



Preserving America's Heritage

Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act

A federal agency is allowed, in some circumstances, to delegate to its applicants the responsibility to initiate consultation pursuant to the regulations that implement Section 106 of the National Historic Preservation Act (NHPA), “Protection of Historic Properties” (36 CFR Part 800). The provision in Section 800.2(c)(4) of the regulations has been used frequently by federal agencies such as the Federal Communications Commission, the Surface Transportation Board, and the Department of Health and Human Services. Although federal agencies can delegate this responsibility without the involvement of the Advisory Council on Historic Preservation (ACHP), inquiries are often made about the applicability of this authority regarding consultation with Indian tribes. This guidance clarifies the restrictions on the use of this provision regarding Section 106 consultation with Indian tribes.

Federal agencies are required to consult with Indian tribes on a government-to-government basis pursuant to Executive Orders, Presidential memoranda, and other authorities. Section 800.2(c)(2)(ii)(B) of the ACHP’s regulations remind federal agencies that “the Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies or limits the exercise of such rights.”

Section 800.2(c)(2)(ii)(C) of the ACHP’s regulations further reminds agencies that “consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government.”

Moreover, Section 101(d)(6)(B) of the NHPA specifically requires that “in carrying out its responsibilities under [Section 106], a Federal agency shall consult with any Indian tribe ... that attaches religious and cultural significance to [historic properties that may be affected by the undertaking].”

Accordingly, the authorization to applicants to initiate Section 106 consultation does not apply to the initiation of consultation with Indian tribes unless expressly authorized by the Indian tribe to do so. Indian tribes may certainly choose to meet with applicants that would like to initiate Section 106 early in project planning. However, federal agencies cannot unilaterally delegate their tribal consultation responsibilities to an applicant nor presume that such discussions substitute for federal agency tribal consultation responsibilities.

Finally, Section 800.2(c)(4) of the ACHP’s regulations states that “Federal agencies that provide authorizations to applicants [to initiate consultation] remain responsible for their government-to-government relationships with Indian tribes.” Simply stated, Indian tribes are not obligated by statute or

regulations implementing Section 106 to consult with applicants. And, nothing in the Section 106 regulations is intended to (or could) waive tribal rights to government-to-government consultation. Accordingly, it is not appropriate to assume that the lack of written or verbal response by a tribe to an applicant's outreach signifies a lack of interest in the project or waiver of its right to consultation during its review under Section 106.

In circumstances where an Indian tribe agrees to allow a federal agency to authorize an applicant to initiate or carry out Section 106 consultation for a particular program or undertaking, the ACHP recommends that any such delegations be articulated in written agreements between the federal agency and the Indian tribe to avoid confusion. Any such agreement, however, should include a provision that requires the federal agency to reenter the consultation process at any time at the request of the Indian tribe since the federal agency remains responsible for government-to-government consultation. Finally, federal agencies should ensure that applicants fully understand the role of Indian tribes in the Section 106 process and, have clarified what is required to ensure that Indian tribes are afforded a meaningful opportunity to participate.

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