ADVISORY COUNCIL ON HISTORIC PRESERVATION

Action Plan

on ACHP

Native American Initiatives

October 2003

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Executive Summary

In 2000, the Advisory Council on Historic Preservation (ACHP) adopted a *Policy Statement Regarding the Council's Relationships with Indian Tribes* that included a commitment to develop a plan for translating policy into action. This *Action Plan on ACHP Native American Initiatives* has been prepared in response to that obligation as well as the ACHP Chairman's commitment to take steps to improve the ACHP's and other Federal agencies' interaction and communication with Native peoples.

This Action Plan is based on many years of interaction by the ACHP with Indian tribes and Native Hawaiians, including a recent meeting in Houston, Texas, and consultation with Indian tribes in developing the policy statement. It sets forth six major objectives with specific actions designed to meet those objectives.

The goal of this plan is to assist Federal agencies in meeting their requirements to consult with Indian tribes and Native Hawaiian organizations under the National Historic Preservation Act (NHPA). These actions are intended to build on and expand existing Federal-tribal relationships where they function well and enhance the capacity of all participants to work together more productively. This strategy is designed to ensure that Native Americans are afforded the opportunities to participate in Federal planning processes as the law provides.

The plan's objectives are:

I. *Assisting Federal agencies*
Building on existing ACHP efforts, eight major actions are proposed to facilitate Federal agencies' program planning efforts so that they may effectively meet their legal responsibilities to consult with Indian tribes and Native Hawaiians regarding historic properties.

II. *Establishing a body of Native American advisors*
To address the need for enhanced and effective Native involvement and voice in ACHP work, the ACHP proposes to establish a body of advisors from Indian tribes and Native Hawaiian organizations.

III. *Working with individual Native communities and organizations*
Through Native media outlets, ACHP Web site enhancements, and more frequent direct communication, the ACHP will improve communication and interaction with intertribal organizations and individual Indian tribes and Native Hawaiian organizations.

IV. *Improving communication for all ACHP participants*
Through improved guidance and consultation tools, the ACHP will assist all participants in understanding Native American consultation requirements in the Section 106 process.

V. *Ensuring ACHP implementation*
A number of mechanisms internal to the ACHP will also be instituted to ensure that the plan is effectively implemented.

VI. *Amending NHPA to add a tribal member to the ACHP*
In response to Native American leaders and representatives, the plan includes a proposal to amend the NHPA to modify the ACHP membership.

The ACHP holds a unique position in the Federal Government as the advisor to the President, Congress, and Federal agencies regarding historic preservation matters. Native peoples, Federal agencies, and other

Section 106 participants have approached the ACHP for assistance. By implementing this plan of action, the ACHP is not only responding to its partners but also serves as an example to other Federal agencies.

Introduction

For more than a decade, Federal agencies have been required to consult with Indian tribes and Native Hawaiian organizations under several key pieces of Federal legislation regarding human remains and grave goods, cultural resources, and historic properties. Yet many agencies have struggled to meet these responsibilities. In some cases, agencies have instituted effective Section 106 consultation efforts and internal education programs that build on existing program-delivery relationships and a clear understanding of their responsibilities. However, the results have not yet been uniformly realized nationwide. In other cases, agencies may be confused about protocols regarding how to consult, with whom to consult, and when to consult. In still other cases, agencies and other consulting parties may simply be unaware of requirements to consult in the Section 106 review process.

The problem has led to confusion and anger on all sides, even where Federal agencies have attempted to engage in good faith consultation. It has culminated in misunderstandings, recriminations, increasing litigation and, more recently, in nationwide attention on the shortfalls of existing consultation efforts. This nationwide attention has taken the form of media coverage, public discussions, policy meetings, and congressional hearings. In effect, a national dialogue has begun with the ACHP as a participant.

From its earliest days, the ACHP addressed Native American historic preservation issues in Section 106 reviews and has, over time, recognized and increased the role of Indian tribes and Native Hawaiians in its implementation of the Section 106 review process. Many would, undoubtedly, view this progress as slow and arduous; admittedly, it is a reflection of the times and society in which it has functioned.

The involvement of Native peoples in historic preservation has happened largely as a result of the work of many dedicated Native individuals to ensure that their culture, history, and ancestors are both protected and respected. The Federal Government was much slower to respond but there was a growing awareness of Native perspectives and important places, particularly in the western United States.

The ACHP first formally acknowledged the role of Native peoples in 1986 when provisions were added to Section 106 regulations for consultation with Indian tribes and traditional leaders. Again, the response by Federal agencies and other parties in the process was slow and mostly a western phenomenon. Gradually, however, the practice of consulting with Native peoples was becoming more routine, at the same time that Native peoples were actively seeking additional Federal protections and legislation as well as becoming more aware of the opportunities that Federal laws presented.

In 1992, Congress sought stronger support for tribal and Native Hawaiian participation by amending the National Historic Preservation Act to:

1) recognize that historic properties of religious and cultural significance to Indian tribes or Native Hawaiians may be eligible for the National Register of Historic Places;
2) require that Federal agencies consult with any Indian tribe or Native Hawaiian organization that attaches significance to such sites; and
3) provide for the replacement of Tribal Historic Preservation Officers (THPOs) for State Historic Preservation Officers (SHPOs) on tribal lands.

In response to the NHPA amendments, the ACHP began a six-year process of revising its regulations. The consultation with Native peoples carried out during this revision effort not only greatly enhanced the regulations but also began an ongoing process of education and enlightenment for the ACHP.

Relationships were forged, albeit rocky at times, with some tribes and Native Hawaiian and intertribal organizations.

This increased understanding, these developing relationships, and the upcoming publication of revised regulations each contributed to the establishment of a Native American program within the ACHP in 1998. Equally important, these catalysts led to the development and adoption by the full Council in November 2000 of a *Policy Statement Regarding the Council's Relationships with Indian Tribes* (Appendix A). The policy addressed tribal sovereignty, government-to-government consultation, trust responsibilities, tribal participation in historic preservation, sympathetic construction, and respect for tribal religious and cultural values.

While the regulations integrate Indian tribes and Native Hawaiians in the Section 106 review process, the involvement of Native Americans has not improved significantly. The regulations provide for streamlining the review process, to the mutual benefit of all stakeholders, but the absence of direction from the ACHPon what is the required consultation for adopting such measures has hindered Federal agencies from achieving this goal. Where agencies have explored program alternatives, consultation with Indian tribes and Native Hawaiians has been non-existent. Likewise, project-specific reviews focus exclusively on Federal-SHPO relationships without recognition of delays that could result from forgetting to involve Native Americans.

This Action Plan on ACHP Native American Initiatives is the logical extension of the above cited events and a response to the collective wisdom of the ACHP's partners in historic preservation.

The Issues

The central challenge regarding Native American historic preservation is the lack of consistent, timely and effective consultation between Federal agencies and Native peoples. Time and again, and from both agencies and Native peoples, the ACHP has been reminded that such consultation presents unique challenges. While many agencies have their own consultation policies, guidelines and training programs, there are still significant barriers to consultation. These barriers, whether real or perceived, are preventing Native peoples from realizing their legal rights to voice their views to Federal decision makers. Ultimately, the result of this lack of access is the inability of Native peoples to protect the places of importance to them.

While nearly every Federal agency has a Native American policy regarding consultation or coordination with Indian tribes, this does not always translate into appropriate consultation regarding proposed undertakings. For many agencies, there remains a significant problem with implementation. Yet, for all the problems that still exist, some agencies have made tremendous progress, not only in developing consultation strategies but in putting those strategies into effect. To be sure, there remains room for improvement but a brief examination of some recent Federal efforts demonstrates what is possible to achieve. Some of these efforts are outlined in Appendix B.

While the consultation provisions of the ACHP's regulations are sometimes the focus of discussion and frustration for Federal agencies, the requirements to consult with Indian tribes and Native Hawaiians existed long before the ACHP's regulations. For many agencies, it is not the requirement to consult that is problematic but the mechanics of consultation. Where agencies have taken the initiative to train staff and develop consultation tools, the results have been very promising. For Indian tribes, in particular, their relationship with the Federal Government and its obligations to them began with the formation of the United States Government. The relationship has evolved and been clarified over time through laws,

Supreme Court decisions, and other governmental directives so that there now exists a body of Federal-Indian law. The ACHP regulations simply conform to consultation obligations established elsewhere.

Most recently, the relationship between the Federal Government and Indian tribes has again been strengthened with Executive Order 13287, “Preserve America.” The order encourages agencies to seek partnerships with tribal governments and others to make more efficient and informed use of their resources for economic development and other recognized public benefits.

The Executive order requires Federal agencies to report to the ACHP on their efforts to inventory and manage historic properties in accordance with Sections 110 and 111 of NHPA. Section 110, in particular, requires Federal agencies to develop historic preservation programs in consultation with Indian tribes, Native Hawaiians, and others. Accordingly, as the ACHP develops guidelines for such reporting, it will include a recommendation that agencies consult with stakeholders, including Indian tribes, in developing such inventories.

Through the ACHP's interaction with Indian tribes and Native Hawaiian organizations the following issues have been consistently identified as barriers to effective consultation. This is a general discussion indicating areas that warrant serious attention by the ACHP and Federal agencies to improve consultation. However, it should be noted that there are many excellent examples of meaningful and effective consultation by Federal agencies or Federal efforts to improve consultation on an agency-wide basis. A sampling of these initiatives is presented in Appendix D. The ACHP intends to rely on these efforts to advance consultation and the commitments embodied in this plan.

Absence of Consultation

For many Indian tribes, there has been virtually no consultation with Federal agencies regarding projects that impact properties of religious and cultural significance. Indian tribes in both the East and West have requested assistance from the ACHP to increase their participation in Section 106 consultation in their respective homelands. Even where some agencies have taken steps to initiate consultation, little progress has been made to put the commitments into action. The ACHP often fields complaints from Indian tribes about endless cycles of meetings with little progress or action.

Yet, based on the experiences of the ACHP’s professional staff, there has been an overall increase in the number of cases involving Native American issues. Indeed, as reported in *Taking into Account: How Our Business is Changing* (ACHP 2003), tribal and Native Hawaiian involvement in the review of Federal projects is increasing. Clearly, a growing number of Federal agencies are embracing their responsibilities to consult. Additionally, as Indian tribes and Native Hawaiian organizations become more sophisticated in the nuances of the process, the effectiveness of their participation is also increasing. Where active participation by Native Americans is becoming routine, the Section 106 process is often focused on improving and refining the mechanisms of consultation. In turn, the issues become more complex and typically involve such things as how Native values and traditional knowledge are incorporated into a fundamentally Western-centered system.

For many agencies and project applicants, knowing which Indian tribes or Native Hawaiian organization to consult with remains elusive. Historically, countless Indian tribes were driven from their territories and resettled on reservations in other regions. Those that did remain in their homelands lost much of their land base. thus, it can be difficult for agencies, particularly permitting and assistance agencies with large jurisdictions, to identify which tribes to consult. This issue has surfaced during the regulations revision process, meetings between Chairman Nau and other agency leaders, and Section 106 training courses. ACHP staff receives a steady stream of requests for such information.

Obstacles to Meaningful Consultation

Even where Indian tribes have been regular participants in the Section 106 review process, there are significant obstacles to meaningful participation. At an April 2003 meeting hosted by Chairman Nau in Houston, Texas, Native American leaders, elders, and cultural resource experts came together to share ideas and information with the ACHP to assist in identifying and addressing the challenges of consultation. These include:

- *A lack of understanding and knowledge of protocols, cultural differences, and what preservation means to Native peoples.*

  Many Federal officials simply do not understand Native peoples and do not invest the time and effort to do so. This lack of understanding often results in miscommunication and frustration by all participants and can lead to inadequate protection of historic properties of religious and cultural significance to Indian tribes and Native Hawaiians.

- *A lack of respect for traditional knowledge; lack of respect or understanding of tribal sovereignty, the government-to-government relationship, and trust responsibilities*.

  Traditional knowledge is viewed by many non-Native peoples as inferior or unreliable information, often requiring verification by "professionals." Some view such knowledge as self-serving; that is, Native peoples claim significance as a way to stop a project or to justify a land claim. These attitudes and suspicions are sometimes fueled by the reluctance or refusal of Native peoples to share sensitive information with those outside their culture. Rather than seeking more creative approaches to consultation and ways to earn the trust of Native peoples, many officials simply argue that such consultation is too time consuming and difficult. Native peoples are, therefore, denied their place in the consultation process.

  Similarly, in those cases where Indian tribes identify large landscapes as historic properties of significance to them, Federal agencies react with skepticism and discomfort. Section 106 review can be significantly delayed while such issues are addressed, and Indian tribes can be left feeling that Federal agencies are not listening.

  If there is not a clear understanding of the relationship of the United States Government to the indigenous peoples of this country, it follows that respect for cultural differences, traditional knowledge, and even legal obligations will suffer. Despite the Federal government's long (200+ years) relationship with the indigenous nations, there is a remarkable lack of knowledge within the Government about its obligations to Indian tribes.

  This problem became evident to the ACHP when it published its Section 106 regulations in 2001 and agencies began inquiring—and even complaining—about the requirements to consult with Indian tribes and Native Hawaiians. Despite the fact that the regulations reference Federal laws and directives regarding consultation, many Federal Section 106 users are unaware of such requirements. The result is that Indian tribes are not accorded the respect and status to which they are entitled, leading to anger, frustration, and, in some cases, threats of litigation to exercise their rights.

  Finally, confusion over trust responsibilities has led to increasing debate over who should fund an Indian tribe's participation in the Section 106 review process. While the ACHP has issued guidance regarding when it is appropriate to pay a fee for services, agencies and tribes continue to struggle with this issue. Conflicts continue over whether agencies and project applicants should fund tribal

efforts to identify historic properties of religious and cultural significance, to monitor construction, or to provide archeologists with the tribe's interpretation of the archeological record.

- *A lack of adequate resources for most Indian tribes and Native Hawaiian organizations to effectively participate in consultation*.

  While NHPA established the position of Tribal Historic Preservation Officer, and while the ACHP's new regulations outline a significant role for Indian tribes in the review process, funding to enable tribes to take advantage of these opportunities has not been forthcoming. The funding for THPOs that has been carved out of an existing grant program is inadequate and remains flat while the number of THPOs is growing. For non-THPO tribes and Native Hawaiian organizations, no funding mechanism exists that enables them to become effective participants in the process.

  The result of the inadequate allocation of resources to Indian tribes and Native Hawaiians is that they have tremendous difficulty establishing and maintaining historic preservation programs. Where there are programs, budgets often do not support training to prepare staff for effective participation, to travel to consultation meetings, or maintain the basic infrastructure to operate a program.

  In fact, the funding situation is so critical in some tribes, that they are forced to forego their guaranteed right to participate in Section 106 reviews because they do not have sufficient staff or infrastructure. The result is that Native peoples are largely unable to take full advantage of the opportunities afforded them to participate in Federal decisionmaking when historic resources of importance to them are threatened.

- *Delays in consultation*

  Indian tribes are often contacted too late in the review process to have a meaningful role in decisionmaking. For example, if Section 106 consultation is delayed until late in the environmental review process, or after leases have been issued, input from Indian tribes cannot influence project design or location and the Federal agency may not be able to take steps to avoid or protect historic properties of significance to Native Americans.

The ACHP's experiences, as well as suggestions from countless Native peoples including the participants in the recent meeting in Houston, form the basis for the Action Plan that follows.

The Action Plan

Provided herein is the ACHP's Action Plan for improving consultation and interaction between America's Native peoples and the other participants in the ACHP's review process: the ACHP, Federal agencies, State Historic Preservation Officers, and members of the general public. This plan is the result of direction provided in the ACHP's adopted policy, married with the experience and lessons learned in the last 10 years and the wise thoughts of many Native and non-Native minds.

Guiding Principle

The actions embodied within this plan are based on the principle of respect: respect for the government-to-government relationship, for Native beliefs and values, for the knowledge Native peoples bring to the process, and, finally, for the law.

A foundational principle of both the ACHP policy and this Action Plan is respect for the nationhood status of Indian tribes and the government-to-government relationship that exists between the Federal Government and Indian tribes. Fundamental to the history of contact between the indigenous peoples of North America and the colonizers was the acknowledgment that indigenous peoples were sovereigns.

From the first treaty to the current body of Federal law, respect by the United States for the sovereignty of indigenous nations has been the underlying principle of relations between the two entities. This plan articulates in both concrete steps and in general directions that the ACHP acknowledges and respects the sovereign status of Indian tribes and will work with Indian tribes as partners.

For the ACHP, respect goes beyond a nation-to-nation relationship and encompasses the views, beliefs, and life ways of Native peoples as they relate to places of importance to them. A fundamental goal of the NHPA is the preservation of historic places of significance to Native peoples, as well as places of significance to others. Congress established that:

- The spirit and direction of the Nation are founded upon and reflected in its historic heritage;
- The historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people; and
- The preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, esthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.

Many Native peoples have reminded the ACHP that traditional knowledge is generally not accorded the same respect by project applicants and Federal agencies that written information receives. While it is generally understood that many Native knowledge systems are oral, the acceptance of unwritten knowledge as a valid and important resource lags far behind. To maintain a viable, relevant national historic preservation program and to understand and preserve our Nation's diverse heritage, the Federal Government must acknowledge and embrace the contributions of all its citizens including Native peoples.

Accordingly, the ACHP commits not only to respect traditional Native knowledge, values, customs, and beliefs in carrying out its own mission and programs, but to encourage other Federal agencies in carrying out their historic preservation responsibilities to be sensitive to and respectful of traditional Native knowledge, values, customs, and beliefs.

There are many aspects of this issue in which the ACHP could assist others and thus has included such initiatives in this Action Plan. Foremost among these initiatives is the establishment of effective, regular communication networks among all parties. Only through regular dialogue can all the parties in the national historic preservation program come to understand each other and to craft solutions of mutual benefit.

Equally important is respect for the law, particularly NHPA, but also including all others pertaining to the Federal Government and Native Americans. In addition to laws, a number of significant Executive orders exist, including E.O. 12898, "Environmental Justice," E.O. 13007, "Indian Sacred Sites," and E.O. 13175, "Consultation and Coordination with Indian Tribal Governments."

The ACHP is committed to overseeing implementation of the Native American consultation requirements in the Section 106 review process through several means, including regular training for Federal agencies, ACHP staff, and ACHP members, and verifying that agencies have carried out good faith consultation.

Overview of the Action Plan

Goal

The goal of the plan is to assist Federal agencies in meeting their requirements to consult with Indian tribes and Native Hawaiian organizations under the National Historic Preservation Act. These actions are intended to enhance the capacity of all participants to work together more productively and to ensure that Native Americans are afforded the opportunities to participate as the law provides.

Objectives

To meet this goal, the ACHP proposes to undertake explicit actions or objectives:

I. Assisting Federal agencies

II. Establishing a body of Native American advisors

III. Working with individual Native communities and organizations

IV. Improving communication for all ACHP participants

V. Ensuring ACHP implementation

VI. Amending NHPA to add a tribal member to the ACHP

The plan is meant to be a long-term initiative that guides the ACHP's actions for the next five years. Since it is important that the plan be responsive to Federal mandates as well as the policy and social landscape, the ACHP periodically should review the plan for consistency and progress in implementation. We recommend a three-year cycle. It is intended that the Action Plan be integrated into the ACHP's strategic planning efforts.

Appendix A outlines who is responsible for carrying out each action, with a start date.

Specific Actions

I. Assisting Federal Agencies

The ACHP will continue to assist Federal agencies in meeting their legal responsibilities to consult with Indian tribes and Native Hawaiians under NHPA. Building on existing efforts, the ACHP will implement the following actions:

A. *Encourage Federal agencies to enter into agreements with Indian tribes and Native Hawaiians.*

While the regulations outline the requirements to consult throughout the process, it is often of great benefit for Federal agencies to enter into agreements with their partners including SHPOs, Indian tribes or Native Hawaiian organizations, and applicants (e.g., State departments of transportation). Such agreements can be of benefit to all parties because they establish processes that suit each party's needs while maintaining the objectives of the Section 106 review process.

The ACHP will encourage Federal agencies and Indian tribes or Native Hawaiian organizations to explore this mechanism to improve consultation, share examples of effective arrangements, and assist in the development of agreements if so requested.

1. The ACHP executive director will send a memorandum to all Federal Preservation Officers encouraging the development of agreements as an effective means to improve consultation.

2. The ACHP will make available upon request copies of those agreements filed with the ACHP in accordance with Section 800.2(c)(ii)(E) of the regulations.

B. *Develop and regularly update a consultation "tool kit."*

As an aid to understanding the Federal Government's obligations and how to consult with Indian tribes and Native Hawaiian organizations, the ACHP will develop a set of tools regarding consultation.

1. The ACHP will regularly update existing guidance on the agency Web site and materials used in ACHP training courses in response to changes in Federal mandates and emerging issues and challenges.

2. The ACHP, in consultation with Indian tribes and Native Hawaiians, will issue guidelines for consultation in the Section 106 review process. The ACHP, working with United South and Eastern Tribes (USET), will also complete the current project to draft and issue similar guidelines for consultation with its member tribes.

3. The ACHP, in consultation with Indian tribes, Native Hawaiians, and Federal agencies, will identify and disseminate "best practices" in Native American consultation.

C. *Focus on the U.S. Army Corps of Engineers (Corps) and the Federal Highway Administration (FHWA) to improve their levels of consultation.*

The Corps and FHWA were identified by the Native American representatives who met with the Chairman Nau in Houston as Federal agencies the ACHP should be working with to address consultation. Building on the FHWA's leadership in such initiatives as the Tribal Database Project and track record in addressing Native American issues, the ACHP will work with FHWA to develop strategies for effective consultation and communication with Indian tribes and Native Hawaiians.

The ACHP will work with policy level officials of the Corps to identify the areas that should be improved and to develop strategies to address them. The ACHP will offer technical expertise to the Corps through an interagency agreement or similar instrument. With FHWA and the Corps as models, the ACHP will also work with policy level officials of all agencies to improve consultation and communication with Indian tribes and Native Hawaiians.

D. *Revise the regulations to clarify that agencies cannot delegate to applicants the ability to initiate consultation with any Indian tribe, including THPOs.*

The current regulations allow for agencies to notify SHPOs and THPOs of a delegation to an applicant of the authority to initiate Section 106 consultation. Many Indian tribes that participate in the THPO program pursuant to Section 101(d)(2) of NHPA object to this delegation as a violation of the government-to-government relationship.

Accordingly, the ACHP will revise this provision to clarify that only the initiation of consultation with the SHPO may be granted to an applicant. However, since there are also Indian tribes that are willing to work with applicants, the provision will be clear that nothing in the regulations prevents an Indian tribe from agreeing to work with an applicant.

E. *Participate in interagency initiatives regarding Native American issues.*

To advance effective consultation with Indian tribes and Native Hawaiian organizations in the Section 106 process, the ACHP will seek opportunities to participate in and contribute to interagency initiatives that bear upon Native issues related to historic preservation matters. Such initiatives include standing committees, e.g., the Interagency Working Group on Environmental Justice, or efforts such as the Sacred Lands Forum in Washington, DC, in 2002.

F. *Continue to offer training to Federal agencies, applicants, and consultants.*

Building on past successes, the ACHP, in collaboration with Indian tribes and Native Hawaiians, will continue to offer and expand existing training to Federal agencies regarding consultation.

G. *Communicate with Federal leadership regarding Native American consultation.*

ACHP leadership will continue to talk with other Federal leaders to promote effective consultation with Native peoples. Federal leaders will be informed of the ACHP program development and encouraged to take similar steps. Federal ACHP members, in particular, will be encouraged to report to the membership on their agency's experiences and successes.

H. *Include in the Executive Order 13287 Advisory Guidelines a recommendation that Federal agencies consult with Indian tribes and others in developing historic property inventories.*

II. Establishing a Body of Native American Advisors

A. *Establish a body of Native American advisors to the ACHP on issues regarding interaction and consultation.*

This advisory body will be comprised of leaders and cultural resource experts from Indian tribes and Native Hawaiian organizations brought together to provide the ACHP with Native perspectives at both the member and staff levels. The advisory body will work with the ACHP on:

- policy matters affecting Native peoples;
- heritage preservation initiatives including heritage tourism;
- regional meetings with Indian tribes and Native Hawaiians; and
- consultation tools for Federal agencies and Native peoples.

The ACHP will work with major intertribal organizations including the National Congress of American Indians, United South and Eastern Tribes, the Great Plains Regional Tribal Chairman's Association, the Affiliated Tribes of the Northwest Indians, the All Indian Pueblo Council, Great Lakes Intertribal Council, the Alaska Federation of Natives, and the Council for Native Hawaiian Advancement to establish the advisory group.

The ACHP, with the assistance of these organizations, will request that Indian tribes within each of the 12 Bureau of Indian Affairs regions select a representative to serve on the advisory body. Working with the Council for Native Hawaiian Advancement, the ACHP will request that a Native Hawaiian be selected to serve on this group. Thus, there will be representation from each of the major regions.

The ACHP will draft the charter that sets forth the mission, membership, and logistics. However, the advisory body is not a substitute for government-to-government consultation by the ACHP. Its existence and relationship to the ACHP does not relieve the ACHP of its responsibilities to consult with Indian tribes and Native Hawaiian organizations.

III. Working with Individual Native Communities and Organizations

Partnerships with Indian tribes, Native Hawaiian organizations and intertribal organizations will be the key to improving the ACHP's interaction with Native peoples; assisting Federal agencies in carrying out their responsibilities; and, preserving historic properties of importance to Native peoples. Consistent with Executive Order 13287, *Preserve America*, the ACHP commits to developing partnerships to promote the preservation of the unique cultural heritage of Native communities.

The first step will be to improve communication and information sharing. Native peoples cannot exercise their right to have a voice in Federal decisionmaking without adequate information. Therefore, the ACHP will develop means of sharing information, establishing regular dialogues, and working in partnership with Native peoples.

A. *Establish a communication network in which information is regularly exchanged with Native peoples.*

   1. Establish a regular Chairman's column in major Native media outlets.

   2. On a quarterly basis, e-mail broadcasts (with printed version for tribes who lack Internet access) to report significant news and information to Indian tribes and Native Hawaiian organizations.

   3. Host regular regional meetings to dialogue with Native peoples about issues of concern, to increase understanding of their positions, and to share information.

   4. Create an interactive Web site to encourage dialogue.

B. *Extend outreach and training to assist Native organizations in participating effectively in the ACHP's process.*

   1. Routinely notify Indian tribes and Native Hawaiians regarding ACHP involvement in the development of nationwide Programmatic Agreements and alternate procedures.

   2. Continue to offer a minimum of two training courses on consultation requirements in the Section 106 process.

C. *Continue to seek working relationships with intertribal and Native Hawaiian organizations building on the USET-ACHP model of collaboration.*

D. *Continue to expand ACHP databases of cultural resource experts within Native organizations to ensure the widest possible distribution of information to Native communities.*

E. *Increase efforts to support funding for tribal historic preservation programs.*

F. *Hold a business meeting on an Indian reservation or in the Pacific or in Alaska at least once every third year.*

G. *Improve customer service measures to include communicating directly with Indian tribes and Native Hawaiian organizations regarding the ACHP's decisions on specific cases where concerns have been expressed.*

IV. Improving Communication for All ACHP Participants

While the core of the consultation issue involves Federal agencies and Native peoples, other participants such as State Historic Preservation Officers have requested additional information and assistance. Using technology as the principle vehicle, the ACHP will develop mechanisms for increasing outreach to all Section 106 participants.

A. *Dedicate a section of the ACHP Web site to Native issues including news items, guidance, and training information.*

B. *Complete the tribal database project regarding which Indian tribes to consult when a project is proposed.*

V. Ensuring ACHP Implementation

In order to ensure ongoing, effective implementation of the actions within this plan, ACHP members and staff require improved understanding and systematic training of these issues.

A. *Continually refresh the understanding of ACHP members and staff regarding Native American issues and government policies.*

1. At the member level, report at business meetings as needed.

2. At the staff level, hold semi-annual briefing sessions for staff.

3. Institute internal tracking of cases of concern to Native Americans.

B. *Implement e-mail alerts for members and staff regarding significant Native American issues and developments.*

C. *Institutionalize training requirement for all incoming staff who may be responsible for addressing Native American issues.*

D. *Implement internal procedures to ensure that ACHP programs, policies, and practices are consistent with relevant Federal laws regarding Native Americans.*

E. *Broadcast employment opportunities at the ACHP more broadly to include Native media outlets, tribal colleges, and intertribal organizations.*

F. *Establish a standing committee/task force of members to oversee policy and program development.*

G. *Increase the ACHP staff dedicated to the implementation of the Action Plan from one to three full-time employees.*

H. *Update the Action Plan at least every three years.*

VI. Amending NHPA to Add a Tribal Member to the ACHP

As expressed by the participants in the Houston meeting, the ACHP could better incorporate the views of Indian tribes in its work with the addition of a member of an Indian tribe to the ACHP membership. While the ACHP membership currently includes one member of either an Indian tribe or Native Hawaiian organizations, Indian tribes have long believed that such representation is inadequate to address the full breadth of their issues and concerns. Accordingly, the ACHP will introduce an amendment to NHPA adding another member.

A. Take the necessary steps to amend NHPA to achieve the addition of a new seat on the ACHP dedicated to a tribal member.

Appendix A. Policy Statement Regarding the Council's Relationships with Indian Tribes

Adopted by the Advisory Council on Historic Preservation
November 17, 2000, Alexandria, Virginia

Introduction

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

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

> Indian tribe means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (16 U.S.C. 470w).

I. Purpose

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

- National Historic Preservation Act (Act)
- National Environmental Policy Act
- American Indian Religious Freedom Act
- Native American Graves Protection and Repatriation Act
- Executive Order 13007, "Indian Sacred Sites"
- Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments"
- Executive Order 12898, "Executive Order on Environmental Justice"

and the implementing regulations for these authorities.

This policy establishes the framework by which the Council integrates the concepts of tribal sovereignty, government-to-government relations, trust responsibilities, tribal consultation, and respect for tribal

religious and cultural values into its administration of the Section 106 process and its other activities. The policy sets forth general principles that will guide the Council's interaction with Indian tribes as it carries out its responsibilities under the Act. It also provides guidance to the Council and its staff and serves as the foundation for Council policies and procedures regarding specific Indian tribal issues.

Upon adoption of the policy, the Council will develop an implementation plan to assist members and staff with integrating principles of respect for tribal sovereignty, government-to-government consultation, the Council's trust responsibilities, and tribal values into the conduct of Council business.

II. Statements of Policy

Tribal Sovereignty

A. Recognition of tribal sovereignty is the basis upon which the Federal Government establishes its relationships with federally recognized Indian tribes. The sovereignty of Indian tribes was first recognized by the United States in treaties and was reaffirmed in the 1831 landmark Supreme Court opinion of Chief Justice John Marshall that tribes possess a nationhood status and retain inherent powers of self-governance (Cherokee Nation vs. Georgia, 30 U.S. (5 Pet.) 1 (1831)).

B. The Council, recognizing that each federally recognized Indian tribe retains sovereign powers, shall be guided by principles of respect for Indian tribes and their sovereign authority.

C. Additionally, the Council acknowledges that the sovereign status of tribes means that each tribe has the authority to make and enforce laws and establish courts and other legal systems to resolve disputes.

Government-to-Government Consultation

A. The relationship between the United States and federally recognized Indian tribes was reaffirmed in the President's Memorandum on "Government to Government Relations with Native American Tribal Governments" (April 29, 1994). The memorandum directs Federal agencies to operate "within a government-to-government relationship with federally recognized tribal governments." It also directs agencies to consult with tribes prior to making decisions that affect tribal governments and to ensure that all components in the agency are aware of the requirements of the memorandum. In addition, Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," directs Federal agencies to consult with tribal governments regarding issues that "significantly or uniquely affect their communities."

B. In recognition of the status of federally recognized Indian tribes as sovereign authorities and in accordance with the President's Memorandum on "Government to Government Relations with Native American Tribal Governments" (April 29, 1994), the Council is committed to operating on the basis of government-to-government relations with Indian tribes. Together with other executive departments, the Council acts on behalf of the Federal Government to fulfill the intent of the President and Congress regarding government-to-government consultation. The Council acknowledges that Federal-tribal consultation is a bilateral process of discussion and cooperation between sovereigns.

Trust Responsibilities

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

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

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

Tribal Participation in Historic Preservation

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

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

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

Sympathetic Construction

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

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

Respect for Tribal Religious and Cultural Values

The Council recognizes and respects that certain historic properties retain religious and cultural significance to federally recognized Indian tribes and that preservation of such properties may be imperative for the continuing survival of traditional tribal values and culture. Therefore, the Council shall develop and implement its programs in a manner that respects these traditional tribal values and customs and strives to recognize that certain historic properties may be essential elements of actual living cultures and communities.

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

III. Implementation of the Council's Policy

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

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

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

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

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

Appendix B. Recent Federal Agency Consultation Initiatives

Many Federal agencies have taken both policy and program steps to improve and institutionalize consultation with Indian tribes. In fact, most agencies had adopted tribal consultation policies long before the ACHP revised its regulations in 2001. For example, the Department of Energy first adopted a policy in 1988 and recently updated the policy to reflect changes in Federal directives.

Of the countless positive efforts, the ACHP presents a handful of excellent examples of both policy and program initiatives undertaken by the Departments of Defense, Agriculture, and Transportation. The ACHP intends to build on and showcase these efforts in carrying out the Action Plan. Partnerships with these agencies are either underway or under negotiation to combine resources and expertise in advancing program enhancements, training, and capacity building for both Federal agencies and Indian tribes.

U.S. Department of Agriculture, Natural Resources Conservation Service (USDA NRCS)

Through its nationwide Programmatic Agreement, executed in May 2002 with the ACHP and National Conference of State Historic Preservation Officers, and after extensive nation-to-nation consultation with Indian tribes over a two-and-one-half year period, NRCS instituted a policy of collaboratively developing consultation agreements with individual tribal governments in order to ensure appropriate consultation takes place during the Section 106 review process. When an Indian tribe wishes to enter into an agreement, it is to be developed, collaboratively, through government-to-government consultation; the signatories to these agreements are tribal leaders, THPOs and NRCS State Conservationists. Not all tribes wish to enter into these agreements and, in some cases, less structured consultation procedures or protocols replace formal agreements.

These NRCS agreements and protocols are to be reviewed and updated regularly, and as wished by the signatories. Consultation to develop and update these agreements will remain an ongoing process; they must remain dynamic. This creates some frustrations among the consulting parties, some of whom view this ongoing consultation as indecisiveness. However, many view the consultation agreement reviews as an opportunity to retain and build on existing partnership relationships. Of course, as with initial implementation of most such initiatives, the application of the policy has been uneven and realization of the goals of effective cultural resources consultation and protection to the satisfaction of many tribes is quite incomplete.

Additionally, NRCS has more than 10 years of experience developing and presenting staff training on consultation in collaboration with tribal partners. These include, but are not limited to: Working Effectively with American Indian Tribes ("Harmony Workshops" for field staff and management); Consultation with American Indian Governments (regarding program delivery with two versions—one for management and one for conservation staff); and a new course on contracting in Indian Country.

Additionally, State offices participate in national, regional, and State workshops developed in collaboration with individual tribes. These courses are reviewed by NRCS tribal employees and advisory councils of tribal elders and officials, and updated regularly. NRCS works closely with several national and regional tribal advisory organizations, including, but not limited to, the Intertribal Agriculture Council (IAC), the Southwest Indian Agriculture Association (SWIAA), and the United South and Eastern Tribes (USET). NRCS has sought and received advice and training assistance over several years from member and staff of the National Association of Tribal Historic Preservation Officers (NATHPO).

Department of Agriculture, Forest Service

The Forest Service (FS) recently developed a consultation policy that will be finalized soon. FS:

- Drafted and distributed more than 25 editions of the consultation policy from the Washington office to tribes and regional foresters;
- Discussed the draft policy and elicited comments and recommendations in various meetings including:
  - Listening sessions held at Ft. McDowell and San Pasqual Reservations; with the California Native American Heritage Commission; and in the Washington office with more than 100 tribal governmental representatives;
  - Annual meetings of the Intertribal Timber Council, National Congress of American Indians; and
  - Regional leadership forums and training sessions in three FS regions.

The draft consultation policy benefited from comments from tribal and FS leaders and the review of other agency consultation policies. More than 1,500 copies of various drafts were distributed in the forums listed above and other conferences and meetings, and more than 100 comments were received from tribal and agency reviewers. Almost unanimously, the responses from meetings, listening sessions, and review of various editions of the policy have been extremely supportive.

Selected Policy Elements

The Forest Service shall:

1. Notify tribes of proposed FS policy, plans, projects or actions that may affect tribal rights or interests prior to decisions in order to provide an opportunity for meaningful dialogue on potential implications and effects.
2. Develop, in consultation and collaboration with tribes when mutually agreed upon, unit-specific programmatic and other agreements and statements of relationships with tribes that set forth specific requirements, procedures, and protocols for consultation, including the points of contact.
3. Provide tribes with contact information for FS officials who are responsible for making final decisions that may affect tribes.
4. Involve tribal representatives, including staff and technical representatives, in the consultation process including development of proposed policies, plans, projects, or actions, where appropriate.
5. Fully consider the data from and recommendations of tribes and address tribal concerns on proposed decisions.
6. Inform tribes how their information and recommendations are reflected or were considered in FS decisions, including explanations in the event that tribal input was not adopted or incorporated.
7. Document the process and actions taken to consult with tribes, the results of those actions, and how FS's final decision was communicated to affected tribe(s). The consultation review and monitoring process shall involve tribal officials and representatives and may be included in the general management review process.

In addition to policy initiatives, FS has had a number of successful consultations on individual National Forests (NF). The following are just a few examples:

- *Cave Rock on the Lake Tahoe Basin Management Unit:* teamwork between the FS Heritage and Tribal Programs and consultation with the Washoe Tribe.
- *White River NF Land Management Plan in Colorado:* developed in consultation primarily with the Northern Ute, Southern Ute, and Ute Mountain Ute.
- *Youth projects in the Black Hills NF:* outgrowth of consultation with affiliated tribes.
- *Coronado NF:* Mt. Graham's nomination to the National Register of Historic Places resulting from consultation with the southern Arizona tribes.

Department of Defense

Where agencies have taken the initiative to train appropriate staff and develop consultation tools, the results have been very promising. The principle example of such efforts is the Department of Defense (DoD) program to institutionalize its American Indian and Alaska Native Policy, which establishes a consistent framework for working with the tribes at all levels of DoD.

DoD adopted its current policy on American Indians and Alaska Natives in 1998, after a 20-month period of extensive consultation with tribal governments. The policy was designed to bring more uniformity to the way in which DoD and its Components consult with tribes concerning proposed military activities that could affect tribal lands and resources, including sacred sites and off-reservation reserved rights to hunt, fish, and gather.

DoD recognized at the outset that training is integral to successful policy implementation. Since 1998, DoD has sponsored a series of training courses to assist military and civilian personnel in understanding the unique relationship that exists between the Federal Government and tribal governments. DoD has conducted nearly 20 such courses and trained more than 800 DoD staff on American Indian and Alaska Native law and history, consultation and intercultural communications, and cultural resource issues.

The courses are taught by senior DoD officials and American Indian trainers, and incorporate participation by local tribal historians, cultural resource specialists, and tribal elders. Military and civilian attendees consistently report that the training is highly beneficial in helping them understand how to establish mutually rewarding relationships with the tribes whose lands, resources, or traditional cultural properties may be affected by military activities.

Department of the Army

Prominent among all Federal agency efforts is the Department of the Army's consultations with Indian tribes and Native Hawaiians regarding the Army Alternate Procedures. In 1997, the Army decided to explore the option of developing Section 106 procedures tailored to its mission and operations. From the outset of that process, the Army, in partnership with the ACHP, consulted and actively engaged Indian tribes and Native Hawaiians in drafting those procedures.

The Army held 27 regional consultation meetings and briefings that drew participation from 120 Indian tribes and 13 Native Hawaiian organizations. To facilitate the consultation effort, the Army funded travel costs for many participants. Where interest was high, the Army held multiple meetings to ensure that Native perspectives were effectively incorporated into the Alternate Procedures.

Department of Transportation

The Department of Transportation (DoT), especially the Federal Highway Administration (FHWA) and the State DoTs, has taken steps to improve compliance with the provisions in NHPA and Section 106 requiring consultation with Native peoples regarding properties that may hold religious and cultural significance to them.

- Iowa held a major tribal summit hosted by the Governor and FHWA that has initiated a series of Programmatic Agreements with the region's tribes on how and where consultation will be conducted.
- Pennsylvania is planning a similar summit for September 2003.
- The FHWA division administrator in Minnesota meets personally on an annual basis with each of the State's resident tribes to cultivate relationships that form the basis for effective consultation.
- Texas and Arizona have had active relationships with their interested tribes for years primarily through the respective State DoT.
- The Federal Transit Administration will hold a conference call in September 2003 with its regional offices to discuss issues surrounding transit and tribal populations, including Section 106 consultation concerns.

Besides these examples of efforts to improve section 106 consultation, DoT has partnered with the Bureau of Indian Affairs to form the Tribal Technical Assistance Program (TTAP) in connection with the Indian Reservation Roads program. TTAP conveys the latest technology and information on tribal roads and bridges, tourism and recreation, and related economic development to tribal transportation and planning personnel. TTAP also provides training and an electronic library.

DoT recognizes that work remains to fully meet the letter and spirit of the law. Accordingly, FHWA has approached the ACHP about developing Native American consultation guidelines and training for FHWA. FHWA believes this work, along with its prior support for the ACHP tribal database project, evidences DoT's leadership in this area.