



Preserving America's Heritage

The Indian Removal Era and Section 106 Tribal Consultation: Information Paper

INTRODUCTION

The National Historic Preservation Act (NHPA) requires federal agencies, in carrying out the Section 106 process, to consult with Indian tribes and NHOs when historic properties of religious and cultural significance to them may be affected by a federal project. It also clarifies that properties of religious and cultural significance to Indian tribes and NHOs may be eligible for the National Register of Historic Places.

The ACHP's regulations implementing Section 106, 36 C.F.R. Part 800, in turn, require federal agencies to consult with Indian tribes throughout the review process. This requirement applies regardless of the location of the historic property. The regulations also include a reminder that "frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes." (36 C.F.R. Section 800.2(c)(2)(ii)(D))

Therefore, in this paper, the Advisory Council on Historic Preservation (ACHP) seeks to help federal agencies understand why they must consult with those Indian tribes who were removed from their homelands by the federal government and now may reside great distances from a proposed undertaking. Understanding the effects of removal on Indian tribes and their ability to participate in the Section 106 process will help federal agencies to carry out their consultation responsibilities more effectively and efficiently.

It is important to understand that United States (US) policies concerning Indian tribes, from the first treaties, still affect the relationship, roles, and responsibilities between the US and tribal governments. Some of the most profound impacts occurred and continue today as a result of the removal of Indian tribes from their ancestral lands.

While this paper describes difficulties for Indian tribes that have been forcibly removed from their ancestral lands, it is important to note that all Indian tribes have undergone some manner of displacement, whether they have seen their homelands whittled down to small reservations or have lost their lands and status through the federal policies of removal and termination. This means that the effects of removal persist and continue to affect tribal participation in the Section 106 process, and that all Indian tribes have lost places of importance and cultural relevance and, as a result, have interests and concerns for locations, places, and sites within their ancestral lands that may contain properties of religious and cultural significance to them.

The Section 106 process, 36 CFR Part 800, is fundamentally about attempting to resolve potential conflicts between projects carried out, assisted, or licensed by federal agencies (undertakings) and historic

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preservation concerns. The process is rooted in consultation between the federal agency and consulting parties, including Indian tribes, and is intended to help the federal agency make informed decisions about historic properties, including those properties of religious and cultural significance to Indian tribes.

BACKGROUND

Indian removal pre-dated the formation of the United States. As early as the 17th century, the Delaware Nation was under pressure from Dutch settlers to leave their homelands. The Delaware then entered into a treaty with England in which they ceded their aboriginal territory in the Delaware and Hudson River watershed to the English and moved west.

In 1830, Congress, following the example of the English, passed the Indian Removal Act, which required the various Indian tribes in today's southeastern United States to give up their lands in exchange for federal territory which was located west of the Mississippi River. Most Indians fiercely resisted this policy, but as the 1830s wore on, most of the major tribes – the Choctaws, Muscogee Creeks, Seminoles, and Chickasaws–agreed to be relocated to Indian Territory (in present-day Oklahoma). As an example, in May 1838, the Cherokee removal process began, and US Army troops, along with various state militias, moved into the tribe's homelands and forcibly evicted more than 16,000 Cherokee people from their homelands in Tennessee, Alabama, North Carolina, and Georgia. The impact of the resulting "Trail of Tears" was devastating. The other southeastern tribes suffered similarly.

The Indian Removal Act established a process whereby the President could grant land west of the Mississippi River to Indian tribes that agreed to give up their homelands. As incentives, the law allowed the Indians financial and material assistance to travel to their new locations and start new lives and guaranteed that the Indians would live on their new property under the protection of the United States government forever.¹ However, the assistance and allowances were not usually provided to the Indian tribes that experienced the removal events.

All of the Indian tribes subject to the Act were removed from their ancestral territories and the places encompassing important cultural, historic, ceremonial, and sacred sites. The Act deeply affected Indian tribes particularly in the Southeast, Midwest, and Plains regions where various Indian tribes experienced partial, extensive, or complete relocation. The Potawatomi Nation was fragmented and moved along the Trail of Death to Kansas and Oklahoma from their ancestral lands now known as Wisconsin, Michigan, Illinois, and Indiana. The Ponca Nation was forcibly moved to Indian Territory from their ancestral lands, currently Nebraska, after the US dispensed the land to the Sioux Nation in the Treaty of 1851.²

The impacts of removal were more complicated than can be fully explained in this paper. For instance, Indian tribes may have lost or gained recognition as a result of removal. For instance, there are now three Choctaw tribes, one located in Choctaw homelands, one between the homelands and Oklahoma, and one in Oklahoma. Some Indian tribes may have been incorporated into other tribes as a result of removal, and some Indian tribes that were unrelated were grouped together and placed on the lands that were occupied previously by other Indian tribes. Therefore, there may now be overlap between the original Indian tribes and removed Indian tribes.

Some Indian tribes relocated from their aboriginal homelands to their current localities because of displacement by European settlers and their descendants. This was not a result of the Act but a pressured and involuntary migration which effectively removed Indian tribes from their ancestral lands. These tribes

1 <https://history.state.gov/milestones/1830-1860/indian-treaties>

2 <http://www.fivecivilizedtribes.org/Portals/FiveCivilizedTribes/Docs/Resolutions/2016/16-25.pdf?ver=2016-08-08-101204-470>

face the same challenges in consultation on projects in their traditional or ancestral lands.

Other Indian tribes were subject to removal but ended up back in their homelands. For instance, the Navajo Nation experienced a removal event, known as The Long Walk. In 1864, the US Army drove the Navajo at gunpoint as they walked from their homeland in Arizona and New Mexico 300 miles to Fort Sumner along the Pecos River in New Mexico. Hundreds died during 18 days of marching. About 9,000 Navajos reached the fort, where 400 Mescalero Apaches were already held.³

It is also important to understand that removal and other impacts faced by Indian tribes throughout US history have resulted in historic trauma. Historic trauma⁴ continues to impact tribal communities daily, and the value system that affects tribes are not always known or understood. The emotional and spiritual attachment to the land intensifies when tribes are excluded from their ancestral lands, which contain important and significant areas and places, and can be frustrating during the consultation process.

THE CHALLENGES

Section 54 U.S.C. 302706 of the National Historic Preservation Act (NHPA) and the ACHP's regulations require federal agencies, in carrying out their Section 106 responsibilities, to consult with any federally recognized Indian tribe that attaches religious and cultural significance to historic properties that may be affected by a proposed undertaking. Such consultation is required regardless of the location of the historic properties or where the tribal government currently resides. It is important to note that the removal policies of the past as well as other historical circumstances may mean that Indian tribes could be concerned about properties of religious and cultural significance hundreds of miles and many states away from the current location of the tribal government. These distances present Section 106 consultation challenges for both Indian tribes and federal agencies.

In developing this paper, the ACHP sought input from Indian tribes about their unique challenges in Section 106 consultation as a result of their removal or other relocation from their ancestral lands. Every removed Indian tribe may have challenges specific to their circumstances, and there may be additional issues not covered here, but the general obstacles that were identified include the following:

- Distance
- Consulting out-of-state Indian tribes
- Inadequate funding
- Education and awareness

DISTANCE

Great distances separating removed Indian tribes from their ancestral homelands can complicate their ability to participate in Section 106 consultations. For instance, it is not uncommon, in states where there are currently no resident Indian tribes, for Section 106 participants to be unaware that there may be tribal interest in project locations or that there may be properties of religious and cultural significance to an Indian tribe that needs consideration. This results in Indian tribes not being afforded their right to participate in consultation and, thus, the opportunity to make others aware of historic properties of religious and cultural significance to them.

Distance also means that an Indian tribe may have to travel quite far in order to accurately locate and evaluate their significant places or locations. These places may continue to be of significance to an Indian

³ <https://www.nlm.nih.gov/nativevoices/timeline/332.html>

⁴ <https://store.samhsa.gov/system/files/sma14-4866.pdf>

tribe, but the precise location may be much more difficult to identify because the Indian tribe no longer has access to them or, due to distance, can no longer regularly go to these places. However, this separation or inability to physically visit a place does not necessarily diminish the significance or importance it holds to an Indian tribe or its citizens.

CONSULTING OUT-OF- STATE INDIAN TRIBES

There are states in which there are currently no Indian reservations or resident federally recognized Indian tribal governments. Yet, within those states there are ancestral lands for which many Indian tribes maintain cultural relationships or ascribe religious and cultural importance to locations, places, and sites. Therefore, federal agencies involved in undertakings in these states must make a reasonable and good faith effort to identify and consult with such out-of- state Indian tribes.⁵

The Natural Resources Conservation Service (NRCS) recently released guidance addressing the identification of and consultation with Indian tribes on their ancestral lands.⁶ A primary purpose of the guidance is to outline “how NRCS can effectively manage projects that incorporate Indian Tribe input acquired through consultation, and complete the NHPA Section 106 review process in a timely manner.”⁷ An important component is the NRCS definition of ancestral lands that is consistent with the Section 106 requirements of identifying relevant tribes regardless of current location and is inclusive enough to capture the concepts of ancestral, aboriginal, and ceded lands:

“Ancestral Lands —Areas, whether discrete or continuous, where Indian Tribes, Native Hawaiian organizations, or their members have affiliation. These are areas that have cultural, historical, spiritual, subsistence, or ceremonial significance ascribed to them. An Indian Tribe’s or NHO’s physical connections to these areas may or may not persist into the modern era, an ongoing physical connection to an area is not required for a site to have religious and cultural significance. Ancestral lands are defined by Indian Tribes or NHOs based on their knowledge of their history and connections with that area.”⁸

While this definition and the accompanying guidance have been developed for one federal agency, it provides a useful example that other federal agencies can follow for the identification of and interactions with Indian tribes concerning historic properties in their ancestral lands during the Section 106 process.

INADEQUATE FUNDING

The lack of adequate funding for historic preservation efforts is a relentless challenge for most Indian tribes as the number of Section 106 reviews increases and as they assume more and more responsibilities to protect and preserve their cultural identity and places of religious and cultural importance to them. While funding is an important issue for all Indian tribes, it has additional ramifications for removed and relocated Indian tribes because of the distance and associated costs to attend and be present in their ancestral lands. Therefore, funding shortages may challenge the ability of removed Indian tribes from effectively participating in the Section 106 process.

EDUCATION AND AWARENESS

5 36 C.F.R. 800.2(c)(2)(ii)(A)

6 *Tribal Ancestral Lands Consultation Under the National Historic Preservation Act – Guidance for Natural Resources Conservation Service Employees* – Title 190 Part 315

7 Title 190, Subpart A, Part 315.1

8 Title 190, Subpart A, Part 315.3.G.(i)

Investing in education and training about US-tribal relations and history, tribal histories and cultures, and federal obligations to Indian tribes would go a long way to resolving consultation challenges. Tribal representatives frequently have to educate other Section 106 participants about their histories and cultures and their rights to participate in Section 106 consultations. This is an additional burden on already stressed tribal resources. It also means that removed Indian tribes face a greater risk of not being included in the Section 106 review process when projects are implemented within their ancestral lands at great distances from the current location of the tribal government.

Some tribal representatives also describe difficulties consulting with federal agencies about cultural sites, even for high profile historic events such as the Trail of Tears. Removal routes and associated places are sensitive and important to Indian tribes that experienced removal. Additionally, removal or relocation may mean that Indian tribes have very large areas of interest, sometimes encompassing several states, because they were forced to move great distances.

There are general resources available for Section 106 participants such as the Frequently Asked Questions compiled by the Bureau of Indian Affairs⁹ and the paper *Tribal Nations & the United States: An Introduction* by the National Congress of American Indians.¹⁰

CONCLUSION

When interacting with tribal members, it is important to understand that each person has experienced his or her culture in a unique way. It is equally important to remember that each Indian tribe is unique and, while there may be similarities among tribal nations, their histories and cultures are unique. And, historical trauma and grief events, such as boarding schools and the Trail of Tears, may play a dramatic role in the shaping of attitudes, sense of identity, and levels of trust extended to federal agencies.

For more efficient and effective Section 106 tribal consultation with Indian tribes that were subject to Removal Era policies, federal agencies can improve their understanding of tribal histories and incorporate mechanisms to overcome or remove obstacles to consulting with such Indian tribes. Overall, the goal is improved federal-tribal relations and tribal involvement in Section 106 consultations which, in turn, can lead to better preservation outcomes in the Section 106 process while achieving greater efficiencies for the undertakings.

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⁹ <https://www.bia.gov/frequently-asked-questions>

¹⁰ <http://www.ncai.org/about-tribes>