



Preserving America's Heritage

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

Advisory Council on Historic Preservation
February 3, 2010

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

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

Introduction

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

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

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

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

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

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

ACHP actions or policies that might affect tribal governments:

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

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

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

ACHP actions or policies that may not have tribal implications:

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

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

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

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