

# Advisory Council On Historic Preservation

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## MEMORANDUM

July 6, 2001

To: Federal Preservation Officers  
Tribal Historic Preservation Officers  
State Historic Preservation Officers  
Indian Tribes

From: Executive Director

Subject: Fees in the Section 106 Review Process

There has been a growing concern about the practice of certain parties charging fees from Federal agencies or their applicants for their participation in the Section 106 process. In particular, the issue has emerged in the context of Indian tribes and their participation in the process. While the question of fees has many dimensions that will require more detailed attention over the long term, this memorandum is intended to provide some immediate guidance on the current tribal issue.

**Background.** The concern that has arisen centers around requests by Indian tribes to be compensated for activities connected to the Section 106 process. To address the issue, there are certain fundamental points that need to be acknowledged:

- Neither Section 106, 16 U.S.C. § 470f, nor the Council's regulations, 36 C.F.R. Part 800, require a Federal agency to engage anyone to provide data or information for Section 106 compliance. While the agency does have an obligation to obtain necessary information to fulfill its legal duties, it has full discretion regarding the means used to meet this obligation.
- Neither Section 106 nor the Council's regulations impose a duty on an applicant for Federal assistance or approval to develop information and analyses for Section 106 compliance or to engage contractors to do so. If a Federal agency has the authority to impose the development of such information and analyses on the applicant and chooses to do so, the legal basis for that obligation on the applicant lies in the Federal agency's authorities and does not derive from the Council's regulations.
- The National Historic Preservation Act (NHPA) does obligate a Federal agency to consult

with Indian tribes that attach religious and cultural significance to historic properties when the agency's undertakings will affect such properties. The Council's regulations specify how that consultation takes place.

- The NHPA and the Council's regulations authorize Federal agencies to contract with others, including Indian tribes, to provide information for complying with Section 106, and encourage agencies to actively involve Indian tribes in the Section 106 review process. However, neither authority requires Federal agencies to pay for any aspect of tribal nor other consulting party participation in the Section 106 process.

***The role of Indian tribes in the Section 106 process.*** An underlying policy of the NHPA and the Council's regulations is that historic resources of significance to Indian tribes deserve full consideration in the Federal planning process and that Indian tribes possess a special perspective on and relation to these resources. This policy finds expression in provisions of the Section 106 regulation that encourage agencies, when identifying historic properties, to seek information from Indian tribes on those historic properties that have religious and cultural significance to them and that establish a consultative role for Indian tribes, both on and off their tribal lands, which provides them an opportunity to make their views known throughout the Section 106 process. These two tribal roles are not treated the same when it comes to compensation, although the line between them may not be sharp.

***Facilitating tribal participation.*** At the outset, it must be stressed that the Council 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 times that are convenient for Indian tribes to paying travel expenses for participating tribal representatives. Indeed, Federal agencies are strongly encouraged to use resources, consistent with their authorities, to overcome financial impediments that Indian tribes may have to effective participation in the Section 106 process. Likewise, applicants for Federal assistance that assume responsibilities for carrying out Section 106 functions are urged to do the same. However, this encouragement by the Council is not a legal mandate nor does any portion of the NHPA or the Council's regulations require an agency or an applicant to pay for any form of tribal involvement.

***Tribal consultation.*** Throughout the Section 106 process, the regulations impose on Federal agencies (and applicants who assume an agency's duties) an obligation to consult with Tribal Historic Preservation Officers and Indian tribes. These occasions range from the initial scoping of Section 800.3, through the identification, evaluation and effect assessment of Sections 800.4 and 800.5, to the resolution of adverse effects in Section 800.6. The purpose of this role is to give the Indian tribe an opportunity to get its interests and concerns before the agency. In these situations, the Federal agency obligation is to seek and consider the views of participating Indian tribes. This means it must make an effort to solicit a tribe's opinions and factor them into the decisions that the agency must make on the project. The consultation requirement thus gives an Indian tribe the ability to advocate the outcome it would like to see the agency ultimately take in the final project decision.

When the Federal agency or applicant is seeking the views of an Indian tribe to fulfill the agency's

legal obligation to consult with a tribe under a specific provision of the Council's regulations, the agency or applicant is not required to pay the tribe for providing its views. If the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.

*When payment is appropriate.* When, during the identification phase of the Section 106 process, an agency or applicant seeks to identify historic properties that may be significant to an Indian tribe, it may ask for specific information and documentation regarding the location, nature, and condition of individual sites, or actually request that a survey be conducted by the tribe. In doing so, the agency essentially asks the tribe to fulfill the role of a consultant or contractor. In such cases, the tribe would seem to be justified in requiring payment for its services, just as any other contractor. The agency or applicant is free to refuse, but retains the obligation for obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on the historic properties. Ultimately, the Federal agency must be able to demonstrate that it made the "reasonable and good faith effort" that Section 800.4(b) of the Section 106 regulations requires.

*Summary.* While the Council's regulations encourage the active participation of Indian tribes, they do not obligate Federal agencies or applicants to pay for consultation. If an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant may refuse and move forward. If, on the other hand, the agency or applicant seeks information or documentation that it would normally obtain from a professional contractor or consultant, they should expect to pay for the work product. When the line between the two is unclear, the agency or applicant is encouraged to act in a manner that facilitates, rather than impedes, effective tribal participation in the Section 106 process.



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