



## **FEMA's Tribal Consideration Brief:**

### **Development and Execution of a FEMA Prototype Programmatic Agreement**

The Federal Emergency Management Agency (FEMA), via a letter from the Department of Homeland Security (DHS) to the Advisory Council on Historic Preservation (ACHP) dated March 25, 2010, formally announced its intention to develop a prototype programmatic agreement in accordance with 36 CFR §800.14(b)(4), the regulations implementing Section 106 of the National Historic Preservation Act (NHPA).

#### **Basis for Prototype PA as a Guide for Tribal Consultation**

The mission of FEMA is to reduce the loss of life and property and protect the United States from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting a risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.

As a result of a number of high profile disasters in the late 1980s and early 1990s that resulted in significant damage to historic properties, FEMA recognized that agency specific procedures and tools were needed to better integrate Federal historic preservation compliance requirements into the formulation of agency undertakings. With the assistance of the ACHP and the support of the National Conference of State Historic Preservation Officers (NCSHPO), FEMA negotiated disaster specific agreements for Hurricanes Hugo and Iniki, the Loma Prieta and Northridge Earthquakes, and the Midwest Floods. These agreements:

- stipulated expedited timelines for consultation
- outlined disaster specific protocols
- Exempted from further Section 106 review routine FEMA funded activities with little or no potential to affect historic properties.
- established early coordination and information sharing between FEMA, the State Historic Preservation Officer (SHPO), and State Emergency Management Agency (SEMA)

From these agreements, FEMA gradually developed a compliance track record through the 1990s that served as a foundation for negotiation of State specific agreements extending for 5-7 years. FEMA's Section 106 compliance track record with Indian Tribes and Native Hawaiians has been much more uneven. In some FEMA regions, FEMA has dedicated staff with the capacity to develop and maintain strong working relationship with Tribes for the purposes of Section 106

review. In the State of Maine, for example, FEMA successfully negotiated in 2002 a Statewide PA with the Maine SHPO and the five resident Tribes. And in 2003, at the request of the Wampanoag (Aquinnah) Tribe in Massachusetts, FEMA and the Tribe signed a Tribal specific PA, thus establishing multiple avenues for tribal consultation in New England. However, in other regions, resource constraints have resulted in FEMA only taking minimal steps to consult with Tribes for project specific compliance issues or negotiation of Section 106 program alternatives. A particular challenge for FEMA in its disaster response and recovery work has been establishing a consistent approach and level of effort for consultation with Tribes. In the immediate aftermath of Hurricane Katrina, FEMA was not adequately prepared to respond to the high level of tribal interest in FEMA activities on the Gulf Coast.

Since 2005, with the assistance of dedicated tribal resources including support from other Federal agencies, FEMA has begun to establish better working relationships with tribes concerned about the effects of FEMA funded undertakings along the Gulf Coast. Indicative of this progress was the participation of resident and non-resident tribes in the negotiation of new Statewide PAs in Louisiana and Mississippi and FEMA then inviting them to be signatories to the PAs. Similar consultation efforts also are underway in Alabama. Still, FEMA recognizes that much more work is needed to improve its tribal consultation responsibilities and wishes to engage in more meaningful discussions with Tribes to help the agency develop better Tribal consultation guidance and improve training and job aids for FEMA management and staff responsible for addressing compliance issues involving Tribal historic and cultural properties.

FEMA also recognizes that a prototype agreement may not necessarily serve the interests and concerns of all Indian Tribes, and is committed to consulting with Tribal governments during the prototype PA development process to determine the most appropriate vehicle to address Tribal needs, including negotiating separate PAs or Memorandum of Understandings (MOUs) with FEMA or relying on the standard review process outlined in 36 CFR Part 800. FEMA's objective above all is to ensure that a mutually agreeable mechanism for consultation is established *before* disasters strike.

### **Benefits of Prototype PA to Tribes & FEMA**

The prototype PA would provide Tribes and FEMA with the crucial flexibility necessary to address unique Tribe specific issues and concerns while also establishing a nationwide framework for FEMA to expedite Section 106 compliance by:

- Providing a national template to inform and guide Tribal specific negotiations with FEMA, and when appropriate, SEMAs, SHPOs, and FEMA, saving Tribes/THPOs and State stakeholders valuable time and limited resources in often dire emergency situations.
- Further integrating historic preservation compliance into the formulation and delivery of FEMA funded undertakings.
- Allowing for a tailored compliance process reflecting Tribal specific considerations and focusing time and resources on those undertakings of most concern to Tribes.
- Eliminating the need for ACHP participation on a State by State basis.

- Providing a platform that may serve to develop and enhance working relationships among Tribes/THPOs, SHPOs, and SEMAs in anticipation of future coordination efforts that may not necessarily involve FEMA.

In addition, the prototype PA would:

- Acknowledge the sovereignty of Federally recognized Tribes.
- Establish a consistent basis for consultation with Tribes holding land within each state and/or with Tribes maintaining interest in geographic areas of each state.
- Ensure that FEMA’s consultation with other consulting parties shall not include the dissemination of information that might risk harm to a site having traditional religious and cultural significance or that might impede the use of such a site by a Tribe in accordance with Section 304 of the NHPA and other applicable laws.

### **Existing State Specific PA Status & Negotiations with Tribes/THPOs Utilizing a Prototype Programmatic Agreement or FEMA-Tribal Agreement**

- Existing State specific PAs may remain in effect until they expire.
- Any Tribe/THPO may opt to not participate in the negotiation of a State Specific PA.
- Any Tribe/THPO may opt out of participating in FEMA’s consultation with Tribes/THPOs regarding the proposed prototype PA (see “Process for Prototype PA Development” below).
- The ACHP will not participate in future FEMA State specific PA unless unusual circumstances warrant otherwise.

### **Elements of FEMA’s Proposed Prototype PA**

FEMA proposes that the prototype agreement:

- Be applicable to all FEMA assistance programs, including:
  - Disaster Assistance (*e.g.* Public Assistance, Individual Assistance & Hazard Mitigation Grant Program) &
  - Non-Disaster Programs (*e.g.* Assistance to Firefighters Grants & Predisaster Mitigation Programs)
- Establish roles and responsibilities of the signatories: FEMA, Tribes/THPOs, SHPOs, and SEMAs, including requiring Section 106 review to be performed by credentialed FEMA staff.
- Establish abbreviated time frames for consultation
- Exempt from further Section 106 review routine FEMA funded activities with little or no potential to affect historic properties.
- Utilize streamlined procedures to resolve adverse effects

*Please refer to the enclosed draft FEMA prototype PA outline and the Summary of FEMA Assistance Programs for additional information*

## **Process for Prototype PA Development**

FEMA will seek key input from Tribal, State, and Federal stakeholders in formulating the proposed prototype PA. Specific to Tribal and THPO interests, FEMA proposes a plan to consult with Tribes. The basics of the plan are as follows:

- The ACHP's Office of Federal Agency Programs will convene and guide several listening sessions for Tribal representatives and THPOs to discuss the proposed prototype (ACHP will provide specific dates and times).
- Based on the results of the Tribal listening sessions, FEMA will initiate consultation with Tribes and convene 1 – 2 working meetings with select Tribal representatives and/or THPOs to discuss Tribal concerns and questions and solicit additional input regarding appropriate vehicle(s) to guide consultation.
- FEMA will utilize presentations at select Tribal conferences as additional opportunities to consult with Tribes and solicit feedback and guidance.

The ACHP intends to create on its website a page that will provide further information and periodic updates regarding FEMA's efforts to develop the proposed prototype PA.

The ACHP also will hold listening sessions for SHPOs on FEMA's behalf, and FEMA will meet with select SHPOs to gather further feedback. In addition, FEMA will consult with the National Emergency Management Association, the professional association of and for emergency management directors from all states, territories, and the District of Columbia. Through this outreach, FEMA will learn of stakeholder concerns and provide opportunity for input about the prototype PA.

Upon completing its outreach efforts, FEMA intends to finalize the prototype PA and submit it to the ACHP for its formal consideration at the ACHP fall 2010 meeting.