



Preserving America's Heritage

RECOMMENDATIONS FOR IMPROVING TRIBAL-FEDERAL CONSULTATION

Tribal consultation remains a challenge, not just in historic preservation but in all aspects of the tribal-federal relationship. Tribal leaders continue to raise concerns about consultation to Administration officials at White House Tribal Nations Conferences and in meetings with federal officials. Federal officials often face challenges in meeting the conflicting priorities of tribal consultation and their mission and project obligations. They also raise concerns about these challenges and seek advice and assistance from the Advisory Council on Historic Preservation (ACHP) regarding tribal consultation.

Background

In the course of the ACHP's work and involvement in the Section 106 process, consultation has been raised many times as an issue of concern. The ACHP has also hosted two regional summits focused on tribal consultation. The Tribal Summit on Renewable Energy, co-hosted with the National Association of Tribal Historic Preservation Officers, took place in Palm Springs, California, in 2011. The Northern Plains Tribal Summit was co-hosted with the Standing Rock Sioux Tribe in 2014. Key issues the ACHP has heard repeatedly include but are not limited to:

- Recognition of the government-to-government relationship between the federal government and Indian tribes
- Different interpretations of the trust responsibility of the federal government to tribes
- Complications created by expedited reviews and large scale developments
- Training for all Section 106 participants
- Diverse expectations regarding identification and evaluation of historic properties
- Capacity and sustainability challenges, particularly funding and staffing
- Applicant-driven deadlines and processes

While many Section 106 participants seek the assistance of the ACHP, typically on a case-by-case basis, the ACHP believes the most effective way to address issues is to do so on a programmatic and regional or local level. As the ACHP stated in its 2008 Native Hawaiian policy, "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." Therefore, the ACHP has developed a set of recommendations for federal agencies and Indian tribes and other Section 106 participants to consider adopting as a means for addressing their issues and challenges on a broad scale.

Major Consultation Challenges:

Development pressures, especially energy and infrastructure development, are challenging Section 106 participants. Significant increases in the number of large, complex projects with very compressed schedules are making it difficult for federal agencies, State Historic Preservation Officers (SHPOs), and Indian tribes to manage their responsibilities in the Section 106 process. Everyone is chronically understaffed and underfunded, and this lack of adequate resources to manage the review process is creating friction, in many cases, where there had been good working relationships.

Vast diversity among federal agencies and Indian tribes can also lead to challenges in consultation. There are more than 100 individual federal agencies with different authorities, missions, operating procedures, budgets, and staffing capacities. Likewise, there are 567 federally recognized Indian tribes with different cultures, histories, governing structures, budgets, and staffing capacities.

The fact that most Section 106 reviews are generated by projects that will be carried out by applicants for federal permits or approvals or by grant recipients further complicates Section 106 consultation. Even for federal land managers, the majority of Section 106 reviews are of applicant-proposed undertakings. For a variety of reasons, federal agencies receive applications well after the applicant has made decisions about siting and has carried out a great deal of planning, including historic preservation work. It then becomes very difficult for federal agencies to carry out effective Section 106 consultation with Indian tribes and others.

These are just some of the Section 106 challenges. There are certainly many others unique to specific federal agencies, Indian tribes, projects, and regions. For instance, in the Northern Plains, the push for oil and gas development is straining the resources of Section 106 participants while, in other regions, there are pressures from mining, infrastructure projects, and renewable energy development.

Potential Solutions

Based on input from many sources and its own observations, the ACHP offers the following suggestions for generally improving federal-tribal consultation. The ACHP has heard from many Section 106 participants that each region has its own unique set of issues and challenges. Many tribal representatives have applauded federal tribal policies but caution that implementation is uneven and needs to happen at the local level in order to be meaningful and effective. Therefore, some of the recommendations may work best as agency-wide solutions while others may be more appropriate for regional or local situations.

In any case, these suggestions are not meant to constitute an exhaustive list of solutions for improving consultation. Just as the practice of consultation has evolved over the past few decades, the ACHP is confident there is still much to be learned. Therefore, the ACHP intends to continue to update these recommendations and welcomes feedback and additional ideas as Section 106 participants further refine their consultation tools.

Building Relationships and Improving Communication:

The foundation for resolving most, if not all, challenges facing Section 106 participants is a solid and productive working relationship. Solutions tend to have a much better chance of success when they are developed in cooperation and coordination with affected parties. They also tend to lead to effective partnerships. Conflicts may still arise and there may be disagreements but they can be handled, if not resolved, when participants have the trust and understanding that develops out of the effort to develop and maintain working relationships. The ACHP has seen, time and again, that when a federal agency and an Indian tribe commit to working together to find mutually acceptable solutions, historic preservation thrives.

The ACHP recognizes that developing and maintaining working relationships with Indian tribes may be particularly challenging for funding, licensing, and permitting agencies that do not have a local or regional presence. Nevertheless, some agencies have managed to do so by attending national and regional meetings and conducting regular outreach to tribes. For example, the Federal Communications Commission, while headquartered in Washington, D.C., has developed productive working relationships with many Indian tribes throughout the U.S.

1. Suggested solution: Meet on a regular basis.

Meeting on an annual (or other interval) basis outside of project consultation to discuss and resolve, where possible, project planning, consultations strategies, and other issues that arise in Section 106 consultation has proven to be a very effective tool for improving consultation among all parties, especially between federal agencies and Indian tribes. A region of the Forest Service has hosted an annual conference with Indian tribes for many years. It has grown to include other federal agencies, State Historic Preservation Officers, and others and is considered by many to be a model for building and improving relationships. Similarly, many military installations host annual government-to-government meetings with tribal leaders to discuss installation-specific issues.

2. Suggested solution: Enter into consultation agreements.

Consultation agreements or protocols are another vehicle for developing and defining relationships. In fact, the ACHP's regulations at 36 CFR Section 800.2(c)(2)(ii)(E) provide for federal agencies and Indian tribes to enter into agreements specifying how they will carry out Section 106 consultation and may offer a tribe additional opportunities beyond what the regulations provide. The most common form is between a federal agency and an Indian tribe, but such agreements or protocols could also be developed between any of the Section 106 participants and would go far toward improving relationships and supporting greater preservation. Such agreements may define how parties will consult, identify points of contact, and address other common issues. Often, the negotiation process leads to or improves existing relationships.

3. Suggested solution: Develop mutually acceptable standards or protocols for identification and evaluation.

Approaching the identification and evaluation of historic properties of religious and cultural significance to Indian tribes on a project-by-project basis is generally proving to be unproductive and can result in the loss of historic properties, project delays, and cost overruns. Protocols could focus, for instance, on refinements to standard archeological survey methods so that properties of religious and cultural significance are also identified during archeological surveys.

Training and Outreach:

In the ACHP's experience, the most productive tribal consultations are those in which all the participants are well versed in historic preservation laws and regulations, the unique federal-tribal relationship, and the roles of key participants in the process. There are many resources to assist Section 106 practitioners including classroom and online courses, guidance, and conferences. All federal agencies and most Indian tribes also host Web sites with helpful information.

Additionally, given the role of applicants and consultants in the Section 106 process, they also need to be proficient in working with Indian tribes and need to understand basic concepts such as the government-to-government relationship between federal agencies and Indian tribes.

Suggested solution: Work toward improved understanding of historic preservation and federal Indian law.

In support of this suggested solution, the ACHP plans to develop and distribute a Section 106 toolkit for tribal leaders. The toolkit will be available for tribal staff to ensure that leadership understands federal responsibilities and tribal opportunities in the Section 106 process.

Federal agencies and Indian tribes are uniquely positioned to influence the manner in which archaeological and historic preservation consultants as well as applicants carry out their work. It would be

beneficial for agencies and tribes to work collaboratively to ensure consultants and applicants fully understand the role of Indian tribes in the Section 106 process as well as the federal-tribal relationship. Some federal agencies, like the Natural Resources Conservation Service, have comprehensive cultural resources training for staff. Other federal agencies might find this a useful model to ensure staff has the necessary tools to carry out responsibilities.

Building Capacity:

All participants in the Section 106 process face challenges to their ability to effectively manage and/or participate effectively in the process. There is a tendency to assume federal agencies have unlimited resources, but the fact is that some federal agencies have limited financial resources. They have also identified the limited resources of many of their applicants as a contributing factor to the challenges they face in consulting with Indian tribes or in meeting tribal requests in the Section 106 process.

There is also a tendency to assume that Indian tribes and Tribal Historic Preservation Officers (THPOs) have the resources or the responsibility to identify historic properties of religious and cultural significance to them. Not only are many tribes and THPOs struggling to meet the demands of Section 106 consultation, federal agencies remain responsible for identification and evaluation, albeit in consultation with them. While THPOs receive funding from the National Park Service, it is woefully inadequate to carry out their basic responsibilities.

The increasing amount of review requests and continuing funding shortages are severely straining the ability of Indian tribes to participate in the Section 106 process. THPOs, for example, have been facing decreasing grants from the National Park Service. While the ACHP has aggressively advocated for full funding for the Historic Preservation Fund (the source of funding for THPOs and SHPOs), this solution may remain out of reach for some time. However, there are other options that would both support tribal participation and improve the efficiency of the Section 106 process.

1. Suggested solution: Make available to potential applicants information about the requirements of the Section 106 process, especially about federal responsibilities to consult with Indian tribes.

Some federal agencies have made available pre-application information about the requirements of the Section 106 process and of tribal consultation. If preservation is the desired outcome of the Section 106 process, applicants need to be aware of the scope of the process including tribal consultation in advance of project planning in order to avoid impacts to historic properties. In many Section 106 consultations, by the time tribal consultation is initiated, the project proponent has already carried out environmental studies including cultural resource surveys and determined the footprint of the project.

2. Suggested solution: Seek opportunities for tribal expertise to be employed in the Section 106 process.

Since federal agencies are responsible for making a reasonable and good faith effort to identify historic properties, including those of religious and cultural significance to Indian tribes, it makes sense to develop mechanisms that facilitate the identification of these properties by the entities that possess the expertise to do so. The ACHP issued a memorandum about this topic on 2001 which is available at <http://www.achp.gov/regs-fees.html>.

Conclusion

The ACHP acknowledges that these recommendations may not address all of the consultation issues facing federal agencies and Indian tribes. All the issues specific to each federal agency, Indian tribe, or region of the country have likely not been discussed here. Instead, these recommendations are offered as a

place to start a dialogue and as food for thought, hopefully leading to more effective partnerships and, thus, to better outcomes in the Section 106 process.

The ACHP encourages everyone to also take advantage of the wealth of information on the ACHP's Web site at www.achp.gov. Section 106 information can be found at <http://www.achp.gov/work106.html>, and tribal consultation information can be found at <http://www.achp.gov/nap.html>.

September 14, 2015