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ACHP TRIBAL/NHO POLICIES

Tribal Policy Statement (2000)

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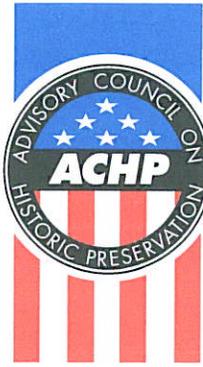
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**TRIBAL POLICY STATEMENT
(2000)**



Preserving America's Heritage

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

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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 which "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 which 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 email, 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.

INDIAN TRUST RESPONSIBILITY
(2004)



Preserving America's Heritage

**THE ADVISORY COUNCIL ON HISTORIC PRESERVATION'S
STATEMENT ON ITS TRUST RESPONSIBILITY**

July 21, 2004

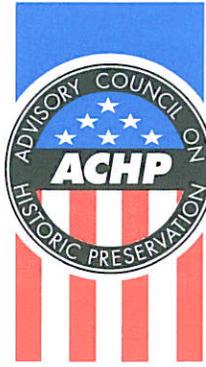
Section 106 of the National Historic Preservation Act requires Federal agencies to consider the effects of their actions on historic properties and to seek comments from the Advisory Council on Historic Preservation (ACHP). The purpose of Section 106 is to avoid unnecessary harm to historic properties from Federal actions. The procedure for meeting Section 106 requirements is defined in ACHP's regulations, 36 CFR Part 800. The regulations include both general direction regarding consultation and specific requirements at each stage of the review process.

The ACHP's trust responsibility is to ensure that its regulations implement the requirements of Section 106 of the National Historic Preservation Act and that such regulations incorporate the procedural requirement that Federal agencies consult with Indian tribes that attach religious and cultural significance to historic properties that may be affected by their undertakings. The ACHP has met, and continues to meet, that responsibility through its present Section 106 regulations, which require Federal agencies to consult with such Indian tribes at every significant step of the process.

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**NATIVE HAWAIIAN ORGANIZATIONS
POLICY STATEMENT
(2008)**



Preserving America's Heritage

ACHP Policy Statement on the ACHP's Interaction with Native Hawaiian Organizations

Adopted by the Advisory Council on Historic Preservation
May 13, 2008
Washington, DC

Introduction

The history of the United States is enhanced by the many cultures and peoples that make up this nation. These cultures and peoples bring together diverse languages, ceremonies, practices, rites and stories; all of which add to our nation's vibrancy and strength, engender our compassion, and define our collective history.

Native Hawaiians, the indigenous people of our 50th state, bring a culture to this country that is unique. Theirs is a history of a proud people who, like other Native peoples of our country, have struggled to maintain their culture amidst other prevalent influences of American society.

Native Hawaiians have begun to more assertively recall their heritage as a great Polynesian people. Their ceremonies and cultural practices have been reborn and their language is thriving. Their historic sites are reminders of their prowess as ocean navigators, agricultural innovators, and as a successful multi-tiered, complex society that existed for hundreds of years before Europeans left their homelands.

Native Hawaiians bring their values to the historic preservation dialogue, values that are often shared by other Native peoples. Among others, these include:

- A deep love and understanding of the land;
- A respect for the powerful forces of nature;
- An understanding of an ever-evolving society and the need to reflect that in sites and buildings;
- A need to minimize their footprint on the Earth, so as to leave it capable of accommodating many generations to come;
- A historic view that Native Hawaiians stand on the work of past ancestors and have a responsibility to their children to appreciate that context;
- A deep obligation to their ancestors, to their memory and to their resting places; and,
- An enjoyment of their very brief time on this earth and all it has to offer.

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The Advisory Council on Historic Preservation (ACHP), therefore, is committed to fully considering these values as it carries out its responsibilities under the National Historic Preservation Act (NHPA). Furthermore, the ACHP recognizes the significant contribution that Native Hawaiians have and continue to make to the enrichment of this nation.

Authority

The ACHP, an independent federal agency established by the NHPA, advises the President and Congress regarding historic preservation matters; recommends legislative and administrative improvement to protect America's heritage; encourages federal agencies to make their programs and policies advance the national historic preservation goals; and, through the Section 106 review process, ensures that Indian tribes, Native Hawaiian organizations, state and local governments, and the public have a voice in the federal decisions that affect historic properties.

Purpose

This policy sets forth the commitments the ACHP makes to ensuring that Native Hawaiian organizations have the opportunities to which they are entitled under the NHPA to participate in the national historic preservation dialogue and program. The ACHP also believes that the NHPA and regulations implementing Section 106 of the NHPA, 36 C.F.R. Part 800, set the minimum standards for federal agency interaction with its preservation partners.

The basis for this policy regarding the ACHP's role, responsibilities, and relationships with individual Native Hawaiian organizations derives from the NHPA, particularly at 16 U.S.C.470a(d)(6). This policy sets forth actions the ACHP will take to oversee the implementation of its responsibilities under the NHPA with respect to the role afforded to Native Hawaiian organizations in the NHPA.

Since the NHPA is the governing authority, all terms used in this policy find their definitions in that Act. Therefore, this policy pertains to Native Hawaiian organizations as defined in the NHPA at 16 U.S.C. § 470w(18) as follows:

Native Hawaiian organization means any organization which-

- Serves and represents the interests of Native Hawaiians;
- Has as a primary and stated purpose the provision of services to Native Hawaiians; and,
- Has demonstrated expertise in aspects of historic preservation that are culturally significant to Native Hawaiians.

"Native Hawaiians" in turn, are defined in the NHPA at 16 U.S.C. 470w(17) as follows:

Native Hawaiian means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

Policy Principles

This policy sets forth principles that will guide the ACHP's interaction with Native Hawaiian organizations as it carries out its responsibilities under the NHPA. It also provides guidance to the ACHP and its staff and serves as the foundation for ACHP policies and procedures affecting Native Hawaiian issues. Upon adoption of the policy, the ACHP will revisit the *Action Plan on Advisory Council on Historic Preservation Native American Initiatives* (2003) to determine its consistency with this policy and make any necessary revisions.

The ACHP, in carrying out its NHPA responsibilities with regard to projects in Hawaii has found that there are particular challenges for Native Hawaiian organizations in participating in the national historic

preservation program and in having a voice in Federal decisions that impact historic properties of religious and cultural significance to them as ensured by the NHPA (16 U.S.C. 470a(d)(6)(B)). Therefore, the ACHP commits to working with Native Hawaiian organizations and the Native Hawaiian organization representative on the ACHP's Native American Advisory Group (NAAG) to develop and implement measures to address these challenges. The first step toward this goal is the adoption of the following statements of policy:

1. The ACHP acknowledges Native Hawaiian traditional cultural knowledge, beliefs and practices and recognizes their value in the understanding and preservation of historic properties in Hawaii.

The ACHP acknowledges the unique nature of Native Hawaiian perspectives and worldview. Accordingly, ACHP will carry out its responsibilities in a manner that reflects this understanding and respect, and sets an example for other federal agencies. In fact, the ACHP's regulations include a reminder to Federal agencies to acknowledge that Native Hawaiian organizations have special expertise in identifying and evaluating the National Register of Historic Places eligibility of properties of religious and cultural significance to them (36 C.F.R §800.4(c)(1)). Therefore, the ACHP, in carrying out its NHPA responsibilities in Hawaii, will:

- Seek to understand and integrate into its work in Hawaii an understanding of the relationship of Native Hawaiians' perspective on their relationship to the land, to nature's forces that affect the land, to the *kuleana* (responsibility) of all Native Hawaiians to be *pono* (honorable) as Native Hawaiians.
- Work with other federal agencies to ensure that they respect, fully acknowledge and consider the traditional knowledge, beliefs and practices conveyed by Native Hawaiian organizations in carrying out their Section 106 responsibilities and to understand their perspective on their relationship to the land and their *kuleana* to be *pono* as Federal agencies make decisions that affect the land.
- The ACHP will encourage and assist, where possible, federal agencies in working with Native Hawaiian organizations and understanding differences in perceptions and worldview.
- Develop guidance materials to guide Federal agencies in seeking and consulting with Native Hawaiian organizations in their decision making pursuant to Section 106.

2. The ACHP commits to working with Native Hawaiian organizations to fully consider the preservation of historic properties of importance to them. ACHP also understands and recognizes the connection of *`ohana* (family) to such places. Therefore, the ACHP will:

- Offer training to Federal agencies regarding their responsibilities to consult with Native Hawaiian organizations and to consider their views in the Section 106 review process.
- Develop guidance on working more effectively with Native Hawaiian organizations and consider the inclusion of *`ohana* (family) as Native Hawaiian organizations in the consultation process.
- Increase participation of all parties in the *Preserve America* initiative to both acknowledge preservation efforts, educate the public about the importance of preserving Native Hawaiian historic properties, and to raise the visibility of Native Hawaiian historic preservation.

3. The ACHP acknowledges the important contributions of Native Hawaiian organizations to the national historic preservation program. Their history is one of many histories that make up the essential fabric of our great nation. Further, the ACHP acknowledges the rights of Native Hawaiian organizations to participate in Section 106 consultation with Federal agencies. Therefore, the ACHP will:

- Identify those Federal agencies with the greatest consultation challenges and develop and implement strategies to assist those agencies in addressing such challenges.
- Work with Federal agencies to adopt policies acknowledging their responsibilities to consult with Native Hawaiian organizations and mechanisms to assist Federal staff in carrying out such responsibilities.

- Encourage federal agencies to be particularly diligent in involving Native Hawaiian organizations early in the review process.
- As directed by Appendix A of 36 CFR Part 800, stand ready to address unreasonable agency decisions that limit Native Hawaiian organization participation in the Section 106 process.
- Encourage federal agencies to approach Section 106 consultation with Native Hawaiian organizations with flexibility.
- Actively encourage and welcome Native Hawaiian organization participation in ACHP and other historic preservation programs beyond the Section 106 review process.

The ACHP understands and accepts its responsibility as a proponent for historic preservation in Hawaii. One of the most important ways in which the ACHP carries out that responsibility is to ensure that Native Hawaiian organizations have the opportunity to participate in the programs of the ACHP, in particular, the Section 106 process as provided for in the NHPA.

The ACHP will encourage participants in the ACHP programs, particularly federal agencies, to also act in accordance with these principles. Further, the ACHP will implement these measures in consultation with Native Hawaiian organizations and considering the advice of the Native Hawaiian organization representative to NAAG.

**GOVERNMENT-TO-GOVERNMENT
PROCEDURES
(2009)**

John L. Nau, III
Chairman

Susan S. Barnes
Vice Chairman

John M. Fowler
Executive Director



Preserving America's Heritage

September 16, 2009

Memorandum

To: ACHP Members
Executive Director

From: Chairman

Subject: Procedures for Government-to-Government Consultation Between the Advisory Council on Historic Preservation and Indian Tribes

This memorandum formalizes the procedures the Advisory Council on Historic Preservation (ACHP) has long used to initiate and conduct government-to-government consultation with Indian tribes.

ACHP must consult, on a government-to-government basis with Indian tribes when the ACHP is considering certain program alternatives pursuant to 36 CFR Part 800.14; when the ACHP is developing a policy that might affect historic properties of religious and cultural significance to Indian tribes; and, when the ACHP revises its regulations, 36 CFR Part 800.

In 2000, the ACHP adopted "The Policy Statement Regarding the ACHP's Relationships with Indian Tribes" and affirmed its commitment to the government-to-government relationship.

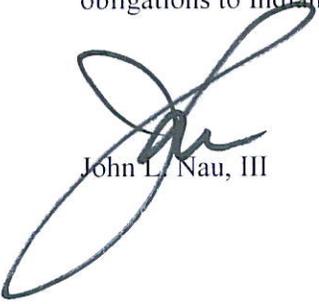
"In recognition of the status of Federally recognized Indian tribes as sovereign authorities and in accordance with the President's Memorandum on "Government to Government Relations with Native American Tribal Governments" (April 29, 1994), the ACHP is committed to operating on the basis of government-to-government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

Responsibility for the ACHP's government-to-government consultation rests with the Chairman. When the ACHP is required to carry out government-to-government consultation, the initial contact with tribal leaders is made by the Chairman in the form of an official letter sent either via U.S. Mail and/or E-mail. ACHP's government-to-government consultation meetings are hosted by the ACHP Chairman or the Chairman's designee, typically another ACHP member or the Executive Director. Similarly, teleconferences in lieu of face-to-face meetings are hosted by the Chairman or the Chairman's designee.

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The Executive Director is responsible for ensuring that all contacts with a tribal leader are handled appropriately and responded to in a timely manner. The Executive Director is also responsible for implementing staff-level procedures to ensure that the ACHP meets its government-to-government obligations to Indian tribes.

A handwritten signature in black ink, appearing to read 'John L. Nau, III', written in a cursive style. The signature is positioned above the printed name.

John L. Nau, III

**PLAN to SUPPORT the
UN DECLARATION on the
RIGHTS of INDIGENOUS PEOPLES
(2013)**



Preserving America's Heritage

ACHP PLAN TO SUPPORT THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

On December 16, 2010, at the second White House Tribal Nations Conference, President Obama announced the United States' support for the Declaration on the Rights of Indigenous Peoples (Declaration). However, the Administration does not see support for the Declaration as an end in itself. In President Obama's words, "[w]hat matters far more than words—what matters far more than any resolution or declaration—are actions to match those words." Accordingly, the Administration is looking to the principles embodied in the Declaration to meaningfully address the challenges Indian tribes face.

The President's call to action is an opportunity to explore ways to more directly support the principles in the Declaration. It is also an opportunity to promote better stewardship and protection of Native historic properties and sacred places and, thus, ensure the survival of indigenous cultures.

While the Advisory Council on Historic Preservation's (ACHP) work already largely supports the United Nations Declaration on the Rights of Indigenous Peoples, additional and deliberate actions will be taken to more overtly support the Declaration. The Section 106 review process provides Indian tribes and Native Hawaiian organizations (NHOs) with a very important opportunity to influence federal decision making when properties of religious and cultural significance may be threatened by proposed federal actions. While federal agencies are required to consult with Indian tribes and NHOs and to take their comments into account in making decisions in the Section 106 review process, adding the principles of the Declaration to that consideration may assist federal agencies in making decisions that result in the protection of historic properties of religious and cultural significance to Indian tribes and NHOs.

Raise Awareness. One of the most important contributions the ACHP can make is to raise awareness about the Declaration in the historic preservation community. As the only independent historic preservation agency of the U.S. government, the ACHP can use its voice to raise awareness about the indigenous rights the Declaration seeks to protect in the area of cultural preservation. Doing so could lead to the preservation community including the Declaration in its own work and activities. Therefore, the ACHP will:

1. Add information about the Declaration to the ACHP's Web site. Links to related information such as the State Department page about the Declaration could be included.
2. Integrate information about the Declaration in presentations, training courses, technical publications, and speeches, where appropriate.
3. Send the Declaration and explanatory material to Federal Preservation Officers, State Historic Preservation Officers, Tribal Historic Preservation Officers, NHOs, and preservation organizations.

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4. Compile and distribute official Administration statements about the Declaration to the other members of the indigenous-focused interagency working groups to which the ACHP belongs. The ACHP, as a member of these groups, will also advocate for attention to the Declaration in the work of these interagency initiatives.

5. Raise the level of understanding for new ACHP members and staff about the Declaration through briefings and written materials.

6. Develop guidance regarding how the Declaration intersects with the Section 106 process with an emphasis on the treatment of pre-contact period archaeological resources. The ACHP will also reach out to the archaeological community through its member Archaeology Subcommittee to share information about the Declaration and how it intersects with the conduct of archaeology in the United States.

Incorporate the principles and aspirations of the Declaration into ACHP initiatives and programs. The ACHP will integrate the principles and aspirations of the Declaration into its work regarding tribal and Native Hawaiian historic preservation issues.

1. The ACHP's Native American Traditional Cultural Landscapes Action Plan would greatly benefit from the integration of the Declaration in the products and outcomes required under the plan. The preservation of these large-scale historic properties of religious and cultural significance to Indian tribes and NHOs is one way in which their rights to practice and revitalize their cultural traditions and customs would be ensured as called for in the Declaration. As the ACHP carries out the Action Plan, it will include the Declaration in the development of guidance and policies regarding traditional cultural landscapes.

2. The ACHP, as a signatory to the Sacred Sites Memorandum of Understanding (MOU), will advocate for the inclusion of information about the Declaration in the training materials and other products to be developed in accordance with the MOU. Much like the ACHP's Landscapes Action Plan, the purposes and goals of the MOU are very much in accord with certain articles and the overall intent of the Declaration.

3. The ACHP will incorporate information about, and the principles within, the Declaration in future policy and program initiatives regarding the protection and preservation of historic properties of religious and cultural significance to Indian tribes and NHOs and in efforts to improve federal agency Section 106 consultation with Indian tribes and NHOs.

March 1, 2013

**TRIBAL
HISTORIC PRESERVATION OFFICERS
(2014)**



Preserving America's Heritage

ACHP Policy Statement Regarding Federal Relationships with Tribal Historic Preservation Officers

Adopted on November 6, 2014
Washington, D.C.

Introduction

In 1992, the National Historic Preservation Act (NHPA) was amended to establish tribal historic preservation programs and grants to these tribes¹. Section 101(d)(2) of the act provides for federally recognized Indian tribes to apply to the Department of the Interior (DOI) to assume any or all of the functions of a State Historic Preservation Officer (SHPO) on their tribal lands². While a number of Indian tribes already had established historic preservation programs, these amendments allowed an officially designated Tribal Historic Preservation Officer (THPO) to assume some or all of the duties of the SHPO and to replace the SHPO in the review of undertakings on tribal lands under Section 106 of the NHPA. The National Park Service, on behalf of DOI, has thus far approved 150 THPOs throughout the United States and the number increases every year. Overall, the participation of Indian tribes in the national historic preservation program continues to expand.

The Section 106 process provides a key opportunity for THPOs and Indian tribes³ to influence federal decision making when historic properties of religious and cultural significance are threatened by proposed undertakings on and/or off tribal lands. Indian tribes that do not have a THPO in accordance with Section 101(d)(2) of the act also participate in consultation when a federal undertaking may affect historic properties of religious and cultural significance to them.

In 1998, in recognition of the statutory role of THPOs in the Section 106 process, the ACHP invited the General Chairman of the National Association of Tribal Historic Preservation Officers to become an observer to the ACHP.

In 2000, the ACHP adopted the "Policy Statement Regarding the Council's Relationships with Indian Tribes," to acknowledge its government-to-government relationship and trust responsibility to Indian tribes as well as to recognize tribal sovereignty and the rights of Indian tribes to participate in Section 106 consultation. While that policy recognized the important role of THPOs, the ACHP believes that it is appropriate to devote specific policy attention to THPOs and support their full and meaningful participation in the Section 106 process and the national preservation program.

¹ Indian tribe, as defined in the NHPA, "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. 470w4)

² Tribal lands are defined in the NHPA as "all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities" (16 U.S.C § 470w14).

Authority

The ACHP, an independent federal agency established by the NHPA, has among its statutory authorities the duty to issue the regulations implementing Section 106 of the NHPA in its entirety (which includes the role of Indian tribes, THPOs and Native Hawaiian organizations in that process); advise the President and Congress regarding historic preservation matters; educate Federal agencies, State and local governments, and Indian tribes as to the ACHP's authorized activities; and, recommend to federal agencies methods to improve the effectiveness, coordination, and consistency of their policies and programs with the national historic preservation program. 16 U.S.C. §§ 470j and 470s.

Purpose

This policy sets forth commitments of the ACHP to assist THPOs in maximizing the opportunities provided by the NHPA for them to fully and meaningfully participate in the Section 106 process and the national historic preservation program. One of the premises underlying this policy is the ACHP belief that the NHPA and regulations implementing Section 106 of the NHPA, 36 C.F.R. part 800, set the minimum standards for federal agency interaction with its preservation partners.

The basis for this policy regarding the federal government's responsibilities to and relationships with individual THPOs derives from the NHPA, particularly at 16 U.S.C. § 470a(d)(2). This policy sets forth actions the ACHP will take to clarify federal agency responsibilities under the NHPA and the Section 106 regulations with respect to THPOs. The policy also sets forth steps the ACHP will take to promote the full participation of THPOs in the national preservation program.

This policy pertains to THPOs as defined in 36 C.F.R. § 800.16(w):

Tribal Historic Preservation Officer (THPO) means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

Policy Principles

1. Participation in the Section 106 process

The NHPA provides Indian tribes the authority to assume the role of the SHPO on tribal lands and the ACHP's regulations require federal agencies to consult with THPOs in the Section 106 process for federal undertakings both on and off tribal lands. Therefore, the ACHP will:

- a. Inform Section 106 practitioners and the public about the role of THPOs in the Section 106 process; the federal responsibilities to consult with THPOs; and the value of the contributions of THPOs to historic preservation;
- b. Develop guidance, training and other outreach materials for federal agencies and their applicants regarding the role of THPOs in the Section 106 process; the expertise THPOs bring to Section 106 consultation; and, the role of Indian tribes that do not have a THPO pursuant to 101(d)(2) of the act.

2. THPO Expertise

The ACHP acknowledges the expertise that THPOs bring to the process and values the contributions of THPOs both in individual project reviews and in the national historic preservation program. Therefore, the ACHP will:

- a. Advance greater involvement of THPOs in the national preservation program;
- b. Continue to work with THPOs to address regional and national historic preservation issues of concern to Indian tribes;
- c. Continue to ensure that ACHP training is accessible to and affordable for THPOs; and,
- d. Continue to provide guidance and technical assistance to THPOs regarding the Section 106 process.

3. THPO-SHPO Collaboration

One of the first steps a federal agency must take in the Section 106 process is to initiate consultation with the SHPO, THPO, and other consulting parties. Initial contact and consultation with the SHPO and/or THPO is critical to ensure that the preservation experts who represent the citizens of a state or an Indian tribe have the opportunity to influence federal decision making at the very beginning of the Section 106 process. As two of the most important preservation voices in Section 106, collaboration and partnerships among SHPOs and THPOs are powerful tools to advance the preservation of historic properties. In fact, Section 101(d)(1)(a) requires the Secretary of the Department of the Interior to foster communication and collaboration between Indian tribes and SHPOs. Therefore, the ACHP will:

- a. Collaborate with the Department of the Interior to foster communication and cooperation between THPOs and SHPOs in the administration of the national historic preservation program to
 1. Ensure that all types of historic properties are given due consideration and,
 2. Encourage coordination among Indian tribes, SHPOs, and federal agencies in historic preservation planning and in the identification, evaluation, protection, and interpretation of historic properties.
- b. Encourage SHPOs and THPOs to share information, within appropriate guidelines, especially in those program areas for which a THPO has assumed SHPO responsibilities on tribal lands.

4. Funding

The ACHP recognizes that THPOs face critical funding shortages and that additional funding is needed to facilitate meaningful participation in both the Section 106 process and the national preservation program. Therefore, the ACHP will:

- a. Continue to encourage full funding of the Historic Preservation Fund (HPF) and an increase in the total allocation of funding for THPOs.

b. Issue an updated Executive Director's memorandum regarding when it may be appropriate for federal agencies to compensate consulting parties including THPOs, Indian tribes, and SHPOs for services carried out in the Section 106 process. 4

Policy Implementation

Implementation of the policy is the responsibility of the ACHP's leadership and staff. Staff responsibility for this policy will reside with the Offices of Native American Affairs (ONAA) and Federal Agency Programs (OFAP). Accordingly, it shall be the responsibility of those offices to:

1. Train ACHP staff regarding the role of THPOs in the Section 106 process and their expertise regarding the identification and evaluation of historic properties of religious and cultural significance to their tribes as well as the appropriate treatment of such properties;
2. In partnership with THPOs, develop training, guidance, and/or outreach materials for all Section 106 participants, including but not limited to federal agencies, SHPOs, applicants, and local governments regarding such issues as:
 - a. The role of THPOs in the Section 106 process including but not limited to consultation regarding culturally appropriate methods⁵ for the:
 1. Identification of historic properties of religious and cultural significance;
 2. Evaluation of such properties for eligibility to the National Register of Historic Places;
 3. Assessment of effects to historic properties;
 4. Determination of appropriate means to avoid, minimize, or mitigate adverse effects to such properties; and,
 5. Resolution of adverse effects.
 - b. The scope and timing of federal agency consultation with the THPO in the process;
 - c. The respective roles of the SHPO and the THPO when both participate in the Section 106 process;
 - d. The role of the THPO in government-to-government consultation in the Section 106 process; and,
 - e. The role of THPOs and Indian tribes in Section 106 consultation for undertakings off tribal lands.
3. Continue to regularly communicate with THPOs regarding historic preservation news and policy developments;

4 In 2001, the ACHP Executive Director issued a memorandum entitled, Fees in the Section 106 Process. The memorandum clarified that when a federal agency or an applicant seeks information from an Indian tribe regarding sites or requests a survey, the tribe may "be justified in requiring payment for its services, just as any other contractor."

5 Culturally appropriate methods may differ from methods traditionally employed in the Section 106 process; for example, shovel testing to identify archeological resources.

4. Promote the active engagement of THPOs in Section 106 consultation in individual cases that may affect properties of religious and cultural significance to their tribes;
5. Encourage federal agencies to give adequate and meaningful consideration to the views of THPOs in developing appropriate measures to identify and evaluate historic properties and assess and resolve adverse effects; and,
6. Encourage THPOs and federal agencies to develop mutually acceptable protocols for their interactions and Section 106 consultations and make them available to the ACHP.
7. Disseminate examples of successful consultations between federal agencies and THPOs.

**IMPROVING TRIBAL CONSULTATION
in INFRASTRUCTURE PROJECTS
(2017)**



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.

Milford Wayne Donaldson, of Sacramento, California, is chairman of the 24-member council, which is served by a professional staff with offices in Washington, D.C. For more information about the ACHP, contact:

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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 tribes¹ 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.bia.gov/cs/groups/public/documents/document/idc2-060030.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* and sent it to Indian tribes, Federal Preservation Officers, and the broader preservation community. The recommendations are available online at <http://www.achp.gov/docs/improving-tribal-federal-consultation.pdf>. The ACHP also has provided extensive guidance about consultation with Indian tribes and Native Hawaiian organizations at <http://www.achp.gov/nap.html> and the Section 106 process at <http://www.achp.gov/work106.html>.

¹ 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.

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.² 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.³

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.

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.

² 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.

³ 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.

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 System⁴, 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

⁴ 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 (http://www.achp.gov/docs/Section106SuccessStory_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 (WHCNA) 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 WHCNA 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*⁵ 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.

⁵ 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 <http://www.achp.gov/docs/improving-tribal-federal-consultation.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.⁶ 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.
- 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.

⁶ The memorandum is available at <http://www.achp.gov/regs-fees.html>.

- 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 advance⁷.
- 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.

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.

⁷ 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](#).

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.⁸ 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.⁹ 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 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

⁸ 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.

⁹ 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)

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 Council 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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