

Environmental Compliance Workshop

Tribal Outreach Under the Nationwide Programmatic Agreement

Ellen Saint Onge
Federal Preservation Officer

Christine Heacock
Deputy Federal Preservation Officer

November 02, 2023



* This presentation and its contents are for informational purposes only; the Commission's rules in part 47 of the Code of Federal Regulations and the Commission's previous reports and orders adopting those rules represent the binding rules and determinations of the Commission.

National Historic Preservation Act and Tribal Historic Preservation

- ▶ Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires federal agencies to consider the effects of projects they carry out, assist, fund, permit, license, or approve throughout the country on historic properties, including properties for which Tribes attach religious and cultural significance.
- ▶ The NHPA defines a historic property as any “prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on, the National Register of Historic Places, including artifacts, records, and material remains related to such a property or resource.” [54 U.S.C. § 300308]
- ▶ Properties of Tribal significance were not eligible for the National Register of Historic Places until 1992.
- ▶ Tribal consultation is necessary to identify Tribal historic properties.
- ▶ 1992 NHPA amendments established “Tribal Historic Preservation Officers” or THPOs.
- ▶ THPOs may assume the responsibility of State Historic Preservation Officers (SHPOs) for projects on Tribal lands and may participate in Section 106 reviews of projects off Tribal lands as consulting parties.

Tribes and Section 106 Review

On Tribal Lands: 36 CFR 800.2 (c)(2)(i) *Consultation on Tribal lands.*

- ▶ ***Tribal historic preservation officer.*** The agency consults with a formally designated THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on Tribal lands.
- ▶ ***Tribes that have not assumed SHPO functions.*** The agency consults with a representative designated by the Tribe in addition to and on the same basis as consultation with the SHPO regarding undertakings occurring on or affecting historic properties on its Tribal lands.

Off Tribal Lands: 36 CFR 800.2(c)(2)(ii) *Consultation on historic properties of significance to Indian Tribes and Native Hawaiian Organizations.*

- ▶ The agency consults with a Tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking, regardless of the location of the historic property, and invites the Tribe to be a consulting party.

Section 106 Tribal Requirements under the Nationwide Programmatic Agreement (NPA)

- ▶ Identify Indian Tribes and Native Hawaiian Organizations (NHOs) that may attach religious and cultural significance to potentially affected Historic Properties. The first step is to use TCNS or some other means to notify Tribes who have included the site within their geographic area of interest.
 - ▶ Includes tribal, ancestral, aboriginal and ceded lands
 - ▶ TCNS = Reasonable and Good Faith Effort to Identify Tribes
- ▶ Applicant follows Tribes' preferred communication preference (e.g., email, USPS).
- ▶ Applicant must be sensitive and respectful in communications.
- ▶ Provide information reasonably necessary for the Tribe to evaluate whether Historic Properties of religious and cultural significance may be affected.
- ▶ Provide Tribe reasonable opportunity to respond (usually 30 days from information receipt) and make a reasonable effort to follow up.



Section 106 Tribal Requirements under the Nationwide Programmatic Agreement (NPA)

- ▶ Where possible, applicant and Tribe reach an agreement on the presence or absence of effects that may obviate the need for consultation.
- ▶ If Tribe identifies a historic property, applicant invites Tribe to become “consulting party” and notifies the FCC.
- ▶ If the project will affect the historic property, the applicant consults to avoid, minimize or mitigate effect.

Tower Construction Notification System - TCNS

- ▶ Voluntary system proprietary to FCC, developed to facilitate identification of and contact with potentially affected Tribes.
- ▶ Tribes and NHOs designate geographic areas of interest.
 - ▶ The FCC protects this information as confidential.
- ▶ Basic project information supplied by applicant automatically forwarded to interested Tribes.
- ▶ Tribes may indicate or disclaim interest in further participation.
- ▶ TCNS provides NOTIFICATION, it does not substitute for Section 106 process or government-to-government consultation unless Tribe disclaims interest.

Tower Construction Notification System - TCNS

- ▶ Following TCNS notification, the applicant must use the E-106 system to start the review clock that will enable referral of non-responsive Tribes when a Form 620 or 621 is prepared for SHPO review.
- ▶ Facilities located in industrial parks, strip malls, or shopping centers and facilities in utility/communications rights of way are excluded from SHPO review under NPA Sections III D & E.
 - ▶ These deployments still require Tribal participation.
 - ▶ The Commission's 2nd Wireless Infrastructure Report & Order (adopted March 2018) (R&O) established "alternate submission packet" requirements when a Form 620/621 is not prepared for SHPO review.
 - ▶ Alternate submissions must include contact information, project coordinates and mapping, facility/site descriptions, and aerial and site photographs.
- ▶ Applicants must provide all information via Tribes' preferred means.

Resolving TCNS Issues

- ▶ In 2018, the R&O clarified Section 106 Tribal participation requirements by addressing fees, information requests, time frames, and contracting issues.
- ▶ Disagreements with Tribes about these requirements should always be referred to the FCC by emailing tcnshelp@fcc.gov.
- ▶ The R&O clarifications maintain an applicant's responsibility to identify Tribal historic properties.
- ▶ Non-responsive Tribes may be referred through the TCNS system once they have had thirty (30) days to review the Form 620/621 or alternate submission packet.
- ▶ Tribes that respond and then go silent or are otherwise not referable through TCNS may be referred at <https://www.fcc.gov/tcns-manual-referral> by following instructions available at <https://us-fcc.app.box.com/s/ec13y8ofc5ew9q1ca059eotybig6n37x>

Response Timelines

- ▶ The review clock begins to run on the date that the Tribal Nation can be shown to have received or may reasonably be expected to have received the required information.
- ▶ Applicants should convey the Form 620/621 or alternate submission packet to the Tribe following their preferred means for receiving review information (e.g., email, USPS mail). This may be described in the Notice of Organizations or expressed directly by the Tribe to the applicant.
- ▶ Applicants must provide a complete and accurate submission packet to start the clock.
- ▶ Uploading the Form 620/621 to the E-106 system starts the referral clock and generates a notification to the Tribe that the information is available to review.
- ▶ Alternate submission packets for projects excluded from SHPO review are uploaded at the time of the TCNS filing to start the 30-day referral clock.
- ▶ Applicants should follow up with the Tribe to confirm receipt, clearly communicating that the contact is a courtesy and not an indication of tardiness.

Response Timelines

- ▶ If a Tribe does not respond within 30 calendar days of receiving required information electronically (35 days if by USPS delivery) the applicant can refer the matter to the FCC for follow up.
- ▶ Tribes that have not provided any reply should be referred in the TCNS system.
- ▶ Tribes that cannot be referred in TCNS may be eligible for manual referral provided that they do not have "No Response Equals No Interest" (NRENI) language in their details. Check for this before referring!
- ▶ Upon receiving referrals, the FCC sends a letter or email requesting that the Tribe respond within 15 calendar days if interested in participating in the review.
- ▶ The FCC then attempts a follow-up call to the Tribal TCNS contact.
- ▶ If the Tribal Nation does not respond within 15 calendar days, the applicant may move forward with construction unless notified otherwise by the FCC.

Government-to-Government Consultation

- ▶ Tribes have a right to request government-to-government consultation during any point in the Section 106 process.
- ▶ When a Tribe requests government-to-government consultation, all correspondence is relayed through FCC staff.
- ▶ Tribes may choose to re-engage with applicants/consultants.
- ▶ For clarity, FCC staff should be made aware when a Tribe no longer wishes for a project to remain in government-to-government consultation.
- ▶ Because ONAP staff are not normally directly involved in the Section 106 process, they are an available resource that Tribes can go to in cases of higher sensitivity.

Tribal Review Fees

- ▶ Consistent with ACHP guidance, applicants are not legally obligated to pay up-front fees when providing Tribal Nations with the opportunity to comment on proposed facility deployments.
- ▶ Tribal Nations remain free to request upfront fees and applicants may, if they choose, voluntarily pay such fees.
- ▶ Parties must mutually agree on the terms of any compensation in advance.
- ▶ If a Tribe conditions its response on the receipt of up-front compensation, an applicant should explain that the R&O clarified that neither the ACHP nor the FCC require applicants to pay Section 106 fees and reiterate the invitation to comment on the project. If the Tribe does not comment by the end of the review period, the applicant may refer the Tribe to the FCC as non-responsive.

Consultant Services

- ▶ An applicant may ask a Tribal Nation participating in a Section 106 review to conduct surveys or perform other services for which a negotiated fee is appropriate.
- ▶ If the applicant and Tribe cannot agree on a fee, the applicant may seek other means to fulfill its “reasonable and good faith” identification obligation on behalf of the FCC.
- ▶ The applicant is not presumed to be required to engage the services of any particular party to assist with identification, monitoring, or mitigation.
- ▶ The applicant must, however, use a properly qualified consultant or contractor when expert services are required.
- ▶ With respect to identification and evaluation of historic properties and effects, the professional must generally meet the relevant Secretary of the Interior’s Professional Qualification Standard.

Consultant Services

- ▶ Traditional knowledge may be required to assess the significance of above ground features, to identify archaeological properties, or to monitor construction.
- ▶ An agreement regarding compensable services is required before services are performed.
- ▶ If an applicant and a Tribe disagree on whether the applicant has met the good faith standard of identification, either party may ask the Commission to decide whether the applicant's obligations have been satisfied.
- ▶ In the case of a dispute, the applicant will have the burden of substantiating its claim within 15 days. Following this, the objecting party will then have 15 days to make their case.

Identifying Tribal Historic Properties

- ▶ Under the NPA, Tribal religious and cultural sites are treated differently from historic properties already identified by SHPOs or Federal agencies.
- ▶ FCC licensees, and those who are building for them, are required to cooperate with the Tribes to identify historic properties of religious or cultural significance.
- ▶ There are cases where this may require research by Tribal members or THPO staff.
- ▶ FCC staff will assist in clarifying requirements upon request.
- ▶ The R&O established a dispute resolution process to handle disagreements between applicants and Tribes over what constitutes “reasonable and good faith” identification efforts.

Tribal Religious and Cultural Sites

- ▶ Tribal historic properties are frequently not identified in SHPO records or listed in the National Register, so Tribal participation in Section 106 reviews is critical.
- ▶ The NPA allows Tribes (and SHPOs) to request an expanded APE.
- ▶ Tribes that identify a historic property of religious or cultural significance should be invited to become consulting parties.
- ▶ The FCC expects that the identification of a historic property of Tribal significance will involve a recognized Tribal Authority.
- ▶ In cases where site information is sensitive, the FCC can work with the Tribe and applicant to develop an approach that avoids areas of religious or cultural significance.
- ▶ The FCC and our licensees do not need to know why a site has religious or cultural significance to a Tribe.

Learning from the THPOs

- ▶ Each Tribe has a unique history and perspective that informs their evaluation of Federal undertakings.
- ▶ There are unique factors that THPOs and their staffs evaluate when considering impacts on Tribal religious and cultural properties that are different from what consultants may be used to when working with SHPOs.
- ▶ In some regions, large geographic areas have traditional meaning and continue to be actively used by the Tribes.
- ▶ For some sites, knowledge about the importance of a place may be restricted to certain clans or families.
- ▶ The FCC staff do not require that Tribes explain their religious and cultural beliefs; only that a recognized elder and/or Tribal authority has identified the area as important.

Be aware:

- ▶ Only Tribes can identify their historic properties of religious and cultural significance. Sites may include Tribal Cultural Landscapes (TCL) and Traditional Cultural Properties (TCP).
- ▶ Traditionally-trained archeologists may not recognize evidence of Tribal sites, and different Tribes may view the same site differently.
 - ▶ *For example, an archaeological site can have culturally significant plants and modified trees above ground (peeled bark, coppiced [pruned to encourage new growth], etc.), a lithic component (stone tools) underground, and possess a viewshed of an important cultural or spiritual location, such as a mountain. The complexity inherent in these types of places is understood by the communities that inhabit and interact with them.* (https://www.boem.gov/sites/default/files/environmental-stewardship/Environmental-Studies/Pacific-Region/Studies/BOEM-2017-001_Vol1.pdf)
- ▶ Protect the location of all Tribal sites.



Email all general questions on Tribal participation requirements
to **TCNSHELP@FCC.GOV**

TCNS HELP SUPPORT TEAM:

Maira Delao (Administrator)
Connie Diaz (Support)
Leon Jackler (Attorney)
Don Johnson (Attorney)
Matthew Hartnett (TCNS Technical)



QUESTIONS?

fccenvironmentalworkshop@fcc.gov