



EARLY COORDINATION WITH INDIAN TRIBES DURING PRE-APPLICATION PROCESSES

A HANDBOOK



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On the cover: Members of the Paiute and Shoshone tribal communities who trained in archaeology are shown surveying an area of northern Nevada for cultural resources prior to construction of a gas pipeline. (*Breaking New Ground*, 2014, courtesy Cinnabar Video and Far Western Anthropological Research Group, Inc.)

INTRODUCTION

This handbook presents recommendations for federal agencies, applicants, and Indian tribes to work together in pre-application information gathering or prior to initiating the Section 106 process. The Section 106 regulations state that “(t)he agency official shall ensure that the Section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.” The Advisory Council on Historic Preservation (ACHP) is aware that many Section 106 reviews for infrastructure, energy, and other development projects begin after significant preparations and a great many investments have been made about project location. Projects for which non-federal entities apply for funding or approval typically require the applicant to include environmental and cultural resources information in the application. The Section 106 process in many cases is not initiated until the applicant submits an application to a federal agency. Thus, it can be challenging to consider alternatives for the proposed project’s location in order to avoid or minimize impacts to historic properties in the Section 106 process.



(ACHP Chairman Aimee Jorjani with Tribal Historic Preservation Officer Kyle Felsman of the Confederated Salish and Kootenai Tribes, MT)

The National Historic Preservation Act (NHPA) requires federal agencies, in carrying out the Section 106 process, to consult with Indian tribes and Native Hawaiian organizations (NHOs) when historic properties of religious and cultural significance to them may be affected by a project that they carry out, license, or financially assist (also referred to as an undertaking). The ACHP’s regulations implementing Section 106, 36 C.F.R. Part 800, in turn, require federal agencies to consult with Indian tribes and NHOs throughout the review

process for such projects. This requirement applies regardless of the location of the historic property. This document will focus on coordination and consultation with Indian tribes regarding such projects outside the formal Section 106 review process.

In the fall of 2016, the Departments of the Interior (DOI), Justice (DOJ), and the Army and other federal agencies including the ACHP met with Indian tribes regarding tribal input in federal infrastructure decisions. Many of the tribal comments were either about specific problems Indian tribes experience in the **Section 106** process or were general observations about federal-tribal interactions that can also occur in Section 106 consultations.

Of particular interest to the ACHP were the comments suggesting that Indian tribes be involved in the pre-licensing/permitting phase to ensure that sites of religious and cultural significance are properly identified and protected. One commenter referred to this as an “early intervention process.” Tribal commenters also repeatedly suggested that federal agencies start the Section 106 process earlier for infrastructure projects, before specific location, siting, routing, or alignment decisions are made and historic properties, including those of religious and cultural significance to Indian tribes, are identified.

DOI, DOJ, and the Army released a report, **Improving Tribal Consultation and Tribal Coordination in Federal Infrastructure Decisions**, in January 2017, in response to the interagency meetings. In the report, it is recommended that:

- “1. Each Federal agency involved in infrastructure decision making should use mechanisms to involve Tribes early in project planning whenever possible. This should include developing procedures that facilitate permit applicants and Tribes working together before applicants make siting decisions or other commitments that impede consideration of alternatives. Federal agencies should use programmatic, landscape-level planning mechanisms to ensure thoughtful and meaningful consultation on infrastructure projects.
2. Each Federal agency involved in infrastructure decision making should develop and implement procedures for consulting with and including Tribes as early as possible in the NEPA and NHPA processes, including pre-decisional scoping discussions with Tribes.”

In May 2017, the ACHP released its report, **Improving Tribal Consultation in Infrastructure Projects**, in response to the Section 106 issues raised in the interagency meetings. In the ACHP's report, it is recommended that:

“1. Federal agencies improve pre-application information about Section 106 and tribal consultation, and

2. Federal agencies encourage proactive planning by applicants that includes coordination with and information gathering from Indian tribes.”

ABOUT THESE RECOMMENDATIONS

The recommendations in this document address early coordination with Indian tribes in order to improve the consideration and protection of historic properties, including those of religious and cultural significance, during infrastructure project planning by federal agencies and applicants for federal approvals or funding. Early coordination, or pre-application coordination, refers to the efforts an applicant should take to include Indian tribes in the project planning and pre-application work prior to submission of an application to the federal agency and the subsequent initiation of Section 106 review. It could also mean early project planning by a federal agency for a project the agency will carry out. The efforts taken by the applicant to facilitate early coordination with Indian tribes will vary depending on the circumstances of the project, the federal agency involved, tribal participation, and other factors specific to individual undertakings. This document provides recommendations for federal agencies, applicants, and Indian tribes regarding how to begin, facilitate, and participate in early coordination in a manner that should result in a more efficient and effective Section 106 process.

While these recommendations encourage applicants to coordinate with Indian tribes early in pre-application work, some Indian tribes may not be willing to work with project applicants for a variety of reasons including the fact that the applicant does not have the same responsibilities to Indian tribes as a federal agency does. Accordingly, some Indian tribes may only be willing to work with applicants when a federal agency is also involved. Applicants and federal agencies should not assume that an Indian tribe's unwillingness to participate in pre-application work signals a lack of interest by that tribe in the undertaking or in the effects

an undertaking may have on historic properties of religious and cultural significance to the tribe.

Early coordination can be beneficial for both the protection of historic properties and for efficiencies in the Section 106 review process. Typically, an applicant conducts pre-application environmental and cultural resources analyses in preparation for a permit, license, or funding application. This may be done to help inform a preferred project location. Therefore, if an Indian tribe waits to discuss concerns and offer views until federal review processes have been initiated, it may be much more challenging to modify the project's proposed location or alignment in order to avoid or minimize adverse effects to historic properties of religious and cultural significance. It is also beneficial for the applicant to be informed early of tribal historic preservation concerns. Regardless of pre-application coordination, in carrying out the Section 106 review, the federal agency is still required to invite all Indian tribes that attach religious and cultural significance to historic properties that might be affected by the undertaking to consult. Coordination in the pre-application phase does not substitute for this required consultation.

To realize efficient and effective compliance with Section 106 and in many cases, project planning, federal agencies should begin their own Section 106 consultation early in project planning and should assist applicants in coordinating with Indian tribes in pre-application processes, whenever possible. Overall, the goal is improved tribal involvement in infrastructure planning which, in turn, can lead to better preservation outcomes in the Section 106 process while achieving greater efficiencies in project planning.

BACKGROUND

In the preamble to the **NHPA**, Congress asserts that:

- ▶ the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development.¹

In 1992, important amendments to the NHPA clarified that properties of religious and cultural significance to Indian tribes could be eligible for listing on the National Register of Historic Places.² Additionally, amendments clarified that federal agencies, in carrying out their Section 106 responsibilities, must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by a proposed undertaking.³ The Section 106 implementing regulations, **36 C.F.R. Part 800**, were subsequently amended in 1999 to reflect these clarifications in the NHPA.



(ACHP: San Francisco Peaks, AZ)

Federal agencies have a responsibility to consult with Indian tribes during the Section 106 process when historic properties of religious and cultural significance to them might be affected by an undertaking.⁴ The Section 106 implementing regulations

clarify that this consultation requirement applies regardless of the location of the historic property⁵ and that these historic properties are frequently located on "...ancestral, aboriginal, or ceded lands of Indian tribes..."⁶ At this time, neither the NHPA nor its implementing regulations provide a definition of ancestral, aboriginal, or ceded lands. The federal agency is responsible for making a reasonable and good faith effort regarding identification of Indian tribes that shall be consulted in the Section 106 process on those lands.⁷ However, relying on federal agency staff to identify which Indian tribes have had an association within a project area has resulted in inconsistent inclusion of Indian tribes in the Section 106 process for varying reasons. The lack of internal agency guidance regarding identification of and consultation with Indian tribes off-reservation is a contributing factor for this inconsistency.



(ACHP: Spoked Wheel Geoglyph: Ocotillo Express, CA)

The consultation process includes providing the Indian tribe with a reasonable opportunity to identify its concerns, advise the federal agency on identification and evaluation, articulate its views on effects to the historic property, and participate in the resolution of adverse effects. Federal agencies are also made aware that historic properties of religious and cultural significance are frequently located on the ancestral, aboriginal, or ceded lands of Indian tribes and that, regardless of location, federal

1 Section 1(b)(6) of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515.

2 5 U.S.C. § 302706(a).

3 5 U.S.C. § 302706(b).

4 54 U.S.C. § 302706(b).

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

6 36 C.F.R. 800.2(c)(2)(ii)(D).

7 36 C.F.R. 800.2(c)(2)(ii)(A).

agencies are required to consult with Indian tribes regarding these historic properties. Despite the integration of Indian tribes into the Section 106 process in a more systematic manner, many

challenges still exist, as evidenced by the mentioned interagency meetings in late 2016.

EARLY CONSULTATION AND COORDINATION WITH INDIAN TRIBES

It is important to clarify that the ACHP is not suggesting applicants are authorized to carry out Section 106 review or government-to-government consultation with Indian tribes. Indian tribes, as sovereign nations, have a government-to-government relationship with the federal government. Therefore, federal agencies cannot unilaterally delegate their government-to-government consultation responsibilities to a non-federal entity without prior approval from the Indian tribe.⁸ However, applicants are encouraged to communicate and coordinate with Indian tribes to identify historic preservation concerns during their pre-application planning and where applicable, federal agencies should assist applicants in doing so.

Pre-application efforts that are coupled with early Section 106 consultation will help provide the information necessary to more fully consider approaches and alternatives that may avoid or minimize adverse effects to historic properties of religious and cultural significance to Indian tribes.⁹

Even with early coordination efforts that include pre-planning and identification, the Section 106 process requires consultation with Indian tribes throughout the four-step process.

FEDERAL AGENCIES

While all federal agencies are required to consult with Indian tribes in the Section 106 process, there are significant differences between agencies regarding their inherent authorities and missions. These differences influence how each agency approaches and carries out tribal consultation. Because federal land managers operate on a fairly static land base, they have more opportunities than a permitting agency to interact and develop relationships with Indian tribes; they are more familiar with the nature of historic properties within the lands under their management; and, they are able to maintain databases of historic property information to aid in land management planning. In other words, federal land managers can be proactive regarding tribal consultation and historic preservation, even when they are considering a permit application.

Federal permitting or funding agencies, on the other hand, typically do not manage the lands affected by the projects requiring their permits and usually do not know in advance where projects will be proposed. Nevertheless, permitting and funding agencies can engage in some planning and develop proactive measures to improve tribal consultation and historic preservation reviews. They can also encourage prospective applicants to take useful steps toward early coordination with

Indian tribes and gather information about areas of tribal concern to inform project siting.

Despite the differences in authorities and missions, all federal agencies can work toward developing relationships with Indian tribes. In [Recommendations for Improving Tribal-Federal Consultation](#),



(ACHP: Wild Horse Wind Farm, WA)

⁸ See [Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act](#).

⁹ 36 CFR § 800.1(c).

the ACHP suggested that “the foundation for resolving most, if not all, challenges facing Section 106 participants is a solid and productive working relationship.” The ACHP also recognized that “...developing and maintaining working relationships with Indian tribes may be particularly challenging for funding, licensing, and permitting agencies that do not have a local or regional presence. Nevertheless, some agencies have managed to do so by attending national and regional meetings and conducting regular outreach to tribes.”

Federal Land Managers

Many federal land managers have consultation or protocol agreements with Indian tribes in place as well as general preservation planning tools. These tools, when actively implemented, can help inform federal agencies about tribal concerns when the agency considers approvals for applicant-driven projects. Even when federal agencies have such tools in place, there are often challenges in the meaningful consideration of historic properties of religious and cultural significance to Indian tribes. Therefore, federal land managers may benefit from some of the suggestions offered for applicant-driven projects.

Federal land managers often have vast tracts of land to manage that include numerous resources and competing interests. As a result, limited funding plays a part in the capacity of an agency to conduct in-person meetings, host field visits, and engage in conferences and other professional venues. Applicants should also be aware of both the federal agency and tribal limitations of time and funding, and be aware that their project is one of many governmental concerns being balanced by their federal and tribal counterparts.

Federal agency personnel need to be clear and honest about their agency’s capacity when consulting with Indian tribes. However, federal agencies often find ways to creatively use their existing authorities to work with their partners in a mutually beneficial manner. The examples below highlight some achievements federal



(BLM: Canyons of the Ancients, CO)

agencies and Indian tribes have had when they took advantage of funding and/or project opportunities to share information and resources in a manner that would benefit both parties.

Examples of federal land management tools:

- ▶ The Bureau of Land Management (BLM) developed an ethnographic report for western Montana with the local Indian tribes. The Indian tribes were contracted to develop a Geographic Information System database that included recorded sites, place names, and site-specific oral history information. The Indian tribes also conducted additional survey in high priority areas. This tool identified data gaps; showed the variability in previously recorded archaeological site types and tribal information; developed relationships between BLM and the Indian tribes; fulfilled project review requirements for BLM for several projects; will expedite future reviews; and, will inform future decision making.
- ▶ The U.S. Forest Service entered into a cost-share contract with the Confederated Salish and Kootenai Tribes for a Tribal Liaison. It provides for an on-site tribal member, as part of the consultation protocol, to serve as the communication conduit and voice for the tribe regarding historic properties of religious and cultural significance within that forest. It also includes project review mechanisms and process protocols, thereby providing predictability for both the Forest Service and the tribe; the Forest Service benefits by having on-site assistance for surveys rather than having to contract for seasonal employees each year.
- ▶ Glacier National Park has a **Protocol for Ice Patch Artifacts in the Field, Lab/Analysis, and Transport Actions** with the Confederated Salish and Kootenai Tribes and the Blackfoot Nation for the identification and handling of certain cultural items. This protocol developed from a Cultural Resource Management Group that was formed to undertake ice patch archaeology and paleoecological studies throughout the park. Parameters on recordation and analysis of culturally sensitive items and human remains were jointly developed. The goal included expediting field reviews in the absence of tribal participants and ensuring sensitive handling of tribal heritage items.

Federal Funding, Permitting, or Licensing Agencies

The nature of federally permitted, licensed, approved, or funded projects presents unique challenges for an agency’s ability to plan for the long term and develop relationships with Indian tribes. Perhaps the greatest challenge is that the federal agency issuing the permit, license, or approval or providing funding is not the project proponent and, thus, is generally in a reactive rather than proactive position. As a result, these agencies may be less likely to develop ongoing relationships with Indian tribes; are less familiar



(Volunteers, TVA staff, and Tribal rep Emman Spain at the pilot Thousand Eyes Workshop at Painted Bluff, AL)

with the land base; and have less first-hand knowledge of the resources on the landscape with a proposed project location.

While these are real and significant challenges, all federal agencies can take proactive steps to develop relationships with Indian tribes and encourage applicants to coordinate with Indian tribes. Some agencies have a presence in a specific set of states or in a region of the country. Developing relationships with the Indian tribes with ancestral ties to lands in the area where they work is similar to what some land managing agencies do. Relationship-building with Indian tribes can include attending conferences, developing consultation protocols, and coordinating with Indian tribes on projects when opportunities become available. Even federal agencies with nationwide programs can make themselves known to Indian tribes and can establish some level of relationship with them.

The ACHP understands that federal agencies are often not aware of an applicant's proposed plans until the applicant is well into project planning and seeks federal approval or funding. However, federal agencies can take steps to better inform potential applicants of both Section 106 requirements and the benefits of early coordination with Indian tribes. Agencies should consider developing measures such as program alternatives that make federal decision making more efficient and include tribal input before applicants make investments or arrangements that narrow alternatives (or make them much less palatable) before the Section 106 has even begun. Federal agencies should also consider developing communication tools for applicants and making information about tribal outreach readily available along with pre-application information.

Examples of federal funding, permitting, or licensing agency management tools:

- ▶ The Natural Resources Conservation Service (NRCS) in South Dakota receives hundreds of Environmental Quality Incentive Program and other program applications each year. However, NRCS staff is usually unaware of which application will receive funding until shortly before the applications are ranked and selected. With limited staff and undertakings located throughout the state requiring simultaneous review, the NRCS is restricted in its capacity to routinely coordinate field visits with Indian tribes under Section 106 at the project application phase. This is not only due to the sheer number of applications, but also because many of the projects may not be funded. As a proactive tool, NRCS staff began plotting all of the higher ranked applications' (those likely to be funded) locations on a map and provided this information to Indian tribes with an explanation of the pending ranking selection process, proposed type of conservation activities that may occur, and described the NRCS' Section 106 process following ranking, consultation, and contract signing. This information is provided to all in-state and out-of-state Indian tribes known to have an ancestral tie to the state. Indian tribes are provided the opportunity to identify specific locations of concern or historic properties of religious and cultural significance early in the planning process to better facilitate the Section 106 process once initiated.
- ▶ Consultation agreements or protocols are often developed by federal land managers but can be an equally effective tool for funding or permitting agencies. For example, many state divisions of the Federal Highway Administration (FHWA) have entered into **consultation agreements** with the state departments of transportation and Indian tribes that allow for the state to carry out tribal consultation. In most cases, FHWA enters the Section 106 review process only when there are conflicts.
- ▶ State offices of NRCS have entered into **Prototype Programmatic Agreements** with individual Indian tribes that outline how the Section 106 review process will occur on tribal lands in an effective and predictable manner. Efficiencies agreed upon include developing a list of undertakings with no potential to cause an effect to historic properties, determining points-of-contact, preferred notification method (digital vs. paper), specific areas of tribal concern, reporting methods, and comment and review timeframes.

PROACTIVE STEPS ALL FEDERAL AGENCIES, APPLICANTS, AND INDIAN TRIBES CAN TAKE

1. Develop Relationships

The foundation for resolving most, if not all, challenges facing Section 106 participants is a solid and productive working relationship. Solutions tend to have a much better chance of success when they are developed in cooperation and coordination with affected parties. Relationships can also lead to more effective collaboration and offer a forum in which potential conflicts can be addressed. The ACHP has seen, time and again, that when federal agencies, applicants, and Indian tribes commit to working together to find mutually acceptable solutions, historic preservation thrives and project reviews proceed more expeditiously.

In working with an Indian tribe, it is helpful to develop an understanding of the Indian tribe's governmental structure. Many tribal governments include their cultural programs, legal offices, tribal leadership, and elders in their historic preservation review process. These groups may have infrequent meeting dates or seasonal availability. Asking the tribe which individuals or programs will represent the Indian tribe in project review can help reduce confusion and allow for better planning and coordination between parties. It can be helpful for a federal agency or applicant to offer presentations to tribal leadership and staff about its organization and mission. It may also be helpful to attend public events hosted by the Indian tribe to learn about the government, history, and culture of the Indian tribe.

The ACHP recognizes that developing and maintaining working relationships with Indian tribes may be particularly challenging for funding, licensing, and permitting agencies that do not have a local or regional presence. Nevertheless, some agencies have managed to do so by attending national and regional tribal conferences and meetings and by conducting regular outreach

to tribes. The **National Association of Tribal Historic Preservation Officers**, the **National Congress of American Indians** and the **United South and Eastern Tribes** host national and regional conferences that include regular attendance by tribal government and cultural leaders.

Many federal agencies do have either an individual or an office devoted to tribal relations. Even if these staff or offices are not organizationally situated in the permitting or funding office, federal agencies should establish mechanisms to allow such staff or offices to be available to assist others in the agency in developing relationships and working with Indian tribes.

One way to build relationships is to meet on an annual (or other interval) basis outside of project consultation to discuss and resolve, where possible, project planning, consultation strategies, and other issues that arise in Section 106 consultation. This has proven an effective tool for improving consultation among all parties, especially between federal agencies and Indian tribes. The Forest Service has co-hosted the annual "To Bridge A Gap" conference with Indian tribes for many years. It has grown to include other federal agencies, State Historic Preservation Officers (SHPOs), and others and is considered by many to be a model for building and improving relationships. Similarly, many military installations host annual government-to-government meetings with tribal leaders to discuss installation-specific issues. The FHWA, North Dakota Department of Transportation, and multiple Indian tribes have created and signed a Programmatic Agreement creating the **Tribal Consultation Committee** which meets twice a year in order to discuss transportation projects. Similarly, many NRCS Field Offices meet annually or bi-annually with local Indian tribes to review pending undertakings and to review prior activities.

Applicants can create and maintain effective working relationships with Indian tribes as well. For example, NextEra Energy recently informed the ACHP of its efforts to develop a tribal outreach program for early coordination efforts with Indian tribes (see Appendix B). NextEra noted that regardless of the location or type of project being pursued, relationships and trust between federal agencies, applicants, and Indian tribes are built over time. Applicants that employ consistent approaches during tribal outreach and project participation with Indian tribes are likely to find such actions help facilitate those relationships.

2. Agreements

Federal agencies can enter into agreements with Indian tribes that outline mutually acceptable consultation strategies. Federal



(ACHP and the National Trust Panel at NATHPO Conference, 2018)

agencies can also enter into agreements with Indian tribes to outline how applicants can coordinate with or collect information from the tribes. Such agreements could define those actions that are acceptable for an applicant to carry out; how the agency will consider the information gathered from early coordination in the Section 106 process; and, can clarify that early coordination does not substitute for consultation between the federal agency and Indian tribe (see earlier discussion regarding government-to-government consultation). The Section 106 regulations provide for an Indian tribe to “enter into an agreement with an agency official... [that] may cover all aspects of tribal participation in the section 106 process... [and] may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions...”¹⁰

Partnering with Indian tribes beyond project-specific consultation can lead to efficiencies and greater predictability in the review process. The process to develop an agreement, which is done with the full participation and consent of Indian tribes, can also lead to or strengthen existing relationships between federal agencies and Indian tribes.

Similarly, applicants and Indian tribes can work to develop agreements to guide their interaction. This document does not need to bind parties in the Section 106 process but can help during early coordination in many of the same ways that a federal agency consultation protocol does with Indian tribes. Points of contact, areas of interest, data sharing method (electronic vs. paper), ways to keep sensitive information confidential, and response timeframes are some of the items that an applicant and an Indian tribe could agree on.

Indian tribes have a long history of entering into agreements with federal and/or state agencies outside of the Section 106 process. Public Law 93-638 allows for federally recognized Indian tribes to acquire increased control over the management of federal programs that impact their members, resources, and governments¹¹ including real estate, health care, law enforcement, and other land and resource management functions.¹² Agreements between Indian tribes and states include gaming compacts,¹³ wilderness management,¹⁴ and health and safety agreements. Indian tribes also enter into partnership agreements

with local governments and private entities for economic development purposes,¹⁵ social programs,¹⁶ and for other local concerns and issues.

3. Use Available Resources to Identify and Contact Interested Indian Tribes

Federal agencies and applicants should consider using the U.S. Department of Housing and Urban Development (HUD) **Tribal Directory Assessment Tool (TDAT)**. This online directory was developed by the Office of Environment and Energy to help users identify Indian tribes that may have an interest in the location of a HUD-assisted project. It is available to the public and can be used by anyone who needs to identify Indian tribes with an interest in a particular county. It also provides tribal contact information, but it should be noted that there are some gaps in the information it contains. While HUD attempts to keep the database updated, there may be inadvertent errors. With these caveats in mind, it is still the only publicly available comprehensive source of information about Indian tribes’ areas of interest.

Many states have committees or commissions on Indian affairs that maintain information about which Indian tribes have ancestral ties in that state or that may be able to help applicants identify Indian tribes to be consulted. A list of state committees and commissions is maintained online by the **National Conference of State Legislatures**.

NRCS has recently released a guidance document, **Tribal Ancestral Lands Consultation Under the National Historic Preservation Act – Guidance for Natural Resources Conservation Service Employees**, addressing identification of and consultation with Indian tribes on ancestral lands. A primary purpose of the guidance was to outline “how NRCS can effectively manage projects that incorporate Indian Tribe input acquired through consultation, and complete the NHPA Section 106 review process in a timely manner.”¹⁷ A key to developing and implementing this guidance relied on NRCS developing a definition of ancestral lands that was consistent with the NHPA and its implementing regulations and was inclusive enough to capture the concepts of ancestral, aboriginal, and ceded lands:

¹⁰ 36 CFR § 800.2(c)(2)(ii)(E).

¹¹ https://www.doi.gov/ost/tribal_beneficiaries/contracting.

¹² https://www.fws.gov/alaska//external/native_american/Living_Working_Together_10-06-15b.pdf.

¹³ <https://www.nigc.gov/general-counsel/indian-gaming-regulatory-act>.

¹⁴ <http://www.csktribes.org/natural-resources>.

¹⁵ <http://www.rsic.org/about-3/business-enterprises-and-economic-development/>.

¹⁶ <http://www.valleyjournal.net/Article/19324/CSKT-Council-approves-free-use-permit-for-club>.

¹⁷ Title 190, Subpart A, Part 315.1.

Ancestral Lands —Areas, whether discrete or continuous, where Indian Tribes, NHOs, or their members have affiliation. These are areas that have cultural, historical, spiritual, subsistence, or ceremonial significance ascribed to them. An Indian Tribe's or NHO's physical connections to these areas may or may not persist into the modern era; an ongoing physical connection to an area is not required for a site to have religious and cultural significance. Ancestral

lands are defined by Indian Tribes or NHOs based on their knowledge of their history and connections with that area.¹⁸

While this definition and the accompanying guidance may not serve everyone, it provides an example of an agency's identification of and interactions with Indian tribes in their ancestral lands during the Section 106 process.

PROACTIVE STEPS FEDERAL AGENCIES CAN TAKE

1. Educate and Inform Applicants

Many federal agencies interact with industry-wide associations and present at their meetings, an excellent way to reach out to potential applicants about federal historic preservation requirements. Most industry associations also publish newsletters and host conferences or meetings in which innovations and new information are shared. Federal agencies can include information about Section 106 and federal historic preservation responsibilities in such trade publications. Some federal agencies offer training on cultural resources and historic preservation. For example, the Federal Energy Regulatory Commission (FERC) offers regular training, which includes a segment on cultural resources and historic preservation requirements, and is open to all: industry, contractors, federal/state representatives, non-governmental organizations, and Indian tribes.

Federal agencies can also develop brief information papers about their historic preservation and tribal consultation responsibilities. These can be posted online and handed out at conferences and in-person meetings. Some NRCS Field Offices provide applicants for grants and technical assistance **information regarding the Section 106** process and its role in their application process.

2. Facilitate Applicant Coordination with Indian Tribes

Federal agencies should consider reaching out to Indian tribes to discuss ways to ensure tribal historic preservation interests and concerns can be accommodated through early coordination with the applicant. The discussions should lead to mutually acceptable protocols for communication, information sharing, and resolution of potential conflicts. Such an initiative could be national, regional, or project-specific depending on the



(ACHP meeting with tribal members)

scope of the federal action or program. While consensus may not be possible, these discussions will give federal agencies and applicants insights into the kinds of issues that may arise in project planning.

Agencies should also consider facilitating or participating in discussions between industry associations and Indian tribes. For example, the Federal Communications Commission participated in long-term discussions among several telecommunications industry associations and the United South and Eastern Tribes that resulted in solid working relationships between many tribes in the eastern United States and telecommunications companies.¹⁹ As another example, the U.S. Army Corps of Engineers sometimes hosts pre-application meetings with applicants and can consider inviting interested Indian tribes to these meetings, particularly when an Indian tribe is uncomfortable working with an applicant in the pre-application process.

¹⁸ Title 190, Subpart A, Part 315.3.G.(i).

¹⁹ https://apps.fcc.gov/edocs_public/attachmatch/DOC-253516A2.pdf.

Most importantly, federal agencies with pre-application procedures should provide clear instructions and expectations regarding applicant coordination with Indian tribes in the pre-application information. Many federal agencies have pre-application information²⁰ on their websites and should ensure that it includes instructions regarding when and how applicants should contact Indian tribes as well as information on etiquette and protocol.

Federal agencies should consider the following ways to assist their applicants' interaction with Indian tribes:

- ▶ Provide template letters that ensure applicant correspondence is respectful and efficient. Template letters can also ensure the applicant is addressing the relevant topics using correct terminology.
- ▶ Ensure applicants understand that they are engaging with a sovereign nation and should expect to work with staff and not tribal leaders. In the event they engage at a higher political level, tribal leaders are to be addressed as any head of state should be addressed.
- ▶ Correspondence examples can show applicants how to clarify that pre-application coordination is being initiated, not federal agency consultation. Developing a "roadmap" that identifies where the applicant's pre-application efforts fit into the larger Section 106 process would provide clarity to all parties.
- ▶ Make sure the initial letter identifies which federal agency or agencies will ultimately be involved (and the Section 106 lead agency, if one has been so designated in situations where multiple federal agencies may be involved in a single undertaking) and explain how the Indian tribe can contact those agencies about the pre-application process and any other concerns related to the proposed project.
- ▶ Guide applicants to ask the Indian tribe whether it has any concerns about the project and its location rather than requesting a tribe first identify sites of concern or interest. The applicant should also ask if the Indian tribe is willing to work with the applicant to discuss historic properties of religious and cultural significance.

Clear guidance and sample communications can reduce the possibility of confusion and conflicts and hopefully lead to productive working relationships between applicants and Indian tribes.

3. Share Documentation Efficiently

A key to effective early coordination is ensuring that all parties, including Indian tribes, receive timely and adequate project documentation. The agency should assist applicants in understanding what information is necessary to send in order for Indian tribes to effectively participate during pre-application coordination. To the extent possible, information should include the purpose to be served by the proposed project, maps with descriptions of the proposed project that clearly illustrate potential project footprint(s), staging area(s), access road(s), and/or project alignment(s). Additional information should include a timeline for the review process, points-of-contact, and hyperlinks to any information that may be available online.

As a matter of efficiency, many agencies use documentation developed for National Environmental Policy Act (NEPA) compliance in the Section 106 process, and the ACHP and the Council on Environmental Quality encourage such use to facilitate Section 106 consultation.²¹ However, it can be difficult for consulting parties with limited or no staff, such as Indian tribes, to wade through extensive documentation. Therefore, it is helpful to highlight the information relevant to the Section 106 process in the NEPA documentation. Information relevant to an Indian tribe's historic property concerns may not always be captured solely in the cultural resources section of a NEPA document. Traditional cultural properties and other sites of religious and cultural significance may include botanical, geological, and or aquatic resources.

Additionally, if all parties agree, using electronic submission of documentation rather than mailing paper copies can save time and resources. Agreed upon protocols for sharing documents and information may be reached through a consultation agreement. This can include specifying who should receive documents; who is responsible for commenting; and timeframes for responses. Any efficiency that can be identified and agreed upon is constructive and can be documented in the protocol.

4. Consult Early in Project Planning

Federal agencies should begin their own tribal consultation as early as possible, whether the undertaking is to be carried out by the agency or an applicant. During the scoping stage, while alternatives and project areas are being determined, the federal agency should make clear to Indian tribes if it is asking for input on a wide "study area" from which a more focused array of alternatives will later be screened. Transparency in the decision-making process is necessary for all parties to have the

²⁰ <https://www.blm.gov/policy/im-2011-061>; <https://www.ferc.gov/industries/gas/enviro/guidelines/cultural-guidelines-final.pdf>; <https://www.boem.gov/2015-047/>.

²¹ <https://www.achp.gov/digital-library-section-106-landing/nepa-and-nhpa-handbook-integrating-nepa-and-section-106>.

opportunity to be effective, and federal agencies should not assume that Indian tribes have a working knowledge of the alternatives available.

Despite any early coordination between the applicant and Indian tribe, the federal agency is still required to consult with the Indian tribe during the Section 106 process. In Section 106 consultation, the federal agency should verify information submitted by the applicant, particularly regarding tribal concerns; determine if any aspects of the project have changed since the pre-application process; and determine if the Indian tribe has any additional information regarding sites of religious and cultural significance that was not shared with the applicant.



(ACHP: Nine Mile Canyon consultation, UT)

Even if Indian tribes have been involved in early coordination with applicants, federal agencies must inform Indian tribes about how

they will meet their Section 106 consultation responsibilities when the review process is formally initiated. This information should also include any models or methods used to screen alternatives and to locate historic properties, particularly when identification of historic properties of religious and cultural significance to Indian tribes has not been carried out by the applicant.

5. Train Agency Staff

Federal agencies should train all staff with responsibilities to interact with Indian tribes or who have decision-making authority over programs or projects that could affect Indian tribes to ensure they are familiar with the federal government's relationship with tribes. Training should be commensurate with the type of interaction and level of authority but should, at a minimum, cover basic concepts such as:

- ▶ Federal treaty obligations
- ▶ The federal trust responsibility
- ▶ Tribal sovereignty
- ▶ The history of U.S.-tribal relations and policies
- ▶ Current consultation requirements

Some federal agencies offer or require training for staff. For example, the Department of Defense offers cross cultural training for service members, staff, and contractors. The ACHP requires all staff to be trained by its Office of Native American Affairs.

PROACTIVE STEPS APPLICANTS CAN TAKE

Many federal agencies require applicants to file environmental and cultural resource information as part of the application process. This information often provides the baseline information from which federal agencies make Section 106 decisions. Since many projects, whether federal, federally funded, or federally approved, require consultation with Indian tribes, early coordination can make the review process more productive and efficient.

While the Section 106 regulations allow a federal agency to authorize an applicant or group of applicants to initiate Section 106 consultation with the SHPO or Tribal Historic

Preservation Officer (THPO)²² and others, this authorization cannot be used to allow an applicant to initiate consultation without the prior approval of the Indian tribe.²³ Agencies and applicants need to clearly understand that if an agency authorizes an applicant to initiate consultation with a SHPO or THPO, it occurs as part of the formal Section 106 process. It is not early coordination. Additionally, federal agencies are required to notify the SHPO or THPO in advance if an applicant is authorized to initiate consultation. In the event that an applicant is authorized to initiate consultation, the federal agency is still "legally responsible for all findings and determinations charged to the agency official." [36 CFR 800.2(c)(4)]

²² 36 CFR § 800.2(c)(4).

²³ See [Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act](#).



(Karuk Indigenous Basketweavers, CA)

Nevertheless, applicants can and should reach out to Indian tribes to learn about potential concerns regarding the nature and location of a proposed project. An applicant's use of contractors, whether to relay project information to Indian tribes or to carry out identification of historic properties, should be discussed with the Indian tribe during the initial contact and meetings. Even if the federal agency does not provide guidance, there are some basic steps applicants can take to understand if there are potential effects from their projects on places of religious and cultural significance to Indian tribes.

Working with Indian tribes upfront can have many advantages. Early coordination can help expedite project planning and federal reviews; avoid potential legal challenges; reduce costs (because avoiding adverse effects to historic properties can be less expensive than mitigation); create positive working relationships with Indian tribes; and, reduce the potential for unfavorable media coverage resulting from conflict. The following highlights several steps applicants can take to be proactive in pre-application and Section 106 processes.

1. Plan Ahead

If an applicant suspects that their project could affect places of interest to Indian tribes, the applicant should include Indian tribes in their project planning and any pre-application information gathering. It is far more efficient to learn of potential issues as early as possible so they can be addressed before making investments and preparations that might be difficult to revisit. Many Indian tribes are willing to work with applicants before there is a federal review such as Section 106 in order to avoid damage to or destruction of their sacred places.

An applicant should become familiar with how the responsible federal agency carries out its tribal consultation responsibilities. Many federal agency tribal consultation policies and guidance documents are available online. Understanding the agency's views

and expectations can help shape and direct efforts to coordinate with Indian tribes.

If an applicant encounters an Indian tribe unwilling to coordinate during the pre-application process without federal oversight, the applicant might consider asking if the federal agency is willing to offer a pre-application meeting.

2. Develop Positive Long-Term Relationships with Indian Tribes

For applicants as well as federal agencies, developing relationships rather than relying on project-by-project interactions can lead to more efficient and effective project planning. Host meet and greet gatherings, attend inter-tribal organization meetings to learn about tribes and to offer presentations, visit with tribal offices and cultural centers to gain a greater understanding of the history and culture of the Indian tribe(s) involved. Consider developing mechanisms for including tribal involvement in cultural resources work and be aware that tribal offices often house important cultural information to which federal agencies and SHPOs do not have access.

3. Document Outreach Efforts and Outcomes of Coordination

In order to help the federal agency through the Section 106 review process, applicants should carefully document their efforts to reach out to and coordinate with Indian tribes. Understanding which Indian tribes did not respond or indicated an unwillingness to work with the applicant will assist the federal agency or agencies in quickly identifying which Indian tribes have been involved in early coordination efforts and which tribes must be invited to participate in the Section 106 consultation. This information will also help the federal agency understand if there are potential gaps in information it needs to fulfill its Section 106 responsibilities.

Document the interaction that occurs in meetings and during phone calls. This is important not only for the applicant's recordkeeping but also becomes an important source of information for the federal agency. Any notes taken should be shared with the Indian tribes to ensure accuracy and agreement and to clarify if some information shared by the Indian tribe was not intended to be written down. It also allows the Indian tribe an opportunity to add additional information for the applicant to consider and provide additional context.

4. Identify a Tribal Liaison

For applicants developing large or complicated projects, a tribal liaison can be an important addition to the project planning team. The liaison can work with Indian tribes to develop and

maintain relationships and can become familiar with tribal governmental structure and policy. The tribal liaison should be fully trained and qualified; avoid giving this responsibility to an existing employee as a collateral duty. Having proper experience and training on how to coordinate and work with Indian tribes will help avoid mistakes and will aid in relationship development. Be prepared to give the liaison authority to advise company leadership and assist in decision making. A liaison is only as effective as his or her authority allows. Indian tribes often prefer to meet with decision makers, so if a representative of the applicant (contractor, liaison, etc.) has limited authority to make decisions, the Indian tribe should be informed prior to meeting.

5. Develop Training

Provide training for all staff who might interact with Indian tribes. This could be provided by the tribal liaison or acquired from an outside source that is experienced in working with Indian tribes and conducting training for professionals. Training is important to ensure culturally appropriate interaction between staff and Indian tribes. An inadvertent action can derail an otherwise fruitful relationship. Consider having local Indian tribes provide a portion of the training. Their experience and knowledge is invaluable to the learning process. Integrating Indian tribes into the training program is also a demonstration of the applicant's commitment to a collaborative working relationship.

6. Develop a Tribal Coordination Policy

Consider developing a company policy regarding tribal coordination and working with Indian tribes. Having a document that personnel can read and refer to reduces the potential for errors. This will allow for accountability of personnel and provides transparency for Indian tribes regarding a company's intentions. Policies also serve as foundational documents for future agreements and working relationships with Indian tribes.

Policies developed in consultation with Indian tribes ensure that language and concepts are culturally appropriate. Consider developing the company policy with the help of a working group comprised of tribal representatives. Then, share the policy with Indian tribes and seek their comments. Talk about the draft policy at intertribal meetings. And, consider being flexible. If Indian tribes come forward with comments after the policy has been issued, consider revising the policy to accommodate tribal views.

7. Conduct Outreach

Invest in outreach efforts. There are many intertribal organization meetings around the country which provide a venue



(ACHP: To Bridge a Gap conference, 2019)

for reaching out to tribal leaders and staff about the company, the industry, and so on. These meetings not only provide opportunities for formal presentations but also for informal interactions. Understand that there may be strong feelings of distrust toward the industry. Be open and up front about the company's intentions in working with Indian tribes to help alleviate some of the distrust that may be encountered.

8. Consider Contracting with Indian Tribes

Consider including tribal contractors when soliciting for cultural resource firms. Their expertise can result in a more accurate assessment of historic properties of religious and cultural significance to Indian tribes. Because cultural information is often not shared outside the Indian tribe, cultural resource professionals may not be qualified to identify such historic properties. Conducting an archaeological survey may be a necessary component of the identification of historic properties but, unless the contractors are trained to identify places of importance to Indian tribes, the survey effort may not be comprehensive enough to identify such historic properties likely to be affected by the project.

9. Understand the Potential Limitations of Your Partners

It bears repeating that both federal agencies and Indian tribes often face limitations of time and funding. Applicants should be aware that their project is one of many governmental concerns being balanced by their federal and tribal counterparts. Tribal governments also have their own decision-making processes and schedules which may not align with project schedules and deadlines. Therefore, in project planning, consider tribal processes and other means to facilitate their participation.

PROACTIVE STEPS INDIAN TRIBES CAN TAKE

There are steps Indian tribes can take to inform others about their areas of interest and their expectations during early coordination and consultation. That said, the ACHP recognizes that lack of resources, especially financial resources, for many Indian tribes creates significant challenges in developing and managing historic preservation programs and, thus, proactive planning. Taking steps like those suggested may lead to more efficient and productive consultations, even for those Indian tribes with scarce resources.

1. Enter Into Consultation or Coordination Agreements with Federal Agencies and Applicants

Indian tribes should consider entering into agreements with willing federal agencies and/or applicants to define and tailor how Section 106 consultation or early coordination efforts will proceed. As noted above, such agreements can provide a clear roadmap and predictability for all parties. Agreements with applicants such as state departments of transportation (state DOTs) or private companies do not necessarily require the participation of a federal agency unless the applicant will be carrying out some of the responsibilities of a federal agency. For instance, many agreements between Indian tribes and state DOTs include FHWA for this reason. For an agreement between a federal agency and an Indian tribe, the Section 106 regulations at 36 CFR Section 800.2(c)(2)(ii)(E) clarify that these types of agreements between federal agencies and Indian tribes cannot modify the role of other parties in the Section 106 review without their consent.

Indian tribes work with multiple agencies, and staff turnover at various agencies can have significant impacts on routine processes and unwritten understandings. Take the opportunity to document effective working relationships to assure that those mechanisms continue beyond the tenure of the current agency staffer. Similarly, tribal staff turnover occurs. Therefore, having an agreement in place could help Indian tribes and federal agencies maintain continuity.

2. Share Information about Geographic Areas of Interest/Concern

While there is at least one online tool, HUD's TDAT (mentioned above), for determining which Indian tribes have an interest in specific counties, Indian tribes might still consider developing **lists of states and counties** within which they wish to be consulted. The lists can be posted on tribal websites, sent directly to agencies and SHPOs, and provided to

other parties as needed. Confusion about which Indian tribes should be invited to consult could be dramatically reduced with dissemination of such information. Applicants would also be able to more easily determine with whom to coordinate early in project planning.

3. Develop Consultation Protocols or Define Expectations of Consultation

Federal agencies and Indian tribes do not always agree on what constitutes adequate consultation. Most federal agencies have consultation policies that describe in varying detail how they will meet their general consultation responsibilities with Indian tribes. However, it can be very effective for Indian tribes to determine what consultation is to them and how it should be conducted prior to working with a federal agency. Having written expectations about consultation, or a set of consultation principles or protocols, allows Indian tribes to be proactive rather than reactive, and it alerts federal agencies of the Indian tribe's expectations. It also allows for differences in expectations to be discussed, examined, and worked out before the process begins.

4. Consider Developing Protocols for Early Coordination

Indian tribes interested in working with applicants early in project planning should consider developing a set of protocols to govern how such coordination should take place. The protocols could clarify how the Indian tribe wishes to engage with applicants; points of contact; expectations for the protection of sensitive information; and other important topics. Having written protocols alerts potential applicants to the Indian tribe's interests and expectations and, thus, can reduce the potential for confusion and miscommunication.

5. Create an Administrative Record

Indian tribes should consider maintaining a written record of their interactions with federal agencies and applicants. Having such a record minimizes confusion about what was discussed in telephone calls and meetings and confirms who participated and on what dates. Sharing written documentation of communications gives all parties an opportunity to correct misunderstandings and misinformation. The goal of these notes is to provide an accurate record of events. A thorough review of notes approved by the group will allow any gaps in procedural review or coordination to be addressed with less probability of confusion or disagreement between parties.

6. Cultivate and Maintain Relationships

Many Indian tribes have developed relationships with federal agencies over time amid consultations across varied and multiple projects. Indian tribes could foster and maintain relationships with federal agencies and applicants by hosting meetings or events, such as a staff gathering or potluck dinner, outside of the consultation process or specific project setting. Building a relationship outside of the early coordination or Section 106 review process allows interaction to happen in a more natural and less stressed venue.

As noted above, consultation and protocol agreements can promote, define, and provide that the developed relationships between the tribes and federal agencies continue and are preserved in case of federal or tribal staff turnover. Such an agreement may include applicants for federal assistance.



(ACHP meeting with Hoh Tribe, WA)

ISSUES FOR CONSIDERATION

Tribal Capacity

In the interagency consultations conducted in 2016, Indian tribes noted challenges they face regarding the resources necessary to effectively participate in the Section 106 process as well as other environmental reviews. Some commenters also acknowledged difficulties in meeting response deadlines. In *Improving Tribal Consultation in Infrastructure Projects*, the ACHP suggested federal agencies:

- ▶ Seek opportunities, and encourage applicants, to employ tribal expertise in environmental and cultural resource processes, and
- ▶ Provide direct assistance to Indian tribes through training and the development of resource materials to prepare them to fully and more effectively participate in infrastructure reviews.

Knowing that Indian tribes may not have the capacity to respond to requests within project-driven or regulatory timeframes, federal agencies and applicants should be aware that lack of resources rather than lack of interest or concern may be the reason for unresponsiveness. If a tribe needs more time to review or is otherwise having difficulty participating, they should reach out to the agency about those difficulties. To the extent possible, federal agencies and applicants should confirm an Indian tribe's interest with follow-up emails and/or telephone calls. Learning of potential challenges early in project planning may allow for a review process that can accommodate tribal needs.

Treaty Rights and Trust Responsibility

It is important to note that many Indian tribes have treaties with the United States that often provide access to and protection of places or resources of importance to them. Through these treaties, many Indian tribes ceded large portions of their aboriginal lands to the United States in return for promises to protect their rights as self-governing nations within their reserved lands (reservations) and their ability to exercise certain retained rights (i.e., hunting, fishing, and gathering) to resources located outside of those reserved lands. Off-reservation locations utilized by Indian tribes may also be considered to be historic properties of religious and cultural significance that must be considered during the Section 106 process.

It is not uncommon for Indian tribes to raise trust responsibility and treaty rights concerns during Section 106 consultations and expect government-to-government consultations and actions to resolve issues arising from infrastructure or project development. All federal agencies should be aware that treaty rights can and do extend to federal, state, and private lands depending on the language of the treaty. The ACHP has recently developed an information paper regarding the intersection of [Tribal Treaty Rights in the Section 106 Process](#) to draw attention to the possibility of treaty rights arising in the Section 106 review process and to suggest agencies and applicants be proactive in researching and addressing them.

Confidentiality of Sensitive Information

While federal agencies and applicants are encouraged to involve Indian tribes very early in project planning, the ACHP acknowledges the challenges all parties face regarding the protection of sensitive information. Section 304 of the NHPA affords some protection from public disclosure for certain information gathered or obtained by federal agencies in the Section 106 process, but **Section 304** does not apply to information held by applicants. It may not be possible for tribal representatives to share some or any information about certain places because of cultural prohibitions. Or, there may be issues of trust that prevent the sharing of information.

Applicants and Indian tribes are encouraged to explore ways to protect sensitive information at the beginning of pre-application coordination. One example of a creative approach is how the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) have addressed confidentiality of sensitive information with applicants. CTUIR has developed provisions for ensuring the protection of sensitive information when working with non-federal entities. CTUIR's provisions essentially commoditize the information and treat it as a trade secret protected from disclosure even to the applicant. The language is attached as Appendix A for reference only. By providing this example, the ACHP does not intend to limit what applicants and Indian tribes may work out among themselves. The solution needs to be acceptable to and enforceable by the parties that enter into the arrangement.

CONCLUSION

Early coordination can be beneficial for both the protection of historic properties and the efficient conclusion of the Section 106 review process. Since applicants are typically required to conduct environmental and cultural resources studies prior to submitting an application for a federal permit, license, or funding, the opportunity to protect historic properties of religious and cultural significance to Indian tribes is greatly diminished if tribal input only informs project planning after the federal agency formally initiates a Section 106 review. The ACHP believes early coordination with Indian tribes may lead to more efficient review processes and better historic preservation outcomes. Such proactive planning for early coordination can increase predictability for both applicants and Indian tribes, leading to better preservation outcomes and possible project cost savings.

The ACHP acknowledges the inherent challenges in ensuring that historic preservation issues and, specifically tribal concerns, are addressed early in applicant-driven project planning. The ACHP is committed to providing assistance to federal agencies, Indian tribes, and applicants to work through these challenges.



(ACHP: Gateway West Transmission Line Project)

APPENDIX A: Confederated Tribes of the Umatilla Indian Reservation Contract Language Regarding Protection of Sensitive Information

Document Ownership

1. Ownership. The COMPANY shall own all reports provided it pursuant to this agreement. All information contained within any such report that pertains to information concerning the location of archaeological sites or objects shall be kept confidential as a trade secret of CONSULTANT (“Confidential Information”). All other intellectual property, including but not limited to work product, shall be the property of the CONSULTANT.
2. Authority to Publish. CONSULTANT has unrestricted authority to publish, disclose, distribute, and otherwise use, in whole or part, any reports, data, plans, or any other material prepared by CONSULTANT.
3. Trade Secret. Some information and technology of the CONSULTANT is confidential, proprietary, or otherwise a trade secret, including but not limited to reports produced under this agreement, information concerning the location of archaeological sites or objects, other cultural resources, oral histories of CONSULTANT’S members, and compilations of information not generally known or reasonably ascertainable to the public.
4. CONSULTANT’S withholding of Information. Any information may be withheld by the CONSULTANT if, in their sole discretion, they believe it may be subject to public disclosure under the public disclosure act(s) of COMPANY, if any, notwithstanding the consequences of withholding the information.
5. COMPANY’S Non-disclosure of Information. If applicable, the COMPANY shall withhold from public disclosure any and

all information obtained from the CONSULTANT that is subject to exclusion under the COMPANY’S state or federal public disclosure act(s). Specifically, all oral histories, stories, archeological or cultural resource information pertaining to specific sites or objects, and any other information that is not generally known or ascertainable, shall be considered trade secrets of the Tribes as that term is defined in the Uniform Trade Secrets Act, and the COMPANY shall assert that as a basis for exemption in any request for information. In addition, the COMPANY shall withhold from public disclosure all records, maps or other information identifying the location of any and all archaeological sites including information related to the study being conducted.

6. Disclosure to Employees. COMPANY shall restrict access to the Confidential Information provided to it only to employees of the COMPANY who clearly need such access in order to obtain any and all necessary permits and authorizations from any state or federal governmental entity for the operation of the project provided the employee has been instructed to comply with the terms of this agreement.

7. Discovery. If COMPANY receives a discovery request to disclose Confidential Information, COMPANY shall immediately notify CONSULTANT. In the event of a discovery request COMPANY shall work with CONSULTANT to prevent disclosure, whether by agreement with third parties or by seeking a court protective order, on the ground that the Confidential Information is a trade secret of CONSULTANT and contains sensitive cultural resource information.

APPENDIX B: NextEra Energy and Early Coordination with Indian Tribes: Outreach Process, Coordination Techniques, and Benefits of Early Coordination

NextEra Energy is the world’s largest utility company whose assets include both renewable and non-renewable energy sources. As part of our efforts at being responsive to local level concerns where our projects are being developed, NextEra has voluntarily implemented a robust tribal outreach program aimed at conducting early coordination with Indian tribes.

In our experience, the purpose of early coordination is to understand what the Tribes care about and where those resources are located so that the project design can be revised to avoid impacting those resources where feasible. We have

found early tribal coordination on the part of the applicant to be effective for all types of energy projects, in all jurisdictions, and with many different Tribes.

Tribal outreach process:

Outreach efforts are conducted through regionally organized teams that have full-time responsibility for developing tribal relationships, evaluating potential tribal interest in proposed project locations, reaching out to Tribes with detailed information about project plans, and working with Tribes on

their desired participation. This approach is taken on all of our projects, including wind, solar, storage, electric transmission, natural gas pipelines and natural gas generation; the process is the same for projects on private lands, and on projects where there is a federal nexus. What varies by region is how Tribes respond and choose to participate in project activities; tribes have varying levels of internal resources, but where they can participate, they generally do.

Additionally, An internal Tribal Impact Evaluation is completed for each project that includes potential cultural sensitivity concerns, proximity to reservation lands, identification of Tribes with ancestral lands in the project area, and identification of important historical events in the area (i.e. battle sites, removal trails, etc.). Each project developer makes a decision about tribal outreach based on this evaluation.

Coordinating with federal agencies:

For projects that have a federal nexus we coordinate with Tribes (in multiple ways as identified below) while working in parallel with the federal agencies. We believe that these agencies, across the board, appreciate that we already had, or were building, relationships with the Tribes.

We inform the agencies about what we are doing and when it was done, regarding both our tribal interaction and project planning. We maintain coordination with the federal agency throughout the process and make it very clear that any discussion between the Tribes and NextEra does not represent “consultation” as defined in Section 106 of the National Historic Preservation Act.

Coordinating with Indian tribes:

One of the key components of our approach is the development of outreach letters that provide as much detail about the project as possible (including project location, known cultural resources, etc.). Providing this information early in the process allows the Tribe to make an informed decision regarding their potential involvement. We reach out to all the Tribes who may have ancestral ties to the project area and are currently developing our own Ancestral Homeland Database, which includes state and county data from publicly available sources, such as HUD and NAGPRA, and with direct input from those Tribes that provided data in response to our requests.

When Tribes are interested in participating in our projects they often participate in several ways: micro-siting (small teams that ground-truth infrastructure locations early in the development/design process); joint archaeological/tribal cultural surveys; providing cultural sensitivity training to construction teams (typically provided by joint Tribal Relations staff and Tribal Historic Preservation Officers of participating Tribes); as well

as providing construction monitoring services. We have found that identifying the right person in the Tribe to work with at all junctions of our interaction is critically important—we take extra care to do that.

Many Tribes have developed their own databases of sensitive/sacred sites. In our early outreach efforts, we provide tribal cultural/Historic Preservation staff with a kmz file (Google Earth file) of the project boundary so that Tribes can easily identify areas of concern and communicate the appropriate level of concern to the company. We have also worked with Tribes and SHPOs in multiple states to allow tribally identified sites to be included in cultural resource report data recorded in SHPO files, but without details that Tribes considered confidential.

Benefits of early coordination:

We find that the earlier we work with Tribes to understand where sensitive resources are located, the easier and less costly it is to make design changes. When we meet with Tribes for the first time we are often told that no other energy company has ever met with the Tribe voluntarily.

By including tribal members in our joint archaeological/tribal cultural survey efforts, we work to ensure that all sensitive resources are both identified and avoided, where feasible. Tribes believe, and have demonstrated on multiple projects, that many sites that they consider to have religious and cultural significance are neither identified nor recorded properly by archaeologists. NextEra treats these as historic properties, and our policy is to avoid these resources in project design and construction, where feasible.

By collaborating with Tribes in the pre-application phase of our projects we have found that our Section 106 review timeframes are reduced as many of the cultural site areas significant to the Tribes have already been located and avoided. This reduces the potential for delay during the federal agency’s Section 106 review process, reduces conflict, and allows the agency, Tribes, and NextEra to focus our attention on any remaining concerns.

Examples of early coordination work conducted with tribes:

- ▶ We are working with multiple Tribes in North and South Dakota, in parallel with Section 106 consultation efforts, to identify and avoid sensitive resources on our Day County II Wind Project. Tribes were provided detailed information about the project early in the development process. Several interested Tribes have participated in multiple sessions of on-the-ground micro-siting and are participating in joint archaeological/tribal cultural surveys, cultural sensitivity training and construction monitoring.

- ▶ We have also worked with Tribes in the desert Southwest, on both federal and private solar projects, on innovative approaches to protecting cultural resources. On two solar projects near Blythe, California, we allowed (with BLM concurrence) the Colorado River Indian Tribes to rebury isolates onsite rather than have them sent to a curation facility or be impacted by construction.

- ▶ Current efforts to collaborate with Tribes along the route of a natural gas pipeline include providing them with all available information (project, cultural resource, FERC procedures, etc.), soliciting comments, and encouraging each group to participate with NextEra as the pipeline is developed.

APPENDIX C: California Department of Transportation (Caltrans) and Early Coordination with Indian Tribes: Challenges, Solutions, and Lessons Learned

California is the nation's 3rd largest state, has a population of approximately 40 million people, and is home to 109 federally recognized Indian tribes and approximately 80 non-federally recognized tribes. As part of the state government²⁴ Caltrans manages more than 50,000 miles of California's highway and freeway lanes, provides inter-city rail services, permits more than 400 public-use airports and special-use hospital heliports, and works with local agencies.

Toward the desire for improved tribal relations and early pre-project coordination, Caltrans has been making a more concerted effort than in the past to proactively coordinate with tribal partners in advance and outside of project-specific circumstances. The intent is to have more general conversations about processes and best practices aimed at fostering mutual understandings and laying the groundwork for successful collaboration during subsequent Section 106 review and project delivery.

It is helpful to ensure that those who may not understand the complexities of tribal engagement in the context of project delivery are made aware of the benefits of investing in tribal relationships and early project coordination, namely minimizing potential project delays, unnecessary costs, legal challenges, and/or unfavorable publicity associated with affecting tribal resources.

Challenges Experienced

- ▶ High number of Indian tribes to consult with per project
- ▶ High number of projects with variable specifications, need, and timelines
- ▶ Insufficient resources to conduct one-on-one consultation with Indian tribes
- ▶ Many Indian tribes view the resolution of adverse effects differently than archaeologists

Solutions Implemented

- ▶ Conduct meetings with coalitions of tribes and participate at tribal conferences
- ▶ Educate management and non-historic preservation staff to recognize project delivery benefits/efficiencies of proactive pre-project tribal engagement
- ▶ Have open conversations with tribal communities about how to resolve adverse effects in a manner that meaningfully promotes the awareness and preservation of tribal cultural heritage for the benefit of tribal communities and the public

Lessons Learned

- ▶ Face-to-face meetings are most effective for building relationships and mutual understanding
- ▶ Clearly conveying our agency's mission and how we operate leads to more effective discussions regarding best practices for addressing tribal heritage resources within the context of infrastructure development aimed at improving the safety and mobility of the traveling public
- ▶ By promoting avoidance first, but being forthright about the potential for future unavoidable effects, we are able to receive and incorporate input from the tribes regarding the treatment of tribal heritage resources in the event of an unintended discovery or unavoidable impact
- ▶ We found a benefit in providing better support to our local partners in their early tribal outreach/coordination efforts

²⁴ Caltrans serves as the project proponent/applicant and federal agency official performing oversight and approval for local agency projects for both NEPA and Section 106



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