



Preserving America's Heritage

Section 106 Consultation Between Federal Agencies and Indian Tribes Regarding Federal Permits, Licenses, and Assistance Questions and Answers

1. How does the ACHP define the roles of applicants for federal permits, licenses, and assistance in the Section 106 process?

Applicants for federal permits, licenses, and assistance are entitled to be Consulting Parties in the Section 106 consultation process. The other parties entitled to participate in consultation include the State and Tribal Historic Preservation Officers (SHPO/THPO), Indian tribes, and local governments. In addition, federal agencies may use the services of applicants to prepare information, analyses, and recommendations, but the federal agency remains legally responsible for all required findings and determinations. However, the ACHP advises federal agencies that applicants should not communicate directly with Indian tribes without prior consent from the tribes. An example of such direct communication negotiated with prior consent is the agreement among FHWA, the Massachusetts Department of Transportation, and the Narragansett Tribe, whereby MassDOT, the applicant to FHWA, initiates consultation with the tribe for FHWA undertakings.

2. What is the ACHP's position regarding government-to-government consultation for federal permits, licenses, and assistance?

The ACHP's position is that a federal agency cannot delegate its government-to-government consultation with Indian tribes to applicants or other non-federal entities, including state and local governments, without prior consent from the tribes. It is important to remember that Indian tribes are under no obligation to consult directly with an applicant. Absent a formal agreement or approved protocol previously negotiated between the federal agency and the Indian tribe, an agency must initiate and conduct the consultation process with the Indian tribe. Further, the ACHP regulations remind federal agencies that tribal consultation must recognize the government-to-government relationship, which often means involving appropriate Agency Officials when meeting with tribal representatives.

3. Is there a difference in Section 106 consultation regarding permitting, licensing, and assistance versus federal property management undertakings?

Yes. The involvement of applicants and the limitation of a federal agency to control the actions of its applicant often challenge the nature of consultation in permitting, licensing, and assistance undertakings.

4. How can tribes make the most of their participation in Section 106 consultation?

The ACHP advises all Consulting Parties that effective consultation occurs when you:

- Keep an open mind;
- State your interests clearly;
- Acknowledge that others have legitimate interests, and seek to understand and accommodate them;
- Consider a wide range of options; and
- Identify shared goals and seek options that allow mutual gain.

[from *Protecting Historic Properties: A Citizen's Guide to Section 106 Review*, available at www.achp.gov]

In addition, we encourage Indian tribes to fully participate in Section 106 consultation for a particular undertaking, recognizing that certain historic properties of religious and cultural significance may require confidentiality and may not be discussed outside of government-to-government consultation meetings. When tribes make their concerns known, respecting necessary confidentiality limitations, all parties benefit, as it opens the consultation to a discussion beyond archaeological and architectural resources.

5. Are Indian tribes bound by 30-day review period in our regulations for eligibility and effect findings?

Federal permitting, licensing, and assistance agencies are often bound by program regulations or otherwise pressured by their applicants to make decisions quickly and thus rely heavily on the 30-day review periods in the ACHP's regulations. If any consulting party, including Indian tribes, does not respond within this time frame, the opportunity to make its views known may be lost, because agencies are not required to wait more than 30 days for a response. However, an extension of time limits can be negotiated and agreed to by all parties in many cases.

6. Who decides if a property of religious and cultural significance to an Indian tribe should be considered in Section 106 consultation?

When an Indian tribe informs a federal agency that a historic property of religious and cultural significance to the tribe may be affected by the undertaking, the federal agency must consider the "special expertise" of the tribe in identifying this property. The ACHP advises federal agencies to refer any disputed eligibility determinations to the Keeper of the National Register of Historic Places for a formal determination of eligibility. This 45-day review typically involves consultation between the National Register staff and the tribe. It is a process that, once concluded, cannot be challenged by the federal agency.

7. Should a federal agency consult with Indian tribes when evaluating alternatives to avoid or minimize adverse effects?

Yes. Ideally, the federal agency should consider avoidance and ways to minimize effects before making a formal finding of adverse effect. This is when the broadest range of alternatives is available for consideration. When a tribe has agreed to consult with an applicant, this may be the appropriate point in the process for Indian tribes to ask that federal agencies join the consultation to ensure that the full range of alternatives are considered and that government-to-government consultation is carried out properly.

8. How does the ACHP assist Indian tribes in Section 106 consultations?

Indian tribes have a formal role as Consulting Parties in the Section 106 process. In the event that an Indian tribe concludes that they have been left out of discussions or their concerns have not been adequately addressed, Criterion 4 of Appendix A of our regulations (36 CFR Part 800) provides that tribes may notify the ACHP and request our participation in the consultation. Such a notification or request should be submitted in writing to the ACHP it is part of the formal record of the undertaking.

9. What is an Indian tribe's role in the execution of Memoranda of Agreement?

When the undertaking is entirely or in part located on tribal lands, the Indian tribe must be a signatory to the Memorandum of Agreement. However, when the undertaking is located off tribal lands and affects historic properties of religious and cultural significance, as is often the case in permitting, licensing, and assistance undertakings, the agreement of the tribe is often desired by the federal agency to evidence that it has met its tribal consultation responsibility. In such a case, the Indian tribe may be an invited signatory or a concurring party, as determined by the federal agency and the Indian tribe through consultation.