

Quick Reference Guide

for

NCHRP Web-Only Document 281: Integrating Tribal Expertise into Processes to Identify, Evaluate, and Record Cultural Resources

Prepared for

AASHTO Committee on Environment and Sustainability

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BRIEF

The research objective of NCHRP Web-Only Document 281 Project 25-25, Task 114, was to understand and detail how tribal perspectives and expertise can inform the requirements and intent of Section 106 of the National Historic Preservation Act (NHPA) for surface transportation projects, recognizing federal agency government-to-government consultation responsibilities and addressing issues associated with confidentiality. Through a literature review; online surveys of tribes, state departments of transportation (DOTs), Federal Highway Administration (FHWA) Division Offices, and other agencies; and follow-up interviews with tribes and state DOTs, Task 114 sought to explore successful Section 106 outcomes through collaborative incorporation of tribal expertise throughout the tribal engagement and consultation process. The latter includes identifying places of religious and cultural significance, assessing potential project effects on these significant places, and resolving any adverse effects. This study also examined the consideration of tribal expertise during early transportation planning, such as during long-range planning, corridor studies, 10-year plans, project programming, etc.

Previous research conducted by NCHRP and other organizations and agencies has articulated several roadblocks to facilitating the integration of tribal expertise into the Section 106 process (and early planning). These roadblocks include the following.

- Tribal responsiveness because of capacity issues and lack of financial and personnel resources.
- Lack of trust between tribes and agencies.
- Absence of a clear benefit to tribes resulting from their participation in the Section 106 process.
- Resolving conflicting perspectives on data and information acquisition and cultural sensitivity, cultural perspective and confidentiality issues.

Task 114 has identified the following possible solutions to these and related roadblocks.

- Enhance the capacity of tribes to contribute their expertise to project development by compensating tribes for their participation in the same way an agency would pay a consultant. These financially compensated activities might include inventory/survey (including consultation with elders and other experts), evaluations of identified places of religious and cultural significance, and development and implementation of measures to resolve adverse effects. This would not involve compensation for participation as a Section 106 consulting party in the Section 106 process (e.g., reviewing standard Section 106 documentation).
- Dedicated agency staff such as tribal liaisons. These tribal liaisons are generally involved in the entire project delivery process, from early planning to project completion.
- Collaborative development of memoranda of understanding or protocols detailing the use of tribal expertise both in early planning and also project development. When appropriate and agreed upon, these protocols can also be codified in formal Section 106 agreement documents as part of Section 106 reviews.
- Protocols can also be used in laying out process for communication between tribes and agencies, addressing information and data acquisition and sensitivity issues.
- Opportunities for face-to-face interactions and discussions during all aspects of project delivery, from early planning to resolution of adverse effects.
- Providing continuous feedback to tribes on how their expertise is used in early planning and project development decision-making.

INTRODUCTION

This document serves as a quick reference guide for effectively integrating tribal expertise and knowledge into all steps in the review process associated with Section 106 of the NHPA (Section 106), in the context of state DOT projects funded through federal sources, such as the FHWA Federal-Aid Highway Program. The guide also examines using tribal expertise during the early planning process (e.g., long-range planning, corridor studies, 10-year plans, and project programming), and how consideration of tribal input during early planning benefits subsequent project development (i.e., during Section 106 and National Environmental Policy Act [NEPA] reviews). Tribal participation in both planning and environmental reviews also enhances efforts that link early planning and the NEPA review process (i.e., Planning and Environmental Linkages).

First, why integrate tribal expertise and knowledge into all steps in the Section 106 process? Full consideration of tribal expertise informs and enhances the tribal consultation process associated with the requirements and intent under Section 106. Tribes become full partners in the project review process, incorporating unique tribal expertise and perspectives into the identification of historic properties (including identification of areas of potential effect, defining the level of effort to identify historic properties, and evaluating National Register of Historic Places eligibility), the assessment of effects (including making findings of no historic properties affected, no adverse effect, and adverse effect), and the resolution of adverse effects, including the monitoring of agency implementation of commitments for resolving adverse effects. When done appropriately and successfully, consideration of tribal expertise results in improved project outcomes for the agencies by avoiding costly delays and conflicts. From a tribal perspective, consideration of their expertise demonstrates that the agency is listening to the tribes and values their contributions and participation. In addition, working with tribes in this way improves trust and builds stronger relationships, which in turn benefits the goals and objectives of both parties.

Consideration of tribal expertise during early planning has similar benefits. During early planning, tribal expertise is used to define areas of concern that may have an impact on the ultimate selection, location, and design of future projects, thus avoiding to the maximum extent feasible and addressing early in project delivery environmental and cultural conflicts that would impact scopes of future projects.

The activities and efforts presented below in this quick reference guide serve as approaches for addressing the following primary challenges encountered when integrating tribal expertise and knowledge into all steps in the Section 106 process, in addition to the early project planning process.

- Communication.
- Tribes' capacity to provide their expertise during both project planning and project development because of capacity and resource issues (funding and personnel).
- Lack of trust.
- Cultural sensitivity, cultural perspectives, and confidentiality.

The approaches and items listed below were all identified by the state DOTs, other agencies, and tribes that participated in this NCHRP study. They can be considered best practices for the integration of tribal expertise in all aspects of the Section 106 process, in addition to early project planning.

ESTABLISHING PROTOCOLS FOR INTEGRATION OF TRIBAL EXPERTISE AND KNOWLEDGE INTO THE EARLY PLANNING PROCESS AND SECTION 106 PROCESS

Developing non-binding memoranda of understanding (MOUs) or Consultation Protocol Agreements (CPAs) that detail how FHWA and state DOTs will communicate with tribes and coordinate the use of tribal expertise in the project delivery process are important strategies in fostering and maintaining relationships with mutual understandings that have more predictable outcomes. For several tribes, the use of MOUs and CPAs are the preferred tool to incorporate tribal expertise into all steps in the Section 106 process, using a collaborative approach. Consultation with tribal partners in the development of such MOUs and CPAs are an important element in their successful implementation, as is consideration of how best to put the MOUs and protocols for positive outcomes for the agencies and the tribes into operation.

These MOUs and protocols would describe:

- The areas of interest to tribes (locations within a state, issues associated with projects, project types, etc.);
- When and how tribes are to be consulted;
- When and how their expertise is applied to projects and early project planning; and
- How to address issues associated with cultural sensitivity, data and information confidentiality, and the inclusion of cultural perspectives in project products.

Another important element of these MOUs and protocols is the requirement for face-to-face interactions with tribes as an effective way of building trust and incorporating tribal expertise into all steps in the Section 106 process, in addition to early planning.

Tribes have a keen interest in making sure that areas of significance to them are protected for future generations, and agencies want to streamline the project development process through effective early planning, such as through Planning and Environmental Linkages. These studies linking planning and NEPA may offer the opportunity to address many of the concerns expressed by tribes, and provide the ability to undertake planning analyses utilizing a broader landscape approach to identifying and evaluating areas of importance to tribes and providing critical planning data for decision-making. Using a landscape approach is an issue that a number of tribes have raised; if done in early planning, this approach would provide ample time to engage in collaborative approaches throughout consultation.

IMPROVING TRIBAL CAPACITY TO PARTICIPATE IN THE IDENTIFICATION OF PLACES OF RELIGIOUS AND CULTURAL SIGNIFICANCE TO TRIBES

A direct approach to improving the capacity of tribes to contribute their expertise to project development and, where appropriate, early project planning, is to compensate tribes (through one of their governmental offices) for their participation in the same way an agency would pay a consultant (Note: this does not involve compensation for standard participation in the Section 106 process as a Section 106 consulting party). The focus of this compensation, for contributing their expertise, would be investigations to identify places of religious and cultural significance to tribes, i.e., Traditional Cultural Properties (TCPs). Tribes could conduct background research, consult with tribal elders and other experts, and carry out fieldwork, in addition to providing information on site evaluations and project effects. Tribes can conduct all this work or partner with a non-tribal consultant under contract with a state DOT. If a project requires resolution of adverse effects to TCPs, tribes might be involved in carrying out all or elements of these measures to resolve adverse effects and would be compensated in the same way as a private-sector consultant. Participation in

the Section 106 process as a paid consultant is a potential pathway toward increasing the capacity of tribes to more fully engage in and contribute to the Section 106 process when a project may involve or affect places of religious and cultural significance to tribes.

PROVIDING FEEDBACK TO TRIBES DURING PLANNING AND THE SECTION 106 PROCESS

Tribes often do not know what the final decision is on a project, so there is a bit of a breakdown in the feedback loop. This observation mirrors the results of a 2019 Government Accountability Office report on how federal agencies conduct tribal consultation. Tribes would like to know on every project what the final decision is and how agencies consider tribal expertise and concerns in decision-making. Tribes need to rely on agencies to provide this feedback because tribes cannot follow up with all agencies given tribes' involvement in hundreds of consultations. One approach is to include feedback procedures in the above discussed MOUs or CPAs. The development of these procedures would be a collaborative effort among tribes, state DOTs, and FHWA.

ESTABLISHING A PRIMARY POINT OF CONTACT WITHIN A STATE DOT

Building trust takes time, effective communication, and reliable actions. Increased and continuing face-to-face engagement and communication with tribal partners through consultative meetings, active participation in early project planning, and collaboration to find successful project outcomes through the use of tribal expertise will build trust over time. A consistency in approach to relationship building can be augmented through the use of tribal liaisons and also provides a reliable partner for tribal outreach and engagement.

Having a tribal liaison within a state DOT provides tribes with a single consistent point of contact. In addition, the liaison can track changes within tribal governments over the life of a project, working to maintain an open dialogue and communication with a tribe even with changes in tribal personnel, re-establishing the validity of tribal expertise protocols and MOUs during these changes. A tribal liaison would work with tribes to assess the performance of these protocols and MOUs, and work with tribes to improve these tools and to develop other mechanisms for improving the integration of tribal expertise into both project development and early project planning. Having such a defined position in an agency also demonstrates the FHWA's and DOT's commitment to building a relationship with tribes, and provides a foundation on which bi-directional communication can be established and sustained.