

- Be respectful of tribal sovereignty.
- Become aware of tribal conventions and protocols and follow them; respect tribal customs.
- Dress respectfully. Do not wear shorts, short skirts, sleeveless shirts, or shirts with plunging necklines to meetings. Check with your tribal contact as to appropriate dress for site visits or tribal events.
- Do not take photographs without obtaining permission first.
- Behavior you may perceive as normal may be insulting or offensive to others. For example, some tribes consider pointing one’s finger to be offensive, and consider a gentle handshake a sign of respect instead of a sign of weakness. Consider native perspectives and values. When in doubt, ask respectfully.
- Tribal leaders have many duties; be aware of this fact and do not demand that everyone adhere to your deadline. Instead, explain why your deadline exists, who set it, and why it is important. Above all, strive to be as flexible as possible. Look for ways to work cooperatively, because this is your undertaking and consultation is your responsibility.
- Be sensitive to time and costs. A tribe’s lack of human and financial resources may impede its representatives’ ability to respond quickly or travel to meetings. Make an effort to facilitate and support consultation with available agency resources.
- Do not voice your opinion on what is best for the tribe; that is for tribal leaders to determine.
- Be mindful of the significance of history. The history of U.S. government relations with Indian tribes may color current perceptions and attitudes and cause distrust or suspicion. Take the time to learn about the unique history of the tribe you are consulting with.

## Communication is Key

- Communicate with tribal representatives directly whenever possible—do not rely solely on letters. Follow up written correspondence by phone or in person. Create documentation of your communications, such as notes on the content of discussions, keep phone logs, etc.
- Do not expect quick answers. Tribal officials may need time to consult with others, including tribal councils or the head of the tribal government. Make sure you understand the timelines for tribal decision-making.
- Do not assume silence means concurrence; it could signal disagreement. Always verify views with the official tribal representative.
- Always ask tribal representatives about their preferred way of doing business and any specific tribal protocols for meetings. Be aware that the cultural norms of tribal citizens may be different from yours, and that each of the more than 560 Indian tribes has a unique culture and heritage.
- Do not assume everyone is the same. For example, traditional cultural authorities may sometimes have perspectives that differ from those of their tribal governments. It is important to listen to all consultation participants, but also to be sure that you understand the position of the elected tribal leadership on every issue.
- Develop points of contact through the tribal government. Do research ahead of time to find out whom you will be consulting with and their tribal positions, then make the effort to get to know them. Tribal governments may consist of elected leadership (tribal leader, tribal council, tribal courts), traditional leaders (treaty councils, tribal elders, spiritual leaders), and tribal administration (program managers, administrators, and staff).
- Be mindful of appropriate behaviors—be sure to demonstrate respect to tribal leaders just as you would to a leader of a foreign nation. Always show deference toward tribal elders and allow them plenty of time to speak first. Do not interrupt or raise your voice. Learn by observation and by talking to others. Again, when in doubt, ask respectfully.

## Consultation: Early and Often

- Make sure you identify and initiate consultation with tribes at the *start* of the planning process for your agency's undertaking.
- Suggest a process for consultation and discuss it with the tribes. Collaborate in a way that accommodates tribal protocols and schedules. The ACHP regulations at 36 CFR Section 800.2(c)(2)(ii)(E) provide for agreements with tribes that set out procedures for Section 106 consultation and can address tribal concerns about confidentiality of information.
- Consider establishing a on-going working group that can provide continuity for future undertakings by your agency.
- Focus on partnerships rather than on project-by-project coordination.

- Remember to document all correspondence, follow-up telephone calls, consultation meetings and visits to project sites and reservations. Be sure to include the content of your communications in your documentation.
- Find out if the tribal leadership wants to receive additional copies of all the consultation materials and documentation that you are providing to the tribe's designated representative (THPO, or cultural resources staff person) as part of your consultation.
- Ask tribal representatives to keep you up-to-date on any changes to tribal postal or email addresses and contact information for new tribal leadership.

### **Effective Meetings are a Primary Component of Successful Consultation**

- Develop an understanding of the tribe's decision-making process and get to know its decision makers.
- Offer to go on-site with traditional authorities. Some people may be uncomfortable relying solely on maps, and site visits may stimulate consideration of alternatives.
- Do not create expectations or make commitments that you are unable or unwilling to fulfill. Before entering into consultation, be certain that what you are negotiating is supported by the Office of General Counsel or Solicitor of your agency, and anyone else who will need to review and approve your position.
- Do not set your own meeting agenda without consulting with tribal representatives to learn what they expect the process and substance to be. Tribes may have their own ways of conducting meetings.
- Inform tribal representatives in advance of the meeting's goal and what needs to be accomplished in the time you have, so that participants can stay focused. Like you, tribal representatives are there to work and accomplish results.
- Give plenty of notice beforehand so that tribal representatives have adequate time to prepare. Provide participants with maps, hotel information, a list of all attendees, an agenda, and most importantly, complete project documentation.
- Speak to tribal members by phone beforehand so that you know who will be attending the meeting. Allow tribes to send as many representatives as they wish, but explain any limitations that your agency may have with funding travel.
- Check if anyone has special needs. Some tribal elders may need special accommodations.
- Offer the tribal participants the opportunity to make an opening or welcoming statement.
- Make sure you invite tribal representatives to sit at the table with you, and introduce all participants with their proper titles. Check with your tribal contact beforehand so you know if certain officials or elders should be introduced and acknowledged first.
- Review your agency's mission and operations at the start of the meeting. Do not assume that everyone knows how your agency functions or is familiar with all of the programs it oversees.

- Take accurate notes during the meeting, or, *if the tribe agrees in advance*, arrange for meetings to be recorded (it is still advisable to take notes to avoid problems should a recording be lost or damaged). It is important to document not only that you have consulted with the tribe, but the substance of the meeting and the views and concerns expressed by the tribe, as well. Be sensitive to the issue of confidentiality, which may require that you switch the recorder off, or to omit certain sensitive information from your notes if the tribe so requests. Documenting meeting content ensures that participants can later review and correct any inaccuracies, and also provides the agency with a solid consultation record.
- Remember that consent by one tribal member does not necessarily mean consent by the tribe. Make sure that the tribe's governing body has approved final decisions.
- Be prepared on the issues and be open to tribal perspectives.

## **Conclusion**

We hope this handbook has been helpful. If needed, you may obtain further assistance from the ACHP in understanding and interpreting the requirements of Section 106, including tribal consultation. For general information, please visit the ACHP web site at [www.achp.gov](http://www.achp.gov).





*Preserving America's Heritage*

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