



VOLUME 4 - TRIBAL AND NATIVE HAWAIIAN POLICIES AND INITIATIVES

Table of Contents

Policies and Procedures

- Consultation Procedures Pursuant to E.O. 13175 (2021)
- Internal Government-to-Government Procedures (2009)

- Tribal Historic Preservation Officers (2014)

- Native Hawaiian Organizations (2008)

- The ACHP's Trust Responsibilities (2004)

- Indian Tribes (2000)

Major Initiatives

- Early Coordination with Indian Tribes

- Plan to Support the UN Declaration on the Rights of Indigenous Peoples (2013)

- Traditional Knowledge

 - Traditional Knowledge and the Section 106 Process
 - U.S. Statement to UN PFII

- Partnership with Salish Kootenai College

- Interagency MOUs

 - Sacred Sites
 - Treaty Rights
 - Native Hawaiian Organizations

- White House Council on Native American Affairs

 - Readout of the Biden-Harris Administration's First Meeting of the WHCNAA
 - WHCNAA (4.23.21) Principals Meeting Package



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 tribes¹ 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.² 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.³ The Section 106 regulations also require federal agency consultation to recognize the

¹For 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.

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

³54 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.⁴

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

⁴36 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.⁵ 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.⁶

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.

⁵ 54 U.S.C. § 302705

⁶ 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.

April 2017

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.

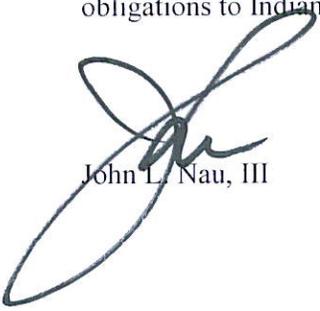
"In recognition of the status of Federally recognized Indian tribes as sovereign authorities and in accordance with the President's Memorandum on "Government to Government Relations with Native American Tribal Governments" (April 29, 1994), the ACHP is committed to operating on the basis of government-to-government 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.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@achp.gov • www.achp.gov

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, consisting of a large, stylized initial 'J' followed by 'L. Nau, III'.

John L. Nau, III



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

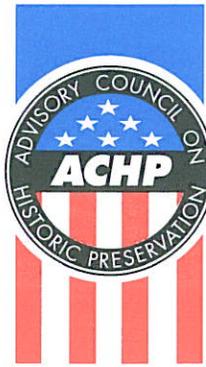
Implementation of the policy is the responsibility of the ACHP's leadership and staff. Staff responsibility for this policy will reside with the Offices of Native American Affairs (ONAA) and Federal Agency Programs (OFAP). Accordingly, it shall be the responsibility of those offices to:

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.



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.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@achp.gov • www.achp.gov

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.



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.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@achp.gov • www.achp.gov



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

ADVISORY COUNCIL ON HISTORIC PRESERVATION

1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@achp.gov • www.achp.gov

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.



EARLY COORDINATION WITH INDIAN TRIBES: ACHP RESOURCES

It is essential that applicants include Indian tribes in project planning and the information gathering that takes place in advance of submitting an application for federal approval or funding. Such coordination can lead to avoidance of impacts to places of religious and cultural significance to Indian tribes, before the applicant decides on the project location and footprint.

With assistance from a tribal working group, federal and state agencies, and energy producers and trade organizations, the ACHP published [*Early Coordination with Indian Tribes During Pre-application Processes: A Handbook*](#) in 2019. It provides background information on the Section 106 process for applicant-driven projects and offers suggestions for federal agencies, industry, and Indian tribes to work collaboratively and effectively in pre-application planning. The document includes best practices from an Indian tribe, an energy company, and a state transportation agency.

The ACHP also launched a free, online, on-demand eLearning course in July 2019, **Early Coordination with Indian Tribes for Infrastructure Projects**. The course will help federal agencies and applicants develop skills for interacting and working with Indian tribes early in project planning. Registration is through the ACHP's [e-Learning Portal](#).



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.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@achp.gov • www.achp.gov

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



Traditional Knowledge and the Section 106 Process: Information for Federal Agencies and Other Participants

Introduction

The Section 106 review process requires federal agencies to consider the impacts of undertakings they carry out, license, or assist on properties determined eligible for the National Register of Historic Places, including those with religious and cultural significance to Indian tribes and Native Hawaiian organizations (NHOs). Understanding how the significance of historic properties of cultural and religious significance to Indian tribes and NHOs is determined and effects to them are resolved, in consultation with Indian tribes and NHOs, is crucial to successful Section 106 reviews. The purpose of this paper is to explain the important role traditional knowledge can play in meeting these requirements.

Key Concepts

Although the term “traditional knowledge” (TK) is not defined in the National Historic Preservation Act (NHPA) or its implementing regulations, its role in the Section 106 process is necessitated by the requirement, at 36 CFR Section 800.4, that agency officials “acknowledge that Indian tribes and Native Hawaiian organizations (NHOs) possess **special expertise** in assessing the eligibility of historic properties that may possess **religious and cultural significance** to them.” Traditional knowledge is an integral part of that special expertise. The Advisory Council on Historic Preservation (ACHP) applies the term “traditional knowledge,” for purposes of Section 106, to the information or knowledge held by Indian tribes and NHOs and used for identifying, evaluating, assessing, and resolving adverse effects to historic properties of religious and cultural significance to them.

The NHPA clarifies that properties of religious and cultural significance to Indian tribes and NHOs may be eligible for the National Register of Historic Places. It also requires federal agencies, in carrying out the Section 106 review process, to consult with Indian tribes and NHOs when historic properties of religious and cultural significance to them may be affected by a federal undertaking. The ACHP’s regulations implementing Section 106, 36 CFR Part 800, in turn, require federal agencies to consult with Indian tribes and NHOs throughout the Section 106 review process.

This paper focuses on traditional knowledge of Indian tribes and NHOs and its role in the Section 106 process. For purposes of this paper and out of respect, Native Hawaiians will be referred to as *kanaka maoli* unless the legal rights of NHOs are being discussed. The term “Native Hawaiian organization” refers to certain groups who have the right to participate in the Section 106 review process. *Kanaka maoli* is the Hawaiian word, roughly translated as “the people” or “true people.” It should also be noted that the actual name of each Indian tribe should be used to address the tribe in the consultation process.

This paper includes appendices with examples of how *kanaka maoli*, Indian tribes, intertribal organizations, federal and state agencies, and international bodies explain and address traditional knowledge. The tribal information was generously provided by tribal representatives and the Hawaiian information from *kanaka maoli* to help educate others about the importance of traditional knowledge and

its place in their worlds. The information is presented as it was submitted to the ACHP. The ACHP acknowledges that sharing and discussing traditional knowledge can be sensitive and is grateful to all those who helped draft this paper and provided information for the appendices. The appendices will be updated as additional information is provided to the ACHP.

Traditional Knowledge

It is important to understand at the outset that traditional knowledge is frequently used by Indian tribes and *kanaka maoli* to identify historic properties of religious and cultural significance to them in the Section 106 review process. While there is no singular federal definition or understanding of traditional knowledge, the concept of traditional knowledge is recognized by a number of federal agencies in the context of environmental reviews and in carrying out land management and restoration. In these contexts, it is often referred to as traditional ecological knowledge or TEK. It may also be referred to as indigenous knowledge or traditional cultural knowledge. For the purposes of Section 106, the term “traditional knowledge” is inclusive of all these terms, and it informs the body of knowledge referred to in the Section 106 regulations as “special expertise.”

Traditional Knowledge in the Section 106 Process

While indigenous oral histories and traditions that inform traditional knowledge have, in the past, been treated as mythology, stories, or folklore by some people who are not indigenous and therefore lacking validity, this is not the case for traditional knowledge which is both valid and an accepted form of information acknowledged by federal law. For example, oral tradition is one of 10 lines of evidence used to demonstrate cultural affiliation in the Native American Graves Protection and Repatriation Act (NAGPRA). The federal acknowledgement process (25 CFR Part 83) also often integrates tribal knowledge as part of the evidence collected to demonstrate continuity of Indian tribes and their social and political interactions over time. That said, the ACHP is not suggesting that traditional knowledge is only legitimized when specifically identified in federal law or regulation; rather, the ACHP points to these examples to illustrate the ongoing practice of the federal government to recognize traditional knowledge as valuable information.

The inclusion of traditional knowledge in the Section 106 process is a critical component in the identification and evaluation of historic properties. In fact, the Section 106 regulations at 36 CFR § 800.4(c)(1) require federal agencies to acknowledge the special expertise of Indian tribes and NHOs in evaluating and, by extension, identifying historic properties of religious and cultural significance to them. Including Indian tribes or NHOs early on in project planning in addition to consulting with them at every step of the process as required in the regulations, will help provide federal agencies with the information necessary to carry out the Section 106 process. It should also be noted that the regulations acknowledge that the passage of time, changing perceptions of significance, or incomplete prior evaluations may require the reevaluation of project areas for the presence of historic properties (36 CFR § 800.4(c)(1)). This is a particularly important consideration in planning for identification, because past identification and evaluation efforts may not have included the traditional knowledge held by Indian tribes and NHOs.

Indian tribes or their designated representatives and NHOs and *kanaka maoli* are the experts about their respective cultures and thus are the experts in the identification and evaluation of historic properties of religious and cultural significance to them. Federal agencies are not the experts on what constitutes traditional knowledge. It must also be understood that historic properties are unique to each Indian tribe or NHO and may have tangible or intangible characteristics that could include both natural and human-made elements. Each Indian tribe or NHO may have their own information about a specific place that differs from that of another tribe or NHO, because each has a unique culture and history. In many cases, different tribes or NHOs may have different views or beliefs about the same place. The fact that each may

hold different traditional knowledge about the same place does not invalidate that knowledge. Additional outreach and consultation may be required for a federal agency to engage with multiple tribes to better understand a single place; such additional efforts enrich the process and better inform decision making.

In planning for Section 106 consultation, federal agencies should recognize that it may take time for Indian tribes or NHOs to produce traditional knowledge because such knowledge is not usually documented in databases or written files and may in fact be dispersed in different locations and among more than one person. In some cases, the very act of writing down traditional knowledge can cause harm to the practices and places with which it is related. Sometimes, such information or permission to share such information needs to be obtained from knowledgeable community members, elders, preservation boards, cultural committees, and/or elder advisory boards of an Indian tribe or NHO. Doing so may take time. Indian tribes and NHOs may also have protocols that dictate if, how, and/or when they can divulge or discuss information about properties of religious and cultural significance. For example, there may be times during the year when it is forbidden to speak about certain places or their use. Such protocols or prohibitions should be considered in the Section 106 process and project planning and may require a fair degree of flexibility and creativity in decision making. Therefore, working with Indian tribes and NHOs early in the Section 106 process makes sense in order to accommodate protocols and information gathering.

In addition, the Section 106 regulations require federal agencies to conduct consultation in a manner that respects tribal sovereignty and recognizes the nation-to-nation relationship that exists between Indian tribes and the federal government. The regulations further remind the agency official to take into account and address any tribal or NHO concerns about confidentiality pursuant to 36 CFR § 800.11(c). Therefore, federal agencies must treat access to and use of traditional knowledge as part of the nation-to-nation interaction and be guided by tribal protocols about traditional knowledge.

The National Congress of American Indians (NCAI), an intertribal organization, states that “traditional knowledge should also only be accessed through the government-to-government process that respects the sovereign right of each Tribe to determine its appropriate process with its tradition holders for access...in those cases where traditional knowledge may be shared by the tribes, measures need to be developed to ensure that it is used appropriately, that tribes are protected in policy and law against its misuse and that the tribes are able to determine and receive benefits from its use.”¹

Traditional knowledge can provide information that greatly enhances a federal agency’s ability to make historic preservation decisions that respect, value, and take into account historic properties of religious and cultural significance to Indian tribes or NHOs. The integration of traditional knowledge into project planning can also help ensure identification and evaluation efforts meet the regulatory requirement that the federal agency carry out a reasonable and good faith effort. The demonstration of respect for traditional knowledge can show the Indian tribe or NHO that the agency takes its responsibilities seriously and recognizes values and practices of the Indian tribe or NHO.

Traditional Knowledge in the U.N. Declaration on the Rights of Indigenous Peoples

In 2013, the ACHP formally adopted a plan to support the U.N. Declaration on the Rights of Indigenous Peoples (Declaration). The plan includes a commitment to incorporate the principles and aspirations in ACHP’s work regarding tribal and *kanaka maoli* historic preservation. Therefore, it is important to briefly discuss what the Declaration says about traditional knowledge and its relationship to this information paper.

¹The National Congress of American Indians Resolution #REN-13-035

While the U.S. acknowledges tribal self-determination in federal statute, regulation, and executive actions, it bears noting that Article 3 of the Declaration states that indigenous peoples have the right to self-determination. In this context, the ACHP recognizes that this inherent right is the underpinning for any discussion about potential sharing of traditional knowledge by Indian tribes and *kanaka maoli* and uses of it by federal agencies. The following articles provide further clarity about the rights of indigenous peoples as it relates to their traditions and knowledge.

Article 12 of the Declaration proclaims the right of indigenous peoples “to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access to privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.”

Article 15 explains that “indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information and that states (national governments) shall take effective measures to promote understanding among indigenous peoples and others.”

Article 19 is particularly relevant to the use and integration of traditional knowledge in Section 106 decision making. It states that governments “shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative and administrative measures that may affect them.” In requesting traditional knowledge, federal agencies should be respectful of an Indian tribe’s or NHO’s authority to disclose or withhold such information. If such information is shared by an Indian tribe or *kanaka maoli*, the federal agency should obtain permission regarding how and when it is used. The NHPA does not require any Indian tribe or NHO to provide federal agencies with traditional knowledge simply because it may be valuable information in the context of Section 106 decisions. Traditional knowledge belongs to the people who hold it.

Finally, Article 31 states that “indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” Working with indigenous peoples, governments “shall take effective measures to recognize and protect the exercise of these rights.”

Accordingly, in the context of the Section 106 process, when a federal agency is working with and respectful of an Indian tribe’s or NHO’s special expertise, its actions align with these principles in the Declaration.

Conclusion

The ACHP has provided this information to help inform federal agencies of their obligation to incorporate traditional knowledge into their Section 106 decision making.

Traditional knowledge is a valuable source of information that federal agencies must recognize and incorporate into the Section 106 process to determine whether an undertaking would affect a historic property of religious and cultural significance to an Indian tribe or NHO and, if so, how to resolve such effects. When a federal agency engages a traditional knowledge consultant, such as a tribal or *kanaka maoli* specialist, traditional practitioner, or tribal or *kanaka maoli* archaeologist, to inform its

identification and evaluation efforts, the agency should compensate that subject matter expert just as other subject matter experts would be compensated for their particular and specific knowledge and skills. It has long been recognized that archaeologists, historic architects, and architectural historians, among others, possess the knowledge and expertise to assist federal agencies in meeting their Section 106 responsibilities. It has also long been the practice to compensate them for their services when employed by a federal agency. The same recognition of the knowledge and expertise that tribal and *kanaka maoli* preservation and traditional practitioners possess is long overdue, and compensation for the employment of such consultants is appropriate to assist applicants and federal agencies in the Section 106 process.

Although traditional knowledge and non-Native scientific knowledge may arise from different cultural traditions, they are often compatible when integrated appropriately. The ACHP believes that both Native and non-Native ways of knowing are important to a full understanding of historic properties that must be considered in the Section 106 review process. Listening to indigenous perspectives, even when they differ, and taking traditional knowledge into account are vital to achieving informed decisions about historic properties.

Acknowledgements

The ACHP wishes to thank the many tribal and *kanaka maoli* partners who helped frame and contributed to this paper. They spent many hours in discussions with ACHP staff, edited the main text, and shared information for the appendices. Their participation in this effort has enriched the content and given it greater meaning.

April 2021

The Appendices

It is helpful for federal agencies and others to be aware of how Indian tribes and NHOs/*kanaka maoli*, intertribal organizations, various international bodies, as well as some governmental agencies have characterized traditional knowledge. The following is only a sampling of such sources; therefore, it is important to note that these examples are not universal but rather represent the views and understandings only of the referenced source.

Common throughout the definitions included here is the reality that traditional knowledge is reflective of and often tied to local landscapes as understood through the local community. Regardless of how expansive or specific the traditional knowledge is, an important takeaway is that traditional knowledge is both held by and verified through the Indian tribe or NHO providing such information; federal agencies are not the authority on what constitutes traditional knowledge. As noted previously, the ACHP considers traditional knowledge to be the information held by Indian tribes and NHOs and is the special expertise they bring to the Section 106 process.

Appendix A: Traditional Knowledge as Explained by *Kanaka Maoli*

Kaleo Paik, Indigenous First Nation

Our sacred places were chosen and structures erected for specific purposes. The purpose and what it served was carried down through traditional knowledge via oral history or practices that have continued over time. Therefore the term traditional knowledge can only be defined through the lens of that indigenous culture and not through the filters of a process which undermines the very indigenous wisdom by vetting it through a science that is not well suited to understand or help make the final decision in regards to our sites.

Excerpt Provided by Kua'aina Ulu Auamo (KUA)

Hawaiian view of natural resources

Hawaiian world view emerged from many generations of life in this archipelago, and while beliefs are diverse, several key beliefs are common across the islands. One of these common beliefs holds that native species are ancestors to humans. This imposes familial responsibilities on people, and engenders respect and care for native plants and animals. Many native species are also viewed as physical manifestations of akua (gods), linking natural and supernatural worlds, and removing them from the mundane world, and requiring the attention devoted to sacred matters. Native species and ecosystems are further viewed as an inherent part of place, and cannot be separated from the cultural sense of place. To many Hawaiians, the natural world is in an ongoing reciprocal relationship with people that requires dedication and effort to maintain. Hawaiian cultural identity, knowledge, and practice are rooted in this reciprocal relationship with the land -- and the health of one depends upon the health of the other.

Traditional knowledge

Traditional Hawaiian knowledge encompasses a broad scope, including knowledge of native species diversity, knowledge of ecological processes and patterns, and knowledge of management of land and sea. Such knowledge was originally transmitted purely in an oral, trans-generational manner, and remains embodied in the names of species and places, and in oli (chants), mo'olelo (stories), and 'ōlelo no'eau (proverbs). There recently has been a development of explorations on the process of Hawaiian inquiry: on how traditional knowledge is gathered, assessed, and promulgated. This "Hawaiian Science" is comparable to conventional "Western Science" in terms of observation, manipulation, testing, and promulgation of knowledge. An example of this kind of exploration in the Papakū Makawalu inquiry method promises to create a multi-tiered training approach in traditional knowledge that honors and reinstates ancient knowledge, but is valid and applicable for modern times.

Hawaiian values

The values of Hawaiian people are broad-ranging, encompassing all aspects of human interactions with each other and with their environment. This paper does not intend to cover all values, but points out that many of these values align very well with the cause of conservation. For example:

'ike: knowledge and deep understanding is highly valued, and essential for survival and producing abundance;

ho'omau: perseverance, continuity and training ensures long term success and perpetuation of life;

kānāwai: rules dictate appropriate behavior for places and resources, mitigating abuse, waste and overuse;

laulima: pooling of resources and efforts is characteristic of familial coordination and cooperation which extends to nature;

lōkahi: interdependence between all beings is necessary for survival, and the balance of uses is a desirable condition;

Appendix B: TRADITIONAL KNOWLEDGE AS EXPLAINED BY INDIAN TRIBES

Confederated Salish and Kootenai Tribes

Cultural resources are precious Tribal resources. They encompass the Tribes' elders, languages, cultural traditions, and cultural sites. They include the fish, wildlife and plants native to the region and land forms and landmarks. Tribal elders and the languages are perhaps the most vital of these resources because they teach and communicate the histories and traditional lifestyles of the Tribes. The traditions depend on land based cultural resources, the topic of this chapter. These land-based resources include native fish and wildlife and their habitats, food and medicinal plants and the areas where they grow, prehistoric and historical use sites, and other land areas where Tribal members currently practice cultural traditions.

Hunting, fishing, plant harvesting, hide-tanning, food and medicine preparation, singing, dancing, praying, feasting, storytelling and practicing ceremonies are examples of age-old traditions that rely on the land and the community of life it supports.

Although each of the Tribes on the Reservation possess distinctive beliefs and practices, the people share one important similarity: Tribal people value the Earth—its air, water and land— as the foundation of Indian culture. In the words of the Flathead Culture Committee,

The Earth is our historian, it is made of our ancestors' bones. It provides us with nourishment, medicine and comfort. It is the source of our independence; it is our Mother. We do not dominate Her, but harmonize with Her.

The Tribes believe everything in nature is embodied with a spirit. The spirits are woven tightly together to form a sacred whole (the Earth). Changes, even subtle changes that affect one part of this web affect other parts.

Protecting land-based cultural resources is essential if the Tribes are to sustain Tribal cultures. This is one of the most important goals of Tribal natural resource management on the Reservation. It is also a goal that the Tribes have for Tribal aboriginal territories managed by other entities.²

Traditional Indigenous Knowledge – John Brown, Narragansett Indian Tribe

Traditional indigenous knowledge is what Indian tribes and Native Hawaiians bring to the Section 106 process in identifying, evaluating and determining effects to historic properties of religious and cultural significance to them. In simple terms, it is their way of knowing about these places.

Each culture has its unique way of knowing things, of viewing the world, of expressing their views and ideas. Different cultures can look at the same object, place, or living thing but may have very different knowledge about it or even have similar knowledge but express that knowledge differently. For example, a non-Native woman might look at a maple tree and think of it as a tree and source of maple syrup. A Native woman might look at the same tree and see it as a spirit being or source of medicine or power. In historic preservation, an archaeologist might examine a site and see its potential to yield archeological information about the past while a Native person might know it as a place of power and spiritual

² CONFEDERATED SALISH & KOOTENAI TRIBES - COMPREHENSIVE RESOURCES PLAN

significance. An archaeologist might have to use technology and dig into the site to obtain the information while a Native person might see certain clues on the surface that indicate the type of place it is without having to physically disturb the site. The archaeologist obtained his or her knowledge through a non-Native education system and practice while the Native person might have obtained his or her knowledge through a system of learning specific to that culture. The content of such learning may also have been very different than that passed down to the archaeologist.

Traditional Knowledge is a non-linear expression that considers math, sciences, history, psychology, structural engineering and religion all at once from multiple vectors.

We are looking at the same reality; Traditional Knowledge simply expresses reality differently. So, what is needed is a translation process so that two or more parties can communicate, come to an understanding and reach common ground.

CONCEPTUALIZING TRADITIONAL KNOWLEDGE: Tejon Indian Tribe

Traditional Knowledge (“TK”) is the deep generational wisdom gleaned via indigenous peoples’ symbiotic relationship with their super/natural environments over millennia of sustainable coexistence with those environments. Therefore, TK can include agricultural, anthropological, astronomical, biological, cultural, ecological, geological, historical, mathematical, medical, pharmacological, philosophical, spiritual and various other types of modern academic data, which are typically commingled by most aboriginal societies into a holistic and interdisciplinary ‘science’ or TK. While the ontological value of TK is derived from its persistence through the millennia (via, e.g., traditional practices, oral histories, cosmologies, etc.), its epistemological value is derived from the epigenetic and ethnolinguistic access that is *only* available to the aboriginal society maintaining a particular TK. Consequently, the ability to document, implement, interpret, transmit and/or otherwise utilize TK is *only* possible with the *proactive* participation of the indigenous keeper(s) of the TK. The Tejon Indian Tribe acknowledges that each aboriginal society maintains a discrete TK; thereby, making it impossible to provide a universal definition for TK. However, it is not implausible for multiple TKs to align, either partially or wholly, along the aforementioned principles.

TRADITIONAL KNOWLEDGE: Cheyenne River Sioux Tribe

The Cheyenne River Sioux Tribe realizes the principles established by the Department of the Interior in National Register Bulletin 38, “Guidelines for Evaluating and Documenting Traditional Cultural Properties.” This document states: “A traditional cultural property, then can be defined generally as one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.”

Site descriptions embodying a lifeway which has been ancestrally communicated through oral tradition, when transmitted to a professional of non-native descent, has typically been diminished as knowledge that is *incidental information or addendum* that is relevant but not essential to determine a site’s significance or eligibility to the National Register of Historic Places. Eligibility criterion determination measures are not inclusive of those Native attested descriptive tangible or intangible values of a site’s content. This condition prompts the non-native communities of researchers to seek to determine validation by scientific weights, measures, research of non-native theses and dissertations, and lastly, replication. In previous projects where Oceti Sakowin TCS have disclosed site information has led to traditional knowledge being appropriated without Oceti Sakowin permission. Perceptions engendered by the non-native researcher

becomes an erroneous depiction that is cited and compounded by citation and reference over time. Essentially, Oceti Sakowin knowledge is not a commodity that an academic degree can validate, or be owned via non-native scholarly research objectives and thereby be discounted of historical/cultural relevance.

Susanville Indian Rancheria
Melany L Johnson, THPO/NAGPRA Coordinator

Traditional Ecological Knowledge, TEK, when I first heard of this term I didn't know what it was and thought to myself I need to ponder this. TEK refers to the aboriginal, indigenous, Native form of knowledge, practice, and belief. It is passed down from generation to generation, culturally. It's the relationship of us, as living human beings and our environment; which is also living.

TEK is controversial in management and science. Science uses data based on research and experimentation. We as Native Americans know the cultural knowledge as it has been passed down from Great Grandparents to Grandparents to parents to children, to grandchildren. It's the Circle of Life. It is how we survived for thousands of years, even in hostile environments. We are the experts.

We suffered a *DISCONNECT* when our California homelands were invaded by Europeans, pioneers, and the 49er's. While it's true that we suffered Genocide, we are here today because our Great Grandparents were lucky enough, clever enough to stay alive. But, they had to sacrifice so much for us to be here, right now, right at this moment.

For me, my language was forbidden, my Grandma wanted us to be assimilated...But, she took us out in the woods and in the meadows to gather foods and medicine. We know how to take care of the plants, what to do to make them come back again next year. We know how to make acorn soup and jellies. We know how to gather basket materials and how to burn. We know the places of importance, medicine places, food sources, roots, Sacred areas.

Everything is related, everything is connected, Mother Earth, Water, Air, the four legged, the two legged, the winged, the trees, our food. We are all connected; we need to take care of our resources.

You must also understand, non-natives cannot do TEK. They can understand, they can be respectful...but it's not their job to sing, pray, give offering to our sites. That is our job.

Traditional Indigenous Knowledge
Sunshine Thomas-Bear, Winnebago Tribe of Nebraska

Traditional Knowledge (TK) to the Winnebago Tribe of Nebraska is a connection to all things. We are connected from the air we breathe, the ground we walk on, to the foods we grow, the animals and plants we share our earth with, the connectedness with all things our creator put on this earth. We grow and respect all of these things in our lifetime, knowing that one day we will return to the earth and the cycle of life will continue.

Although colonization and the genocide of our people has taken its toll, loss of lands, culture, language and family structure, through TK we continue to learn, grow and become what our ancestors wanted for us. We are, our ancestor's prayers; answered. The battle to let go of the historical trauma of our people, learn from what we have left of TK, and form our culture and language from what we can reconstruct and reconnect with has and will be an ongoing battle but through TK we know where we come from, our oral

history, our lands our ancestors have walked on, finding our way back and knowing it is our place, here. Through perseverance and resistance, we continue to protect our culture, lands, and language, all of this possible through TK.

The Winnebago Tribe of Nebraska knows the battle for our lands and have suffered through the loss of our homelands and the split of our people and families due to removal. Finding our way back and protecting the lands we have left is extremely important to us. Unfortunately, we have to rely on a government that we know we cannot trust, that has not upheld their treaties with our people and learn to work with them to protect what little we have left.

Our people are aware that this form of knowledge, this blessing of being connected to everything is not a Western belief, nor can it be comprehended by many who are not Indigenous. There is a disconnect. Our people belong in all areas where decisions are being made, not only for our lands, but our culture, language, foods, children and people. No one can understand what we need and what our lands need but us. The world as a whole is not pieces to be broken up and to profit from, it is living and breathing and our people, all Indigenous people have a job to uphold, to protect our lands through our connection to all things.

Confederated Tribes of the Colville Reservation Tribal Historic Preservation Office

We have been called on to defend traditional information, knowledge, and places frequently in the last few years in relation to state, local, federal and international undertakings here in the Columbia Plateau. Our comments regarding TEK, Sacred Sites, places of religious and cultural significance, Indian trust assets, traditional foods' role in maintaining healthy minds and bodies, and the association between historic properties and ceremonial and ritual use is voluminous and compound. This is particularly true when determining areas of potential effect and cultural resource ties to natural resources, for example, the relationship between spirituality and full life cycle anadromous fish passage in the Upper Columbia River, or the importance of air and water quality to traditionally gathered food and medicinal plants. Each iteration of justifying Native American traditional practices in light of various undertakings and impacts is individualized and not easily condensed.

Appendix C: TRADITIONAL KNOWLEDGE AS EXPLAINED BY INTERTRIBAL ORGANIZATIONS

Affiliated Tribes of Northwest Indians

The Affiliated Tribes of Northwest Indians (ATNI), an intertribal organization comprised of 57 tribes, passed Resolution #11-77 stating that traditional ecological knowledge is "...an accumulation of centuries of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission." ATNI's resolution includes significant statements regarding the need for the United States and its agencies to "recognize and respect Tribal traditions, ordinances and expectations regarding access to and respectful use of their traditional ecological knowledge."

National Congress of American Indians

The National Congress of American Indians (NCAI), an intertribal organization, addressed traditional knowledge in Resolution REN-13-035, "Request for Federal Government to Develop Guidance on Recognizing Tribal Sovereign Jurisdiction over Traditional Knowledge." The resolution explains that traditional knowledge is a core part of tribal identities and ways of life, is highly spiritual, and carries responsibilities for its appropriate uses. NCAI goes on to explain that traditional knowledge includes, but is not limited to, the use of medicinal plants, knowledge of traditional habitats, and that some traditional knowledge is so sacred that it cannot be shared outside of tribal societies and traditional holders. Finally, NCAI also explains that there is increasing acknowledgement that tribal traditional knowledge is equivalent to scientific knowledge in solving environmental problems.

Appendix D: TRADITIONAL KNOWLEDGE AS EXPLAINED BY GOVERNMENT AGENCIES

U.S. Mission to the United Nations

In the 2019 U.S. Statement: UN Permanent Forum to the U.N. (PFII) Eighteenth Session Agenda Item 9: Traditional Knowledge: Generation, Transmission, and Protection, the U.S. Mission acknowledged the role of traditional knowledge in U.S. government decision making:

“The United States engages and works with Indian tribes, Native Hawaiian organizations and other indigenous communities to support, share, utilize and protect traditional knowledge. We have a legal framework in place to incorporate traditional knowledge into U.S. government decision-making.”

U.S. Bureau of Ocean Energy Management³

Traditional knowledge can be defined as a body of evolving practical knowledge based on observations and personal experience of indigenous residents over an extensive time period. It can be described as information based on the experiences of a people passed down from generation to generation. It includes extensive understanding of environmental interrelationships and can provide a framework for determining how resources are used and shared.

BOEM acknowledges that traditional knowledge is the following:

- Holistic
- Local and highly contextual
- Shared through kinship that promotes survival and well-being
- Dynamic rather than rigid
- Based on experience
- More than a collection of observations
- An important sociocultural component that anchors community values and can be part of a community’s spiritual and cultural identity
- A framework that emphasizes a fundamental sense of unity in which people are viewed as part of the environment.

U.S. Fish and Wildlife Service

The U.S. Fish and Wildlife Service (FWS) discusses traditional knowledge in its fact sheet, [*Traditional Ecological Knowledge for Application by Service Scientists*](#) as follows:

“Also called by other names including Indigenous Knowledge or Native Science, (hereafter, TEK) refers to the evolving knowledge acquired by indigenous and local peoples over hundreds or thousands of years through direct contact with the environment. This knowledge is specific to a location and includes the relationships between plants, animals, natural phenomena, landscapes and timing of events that are used for lifeways, including but not limited to hunting, fishing,

³ <https://www.boem.gov/about-boem/traditional-knowledge>

trapping, agriculture, and forestry. TEK is an accumulating body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (human and non-human) with one another and with the environment. It encompasses the world view of indigenous people which includes ecology, spirituality, human and animal relationships, and more.”

National Park Service

The National Park Service (NPS) has a webpage devoted to traditional ecological knowledge and describes it as:

“Traditional Ecological Knowledge (TEK) is the on-going accumulation of knowledge, practice and belief about relationships between living beings in a specific ecosystem that is acquired by indigenous people over hundreds or thousands of years through direct contact with the environment, handed down through generations, and used for life-sustaining ways. This knowledge includes the relationships between people, plants, animals, natural phenomena, landscapes, and timing of events for activities such as hunting, fishing, trapping, agriculture, and forestry. It encompasses the world view of a people, which includes ecology, spirituality, human and animal relationships, and more.

TEK is also called other names, such as Indigenous Knowledge, Native Science.”

State of California

AB-275 Native American cultural preservation (2020):

“Tribal traditional knowledge” means knowledge systems embedded and often safeguarded in the traditional culture of California Indian tribes and lineal descendants, including, but not limited to, knowledge about ancestral territories, cultural affiliation, traditional cultural properties and landscapes, culturoscapes, traditional ceremonial and funerary practices, lifeways, customs and traditions, climate, material culture, and subsistence. Tribal traditional knowledge is expert opinion.

Appendix E: TRADITIONAL KNOWLEDGE AS EXPLAINED BY INTERNATIONAL BODIES

The United Nations Educational, Scientific and Cultural Organization (UNESCO)

UNESCO defines traditional knowledge as “knowledge, innovations, and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, forestry and environmental management in general.”⁴

UN Permanent Forum on Indigenous Issues: Study on the treatment of traditional knowledge in the framework of the United Nations Declaration on the Rights of Indigenous Peoples and the post-2015 development agenda 2/2/15

“Traditional knowledge also encompasses traditional cultural expression and manifestations of sciences, technologies and cultures, including knowledge of human and genetic resources, seeds, medicines, flora and fauna, as well as oral traditions, literatures, designs, traditional sports and games and visual and performing arts.”

“In the WIPO context, traditional knowledge is considered to consist of traditional knowledge per se (techniques, practices, skills and innovations), traditional cultural expressions (the forms through which a traditional culture expresses itself, such as music, symbols or painting) and the genetic resources associated with traditional knowledge (such as medicinal plants or traditional crops).”

“Traditional knowledge is knowledge concerning the environment in which indigenous peoples live which is passed on from one generation to another in written and oral form on the basis of their own cultural codes. The knowledge is intangible, inalienable, imprescriptible and non-seizable. Traditional knowledge is a system of innovations and practices, and the only way of guaranteeing the survival of this knowledge and the associated best practices is to protect indigenous lands and ensure that both indigenous peoples and the biodiversity resources on their lands survive.”

“Traditional knowledge refers to knowledge, innovations and practices of indigenous peoples around the world which is developed through experience gained over the centuries, adapted to the local culture and environment and passed on orally from generation to generation (see the Declaration of the Indigenous Women’s Biodiversity Network). It tends to be collectively owned and takes the form of stories, songs, proverbs, cultural values, beliefs, rituals, laws and community rules, local language, art and agricultural practices, including the development of plant and animal species. It is sometimes referred to as oral tradition because it is transmitted orally but is also expressed through song, dance, paintings, sculptures or carvings. Traditional knowledge is mainly practical knowledge and covers areas such as agriculture, fishing, health, horticulture, forestry and environmental management (see www.cbd.int/traditional/intro.shtml). “

⁴ [Traditional knowledge | UNESCO UIS](#)

UN Permanent Forum on Indigenous Issues: Report on the eighteenth session (22 April-3 May 2019)

“Self-determination is closely linked to the generation, transmission and protection of traditional knowledge, given that indigenous peoples have the right to determine their own conditions for safeguarding and developing their knowledge.”

“Indigenous languages represent complex systems of knowledge that have been developed over thousands of years and are inextricably linked to lands, waters, territories and resources. Each indigenous language represents a unique framework for understanding the world in all its complexity and is a repository of traditional knowledge...”

“Indigenous languages are key to ensuring the continuation and transmission of culture, customs and history as part of the heritage and identity of indigenous peoples.”

World Intellectual Property Organization

Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.

While there is not yet an accepted definition of TK at the international level, it can be said that: **TK in a general sense** embraces the content of knowledge itself as well as [traditional cultural expressions](#), including distinctive signs and symbols associated with TK.

TK in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations.

Traditional knowledge can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge. (<https://www.wipo.int/tk/en/tk/>, 1/2020)

United States Mission to
the United Nations

U.S. Statement: UN Permanent Forum on Indigenous Issues (PFII), 18th Session Agenda Item 9; Traditional Knowledge: Generation, Transmission, and Protection

Valerie Hauser

Advisor

U.S. Mission to the United Nations

April 26, 2019

AS DELIVERED

The United States engages and works with Indian tribes, Native Hawaiian organizations, and other indigenous communities to support, share, utilize, and protect traditional knowledge. We have a legal framework in place to incorporate traditional knowledge into U.S. government decision-making.

For example, when federal agencies carry out, license, or assist on projects potentially affecting properties that Indian tribes and Native Hawaiian organizations view to be of religious and cultural significance, the National Historic Preservation Act and implementing regulations mandate consultation. In practice traditional knowledge is generally considered in identifying such properties and assessing how projects might affect them. The Advisory Council on Historic Preservation (ACHP), the federal agency overseeing these requirements, has explicitly acknowledged traditional knowledge in its tribal and Native Hawaiian policies and in consultation guidance. In another example, the Native American Graves Protection and Repatriation Act and its implementing regulations include “oral tradition” as a line of evidence to support a claim of cultural affiliation.

Confidentiality provisions in the National Historic Preservation Act and the Archaeological Resources Protection Act protect traditional knowledge. These provisions instruct federal agencies and other public officials to withhold sensitive information – including sites’ exact locations on public or Indian lands and information on the character, use, or ownership of historic properties – when disclosure could result in a significant invasion of privacy, damage to the historic property, or restrictions on using a traditional religious site. The Cultural and Heritage Cooperation Authority authorizes the Forest Service to protect tribal information from release under the Freedom of Information Act.

The Environmental Protection Agency (EPA) has several policies and guidance documents that directly address, include, or pertain to Traditional Ecological Knowledge, or TEK. Earlier this year, the EPA and ACHP hosted a webinar for their staff on traditional knowledge in the context of environmental and historic preservation review processes. Another webinar is planned for May 2019.

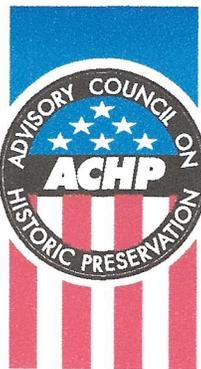
The Department of the Interior's National Park Service (NPS) actively supports traditional knowledge in associated national park areas and on tribal lands. Through engagement with Native Americans, Native Hawaiians, and Alaska Natives, NPS supports traditional knowledge and values the deep connection these traditions have to contemporary parklands.

Thank you for your attention.

###

This is the official website of the U.S. Mission to the United Nations. External links to other Internet sites should not be construed as an endorsement of the views or privacy policies contained therein.





Preserving America's Heritage

**Memorandum of Understanding
Among
the Advisory Council on Historic Preservation (ACHP),
the ACHP Foundation (Foundation), and
Salish Kootenai College (SKC)
Regarding the Tribal Preservation Training Partnership**

WHEREAS, the ACHP, an independent federal agency, promotes the preservation, enhancement, and sustainable use of the nation's diverse historic resources and advises the President and the Congress on national historic preservation policy;

WHEREAS, per 54 U.S.C. § 304102(a), the ACHP is authorized to, among other things, "encourage ... public interest and participation in historic preservation," "encourage, in cooperation with appropriate public and private agencies and institutions, training and education in the field of historic preservation," and "inform and educate ... Indian tribes ... and private groups and individuals as to the Council's authorized activities";

WHEREAS, the ACHP Foundation is a tax-exempt non-profit organization with an IRS designation of 509(a)(3) that supports the purposes of the ACHP by raising funds and distributing them to the ACHP as well as conducting activities for the benefit and/or to carry out the purposes of the ACHP;

WHEREAS, the ACHP and Foundation want to develop more preservation capacity in Indian country through a partnership with SKC to provide educational, personal development and professional growth opportunities to students in the Tribal Historic Preservation (THP) and Tribal Governance and Administration degree programs at SKC;

WHEREAS, in accordance with Section 101(d)(2) of the National Historic Preservation Act (NHPA) tribes may assume on their tribal lands the responsibilities of the State Historic Preservation Officer for purposes of Section 106 of the NHPA, which requires federal agencies to take into account the effects of projects they carry out, license, or financially assist on historic properties, and to do so in consultation with Indian tribes;

WHEREAS, the mission of SKC is to provide quality post-secondary educational opportunities for Native Americans, locally and from throughout the United States; and,

WHEREAS, SKC's THP program is committed to training resourceful, skilled, multi-disciplinary preservationists and promoting the involvement of tribal people and governments in cultural resource management that respects and values indigenous ways of knowing, oral tradition and Native ideologies.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

Now, therefore, the ACHP, Foundation, and SKC (the Parties) agree to work together to implement the following goals.

Mutual Goals:

1. Build awareness of the SKC THP program and the Parties collaboration;
2. Provide class lectures to SKC students via in-person and/or video teleconference regarding historic preservation content consistent with the THP curriculum and program needs;
3. Develop NHPA course content that will provide SKC students with guidance on; the 4-step Section 106 process, reasonable and good faith effort standards, roles and responsibilities of Indian tribes and Tribal Historic Preservation Officers, special expertise, sites of religious and cultural significance, ancestral lands, the federal-tribal relationship, and other applicable topics;
4. Develop experiential educational opportunities to include internships and field schools;
5. Develop a mentor program to facilitate guided interaction between ACHP and THP program students;
6. Co-host historic preservation gatherings such as Tribal summits at SKC; and
7. Hold an annual meeting either at the SKC campus or at the ACHP offices to review the MOU, develop best practices and explore additional opportunities for collaboration.

The ACHP agrees to:

1. Forward information and material to SKC as it pertains to historic preservation jobs, internships, or other professional opportunities. The ACHP will raise awareness of SKC's THP and Tribal Governance and Administration programs on its Native Youth website and at appropriate venues including but not limited to conferences, meetings, and to Indian tribes.
2. Facilitate the availability of ACHP staff subject matter experts, as appropriate, to offer class lectures via video teleconferencing and, if adequate funding is available, in-person at SKC at a minimum of once per quarter. Coordinate with other federal agencies to provide SKC with subject matter experts who can provide class lectures via video teleconferencing on Section 106 and/or other applicable historic preservation or environmental laws and regulations. Use its network of historic preservation experts to provide guest lecturers to SKC's THP program.
3. Provide/develop information and materials for Section 106 course content that can be integrated into existing SKC courses and curricula; work with partner agencies to provide/develop information and materials regarding other preservation laws that can be integrated into existing SKC courses.
4. Work with the Foundation and SKC to develop experiential education opportunities for SKC students such as internships and field schools.
5. Provide ACHP mentors or advisors for SKC students who can serve as educational resources, assist with professional development opportunities, and/or provide any other agreed upon guidance as it pertains to historic preservation.

6. Work with SKC to co-host a federal-tribal-student preservation gathering at SKC including development of agenda, facilitating federal agency participation, coordinating with the Confederated Salish and Kootenai Tribes, and other necessary actions.
7. Participate in an annual in-person meeting with SKC and the Foundation to assess the standing and utility of the MOU.
8. Seek other federal partners, in consultation with SKC, to participate in this MOU to provide support and professional expertise.
9. Not distribute information and material regarding the THP and Tribal Governance and Administration programs except those provided by SKC that are publicly available or are a product of this MOU.

The ACHP Foundation agrees to:

1. Work with ACHP and SKC to build awareness of the program and collaboration to expand educational and employment opportunities.
2. Assist in identifying financial support and Foundation mentors for SKC students in the Tribal Historic Preservation Program.
3. Assist in identifying, cultivating, and securing potential funds for ACHP to participate in this partnership. Assist in identifying, cultivating, and securing potential financial support for this partnership.
4. Work with the ACHP and SKC to develop experiential education opportunities for SKC students such as internships and field schools.
5. Collaborate with the SKC Development staff to identify and solicit potential donors and funders.
6. Participate in an annual in-person meeting with ACHP and SKC to assess the standing and utility of the MOU.

SKC agrees to:

1. Provide the ACHP with information relevant to the Tribal Historic Preservation course (i.e. class schedule, reading list, syllabus, etc.) and an invitation to offer course lecture at least one month in advance.
2. Coordinate with ACHP staff and staff of other federal agency staff in the development of original Section 106 curriculum for implementation into existing SKC courses or as a stand-alone course.
3. Coordinate with ACHP staff to define experiential education requirements necessary for students to receive credit hours in conjunction with the THP program.
4. Coordinate with ACHP staff regarding ACHP mentors/advisors to SKC students to ensure that students are paired with an appropriate ACHP staff expert. Review and approve mentor agreement and any associated content.
5. Provide conference space to host the proposed federal-tribal-student historic preservation gatherings. Assist with planning and coordination where feasible including but not limited to the development of

agenda items, identifying participants and presenters, and coordination with local federal agencies and Indian tribes.

6. Participate in an annual in-person meeting with ACHP and the Foundation to assess the standing and utility of the MOU.

7. Properly steward donors and develop appropriate recognition for this partnership.

General Provisions and Limitations

This MOU is a voluntary agreement that expresses the good-faith intentions of the Parties, is not intended to be legally binding, does not create any contractual or fiscal obligations, and is not enforceable by any party. It does not create any right or benefit, substantive or procedural, enforceable by law or equity, by any party, against the Parties, their officers or employees, or any other person. This MOU does not direct or apply to any person outside of the Parties.

All commitments made by the ACHP in this MOU are subject to the availability of appropriated funds and budget priorities. Nothing in this MOU, in and of itself, obligates the ACHP to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations.

All commitments made by the Foundation in this MOU are subject to the availability of funds and budget priorities. Nothing in this MOU, in and of itself, obligates the Foundation to expend Foundation funds or to enter into any contract, assistance agreement, or incur other financial obligations.

All commitments made by the SKC in this MOU are subject to the availability of funds and budget priorities. Nothing in this MOU, in and of itself, obligates SKC to expend funds or to enter into any contract, assistance agreement, or incur other financial obligations. SKC will only provide publicly available materials pertaining to its THP and Tribal Governance and Administration programs to the ACHP, Foundation, or other partners or signatories to this MOU for public use and distribution.

This MOU does not transfer or convey any copyright or other intellectual property right held by SKC in the Tribal Historic Preservation Curriculum/Degree Program to the ACHP, Foundation, or any other party. SKC may share the Tribal Historic Preservation Curriculum/Degree Program materials with these parties for the sole purpose of fulfilling the terms of this MOU.

Administrative Provisions

This MOU takes effect upon signature of all Parties and shall remain in effect through the 2021-2022 academic year. This MOU may be extended or amended upon written consent from any Party and the subsequent written concurrence of the others.

Any Party can opt out of this MOU by providing a 60-day written notice to the other signatories.

Signatories

Salish Kootenai College


Dr. Sandra Boham
President

9.23.19

Date

Advisory Council on Historic Preservation


Aimee Jorjani
Chairman

9.23.19

Date

Advisory Council on Historic Preservation Foundation


Katherine Slick
President

9-23-19

Date



**Memorandum of Understanding
Among
U.S. Department of Defense
U.S. Department of the Interior
U.S. Department of Agriculture
Department of Energy
Advisory Council on Historic Preservation
on
Interagency Coordination and Collaboration for the
Protection of Indian Sacred Sites**

I. Purpose and Principles

The Departments of Defense, Interior, Agriculture, and Energy, and the Advisory Council on Historic Preservation, (Participating Agencies) entered into the Memorandum of Understanding, Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (MOU), to improve the protection of, and tribal access to, Indian sacred sites through enhanced and improved interdepartmental coordination and collaboration.

The Participating Agencies have amended the duration of the MOU from its original deadline of December 31, 2017, to December 31, 2024, in order to accomplish all of the commitments in the MOU. All other terms of the MOU, originally executed on December 5, 2012, remain the same.

II. Background

Federal land managing agencies hold in public trust a great diversity of landscapes, including many culturally important sites held sacred by Indian tribes. Indian tribes are defined here as an American Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103-454, 108 Stat. 4791. All Federal agencies are responsible for assessing the potential effects of undertakings they carry out, fund, or permit on historic properties of traditional cultural and religious importance to Indian tribes including sacred sites. While the physical and administrative contexts in which Federal agencies encounter sacred sites vary greatly, similarities do exist. Because of those similarities, the Participating Agencies recognize that consistency in policies and processes can be developed and applied, as long as they remain adaptable to local situations.

For purposes of this MOU, a “sacred site” retains the same meaning as provided in Executive Order 13007; that is “...any specific, discrete, narrowly delineated location on Federal land that

is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.” Such sacred sites may also be eligible for the National Register of Historic Places as historic properties of religious and cultural significance to Indian tribes.

Sacred sites often occur within a larger landform or are connected through features or ceremonies to other sites or a larger sacred landscape. Agencies should consider these broader areas and connections to better understand the context and significance of sacred sites. Sacred sites may include, but are not limited to geological features, bodies of water, archaeological sites, burial locations, traditional cultural properties, and stone and earth structures.

III. Authorities Which May be Relevant to the Protection and Preservation of Sacred Sites

The Participating Agencies will review the following authorities to determine their potential relevance to sacred sites and to determine if additional inter-agency measures may be warranted to better protect sacred sites.

Executive Order 13007: Indian Sacred Sites
 National Historic Preservation Act
 National Environmental Policy Act
 Native American Graves Protection and Repatriation Act
 American Indian Religious Freedom Act
 Religious Freedom Restoration Act
 Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

IV. Participating Agency Agreement

The Participating Agencies hereby agree to work together to accomplish, and consult with Indian tribes as appropriate in developing and implementing, the following actions:

1. Creating a training program to educate all Federal staff on (a) the legal protections and limitations regarding the accommodation of, access to, and protection of sacred sites and (b) consulting and collaborating effectively with Indian tribes, tribal leaders, and tribal spiritual leaders to address sacred sites;
2. Developing guidance for the management and treatment of sacred sites including best practices and sample tribal-agency agreements;
3. Creating a website that includes links to information about Federal agency responsibilities regarding sacred sites, agency tribal liaison contact information, the websites of the agencies participating in this MOU, and information directing agencies to appropriate tribal contact information for project consultation and sacred sites issues; this website would be hosted by one of the Participating Agencies;
4. Developing and implementing a public outreach plan focusing on the importance of maintaining the integrity of sacred sites and the need for public stewardship in the protection and preservation of such sites;

5. Identifying existing confidentiality standards and requirements for maintaining the confidentiality of sensitive information about sacred sites, analyzing the effectiveness of these mechanisms, and developing recommendations for addressing challenges regarding confidentiality;
6. Establishing management practices that could be adopted by Participating Agencies, for example, these could include mechanisms for the collaborative stewardship of sacred sites with Indian tribes, such as Federal-tribal partnerships in conducting landscape-level cultural geography assessments;
7. Identifying impediments to Federal-level protection of sacred sites and making recommendations to address the impediments;
8. Developing mechanisms to exchange/share subject matter experts among Federal agencies and identifying contracting mechanisms for obtaining tribal expertise;
9. Developing outreach to non-Federal partners to provide information about (a) the political and legal relationship between the United States and Indian tribes, (b) Federal agency requirements to consult with Indian tribes, and (c) the importance of maintaining the integrity of sacred sites;
10. Exploring mechanisms for building tribal capacity to participate fully in consultation with Federal agencies and to carry out the identification, evaluation, and protection of sacred sites; and
11. Establishing a working group of appropriate staff from each of the Participating Agencies to facilitate the implementation of the provisions of this MOU and address issues as they arise. The working group will develop an action plan for implementation of this MOU within 90 days. Participating Agency representatives will serve on the working group until replaced by their Agencies. The working group will be chaired by one of the Participating Agencies chosen by majority vote of the working group and will serve a 2-year term. At the expiration of the chair's term, the Participating Agencies shall select a new chair from among the Participating Agencies.

V. Non-Funding Obligating Document

Participating Agencies will handle their own activities and use their own resources in pursuing these objectives. Each party will carry out its separate activities in a coordinated and mutually beneficial manner.

Nothing in this MOU shall obligate any Participating Agency to obligate or transfer funds. Specific work projects or activities that involve the transfer of funds, services, or property among the various Participating Agencies will require execution of separate agreements and will be contingent upon the availability of appropriated funds. Any such activities must be independently authorized by appropriate statutory authority. This MOU does not provide such authority. Negotiation, execution, and administration of each such agreement must comply with all applicable statutes and regulations.

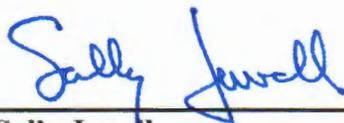
VI. Third Parties

This MOU is not intended to, and does not create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by any party against the United States, its agencies, its officers, or any person.

VII. Administrative Provisions

1. This MOU takes effect upon the signature of all Participating Agencies, and shall remain in effect until December 31, 2024. This MOU may be further extended or amended upon written consent from any Participating Agency and the subsequent written concurrence of the others.
2. Any Participating Agency can opt out of this MOU by providing a 60-day written notice to the other signatories.
3. Any additional Federal agencies may become Participating Agencies in this MOU at any time during the duration of the MOU. Participation will be evidenced by an agency official signature on the MOU.

VIII. Signatures



SEP 23 2016

Sally Jewell
Secretary of the Interior

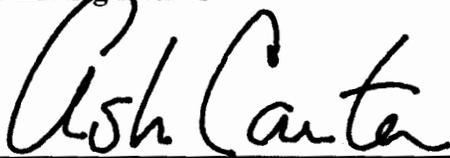
VI. Third Parties

This MOU is not intended to, and does not create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by any party against the United States, its agencies, its officers, or any person.

VII. Administrative Provisions

1. This MOU takes effect upon the signature of all Participating Agencies, and shall remain in effect until December 31, 2024. This MOU may be further extended or amended upon written consent from any Participating Agency and the subsequent written concurrence of the others.
2. Any Participating Agency can opt out of this MOU by providing a 60-day written notice to the other signatories.
3. Any additional Federal agencies may become Participating Agencies in this MOU at any time during the duration of the MOU. Participation will be evidenced by an agency official signature on the MOU.

VIII. Signatures



SEP 23 2016

Ashton Carter
United States Secretary of Defense

Date

VI. Third Parties

This MOU is not intended to, and does not create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by any party against the United States, its agencies, its officers, or any person.

VII. Administrative Provisions

1. This MOU takes effect upon the signature of all Participating Agencies, and shall remain in effect until December 31, 2024. This MOU may be further extended or amended upon written consent from any Participating Agency and the subsequent written concurrence of the others.
2. Any Participating Agency can opt out of this MOU by providing a 60-day written notice to the other signatories.
3. Any additional Federal agencies may become Participating Agencies in this MOU at any time during the duration of the MOU. Participation will be evidenced by an agency official signature on the MOU.

VIII. Signatures



Thomas J. Vilsack
Secretary
U.S. Department of Agriculture

9/24/16

Date

VIII. Signatures

Ashton Carter
Secretary
U.S. Department of Defense

Date

Sally Jewell
Secretary
U.S. Department of the Interior

Date

Thomas J. Vilsack
Secretary
U.S. Department of Agriculture

Date



Ernest J. Moniz
Secretary
U.S. Department of Energy

AUG 12 2016

Date

Milford Wayne Donaldson, FAIA
Chairman
Advisory Council on Historic Preservation

Date

Milford Wayne Donaldson

13 JUL 2016

Milford Wayne Donaldson, FAIA
Chairman
Advisory Council on Historic Preservation

Date



**MEMORANDUM OF UNDERSTANDING
REGARDING INTERAGENCY COORDINATION AND COLLABORATION
FOR THE PROTECTION OF TRIBAL TREATY RIGHTS
RELATED TO NATURAL RESOURCES**

White House Tribal Nations Conference

November 29, 2016

The White House Council on Native American Affairs Environment, Climate Change, and Natural Resources Subgroup developed the attached memorandum of understanding (MOU). The MOU affirms the signatory Agencies' commitment to protect tribal treaty rights and similar tribal rights relating to natural resources through consideration of such rights in agency decisionmaking processes and enhanced interagency coordination and collaboration.

The following agencies are signatories to the MOU as of the above date:

- U.S. Department of the Interior
- U.S. Department of Agriculture
- U.S. Department of Justice
- U.S. Department of Commerce
- U.S. Department of Defense
- U.S. Environmental Protection Agency
- U.S. Department of Transportation
- White House Council on Environmental Quality
- Advisory Council on Historic Preservation

This list will be updated as other agencies join the MOU.



MEMORANDUM OF UNDERSTANDING

among the

U.S. Department of the Interior,

U.S. Department of Agriculture,

U.S. Department of Justice ,

U.S. Department of Commerce,

U.S. Department of Defense,

U.S. Environmental Protection Agency,

U.S. Department of Transportation,

White House Council on Environmental Quality,

Advisory Council on Historic Preservation

REGARDING INTERAGENCY COORDINATION AND COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY RIGHTS

I. Purpose and Principles

The signatory agencies (Parties) enter into this Memorandum of Understanding (MOU) to affirm our commitment to protect tribal treaty rights and similar tribal rights relating to natural resources through consideration of such rights in agency decisionmaking processes and enhanced interagency coordination and collaboration.

II. Background

From 1778 to 1871, the Federal Government's relations with American Indian tribes were defined and conducted largely through the treaty-making process. These treaties established unique sets of rights, benefits, and conditions for the treaty-making tribes that agreed to cede millions of acres of their homelands to the United States in return for recognition of property rights in land and resources and Federal protections.

Through treaty-making, Indian tribes granted land and other natural resources to the United States, while retaining all rights not expressly granted. Treaties with American Indian tribes cover a wide variety of subjects, including rights reserved by tribes relating to natural resources, such as the right to hunt, fish, and gather both on land ceded or given up by tribes, and on land retained by tribes. Although the treaty-making era ended in 1871, Federal treaties with tribes ratified by the U.S. Senate remain the law.

Under the U.S. Constitution, treaties are part of the supreme law of the land, with the same legal force and effect as Federal statutes. Treaties bind both the Federal Government and the signing Indian tribe or tribes, and generally constitute recognition of rights to lands and resources, as well as rights to fish, hunt, and gather. As such, the Federal Government has an obligation to honor and respect tribal rights and resources that are protected by treaties. This means that federal agencies are bound to give effect to treaty language and, accordingly, must ensure that federal agency actions do not conflict with tribal treaty rights. Integrating consideration of tribal treaty rights into agency decisionmaking processes is also consistent with the Federal Government's trust responsibility to federally recognized tribes.

After the treaty-making era ended in 1871, agreements between tribes and the Federal Government were instead generally memorialized through other sources of law, including Acts of Congress, such as land claims settlement acts, and in some cases through executive orders. The Parties recognize that, like treaties, these other sources of federal law may also protect reserved tribal rights relating to natural resources. The Parties intend to consider these other natural resources rights as well, as part of the activities listed below.

III. Participating Agency Agreement

The Parties, as members of the White House Council on Native American Affairs, Environment, Climate Change, and Natural Resources Subgroup, will work together and consult with federally recognized tribes, as appropriate, in developing and implementing the following actions:

1. Continue the Parties' current efforts to integrate consideration of tribal treaty rights into their decisionmaking processes to ensure that agency actions are consistent with such applicable rights;
2. Develop and share tools and resources to identify, understand, and analyze tribal treaty rights that may be affected by agency actions;
3. Consider tribal treaty rights as part of the Parties' respective tribal consultation policies and procedures;
4. Identify and share best practices for considering tribal treaty rights in Federal decisionmaking processes, for example, in determining the potential effect of

proposed agency actions on tribal treaty rights, or in analyzing potential environmental impacts of Federal actions pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 et seq.; and

5. Establish a working group with members from each of the Parties to enhance interagency collaboration and coordination and address significant issues as they arise. This working group will include a sub-group of agency attorneys to provide legal support to the working group and facilitate interagency coordination on legal issues relating to tribal treaty rights.

IV. General Provisions and Limitations

This MOU is a voluntary agreement that expresses the good-faith intentions of the Parties, is not intended to be legally binding, does not create any contractual or fiscal obligations, and is not enforceable by any party. It does not create any right or benefit, substantive or procedural, enforceable by law or equity, by any party, against the Parties, their officers or employees, or any other person. This MOU does not direct or apply to any person outside of the Parties.

All commitments made by the Parties in this MOU are subject to the availability of appropriated funds and budget priorities. Nothing in this MOU, in and of itself, obligates the Parties to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations. Any transaction involving transfers of funds between the Parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

V. Administrative Provisions

1. This MOU takes effect upon signature of the Parties and shall remain in effect until December 31, 2021. This MOU may be extended or amended upon written request from any Party and the subsequent written concurrence of the others.
2. Any Party can opt out of this MOU by providing a 60-day written notice to the other signatories.
3. Other Federal agencies may participate in this MOU at any time while the MOU is in effect. Participation will be evidenced by an agency official signature on the MOU.

VI. Signatures of the Parties of the MOU on Tribal Treaty Rights

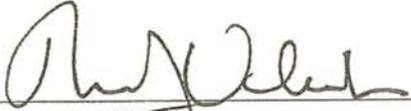
See attachments.

Sally Jewell

Sally Jewell
Secretary
Department of the Interior

September 22, 2016

Date



Thomas J. Vilsack
Secretary
U.S. Department of Agriculture

9/24/16
Date

Loretta E. Lynch

September 26, 2016

Loretta E. Lynch
Attorney General
U.S. Department of Justice

Date



9/19/16
Date

Bruce H. Andrews
Deputy Secretary of Commerce

Ashton Carter

Ashton Carter
United States Secretary of Defense

NOV 09 2016

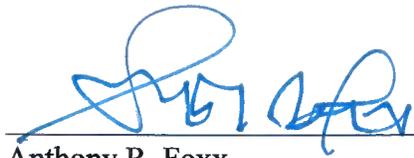
Date



Gina McCarthy
Administrator
Environmental Protection Agency

SEP 20 2016

Date



Anthony R. Foxx
Secretary
U.S. Department of Transportation

11/29/16

Date



September 20, 2016 _____

Milford Wayne Donaldson, FAIA
Chairman
Advisory Council on Historic Preservation

Christina Goldfuss

Christina Goldfuss
Managing Director
White House Council
on Environmental Quality

09/26/16

Date



Memorandum of Understanding among Participating Agencies of the Native Hawaiian Federal Interagency Working Group

I. Introduction

The Native Hawaiian Federal Interagency Working Group (Working Group) began its efforts in 2006 with the development of the Department of the Interior Native Hawaiian Organization List. This list (Native Hawaiian Organization List, 72 Fed. Reg. 54672 (September 26, 2007)) is now used by Federal Agencies seeking to consult with the Native Hawaiian Community through Native Hawaiian organizations. After other similar joint agency projects, on February 17, 2011, the U.S. Department of the Interior, the U.S. Department of Defense, and the Advisory Council on Historic Preservation signed a memorandum of understanding (MOU) formally establishing the Working Group. Accomplishments of the Working Group include: creation of the Department of Defense Consultation Policy with Native Hawaiian Organizations; A Handbook for Consultation with Native Hawaiian Organizations in the Section 106 Review Process; and The Native Hawaiian Community Guide to Federal Programs and Services.

The Working Group continues to provide guidance and assist Federal Agencies with their compliance activities associated with (1) administration of Federal Programs that directly and/or uniquely affect the Native Hawaiian community and (2) consultation with Native Hawaiian organizations regarding the potential effects of Federal Programs and activities on Native Hawaiian organizations' resources, rights, or lands. Per this MOU, the members of the Working Group are the Office of Native Hawaiian Relations (ONHR) within the Department of the Interior, the Office of the Deputy Assistant Secretary of Defense for Environment, Safety, and Occupational Health, within the Department of Defense, the Advisory Council on Historic Preservation, and the Small Business Administration.

ONHR has the lead in organizing the Working Group consistent with P.L. 108-199, Div. H, Sec. 148 (118 Stat. 445), which established ONHR as a focal point among Federal Agencies for coordination of information regarding consultation with Native Hawaiian organizations. The Working Group anticipates that additional Federal Agencies that administer Federal Programs to Native Hawaiian organizations or have consultation responsibilities to Native Hawaiian organizations will join the Working Group by signing the MOU in the future.

II. Purpose

Federal Agencies are required to consult with Native Hawaiian organizations before taking any action that may have the potential to significantly affect Native Hawaiian resources, rights, or lands. To that end, the first purpose of this Working Group is to establish processes to assist federal agencies with the identification of impediments to meaningful, regular, and appropriate consultation

with Native Hawaiian organizations as required by law, regulation, and policy; and to develop information and recommendations to assist Federal Agencies with their consultation with Native Hawaiian organizations. The second purpose of the Working Group is to assist Federal Agencies with their compliance activities associated with the administration of Federal Programs that directly and/or uniquely affect the Native Hawaiian Community.

III. Authorities

This MOU is established under the following authorities: U.S. Public Law 108-199, establishing the United States Office for Native Hawaiian Relations; 109 Stat. 537, The Hawaiian Home Lands Recovery Act; 54 U.S.C. § 304102, establishing the Advisory Council on Historic Preservation; and U.S. Public Law 104-201, 10 U.S.C. § 2694(c), authorizing the Secretary of Defense to negotiate and enter into agreements with public and private agencies, organizations, institutions, individuals, or other entities regarding cultural and natural resource management.

IV. Functions

The Working Group will continue to:

(a) Provide guidance to Federal agencies regarding the appropriate methods to comply with laws and administer program(s) that directly and/or uniquely affect the Native Hawaiian Community.

(b) Consider information and advice obtained from the Governor of Hawaii and other elected officials in the Hawaiian Islands concerning how Federal agencies undertaking actions in Hawaii may more effectively consult with Native Hawaiian organizations. The Working Group will try to meet at least once each year with the Governor of Hawaii or his or her representative who may wish to attend; and

(c) Consider information and advice individually obtained from Native Hawaiian leaders and representatives of Native Hawaiian organizations, non-governmental organizations, academia, and cultural practitioners concerning how Federal agencies undertaking actions in Hawaii may more effectively consult with Native Hawaiian organizations.

(d) Execute the action plan developed in accordance with section V of this MOU.

V. Funding

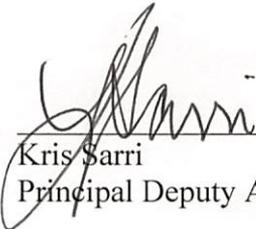
This MOU is not a funds obligating document and nothing in it expands, limits, or alters the parties' statutory authority and responsibilities. Nor is the purpose of this MOU to establish the intention, or commitment, to fund any project on the part of the Federal Agencies. However, the Working Group may provide advice on the coordination of several Federal Programs and responsibilities. In some cases, coordination with other parties, such as a state agencies or non-governmental organizations, may also be considered.

VI. Duration of Agreement

The MOU shall continue in effect for five years or until all Working Group members provide written notice of termination, whichever comes first. Any signatory may terminate its participation with 60 days written notice to the other signatories. The document may be updated and periodically amended with the written concurrence of all parties. Additional agencies may join the Working Group by signing the MOU.

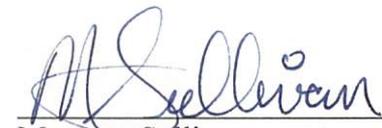
VII. Signatures

U.S. Department of the Interior


Kris Sarri
Principal Deputy Assistant Secretary, Policy, Management and Budget

October 3, 2016
Date

Department of Defense


Maureen Sullivan
Deputy Assistant Secretary of Defense for Environment, Safety, and Occupational Health

Oct 31, 2016
Date

Advisory Council on Historic Preservation


Milford Wayne Donaldson
Chairman

September 30, 2016
Date

Small Business Administration


David R. Sanborn
Assistant Administrator, Office of Native American Affairs

11.3.16
Date

The White House
1600 Pennsylvania Ave NW
Washington, DC 20500

To search this site, enter a search term Search

[Briefing Room](#)

Readout of the Biden-Harris Administration's First Meeting of the White House Council on Native American Affairs

April 23, 2021 • [Statements and Releases](#)

Today, Secretary of the Interior Deb Haaland and Domestic Policy Advisor Susan Rice convened the first meeting of the White House Council on Native American Affairs in the Biden-Harris Administration. The Council will coordinate with Tribal Nations as it advances work on key issues such as climate change, Tribal homelands and treaties; economic development, energy and infrastructure; health; education; public safety and justice; and international Indigenous issues.

Ten Cabinet Secretaries and other top government officials participated in discussions focused on strengthening the Nation-to-Nation relationship, improving tribal consultation, and formalizing the working committees of the Council.

In addition, the White House today announced that it will hold a White House Tribal Leaders Summit in late 2021. The purpose of the Summit is to provide an opportunity for the leaders from the 574 federally recognized Tribal Nations to have an opportunity to interact directly with the President and representatives from the highest levels of the Administration.

The White House Council on Native American Affairs was established by Executive Order in 2013. The Council languished in the last Administration. President Biden reinstated the Council in less than 100 days in office.

Participants at the virtual meeting included agency leadership and senior White House officials representing:

- Department of the Interior
- Domestic Policy Council
- Department of Agriculture
- Department of Commerce
- Department of Defense
- Department of Education
- Department of Energy
- Environmental Protection Agency

- Department of Health and Human Services
- Department of Homeland Security
- Department of Justice
- Department of Labor
- Office of Management and Budget
- Office of Personnel Management
- Office of Management and Budget
- Small Business Administration
- Social Security Administration
- Department of State
- Department of Transportation
- Department of Treasury
- Department of Veterans Affairs
- US Ambassador to the United Nations
- US Trade Representative
- Advisory Council on Historic Preservation
- Denali Commission
- Gender Policy Council
- Office of Science and Technology Policy
- National Climate Advisor
- Office of Intergovernmental Affairs
- Council on Environmental Quality
- Cabinet Affairs

###

FOR OFFICIAL USE ONLY

April 20, 2021

Meeting of the White House Council on Native American Affairs

DATE: Friday, April 23, 2021
TIME: 2:30 – 3:30 PM EST
LOCATION: Zoom

AGENDA

- I. Land Acknowledgement.....DOI
- II. Introduction and Expectations of the President.....DPC
- III. Objectives of the WHCNAA Meeting.....DOI
- IV. Discussion of the Presidential Memorandum on Tribal Consultation and Strengthening the Nation-to-Nation Relationship.....All
- V. Discussion and Coordination of the WHCNAA Committees.....All
- VI. Upcoming Dates and Conclusion.....DPC/DOI/IGA

ATTACHMENTS

- Tab A Participants
- Tab B Discussion Paper
- Tab C Executive Order 13647 creating the WHCNAA
- Tab D Presidential Memorandum on Tribal Consultations

FOR OFFICIAL USE ONLY

TAB A

FOR OFFICIAL USE ONLY

PARTICIPANTS

Department of the Interior (co-chair)
Domestic Policy Council (co-chair)
Department of State
Department of the Treasury
Department of Defense
Department of Justice
Department of Agriculture
Department of Commerce
Department of Labor
Department of Health and Human Services
Department of Housing and Urban Development
Department of Transportation
Department of Energy
Department of Education
Department of Veterans Affairs
Department of Homeland Security
Social Security Administration
Office of Personnel Management
Environmental Protection Agency
Small Business Administration
The United States Trade Representative
United States Mission to the United Nations
Office of Management and Budget
Council of Economic Advisers
Office of National Drug Control Policy
National Economic Council
White House Climate Office
Office of Science and Technology Policy
Council on Environmental Quality
White House Office of Public Engagement
White House Office of Intergovernmental Affairs
Advisory Council on Historic Preservation
Denali Commission
Office of the Vice President
White House Office of Cabinet Affairs
White House Counsel Office
Gender Policy Council
Office of the Chief of Staff

TAB B

Discussion Paper for the Meeting of the White House Council on Native American Affairs

PURPOSE

This first meeting of the White House Council on Native American Affairs during the Biden-Harris Administration will provide an overview of the Tribal Consultation Presidential Memorandum and next steps in its implementation. The meeting will also establish WHCNAA Committees and agency leads or co-leads for each Committee, which will conduct the ongoing work of the Council. Holding the meeting so early in the Administration underscores the Administration's goals of strengthening the Nation to Nation relationship.

BACKGROUND

In 2013, President Obama issued Executive Order 13647 (Tab C), establishing the White House Council on Native American Affairs. The EO established, "a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities." The WHCNAA met approximately half a dozen times during the second term.

The mission and function of the WHCNAA include working across executive departments, agencies, and offices to coordinate the development of policy recommendations to support Tribal self-governance and improve the quality of life for Native Americans. The WHCNAA makes recommendations to the President on policy priorities, including improving the effectiveness of Federal investments in Native American communities, and where appropriate, to increase the impact of Federal resources and create greater opportunities to help improve the quality of life for Native Americans. The WHCNAA also coordinates the United States' engagement with Tribal governments and their communities and assists the White House Office of Public Engagement and Intergovernmental Affairs (IGA) in organizing the White House Tribal Nations Conference each year.

The National Congress of American Indians passed a resolution in 2016 expressing support for continuation of the White House Council on Native American Affairs in all future Presidential Administrations. However, during the Trump Administration, the WHCNAA met only one time, in 2020 (remotely), to discuss COVID-19 issues impacting Indian Country.

President Biden has committed to ensuring that Tribes have a seat at the table at the highest levels of the federal government and a voice throughout the government. The WHCNAA helps to carry through on this commitment and Tribal leaders are excited about the prospect of standing up the WHCNAA again after four years of relative dormancy. Convening the WHCNAA within the first 100 days of the Biden administration is an important action. It both sends an important public signal about the priority of Native American affairs and tribal engagement and launches the substantive work of the WHCNAA early. There will be significant interest in this first meeting.

FOR OFFICIAL USE ONLY

The President has had early successes in Indian Country in his first days in office that have begun to remedy the underinvestment and inadequate engagement of the prior administration and serve as a foundation to take relations with Tribal Nations to the next level. Notable actions of the Biden-Harris Administration include:

- A well-organized and effective vaccine distribution process that continues to drive uptake in Indian Country, with more than one million vaccinations delivered to date. Working with tribal communities, the Indian health system more than tripled the doses of COVID-19 vaccine administered during a two-week period in February and March, administering more than 500,000 doses to patients, health care employees, essential workers, and others in Native communities.
- The American Rescue Plan provides the largest single federal investment in history for Native programs, committing \$31.2 billion in investments, including \$20 billion for Tribal governments to combat COVID-19 and stabilize tribal community safety-net programs.
- The President's FY 2022 budget seeks to begin redressing long-standing health inequities experienced by American Indians and Alaska Natives by dramatically increasing funding for the Indian Health Service (IHS) through advanced appropriations, which will address longstanding Native concerns that federal healthcare funding for Native Americans is both well below the per-person dollar average for all other Americans and funded year-to-year, which prevents effective budget planning.
- Historic presidential appointments, most notably Secretary Haaland as the first Native American Cabinet Secretary. The President has appointed more than 30 Native people across the Administration, including the first Native ever in a political position at the US Army Corps of Engineers and the nomination of a Native woman as the General Counsel of the USDA. The Administration is delivering on the President's commitment to tribes having at a seat at the table at the highest levels of the federal government and a voice across the government.

Notwithstanding these early accomplishments, among others, longstanding inequities persist that remain to be tackled. These include a large deficit in funding for a majority of Native American programs. Native Americans living on tribal lands do not have access to the same services and programs available to other Americans, including broadband, critical water infrastructure, and safe roads. Climate change poses particular threats to Tribal Nations, from those who have to relocate because of erosion and rising sea levels on the coasts to those across the entire country experiencing varied impacts. These are some of the problems the WHCNAA will address over the next four years.

ISSUES FOR DISCUSSION

1. Advancing the Presidential Memorandum on Tribal Consultation and Strengthening the Nation to Nation Relationship

The President has made clear statements since his first days in office that he respects Tribal sovereignty and self-governance, honoring federal trust and treaty responsibilities, and conducting regular, meaningful, and robust consultation with Tribal Nations. The President has also stated a goal of strengthening the Nation-to-Nation relationship between the United States and Indian tribes, supporting the empowerment of the 574 federally recognized Tribal Nations to govern their own communities and make their own decisions.

Enhanced consultation can contribute to the creation of better designed, more effective federal policies and regulations. On January 26, six days into office, the President issued a memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Tab D). It clearly states that agencies must comply with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” which was issued by President Bill Clinton in 2000. This EO requires federal departments and agencies to consult with Indian Tribal governments when considering policies that will impact Tribal communities. The January 26th Presidential Memorandum promotes regular, robust and meaningful consultation with Tribal Nations. ***It requires substantive engagement with tribes, ensures that consultation policies are consistent across federal agencies and encourages independent agencies to establish policies as well. The Presidential Memorandum requires each agency create a plan of action detailing how consultation will be accomplished in each respective agency. It also requires that federal agencies consult with tribes to inform these plans of action and that each agency prepare and periodically update a detailed plan of action to implement the policies and directives of Executive Order 13175 (a Clinton era EO that mandated consultation with Tribal Nations).***

Currently, 68 federal agencies and offices are consulting with Tribal Nations and creating and revising their consultation plans of action to ensure strong communication and a constructive relationship with Tribes.

Principals will discuss the mandate of the presidential memorandum, their agencies’ consultations with Tribal Nations, and the development of their action plans.

2. Launching the WHCNAA Committees

The WHCNAA policy initiative was created to make federal agencies work more collaboratively and effectively with federally recognized Tribal Nations to advance the latter’s vital economic and social priorities. Convening the WHCNAA within the first 100 days in office underscores the President’s commitment to build effective partnerships with American Indian and Alaska Native communities and make the federal government work more efficiently to find solutions to the challenges facing Indian Country. The WHCNAA, which includes more than 30 federal departments and agencies, coordinates the Administration’s engagement with Tribal governments and works across executive departments, agencies and offices to develop policy recommendations and expand efforts to leverage federal programs and resources available to Tribal communities.

FOR OFFICIAL USE ONLY

The WHCNAA Committees perform the day-to-day work of the WHCNAA and are vital to its overall success. The Committees consist of interagency appointees and career staff whose work is briefed to Principals at each WHCNAA meetings. The Committees will meet frequently, likely once per month.

Critically, the Committees' activity focus on tribally driven priorities. Through input received at individual Tribal consultation or at the White House Tribal Leaders Summit, the Committees will identify Tribal policy priorities that align with Administration priorities and identify deliverables.

At this first meeting, Principals are asked to commit their agencies to chair and/or participate in the different Committees. The WHCNAA will focus its efforts on advancing six issues that Tribal leaders have raised as priorities:

- Climate Change, Tribal Homelands, and Treaties Committee
- Health Committee
- Education Committee
- Economic Development, Energy and Infrastructure Committee
- Public Safety and Justice Committee
- International Indigenous Issues Committee

Principals will endorse the Committee structure and participation and begin to discuss the priorities for the committees.

3. White House Tribal Nations Summit

In 2009, at the request of Tribal Nations, President Obama convened the first White House Tribal Nations Conference and the Obama-Biden Administration continued to hold this conference annually for its eight years in office. Considered a “consultation,” This conference was used to facilitate President Obama’s sustained outreach to Native people, and provide leaders from then 564 (now 574) federally recognized Tribal Nations the opportunity to interact directly with the President and representatives from the highest levels of the Administration. Cabinet Members appeared in person at the Conference and announced new initiatives and actions involving Tribal Nations. During the 2020 campaign, Tribal Nations requested that the “Conference” be turned into a “Summit” to recognize that tribes are sovereign nations.

The President has committed to holding the White House Tribal Nation Summit by the end of this year, likely in November or December. The purpose of the summit is to restore and heal U.S. Government relations with Native Americans and strengthen the Nation-to-Nation relationship between the United States and Tribal governments, bolstering the federal policies of self-determination and self-governance.

The White House Office of Intergovernmental Affairs will brief Principals on initial planning for and expectations around the Summit.

TAB C

Executive Order 13647
Establishing the White House Council on Native American Affairs

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote and sustain prosperous and resilient Native American tribal governments, it is hereby ordered as follows:

Section 1. Policy. The United States recognizes a government-to-government relationship, as well as a unique legal and political relationship, with federally recognized tribes. This relationship is set forth in the Constitution of the United States, treaties, statutes, Executive Orders, administrative rules and regulations, and judicial decisions. Honoring these relationships and respecting the sovereignty of tribal nations is critical to advancing tribal self-determination and prosperity.

As we work together to forge a brighter future for all Americans, we cannot ignore a history of mistreatment and destructive policies that have hurt tribal communities. The United States seeks to continue restoring and healing relations with Native Americans and to strengthen its partnership with tribal governments, for our more recent history demonstrates that tribal self-determination -- the ability of tribal governments to determine how to build and sustain their own communities -- is necessary for successful and prospering communities. We further recognize that restoring tribal lands through appropriate means helps foster tribal self-determination.

This order establishes a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities. This policy is established as a means of promoting and sustaining prosperous and resilient tribal communities. Greater engagement and meaningful consultation with tribes is of paramount importance in developing any policies affecting tribal nations.

To honor treaties and recognize tribes' inherent sovereignty and right to self-government under U.S. law, it is the policy of the United States to promote the development of prosperous and resilient tribal communities, including by:

(a) promoting sustainable economic development, particularly energy, transportation, housing, other infrastructure, entrepreneurial, and workforce development to drive future economic growth and security;

(b) supporting greater access to, and control over, nutrition and healthcare, including special efforts to confront historic health disparities and chronic diseases;

(c) supporting efforts to improve the effectiveness and efficiency of tribal justice systems and protect tribal communities;

(d) expanding and improving lifelong educational opportunities for American Indians and Alaska Natives, while respecting demands for greater tribal control over tribal education, consistent with Executive Order 13592 of December 2, 2011 (Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities); and

(e) protecting tribal lands, environments, and natural resources, and promoting respect for tribal cultures.

Sec. 2. Establishment. There is established the White House Council on Native American Affairs (Council). The Council shall improve coordination of Federal programs and the use of resources available to tribal communities.

Sec. 3. Membership. (a) The Secretary of the Interior shall serve as the Chair of the Council, which shall also include the heads of the following executive departments, agencies, and offices:

- (i) the Department of State;
- (ii) the Department of the Treasury;
- (iii) the Department of Defense;
- (iv) the Department of Justice;
- (v) the Department of Agriculture;
- (vi) the Department of Commerce;
- (vii) the Department of Labor;
- (viii) the Department of Health and Human Services;
- (ix) the Department of Housing and Urban Development;
- (x) the Department of Transportation;
- (xi) the Department of Energy;
- (xii) the Department of Education;
- (xiii) the Department of Veterans Affairs;
- (xiv) the Department of Homeland Security;
- (xv) the Social Security Administration;
- (xvi) the Office of Personnel Management;
- (xvii) the Office of the United States Trade Representative;
- (xviii) the Office of Management and Budget;

(xix) the Environmental Protection Agency;
(xx) the Small Business Administration;
(xxi) the Council of Economic Advisers;
(xxii) the Office of National Drug Control Policy;
(xxiii) the Domestic Policy Council;
(xxiv) the National Economic Council;
(xxv) the Office of Science and Technology Policy;
(xxvi) the Council on Environmental Quality;
(xxvii) the White House Office of Public Engagement and Intergovernmental Affairs;
(xxviii) the Advisory Council on Historic Preservation;
(xxix) the Denali Commission;
(xxx) the White House Office of Cabinet Affairs; and
(xxxi) such other executive departments, agencies, and offices as the Chair may, from time to time, designate.

(b) A member of the Council may designate a senior-level official, who is a full-time officer or employee of the Federal Government, to perform his or her functions.

(c) The Department of the Interior shall provide funding and administrative support for the Council to the extent permitted by law and within existing appropriations.

(d) The Council shall coordinate its policy development through the Domestic Policy Council.

(e) The Council shall coordinate its outreach to federally recognized tribes through the White House Office of Public Engagement and Intergovernmental Affairs.

(f) The Council shall meet three times a year, with any additional meetings convened as deemed necessary by the Chair. The Chair may invite other interested agencies and offices to attend meetings as appropriate.

Sec. 4. Mission and Function of the Council. The Council shall work across executive departments, agencies, and offices to coordinate development of policy recommendations to support tribal self-governance and improve the quality of life for Native Americans, and shall coordinate the United States Government's engagement with tribal governments and their communities. The Council shall:

(a) make recommendations to the President, through the Director of the Domestic Policy Council, concerning policy priorities, including improving the effectiveness of Federal investments in Native American communities, where appropriate, to increase the impact of

Federal resources and create greater opportunities to help improve the quality of life for Native Americans;

(b) coordinate, through the Director of the Office of Public Engagement and Intergovernmental Affairs, Federal engagement with tribal governments and Native American stakeholders regarding issues important to Native Americans, including with tribal consortia, small businesses, education and training institutions including tribal colleges and universities, health-care providers, trade associations, research and grant institutions, law enforcement, State and local governments, and community and non-profit organizations;

(c) coordinate a more effective and efficient process for executive departments, agencies, and offices to honor the United States commitment to tribal consultation as set forth in Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), and my memorandum of November 5, 2009 (Tribal Consultation); and

(d) assist the White House Office of Public Engagement and Intergovernmental Affairs in organizing the White House Tribal Nations Conference each year by bringing together leaders invited from all federally recognized Indian tribes and senior officials from the Federal Government to provide for direct government-to-government discussion of the Federal Government's Indian country policy priorities.

Sec. 5. General Provisions. (a) The heads of executive departments, agencies, and offices shall assist and provide information to the Council, consistent with applicable law, as may be necessary to carry out the functions of the Council.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) For purposes of this order, "federally recognized tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(e) For purposes of this order, "American Indian and Alaska Native" means a member of an Indian tribe, as membership is defined by the tribe.

(f) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA

TAB D

Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships

JANUARY 26, 2021

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Tribal Consultation and Strengthening Nation-to-Nation Relationships

American Indian and Alaska Native Tribal Nations are sovereign governments recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy. The United States has made solemn promises to Tribal Nations for more than two centuries. Honoring those commitments is particularly vital now, as our Nation faces crises related to health, the economy, racial justice, and climate change — all of which disproportionately harm Native Americans. History demonstrates that we best serve Native American people when Tribal governments are empowered to lead their communities, and when Federal officials speak with and listen to Tribal leaders in formulating Federal policy that affects Tribal Nations.

To this end, Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), charges all executive departments and agencies with engaging in regular, meaningful, and robust consultation with Tribal officials in the development of Federal policies that have Tribal implications. Tribal consultation under this order strengthens the Nation-to-Nation relationship between the United States and Tribal Nations. The Presidential Memorandum of November 5, 2009 (Tribal Consultation), requires each agency to prepare and periodically update a detailed plan of action to implement the policies and directives of Executive Order 13175. This memorandum reaffirms the policy announced in that memorandum.

Section 1. Consultation. My Administration is committed to honoring Tribal sovereignty and including Tribal voices in policy deliberation that affects Tribal communities. The Federal Government has much to learn from Tribal Nations and strong communication is fundamental to a constructive relationship. Accordingly, I hereby direct as follows:

(a) The head of each agency shall submit to the Director of the Office of Management and Budget (OMB), within 90 days of the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. The plan

shall be developed after consultation by the agency with Tribal Nations and Tribal officials as defined in Executive Order 13175.

(b) Each agency's plan and subsequent reports shall designate an appropriate agency official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. These officials shall submit reports to the Assistant to the President for Domestic Policy (APDP) and the Director of OMB, who will review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

(c) The head of each agency shall submit to the Director of OMB, within 270 days of the date of this memorandum, and annually thereafter, a progress report on the status of each action included in the agency's plan, together with any proposed updates to its plan.

(d) The Director of OMB, in coordination with the APDP, shall submit to the President, within 1 year from the date of this memorandum, a report on the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the Tribal consultation process more effective, if any, should be included in this report.

Sec. 2. Definitions. The terms "Tribal officials," "policies that have Tribal implications," and "agency" as used in this memorandum are as defined in Executive Order 13175.

Sec. 3. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 4. Publication. The Director of OMB is authorized and directed to publish this memorandum in the Federal Register.

JOSEPH R. BIDEN JR.