

Consultation Process Pursuant to E.O. 13175:
Consultation and Coordination with Indian Tribal Governments

Advisory Council on Historic Preservation
March 7, 2001

In accordance with Section 5(a) of Executive Order 13175: Consultation and Coordination with Indian Tribal Governments, the Advisory Council on Historic Preservation (Council) submits this report outlining its process for ensuring meaningful and timely input from tribal officials in the development of regulatory policies that have tribal implications.

Introduction

The Advisory Council on Historic Preservation, an independent Federal agency, is the major policy advisor to the government in the field of historic preservation. The Council oversees implementation of the Section 106 review process, which mandates Federal consideration of historic properties when planning projects. It also advises other Federal agencies on carrying out their programs and policies with consideration to preserving the Nation's historic resources.

The National Historic Preservation Act of 1966 (NHPA) established a national program and Federal policies regarding historic preservation, directed Federal agencies to carry out stewardship of historic resources, and created the Council. Section 106 of the NHPA requires Federal agencies to consider the effects of their actions on historic properties and provide the Council an opportunity to comment on Federal projects prior to implementation. Through Section 211 of the NHPA, the Council is authorized to promulgate regulations governing the implementation of Section 106.

Amendments to the NHPA in 1992 enhanced the role of Indian tribes and Native Hawaiian organizations in the national preservation program, clarified Federal agency responsibilities to consult with them, and authorized the Council to enter into agreements with Indian tribes to substitute their historic preservation regulations for the Council's Section 106 regulations on tribal lands. The amendments also added a Presidentially-appointed member of an Indian tribe or Native Hawaiian organization to the Council.¹ In addition to the Native American member, the General Chairman of the National Association of Tribal Historic Preservation Officers sits on the Council as an observer.

The Council's regulations, 36 CFR Part 800, "Protection of Historic Properties," set forth a process by which Federal agencies fulfill the requirements of Section 106. The Council recently amended these regulations to incorporate the requirement at Section 101(d)(6)(B) of the NHPA for Federal agencies, in carrying out their Section 106 responsibilities, to consult with Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to historic properties.² The Council's regulations also require agencies to conduct consultation in a

¹The Council is comprised of twenty members. A small staff carries out the daily work of the Council.

²36 CFR Section 800.2(c)(2).

manner that recognizes the government to government relationship between the Federal government and Indian tribes, and encourages agencies to conduct such consultation in a manner respectful of tribal sovereignty.³

Council actions that might affect tribal governments:

E.O. 13175 applies to Federal policies that have tribal implications which are defined as regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

The nature of the Council's authority and mission is such that its actions generally do not result in "substantial direct effects on one or more Indian tribes." The role of the Council in Federal agency project and program planning is essentially advisory, thus, the Council's actions do not, in themselves, result in direct effects to Indian tribes. Even when the Council renders comments regarding a proposed Federal undertaking, it is the Federal agency that makes the final decision that might result in substantial direct effects on an Indian tribe.

The Council does, however, promulgate regulations implementing Section 106 which do influence the manner in which Federal agencies interact with Indian tribes. The Council also issues policies that might bear on the relationship between Federal agencies and Indian tribes pursuant to the Section 106 review process or between itself and Indian tribes. The Council may enter into agreements with Indian tribes for substitution of tribal historic preservation regulations for those of the Council pursuant to Section 101(d)(5) of the NHPA in which tribes voluntarily accept review responsibilities over Federal undertakings on their lands.

Moreover, the Council, in its role overseeing the Section 106 process, is in a unique position to set the standard for Federal agency consultation with Indian tribes regarding historic preservation or cultural resource matters. Accordingly, the Council recently adopted a policy governing its own relationship with Indian tribes (copy attached). In the policy, the Council not only recognizes and commits to carrying out its responsibilities to Indian tribes, but also requires the staff to develop an implementation plan in consultation with tribes. The consultation plan outlined here will be integrated into the Council's more comprehensive policy implementation plan.

Council policies that have tribal implications:

The scope of the Council's consultation with Indian tribes is based on the nature and scope of the proposed action. The diversity of these actions demand a tailored approach to consultation. Some Council actions are national in scope while others are project specific. The nature of these actions is also very different; some are Council-driven while some are generated by other Federal agencies.

Council-driven actions include:

³36 CFR Section 800.2(c)(2)(ii)(B) and (C).

- promulgating regulations implementing Section 106;
- policy development; and,
- providing advice to the President and Congress regarding historic preservation matters.

Actions where the Council is largely reactive include:

- commenting on Federal actions undergoing Section 106 review;
- reviewing historic preservation programs and policies of Federal agencies; and,
- entering into the substitution agreements with Indian tribes mentioned earlier (Section 101(d)(5) of the NHPA).

Each of these actions has the potential to have implications for Indian tribes by virtue of the fact that historic properties can include those of religious and cultural significance to Indian tribes. Each such action is evaluated on its potential to include or affect such properties.

The Council's Consultation Process:

Regulations and Policies with Tribal Implications, *National in Scope*

Issuing regulations, policies, and advice to the President and Congress are carried out by the Council membership with the assistance of the staff. The Council membership, which includes a Native American representative and a tribal preservation organization as an observer, ensures that the views of Indian tribes are brought directly to the Council's deliberations regarding policies and regulations. The mechanics of consultation and communication with Indian tribes are the responsibility of the Native American Program, established in 1998. The Coordinator reports directly to the Executive Director and works closely with the Native American Member.

The Council conducts consultation as follows:

1. An advisory group of tribal representatives is assembled to work directly with the staff or Council members, as appropriate, in the development of draft documents and the evaluation of tribal comments on such documents. The number of participants is dependent on the scope of the proposed action and is drawn from different regions to ensure adequate representation. The intention of working with an advisory group is to ensure a tribal perspective in the development of Council policies. The group is not a substitute for consultation with Indian tribes.
2. Comments on draft policies are sought directly through written correspondence to the leaders of all Indian tribes. Copies are also forwarded to the cultural resource staff of approximately 150 tribes to ensure that appropriate tribal staff is aware of the Council initiative and the opportunity to comment.⁴ The number of such solicitations is dependent on the scope of the action. Tribes are encouraged to respond either in writing or by telephone.
3. Regional consultation meetings with Indian tribes are held during the comment period to offer an opportunity for face-to-face dialogue in addition to written or telephonic correspondence. The number and distribution of such meetings are dependent on the scope of the proposed action.

⁴A database of tribal cultural resource staff is maintained by the Council's Native American Program and is updated continuously as the Council's contacts expand. Such information is also regularly requested from tribal leaders.

Ongoing consultation is typically carried out with those tribes that express an interest in the proposed action either by submitting a written response, attending a consultation meeting, or telephoning. However, if the Council provides additional opportunities for the public to comment, all Indian tribes are again contacted.

In addition to the formal procedures for consultation with Indian tribes, the Council's Native American Program maintains regular contact with major tribal organizations such as the United South and Eastern Tribes, the National Association of Tribal Historic Preservation Officers, and the National Congress of American Indians regarding Council and major Federal preservation initiatives.

Regulations and Policies with Tribal Implications, *Project or Tribe Specific*

A. Council review of, and comment on, Federal undertakings. Federal agencies are responsible for fulfilling the requirements of Section 106 and the Council's regulations. To ensure that Federal agencies consult appropriately with Indian tribes, the Council's regulations refer to requirements for government to government consultation, respect for tribal sovereignty, respect for tribal expertise in identifying and evaluating historic properties of religious and cultural significance to them, and sensitivity regarding such issues as confidentiality.

When the Council is involved in Section 106 consultation or is reviewing how a Federal agency has carried out its Section 106 responsibilities, the Council's regulations require the proponent Federal agency to provide the views of Indian tribes. The regulations direct agencies to make a reasonable and good faith effort to identify tribes that attach religious and cultural significance to historic properties and to consult with them. Project documentation must include evidence of such consultation.

B. The Council's review of Federal agency programs and policies pursuant to Section 202 of the NHPA. Such review is intended to ensure that Federal agency programs and policies are consistent with the requirements of Section 106 and the Council's regulations. Accordingly, the Council's evaluation includes a consideration of how an agency consults with Indian tribes regarding historic properties of religious and cultural significance to them. When making recommendations regarding how an agency might improve its program or performance pursuant to Section 106, the Council may include methods for improving consultation with Indian tribes.

C. Substitution agreements. As stated before, Section 101(d)(5) of the NHPA authorizes the Council to enter into agreements with Indian tribes to substitute tribal historic preservation regulations for the Council's regulations on tribal lands. Consultation is carried out between the tribe and the Council as agreed upon by each party. The Council does not dictate how such consultation shall take place but remains flexible and available to consult with Indian tribes at all levels. Typically, the consultation takes place between the staff of the tribe and Council with execution of the agreement by the respective leadership.