Tribal Consultation in Section 106

Durant, Oklahoma
July 18, 2018

Nancy E. Boone
Federal Preservation Officer
Office of Environment and Energy
U.S. Department of Housing and Urban Development
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.

These sections have since been renumbered to 54 U.S.C. 302706

Implementing regulations found in 36 CFR 800
WHO: federally recognized Indian tribes, including native Alaskans

WHAT: historic properties of religious and cultural significance to tribes

WHEN: when a project may affect historic properties of religious and cultural significance to tribes
Only the “Agency Official” can conduct consultation with tribes

- Consultation is government-to-government, U.S. federal agency to sovereign Indian Nation
- In Part 50 reviews, HUD is the Agency Official
- In Part 58 reviews, the Responsible Entity (RE) is the Agency Official
- Lenders, consultants, applicants, etc. CANNOT conduct tribal consultation
Some program statutes (e.g. CDBG, HOME, etc.) require REs to assume environmental review authority for projects in their jurisdictions.

24 CFR Part 58 directs REs to assume responsibility for all aspects of environmental review, including Section 106 and tribal consultation.

The REs (state, local, and tribal governments) have assumed the role of the federal agency official in tribal consultation.

Assumption authority for tribal consultation is sometimes challenged, but it is statutorily required for HUD programs that fall under Part 58.
Notice: Process for Tribal Consultation in Projects That Are Reviewed Under 24 CFR Part 58  (Extended to Part 50 by memo)

TDAT: Tribal Directory Assessment Tool Version 3.0

HP Fact Sheet #6: Guidance on Archeological Investigations in HUD Projects

7015.15: Request for Release of Funds Certification
HUD NOTICE
CPD-12-006

Notice CPD-12-006

Issued: June 15, 2012
Expires: This Notice is effective until amended, superseded, or rescinded

Special Attention of:
All Regional Directors
All Field Office Directors
All Regional Environmental Officers
All Responsible Entities
All Housing Directors
All FIM Division Directors
All Program Environmental Clearance Officers

SUBJECT: Process for Tribal Consultation in Projects That Are Reviewed Under 24 CFR Parts 98

I. Purpose

The "Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities" 24 CFR, Part 55, outlines the review process for many projects assisted with HUD programs, including those funded through CDBG, HOME, ROPE VI, HOPE VI, Emergency Shelter Grants, certain Indian Housing programs, Public Housing Capital Fund, and Economic Development Initiative grants, and certain tribes guaranteed by HUD. Part 58 covers many environmental areas, including historic resources. It references the "Section 106 review process for historic properties, which requires federal agencies to consult with federal-recognized Indian tribes on projects that may affect historic properties of religious and cultural significance to tribes. Under Part 58, local, state, or tribal governments become Responsible Entities (REs) and assume the federal agency’s responsibility for projects within their jurisdiction, including those for which they are grantee. This RE must consult with tribes to determine whether a proposed project may adversely affect historic properties of religious and cultural significance, and if so, how this adverse effect could be avoided, minimized or mitigated. This applies to projects on and off tribal lands. This Notice clarifies the steps that REs should follow in the tribal consultation process. Following this protocol ensures compliance with the requirement for certification of tribal consultation on the Request for Release of Funds and Certification (Form HUD 101515).

II. Background

Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) and its implementing regulations (36 CFR, Part 800) direct federal agencies to undertake an open, consultative process to consider the impact of their projects on historic and archaeological resources. The review must
WHO to consult?

- Consultation required ON and OFF tribal lands
- Tribes with current or ancestral interest
- Multiple tribes may have interest
- RE may invite or allow participation by non-federally recognized Indian tribes
TDAT - Tribal Directory Assessment Tool

https://egis.hud.gov/tdat

• Database that uses project address to identify federally recognized tribes with possible interest in a project
• Developed in 2010
• Expanded in 2015-16
• Contains links to tribal websites
• Information updated periodically
TDAT - Tribal Directory Assessment Tool
TDAT - Searching By Address

1200 South Quincy Street, Green Bay, Wisconsin 54301

Contact Information for Tribes with Interests in Brown County, Wisconsin

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<thead>
<tr>
<th>Tribal Name</th>
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<td>Hannahville Indian Community, Michigan</td>
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1 - 9 of 9 results
TDAT - Searching by Address

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<th>Contact Name</th>
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<td>Harold Frey</td>
<td>Chairman</td>
<td>P.O. Box 340-Creston, WI 54020</td>
<td>(715) 478-7200</td>
<td>(715) 478-5209</td>
<td></td>
<td><a href="mailto:gus.frey@frostwaters-mn.gov">gus.frey@frostwaters-mn.gov</a></td>
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<tr>
<td>Michael Blackwell</td>
<td>TRPO</td>
<td>606 Agency Main Street, Mel, MT 59725</td>
<td>(406) 333-9471</td>
<td>(406) 333-2009</td>
<td></td>
<td><a href="mailto:michaelblackwell@belknap.org">michaelblackwell@belknap.org</a></td>
<td><a href="http://www.belknap.org/">http://www.belknap.org/</a></td>
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<tr>
<td>Mark Azele</td>
<td>President</td>
<td>606 Agency Main Street, Mel, MT 59725-2405</td>
<td>(406) 333-8333</td>
<td>(406) 333-8333</td>
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<tr>
<td>Kenneth Worghaud</td>
<td>Chairperson</td>
<td>141511 Hanhaville E1 Road</td>
<td>(506) 466-2952</td>
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<td><a href="mailto:tydnyee@hanhaville.org">tydnyee@hanhaville.org</a></td>
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TDAT - Searching by State

Search For Tribes

Option 1: Search by Address
451 7th Street S.W., Washington, DC 20410

Option 2: Select a Tribe
—Select One—

Option 3: Select by State/County
Minnesota

Select One or More Counties (hold shift to select more than one):
- Allin
- Anoka
- Becker
- Beltrami
- Benton
- Big Stone
- Blue Earth
- Brown
- Carlton
- Carver
- Cass
- Chippewa
- Clay

Get All Tribes for Minnesota

Close
## TDAT - Searching by State

### Contact Information for Tribes with Interests in Minnesota

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<tr>
<th>Tribal Name</th>
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<th>Title</th>
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<tr>
<td>Apache Tribe of Oklahoma</td>
<td>Bob Komardy</td>
<td>Chairman</td>
<td>PO Box 1330 Amedove, OK 73006</td>
<td>(405) 247-0463</td>
<td>(405) 247-2863</td>
<td></td>
<td><a href="mailto:bobkomardy@ookook.com">bobkomardy@ookook.com</a></td>
<td><a href="http://www.apachetribes.org/">http://www.apachetribes.org/</a></td>
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<tr>
<td>Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin</td>
<td>Michael Wiggins</td>
<td>Chairman</td>
<td>PO Box 76 Otsego, WI 54985</td>
<td>(715) 682-7111</td>
<td>(715) 682-7118</td>
<td></td>
<td><a href="mailto:morgan@badriver-icas.org">morgan@badriver-icas.org</a></td>
<td><a href="http://www.badriver-icas.org">www.badriver-icas.org</a></td>
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<tr>
<td>Stockbridge-Francis Band (Nat Lk) of the Minnesota Chippewa Tribe</td>
<td>Edith Lewis</td>
<td>THPO</td>
<td>PO Box 36 Otsego, WI 54985</td>
<td>(715) 633-7123 ext. 1662</td>
<td>(715) 682-7118</td>
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<td><a href="mailto:thpo@badriver-icas.org">thpo@badriver-icas.org</a></td>
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<td>Stockbridge-Francis Band (Nat Lk) of the Minnesota Chippewa Tribe</td>
<td>Kevin Lawey</td>
<td>Chairman</td>
<td>15501 Laketown Drive Blvd, MN 55772</td>
<td>(218) 757-3281</td>
<td>(218) 757-3212</td>
<td></td>
<td><a href="mailto:kwlawey@badriver-icas.org">kwlawey@badriver-icas.org</a></td>
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<td>Stockbridge-Francis Band (Nat Lk) of the Minnesota Chippewa Tribe</td>
<td>Bill Latisky</td>
<td>THPO</td>
<td>10501 Bass Fort Road Tower, Minnesota, MN 55770</td>
<td>(218) 763-0617</td>
<td>(218) 763-4036</td>
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<tr>
<td>Chippewa and Anishina Tribes, Oklahoma</td>
<td>Margaret Sutter</td>
<td>THPO</td>
<td>P.O. Box 167 Crook, SD 57322</td>
<td>(406) 422-7404</td>
<td>(406) 422-8224</td>
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<td><a href="mailto:mousutter@c-a-tribes.org">mousutter@c-a-tribes.org</a></td>
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<td>Stockbridge-Francis Band (Nat Lk) of the Minnesota Chippewa Tribe</td>
<td>Eddie Hamilton</td>
<td>Governor</td>
<td>P.O. Box 167 Crook, SD 57322</td>
<td>(406) 422-7734</td>
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<td>Stockbridge-Francis Band (Nat Lk) of the Minnesota Chippewa Tribe</td>
<td>Anthony Reder</td>
<td>Chairperson</td>
<td>PO Box 283 Flandreau, SD 57325-9828</td>
<td>(605) 957-6011</td>
<td>(605) 957-3016</td>
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<td><a href="mailto:president@fat.org">president@fat.org</a></td>
<td><a href="http://www.sainteanesou.com">www.sainteanesou.com</a></td>
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<td>Stockbridge-Francis Band (Nat Lk) of the Minnesota Chippewa Tribe</td>
<td>Elise Montoya</td>
<td>THPO</td>
<td>PO Box 283 Flandreau, SD 57325</td>
<td>(605) 957-6112</td>
<td>(605) 957-3016</td>
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+ Fond du Lac, Band of the Minnesota Chippewa Tribe
+ Fort Belknap Indian Community of the Fort Belknap Reservation of Montana
+ Grand Portage Band of the Minnesota Chippewa Tribe
TDAT - Searching by Tribe
## Results from Query

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<td>1161 Old Landing Road</td>
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<th>Tribal Name</th>
<th>County Name</th>
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<tbody>
<tr>
<td>Forest County Potawatomi Community of Wisconsin</td>
<td>Brown</td>
</tr>
<tr>
<td>- Forest County Potawatomi Community of Wisconsin</td>
<td>Brown</td>
</tr>
<tr>
<td>- Fort Belknap Indian Community of the Fort Belknap Reservation of Montana</td>
<td>Brown</td>
</tr>
<tr>
<td>- Hannahville Indian Community, Michigan</td>
<td>Brown</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Contact Name</th>
<th>Title</th>
<th>Mailing Address</th>
<th>Work Phone</th>
<th>Fax Number</th>
<th>Cell Phone</th>
<th>Email Address</th>
<th>URL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harold Frank</td>
<td>Chairman</td>
<td>P.O. Box 340 Crex, WI 54520</td>
<td>(715) 478-7200</td>
<td>(715) 478-5280</td>
<td></td>
<td><a href="mailto:gus.frank@fcpotawatomi-nsn.gov">gus.frank@fcpotawatomi-nsn.gov</a></td>
<td><a href="https://www.fcpotawatomi-nsn.gov/">https://www.fcpotawatomi-nsn.gov/</a></td>
</tr>
<tr>
<td>Michael Blackwolf</td>
<td>THPO</td>
<td>656 Agency Street, Harlem, MT 69526</td>
<td>(406) 353-8471</td>
<td>(406) 353-2889</td>
<td></td>
<td><a href="mailto:mblackwolf@ftbelknap.org">mblackwolf@ftbelknap.org</a></td>
<td><a href="http://www.ftbelknap.org/">http://www.ftbelknap.org/</a></td>
</tr>
<tr>
<td>Mark Azure</td>
<td>President</td>
<td>656 Agency Street, Harlem, MT 69526-6455</td>
<td>(406) 353-8303</td>
<td>(406) 353-4541</td>
<td></td>
<td><a href="mailto:mazure@ftbelknap.org">mazure@ftbelknap.org</a></td>
<td><a href="http://www.ftbelknap.org/">http://www.ftbelknap.org/</a></td>
</tr>
<tr>
<td>Kenneth Meshigaud</td>
<td>Chairperson</td>
<td>N1-4911 Hannahville B1 Road, Wilson, MI 49896</td>
<td>(906) 466-2632</td>
<td>(906) 466-2933</td>
<td></td>
<td><a href="mailto:tyderyen@hannahville.org">tyderyen@hannahville.org</a></td>
<td><a href="http://www.hannahville.net">www.hannahville.net</a></td>
</tr>
</tbody>
</table>
Feedback and Corrections

Send corrections and updates, as well as feedback on how the Tribal Directory Assessment Tool may be improved to EnvReview@hud.gov

To submit corrections and updates for the database:
1. Use Select a Tribe to display existing database information.
2. Press Export to Excel button.
3. Revise the data as needed.
4. Save the revised file with the name "[tribe name] TDAT Revisions".
5. Send the revised Excel file as an email attachment to the email above.
 WHAT to consult about?

• Historic properties of religious and cultural significance to tribes including:
  • archeological sites
  • burial grounds
  • sacred landscapes or features
  • ceremonial areas
  • traditional cultural landscapes and places
  • plant and animal communities
  • structures with significant tribal association
“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.”
When to consult?

- When the project involves the types of activities that may affect historic properties of religious or cultural significance to tribes including:
  - ground disturbance (digging)
  - new construction in undeveloped natural areas
  - introduction of incongruent visual, audible, or atmospheric changes
  - work on a building with significant tribal association
  - transfer, lease or sale of historic properties of religious and cultural significance
Consult early, before decisions are made

Native American Groups Sue to Stop Solar Projects
Feb 27, 2011 – 3:04 PM

- BLYTHE, Calif. -- Native Americans are clashing with the federal government over plans to fast-track approval and construction of massive solar energy project that the Indians fear will harm sacred and culturally significant sites in Western deserts.

Recent lawsuits by two native groups pose a threat to half dozen proposed solar developments that the Obama administration has identified as a high priority in its quest for more clean energy production.

One suit already has halted work on a major solar farm in Southern California......
Using information from TDAT, write a letter to the tribe(s) and invite them to consult

- Inquire about historic properties
- Include project description and map
- Include previous surveys (if any)

Template letter available

Letters to tribal leader and THPO

Letter on letterhead of RE, signed by RE official

- If Part 50, letter is from HUD official

Letter may be transmitted by email
• About a third of tribes have a THPO

• HUD guidance directs REs to initiate consultation with tribal leader and THPO on projects off tribal lands

• THPO may have assumed role of SHPO on tribal lands and on projects that affect tribal lands
  • Consult with them in lieu of SHPO
  • Unless THPO or non-tribal owner of land within reservation boundaries or affected by project within reservation boundaries requests SHPO participation
Sample Section 106 Letters and Notices

Date Published: March 2014

Description
These documents contain sample Section 106 letters and notices.

Resource Links
- Sample Consulting Parties Invitation Language (DOCX)
- Sample No Historic Properties Affected Letter (DOCX)
- Sample No Adverse Effect Letter (DOCX)
- Sample Adverse Effect Letter (DOCX)
- Section 106 Tribal Consultation Letter Template for Part 58 Projects (DOCX)
- Section 106 Tribal Consultation Letter Template for Part 50 Projects (DOCX)
- Sample Project Descriptions (PDF)

Tags: Environmental Review
Letter includes:

• RE or HUD letterhead
• Project description
• Map showing location
• Photographs
• Date for response
• Information already known about cultural resources on the site
• Copy of previous surveys (if any)

• Template can be used in mail merge with Excel from TDAT
Section 106 – Step 1
Initiate Consultation

Response requested within 30 days of receipt

If tribe responds with no interest, or there is no response, tribal consultation is complete

Tribe asked to accept or decline consultation within 30 days, not to provide information within 30 days

RE may invite non-federally recognized tribes to be consulting parties; they may also participate as members of the public
Section 106 – Step 2
Identify and Evaluate Historic Properties

• Consultation meetings with tribes
  • face-to-face, web, phone
  • joint consultation with other tribes and consulting parties

• Confidentiality
  • inability to share information
  • protection of sensitive information
     • practical means, state and federal laws

• Fees
  • no fees to consulting parties for consultation
  • detailed survey documentation may be eligible project expense similar to consultant
Archeological Consultants

• Eligible project expense
• Must meet Secretary of the Interior’s Professional Qualification Standards (36 CFR 61)
  • Masters degree, specialized training and experience in research, supervisory experience in field investigations
• SHPO often has list of consultants who meet Professional Qualifications
• SHPO often has archeological study guidelines
• THPO or Tribal member with traditional cultural knowledge may act as a consultant
Section 106 –
Step 2
Identify and Evaluate Historic Properties

• If parties disagree on eligibility of a site for the National Register, they can invite ACHP to consult.

• On tribal lands, if tribe and RE disagree, RE must obtain a formal Determination of Eligibility.

• Off tribal lands, tribe can ask ACHP to request that RE or HUD official obtain a formal Determination of Eligibility.
Section 106 – Step 3
Assess Effects

Criteria of Adverse Effect

• physical destruction or damage of historic properties
• alteration of building or setting or use that does not meet Secretary of the Interior’s Standards
• removal of property from its historic setting
• introduction of incongruent visual, audible, or atmospheric changes
• transfer, lease or sale of historic properties of religious and cultural significance
Section 106 – Step 4 Resolve Adverse Effects

- If Adverse Effect, notify Advisory Council and invite their participation in consultation
- Criteria for Council participation
  - “Presents issues of concern to Indian tribes and Native Hawaiian organizations”
- Continue consultation to AVOID, MINIMIZE, OR MITIGATE
Mitigation Measures

- Redesign project
- Data recovery through excavation
- Curation
- Signage or plaques on site
- Monitoring
- Survey
- Sensitivity mapping/ predictive model
- Oral history
- Interpretive exhibits with artifacts
- Web archive or exhibit
- Educational programs
- Deed restrictions for property disposals
MOA Signatories

• Required signatories: execute, amend, terminate
  - Tribe and THPO on tribal land

• Invited signatories: amend, terminate
  • Should include any party who has a role in carrying out stipulations
  • Refusal to sign does not affect validity of agreement
  - RE or HUD can invite Tribe and/or THPO to sign

• Concurring Parties: documents participation
  • Refusal to sign does not affect validity of agreement
  - Tribe and/or THPO can be invited to be a Concurring Party
3. The responsible entity has assumed responsibility for and complied with and will continue to comply with Section 106 of the National Historic Preservation Act, and its implementing regulations 36 CFR 800, including consultation with the State Historic Preservation Officer, Indian tribes and Native Hawaiian organizations, and the public.

- Old form required certification of compliance with all relevant environmental laws and regulations
- Revision added certification of compliance with Section 106 process including consultation with SHPO and Indian tribes
- Ties consultation to approval of release of funds
Discoveries during construction

If historic properties are discovered during construction, stop construction and notify tribes, THPO, and SHPO within 48 hours, and reenter consultation. Site visit recommended to resolve potential adverse effects.

If discovery includes human remains, respectfully cover over and secure the remains, and notify same parties plus local law enforcement officials. Follow ACHP “Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects”.
“Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects”

- [http://www.achp.gov/docs/hrpolicy0207.pdf](http://www.achp.gov/docs/hrpolicy0207.pdf)

- Prescribes a consultation process, not an outcome

- Priority to leave burials undisturbed in place

- Develop and implement treatment plan in consultation with lineal descendants or descendant communities, which may include tribes
Quick Quiz  True or False?

I don’t need to consult with a tribe because:

• That tribe doesn’t live here now
• We consulted with the SHPO on archeology
• I don’t even know what tribes might be interested
• My consultant is doing it
Resources

• Search for “HUD Historic Preservation”

• https://www.hudexchange.info/environmental-review/historic-preservation/

• WISER