



Preserving America's Heritage

## SECTION 101(D)(5) GUIDANCE FOR INDIAN TRIBES

The 1992 amendments to the National Historic Preservation Act (NHPA) added a new authority for the Advisory Council on Historic Preservation (ACHP) to enter into an agreement with an Indian tribe to substitute the tribe's historic preservation procedures for the ACHP's regulations implementing Section 106 of the NHPA regarding undertakings on tribal lands. Section 101(d)(5) of the NHPA states:

The Council may enter into an agreement with an Indian tribe to permit undertakings on tribal land to be reviewed under tribal historic preservation regulations in place of review under regulations promulgated by the Council to govern compliance with [Section 106], if the Council, after consultation with the Indian tribe and appropriate State Historic Preservation Officers, determines that the tribal preservation regulations will afford historic property consideration equivalent to that afforded by the Council's regulations. (54 U.S.C. § 302705)

Since then, the ACHP has entered into two such agreements with Indian tribes: one with the Narragansett Indian Tribe in 2000 and the other with the Seminole Tribe of Florida in 2016.

Since each tribe has a unique tribal historic preservation regulation, the Section 101(d)(5) agreements with the ACHP are unique as well. The absence of published guidance has allowed the parties to be creative in developing the agreements that effectuate the substitution of the ACHP's regulations. However, the ACHP believes that guidance about Section 101(d)(5) would be helpful to other Indian tribes who are considering entering into such agreements for the review of undertakings on their tribal lands under their tribal historic preservation regulations.

Therefore, the following information is intended to guide Indian tribes in their decision-making processes regarding whether and how to enter into Section 101(d)(5) agreements and to provide insight into the ACHP's interpretation of Section 101(d)(5).

### **Does an Indian tribe have to have a written historic preservation regulation, ordinance, or formal procedure in place in order to enter into a Section 101(d)(5) agreement with the ACHP?**

Yes. Section 101(d)(5) allows the ACHP to enter into an agreement with an Indian tribe to substitute the "*tribal historic preservation regulations*" for the ACHP's regulations. The term "*tribal historic preservation regulations*," encompasses any written procedures adopted by the relevant tribal authority and having the force of law within the relevant tribal lands. However, if an Indian tribe is interested in making such a substitution but does not yet have its own procedures in place, it may be helpful for it to consider the guidance offered here when developing tribal historic preservation regulations.

### **What does "afford historic properties consideration equivalent to that afforded by the Council's regulations" mean?**

Section 101(d)(5) requires the ACHP to determine if the tribal preservation regulations "will afford historic properties consideration equivalent to those afforded by the Council's regulations." Section 106 requires federal agencies to take into account the effects of their undertakings on historic properties and to afford the ACHP an

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opportunity to comment. The ACHP's regulations at 36 CFR Part 800 specify the process by which agencies meet these responsibilities.

The Section 106 process calls for a federal agency, in consultation with the SHPO, Indian tribes, and other consulting parties, and prior to making a final decision on the undertaking, to identify and evaluate historic properties; determine effects; and consult to develop measures to avoid, minimize, or mitigate adverse effects. Failure to reach an agreement about such measures requires the agency to obtain and consider the ACHP's formal comments before making a final decision on the undertaking.

Accordingly, in order to afford historic properties "equivalent consideration," a tribe's preservation regulations should include a process with similar core requirements. In a nutshell, those tribal regulations should result in the identification of historic properties (as defined in the NHPA) that may be affected by an undertaking, an understanding of how such properties may be affected, and a meaningful effort to resolve adverse effects. The process needs to provide the relevant federal agency with the information necessary for it to understand how historic properties may be affected by its undertaking, and how adverse effects will be resolved, prior to the federal agency making a final decision regarding the undertaking. Finally, it would also need to address how the ACHP would be given a reasonable opportunity to comment in the event there is a failure to reach agreement on resolving adverse effects.

**How does the ACHP make a determination that an Indian tribe's historic preservation regulations afforded historic properties consideration equivalent to that afforded by the ACHP's regulations?**

The ACHP reviews the Indian tribe's regulations and any supporting documentation submitted with the regulations to determine if the basic requirements noted above are covered in the tribe's regulations. Under the supervision of the ACHP membership, the ACHP staff takes the lead in reviewing the tribal regulations and negotiating the specific language of the Section 101(d)(5) agreement. The final decisions on whether the equivalent consideration standard is met and whether the agreement is approved are the responsibility of the ACHP membership through a vote.

**Can a Section 101(d)(5) agreement require federal agencies to address other kinds of properties?**

No. Neither Section 101(d)(5) nor any other section of the NHPA provides for such an authority. The scope of Section 101(d)(5), as well as Section 106, is limited to the consideration of historic properties as defined in the NHPA. "Historic properties" are defined in the NHPA to mean "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object."(54 U.S.C. § 300308 )

The ACHP is aware that some tribes have regulations that cover properties in addition to those deemed "historic properties" under the NHPA and that may seek to require federal agencies to consider such other properties. While such regulations may be the basis for a Section 101(d)(5) agreement (assuming they provide equivalent consideration of "historic properties," as explained above), such an agreement will not impose requirements on federal agencies to consider such other properties. Again, the scope of Section 101(d)(5) agreements is limited to "historic properties" as defined in the NHPA.

**What if an Indian tribe's regulations do not apply to all historic properties as defined in the NHPA?**

Since a substitution must provide equivalent consideration to historic properties, the tribal regulations must provide for consideration of historic properties as defined in the NHPA.

### **What if an Indian tribe’s regulations do not have the same steps as the ACHP’s regulations?**

The tribal regulations do not need to parrot the process in the ACHP’s Section 106 regulations. However, as outlined above, they do need to provide a process that provides the results specified in the ACHP’s definition of “consideration equivalent to that afforded by the Council’s regulations.”

### **What if an Indian tribe’s regulations themselves do not provide “consideration equivalent to that afforded by the Council’s regulations?”**

The agreement entered into between the Indian tribe and the ACHP may include provisions to ensure that all of these core requirements are included to the extent they are not already reflected in the tribal regulations. For example, if an Indian tribe’s regulations do not provide federal agencies with the information needed for the agencies to take into account the effects of the undertaking on historic properties, the Section 101(d)(5) agreement could be used to bind the tribe to provide that information to the relevant federal agency.

### **What does the tribe have to submit to the ACHP?**

The tribe must submit a letter from tribal leadership specifying the Indian tribe’s interest in entering into a Section 101(d)(5) agreement with the ACHP to substitute the tribe’s regulations for the ACHP’s regulations. A copy of the tribe’s regulations must be included. The tribe may also wish to include other supporting documentation, such as how the regulations’ provisions meet the equivalency standard, what federal agencies conduct undertakings on the tribe’s lands, and any other information that would assist the ACHP in reviewing the request for substitution.

### **Why does the ACHP consult with the SHPO?**

The ACHP must do so because Section 101(d)(5) specifically requires that the ACHP consult with the “appropriate State Historic Preservation Officers.” Subject to the one exception, noted below, the “appropriate SHPO” is the SHPO for the state or states overlapped by the tribal land of the tribe requesting the Section 101(d)(5) substitution.

The exception is that there is no “appropriate SHPO” to be consulted on a Section 101(d)(5) substitution when the tribe requesting substitution:

- (1) Has a Tribal Historic Preservation Officer (THPO) pursuant to Section 101(d)(2); and
- (2) Has no properties within its tribal land, beyond those held in trust by the Secretary of the Interior, that are owned by non-tribal members.

This exception is based on the Section 106 regulations, which provide for a THPO to act in lieu of the SHPO regarding undertakings on its tribal lands (36 C.F.R. § 800.2(c)(2)(i)(A)), and the section in the NHPA that otherwise authorizes owners of properties on tribal lands that are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in such undertakings (54 U.S.C. § 302702(4)(C)).

### **For a Section 101(d)(5) substitution, must the relevant tribal regulations or the Section 101(d)(5) agreement provide a role for other Indian tribes who may attach significance to historic properties within the boundaries of the requesting tribe’s lands?**

Yes. The NHPA requires federal agencies, in carrying out their Section 106 responsibilities, to consult with any Indian tribe that may attach religious and cultural significance to historic properties affected by their undertakings (54 U.S.C. § 302706(b)). In order for this statutory requirement to be met, the Section

106 regulations require that such tribes be consulted regardless of the location of the undertaking, including within the tribal lands of other tribes. In order for a tribal regulation to “afford historic properties consideration equivalent to those afforded by the Council’s regulations,” it must provide a consultative role for other tribes that might attach religious and cultural significance to historic properties located on the lands subject to the tribal regulation.

This is also consistent with the NHPA’s requirement that the Secretary of the Interior, in considering an Indian tribe’s assumption of the responsibilities of the SHPO, consult with other Indian tribes whose ancestral lands may be affected by the conduct of the tribal preservation program.

If the tribal regulation does not include a provision for federal agency consultation with other Indian tribes, the requirement can be included in the agreement between the ACHP and the tribe.

**What are “tribal lands” for purposes of the Section 101(d)(5) substitution?**

“Tribal lands” means all lands within the exterior boundary of any Indian reservation and all dependent Indian communities.

**Can the Section 101(d)(5) substitution apply to federal undertakings off tribal lands but within the Indian tribe’s ancestral lands?**

No. Section 101(d)(5) allows the ACHP to enter into an agreement with an Indian tribe to substitute the tribe’s regulations for the ACHP’s regulations for undertakings *on tribal lands*. Therefore, Section 101(d)(5) does not provide the authority for such a substitution off tribal lands.

However, other vehicles are available under the Section 106 regulations that could achieve similar purposes. For instance, a programmatic agreement under 36 C.F.R. § 800.14 could specify how certain undertakings on a tribe’s ancestral lands would be reviewed by a federal agency. Please refer to those regulations for specifics on the parties that must execute such agreements and must be consulted in their negotiation.

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