

NATHPO TRIBAL FORUM · STRATEGY SESSION

The ACHP's Proposed Rewrite of Section 106 Regulations

What it would mean for Tribal Nations, THPOs, and the places Tribes protect

July 21, 2026

Prepared for Tribal Leaders and Tribal Historic Preservation Officers

Nothing in this presentation creates an attorney-client relationship. This presentation is for general informational purposes only and does not constitute legal advice.

Who We Are

- Cultural Heritage Partners, PLLC is a private law firm with a public mission: we believe cultural heritage is a human right.
- We are experienced Section 106 practitioners—the federal historic preservation program is core to our practice, not a side issue.
- We represent Tribal Nations, local governments, community organizations, and preservation advocates nationwide.
- Through our “[War Room](#)” initiative, we are actively tracking and responding to ACHP’s Section 106 regulatory overhaul.

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URGENT ACTION NOW!

PLEASE CONTACT SENATORS ON ENR COMMITTEE TODAY!!!

WE ARE MOBILIZING TRIBAL LEADERS, CITIZENS, AND THPOs to write to Democrats on the Senate Energy and Natural Resources Committee to raise a red flag about the proposed regulations that the Advisory Council on Historic Preservation is expected to vote on **this Friday, July 24**. Please share that these regulations would be a complete betrayal of tribal consultation requirements and existing legal obligations to Tribes.

Democratic members of the Committee include Senators from **New Mexico, Oregon, Washington, Hawaii, Maine, Nevada, Colorado, and Arizona**. Advocacy from Tribal Nations from these areas would be especially effective. The committee may consider formal comments regarding the proposed vote, but they need to hear that this issue is a priority.

DRAFT SCRIPT FOR CALL/EMAIL:

"My name is [Name], and I serve as [title] for the [Tribal Nation], a federally recognized Tribe located in [state]. I am calling to ask the Senator to oppose the Advisory Council on Historic Preservation's proposed revisions to 36 C.F.R. Part 800. These revisions would decimate Tribal consultation under Section 106 of the National Historic Preservation Act. Consultation is not a courtesy. It is a government-to-government obligation rooted in our sovereignty and in the federal trust responsibility. Turning it into a box-checking exercise infringes on that sovereignty and cuts Tribes out of decisions about our own ancestors, our sacred places, and our homelands."

WHY WE ARE HERE

Section 106 is one of the primary tools Tribes use to protect sacred places

For nearly sixty years, Section 106 of the National Historic Preservation Act has been how the federal government stops to ask, before it acts, whether a project will destroy a burial ground, a ceremonial place, or a landscape a Tribe has known since time immemorial. It is one of the few points in federal law where a Tribe has a right to be at the table.

The ACHP's draft would fundamentally weaken the role of Tribal Nations and THPOs in that process and undercut the consideration of sacred places, cultural landscapes, and the practices tied to them.

“The ACHP’s proposed regulations are an affront to Tribal sovereignty. Any effort to diminish our voice or disregard the places, traditions, and practices we hold sacred is egregious.”

– Ira L. Matt (Séliš)
Executive Director, NATHPO

Today's conversation

1

What is happening

The ACHP's draft rewrite and where it is in the process right now.

2

How it cuts Tribes out

The specific changes that weaken consultation, sovereignty, and sacred-site protection.

3

What we do about it

Comments, coordination, and litigation, and how your Tribe can plug in.

4

Hearing from you

This is a forum. Your questions and concerns shape the path forward.

THE BOTTOM LINE

This is worse than many of us feared

These draft revisions would effectively eliminate the consultative Section 106 process as we know it. For Tribal Nations specifically, they would strip away the sovereignty-based, government-to-government consultation that has protected sacred places for nearly sixty years, and reduce Tribes from sovereigns with a seat at the table to one optional “party” an agency may choose to hear, or not.

Sacred places

Mountains, waters, and cultural landscapes could be defined out of Section 106 entirely.

Tribal voice

Consultation becomes optional and agency-directed, no longer a required step.

Sovereignty and trust

Government-to-government and trust-responsibility language is stripped from the text.

Off-reservation sites

The duty to consult on ancestral and ceded lands is gutted, where most sacred sites are.

Three moves, one result

1

Makes consultation optional

Tribal consultation shifts from a required, structured, government-to-government process to something an agency, or even the project applicant, may run at its discretion.

2

Defines sacred places out

A new “geographically compact” and “human improvements” test excludes sacred mountains, waters, and cultural landscapes from the definition of “historic property.”

3

Strips sovereignty and effects

Government-to-government and trust language is removed, and fewer harms—visual, cumulative, off-site—would ever count as an “adverse effect.”

From a required conversation to “listen, then proceed”



“May” replaces “shall”

The rule now says consulting parties “may have consultative roles.” Consultation is no longer a required step for every undertaking. It is at the agency’s discretion.



“Consultation” is redefined

It once meant seeking, discussing, and, where feasible, seeking agreement. The draft cuts it to only “seeking and considering” views. You may be heard, but no one has to discuss with you or try to reach agreement.



The applicant can run it

A project’s own applicant may now initiate consultation directly with THPOs, and the language keeping agencies responsible for their government-to-government relationships with Tribes is deleted. Agency is only responsible for “findings and determinations.”

Agencies Control Who is at the Table

- Applicants, including for federal permits, licenses, and funding, may now initiate and conduct early consultation directly with SHPOs/THPOs on the agency's behalf, including with Tribes.
- Agencies gain broad new authority to shorten, lengthen, or waive procedural deadlines, including the Council's own comment period, simply by publishing notice of the change.
- Public participation becomes entirely discretionary. The draft states the agency "has exclusive discretion to determine the usefulness of public participation, including, e.g., as necessary to resolve community concerns. The agency shall consider how offering an opportunity for public participation is balanced against the cost of other values, such the public interest." *(yes, it is missing a word.)*

What Counts as an “Undertaking”?

The draft rewrites what qualifies as a federal action subject to Section 106 review in the first place, before any other analysis happens. Many of these provisions are poorly drafted and their meaning is unclear.

For example, under the draft, these types of activities do NOT trigger 106:

- State, local, or Tribal actions taken under delegated federal authority
- Federal grants where the government does not control how, to whom, or why funds are disbursed
- Actions “merely subject to a federal veto” that do not require affirmative federal approval
- Projects with “no or minimal” federal funding or involvement where a federal agency cannot control the outcome of a project. A but-for causal relationship is insufficient to make an agency responsible for a particular action and thus, does not by itself convert that action into a Federal undertaking
- Actions where another statute’s process is deemed to substitute for Section 106 compliance

New Off-Ramps to Skip Review Entirely

- Beyond the carve-outs, the draft creates a streamlined process for agencies to exempt entire categories or programs of undertakings from Section 106 review altogether.
- ACHP's own stated goal is to align Section 106 exemptions with NEPA's "categorical exclusions," so that far more project types face no historic-preservation review at all.
- Public participation is not required, rather creating an exemption is left to the "proponent of the exemption" to arrange.
- Once an exemption is approved, the Council's power to terminate it is limited and reactive, not automatic.

A sacred mountain would no longer count

The draft adds two new requirements to the definition of “historic property.”
To qualify, a place must:



Include tangible human improvements

It must include or once have included built structures. Ground that was never built on can fail this test.



Be “geographically compact”

Large, connected landscapes are excluded by design.



The draft says so explicitly:

“...[N]oncompact, unimproved natural features such as mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes, do not qualify as property for the purposes of Section 106.”

That is a direct description of many traditional cultural places and sacred sites – places that were never about a single building.

Draft 36 CFR § 800.16(k)(2). The draft keeps a nod to “properties of traditional religious and cultural importance,” but how will they know what these are without consultation?

The duty to consult on ancestral lands is gutted

Most sacred sites and traditional cultural places sit on ancestral or ceded lands – off today’s reservations. Current law requires consultation there “regardless of the location of the historic property.” The draft removes the protections that make that real:

~~“Regardless of location”~~

The explicit rule that the off-reservation duty applies wherever the property is located is deleted.

~~“Shall be a consulting party”~~

The guarantee that a Tribe attaching significance to an off-reservation site is a consulting party is removed.

Tied to the narrowed definition

What remains is limited to “historic property” as newly defined, which already excludes sacred landscapes.

Tribes reduced from sovereigns to “parties”

The draft deletes the language that framed Section 106 consultation as government-to-government. Struck from the text:



The trust relationship

The recognition of the “unique legal relationship” between the U.S. and Tribes set in the Constitution, treaties, and court decisions—removed.



Government-to-government

The requirement that consultation “recognize the government-to-government relationship” and be conducted respectful of tribal sovereignty—removed.



Ancestral-lands awareness

The instruction that agencies be aware sacred properties are often on ancestral, aboriginal, or ceded lands—removed.

Even when 106 applies, less counts as harm



Indirect and cumulative effects—removed

The draft deletes consideration of indirect and cumulative effects. Harm from a related project down the road, or from many projects together, would not count.



Visual, atmospheric, audible—removed

Introducing an element that diminishes a sacred site's setting. A transmission tower on a ceremonial viewshed, noise over a quiet place would no longer be an adverse effect.



Cost can outweigh preservation

Agencies need not avoid or minimize harm; they can document that “other considerations outweigh” it. The binding Memorandum of Agreement gives way to a one-sided Memorandum of Decision.

What narrowly survives, and why it is not enough

Still standing on tribal lands

THPO in lieu of SHPO. On tribal lands, agencies still consult the THPO in place of the SHPO where the Tribe has assumed those duties.

Tribal sign-off on programmatic agreements. A programmatic agreement still cannot take effect on tribal lands unless the THPO or Tribe signs it.

Emergency and discovery roles on tribal land are retained.

But the protection is thin

“Shall involve” → “may consult.” Even in program alternatives, mandatory tribal consultation is softened to the agency’s discretion.

Off-reservation sites are where the most danger lies. Most sacred places are off today’s tribal lands, exactly where the new definition and the gutted duty leave Tribes exposed.

A seat only on paper. Retaining a role “in lieu of the SHPO” means little once consultation itself is optional and sacred sites are defined out.

WHAT THIS MEANS ON THE GROUND

The burden falls hardest on Tribes



No warning, no identification

Unmarked burials and sacred sites, often known only through community knowledge, bulldozed before anyone can flag them.



No seat at the table

Tribal participation left to agency discretion, with little ability to hold a developer accountable across a project's life.



Permanent, irreversible loss

Places central to cultural and religious life destroyed with no record and no recourse, off-reservation sites most of all.



Fights shift to the courts

With no early consultation to resolve concerns, Tribes are left with litigation or protest, slower and costlier for everyone.

Not Just Bad for Tribes, Bad for Everyone

1

Consolidates all of these functions inside federal agencies that don't have the staff to do this work.

2

Excludes Tribal expertise and undermines the federal government's trust responsibility to Tribes.

3

Excludes state and local expertise: inviting unanticipated discoveries, project delays, and tort liability for developers.

4

Strips project proponents of a structured way to resolve community concerns, pushing conflict into other, less predictable venues.

5

Poor drafting: internal inconsistencies, missing language, ambiguous cross-references.

6

Litigation risk goes up substantially, for agencies and applicants alike.

The Road to a Final Rule

1

ACHP Votes to Approve the Draft

Friday, July 24, 2026: the Council votes on whether to approve the draft regulations for publication.

2

OIRA Review

The draft moves to the White House Office of Information and Regulatory Affairs for interagency review.

3

Federal Register Publication

Once published, the public comment period opens and runs for only 30 days.

4

ACHP Responds and Issues the Final Rule

The Council must respond to substantive comments before it can finalize the regulations.



Litigation

Legal challenges will likely follow, contesting both the rulemaking process and the legality of the regulations themselves.

Make your Tribe's comment count

1

Speak as a sovereign

Tribes carry distinct weight in the record. Say who you are and invoke the trust and treaty responsibility directly.

2

Cite the exact provision

Name the section, e.g., § 800.16(k)(2) on sacred sites, § 800.2(c) on consultation, not the rule in general.

3

Lead with real places

Concrete examples of sacred sites and TCPs protected through 106 outweigh general opinion in the record.

4

Answer ACHP's questions

Respond to the NPRM's numbered questions by number; propose the alternative text you want adopted.

5

Preserve issues for court

Courts generally review only arguments raised in comments. Raise consultation, sovereignty, and § 101(d)(6)(B).

6

Nail the mechanics

30-day deadline, via regulations.gov with the docket/RIN. NATHPO will share how and when to submit.

LITIGATION READINESS

Lawsuit will follow the final rule

If ACHP issues a final rule, we can ask a court to block it while the case is litigated. Likely claims include:

Failure to consult

Including the lack of meaningful Tribal consultation in developing this rule in the first place.

Failure to consider comments

The APA requires agencies to genuinely grapple with substantive comments – not just collect them.

Exceeds ACHP's authority

Several provisions conflict with the NHPA itself, including the Act's Tribal consultation mandate.

Interested in serving as a plaintiff, funder, or expert? Tribes carry unique standing here.

WHAT TO DO THIS WEEK

Where your Tribe can plug in

CHP is forming the following working groups. If you want to join one, email marion@culturalheritagepartners.com. You are not making a commitment, just letting us know where you might help.



Litigation

Support the case as a potential plaintiff, funder, or expert witness. Provide lawyers with critical information to make our case more strong.



Communications

Coordinate messaging and outreach to memberships, media, and elected officials.



Public comments

Coordinate the content of Tribal comments for the administrative record.

Get in touch: Reach out to join a working group or flag agencies cutting corners on 106 right now. Even if you are unsure where you fit, reach out, and we will find the right place together.

CLOSING

Your voice matters.

This overreach is also an opening. For decades, this work has happened quietly, in agency offices and comment dockets few people ever see. Now the whole country is watching.

This is our chance to say plainly what Section 106 protects: the right of Tribal Nations to have a real say in what happens to the sacred places, waters, and landscapes they have carried forward since time immemorial. First, we stop these regulations. Then, together, we build something stronger.

Let's protect what matters, together.

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[Link to our Section 106 War Room](#)

