

**Written Testimony of Steven Concho,
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before the

**Senate Committee on Energy and Natural Resources
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Introduction.

My name is Steven Concho, and I serve as the Tribal Historic Preservation Officer (“THPO”) for the Pueblo of Acoma (“Pueblo” or “Acoma”). My testimony addresses how Section 106 works on the ground, why consultation is indispensable, and how targeted investments in Tribal Historic Preservation Offices and utilizing existing legal and regulatory tools to improve efficiency will simultaneously reduce permitting delays and improve federal compliance.

The Acoma people are an ancient people. We have lived at Acoma Sky City, our mesa-top home, for over 1,000 years, making it one of the oldest continuously inhabited communities in the United States. Our living culture, language, and cultural practices are deeply tied to a network of ancestral sites, cultural landscapes, shrines, and ceremonial trails that extend far beyond the present-day Pueblo boundaries. These places are integral to Acoma’s ongoing cultural identity and survival.

Acoma, like other tribes, shares a unique, government-to-government relationship with the United States based on our status as a sovereign nation. The “Section 106” consultation process of the National Historic Preservation Act (“NHPA”) is therefore critical, as it is one of the only statutory mechanisms requiring federal agencies to consider and consult with Indian Tribes regarding federal undertakings that may affect historic properties of traditional religious and cultural significance. This Section 106 process is a way that the United States meets treaty and trust obligations to Tribes and ensures that Tribal lifeways, cultural practices, and sacred places are considered in federal decision making while projects advance. When proper consultation under Section 106 occurs, projects move forward in a way that protects cultural resources. Most projects proceed efficiently and collaboratively. On the other hand, when Tribes are not consulted properly or in a timely manner, projects can be delayed because of fights over a threatened resources or cultural resources can be destroyed.

Over decades of experience, the Pueblo of Acoma regards the NHPA as one of the most effective federal statutes for ensuring that tribal voices and knowledge are incorporated into federal decision-making concerning cultural heritage and sacred landscapes.

Purpose of Section 106 of the NHPA.

Congress’s policy, enshrined in the NHPA, is that preservation and modern society should exist “in productive harmony” and that the federal government must provide leadership in preservation.¹ Section 106 operationalizes a critical part of that policy by requiring agencies, before funding or permitting an undertaking, to “take into account the effect of the undertaking on any historic property” and to afford the Advisory Council on Historic Preservation (“ACHP”) a reasonable opportunity to comment.² A

¹ 54 U.S.C. § 300101(1); *see also* § 300101(2).

² 54 U.S.C. § 306108; 36 C.F.R. § 800.1(a)

historic property that must be considered in this process is one that is listed on (or is eligible for listing on) the National Register of Historic Places ("National Register"). Properties of "traditional religious and cultural importance" to tribes may be determined eligible for the National Register, ensuring that cultural landscapes like Mount Taylor, discussed *infra*, receive consideration during review.³ Consultation with Indian Tribes must occur on a government-to-government basis, early and respectfully, consistent with the regulations at 36 C.F.R. Part 800.⁴ The regulations define consultation as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement[.]"⁵ The goal is to avoid adversely impacting such cultural properties where possible through project alterations, or, if avoidance is not possible, to mitigate adverse effects. In the NHPA, Congress also directed agencies to protect sensitive information from disclosure when necessary to safeguard historic properties of religious and cultural significance.⁶

Crucially, Section 106 is procedural. It ensures agencies consider effects and consult in good faith; it does not mandate a particular substantive outcome or prohibit development.⁷ This point bears repeating: consultation is important as it enables an agency to take into account effects but does not dictate a particular result.

Traditional Cultural Properties and NHPA guidance.

The National Park Service's Bulletin 38 explains that a Traditional Cultural Property ("TCP") may be eligible for the National Register because of its association with the cultural practices or beliefs of a living community that are rooted in its history and important to maintaining cultural identity.⁸ The ACHP's Consultation with Indian Tribes Handbook (2021) provides practical guidance for federal staff and THPOs, emphasizing early, respectful, government-to-government consultation, the possibility of consultation protocols, and the special expertise tribes hold regarding places of religious and cultural significance.⁹

Importance of Tribal Consultation Under Section 106.

Tribal consultation under Section 106 is not an optional courtesy; it is a statutory requirement and a cornerstone of federal preservation policy. Tribes possess unique ethnographic, linguistic, and cultural expertise necessary for determining whether a property is eligible for the National Register as a historic property or TCP of cultural significance. No other entity possesses the requisite knowledge to make these determinations in a manner consistent with the NHPA's requirements.

In practice, based on my experience, many delays or disputes attributed to "tribal consultation" stem from late or incomplete agency initiation of the Section 106 process. Early engagement with tribes during project scoping (prior to route selection, lease issuance, or design finalization) reduces both

³ 54 U.S.C. § 302706 (properties of traditional religious and cultural importance may be determined eligible for the National Register); *see also* National Register guidance (Bulletin 38)

⁴ 36 C.F.R. Part 800; *see* 36 C.F.R. § 800.2(c)(2)(ii)(C) (stating "Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes...[.]").

⁵ 36 C.F.R. § 800.16(f) (definition of "consultation").

⁶ 54 U.S.C. § 307103 (withholding sensitive information about historic properties); *see also* 36 C.F.R. § 800.11(c).

⁷ *See generally* 54 U.S.C. § 306108 (requiring federal agencies to "take into account the effect on any historic property"); *see also* 36 C.F.R. §§ 800.5 – 800.6.

⁸ *See* National Register guidance (Bulletin 38) (available at: <https://www.nps.gov/subjects/nationalregister/upload/NRB38-Completenessweb.pdf>).

⁹ ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (2021) (available at: <https://www.achp.gov/sites/default/files/2021-06/ConsultationwithIndianTribesHandbook6-11-21Final.pdf>).

procedural risk and cost. When tribes are engaged after decisions are effectively made, duplication of studies to account for tribal input as required, litigation, and project redesigns often follow. NHPA is not a “stop-work” statute. Section 106 does not dictate project outcomes; it ensures informed decision-making. The agency retains discretion to proceed after completing consultation and considering avoidance or mitigation, but that discretion must be exercised in light of a developed administrative record demonstrating that tribal input was meaningfully considered.

Acoma’s Experience and the “Acoma Model”.

Acoma has participated in myriads of federal undertakings under Section 106 and through this experience has developed a structured, legally defensible model for tribal consultation. Where employed, the “Acoma Model” has led to outcomes that met the requirements of the NHPA and satisfied the concerns of the Pueblo and project proponents. Two case studies warrant discussion and consideration by the Committee:

Case Study 1: Mount Taylor Traditional Cultural Property.¹⁰

When several uranium plans of operation were proposed on Mount Taylor, the Cibola National Forest (“CNF”) proactively initiated a determination of eligibility for the Mount Taylor cultural landscape and formally invited extensive tribal participation, including a multi-tribal ethnographic study describing the mountain’s significance to the Pueblos of Acoma, Laguna, Zuni, the Hopi Tribe, and the Navajo Nation. CNF concluded that the Mount Taylor cultural landscape is eligible for the National Register as a traditional cultural property, primarily under Criteria A and B; with contributing resources that may also meet Criterion D.¹¹ Eligibility ensures consideration under Section 106 but does not, by itself, bar development. The eligibility determination neither pre-decided outcomes for future projects in and around Mount Taylor, nor did it substitute for project-specific identification of historic properties, but it put all applicants on notice that early, government-to-government consultation with tribes would be necessary and productive. This approach improved scoping in future projects such as currently proposed uranium mining projects on or near the Mount Taylor TCP, clarified party expectations, and helped steer proponents toward collaborative survey and design methods that avoid or minimize effects.

Case Study 2: Kinder Morgan Lobos CO2 Pipeline – “the Acoma Model”.¹²

Using the lessons learned from the Mt. Taylor Traditional Cultural Property, Acoma utilized a similar process during a proposed 214-mile CO2 pipeline that would have connected Arizona’s St. Johns Field to Kinder Morgan’s Cortez line in New Mexico. Fourteen miles of the pipeline would have crossed Acoma trust lands. From the outset, BLM and Kinder Morgan approached Acoma, and the Pueblo insisted that the proponent reimburse the Pueblo’s actual costs of participation, including ethnographic fieldwork, in relation to the project on Acoma lands. The project proponent and Acoma executed a monthly cost-

¹⁰ See Mt. Taylor Traditional Cultural Property Determination of Eligibility. (Feb. 4, 2008) (available at: <https://www.nrc.gov/docs/ML0904/ML090440287.pdf>).

¹¹ These criteria provide in part: “The quality of significance in American history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures, and [objects](#) that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or

...

- (d) that have yielded, or may be likely to yield, information important in prehistory or history.” 36 C.F.R. § 60.4.

¹² See Ann Berkley Rodgers, Aaron M. Sims & Gregory A. Smith, Defending the National Historic Preservation Act: Part 2, Law360 (Nov. 1, 2017),) (available at: <https://www.law360.com/articles/979317>).

reimbursement agreement. Acoma then fielded ethnographic assessment teams, comprised of knowledgeable Acoma cultural experts, to work alongside the proponent’s archaeologists and engineers to run a simultaneous Class III inventory – an intensive pedestrian field survey meant to locate and record all historic properties, TCP survey, and routing study. While BLM lands, outside of the Pueblo’s trust lands, were surveyed within a 300-foot corridor, Acoma directed a wider half-mile study area on Pueblo trust lands to enable real routing flexibility. Within that study area, the parties ultimately delineated a 100-foot construction corridor approved by both Acoma and Kinder Morgan.

Given Acoma’s longstanding confidentiality protocols, all non-federal personnel signed project-specific confidentiality agreements. Within the fourteen-mile Acoma transect, joint field teams identified more than 150 cultural/archaeological properties on Acoma lands, far more than along the rest of the alignment, including 90 TCPs that standard archaeological methods would likely have missed without tribal expertise. Despite the density of sensitive places, the team designated an area of potential effects across Acoma lands ***that avoided all identified properties***. Because consultation was initiated early and in good faith, allowing issues to be solved in the field with the right people at the right time, the on-the-ground routing and cultural resource work concluded in roughly six weeks (including about three weeks in the field for cultural property identification and avoidance). This collaborative approach avoided protracted Section 106 agreement negotiation, Phase II testing (which is done to identify eligible properties), and costly mitigation/data recovery. With BLM participation, there were no certification issues.

Beyond schedule and cost benefits, the “Acoma Model” produced a durable cultural-resource record while honoring Acoma sovereignty and knowledge systems. It also yielded a profound cultural benefit: fieldwork on recently reacquired trust lands corroborated Acoma oral histories about ancestral movements, strengthening intergenerational cultural continuity.

Even though external market factors ultimately halted the project, the “Acoma Model” stands as proof that early, well-funded, government-to-government consultation (which includes pairing tribal experts with agency and proponent teams), and good-faith involvement with project proponents, can identify avoidance routes, narrow the Areas of Potential Effects (“APE”) to exclude sensitive places, accelerate review, and reduce litigation risk. In short, meaningful early consultation enables better, faster, and more defensible outcomes that are better for every party to the permitting process.

Under-resourcing of Tribal Historic Preservation Offices is a root cause of delay.

During any given month, Acoma’s THPO manages dozens of simultaneous Section 106 requests across four states (New Mexico, Colorado, Arizona, and Utah) from various federal agencies. Acoma, like many THPOs, receives modest, formula-based awards from the Historic Preservation Fund which must cover staffing, training, travel for field visits, records management, and participation in complex NHPA processes. In FY 2024, an estimated \$23 million was appropriated to fund an average near \$100,000 per THPO, while the number of recognized THPOs continues to grow and consultation requests increase.¹³ Unpredictable annual funding and late apportionments make it difficult for THPOs to maintain staff, manage caseloads, and engage consistently in reviews.

¹³ See National Association of Tribal Historic Preservation Officers, “Statement of the National Association of Tribal Historic Preservation Officers Valerie J. Grussing, PhD, Executive Director Fiscal Year 2025 Interior, Environment, and Related Agencies Appropriations Committee on Appropriations, United States House of Representatives May 8, 2024”.

Predictably, thin funding and staffing forces triage: site visits are delayed, document reviews stack up, and agencies interpret slower response times as “delay.” In fact, better resourcing is the fastest way to reduce delay. Direct and increased, multi-year THPO funding that supports professional staff, travel for early site reconnaissance, and development of consultation protocols will yield faster, higher-quality responses and more durable, litigation-resilient decisions.

Since Senator Heinrich pointed out these funding issues in 2023, the number of THPO has increased, but THPO funding has not. Last Congress, Sen. Heinrich introduced the [Historic Preservation Enhancement Act \(S. 5645\)](#) which would require that THPOs receive a minimum of 20 percent of the Historic Preservation Fund (HPF) funding each year. Currently, THPOs receive about 11 or 12 percent of the HPF funding each year. Congresswoman Leger Fernandez introduced a companion bill H.R. 10553. Acoma would support reintroduction and passage of the legislation.

Recommendations.

1. Reaffirm and strengthen Section 106 implementation.

Congress should reaffirm the core Section 106 tribal consultation framework, require agencies to initiate early consultation at planning inception, encourage use of consultation protocols with tribes as authorized in the regulations, and encourage utilization of existing tools like Programmatic Agreements and Program Comments to increase efficiency and consistency.

2. Invest directly in THPO capacity.

Congress should expand the THPO set-aside in the Historic Preservation Fund, authorize multi-year awards, and direct agencies to budget project-specific support for tribal participation (e.g., applicant-funded, agency-administered support for tribal fieldwork) while preserving tribal independence in consultation. This includes supporting reintroduction and passage of the [Historic Preservation Enhancement Act \(S. 5645\)](#).

3. Safeguard sensitive information.

Congress should reaffirm and, where necessary, clarify agencies’ duty to withhold from public disclosure certain location and character information for sacred places to prevent looting or harm while still allowing informed decision-making.

4. Encourage alignment of Section 106 with other decision statutes.

Congress should promote integration of Section 106 with National Environmental Policy Act and relevant project-specific statutes so that real avoidance and minimization alternatives are genuinely considered, not foreclosed by late timing or inflexible authorizing laws.

5. Enhance agency accountability and early consultation.

Congress should recommend increased authority for Offices of Tribal Relations across agencies to ensure archaeologists and other compliance staff meet standards and do not delay project reviews because of internal training or compliance gaps. Hold agencies accountable for early and meaningful consultation and for meeting their statutory and trust responsibilities.

Conclusion.

The Pueblo of Acoma respectfully urges Congress to reaffirm and strengthen the implementation of Section 106 and to invest in the THPO capacity that makes consultation meaningful. When consultation begins early and is adequately resourced, it consistently produces better fieldwork, more thoughtful design, fewer conflicts, and decisions that honor tribal sovereignty and the federal trust responsibility while advancing responsible development. Doing so is crucial for federal agencies to simultaneously meet their legal obligations and protect the places that sustain living cultures.