



Preserving America's Heritage

ROLE OF THE TRIBAL HISTORIC PRESERVATION OFFICER IN THE SECTION 106 PROCESS

The 1992 amendments to the National Historic Preservation Act (NHPA) included provisions for Indian tribes to assume the responsibilities of the State Historic Preservation Officer (SHPO) *on tribal lands*, and establish the position of a Tribal Historic Preservation Officer (THPO).¹ The regulations implementing Section 106 of the NHPA use the term “THPO” to mean the Tribal Historic Preservation Officer under Section 101(d)(2) of the NHPA. *Tribal lands* are defined in the NHPA and the Section 106 regulations (36 CFR Part 800) as, 1) all lands within the exterior boundaries of any Indian reservation; and, 2) all dependent Indian communities.²

What are the responsibilities of a THPO?

As the tribal counterpart to the SHPO, the THPO may assume some or all of the duties for historic preservation *on tribal lands* that the SHPO performs on private, state, or federal lands. These responsibilities may include conducting a comprehensive survey of tribal historic properties and maintaining an inventory of such properties, preparing and implementing a tribal-wide historic preservation plan, and assisting federal agencies in the Section 106 review of undertakings on tribal lands.

Is the THPO the official tribal representative for the purposes of Section 106?

THPOs have assumed the historic preservation officer functions for tribal lands; however, they may not have been designated by their tribal governments to function as the sole point of contact for the review of undertakings on and off tribal lands. Therefore, federal agencies should contact both the tribal governmental leaders and the THPO prior to formal initiation of Section 106 consultation in order to determine the appropriate point(s) of contact.

For the purposes of the Section 106 process on tribal lands, the THPO will, in most cases, be the signatory for the tribe on a Memorandum of Agreement or Programmatic Agreement. In some cases a tribe may stipulate that only the tribal leader, i.e. chairman, is authorized to sign Section 106 agreements on behalf of the tribe. This is an issue that should be addressed as the Section 106 process proceeds and which may be the subject of agreed upon protocols with an agency.

How long does a THPO have to review a finding or determination?

Under the Section 106 regulations, a THPO who has assumed Section 106 review functions is subject to

¹ The National Park Service (NPS) administers the national THPO program and maintains an up-to-date listing of all tribes who have established Tribal Historic Preservation Officers under Section 101(d)(2) of the NHPA and the contact information of their Tribal Historic Preservation Officers, available at www.nps.gov/history/hps/tribal/thpo.htm

² The U.S. Supreme Court decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) held that “dependent Indian communities” refers to a limited category of Indian lands that are neither reservations nor allotments and that must satisfy two requirements: first, they must have been set aside by the federal government for the use of the Indians as Indian land; second, they must be under federal superintendence.

the time frames set forth in the Section 106 regulations for responding to requests to review an agency's Section 106 findings and determinations. Failure of a THPO to respond within regulatory time frames may result in an agency proceeding with its finding or determination, or consulting with the ACHP in the THPO's absence in accordance with the Section 106 regulations. Subsequent involvement by the THPO is not precluded, but the agency is not required to reconsider a finding or determination when a THPO failed to respond in a timely manner. It should also be noted that if a THPO terminates consultation regarding an undertaking occurring on or affecting historic properties on tribal lands, the ACHP must comment on the undertaking.

What is the role of the SHPO in the Section 106 process on tribal lands when there is a THPO?

Once a tribe has established a THPO, the SHPO may still participate in consultation for undertakings on tribal lands if: 1) the THPO requests SHPO participation; 2) the undertaking takes place on tribal lands but affects historic properties located off tribal lands; or, 3) a non-tribal member who owns lands within the exterior boundaries of a reservation requests that the SHPO also participate in Section 106 consultation, though only with regard to the property he/she owns. This provision, located at Section 101(d)(2)(D)(iii) of NHPA and in the Section 106 regulations at 36 CFR Section 800.3(c)(1), is intended to provide a property owner an opportunity to include the SHPO in the consultation if that property owner feels that his/her interests in historic preservation may not necessarily be represented by the THPO. The inclusion of the SHPO in the consultation *does not*, however, replace the role of the THPO, who still participates fully and retains its Section 106 role.

What is the role of the THPO off tribal lands?

The THPO's role for undertakings *off tribal lands* (in other words, on non-tribal lands such as private, state, or federal lands) is different from its role on its own tribal lands. If the proposed undertaking's area of potential effect (APE) is *located outside of the tribal lands it oversees*, the THPO does not supplant the jurisdiction or have the same rights as the SHPO, but rather may serve as the official representative designated by his/her tribe to represent its interests as a consulting party in Section 106 consultation. Therefore, off tribal lands, the THPO has the same role as any other Indian tribe who attaches religious and cultural significance to historic properties that may be affected by a proposed undertaking. Decisions regarding the appropriate signature status for a THPO on agreement documents pertaining to undertakings off tribal lands are negotiated by the federal agency and THPO on a case-by-case basis.

What is the role of the Indian tribe in the Section 106 process on tribal lands when there is no THPO?

For proposed undertakings *on or affecting the tribal lands* of an Indian tribe that *has not* assumed THPO responsibilities under Section 101(d)(2) of the NHPA, the federal agency carries out consultation with that tribe's designated representative in addition to—and *on the same basis as*—consultation with the SHPO. Otherwise, the tribe retains the same consultation rights as a formally designated THPO regarding agency findings and determinations, and must be afforded the status of required signatory regarding the execution of a Memorandum of Agreement or Programmatic Agreement.

For proposed undertakings *off tribal lands*, a tribe designates who will represent it in consultation regarding historic properties of religious and cultural significance to it. A tribe that does not have a designated THPO has the same rights ascribed to a THPO when the proposed undertaking affects properties of religious and cultural significance to the tribe off tribal lands.

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