



Section 106 Regulations Under Threat

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WHO WE ARE

- Cultural Heritage Partners, PLLC is a private law firm with a public mission: we believe cultural heritage is a human right.
- We are experienced Section 106 practitioners — the federal historic preservation program is core to our practice, not a side issue.
- We represent Tribal Nations, local governments, community organizations, and preservation advocates nationwide.
- We are in active litigation against the Trump Administration to stop the President's plans to paint the Eisenhower Executive Office Building and to demolish the Kennedy Center.
- Through our "War Room" initiative, we are tracking and responding to ACHP's Section 106 regulatory overhaul. Visit culturalheritagepartners.com/defend-section-106/



Marion Forsyth Werkheiser

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

What the Draft Does

Three major themes emerge:

1 Consolidates Agency Control

Consultation becomes optional and agency-directed

2 Reduces Application of Section 106

Fewer projects would be reviewed at all

3 Reduces Scope of Consideration

Less counts as “historic” or “adverse”

Consultation Becomes Optional

-  **Consultation becomes optional.**
Consultation with State Historic Preservation Offices, Tribal Historic Preservation Offices, and local governments becomes optional, at the agency's own discretion — no longer a required step for every undertaking. “May” replaces “shall.”
-  **Public participation becomes discretionary.**
The draft states the agency “has exclusive discretion to determine the usefulness of public participation, including, e.g., as necessary to resolve community concerns. The agency shall consider how offering an opportunity for public participation is balanced against the cost of other values, such the public interest.” (yes, it’s missing a word.)
-  **“Consultation” is redefined.**
Consultation now only means “seek and consider” other parties’ views, not discuss them or seek agreement with them.

Agencies and Applicants in Control



Applicants can run consultation directly.

Applicants — including for federal permits, licenses, and funding — may now initiate and conduct early consultation directly with SHPOs/THPOs on the agency's behalf, including with Tribes (if the agency wants to do “consultation” at all).



Agencies control the deadlines.

Agencies gain broad new authority to shorten, lengthen, or waive procedural deadlines — including the Council's own comment period — simply by publishing notice of the change.

What Counts as an “Undertaking”?

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

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

- State, local, or tribal actions taken under delegated federal authority
- Federal grants where the government doesn't control how, to whom, or why funds are disbursed
- Actions “merely subject to a federal veto” that don't require affirmative federal approval
- Projects with “no or minimal” federal funding or involvement where a federal agency cannot control the outcome of a project
- Actions where another statute's process is deemed to substitute for Section 106 compliance

New Off-Ramps to Skip Review Entirely

Beyond the carve-outs, the draft creates a streamlined process for agencies to exempt entire categories or programs of undertakings from Section 106 review altogether.

- ACHP's own stated goal is to align Section 106 exemptions with NEPA's “categorical exclusions,” so that far more project types face no historic-preservation review at all.
- Public participation in creating an exemption is left to the “proponent of the exemption” to arrange — it is not required.
- Once an exemption is approved, the Council's power to terminate it is limited and reactive, not automatic.

What Counts as “Historic”?

The definition of “historic property” is narrowed. Still means eligible for or listed on the National Register, except also:

- A place must include, or have once included, tangible human improvements — built structures — AND
- It must be “geographically compact.”
- The draft says explicitly: “noncompact, unimproved natural features such as mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes, do not qualify.”
- Excluded: many traditional cultural places and sacred sites of deep religious and cultural significance to Tribes and Native Hawaiian organizations — places that were never about a single building.
- Definition of “geographically compact” could also threaten rural historic districts, large urban historic districts, and large single property designations.

Fewer Effects Would Ever Count as “Adverse”



Removed entirely:

consideration of indirect effects and cumulative effects on historic properties.



Also removed:

“introduction of visual, atmospheric, or audible elements that diminish the integrity” of a property, and effects that “change the character of the property's use.”



New standard:

only effects with “a reasonably close causal relationship” to the undertaking count — and effects of other, separate projects don't count at all, even if related.

Cost Becomes the Deciding Factor

Less field investigation required.

Field investigations and identification work (the heart of CRM practice) are only required “taking into account reasonable considerations and factors like the cost and time of doing so” — real discretion to do less.

“Reasonable mitigation” redefined.

Redefined to mean only measures that are “technically and economically feasible” — cost can justify weaker mitigation.

No duty to avoid harm.

Agencies are no longer required to avoid or minimize adverse effects, or to consider alternatives — they can simply document that “other considerations outweigh” historic preservation.

Agreements become unilateral.

Binding Memoranda of Agreement give way to unilateral Memoranda of Decision: the agency decides, on its own, how (or whether) to address harm.

A FEW MORE RED FLAGS

Other Horribles



Broadened emergency authority.

The draft expands the sweeping “disaster or emergency declared by the President” trigger for bypassing Section 106 — the same authority already invoked under the January 2025 National Energy Emergency executive order to fast-track energy projects nationwide.



The draft is internally inconsistent.

Duplicate and renumbered provisions, undefined terms, and drafting errors create real ambiguity, and real litigation risk.

Four Moves That Cut Tribes Out

1

Consultation becomes optional.

It shifts from a required government-to-government process to something an agency — or the project's own applicant — may run at its discretion.

2

Sacred places are defined out.

New “geographically compact” and “built structure” tests write sacred mountains, waters, and cultural landscapes out of the definition of “historic property.”

3

Off-reservation protections are gutted.

The explicit duty to consult “regardless of location” is deleted, undercutting protection for sacred sites on ancestral and ceded lands.

4

Sovereignty and trust language is deleted.

References to the government-to-government relationship and the federal trust responsibility are struck from the rule entirely.

Not Just Bad for Preservation — Bad for Everyone

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

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

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

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

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

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

What Results – A Disproportionate Burden



No warning, no identification.

Unmarked burial grounds and sacred sites – often best identified and known through community knowledge – bulldozed before communities have the opportunities to alert parties to their vulnerability and existence.



No seat at the table.

Tribes, African American descendant communities, local governments, and other important rightsholders' participation is left to agency discretion; the ability to hold developers accountable through the lifecycle of a project severely limited.



Permanent, irreversible loss.

Places central to cultural life destroyed with no record and no recourse. Tribal cultural resources and historic properties located off reservation and tribal land, including traditional cultural places, are especially vulnerable.



Fights shift to the streets and the courts.

Communities who cannot resolve disputes with developers through early negotiation and the Section 106 consultation process are left with few options: litigation and/or protest. The slower, costlier path is worse for both communities and developers.



ACHP's proposed revisions to 36 CFR Part 800

July 31, 2026

Who Controls What History Survives?

- What places are recognized
- What knowledge is accepted
- Whose expertise matters
- Which harms are considered
- Whether consultation changes the decision

This is not simply a change in procedure.

It is a transfer of power over the American public's history.

It will determine who benefits from federal decisions and who is expected to suffer the loss.



**NATIONAL ASSOCIATION
OF TRIBAL HISTORIC
PRESERVATION OFFICERS**



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Congress Required Tribal Consultation:

54 U.S.C. § 302706 Eligibility for inclusion on National Register

(a) IN GENERAL.—Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

(b) CONSULTATION.—In carrying out its responsibilities under section 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).

Congress established the duty.

The current regulations made it meaningful.

The proposed updates intentionally undermine that framework.



Tribal Knowledge Is Expertise

The current regulations recognize Tribal “special expertise”

- Language and place names
- Oral histories and traditional teachings
- Pictographs and cultural context
- Generations of knowledge and responsibility
- Lived experience

Tribal knowledge is not supplemental information. It is evidence.



Cultural resources are precious Tribal resources. They encompass the Tribes’ elders, languages, cultural traditions, and cultural sites. They include the fish, wildlife and plants native to the region and landforms and landmarks.

The Proposal Narrows the Places and Harms That Count

Proposed historic-property definition:

- Geographically compact
- Tangible human improvements
- Specifically identified human activity

Expressly excluded:

- Noncompact mountains
- Valleys
- Bodies of water
- Ethnographic landscapes

Effects language removed or narrowed:

- Use and setting
- Visual, atmospheric, and audible effects
- Indirect and cumulative effects

**Preservation is not only physical survival.
Preservation is perpetuation.**



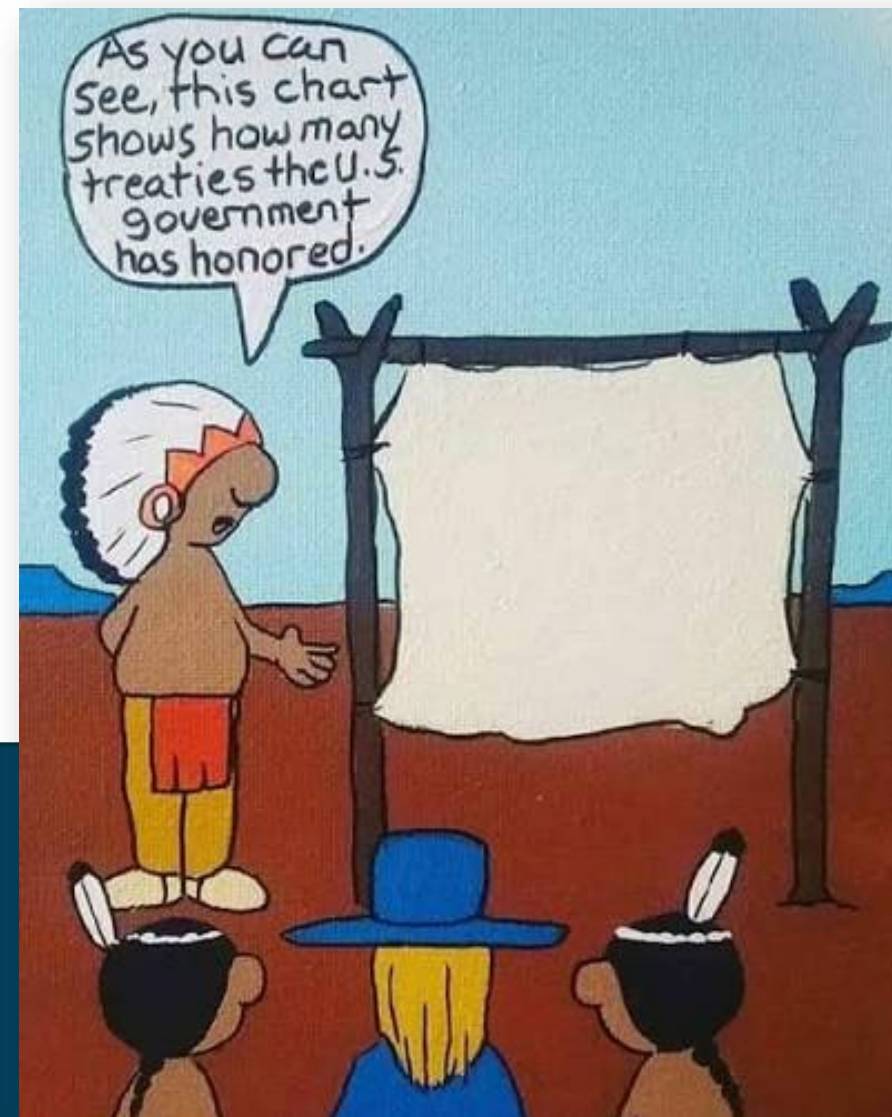
The proposal gives the agency greater control over:

- Deadlines
- Identification
- Area of potential effects
- Section 106 report
- Effects findings
- Treatment of objections
- Final decision

The agency defines the property, controls the record, weighs the objections, and issues the decision.

Sensitive Tribal information withheld for protection may be treated as missing evidence.

The Agency Controls the Record and the Decision

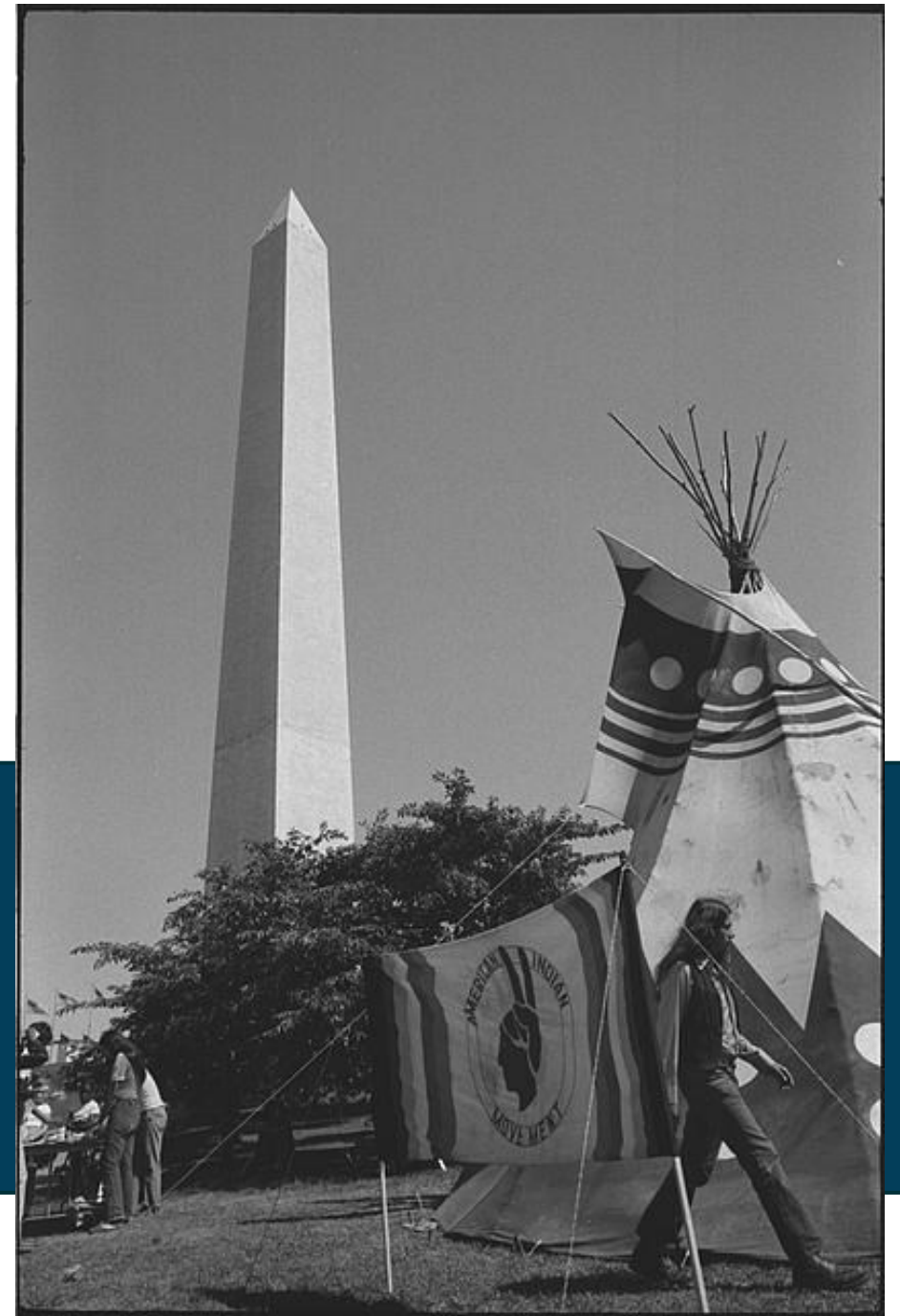


Fix the Failures, Keep the Safeguards

What actually causes delay:

- Consultation that begins too late
- Delegated engagement without accountability
- Incomplete or changing project information
- Inadequate identification and documentation
- Insufficient federal staffing and expertise
- Inconsistent agency protocols and standards

Good reform does not silence the people closest to the harm. It listens to those who know the places, understand the consequences, and carry the responsibility forward.



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NCSHPO

National Conference
of State Historic
Preservation Officers

ERIK HEIN, EXECUTIVE DIRECTOR

SHPO CONCERNS

- Loss of Required Consultation with States, Tribes, Local Governments and the Public
- Completely Sidelines States and Tribes
- Poor or No Identification of Historic Properties
- Unilateral Agency Control
- Attempt to Limit Historic Properties Subject to 106
- Trades Memoranda of Agreement for Memoranda of Decision

Violates the very intent of the
National Historic Preservation Act



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WHAT ARE WE WORRIED ABOUT?

HISTORY REPEATING



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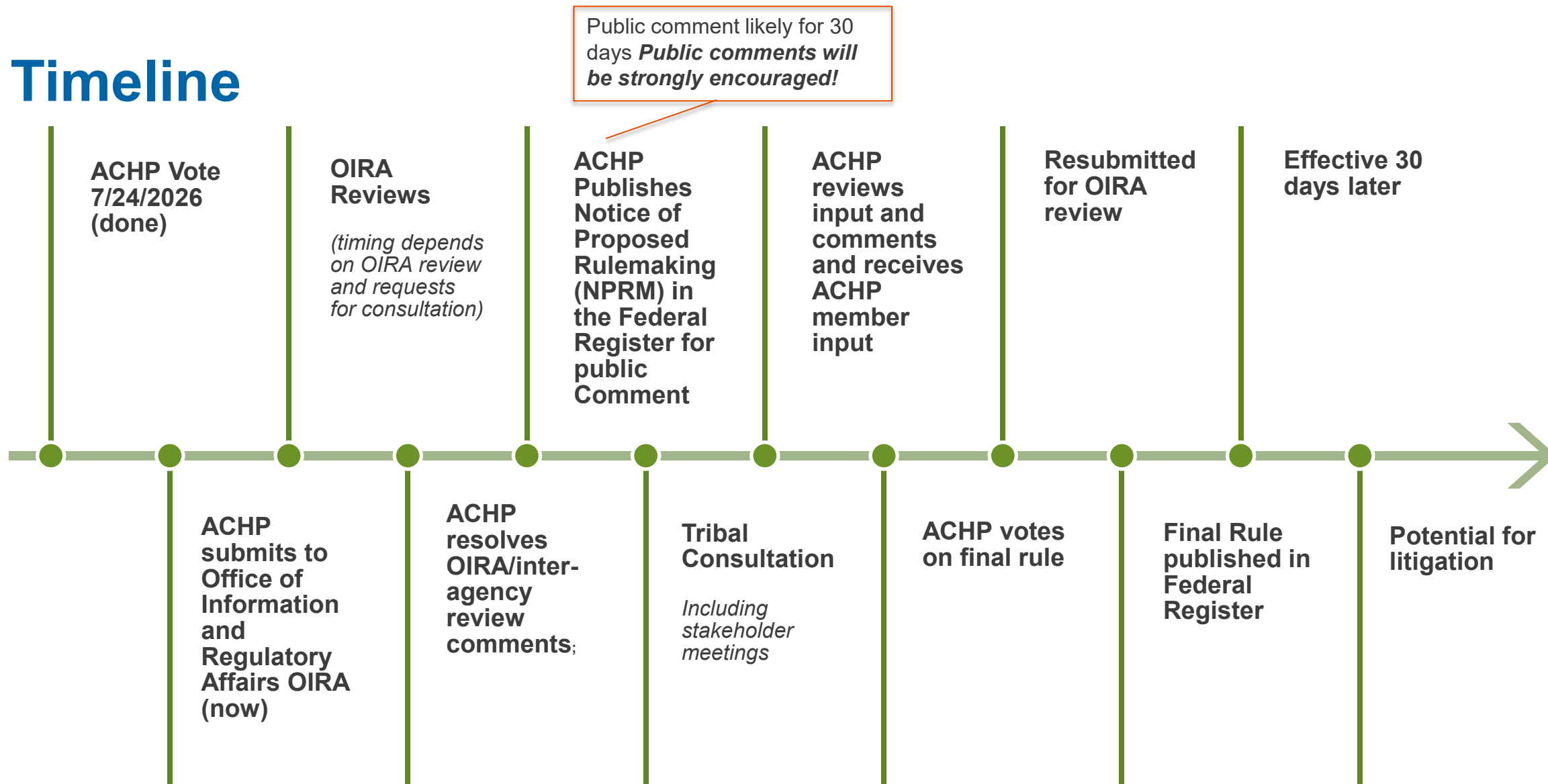
National Conference of
State Historic Preservation Officers



Tom Mayes

Chief Legal Officer, National Trust for Historic Preservation

Timeline



What Can You Do?

- Follow Updates at <https://savingplaces.org/section106>. All links for the items below will be shared in the chat and on the Section 106 webpage.
- Send us examples of Section 106 consultations that benefited your community
- Write to your Governor and share how these changes impact historic properties in your location.
- Write to your Member of Congress and consider contacting the district office during the August recess to make your voice heard
- Be prepared to send comments to the Advisory Council on Historic Preservation when the comment period opens



Question and Answer

Please submit questions in the Q&A function located at the bottom of your zoom screen

Save the Date! October 19, 2026
Washington D.C. and Online



Thank You!

Questions? Please contact:

FORUM@SAVINGPLACES.ORG



National Trust *for*
Historic Preservation®