NOTTAWASEPPI HURON BAND OF THE POTAWATOMI

A FEDERALLY RECOGNIZED TRIBAL GOVERNMENT

Position Statement on Proposed Revisions to Section 106 of the National Historic Preservation Act

Nottawaseppi Huron Band of the Potawatomi

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PINE CREEK INDIAN RESERVATION
1485 MNO-BMADZEWEN WAY • FULTON, MI 49052

Executive Summary

The Nottawaseppi Huron Band of the Potawatomi (NHBP) recognizes the National Historic Preservation Act (NHPA), including Section 106, codified at 54 U.S.C. § 306108 and implemented through 36 C.F.R. Part 800, represents one of the federal government's most important mechanisms for considering the effects of federal undertakings on historic properties and engaging Tribal Nations in decisions affecting places of religious and cultural significance. For Tribal Nations, Section 106 extends well beyond the identification of archaeological sites or historic buildings. It provides a formal process through which tribal governments can identify and advocate for the protection of cultural landscapes, sacred places, traditional cultural properties, ancestral burial places, treaty-related resources, and other places that remain integral to tribal sovereignty, cultural identity, and self-determination.

NHBP is deeply concerned that the proposed revisions to the NHPA in Title III of the Bipartisan American Affordability and Jobs Act (BAAJA) and to the Section 106 regulations by the federal Advisory Council on Historic Preservation would weaken this framework by reducing meaningful consultation and concentrating greater decision-making authority within lead federal agencies and, in some circumstances, project applicants. Additionally, some provisions in Title III of BAAJA, as currently drafted, directly attack Tribal sovereignty by allowing the federal government to audit and takeover Tribal Historic Preservation Offices.

Section 106 places responsibility on the head of the federal agency to take into account the effects of an undertaking on historic properties before approving federal expenditures or issuing applicable licenses and requires the agency to provide the Advisory Council on Historic Preservation a reasonable opportunity to comment (54 U.S.C. § 306108). The regulations implementing this statutory responsibility should therefore ensure that federal agencies have sufficient information, expertise, and consultation to understand the historic properties that may be affected before decisions become irreversible.

NHBP is particularly concerned about the diminished role that Tribal Historic Preservation Offices (THPOs), State Historic Preservation Officers (SHPOs), Tribal Nations, and other parties with specialized knowledge could have under the proposed Title III of BAAJA and revised regulatory framework. A process in which tribal or preservation expertise is primarily introduced after a lead federal agency has substantially completed its identification, evaluation, or effects analysis fundamentally changes the value of consultation. Consultation should inform the analysis, not merely provide an opportunity to respond to conclusions already reached.

This is reinforced by the current statutory structure of the NHPA. Congress expressly assigns SHPOs responsibility to cooperate with federal agencies and other governmental entities to ensure that historic properties are considered throughout planning and development and to consult with appropriate federal agencies regarding undertakings that may affect historic properties and plans intended to protect, manage, or mitigate harm to those properties (54 U.S.C. § 302303). The collaborative role of preservation professionals is therefore embedded in federal statute rather than existing solely as an administrative feature of the current Part 800 regulations.

Tribal participation is distinct. Tribal Nations are not simply preservation stakeholders. They are sovereign governments possessing specialized knowledge of their own histories, cultural landscapes,

sacred places, ancestral burial areas, traditional cultural properties, and relationships with natural resources. Federal agencies and project applicants cannot independently recreate this knowledge through archaeological surveys, existing databases, or technical assessments. A federal agency cannot meaningfully evaluate the effects of an undertaking on a culturally significant property if the agency does not know that the property exists or does not understand why that place is significant to the Tribal Nation.

From a natural resource stewardship perspective, tribal cultural resources cannot be separated from the broader ecosystems in which they exist. Rivers, wetlands, forests, fisheries, wildlife habitat, medicinal plant communities, and culturally important species are components of interconnected cultural landscapes that have sustained Indigenous communities for generations. Tribal stewardship recognizes that ecological integrity and cultural continuity are inseparable. Federal actions affecting these landscapes therefore require early engagement with Tribal Nations so that environmental, historical, cultural, and spiritual values can be understood before decisions are made (Berkes, 2018; Whyte, 2013).

The proposed narrowing of the types of properties and effects considered through Section 106 is consequently of significant concern to NHBP. Traditional cultural properties and sacred landscapes often do not consist of built structures and cannot always be confined within geographically compact boundaries. Their significance may arise from relationships among waterways, natural features, culturally significant species, traditional gathering areas, ceremonial practices, oral histories, and broader ancestral landscapes. Conventional archaeological methods alone may be insufficient to identify or evaluate these relationships. Tribal oral histories, Indigenous Knowledge, and community expertise are therefore indispensable to understanding cultural significance (Kimmerer, 2013).

These concerns are acute for properties located outside contemporary reservation boundaries. Reservation boundaries do not define the limits of tribal history or cultural identity. Treaties, land cessions, removal, allotment, and other federal policies separated Tribal Nations from substantial portions of their ancestral territories, but they did not extinguish tribal relationships with those landscapes. Sacred places, ancestral villages, burial areas, traditional gathering locations, waterways, and other culturally significant resources throughout ancestral and ceded territories remain connected to living tribal communities. A Section 106 process that limits consultation based on contemporary jurisdiction or land ownership risks excluding precisely those resources that federal historic preservation law should be capable of identifying and considering.

Section 106 also complements other federal laws protecting tribal interests, including the Native American Graves Protection and Repatriation Act (NAGPRA). Although NAGPRA establishes requirements concerning Native American human remains and specified cultural items, Section 106 provides an important opportunity to identify culturally sensitive areas before ground disturbance occurs. Early tribal involvement can prevent ancestral burials and associated cultural resources from being disturbed in the first instance rather than requiring Tribal Nations to respond after an inadvertent discovery has already occurred. Weakening early consultation therefore risks shifting historic preservation from prevention toward crisis response.

NHBP is concerned that reducing collaborative review will create consequences for federal agencies and project proponents themselves. Excluding tribal, state, local, and descendant-community

expertise may increase the likelihood of unanticipated discoveries, project redesign, construction delays, disputes, administrative challenges, and litigation. Section 106 provides a structured forum for identifying and resolving concerns while alternatives remain available. Removing that forum does not eliminate conflict; it risks transferring conflict to less predictable and more costly venues after agencies and applicants have already committed substantial resources to an undertaking.

Title III of the BAAJA and proposed changes to the implementing regulations seek to revamp Section 106 of the NHPA. NHBP recommends withdrawal of Title III and of proposed regulatory revisions that diminish meaningful tribal consultation, marginalize THPO or SHPO expertise, narrow the consideration of culturally significant properties or adverse effects, or transfer inherently federal consultation responsibilities in a manner that weakens government-to-government engagement. If revisions are needed to Section 106 of the NHPA or to 36 C.F.R. Part 800, they should be developed through meaningful and comprehensive consultation with Tribal Nations and informed by SHPOs, THPOs, descendant communities, local governments, preservation professionals, and other parties whose expertise contributes to effective historic preservation. Such changes should not be imposed on Indian Country without meaningful input or a genuine opportunity to engage in dialogue.

NHBP supports improving Section 106 through earlier coordination, clearer responsibilities, predictable timelines, adequate staffing at the federal agencies, meaningful incorporation of Indigenous Knowledge, and greater federal accountability. Streamlining should mean making consultation work better and earlier—not reducing consultation, narrowing protections, or providing Tribal Nations an opportunity to comment only after consequential decisions have effectively been made.

Introduction

For generations, Tribal Nations have maintained enduring relationships with the lands, waters, plants, wildlife, and cultural places that have sustained their communities since time immemorial. These relationships extend beyond concepts of ownership or land use; they embody the cultural, spiritual, ecological, and historical foundations of tribal identity and self-governance. Sacred sites, ancestral villages, burial grounds, ceremonial landscapes, traditional gathering areas, and culturally significant ecosystems remain living components of tribal communities and continue to support the exercise of treaty-reserved rights, traditional lifeways, and the transmission of Indigenous knowledge to future generations.

The National Historic Preservation Act (NHPA) of 1966, and specifically Section 106, has served for more than five decades as one of the principal federal mechanisms through which Tribal Nations participate in federal decision-making affecting these irreplaceable cultural resources. While commonly associated with historic preservation, Section 106 represents a broader recognition that federal actions have the potential to affect places possessing profound religious, cultural, historical, and environmental significance to Tribal Nations. The consultation process established under Section 106 provides a structured opportunity for federal agencies and Tribal Nations to engage before federal undertakings result in irreversible impacts to historic properties and traditional cultural landscapes. Federal law expressly requires agencies carrying out Section 106 responsibilities to consult with any Indian tribe that attaches religious and cultural significance to qualifying property (54 U.S.C. § 302706(b)), while the

current regulations require consultation regardless of the location of the historic property (36 C.F.R. § 800.2(c)(2)(ii)).

Recent discussions regarding the potential dismantling or substantial weakening of Section 106 raise significant concerns for Tribal Nations across the United States. As of July 24, 2026, the Advisory Council on Historic Preservation (ACHP) had voted to move forward with a Notice of Proposed Rulemaking concerning revisions to 36 C.F.R. Part 800, with the draft proceeding to interagency review before publication in the Federal Register (Advisory Council on Historic Preservation [ACHP], 2026). In late September 2026, a bipartisan group of U.S. Senators introduced S.5653, the Bipartisan American Affordability and Jobs Act (BAAJA), which among other things, proposes to substantially revise the Section 106 process and limits judicial review. Such changes would extend far beyond administrative reform and could fundamentally alter the manner in which federal agencies identify historic properties, evaluate cultural landscapes, engage Tribal Nations, and fulfill their trust responsibilities. Reducing statutory consultation requirements would likely diminish tribal participation in decisions affecting ancestral homelands, increase the risk of inadvertent disturbance to burial sites and sacred places, and weaken one of the few legal processes specifically designed to ensure tribal voices are incorporated into federal actions before irreversible decisions are made.

This position statement reflects the perspective that the protection of tribal cultural heritage, natural resources, and sacred places is inseparable from the exercise of tribal sovereignty and self-determination. It is intended to articulate the concerns of Tribal Nations regarding proposed changes to Section 106, examine the broader legal and policy implications for tribal consultation and resource protection, and provide recommendations for strengthening, not diminishing the federal government's commitment to meaningful government-to-government consultation. Protecting these resources is not solely a matter of preserving the past; it is an investment in sustaining the cultural continuity, environmental stewardship, and sovereign rights of Tribal Nations for generations to come.

Tribal Sovereignty and Federal Responsibilities

The relationship between Tribal Nations and the United States rests on the recognition that Tribal Nations possess inherent sovereignty that predates the formation of the United States. Tribal sovereignty is not granted by Congress or derived from the Constitution; rather, it is an inherent authority retained by Tribal Nations except where expressly limited by Congress. The United States Supreme Court has consistently recognized that federally recognized tribes retain attributes of sovereignty over their members and territory despite limitations imposed through federal law (United States v. Wheeler, 1978). As sovereign governments, Tribal Nations possess the inherent authority and responsibility to govern their citizens, protect cultural heritage, manage natural resources, preserve traditional lifeways, and make decisions that ensure the well-being of present and future generations (Cornell & Kalt, 2007).

This principle was established in Worcester v. Georgia (1832), in which Chief Justice John Marshall recognized Indian tribes as distinct political communities possessing inherent powers of self-government. The Court held that states generally lack authority within Indian Country and affirmed that relations with Tribal Nations are the exclusive responsibility of the federal government. Although federal

Indian law has continued to evolve, Worcester remains one of the most influential decisions defining the nation-to-nation relationship and affirming the political status of Tribal Nations within the constitutional framework of the United States.

For Tribal Nations, sovereignty includes an enduring responsibility of stewardship. The obligation to care for lands, waters, wildlife, sacred places, and ancestral cultural resources is rooted in Indigenous law, cultural teachings, and longstanding reciprocal relationships with the natural world. This perspective differs from conventional Western concepts of property ownership by recognizing that cultural landscapes are living systems that sustain ecological integrity, cultural identity, spiritual practices, and the continued exercise of tribal sovereignty. Stewardship therefore represents both a governmental responsibility and a cultural obligation to protect resources for future generations (Berkes, 2018).

Federal actions affecting ancestral homelands have direct implications for the exercise of tribal sovereignty regardless of current land ownership. Much of the cultural landscape that remains central to tribal identity exists outside present-day reservation boundaries because Tribal Nations ceded extensive territories through treaties while expressly reserving certain rights and maintaining enduring cultural connections to those lands. Sacred sites, traditional cultural properties, ceremonial landscapes, hunting and fishing areas, medicinal plant gathering locations, and ancestral burial places continue to hold profound cultural, historical, and religious significance despite changes in jurisdiction or ownership.

Accordingly, the federal government's responsibility to engage Tribal Nations extends beyond reservation boundaries whenever proposed federal actions have the potential to affect places of religious, cultural, historical, or environmental significance. Meaningful consultation recognizes that these resources are not simply historic artifacts or environmental features; they are living components of tribal communities that continue to support cultural practices, treaty-reserved rights, traditional ecological knowledge, and the exercise of tribal self-determination. Protecting these resources is therefore inseparable from protecting tribal sovereignty itself.

Government-to-Government Relationship & The Federal Trust Responsibility

The federal trust responsibility defines the unique political and legal relationship between the United States and Tribal Nations. Rooted in treaties, statutes, executive actions, and judicial precedent, this relationship imposes important obligations on the federal government when administering tribal lands, treaty rights, trust resources, and other interests protected by federal law. The trust responsibility is not simply a historical principle; it remains an important component of the contemporary relationship between the United States and federally recognized Tribal Nations.

The Supreme Court has repeatedly recognized this distinctive relationship. In Cherokee Nation v. Georgia (1831), the Court characterized tribes as “domestic dependent nations,” establishing an early foundation for what developed into the federal trust doctrine. One year later, Worcester v. Georgia (1832) recognized Tribal Nations as distinct political communities and reinforced the federal character of relations between Tribal Nations and the United States. The Court later emphasized the fiduciary character of federal responsibilities in Seminole Nation v. United States (1942), explaining that the federal government’s conduct toward tribes should be judged according to exacting fiduciary standards.

In United States v. Mitchell (1983), the Court further recognized enforceable fiduciary duties where federal statutes and regulations establish comprehensive federal control over tribal trust resources. Together, these decisions demonstrate that the relationship between the United States and Tribal Nations carries legal responsibilities that differ fundamentally from the federal government's relationship with ordinary stakeholders.

Government-to-government consultation expresses this unique political relationship. Tribal Nations participate in federal decision-making as sovereign governments possessing distinct legal, cultural, and territorial interests, not merely as members of the public or interested organizations. Consultation with tribes therefore cannot be equated with general public participation. Meaningful consultation requires direct engagement, a genuine opportunity for tribal governments to identify concerns and provide knowledge, and consideration of those concerns while federal decisions can still be influenced.

The Nottawaseppi Huron Band of the Potawatomi (NHBP) is therefore deeply concerned by proposed revisions to the Section 106 law and regulations that remove explicit references to the government-to-government relationship and federal trust responsibility and that would diminish mandatory tribal consultation requirements. Removing these principles from the regulatory framework is not merely a matter of terminology. Their omission risks separating Section 106 implementation from the broader body of federal Indian law and policy that recognizes Tribal Nations as sovereign governments with a unique political relationship with the United States.

Of particular concern is any statutory or regulatory framework that would place greater discretion in the hands of a federal agency or project applicant to determine whether consultation with a Tribal Nation is warranted. Such an approach reverses the purpose of meaningful consultation. Federal personnel and project proponents cannot independently determine the cultural significance of a place based solely upon archaeological surveys, existing inventories, geographic databases, or their own professional expertise. Tribal knowledge may include oral histories, traditional land-use practices, ceremonial associations, ecological relationships, migration histories, burial information, and knowledge concerning places whose significance has never been recorded in federal or state databases. In many circumstances, the Tribal Nation itself is the only authoritative source capable of explaining why a particular place, landscape, species, or resource possesses cultural significance.

Delegating tribal consultation responsibilities to project applicants raises another concern. Applicants have an inherent interest in obtaining project approval and advancing an undertaking efficiently. While applicants may appropriately participate in the Section 106 process and communicate with consulting parties, the federal agency retains responsibility for the federal undertaking and for compliance with applicable federal law. Allowing an applicant to assume the government's central role in initiating or conducting government-to-government consultation risks blurring the distinction between consultation among sovereign governments and project-level stakeholder engagement. From NHBP's perspective, meaningful tribal consultation must remain a federal responsibility and should not be transferred to the party with the greatest direct interest in advancing the proposed project.

NHBP is concerned about proposals that would narrow the meaning or practical application of "historic property" through concepts such as geographic compactness or an increased emphasis on built structures. Such limitations are poorly aligned with the character of many places that hold religious and

cultural significance to Tribal Nations. Sacred places and traditional cultural landscapes often do not conform to discrete archaeological boundaries or consist of buildings and other constructed features. They may include waterways, wetlands, forests, mountains, valleys, gathering areas, travel corridors, burial landscapes, or broader ethnographic landscapes whose significance derives from the relationships among people, place, natural resources, history, and cultural practice.

NHBP also has serious concerns regarding proposals to narrow what constitutes an adverse effect by excluding or reducing consideration of indirect, cumulative, visual, atmospheric, or audible impacts and changes to the character or traditional use of culturally significant properties. Physical destruction is not the only means by which a sacred or traditional cultural place can lose integrity or cultural value. Noise, viewshed alterations, changes in access, fragmentation of landscapes, disruption of traditional use, or alteration of surrounding environmental conditions can substantially affect how a place functions culturally even when the physical location itself remains intact. Federal review must be capable of considering these forms of harm if consultation is to meaningfully protect properties of religious and cultural significance.

Also concerning is the proposed removal of explicit language requiring consultation with Tribal Nations regarding properties of religious and cultural significance regardless of where those properties are located. Contemporary reservation boundaries do not define the geographic limits of tribal history, cultural identity, treaty relationships, or traditional use. Federal policies of land cession, displacement, allotment, and removal separated many Tribal Nations from substantial portions of their ancestral homelands. Consequently, sacred sites, ancestral villages, burial places, gathering areas, traditional cultural properties, and other culturally significant landscapes are often located outside present-day reservation boundaries.

NHBP supports efficient federal review. However, efficiency should not be achieved by reducing consultation, narrowing the types of cultural resources eligible for consideration, or transferring federal responsibilities to project applicants. Reform of the NHPA law or its implementing regulations located at 36 C.F.R. Part 800 should instead improve efficiency through regulatory clarity, early coordination, predictable timelines, accountability, and meaningful engagement with Tribal Nations at the beginning of project planning. Early consultation can identify conflicts before significant resources are committed to a project, allowing agencies, applicants, and Tribal Nations to develop alternatives that avoid unnecessary harm and reduce the potential for project redesign, administrative disputes, or litigation later in the process.

Purpose and Importance of Section 106

Section 106 of the National Historic Preservation Act's main purpose is to integrate historic preservation into federal planning. It does this by requiring federal agencies to evaluate the impact of federally funded, licensed, or assisted projects on historic and cultural properties. Importantly, Congress expressly requires a federal agency carrying out Section 106 responsibilities to consult with an Indian tribe that attaches religious and cultural significance to qualifying property (54 U.S.C. § 302706(b)), and the current regulations recognize that consultation must respect tribal sovereignty and the government-to-government relationship (36 C.F.R. § 800.2(c)(2)(ii)). The fact that early and often consultation is the

key to Section 106 cannot be overemphasized. This consultation is aimed at reaching binding agreements on Section 106 projects with all concerned parties (Tribes, SHPO, public, and local experts alike). The ability to be at the table and have a voice on these projects is monumentally important because critical information regarding the location and importance of significant historic properties, sacred sites, and TCPs/TCLs can be shared early on with federal agencies. This information can then be incorporated into decisions before these properties are irreversibly destroyed, saving time and money. This process is critical because these historic properties are non-renewable resources. Once destroyed or damaged, they are gone forever, including the cultural knowledge, stories, language, and traditions that were tied to that place/property.

Tribal Perspective and Concerns

The Nottawaseppi Huron Band of the Potawatomi has serious concerns with proposed revisions that would remove or diminish explicit recognition of the government-to-government relationship and federal trust responsibility and make tribal participation more discretionary. These concerns are reinforced by federal statute. Congress has expressly required federal agencies carrying out Section 106 responsibilities to consult with any Indian tribe that attaches religious and cultural significance to qualifying property (54 U.S.C. § 302706(b)). The current regulations further recognize tribal sovereignty, the government-to-government relationship, and consultation regarding culturally significant historic properties regardless of location (36 C.F.R. § 800.2(c)(2)(ii)). Supreme Court precedent likewise recognizes the distinctive federal–tribal relationship and fiduciary obligations arising under applicable statutes and trust arrangements (*Cherokee Nation v. Georgia*, 1831; *Seminole Nation v. United States*, 1942; *United States v. Mitchell*, 1983). Against this legal background, NHBP opposes statutory or regulatory changes that would reduce meaningful federal–tribal consultation or treat Tribal Nations as ordinary stakeholders.

Another concern is that the proposed changes to Section 106 would also consolidate control in the hands of the federal agency (or the applicant) to make decisions about whether consultation is warranted or not. This is alarming to NHBP because Tribal knowledge is a type of evidence that only Tribal communities can know and share. It is extremely doubtful, if impossible, that federal agencies and their staff, or project applicants, know what Tribes know about where their own cultural resources are and why they are important to the Native Nations themselves. If consultation is not conducted with Tribes, there will be no way to learn about and avoid important Native cultural resources, leading to the destruction of these non-renewable resources. Again, it is worthwhile to point out that Tribes are not merely stakeholders, but inherently sovereign nations requiring government-to-government consultation. Furthermore, the proposed changes would allow the project applicants to initiate and conduct consultation with Tribes. The thought of the one party with the most interest in the project (i.e., the applicant) having the authority to conduct Tribal consultation is extremely concerning. The thought of reducing the Section 106 process to merely a single federal agency document, and the potential lack of circulation of that document to the public, is equally concerning.

The proposed changes unnecessarily narrow the definition of a “historic property.” Specifically, the new “geographically compact” and “built structures” language would eliminate the need to consider project effects on sacred places, traditional cultural places, and traditional cultural landscapes. Ironically,

places of deep cultural and spiritual significance to Tribes were rarely about a built structure itself and oftentimes are not geographically compact. Some of the most important cultural resources to Tribes are often "natural features such as mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes." These cannot be excluded when considering the effects of Section 106 projects. To do so is a violation of the federal government's legal trust responsibility and its requirement to conduct meaningful government-to-government consultation involving sincere discussion and collaboration aimed at avoiding, minimizing, or mitigating any adverse effects to Tribal cultural resources or historic properties. NHBP also disagrees with the proposed definition of what would be considered "adverse." It seeks to remove indirect effects and cumulative effects on historic properties, as well as eliminating the need to consider the "introduction of visual, atmospheric, or audible elements that diminish the integrity" of a property, and the effects that "change the character of the property's use." Many of these factors are critical and have the potential to negatively impact Tribal resources or historic properties, as well as our ability to continue conducting our cultural practices at these places.

The proposed changes also delete the explicit duty to consult "regardless of location." This effectively would undercut protections for sacred sites on ancestral and ceded lands that are located off reservation (i.e., outside contemporary reservation boundaries). Due to Tribal histories involving the horrendous and damaging effects of the forced U.S. removal of Native Nations or the allotment and assimilation or termination policy eras, it is not surprising that most of our sacred sites or TCPs are outside of our current reservation bases. Our ability to protect and preserve these cultural resources would be lost. For Tribes, preservation is not only about its physical survival, but also the perpetuation of all the historical and cultural knowledge, language, and traditional practices associated with it.

Potential Impacts of Weakening Section 106

This concern is particularly significant for archaeological resources, ancestral burial places, sacred sites, and traditional cultural properties. A substantial portion of the archaeological record remains underground and undocumented. Existing databases and archaeological surveys cannot identify every culturally significant location, nor can archaeological methods independently explain the religious, historical, or cultural importance that a particular place holds for a Tribal Nation. In many circumstances, this information resides within tribal oral histories, cultural teachings, Indigenous Knowledge, and relationships with ancestral landscapes that have been maintained across generations.

Tribal expertise is therefore not interchangeable with agency expertise. Tribal Nations possess knowledge that federal agencies, contractors, and project applicants may not have and cannot independently recreate. When tribes are excluded from early consultation, federal agencies may not learn that a culturally significant place exists until ground disturbance has already occurred. By that point, opportunities for avoidance may have disappeared. An ancestral burial, archaeological deposit, ceremonial place, or culturally significant natural feature is a nonrenewable resource. Once physically destroyed or fundamentally altered, neither documentation nor mitigation can fully restore what has been lost.

The existing Section 106 process provides a systematic mechanism for identifying and considering historic properties that may be affected by federally funded, licensed, permitted, or

otherwise assisted undertakings. Weakening that process could increase the frequency of unanticipated discoveries during construction and expose federal agencies and project proponents to greater uncertainty, delays, redesign costs, disputes, and potential legal liability. A process intended to accelerate federal decision-making may therefore have the opposite practical effect when culturally significant resources are discovered after construction has begun rather than identified during early project planning.

Ancestral Lands and Traditional Cultural Properties

These risks are especially pronounced for tribal cultural resources located beyond contemporary reservation boundaries. The geographic boundaries of modern reservations do not correspond with the full extent of Tribal Nations' ancestral homelands, treaty territories, migration histories, traditional gathering areas, or places of religious and cultural importance. Centuries of land cessions, displacement, allotment, and forced removal separated Tribal Nations from substantial portions of their ancestral territories. The resulting change in land ownership did not erase tribal histories, cultural relationships, or the significance of those places.

Traditional cultural properties and broader cultural landscapes are particularly vulnerable because their significance may not be apparent from the physical landscape alone. A river, wetland, forest, burial landscape, gathering area, trail, or ceremonial location may appear unremarkable to someone unfamiliar with its history while carrying profound significance to the Tribal Nation connected to that place. This illustrates why consultation cannot be replaced solely by archaeological surveys, database reviews, or determinations made by federal personnel and project applicants.

The Supreme Court's decision in Lyng v. Northwest Indian Cemetery Protective Association (1988) further illustrates the vulnerability of sacred places under other areas of federal law. In Lyng, the Court declined to find a Free Exercise Clause violation despite acknowledging that the proposed federal action could have severe effects on Indigenous religious practices associated with sacred lands. The case demonstrates why statutory processes such as the NHPA and Section 106 remain important. When other areas of law provide limited protection against federal actions affecting sacred landscapes, meaningful consultation and consideration before an undertaking proceeds may represent one of the most consequential opportunities available to Tribal Nations to prevent irreversible harm.

Loss of Expertise and Increased Project Risk

NHBP is concerned that consolidating greater decision-making authority within individual federal agencies would place additional responsibilities on agencies that may lack sufficient staffing, cultural expertise, archaeological capacity, or resources to perform the work previously supported through a broader consultative process. Federal agencies possess important technical expertise, but they cannot substitute their own institutional knowledge for the specialized expertise held by Tribal Nations, State Historic Preservation Officers, local governments, descendant communities, and other parties with direct historical and cultural relationships to affected places.

The exclusion or marginalization of these parties would have consequences beyond tribal interests. African American descendant communities, local governments, preservation organizations, and other communities with specialized knowledge of historic places could similarly lose meaningful opportunities to identify resources and raise concerns before projects proceed. Historic preservation benefits when decisions are informed by those who understand the history and significance of the affected landscape rather than relying exclusively on centralized agency determinations.

Reduced consultation could also weaken accountability throughout the lifecycle of an undertaking. Section 106 currently provides a structured framework through which adverse effects can be identified and measures to avoid, minimize, or mitigate those effects can be negotiated and documented. Memoranda of Agreement and Programmatic Agreements can establish responsibilities that continue beyond the initial federal approval. Weakening participation in the development and implementation of these agreements risks reducing both transparency and accountability once construction begins.

Increased Conflict, Litigation, and Project Uncertainty

Section 106 is not simply a regulatory obstacle; it functions as an early planning and conflict-resolution process. It provides federal agencies, applicants, Tribal Nations, State Historic Preservation Officers, and other consulting parties with a structured forum for identifying historic properties, evaluating potential effects, and developing solutions before conflicts become entrenched or resources are irreversibly damaged. Early identification of cultural resources may allow an undertaking to be redesigned, relocated, or modified while alternatives remain economically and technically feasible.

Removing or substantially weakening that structured process does not eliminate disagreement or the federal agency's underlying statutory responsibility. Section 106, now codified at 54 U.S.C. § 306108, directs the head of a federal agency with jurisdiction over a proposed federal or federally assisted undertaking, or authority to license an undertaking, to take into account the effect of the undertaking on historic properties before approving the expenditure of federal funds or issuing a license. The statute also requires the agency to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment (54 U.S.C. § 306108, 2014). The responsibility imposed by Congress therefore rests with the federal agency and occurs before the relevant federal approval.

This existing statutory language is important when evaluating proposed revisions to the law or implementing regulations at 36 C.F.R. Part 800. The current Congress must take note of the original intent of prior Congresses when the NHPA was enacted. Revisions that substantially narrow the universe of historic properties considered, reduce the consideration of effects, restrict the information available to agency decision makers, or diminish consultation with Tribal Nations possessing specialized knowledge of affected properties raise serious questions about whether agencies will continue to have a sufficiently informed process to meaningfully “take into account” the effects of their undertakings as required by 54 U.S.C. § 306108.

NHBP is particularly concerned about any approach that transfers substantial responsibility for tribal consultation or identification of culturally significant resources to project applicants. Section 306108 assigns the statutory obligation to the head of the responsible federal agency. Applicants may

appropriately assist agencies with studies, information gathering, and other components of the review process, but such assistance should not displace federal responsibility for compliance or transform government-to-government consultation into applicant-led stakeholder engagement. The federal agency must remain accountable for ensuring that its decision is informed by the tribal knowledge and cultural information necessary to understand the effects of the undertaking.

The proposed changes also create potential tension with the broader statutory framework of the National Historic Preservation Act. Congress expressly incorporated Tribal Nations and Tribal Historic Preservation Officers into the national historic preservation program and recognized tribal participation in the identification and protection of properties possessing religious and cultural significance. Section 106 should therefore be interpreted and implemented within that existing broader statutory framework rather than as an isolated procedural requirement.

Weakening consultation may also increase rather than decrease project uncertainty. Tribal Nations and communities that cannot meaningfully address concerns through early consultation may be left with fewer administrative opportunities to prevent harm before it occurs. Disputes that could have been addressed through project planning may instead move into administrative challenges, litigation, political intervention, or public protest. Federal agencies may face challenges regarding compliance with the NHPA or other applicable federal laws, while applicants may experience delays and unexpected costs when previously unidentified cultural resources are discovered after construction begins.

NHBP Position and Recommendation

NHBP recommends that the Congress and the Trump Administration withdraw proposed revisions that diminish meaningful tribal consultation, narrow the consideration of historic properties or adverse effects, or transfer inherently federal responsibilities in a manner that weakens government-to-government engagement with Tribal Nations.

NHBP's concern is grounded directly in the existing statutory obligation Congress established in Section 106. Under 54 U.S.C. § 306108, the responsible federal agency must take into account the effects of its undertaking on historic properties before approving federal expenditures or issuing a license. The Section 106 regulations should facilitate the federal government's ability to fulfill that responsibility comprehensively and meaningfully. They should not establish a process that allows potentially significant effects to escape consideration because the affected resource does not fit a newly narrowed regulatory definition or because the Tribal Nation possessing the relevant knowledge was never meaningfully consulted.

Importantly, NHBP does not maintain that Section 106 requires the preservation of every historic property or provides Tribal Nations with veto authority over federal projects. Rather, the statute establishes a decision-making obligation: effects on historic properties must be considered before the federal decision is made. For that consideration to be meaningful, agencies must have access to sufficient information to understand what historic properties may be affected and the nature of those effects. For properties of religious and cultural significance to Tribal Nations, that information often cannot be obtained without consultation with the Tribal Nations that possess the relevant cultural knowledge.

Statutory or regulatory changes that reduce tribal consultation may impair the federal agency's ability to develop the factual record necessary to satisfy its statutory responsibility. A federal agency cannot meaningfully consider an effect it has failed to identify, and it cannot adequately understand the cultural significance of a property based solely upon assumptions made by agency personnel, consultants, or project applicants who do not possess the Tribe's cultural knowledge. This is especially important for traditional cultural properties, sacred places, ancestral burial areas, and cultural landscapes located beyond contemporary reservation boundaries.

If revisions to the NHPA statute or implementing regulations are necessary, NHBP recommends that they be developed through meaningful and comprehensive government-to-government consultation with Tribal Nations, along with appropriate engagement of State Historic Preservation Officers, local governments, descendant communities, preservation professionals, project proponents, and other affected parties. Reform should focus on improving the effectiveness of Section 106 rather than diminishing the information available to federal decision makers.

Modernization should emphasize early coordination, regulatory clarity, predictable timelines, adequate staffing, agency accountability, meaningful consideration of Indigenous Knowledge, and early identification of potential conflicts. These reforms can improve efficiency while remaining faithful to the purpose of Section 106: ensuring that federal agencies consider the effects of their undertakings on historic properties before federal decisions make those effects difficult or impossible to avoid.

NHBP maintains that certain principles must remain foundational to the NHPA law and regulations located at 36 C.F.R. Part 800. Tribal sovereignty and the unique political relationship between Tribal Nations and the United States must be acknowledged. Government-to-government consultation must remain the responsibility of the federal government and cannot be reduced to discretionary stakeholder engagement. Tribal participation must extend to properties of religious and cultural significance located within ancestral and ceded territories, not solely lands within contemporary reservation boundaries. The regulations must also recognize that tribal cultural properties and landscapes cannot always be understood through conventional archaeological methods, built structures, or geographically compact boundaries.

Efficiency and meaningful consultation are compatible. Early engagement with Tribal Nations can identify cultural resources and potential conflicts before substantial public and private resources have been committed to an undertaking. In contrast, discovering an ancestral burial, sacred site, or previously unidentified archaeological resource during construction can result in work stoppages, redesign, disputes, increased costs, and litigation. A strong Section 106 process therefore provides regulatory certainty not only for Tribal Nations but also for federal agencies and project proponents.

For NHBP, preservation is more than protecting physical objects. It encompasses the relationships among people, place, language, history, ceremony, natural resources, and knowledge passed between generations. Once an ancestral burial place, sacred landscape, archaeological site, or other irreplaceable cultural resource is destroyed, no subsequent administrative process can fully restore what has been lost. The appropriate time to identify these resources, understand their significance, and resolve potential conflicts is before the ground is disturbed.

Any revision of Section 106 of the NHPA or its implementing regulations located at 36 C.F.R. Part 800 should strengthen the federal government's ability to fulfill the responsibility Congress established

in 54 U.S.C. § 306108, not diminish it. Streamlining should mean earlier engagement, clearer responsibilities, improved coordination, and greater predictability—not less consultation, narrower consideration of historic properties, or reduced opportunities to prevent irreversible harm.

Conclusion

The Nottawaseppi Huron Band of the Potawatomi maintains that Section 106 of the National Historic Preservation Act is more than an administrative review requirement. It is an essential component of the federal historic preservation framework and provides one of the most important processes through which Tribal Nations participate in federal decisions affecting ancestral places, sacred sites, traditional cultural properties, burial places, cultural landscapes, and natural resources. The current process recognizes an important reality: federal agencies cannot fully understand the significance of tribal cultural resources without meaningful engagement with the Tribal Nations that hold the knowledge, history, and continuing relationships associated with those places.

The proposed revisions to the NHPA and its implementing regulations raise significant concerns because they would alter the collaborative foundation upon which Section 106 has developed. Reducing tribal consultation, diminishing the roles of Tribal Historic Preservation Offices and other preservation professionals, narrowing the properties or effects subject to review, limiting consideration of resources outside contemporary reservation boundaries, or transferring significant consultation responsibilities to project applicants would not simply streamline an administrative process. Collectively, these changes risk reducing the information available to federal decision makers before actions affecting irreplaceable cultural resources become irreversible.

NHBP recognizes the federal government's interest in improving efficiency, reducing unnecessary delay, and providing greater predictability for federal undertakings. Those objectives do not require sacrificing meaningful consultation or historic preservation. In fact, early identification of cultural concerns can provide greater certainty for federal agencies and applicants by allowing potential conflicts to be addressed before significant financial and institutional commitments have been made. Eliminating opportunities for early resolution does not eliminate conflict. It risks moving those conflicts into construction delays, administrative disputes, litigation, political intervention, or public protest.

Most importantly, Tribal Nations must remain directly involved throughout federal decision-making when undertakings may affect properties of religious and cultural significance to them. Government-to-government consultation should remain a federal responsibility and should not be transformed into discretionary stakeholder engagement or delegated in a manner that allows project applicants to substitute for the federal government's relationship with sovereign Tribal Nations.

NHBP supports responsible development, infrastructure investment, environmental restoration, and economic growth. Historic preservation and development need not be competing objectives. A well-functioning Section 106 process provides the opportunity to bring governments, applicants, preservation professionals, and communities together early enough to find solutions. True streamlining should therefore be measured by the ability to identify concerns earlier, improve coordination, reduce uncertainty, and prevent avoidable conflicts—not by the number of voices removed from the process or the number of resources excluded from consideration.

Once an ancestral burial place, sacred landscape, archaeological site, or culturally significant natural resource is destroyed, no statutory or regulatory process can recreate it. The opportunity to identify, understand, and protect these places must therefore exist before irreversible decisions are made and before the ground is disturbed. NHBP urges the federal government to preserve that opportunity by maintaining a strong Section 106 process grounded in tribal sovereignty, meaningful government-to-government consultation, federal accountability, and the shared responsibility to protect the cultural heritage entrusted to the generations that follow.

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