

FEES DURING SEC. 106 PROCESS (WHEN IS THE TRIBE A PAID CONTRACTOR?)

When Payment Is Appropriate

When, during the identification phase of the Section 106 process, an agency or applicant seeks to identify historic properties that may be significant to an Indian tribe, it may ask for specific information and documentation regarding the location, nature, and condition of individual sites, or actually request that a survey be conducted by the tribe.

In doing so, the agency essentially asks the tribe to fulfill the role of a consultant or contractor. In such cases, the tribe would seem to be justified in requiring payment for its services, just as any other contractor. The agency or applicant is free to refuse, but retains the obligation for obtaining the necessary information for the identification of historic properties, the evaluation of their National Register eligibility, and the assessment of effects on the historic properties.

Ultimately, the Federal agency must be able to demonstrate that it made the “reasonable and good faith effort” that Section 800.4(b) of the Section 106 regulations requires.

Summary

While ACHP’s regulations encourage the active participation of Indian tribes, they do not obligate Federal agencies or applicants to pay for consultation. If an agency or applicant attempts to consult with an Indian tribe and the tribe demands payment, the agency or applicant may refuse and move forward.

If, on the other hand, the agency or applicant seeks information or documentation that it would normally obtain from a professional contractor or consultant, they should expect to pay for the work product.

When the line between the two is unclear, the agency or applicant is encouraged to act in a manner that facilitates, rather than impedes, effective tribal participation in the Section 106 process.

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