



U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-7000

OFFICE OF COMMUNITY PLANNING
AND DEVELOPMENT

JUN 21 2005

Don Klima
Director
Office of Federal Agency Programs
Advisory Council on Historic Preservation
1100 Pennsylvania Ave, NW, Suite 809
Washington, DC 20004

Dear Mr. Klima:

Thank you for your letter of March 11, 2005, regarding the Nantucket (Massachusetts) School Staff Housing Project. Tom Melone, HUD Regional Environmental Officer in Boston, has confirmed that this project did not use or receive any Departmental funds. Therefore, the Town of Nantucket has not triggered Section 106. Tom has responded to Jeff Durbin, Council/HUD Liaison, to this effect.

In response to a broader issue raised in your letter, the Department wants to clarify its position on how HUD and its grantees under 24 CFR Part 58 fulfill their government-to-government responsibilities with Indian tribes.

The Department respectfully disagrees with your statement that "HUD cannot delegate its Federal obligation to consult with an Indian tribe on a government-to-government basis in Section 106 cases involving properties of religious or cultural significance to Indian tribes." It bases this on a legal interpretation of existing statute and regulations, including the Housing and Community Development Act (HCDA) of 1974, as amended (42 U.S.C. 5304(g)(1)), which states

...the Secretary, in lieu of the environmental protection procedures otherwise applicable, may under regulations provide for the release of funds for particular projects to recipients... who assume all of the responsibilities for environmental review, decisionmaking, and action pursuant to [NEPA], and such other provisions of law as the regulations of the Secretary specify, that would apply to the Secretary were he to undertake such projects as Federal projects.

To implement this unique legislative authority, the Department has issued 24 CFR Part 58, "Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities." Specifically, §58.4, "Assumption Authority," states that

Responsible entities shall assume the responsibility for environmental review, decision-making, and action that would otherwise apply to HUD under NEPA and other provisions of law that further the purposes of NEPA, as specified in Sec. 58.5. Responsible entities that receive assistance directly from HUD assume these responsibilities by execution of a grant agreement with HUD and/or a legally binding document such as the certification contained on HUD Form 7015.15, certifying to the assumption of environmental responsibilities.

In accordance with the HCDA and similar provisions in authorizing legislation for a number of other HUD programs, §58.5 specifies that the National Historic Preservation Act, particularly Sections 106 and 110, and the ACHP regulations in 36 CFR Part 800, are among the provisions of law for which responsible entities assume responsibility for compliance.

The HCDA, other authorizing legislation and 24 CFR Part 58 thus allow state, local, and tribal government grantees (and, in some cases, non-grantees) of certain HUD programs to become the Federal agency for the purposes of complying with NEPA and other related laws.

Furthermore, the Advisory Council's own regulations at 36 CFR Part 800 recognize HUD's "assumption authority." Part 800 subsections that recognize this authority are found at §800.2(a), §800.2(c)(3), §800.12(c), and §800.16(k). For example, §800.2(a) explicitly recognizes that the "agency official" that takes legal responsibility for compliance with Section 106 and Part 800 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.

Also, in the *Federal Register*, dated December 12, 2000, the Advisory Council, in response to a comment on "delegation authority," recognized HUD's unique mandate:

Congress specifically placed Section 106 compliance responsibilities on Federal agencies. Only Congress can shift that responsibility. The Council is only aware of certain Department of Housing and Urban Development programs containing such a statutory delegation. (65 FR 77701)

Section 800.2(c)(2)(i)(3) requires that the "agency official" shall consult with representatives designated or identified by a tribal government or Native Hawaiian organization. It should be noted that when state, local or tribal government officials are authorized by HUD statutes and Part 58 to carry out the Section 106 process, they are doing so as the agency official and not as an "applicant." Such governments may not be applicants. Under a number of HUD programs that are subject to Part 58, the program applicant may be a nonprofit organization or special purpose governmental entity, but a third party state, unit of general local government, or Indian tribe assumes the Federal environmental and historic preservation review responsibilities and acts as the agency official.

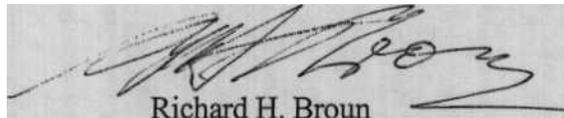
An end result of the Department's "assumption authority" provisions is that Section 106 consulting parties, including Indian tribes, are in direct contact with project or program decision-makers and thus have an increased chance of influencing positive outcomes. It is important to understand that HUD is not the final decision-maker in programs covered by Part 58.

In a number of other ways, HUD fulfills its government-to-government responsibilities with Indian tribes. In September 2001, in response to Executive Order 13084 (and later 13175), the Office of Native American Programs published HUD's "Tribal Government-to-Government Consultation Policy" (66 FR 49784-49786). Relating directly to 24 CFR Part 58 grant programs, the Department's field environmental staff offers regular environmental training to local, state, and tribal government grantees on the requirements associated with tribal consultation. It also

encourages grantees to attend training courses offered by the Advisory Council. Currently, the Office of Environment and Energy (OEE) is working closely with members of your staff, Jeff Durbin and Valerie Hauser, on developing tribal consultation guidance to educate our field staff and grantees more thoroughly and to improve the effectiveness of OEE's technical assistance. In addition, HUD administers housing assistance to Indian tribes under the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA) (25 U.S.C. 4101). NAHASDA is implemented under HUD regulations that were developed through negotiated rulemaking with representatives of tribal governments. NAHASDA also provides for assumption of environmental responsibilities by tribes (25 U.S.C. 4115); the regulations negotiated with the tribal representatives give tribes the choice of taking on those responsibilities or requesting that HUD do so. NAHASDA was amended in 2000 to permit HUD to waive requirements of NAHASDA's environmental assumption provision in certain situations where an Indian tribe has inadvertently failed to comply and the failure will not frustrate the purposes of NEPA or the related statutes (including NHPA). HUD has carefully considered and granted a number of requests from tribal governments or their designees for waivers of this provision, in accordance with the provisions of Executive Order 13175.

Should you have any further questions or comments regarding this matter, please contact me at 202-708-2894, ext. 4439, or by email at Richard Broun@hud.gov, or the Department's historic preservation officer, David Blick, at ext. 5718, or David G Blick@hud.gov.

Sincerely,

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read 'Richard H. Broun'. Below the signature, the name 'Richard H. Broun' is printed in a standard black font.

Richard H. Broun
Director
Office of Environment and Energy