



Preserving America's Heritage

SECTION 106 AND THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: INTERSECTIONS AND COMMON ISSUES: ARTICLE 18 AND SECTION 106

The Advisory Council on Historic Preservation (ACHP) adopted a plan to support the U.N. Declaration on the Rights of Indigenous Peoples (Declaration) on March 1, 2013. In the plan, the ACHP commits to raising awareness about the Declaration in the historic preservation community and incorporating the principles and aspirations of the Declaration into ACHP initiatives and programs. As part of the effort to raise awareness, the ACHP also committed to developing guidance on the intersection of the Section 106 process and the Declaration.

In recognition that the Declaration is an international instrument written to be relevant to many nations and indigenous peoples, the ACHP has liberally interpreted the language and intention of the articles in the Declaration. The ACHP has identified nine articles that intersect with the mission and work of the ACHP and with the Section 106 review process. They are Articles 8, 11, 12, 15, 16, 18, 25, 31, and 38. This guidance addresses the relationship between Article 18 and the tribal and Native Hawaiian organization (NHO) consultation requirements in the Section 106 process. Future guidance will address the other articles.

The Section 106 Process

Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to take into account the effects of undertakings they carry out, assist, fund, or permit (undertakings) on historic properties and to afford the ACHP a reasonable opportunity to comment on such undertakings. Federal agencies meet these requirements by completing the Section 106 process set forth in the implementing regulations, "Protection of Historic Properties," 36 C.F.R. part 800. The goal of the process is to identify and to consider historic properties that might be affected by an undertaking and to attempt to resolve any adverse effects through consultation.

Both the NHPA and the Section 106 regulations require that federal agencies, in carrying out their Section 106 responsibilities, consult with any Indian tribe or NHO that attaches traditional religious and cultural significance to historic properties that may be affected by an undertaking. The regulations provide both general directions regarding consultation at Section 800.2(c)(2) as well as very specific steps to be taken throughout the process.

U.N. Declaration on the Rights of Indigenous Peoples

"The Declaration is a comprehensive statement about the rights of indigenous peoples around the world. It emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures, and traditions and to pursue their development in keeping with their own needs and aspirations."¹

¹ United Nations Permanent Forum on Indigenous Issues. "Frequently Asked Questions - Declaration on the Rights of Indigenous Peoples." Available at: <http://www.un.org/esa/socdev/unpfi/documents/FAQsindigenousdeclaration.pdf>. Accessed: 10/24/2013.

The position of the United States is that the Declaration, “while not legally binding or a statement of current international law—has both moral and political force. It expresses both the aspirations of indigenous peoples around the world and those of States in seeking to improve their relations with indigenous peoples. Most importantly, it expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.”²

There are 46 articles in the Declaration that address a wide range of issues facing indigenous peoples. The article which is the focus of this document is Article 18:

“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.”

Article 18 and the Section 106 Process

The Declaration, while not having the force of law, expresses ideals. Article 18 of the Declaration addresses the right of indigenous peoples to participate in decision making when their rights would be affected. The scope of this article is very broad, covering all rights to which indigenous peoples are entitled.

On the other hand, Section 106 and its implementing regulations do have the force of law. However, the scope of Section 106 is narrower in that it addresses only the consideration of impacts of undertakings on historic properties, but broader in the sense that it applies regardless of who holds “rights” to such properties.

Regardless, Section 106 seems consistent with the thrust of Article 18 of the Declaration in various respects.

For instance, Section 101(d)(6)(B) of the NHPA and the Section 106 regulations require federal agencies to invite Indian tribes and NHOs to participate in Section 106 consultation when an undertaking may affect historic properties of traditional religious and cultural importance to them. These consultation requirements are intended to ensure that Indian tribes and NHOs have the opportunity not only to identify those places of religious and cultural importance to them (sometimes referred to as sacred sites) but also to influence federal decision making in order to protect those places. While other federal directives and statutes may require that federal agencies seek information from Indian tribes and NHOs, the NHPA requires federal agencies to invite them to participate in the consultation process to identify, evaluate, and resolve effects to historic properties of religious and cultural importance to them. Moreover, this obligation to consult is triggered regardless of whether the tribe or NHO holds a “right” over the property at issue. All that matters is that the historic property is of traditional and cultural importance to the tribe or NHO. Of course, if a tribe holds rights over a historic property under consideration in a Section 106 review, such as treaty rights, those rights may be determinative of the final federal agency decision regardless of the outcome of the Section 106 review.

The consistency between the thrusts of Section 106 and Article 18 is also reflected in how the Section 106 regulations address federal agency responsibilities for tribal consultation when an undertaking takes place on tribal lands. For instance, in consideration of tribal sovereignty, a Section 106 agreement to resolve adverse effects cannot apply on tribal lands without the relevant tribe’s signature.

² Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples.

While the federal agency makes the decisions in the Section 106 process, including whether to proceed with the proposed undertaking, the process emphasizes consultation, both as a means for other parties to express their views and concerns and for the federal agency to be fully informed in reaching its decisions. Accordingly, the Section 106 process anticipates that federal agencies will, in carrying out the process, consider the views of other parties, including those of Indian tribes and NHOs.

The fact that the U.N. Declaration includes a provision regarding the rights of indigenous peoples to participate in decision making underscores the importance of federal agency consultation with Indian tribes and NHOs in the Section 106 process when historic properties of religious and cultural significance to them may be affected by a proposed undertaking. It is also important for federal agencies to remember that President Obama's announcement of U.S. support for the U.N. Declaration including all its articles, further underscores the importance of tribal and NHO consultation and participation in decision making.

In order for consultation to be meaningful and effective, it must begin as early as possible in project planning to fully afford all, including Indian tribes and NHOs, an opportunity to express the full range of their interests and concerns. The Section 106 regulations at 36 C.F.R. § 800.2(c)(2) state that:

The agency official 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, advise on the identification and evaluation of 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. It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

Early and ongoing consultation also provides the federal agency the opportunity to identify and resolve issues, including potential adverse effects to historic properties, while there are still a broad range of alternatives available. This could result not only in the preservation of historic properties of importance to Indian tribes and NHOs but also in significant cost and time savings for federal agencies and project proponents.

The ACHP has produced extensive guidance regarding consultation with Indian tribes and NHOs:

Consultation with Indian tribes in the Section 106 process: A Handbook, available at <http://www.achp.gov/docs/consultation-indian-tribe-handbook.pdf>

Consultation with Native Hawaiian organizations in the Section 106 Review Process: A Handbook, available at <http://www.achp.gov/docs/consultation-indian-tribe-handbook.pdf>.

Other ACHP guidance regarding Indian tribes and Native Hawaiians is available at <http://www.achp.gov/nap.html>.

For more information about the Declaration and the ACHP's plan to support it, go to www.achp.gov/undeclaration. More information about the Section 106 review process can be found at www.achp.gov/work106.

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