



Preserving America's Heritage

GUIDE TO WORKING WITH NON-FEDERALLY RECOGNIZED TRIBES IN THE SECTION 106 PROCESS

Table of Contents

- Introduction and Purpose.....Page 1
- Terminology.....Page 2
- Involving Non-Federally Recognized Tribes in the Section 106 Process.....Page 3
- Why Some Tribes Are Not Federally Recognized.....Page 4
(Including several examples of non-federally recognized tribes)
- Conclusion.....Page 7

Introduction and Purpose

The National Historic Preservation Act of 1966 (NHPA) established a comprehensive program to preserve the historical and cultural foundations of the nation. Section 106 of the NHPA is central to that program and requires federal agencies to consider the effects of projects they carry out, assist, fund, permit, license, or approve (undertakings) on historic properties.¹ As part of this review process, federal agencies consult with interested parties to identify and evaluate historic properties, assess the effects of the undertakings on these properties, and attempt to negotiate an outcome that will balance project needs and historic preservation values. Federal agencies must consult with certain parties who have concerns about historic properties that may be affected by undertakings (discussed in more detail below). Federal agencies should also consider reaching out as broadly as possible when gathering information about potential historic properties in the project area and to obtain views from all interested parties about historic properties that may be important to them. This guide focuses on one such interested party: non-federally recognized tribes.

This document provides information and guidance for federal agencies regarding engagement with non-federally recognized tribes in the Section 106 process. The question of whether to invite non-federally recognized tribes to participate in the review process can be both complicated and sensitive and thus deserves careful consideration. State-recognized tribes and other tribal entities often have interests in undertakings within their homelands, just as federally recognized Indian tribes do. Non-federally recognized tribes may be invited by federal agencies to participate in the Section 106 process as parties with demonstrated interests in projects or they may seek to participate through collaboration with federally recognized Indian tribes already engaged in the process.

The Section 106 process is designed to ensure inclusiveness of those parties who may have an interest in historic resources that may be affected by proposed federal undertakings. The regulations at 36 C.F.R. Part 800 outline the review process and discuss the parties that must be invited to participate as well as those parties that may be invited. Agency officials with jurisdiction over undertakings are required to

¹ Historic properties are defined as those properties that are listed, or are eligible for listing, on the National Register of Historic Places.

consult with state historic preservation officers (SHPOs), Indian tribes (meaning federally recognized Indian tribes), Native Hawaiian organizations (NHOs), tribal historic preservation officers (THPOs), local governments, and project applicants. Additional consulting parties may be invited to participate in the process. The Advisory Council on Historic Preservation (ACHP) may participate in the process and must be notified of adverse effects. As members of the public and American citizens, both non-federally recognized tribes and their individual members are entitled to the same consideration all citizens of the U.S. have in the Section 106 process. This guidance provides background and information on the participation of these citizens, and clarifies how those rights differ from those of Indian tribes and NHOs.

The indigenous populations in Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau, like non-federally recognized tribes, also do not have formal government-to-government relationships with the U.S. government, as federally recognized Indian tribes do, but they may have important information to contribute to the Section 106 process.

The United Nations Declaration on the Rights of Indigenous Peoples (U.N. Declaration), which has been supported by the U.S. since 2010, encourages recognition of the special status and rights of indigenous peoples globally. While not legally binding, it is acknowledged by the U.S. as having “both moral and political force.”² In 2013, the ACHP adopted a [plan](#) to support the U.N. Declaration, acknowledging intersections between Section 106 and the Declaration. While many articles in the U.N. Declaration relate to or intersect with Section 106, Article 18 which addresses the rights of indigenous peoples to have a role in decision-making processes, most closely aligns with the consultation rights afforded to Indian tribes and NHOs in the Section 106 process. Article 18 states that, “Indigenous peoples have the right to participate in decision making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.” The fact that the Declaration includes a provision regarding the rights of indigenous peoples to participate in decision making underscores the importance of federal agency consultation with all indigenous peoples in the U.S. in the Section 106 process when historic properties of significance to them may be affected by proposed undertakings.³

The ACHP, in its work to build a more inclusive preservation program, explains that

“The diversity of cultures in our country shape and enrich the American experience, and the federal government can continue to encourage wider involvement and representation in determining what historic sites are worthy of recognition and preservation; how history and cultural heritage should be valued, interpreted, and preserved; and how we can ensure the American public as a whole can take advantage of the programs and tools created under the National Historic Preservation Act.”⁴

This guidance, therefore, supports such goals to broaden the involvement and representation of interested citizens in historic preservation reviews.

Terminology

It should be understood at the outset that the term “Indian tribe” is defined in the NHPA 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)), that is recognized as eligible for the special programs and services

² <http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pdf>

³ For a more detailed discussion of Article 18 and Section 106: <http://www.achp.gov/docs/UNDeclaration106.pdf>

⁴ <http://www.achp.gov/inclusiveness.html>

provided by the United States to Indians because of their status as Indians.” Therefore, the term “Indian tribe” refers to federally recognized Indian tribes. The federal government has a unique political and legal relationship with Indian tribes not shared by non-federally recognized tribes. The federal government has a trust responsibility to Indian tribes that it does not have with non-federally recognized tribes. And, the federal government works with Indian tribes on a nation-to-nation basis but does not do so with any other indigenous groups, including NHOs.

Therefore, in this guidance, the term “Indian tribe” means those tribes that are federally-recognized. While the term “non-federally recognized tribe” is not defined in federal laws, it can include state-recognized tribes and tribal entities without state or federal recognition. State-level Indian Commissions and organizations also often include non-federally recognized tribes in their membership. Many Indian tribes have strong and long-standing relationships—as well as kinship ties—with non-federally recognized tribes and recognize them as tribes.

Involving Non-Federally Recognized Tribes in the Section 106 Process

In carrying out Section 106, a federal agency may invite state-recognized tribes or tribes with neither federal nor state recognition to participate in the review process as “additional consulting parties” based on a “demonstrated interest” in an undertaking’s effects on historic properties.⁵

The decision to invite a non-federally recognized tribe to participate in the Section 106 process is a discretionary decision by the federal agency.⁶ While the NHPA provides Indian tribes and NHOs the right to be consulted in Section 106, the inclusion of non-recognized tribes is completely discretionary and is not done on a government-to-government basis. Only Indian tribes have a government-to-government relationship with the federal government. Inviting non-federally recognized tribes to participate in the process does not in any way diminish or alter the unique legal and political relationship between federal agencies and Indian tribes.

While non-federally recognized tribes do not have a statutory right to be included in the Section 106 process, an agency may invite them to participate, as noted above, if they have a demonstrated interest in a project. They may also have important information about historic properties in the project area.⁷ For example, some non-federally recognized tribes still have ancestral ties to an area or still occupy their aboriginal territory. Members of non-federally recognized tribes may be direct descendants of indigenous peoples who once occupied an area affected by an undertaking, or can provide additional information regarding historic properties that should be considered in the review process.

While federal agencies should consider whether a non-federally recognized tribe has a demonstrated interest in a historic property, their inclusion may raise objections from some Indian tribes. Other Indian tribes, however, routinely support the inclusion of non-recognized tribes in the consultation process, recognizing their interests. In some areas, members of Indian tribes and non-federally recognized tribes are related through both kinship and socio-political connections. One potential difficulty is when groups or individuals claim to represent Indian tribes or present themselves as Indian (federally or non-federally recognized) when they cannot substantiate these claims. When questions arise concerning such situations,

⁵ 36 C.F.R. §§ 800.2(c)(5) and 800.3(f)(3)

⁶ For purposes of this guide’s discussion of consulting party status, the assumption is made that the non-federally recognized tribe is not the applicant for the relevant federal assistance, permit, license, or approval in the undertaking. Such applicants are entitled to be consulting parties in the Section 106 process regardless of whether they are a non-federally recognized tribe or any other type of entity. 36 C.F.R. § 800.3(c)(4).

⁷ 36 C.F.R. § 800.2(c)(5)

Indian tribes, the state Indian commission (or similar agency), the SHPO, or other state office designated to handle Section 106 review, could all be of assistance with these questions.

Non-federally recognized tribes can also facilitate their involvement in the Section 106 process a number of ways. In addition to ensuring that all federal agencies know the tribe's areas of interest (areas where the tribe has had a presence over time), SHPOs and Indian tribes could keep a non-federally recognized tribe informed of projects being undertaken by federal agencies. Non-federally recognized tribes can also delegate a representative (similar to a THPO) as a primary point of contact for historic preservation, who can develop relationships and maintain contact with federal agencies.

The ultimate decision about whether to invite non-federally recognized tribes to participate in the Section 106 process rests with the federal agency. The decision should be given careful consideration and take into account relevant information provided by Indian tribes (or the THPO or designated tribal official) or the SHPO. If the federal agency decides it is inappropriate to invite non-federally recognized tribes to consult as "additional consulting parties," those tribes can still provide views and information to the federal agency as members of the public.

Not granting consulting party status to parties that have a demonstrated interest in affected historic properties is legally allowable but may defeat the ultimate intent of Section 106. The process is intended to ensure federal agencies make informed decisions on undertakings that could affect historic properties and reasonably attempt to resolve adverse effects to them. Because non-federally recognized tribes may have information that assists the Section 106 process, consulting with them can enhance agencies' decision-making processes.

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 consulting parties, as appropriate. Sometimes, Indian tribes are only willing to share sensitive information with the federal agency (as part of the government-to-government relationship) and not with other consulting parties, including other tribes (federally recognized or non-federally recognized). If confidentiality concerns are anticipated, the federal agency should have a plan in place for handling these concerns in accordance with applicable law. Such a plan would also provide parties with clear expectations about how these issues will be handled. Confidentiality of sensitive information is a very important issue in Section 106 tribal consultation, and for all stakeholders in the process.

Why Some Tribes Are Not Federally Recognized

In at least 14 states, tribal entities are recognized at the state level as having self-government authority outside of federal processes: Alabama, Connecticut, Delaware, Georgia, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, North Carolina, Vermont, Virginia, and Washington.⁸ As a result of historical circumstances, some states have complicated situations. It is important to note that, unlike the limited number of pathways to federal recognition, states have their own unique processes for recognizing tribes. The U.S. Government Accountability Office has identified approximately 400 non-federally recognized tribal entities in the U.S.⁹ Some non-federally recognized tribes lost their recognition as a result of federal government actions in the 1950s and 1960s that terminated government-to-government relationships with Indian tribes, making them now ineligible to apply to the Bureau of Indian Affairs (BIA) for recognition.

⁸ <http://www.acf.hhs.gov/programs/ana/resource/american-indians-and-alaska-natives-what-are-state-recognized-tribes>

⁹ <http://www.gao.gov/assets/600/590102.pdf>

State-recognized tribes have existed since the end of the Colonial period, beginning in New England and the East Coast, and have had important roles in the development of policy over the centuries. Virginia, for example, had 11 state-recognized tribes until recently when seven gained federal recognition. One of the earliest reservations in the country was established in 1666 in Connecticut for the Pequot Indians, a portion of which is occupied today by the state-recognized Eastern Pequot Tribal Nation.¹⁰ In California, while the state does not formally recognize tribes, there are at least 45 tribal communities that were either terminated by the U.S. government as part of the federal termination policy of the 1950s-60s or never formally recognized.¹¹

If not already recognized by the federal government through treaties or Presidential executive orders, tribes can become federally recognized in one of three ways: judicially (a federal court decision), congressionally (Congress passes law) or administratively (a determination by the Assistant Secretary of Indian Affairs) through a process outlined in 25 C.F.R. part 83 and evaluated by the BIA.¹² Since the establishment of these regulations in 1978, many tribes have applied for acknowledgement, submitting documentation to demonstrate they meet the criteria outlined in the process. For tribes impacted by colonial settlement, Christianization, and other acculturation factors for 400 years, providing uninterrupted documentation of their continued presence to satisfy the regulations can be a difficult or impossible task. While a number of tribes remain unrecognized because they could not provide sufficient evidence to demonstrate continued existence (without gaps) as a tribal entity throughout time, a number do retain status as state-recognized entities.

Examples of Non-Federally Recognized Tribes

EXAMPLE 1:

Some tribes have consciously chosen not to pursue federal recognition for varying reasons. For example, the Wanapum Tribe of Washington has chosen this path, remaining independent from the federal government. However, the Tribe, along with Indian tribes in the region, is regularly invited to participate in Section 106 reviews and other processes such as the Native American Graves Protection and Repatriation Act (NAGPRA). The Tribe also maintains a heritage center.¹³

EXAMPLE 2:

Other tribes have spent decades unsuccessfully working toward federal acknowledgement through the administrative process (25 C.F.R. part 83). The Nipmuc Nation of Massachusetts began federal acknowledgment efforts in 1980; two years after the regulations were established. The tribe had to demonstrate a continued presence (without gaps) through written documentation dating back to the early 1600s to satisfy requirements in the regulations. The tribe is state recognized with a tax-free reservation and tuition-free education at state institutions for tribal members, but cannot take advantage of most federally-funded programs reserved for Indian tribes with federal acknowledgment due to an unsuccessful 30-plus year attempt to gain recognition.

EXAMPLE 3:

The Brothertown Indian Nation in Wisconsin is also not recognized by the federal government. The tribe has roots in New England and New York, with historical connections to the Mohegan, Montauk, Narragansett, Niantic, Pequot and Tunxis peoples, in addition to the Oneida and Stockbridge-Munsee. After several moves westward from New England between the late 1700s and late 1820s, the tribe settled on the eastern shore of Lake Winnebago in Wisconsin. The tribe did not want to relocate again when

10 <http://www.mashantucket.com/tribalhistory.aspx>; <http://www.easternpequottribalnation.com/history.html>

11 <http://www.courts.ca.gov/3066.htm>

12 For more information on tribal acknowledgment, see <https://www.bia.gov/as-ia/ofa>

13 <http://wanapum.org>

Congress enacted the Indian Removal Act in 1830 and sought to move it to the Kansas Territory. Congress eventually granted the tribe's request for allotment of reservation land and U.S. citizenship, passing an Act on March 3, 1839, and preventing tribal members from being removed from their Wisconsin land base.¹⁴

Like the Nipmuc Nation, the Brothertown Indian Nation filed a letter of intent to seek recognition under the acknowledgment regulations in 1980, after the government stopped extending benefits to the tribe and reclassified it as no longer federally acknowledged. In 1990, the Department of the Interior informed the tribe that the 1839 Congressional Act granting citizenship and allotment of the reservation was *not* a form of termination, but then in 2012 reversed this decision and stated that the 1839 Act *was* an act of termination, which therefore excluded the tribe from being eligible for modern-day recognition through the regulations.¹⁵ From the perspective of the Brothertown Indian Nation, federal acknowledgement will be a "re-recognition" of what it once had as a reservation tribe, firmly established in Wisconsin for generations. The tribe asserts that it did not in any way see accepting citizenship and allotment of reservation land in the 1830s as forfeiting acknowledgement as Indian or as a tribe.¹⁶

EXAMPLE 4:

Attempts to achieve federal recognition by the Lumbee Tribe of North Carolina began more than 125 years ago, with efforts to obtain federal funding for an Indian school in Robeson County. The tribe has had a continuous presence in and around this area since the early 18th century. In 1885, the tribe was recognized by the state and has sought federal recognition since 1888. In 1956, Congress passed the Lumbee Act, also recognizing the tribe as Indian but withholding full benefits received by other recognized tribes. In 1987, the tribe petitioned the U.S. Department of the Interior for acknowledgment, which was denied due to language in the 1956 Lumbee Act. The tribe continues efforts to get legislation passed granting federal recognition but in the meantime retains status as a state-recognized tribe in North Carolina.¹⁷

These are just a few examples that demonstrate the various circumstances under which non-federally recognized tribal entities can exist in the 21st century, either from having lost federal acknowledgement through previous laws or actions; failing to satisfy the federal acknowledgement criteria;¹⁸ or, choosing not to pursue acknowledgment by the federal government as an assertion of genuine sovereignty.

Conclusion

While a statutory requirement exists to consult with Indian tribes and NHOs in the Section 106 review process when historic properties of religious and cultural significance to them may be affected, federal agencies should remember that non-federally recognized tribes can and often should also be involved. Their contributions to the process can include a deep knowledge of the history of and resources in their homelands including historic properties that should be considered in the Section 106 process. For

¹⁴ <http://www.brothertownindians.org/heritage/tribal-alliance/>; Kathleen Brown-Perez (personal communication)

¹⁵ Criterion (g) of the mandatory criterion for federal acknowledgment at 25 CFR § 83.7 states that: "Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship." <https://www.gpo.gov/fdsys/pkg/CFR-2011-title25-vol1/pdf/CFR-2011-title25-vol1-sec83-7.pdf>

¹⁶ <http://www.brothertownindians.org/government/recognition-restoration/>; Kathleen Brown-Perez (personal communication)

¹⁷ <http://www.lumbee Tribe.com/#!/history--culture/c20mm>

¹⁸ Recently revised so tribes do not have to document continuity back to colonial times but only to 1900; <http://www.ecfr.gov/cgi-bin/text-idx?SID=64048aabd80c642ca2ec39623166d704&mc=true&node=pt25.1.83&rgn=div5>

example, the Wanapum of Washington and Nipmuc of Massachusetts have lived in their homelands for thousands of years, and the Lumbee of North Carolina has occupied their present-day homelands for generations.

Additionally, many non-recognized tribes are currently going through the acknowledgement process, and may become recognized in the future. The Pamunkey Tribe of Virginia had been one of 11 state-recognized tribes until it received federal recognition through the administrative process. On January 29, 2018, the President signed into law the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act which extends federal recognition to six of the tribes in Virginia. An invitation to these tribes to participate in the Section 106 process will now be required when an undertaking may affect historic properties of religious and cultural significance to them. Including non-federally recognized tribes that sometimes become federally recognized, can only strengthen the Section 106 process. Some state laws and regulations include special provisions for non-recognized tribes that need to be factored into planning for projects that require compliance with state laws.

Members of non-recognized tribes are also American citizens, entitled to the same considerations all citizens have in the Section 106 process. The ACHP's regulations provide that participants in the process may include individuals and organizations with a demonstrated interest in federal undertakings. Additionally, the views of the public must be considered. Non-recognized tribes may fall into either of these categories.

The U.N. Declaration encourages recognition of the special status and rights of indigenous peoples, and the ACHP acknowledges intersections of the U.N. Declaration and Section 106. Federal agencies may invite state-recognized tribes or tribes with neither federal nor state recognition to participate in consultation as "additional consulting parties" based on a demonstrated interest in an undertaking's effects on historic properties. Many non-federally recognized tribes still have ancestral ties to an area or still occupy their aboriginal territory, or can contribute to identification and documentation of historic properties in other ways through their knowledge and expertise.

The historical reasons for which many tribes are not federally recognized should also be considered in making decisions regarding Section 106 consultation with these tribes. The four examples discussed above illustrate the range of circumstances that can result in tribal entities not being federally recognized regardless of their long histories. Lack of federal recognition, however, does not invalidate the valuable information or legitimate interests of state recognized tribes that should be considered by federal agencies in the Section 106 process.

In encouraging federal agencies to consider including non-federally recognized tribes in the Section 106 process, the ACHP is not suggesting that federal agencies ignore the unique legal and political status of or federal obligations to Indian tribes. The involvement of non-recognized tribes in the Section 106 process could not be on the same basis as Indian tribes. The federal government and Indian tribes have a government-to-government relationship; federal agencies have trust responsibilities to Indian tribes; and, federal agencies are required to uphold the treaty rights of Indian tribes. There are also numerous federal statutes that establish additional legal obligations of the federal government to Indian tribes.

Information about non-federally recognized tribes can be found through a number of sources, including state historic preservation and archaeology offices, state Indian Commission Offices, and the National Conference of State Legislators at <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#State>. More information about Section 106 can be found at www.achp.gov.