MEMORANDUM OF AGREEMENT BETWEEN THE VERMONT DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND THE VERMONT STATE HISTORIC PRESERVATION OFFICER

This Memorandum of Agreement (MOA) sets forth the agreement between the parties, Vermont Department of Environmental Conservation (DEC) and the Vermont State Historic Preservation Officer (SHPO) (collectively referred to as "the Parties"), for the purpose of administration of the Vermont Drinking Water State Revolving Loan Fund and Vermont Clean Water State Revolving Loan Fund (collectively referred to as "the Funds").

WHEREAS, DEC is responsible for administering and awarding loans to water supply systems in Vermont through the Vermont Drinking Water State Revolving Loan Fund, under a Drinking Water State Revolving Fund Operating Agreement with the United States Environmental Protection Agency, as provided for by Section 1452 of the Safe Drinking Water Act; and

WHEREAS, DEC is responsible for administering and awarding loans to Clean Water projects in Vermont through the Vermont Clean Water State Revolving Loan Fund, under a Clean Water State Revolving Fund Operating Agreement with the United States Environmental Protection Agency, as provided for by Title VI of the Clean Water Act (CWA) (33 U.S. Code §1383); and

WHEREAS, DEC has determined that the administration of the Funds may have effects on buildings, structures, historic districts, objects or archaeological sites included or eligible for inclusion in the National Register of Historic Places (Historic Properties), and has consulted with SHPO pursuant to Section 800.13 of the 1986 regulations (36 CFR Part 800) implementing Section 106 of the National Historic Preservation Act (16 U.S.C 470) (the Act); and

WHEREAS, DEC is given primary responsibility by the United State Environmental Protection Agency February 28, 1997 Drinking Water State Revolving Fund Program Guidelines and Clean Water State Revolving Fund Program Guidelines for implementing the provisions of Section 106 of the Act, as amended, for water supply projects and Clean Water projects receiving loans from the Funds; and

WHEREAS, DEC has an affirmative obligation under Title 22 of the Vermont Statutes Annotated (VSA) Section 742 (a)(7) and Section 743 (4) to consider historic and archaeological resources, consult with the Vermont Advisory Council on Historic Preservation (Vermont Council), and institute procedures to assure that its plans, programs, codes and regulations contribute to the preservation and enhancement of sites, structures and objects of historical, architectural, archaeological or cultural significance; and

WHEREAS, project review under National Environmental Policy Act of 1969 (NEPA) (P.L. 91-190; 83 Stat. 852; 42 U.S.C. 4321) can be integrated and coordinated with review under Section 106 of the National Historic Preservation Act as set forth in 36 CFR Section 800.8, and the parties recognize the benefits of such integration and coordination, and can also be coordinated with review under Title 22 of the Vermont Statutes; and

WHEREAS, DEC intends to comply with the principles identified in the Advisory Council on Historic Preservation (Council)'s "Recommended Approach for Consultation on the Recovery of Significant Information from Archaeological Sites" published in the Federal Register on May 18, 1999, and the Council's Handbook *on Consultation with Indian Tribes in the Section 106 Review Process* (June 2012); and

WHEREAS, DEC has determined it is in the public interest to assure safe drinking water and clean water to all Vermonters at the lowest possible costs, while protecting the natural and cultural resources of Vermont, including its archaeological and historic resources, and prefers a design option providing minimum disturbance of such resources in instances where effects cannot economically be avoided; and;

NOW, THEREFORE, DEC and SHPO agree that the activities of these Funds shall be administered in the manner described below and in accord with the herein contained stipulations in order to satisfy the DEC's responsibility under the Safe Drinking Water Act, under its most current workplan approved by the United States Environmental Protection Agency, and the Clean Water Act, for all individual undertakings under the Funds:

PURPOSE

The purpose of this Memorandum of Agreement is to assure that Historic Properties are not affected, or if affected, are not adversely affected, when Vermont public water systems or Clean Water project owners use loans from the Funds to upgrade their facilities and operations in order to comply with the federal Safe Drinking Water Act and the Vermont Water Supply Rule or the Clean Water Act. For the purpose of this Agreement the term 'historic properties' means any building, structure, district or archaeological site listed in, or eligible for inclusion in the National Register of Historic Places.

STIPULATIONS

DEC shall ensure that the following measures are carried out:

I. Identification of Historic Properties

a. On tracts of land potentially affected by water supply or Clean Water projects financed by loans from the Funds, DEC shall require the loan recipient to engage a qualified consultant (as set forth below) to identify and evaluate historic properties that may be affected by the activities listed in Stipulation VI. DEC shall coordinate with SHPO to ensure that all studies are completed in accordance with the Secretary of the Interior's Standards and Guidelines and the SHPO Guidelines for Archaeological Studies in Vermont (2002 or as revised) (Guidelines).

b. To the extent possible, historically and archaeologically sensitive areas shall be avoided. DEC will not normally loan funds for projects with a determination of 'Adverse Effect' on historic properties. Preferred treatment of archeologically sensitive areas and historic buildings and structures may include:

i. Avoidance;
ii. Redesign of one or more project components;
iii. Specific construction conditions;
iv. Construction monitoring by a qualified Archaeologist and/or Architectural Historian; and
v. Rehabilitation of an affected historic building or structure in accordance with the Secretary of the Interior's Standards for Rehabilitation.

c. Costs for identifying and evaluating historic buildings, structures and archaeological sites; for project reviews and determination of effect; and for necessary studies (see II (e) and (f)) shall be eligible expenses under the Funds.

II. Project Review Procedures

DEC and SHPO have developed a project review procedure to implement this Agreement, which is attached as Appendix A.

III. Treatment of Human Remains

If human remains are discovered during any phase of archaeological study or during construction, the study or that portion of the project will stop immediately. The Recipient shall immediately report the discovery to local police and the Office of the Chief Medical Examiner and follow applicable state laws and procedures, including 18 V.S.A. §5212b(f). The remains shall be respectfully covered over and secured. If the human remains are determined to be archaeological, the Recipient shall immediately contact Vermont Division of Historic Preservation (VDHP). If the human remains are determined to be Indian burials, the Recipient should follow the guidance in the "Advisory Council on Historic Preservation Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects" (February 2007) (Attachment D). A treatment and reburial plan shall be developed by the Recipient's qualified archaeological professional, in consultation with VDHP and appropriate Native Americans and the tribe(s) Tribal Historic Preservation Officer, if applicable. The Agency shall ensure that the treatment and reburial plan is fully implemented. Avoidance and preservation in place is the preferred option for treating human remains.

IV. Monitoring

a. SHPO may monitor any activities carried out pursuant to this Agreement. DEC shall cooperate with SHPO in carrying out these monitoring and review responsibilities.
b. DEC shall prepare an Annual Report of activities conducted under this Agreement for the Federal fiscal reporting year (October 1st-September 30th) and submit it to the SHPO by December 1st. The Annual Report shall include, but not be limited to: a list of all projects with their effect determinations; a summary of all other activities for the year; copies of Historians' property eligibility determinations, copies of Vermont Historic Sites and Structures Survey forms and photographs; and any recommendations for changes to this Agreement. DEC and SHPO shall meet annually to review the process and recommend changes to the Agreement.

V. Compliance with Title 22 VSA Section 742(a)(7) and Section 734(4)

Implementation of the stipulations in this Agreement, including the Project Review Procedures set forth in Appendix A, satisfies DEC's responsibilities for the program under Title 22 VSA Section 742(a)(7) and Section 743(4).

VI. Redaction

DEC will support SHPO and the State Archaeologist in their obligations and efforts to protect confidential archaeological site location information pursuant to with 22 V.S.A. § 761(b) and 1 V.S.A. § 317(c) (20). Specifically, DEC, and/or their Qualified Consultant shall redact any location information before providing documents to the public.

VII. Effective Date; Modification

a. This Agreement will become effective on the date signed by the SHPO and will continue in force for five (5) years. At the end of that period, the parties shall consult to determine whether the Agreement remains satisfactory.
b. Either party to the Agreement may terminate it by providing thirty (30) days notice to the other party, provided that the parties consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, DEC will comply with 36 CFR 800.4 through 800.6 and 22 VSA Section 742 (a)(7) with regard to individual undertakings covered by this Amendment.

VIII. Program Contacts

<u>VDHP Contact</u>
Jamie Duggan
HP Review Coordinator
(802) 477-2288
james.duggan@vermont.gov

<u>VDEC Contact</u>
Kim McKee
Admin. and Innovation Division
(802) 477-3349
kimberley.mckee@vermont.gov

IX. ATTACHMENTS

Appendix A: Project Review Procedures

Appendix B: Recommended Approach For Consultation On Recovery Of Significant Information From Archaeological Sites

Appendix C: Handbook on Consultation with Indian Tribes in the Section 106 Review Process (June 2012)

Appendix D: ACHP Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects (February 2007)

Appendix E: Map of Tribal Interest

WE, THE UNDERSIGNED PARTIES, AGREE TO BE BOUND BY THIS AGREEMENT

STATE OF VERMONT

Dept. of Environmental Conservation

By:

e-Signed by Joanna Pallito
on 2017-04-10 17:19:44 GMT

Commissioner - Dept. of Environmental Conservation

Date: _____

STATE OF VERMONT

Division for Historic Preservation

By:

e-Signed by Laura Trieschmann
on 2017-04-10 16:46:36 GMT

State Historic Preservation Officer

Date: _____

Appendix A

Project Review Procedure

I. Proposed Activities Not Requiring Archaeological Resource Assessment

A. DEC will individually review these types of projects and make a final determination.

1. Construction within footprint of existing structure (unless the structure is in a floodplain).
    a. Definition of Structure: A **structure** is a walled and roofed building, including a gas or liquid storage tank, that is principally above ground, as well as a manufactured home.
2. Water Sources - The development, construction or renovation of a water source that involves the disturbance of an area less than 100 square feet to a depth less than six (6) inches. Examples include drilled wells and springs.
3. Purchase, expansion, renovation, modification, repair, or demolition of an existing structure that is less than fifty years old, that is not located in or adjacent to a historic district, and that does not involve new ground disturbance.
4. Construction within the disturbed boundaries of a post-1950 residential, industrial, or commercial development.
    a. Definition of Development: **Development** means any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.
5. Infrastructure replacement within existing trenching that has been previously assessed.

II. Proposed Activities Requiring Archaeological Resource Assessment

A. All proposed activities not specifically listed above require an archaeological resource assessment.

III. Archaeological Review Procedures

A. Recipients of loans from the Funds shall rely on the services of an archaeologist (the Archaeologist) who meets the minimum qualifications under the Secretary of the Interior's Professional Qualification Standards (48 FR 44738-9) (Professional Standards). DEC and the Archaeologist shall review all proposed projects in accord with the provisions of this Agreement and in coordination with the SHPO and any federally recognized tribes that may attach religious and cultural

significance to historic properties that may be affected by the project throughout this process.

B. The Archaeologist shall assess the area of the proposed project in consultation with the loan recipient and the project design engineer.
C. An **Archaeological Resource Assessment** shall be prepared by the Archaeologist to document all work conducted and it shall be submitted to DEC for review and approval. One copy of all archaeological resource assessments shall be sent by DEC to SHPO for concurrence through Project Review submittal portal @ ACCD.projectreview@vermont.gov. In some cases, the need for Phase I site identification investigation may be readily apparent without an ARA. In those situations, a Phase I scope of service can be submitted to SHPO for review and concurrence.
D. All archaeological scope of services must be consistent with the Guidelines for Conducting Archaeological Studies in Vermont (Guidelines) (see Appendix B) and shall be reviewed and approved by SHPO within 30 days of submittal.
E. For purposes of this Agreement, the term 'additional archaeological studies' includes Phase I, Phase II, and Phase III investigations.
F. A report of each study, in accordance with the Guidelines, shall be submitted to DEC. After review for completeness DEC shall submit the report to SHPO in a digital format through Project Review submittal portal @ ACCD.projectreview@vermont.gov.
G. Upon SHPO's receipt of archaeological resource assessments, other archaeological reports, or end-of-field documents, SHPO shall have 30 days to render a final determination. Non-response by SHPO within 30 days will constitute concurrence with documents submitted. When additional archaeological studies are determined by the Archaeologist to be necessary, they shall be conducted by the Archaeologist in consultation with DEC, the SHPO, and any other relevant consulting party.
H. For projects that fall within or intersect with the ancestral homelands of any federally recognized tribe, DEC shall provide all project information to the tribe in accordance with mutually accepted notification procedures. The tribe shall have 30 days to respond to DEC. Non-response by the tribe within 30 days will constitute acceptance of project information submitted.

IV. Historic Building, Structures & Districts Review Procedures

A. DEC shall utilize the Environmental Information Document provided as part of State Environmental Review Procedures to identify any buildings, structures, historic districts and objects within the proposed project area that are 50 years old or older and provide to SHPO for concurrence. DEC will withhold any disbursement and/or loan approval until pertinent information is received from the loan recipient or designated representative.
B. If the proposed project involves the repair, rehabilitation, expansion or demolition of buildings or structures 50 years old or older; or the expansion of existing

buildings or structure or the construction of new buildings or structures in a historic district, the loan recipient shall rely on the services of a qualified Architectural Historian (the Historian) to evaluate the eligibility of structures in the project area for inclusion on the State and National Registers of Historic Places.

C. The Historian shall meet the minimum qualifications under the Secretary of the Interior's Professional Qualification Standards (48 FR 44738-9) (Professional Standards). The Historian shall review all projects in accord with the provisions of this Agreement and in coordination with the SHPO. The Historian shall submit Historic Resource documentation to DEC for review and approval. One copy of all review documentation and recommendations shall be sent to SHPO, through Project Review submittal portal @ ACCD.projectreview@vermont.gov.

D. For properties found eligible for inclusion on the State or National Registers, but not already included in the Vermont Sites and Structures Survey, DEC shall forward the documentation to SHPO for review, according to VDHP's Determination of Eligibility (DOE) procedure.

E. If rehabilitation, modification or expansion of a building or structure 50 years old or older, or a new building or structure in a historic district is proposed, the loan recipient shall employ a Historian to review the proposed plans and ensure that they meet the Secretary of Interior's *Standards for Rehabilitation* (1990) (Standards). Review documentation shall meet the SHPO's requirements as defined in Section V below.

V. Project Review Submittals

A. DEC shall complete and submit a **§106 Project Review Form** (PRF) for all projects.

B. For exempt properties or activities – DEC staff will check appropriate box(es) in Question #1-#4 on PRF to indicate exemption of property and/or activity and insert comment supporting their determination - no further review is necessary.
   i. VDHP will return concurrence of exempt status to DEC within 15 days. Non-response by VDHP within 15 days will constitute concurrence with documents submitted.

C. For properties or activities that are not exempt, in addition to Questions #1-#4, DEC shall complete Question #5 and submit PRF with appropriate supporting documentation as described below:
   1. Consultant Report/ DEC Staff Memorandum
   2. Location Map (annotated Google map or other)
   3. Site map (especially where ground disturbance is proposed)
   4. Project plans / Construction drawings (when available)

D. VDHP will review PRF and supporting documentation and respond accordingly
   i. For initial reviews, (preliminary plans for those that have not been pre-screened by DEC) VDHP will complete a desk review to determine whether the project location is considered sensitive and if a consultant is

needed by checking the appropriate boxes and returning the form to DEC (this will be without a locked signature "eSign"). VDHP will return initial review determination to DEC within 30 days. Non-response by VDHP within 30 days will constitute concurrence with documents submitted.

ii. For final reviews, VDHP will indicate concurrence with recommendation for determination of effect and indicate by checking appropriate box(es) and returning to DEC with a locked signature.

VI. Project Review Determinations

A. DEC shall rely on SHPO's application of the Criteria of Effect and Adverse Effect as specified in 36 CFR 800.9 (a) and (b) for each proposed activity to determine whether an Effect will occur on any Historic Properties.

B. Treatment of buildings, structures, districts, or historic landscapes listed or eligible for listing on the State or National Registers of Historic Places shall be undertaken in accordance with the Standards.

C. For activities determined to have No Adverse Effect, and with VDHP concurrence, DEC will move forward with proposed plans and notify VDHP if the approved plans have changed.

D. For activities which may have a potential Adverse Effect on Historic Properties, DEC shall advise the loan recipient, in consultation with SHPO, to work closely with the Archaeologist or Historian to seek ways to avoid or minimize an Adverse Effect on the historic property or archaeological site.

E. Mitigation treatment of archaeological sites listed or eligible for listing on the State or National Registers of Historic Place shall be undertaken in accordance with the Secretary of the Interior's Standards for Archaeological Documentation and the Guidelines. The Scope of Work shall be approved by the SHPO.

F. Once SHPO approves a treatment plan to arrive at No Adverse Effect or to mitigate an Adverse Effect, DEC shall require the loan recipient to implement it according to the terms of the consultation. Documentation of the plan will be described on the master record. Where applicable, a 2-party MOA will be executed unless National Advisory Council on Historic Preservation (National Council) involvement is specifically requested. DEC shall defer to the outcome.

G. If the loan recipient in concert with DEC and SHPO cannot agree to satisfactory measures to avoid or minimize the Adverse Effect on historic properties, or where demolition is proposed, or where a National Historic Landmark is present within the area of potential effect, the parties shall appeal for an advisory opinion pursuant to January 2001 36 CFR 800.

VII. Field Work & Construction Contingencies

A. If previously unknown archaeological deposits or artifacts are discovered during construction, DEC shall advise the loan recipient to stop work on the involved portion of the project immediately and proceed only in accordance with Stipulation II of this Agreement. This stipulation shall be incorporated into project agreement documents.

B. In order to prevent the destruction or damage of historic and archaeological resources during construction activities, the Department shall require as a loan condition that all construction contracts financed by the Funds contain the provisions specified in Sections (a) and (b) above, including the stoppage of work.

APPENDIX B

RECOMMENDED APPROACH FOR CONSULTATION ON RECOVERY OF SIGNIFICANT INFORMATION FROM ARCHAEOLOGICAL SITES

FR Doc No: 99-12055]
Federal Register / Vol. 64, No. 95 / Tuesday, May 18, 1999 /

Sections 800.5 and 800.6 of the Council's revised regulations, “Protection of Historic Properties” (36 CFR part 800) detail the process by which Federal agencies determine whether their undertakings will adversely affect historic properties, and if they will, how they are to consult to avoid, minimize, or mitigate the adverse effects in order to meet the requirements of Section 106 to “take into account”' the effects of their undertakings on historic properties. One such category of historic properties is comprised of prehistoric or historic archaeological resources. The National Register of Historic Places defines an archaeological site as “the place or places where the remnants of a past culture survive in a physical context that allows for the interpretation of these remains” (National Register Bulletin 36, “Guidelines for Evaluating and Registering Historical Archaeological Sites and Districts,” 1993, p. 2). Such properties may meet criteria for inclusion in the National Register of Historic Places for a variety of reasons, not the least of which may be because “they have yielded, or may be likely to yield, information important to prehistory or history” (National Register Criteria for Evaluation, 36 CFR 60.4).

In the context of taking into account the effects of a proposed Federal or federally assisted undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register, potential impacts to archaeological sites often need to be considered. Appropriate treatments for affected archaeological sites, or portions of archaeological sites, may include active preservation in place for future study or other use, recovery or partial recovery of archaeological data, public interpretive display, or any combination of these and other measures.

Archaeological Sites and Their Treatment

The nature and scope of treatments for such properties should be determined in consultation with other parties, but in the Council's experience they generally need to be guided by certain basic principles:

The pursuit of knowledge about the past is in the public interest.

An archaeological site may have important values for living communities and cultural descendants in addition to its significance as a resource for learning about the past; its appropriate treatment depends on its research significance, weighed against these other public values.

Not all information about the past is equally important; therefore, not all archaeological sites are equally important for research purposes.

Methods for recovering information from archaeological sites, particularly large-scale excavation, are by their nature destructive. The site is destroyed as it is excavated. Therefore, management of archaeological sites should be conducted in a spirit of stewardship for future generations, with full recognition of their non-renewable nature and their potential multiple uses and public values.

Given the non-renewable nature of archaeological sites, it follows that if an archaeological site can be practically preserved in place for future study or other use, it usually should be (although there are exceptions). However, simple avoidance of a site is not the same as preservation.

Recovery of significant archaeological information through controlled excavation and other scientific recording methods, as well as destruction without data recovery, may both be appropriate treatments for certain archaeological sites.

Once a decision has been made to recover archaeological information through the naturally destructive methods of excavation, a research design and data recovery plan based on firm background data, sound planning, and accepted archaeological methods should be formulated and implemented. Data recovery and analysis should be accomplished in a thorough, efficient manner, using the most cost-effective techniques practicable. A responsible archaeological data recovery plan should provide for reporting and dissemination of results, as well as interpretation of what has been learned so that it is understandable and accessible to the public. Appropriate arrangements for curation of archaeological materials and records should be made. Adequate time and funds should be budgeted for fulfillment of the overall plan.

Archaeological data recovery plans and their research designs should be grounded in and related to the priorities established in regional, state, and local historic preservation plans, the needs of land and resource managers, academic research interests, and other legitimate public interests.

Human remains and funerary objects deserve respect and should be treated appropriately. The presence of human remains in an archaeological site usually gives the site an added importance as a burial site or cemetery, and the values associated with burial sites need to be fully considered in the consultation process.

Large-scale, long-term archaeological identification and management programs require careful consideration of management needs, appreciation for the range of archaeological values represented, periodic synthesis of research and other program results, and professional peer review and oversight.

Resolving Adverse Effects Through Recovery of Significant Information From Archaeological Sites

Under 36 CFR 800.5, archaeological sites may be “adversely affected”' when they are threatened with unavoidable physical destruction or damage. Based on the principles articulated above, the

APPENDIX B: RECOMMENDED APPROACH FOR CONSULTATION ON RECOVERY OF SIGNIFICANT INFORMATION FROM ARCHAEOLOGICAL SITES

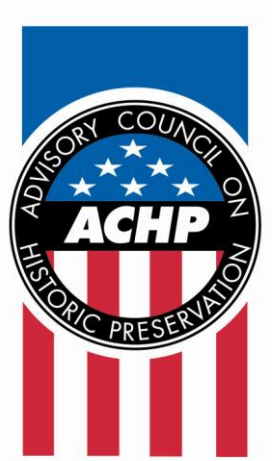
Council recommends that the following issues be considered and addressed when archaeological sites are so affected, and recovery of significant information from them through excavation and other scientific means is the most appropriate preservation outcome.

If this guidance is followed, it is highly unlikely that the Council would decide to enter the consultation process under 36 CFR 800.6 or raise objections to the proposed resolution of adverse effects in a given case, unless it is informed of serious problems by a consulting party or a member of the public.

1. The archaeological site should be significant and of value chiefly for the information on prehistory or history they are likely to yield through archaeological, historical, and scientific methods of information recovery, including archaeological excavation.
2. The archaeological site should not contain or be likely to contain human remains, associated or unassociated funerary objects, sacred objects, or items of cultural patrimony as those terms are defined by the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001).
3. The archaeological site should not have long-term preservation value, such as traditional cultural and religious importance to an Indian tribe or a Native Hawaiian organization.
4. The archaeological site should not possess special significance to another ethnic group or community that historically ascribes cultural or symbolic value to the site and would object to the site's excavation and removal of its contents.
5. The archaeological site should not be valuable for potential permanent in-situ display or public interpretation, although temporary public display and interpretation during the course of any excavations may be highly appropriate.
6. The Federal Agency Official should have prepared a data recovery plan with a research design in consultation with the SHPO/THPO and other stakeholders that is consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties, the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation, and the Advisory Council on Historic Preservation's Treatment of Archaeological Properties: A Handbook. The plan should specify: (a) The results of previous research relevant to the project; (b) research problems or questions to be addressed with an explanation of their relevance and importance; (c) the field and laboratory analysis methods to be used with a justification of their cost-effectiveness and how they apply to this particular property and these research needs; (d) the methods to be used in artifact, data, and other records management; (e) explicit provisions for disseminating the research findings to professional peers in a timely manner; (f) arrangements for presenting what has been found and learned to the public, focusing particularly on the community or communities that may have interests in the results; (g) the curation of recovered materials and records resulting from the data recovery in accordance with 36 CFR part 79 (except in the case of unexpected discoveries that may need to be considered for repatriation pursuant to NAGPRA); and (h) procedures for evaluating and treating discoveries of unexpected remains or newly identified historic properties during the course of the project, including necessary consultation with other parties.
7. The Federal Agency Official should ensure that the data recovery plan is developed and will be implemented by or under the direct supervision of a person, or persons, meeting at a minimum the Secretary of the Interior's Professional Qualifications Standards (48 FR 44738-44739).

8. The Federal Agency Official should ensure that adequate time and money to carry out all aspects of the plan are provided, and should ensure that all parties consulted in the development of the plan are kept informed of the status of its implementation.
9. The Federal Agency Official should ensure that a final archaeological report resulting from the data recovery will be provided to the SHPO/THPO. The Federal Agency Official should ensure that the final report is responsive to professional standards, and to the Department of the Interior's Format Standards for Final Reports of Data Recovery Programs (42 FR 5377-79).
10. Large, unusual, or complex projects should provide for special oversight, including professional peer review.
11. The Federal Agency Official should determine that there are no unresolved issues concerning the recovery of significant information with any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to the affected property.
12. Federal Agency Officials should incorporate the terms and conditions of this recommended approach into a Memorandum of Agreement or Programmatic Agreement, file a copy with the Council per Sec. 800.6(b)(iv), and implement the agreed plan. The agency should retain a copy of the agreement and supporting documentation in the project files.

APPENDIX C



Preserving America's Heritage

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

June 2012

An independent federal agency, the Advisory Council on Historic Preservation (ACHP) promotes the preservation, enhancement, and productive use of our nation's historic resources and advises the President and Congress on national historic preservation policy. It also provides a forum for influencing federal activities, programs, and policies that affect historic properties. In addition, the ACHP has a key role in carrying out the Administration's Preserve America initiative.

John L. Nau, III, of Houston, Texas, is chairman of the 23-member council, which is served by a professional staff with offices in Washington, D.C. For more information about the ACHP, contact:

Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 803
Washington, D.C. 20004
Phone: 202-606-8503
Web site: www.achp.gov

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

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Acknowledgements:

Office of Native American Affairs staff wishes to thank the members of the United South and Eastern Tribes (USET) Culture & Heritage Committee, Tribal Historic Preservation Officers, and the members of ACHP's Native American Advisory Group (NAAG) for providing their thoughtful comments and suggestions which contributed greatly to this handbook.

Office of Native American Affairs
Advisory Council on Historic Preservation

June 2012

I. About This Handbook

Many different statutes, regulations, executive orders, and federal policies direct federal agencies to consult with Indian tribes including the National Historic Preservation Act (NHPA), 16 U.S.C. Section 470f). Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on those undertakings. The ACHP has issued the regulations implementing Section 106 (Section 106 regulations), 36 CFR Part 800, "Protection of Historic Properties." The NHPA requires that, in carrying out the Section 106 review process, federal agency must consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by the agency's undertakings.

The ACHP offers this handbook as a reference for federal agency staff responsible for compliance with Section 106. Tribal Historic Preservation Officers (THPOs) and tribal cultural resource managers may also find this handbook helpful. Readers should have a basic understanding of the Section 106 review process as this document focuses only on Section 106 tribal consultation. It is not a source for understanding the full breadth of Section 106 responsibilities, such as consulting with State Historic Preservation Officers (SHPOs), involving the public, or consulting with Native Hawaiian organizations (NHOs).[1]

This handbook will be periodically updated by the ACHP when new information is obtained or laws or policies change. Agencies should also supplement this document with their own agency-specific regulations, directives, policies, and guidance pertaining to tribal consultation. Federal agencies should also be aware that many Indian tribes have their own statutes, regulations, and policies that apply to undertakings on tribal lands.

In addition, federal agency staff may refer questions on the Section 106 review process, and the requirements to consult with Indian tribes within this process, to their agency's Federal Preservation Officer (FPO).

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

For additional questions about tribal consultation, contact:

Office of Native American Affairs
Advisory Council on Historic Preservation
1100 Pennsylvania Ave., NW
Room 803
Washington, DC 20004
native@achp.gov

[1] For information on the requirements to consult with NHOs, visit http://www.achp.gov

II. Federal Government Consultation with Indian Tribes

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

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

Legally, there is a distinction between Indian tribes who are federally recognized and those who are not. Federal recognition signifies that the U.S. government acknowledges the political sovereignty and Indian identity of a tribe and from that recognition flows the obligation to conduct dealings with that tribe's leadership on a "government-to-government" basis. When federally recognized tribes speak of "government-to-government" consultation, they are often referring to consultation between a designated tribal representative and a designated representative of the federal government.

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

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

B. The Federal Trust Responsibility Toward Indian Tribes

The federal government's trust responsibility emanates from the Constitution, Indian treaties, statutes, case law, executive orders, and the historic relationships between the federal government and Indian tribes. It applies to all federal agencies. Each agency defines the scope of its own trust responsibility towards tribes.

This trust responsibility is rooted, in large part, in the treaties through which Indian tribes ceded large portions of their aboriginal lands to the United States in return for promises to protect tribal rights as self-governing nations within the reserved lands (reservations) and certain reserved rights (i.e. aboriginal hunting, fishing, and gathering rights) to resources outside of those reserved lands.

Trust responsibility is legally construed in different forms, depending on the context in which it is invoked and includes: full fiduciary, which arises in the context of federal agency management of tribal assets; the "Indian canons of statutory construction," by which ambiguities in legislation dealing with tribal issues are to be construed liberally in favor of tribes; and, general, which is fulfilled by a federal agency's compliance with general regulations and statutes.

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

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

C. Legal Requirements and Directives to Consult with Indian Tribes

1) Statutes

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

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

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

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

- Amended in 1992, the **National Historic Preservation Act of 1966 (NHPA)** is the basis for tribal consultation in the Section 106 review process. The two amended sections of NHPA that have a direct bearing on the Section 106 review process are:

    - Section 101(d)(6)(A), which clarifies that properties of religious and cultural significance to Indian tribes may be eligible for listing in the National Register of Historic Places; and

    - Section 101(d)(6)(B), which requires that federal agencies, in carrying out their Section 106 responsibilities, consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking.

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

    - Section 106 requires federal agencies to consider the effects of their undertakings on historic properties and to provide the ACHP an opportunity to comment. Also known

[2] A list of federal authorities that require tribal consultation was compiled by an interagency working group and is available on the ACHP's webpage at www.achp.gov.

as the Section 106 review process, it seeks to avoid unnecessary harm to historic properties from federal actions. The procedure for meeting Section 106 requirements is defined in the Section 106 regulations, 36 CFR. Part 800, "Protection of Historic Properties."[3]

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

For more information about the NHPA and the ACHP's regulations, visit www.achp.gov

- **The National Environmental Policy Act of 1969 (NEPA)** requires the preparation of an environmental impact statement (EIS) for any proposed major federal action that may significantly affect the quality of the human environment. While the statutory language of NEPA does not mention Indian tribes, the Council on Environmental Quality (CEQ) regulations[4] and guidance[5] do require agencies to contact Indian tribes and provide them with opportunities to participate at various stages in the preparation of an environmental assessment or EIS. CEQ has issued a Memorandum for Tribal Leaders encouraging tribes to participate as cooperating agencies with federal agencies in NEPA reviews.[6]

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

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

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

  In instances where a proposed project that is funded or licensed by a federal agency may cross federal or tribal lands, it is the federal land managing agency that is responsible for compliance with NAGPRA. Detailed information about NAGPRA and its implementing regulations is available at the National Park Service (NPS) National NAGPRA Web site.[7]

2) Executive Orders

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

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3 Available at http://www.achp.gov/regs-rev04.pdf

4 Available at http://ceq.hss.doe.gov/nepa/regs/ceq/1506.htm

5 Available at http://ceq.hss.doe.gov/nepa/regs/ej/justice.pdf

6 Available at http://ceq.hss.doe.gov/nepa/regs/cooperating/cooperatingagenciesdistributionmemo.html

7 Available at http://www.cr.nps.gov/nagpra/

- **Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments"** (2000), directs federal agencies to respect tribal self-government and sovereignty, tribal rights, and tribal responsibilities whenever they formulate policies "significantly or uniquely affecting Indian tribal governments." The executive order applies to all federal agencies other than those considered independent federal agencies, encouraging "meaningful and timely" consultation with tribes, and consideration of compliance costs imposed on tribal governments when developing policies or regulations that may affect Indian tribes.

- **Executive Order 13007, "Indian Sacred Sites"** (1996), applies to all federally owned lands except "Indian trust lands." It encourages land managing agencies to:

    - accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners; and

    - avoid adversely affecting the physical integrity of such sites.

- **Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations"** (1994), is designed to focus federal attention on the environmental and human health conditions in minority communities and low-income communities. It is also designed to promote non-discrimination in federal programs substantially affecting human health and the environment.

    - Section 6-606 of the order states that, "each federal agency responsibility set forth under this order shall apply equally to Native American programs."

III. Consultation with Indian Tribes in the Section 106 Process

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

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

The requirements to consult with Indian tribes in the Section 106 review process are derived from the specific language of Section 101(d)(6)(B) of NHPA. They are also based on the unique legal relationship between federally recognized Indian tribes and the federal government embodied in the U.S. Constitution, treaties, court decisions, federal statutes, and executive orders.

Agencies are required to consult with Indian tribes at specific steps in the Section 106 review process. A common misunderstanding is that tribal consultation is only required for undertakings on tribal lands, when, in fact, consultation is also required for undertakings that occur off tribal lands. Tribal consultation for projects off tribal lands is required because the NHPA does not restrict tribal consultation to tribal lands alone and those off tribal lands may be the ancestral homelands of an Indian tribe or tribes, and thus may contain historic properties of religious and cultural significance to them.

A. Role of the Tribal Historic Preservation Officer (THPO)[8] in the Section 106 Process

NHPA's 1992 amendments include provisions for Indian tribes to assume the responsibilities of the State Historic Preservation Officer (SHPO) *on tribal lands*, and establish the position of a Tribal Historic Preservation Officer (THPO). The Section 106 regulations use the term "THPO" to mean the Tribal Historic Preservation Officer under Section 101(d)(2) of the NHPA. *Tribal lands* are defined in the NHPA and the ACHP's regulations (36 CFR Part 800) as, 1) all lands within the exterior boundaries of any Indian reservation; and 2) all dependent Indian communities.[9]

As the tribal counterpart to the SHPO, the THPO may assume some or all of the duties for historic preservation *on tribal lands* that the SHPO performs on private, state, or federal lands. These responsibilities may include maintaining an inventory of historic properties under its jurisdiction and assisting federal agencies in the review of federal undertakings.

THPOs have been delegated authority by the Secretary of the Interior to serve as the historic preservation officer for tribal lands; however, they may not have been designated by their tribal governments to function as the sole point of contact for federal undertakings on and off tribal lands. Therefore, agencies should contact both the tribal governmental leaders and the THPO prior to formal initiation of Section 106 consultation in order to determine the appropriate point(s) of contact.

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[8] The National Park Service (NPS) administers the national THPO program and maintains an up-to-date listing of all tribes who have established 101(d)(2) Tribal Historic Preservation Officers and the contact information of their Tribal Historic Preservation Officers, available at www.nps.gov/history/hps/tribal/thpo.htm

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

Under the Section 106 regulations, a THPO who has assumed Section 106 review functions is subject to the time frames set forth in the Section 106 regulations for responding to requests to review an agency's Section 106 findings and determinations *for undertakings on or affecting tribal lands*. Failure of a THPO to respond when there is such a time frame permits an agency to proceed with its finding or determination, or to consult with the ACHP in the THPO's absence in accordance with the Section 106 regulations. Subsequent involvement by the THPO is not precluded, but the agency is not required reopen a finding or determination that a THPO failed to respond to in a timely manner earlier in the process.

Once a tribe has established a THPO, the SHPO may still participate in consultation for undertakings on tribal lands if: 1) the THPO requests SHPO participation; 2) the undertaking takes place on tribal lands but affects historic properties located off tribal lands; or 3) a non-tribal member who owns lands within the exterior boundaries of a reservation requests that the SHPO participate in Section 106 consultation. This provision, located at Section 101(d)(2)(D)(iii) of NHPA and in the Section 106 regulations at 36 CFR Section 800.3(c)(1), is intended to provide a property owner an opportunity to include the SHPO in the consultation if that property owner feels that his/her interests in historic preservation may not necessarily be represented by the THPO. This inclusion of the SHPO in the consultation *does not*, however, replace the role of the THPO, who still participates fully and retains its Section 106 role. .

B. Role of the THPO: *Off Tribal Lands*

The THPO's role for federal undertakings *off tribal lands* (in other words, on non-tribal lands such as private, state, or federal lands) is different from its role on its own tribal lands. If the proposed undertaking's area of potential effect (APE) is *located outside of the tribal lands it oversees*, the THPO does not supplant the jurisdiction or have the same rights as the SHPO, but rather may serve as the official representative designated by his/her tribe to represent its interests as a consulting party in Section 106 consultation.

C. When there is no THPO

For proposed undertakings *on or affecting the tribal lands* of an Indian tribe that *has not* assumed THPO responsibilities, the federal agency carries out consultation with that tribe's designated representative in addition to—*and on the same basis as*—consultation with the SHPO. The tribe retains the same consultation rights regarding agency findings and determinations, and to execute a Memorandum of Agreement (MOA) or Programmatic Agreement (PA), as it would if it had a THPO.

For proposed undertakings *off tribal lands*, a tribe designates who will represent it in consultation regarding historic properties of religious and cultural significance to it. A tribe that does not have a THPO has the same rights to be a consulting party as tribes that do have THPOs when the proposed federal undertaking is not on or affecting tribal lands.

D. Regulatory Principles and General Directions for Section 106 Tribal Consultation

The procedures for meeting Section 106 requirements are defined in the Section 106 regulations, "Protection of Historic Properties" (36 CFR Part 800).[10] Under the NHPA, "historic properties" are defined as those properties that are listed on the National Register of Historic Places, or are eligible for such listing.

The regulations provide both overall direction as well as specific requirements regarding consultation at each step of the Section 106 review process. The Section 106 regulations at 36 CFR Section 800.2(c)(2)

[10] Available at http://www.achp.gov/regs-rev04.pdf

outline the following important principles and general directions to federal agencies regarding consultation with tribes:

- The agency shall ensure that consultation provides the Indian tribe a reasonable opportunity to identify its concerns about historic properties; advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance to them; articulate its views on the undertaking's effects on such properties; and participate in the resolution of adverse effects.
- Tribal consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and plan how to address concerns about confidentiality of information obtained during the consultation process.
- Historic properties of religious and cultural significance to an Indian tribe may be located on ancestral (also referred to as aboriginal) homelands, or on officially ceded lands (lands that were ceded to the U.S. government by the tribe via treaty). In many cases, because of migration or forced removal, Indian tribes may now be located far away from historic properties that still hold such significance for them. Accordingly, the regulations require that agencies make a *reasonable and good-faith effort* [11]to identify Indian tribes that may attach religious and cultural significance to historic properties that may be affected by the undertaking, even if tribes are now located a great distance away from such properties and undertakings.
- The agency official shall ensure that consultation under the Section 106 review process is respectful of tribal sovereignty in conducting consultation and must recognize the government-to-government relationship that exists between the federal government and federally recognized Indian tribes.
- An Indian tribe may enter into an agreement with a federal agency regarding any aspect of tribal participation in the review process. The agreement may specify a tribe's geographic area of interest, types of projects about which they wish to be consulted, or provide the Indian tribe with additional participation or concurrence in agency decisions under Section 106 provided that no modification is made to the roles of other parties without their consent.

The Section 106 regulations recognize an Indian tribe's sovereign authority regarding proposed undertakings *on or affecting its tribal lands* in several ways. The regulations require the federal agency to provide the THPO, as appropriate,[12] an opportunity to review, and thus to concur with or object to, agency findings and determinations. The regulations also require federal agencies to invite the THPO (or designated tribal representative, if the tribe has not assumed THPO duties) to sign a Memorandum Of Agreement (MOA) as well as a Programmatic Agreement (PA). If the THPO/tribe terminates consultation, the ACHP must provide comment to the head of the agency rather than execute an agreement without the tribe.

While the Section 106 regulations are fairly prescriptive in nature, they only direct agencies on what to do and at which stages of the process to engage in consultation. They do not provide direction on how to

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[11] Tips on how to fulfill this requirement are provided under the heading "How do I identify tribes that must be invited to consult," at Section V(A)(3) of this handbook.

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

carry out consultation. Thus, the following questions and answers are intended to clarify the most common questions and issues regarding tribal consultation under the Section 106 review process.

V. General Questions and Answers

The following list of questions is meant to address general issues that commonly arise in the Section 106 review process, typically before an agency begins the review process or very early in the process. Section V addresses questions that might arise at each step of the Section 106 review process.

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

The 1992 amendments to NHPA require federal agencies, in carrying out the Section 106 review process, to consult with Indian tribes when a federal undertaking may affect historic properties of traditional religious and cultural significance to them. An "undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; or those requiring a federal permit, license or approval. This requirement applies to all undertakings regardless of whether they are located on or off tribal lands.

2) Which Indian tribes must be consulted?

Federally recognized tribes that attach religious and cultural significance to historic properties that may be affected by undertakings must be consulted. Federal agencies must make "a reasonable and good faith" effort[13] to identify each and every such Indian tribe and invite them to be consulting parties.

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

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

Consult the list maintained by the U.S. Department of the Interior's Bureau of Indian Affairs (BIA).[14] The list is regularly published in the *Federal Register*. Another way to determine if a tribe is federally recognized is to contact BIA headquarters in Washington, D.C. or one of the BIA regional offices throughout the United States.

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

Even when there are no federally recognized Indian tribes with tribal lands in the state where the project is located, the agency must still make a reasonable and good faith[15] effort to identify and consult with any Indian tribes that attach religious and cultural significance to historic properties that may be affected by the undertaking. The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance. Therefore, agencies are required to

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[13] Tips on how to fulfill this requirement are provided under the heading "How do I identify tribes that must be invited to consult," at Section V(A)(3) of this handbook.

[14] Available at http://library.doi.gov/internet/native.html

[15] Tips for fulfilling this requirement are provided under the heading "How do I identify tribes that must be invited to consult," at Section V(A)(3) of this handbook.

identify Indian tribes that may attach religious and cultural significance to historic properties in the area of the undertaking, even if there are no tribes near the area of the undertaking or within the state.

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

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

The question of inviting non-federally recognized tribes to participate in consultation can be both complicated and sensitive and thus deserves careful consideration. For example, some tribes may not be federally recognized but may have ancestral ties to an area. Other non-federally recognized tribes may have lost their recognition as a result of federal government actions in the 1950s to terminate relationships with certain tribes.[16] In other cases, such as in California,[17] the situation is complicated because there are more than 100 federally recognized tribes and more than 100 non-federally recognized tribes; again, the result of historical circumstances.

While non-federally recognized tribes do not have a statutory right to be consulting parties in the Section 106 process, the agency may invite them to consult as an "additional consulting party" as provided under the ACHP's regulations at 36 CFR Section 800.2(c)(5), if they have a "demonstrated interest." The agency should consider whether the non-federally recognized tribe can meet the threshold of a "demonstrated interest"—for example, whether the tribe can demonstrate it has ancestral ties to the area of the undertaking, or that it is concerned with the effects of the undertaking on historic properties for other reasons. In some cases, members of a non-federally recognized tribe may be direct descendants of indigenous peoples who once occupied a particular Native American site to be affected by the undertaking, or they might be able to provide the federal agency with additional information regarding historic properties that should be considered in the review process.

The inclusion of non-federally recognized groups in consultation may raise objections from some federally recognized tribes. Yet, there are other tribes who routinely support the invitation of non-recognized tribes into consultation, recognizing their interests as well.

The ultimate decision on whether to consult with non-federally recognized tribes, however, rests with the federal agency. The decision should be given careful consideration and made in consultation with the SHPO (or if on or affecting tribal lands, with the THPO or designated tribal official). In addition, the federal agency may elicit input on the question from any federally recognized Indian tribes that are consulting parties. If the agency decides that it is inappropriate to invite non-federally recognized tribes to consult as "additional consulting parties," those tribes can still provide their views to the agency as members of the public under 36 CFR Section 800.2(d).

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[16] During the "Termination Period" of the 1950s, Congress ended the federal government's relationship with more than 100 tribes in an attempt to assimilate members of Indian tribes into the broader society. Many, but not all, tribes regained their recognition. Some Indian tribes, however, are still seeking restoration of their federal recognition. For more information on this topic, visit www.epa.gov/indian

[17] For more information about Indian tribes in California, their history, and a list of federally and state recognized tribes, visit the California Native American Heritage Commission website at http://ceres.ca.gov/nanc

6) The federal agency believes a state recognized tribe should be included in the consultation process, but the federally recognized tribes object. How should the agency proceed?

It is important to remember that the federal agency ultimately makes the decision regarding the involvement of other consulting parties, including non-federally recognized tribes. However, reasonable objections raised by any parties should always be considered.

Not granting consulting party status to parties that have a demonstrated interest in the affected historic properties (see 36 CFR Section 800.2(d)) is legally allowable but may not be consistent with the spirit and intent of the Section 106 process. The Section 106 process is intended to provide both the public and certain individuals or groups with the opportunity to provide their views so that the federal agency can make an informed decision. Because non-federally recognized tribes may have information that assists the Section 106 process, consulting with them may enhance the agency's decision-making process.

Rather than denying a party the opportunity to participate in consultation, there may be ways in which every party can be accommodated. For instance, separate consultation meetings can be held, with information and views shared amongst all the consulting parties, as appropriate. However, there may be instances where an Indian tribe's leadership is only willing to share sensitive information with the federal agency (as part of the government-to-government relationship) and not with the other consulting parties, including other tribes. If confidentiality concerns are foreseeable, the federal agency should have a plan in place for how to handle these concerns in accordance with applicable law as the Section 106 process moves forward. Such a plan would also provide parties with clear expectations on how these issues will be handled. The issue of confidentiality is a very important one in Section 106 tribal consultation and is discussed in greater detail at Section V(B)(4) of this handbook.

7) What are appropriate consultation methods for individual undertakings?

The consultation process must provide an Indian tribe a reasonable opportunity to identify its concerns about historic properties; advise on the identification and evaluation of historic properties, including those of religious and cultural significance to the tribe; articulate views on the undertaking's effects on such properties; and participate in the resolution of adverse effects. (See 36 CFR Section 800.2(c)(2)(ii)(A).

Once it has accepted the agency's invitation to consult, the tribal leadership may find it acceptable for consultation to take place between the agency and designated tribal staff, such as the THPO or, if the tribe has not established a THPO, the cultural resource officer, for instance. In some cases tribal leadership may want to remain directly involved in the consultation process as well.

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

A federal agency and an Indian tribe may enter into an agreement in accordance with the Section 106 regulations at 36 CFR Section 800.2(c)(2)(ii)(E) regarding how Section 106 consultation will take place. Such agreements can cover all potential agency undertakings, or apply only to a specific undertaking. They can establish protocols for carrying out tribal consultation, including how the agency will address tribal concerns about confidentiality of sensitive information. Such agreements also can cover all aspects of the Section 106 process, provided that no modification is made in the roles for other parties to the Section 106 process without their consent. Determining the types of undertakings and the potential geographic project areas on which a tribe wants to be consulted, and how that consultation will take place can lead to tremendous efficiencies for both the federal agency and the Indian tribe. Filing such

agreements with both the appropriate SHPO and the ACHP is required per 36 CFR Section 800.2(c)(2)(ii)(E), and can eliminate questions about tribal consultation when either the SHPO or the ACHP is reviewing a proposed undertaking.

Documentation of consultation is important because it allows consulting parties to more accurately track the stages of the Section 106 process. Federal agencies should document all efforts to initiate consultation with an Indian tribe or tribes, as well as documenting the consultation process once it has begun. Such documentation, in the form of correspondence, telephone logs, e-mails, etc., should be included in the agency's official Section 106 record. Agencies should also keep notes so that the consultation record documents the *content* of consultation meetings, site visits, and phone calls in addition to information about dates and who participated. Doing so allows agencies and consulting parties to review proceedings and correct any errors or omissions, thus facilitating better overall communication. Keeping information confidential can present unique challenges (see Section V(B)(4) of this handbook.

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

Yes, the ACHP encourages federal agencies to take the steps necessary to facilitate tribal participation at all stages of the Section 106 process. These steps may range from scheduling meetings in places and at times that are convenient for Indian tribes, to paying travel expenses for participating tribal representatives. Indeed, agencies are strongly encouraged to use available resources to help overcome financial impediments to effective tribal participation in the Section 106 process. Likewise, if a tribe has consented (in advance and in writing) to allow an applicant for federal assistance or federal permit to carry out tribal consultation, the applicant is encouraged to use available resources to facilitate and support tribal participation. However, federal agencies should not expect to pay a fee to an Indian tribe or any consulting party to provide comments or concurrence in an agency finding or determination.

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

Yes, though it should be noted that while the ACHP encourages agencies to utilize their resources to facilitate consultation with Indian tribes, this encouragement is not a legal mandate; nor does any portion of the NHPA or the ACHP's regulations require an agency or an applicant to pay for any form of tribal involvement.

However, during the identification and evaluation phase of the Section 106 process when the agency or applicant is carrying out its duty to identify historic properties that may be significant to an Indian tribe, it may ask a tribe for specific information and documentation regarding the location, nature, and condition of individual sites, or even request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such cases, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor. Since Indian tribes are a recognized source of information regarding historic properties of religious and cultural significance to them, federal agencies should reasonably expect to pay for work carried out by tribes. The agency or applicant is free to refuse just as it may refuse to pay for an archaeological consultant, but the agency still retains the duties of obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on those historic properties, through reasonable methods.

10) What specific activities might be reimbursed?

Examples of reimbursable costs may include those costs associated with expert consultants to identify and evaluate historic properties as outlined in the immediately preceding answer. This may include field visits

to provide information about specific places or sites, monitoring activities, research associated with historical investigation, documentation production costs, and related travel expenses.

For more information, see "Fees in the Section 106 Review Process" on the ACHP Web site.[18]

11) Aside from applicable federal statutes, are there specific tribal laws the agency must comply with for undertakings on tribal lands?

The agency should be aware that the sovereign status of Indian tribes on their tribal lands may dictate other obligations and requirements in addition to those outlined in Section 106 and other federal laws. Many tribes have developed their own statutes, regulations, and policies that may apply to undertakings on their own lands and federal agency officials, staff, applicants, and contractors must comply with them as applicable. Inquiring about such legal requirements early in the planning process demonstrates a respect for tribal sovereignty.

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

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

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

13) Can Indian tribes, as well as federal agencies, request ACHP involvement in the Section 106 review process?

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

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

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

Yes. On February 23, 2007, the members of the Advisory Council on Historic Preservation unanimously adopted its revised "Policy Statement Regarding the Treatment of Burial Sites, Human Remains and Funerary Objects." This policy is designed to guide federal agencies in making decisions about the

[18] Available at http://www.achp.gov/regs-fees.html

identification and treatment of burial sites, human remains, and funerary objects encountered in the Section 106 process in various instances including those where federal or state law does not prescribe a course of action. The policy is not exclusively directed toward Native American burials, human remains or funerary objects, but those would be included under the policy. In accordance with Section 106, the policy does not recommend a specific outcome from the consultation process, but rather focuses on issues and perspectives that federal agencies ought to consider when making their Section 106 decisions. The policy is available at http://www.achp.gov/docs/hrpolicy0207.pdf

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

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

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

- "off" tribal lands (in other words, on non-tribal land such as federal, state, or private lands outside tribal lands);
- "on" or affecting tribal lands. Tribal lands are defined in the NHPA and the Section 106 regulations (36 CFR Part 800) as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.[19]
- Where the required steps are the same both off and on (or affecting) tribal lands, a single response is provided.

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

A. Initiation of the Section 106 Process

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

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

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

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

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

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

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

a) Off Tribal Lands

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

While we cannot vouch for their accuracy, certain websites may be useful references as part of a broader agency effort to identify relevant Indian tribes. The National Park Service maintains the Native American Consultation Database (NACD), which may be helpful in identifying Indian tribes with an interest in an area.[20] Other Internet sources include MAPS: GIS Windows on Native Lands, Current Places, and History,[21] which provides maps on current and ancestral locations of Indian lands, and the Library of Congress Indian Land Cessions document Web site,[22] which has information on historic Indian land areas.

National and regional intertribal organizations, such as the National Congress of American Indians,[23] the United South and Eastern Tribes,[24] the National Association of Tribal Historic Preservation Officers,[25] the Michigan Anishinaabek Cultural Preservation and Repatriation Alliance,[26] and the Affiliated Tribes of Northwest Indians[27] may also be able to provide assistance in identifying tribes with ancestral connections to an area.

Keep in mind that identification of Indian tribes with ancestral connections to an area is not a "one stop shopping" endeavor in which any single source can be depended upon to fulfill the agency's legal responsibilities. Agency officials should bear in mind that while Internet sources are convenient and can be useful, their informational content may be incomplete.

Once the agency has identified a tribe or tribes that may attach religious and cultural significance to any historic properties that may exist in the APE, the agency must invite them to consult.

Finally, it is important to remember that documentary or other sources of information that do not clearly support a tribe's assertions should not be used to deny a tribe the opportunity to participate in consultation. A common misunderstanding is that an Indian tribe needs to document its ties to historic properties in the area of the undertaking. Instead, the NHPA requires agencies to consult with any federally recognized Indian tribe that attaches religious and cultural significance to a historic property. It stands to reason that the best source for determining what historic properties have significance for a tribe

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20 Available at http://www.cr.nps.gov/nacd/

21 Available at http://www.kstrom.net/isk/maps/mapmenu.html

22 Available at http://www.memory.loc.gov/ammem/amlaw/lwss-ilc.html

23 Official Web site at http://www.ncai.org

24 Official Web site at http://www.usetinc.org

25 Official Web site at http://www.nathpo.org

26 Official Web site at http://www.macpra.org

27 Official Web site at http://www.atnitribes.org

would be the experts designated by the tribe to determine the tribe's own interest. Such experts might include elders, traditional practitioners, tribal historians, the THPO or tribal cultural resource staff. The tribe will designate the appropriate tribal representative(s) to represent its interests in the Section 106 consultation process.

b) On Tribal Lands

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

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

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

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

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

Consultation with an Indian tribe or tribes should be initiated by the agency official[28] through a letter to the leadership of each tribe, with a copy going to each tribe's THPO, or for a tribe without a THPO, its cultural resource officer. Indian tribes are sovereign nations and their leaders must be shown the same respect and formality given to leaders of other sovereign nations. Since tribal elections often result in changes in leadership, agency officials should contact the tribe prior to executing the letters in order to ascertain that the correspondence is correctly addressed to the appropriate points of contact. It is helpful to follow up such correspondence with direct telephone communication to ensure the letter has been received.

If the agency official has correspondence from tribal leadership designating a person or position within the tribe to act on the tribe's behalf in the Section 106 process, the agency may initiate consultation

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

accordingly. It is good practice, in this instance, to send a copy of all correspondence to tribal leadership as well.

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

No, federal agencies cannot unilaterally delegate their responsibilities to conduct government-to-government consultation with Indian tribes to non-federal entities. It is important to remember that Indian tribes are sovereign nations and that their relationship with the federal agency exists on a government-to-government basis. For that reason, some Indian tribes may be unwilling to consult with non-federal entities associated with a particular undertaking. Such non-federal entities include applicants[29] for federal permits or assistance (which would include any contractors hired by the applicant), as well as contractors who are not government employees but are hired to perform historic preservation duties for a federal agency. In such cases, the wishes of the tribe for government-to-government consultation must be respected, and the agency must carry out tribal consultation for the undertaking.

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

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

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

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

B. Identification of Historic Properties

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

a) Off Tribal Lands

[29] An applicant may be a state agency, local government, organization, or individual seeking federal assistance, permits, licenses, and other approvals.

Yes, the agency consults with Indian tribes to carry out identification efforts and to evaluate the National Register eligibility of identified properties for proposed undertakings located off tribal lands.

Many agencies assume that agency or contract archaeologists can identify which properties are of significance to which Indian tribes when they conduct archaeological surveys. However, unless an archeologist has been specifically authorized by a tribe to speak on its behalf on the subject, it should not be assumed that the archaeologist possesses the appropriate expertise to determine what properties are or are not of significance to an Indian tribe. The appropriate individual to carry out such a determination is the representative designated by the tribe for this purpose. Identification efforts may include site visits to assist in identifying these types of properties.

The Section 106 regulations state that the agency official shall acknowledge that Indian tribes possess special expertise in assessing the National Register eligibility of historic properties that may possess religious and cultural significance to them (36 CFR § 800.4(c)(1)).

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

b) On Tribal Lands

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

If the tribe has not assumed THPO responsibilities, the agency will carry out identification and evaluation in consultation with both the tribe's cultural resource officer (and any other parties designated by the tribe for this purpose) and the SHPO. In this situation, the tribal cultural resource officer (or other such designated tribal official) has the same rights as a THPO would have in eligibility determinations.

As noted in Section V(A)(3) above, it is possible that the APE for a proposed federal undertaking on one tribe's lands may contain historic properties that are of religious and cultural significance to other tribes. To continue the hypothetical model introduced in Section V(A)(3), a proposed undertaking is located on Tribe A's tribal lands. Once the agency has identified the other tribes that may attach significance to historic properties within the APE and invited them to consult, the agency must determine the best way to afford those tribes an opportunity to participate in the identification and evaluation of any such historic properties. In such cases, it is the prerogative of Tribe A, in keeping with its status as a sovereign nation, whether to grant access to the APE within its tribal lands to other consulting parties. If Tribe A decides not to grant access, the agency must still consult with the other tribes in order to provide them a reasonable opportunity to identify their concerns about historic properties, advise on the identification and evaluation of historic properties, articulate their views on the undertaking's effects on such properties, and

participate in the resolution of adverse effects. Accordingly, it may be necessary to consult with each tribe individually and to do so off the reservation.

In such cases, concerns may arise about confidentiality and protection of sensitive information that may be provided to the federal agency by one or more of the consulting parties. This issue is a very important one in Section 106 tribal consultation and is discussed in greater detail in Section (V)(B)(4) of this handbook.

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

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

3) What are Traditional Cultural Properties?

The term "Traditional Cultural Property" (TCP) is used in the National Park Services (NPS) Bulletin 38, entitled *"Guidelines for Evaluating and Documenting Traditional Cultural Properties."*[30] That bulletin explains how to identify a property "that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that a) are rooted in that community's history, and b) are important in maintaining the continuing cultural identity of the community." For a TCP to be found eligible for the National Register, it must meet the existing National Register criteria for eligibility as a building, site, structure, object, or district. TCPs are defined only in NPS guidance and are not referenced in any statute or regulation, and **refer to places of importance to any community, not just to Indian tribes.** Therefore, this terminology may be used when an agency is considering whether any property is eligible for the National Register.

Within the Section 106 process, the appropriate terminology for sites of importance to Indian tribes is **"historic property of religious and cultural significance to an Indian tribe.**" Unlike the term TCP, this phrase appears in NHPA and the Section 106 regulations. **It applies (strictly) to tribal sites, unlike the term TCP.** Furthermore, Section 101(d)(6)(A) of the NHPA reminds agencies that historic properties of religious and cultural significance to Indian tribes may be eligible for the National Register. Thus, it is not necessary to use the term TCP when considering whether a site with significance to a tribe is eligible for the National Register as part of the Section 106 process. The NPS Bulletin 38 guidelines are helpful, however, in providing an overview of how National Register criteria are applied.

Another issue with the term TCP is that Bulletin 38 has sometimes been interpreted as requiring an Indian tribe to demonstrate continual use of a site in order for it to be considered a TCP in accordance with Bulletin 38. This requirement could be problematic in that tribal use of a historic property may be dictated by cyclical religious or cultural timeframes that do not comport with mainstream conceptions of "continuous" use; while in many other cases, tribes have been geographically separated from and/or denied access to historic properties of religious and cultural significance to them. It is important to note that under the NHPA and the Section 106 regulations, the determination of a historic property's religious and cultural significance to Indian tribes is **not** tied to continual or physical use of the property.

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

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[30] Available at http://www.cr.nps.gov/nr/publications/bulletins/nrb38/nrb38%20introduction.htm

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

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

One important caveat: the Section 304 confidentiality provisions only apply to properties that have been determined eligible for the National Register. Thus, it is possible that information disclosed prior to an eligibility determination may not be protected. Therefore, the ACHP suggests that agencies and Indian tribes contact National Register staff for guidance regarding the amount of information and detail needed to make a determination of eligibility when such information might be at risk of disclosure. It may be possible for a tribe to share just enough information for the agency to identify the existence of a site and make a determination of eligibility without compromising the site or the tribe's beliefs. Such information might include general aspects of the historic property's attributes, i.e., that an important yearly ceremony takes place in a certain general location, that quiet is required in an area where spirits reside, that visual impacts will impede the ability to properly perform a required ritual, or that important ceremonial harvesting activities must occur at a particular place, time, or under certain conditions. However, if there are questions about the adequacy of such information in making determinations of eligibility, the National Register staff should be consulted.

Issues of confidentiality and sensitivity of information require flexibility and cooperation among the consulting parties. There may be situations where a tribe is only willing to share information with the federal agency and not with the other non-federal consulting parties. This can challenge the traditional Section 106 process where the federal agency also consults with the SHPO to determine eligibility of properties off tribal lands or on tribal lands where the tribe has not assumed THPO responsibilities. In such cases, it is recommended that the agency promptly talk with the ACHP or the National Register staff about how to resolve such a situation.

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

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

considering determinations of significance. For additional guidance on making eligibility determinations, the agency should consult with the staff of the National Register.[31]

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

a) Off Tribal Lands

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

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

b) On Tribal Lands

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

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

a) Off Tribal Lands

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

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

b) On Tribal Lands

On tribal lands, a finding of no historic properties present or no historic properties affected requires the agency to provide the THPO (or designated tribal official, if the tribe has not assumed THPO duties)

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[31] Contact information for National Register headquarters in Washington, D.C., available at http://www.cr.nps.gov/nr/about.htm#contactus

documentation of this finding. The agency also provides this documentation to other consulting parties. Upon receipt of an adequately documented finding, the THPO/tribe has 30 days to object. If the THPO/tribe does not object within 30 days, the agency's Section 106 responsibilities have been fulfilled. If the THPO/tribe does object to the finding, the agency shall either consult with the THPO/tribe to resolve the disagreement, or forward the finding to the ACHP and request that it be reviewed. When the agency makes such a request, it is also required to concurrently notify all consulting parties of the request and make the request and documentation available to the public. The ACHP then has 30 days to review the finding and provide the agency official, and, if the ACHP determines the issue warrants it, the head of the agency, with the ACHP's opinion regarding the finding.

C. Assessment of Adverse Effects

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

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

b) On Tribal Lands

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

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

a) Off Tribal Lands

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

b) On Tribal Lands

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

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

a) Off Tribal Lands

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

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

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

b) On Tribal Lands

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

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

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

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

D. Resolution of Adverse Effects

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

a) Off Tribal Lands

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

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

b) On Tribal Lands

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

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

a) Off Tribal Lands

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

b) On Tribal Lands

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

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

a) Off Tribal Lands

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

b) On Tribal Lands

MOAs and PAs for undertakings on tribal lands require that the THPO (or the designated tribal official if the tribe has not assumed THPO duties) be a signatory, with the same rights to seeking amendments to or terminating the agreement as all other signatories. The agency and the signatories may invite other consulting parties to be signatories or sign as concurring parties. Those that sign as a concurring party do not have such rights to amend or terminate the MOA or PA. 36 CFR 800.2(c)(2)(ii)(F) provides that an Indian tribe that has not assumed THPO duties may notify the agency in writing that it is waiving its rights to execute an MOA for undertakings on its tribal lands.

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

a) Off Tribal Lands

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

b) On Tribal Lands

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

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

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

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

representative and the agency (along with filing the agreement with the ACHP), and agency compliance with the terms of the agreement, would complete the Section 106 process.

VI. Consultation Tools

While federal authorities direct agencies to consult and coordinate with Indian tribes on proposed actions, little guidance exists on how to carry out such consultation. On a national level, such guidance is general because of the differences between federal agencies, Indian tribes, and local circumstances.

Agreements

The Section 106 regulations at 36 CFR Section 800.2©(2)(ii)(E) provide for agreements between federal agencies and Indian tribes that tailor how consultation will be carried out. Such agreements are not project-specific but, instead, are more general and are focused on the relationship between an agency and an Indian tribe. An agreement can cover all aspects of the consultation process and could grant an Indian tribe additional rights to participate or concur in agency decisions in the Section 106 process beyond those specified in the regulations. The only restriction on the scope of such agreements is that the role of other parties in the process may not be modified without their consent.

A common misunderstanding is that such agreements are required before an agency and a tribe can enter into Section 106 consultation for individual undertakings. In fact, consultation agreements are not required but are meant to facilitate consultation.

A number of federal agencies have entered into such agreements with Indian tribes as a means not only to ensure that consultation would be carried out to the satisfaction of both parties but also as a workload management tool. Agreements can outline the areas of a state or region in which a tribe has an interest or the types of undertakings that might not require consultation with the tribe.

If an Indian tribe agrees in advance to such delegation, an agreement with the tribe would be the vehicle through which an agency could delegate the day-to-day consultation and coordination with the tribe to an applicant.[32] The agreement itself illustrates recognition of the government-to-government relationship between the federal agency and an Indian tribe. However, absent prior agreement by a tribe, an agency cannot delegate its government-to-government consultation responsibilities to an applicant.

The negotiation process to develop an agreement with an Indian tribe does not require participation by any other parties outside of the agency (there may be other entities within the agency, such as the agency's office of legal counsel that must participate). These agreements are, in fact, between the federal government and a sovereign nation. Therefore, unless the tribe agrees, it would be inappropriate to invite another party to participate. The only requirements for such agreements under the ACHP's regulations are that:

- the role of other parties is not modified without their consent; and
- the agreement is filed with both the ACHP and appropriate SHPO.

Summits and Meetings

Some agencies have hosted summits with Indian tribes and continue to do so on a regular basis. These meetings provide a means for agencies to share information about proposed undertakings and for Indian

[32] An applicant may be a state agency, local government, organization, or individual seeking federal assistance, permits, licenses, and other approvals.

tribes to voice their views and talk with agency personnel. They also serve to develop trust and build relationships.

Some agencies host annual or regular meetings with Indian tribes to ensure that the consultation relationships are working and to address any outstanding issues. These gatherings are separate from Section 106 consultation meetings. They provide a forum for airing more general concerns, a means for recharging the relationship, and an opportunity to meet new agency personnel and tribal representatives.

Guidance Materials and Training

Many agencies have published or are currently developing various guidance materials for their staff and leadership on consultation with Indian tribes. Most of these materials are intended to serve as department or agency-wide guidance.

Training is also extremely useful in that it ensures that both federal agencies and Indian tribes have a common understanding of legal requirements, organizational structures, decision-making, and other important mechanics of the consultation relationship. Training can also address cultural issues to help foster greater mutual understanding. Some agencies have hosted joint training sessions, while others require new personnel to receive training specific to their new duties. For instance, the ACHP has an internal requirement to train all staff and members regarding tribal consultation within the Section 106 process.

On-line training resources are also becoming more prevalent. The ACHP played a large role, along with several other departments and agencies,[33] in the development of the "Working Effectively With Tribal Governments" on-line training program that is available through the U.S. Office of Personnel Management's GoLearn website.[34] This course provides content useful to all federal employees, including information essential to understanding the unique political status of federally recognized Indian tribes, an overview of federal Indian law and polices, and cultural information that can increase the quality of cross-cultural communications. Other agencies have developed agency specific on-line training, such as the course that the Federal Emergency Management Agency (FEMA) has developed for its employees on working with Indian tribes.

VII. Principles and Tips for Successful Consultation

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

Respect is Essential

- Be respectful of tribal sovereignty.

[33] Other federal departments and agencies involved in the development of the "Working Effectively With Tribal Governments" on-line training course include the Environmental Protection Agency, the Department of Justice, the Department of Interior, the U.S. Forest Service, the Small Business Administration, the General Services Administration, the Department of Health and Human Services and the Department of Energy.
[34] Available at: http://www.golearn.gov

- Become aware of tribal conventions and protocols and follow them; respect tribal customs.

- Dress respectfully. Do not wear shorts, short skirts, sleeveless shirts, or shirts with plunging necklines to meetings. Check with your tribal contact as to appropriate dress for site visits or tribal events.

- Do not take photographs without obtaining permission first.

- Behavior you may perceive as normal may be insulting or offensive to others. For example, some tribes consider pointing one's finger to be offensive, and consider a gentle handshake a sign of respect instead of a sign of weakness. Consider native perspectives and values. When in doubt, ask respectfully.

- Tribal leaders have many duties; be aware of this fact and do not demand that everyone adhere to your deadline. Instead, explain why your deadline exists, who set it, and why it is important. Above all, strive to be as flexible as possible. Look for ways to work cooperatively, because this is your undertaking and consultation is your responsibility.

- Be sensitive to time and costs. A tribe's lack of human and financial resources may impede its representatives' ability to respond quickly or travel to meetings. Make an effort to facilitate and support consultation with available agency resources.

- Do not voice your opinion on what is best for the tribe; that is for tribal leaders to determine.

- Be mindful of the significance of history. The history of U.S. government relations with Indian tribes may color current perceptions and attitudes and cause distrust or suspicion. Take the time to learn about the unique history of the tribe you are consulting with.

Communication is Key

- Communicate with tribal representatives directly whenever possible—do not rely solely on letters. Follow up written correspondence by phone or in person. Create documentation of your communications, such as notes on the content of discussions, keep phone logs, etc.

- Do not expect quick answers. Tribal officials may need time to consult with others, including tribal councils or the head of the tribal government. Make sure you understand the timelines for tribal decision-making.

- Do not assume silence means concurrence; it could signal disagreement. Always verify views with the official tribal representative.

- Always ask tribal representatives about their preferred way of doing business and any specific tribal protocols for meetings. Be aware that the cultural norms of tribal citizens may be different from yours, and that each of the more than 560 Indian tribes has a unique culture and heritage.

- Do not assume everyone is the same. For example, traditional cultural authorities may sometimes have perspectives that differ from those of their tribal governments. It is important to listen to all consultation participants, but also to be sure that you understand the position of the elected tribal leadership on every issue.

- Develop points of contact through the tribal government. Do research ahead of time to find out whom you will be consulting with and their tribal positions, then make the effort to get to know them. Tribal governments may consist of elected leadership (tribal leader, tribal council, tribal courts), traditional leaders (treaty councils, tribal elders, spiritual leaders), and tribal administration (program managers, administrators, and staff).

- Be mindful of appropriate behaviors—be sure to demonstrate respect to tribal leaders just as you would to a leader of a foreign nation. Always show deference toward tribal elders and allow them plenty of time to speak first. Do not interrupt or raise your voice. Learn by observation and by talking to others. Again, when in doubt, ask respectfully.

Consultation: Early and Often

- Make sure you identify and initiate consultation with tribes at the ***start*** of the planning process for your agency's undertaking.

- Suggest a process for consultation and discuss it with the tribes. Collaborate in a way that accommodates tribal protocols and schedules. The ACHP regulations at 36 CFR Section 800.2(c)(2)(ii)(E) provide for agreements with tribes that set out procedures for Section 106 consultation and can address tribal concerns about confidentiality of information.

- Consider establishing an on-going working group that can provide continuity for future undertakings by your agency.

- Focus on partnerships rather than on project-by-project coordination.

- Remember to document all correspondence, follow-up telephone calls, consultation meetings and visits to project sites and reservations. Be sure to include the content of your communications in your documentation.

- Find out if the tribal leadership wants to receive additional copies of all the consultation materials and documentation that you are providing to the tribe's designated representative (THPO, or cultural resources staff person) as part of your consultation.

- Ask tribal representatives to keep you up-to-date on any changes to tribal postal or email addresses and contact information for new tribal leadership.

Effective Meetings are a Primary Component of Successful Consultation

- Develop an understanding of the tribe's decision-making process and get to know its decision makers.

- Offer to go on-site with traditional authorities. Some people may be uncomfortable relying solely on maps, and site visits may stimulate consideration of alternatives.

- Do not create expectations or make commitments that you are unable or unwilling to fulfill. Before entering into consultation, be certain that what you are negotiating is supported by the Office of General Counsel or Solicitor of your agency, and anyone else who will need to review and approve your position.

- Do not set your own meeting agenda without consulting with tribal representatives to learn what they expect the process and substance to be. Tribes may have their own ways of conducting meetings.

- Inform tribal representatives in advance of the meeting's goal and what needs to be accomplished in the time you have, so that participants can stay focused. Like you, tribal representatives are there to work and accomplish results.

- Give plenty of notice beforehand so that tribal representatives have adequate time to prepare. Provide participants with maps, hotel information, a list of all attendees, an agenda, and most importantly, complete project documentation.

- Speak to tribal members by phone beforehand so that you know who will be attending the meeting. Allow tribes to send as many representatives as they wish, but explain any limitations that your agency may have with funding travel.

- Check if anyone has special needs. Some tribal elders may need special accommodations.

- Offer the tribal participants the opportunity to make an opening or welcoming statement.

- Make sure you invite tribal representatives to sit at the table with you, and introduce all participants with their proper titles. Check with your tribal contact beforehand so you know if certain officials or elders should be introduced and acknowledged first.

- Review your agency's mission and operations at the start of the meeting. Do not assume that everyone knows how your agency functions or is familiar with all of the programs it oversees.
- Take accurate notes during the meeting, or, ***if the tribe agrees in advance***, arrange for meetings to be recorded (it is still advisable to take notes to avoid problems should a recording be lost or damaged). It is important to document not only that you have consulted with the tribe, but the substance of the meeting and the views and concerns expressed by the tribe, as well. Be sensitive to the issue of confidentiality, which may require that you switch the recorder off, or to omit certain sensitive information from your notes if the tribe so requests. Documenting meeting content ensures that participants can later review and correct any inaccuracies, and also provides the agency with a solid consultation record.

- Remember that consent by one tribal member does not necessarily mean consent by the tribe. Make sure that the tribe's governing body has approved final decisions.

- Be prepared on the issues and be open to tribal perspectives.

Conclusion

We hope this handbook has been helpful. If needed, you may obtain further assistance from the ACHP in understanding and interpreting the requirements of Section 106, including tribal consultation. For general information, please visit the ACHP web site at www.achp.gov.

Preserving America's Heritage

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APPENDIX D

Preserving America s Heritage

ADVISORY COUNCIL ON HISTORIC PRESERVATION

POLICY STATEMENT
REGARDING
TREATMENT OF BURIAL SITES, HUMAN REMAINS AND FUNERARY OBJECTS

Preamble: This policy offers leadership in resolving how to treat burial sites, human remains, and funerary objects in a respectful and sensitive manner while acknowledging public interest in the past. As such, this policy is designed to guide federal agencies in making decisions about the identification and treatment of burial sites, human remains, and funerary objects encountered in the Section 106 process, in those instances where federal or state law **does not prescribe a course of action**.

This policy applies to all federal agencies with undertakings that are subject to review under Section 106 of the National Historic Preservation Act (NHPA; 16 U.S.C. § 470f), and its implementing regulations (36 CFR Part 800). To be considered under Section 106, the burial site must be or be a part of a historic property, meaning that it is listed, or eligible for listing, in the National Register of Historic Places.

The Advisory Council on Historic Preservation (ACHP) encourages federal agencies to apply this policy throughout the Section 106 process, including during the identification of those historic properties. In order to identify historic properties, federal agencies must assess the historic significance of burial sites and apply the National Register criteria to determine whether a property is eligible. Burial sites may have several possible areas of significance, such as those that relate to religious and cultural significance, as well as those that relate to scientific significance that can provide important information about the past. This policy does not proscribe any area of significance for burial sites and recognizes that the assessment must be completed on a case-by-case basis through consultation.

The policy is not bound by geography, ethnicity, nationality, or religious belief, but applies to the treatment of all burial sites, human remains, and funerary objects encountered in the Section 106 process, as the treatment and disposition of these sites, remains, and objects are a human rights concern shared by all.

This policy also recognizes the unique legal relationship between the federal government and tribal governments as set forth in the Constitution of the United States, treaties, statutes and court decisions, and acknowledges that, frequently, the remains encountered in Section 106 review are of significance to Indian tribes.

Section 106 requires agencies to seek agreement with consulting parties on measures to avoid, minimize, or mitigate adverse effects to historic properties. Accordingly, and consistent with Section 106, this policy does not recommend a specific outcome from the consultation process. Rather, it focuses on issues and perspectives that federal agencies ought to consider when making their Section 106 decisions. In many cases, federal agencies will be bound by other applicable federal, tribal, state, or local laws that do

prescribe a specific outcome, such as the Native American Graves Protection and Repatriation Act (NAGPRA). The federal agency must identify and follow applicable laws and implement any prescribed outcomes.

For undertakings on federal and tribal land that encounter Native American or Native Hawaiian human remains and funerary objects, NAGPRA applies. NHPA and NAGPRA are separate and distinct laws, with separate and distinct implementing regulations and categories of parties that must be consulted.[1] Compliance with one of these laws does not mean or equal compliance with the other. Implementation of this policy and its principles does not, in any way, change, modify, detract or add to NAGPRA or other applicable laws.

Principles: When burial sites, human remains, or funerary objects will be or are likely to be encountered in the course of Section 106 review, a federal agency should adhere to the following principles:

Principle 1: Participants in the Section 106 process should treat all burial sites, human remains and funerary objects with dignity and respect.

Principle 2: Only through consultation, which is the early and meaningful exchange of information, can a federal agency make an informed and defensible decision about the treatment of burial sites, human remains, and funerary objects.

Principle 3: Native Americans are descendants of original occupants of this country. Accordingly, in making decisions, federal agencies should be informed by and utilize the special expertise of Indian tribes and Native Hawaiian organizations in the documentation and treatment of their ancestors.

Principle 4: Burial sites, human remains and funerary objects should not be knowingly disturbed unless absolutely necessary, and only after the federal agency has consulted and fully considered avoidance of impact and whether it is feasible to preserve them in place.

Principle 5: When human remains or funerary objects must be disinterred, they should be removed carefully, respectfully, and in a manner developed in consultation.

Principle 6: The federal agency is ultimately responsible for making decisions regarding avoidance of impact to or treatment of burial sites, human remains, and funerary objects. In reaching its decisions, the federal agency must comply with applicable federal, tribal, state, or local laws**.**

Principle 7: Through consultation, federal agencies should develop and implement plans for the treatment of burial sites, human remains, and funerary objects that may be inadvertently discovered.

Principle 8: In cases where the disposition of human remains and funerary objects is not legally prescribed, federal agencies should proceed following a hierarchy that begins with the rights of lineal descendants, and if none, then the descendant community, which may include Indian tribes and Native Hawaiian organizations.

[1] The ACHP's publication *Consulting with Indian Tribes in the Section 106 Process* and the National Association of Tribal Historic Preservation Officers' publication *Tribal Consultation: Best Practices in Historic Preservation* provide additional guidance on this matter.

DISCUSSION:

Principle 1: Participants in the Section 106 process should treat all burial sites, human remains and funerary objects with dignity and respect.

Because the presence of human remains and funerary objects gives a historic property special importance as a burial site or cemetery, federal agencies need to consider fully the values associated with such sites. When working with human remains, the federal agency should maintain an appropriate deference for the dead and the funerary objects associated with them, and demonstrate respect for the customs and beliefs of those who may be descended from them.

Through consultation with descendants, culturally affiliated groups, descendant communities, and other parties, federal agencies should discuss and reach agreement on what constitutes respectful treatment.

Principle 2: Only through consultation, which is the early and meaningful exchange of information, can a federal agency make an informed and defensible decision about the treatment of burial sites, human remains, and funerary objects.

Consultation is the hallmark of the Section 106 process. Federal agencies must make a "reasonable and good faith" effort to identify consulting parties and begin consultation early in project planning, after the federal agency determines it has an undertaking and prior to making decisions about project design, location, or scope.

The NHPA, the ACHP's regulations, and Presidential Executive Orders set out basic steps, standards, and criteria in the consultation process, including:

- Federal agencies have an obligation to seek out all consulting parties [36 CFR § 800.2(a)(4)], including the State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer (THPO) [36 CFR § 800.3(c)].

- Federal agencies must acknowledge the sovereign status of Indian tribes [36 CFR § 800.2(c)(2)(ii)]. Federal agencies are required to consult with Indian tribes on a government-to-government basis in recognition of the unique legal relationship between federal and tribal governments, as set forth in the Constitution of the United States, treaties, statutes, court decisions, and executive orders and memoranda.

- Consultation on a government-to-government level with Indian tribes cannot be delegated to non-federal entities, such as applicants and contractors.

- Federal agencies should solicit tribal views in a manner that is sensitive to the governmental structures of the tribes, recognizing their desire to keep certain kinds of information confidential, and that tribal lines of communication may argue for federal agencies to provide extra time for the exchange of information.

- Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined eligible for inclusion on the National Register [16 U.S.C. § 470a(d)(6)(A)], and federal agencies must consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to such historic properties [16 U.S.C. § 470a(d)(6)(B) and 36 CFR § 800.2(c)(2)(ii)(D)].

Principle 3: Native Americans are descendants of original occupants of this country. Accordingly, in making decisions, federal agencies should be informed by and utilize the special expertise of Indian tribes and Native Hawaiian organizations in the documentation and treatment of their ancestors.

This principle reiterates existing legal requirements found in federal law, regulation and executive orders, and is consistent with positions that the ACHP has taken over the years to facilitate enfranchisement and promote broad participation in the Section 106 process. Federal agencies must consult with Indian tribes on a government-to-government basis because they are sovereign nations.

Indian tribes and Native Hawaiian organizations bring a special perspective on how a property possesses religious and cultural significance to them. Accordingly, federal agencies should utilize their expertise about, and religious and cultural connection to, burial sites, human remains, and associated funerary objects to inform decision-making in the Section 106 process.

Principle 4: Burial sites, human remains and funerary objects should not be knowingly disturbed unless absolutely necessary, and only after the federal agency has consulted and fully considered avoidance of impact and whether it is feasible to preserve them in place.

As a matter of practice, federal agencies should avoid impacting burial sites, human remains, and funerary objects as they carry out their undertakings. If impact to the burial site can be avoided, this policy does not compel federal agencies to remove human remains or funerary objects just so they can be documented.

As this policy advocates, federal agencies should always plan to avoid burial sites, human remains, and funerary objects altogether. When a federal agency determines, based on consultation with Section 106 participants, that avoidance of impact is not appropriate, the agency should minimize disturbance to such sites, remains, and objects. Accordingly, removal of human remains or funerary objects should occur only when other alternatives have been considered and rejected.

When a federal agency determines, based on consultation with Section 106 participants, that avoidance of impact is not appropriate, the agency should then consider any active steps it may take to preserve the burial site in place, perhaps through the intentional covering of the affected area, placement of markers, or granting of restrictive or other legal protections. In many cases, preservation in place may mean that, to the extent allowed by law, the locations of burial sites, human remains, and funerary objects should not be disclosed publicly. Alternatively and consistent with the Section 106 regulations [36 CFR § 800.5(a)(2)(vi)], natural deterioration of the remains may be the acceptable or preferred outcome of the consultation process.

Principle 5: When human remains or funerary objects must be disinterred, they should be removed carefully, respectfully, and in a manner developed in consultation.

When the federal agency decides that human remains or funerary objects must be disturbed, they should be removed respectfully and dealt with according to the plan developed by the federal agency in consultation. "Careful" disinterment means that those doing the work should have, or be supervised by people having, appropriate expertise in techniques for recognizing and disinterring human remains.

This policy does not endorse any specific treatment. However, federal agencies must make a reasonable and good faith effort to seek agreement through consultation before making its decision about how human remains and/or funerary objects shall be treated.

The plan for the disinterment and treatment of human remains and/or funerary objects should be negotiated by the federal agency during consultation on a case-by-case basis. However, the plan should provide for an accurate accounting of federal implementation. Depending on agreements reached through the Section 106 consultation process, disinterment may or may not include field recordation. In some instances, such recordation may be so abhorrent to consulting parties that the federal agency may decide it is inappropriate to carry it out. When dealing with Indian tribes, the federal agency must comply with its legal responsibilities regarding tribal consultation, including government-to-government and trust responsibilities, before concluding that human remains or funerary objects must be disinterred.

Principle 6: The federal agency is ultimately responsible for making decisions regarding avoidance of impact to or treatment of burial sites, human remains, and funerary objects. In reaching its decisions, the federal agency must comply with applicable federal, tribal, state, or local laws.

Federal agencies are responsible for making final decisions in the Section 106 process [36 CFR § 800.2(a)]. The consultation and documentation that are appropriate and necessary to inform and support federal agency decisions in the Section 106 process are set forth in the ACHP's regulations [36 CFR Part 800].

Other laws, however, may affect federal decision-making regarding the treatment of burial sites human remains, and funerary objects. Undertakings located on federal or tribal lands, for example, are subject to the provisions of NAGPRA and the Archaeological Resources Protection Act (ARPA). When burial sites, human remains, or funerary objects are encountered on state and private lands, federal agencies must identify and follow state law when it applies. Section 106 agreement documents should take into account the requirements of any of these applicable laws.

Principle 7: Through consultation, federal agencies should develop and implement plans for the treatment of burial sites, human remains, and funerary objects that may be inadvertently discovered.

Encountering burial sites, human remains, or funerary objects during the initial efforts to identify historic properties is not unheard of. Accordingly, the federal agency must determine the scope of the identification effort in consultation with the SHPO/THPO, Indian tribes and Native Hawaiian

organizations, and others before any archaeological testing has begun [36 CFR § 800.4(a)] to ensure the full consideration of avoidance of impact to burial sites, human remains, and funerary objects.

The ACHP's regulations provide federal agencies with the preferred option of reaching an agreement ahead of time to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking. In the absence of prior planning, when the undertaking has been approved and construction has begun, the ACHP's post-review discovery provision [36 CFR § 800.13] requires the federal agency to carry out several actions:

(1) make reasonable efforts to avoid, minimize, or mitigate adverse effects to such discovered historic properties;
(2) notify consulting parties (including Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to the affected property) and the ACHP within 48 hours of the agency's proposed course of action;
(3) take into account the recommendations received; and then
(4) carry out appropriate actions.

NAGPRA prescribes a specific course of action when Native American and Native Hawaiian human remains and funerary objects are discovered on federal or tribal lands in the absence of a plan—cessation of the activity, protection of the material, notification of various parties, consultation on a course of action and its implementation, and then continuation of the activity. However, adherence to the plan under Principle 5 would cause new discoveries to be considered "intentional excavations" under NAGPRA because a plan has already been developed, and can be immediately implemented. Agencies then could avoid the otherwise mandated 30 day cessation of work for "inadvertent discoveries."

Principle 8: In cases where the disposition of human remains and funerary objects is not legally prescribed, federal agencies should proceed following a hierarchy that begins with the rights of lineal descendants, and if none, then the descendant community, which may include Indian tribes and Native Hawaiian organizations.

Under the ACHP's regulations, "descendants" are not identified as consulting parties by right. However, federal agencies shall consult with Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to burial sites, human remains and associated funerary objects, and be cognizant of their expertise in, and religious and cultural connection to, them. In addition, federal agencies should recognize a biological or cultural relationship and invite that individual or community to be a consulting party [36 CFR § 800.3(f)(3)].

When federal or state law does not direct disposition of human remains or funerary objects, or when there is disagreement among claimants, the process set out in NAGPRA may be instructive. In NAGPRA, the "ownership or control" of human remains and associated funerary objects lies with the following in descending order: specific lineal descendants; then tribe on whose tribal lands the items were discovered; then tribe with the closest cultural affiliation; and then tribe aboriginally occupying the land, or with the closest "cultural relationship" to the material.

Definitions Used for the Principles

- **Burial Site**: Any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited [25 U.S.C. 3001.2(1)].
- **Consultation:** The process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 review process [36 CFR § 800.16(f)].
- **Consulting parties:** Persons or groups the federal agency consults with during the Section 106 process. They may include the State Historic Preservation Officer; the Tribal Historic Preservation Officer; Indian tribes and Native Hawaiian organizations; representatives of local governments; applicants for federal assistance, permits, licenses, and other approvals; and/or any additional consulting parties [based on 36 CFR § 800.2(c)]. Additional consulting parties may include individuals and organizations with a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties [36 CFR § 800.2(c)(6)].
- **Disturbance:** Disturbance of burial sites that are listed in or eligible for listing in the National Register of Historic Places will constitute an adverse effect under Section 106. An adverse effect occurs when "an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, setting, materials, workmanship, feeling, or association" [36 CFR § 800.5(a)(1)].
- **Federal land:** Lands under a federal agency's control. Mere federal funding or permitting of a project does not turn an otherwise non-federal land into federal land (see *Abenaki Nation of Mississquoi* v. *Hughes*, 805 F. Supp. 234 (D. Vt. 1992), aff'd, 990 F. 2d 729 (2d Cir. 1993) (where the court found that a Clean Water Act permit issued by the US Army Corps of Engineers did not place the relevant land under federal "control" for NAGPRA purposes).
- **Funerary objects:** "items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains" [25 U.S.C. 3001(3)(B)].
- **Historic property:** "Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register of Historic Places criteria" [36 CFR § 800.16(1)].
- **Human remains:** The physical remains of a human body. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets [see 43 CFR § 10.2(d)(1)].
- **Indian Tribe**: "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" [36 CFR § 800.16(m)].
- **Native American:** Of, or relating to, a tribe, people, or culture that is indigenous to the United States [25 U.S.C. 3001 (9)]. Of, or relating to, a tribe, people, or culture indigenous to the Unites States, including Alaska and Hawaii [43 CFR 10.2(d)].

- **Native Hawaiian:** Any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the state of Hawaii [36 CFR § 800.16(s)(2)].
- **Native Hawaiian Organization:** Any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians [36 CFR § 800.16(s)].
- **Policy statement:** A formal statement, endorsed by the full ACHP membership, representing the membership's collective thinking about what to consider in reaching decisions about select issues, in this case, human remains and funerary objects encountered in undertakings on federal, tribal, state, or private lands. Such statements do not have the binding force of law.
- **Preservation in place:** Taking active steps to ensure the preservation of a property.
- **Protection of Historic Properties**: Regulations [36 CFR Part 800] implementing Section 106 of the National Historic Preservation Act.
- **Section 106**: That part of the National Historic Preservation Act which establishes a federal responsibility to take into account the effects of undertakings on historic properties and to provide the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such action.
- **State Historic Preservation Officer:** The official appointed or designated pursuant to Section 101(b)(1) of NHPA to administer the state historic preservation program.
- **Tribal Historic Preservation Officer**: The official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of Section 106 compliance on tribal lands in accordance with Section 101(d)(2) of NHPA.
- **Treatment:** Under Section 106, "treatments" are measures developed and implemented through Section 106 agreement documents to avoid, minimize, or mitigate adverse effects to historic properties.

Acronyms Used for the Policy Statement
- **ACHP**: Advisory Council on Historic Preservation.
- **ARPA**: Archaeological Resources Protection Act [16 U.S.C. 470aa-mm].
- **NHPA**: National Historic Preservation Act [16 U.S.C. § 470f].
- **NAGPRA**: The Native American Graves Protection and Repatriation Act [25 U.S.C. 3001 et seq].
- **SHPO**: State Historic Preservation Officer
- **THPO**: Tribal Historic Preservation Officer

[The members of the Advisory Council on Historic Preservation unanimously adopted this policy on February 23, 2007]

APPENDIX E: MAP OF TRIBAL INTEREST