



*Preserving America's Heritage*

# **Improving Tribal Consultation in Infrastructure Projects**

*A report by the  
Advisory Council on Historic Preservation  
May 24, 2017*

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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An independent federal agency, the ACHP promotes the preservation, enhancement, and sustainable use of our nation's diverse 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. The ACHP promotes historic preservation to foster the understanding of the nation's heritage and the contribution that historic preservation can make to contemporary communities and their economic and social well-being.

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## INTRODUCTION

The Departments of the Interior and Justice and the Army Corps of Engineers (Corps) hosted a series of meetings and a listening session in 2016 to discuss with Indian tribes<sup>1</sup> their input in federal infrastructure decisions in response to the widespread concerns regarding the Dakota Access Pipeline. In the announcement about the consultations, the agencies noted that “this case has highlighted the need for a serious discussion on whether there should be nationwide reform with respect to considering tribes’ views on these types of infrastructure projects.” The listening session took place in conjunction with the annual meeting of the National Congress of American Indians in Phoenix, Arizona, on October 11, 2016. The meetings took place in Albuquerque, New Mexico; Billings, Montana; Old Town, Maine; Prior Lake, Minnesota; and Rapid City, South Dakota, between October 25 and November 17, and there was a teleconference on November 21, 2016. Written comments were also received from 59 Indian tribes and eight intertribal organizations.

Federal agencies involved in infrastructure decisions were invited to participate. The Advisory Council on Historic Preservation (ACHP) also participated in all the meetings, as it oversees the historic preservation review process established by Section 106 of the National Historic Preservation Act (NHPA). Section 106 applies to federal decision making regarding all undertakings, including proposed infrastructure projects, and requires federal agencies to consult with Indian tribes when those undertakings affect properties of traditional religious and cultural significance to them. After the consultations were concluded, a report, [Improving Tribal Consultation and Tribal Input in Federal Infrastructure Decisions](https://www.achp.gov/sites/default/files/reports/2018-06/ImprovingTribalConsultationandTribalInvolvementinFederalInfrastructureDecisionsJanuary2017.pdf) (https://www.achp.gov/sites/default/files/reports/2018-06/ImprovingTribalConsultationandTribalInvolvementinFederalInfrastructureDecisionsJanuary2017.pdf), addressing the comments and offering recommendations was issued by the Departments of the Interior and Justice and the Corps on January 18, 2017.

## ABOUT THIS REPORT

In recognition that many of the issues raised during the sessions and submitted in written comments are about, or related to, the Section 106 process, the ACHP offers this report in response. It is intended to be a companion to the interagency report and provides recommendations for improving tribal consultation in the Section 106 review process for federal infrastructure decisions. Productive, timely, and meaningful tribal consultation is an important component of an efficient review process that, in turn, helps to advance federal decisions and projects overall.

It bears noting at the outset that these issues are not new to the ACHP. Indian tribes have raised many of these issues in the context of individual Section 106 reviews and in national meetings and two regional summits hosted by the ACHP. The Tribal Summit on Renewable Energy, co-hosted with the National Association of Tribal Historic Preservation Officers, took place in Palm Springs, California, in 2011. The Northern Plains Tribal Summit was co-hosted with the Standing Rock Sioux Tribe in 2014. In response to these discussions, in 2015, the ACHP published [Recommendations for Improving Tribal-Federal Relationships](https://www.achp.gov/sites/default/files/guidance/2018-06/RecommendationsforImprovingTribal-FederalConsultation14Sep2015.pdf) and sent it to Indian tribes, Federal Preservation Officers, and the broader preservation community. The recommendations are available online at <https://www.achp.gov/sites/default/files/guidance/2018-06/RecommendationsforImprovingTribal-FederalConsultation14Sep2015.pdf>. The ACHP also has provided extensive guidance about consultation

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<sup>1</sup> Indian tribes means an Indian tribe, band, nation or other organized group or community, including an Alaska Native village, Regional Corporation or Village Corporation (as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

with Indian tribes and Native Hawaiian organizations at <https://www.achp.gov/indian-tribes-and-native-hawaiians> and the Section 106 process at <http://www.achp.gov/work106.html>.

## **SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT**

The purpose of Section 106 is to ensure federal agencies give due consideration to the impacts of their actions on historic properties and seek ways to avoid, minimize, or mitigate such impacts through consultation with stakeholders. The Section 106 process is of particular importance to Indian tribes because the protection of historic properties is so vital to the preservation of their cultures, and it provides the opportunity for tribes to directly influence federal decision making. Therefore, it is not surprising that it was a dominant theme in the infrastructure discussions.

The Section 106 process, at its core, is a fairly simple four-step process that requires federal agencies to consider the effects on historic properties of projects they carry out, assist, permit, license, or approve. A fundamental goal of the Section 106 process is to ensure federal agencies consult with interested parties, including Indian tribes, to identify and evaluate historic properties, assess the effects of their undertakings on historic properties, and attempt to negotiate an outcome that will balance project needs and historic preservation values. Overall, the process runs smoothly and is concluded with agreement among the parties on how the project will proceed.

Federal agencies must consult with Indian tribes at each step in the Section 106 process and recognize the special expertise of Indian tribes regarding the significance of and impacts to sites important to them.<sup>2</sup> The regulations actually offer quite a bit of guidance at 36 CFR§ 800.2(c)(2), including a reminder that federal agency consultation with Indian tribes must respect the government-to-government relationship and start early in the planning process. The regulations also provide for federal agencies and Indian tribes to enter into agreements that specify how they will work together in the process. Such agreements may also afford Indian tribes additional rights to participate or concur in agency decisions. So the regulations provide ample guidance as well as tools to tailor consultation to the needs of tribes and federal agencies.

It should be noted that there are other important participants in the Section 106 process in addition to Indian tribes. State Historic Preservation Officers (SHPOs) play a central role in most Section 106 reviews. They administer the national historic preservation program at the state level, review National Register of Historic Places nominations, maintain data on historic properties that have been identified but not yet nominated, and consult with federal agencies at each step of the Section 106 review process. The only instance in which SHPOs are not involved in a Section 106 review is when an Indian tribe has a Tribal Historic Preservation Officer (THPO) under Section 101(d)(2) of the NHPA.<sup>3</sup>

While federal agencies have the legal responsibility for complying with Section 106, applicants for federal funding and approvals are also important participants in the process. It is common practice for federal agencies, in the course of considering approvals or funding, to request applicants to pay for the cost of meetings, travel, maintaining the administrative record, or studies to inform the review, while retaining responsibility for all findings, determinations, and decisions.

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<sup>2</sup> Under the NHPA and the Section 106 regulations Native Hawaiian organizations (NHOs) have the same consultation rights that Indian tribes have for undertakings off tribal lands. While this report focuses on Indian tribes because it is the ACHP's response to tribal concerns raised in the interagency consultations, federal agencies should consider implementing those recommendations that are adaptable to their NHO consultation responsibilities.

<sup>3</sup> Among the amendments to the NHPA in 1992, Section 101(d)(2) provides for Indian tribes to appoint a Tribal Historic Preservation Officer (THPO) to assume the role of the SHPO on tribal lands and submit a preservation plan to the National Park Service.

This report acknowledges the interrelation of these participants in the Section 106 process and the importance of effective communication and interaction among them to ensure efficient project reviews.

## **KEY ISSUES RAISED IN THE CONSULTATION SESSIONS AND WRITTEN COMMENTS**

The following issues are derived from the verbal and written comments of tribal leaders and other tribal representatives that emerged in the interagency consultations. In addition to attending all the consultation meetings, the ACHP reviewed all written comments and meeting transcripts. While the ACHP did not conduct further consultation of its own with Indian tribes in the preparation of this report, the ACHP's extensive experience in overseeing the Section 106 process nationally informed the development of the recommendations included here. The report was also reviewed by members of the ACHP, which include representatives of federal agencies, Indian tribes, and national organizations of THPOs and SHPOs.

During the interagency consultation, there was extensive focus on consultation, which is the cornerstone of the Section 106 process. Likewise, there were extensive comments about sacred sites. Since the term "sacred sites" is often used by Indian tribes synonymously with "historic properties" in the Section 106 process, they are included in the report with the understanding that such properties must be on or eligible for the National Register of Historic Places in order to be considered under Section 106. It should also be noted that the majority of issues raised by tribal leaders and representatives in the interagency consultations were directed primarily at federal infrastructure projects off tribal lands. In only a few instances, tribal commenters spoke about problems on tribal lands. Therefore, the recommendations offered by the ACHP are meant to address consultation challenges for those infrastructure projects that take place off tribal lands, although the general principles may apply to projects both on and off tribal lands.

The report begins by examining the broader issues that influence or are related to the Section 106 process, and then focuses on major Section 106 issues. Below each issue, tribal comments are summarized and are followed by ACHP recommendations and, where applicable, commitments to take action.

## **GENERAL ISSUES**

### **IMPROVING CONSULTATION**

#### **Tribal Comments**

This was a major concern raised by a great many commenters. Tribal commenters acknowledged that while there were significant improvements in federal agency consultation with Indian tribes in recent years, consultation challenges remain.

Tribal commenters complained about the practice of federal agency delegation of consultation to non-federal entities and failure of agencies to enter the process when problems arise. Tribal commenters explained that this practice denies Indian tribes of their rights as sovereign entities to government-to-government consultation and gives too much authority to applicants who have an inherent interest to proceed with projects they propose.

Tribal commenters noted that they continue to believe true, meaningful consultation only takes place in face-to-face meetings on tribal lands between federal agency decision makers and tribal leadership. Further, consultation is also not a “one size fits all” exercise nor is it simply sending a letter. One commenter explained that if the federal agency does not get a response, it should follow up with phone calls and emails. Additionally, federal agencies should not assume that, when a tribe does not respond, there is no interest or that the tribe consents to the proposed action. A few tribal commenters explained that they do not have the funding or resources to participate in all consultations.

Many tribal commenters asserted that, in order for consultation to be meaningful, Indian tribes must have decision-making authority. The majority of commenters, in fact, called for “free, prior, and informed consent,” a central tenet of the United Nations Declaration on the Rights of Indigenous Peoples. Many tribal commenters felt that unless federal agencies are willing to reject project proposals based on tribal objections, tribal input is essentially meaningless. Some commenters felt that, at the least, the goal of consultation should be consensus, and that federal agencies should use their discretionary authority to deny projects that will impact significant tribal resources.

Many commenters noted that Indian tribes need to be consulted much earlier in federal decision making, before critical decisions are made that preclude consideration of options for avoiding impacts to resources tribes are concerned about. They also noted that they need to be consulted on all projects that might affect them and to be informed of federal agency decisions following conclusion of the consultation process.

The contact system operated by the Federal Communications Commission (FCC), called the Tower Construction Notification System<sup>4</sup>, was mentioned several times as a model that would facilitate better communication with Indian tribes. Some tribal commenters also suggested federal agencies develop mapping systems that indicate where each Indian tribe has concerns so federal agencies can make better decisions early in project planning.

#### **ACHP Response**

Indian tribes have also raised these issues in individual Section 106 reviews and in meetings on broader issues. In the ACHP’s experience, when federal agencies better understand and respect

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<sup>4</sup> Tower construction notification allows companies to voluntarily submit notifications of proposed tower constructions to the FCC. The Commission subsequently provides this information to federally-recognized Indian Tribes, Native Hawaiian Organizations (NHOs), and State Historic Preservation Officers (SHPOs), and allows them to respond directly to the companies if they have concerns about a proposed construction.



their obligations to consult with Indian tribes in general, there are fewer conflicts in the Section 106 process. Fewer conflicts avoid delays in the process and overall project planning.

Where federal agencies invest the time and resources to build trust and relationships with Indian tribes, projects proceed in a timelier manner, and conflicts can be more easily addressed. There are multiple examples in the historic preservation program of federal agencies and Indian tribes working collaboratively to address challenges. One such example is the North Dakota Tribal Consultation Committee (<https://www.achp.gov/sites/default/files/2017-01/TCC.pdf>) established by the Federal Highway Administration, the North Dakota Department of Transportation, and Indian tribes.

- To enhance federal agency consultation and applicant communication with Indian tribes, the White House Council on Native American Affairs (WHCNAA) should have a member agency develop a government-wide contact system similar to that used by FCC. The U.S. Department of Housing and Urban Development also has a system that is a potential prototype or could serve as a government-wide tool.
- The members of the WHCNAA should develop government-wide consultation standards and include recommended accountability measures, participation by decision makers, documentation of decisions, and response to tribal leadership.
- While federal departments and agencies have tribal liaisons in positions at headquarters and in regional offices to advise leadership, federal agencies should also establish internal protocols that require decision makers, rather than non-decision making staff, to consult with Indian tribes.
- Federal agencies should work with Indian tribes to:
  - Meet on a regular basis outside of project consultations.
  - Develop mutually acceptable standards and protocols for the identification and treatment of resources that might be affected by infrastructure projects.
  - As suggested by tribal commenters, enter into consultation agreements.
- Federal agencies should ensure all staff are aware of, and act in accordance with, government-wide and agency policies and directives regarding tribal consultation.

## **FEDERAL AGENCY COMPLIANCE WITH FEDERAL LAWS AND REGULATIONS**

### **Tribal Comments**

Tribal commenters complained that federal agencies do not comply with federal laws and regulations but Indian tribes are required to do so. THPOs are required to submit annual reports documenting how they carried out their responsibilities, but federal agencies have no such accountability requirements. Tribes indicated that they spend too much of their time trying to get federal agencies to comply with federal laws and regulations. Tribal commenters also suggested that legislation be amended to create penalties or consequences for non-compliance with Section 106.

### **ACHP Response**

The ACHP notes that neither Section 106 nor the NHPA includes specific accountability requirements. Instead, the review process has been structured to ensure that federal decisions are made in consultation with others and are, thus, transparent. The ACHP believes that the creation of federal agency performance accountability standards, increased training of federal staff, and federal agency monitoring of internal implementation of legal and policy requirements would substantially improve federal agency compliance.

- Federal agencies should work with the Office of Personnel Management to develop and incorporate accountability measures in federal employee performance standards.
- The Secretary of the Interior should ensure the professional qualification standards for Federal Preservation Officers include training in tribal and Native Hawaiian consultation.

## TRAINING

### **Tribal Comments**

Tribal commenters noted the need for federal officials at all levels to be trained in tribal histories, cultures, and communication protocols. A number of commenters noted that, in general, federal agency officials do not understand tribal world views. One commenter noted that Foreign Service officers receive extensive training before working with other nations; therefore, federal officials need similar training, including how to conduct themselves appropriately in tribal consultation.

Some commenters noted that federal agencies also do not know all their responsibilities nor do they understand their trust obligations, tribal treaty rights, or their own agency's internal policies and guidance.

### **ACHP Response**

The ACHP has long believed that training is essential to ensuring productive and meaningful implementation of federal agency Section 106 responsibilities and has maintained a respected training program for many years. In addition to offering training on topics related to Section 106, the ACHP has participated in numerous interagency training initiatives to support federal agencies in meeting their broader obligations to Indian tribes. In response to tribal comments, the ACHP is in the process of developing training for federal agencies on tribal consultation in the Section 106 review process.

- The members of the WHCNAA should ensure existing government-wide, free, online training courses are available. There are two that could serve as components of a training program for federal officials: *Working Effectively with Tribal Governments*<sup>5</sup> and *Native American Sacred Sites and the Federal Government*.  
[\[https://www.justice.gov/tribal/video/sacred-sites-training-video\]](https://www.justice.gov/tribal/video/sacred-sites-training-video)
- The members of the WHCNAA, in consultation with Indian tribes, should develop and offer additional training for federal officials to include, at a minimum, a third course that addresses general cultural sensitivity.
- Federal agencies should integrate the above courses into existing training for staff and require completion of such training for appropriate staff.
- Regional and local offices of federal agencies should work with Indian tribes to develop training for federal staff to prepare them to work and consult with those tribes and to develop training for tribal staff to assist them in participating more effectively in federal review processes.
- Federal agencies should ensure all appropriate staff receive training in environmental and cultural resource/historic preservation responsibilities as well as tribal consultation.

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<sup>5</sup> The course will be available online, through the Office of Personnel Management, again in the spring of 2017.

## **SECTION 106-SPECIFIC ISSUES**

Tribal commenters raised specific Section 106 issues and general concerns about the NHPA. While there were many process-specific comments, this report focuses on broader Section 106 issues and offers recommendations that are designed to remedy both general and specific challenges.

### **STATUTORY ISSUES**

#### **Tribal Comments**

Several tribal commenters suggested that clearer language and definitions are needed in the NHPA and Section 106, particularly about tribal consultation requirements. Tribal commenters also noted that the NHPA does not explicitly address treaty rights. General lack of knowledge about basic concepts and legal requirements, including treaty rights and the gap in the legislation, results in no consideration of treaty rights in the Section 106 process. Tribes noted that Section 106 does not require the federal government to obtain tribal consent before taking action, and that consultation and consent should be required when actions affect treaty lands or resources. Tribes also called for redress for the destruction of cultural sites when there has not been free, prior, and informed consent.

Another important issue raised by tribal commenters is that Section 106 is a *process* and does not provide for—or in any way ensure protection of—tribal cultural resources.

Some commenters stated that they believe the Section 106 process is driven by applicants and their deadlines and project needs.

#### **ACHP Response**

While there have been significant improvements in federal agency consultation with Indian tribes, Section 106 consultation challenges remain and for many of the reasons pointed out by tribal commenters. Expedited reviews of infrastructure projects, increased exploration for and extraction of natural resources, and dwindling federal budgets have contributed to the challenges. In recognition of the challenges, the ACHP issued recommendations, available at <https://www.achp.gov/sites/default/files/guidance/2018-06/RecommendationsforImprovingTribal-FederalConsultation14Sep2015.pdf>, many of which have been incorporated in the recommendations in this report.

In 2016, the Departments of the Interior, Defense, Agriculture, Transportation, Commerce, and Justice, the Environmental Protection Agency, Council on Environmental Quality, and the ACHP entered into a Memorandum of Understanding (MOU) to affirm a commitment to protect tribal treaty rights and similar tribal rights related to natural resources through consideration of such rights in agency decision making processes and enhanced agency coordination and cooperation.

While changes to the NHPA require congressional action, there are steps the ACHP will take to address some of these concerns:

- The ACHP, as a signatory to the treaty rights MOU, will draft a guidance statement reminding federal agencies to consider treaty rights in the Section 106 process.
- The ACHP will review and evaluate its existing guidance regarding tribal consultation in the Section 106 process and, where necessary, will update it to clarify federal consultation requirements and best practices.
- The ACHP will recirculate its tribal consultation guidance on a regular basis to Section 106 participants.

## ACCOUNTABILITY, ENFORCEMENT, AND CONSISTENCY

### Tribal Comments

Overall, a number of tribal commenters noted that the Section 106 process and the NHPA do not require accountability for federal agencies. They hold that federal agencies face no consequences for failure to consult with Indian tribes or to comply with the law and regulations. Tribal commenters also noted the ACHP lacks sufficient authority; that the ACHP is advisory; and its recommendations are often ignored. Indian tribes would like the ACHP to have more authority, including the ability to enforce its decisions. They called on the federal government to create internal enforcement mechanisms or amend the act and the Section 106 regulations to add authority for the ACHP to enforce Section 106 and to add penalties for non-compliance. Additionally, they said federal agencies should not be allowed to proceed or issue permits if the ACHP or another agency calls for additional reviews or consultation.

Indian tribes also pointed out that there is inconsistent application of the Section 106 regulations across federal agencies. This adversely impacts the integrity of the process and the protection of historic properties, including traditional cultural properties.

Tribal commenters also noted that while THPOs are mandated to follow Section 106 procedures closely, federal agencies are not held to such standards, have different interpretations, and, exercise leeway in implementation of Section 106. For example, they mentioned that private firms or cultural resource management (CRM) companies often undertake Section 106 review, which is legally the responsibility of federal agencies. Tribes maintained that Section 106 reviews should be performed by federal agencies, or a neutral entity, if delegated at all.

### ACHP Response

The ACHP acknowledges the frustration of Indian tribes regarding enforceability, consistency, and accountability in the Section 106 process and that there are many instances in which Indian tribes feel the process has failed their preservation efforts. The ACHP believes implementation of the recommendations in this report and in [\*Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions\*](#) will greatly improve overall compliance with federal requirements and tribal consultation.

- Federal agencies should ensure that internal guidance and directives regarding the NHPA and Section 106 responsibilities are consistent with statutory and regulatory language and ACHP interpretations, and clearly articulate tribal consultation responsibilities.
- Each federal agency should consider developing and implementing an internal system that ensures compliance with the NHPA and Section 106 by agency staff.

## TIMING

### Tribal Comments

Many tribal commenters remarked that Section 106 consultation is often started too late, after project plans are well advanced or nearly completed, and is not conducted as a process separate from the National Environmental Policy Act (NEPA) review process. This results in tribal input becoming a “check the box” exercise rather than the meaningful and substantive input the NHPA intends. Tribes believe they are not being heard and are being viewed as obstacles. This situation puts them on the defensive rather than being considered partners in the process.

Tribal commenters suggested Indian tribes be involved in and consulted during the pre-licensing/permitting phase to ensure cultural and religious sites are properly identified and protected. One commenter referred to this as an “early intervention process.”

#### **ACHP Response**

The ACHP supports the suggestion for tribal involvement in pre-licensing/permitting and commits to working with permitting agencies, industry officials, and Indian tribes to encourage protocols for the early involvement of Indian tribes. However, the ACHP reminds federal agencies and their applicants that a federal agency’s government-to-government consultation responsibilities cannot be unilaterally delegated to a non-federal entity.

- Federal agencies should improve pre-application information about Section 106 and tribal consultation.
- Federal agencies should encourage proactive planning by applicants that includes coordination with and information gathering from Indian tribes.

## **CONSULTATION**

### **Tribal Comments**

Commenters suggested that federal agencies confuse Section 106 consultation and government-to-government consultation. Federal agencies carry out Section 106 consultation with tribal staff and assume it meets all their consultation requirements. Tribal commenters asserted that federal agencies do not know they are also required to carry out government-to-government consultation with tribal leadership. Tribal commenters explained that government-to-government consultation happens between decision makers and is a separate requirement. They further explained that they believe Section 106 is meant to be a comprehensive review of a proposed project so when Section 106 consultation does not happen, Indian tribes are not afforded the opportunity to protect cultural and natural resources.

Many commenters felt federal agencies treat consultation as a “one size fits all” exercise and do not acknowledge that each Indian tribe is unique. A related issue raised by Indian tribes is that consultation is not appropriately defined in the NHPA or Section 106, so it has historically been used as a procedural box-checking action.

Tribes explained that they should be given project planning schedules. Federal planning schedules should factor in tribal constraints, such as inadequate staffing and budgets, in meeting deadlines. They believe review periods are too short to accommodate competing tribal priorities and limitations, and that federal budgets should include funding for tribal consultation and input. Federal planning needs to accommodate tribal limitations in capacity and resources.

Some commenters believe Indian tribes and SHPOs should work together more often in the Section 106 process.

As noted above, some tribal commenters believe the goal of consultation is consensus.

#### **ACHP Response**

The ACHP notes that the Section 106 process is based on consultation with the goal of reaching agreement regarding the consideration of historic properties. The ACHP reminds federal agencies that, in addition to budget and staff constraints, Indian tribes have internal government processes that may not align with federal government processes. Additionally, there may be protocols that constrain when a tribal representative may discuss certain issues or decisions that may require full tribal government review.

- Federal agencies should examine existing tribal consultation policies and incorporate principles for reaching consensus with Indian tribes in the Section 106 process, if such principles do not currently exist. Additionally, all staff responsible for making decisions that might affect Indian tribes and all staff responsible for working with tribes should be aware of and implement such principles.
- Federal agencies and Indian tribes should develop Section 106 consultation agreements or protocols that define how they will consult, identify points of contact, and address other common issues. Authority for such agreements is included in 36 C.F.R Section 800.2(c)(2)(ii)(E). These agreements should be rooted in government-wide consultation standards. Many agencies and tribes have already entered into such agreements.
- Federal agencies should meet regularly with Indian tribes outside of project consultations to discuss issues of mutual interest.
- The ACHP will develop training for federal agencies regarding Section 106 consultation with Indian tribes.

## **SECTION 106 AGREEMENTS**

### **Tribal Comments**

Some tribal commenters believe federal agencies use Section 106 agreements, particularly nationwide agreements (and nationwide permits), as a way to avoid compliance and tribal consultation. They believe such broad agreements also do not account for differences among Indian tribes across the country.

Commenters noted that the common practice of deferring, until after a decision is made about a project, much of the Section 106 process through programmatic agreements, negatively impacts tribal consultation.

Many commenters called for a requirement in the Section 106 process for an Indian tribe to sign an agreement when places of importance to a tribe will be impacted, even if such places are located outside their tribal lands. They likened it to free, prior, and informed consent. In their view, unless Indian tribes have authority equal to federal agencies, or even SHPOs (who must be invited to sign agreements), consultation is meaningless.

Some commenters suggested federal agencies enter into programmatic agreements with Indian tribes early in the review process for infrastructure projects, thereby ensuring tribal involvement and agency accountability.

### **ACHP Response**

In the Section 106 regulations, a federal agency has the discretion, but is not required, to invite an Indian tribe to sign a memorandum of agreement outlining measures to avoid, minimize, or mitigate adverse effects to historic properties of religious and cultural significance to the tribe when those properties are not on tribal lands. When the undertaking is on or will affect historic properties on tribal lands, the federal agency must invite the tribe to sign the agreement.

- The ACHP will develop internal procedures to guide its actions in those instances in which a federal agency will not invite an Indian tribe to be a signatory to a project-specific Section 106 memorandum of agreement or programmatic agreement and those instances in which a federal agency has invited an Indian tribe or tribes to sign such an agreement but the Indian tribe or tribes refuse to sign an agreement. The ACHP's internal procedures could include but not be limited to elevating the ACHP's participation from staff-level to chairman or member-level involvement or terminating such consultation.

- The ACHP will issue guidance that encourages federal agencies, when developing Section 106 agreements, to invite Indian tribes to be signatories when properties of religious and cultural significance to the tribes will be affected by the proposed project.
- The ACHP will issue a policy statement clarifying that federal agencies should invite Indian tribes to be signatories to Section 106 agreements when historic properties of religious and cultural significance to them will be affected by a proposed project.

## **IDENTIFICATION AND EVALUATION OF HISTORIC PROPERTIES**

### **Tribal Comments**

Several commenters felt the Section 106 process is too focused on and driven by archaeology and anthropology rather than by tribal knowledge and values. They believe federal agencies rely too heavily on archaeologists for identification and evaluation of historic properties rather than working with tribes to consider properties outside archaeologists' expertise. Consequently, places of importance to tribes are often not identified or are misidentified by archaeologists. Similarly, commenters noted that the SHPO's views are often valued over the opinions of Indian tribes. Additionally, the Secretary of the Interior's standards for cultural resource professionals ignore tribal knowledge, as do the eligibility criteria of the National Register of Historic Places. All of these result in tribal expertise being dismissed or ignored and perpetuate the idea that archaeologists are stewards of tribal history rather than the tribes.

Many tribes raised concerns about the general lack of cultural sensitivity of federal agencies and in the conduct of the Section 106 process. They noted the entire system was created from a non-Native world view and is just not structured to understand and respect indigenous values and customs. Lack of respect for traditional knowledge is a related issue. One tribal commenter noted that, in fact, Native Americans have been practicing science for thousands of years.

Tribal commenters mentioned the reluctance of federal agencies to compensate Indian tribes for cultural resources work while they are willing to pay for engineers, archaeologists, and other experts. Federal agencies do not recognize the expertise of Indian tribes regarding their own cultures and histories.

According to tribal commenters, all of these issues lead to the loss of places important to Indian tribes.

### **ACHP Response**

Compensation for work performed in the Section 106 process on behalf of federal agencies has, for some time, been an issue. In fact, the ACHP issued a memorandum in 2001 to clarify when it is appropriate to compensate Indian tribes in the Section 106 process.<sup>6</sup> The ACHP is also developing *ACHP Guidance on Reimbursement of Consulting Parties in the Section 106 Review Process*, which will include Indian tribes.

The ACHP also notes that the signatories to the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (Sacred Sites MOU) recognized the need for greater understanding regarding sacred sites, not just among federal officials but also by the general public and issued an information paper (see below). As noted above, the signatories also developed online training regarding sacred sites protection.

- Federal agencies should develop mechanisms for Indian tribes to carry out the identification and evaluation of historic properties of religious and cultural significance to them.

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<sup>6</sup> The memorandum has been incorporated in guidance available at <https://www.achp.gov/digital-library-section-106-landing/guidance-assistance-consulting-parties-section-106-review>.

- Federal agencies and Indian tribes, in consultation with SHPOs, should develop culturally sensitive, mutually acceptable standards for, and communications strategies about, the identification and evaluation of historic properties of religious and cultural significance to tribes.
- The ACHP, as a signatory to the Sacred Sites MOU, will redistribute the information paper entitled, [\*The Protection of Indian Sacred Sites: General Information\*](#), to Section 106 participants.

## **DELEGATION OF AUTHORITIES**

### **Tribal Comments**

A number of tribal commenters raised concerns about delegation of responsibilities to non-federal parties. When there is no federal involvement or oversight of the work, Indian tribes asserted that they are not included in the work.

In some cases, federal laws such as the Clean Water Act allow for federal programs to be delegated to state agencies. Tribal commenters asserted that when this occurs, Indian tribes lose their seat at the decision-making table because most states do not have laws that require tribal consultation.

### **ACHP Response**

In many, if not all, infrastructure projects, the environmental and cultural resources work is delegated to the applicant or must be completed prior to applying for federal permits or other approvals.

- The ACHP will recirculate its existing guidance that clarifies that tribal consultation cannot be delegated to non-federal parties unless an Indian tribe agrees to such delegation in advance<sup>7</sup>.
- The ACHP will remind federal agencies that the delegation of a federal program to a non-federal entity is an undertaking under the NHPA, and is subject to Section 106. Such delegations may be good candidates for process-oriented programmatic agreements which would include consultation with SHPOs and Indian tribes.

## **PROTECTION OF CONFIDENTIAL/SENSITIVE INFORMATION**

### **Tribal Comments**

Tribal commenters, in the meetings and in letters, raised concern about the protection of historic property and sacred site information that Indian tribes share, whether the sites are located on or off tribal lands.

While Section 304 of the NHPA provides a framework for protecting confidentiality, tribal representatives feel that, in practice, many federal agencies seem reluctant to follow the framework. Tribes noted the need for clearer guidance regarding confidentiality of information and the development of minimum standards. Concern was also expressed about the scope of Section 304. Indian tribes would like to see the language strengthened and clarified to ensure sensitive information cannot be disclosed.

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<sup>7</sup> The guidance documents are [\*Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act\*](#) and [\*Section 106 Consultation Between Federal Agencies and Indian Tribes Regarding Federal Permits, Licenses, and Assistance: Questions and Answers\*](#).



A few tribal commenters discussed the challenges they face in incorrect interpretations of Section 304 by federal agencies. In some cases, commenters asserted that federal agencies believe information generated in the Section 106 process cannot be withheld from disclosure while in other cases, federal agencies believe they cannot share certain information with Indian tribes.

#### **ACHP Response**

The ACHP, recognizing general confusion about the applicability of Section 304 in the Section 106 process, issued guidance in August 2016 entitled, [\*Frequently Asked Questions on Protecting Sensitive Information About Historic Properties Under Section 304 of the National Historic Preservation Act\*](#). While it was widely distributed to federal agencies and the preservation community and is available online, the ACHP will redistribute it. In addition, the signatories to the Sacred Sites MOU issued [\*Policy Statement on the Confidentiality of Information about Indian Sacred Sites\*](#).

- The Department of the Interior should consider seeking legislative amendments to strengthen Section 304 of the NHPA. The special authority of the Forest Service, under 25 U.S.C. § 3056, may be a model.
- The National Park Service should develop minimum standards for the protection of sensitive information under Section 304 as well as a clarification about federal agencies withholding information from Indian tribes.

### **APPENDIX C AND SECTION 106**

#### **Tribal Comments**

Tribal commenters universally expressed concerns regarding Appendix C (33 CFR 325, Procedures for the Protection of Historic Properties). According to tribal commenters, the use of Appendix C has been at the heart of many tribal consultation issues, and they called for its repeal. A primary concern for tribes is also that Appendix C has not been revised to reflect the 1992 amendments to the NHPA that make consultation mandatory.<sup>8</sup> Tribes noted Appendix C results in disputes over determinations of the area of potential effect; narrow interpretations by the Corps of what constitutes an undertaking; no solicitation of input from tribes; no protection of confidential information; and, no treatment of unanticipated discoveries, as required by 36 C.F.R. Part 800.

The issue of the Corps' Nationwide Permit General Conditions, particularly Condition 20, was also raised by several tribes because it allows non-federal permit applicants to identify historic properties without input from Indian tribes.<sup>9</sup> A lack of public notices for projects under these general conditions was also noted as a problem.

#### **ACHP Response**

In 1990, the Corps published Appendix C to address its Section 106 responsibilities for permits they issue pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. These regulations are inconsistent with the government-wide Section 106

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<sup>8</sup> In 1992, there were major amendments to the NHPA including clarifications that properties of religious and cultural significance to Indian tribes can be eligible for the National Register of Historic Places and that federal agencies are required to consult with Indian tribes and NHOs, in carrying out Section 106, when such properties might be affected by an undertaking.

<sup>9</sup> Permit Condition 20 allows the non-federal permittee to determine if historic properties will be affected by the proposed project while only suggesting that assistance can be sought from the State Historic Preservation Officer or the Tribal Historic Preservation Officer. The text of the condition can be found at [http://www.nap.usace.army.mil/Portals/39/docs/regulatory/nwp/NWP%20General%20conditions%20\(2012\).pdf](http://www.nap.usace.army.mil/Portals/39/docs/regulatory/nwp/NWP%20General%20conditions%20(2012).pdf)

regulations issued by the ACHP in key areas, including the establishment of areas of potential effect, consultation with Indian tribes, and the resolution of effects.

The Water Infrastructure Improvements for the Nation Act includes a requirement for the Secretary of the Army to submit to the Senate Committee on the Environment and Public Works and the House Committee on Transportation and Infrastructure a report that describes the results of a review by the Secretary of existing policies, regulations, and guidance related to consultation with Indian tribes on water resources development projects or other activities that require the approval of, or the issuance of a permit by, the Secretary and that may have an impact on tribal cultural or natural resources. In *Improving Tribal Consultation and Tribal Input in Federal Infrastructure Decisions*, the Corps has committed to “update its Appendix C (33 C.F.R. 325) in 2017 in response to extensive Tribal comments calling for Appendix C’s rescission or revision.”

- The Corps should work with the ACHP to adopt a program alternative to resolve these inconsistencies. Such an alternative will reduce conflict and confusion among applicants and stakeholders who are currently required to navigate two separate regulations. It will also help avoid legal challenges and disputes that occur with increasing frequency regarding the Corps’ use of its own regulations.
- The ACHP will work with fellow members of the Federal Permitting Improvement Steering Committee to identify other steps that can be taken to improve the alignment of Appendix C with the ACHPs regulations and other environmental reviews.

## TRIBAL CAPACITY

### Tribal Comments

Many commenters noted that Indian tribes do not have the financial and staff resources to effectively participate in the Section 106 or environmental review processes or to meet regulatory deadlines. A number of tribal representatives suggested the federal government could do more to increase the capacity of Indian tribes. Specific examples of areas in which Indian tribes need training include mapping and Geographic Information Systems.

### ACHP Response

The ACHP acknowledges the challenges Indian tribes and THPOs face in participating in the Section 106 review process, especially those created by the lack of adequate funding. The ACHP has long supported an increase in the Historic Preservation Fund grants for THPOs and for federal agencies to find creative ways to support all Indian tribes. The ACHP has also acknowledged that many SHPOs do not have sufficient funding to maintain staffing and for technological improvements that would make the Section 106 process more efficient. Therefore, in 2015, the ACHP adopted the [Action Plan to Support SHPOs/THPOs](#) and will continue to implement it.

- Federal agencies should provide applicants with information and training about the Section 106 and tribal consultation requirements federal agencies must carry out. Federal agencies should also provide clear and explicit instructions to applicants about how to carry out pre-licensing historic preservation work and tribal coordination.
- Federal agencies should seek opportunities, and encourage applicants, to employ tribal expertise in environmental and cultural resource processes.
- Federal agencies should provide direct assistance to Indian tribes through training and the development of resource materials to prepare them to fully and more effectively participate in infrastructure reviews.

- The ACHP will work with the National Park Service to develop and deliver training for THPOs to prepare them to carry out their responsibilities under the NHPA.
- The National Park Service should develop and deliver training for federal agencies, SHPOs, applicants, and other Section 106 practitioners about how to apply the criteria of eligibility for listing in the National Register of Historic Places to properties of religious and cultural significance to Indian tribes.
- The National Park Service is revising Bulletin 38: Criteria for Evaluating and Documenting Traditional Cultural Places, and the ACHP will continue to support this effort.

## **CONCLUSION**

The ACHP's 50 years of experience in administering the Section 106 process has demonstrated that development, in this case, infrastructure, and historic preservation are not mutually exclusive. The interagency consultations in the fall of 2016 revealed a multitude of challenges Indian tribes face in the protection of their sacred places and, yet, with some basic steps to improve tribal consultation, federal agencies can meet their responsibilities to Indian tribes and participate in the protection of the nation's cultural heritage while successfully carrying out their primary mission. The concrete actions offered in this report can advance these goals and lead to more efficient project delivery and better accommodation of tribal cultural concerns by federal agencies.



*Preserving America's Heritage*

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