



**CONSULTATION WITH INDIAN TRIBES
IN THE
SECTION 106 REVIEW PROCESS:
THE HANDBOOK**

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An independent federal agency, the Advisory Council on Historic Preservation (ACHP) promotes the preservation, enhancement, and productive use of our nation's historic resources and advises the President and Congress on national historic preservation policy. It also provides a forum for influencing federal activities, programs, and policies that affect historic properties.

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Consultation with Indian Tribes in the Section 106 Review Process: A Handbook

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About this Handbook

Since the first publication of this handbook in 2008, there have been a number of policy developments that bear on federal agency consultation with Indian tribes. Among these developments is the adoption of tribal consultation policies by every major U.S. department and the United States' support for the United Nations Declaration on the Rights of Indigenous Peoples. The ACHP has also issued additional guidance about specific issues regarding tribal consultation in the Section 106 process and, as a member of interagency working groups, on broader tribal preservation topics. These new developments will be referenced throughout the guidance.

The focus of this handbook is tribal consultation in the Section 106 review process. It is intended to be a reference for federal agency staff responsible for compliance with Section 106. Tribal Historic Preservation Officers (THPOs) and tribal cultural resource managers may also find this handbook helpful.

Readers should have a basic understanding of the Section 106 review process as this document focuses only on Section 106 tribal consultation. It is not a source for understanding the full breadth of Section 106 responsibilities, such as consulting with State Historic Preservation Officers (SHPOs), involving the public, or consulting with Native Hawaiian organizations (NHOs).¹

Agencies should supplement this document with their own agency-specific regulations, directives, policies, and guidance pertaining to tribal consultation. Many have already done so. Federal agencies should also be aware that many Indian tribes have their own statutes, regulations, and policies that apply to projects and development on tribal lands. In addition, federal agency staff should refer questions about the Section 106 review process, and the requirements to consult with Indian tribes within this process, to their agency's Federal Preservation Officer (FPO).

Finally, agency staff may obtain assistance from the ACHP in understanding and interpreting the requirements of Section 106, including tribal consultation. For general information on the requirements of Section 106, access the ACHP website at <http://www.achp.gov>.

For additional questions about tribal consultation, contact:

Office of Native American Affairs at
native@achp.gov

¹ For information on consultation with NHOs, the ACHP provides *Consultation with Native Hawaiian Organizations in the Section 106 Review Process: A Handbook*.

II. Federal Government Consultation with Indian Tribes

Many different statutes, regulations, executive orders, and federal policies direct federal agencies to consult with Indian tribes including the [National Historic Preservation Act](#) (NHPA) as amended. Section 106 of the NHPA, 54 U.S.C. 306108 and its implementing regulations at 36 CFR part 800 (Section 106), requires federal agencies to take into account the effects of projects they carry out, license, or financially assist (undertakings) on historic properties and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on those undertakings. The NHPA also requires that, in carrying out its responsibilities under the Section 106 review process, a federal agency must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the agency's undertakings. 54 U.S.C. 302706 (b).

The following is a very brief description of basic concepts regarding the federal government's responsibility towards and relationship with Indian tribes. There are many sources for additional information including the [BIA frequently asked questions](#).

A. The Government-to-Government Relationship between the United States and Indian Tribes

The federal government's unique relationship with each and every Indian tribe is embodied in the U.S. Constitution, Indian treaties, court decisions, federal statutes, and executive orders. This relationship is deeply rooted in history, dating back to the earliest contact between colonial and tribal governments. As the colonial powers did, the United States acknowledges federally recognized Indian tribes as sovereign nations; thus, federal government interaction with federally recognized Indian tribes takes place on a "government-to-government" basis.

Legally, there is a distinction between Indian tribes that are federally recognized and those that are not. Federal recognition signifies that the U.S. government acknowledges the political sovereignty and Indian identity of an Indian tribe and from that recognition flows the obligation to conduct dealings with that Indian tribe's leadership on a "government-to-government" basis.

Executive Order 13175 (2000), *Consultation and Coordination with Tribal Governments* lists as one of its purposes "to strengthen the United States' government-to-government relationships with Indian tribes..." Thus, the government-to-government consultation process continues to embody the unique relationship between the United States and Indian tribes.

Federal agency staff responsible for carrying out tribal consultation should be familiar with the history of the relationship between the U.S. government and Indian tribes because that history may influence the context of consultation.

B. The Federal Trust Responsibility Toward Indian Tribes

The federal Indian trust responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (*Seminole Nation v. United States*, 1942). This obligation was first discussed by Chief Justice John Marshall in *Cherokee*

Nation v. Georgia (1831). Over the years, the trust doctrine has been at the center of numerous other Supreme Court cases, thus making it one of the most important principles in federal Indian law.

The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages. In several cases discussing the trust responsibility, the Supreme Court has used language suggesting that it entails legal duties, moral obligations, and the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the United States and the federally recognized tribes.

Each agency defines the scope of its trust responsibility to Indian tribes. The ACHP's trust responsibility is to ensure that its regulations implement the requirements of Section 106 of the National Historic Preservation Act and that such regulations incorporate the procedural requirement that federal agencies consult with Indian tribes that attach religious and cultural significance to historic properties that may be affected by their undertakings.

Questions regarding your agency's trust responsibility to Indian tribes should be directed to your tribal liaison/Native American coordinator or office of general counsel. The ACHP neither defines such a scope for others nor advises agencies on this issue.

C. Legal Requirements and Directives to Consult with Indian Tribes

1) Statutes

A number of federal statutes require federal agencies to consult or coordinate with Indian tribes.² This section will address only those applicable in the areas of historic preservation, natural resource protection, and cultural resource protection. It is useful to be familiar with these various statutory requirements not only to ensure compliance, but also to explore opportunities to maximize consultation opportunities. For instance, if a project requires compliance with both the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA), it may be helpful to carry out consultation in a comprehensive manner by including discussions about historic properties and natural resources in the same meetings. (Note: The ACHP regulations at 36 CFR, Section 800.8 set out principles and requirements for coordinating or combining NHPA and NEPA procedures.) The ACHP and Council on Environmental Quality (CEQ) have also jointly published *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*.

In addition, federal agencies should talk with interested Indian tribes as *early in the planning process as possible* to identify any special legal authorities that carry additional requirements for consultation or consideration, such as a treaty that reserves certain tribal rights that could be impinged upon by a proposed project.

Historic Preservation, Natural Resource Protection, and Cultural Resource Protection Statutes

The following are broad summaries of key federal historic preservation, natural resource protection, and cultural resource protection statutes that require agencies to consult with Indian tribes or accommodate tribal views and practices. This is not an exhaustive list of requirements, nor does it imply that each of these statutes is applicable to each proposed project.

² A list of federal authorities that require tribal consultation was compiled by an interagency working group in a *Progress Report on the Implementation of the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites*.

- **The National Historic Preservation Act of 1966 (NHPA)** is the basis for tribal consultation in the Section 106 review process. Two portions of the NHPA that have a direct bearing on the Section 106 review process are:

54 U.S.C. 302706 (a), which clarifies that properties of religious and cultural importance to Indian tribes may be eligible for listing in the National Register of Historic Places; and

54 U.S.C. 302706 (b), which requires that federal agencies, in carrying out their Section 106 responsibilities, consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking.

The Section 106 regulations incorporate these provisions and reflect other directives about tribal consultation from executive orders, presidential memoranda, and other authorities.

Section 106 of the NHPA requires federal agencies to consider the effects of projects they carry out, license, or financially assist (undertakings) on historic properties and to provide the ACHP an opportunity to comment on such undertakings. The procedure for meeting Section 106 requirements is defined in its implementing regulations at [36 CFR Part 800, "Protection of Historic Properties."](#)³ This process, also known as the Section 106 review process, seeks to avoid, minimize or mitigate adverse effects to historic properties from undertakings.

The Section 106 regulations include both general direction regarding tribal consultation and specific requirements at each stage of the review process. (Section 106 is discussed more fully in the next section, "Consultation with Indian tribes under Section 106 of NHPA.")

For more information about the NHPA and the Section 106 regulations, visit <https://www.achp.gov/>.

The National Environmental Policy Act of 1969 (NEPA) requires the preparation of an environmental impact statement (EIS) for any proposed major federal action that may significantly affect the quality of the human environment. Under NEPA, Federal agencies are encouraged to consult with Indian tribes early in the planning process, and to invite Indian tribes to be cooperating agencies in preparation of an EIS, when potential effects are on a reservation or affect tribal interests. Tribal consultation under NEPA can include effects to treaty, trust, and other natural resource issues, as well as to cultural resources in general, whether or not they meet the specific definition of historic property under the NHPA. The NEPA review may also include the government's responsibilities under Executive Order (EO) 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; EO 13175, Consultation and Coordination with Indian Tribal Governments; the American Indian Religious Freedom Act; and related statutes and policies that have a consultation component.⁴

- **The American Indian Religious Freedom Act of 1978 (AIRFA)** establishes the policy of the federal government "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

³ [36 CFR PART 800 -- PROTECTION OF HISTORIC PROPERTIES](#) (incorporating amendments effective August 5, 2004)

⁴ [NEPA and NHPA: A Handbook for Integrating NEPA and Section 106](#)

- **The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)**, Section 3(c) requires federal land-managing agencies to consult with federally recognized Indian tribes prior the intentional removal or excavation of Native American human remains and other cultural items as defined in NAGPRA from federal lands.

On tribal lands, planned excavation requires the consent of the appropriate Indian tribe (43 CFR § 10.3).

In instances where a proposed project that is funded or licensed by a federal agency may cross federal or tribal lands, it is the federal land managing agency that is responsible for compliance with NAGPRA. Detailed information about NAGPRA and its implementing regulations is available at the National Park Service (NPS) [National NAGPRA website](#).⁵

2) Executive Orders

In many instances, presidential executive orders apply to agencies on an agency-wide or program-wide basis rather than on a project-by-project basis. However, federal staff responsible for working or coordinating with Indian tribal governments should be familiar with the applicable executive orders and act in accordance with the intent of the directives. Several of the orders specific to consultation with federally recognized Indian tribes include:

- **Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”** (2000), directs federal agencies to respect tribal self-government and sovereignty, tribal rights, and tribal responsibilities whenever they formulate policies “significantly or uniquely affecting Indian tribal governments.” The executive order applies to all federal agencies other than those considered independent federal agencies, encouraging “meaningful and timely” consultation with Indian tribes, and consideration of compliance costs imposed on tribal governments when developing policies or regulations that may affect Indian tribes.
- **Executive Order 13007, “Indian Sacred Sites”** (1996), applies to all federally owned lands except “Indian trust lands.” It encourages land managing agencies to:
 - accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners; and
 - avoid adversely affecting the physical integrity of such sites.
- **Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”** (1994), is designed to focus federal attention on the environmental and human health conditions in minority communities and low-income communities. It is also designed to promote non-discrimination in federal programs substantially affecting human health and the environment.
 - Section 6-606 of the order states that, “each federal agency responsibility set forth under this order shall apply equally to Native American programs.”

D. Treaties

From 1778 to 1871, the federal government’s relations with Indian tribes were defined and conducted largely through the treaty-making process. These treaties recognized the sovereignty of Indian tribes.

⁵ National Park Service [Native American Graves Protection and Repatriation Act](#)

They also established unique sets of rights, benefits, and conditions for the treaty-making tribes that agreed to cede millions of acres of their homelands to the United States in return for recognition of property rights in land and resources and federal protections.

Under the U.S. Constitution, treaties are part of the supreme law of the land, with the same legal force and effect as federal statutes. Treaties bind both the federal government and the signing Indian tribe or tribes, and generally constitute recognition of rights to lands and resources, as well as rights to fish, hunt, and gather. An important consideration is the reserved rights doctrine in which any rights not expressly addressed in the treaty are reserved to the Indian tribe. This means treaties address the specific rights Indian tribes relinquished, not the rights they retained. As such, the federal government has an obligation to honor and respect tribal rights and resources that are protected by treaties. This means that federal agencies are bound to give effect to treaty language and, accordingly, must ensure that federal agency actions do not conflict with tribal treaty rights. Integrating consideration of tribal treaty rights into agency decision making processes is also consistent with the federal government's trust responsibility to federally recognized Indian tribes.

For more information, see *Tribal Treaty Rights in the Section 106 Process*.

E. The United Nations Declaration on the Rights of Indigenous Peoples

In 2010, President Obama announced that the United States supports the [United Nations Declaration on the Rights of Indigenous Peoples](#) (Declaration). At the same time, the State Department issued *Announcement of U.S. Support for the Declaration on the Rights of Indigenous Peoples* “which explains the U.S. position on the Declaration. In it, the State Department explains that the Declaration:

“which—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.”

In 2013, the ACHP formally adopted a [plan to support the Declaration](#) and subsequently issued two guidance documents on the intersection of the Declaration and Section 106. *Section 106 and the U.N. Declaration on the Rights of Indigenous Peoples: General Information and Guidance* addresses consultation under the Declaration and the Section 106 process and *Section 106 and the U.N. Declaration on the Rights of Indigenous Peoples: Intersection and Common Issues: Article 18 and Section 106* addresses multiple intersections between the two.

While the Declaration is not legally enforceable, it is an important policy document. The ACHP recommends that federal agencies familiarize themselves with it and consider ways in which the Declaration supports their tribal consultation policies and practices. The ACHP provided a web page with more information and guidance concerning the [Declaration](#).

III. General Information about Consultation with Indian Tribes in the Section 106 Process

Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.(36 CFR Section 800.16 (f)).

Consultation is more than simply notifying an Indian tribe about a planned undertaking. The ACHP views consultation as a process of communication that may include written correspondence, meetings, telephone conferences, site visits, and e-mails.

The requirements to consult with Indian tribes in the Section 106 review process are derived from the specific language in the NHPA at 54 USC 302706(b). They are also based on the unique legal relationship between federally recognized Indian tribes and the federal government embodied in the U.S. Constitution, treaties, court decisions, federal statutes, and executive orders.

Federal agencies are required to consult with Indian tribes at specific steps in the Section 106 review process and regardless of whether the undertaking is located on or off tribal lands. Tribal consultation for projects off tribal lands is required because the NHPA does not restrict tribal consultation to tribal lands alone and those off tribal lands may be the ancestral homelands of an Indian tribe or Indian tribes, and thus may contain historic properties of religious and cultural significance to them.

Regulatory Principles and General Directions for Section 106 Tribal Consultation

The procedures for meeting Section 106 requirements are defined in the Section 106 regulations, “Protection of Historic Properties” (36 CFR Part 800). Under the NHPA, “historic properties” are defined as those properties that are listed on the National Register of Historic Places, or are eligible for such listing.

The regulations provide both overall direction as well as specific requirements regarding consultation at each step of the Section 106 review process. The Section 106 regulations at 36 CFR Section 800.2(c)(2) outline the following important principles and general directions to federal agencies regarding consultation with Indian tribes:

- The agency shall ensure that consultation provides the Indian tribe a reasonable opportunity to identify its concerns about historic properties; advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance to them; articulate its views on the undertaking’s effects on such properties; and participate in the resolution of adverse effects.
- Tribal consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and plan how to address concerns about confidentiality of information obtained during the consultation process.
- Historic properties of religious and cultural significance to an Indian tribe may be located on ancestral (also referred to as aboriginal) homelands, or on officially ceded lands (lands that were ceded to the U.S. government by the Indian tribe via treaty). In many cases, because of migration or forced removal, Indian tribes may now be located far away from historic properties that still hold significance for them. Accordingly, the regulations require that federal agencies make a *reasonable and good-faith effort* to identify Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the undertaking, even if Indian tribes are now located a great distance away from such properties and undertakings.

- The agency official shall ensure that consultation under the Section 106 review process is respectful of tribal sovereignty in conducting consultation and must recognize the government-to-government relationship that exists between the federal government and federally recognized Indian tribes.
- An Indian tribe may enter into an agreement with a federal agency regarding any aspect of tribal participation in the review process. The agreement may specify an Indian tribe's geographic area of interest, types of projects about which they wish to be consulted, or provide the Indian tribe with additional participation or concurrence in agency decisions under Section 106 provided that no modification is made to the roles of other parties without their consent.

The Section 106 regulations recognize an Indian tribe's sovereign authority regarding proposed undertakings *on or affecting historic properties on its tribal lands* in several ways. The regulations require the federal agency to consult with the THPO or (designated tribal representative if the Indian tribe has not assumed THPO duties), as appropriate and provide the THPO or tribe an opportunity to review, and thus to concur with or object to, federal agency findings and determinations. The THPO or tribe is also a signatory to memoranda of agreement (MOA) or programmatic agreements (PA) that conclude the review process. If the THPO/Tribe terminates consultation, the ACHP must provide its comments to the head of the agency rather than execute an agreement without the Indian tribe.

Note that the regulations clarify that THPOs and those Indian tribes that do not have a 101(d)(2) THPO have the same rights in the process for undertakings on or affecting historic properties on tribal lands, for purposes of Section 106. The difference is whether the SHPO participates. Where there is a THPO, the SHPO only participates in consultation if the THPO invites the SHPO to participate, if an undertaking on tribal lands affects a historic property off tribal lands, or if a non-tribal member who owns a parcel within the exterior boundaries of the reservation so requests. For undertakings on tribal lands where there is no THPO, the federal agency consults with both the designated tribal official and the SHPO.

Role of the Tribal Historic Preservation Officer (THPO)⁶ in the Section 106 Process

The 1992 amendments to the NHPA provided Indian tribes with the ability to assume the role of the State Historic Preservation Officer (SHPO) on their tribal lands. Therefore, Tribal Historic Preservation Officers (THPOs) are an essential participant in the Section 106 review process on tribal lands. While the number of THPOs has steadily increased since 1992, there is still some confusion about the role of the THPO. Therefore, the ACHP issued *Role of the Tribal Historic Preservation Officer in the Section 106 Process*.

In 2014, the ACHP also adopted *ACHP Policy Statement Regarding Federal Relationships with Tribal Historic Preservation Officers*. The policy is intended to highlight the importance of THPOs not only in the Section 106 process but also in the national preservation program. The policy also served to commit the ACHP to take certain actions to support THPOs.

⁶ The National Park Service (NPS) administers the [Tribal Historic Preservation Program](#) and maintains an up-to-date [listing](#) of all Indian tribes who have established 101(d)(2) Tribal Historic Preservation Officers and the contact information of their Tribal Historic Preservation Officers.

IV. General Questions and Answers

While the Section 106 regulations are fairly prescriptive in nature, they only direct federal agencies on the process and at which stages of the process to engage in consultation. They do not provide direction on how to carry out consultation. Thus, the questions and answers are intended to clarify the most common questions and issues regarding tribal consultation that arise in the Section 106 review process, typically before an agency begins the review process or very early in the process.

1) When are federal agencies required to consult with Indian tribes?

The NHPA requires federal agencies, in carrying out the Section 106 review process, to consult with Indian tribes when a federal undertaking may affect historic properties of traditional religious and cultural significance to them. An “undertaking” means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; or those requiring a federal permit, license or approval. This requirement applies to all undertakings regardless of project location.

2) Which Indian tribes must be consulted?

Federally recognized Indian tribes that attach religious and cultural significance to historic properties that may be affected by undertakings must be consulted. Federal agencies must make “a reasonable and good faith” effort to identify each and every such Indian tribe and invite them to be consulting parties.

This includes Indian tribes that no longer reside in their ancestral territory but may still have ancestral ties to the area that includes the proposed project. Many Indian tribes were removed from their homelands, while others traditionally moved from place to place. Consequently, an Indian tribe may very well attach significance to historic properties located in an area where they may not have physically resided for many years. If an Indian tribe that attaches significance to a historic property has not been invited to consult by the federal agency, the tribe may request in writing to be a consulting party. The NHPA and the Section 106 regulations require that the agency grant consulting party status to such an Indian tribe.

3) How would I know if an Indian tribe is federally recognized?

Consult the [Indian Affairs Federal Register Notices](#) maintained by the U.S. Department of the Interior’s Bureau of Indian Affairs (BIA). *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs* is regularly published in the *Federal Register*.

4) If there are no federally recognized Indian tribes in the state where the project is located, does the agency still have to consult with any Indian tribes?

Even when there are no federally recognized Indian tribes with tribal lands in the state where the project is located, the agency must still make a reasonable and good faith effort to identify and consult with any Indian tribes that attach religious and cultural significance to historic properties that may be affected by the undertaking. The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance. Therefore, federal agencies are required to identify Indian tribes that may attach religious and cultural significance to historic properties

in the area of the undertaking, even if there are no Indian tribes near the area of the undertaking or within the state.

5) What is the federal agency's responsibility to consult with state recognized Indian tribes or Indian tribes who have neither federal nor state recognition?

The Section 106 regulations at 36 CFR Section 800.2(c)(5), clarify that a federal agency *may* invite such groups to participate in consultation as “additional consulting parties” based on a “demonstrated interest” in the undertaking’s effects on historic properties. However, the term “Indian tribe” as it appears in the NHPA refers only to federally recognized Indian tribes, which includes Alaska Native Villages and Village and Regional Corporations. In other words, only federally recognized Indian tribes that attach religious and cultural significance to historic properties that may be affected by the proposed undertaking have a statutory right to be consulting parties in the Section 106 process.

The ACHP’s *Guide to Working with Non-Federally Recognized Tribes in the Section 106 Process* provides information and guidance for federal agencies regarding engagement with non-federally recognized tribes.

6) What are appropriate consultation methods for individual undertakings?

The consultation process must provide an Indian tribe a reasonable opportunity to:

- a) Identify its concerns about historic properties
- b) Advise on the identification and evaluation of historic properties including those of religious and cultural significance to the Indian tribe
- c) Articulate views on the undertaking’s effects on such properties; and
- d) Participate in the resolution of adverse effects.

Consultation should begin with a formal letter from the agency official to the appropriate tribal official, usually the tribal leader, with a copy to the THPO or cultural resources staff person if there is no THPO.

Face-to-face meetings or on-site visits may be the most practical way to conduct consultation. In all cases, consultation should be approached with flexibility that respects the tribe’s role within the overall project planning process and facilitates its full participation.

Documentation of consultation is important because it allows consulting parties to more accurately track the stages of the Section 106 process. Federal agencies should document all efforts to initiate and carry out consultation with an Indian tribe or Indian tribes. Such documentation, in the form of correspondence, telephone logs, e-mails, etc., should be included in the agency’s official Section 106 record. Agencies should also keep notes so that the consultation record documents the *content* of consultation meetings, site visits, and phone calls in addition to information about dates and who participated. Doing so allows agencies and consulting parties to review proceedings and correct any errors or omissions, thus facilitating better overall communication. Keeping information confidential can present unique challenges. See question 3(b) in Section V for more information.

7) Can a federal agency pay for expenses that facilitate consultation with Indian tribes?

Yes, the ACHP encourages federal agencies to take the steps necessary to facilitate tribal participation at all stages of the Section 106 process. These steps may range from scheduling meetings in places and at times that are convenient for Indian tribes, to paying travel expenses for participating tribal representatives. Indeed, agencies are strongly encouraged to use available resources to help overcome financial impediments to effective tribal participation in the Section 106 process. Likewise, if a tribe has

consented (in advance and in writing) to allow an applicant for federal assistance or federal permit to coordinate with the Indian tribe, the applicant is encouraged to use available resources to facilitate and support such tribal interaction. However, federal agencies should not expect to pay a fee to an Indian tribe or any consulting party to provide comments or concurrence in an agency finding or determination.

8) Can a federal agency pay a fee to an Indian tribe for services provided in the Section 106 process?

Yes, if during the identification and evaluation phase of the Section 106 process, the federal agency or applicant asks an Indian tribe for specific information and documentation regarding the presence, location, nature, and condition of individual sites, or request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the Indian tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the Indian tribe would be justified in requesting payment for its services. Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, a federal agency should reasonably expect to pay for work carried out by Indian tribes at its request. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the responsibility to identify historic properties, evaluate their National Register eligibility, and assess effects on those historic properties, through reasonable methods. For more clarification, the ACHP issued *Guidance on Assistance to Consulting Parties in the Section 106 Review Process*.

9) What specific activities might be reimbursed?

Examples of reimbursable costs may include those costs associated with expert consultants to identify and evaluate historic properties as outlined in the immediately preceding answer. This may include field visits to provide information about specific places or sites, monitoring activities, research associated with historical investigation, documentation production costs, and related travel expenses.

10) If a proposed undertaking is on tribal lands, but the Indian tribe has not assumed THPO duties, does the agency consult with the tribe's designated representative and the SHPO?

Yes, the agency carries out consultation with the Indian tribe regarding undertakings on or affecting that tribe's lands *in addition to—and on the same basis as—*consultation with the SHPO. If the SHPO withdraws from consultation, the agency and the tribal representative may complete the review process with any other consulting parties. While the SHPO may participate in consultation, the Indian tribe maintains the same rights of consultation for agency findings and determinations, and the same rights to be signatories to MOAs and PAs that would apply on their tribal lands, as it would if it had a THPO.

Be aware that some Indian tribes may not wish to consult with the SHPO, other Indian tribes, or consulting parties, thus, requiring the agency to approach consultation with flexibility and understanding. In fact, some Indian tribes may not welcome other consulting parties to meetings or site visits on tribal lands, and they are within their rights to do so. However, the agency will still be responsible for carrying out consultation with the SHPO and other consulting parties.

11) Can Indian tribes or federal agencies request ACHP involvement in the Section 106 review process?

Yes. Any party, including Indian tribes, may request that the ACHP review the substance of any federal agency's finding, determination, or decision or the adequacy of an agency's compliance with the Section 106 regulations.

An Indian tribe may request that the ACHP enter the Section 106 review process for any number of reasons, including concerns about the identification, evaluation or assessment of effects on historic properties of religious and cultural significance to them. It may also request ACHP involvement in the resolution of adverse effects or where there are questions about policy, interpretation, or precedent under Section 106. The ACHP has discretion in determining whether to become involved in the process.

The ACHP issued *Whom to Contact if You Have Section 106 Issues: Guidance for Indian Tribes and Native Hawaiian Organizations* about how to contact the ACHP for assistance.

12) Does the ACHP have a policy on the treatment of burials that are located on state or private lands (and thus not subject to the disinterment provisions of NAGPRA)?

Yes. On February 23, 2007, the members of the Advisory Council on Historic Preservation unanimously adopted its revised “*Policy Statement Regarding the Treatment of Burial Sites, Human Remains and Funerary Objects.*” This policy is designed to guide federal agencies in making decisions about the identification and treatment of burial sites, human remains, and funerary objects encountered in the Section 106 process in various instances including those where federal or state law does not prescribe a course of action. The policy is not exclusively directed toward Native American burials, human remains or funerary objects, but those would be included under the policy. In accordance with Section 106, the policy does not recommend a specific outcome from the consultation process, but rather focuses on issues and perspectives that federal agencies ought to consider when making their Section 106 decisions. The policy statement is available for [download](#).

13) What happens in the Section 106 process when the undertaking is proposed in an area that is addressed in a treaty between an Indian tribe and the U.S. government?

See *Tribal Treaty Rights in the Section 106 Process*.

14) What is a consultation agreement or protocol?

The Section 106 regulations at 36 CFR § 800.2(c)(2)(ii)(E) provide for the development of agreements between federal agencies and Indian tribes or NHOs to tailor how consultation between those parties may be carried out. Such agreements are often not project-specific but instead, are usually more general and are focused on the relationship between the agency and the Indian tribe or NHO. This type of agreement can cover all aspects of the consultation process with the tribe or NHO and could grant an Indian tribe or NHO additional rights to participate or concur in agency decisions in the Section 106 process beyond those specified in the regulations.

The only restriction on the scope of such agreements is that the role of other parties in the Section 106 review process may not be modified without their consent. These consultation agreements differ from MOAs and PAs as they do not address the full range of the agency’s consultation responsibilities with other parties nor do they modify or conclude the agency’s Section 106 compliance. Consultation agreements are a tool to help the agency and the tribe or NHO work better together in the Section 106 context. They can establish protocols for carrying out tribal or NHO consultation, including how the agency will address tribal or NHO concerns about confidentiality of sensitive information.

The ACHP developed guidance, available online, on the difference between [Section 106 agreements and consultation agreements or protocols](#).

15) Is a federal agency required to consult with an Alaska Native Regional or Village Corporation (ANCs) in the Section 106 process?

Yes. The 2004 consolidated appropriations law, as amended, requires federal agencies to consult with ANCs “on the same basis as Indian tribes under Executive Order 13175.” Since no ANCs are currently recognized by the Department of the Interior as Indian tribes, federal agencies are not required to consult with them on a government-to-government basis. Pub. L. No. 108-199, div. H, Section 161, 118 Stat. 3, 452 (2004), as amended by Pub. L. No. 108-447, div. H, Section 518, 118 Stat. 2809, 3267 (2004)

V. Consultation with Indian Tribes for Proposed Undertakings Off—and On—Tribal Lands

As noted earlier in the handbook, tribal consultation is required for *all* federal undertakings, regardless of whether the undertaking's Area of Potential Effect (APE) includes federal, tribal, state, or private lands so long as the undertaking may affect historic properties of religious and cultural significance to an Indian tribe. However, different Section 106 consultation requirements do exist, depending on whether the proposed undertaking may affect non-tribal or tribal lands.

This section outlines tribal consultation requirements for proposed undertakings that will occur:

- “off” tribal lands (in other words, on non-tribal land such as federal, state, or private lands outside tribal lands);
- “on” or affecting tribal lands. Tribal lands are defined in the NHPA and the Section 106 regulations (36 CFR Part 800) as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.⁷
- Where the required steps are the same both off and on (or affecting) tribal lands, a single response is provided.

This section of the handbook is presented to correspond with the Section 106 review process's four steps of initiation, identification, assessment, and resolution.

A. Initiation of the Section 106 Process

1) How would I know if historic properties of traditional religious and cultural significance to Indian tribes may be affected by the proposed undertaking?

Unless such properties have already been identified and the information is readily available, you probably will not know in advance. As with any undertaking that might affect historic properties, you must determine whether the proposed undertaking is generically the kind that might affect historic properties assuming such properties are present. Therefore, if the undertaking is the kind of action that might affect places such as archaeological sites, burial grounds, sacred landscapes or features, ceremonial areas, or plant and animal communities, then you should consult with Indian tribes that might attach religious and cultural significance to such places. Please note that this list of examples is not all-inclusive, as the histories, cultures, and traditions of Indian tribes vary widely. It is through consultation with Indian tribes themselves that such properties can be properly identified and evaluated.

2) If a federal undertaking will not occur on or affect historic properties on tribal lands, is the agency still required to identify Indian tribes and invite them to consult?

Yes, the NHPA requires consultation with Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the proposed undertaking, *regardless of the location of the proposed undertaking*. At this stage of the process, the federal agency identifies any Indian tribes that

⁷ The U.S. Supreme Court decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) held that “dependent Indian communities” refers to a limited category of Indian lands that are neither reservations nor allotments and that must satisfy two requirements: first, they must have been set aside by the federal government for the use of the Indians as Indian land; second, they must be under federal superintendence.

might attach religious and cultural significance to historic properties that may exist in the proposed undertaking's Area of Potential Effect (APE), and invites them to consult.

3) How do I identify the Indian tribes that must be invited to consult?

Identification of Indian tribes that must be invited to consult could entail a number of initiatives.

For instance, it might be useful to check with other federal agencies and their cultural resource specialists in the state or region for a list of Indian tribes with whom they have consulted in past Section 106 reviews. The SHPO and Indian tribes in the region might also be able to suggest which Indian tribes to contact. Other sources for such information may include ethnographies, local histories, experts at local universities, and oral accounts.

Certain websites may be useful references as part of a broader agency effort to identify relevant Indian tribes. Other Internet sources include [MAPS: GIS Windows on Native Lands, Current Places, and History](#), which provides maps on current and ancestral locations of Indian lands, and the Library of Congress [Indian Land Cessions](#) document website, which has information on historic Indian land areas.

National and regional intertribal organizations, such as the [National Congress of American Indians](#), the [United South and Eastern Indian Tribes](#), the [National Association of Tribal Historic Preservation Officers](#), the [Michigan Anishinaabek Cultural Preservation and Repatriation Alliance](#), and the [Affiliated Tribes of Northwest Indians](#) may also be able to provide assistance in identifying Indian tribes with ancestral connections to an area.

While the ACHP cannot vouch for the accuracy of any particular sources, thorough research using these and other sources should produce a reasonably accurate list of Indian tribes to be consulted. Keep in mind that identification of Indian tribes with ancestral connections to an area is not a "one stop shopping" endeavor in which any single source can be depended upon to fulfill the agency's legal responsibilities. Once the agency has identified an Indian tribe or Indian tribes that may attach religious and cultural significance to any historic properties that may exist in the APE, the agency must invite them to consult.

Finally, it is important to remember that documentary or other sources of information that do not clearly support an Indian tribe's assertions should not be used to deny an Indian tribe the opportunity to participate in consultation. A common misunderstanding is that an Indian tribe needs to document its ties to historic properties in the area of the undertaking. Instead, the NHPA requires agencies to consult with any federally recognized Indian tribe that attaches religious and cultural significance to a historic property. It stands to reason that the best source for determining what historic properties have significance for an Indian tribe would be the experts designated by that Indian tribe. Such experts might include elders, traditional practitioners, tribal historians, the THPO or tribal cultural resource staff. The Indian tribe will designate the appropriate tribal representative(s) to represent its interests in the Section 106 consultation process.

4) If the undertaking is on tribal lands or will affect historic properties on tribal lands, do I also have to consult with other Indian tribes?

Undertakings on tribal lands that are carried out by a federal agency, that use federal funds, or that require federal approval/licensing/permitting are subject to Section 106 review. The federal agency will consult with the THPO, or, if the Indian tribe has not assumed THPO duties, with its cultural resource officer, or another designated tribal official. The Indian tribe may also wish to have one or more representative of its tribal government directly involved in the consultation process.

It may be easy to assume that because the proposed undertaking is located on tribal lands, there is no need to identify additional Indian tribes that may attach religious and cultural significance to historic properties within the APE. However, the responsibility for the agency to identify additional Indian tribes that may attach religious and cultural significance to any historic properties within the APE applies *even when an undertaking is on tribal land*. Therefore, the suggestions given above in question #3 above are also applicable here.

The need to identify Indian tribes that may attach significance to sites within an APE on another Indian tribe's lands is rooted in history. When the U.S. government established Indian reservations, it often set boundaries where they did not previously exist. Many Indian tribes were removed to reservations far from their traditional homelands and relocated onto the homelands of other Indian tribes. In other instances, territories that were shared by several Indian tribes became the reservation of one exclusively. The end result is the possibility that an undertaking on one Indian tribe's lands (within the exterior boundaries of its reservation) may contain historic properties that hold religious and cultural significance for another Indian tribe or tribes, as well.

Therefore, the agency carrying out, or providing the funding or approval/licensing/permitting, for the undertaking on tribal lands still has a responsibility to identify any other Indian tribes that may attach religious and cultural significance to historic properties within the proposed undertaking's APE and invite them to consult. Accordingly, it may be necessary to consult with each Indian tribe individually and to do so off the reservation.

5) Who initiates the consultation process with an Indian tribe?

Consultation with an Indian tribe or tribes should be initiated by the agency official⁸ through a letter to the leadership of each Indian tribe, with a copy going to each Indian tribe's THPO or cultural resource officer if there is no THPO. Indian tribes are sovereign nations and their leaders must be shown the same respect and formality given to leaders of other sovereign nations. Since tribal elections often result in changes in leadership, agency officials should check the BIA tribal leaders list or contact the Indian tribe prior to executing the letters in order to ascertain that the correspondence is correctly addressed to the appropriate points of contact. Unless the letter is sent via email, it is helpful to follow up such correspondence with direct telephone communication to ensure the letter has been received.

If the agency official has correspondence from tribal leadership designating a person or position within the tribe to act on the tribe's behalf in the Section 106 process, the agency may initiate consultation accordingly. It is good practice, in this instance, to send a copy of all correspondence to tribal leadership as well.

6) Can applicants for federal permits or contractors hired by the agency initiate and carry out tribal consultation?

Federal agencies cannot unilaterally delegate their responsibilities to conduct government-to-government consultation with Indian tribes to non-federal entities. The ACHP issued guidance *Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act*.

Since Indian tribes are sovereign nations and their relationship with the federal agency exists on a government-to-government basis, federal agency consultation with them cannot be unilaterally delegated

⁸ As defined in Section 800.2 of the ACHP regulations, an agency official is one who has jurisdiction over the undertaking and takes legal and financial responsibility for Section 106 compliance.

to a non-federal party. However, *if an Indian tribe agrees in advance*, the agency may rely, where appropriate, on an applicant (or the applicant's contractor), or the agency's own historic preservation contractor to carry out day-to-day, project-specific tribal coordination. In order to ensure that the tribe, the agency, and the applicant or contractor all fully understand that the tribe may request the federal agency to step in and assume consultation duties if problems arise, the agency should obtain the tribe's concurrence with the agency's delegation in writing.

Even when an Indian tribe agrees to coordinate with an applicant, the federal agency remains responsible for ensuring that the Section process is carried out properly, meeting the letter and spirit of the law, as well as resolving any issues or disputes. Therefore, any agreement between the agency and an Indian tribe documenting the tribe's willingness to consult with a non-federal entity should contain a provision that explains the agency's responsibility to assume consultation responsibilities at the tribe's request. The government-to-government relationship requires that the federal agency is ultimately responsible for tribal consultation.

7) What are the consultation responsibilities for undertakings that involve more than one federal agency?

The Section 106 regulations at 36 CFR Section 800.2 (a)(2) provide that, if more than one agency is involved in an undertaking, some or all of the agencies may designate a lead federal agency who will act on their behalf to fulfill their collective responsibilities under Section 106, including tribal consultation. Those agencies that do not designate a lead agency remain individually responsible for their Section 106 compliance; thus, they each would need to initiate and carry out tribal consultation duties for their Section 106 compliance for their undertaking. For more clarification, the ACHP published [*Frequently Asked Questions About Lead Federal Agencies in Section 106 Review*](#).

B. Identification of Historic Properties

1) Does the federal agency consult with Indian tribes to carry out identification and evaluation of historic properties?

Yes, regardless of the location of the undertaking, the agency consults with Indian tribes to carry out identification efforts and to evaluate the National Register eligibility of identified properties.

Many agencies assume that any preservation professionals can identify historic properties of significance to Indian tribes when they conduct archaeological or historic property surveys. However, unless the preservation professional has been specifically authorized by an Indian tribe to carry out such work, it should not be assumed that the person possesses the appropriate expertise to identify such properties. The appropriate individual to carry out the identification and evaluation of historic properties of significance to an Indian tribe is the representative designated by the tribe for this purpose. Identification efforts may include site visits to assist in identifying these types of properties.

The Section 106 regulations state that the agency official shall acknowledge that Indian tribes possess special expertise in assessing the National Register eligibility of historic properties that may possess religious and cultural significance to them (36 CFR § 800.4(c)(1)). Special expertise is another term for the knowledge Indian tribes possess that enables them to identify places of religious and cultural significance to their tribes, which then may discuss these important places with the federal agency during the section 106 review process. Special expertise, at times, may also be referred to as traditional knowledge, traditional cultural knowledge or indigenous knowledge, or traditional ecological knowledge. Indian tribes have their own way of generating, transmitting, and protecting this information. For more

information about traditional knowledge, see *Traditional Knowledge and the Section 106 Process: Information for Federal Agencies and Other Participants*.

The agency should provide Indian tribes with the same information that is provided to the SHPO during consultation, including information on buildings and other standing structures that may be affected by the proposed undertaking. A common assumption is that Indian tribes are not interested in historic buildings and structures. However, a federal agency should not assume to know what is of significance to a particular Indian tribe unless it has been advised by that tribe. For instance, there may be a historic school in the path of a proposed undertaking. The school might have originally served as an Indian boarding school in its early history and may be of significance to an Indian tribe or tribes.

When the Undertaking is on Tribal Lands

On tribal lands, the agency consults with that Indian tribe's THPO, or other tribal official designated for this purpose. The Indian tribe may also involve other tribal experts to assist the THPO in both the identification and evaluation of the National Register eligibility of any historic properties. When an Indian tribe has a THPO, the SHPO does not participate in the Section 106 process for proposed undertakings on tribal lands. The few exceptions to this rule occur when the THPO invites the SHPO to participate; when an undertaking on tribal lands affects a historic property located off tribal land; and when a non-tribal member who owns land in fee simple within the exterior boundaries of the Indian tribe's reservation so requests. In those limited instances, the SHPO participates in consultation in addition to the THPO.

If the Indian tribe has not assumed THPO responsibilities, the agency will carry out identification and evaluation in consultation with both the tribe's designated official and the SHPO. In this situation, the designated tribal official has the same rights as a THPO would have in eligibility determinations.

As noted above, it is possible that the APE for a proposed federal undertaking on one Indian tribe's lands may contain historic properties that are of religious and cultural significance to other Indian tribes. In such cases, the federal agency must consult with all Indian tribes that attach religious and cultural significance to historic properties. However, the federal agency must respect the sovereignty of the Indian tribe upon whose land the undertaking is proposed. Accordingly, it may be necessary to approach consultation with maximum flexibility and consult with each Indian tribe individually and to do so off the reservation.

In such cases, concerns may arise about confidentiality and protection of sensitive information. The ACHP issued *Frequently Asked Questions on Protecting Sensitive Information About Historic Properties Under Section 304 of the NHPA* and jointly issued a [policy statement](#) with other federal agencies regarding the confidentiality of information about Indian sacred sites.

2) How can I identify historic properties that may possess traditional religious and cultural significance to Indian tribes and determine their National Register eligibility?

The identification of historic properties of traditional religious and cultural significance to an Indian tribe is made by that tribe's designated representative as part of the Section 106 consultation process. This is true regardless of whether the proposed undertaking is off or on tribal lands.

3) What procedures should be followed if an Indian tribe does not want to divulge information to the federal agency regarding places of traditional religious and cultural significance?

Many Indian tribes have belief systems that require the location and even the existence of traditional religious and cultural properties not be divulged. Therefore, it is vital that federal agencies work with Indian tribes to identify sensitive locations while respecting tribal desires to withhold specific information about such sites. The ACHP's regulations at 36 CFR Section 800.4(b)(i) state, in part, that "[t]he agency official shall take into account any confidentiality concerns raised by Indian tribes during the identification process."

The NHPA and the Section 106 regulations also provide a vehicle for protecting information that an Indian tribe has disclosed for the purpose of identification and evaluation in the Section 106 process. Section 304 of the NHPA (16 U.S.C. 470w-3(a)) and the regulations at 36 CFR Section 800.11(c)(1) provide that an agency, after consultation with the Secretary of the Interior, "*shall* withhold from disclosure to the public" information about the location, character, or ownership of a historic property when the agency and the Secretary determine that the disclosure of such information may cause a significant invasion of privacy; risk harm to the historic property; or, impede the use of a traditional religious site by practitioners. After such a determination, the Secretary of the Interior will determine who, if anyone, may have access to the information for purposes of the NHPA.

The ACHP issued extensive [guidance on handling sensitive information](#) in the Section 106 process. And, the Departments of the Interior, Agriculture, Defense, and Energy and the ACHP have issued a [policy statement](#) regarding confidentiality of information about Indian sacred sites.

4) Is the federal agency required to verify a tribe's determination of significance with archaeological or ethnographic evidence before making a National Register eligibility determination?

No. The agency is not required to verify an Indian tribe's determination that a historic property is of religious and cultural significance to the tribe. The ACHP regulations at 36 CFR 800.4(c)(1) state, in part, that "[t]he agency official shall acknowledge that Indian tribes...possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." The National Register considers the information obtained from an Indian tribe's recognized expert to be a valid line of evidence in considering determinations of significance. The [National Register of Historic Places](#) website has more information about the program, making eligibility determinations, and contacting staff of the National Register.

5) Does the federal agency need to obtain an Indian tribe's concurrence with the agency's determination of National Register eligibility?

a) Off Tribal Lands

No. The agency does not need to obtain an Indian tribe's concurrence with eligibility determinations when the undertaking is not on tribal lands or the affected property is not on tribal lands. The agency only needs the concurrence of the SHPO for a determination and, absent such concurrence, the matter goes to the Keeper of the National Register for final resolution. The federal agency must acknowledge, however, that Indian tribes possess special expertise in assessing the eligibility of historic properties that may be of significance to them, as required in the Section 106 regulations at 36 CFR Section 800.4(c)(1).

Also, if an Indian tribe disagrees with the federal agency's determination of eligibility, the Indian tribe may, per the Section 106 regulations at 36 CFR 800.4(c)(2), ask the ACHP to request that the federal agency obtain a formal eligibility determination from the Keeper of the National Register.

b) On Tribal Lands

On tribal lands, the THPO (or the tribe's designated official) have rights of concurrence on National Register eligibility determinations. If the agency and the THPO/tribal official do not agree on a site's eligibility, the ACHP regulations at 800.4(c)(2) state that the agency shall obtain a determination of eligibility from the Keeper of the National Register.

6) Once the required identification and evaluation efforts are completed, does the federal agency need to consult with an Indian tribe in reaching a finding that there are no historic properties that will be affected by the undertaking, or that there are historic properties present but the undertaking will have no effect on them?

a) Off Tribal Lands

Despite the requirements for tribal consultation up to this point in the process, the agency does not need to consult with an Indian tribe in reaching a finding that there are no historic properties present, or that the proposed undertaking will not affect an identified historic property. However, the agency must provide notification and documentation supporting its finding on these questions to any consulting Indian tribe.

If a consulting tribe disagrees with the agency's finding, it should immediately contact the ACHP and request that the ACHP object to the finding, per CFR 800.4(d)(1)(iii). If, upon the review of the finding, the ACHP also objects to the finding, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP objects to a finding, it must do so within 30 days of the agency's issuance of that finding so a timely filing of an objection to the ACHP is critical.

b) On Tribal Lands

On tribal lands, a finding of no historic properties present or no historic properties affected requires the agency to provide the THPO (or designated tribal official, if the tribe has not assumed THPO duties) documentation of this finding. The agency also provides this documentation to other consulting parties. Upon receipt of an adequately documented finding, the THPO/tribe has 30 days to object. If the THPO/tribe does not object within 30 days, the agency's Section 106 responsibilities have been fulfilled. If the THPO/tribe does object to the finding, the agency shall either consult with the THPO/tribe to resolve the disagreement, or forward the finding to the ACHP and request that it be reviewed. When the agency makes such a request, it is also required to concurrently notify all consulting parties of the request and make the request and documentation available to the public. The ACHP then has 30 days to review the finding and provide the agency official, and, if the ACHP determines the issue warrants it, the head of the agency, with the ACHP's opinion regarding the finding.

C. Assessment of Adverse Effects

1) Which parties does the federal agency consult with to apply the criteria of adverse effect to historic properties within the APE?

a) Off Tribal Lands

The agency consults with the SHPO and Indian tribes in applying the criteria of adverse effect to historic properties within the APE. Again, federal agencies must recognize the special expertise of Indian tribes to determine the religious and cultural significance of historic properties to them per 36 CFR 800.4(c)(1), and 36 CFR 800.5(a) requires that agencies apply the criteria of adverse effect in consultation with Indian tribes. Therefore, in assessing how a proposed undertaking might affect historic properties of religious

and cultural significance to Indian tribes located off tribal lands, federal agencies need to consider the views of Indian tribes.

b) On Tribal Lands

On tribal lands, the agency consults with the THPO (or the designated tribal representative and the SHPO if the tribe has not assumed THPO duties)—and with any other Indian tribe that attaches religious and cultural significance to identified historic properties within the APE—in applying the criteria of adverse effect to historic properties, as is required by 36 CFR 800.5(a).

2) When proposing a finding of “no adverse effect,” does the federal agency consult with Indian tribes?

a) Off Tribal Lands

No, the agency consults with the SHPO in proposing a finding of “no adverse effect,” but notifies consulting parties such as Indian tribes, and provides them with documentation supporting that finding. The agency is encouraged, but not required, to seek the concurrence of Indian tribes that attach religious and cultural significance to the historic property subject to the finding.

b) On Tribal Lands

The agency consults with the THPO (or designated tribal official and the SHPO if the tribe has not assumed THPO duties) in proposing a finding of “no adverse effect,” and provides other consulting parties with documentation supporting that finding, as described above.

3) What happens if an Indian tribe disagrees with a finding of “no adverse effect”?

a) Off Tribal Lands

If a consulting Indian tribe disagrees with a proposed agency finding of “no adverse effect,” it must specify the reasons for its objection in writing within 30 days of receipt of the agency’s issuance of the proposed finding. Once a timely written objection is received, the agency must either consult with the objecting tribe to resolve the disagreement or request ACHP review of the “no adverse effect” finding, per 36 CFR 800.5(c)(2)(i). The agency must concurrently notify all other consulting parties that it has requested ACHP review of the finding.

Consulting Indian tribes can make a direct request to the ACHP to review the finding, specifying, in writing and within the 30 day review period, the reasons for its objection, per 36 CFR 800.5(c)(2)(iii).

After review of the objection, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP objects to a finding on its own initiative, it must do so within 30 days of receipt of the agency’s issuance of that finding.

b) On Tribal Lands

If the THPO (or designated tribal official if the tribe has not assumed THPO duties) disagrees with a finding of “no adverse effect” within the 30 day review period, the THPO notifies the agency in writing that it disagrees and specifies the reasons for the disagreement like any other consulting party. Once a timely written objection is received, the agency must either consult with the THPO to resolve the

disagreement or request ACHP review of the “no adverse effect” finding. The agency must concurrently notify all other consulting parties that it has requested ACHP review of the finding.

Consulting parties have the same rights to disagree with a “no adverse effect” finding on tribal lands as they do off tribal lands. Should another Indian tribe that is a consulting party (i.e., a tribe who attaches religious and cultural significance to a historic property located on another tribe’s lands) object to a finding of “no adverse effect,” that tribe may, just as in the case for non-tribal lands (above), file a written objection with the federal agency within the 30 day review period. Again, once a timely written objection is received from any consulting party, the agency must either consult with the objecting Indian tribe to resolve the disagreement or request ACHP review of the “no adverse effect” finding, per 36 CFR 800.5(c)(2)(i). The agency must concurrently notify all other consulting parties that it has requested ACHP review of the finding.

Just as is the case off tribal lands, consulting Indian tribes can also make a direct request to the ACHP to review the finding, specifying, in writing and within the 30 day review period, the reasons for its objection, per 36 CFR 800.5(c)(2)(iii).

Regardless of whether the THPO (or designated tribal official) or a consulting party makes the objection to the agency finding, the ACHP’s response is the same: after review of the finding, the ACHP may provide its opinion to the agency official, and, if the ACHP determines the issue warrants it, to the head of the agency. The regulations stipulate that if the ACHP objects to a finding on its own initiative, it must do so within 30 days of receipt of the agency’s issuance of that finding.

D. Resolution of Adverse Effects

1) Which parties does the federal agency consult with to develop and evaluate alternatives or modifications to the undertakings to avoid, minimize, or mitigate adverse effects?

a) Off Tribal Lands

The agency consults with the SHPO, Indian tribes, and other consulting parties at this phase of the Section 106 process. The agency must provide project documentation to all consulting parties and invite the ACHP into consultation. Any consulting party may request ACHP participation in consultation to facilitate the resolution of adverse effects.

In fact, the Section 106 regulations at 36 CFR Section 800.2(b) stipulate that the ACHP may enter into the consultation at any point in the Section 106 process without invitation when it determines that its involvement is necessary to ensure that the purposes of Section 106 are met. As specified in Appendix A to 36 CFR Part 800, the ACHP may elect to enter the consultation if, among other things, an undertaking presents issues of concern to Indian tribes.

b) On Tribal Lands

On tribal lands, the process and requirements are the same as for proposed undertakings off tribal lands, except that agency consults with the THPO (or designated tribal official and SHPO if the tribe has not assumed THPO duties), and other consulting parties. Again, the agency should continue to be cognizant of any confidentiality issues—see the discussion of confidentiality at Section V(B)(4) of this handbook.

2) What happens if agreement is reached on how to resolve adverse effects?

a) Off Tribal Lands

If agreement is reached, the agency, SHPO and consulting parties, including Indian tribes, develop a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) outlining how the adverse effects will be addressed

b) On Tribal Lands

The agency and the THPO (or designated tribal official and the SHPO, if the Indian tribe has not assumed THPO duties) and consulting parties develop an MOA or a PA outlining how the adverse effects will be addressed (the decision to prepare a PA requires the agency to invite the ACHP to participate). The THPO/tribe is a signatory to the MOA or PA. 36 CFR 800.2(c)(2)(ii)(F) provides that an Indian tribe that has not assumed THPO duties may notify the agency in writing that it is waiving its rights to execute an MOA for undertakings on its tribal lands.

3) Is the federal agency obligated to invite an Indian tribe to be a signatory or a concurring party to an MOA or PA?

a) Off Tribal Lands

No, the agency may, but is not required to, invite an Indian tribe to become a signatory or concurring party when the undertaking or affected historic properties are not on tribal lands. An invited signatory to an MOA or PA possesses the same rights with regard to seeking amendments to or terminating the agreement as all other signatories, which include the agency official, the SHPO, and the ACHP, if participating. Those that sign as a concurring party do not have such rights to amend or terminate the MOA or PA. Refusal by an Indian tribe to become an invited signatory or concurring party to an MOA or PA for an undertaking off tribal lands, however, does not invalidate it. Certainly, agencies are encouraged to invite Indian tribes that attach religious and cultural significance to affected historic properties to sign the agreement. If an Indian tribe is assuming review or other responsibilities under the MOA or PA, the agency should consider inviting the tribe to become a signatory.

b) On Tribal Lands

MOAs and PAs for undertakings on tribal lands include the THPO (or the designated tribal official if the tribe has not assumed THPO duties) as a signatory, with all the rights to seek amendments to or terminate the agreement. The agency and the signatories may invite other consulting parties to be signatories or sign as concurring parties.

4) What happens if agreement is not reached on how to resolve adverse effects?

a) Off Tribal Lands

If agreement is not reached, the agency, the SHPO, or the ACHP (if participating), may terminate consultation. Other consulting parties, including Indian tribes, may decline to participate, but they cannot terminate consultation. After consultation is terminated, the ACHP prepares its formal comments to the head of the agency, who must consider the ACHP's comments in reaching a final decision. Per the Section 106 regulations at 36 CFR Section 800.7 (c), the ACHP must provide an opportunity for the agency, all consulting parties, and the public to provide their views to the ACHP during the time in which the comments are being developed. When the ACHP issues comments, it means the full ACHP membership issues the comments, not the ACHP staff. In addition to providing the comments to the head of the agency, the ACHP shall provide copies of those comments to each of the consulting parties. Once the head of the agency has received the ACHP's comments, he or she is required to prepare a summary of

his or her final decision regarding the proposed federal undertaking that contains both the rationale for its decision as well as evidence that it had considered the ACHP's comments when making that decision. In addition, the agency must provide copies of this summary to all consulting parties.

b) On Tribal Lands

If the agency and the THPO (or designated tribal official, if the tribe has not assumed THPO duties) fail to agree, the agency must invite the ACHP to join the consultation.

The THPO/tribe may determine that further consultation will not be productive and terminate consultation. The THPO/tribe must then notify the agency and other consulting parties of the determination and the reasons for terminating. The ACHP must then issue its comments to the head of the agency when the THPO/tribe terminates consultation because the federal agency and the ACHP cannot execute an agreement without the THPO/tribe for undertakings on or affecting historic properties on tribal lands. The procedure for the development of the ACHP's comments and the requirements to provide copies of both ACHP comments and the agency's summary of its final decision to consulting parties is identical to that explained in answer A) (above) for undertakings affecting historic properties off tribal lands.

5) When an undertaking takes place or affects historic properties on tribal lands, can a Section 106 agreement be concluded between the federal agency and the Indian tribe when the THPO opts out of consultation, even though the designated tribal representative is not a THPO?

Yes, an agreement can be concluded in this circumstance because an Indian tribe has the same rights as a THPO, per 36 CFR 800.2(c)(2)(i)(B). An Indian tribe may reach agreement with a federal agency on the terms of a Section 106 agreement (MOA or PA). Execution of the agreement by a designated tribal representative and the agency (along with filing the agreement with the ACHP), and agency compliance with the terms of the agreement, would complete the Section 106 process.

VI. Consultation Tools and Strategies

The ACHP has developed a number of resources to assist federal agencies, applicants, Indian tribes and NHOs to navigate the Section 106 process and its consultation requirements. These can be found at the ACHPs webpage for [Indian tribe and Native Hawaiians](#).

Through the ACHP's administration of the Section 106 process over many years, it has become apparent that the keys to the most successful outcomes include relationship building, collaboration, and partnership. These themes are woven throughout the ACHP's tribal and Native Hawaiian consultation guidance and information papers. In each of these documents, there are specific recommendations for improving tribal and NHO consultation.

Recommendations for Improving Tribal-Federal Consultation

Improving Tribal Consultation in Infrastructure Projects

Early Coordination with Indian Tribes for Infrastructure Projects, a free online, on-demand course can be taken through the ACHP e-Learning portal.

Early Coordination with Indian Tribes During Pre-application Processes: A Handbook

VII. Principles and Tips for Successful Consultation

The key to success in any consultation relationship is building trust, having common goals, and remaining flexible. There is no “one size fits all” model for consultation with Indian tribes—all Indian tribes are unique, and different undertakings present different challenges. There are, however, central principles that should be kept in mind when conducting tribal consultation and this final section provides tips on how to put them into practice.

Respect is Essential

- Be respectful of tribal sovereignty.
- Become aware of tribal conventions and protocols and follow them; respect tribal customs.
- Do not take photographs without obtaining permission first.
- Behavior you may perceive as normal may be insulting or offensive to others. For example, some Indian tribes consider pointing one’s finger to be offensive, and consider a gentle handshake a sign of respect instead of a sign of weakness. Consider that your partners may have different perspectives and values. When in doubt, ask respectfully.
- Tribal leaders have many duties; be aware of this fact and do not demand that everyone adhere to your deadline. Instead, explain why your deadline exists, who set it, and why it is important. Above all, strive to be as flexible as possible. Look for ways to work cooperatively, because this is your undertaking and consultation is your responsibility.
- Be sensitive to time and costs. An Indian tribe may not have adequate human and financial resources that allow its representatives to respond quickly or travel to meetings. Make an effort to facilitate and support consultation within available agency resources.
- Do not voice your opinion on what is best for the tribe; that is for tribal leaders to determine.
- Be mindful of the significance of history. The history of U.S. government relations with Indian tribes may color current perceptions and attitudes and cause distrust or suspicion. Take the time to learn about the unique history of the Indian tribe you are consulting with.
- Do not create expectations or make commitments that you or your agency are unable or unwilling to fulfill. Before entering into consultation, be certain that what you are negotiating is supported by the Office of General Counsel or Solicitor of your agency, and anyone else who will need to review and approve your position.

Communication is Key

- Communicate with tribal representatives directly whenever possible—do not rely solely on letters. Follow up written correspondence by phone or in person. Create documentation of your communications, such as notes on the content of discussions, keep phone logs, etc.
- Develop an understanding of the tribe’s decision-making process and get to know its decision makers. Understand that tribal officials may need time to consult with others, including elders,

the tribal council or the head of the tribal government. Make sure you understand the timelines for tribal decision-making.

- Do not assume silence means concurrence; it could signal disagreement. Always verify views with the official tribal representative.
- Always ask tribal representatives about their preferred way of doing business and any specific tribal protocols for meetings. Be aware that the cultural norms of tribal citizens may be different from yours, and that each of the more than 570 Indian tribes has a unique culture and heritage.
- Do not assume everyone in the Indian tribe has the same views. For example, traditional cultural authorities may sometimes have perspectives that differ from those of their tribal governments. It is important to listen to all consultation participants, but also to be sure that you understand the position of the elected tribal leadership on every issue.
- Develop points of contact through the tribal government. Do research ahead of time to find out whom you will be consulting with and their tribal positions, then make the effort to get to know them. Tribal governments may consist of elected leadership (tribal leader, tribal council, tribal courts), traditional leaders (treaty councils, tribal elders, spiritual leaders), and tribal administration (program managers, administrators, and staff).
- Be mindful of appropriate behaviors—be sure to demonstrate respect to tribal leaders just as you would to a leader of a foreign nation. Always show deference toward tribal elders and allow them plenty of time to speak first. Do not interrupt or raise your voice. Learn by observation and by talking to others. Again, when in doubt, ask respectfully.
- Remember that consent by one tribal member does not necessarily mean consent by the tribe. Make sure the tribe's governing body has approved final decisions.

Consultation: Early and Often

- Make sure you identify and initiate consultation with Indian tribes at the *start* of the planning process for your agency's undertaking.
- Suggest a process for consultation and discuss it with the Indian tribes. Collaborate in a way that accommodates tribal protocols and schedules. The ACHP regulations at 36 CFR Section 800.2(c)(2)(ii)(E) provide for agreements with Indian tribes that set out procedures for Section 106 consultation and can address tribal concerns about confidentiality of information. The ACHP published *Types of Agreement Documents in Section 106: What They Are and When They Should Be Used* for more information about agreements.
- Consider establishing an on-going working group that can provide continuity for future undertakings by your agency.
- If at all possible, approach consultation as a partnership rather than on project-by-project coordination.
- Remember to document all correspondence, follow-up telephone calls, consultation meetings and visits to project sites and reservations. Be sure to include the content of your communications in your documentation.

- Find out if the tribal leadership wants to receive additional copies of all the consultation materials and documentation that you are providing to the tribe's designated representative (THPO, or cultural resources staff person) as part of your consultation.
- Ask tribal representatives to keep you up-to-date on any changes to tribal postal or email addresses and contact information for new tribal leadership.

Effective Meetings are a Primary Component of Successful Consultation

- Offer to go on-site with traditional authorities. Some people may be uncomfortable relying solely on maps, and site visits may stimulate consideration of alternatives.
- Do not set your own meeting agenda without consulting with tribal representatives to learn what they expect the process and substance to be. Indian tribes may have their own ways of conducting meetings.
- Inform tribal representatives in advance of the meeting's goal and what needs to be accomplished in the time you have, so that participants can stay focused. Like you, tribal representatives are there to work and accomplish results.
- Give plenty of notice beforehand so that tribal representatives have adequate time to prepare. Provide participants with maps, hotel information, a list of all attendees, an agenda, and most importantly, complete project documentation.
- Speak to tribal members by phone beforehand so that you know who will be attending the meeting. Allow Indian tribes to send as many representatives as they wish, but explain any limitations that your agency may have with funding travel.
- Check if anyone has special needs. Some tribal elders may need special accommodations.
- Offer the tribal participants the opportunity to make an opening or welcoming statement.
- Make sure you invite tribal representatives to sit at the table with you, and introduce all participants with their proper titles. Check with your tribal contact beforehand so you know if certain officials or elders should be introduced and acknowledged first.
- Review your agency's mission and operations at the start of the meeting. Do not assume that everyone knows how your agency functions or is familiar with all of the programs it oversees.
- Take accurate notes during the meeting, or, *if the tribe agrees in advance*, arrange for meetings to be recorded (it is still advisable to take notes to avoid problems should a recording be lost or damaged). It is important to document not only that you have consulted with the tribe, but the substance of the meeting and the views and concerns expressed by the tribe, as well. Be sensitive to the issue of confidentiality, which may require that you switch the recorder off, or to omit certain sensitive information from your notes if the tribe so requests. Documenting meeting content ensures that participants can later review and correct any inaccuracies, and also provides the agency with a solid consultation record.
- Be prepared on the issues and be open to tribal perspectives.

Conclusion

We hope this handbook has been helpful. If needed, you may obtain further assistance from the ACHP in understanding and interpreting the requirements of Section 106, including tribal consultation.

The **ACHP's Office of Federal Agency Programs (OFAP)** administers the NHPA Section 106 review process, and works with federal agencies to improve how they incorporate historic preservation values into their programs. OFAP provides technical assistance, training, and guidance for Section 106 users to improve the efficiency and effectiveness of the review process.

This office's core responsibilities include:

- managing the ACHP's participation in Section 106 consultation
- providing guidance, advice, and technical assistance to federal agencies and other participants in the Section 106 process
- overseeing the Section 106 training program to develop training tailored to specific programs or issues

The **ACHP's Office of Native American Affairs (ONAA)** oversees the ACHP's Native American initiatives. ONAA staff also works closely with the ACHP's tribal/Native Hawaiian member to address critical issues brought to the ACHP by Indian tribes, NHOs, and intertribal organizations.

The program's primary responsibilities are:

- Advising the ACHP Chairman, members, executive director, and staff on policy matters and historic preservation issues affecting Indian tribes and Native Hawaiian organizations (NHO's)
- Ensuring the ACHP meets its government-to-government and trust obligations to Indian tribes
- Providing technical assistance and outreach regarding tribal and NHO consultation in the Section 106 process
- Participating in inter-agency initiatives focused on tribal and Native Hawaiian issues

For general information, please visit the [ACHP](#) website.



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