



Proposed Section 106 Regulations: Supporting Analysis and Discussion Guide for Tribal Nations

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This document provides additional analysis for the accompanying **Talking Points: Proposed Section 106 Regulations, Key Issues for Tribal Nations**. It is intended to help Tribal leaders, THPOs, legal counsel, cultural-resource staff, natural-resource programs, and other Tribal governmental offices prepare for discussions with federal agencies, OIRA, Congress, and other officials, as well as future government-to-government consultation and formal rulemaking.

The proposed rewrite should not be evaluated as a collection of isolated edits. Its significance comes from how the changes work together. The proposal changes the threshold for when Section 106 applies, the places that can receive consideration, the effects that count, the timing and character of Tribal participation, the treatment of Tribal knowledge, and the way an agency can conclude the process.

This guide is based on the July 2026 draft regulations advanced by the ACHP. The proposal is not final, and specific language may change through federal review and rulemaking.

1. Start With Congress: Tribal Consultation Is Part of Determining What the Federal Government Must Consider. Section 106 is procedural, but the underlying duties are established by statute. ACHP's authority is to implement those duties, not to rewrite what Congress required. 54 U.S.C. § 306108 requires federal agencies, before approving federal expenditures or issuing a license, to take into account the effect of an undertaking on historic property and give the ACHP a reasonable opportunity to comment.

Congress separately addressed Tribal properties in 54 U.S.C. § 302706. It provides that property of traditional religious and cultural importance to a Tribe "may be determined to be eligible" for inclusion in the National Register. Congress then directs that, in carrying out Section 106, a federal agency "shall consult" with any Indian Tribe that attaches religious and cultural significance to that property. That sequence is critical. Congress does not say that the property must first have been determined eligible before consultation occurs. The statute speaks expressly of property that may be determined eligible and then mandates consultation with the Tribe that attaches significance to it.

ACHP has authority under 54 U.S.C. § 304108 to promulgate regulations governing implementation of Section 106. The important question is whether the proposed regulations simply implement those requirements or create definitions and procedural gates that narrow when they can operate.

The existing regulations make the Tribal consultation obligation practical. They bring Tribes into the process before eligibility has been resolved. Agencies 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, seek Tribal information during identification, and acknowledge Tribal special expertise when applying the National Register criteria. The proposal removes or substantially rewrites much of that framework and places greater emphasis on agency determinations and an agency-prepared Section 106 Report.

That creates a sequencing problem. A Tribe may be the only source of information showing that a place exists, establishing why it is significant, identifying its boundaries, or explaining why it may satisfy National Register criteria. If an agency can make threshold decisions about what qualifies before that information is

meaningfully sought, the statutory consultation duty can be narrowed in practice even if the word “consultation” remains in the regulation.

The proposed definition of “property” raises a related concern. If a federal agency can first decide that a Tribal place falls outside the proposed regulatory definition and then use that conclusion as a basis for limiting consultation, Tribal knowledge may never enter the process that would otherwise help the agency understand whether the place is significant or eligible.

A useful Tribal position: Congress made Tribal consultation mandatory and did not condition it on a prior federal determination that the property is already eligible. Consultation is part of the process through which the federal government identifies and understands Tribal places that may qualify. The regulations should not create preliminary thresholds that allow the agency to decide the question before the Tribe has a meaningful opportunity to inform it.

What your Tribe can provide: An example where the agency initially did not identify a place, misunderstood its significance, drew the wrong boundaries, or reached a different eligibility conclusion before receiving Tribal information.

2. Government-to-Government Consultation and Tribal Expertise Are Being Recast. Existing § 800.2(c)(2) does more than list Tribes as consulting parties. It recognizes the unique legal relationship between the federal government and Indian Tribes, requires consultation to recognize the government-to-government relationship, and calls for consultation respectful of Tribal sovereignty. Existing § 800.4(c)(1) also directs agencies to acknowledge a Tribe’s “special expertise” in assessing the eligibility of properties possessing religious and cultural significance.

The proposed rewrite removes or diminishes much of that language. NATHPO had urged ACHP to move in the opposite direction by strengthening early government-to-government consultation and recognition of Indigenous Knowledge and Tribal special expertise.

This matters because regulatory language tells federal officials how Tribal participation is different. Removing express recognition of sovereignty, government-to-government relations, treaty rights, and special expertise makes it easier for Tribal participation to be treated as one more set of comments on an agency record.

Archaeological evidence may establish that people were present at a location. Tribal oral history, language, place names, teachings, customary law, or cultural practice may explain who, why the place matters, how it relates to other places, and what must remain possible there for its significance to continue.

The timing of that expertise matters as much as its substance. The existing regulations recognize Tribal special expertise as part of the eligibility determination itself, not merely as information supplied after a property has already been determined eligible. If the proposed regulations both narrow when Tribes enter the process and remove the express recognition of special expertise, those changes reinforce one another.

A useful Tribal position: Tribal expertise is not merely evidence about a historic property after eligibility is established. It may be necessary to determine whether the property is eligible in the first place, how it should be defined, and how an undertaking may affect it.

What your Tribe can provide: Examples involving oral history, language, traditional place names, cultural practice, Indigenous Knowledge, or Tribal law that materially changed an agency’s understanding.



3. Applicant-Led Engagement, Deadlines, and Agency Control Change the Character of Consultation.

Applicants already have roles in Section 106, and existing regulations allow agencies to authorize applicants to initiate certain contacts. But existing regulations preserve federal responsibility for government-to-government relationships with Tribes.

The proposed rule goes further by allowing applicant or designee involvement in early consultation while giving agencies substantially more control over deadlines and the administrative record. That distinction is particularly important because Congress assigns the consultation duty to the federal agency. Section 302706 provides that a federal agency “shall consult.” Applicant assistance does not change who Congress made responsible for that consultation.

One proposed provision states that “The agency official may alter any deadline in this part, to be shorter or longer.” Other provisions establish response periods where failure to respond can result in participation, comments, or objections being treated as waived.

Predictable schedules benefit everyone. The concern is treating an agency-controlled deadline as equivalent to a Tribal governmental decision. A significant consultation request may require coordination among a THPO, Tribal council, legal counsel, cultural authorities, natural-resource staff, land programs, and executive leadership.

The proposed process also places significant weight on an agency-prepared **Section 106 Report**, followed by an opportunity for consulting parties to comment. This can shift Tribes from helping develop identification, evaluation, effects analysis, and resolution toward reacting to an agency-developed record.

Particularly concerning is proposed language allowing matters treated briefly or omitted from the report to be understood as intentionally omitted because the agency considered them “comparatively unimportant or frivolous.” That is especially problematic where the disagreement itself concerns the agency’s failure to understand Tribal values, knowledge, or effects.

A useful Tribal position: Consultation should help create the federal record, not merely provide comments on a record the agency has already created. Congress placed the consultation responsibility on the federal agency. Applicant coordination may support the process, but it cannot substitute for federal accountability or government-to-government engagement.

What your Tribe can provide: Explain how consultation requests move through your government and provide an example where applicant outreach was incomplete or direct federal involvement was necessary.

The same concern may arise during formal rulemaking. A major rewrite of Part 800 may require review by THPO staff, legal counsel, cultural and natural-resource programs, executive leadership, Tribal council, and others. If the formal comment period is too short to allow meaningful governmental review, Tribes should say so and request additional time.

4. Tribal Lands: The Issue Is Governmental Authority, Not Merely THPO Participation. The proposal requires particular scrutiny for its effects on Tribal lands.



Where a Tribe has assumed SHPO functions, the THPO plays a formal governmental role in Section 106. Part 800 also intersects with Tribal codes, burial protections, land-use decisions, cultural authorities, natural-resource programs, infrastructure, and Tribal executive or council decisions.

If the proposal narrows what constitutes an undertaking, what qualifies as a historic property, which effects count, or when the process is complete, retaining a THPO role does not necessarily preserve the same scope of Tribal authority.

The discovery provision provides a concrete example. Existing § 800.13(d) requires the agency, for historic properties discovered or unanticipated effects found on Tribal lands in the circumstances covered by that provision, to comply with applicable Tribal regulations and procedures and “obtain the concurrence of the Indian tribe” regarding the proposed action. The proposed rewrite replaces the concurrence requirement with consultation. Concurrence requires agreement. Consultation requires consideration of views. Those are materially different governmental roles.

The rulemaking process itself matters. Executive Order 13175 addresses policies with substantial direct effects on Tribal governments, the federal-Tribal relationship, or the distribution of power and responsibilities between federal and Tribal governments. The proposed changes to consultation, THPO authority, Tribal concurrence, applicant roles, deadlines, and the treatment of Tribal expertise raise those questions both on and off Tribal lands.

A useful Tribal position: The question is not whether the proposed regulation still mentions THPOs. The question is whether it changes the scope of decisions over which Tribal government exercises authority and whether ACHP understood those governmental consequences before proposing the change.

What your Tribe can provide: Identify Tribal codes, programs, agreements, permitting processes, discovery procedures, or leadership decisions that intersect with Part 800 and explain what would have to change internally.

5. Tribal Geography, Treaty Rights, and Sensitive Information Cannot Be Separated From Identification.

The existing regulations state that Tribal consultation applies regardless of the location of the historic property and remind agencies that properties important to Tribes frequently occur on ancestral, aboriginal, or ceded lands. The proposal removes that express language. Present reservation boundaries do not define the extent of Tribal history, religious practice, treaty rights, traditional use, or governmental responsibility.

Treaty rights may likewise extend beyond reservation boundaries. ACHP’s own treaty-rights guidance recognizes that treaty rights can apply across federal, state, and private lands and can impose substantive constraints on federal decisions.

Section 106 does not create or enforce treaty rights, but it frequently provides the planning process through which an agency first learns that a project may also implicate treaty-protected fishing, hunting, gathering, access, water, or other resources. Weakening that early process does not eliminate the treaty obligation. It can simply move the issue into another government-to-government consultation, administrative dispute, legal review, or litigation.

Sensitive Tribal information creates a related identification problem. Congress expressly authorizes withholding information about historic properties where disclosure may risk harm, invade privacy, or



impede traditional religious use. Existing Section 106 practice likewise recognizes that Tribes may be reluctant to disclose culturally sensitive information.

Confidentiality does not relieve an agency of its obligation to make a reasonable and good-faith identification effort. A Tribe should not be required to create public site records or disclose restricted information as a condition of federal consideration.

A useful Tribal position: The absence of Tribal information from an agency database is not evidence that the place or Tribal interest does not exist. Nor should a Tribe have to expose sacred or restricted information to establish significance.

What your Tribe can provide: Identify off-reservation resources, treaty territories, fisheries, gathering areas, water resources, cultural landscapes, or places where cultural protocols limit what information can be disclosed.

6. Three Major Thresholds: What Enters Section 106, Whether the Tribal Place Remains in the Process, and What Counts as Harm. Several of the proposed changes are best understood together because each creates a separate point where a Tribal concern can fall out of the Section 106 process. A project may never enter review, a Tribal place may not remain in the process once review begins, or the harm to that place may not be recognized as an effect that Section 106 must address.

Threshold One: Does Section 106 Apply? The proposed regulations change how federal involvement, delegated programs, grants, exemptions, and other pathways operate in determining whether an activity is subject to Section 106. If an activity falls outside Section 106, there may be no Section 106 requirement to identify historic properties, initiate Tribal consultation, assess effects, or consider ways to avoid or address harm. The existence of another federal environmental review process does not necessarily answer the Section 106 question. NEPA and Section 106 arise from different legal authorities and ask different questions. A conclusion that an activity presents limited environmental impacts does not establish that it cannot affect a place of traditional religious and cultural importance to a Tribe.

That makes these threshold decisions especially important for Tribes. A category of projects that appears routine or low-risk from an agency perspective can still repeatedly affect burial areas, traditional cultural places, cultural landscapes, treaty resources, or other Tribal interests.

A useful Tribal position: Streamlining at the front end should not create categories of federal activity that avoid review before the agency has enough information to know whether Tribal places or interests may be affected.

What your Tribe can provide: Identify recurring federal programs, grants, permits, delegated activities, or infrastructure projects where Section 106 has been the process that alerted your Tribe to a potential effect.

Threshold Two: Does the Tribe's Cultural Location Remain in the Process? The existing regulations define historic property by reference to properties included in or eligible for the National Register and include properties of traditional religious and cultural importance that meet the National Register criteria. They also bring Tribes into identification and evaluation before that determination is complete.

The proposed regulations would add requirements concerning what constitutes "property" for Section 106 purposes, including geographic compactness and tangible evidence of human activity. The draft also states



that certain noncompact, unimproved natural features, including mountains, valleys, bodies of water, and ethnographic landscapes, would not qualify as property for purposes of the process.

These changes raise two related concerns. First, the proposed definition can exclude places whose significance is expressed through broad landscapes, natural features, or relationships among multiple places. Second, Congress mandates consultation concerning property that may be eligible. A federal agency should not be able to use a regulatory definition to eliminate a Tribal place before consulting the Tribe whose knowledge may be necessary to understand whether and how the place qualifies.

Many culturally significant Tribal places are not expressed through buildings, structures, or narrowly bounded archaeological sites. A culturally significant place may involve a mountain system, watershed, river, trail network, gathering area, ceremonial landscape, viewshed, or relationship among several locations.

Preservation in a Tribal context is often about perpetuation, not simply retaining evidence of past presence. A place may matter because Tribal citizens continue to gather there, pray there, fish there, teach there, maintain responsibilities to it, or pass knowledge connected to it to future generations.

A useful Tribal position: A federal agency should not define a Tribal place out of Section 106 before obtaining the Tribal information Congress required it to seek. A place should not be excluded simply because its significance is expressed through a landscape, natural feature, or relationship among places rather than a compact physical site.

What your Tribe can provide: Identify a place whose significance would be misunderstood if the agency looked only for a small, physically bounded property or visible evidence of past human improvement.

Threshold Three: Does the Harm Count? The existing regulations recognize direct and indirect effects and expressly address reasonably foreseeable effects that may occur later in time, farther away, or cumulatively. They also identify changes involving use, setting, visual, atmospheric, and audible elements. The proposed regulations move toward a different causation standard focused on effects with a reasonably close causal relationship to the undertaking and remove or narrow several of those existing categories.

That matters because a Tribal place can remain physically intact while losing the conditions that make it culturally meaningful or usable. Access may be restricted. Noise may interfere with ceremony. A viewshed may be altered. Water, plants, fish, wildlife, privacy, solitude, or relationships among places may be changed.

A useful Tribal position: Harm to a Tribal place cannot be measured only by physical destruction. If an undertaking changes the conditions necessary for cultural use, practice, access, or relationship to continue, that effect should not disappear simply because the physical location remains in place.

What your Tribe can provide: Identify a project where the most important effect was visual, audible, cumulative, ecological, access-related, ceremonial, or otherwise nonphysical.

Why These Thresholds Matter Together. The concern is cumulative. A project can fall outside Section 106 at the beginning. If it remains in the process, the Tribal place itself can be excluded by a narrower definition. If the place remains eligible for consideration, the actual harm experienced by the Tribe can still fall outside a narrower effects standard.



At the same time, proposed changes to consultation, Tribal expertise, applicant involvement, deadlines, and the Section 106 Report can determine whether Tribal knowledge reaches the federal agency early enough to inform any of those threshold decisions.

That creates a central statutory concern: Congress mandates Tribal consultation concerning property of traditional religious and cultural importance that may be eligible. The regulatory process should not allow a series of agency-controlled threshold decisions to occur before the Tribe has a meaningful opportunity to provide the knowledge necessary to make those decisions.

At each stage, Tribes should ask: Did the agency seek Tribal information before deciding the issue? Did Tribal knowledge have a meaningful opportunity to inform the decision? Could the proposed regulations allow the activity, place, or effect to fall out of Section 106 before that occurred?

A useful Tribal position: The concern is not simply that the proposed regulations contain fewer consultation provisions. It is that the proposed structure may allow more consequential federal decisions to be made before the statutory Tribal consultation obligation has done the work Congress intended it to do.

7. Avoidance, Mitigation, and the Shift From Negotiated Resolution to Agency Decision. The existing regulations frame consultation around seeking ways to avoid, minimize, or mitigate adverse effects. Existing § 800.6 requires the agency and consulting parties to develop and evaluate alternatives or modifications that could accomplish those objectives. The proposal changes that emphasis and introduces “reasonable mitigation” defined in part around what is technically and economically feasible while taking account of the goals of the undertaking.

Cost and feasibility are legitimate considerations. The concern is whether avoidance and minimization cease to be meaningful objectives and mitigation becomes the principal question after project decisions have largely been made.

For some Tribal places, mitigation cannot substitute for avoidance. A burial cannot be recreated. Loss of access to a unique sacred place cannot necessarily be offset with documentation. A culturally necessary relationship among water, plants, animals, ceremony, ancestors, and a particular place may have no substitute.

The proposed Memorandum of Decision framework further changes the resolution stage. After evaluating responses to the Section 106 Report, the agency may consult further, issue an MOD, or invite parties to enter an MOA. Proposed MOD language allows the agency to describe “how, if at all” it will address effects or determine that other considerations outweigh preservation.

Congress expressly provides in 54 U.S.C. § 306114 for an agency-head decision record where an undertaking adversely affects a historic property and the agency has not entered into an agreement. Congress also makes that responsibility nondelegable. The concern therefore is not that a federal agency can never make a unilateral decision. The concern is whether the proposal converts a no-agreement backstop into an ordinary way of completing Section 106.

An MOA can establish negotiated commitments involving avoidance, treatment, access, monitoring, discoveries, cultural protocols, continued Tribal participation, amendment, and dispute resolution, whereas the MOD merely documents what the agency decided.



A useful Tribal position: Section 106 never guaranteed preservation or Tribal agreement. But there is a meaningful difference between requiring a serious effort to reach negotiated resolution and allowing an agency to move from comments to a unilateral decision as a routine matter.

What your Tribe can provide: Identify an MOA where consultation produced a meaningful condition or project change that was not part of the agency's original proposal.

8. The Efficiency Claim Should Be Tested Against the Whole System. The proposed rule is being advanced in significant part as streamlining and burden reduction. That makes implementation cost and project-delivery consequences relevant well beyond the preservation community.

A rewrite of a mature federal process has transition costs. Agencies will need to interpret new standards and revise policies, delegations, SOPs, templates, training, NEPA integration, grant procedures, programmatic agreements, tracking systems, and staff responsibilities. Tribal governments may have to review their own procedures and agreements, retrain staff, and create separate processes for treaty, natural-resource, or governmental concerns that Section 106 currently helps surface.

New standards governing undertakings, grants, delegated programs, consultation, historic properties, effects, and NEPA relationships will also have to be interpreted by agencies, Tribes, THPOs, SHPOs, applicants, attorneys, and potentially courts. That can mean additional legal review, project uncertainty, paused procurements or construction, and disputes over how the new standards apply.

Federal and state review may also diverge. Where proponents now use overlapping cultural-resource information for both federal and state review, different definitions or effects standards may produce duplicative documentation and consultation.

The MOD provision presents another practical issue. Section 306114 provides that the agency head may not delegate responsibility for the decision record. If MODs become routine in high-volume agencies, large numbers of decisions could be routed upward rather than streamlined.

For Tribal governments, the same analysis should account for burden shifting. If a federal project no longer receives full Section 106 review but still implicates treaty rights, Tribal lands, sacred sites, natural resources, or another federal responsibility, the Tribe still has to address the issue somewhere. The result may be several government-to-government processes instead of one planning process.

The question for federal officials should be: Does the proposal actually make project delivery faster, cheaper, and more predictable when transition costs, Tribal governmental costs, duplicative processes, agency-head bottlenecks, interpretive uncertainty, litigation risk, and late discovery of treaty or cultural-resource conflicts are included?

What your Tribe can provide: Quantify where possible. How many agencies does your Tribe regularly consult with? How many agreements could require review? Which departments would need to change procedures? Where has early consultation prevented redesign, a discovery, a legal dispute, or a separate treaty process?

9. Building a Useful Tribal Record. A Tribe does not need to address every proposed provision. A few concrete examples tied directly to the proposed language can be more persuasive than a lengthy statement of general opposition.



For each example, try to establish:

- What was the federal undertaking or decision?
- What did the agency know before consulting the Tribe?
- What knowledge, right, governmental interest, or concern did the Tribe identify?
- What changed because the Tribe participated?
- Which proposed regulatory change could have affected that outcome?
- What would have happened if the issue had not been identified or resolved through Section 106?

Examples can involve Tribal lands or lands outside reservation boundaries, sacred places, cultural landscapes, burials, treaty resources, water, access, fisheries, gathering, Indigenous Knowledge, confidential information, Tribal jurisdiction, MOAs, project redesign, or situations where early consultation saved time or money.

Where possible, describe the lived consequence, not only the procedural failure. Saying that consultation was inadequate is important, but it becomes much stronger when paired with what the agency failed to understand and what was actually at risk.

The proposed changes ultimately should be measured against a practical question: Does the federal process still ensure that decision-makers learn what they need to know, from the governments and people who hold that knowledge, while there is still time for that information to matter?

Section 106 does not guarantee a particular outcome. Its value is that it creates an opportunity to identify rights, places, effects, and alternatives before federal decisions become difficult or impossible to change. For Tribal Nations, Congress expressly required consultation as part of that process. The strongest Tribal record will show, through actual experience, why that consultation must occur early enough to identify what the federal government does not yet know and while there is still time for that knowledge to matter.

Have questions? Please contact Ira L. Matt, Executive Director for Indigenous Diplomacy and Federal Relations, NATHPO, at Ira@NATHPO.org.