



Tribal Consultation about Historic Cultural and Religious Properties in Section 106 Review of HUD Projects

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Community Planning and Development

Webinar Format

- Presentation will last approximately one hour followed by 30 minutes of Q&A
- Recording of webinar will be posted on HUD's [Office of Environment and Energy Website](#)
- Audience members are muted due to the high number of participants



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Audio Issues During the Webinar

- For audio, please use the following phone number: 866-893-1635, or listen through your computer.
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 - Logging off, then logging in again
 - Requesting help through the Q & A box that will appear on your screen.



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How to Submit Questions

Type your questions in the Q & A box that will appear on your screen during the presentation. Technical questions will be addressed right away; content questions will be answered after the presentation.



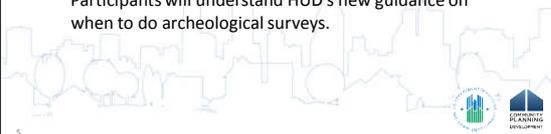
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Objectives

Participants will understand the process for tribal consultation in Section 106 reviews of HUD projects.

Participants will understand the role of Responsible Entities in the Section 106 process.

Participants will understand HUD's new guidance on when to do archeological surveys.



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Presentation Topics



- Background
- Overview of Section 106
- Responsible Entity as Agency Official
- Tribes as Consulting Parties
- Consultation Process on HUD Projects
- Tribal Directory Assessment Tool (TDAT)
- Consideration of Archeological Surveys
- Unanticipated Discoveries



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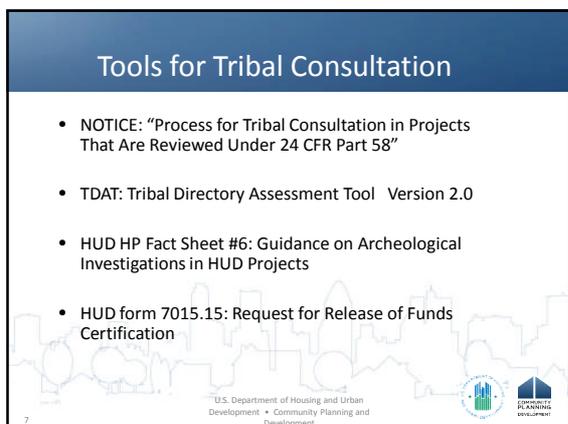
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Tools for Tribal Consultation

- NOTICE: "Process for Tribal Consultation in Projects That Are Reviewed Under 24 CFR Part 58"
- TDAT: Tribal Directory Assessment Tool Version 2.0
- HUD HP Fact Sheet #6: Guidance on Archeological Investigations in HUD Projects
- HUD form 7015.15: Request for Release of Funds Certification

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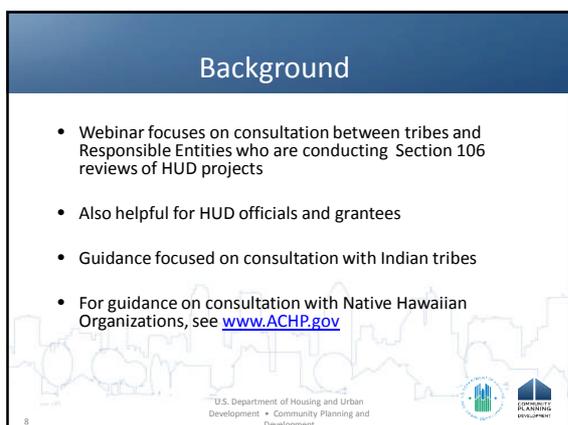


Background

- Webinar focuses on consultation between tribes and Responsible Entities who are conducting Section 106 reviews of HUD projects
- Also helpful for HUD officials and grantees
- Guidance focused on consultation with Indian tribes
- For guidance on consultation with Native Hawaiian Organizations, see www.ACHP.gov

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Background

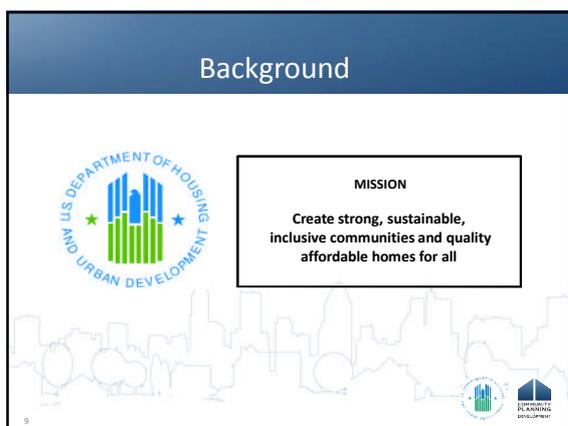


MISSION

Create strong, sustainable, inclusive communities and quality affordable homes for all

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Background

- HUD assists tens of thousands of projects each year
- Projects include new construction and rehabilitation for affordable housing, mortgage and loan guarantees, community planning and development



- Assistance goes to state and local governments, tribal governments, non-profit organizations, and individual recipients

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Background - Legislation

- The National Historic Preservation Act of 1966 requires federal agencies to consider the impact of their projects on historic properties
- Process known as "Section 106" review
- Implementing regulations – 36 CFR Part 800



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Background - Legislation

- Section 106 incorporated by reference in environmental compliance requirements in HUD regulations 24 CFR Parts 58 and 50
- 24 CFR Parts 58 and 50 also require environmental compliance on general environmental impacts under NEPA, and in the following areas:
 - ✓ floodplain management
 - ✓ wetlands protection
 - ✓ protection of aquifers
 - ✓ endangered species
 - ✓ wild and scenic rivers
 - ✓ coastal zone management
 - ✓ air quality
 - ✓ farmlands protection
 - ✓ thermal/explosive hazards
 - ✓ environmental justice
 - ✓ toxic sites
 - ✓ noise

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Section 106 Process

- Step 1: Initiate Consultation
- Step 2: Identify and evaluate historic properties
- Step 3: Assess effects
- Step 4: Resolve any adverse effects



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Section 106

- General Guidance in ATEC (Assessment Tools for Environmental Compliance) on HUD website
http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/environment/atec
or search on the Internet for "HUD ATEC"
- Consultation with Indian Tribes in the Section 106 Review Process: A Handbook
--Advisory Council on Historic Preservation
<http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf>

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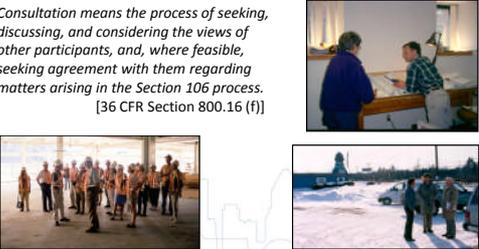
Consulting Parties in the Section 106 Process

- Agency Official
- Applicants
- State Historic Preservation Officer (SHPO)
- Federally recognized Indian tribes and Native Hawaiian organizations
- Tribal Historic Preservation Officer (THPO)
- Local governments
- Organizations with demonstrated interest
- Public
- Advisory Council on Historic Preservation (ACHP)

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Consultation is a process, not an event

Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.
[36 CFR Section 800.16 (f)]



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Background - Assumption of Review Authority

“Agency Official”

- Part 50 projects: HUD staff
- Part 58 projects: Responsible Entity (RE)
 - Applies to many programs including NSP, CDBG, HOME, HOPE VI, Public Housing, Section 8, and NAHASDA

24 CFR Part 58 directs REs to assume responsibility for environmental review, including Section 106 and tribal consultation.

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Background - Assumption of Review Authority

Responsible Entity (RE) [24 CFR 58.2(a)(7)]

- Local, state or tribal governments that have assumed the federal agency’s environmental review authority and responsibility for projects within their jurisdiction, including those for which they are grantees
- HUD memo on legal background
<http://portal.hud.gov/hudportal/documents/huddoc?id=DOC-13724.pdf>

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Background - Assumption of Review Authority

Responsible Entity (RE) [36 CFR Part 800]

- *The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law. [36 CFR 800.2(a)]*
- *Head of the agency means the chief official of the Federal agency responsible for all aspects of the agency's actions. If a State, local, or tribal government has assumed or has been delegated responsibility for section 106 compliance, the head of that unit of government shall be considered the head of the agency. [36 CFR 800.16(k)]*

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Background - Assumption of Review Authority



- Section 106 regulations require “government to government” consultation, federal agency to sovereign Indian nation
- The REs (state, local, and tribal governments) have assumed the role of the federal agency in tribal consultation

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Consulting Parties in the Section 106 process

THPO (Tribal Historic Preservation Officer)

- May have assumed role of SHPO on tribal lands and on projects that affect tribal lands
 - Consult with them in lieu of SHPO
 - Unless THPO or non-tribal owner of land within reservation boundaries requests SHPO participation
 - Unless project on tribal lands has effect off tribal lands

HUD guidance directs REs to initiate consultation with tribal leader and THPO on projects off tribal lands

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Tribal Consultation Requirement

WHO: Federally recognized Indian tribes, including Native Alaskans

WHAT: Historic properties of religious and cultural significance to tribes

WHEN: When a project may affect historic properties of religious and cultural significance to tribes



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WHO to consult?

“Indian tribe”

Indian tribe means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

[36 CFR 800.16(m)]

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WHO to consult?

- Consultation required ON and OFF tribal lands
- Tribes with current or ancestral interest
- Multiple tribes may have interest
- RE may invite or allow participation by non-federally recognized tribes



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WHAT to consult about?

Historic properties of religious and cultural significance to tribes including:

- archeological sites
- burial grounds
- sacred landscapes or features
- ceremonial areas
- traditional cultural landscapes and places
- plant and animal communities
- structures with significant tribal association



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Historic properties of religious and cultural significance to tribes



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Historic properties of religious and cultural significance to tribes



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Historic properties of religious and cultural significance to tribes

Native American Traditional Cultural Landscapes and the Section 106 Review Process: Questions and Answers

- Advisory Council on Historic Preservation
- <http://www.achp.gov/natl-ga.pdf>

Guidelines for Evaluating and Documenting Traditional Cultural Properties

- National Park Service
- <http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf>

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WHEN to consult?

When the project involves the types of activities that may affect historic properties of religious or cultural significance to tribes including:

- ground disturbance (digging)
- new construction in undeveloped natural areas
- introduction of incongruent visual, audible, or atmospheric changes
- work on a building with significant tribal association
- transfer, lease or sale of historic properties of religious and cultural significance



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Activities that may affect historic properties of religious and cultural significance

- **Significant ground disturbance**
Examples: new sewer lines, utility lines, foundations, footings, grading, access roads
- **Work on a building with significant tribal association**
Examples: rehabilitation or demolition of a building or structure associated with a significant tribal event, important person, or tribal community use



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Activities that may affect historic properties of religious and cultural significance

New construction in undeveloped natural areas
Examples: large-scale facilities in undeveloped natural areas



Incongruent visual, audible, or atmospheric changes
Examples: construction of a focal point that is out of character with the surrounding natural area; increase in noise levels above an acceptable standard in areas known for their quiet; excessive light in a dark night sky



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Activities that may affect historic properties of religious and cultural significance

Transfer, lease, or sale of historic properties of religious and cultural significance



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Consult early, before decisions are made

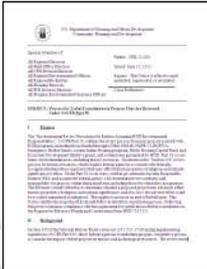
Native American Groups Sue to Stop Solar Projects
Feb 27, 2011 - 3:04 PM

BLYTHE, Calif. -- Native Americans are clashing with the federal government over plans to fast-track approval and construction of massive solar energy project that the Indians fear will harm sacred and culturally significant sites in Western deserts. Recent lawsuits by two native groups pose a threat to half dozen proposed solar developments that the Obama administration has identified as a high priority in its quest for more clean energy production. One suit already has halted work on a major solar farm in Southern California.....



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Notice on Tribal Consultation



http://portal.hud.gov/hudportal/documents/huddoc?id=env_notice_tribe_con.pdf

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Section 106 Process

Step 1: Initiate Consultation

Step 2: Identify and evaluate historic properties

Step 3: Assess effects

Step 4: Resolve any adverse effects



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Section 106 – Step 1 Initiate Consultation

TDAT: Tribal Directory Assessment Tool

- <http://egis.hud.gov/tdat/Tribal.aspx>
- Database that uses project address to identify federally recognized tribes with possible interest in a project
- Information on counties of interest was gathered from tribes in 2011

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Section 106 – Step 1 Initiate Consultation

- Response requested within 30 days of receipt
- If tribe responds with no interest, or there is no response, tribal consultation is complete
- Tribe requested to accept or decline consultation within 30 days, not to provide information within 30 days
- RE may invite non-federally recognized tribes to be consulting parties; they may also participate as members of the public



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Section 106 – Step 2 Identify and Evaluate Historic Properties

- Gather and share information about known and potential historic properties.
- Evaluate properties for the National Register of Historic Places.
- Tribes possess special expertise in evaluating historic properties of religious and cultural significance to them.



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Section 106 – Step 2 Identify and Evaluate Historic Properties

Consultation meetings with tribes

- face-to-face, web, phone
- joint consultation with other tribes and consulting parties

Fees

- no fees to consulting parties for consultation
- detailed survey documentation may be eligible project expense similar to consultant



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Section 106 – Step 2
Identify and Evaluate Historic Properties

Confidentiality

- inability to share information
- protection of sensitive information
 - practical means, state and federal laws
 - Section 304 confidentiality provisions detailed in 36 CFR 800.11(c)
 - “head of agency” consults with Secretary of Interior and ACHP
 - applies to properties listed on or eligible for the National Register

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Section 106 – Step 2
Identify and Evaluate Historic Properties

- If parties disagree on eligibility of a site for the National Register, they can invite ACHP to consult.
- On tribal lands, if tribe and RE disagree, RE must obtain a formal Determination of Eligibility.
- Off tribal lands, tribe can ask ACHP to request that RE obtain a formal Determination of Eligibility.

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Section 106 – Step 2
Identify and Evaluate Historic Properties

Determination of Eligibility (DOE)

- Parallel to National Register nomination, but without designation
- 36 CFR Part 63
- Submittal to the Secretary of the Interior with extensive information about the physical, historical, and/or spiritual aspects of the property, with photographs, maps, and opinion of the SHPO

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Section 106 – Step 2
Identify and Evaluate Historic Properties

If a party requests an archeological survey, use HP Fact Sheet #6 Guidance on Archeological Investigations in HUD Projects -- REVISED



http://portal.hud.gov/hudportal/documents/huddoc?id=env_factsheet_6.pdf

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Section 106 – Step 2
Identify and Evaluate Historic Properties

Fact Sheet #6 -- Factors to Consider



- Information received from SHPO, THPO, tribes
- Likely impact of the project on potential properties
- Previous ground disturbance
- Likely significance of potential properties
- Magnitude of the project and degree of HUD involvement
- Public interest

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Section 106 – Step 2
Identify and Evaluate Historic Properties

Fact Sheet #6 -- Factors to Consider



- Presence of human remains
- ACHP Policy Statement on Affordable Housing and Historic Preservation

“Archeological investigations should be avoided for affordable housing projects limited to rehabilitation and requiring minimal ground disturbance.”

- does NOT apply to new construction

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Section 106 – Step 2
Identify and Evaluate Historic Properties

Fact Sheet #6

“Background research, previous identification efforts and existing National Register documentation may indicate a high likelihood that archeological historic properties may be present in an APE, but a lack of existing information does not indicate a lack of historic properties.”



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Section 106 – Step 3
Assess Effects

Criteria of Adverse Effect

- Physical destruction or damage of historic properties
- Alteration of building or setting or use that does not meet Secretary of the Interior’s Standards
- Removal of property from its historic setting
- Introduction of incongruent visual, audible, or atmospheric changes
- Transfer, lease, or sale of historic properties



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Section 106 – Step 3
Assess Effects

Make a Finding

- No Historic Properties Affected
- No Adverse Effect
- Adverse Effect



Notify all consulting parties of the Finding

- Parties have 30 days to object
- Tribe or RE may ask Advisory Council to review



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Section 106 – Step 3
Assess Effects

- Tribe has 30 days to object to a finding
- Failure of a THPO to respond within 30 days permits the RE to assume concurrence with a finding or determination or to consult with ACHP in the THPO's absence
- Subsequent involvement by the THPO is not precluded but the THPO cannot reopen a finding or determination that it failed to respond to in a timely manner earlier in the process



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Section 106 – Step 4
Resolve Adverse Effects

- If Adverse Effect, notify Advisory Council and invite their participation in consultation
- Council will respond within 15 days
- Criteria for Council participation
 - "Presents issues of concern to Indian tribes and Native Hawaiian organizations"



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Section 106 – Step 4
Resolve Adverse Effects

Consult to avoid, minimize or mitigate Adverse Effects

- Consider alternatives
- Consider mitigation measures



Memorandum of Agreement (MOA)

- Required signatories – RE, SHPO/THPO, ACHP
- Invited signatories – THPO, tribe, other consulting parties
- Must be executed prior to decision point for project



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Section 106 – Step 4 Resolve Adverse Effects

Mitigation Measures

- Data recovery through excavation
- Signage or plaques on site
- Oral history
- Interpretive exhibits with artifacts
- Web archive or exhibit
- Educational programs
- Deed restrictions for property disposals



RE must inform tribe and others when stipulations and mitigation measures have been carried out.

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Section 106 – Step 4 Resolve Adverse Effects

Termination of consultation may be requested by:

- THPO on tribal lands, RE, SHPO, Advisory Council (if participating)
- Tribe that is consulting about properties off tribal lands may decline to sign MOA, but cannot terminate consultation

ACHP comments to Head of Agency

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Unanticipated Discoveries

- If historic properties are discovered during construction, stop construction and notify tribes, THPO, SHPO, and ACHP within 48 hours, and reenter consultation
- If discovery includes human remains, respectfully cover over and secure the remains, and notify same parties plus local law enforcement officials
- Site visit recommended to resolve potential adverse effects

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Unanticipated Discoveries

Follow ACHP "Policy Statement Regarding Treatment of Burial Sites, Human Remains, and Funerary Objects"

- <http://www.achp.gov/docs/hrpolicy0207.pdf>
- Prescribes a consultation process, not an outcome
- Priority to leave burials undisturbed in place
- Develop and implement treatment plan in consultation with lineal descendants or descendant communities, which may include tribes



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Unanticipated Discoveries

Comply with Native American Graves Protection and Repatriation Act (NAGPRA)

- Applies to inadvertent discoveries on federal and tribal lands
- Requires return of certain cultural items to lineal descendants and/or culturally affiliated federally recognized tribes
- Procedures, including notification and consultation requirements, available at: <http://www.nps.gov/nagpra/INDEX.HTM>



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Record of Compliance

Revised Request for Release of Funds (RROF) form (7015.15)

- Old form required certification of compliance with all relevant environmental laws and regulations
- Revision adds certification of compliance with Section 106 process including consultation with SHPO and Indian tribes
- Ties consultation to approval of release of funds



- <http://www.hud.gov/offices/adm/hudclips/forms/hud7.cfm>



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Record of Compliance

Failure to comply could lead to HUD not approving a release of funds for a project or issuing a finding of non-compliance and possible sanctions, corrective actions, or other remedies which may include terminating grants or repayment of federal funds.



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Resources

TDAT
<http://egis.hud.gov/tdat/Tribal.aspx>

Tribal Consultation Tips
http://www.comcon.org/sites/default/files/historic_preservation/section-106-process_3.php

Section 106 Guidance
http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/environment/review/historic

"Working Effectively with Tribal Governments" course
<http://tribal.golearnportal.org/>

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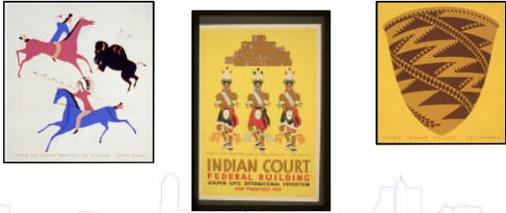
Resources

Local HUD Environmental Officers
http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/environment/contact/localcontacts

HUD Federal Preservation Officer
Nancy E. Boone
Office of Environment and Energy
Community Planning and Development
202-402-5718
Nancy.E.Boone@HUD.gov

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Questions and Thank You



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