

# SECTION 106 AND THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: GENERAL INFORMATION AND GUIDANCE

The Advisory Council on Historic Preservation (ACHP) adopted a <u>plan</u> to support the <u>U.N. Declaration</u> <u>on the Rights of Indigenous Peoples</u> (Declaration) on March 1, 2013. In the plan, the ACHP commits to raising awareness about the Declaration in the historic preservation community and incorporating the principles and aspirations of the Declaration into ACHP initiatives and programs. As part of the effort to raise awareness, the ACHP also committed to developing guidance on the intersection of the process under Section 106 of the National Historic Preservation Act (Section 106) and the Declaration.

This document presents general information about the Declaration and the Section 106 process to give federal agencies, Indian tribes, Native Hawaiian organizations (NHOs), and other interested parties ways in which the two can be integrated in order to enhance the protection of historic properties.

In recognition that the Declaration is an international instrument written to be relevant to many nations and indigenous peoples, the ACHP has liberally interpreted the language and intention of the articles in the Declaration. It could be argued that there are other relevant articles and that the Declaration generally supports the purposes of the National Historic Preservation Act and the Section 106 process. In fact, the 17 of the 46 articles in the Declaration deal with indigenous culture and how to protect and promote it. These articles address issues such as language preservation, education in indigenous languages, and so on, all important but not within the sphere of Section 106. Therefore, the ACHP has identified nine articles that fairly closely intersect with the mission and work of the ACHP and with the Section 106 review process. They are Articles 8, 11, 12, 15, 16, 18, 25, 31, and 38 (see attached).

# **U.N. Declaration on the Rights of Indigenous Peoples**

The U.N. General Assembly adopted the Declaration in 2007 with four member states of the U.N., the United States, Canada, New Zealand, and Australia, initially opposed to it. These states have since reversed their positions.

"The Declaration is a comprehensive statement addressing the human rights of indigenous peoples. It was drafted and formally debated for over twenty years prior to being adopted by the General Assembly on 13 September 2007. The document emphasizes the rights of indigenous peoples to live in dignity, to maintain and strengthen their own institutions, cultures and traditions and to pursue their self-determined development, in keeping with their own needs and aspirations."<sup>1</sup>

"The Declaration establishes a universal framework of minimum standards for the survival, dignity, wellbeing and rights of the world's indigenous peoples. The Declaration addresses both individual and collective rights; cultural rights and identity; rights to education, health, employment, language, and others. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them. It also ensures their right to remain distinct and to pursue

http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf. ADVISORY COUNCIL ON HISTORIC PRESERVATION

<sup>&</sup>lt;sup>1</sup> United Nations Permanent Forum on Indigenous Issues. "Frequently Asked Questions - Declaration on the Rights of Indigenous Peoples." Available at:

their own priorities in economic, social and cultural development. The Declaration explicitly encourages harmonious and cooperative relations between States and indigenous peoples."<sup>2</sup>

For more information about the Declaration, go to <u>http://www.un.org/en/events/indigenousday/pdf/FAQsindigenousdeclaration\_FINAL.pdf</u>.

#### **U.S.** Position on the Declaration

In 2010, at the second White House Tribal Nations Conference, President Obama announced that the United States supports the Declaration, thereby reversing the initial opposition of the U.S. In making the announcement, the President said that "what matters far more than words-what matters far more than any resolution or declaration-are actions to match those words."

The position of the United States is that the Declaration, "while not legally binding or a statement of current international law—has both moral and political force. It expresses both the aspirations of indigenous peoples around the world and those of States in seeking to improve their relations with indigenous peoples. Most importantly, it expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies."<sup>3</sup>

In its response to President Obama's announcement of U.S. support for the Declaration, the National Congress of American Indians (NCAI) issued a statement about the Declaration:

"The importance of the Declaration to American Indian and Alaska Native tribes is significant. While not legally binding in and of itself, it nevertheless performs the invaluable functions of gathering together in one document the basic rights of indigenous peoples, educating the public, and providing clear direction for those nation states endorsing the Declaration. The Declaration has considerable moral and political force and Indian nations will not hesitate to use the Declaration as the standard by which to measure the actions of the federal government."

#### **The Section 106 Process**

Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to consider the effects on historic properties of any project they carry out or which receives federal financial assistance, permits, or approvals (undertakings), and provide the ACHP an opportunity to comment on these projects prior to making a final decision. Agencies must meet their Section 106 responsibilities through a process set forth in regulations issued by the ACHP. These regulations are published in the Code of Federal Regulations at 36 CFR Part 800, "Protection of Historic Properties," and can be found on the ACHP's Web site, <u>www.achp.gov/regs.html</u>.

Both the NHPA and the Section 106 regulations require that federal agencies, in carrying out their Section 106 responsibilities, consult with any Indian tribe or NHO that attaches traditional religious and cultural significance to historic properties that may be affected by an undertaking. The regulations provide general directions regarding tribal and Native Hawaiian consultation at Section 800.2(c)(2) as well as very specific steps to be taken throughout the process. The ACHP has issued extensive guidance regarding such consultation, all of which can be found at <a href="http://www.achp.gov/nap">www.achp.gov/nap</a>.

The Section 106 consultation requirements are very important because they afford Indian tribes and NHOs an opportunity to influence federal decision making when undertakings may affect historic properties of religious and cultural significance to them. These places are often referred to as sacred sites or sacred places. The Section 106 regulations also require federal agencies to acknowledge the special

<sup>&</sup>lt;sup>2</sup> http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx

<sup>&</sup>lt;sup>3</sup> In 2010, the State Department released, "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples." To read the full statement, go to http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pdf.

expertise that Indian tribes and NHOs possess regarding the significance of such places. Further, the regulations support tribal sovereignty in that for an undertaking on tribal land or that affects historic properties on tribal land, an agreement resolving adverse effects to historic properties must have that Indian tribe's signature in order to go into effect. Absent such agreement, the federal agency can only conclude the Section 106 process through ACHP comment, whereby the ACHP membership provides its views to the head of that federal agency or department.

# How the Declaration and the Section 106 Process Intersect

Since the Declaration expresses the rights of indigenous peoples to maintain and protect all aspects of their cultures, there is an obvious relationship to the aims of the NHPA and Section 106. There are also articles that tangentially relate to Section 106. For example, in 2013, the ACHP issued <u>guidance</u> regarding the intersection of Article 18 and the consultation requirements of Section 106.

Some of the rights related to culture and heritage expressed in the Declaration include the right:

- To practice and revitalize cultural traditions and customs
- To maintain, protect and develop the past, present and future manifestations of cultures such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature
- To manifest, practice, develop and teach spiritual and religious traditions, customs and ceremonies
- To maintain, protect, and have access in privacy to religious and cultural sites
- To the use and control of ceremonial objects
- To the repatriation of human remains
- To maintain and strengthen distinctive spiritual relationships with traditionally owned or other occupied and used lands, territories, waters and coastal seas and other resources and to uphold responsibilities to future generations in this regard
- To maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions
- To maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions

Other indigenous rights in the Declaration related, in general, to Section 106 include the right to participate in decision making, the right to not be subjected to the destruction of culture, and the right to reflection of indigenous cultural diversity in State-run media.

# Working with the Declaration: Advice for Federal Agencies

While the Declaration is not legally binding, and thus compliance with its terms is not required, federal agencies can look to the Declaration for policy guidance in general and specifically in carrying out their Section 106 responsibilities. Because the Declaration was developed with input from indigenous peoples around the world, it stands as a guide to what is important to indigenous peoples, above and beyond basic human rights. The ACHP suggests that federal agencies:

- Become familiar with the history of the Declaration and related work at the U.N. and in the U.S. For example, in 2012 Special Rapporteur James Anaya issued a <u>report</u> on the indigenous peoples in the U.S. Additionally, the U.N. held the World Conference on Indigenous Peoples in 2014 and adopted an outcome <u>document</u> or resolution with additional guidance for member states.
- Develop a working knowledge of the <u>Declaration</u> and its articles.
- Know the U.S. <u>position</u> on the Declaration.
- Consider the Declaration to be a policy reference both in the Section 106 process and beyond. In its 2008 policy on its relationship with NHOs, the ACHP clarified that the NHPA and the ACHP's regulations "set the minimum standards for federal agency interactions with its preservation partners." This clarification applies to all preservation partners, not simply NHOs. Therefore, unless a federal agency has binding limitations on what, when, where and how it

consults with Indian tribes and NHOs, it can always make improvements to its consultation practices and policies and the Declaration can help.

- Review agency policies regarding Indian tribes and NHOs and consider updating them to reflect Declaration principles.
- Understand that as indigenous peoples of the U.S. become more familiar with the Declaration, federal agencies may be pressed to recognize, support, and implement the Declaration in carrying out projects and programs.

## Working with the Declaration: Advice for Indian Tribes and Native Hawaiian Organizations

- Become familiar with the Declaration and related work at the U.N. and in the U.S (see above). This information can provide ideas to bring forth in Section 106 and other consultations with federal agencies.
- Understand the current U.S. position on the Declaration and remind federal agencies of such when in consultation.
- Urge succeeding Administrations to continue, and strengthen, the current position on the Declaration.
- Review federal agency policies for consistency with Declaration principles and discuss the results of your review with agencies.
- While the Declaration is primarily directed toward U.N. member states, i.e. nations, share the Declaration with state and local officials to help them understand indigenous issues and the fact that these are global issues.
- Reference specific relevant Declaration articles in consultations and correspondence with federal officials.
- Ask if federal officials are familiar with the Declaration. Refer them to online resources including the ACHP's website.

# Articles of the U.N. Declaration on the Rights of Indigenous Peoples Relevant to the Section 106 <u>Review Process</u>

Of the 46 articles of the Declaration on the Rights of Indigenous Peoples, the following are, in some way, related to the consultation rights afforded to Indian tribes and Native Hawaiian organizations in the Section 106 process, or the overall work of the ACHP. Some of these articles include provisions that are not relevant to historic preservation or the Section 106 process. Therefore, only the relevant provisions of each article are included rather than the entire article. To read the entire Declaration, go to <a href="http://www.achp.gov/docs/UN%20Declaration%20on%20the%20rights%20of%20indigenous%20peoples.pdf">http://www.achp.gov/docs/UN%20Declaration%20on%20the%20rights%20of%20indigenous%20people s.pdf</a>.

## Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

- 2. States shall provide effective mechanisms for prevention of, and redress for:
  - a. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities

## Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

## Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies, the right to maintain, protect, and have access in 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

1. 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.

## Article 16

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

## Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making instructions.

## Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or other occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

## Article 31

1. 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.

2. In conjunction with indigenous peoples, States shall take effect measures to recognize and protect the exercise of these rights.

#### Article 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.