



Talking Points: Proposed Section 106 Regulations, Key Issues for Tribal Nations

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The ACHP is proposing a major rewrite of 36 C.F.R. Part 800, the regulations implementing Section 106 of the NHPA. For Tribal Nations, the proposal could change when Section 106 applies, which Tribal places and effects are considered, how Tribal knowledge and authority are treated, and whether consultation can still meaningfully influence a federal decision.

As you consider these changes, keep three questions in mind:

1. Will your Tribe be brought into the process early enough to matter?
2. Will the government recognize the places, rights, knowledge, and effects that matter to your Tribe?
3. If your Tribe raises a concern, can consultation still change the outcome?

Congress required Tribal consultation and the regulations cannot narrow that responsibility. Congress requires federal agencies to take into account effects on historic properties and separately mandates Tribal consultation. The NHPA provides that property of traditional religious and cultural importance to a Tribal Nation may be determined eligible for the National Register and that, in carrying out Section 106, a federal agency “shall consult” with any Tribe that attaches religious and cultural significance to such property. The statute does not require the property to have already been determined eligible before that consultation occurs.

The existing regulations reinforce that sequence. Before eligibility is determined, the agency must make a reasonable and good-faith effort to identify Tribes that might attach religious and cultural significance to properties in the area of potential effects and invite them to participate. During identification, the agency gathers Tribal information concerning places that may be religiously and culturally significant and may be eligible. Only then are the National Register criteria applied.

The proposed regulations remove or reduce important parts of this framework. That matters because consultation is often how an agency first learns that a place exists, why it is significant, where its boundaries are, or whether it may be eligible in the first place.

Point to make: Congress made Tribal consultation mandatory, and the existing regulations recognize that consultation must help inform identification and eligibility. An agency should not first decide that a place is not a historic property and use that decision as the reason not to consult the Tribe whose knowledge may establish its significance or eligibility.

Example from your Tribe: Share where Tribal participation identified a place, changed an eligibility or identification decision, expanded the area being studied, or provided information the agency did not otherwise have.

Tribal Nations are governments, and Tribal expertise matters. The existing regulations recognize the government-to-government relationship, Tribal sovereignty, expressly preserve treaty rights and other Tribal rights, and Tribal special expertise concerning properties of religious and cultural significance. The proposal removes or diminishes important parts of that framework. Language, oral history, cultural practice, Tribal law, place names, Indigenous Knowledge, and knowledge held by Tribal representatives may tell an agency something a survey, consultant, applicant, or federal database cannot.

Point to make: Streamlining should not mean treating Tribal governments as ordinary commenters or Tribal expertise as optional information.



Example from your Tribe: Identify where Tribal expertise changed an agency's understanding of a place, an effect, or what the federal government needed to do.

Federal responsibility cannot become applicant responsibility, and Tribal interests should not be lost by silence. The proposal expands and restructures the role applicants or their designees may play in early consultation and creates response periods under which participation, comments, or objections may be treated as waived.

Applicants can provide project information, but they do not have the same government-to-government relationship with Tribal Nations as the United States. The existing regulations already allow agencies to authorize applicants to initiate certain consultation, but they expressly retain responsibility for government-to-government relationships with Tribes.

Point to make: Applicant outreach can support consultation, but federal accountability remains federal. Silence within an administrative deadline should not be treated as informed Tribal consent or waiver of a governmental interest.

Example from your Tribe: Explain how consultation requests move through your government or where direct federal engagement was necessary to understand or resolve a concern.

The proposal affects Tribal lands and Tribal governmental authority. Part 800 intersects with THPO authority, Tribal law and jurisdiction, cultural-resource programs, land and natural-resource management, permitting, discoveries, burials, and Tribal leadership decisions. Some THPO provisions remain, but that does not insulate Tribal lands from the larger rewrite. If fewer federal actions enter Section 106, fewer places or effects are considered, or agencies can more readily conclude the process, Tribal authority operates within a narrower federal framework.

For certain post-review discoveries on Tribal lands, the current regulations require **Tribal concurrence** on the proposed action. The proposal replaces that concurrence requirement with consultation. Consultation and concurrence are materially different exercises of authority.

Point to make: Retaining a THPO role does not preserve Tribal authority if the surrounding regulation narrows the actions, places, effects, or decisions over which that authority operates.

Example from your Tribe: Identify where Part 800 supports THPO authority, Tribal law, concurrence, permitting, land management, cultural-resource programs, or another governmental function.

Tribal rights and relationships do not stop at reservation boundaries. The existing regulations recognize that properties important to Tribes may occur on ancestral, aboriginal, or ceded lands. They also expressly provide that the Tribal consultation requirement applies regardless of the location of the historic property. The proposal removes those express provisions.

Section 106 does not create treaty or reserved rights, but it often provides the federal process where those rights first become visible. ACHP's own guidance recognizes that treaty rights may extend beyond reservation boundaries and can constrain federal agency decision-making.

Point to make: Narrowing Section 106 does not narrow treaty rights, Tribal relationships to ancestral lands, or other federal obligations. It may simply move those issues into separate consultation, legal review, or litigation later.



Example from your Tribe: Identify an off-reservation place where Section 106 helped address treaty rights, water, fishing/hunting/gathering, access, cultural practice, or another interest.

Sensitive Tribal information cannot be treated as missing information. Information about sacred places, burials, ceremonies, traditional uses, or culturally restricted locations cannot always be broadly disclosed. A Tribe should not have to violate cultural protocols or expose a sensitive place to risk simply to demonstrate that the place matters.

The existing regulations expressly recognize that Tribes may be reluctant to divulge information concerning the location, nature, or activities associated with culturally significant places. They nevertheless require agencies to gather Tribal information and make a reasonable and good-faith effort to identify historic properties while accounting for confidentiality concerns.

Point to make: A Tribe's decision to protect culturally sensitive information should not be treated as evidence that a place lacks significance, and it does not relieve the federal agency of its identification responsibilities.

Example from your Tribe: Identify where information had to be shared confidentially, in limited form, or through designated Tribal representatives.

The proposal narrows when Section 106 applies and what places and harms count. The proposal creates additional pathways for activities to fall outside ordinary Section 106 review and narrows how historic properties and effects are considered. Of particular concern are broad natural features and cultural landscapes, along with indirect and cumulative effects and effects involving use, setting, visual, atmospheric, or audible changes that may occur without physically destroying a place. The proposed draft also states that certain "noncompact, unimproved natural features such as mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes, do not qualify as property" for Section 106 purposes.

A Tribal cultural place may be a mountain, river, watershed, trail, gathering area, ceremonial landscape, viewshed, or relationship among several places. It may remain physically intact but become culturally unusable because access, water, plants, wildlife, privacy, quiet, or ceremonial conditions have been lost.

For Tribal Nations, preservation is often perpetuation: sustaining the places and relationships that allow culture, knowledge, rights, responsibilities, and practices to continue.

Point to make: Preservation cannot be measured only by whether the physical place survives. The question is if the relationships and practices that give the place meaning can continue.

Example from your Tribe: Identify a place that cannot reasonably be reduced to a small physical site, or where the most important harm was visual, audible, ecological, cumulative, access-related, ceremonial, or otherwise nonphysical.

Consultation still needs to be about avoiding harm and reaching resolution. Some Tribal cultural losses cannot be fixed after the fact. Documentation does not replace a burial, restore access to a sacred place, or recreate a relationship among land, water, ceremony, plants, animals, ancestors, and community. The proposal also makes a Memorandum of Decision (MOD) a pathway for concluding adverse-effect review. Congress provides for agency-head documentation when an undertaking adversely affects a historic property and the agency has not entered into an agreement regarding the undertaking. The concern is



whether that statutory no-agreement backstop becomes a routine alternative to seeking negotiated resolution through a Memorandum of Agreement.

An MOA records negotiated commitments. An MOD records what the agency decided.

Point to make: Section 106 does not guarantee preservation or Tribal agreement, but there is an important difference between trying to resolve adverse effects through consultation and documenting a unilateral federal decision after comments are received.

Example from your Tribe: Identify where avoidance was necessary or where an MOA secured access, monitoring, treatment, discoveries procedures, cultural protocols, or another commitment that materially changed the outcome.

Does this actually make federal decision-making faster, cheaper, or easier? The proposal is intended to reduce regulatory burden. That claim should be tested against total system cost. Federal agencies will have to interpret new standards and revise policies, delegations, training, templates, agreements, NEPA integration, grant procedures, tracking systems, and staff responsibilities. Tribal governments may face similar transition costs or need separate treaty, natural-resource, or governmental processes for issues currently addressed together.

New standards could increase legal review and implementation uncertainty and create greater divergence between federal and state review processes. If MODs become common, requiring agency-head action may itself create a bottleneck for high-volume agencies.

Point to make: A rule does not reduce burden if it simply shifts issues elsewhere or causes them to surface later when they are harder and more expensive to solve.

Example from your Tribe: Share where early consultation prevented redesign, identified a treaty or resource issue before it became a conflict, avoided a later discovery or dispute, reduced the need for separate processes, or helped a project move forward more efficiently.

Bring Your Tribe's Experience Into the Discussion. Your Tribe does not need to address every proposed change. Two or three strong examples can be more useful than a long list of objections. Explain what the agency knew before consultation, what your Tribe contributed, what changed because your Tribe participated, and what could have happened if that opportunity had been narrowed or removed.

Section 106 is not simply paperwork. At its best, it allows federal decision-makers to identify Tribal rights and cultural interests before harm occurs and make better decisions while there is still time to change course.

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