



## **Section 106 and Coronavirus Questions & Answers for Indian Tribes**

To assist Indian tribes during the coronavirus disease outbreak (COVID-19), the ACHP developed this set of questions and answers as well as sample responses to common situations. For general updates, check the [ACHP's COVID-19 web page](#).

**1. Due to the COVID-19 outbreak, the tribal preservation office is currently closed or the work conditions are such that we cannot review any projects or just a few of them (e.g., preservation staff is trying to work from home with limited email access). Under these circumstances, can a federal agency proceed with the Section 106 review of an undertaking on tribal lands without us? What about off tribal lands?**

The ACHP has advised federal agencies that the Section 106 process is “paused” when the Tribal Historic Preservation Office (THPO), Indian tribe, or Native Hawaiian organization is closed due to the COVID-19 outbreak. The ACHP has encouraged federal agencies to be flexible with Section 106 deadlines when they have reason to believe the relevant consulting parties may be facing challenges in meeting such deadlines due to the outbreak. Specifically, the ACHP has stated:

The Section 106 deadlines for the response of State and Tribal Historic Preservation Officers, and Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to historic properties affected by the undertaking, regardless of its location (collectively, States/Tribes/NHOs), will be considered paused while, due to the COVID-19 outbreak, an office is closed or work conditions are such that the States/Tribes/NHOs are unable to carry out their Section 106 duties or statutory rights to consultation in a timely fashion (e.g., staff unavailability due to health reasons; restricted access to records; state or tribal laws requiring hard copy records; lack of Internet access or telework capabilities). The clock will resume once the conditions are no longer in effect.

We strongly encourage federal agencies to be flexible with Section 106 deadlines when they have reason to believe the relevant consulting parties may be facing challenges in meeting such deadlines due to the outbreak. Particular attention should be given to those parties such as Indian tribes and THPOs that may have limited capacity to participate even under normal conditions.

Note that some federal agencies will be proceeding with emergency undertakings in response to the COVID-19 outbreak. Such undertakings are excluded from the mentioned pausing of the Section 106 clock, and can use the expedited review process in 36 CFR 800.12. The nature of those reviews is such that they may move forward with limited or no tribal input.

**2. Do Indian tribes have to notify federal agencies that their THPO or preservation offices are closed in order to pause the Section 106 process as mentioned above?**

No, Indian tribes do not have to notify federal agencies, but it would help if they could. The ACHP has recommended that tribes send notifications to the federal agencies they work with and/or federal preservation officers to the extent they can. Federal agencies have been told to assume the Section 106

clock is paused when they are aware of an official tribal announcement that the preservation office has closed (this could include a notice on its website) or the tribal office's outgoing voicemail message or automatic e-mail reply indicates such closure or conditions making it unable to carry out Section 106 reviews. So, such actions would be recommended.

The ACHP offers the following suggestions for notifying federal agencies:

On [date], the [Tribe name] tribal government declared a state of emergency and closed all but essential government services. The closure remains in effect until [date or "further notice"]. Therefore, this office is unable to respond to requests for review pursuant to Section 106 of the National Historic Preservation Act. Accordingly, the Section 106 process is thereby paused.

OR

On [date], the [Tribe name] tribal government ordered tribal members to limit face-to-face interactions as much as possible until [date]. Accordingly, THPO/tribal employees are staying home and are unable to respond to requests for review pursuant to Section 106 of the National Historic Preservation Act. Accordingly, the Section 106 process is thereby paused.

OR

Due to the [Tribe name] Tribe's Stay-at-Home order and resulting workplace disruptions, Section 106 inquiries and the 30-day clocks are tolled until further notice. This is in line with Advisory Council on Historic Preservation recommendations. We regret any inconvenience and will do our best to address emergency situations.

**3. If the tribe's preservation staff are able to review some undertakings, but not others due to capacity limitations resulting from limited workforce or internet connectivity during an emergency declared by the tribe, is the "clock" still paused for those undertakings that staff cannot review?**

Yes. See the answer to #1.

**4. What should the tribe do if a federal agency or an applicant proceeds with an undertaking on tribal lands without having carried out Section 106 consultation with the THPO or tribe? What about an undertaking off tribal lands?**

If a federal agency or an applicant for federal assistance or approval carries out an undertaking on or off tribal lands without having consulted with the Indian tribe pursuant to Section 106, the tribe should first contact the relevant federal agency to ask about the undertaking and Section 106 review. The tribe should also notify the ACHP as soon as possible. Again, be aware that undertakings responding to the COVID-19 outbreak may be using emergency review procedures under 36 CFR 800.12. See [here](#) for more information.

**5. The THPO or cultural resources staff is working but the tribal government is preoccupied with COVID-19 and is not prioritizing the execution of Section 106 agreement documents. Where a Memorandum of Agreement (MOA) or Programmatic Agreement can only be signed by the head of the Indian tribe, can that undertaking, subject to the agreement, still move forward without the tribe's signature?**

If the agreement is for an undertaking off tribal lands and does not affect historic properties on tribal lands, the federal agency can execute the agreement without the tribe's signature. The federal agency

should include language in the preface that explains the situation regarding the status of consultation with the tribe.

If the agreement is for an undertaking on tribal lands, 36 CFR 800.2(c)(2)(ii)(F) provides for an Indian tribe that does not have a THPO to waive its right to execute an MOA for an undertaking on its lands.

For a tribe that has a THPO, the agreement can be executed by the THPO unless the tribe has explicitly prohibited the THPO from doing so. In such a case, and with the tribe not signing the agreement for an undertaking on tribal lands, the federal agency can only wrap up its Section 106 compliance (and thereafter proceed with the project) once consultation has been terminated and the head of the agency has responded to the ACHP's formal comments under 36 CFR 800.7(c).

**6. What should the tribe do when normal work resumes? Will the tribe have the opportunity to consult on projects for which the Section 106 process timeframes were paused?**

If possible, the tribe should notify the federal agencies with which it typically works and others like the relevant SHPO and ACHP that normal operations have resumed. The extent to which Section 106 consultation will resume on any given undertaking may vary depending on the circumstances. Presumably, the tribe will receive notification from the relevant federal agency or consultant that the review process timeframes have resumed.

**7. If the tribal government declares an emergency in response to COVID-19, what undertakings can be subject to 800.12 provisions - HUD, forestry, roads, etc?**

All federal undertakings proposed in response to the emergency declaration would be subject to the review provisions in 36 CFR 800.12.

The ACHP's general guidance on emergencies can be found at <https://www.achp.gov/digital-library-section-106-landing/role-section-106-disaster-response-frequently-asked-questions>.

The ACHP has issued a blanket extension through May 29, 2020, for federal agency use of emergency Section 106 procedures regarding undertakings that respond to emergency and disaster declarations on the outbreak of coronavirus disease (COVID -19).

The extension applies to projects that respond to COVID-19 under the national emergency declared by President Trump on March 13, 2020, and other COVID-19 emergencies or disaster declarations that have already been issued by the President, a tribal government, or the governor of a state, or may be issued by any of them while the extension is in place.

*April 8, 2020*