



**NATIONAL ASSOCIATION
OF TRIBAL HISTORIC
PRESERVATION OFFICERS**

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Sara Bronin
Chair, Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001

Dear Chair Bronin,

The National Association of Tribal Historic Preservation Officers (NATHPO) has the following comments regarding the Advisory Council on Historic Preservation's Program Comment on Accessible, Climate-Resilient, Connected Communities.

NATHPO is the only national organization devoted to supporting Tribal historic preservation programs. Founded in 1998, NATHPO is a 501(c)(3) non-profit membership association of Tribal government officials who implement federal and Tribal preservation laws. NATHPO empowers Tribal preservation leaders protecting culturally important places that perpetuate Native identity, resilience, and cultural endurance. Connections to cultural heritage sustain the health and vitality of Native peoples.

We appreciate that the proposed Program Comment is a sincere effort to address climate change and the affordable housing crisis. Tribal Nations in general and THPOs specifically recognize the importance of addressing climate change. In fact, many Tribal Nations have long been on the front lines of climate change effects, which represent an existential threat to the cultural resources and sacred places THPOs are responsible for protecting and preserving. Furthermore, the affordable housing crisis is affecting Tribal members who live both on and off Tribal lands. The inability to afford housing affects all aspects of Tribal members' lives, including the preservation of their cultures.

That said, we object to the proposed Program Comment for both general and specific reasons.

1. On the most fundamental level, we are concerned about program comments in general as a tool at the ACHP's disposal.

Of all available program alternatives, it has the greatest potential to preclude Tribal consultation as well as minimize transparency and accountability in the Section 106 process. While you may currently recognize and respect the importance of Tribal sovereignty, there is no guarantee future Administrations and ACHP Chairs will share that perspective and agenda. With that in mind, we use this opportunity to request a broader discussion of the regulations and the existence of program comments as an alternative.

2. Virtual listening sessions are not true Tribal consultation, and an expedited timeline prevents robust Tribal participation in the proposal's creation.

We understand the pressure of election year timelines, but that does not justify fast-tracking a substantial policy change with far-reaching Tribal implications, regardless of intention.

3. Use of the proposed Program Comment will abrogate Tribal sovereignty and weaken Tribal Nations' ability to protect and preserve cultural resources and sacred places.

While we do not believe this is ACHP's intent, we are concerned that using a program comment in this manner would ultimately have those unintended consequences. Specifically, NATHPO has grave concerns that federal agencies will implement the proposed Program Comment without rigorous forethought, resulting in failure to consult with Tribal Nations and ultimately causing the destruction of cultural resources.

PROTECTING NATIVE PLACES

4. "Streamlining" has become synonymous with creating efficiencies which frequently circumvent Tribal consultation and sound project review.

Based on experience, NATHPO fears many federal agencies would use program comments to "streamline" the consultation process. For NATHPO members, far too often their experience has shown federal agencies use "streamlining" or "efficiencies" as a tool to ignore their responsibilities to Tribal Nations. Specifically, we have significant concerns this will be interpreted by agencies as a reason not to conduct a Section 106 review. While we understand the intention of the proposed Program Comment is to enable federal agencies to focus on other undertakings with greater potential for adverse effects, if there are no Section 106 reviews, it is virtually impossible to determine if a project would have an adverse effect to a Tribal cultural resource or sacred place.

Lindsey D. Bilyeu, Program Coordinator for NHPA Compliance Review for the Historic Preservation Department of the Choctaw Nation of Oklahoma, has noted, "Section 106 process is already set up to do what (ACHP) says they want the Program Comment to do." She added, "Even if it's said Tribes were allowed to submit comments, that is not actual consultation. That's sending your concerns to a generic email address, and they likely won't be read by ACHP."

5. The proposed Program Comment may be substituted for existing agreement documents.

We are also opposed to provisions that would allow federal agencies with an existing memorandum of agreement (MOA) or programmatic agreement (PA) to use the proposed Program Comment instead. Many of these existing MOAs and PAs explicitly state that Tribal consultation is required; federal agencies could use the Program Comment to avoid Tribal consultation. Additionally, Tribes are opt-in signatories rather than contributing drafters to many nationwide agreements, and many will not have that requisite role to be consulted as a signatory if an agency decides to substitute the Program Comment.

If ACHP proceeds with the proposed Program Comment, we request it be explicitly stated it does not usurp existing or future MOAs or PAs. As Ms. Bilyeu said, "Tribes need to be consulted on what they do and don't want to see. This isn't achieved through a Program Comment, it's achieved through consultation between the federal agency and the Tribe. This is why we have PAs with federal agencies, and they work just fine."

6. The 20-year duration of the proposed Program Comment.

If ACHP proceeds with the Program Comment, we request the length be significantly reduced, to no more than 5 years.

7. Definition of Tribal lands and effects off Tribal lands.

If ACHP proceeds with the proposed Program Comment, NATHPO believes it is incumbent on ACHP to expand the definition of Tribal lands and clarify broadly that program comments never apply to Section 106 on Tribal lands. Additionally, THPOs do not have signatory authority for places and resources located off Tribal lands, which includes the majority of Tribally significant places and resources. Furthermore, ACHP should specifically state before any program comment can be used, the federal agency must conduct robust Tribal consultation.

8. Previously disturbed areas have not necessarily undergone Section 106 review or lost their significance.

Finally, we request that ACHP reconsider application of the Program Comment to previously disturbed areas. The application of the Program Comment to previously disturbed areas makes the false assumption that these lands have already been surveyed. Much of our nation's infrastructure was completed before laws and policies existed requiring review and Tribal consultation. And as we frequently hear in Tribal

listening sessions, a Tribally important place does not necessarily lose its significance just because something was built on it in the past.

Although NATHPO has significant concerns with the proposed Program Comment, we do want to thank you for including numerous provisions and references that acknowledge the use of Indigenous Knowledge as a valid and self-supporting way of knowing. We also want to thank you for including another provision that federal agencies must compensate Tribal Nations when requesting that they conduct activities beyond basic Section 106 responsibilities. These are important provisions and should be included in all agreements and program alternative documents.

While we understand funding for THPOs is not under ACHP's purview, we would be remiss if we did not note that the "burst of new activities" you mentioned during your meeting with Tribal members on September 9 has not been matched with an increase in funding for THPOs. The Bipartisan Infrastructure Law (BIL) authorized \$1.2 trillion in funding and the full cost of Inflation Reduction Act (IRA)-authorized programs is estimated to be \$800 billion. THPOs consult on the impact federally funded or permitted projects have on Tribal Nations' cultural resources and sacred places. Before the BIL and IRA were passed, total THPO funding was \$15 million. It is now \$23 million. With that total increase for all THPOs, the average amount each THPO receives has increased from \$75,000 per year to \$104,000 per year. This amount also does not keep pace with the growing number of THPOs each year.

The federal funding THPOs receive must match the role Tribal Nations play in consulting on projects with a federal nexus. We urge ACHP to join us in calling on the Administration to propose budgets and Congress to pass appropriations and authorization bills that reflect the important role THPOs play in protecting the places that tell the stories of Tribal Nations.

NATHPO strongly supports a reauthorization of the HPF that would:

- require THPOs receive a minimum of 20 percent of the HPF each year, and;
- direct the National Park Service to review if THPO funding is keeping pace with THPO growth and adjust funding to reflect the annual increase in the number of THPOs.

Increasing funding for THPOs would go a long way toward increasing efficiency in the permitting process for climate change and affordable housing related projects and would significantly negate the need for "streamlining" the permitting process for projects that could have an impact on Tribal Nations' cultural resources and sacred places.

NATHPO appreciates ACHP leading the conversation on climate change and affordable housing and supports the underlying goals of the proposed Program Comment but does not support the use of the Program Comment to achieve them. We look forward to working with you to find other ways to address both issues without creating a mechanism that could circumvent Tribal consultation and contribute to destruction of Tribal Nations' cultural resources and sacred places, and set precedent that could be used to promulgate similar future policies.

Thank you for considering our comments on the proposed Program Comment.

Sincerely,



Valerie J. Grussing, PhD
Executive Director