



# **CONSULTATION PROCEDURES PURSUANT TO E.O. 13175: CONSULTATION AND COORDINATION WITH INDIAN TRIBAL GOVERNMENTS**

Advisory Council on Historic Preservation  
April 26, 2021

In accordance with Section 5(a) of Executive Order 13175: Consultation and Coordination with Indian Tribal Governments, the Advisory Council on Historic Preservation (ACHP), in March 2001, submitted to the Office of Management and Budget (OMB) a plan outlining its process for ensuring meaningful and timely input from tribal officials in the development of regulatory policies that have tribal implications. The ACHP also named Valerie Hauser, Director, Office of Native American Affairs, the tribal consultation official pursuant to the executive order. The plan was updated in 2010 and resubmitted to OMB. In accordance with Section 1 of the January 6, 2021 Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, this plan was once more updated in April 2021. This plan supersedes both the 2001 and the 2010 plans.

## **Introduction**

The ACHP serves as the policy advisor to the President and Congress on historic preservation matters. A key ACHP function is overseeing the federal historic preservation review process established by Section 106 of the National Historic Preservation Act (NHPA). Section 106 requires federal agencies to consider the effects of undertakings on historic properties and provide the ACHP an opportunity to comment on these undertakings prior to a final decision on them.

Amendments to the NHPA in 1992 clarified and enhanced the role of Indian tribes<sup>1</sup> and Native Hawaiian organizations (NHOs) in the national preservation program, clarified federal agency responsibilities to consult with them, and authorized the ACHP to enter into agreements with Indian tribes to substitute their historic preservation regulations for the Section 106 implementing regulations on tribal lands. The amendments also added a Presidentially-appointed member of an Indian tribe or NHO to the ACHP.<sup>2</sup> In 2016, the General Chairman of the National Association of Tribal Historic Preservation Officers was added to the ACHP as a voting member.

In 1999, the ACHP amended the regulations implementing Section 106 at 36 CFR Part 800, “Protection of Historic Properties,” to incorporate the requirement that federal agencies, in carrying out their Section 106 responsibilities, consult with Indian tribes and NHOs that attach religious and cultural significance to historic properties.<sup>3</sup> The Section 106 regulations also require federal agency consultation to recognize the

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<sup>1</sup>For purposes of the NHPA and Section 106, 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)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 54 U.S.C. § 300309.

<sup>2</sup>The ACHP is comprised of twenty four members. Staff carries out the daily work of the ACHP.

<sup>3</sup>54 U.S.C. § 302706(b); 36 C.F.R. § 800.2(c)(2).

government-to-government relationship between the federal government and Indian tribes, and encourage federal agencies to conduct such consultation in a manner respectful of tribal sovereignty.<sup>4</sup>

The ACHP's oversight of the Section 106 process and its tribal consultation requirements make it essential for the ACHP to both set an example for other federal agencies and to set forth a process that ensures the ACHP carries out meaningful consultation with Indian tribal governments pursuant to E.O. 13175 when the ACHP is proposing regulations or policies that might affect tribal governments.

The ACHP's interactions with Indian tribes and advice to federal agencies and others regarding tribal consultation are guided by the *ACHP Policy Statement Regarding the ACHP's Relationships with Indian Tribes* (2000). The policy is included as Appendix A. The policy commits the ACHP to:

- Be guided by principles of respect for Indian tribes and their sovereign authority.
- Operate on the basis of government-to-government relations with Indian tribes. The ACHP acknowledges that Federal-tribal consultation is a bilateral process of discussion and cooperation between sovereigns.
- Recognize 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 ACHP shall be guided by principles of respect for the trust relationship between the Federal Government and federally recognized Indian tribes. The ACHP 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.
- 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 policy establishes the framework by which the ACHP 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. Accordingly, this plan integrates the ACHP's tribal policy commitments.

### **ACHP Actions or Policies That Might Affect Tribal Governments**

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

The nature of the ACHP's authorities and mission is such that its actions generally do not result in "substantial direct effects on one or more Indian tribes." In particular, the ACHP's role in the Section 106 process is advisory; the federal agency carrying out, funding or permitting the undertaking makes all the decisions in the process.

#### **Promulgating Regulations or Adopting Policy Statements**

The ACHP promulgates regulations that implement Section 106 and set forth procedures that require federal agencies to consult with Indian tribes regarding undertakings that may affect historic properties of religious and cultural significance to them. Accordingly, any proposed revisions to the existing Section 106 regulations would require the ACHP to comply with E.O. 13175 and implement the procedures

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<sup>4</sup>36 CFR § 800.2(c)(2)(ii)(B) and (C).

outlined below. Likewise, the ACHP does adopt policy statements that may affect Indian tribes and would require compliance with E.O. 13175.

#### Substitution Agreements

Pursuant to Section 101(d)(5) of the NHPA, the ACHP also may enter into an agreement with an Indian tribe so that undertakings on tribal lands are reviewed in accordance with the tribe's own historic preservation regulations rather than the Section 106 regulations issued by the ACHP.<sup>5</sup> This could have a direct effect on the relationship between the federal government and that tribe, since it would require federal agencies with undertakings on tribal lands to review such undertakings following tribal regulations rather than those issued by the ACHP. It also could result in substantial impacts to other tribes that are not part of the 101(d)(5) agreement, when their ancestral lands happen to be within the boundaries of the tribal lands covered by the agreement.

#### Legislative Proposals

The ACHP does not typically propose legislation. However, if the ACHP does so, the consultation procedures outlined below for regulations will be followed.

#### Comments on Bills Introduced in Congress

The ACHP actively monitors bills introduced in the U.S. Congress related to historic preservation and sometimes submits comments on such bills. Acknowledging that such bills may impact Indian tribes and that deadlines for commenting are driven by the legislative process, the ACHP has developed specific procedures for consulting with Indian tribes in these circumstances. These procedures are outlined below.

### **The ACHP's Consultation Processes**

ACHP consultation with Indian tribes is initiated through correspondence from the Chairman of the ACHP to tribal leaders. In 2009, the Chairman issued a memorandum to the ACHP members reiterating that the ACHP's government-to-government consultation is the responsibility of the Chairman or the Chairman's designee, who may be another ACHP member or the Executive Director. The memorandum is attached as Appendix B.

Since 2008, correspondence has largely been carried out via electronic mail to expedite the delivery of such correspondence and in response to suggestions from tribal representatives. In those cases where electronic mail is not an option, the correspondence is sent via facsimile or U.S. mail.

The ACHP also provides a copy of its correspondence to tribal historic preservation officers or tribal cultural resource staff to ensure that appropriate tribal staff are aware of the ACHP initiative and has the opportunity to advise tribal leadership.<sup>6</sup>

For each proposed action requiring tribal consultation pursuant to E.O. 13175, the ACHP will initiate consultation with Indian tribes at the earliest possible time to allow for robust and meaningful consultation. The ACHP will also accommodate, to the full extent reasonably practical, requests from tribal governments to consult in person, on an individual basis. Any such consultation meetings will be scheduled at the convenience of the tribal government and the ACHP.

The ACHP will strive to reach agreement or consensus with tribal governments on any proposed actions that are subject to E.O. 13175 and this plan.

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<sup>5</sup> 54 U.S.C. § 302705

<sup>6</sup> A database of tribal cultural resource staff is maintained by the ACHP's Office of Native American Affairs and is updated continuously as the ACHP's contacts expand.

## **I. Consultation Regarding Proposed Regulations or ACHP-Proposed Legislation or Proposed Policy Statements**

If the ACHP is considering revisions to the existing Section 106 regulations, promulgating new regulations, considering a new policy statement or proposing legislation that may have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, the ACHP will develop a plan for consulting with Indian tribes for each such proposed action as follows:

- A. Initial Notification to Tribal Leaders. The Chairman of the ACHP or the Chairman's designee will send a written notification that the ACHP is considering revising the existing Section 106 regulations, promulgating new regulations, or proposing legislation. The notification will:
  - a. Include all relevant legal authorities for such action, a description of the proposed action with an analysis of potential impacts to Indian tribes, and a draft outline of the proposed document with a proposed consultation plan and timeline;
  - b. Request information about the tribe's interest in the proposed action and availability to consult with the ACHP;
  - c. Seek input on the proposed consultation plan; and,
  - d. Request initial comments and input from tribal leaders no less than 60 days from receipt of the notification.
  
- B. ACHP Consideration of Tribal Input. The ACHP will:
  - a. Consider tribal leader responses and requests to the initial notification and, to the maximum extent possible, incorporate them into the consultation plan;
  - b. Prepare a summary of all comments received as well as an explanation of how the comments were or were not incorporated in the plan; and,
  - c. Provide a copy of each of the above to tribal leaders.

### ***Consultation Plans for Proposed Regulations or ACHP-Proposed Legislation or Proposed New Policy Statements***

The ACHP will carry out tribal consultation in accordance with the plan, developed with tribal input, for the specific proposed action. The ACHP will formally invite Indian tribes to consult regarding the proposed action as early as possible. As noted above, the formal invitation will be in writing from either the Chairman of the ACHP or the Chairman's designee to each tribal leader. The initial invitation will include:

- The draft document that is the subject of the consultation;
- The consultation plan which will outline a proposed timeline;
- A summary of responses to the initial notification; and,
- An explanation of how the ACHP took into account initial tribal responses to develop the draft document and the consultation plan.

Based on tribal responses and the ACHP's ability to accommodate tribal requests, the consultation effort may include face-to-face meetings on an individual or regional basis during the agreed-upon consultation period to offer an opportunity for face-to-face dialogue in addition to written or telephonic communication. The number and distribution of such meetings would be based on tribal leader and ACHP availability.

In order to accommodate tribal leaders who may be unable to attend in-person meetings, the ACHP will also host video conferences. For tribal leaders who do not have the capability for video conferencing, the

ACHP will conduct teleconferences with them. The number and timing of these will be based on tribal leader and ACHP availability.

Consultation may entail multiple rounds of meetings. After each round, the ACHP will take into account all the comments received to determine the need for revisions to the subject document and to make such revisions. The ACHP will provide summary notes of the meetings and written comments to tribal leaders. The revised document with an explanation of how tribal comments were taken into account will be included. The ACHP will also include information about proposed next steps for the consultation process which will include a timeline.

### ***Conclusion of the Consultation Process***

When the ACHP and, as much as reasonably possible, tribal leaders determine that no further consultation is needed, the ACHP Chairman or Chairman's designee will inform tribal leaders of the ACHP's final action in writing. The notification will include a copy of the final document, a summary of the tribal consultation, and an explanation of how the ACHP took into account tribal comments in developing the final document. A copy of this information will be provided to ACHP's tribal cultural resources contacts and will be posted on the ACHP's website. The ACHP will not post any Indian tribe's comments on the website or share them outside the ACHP without the express permission of the tribe.

## **II. Consultation Regarding Tribal Substitution Agreements Pursuant to Section 101(d)(5)**

With regard to tribal substitution agreements, as stated above, Section 101(d)(5) of the NHPA authorizes the ACHP to enter into agreements with Indian tribes to substitute tribal historic preservation regulations for the Section 106 implementing regulations on the relevant tribal lands. Consultation is carried out between the Indian tribe and the ACHP as agreed upon by both parties. The ACHP does not dictate how such consultation shall take place but remains flexible and available to consult with Indian tribes about such agreements. In cases where the tribal lands to be covered in the substitution agreements include the ancestral lands of other Indian tribes, the ACHP will carry out government-to-government consultation with those other Indian tribes accommodating as much as reasonably possible their respective wishes or protocols. The purpose of such consultation shall be to inform the ACHP's decision regarding the substitution agreement. The ACHP has issued *Section 101(d)(5) Guidance for Indian Tribes* (Attached as Appendix B) that explains how the ACHP consults with the Indian tribe seeking such an agreement and the role of the State Historic Preservation Officer and any Indian tribe that attaches religious and cultural significance to historic properties within the tribe's lands.

## **III. Consultation Regarding Comments on Bills Introduced in Congress**

The ACHP actively monitors bills introduced in the U.S. Congress that are related to historic preservation and sometimes submits comments on such bills. Decisions about whether to comment and the content of such comments are made by the full membership of the ACHP or, when time does not permit that, by the Chairman, the Executive Director and a subgroup of ACHP members. Before the ACHP comments on such bills that might affect one or more tribal governments, to the extent reasonably possible, the ACHP will (a) seek input from tribal governments through written request to tribal leaders, including a copy of the proposed bill and information on the legislative process and deadlines, and (b) provide a copy of the ACHP's final comments to tribal leaders. The time frames for this consultation will be dependent upon the window of opportunity the ACHP has to make such comments.

### **Designation of Agency Official**

In accordance with EO 13175 and the presidential memorandum, each agency must designate an appropriate official to coordinate implementation of the consultation plan and the preparation of annual progress reports on the status of each action included in the plan and any proposed updates to the plan. The ACHP's official for carrying out these actions is the Director of its Office of Native American Affairs.

## Appendix A:

# POLICY STATEMENT REGARDING THE COUNCIL'S RELATIONSHIPS WITH INDIAN TRIBES

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

### ***Introduction***

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

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

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

### **I. Purpose**

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

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

and the implementing regulations for these authorities.

This policy establishes the framework by which the Council integrates the concepts of tribal sovereignty, government-to-government relations, trust responsibilities, tribal consultation, and respect for tribal religious and cultural values into its administration of the Section 106 process and its other activities. The policy sets forth general principles that will guide the Council's interaction with Indian tribes as it carries out its responsibilities under the Act. It also provides guidance to the Council and its staff and serves as the foundation for Council policies and procedures regarding specific Indian tribal issues. Upon adoption

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

## **II. Statements of Policy**

### **Tribal Sovereignty**

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

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

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

### **Government-to-government consultation**

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

## Appendix B:

### SECTION 101(D)(5) GUIDANCE FOR INDIAN TRIBES

The 1992 amendments to the National Historic Preservation Act (NHPA) added a new authority for the Advisory Council on Historic Preservation (ACHP) to enter into an agreement with an Indian tribe to substitute the tribe's historic preservation procedures for the ACHP's regulations implementing Section 106 of the NHPA regarding undertakings on tribal lands. Section 101(d)(5) of the NHPA states:

The Council may enter into an agreement with an Indian tribe to permit undertakings on tribal land to be reviewed under tribal historic preservation regulations in place of review under regulations promulgated by the Council to govern compliance with [Section 106], if the Council, after consultation with the Indian tribe and appropriate State Historic Preservation Officers, determines that the tribal preservation regulations will afford historic property consideration equivalent to that afforded by the Council's regulations. (54 U.S.C. § 302705)

Since then, the ACHP has entered into two such agreements with Indian tribes: one with the Narragansett Indian Tribe in 2000 and the other with the Seminole Tribe of Florida in 2016.

Since each tribe has a unique tribal historic preservation regulation, the Section 101(d)(5) agreements with the ACHP are unique as well. The absence of published guidance has allowed the parties to be creative in developing the agreements that effectuate the substitution of the ACHP's regulations. However, the ACHP believes that guidance about Section 101(d)(5) would be helpful to other Indian tribes who are considering entering into such agreements for the review of undertakings on their tribal lands under their tribal historic preservation regulations.

Therefore, the following information is intended to guide Indian tribes in their decision-making processes regarding whether and how to enter into Section 101(d)(5) agreements and to provide insight into the ACHP's interpretation of Section 101(d)(5).

#### **Does an Indian tribe have to have a written historic preservation regulation, ordinance, or formal procedure in place in order to enter into a Section 101(d)(5) agreement with the ACHP?**

Yes. Section 101(d)(5) allows the ACHP to enter into an agreement with an Indian tribe to substitute the "*tribal historic preservation regulations*" for the ACHP's regulations. The term "*tribal historic preservation regulations*," encompasses any written procedures adopted by the relevant tribal authority and having the force of law within the relevant tribal lands. However, if an Indian tribe is interested in making such a substitution but does not yet have its own procedures in place, it may be helpful for it to consider the guidance offered here when developing tribal historic preservation regulations.

#### **What does "afford historic properties consideration equivalent to that afforded by the Council's regulations" mean?**

Section 101(d)(5) requires the ACHP to determine if the tribal preservation regulations "will afford historic properties consideration equivalent to those afforded by the Council's regulations." Section 106 requires federal agencies to take into account the effects of their undertakings on historic properties and to

afford the ACHP an opportunity to comment. The ACHP's regulations at 36 CFR Part 800 specify the process by which agencies meet these responsibilities.

The Section 106 process calls for a federal agency, in consultation with the SHPO, Indian tribes, and other consulting parties, and prior to making a final decision on the undertaking, to identify and evaluate historic properties; determine effects; and consult to develop measures to avoid, minimize, or mitigate adverse effects. Failure to reach an agreement about such measures requires the agency to obtain and consider the ACHP's formal comments before making a final decision on the undertaking.

Accordingly, in order to afford historic properties "equivalent consideration," a tribe's preservation regulations should include a process with similar core requirements. In a nutshell, those tribal regulations should result in the identification of historic properties (as defined in the NHPA) that may be affected by an undertaking, an understanding of how such properties may be affected, and a meaningful effort to resolve adverse effects. The process needs to provide the relevant federal agency with the information necessary for it to understand how historic properties may be affected by its undertaking, and how adverse effects will be resolved, prior to the federal agency making a final decision regarding the undertaking. Finally, it would also need to address how the ACHP would be given a reasonable opportunity to comment in the event there is a failure to reach agreement on resolving adverse effects.

### **How does the ACHP make a determination that an Indian tribe's historic preservation regulations afforded historic properties consideration equivalent to that afforded by the ACHP's regulations?**

The ACHP reviews the Indian tribe's regulations and any supporting documentation submitted with the regulations to determine if the basic requirements noted above are covered in the tribe's regulations. Under the supervision of the ACHP membership, the ACHP staff takes the lead in reviewing the tribal regulations and negotiating the specific language of the Section 101(d)(5) agreement. The final decisions on whether the equivalent consideration standard is met and whether the agreement is approved are the responsibility of the ACHP membership through a vote.

### **Can a Section 101(d)(5) agreement require federal agencies to address other kinds of properties?**

No. Neither Section 101(d)(5) nor any other section of the NHPA provides for such an authority. The scope of Section 101(d)(5), as well as Section 106, is limited to the consideration of historic properties as defined in the NHPA. "Historic properties" are defined in the NHPA to mean "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object."(54 U.S.C. § 300308 )

The ACHP is aware that some tribes have regulations that cover properties in addition to those deemed "historic properties" under the NHPA and that may seek to require federal agencies to consider such other properties. While such regulations may be the basis for a Section 101(d)(5) agreement (assuming they provide equivalent consideration of "historic properties," as explained above), such an agreement will not impose requirements on federal agencies to consider such other properties. Again, the scope of Section 101(d)(5) agreements is limited to "historic properties" as defined in the NHPA.

### **What if an Indian tribe's regulations do not apply to all historic properties as defined in the NHPA?**

Since a substitution must provide equivalent consideration to historic properties, the tribal regulations must provide for consideration of historic properties as defined in the NHPA.

### **What if an Indian tribe's regulations do not have the same steps as the ACHP's regulations?**

The tribal regulations do not need to parrot the process in the ACHP's Section 106 regulations. However, as outlined above, they do need to provide a process that provides the results specified in the ACHP's definition of "consideration equivalent to that afforded by the Council's regulations."

### **What if an Indian tribe's regulations themselves do not provide "consideration equivalent to that afforded by the Council's regulations?"**

The agreement entered into between the Indian tribe and the ACHP may include provisions to ensure that all of these core requirements are included to the extent they are not already reflected in the tribal regulations. For example, if an Indian tribe's regulations do not provide federal agencies with the information needed for the agencies to take into account the effects of the undertaking on historic properties, the Section 101(d)(5) agreement could be used to bind the tribe to provide that information to the relevant federal agency.

### **What does the tribe have to submit to the ACHP?**

The tribe must submit a letter from tribal leadership specifying the Indian tribe's interest in entering into a Section 101(d)(5) agreement with the ACHP to substitute the tribe's regulations for the ACHP's regulations. A copy of the tribe's regulations must be included. The tribe may also wish to include other supporting documentation, such as how the regulations' provisions meet the equivalency standard, what federal agencies conduct undertakings on the tribe's lands, and any other information that would assist the ACHP in reviewing the request for substitution.

### **Why does the ACHP consult with the SHPO?**

The ACHP must do so because Section 101(d)(5) specifically requires that the ACHP consult with the "appropriate State Historic Preservation Officers." Subject to the one exception, noted below, the "appropriate SHPO" is the SHPO for the state or states overlapped by the tribal land of the tribe requesting the Section 101(d)(5) substitution.

The exception is that there is no "appropriate SHPO" to be consulted on a Section 101(d)(5) substitution when the tribe requesting substitution:

- (1) Has a Tribal Historic Preservation Officer (THPO) pursuant to Section 101(d)(2); and
- (2) Has no properties within its tribal land, beyond those held in trust by the Secretary of the Interior, that are owned by non-tribal members.

This exception is based on the Section 106 regulations, which provide for a THPO to act in lieu of the SHPO regarding undertakings on its tribal lands (36 C.F.R. § 800.2(c)(2)(i)(A)), and the section in the NHPA that otherwise authorizes owners of properties on tribal lands that are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in such undertakings (54 U.S.C. § 302702(4)(C)).

### **For a Section 101(d)(5) substitution, must the relevant tribal regulations or the Section 101(d)(5) agreement provide a role for other Indian tribes who may attach significance to historic properties within the boundaries of the requesting tribe's lands?**

Yes. The NHPA requires federal agencies, in carrying out their Section 106 responsibilities, to consult with any Indian tribe that may attach religious and cultural significance to historic properties affected by their undertakings (54 U.S.C. § 302706(b)). In order for this statutory requirement to be met, the Section 106 regulations require that such tribes be consulted regardless of the location of the undertaking, including within the tribal lands of other tribes. In order for a tribal regulation to “afford historic properties consideration equivalent to those afforded by the Council’s regulations,” it must provide a consultative role for other tribes that might attach religious and cultural significance to historic properties located on the lands subject to the tribal regulation.

This is also consistent with the NHPA’s requirement that the Secretary of the Interior, in considering an Indian tribe’s assumption of the responsibilities of the SHPO, consult with other Indian tribes whose ancestral lands may be affected by the conduct of the tribal preservation program.

If the tribal regulation does not include a provision for federal agency consultation with other Indian tribes, the requirement can be included in the agreement between the ACHP and the tribe.

**What are “tribal lands” for purposes of the Section 101(d)(5) substitution?**

“Tribal lands” means all lands within the exterior boundary of any Indian reservation and all dependent Indian communities.

**Can the Section 101(d)(5) substitution apply to federal undertakings off tribal lands but within the Indian tribe’s ancestral lands?**

No. Section 101(d)(5) allows the ACHP to enter into an agreement with an Indian tribe to substitute the tribe’s regulations for the ACHP’s regulations for undertakings *on tribal lands*. Therefore, Section 101(d)(5) does not provide the authority for such a substitution off tribal lands.

However, other vehicles are available under the Section 106 regulations that could achieve similar purposes. For instance, a programmatic agreement under 36 C.F.R. § 800.14 could specify how certain undertakings on a tribe’s ancestral lands would be reviewed by a federal agency. Please refer to those regulations for specifics on the parties that must execute such agreements and must be consulted in their negotiation.

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