



*Preserving America's Heritage*

## **GUIDANCE FOR INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS: WHAT TO ASK THE FEDERAL AGENCY IN THE SECTION 106 PROCESS**

This guidance is intended to assist tribal and Native Hawaiian organization (NHO) officials in participating more effectively in the Section 106 review process.<sup>1</sup> Understanding federal agency responsibilities and the rights of Indian tribes and NHOs is of central importance in ensuring that you have the opportunity to voice your views. Information about the review process, the statute and regulations, and the role of both Indian tribes and NHOs in the Section 106 process is available at the ACHP's Web site at [www.achp.gov](http://www.achp.gov).

While tribal and Native Hawaiian organization participants may have many different issues and concerns in the Section 106 process, the following insights are drawn from the most common ones brought to the attention of the ACHP staff.

### **Participating in Section 106 consultation**

The Section 106 process is fundamentally about attempting to resolve potential conflicts between projects carried out, assisted, or licensed by federal agencies (undertakings) and historic preservation concerns. The process is rooted in consultation between the federal agency and consulting parties, including Indian tribes and NHOs. It is intended to help the federal agency make informed decisions about historic properties, including such properties of religious and cultural significance to Indian tribes or NHOs. Thus, the Section 106 process provides a very important opportunity for Indian tribes and NHOs to influence federal decision making regarding historic properties of significance to them. The ACHP encourages all tribes and NHOs to take advantage of this opportunity.

The following are general suggestions regarding Section 106 consultation:

- **The federal agency should explain its programs, requirements and responsibilities for carrying out, financially assisting, or licensing an undertaking.** This information should accompany the federal agency's invitation to your tribe or NHO to consult. If you would like more information, be aware that federal agencies have Web sites with basic information about

---

<sup>1</sup> Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, requires federal agencies to take into account the effects of undertakings they carry out, financially assist, or license on historic properties and to give the Advisory Council on Historic Preservation (ACHP) an opportunity to comment. Federal agencies meet these requirements by following the process outlined in the Section 106 regulations at 36 C.F.R. part 800, "Protection of Historic Properties."

Section 101(d)(6)(B) of the NHPA requires federal agencies, in carrying out Section 106, to consult with any Indian tribe or Native Hawaiian organization (NHO) that attaches religious and cultural significance to historic properties that may be affected. It is the federal agency's responsibility to both initiate and carry out tribal and NHO consultation.

their mission, authorities, and programs. You can visit agency Web sites or ask the agency to provide you with that information. The NHPA requires each agency, unless exempted under Section 214, to designate a Preservation Officer who will be responsible for coordinating the agency's historic preservation activities. The ACHP maintains a listing of the [federal preservation officers](#).

- **Prepare a timely response to a federal agency's requests for consultation and for comments.** Be mindful of project and/or regulatory timelines and the need to document your concerns in a timely fashion. If you do not respond, the agency will assume your tribe or NHO is not interested in or concerned about the undertaking and its effects on historic properties of religious and cultural significance to your tribe or NHO. If the agency does not provide enough information about the undertaking, you should let the agency know as soon as possible. To ease your workload, consider having template response letters on hand as a tool to help you respond to the volume of requests you receive. If you need more time to respond, let the agency know but understand that it may not be obligated to wait or may not have the flexibility in the project schedule to delay the process.
- **Be prepared to inform the federal representative(s) about your tribe or NHO.** The tribe should be prepared to share information about the tribal governmental structure. Tribes and NHOs should also be prepared to share protocols, communication mechanisms, and even information about their schedules and capacity to participate in Section 106 consultations. It is essential to help the federal agency understand the history and culture of your tribe or NHO so the agency official can make a better informed decision concerning historic properties. Be prepared to explain to the agency representative(s) the appropriate way to address elders and leaders and to inform him/her about tribal customs and/or protocols.
- **Keep a copy of the documents sent by the agency as well as your responses.** Be mindful that the agency must keep an administrative record and any and all information you send will become part of the record. It is just as important for tribes and NHOs to keep a record as it is for the agency to do so. You should also document for yourself all telephone conversations, meetings, or other communications concerning the undertaking and have records that would clear up or help clarify any misunderstandings should they arise within the Section 106 process.
- **If the tribe or NHO has not been invited to consult, you can contact the agency and request to consult.** A federal agency is legally required to consult with your tribe or NHO when historic properties of religious and cultural significance to your tribe or NHO may be affected by an undertaking. Tribes and NHO's can contact the agency's [Federal Preservation Officer](#) for more information or responsible staff for specific agency undertakings. Tribes and NHOs can also send a copy of the participation request to the ACHP so that we can track consultation by particular agencies.
- **If the federal agency's interpretation of the Section 106 process is not consistent with your understanding, ask about its policies, guidelines, and programmatic agreements that might govern how the agency carries out the process.** If it still does not comport with your understanding, feel free to contact the ACHP staff for a clarification of the Section 106 process. A listing of the ACHP staff assigned to specific agencies can be found at <https://www.achp.gov/about/offices/ofap/agencies>.
- **Understand the eligibility requirements of the National Register of Historic Places (NRHP).** Determinations of eligibility for listing in the NRHP, during the Section 106 process, are made by the responsible/lead federal agency and the relevant State and/or Tribal Historic Preservation Officer (SHPO/THPO), in consultation with the appropriate consulting parties. These determinations should inform how historic properties, including those of religious and cultural significance to an Indian tribe or NHO, are treated in the Section 106 process. If the agency and the relevant SHPO/THPO are unable to agree regarding eligibility, the NRHP may be called upon to issue a formal determination of eligibility. In fact, if a tribe or NHO disagrees with the

agency's determination, it can ask the ACHP to request the agency official to obtain a determination of eligibility from the NRHP.

- **If you disagree with an agency's determinations or findings, let the agency know.** If an agency does not receive comments, it will assume that there is agreement with its findings and may proceed with a final decision on the undertaking. Responding to agencies within the regulatory timeframes is critical.
- **If you have confidentiality issues about historic properties of religious and cultural significance to your tribe or NHO, let the agency know.** Section 304 of the NHPA provides limited authority for an agency to withhold information concerning a historic property when releasing such information may cause a significant invasion of privacy, risk harm to the historic property, or impede the use of a traditional religious site by practitioners. But it is possible that an agency will not think of using such an authority regarding properties of significance to tribes or NHOs unless such tribes or NHOs assert to the agency official that their information concerning such historic properties needs to be kept confidential. Additional information on Section 304 is available in the Section 106 Archaeology Guidance and can be found at <https://www.achp.gov/sites/default/files/guidance/2017-02/ACHP%20ARCHAEOLOGY%20GUIDANCE.pdf>.

### **What to ask during the Section 106 process**

The following section follows the steps in the default process under the Section 106 regulations, 36 CFR part 800. This section is meant as a general guide with the understanding that there may be other project-specific questions that are beyond the scope of this document.

#### **§800.1 (c) Timing**

The regulations state that the federal agency “must complete the Section 106 process ‘prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.’ ” This does not prohibit agency officials from conducting or authorizing nondestructive project planning activities before completing compliance with Section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize, or mitigate the undertaking's adverse effects on historic properties. *“The 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.”* [Emphasis added]

Questions a tribe or NHO might ask the agency:

- When did project planning, formally or informally, begin?
- When does the agency consider it appropriate to initiate consultation?
- Does that leave enough time, within project constraints, to consider effects to historic properties that are of religious and cultural significance to tribes and NHOs?
- In what step of the Section 106 process is the agency now?
- Who does the agency envision the stakeholders will be during project planning?
- How does the agency envision consulting with the tribes or NHOs?
- How does the agency maintain and or plan for government-to-government consultation?
- Is the agency considering alternatives to the current project proposal that would meet the purpose and need for a federal action under the National Environmental Policy Act (NEPA)? If so, what are the alternatives?
- If some alternatives have been rejected, why were they rejected?
- How does the agency intend to manage confidential information?

#### **§800.3 Initiation of the Section 106 process**

At this step, the agency determines if the proposed project is an undertaking that triggers further Section 106 review due to its generic potential to affect historic properties. The agency also might decide, at this point, to coordinate the Section 106 process with other reviews such as NEPA. The agency also determines if the project may occur, or affect historic properties, on tribal lands. Finally, the agency develops a plan to consult with the public and identifies any Indian tribes or NHOs that might attach religious and cultural significance to historic properties in the area of potential effects and invites them to consult. Because the SHPO does not speak for the tribes or NHOs, the agency should contact the SHPOs, tribes, and NHOs at the same time and consult concurrently.

Questions the tribe or NHO might ask the agency:

- If Section 106 compliance is triggered by the proposed issuance of a permit, license, or other approval or financial assistance, when did the agency receive the request from the applicant?
- How did the agency identify consulting parties including the tribes or NHOs?
- Who are the other consulting parties?
- When did the agency send the letter initiating consultation with the tribe or NHO and to whom was it sent? Did it include a project description? Will the review of this project/undertaking under Section 106 be coordinated under NEPA at any time?
- If the agency did not receive a response from your tribe or NHO, were there follow-up phone calls, emails, or letters to the tribe or NHO?
- How much time did the agency give the consulting parties to respond to the invitation to consult? What is the time frame based on?
- How did the agency initiate government-to-government consultation?
- Does the agency have tribal or NHO consultation protocols in place?
- Does the agency have protocols for handling confidential information?
- How did the agency determine the area of potential effects and what factors were taken into account in reaching the determination?
- What is the agency's plan for public outreach?

#### **§800.4 Identification of historic properties**

At this point in the process, the federal agency determines the scope of the identification effort and gathers information from consulting parties and others likely to have knowledge of or concerns about historic properties in the area. This effort includes gathering information from Indian tribes and NHOs. The agency, in consultation with the SHPO and tribes or NHOs, then carries out the identification and evaluation of historic properties. Note that there are time frames at certain points in this step. Because the SHPOs do not speak for the tribes or NHOs, the agency should contact the SHPOs, tribes, and NHOs and consult concurrently.

Questions the tribe or NHO might ask the agency:

- Who was consulted to determine the appropriate scope of the overall identification process?
- How did the agency determine what constituted a reasonable and good faith effort to identify historic properties in the area of potential effects?
- Does the area of potential effect reflect input from the tribes and NHOs as well as the SHPO?
- How did the agency identify properties of religious and cultural significance, and who carried out the identification and evaluation efforts?
- Did the agency offer to consulting parties the opportunity for meetings or site visits or an opportunity to review and comment on proposed identification efforts?
- With whom did the agency consult to determine if properties were eligible for the National Register?

- How did the agency acknowledge the special expertise of Indian tribes or NHOs to assess the eligibility of properties of religious and cultural significance to them?
- If there were issues regarding confidentiality, how did the agency consider protecting the relevant information? Who will have access to confidential information provided by the tribe or NHO? When and why?

### **§800.5 Assessment of adverse effects**

In this step of the process, the agency consults with the SHPO, Indian tribes or NHOs, and other consulting parties to apply the criteria of adverse effect to historic properties in the area of potential effects. The outcome will either be a determination of *no adverse effect* or one of *adverse effect*. Note that there are time frames at certain points in this step, so remember to respond within those time frames to ensure your comments are considered.

Questions the tribe or NHO might ask the agency:

- Did the agency consult with the tribe or NHO about adverse effects?
- Did the agency notify the tribe or NHO of its no adverse effect or adverse effect finding? How did the agency consult with Indian tribes or NHOs to determine whether there would be adverse effects to historic properties of religious and cultural significance?
- What did the agency consider in reaching its findings?
- Has the agency considered access to and use of historic properties of religious and cultural significance in assessing effects?

### **§800.6 Resolution of adverse effects**

In this step, the agency continues to consult with all consulting parties to seek ways to avoid, minimize, or mitigate adverse effects to historic properties. Note that the regulations do not impose time frames for this part of the process.

Questions the tribe or NHO might ask the agency:

- Did the agency notify the ACHP about the determination of adverse effect?
- Is the ACHP participating in the consultation?
- Did the agency consult with Indian tribes or NHOs to consider measures to avoid, minimize or mitigate the adverse effects to historic properties of religious and cultural significance to them?
- How did the agency take into account the views and concerns of the tribes or NHOs?
- Has the agency invited the tribes or NHOs to be invited signatories or concurring parties to the memorandum of agreement or programmatic agreement? How did the agency make its decision regarding which consulting parties to invite to sign the agreement and what their status should be?
- Has the agency clarified its project schedule, milestones, and timelines to conclude the Section 106 process?
- In consideration of confidentiality issues and government-to-government consultation, how did the agency integrate the tribes into its broader efforts to consult with other parties?

### **Additional issues/questions:**

In the course of the Section 106 review process, other issues may arise. The following represent just a few of the additional questions or issues you may want to raise.

If the agency has decided to integrate the Section 106 and National Environmental Protection Act processes, you may want to ask:

- Did the agency think its NEPA announcement was the initiation of Section 106 consultation?
- Did the agency give advance notice to the ACHP and SHPO/THPO about its intent to use NEPA to comply with Section 106? Did it adequately notify other consulting parties?
- When did the NEPA process start?
- Did/will the agency provide NEPA documents to the tribes and NHOs?
- Did the agency review the CEQ/ACHP guidance on integrating NEPA and Section 106?

If you have further questions about the role of Indian tribes or Native Hawaiian organizations in the Section 106 process or about federal agency responsibilities to consult, please feel free to email the ACHP's Office of Native American Affairs at [native@achp.gov](mailto:native@achp.gov).

*November 20, 2013*