



*Preserving America's Heritage*

## **GUIDANCE ON ASSISTANCE TO CONSULTING PARTIES IN THE SECTION 106 REVIEW PROCESS**

### **Introduction**

Consultation is the heart of the Section 106 process. Federal agencies are required to identify and engage a variety of consulting parties during the steps they follow to meet their legal obligations. Principal among these consulting parties are State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs). Federal agencies also have special consultation responsibilities with respect to Indian tribes and Native Hawaiian organizations (NHOs). Finally, agencies frequently engage local governments, applicants for federal assistance or approvals, community groups, and others as consulting parties.

Due to budget shortfalls and increased workloads, SHPOs, THPOs, Indian tribes, NHOs, and other consulting parties are often challenged to participate fully in Section 106 reviews. The federal government's focus on advancing critical infrastructure and energy projects has further strained the capacity of SHPOs and THPOs, as well as Indian tribes and NHOs, due to the increased number and complexity of projects coming to them for consultation under Section 106. At the same time, SHPOs, THPOs, Indian tribes, and NHOs often lack the resources to maintain modern digital databases to make information needed to inform Section 106 reviews readily available. The purpose of this guidance is to help federal agencies, consistent with relevant federal fiscal law and contracting authorities, find opportunities to assist consulting parties' participation in the Section 106 process.

This guidance addresses situations where it may be appropriate for federal agencies to provide assistance to consulting parties to carry out certain activities in the Section 106 review process. While federal agencies are not obligated to pay consulting parties for their participation in Section 106 consultation, the guidance identifies circumstances under which a federal agency should reimburse a consulting party for activities supporting Section 106 reviews completed on the agency's behalf. Similarly, it provides examples of and guidance for voluntary assistance from a federal agency to a consulting party that can facilitate effective and timely consultation.

This guidance has been developed in fulfillment of objectives in the ACHP's [Action Plan to Support SHPOs/THPOs](#). The membership of the ACHP adopted the Action Plan in 2015 to encourage federal agencies to provide greater support for SHPOs and THPOs as they work with agencies in carrying out Section 106 reviews. Strengthening SHPO and THPO capacity to participate in the Section 106 review process, where appropriate, can benefit both the agency and the SHPO and THPO through increased efficiency in the review process and more effective consideration of historic preservation concerns at critical points in project planning. Likewise, the guidance recognizes that other consulting parties, including Indian tribes, NHOs, local governments, and others, also help federal agencies in addressing historic preservation issues and would benefit from agency assistance.

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## **Section 106 Roles and Responsibilities**

### **What are the federal agency’s responsibilities in carrying out Section 106 review?**

While the regulations implementing Section 106 (36 CFR Part 800) require the federal agency to consult with various parties, including the relevant SHPOs and THPOs, responsibility for compliance with Section 106 remains solely with the federal agency. The federal agency therefore is responsible for determining when it has an undertaking with the potential to affect historic properties, establishing the area of potential effects (APE), identifying and evaluating historic properties within the APE, assessing effects, and resolving any adverse effects to historic properties that may result from the undertaking. Federal agencies are required to consult with SHPOs and THPOs (i.e., seek their views and advice) when carrying out these responsibilities.

### **What are the SHPO/THPO’s responsibilities in the Section 106 review?**

SHPOs and THPOs play critical roles in the Section 106 process. As set out in Sections 101(b)(3) and 101(d)<sup>1</sup> of the National Historic Preservation Act (NHPA), they “consult, advise, and assist” federal agencies in carrying out the agency’s Section 106 responsibilities. Under Section 101(b)(9)(a) of the NHPA, SHPOs and THPOs have a responsibility to “consult with appropriate Federal agencies . . . on Federal undertakings that may affect historic property”.<sup>2</sup> Pursuant to these authorities, SHPOs and THPOs annually review more than 110,000 federal undertakings.

### **What are the roles of Indian tribes and Native Hawaiian organizations in the Section 106 review?**

Indian tribes and NHOs play a special consultative role in the Section 106 process. Section 101(d)(6)(B)<sup>3</sup> of the NHPA requires the federal agency official to consult throughout the Section 106 process with any Indian tribe or NHO that attaches religious and cultural significance to historic properties that may be affected by an undertaking. The regulations implementing Section 106 remind federal agencies, in carrying out their Section 106 responsibility to consult with Indian tribes and NHOs, that “frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and [NHOs]”<sup>4</sup> and therefore, Indian tribes and NHOs participate in Section 106 reviews both on and off tribal lands. Section 800.4(c)(1) of the Section 106 regulations notes that they possess “special expertise” in assessing the National Register eligibility of such properties. Agencies consult with them in developing their historic property identification plan; making determinations of National Register eligibility, assessments of effect and adverse effect; and in determining appropriate mitigation for adverse effects. These parties are given an opportunity to convey their interests and concerns to the agency to help inform the agency’s decision making and promote a course of action they would like to see the agency ultimately take.

## **Funding for SHPOs/THPOs**

### **What is the Historic Preservation Fund?**

Pursuant to the NHPA, the Secretary of the Interior, through the National Park Service (NPS), administers the SHPO and THPO programs. Each eligible SHPO and THPO receives funding from the Historic

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<sup>1</sup> 54 U.S.C. §§ 302303, 302702.

<sup>2</sup> 54 U.S.C. §§ 302303(b)(9)(A), 302702.

<sup>3</sup> 54 U.S.C. § 302706(b).

<sup>4</sup> 36 CFR § 800.2(c)(2)(ii)(D).

Preservation Fund (HPF) to carry out various preservation responsibilities as set forth in the NHPA.<sup>5</sup> The grant each receives may vary in amount from year to year, depending on the funds appropriated by Congress. SHPOs are required to match the HPF grants, while THPOs are not.

Supporting tribal involvement in preservation work is especially important. A THPO assumes the responsibilities of the SHPO for Section 106 on tribal lands. While this source of funding is an important form of assistance to those Indian tribes that have a THPO and a historic preservation program, the funding often does not cover the basic operational costs of a THPO. It should also be noted that many tribes do not have an approved THPO program and therefore receive no HPF grants for the purpose of participating in Section 106 review.

### **What does the HPF pay for?**

Among other things, the HPF supports SHPO and THPO actions to advise federal agencies on meeting their Section 106 responsibilities by commenting on and responding to agency findings and determinations at various steps in the Section 106 process.<sup>6</sup> These may include the following:

- Reviewing federal agency Section 106 submissions, developing comments on them, and providing feedback to the agency regarding the scope and nature of the agency's proposed historic property identification efforts and results, determinations of the eligibility of properties for the National Register of Historic Places (National Register), and assessments of effect and adverse effect;
- Reviewing and commenting upon drafts of proposed Memoranda of Agreement (MOAs) and Programmatic Agreements (PAs);
- Assisting federal agencies in carrying out the terms of MOAs and PAs to resolve adverse effects by, among other things, providing ongoing professional technical advice and assistance, opinions, and perspectives;
- Reviewing federal agency proposals for adherence to the applicable Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation;
- Maintaining the state's or tribe's historic properties inventory, which may include information provided by federal agencies, and making available information regarding historic properties consistent with applicable law;<sup>7</sup>
- Consulting with federal agencies that propose to develop program alternatives for compliance with Section 106, which allow the agencies to tailor the Section 106 process to meet their needs;<sup>8</sup> and
- Reviewing nominations to the National Register that are submitted by Federal Preservation Officers.

### **Can a federal agency provide funding to a SHPO or THPO for the kinds of services and activities covered by the HPF to expedite or expand on those activities?**

Yes, if consistent with applicable agency fiscal and acquisition authorities. For example, where authorized

<sup>5</sup> For SHPOs, see 54 U.S.C. § 302303(b)(5, 6, 9, and 10); for THPOs, see 54 U.S.C. § 302702, which states that upon approval by the Secretary of the Interior a THPO "may assume all or any part of the functions of a State Historic Preservation Officer ... with respect to tribal land ...."

<sup>6</sup> The HPF also assists SHPOs and THPOs in conducting other historic preservation activities. See <https://www.nps.gov/preservation-grants/>.

<sup>7</sup> Note Section 304 of the NHPA, 54 U.S.C. § 307103, and 36 CFR § 800.11(c) instructs the federal agency and other public officials receiving grant assistance under the Act, such as SHPOs and THPOs, after consultation with the Secretary of the Interior, to withhold from disclosure to the public information about the location, character, or ownership of a historic property under certain circumstances. See the ACHP's Frequently Asked Questions on this topic at <https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-protecting-sensitive-information>.

<sup>8</sup> 36 CFR § 800.14.

an agency might provide dedicated staffing within a SHPO office to review Section 106 submissions by the agency and make recommendations to SHPO staff on responding to them.

### **What activities is a federal agency not obligated to pay for when done by the SHPO/THPO?**

A federal agency is not obligated to pay a SHPO or THPO to respond to invitations to consult in a Section 106 review, to respond to the agency's proposed APE, scope of identification efforts, or initial eligibility findings. Also, an agency is not obligated to pay a SHPO or THPO to respond to its assessment of effect or to consult to seek ways to resolve any adverse effects and develop an MOA or PA to conclude the Section 106 review.

### **What doesn't the HPF pay for?**

The NPS' HPF Grants Manual specifically prohibits SHPOs and THPOs from using HPF funds to do work on behalf of a federal agency.<sup>9</sup> The Manual says that neither HPF funds nor a matching share shall be used to undertake planning or mitigation activities that are the responsibility of federal agencies.

### **What activities should a federal agency pay for when done by the SHPO/THPO?**

If a federal agency requests that a SHPO or THPO carry out activities that are the federal agency's responsibility under the NHPA, the SHPO or THPO can and should be reimbursed for doing so, as the agency essentially is asking it to fulfill the role of a cultural resource management (CRM) consultant or contractor. The federal agency, if it chooses to request such services from a SHPO or THPO, should consult with the SHPO or THPO about entering into a contract, agreement, or other legally permissible acquisition mechanism to provide for such payment before requesting these services.

For example, the following activities are federal responsibilities, but a federal agency may choose, to the extent allowed under applicable federal and agency spending and contracting authorities, to compensate a SHPO or THPO to undertake any of the following:

- Conduct a field survey to identify historic properties, e.g., to fulfill an agency's responsibilities under Sections 106 or 110 of the NHPA;
- Perform a desktop survey or file search on behalf of a federal agency;
- Research and make preliminary assessments of National Register eligibility on behalf of a federal agency in the Section 106 process as opposed to responding to the federal agency's determination;
- Provide a preliminary assessment of the potential effects of the undertaking on historic properties, as opposed to responding to the federal agency's assessment;
- Carry out mitigation measures;
- Field monitor an undertaking as part of a mitigation plan;
- Curate artifacts recovered as part of a federal agency's historic property identification or mitigation efforts; or
- Design or develop a specific plan or specifications for a federal undertaking that would meet the Secretary of the Interior's Standards for Rehabilitation.

When performing actions such as the above at the request of a federal agency, the SHPO or THPO is entitled to reasonable payment for the services provided just like any contractor.<sup>10</sup>

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<sup>9</sup> Historic Preservation Fund Grants Manual, Chapter 6, Section E.1, at [https://www.nps.gov/preservation-grants/HPF\\_Manual.pdf](https://www.nps.gov/preservation-grants/HPF_Manual.pdf).

<sup>10</sup> There may be circumstances under which the parties may enter into a gratuitous services agreement, in which case the services may be provided without any expectation of compensation, financial benefit, or reimbursement of any kind from the federal agency.

### **What happens if a SHPO/THPO refuses to consult unless paid for it?**

Under the Section 106 regulations, a SHPO or THPO has 30 days from the time of receipt to respond to an adequately documented finding or determination submitted by a federal agency.<sup>11</sup> Where a SHPO or THPO refuses to respond within that time period because of lack of payment or otherwise fails to respond to an agency's notification or request for comment, the agency is authorized to move forward to the next step or conclude its Section 106 review as appropriate, including by exercising the authority set forth under 36 CFR § 800.7. The agency may also elect to consult with the ACHP in lieu of a non-responsive SHPO or THPO pursuant to 36 CFR § 800.3(c)(4).

### **What happens if a SHPO/THPO refuses to provide a service unless paid for it?**

Where the agency (or its applicant) asks the SHPO or THPO to perform work on its behalf, and the SHPO/THPO refuses, the agency's obligation to fulfill its Section 106 responsibilities remains unchanged. For example, if an agency asks a SHPO to complete a survey and offers to pay, but the SHPO refuses, the agency is still obligated to obtain the information necessary to fulfill its Section 106 responsibilities to identify historic properties.

### **Funding for Consulting Parties**

#### **What activities should a federal agency pay for when carried out by a consulting party, including an Indian tribe or NHO?**

If a consulting party is asked by a federal agency to do more than respond to a federal agency's findings and determinations, then it should be compensated for its efforts. The federal agency should enter into an appropriate arrangement to provide for such payment. For example, when the federal agency or applicant requests that a consulting party, such as an Indian tribe, conduct a survey of the APE or monitor ground-disturbing activity, the agency essentially is asking that consulting party to fulfill the role of a CRM consultant or contractor. In such cases, the consulting party is entitled to reasonable payment for services performed in accordance with the relevant contract or agreement that dictates the scope of work, just as any other consultant or contractor would.

#### **What activities is a federal agency not required to pay for when done by a consulting party?**

When the federal agency (or in some cases the applicant) seeks the views and advice of any consulting party in fulfilling its legal obligation to consult with them, the agency or applicant is not required to pay that party for providing its views. This does not mean that an agency or applicant cannot voluntarily provide assistance to the consulting party within the agency's authorities. Whenever the line between an activity for which a consulting party should be reimbursed and an activity that is part of consulting party participation in Section 106 review is not clear, the agency is encouraged to act in a manner that facilitates, rather than impedes, effective participation in the Section 106 process. In such circumstances, the federal agency is encouraged to seek the advice of agency legal counsel to ensure compliance with applicable fiscal and acquisition requirements.

#### **What happens if a consulting party, including an Indian tribe or NHO, refuses to provide a service unless paid for it?**

Unlike SHPOs and THPOs (on tribal lands), which are required to participate in the Section 106 process as described above and in fulfillment of their HPF grants, the involvement of other consulting parties,

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<sup>11</sup> See <https://www.achp.gov/guidance-on-30-day-time-limits>.

including Indian tribes and NHOs, in the Section 106 process is voluntary on their part, and they may elect to respond or not respond to the agency or applicant with their views and/or information. If the federal agency or its applicant has made a “reasonable and good faith effort” to engage any such consulting party, and that party refuses to respond within the time period set forth in the Section 106 regulations without receiving compensation, the agency has no obligation to provide any payment. The agency has met its obligation to consult and is free to move to the next step in the Section 106 process.

### **Authorities and Restrictions**

#### **Who should pay for mitigation to resolve adverse effects to historic properties?**

The federal agency is responsible for developing and considering actions to resolve adverse effects to historic properties where it has determined such effects may occur as part of a Section 106 review. In most cases, this results in measures agreed to by the agency to minimize or mitigate harm. The federal agency is therefore responsible for ensuring any such measures are funded and carried out, either directly by the agency or others, such as an applicant for a federal license, approval, or permit, as specified in a Section 106 agreement document or other binding final agency decision document.

#### **Can a federal agency provide support other than financial assistance to SHPOs/THPOs, Indian tribes, and NHOs, and other consulting parties?**

Yes, where allowed under applicable law and regulation. Where direct financial assistance from an agency to a consulting party may not be available, other forms of assistance may be possible. Nothing in the NHPA bars a federal agency from donating or lending to consulting parties, including SHPOs and THPOs, equipment, material, or non-monetary resources. In such circumstances, the federal agency is encouraged to seek the advice of agency legal counsel to ensure compliance with applicable fiscal, acquisition, and property management requirements.

#### **What are examples of non-financial assistance provided by agencies to consulting parties?**

A federal agency might:

- Provide the consulting party with training on or access to agency-specific computerized inventory data or systems;
- Provide transportation, lodging, or meals to enable participation in a Section 106 consultation meeting or conference; or
- Provide supplies and equipment that will allow the consulting party to more effectively assist the agency in meeting its Section 106 responsibilities.

Other federal laws and regulations may address the provision of such assistance with regard to specific agencies. Likewise there may be state or tribal laws affecting the acceptance of assistance from federal agencies or applicants.

#### **Might an agency have specific legal limitations on providing support to SHPOs/THPOs and other consulting parties?**

Yes. Each federal agency should look to its authorizing legislation, fiscal and acquisition authorities, the Anti-Deficiency Act,<sup>12</sup> and any other applicable federal laws and regulations to consider whether it is permissible to provide support to SHPOs, THPOs, and other consulting parties in any specific circumstance.

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<sup>12</sup> 31 U.S.C. § 1341.

### **What does Section 110(g) of the NHPA authorize?**

Section 110(g) of the NHPA states that, “[e]ach Federal agency may include the costs of preservation activities of such agency under [the NHPA] as eligible project costs in all undertakings of such agency or assisted by such agency. The eligible project costs may also include amounts paid by a Federal agency to any State to be used in carrying out such preservation responsibilities of the Federal agency under [the NHPA], and reasonable costs may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit.”<sup>13</sup> Funding SHPO work under Section 106 could help a federal agency carry out its “preservation responsibilities” and is therefore a use of appropriated funds authorized by Section 110(g) of the NHPA.<sup>14</sup>

### **Can a federal agency pay for personnel in a SHPO office?**

Yes. A federal agency may utilize the authority provided in Section 110(g) of the NHPA to support dedicated personnel in a SHPO office. Such positions may serve as liaisons to assist the federal agency in fulfilling its preservation responsibilities. For example, the agency might fund liaisons who would assist the federal agency by helping to ensure sufficient information is provided to support the agency’s findings or determinations, to ensure the submission package is adequate and complete, to respond to any technical questions, and to provide other assistance as may be needed by the agency in communicating and consulting with the SHPO. Agencies have created such arrangements in the past in response to disaster declarations or phases of increased review volume at a specific federal installation.

### **Can a federal agency pay for personnel in a THPO office?**

Yes. While Section 110(g) refers to amounts paid to a “State,” the statute also allows for the inclusion of other preservation activities, such as providing assistance to a THPO, within “eligible project costs.”<sup>15</sup> The principle of assisting SHPO activities would certainly support federal assistance to THPOs for similar work.

### **Are there other legal authorities that enable agencies to provide support to SHPOs/THPOs and other consulting parties?**

Yes. Some agencies possess their own statutory authority that would allow them to provide such assistance. For example, the Department of the Interior has explicit authority to enter into cooperative agreements with states and Indian tribes to carry out various preservation-related tasks such as maintenance of archaeological databases.<sup>16</sup> The Department of Transportation has specific legal authority to fund positions at different agencies.<sup>17</sup> Other federal agencies should explore whether they may also

<sup>13</sup> 54 U.S.C. § 306109.

<sup>14</sup> See <https://www.achp.gov/digital-library-section-106-landing/national-historic-preservation-act-authorization-federal-agency>.

<sup>15</sup> See 54 U.S.C. § 306109 stating, “[a] Federal agency may include the costs of preservation activities of the agency under this division as eligible project costs in all undertakings of the agency or assisted by the agency.”

<sup>16</sup> For example, “Bureau of Land Management Data Sharing Partnership,” in Advisory Council on Historic Preservation, *In a Spirit of Stewardship: A Report on Federal Historic Property Management*, 2018, 33.

<sup>17</sup> Section 1309(e) of the Transportation Equity Act for the 21st Century (TEA-21) gave DOTs the option to spend federal-aid highway dollars to fund positions at other agencies to meet cooperatively determined time frame in certain circumstances. In 2005 the authority to fund additional staff at resource agencies was extended and broadened with enactment of the Safe, Accountable, Flexible, Efficient, and Transportation Equity Act: A Legacy for Users (SAFETEA-LU). The law retained and broadened the funding authority, allowing State DOTs to support activities outside the National Environmental Policy Act (NEPA) process. Section 6002 of SAFETEA-LU allows State DOTs to fund staff positions at federal and state resource agencies which are dedicated to working on State DOT projects for environmental streamlining and related planning activities. Collectively known as transportation liaisons, these positions are located throughout the country. These liaisons possess expertise in specific environmental disciplines, including historic preservation. As liaisons, historic preservation professionals serve on the staff of SHPOs, typically in the role of Section 106 reviewers.

have similar authorities that can be used in assisting SHPOs, THPOs, and other consulting parties.

**Is there a conflict of interest when a federal agency pays for SHPO/THPO personnel?**

There may be a concern that paying a SHPO/THPO for historic preservation advice or work could infuse an unwanted bias into such advice and therefore also call into question the federal agency decisions that consider such advice. The thinking is that, under those circumstances, the SHPO/THPO may be more willing to side with a federal agency's desired outcome on a project so as not to endanger future funding, rather than provide advice strictly on the historic preservation merits of the matter.

However, it is important to reiterate that Section 106 is a consultative process that, by its very nature, involves the federal agency receiving and considering advice from various parties who, as widely known, have their own interests (many times, financial ones) on the projects at issue. For instance, applicants for federal financial assistance or permits have inherent and direct economic interests in the projects for which they are seeking federal assistance or approvals. Nevertheless, such applicants are consulting parties of right in Section 106 reviews and can (and often do) provide their advice and views to the federal agency on the historic preservation issues that come up in Section 106 reviews. They may even be authorized to initiate Section 106 consultation.<sup>18</sup>

Lastly, it is important to reiterate that all Section 106 findings and determinations are made by the relevant federal agencies. The federal agency makes its own independent decisions in the process and considers advice given to it by the SHPO and THPO, and others that, as mentioned above, may have inherent financial interests in the project at issue. This federal responsibility is unaffected by whether the agency provides assistance to the SHPO and THPO.

To ensure transparency in the consultation process when non-HPF federal funds are used, the federal agency and SHPO/THPO should clearly and reasonably identify to each other the roles and responsibilities of relevant staff and their sources of funding.

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<sup>18</sup> 36 CFR § 800.2(c)(4).