



**FDM 26-35-1 General**

November 17, 2010

This procedure summarizes other laws and regulations that relate to historic properties and Tribal consultation. Its purpose is to:

- alert project managers of other responsibilities
- identify where and how these other laws relate to Section 106

The project manager is responsible for determining whether project activities warrant consideration of other additional laws and regulations.

The following table lists applicable laws and regulations that are included in this procedure. Each entry in the table is hyperlinked to the appropriate description.

<b>Federal Laws, Executive Orders, and Regulations:</b>			<b>Link:</b>
16 U.S.C. 470 et seq.	NHPA	National Historic Preservation Act of 1966, as amended	<a href="#">FDM 26-35-5.1.2</a>
Sec. 106 (36 C.F.R. 800)		Section 106 of NHPA	<a href="#">FDM 26-35-5.1.1</a>
Sec. 4(f) (49 U.S.C. 303)		Section 4(f) of the DOT Act	<a href="#">FDM 26-35-5.1.3</a>
42 U.S.C. 1996 & 1996a	AIRFA	American Indian Religious Freedom Act	<a href="#">FDM 26-35-5.1.4</a>
42 U.S.C. 2000bb	RFRA	Religious Freedom Restoration Act	<a href="#">FDM 26-35-5.1.5</a>
E.O. 13007		Executive Order 13007 of 1996, Indian Sacred Sites	<a href="#">FDM 26-35-5.1.6</a>
25 U.S.C. 3001 et seq.	NAGPRA	Native American Graves Protection and Repatriation Act	<a href="#">FDM 26-35-5.1.7</a>
43 C.F.R. 10		NAGPRA Final Regulations (1995) and Final Rule (2007)	<a href="#">FDM 26-35-5.1.8</a>
16 U.S.C. 470aa-mm	ARPA	Archaeological Resources Protection Act of 1979	<a href="#">FDM 26-35-5.1.9</a>
16 U.S.C. 461-467	HSA	Historic Sites Act of 1935, as amended	<a href="#">FDM 26-35-1</a>
42 U.S.C. 4321-47	NEPA	National Environmental Policy Act of 1979, as amended	<a href="#">FDM 26-35-5.1.9</a>
16 U.S.C. 469	AHPA	Archaeological and Historic Preservation Act of 1974, as amended	<a href="#">FDM 26-35-5.1.10</a>
36 C.F.R. 79		Curation of Federally-Owned and Administered Archaeological Collections	<a href="#">FDM 26-35-5.1.11</a>
25 U.S.C. 450	ISDEA	Indian Self-Determination and Education Act of 1975, as amended	<a href="#">FDM 26-35-5.1.12</a>
E.O. 11593		Executive Order 11593 of 1971, Protection and Enhancement of the Cultural Environment	<a href="#">FDM 26-35-5.1.13</a>
E.O. 12898		Executive Order 12898 of 1994, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations	<a href="#">FDM 26-35-5.1.14</a>
E.O. 13084		Executive Order 13084 of 1998, Consultation and Coordination with Indian Tribal Governments (superseded by Executive Order 13175)	<a href="#">FDM 26-35-5.2.1</a>
E.O. 13175		Executive Order 13175 of 2000, Consultation with Indian Tribal Governments	<a href="#">FDM 26-35-5.2.2</a>
Executive Memorandum, 2004		Government-to-Government Relationship with Native American Tribal Governments	<a href="#">FDM 26-35-5.2.3</a>
<b>State Statutes and Executive Orders</b>			
Section 157.70		Burial Sites Preservation Law	<a href="#">FDM 26-35-10.1</a>
Section 44.40		Historic Preservation Law	<a href="#">FDM 26-35-10.2</a>
Executive Order 39		Executive Order 39 (Government-to-Government Relationships Between the State of Wisconsin and Indian Tribal Governments Located Within the State of Wisconsin)	<a href="#">FDM 26-35-10.3</a>
<b>Additional WisDOT Policies and Agreements</b>			
		WisDOT Tribal Partnership Agreement, 2005	<a href="#">FDM 26-35-20.1</a>

## 5.1 Related to Historic Properties and Historic Preservation

The National Park Service offers an online list of laws, regulations, standards, guidelines, and executive orders (<http://www.nps.gov/history/laws.htm>) and publishes a book entitled *Federal Historic Preservation Laws, The Official Compilation of U.S. Cultural Heritage Statutes* (2006 ed.) ([http://www.nps.gov/history/history/online\\_books/fhpl/index.htm](http://www.nps.gov/history/history/online_books/fhpl/index.htm)).

### 5.1.1 Section 106

*Section 106 [36 C.F.R. 800]*

(<http://www.achp.gov/regs-rev04.pdf>)

Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended, requires federal agencies to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings. The Section 106 Process seeks to accommodate historic preservation concerns with the needs of federal undertakings through consultation among parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

The Section 106 requirements apply to all WisDOT-administered projects unless the region, in consultation with the WisDOT HPO, has made an informed decision not to apply for federal reimbursement. The Section 106 requirements apply to all WisDOT-administered projects when:

1. WisDOT has determined that the project is a federal undertaking; and
2. The project has the potential to effect historic properties eligible or potentially eligible for the NRHP.
3. Even if the project does not involve federal reimbursement, Section 106 may still apply if a federal permit—such as a Federal Army Corps of Engineers Section 404 permit—or license is needed.

Special permits are required to undertake the Section 106 Process on Indian lands (for example, see Archaeological Resources Protection Act, below), and Tribal laws pertaining to Section 106 must be followed on Tribal lands. Larger projects, such as corridor studies and capacity expansion projects, must be coordinated with the SHPO, THPO(s), BTS Cultural Resource Team, Tribal governments, and the FHWA during the earliest initial project design planning stage.

### 5.1.2 National Historic Preservation Act

*National Historic Preservation Act [16 U.S.C. 470 et seq.] (sections other than 106)*

([http://www.nps.gov/history/local-law/FHPL\\_HistPrsrvt.pdf](http://www.nps.gov/history/local-law/FHPL_HistPrsrvt.pdf))

Section 101(d)2 establishes the process by which a Tribe may assume all or any part of the function of the SHPO, thus forming a federally recognized THPO office.

Section 110(f) provides special protection to National Historic Landmarks (NHLs). It states that prior to the approval of any federal undertaking which may directly and adversely affect any NHL, the head of the responsible federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark, and shall afford the ACHP a reasonable opportunity to comment on the undertaking. Any project manager who is involved with or foresees involvement with an NHL should contact BTS Cultural Resource Team immediately.

Section 110(k) focuses on "anticipatory demolition," the intentional alteration or destruction of an eligible property to avoid compliance with Section 106. In short, intentional deceit to avoid Section 106 is a violation of the law and will jeopardize federal assistance and/or permits.

### 5.1.3 Section 4(f) of the DOT Act

*Section 4(f) of the DOT Act (49 U.S.C. 303)*

([http://www.nps.gov/history/local-law/FHPL\\_DOTAct.pdf](http://www.nps.gov/history/local-law/FHPL_DOTAct.pdf))

Section 4(f) says that historic properties (and ascertain other resources) cannot be used for a project under the jurisdiction of the Secretary of Transportation unless no prudent and feasible alternative exists and all possible planning is carried out to minimize harm to the property. The provisions of Section 4(f) that relate directly to historic properties are as follows:

1. applicability is based on the criteria of the National Register of Historic Places (NRHP);
2. special considerations apply to archaeological sites;
3. identification and evaluation of potentially eligible properties relies on Section 106 requirements; and
4. the prudent and feasible test may constrain Section 106's consultation step.

#### 5.1.4 American Indian Religious Freedom Act

*American Indian Religious Freedom Act (AIRFA) [42 U.S.C. 1996 and 1996a]*

([http://www.nps.gov/history/local-law/fhpl\\_IndianRelFreAct.pdf](http://www.nps.gov/history/local-law/fhpl_IndianRelFreAct.pdf))

This act sets forth as U.S. policy the protection and preservation of American Indians' inherent right of freedom to believe, express, and exercise their traditional religions, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rights. Project managers should work with BTS Cultural Resource Team to ensure that undertakings do not impact these rights.

#### 5.1.5 Religious Freedom Restoration Act

*Religious Freedom Restoration Act (RFRA) [42 U.S.C. 2000bb]*

(<http://www4.law.cornell.edu/uscode/42/ch21B.html>)

RFRA establishes certain tests that must be met before an agency can "substantially burden a person's exercise of religion." This law applies to *everyone's* practice of religion, not just Native Americans. Project managers should work with BTS Cultural Resource Team to ensure that the concerns of religious groups are addressed during project development.

#### 5.1.6 Executive Order 13007 of 1996, Indian Sacred Sites

*Executive Order 13007 of 1996, Indian Sacred Sites*

(<http://www.achp.gov/EO13007.html>)

This executive order applies on federal land and directs federal agencies to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners, as well as to avoid adversely affecting the physical integrity of such sacred sites. Although federal agencies must consult with Tribes to learn the existence of places that require management decisions to be made, the directive requires agencies to maintain the confidentiality<sup>1</sup> of sacred sites where appropriate for their protection.

#### 5.1.7 Native American Graves Protection and Repatriation Act with Final Regulations

*Native American Graves Protection and Repatriation Act (NAGPRA) [25 U.S.C. 3001 et seq.] with Final Regulations [43 C.F.R. 10, 1995] and Final Rule [43 C.F.R. 10, 2007]*

(NAGPRA: [http://www.nps.gov/history/local-law/FHPL\\_NAGPRA.pdf](http://www.nps.gov/history/local-law/FHPL_NAGPRA.pdf))

1995 Final Regulations: [http://www.nps.gov/history/nagpra/MANDATES/43CFR10\\_12-4-95.htm](http://www.nps.gov/history/nagpra/MANDATES/43CFR10_12-4-95.htm)

2007 Final Rule: [http://www.nps.gov/history/nagpra/MANDATES/43CFR10\\_10-1-07.htm](http://www.nps.gov/history/nagpra/MANDATES/43CFR10_10-1-07.htm))

NAGPRA applies to the protection of human remains, funerary objects, sacred objects, and objects of cultural patrimony located on land owned by the Federal government or tribal lands. Only projects on such land will involve this law.

Project managers should contact BTS Cultural Resource Team for assistance.

#### 5.1.8 Archaeological Resources Protection Act of 1979

*Archaeological Resources Protection Act of 1979 (ARPA) [16 U.S.C. 470aa-mm]*

([http://www.nps.gov/history/local-law/FHPL\\_ArchRsrcsProt.pdf](http://www.nps.gov/history/local-law/FHPL_ArchRsrcsProt.pdf))

This law protects archaeological resources on land owned by the federal government or tribal lands. ARPA requires that a permit be issued to anyone conducting archaeological activities that involve ground disturbance or removal of cultural material from federal or Tribal land. The archaeological consultant is responsible for obtaining this permit which is issued by the federal agency with land management responsibilities in cooperation with the Tribe. Project managers should contact BTS Cultural Resource Team for assistance.

#### 5.1.9 National Environmental Policy Act of 1969, as Amended [NEPA; 42 U.S.C. 4321-4347]

(<http://ceq.hss.doe.gov/nepa/regqs/nepa/nepaeqia.htm>)

A federal agency must consider the effects of its actions on the environment "to preserve important historic, cultural, and natural aspects of our national heritage." The "cultural environment" includes historic properties and other culturally valued places, as well as sociocultural attributes (such as social institutions, lifeways, religious practices).

#### 5.1.10 Archaeological and Historic Preservation Act of 1974, as Amended [AHPA; 16 U.S.C. 469]

([http://www.nps.gov/history/local-law/fhpl\\_archhistpres.pdf](http://www.nps.gov/history/local-law/fhpl_archhistpres.pdf))

This act provides protection of archaeological, historical, and scientific data threatened by federal, federally assisted, and federally licensed projects. It requires that agencies report to the Secretary of the Interior whenever their actions may damage or destroy archaeological data and take actions in concert with the

<sup>1</sup> Refer to Confidentiality, FDM 26-1 Attachment 1.1 (Glossary).

Secretary to preserve such data.

#### **5.1.11 Curation of Federally-Owned and Administered Archaeological Collections [36 C.F.R. 79]**

(<http://www.nps.gov/archeology/tools/36cfr79.htm>)

These regulations, issued by the Department of the Interior and National Park Service, govern the perpetual curation of archaeological materials, data and associated records owned or administered by federal agencies.

#### **5.1.12 Indian Self-Determination and Education Assistance Act of 1975, as Amended (ISDEA) [25 U.S.C. 450]**

(<http://www4.law.cornell.edu/uscode/25/ch14schII.html>)

This act deals with implementation of the trust responsibility and provides for Tribes to assume the functions of the BIA, Indian Health Service, and some other agencies in the conduct of programs. Under this act, Tribes sometimes take over agency responsibilities in implementing NHPA.

#### **5.1.13 Executive Order 11593 of 1971 (Protection and Enhancement of the Cultural Environment)**

([http://www.gsa.gov/Portal/gsa/ep/content/View.do?contentType=GSA\\_BASIC&contentId=12094](http://www.gsa.gov/Portal/gsa/ep/content/View.do?contentType=GSA_BASIC&contentId=12094))

This executive order was issued by President Nixon to provide direction to Federal agencies in the management of historic properties. Most of its provisions have been absorbed into NHPA.

#### **5.1.14 Executive Order 12898 of 1994 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations)**

(<http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf>)

This executive order was issued by President Clinton to ensure that Federal agencies attempt to avoid disproportionately high adverse human health and environmental impacts. Minority and low-income populations are targeted.

### **5.2 Additional Orders Related to Consultation**

The following additional orders focus on consultation with Indian governments. Please note that this is not a complete listing of all federal laws and regulations pertaining to Tribal consultation

#### **5.2.1 Executive Order 13084 of 1998, Consultation and Coordination with Indian Tribal Governments**

(superseded by Executive Order 13175, see below)

#### **5.2.2 Executive Order 13175 of 2000, Consultation with Indian Tribal Governments**

([http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000\\_register&docid=fr09no00-167.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=fr09no00-167.pdf))

This order was enacted to establish regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, to strengthen the U.S. government-to-government relationships with Indian tribes, and reduce the imposition of unfunded mandates upon Indian tribes. Among other provisions, it directs agencies to adhere to certain criteria when formulating and implementing policies that have tribal implications, and to have an accountable consultation process.

#### **5.2.3 Executive Memorandum, 2004, Government-to-Government Relationship with Native American Tribal Governments**

([http://www.usdoj.gov/archive/otj/Presidential\\_Statements/presdoc1.htm](http://www.usdoj.gov/archive/otj/Presidential_Statements/presdoc1.htm))

This memorandum recognizes the unique legal and political relationship of Tribes and reaffirms that each executive department and agency fully respect the rights of self-government and self-determination in their working relationships with federally recognized Tribal governments.

## **FDM 26-35-10 State Statutes and Executive Orders**

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### **10.1 Burial Sites Preservation Law**

([http://www.wisconsinhistory.org/hp/burialsites/pdfs/157\\_70.pdf](http://www.wisconsinhistory.org/hp/burialsites/pdfs/157_70.pdf))

Section 157.70 of the Wisconsin Statutes provides for the protection of all burial sites in Wisconsin. No one may disturb a human burial site without authorization from the Director of the Wisconsin Historical Society. If human bones or bones suspected to be human are discovered, work must stop immediately, and the Wisconsin Historical Society and BTS Cultural Resource Team must be notified:

- Wisconsin Historical Society, (608) 264-6507 or (800) 342-7834
- BTS Cultural Resource Team, (608) 261-0137 or 266-0099

A recommendation will be made regarding the continuation of work. Purchase of land from a cemetery must be coordinated with BTS Cultural Resource Team.

## 10.2 Historic Preservation Program

(<http://www.legis.state.wi.us/statutes/Stat0044.pdf>)

Section 44.40 of the Wisconsin Statutes provides guidance to state agencies conducting state-funded projects. Projects being developed under Section 106 are exempt from Section 44.40. Project managers wishing to proceed under Section 44.40 must first contact BTS Cultural Resource Team.

## 10.3 Executive Order 39

([http://www.wisgov.state.wi.us/journal\\_media\\_detail.asp?prid=413](http://www.wisgov.state.wi.us/journal_media_detail.asp?prid=413))

Issued by Governor Jim Doyle to affirm “the Government-to-Government Relationships Between the State of Wisconsin and Indian Tribal Governments Located Within the State of Wisconsin,” this executive order directs state agencies to consult with Tribal governments before taking actions that might affect them and to consider Tribal needs and interests.

## FDM 26-35-15 Tribal Laws

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These laws vary from Tribal Nation to Tribal Nation. It is critical that the project manager research the applicable laws when carrying out undertakings within an Indian Reservation and on Tribal lands.

There are also a variety of tribal laws pertaining specifically to cultural resources and archaeological studies. Each Tribe may have a list of these laws that can be accessed through the Tribe before determining the scope of work.

## FDM 26-35-20 Treaty Rights

*November 17, 2010*

FHWA and WisDOT must take into account their activity’s impact on the ability of Tribal nations and their members to carry out their treaty rights. Currently, the State of Wisconsin has eleven federally recognized tribes residing within its boundaries.

- List of treaties by name of Tribe (URL: <http://digital.library.okstate.edu/kappler/Vol2/Toc.htm>) or by year (URL: <http://digital.library.okstate.edu/kappler/Vol2/tocyr.htm>)
- Bad River Band of Lake Superior Tribe of Chippewa Indians
- Forest County Potawatomi Community
- Ho-Chunk Nation
- Lac Courte Oreilles Band of Lake Superior Chippewa Indians
- Lac Du Flambeau Band of Lake Superior Chippewa Indians
- Menominee Indian Tribe of Wisconsin
- Oneida Tribe of Indians of Wisconsin
- Red Cliff Band of Lake Superior Chippewa Indians
- Sokaogon Chippewa Community
- St. Croix Chippewa Community
- Stockbridge-Munsee Band of Mohican Indians

## 20.1 WisDOT Tribal Partnership Agreement, 2005

(<http://www.dot.wisconsin.gov/localgov/docs/partnership-agreement.pdf>)

This document, created as a result of Executive Order 39 (above), creates and defines the processes by which WisDOT and FHWA will work in collaboration with Wisconsin’s 11 sovereign Indian Nations. It is designed to acknowledge and support the government-to-government relationship between Tribes and state and federal agencies and to support American Indian sovereignty. It outlines guiding principles, protocols, and processes of effectively working with Tribal governments in all areas, including cultural resources.