

Tribal Transportation

Section 106 Tribal Consultation Q & A's

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1. When is FHWA required to consult with Indian Tribes or Native Hawaiian Organizations^[1]?

The 1992 Amendments to the National Historic Preservation Act (NHPA) require all Federal agencies to consult with Indian Tribes ^[1] or Native Hawaiian organizations for undertakings which may affect properties of traditional religious and cultural significance on or off Tribal lands. The Section 106 regulations (36 CFR 800) implementing the NHPA were revised on January 11, 2001 to reflect this change. Section 36 CFR 800.2(c)(2)(ii)(A) states that "the agency official ^[2] shall ensure that consultation in the Section 106 process provides the Indian Tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects."

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2. What Tribes need to be consulted?

Federally recognized Tribes or Native Hawaiian organizations that attach religious and cultural significance to properties that may be affected by Federal-aid undertakings on or off Tribal Lands. This includes Tribes that no longer reside in a given area, but may still have ancestral affiliations to a place. Tribes have been mobile both historically and ancestrally and may very well have places that are important to them in locations where they may not have physically resided for hundreds or even thousands of years.

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3. How do I determine if a Tribe has Federal recognition?

A list of federally recognized tribes is available at www.doi.gov/bureau-indian-affairs

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4. How do I identify all the Tribes that may have an interest in an area?

Any number of documentary sources can be used including ethnographies, field records, histories, experts at local universities, and oral accounts keeping in mind that no one source is comprehensive. The State Historic Preservation Officer (SHPO) or other Tribal Historic Preservation Officers (THPO) should also be consulted for any records they may maintain for this purpose. The Native American Consultation Database (NACD) is helpful in identifying Tribes with an interest in an area. This database can be accessed on line at web.cast.uark.edu/other/nps/nacd/. In addition, the web site: MAPS: GIS Windows on Native Lands, Current Places, and History (<http://www.kstrom.net/isk/maps/mapmenu.html>) provides

maps on current and ancestral locations of Indian lands. The web site: Indian Land Cessions in the United States is also an invaluable resource on historic Indian land areas. The site can be found at <http://www.memory.loc.gov/ammem/amlaw/lwss-ilc.html>. Finally, consultants can be used in order to compile the available resources and provide the agency with the required information.

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5. Who should make formal contact with Tribes?

Agency officials should initiate contact with Tribes at the highest level. Tribes are sovereign nations and must be shown the same respect and formality as any other independent nation. The agency official needs to consult with individuals designated by the Tribe or Native Hawaiian organization for this purpose. Once a Tribe has been contacted, protocols for consultation can then be developed through discussions and meetings with individual Tribes. These may differ from Tribe to Tribe or Native Hawaiian organization as each may have very different belief systems, worldviews, and cultural protocols.

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6. With whom do I make initial contact at Tribes or Native Hawaiian organizations to begin the consultation process?

The NACD includes a list of contact people at federally recognized Tribes and Native Hawaiian organizations for each State <http://web.cast.uark.edu/other/nps/nacd/>. The contact is generally the Chief, Chairperson, Governor, or President of the Tribe.

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7. What are appropriate consultation methods?

Sending a letter can begin the consultation process by alerting Tribes or Native Hawaiian organization about specific projects. Letters should be followed up by phone calls and meetings, particularly if there is no response to an initial attempt at contact. The agency officials should confer with Tribes or Native Hawaiian organizations, identify their concerns and come up with mutually agreeable solutions for specific projects. Some consulting parties may not wish to be notified about every project that comes up in a given area or location. Formalized meetings can help determine what types of projects, and specific locations or undertakings are of concern to individual Tribes or Native Hawaiian organizations.

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8. How can FHWA allow the DOTs to carry out Tribal consultation?

The FHWA cannot delegate its government-to-government responsibility and overall consultation and coordination responsibility duties. However, the FHWA may rely on State DOTs to carry out day-to-day and project specific consultation, as long as the Tribes agree. Section 800.2 (c)(4) of the regulations allows the agency official to "authorize an applicant or group of all applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official." However, the agency official must also "notify the SHPO/THPO when an applicant or group of applicants is so authorized."

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9. What are Traditional Cultural Properties (TCPs)?

The term "Traditional Cultural Property" is used by the National Register of Historic Places 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^[3]". In order for a TCP to be found eligible for the National Register, it must meet the existing criteria for eligibility as a building, site, structure, object, or district.

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10. Does FHWA need to consult on Properties of Religious and Cultural Significance not eligible for the National Register?

No. However, the agency official will need to consult with the Tribe or Native Hawaiian organization in making National Register eligibility determinations. For historic properties on tribal land, the THPO or designated tribal official must concur with the Federal agency. Off tribal land, such concurrence is not required.

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11. How can I identify historic properties that may possess traditional religious and cultural significance to Tribes or Native Hawaiian organizations and determine their National Register eligibility?

The identification of properties of traditional religious and cultural significance can be very difficult for those of us unfamiliar with specific cultural practices. Some cultural resource management consulting firms employ ethnographers who may be trained in identifying these types of sites. The SHPO/THPO should also be contacted for information about the location of properties known to have traditional religious and cultural significance. Tribes or Native

Hawaiian organizations must be consulted, and may need to make site visits in some cases, to assist in identifying these types of properties. As noted in Section 800.4(c)(1) "The agency official shall acknowledge that Indian Tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." The National Park Service has published "Guidelines for Evaluating and Documenting Traditional Cultural Properties ^[3]" (available on-line at <http://www2.cr.nps.gov/tribal/bull3803.html>) to assist in the identification of Traditional Cultural Properties as eligible for the National Register.

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12. What procedures should be followed if a Tribe does not want to divulge information to agency officials regarding places of traditional religious and cultural significance?

Many Tribes and Native Hawaiian organizations beliefs systems require that the location and even the existence of traditional religious and cultural properties not be divulged. It is thus vital that agency officials work with Tribes to identify sensitive locations while respecting tribal desires to withhold specific information about these types of sites. Section 304 of the National Historic Preservation Act permits Federal agencies to withhold sensitive information from public disclosure. Issues surrounding confidentiality concerns can also be included in an agreement document between the Tribe and Federal Agency as provided under Section 800.2(c)(2)(ii)(E) of the regulations. For additional guidance about confidentiality see National Register Bulletin 29, Guidelines for Restricting Information About Historic and Prehistoric Resources (order at: <http://www.cr.nps.gov/nr/publications/bulletins.htm>).

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13. Can FHWA fund Tribal consultation?

Yes. FHWA can fund Tribal consultation under certain circumstances, but is not required to do so. However, FHWA's current environmental regulations provide for participation in all costs necessary to mitigate the adverse impacts of the project to the human and natural environment so long as the costs (1) actually result from FHWA's action and (2) the proposed measure is deemed a public expenditure after considering the impacts of the action and the benefit of the proposed mitigation measure (23 CFR 771.105(d)). This includes the costs of consulting with affected Tribes in order to determine the National Register eligibility of a site or in determining the presence of sites with traditional religious and cultural significance. Note, however, that TEA-21 funds cannot be used to fund Tribes as they are not included in the definition of a "federal agency." If the activities are considered for funding, a Memorandum of Understanding (MOU) or other written agreement must be executed to specify the exact nature of the consultation that will be covered. For additional information on funding

see FHWA's environmental streamlining web site
at <http://environment.fhwa.dot.gov/strmlng/index.htm>.

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14. What specific activities are eligible for reimbursement?

Examples of reimbursable costs may include those costs associated with expert consultants to identify historic properties. This includes field visits to provide information about specific places or sites, monitoring activities, research associated with project level historical investigation and travel expenses.

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15. What costs are not eligible for reimbursement?

FHWA cannot participate in the review of documents, or in the establishment and general operating costs of a THPO such as the cost of securing office space and utilities, paying salaries of administrative personnel, and purchasing office equipment. As with other Federal-aid funding decisions, specific eligibility determinations related to project level costs and maintenance expenses are the discretion of the State at the time of the funding request.

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16. Are there processes available for streamlining Tribal consultation?

Yes. Consultation can be addressed through the development of agreements between the agency and the Tribe (800.2(c)(2)(ii)(E)), thereby speeding up the consultation process. Agreement documents can specify in what manner consultation will be carried out including concerns about confidentiality. Such agreement documents can cover all aspects of the Section 106 process "provided that no modification may be made in the roles for other parties to the Section 106 process without their consent." States can also include Tribes or Native Hawaiian organizations in the development of Section 106 Programmatic Agreements (800.14) for highway projects. These PAs may allow the State DOTs to conduct some Section 106 review and can include provisions to exempt certain types of activities (such as the replacement of traffic lights) from Section 106 review. Such agreement documents may ensure that Tribes or Native Hawaiian organizations are not asked to consult about minor highway projects, exempted projects, or areas that have been previously disturbed. The Section 106 regulations also have a streamlining provision for consultation that allows for multiple steps within the Section 106 process to be addressed simultaneously as long as the agency official and SHPO/THPO agree and as long as the consulting parties and public have had a chance to express their views (800.3(g)).

[¹] The NHPA defines "Indian Tribe" as 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 special programs and services provided by the United States to Indians because of their status as Indians" (16 U.S.C. 470w).

[²] Section 106 of the NHPA says that an agency official "may be a State, local, or tribal government official who has been delegated the legal responsibility for compliance with Section 106 in accordance with Federal law" (Sec. 800.2(a)).

[³] Guidelines for Evaluating and Documenting Traditional Cultural Properties. National Register Bulletin 38. U.S. Department of the Interior. 1994.