

Preserving America's Heritage

Consultation Process Pursuant to E.O. 13175: **Consultation and Coordination with Indian Tribal Governments**

Advisory Council on Historic Preservation
February 3, 2010

In accordance with Section 5(a) of Executive Order 13175: Consultation and Coordination with Indian Tribal Governments, the Advisory Council on Historic Preservation (ACHP), in March 2001, submitted to the Office of Management and Budget (OMB) a plan outlining its process for ensuring meaningful and timely input from tribal officials in the development of regulatory policies that have tribal implications. In 2001, the ACHP also named Valerie Hauser, Native American Program Coordinator, the tribal consultation official pursuant to the executive order.

In accordance with the Presidential Memorandum on Tribal Consultation, dated November 5, 2009, the ACHP submits this updated plan to the Office of Management and Budget.

Introduction

The ACHP serves as the policy advisor to the President and Congress in the field of historic preservation. A key ACHP function is overseeing the federal historic preservation review process established by Section 106 of the National Historic Preservation Act (NHPA). Section 106 requires federal agencies to consider the effects of undertakings on historic properties and provide the ACHP an opportunity to comment on these undertakings prior to a final decision on them.

Amendments to the NHPA in 1992 enhanced the role of Indian tribes and Native Hawaiian organizations in the national preservation program, clarified federal agency responsibilities to consult with them, and authorized the ACHP to enter into agreements with Indian tribes to substitute their historic preservation regulations for the Section 106 implementing regulations on tribal lands. The amendments also added a Presidentially-appointed member of an Indian tribe or Native Hawaiian organization to the ACHP.¹ In addition to the tribal or Native Hawaiian organization member, the General Chairman of the National Association of Tribal Historic Preservation Officers sits on the ACHP as an observer.

The ACHP amended the regulations implementing Section 106, 36 CFR Part 800, "Protection of Historic Properties," to incorporate the requirement that federal agencies, in carrying out their Section 106

¹The ACHP is comprised of twenty three members. A small staff carries out the daily work of the ACHP.

responsibilities, consult with Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to historic properties.² The Section 106 regulations also require federal agencies' consultation to recognize the government-to-government relationship between the federal government and Indian tribes, and encourage federal agencies to conduct such consultation in a manner respectful of tribal sovereignty.³

ACHP's oversight of the Section 106 process and its tribal consultation requirements make it essential for the ACHP to both set an example for other federal agencies and to set forth what it believes is a process that ensures meaningful consultation with Indian tribal governments.

ACHP actions or policies that might affect tribal governments:

E.O. 13175 applies to federal policies that have tribal implications which are defined as regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.

The nature of the ACHP's authorities and mission is such that its actions generally do not result in "substantial direct effects on one or more Indian tribes." The ACHP does, however, promulgate the regulations that implement Section 106 and that, among other things, set forth how federal agencies must consult with Indian tribes regarding undertakings involving historic properties of religious and cultural significance to them. Also, under Section 101(d)(5) of the NHPA, the ACHP may enter into agreements with Indian tribes whereby those implementing Section 106 regulations are substituted by the tribal historic preservation regulations regarding federal undertakings on the relevant tribal lands.

Since promulgating or amending the Section 106 implementing regulations and agreeing to their substitution by tribal regulations are arguably actions that may have tribal implications as defined in the Executive Order, the ACHP is committed to the consultation process outlined below.

ACHP actions or policies that may not have tribal implications:

The role of the ACHP in federal agency project and program planning in Section 106 reviews is essentially advisory, thus, ACHP's actions under that role do not, in themselves, result in direct effects to Indian tribes. Even when the ACHP issues comments regarding a proposed federal undertaking in the Section 106 context, those comments are advisory and it is the proponent federal agency, not the ACHP, which makes the final decision that might result in substantial direct effects on an Indian tribe.

However, the ACHP recognizes that, in its role overseeing the Section 106 process, it is in a unique position to set the standard for federal agency consultation with Indian tribes regarding historic preservation or cultural resource matters. The ACHP adopted a policy governing its own relationship with Indian tribes (copy attached). In the policy, the ACHP not only recognizes and commits to carrying out its responsibilities to Indian tribes, but also required the staff to develop an implementation plan in consultation with tribes. That plan was adopted in 2003 and serves as the basis for annual work planning.

²16 U.S.C. § 470a(d)(6)(B); 36 C.F.R. § 800.2(c)(2).

³36 CFR Section 800.2(c)(2)(ii)(B) and (C).

The consultation plan outlined here will be integrated into the ACHP's more comprehensive policy implementation plan.

From time to time, the ACHP also issues advisory policies or guidance that may relate to matters of interest to tribes. These policies or guidance documents are typically applicable on a national level rather than a site-specific or project-specific basis. An example would be the "Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects" (Feb. 23, 2007). While the ACHP's policies may not have tribal implications as defined by the Executive Order, the ACHP recognizes their importance to tribes and the need to consult with tribes in their formulation. Therefore, the ACHP will make every effort to carry out the tribal consultation process outlined below for such proposed actions

Scope of tribal consultation

The scope and nature of the ACHP's actions fall into one of two categories: ACHP-driven actions or actions where the ACHP reacts to the proposals of another federal agency. Under the NHPA and the Section 106 implementing regulations, the federal agency responsible for the proposed program or action, not the ACHP, is responsible for carrying out tribal consultation.

ACHP-driven actions include:

- promulgating regulations implementing Section 106;
- policy development; and,
- providing advice to the President and Congress regarding historic preservation matters.

Actions where the ACHP is largely reactive include:

- commenting on federal actions undergoing Section 106 review;
- reviewing historic preservation programs and policies of federal agencies; and,
- entering into the substitution agreements with Indian tribes mentioned earlier (Section 101(d)(5) of the NHPA).

The ACHP's Consultation Processes:

Regulations and Policies of Interest to Tribes, *Nationwide Applicability*

Issuance of Section 106 regulations (including amendments), historic preservation policies, and advice to the President and Congress is carried out by the ACHP membership with the assistance of the staff. The ACHP membership, which includes a member of an Indian tribe or Native Hawaiian organization and a tribal preservation organization as an observer, ensures that the views of Indian tribes are brought directly to the ACHP's deliberations regarding policies and regulations. The mechanics of consultation and communication with Indian tribes are the responsibility of the ACHP's Native American Program (NAP), established in 1998. The Coordinator of NAP reports directly to the Executive Director and works closely with the Chairman and the ACHP tribal or Native Hawaiian organization member.

In accordance with E.O. 13175, for those regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes proposed by the ACHP, the ACHP will conduct consultation as follows:

1. *Developing the draft regulation or policy.*

For purposes of E.O. 13175, the ACHP will work with its Native American Advisory Group (NAAG) to develop draft regulations or policies to ensure that the draft product includes a tribal perspective. The ACHP will also consult with NAAG to develop a consultation plan.

The ACHP's Native American Advisory Group. In 2004, the ACHP established a Native American Advisory Group (NAAG) to assist the ACHP in improving federal agency consultations with Indian tribes and Native Hawaiian organizations under the NHPA. The purpose of the group is to ensure that Indian tribes and Native Hawaiian organizations have a more effective voice within the ACHP and to work with the ACHP on policy and program matters affecting Indian tribes and Native Hawaiian organizations, heritage preservation initiatives including heritage tourism, and consultation with the federal government. NAAG is comprised of 12 tribal representatives and one Native Hawaiian organization representative. The tribal members are nominated by tribal leaders in the BIA regions. The ACHP maintains the list of current NAAG members on its webpage at www.achp.gov.

NAAG members work together in assembled meetings, teleconferences and via E-mail. NAAG convenes on a quarterly basis in two face-to-face meetings and two conference calls. The meetings are held in the spring and fall and conference calls in winter and summer. NAAG also convenes as needed through conference calls and regularly communicates via E-mail. The chairman of NAAG presents a report on NAAG's work as well as official recommendations or resolutions to the ACHP at its quarterly business meetings. NAAG works directly with ACHP staff or members, as appropriate, in the development of draft documents and the evaluation of tribal comments on policies or programmatic initiatives.

ACHP's coordination with NAAG does not substitute for the ACHP's consultation with Indian tribes. Rather, this coordination is solely for the purpose of ensuring a tribal perspective in the development of draft regulations and policies and in formulating tribal consultation plans for these types of actions..

2. Carrying out tribal consultation for regulations or policies pursuant to E.O. 13175.

A) ACHP consultation with Indian tribes is initiated through correspondence from the Chairman of the ACHP to tribal leaders. In 2009, the Chairman issued a memorandum to the ACHP members reiterating that the ACHP's government-to-government consultation is the responsibility of the Chairman or the Chairman's designee, who may either be another ACHP member or the Executive Director. The memorandum is attached as Appendix B.

Since 2008, correspondence has largely been carried out via E-mail to expedite the delivery of such correspondence and in response to suggestions from tribal representatives. In those cases where E-mail is not an option, the correspondence is sent via facsimile.

The ACHP generally also provides a copy of its correspondence to tribal historic preservation officers or cultural resource staff, where such information is available, to ensure that appropriate tribal staff is aware of the ACHP initiative and the opportunity to comment.⁴

The ACHP's initial correspondence to tribal leaders will include information about the proposed action as well as a request for the tribal leader to identify the level of the tribe's interest in, and expectations for, consultation regarding the proposed action.

⁴A database of tribal cultural resource staff is maintained by the ACHP's Native American Program and is updated continuously as the ACHP's contacts expand. Such information is also regularly requested from tribal leaders.

Based on responses from tribal leaders, as well as the ACHP's consideration of the scope of the action, the ACHP will formulate a plan for consultation and forward the plan to tribal leaders for review and comment.

At the close of the comment period on the consultation plan, the ACHP will evaluate the comments and finalize a consultation plan for the proposed action. The ACHP will inform tribal leaders of the outcome and invite them to consult in accordance with the consultation plan for the proposed action.

Tribes will be encouraged to communicate with the ACHP via modern technologies e.g. E-mail or by telephone to ensure timely and effective communication and consultation.

B) In accordance with the consultation plan, the consultation effort may include regional consultation meetings with Indian tribes during the consultation period to offer an opportunity for face-to-face dialogue in addition to written or telephonic communication. The number and distribution of such meetings would be based on the consultation plan for the proposed action.

The ACHP would also host teleconferences to provide opportunities for those tribal leaders that are unable to attend consultation meetings. The number of teleconferences, again, would depend on information received from tribal leaders and the ACHP's assessment of the scope of the proposed action.

In accordance with the consultation plan, additional consultation might be carried out. If there is such additional consultation, it would be with those tribes that express an interest in continuing consultation by submitting a written response, participating in a consultation meeting, or telephoning. However, if the ACHP provides additional opportunities for the public to comment, all Indian tribes would again be provided additional opportunities to comment.

In addition to the formal procedures for consultation with Indian tribes, the NAP maintains regular contact with major intertribal organizations such as the United South and Eastern Tribes, the National Association of Tribal Historic Preservation Officers, and the National Congress of American Indians regarding ACHP and major Federal preservation initiatives. Typically, copies of correspondence to tribal leaders are also provided to these intertribal organizations.

C) At the conclusion of the consultation process, as outlined in the consultation plan for the proposed action, the ACHP will take into account all of the views provided by tribes during consultation in drafting and finalizing the proposed regulation or policy.

D) The chairman of the ACHP will inform tribal leaders of the ACHP's final action regarding a policy or regulation via email or facsimile. A copy will be provided to ACHP's tribal cultural resources contacts and intertribal organizations. Typically, such ACHP actions are also posted on the agency's webpage.

Regulation Substitution and Policies of Interest to Tribes, *Project or Tribe- Specific Applicability*

A. *ACHP review of, and comment on, federal undertakings.* Federal agencies are responsible for fulfilling the requirements of Section 106 and its implementing regulations. To ensure that federal agencies consult appropriately with Indian tribes, the ACHP included in the Section 106 regulations the requirement that federal agencies' consultations recognize the government-to-government relationship

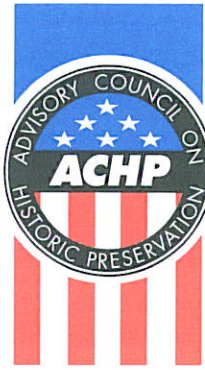
between the federal government and Indian tribes. The regulations also encourage federal agencies to conduct such consultation in a manner respectful of tribal sovereignty and recognize tribal expertise in identifying and evaluating historic properties of religious and cultural significance to them and to be sensitive to a tribe's desire for certain information to be confidential.

The Section 106 regulations require the proponent federal agency to provide the views of Indian tribes to the consulting parties and the ACHP, if participating. The regulations also direct agencies to make a reasonable and good faith effort to identify tribes that attach religious and cultural significance to historic properties and to consult with them. Project documentation must include evidence of such consultation. In those cases where it appears that agencies have not fully met the tribal consultation requirements, the ACHP typically reminds the agency of its responsibilities and offers advice regarding how to meet those requirements. The ACHP also has the discretion to become involved in a Section 106 review if there are issues of concern to an Indian tribe.⁵ However, the ACHP is not responsible for carrying out tribal consultation for projects proposed by another federal agency.

B. The ACHP's review of federal agency programs and policies pursuant to Section 202 of the NHPA. Such review is intended to ensure that federal agency programs and policies are consistent with the requirements of Section 106 and its implementing regulations. Accordingly, the ACHP's evaluation includes a consideration of how an agency consults with Indian tribes regarding historic properties of religious and cultural significance to them. When making recommendations regarding how an agency might improve its Section 106 program or performance, the ACHP may include methods for improving consultation with Indian tribes.

C. Substitution agreements. As stated before, Section 101(d)(5) of the NHPA authorizes the ACHP to enter into agreements with Indian tribes to substitute tribal historic preservation regulations for the Section 106 implementing regulations on the relevant tribal lands. Consultation is carried out between the tribe and the ACHP as agreed upon by each party. The ACHP does not dictate how such consultation shall take place but remains flexible and available to consult with Indian tribes at all levels. Typically, the consultation takes place between the staff of the tribe and ACHP with execution of the agreement by the respective leadership.

⁵ Appendix A of the ACHP's regulations identifies the criteria that are used by the ACHP in determining whether to enter an individual Section 106 review that it would not normally be involved in. One of the criteria is when an undertaking "presents issues of concern to Indian tribes or Native Hawaiian organizations."



Preserving America's Heritage

POLICY STATEMENT REGARDING THE COUNCIL'S RELATIONSHIPS WITH INDIAN TRIBES

Adopted by the Advisory Council on Historic Preservation
November 17, 2000
Alexandria, Virginia

Introduction

The Federal Government has a unique relationship with Indian tribes derived from the Constitution of the United States, treaties, Supreme Court doctrine, and Federal statutes. It is deeply rooted in American history, dating back to the earliest contact in which colonial governments addressed Indian tribes as sovereign nations. The Advisory Council on Historic Preservation (Council), as a Federal agency, recognizes the government-to-government relationship between the United States and federally recognized Indian tribes and acknowledges Indian tribes as sovereign nations with inherent powers of self-governance. This relationship has been defined and clarified over time in legislation, Executive Orders, Presidential directives, and by the Supreme Court.

The Council's policy pertains to Indian tribes as defined in the National Historic Preservation Act of 1966:

Indian tribe means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (16 U.S.C. 470w).

I. Purpose

The basis for the Council's policy regarding its role, responsibilities, and relationships with individual Indian tribes derives from the Constitution, treaties, statutes, executive orders, regulations, and court decisions. It specifically ensures the Council's compliance with and recognition of its tribal consultation responsibilities under certain authorities, including:

National Historic Preservation Act (Act)
National Environmental Policy Act
American Indian Religious Freedom Act

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Native American Graves Protection and Repatriation Act
Executive Order 13007--Indian Sacred Sites
Executive Order 13175--Consultation and Coordination with Indian Tribal Governments
Executive Order 12898--Executive Order on Environmental Justice
and the implementing regulations for these authorities.

This policy establishes the framework by which the Council integrates the concepts of tribal sovereignty, government-to-government relations, trust responsibilities, tribal consultation, and respect for tribal religious and cultural values into its administration of the Section 106 process and its other activities. The policy sets forth general principles that will guide the Council's interaction with Indian tribes as it carries out its responsibilities under the Act. It also provides guidance to the Council and its staff and serves as the foundation for Council policies and procedures regarding specific Indian tribal issues. Upon adoption of the policy, the Council will develop an implementation plan to assist members and staff with integrating principles of respect for tribal sovereignty, government-to-government consultation, the Council's trust responsibilities, and tribal values into the conduct of Council business.

II. Statements of Policy

Tribal Sovereignty

A. Recognition of tribal sovereignty is the basis upon which the Federal Government establishes its relationships with Federally recognized Indian tribes. The sovereignty of Indian tribes was first recognized by the United States in treaties and was reaffirmed in the 1831 landmark Supreme Court opinion of Chief Justice John Marshall that tribes possess a nationhood status and retain inherent powers of self-governance (*Cherokee Nation vs. Georgia*, 30 U.S. (5 Pet.) 1 (1831)).

B. The Council, recognizing that each federally recognized Indian tribe retains sovereign powers, shall be guided by principles of respect for Indian tribes and their sovereign authority.

C. Additionally, the Council acknowledges that the sovereign status of tribes means that each tribe has the authority to make and enforce laws and establish courts and other legal systems to resolve disputes.

Government-to-government consultation

A. The relationship between the United States and federally recognized Indian tribes was reaffirmed in the President's Memorandum on "Government to Government Relations with Native American Tribal Governments" (April 29, 1994). The memorandum directs Federal agencies to operate "within a government-to-government relationship with federally recognized tribal governments." It also directs agencies to consult with tribes prior to making decisions that affect tribal governments and to ensure that all components in the agency are aware of the requirements of the memorandum. In addition, Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," directs Federal agencies to consult with tribal governments regarding issues which "significantly or uniquely affect their communities."

B. In recognition of the status of Federally recognized Indian tribes as sovereign authorities and in accordance with the President's Memorandum on "Government to Government Relations with Native

American Tribal Governments” (April 29, 1994), the Council is committed to operating on the basis of government-to-government relations with Indian tribes. Together with other executive departments, the Council acts on behalf of the Federal Government to fulfill the intent of the President and Congress regarding government-to-government consultation. The Council acknowledges that Federal-tribal consultation is a bilateral process of discussion and cooperation between sovereigns.

Trust responsibilities

A. Trust responsibilities emanate from Indian treaties, statutes, Executive orders, and the historical relationship between the Federal Government and Indian tribes. The trust responsibility applies to all executive departments and Federal agencies that may deal with Indians. This responsibility is rooted, in large part, in the treaties through which tribes ceded portions of aboriginal lands to the United States government in return for promises to protect tribal rights as self-governing communities within the reserved lands and certain rights to use resources off of the reserved lands.

In general, the trust responsibility establishes fiduciary obligations to the tribes including duties to protect tribal lands and cultural and natural resources for the benefit of tribes and individual tribal members/land owners. This trust responsibility must guide Federal policies and provide for government-to-government consultation with tribes when actions may affect tribes and their resources.

B. The Council recognizes that it has a trust responsibility to federally recognized Indian tribes and views this trust responsibility as encompassing all aspects of historic resources including intangible values. The Council shall be guided by principles of respect for the trust relationship between the Federal Government and federally recognized Indian tribes. The Council will ensure that its actions, in carrying out its responsibilities under the Act, are consistent with the protection of tribal rights arising from treaties, statutes, and Executive orders.

Tribal participation in historic preservation

The Council will consult with tribal leaders, and, as appropriate, their representatives including Tribal Historic Preservation Officers, in its consideration and development of policies, procedures, or programs that might affect the rights, cultural resources, or lands of federally recognized Indian tribes. The Council will pursue consultation in good faith and use methods and protocols that are best suited to meet the goals of this policy and the proposed action. In doing so, the Council will recognize and maintain direct government-to-government consultation with tribes in lieu of consortiums, unless so requested by said tribes.

In fulfilling its mission and responsibilities, the Council will endeavor to develop strong partnerships with federally recognized Indian tribes. To achieve this objective, the Council, in its implementation plan, will develop strategies for better understanding and considering the views of Indian tribes in the work of the Council. The Council will also develop means for ensuring that Indian tribes are provided the opportunity to understand their rights and roles in the Section 106 process and in any Council actions which might affect them. When decisions involve resources on tribal land, the Council, exercising its trust responsibility, will attempt to give deference to tribal resource values, policies, preferences, and resource conservation and management plans.

The Council fully supports the participation of federally recognized Indian tribes in the national historic preservation program and acknowledges the significant contributions of tribes in our understanding and protection of our nation's heritage resources. The Council also recognizes the important role of Tribal Historic Preservation Officers that have assumed the role of the State Historic Preservation Officers on tribal lands. The Council will work with Indian tribes to enhance tribal participation in historic preservation and to further the development of tribal preservation programs.

Sympathetic construction

The principle of sympathetic construction is a consequence of the disadvantages Indian tribes faced in negotiating treaties with the United States. Treaties were negotiated and written in English often under threats of force, and dealt with concepts such as land ownership which were unfamiliar to Indian tribes. Accordingly, the Supreme Court has ruled that treaties must be interpreted as tribes would have understood the terms and to the benefit of the tribes.

The Supreme Court has also ruled that statutes passed for the benefit of tribes are to be interpreted in favor of tribes. While the application of this rule to statutes that address Indian tribes but that were not necessarily passed for their benefit has not been consistent, the Council acknowledges the importance of this principle to tribes. Accordingly, the Council, in carrying out its charges under the Act, will liberally interpret those provisions that address Indian tribes.

Respect for tribal religious and cultural values

The Council recognizes and respects that certain historic properties retain religious and cultural significance to federally recognized Indian tribes and that preservation of such properties may be imperative for the continuing survival of traditional tribal values and culture. Therefore, the Council shall develop and implement its programs in a manner that respects these traditional tribal values and customs and strives to recognize that certain historic properties may be essential elements of actual living cultures and communities.

Furthermore, the Council recognizes and respects that certain information about religious or sacred places can be highly sensitive and that in certain situations, traditional tribal laws prohibit disclosure about actual function, use, religious affiliation to a specific society or group, or even precise location. Accordingly, the Council is, to the maximum extent feasible under existing law, committed to withholding from public disclosure such information that may be revealed in the course of a Section 106 review. The Council will carry out its responsibilities in a manner that respects those restrictions imposed by cultural beliefs or traditional tribal laws. In doing so, the Council will interpret and use the Section 106 review process in a flexible manner.

III. Implementation of the Council's Policy

Implementing the policy is the responsibility of the Council leadership, membership, and staff. The implementation plan will provide the necessary guidance to ensure satisfactory adherence to the policy by staff and members.

Within the Executive Office, the Native American Program was formed to:

- develop and coordinate Council policies pertaining to Indian tribes;
- provide Council members and staff with information, materials, and training on the principles of tribal sovereignty, government-to-government relations, and trust responsibilities;
- assist Indian tribes in fully realizing their roles and rights in the Section 106 process; and,
- assist Federal agencies in understanding and carrying out their responsibilities to Indian tribes in the Section 106 review process.

The Native American Program will take steps to ensure that staff understands tribal issues and is aware of protocols. The Native American Program Coordinator will be available to assist Council staff in the Council's review of projects and programs that affect Indian tribes. The Native American Program and its staff will provide technical assistance with the Section 106 process to Indian tribes. Technical assistance includes guidance materials, workshops, and communication through direct mail and email, as appropriate. It also includes responding to specific requests to provide assistance to tribes who are working with Section 106.

The Native American Program will also establish appropriate systems for communicating with the tribal representatives identified by each tribe's leadership to ensure the widest possible distribution of information on Section 106 and Council initiatives. In doing so, the Council and its Native American Program will recognize and maintain direct government-to-government consultation with tribes.