Modernizing Preservation: Fixing the National Historic Preservation Act for Linear Infrastructure

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Executive Summary

Congress designed the National Historic Preservation Act (NHPA) in an era of breakneck federal infrastructure development. But now America struggles to build. The NHPA Section 106 consultation framework functions well for routine undertakings. But it scales poorly for large, multi-state transmission lines, pipelines, and other linear infrastructure. This paper argues that the most persistent challenges in Section 106 review arise from three structural features of the current system.

First, **sequencing and path dependency** often cause meaningful tribal consultation to occur after major project decisions have hardened. This reduces opportunities to avoid conflicts. Second, **fragmented information and administrative coordination** distribute responsibility across agencies, tribes, preservation officers, applicants, and courts. Each operates under different authorities, timelines, and informational constraints. Third, **Section 106 does not scale well to support linear infrastructure.** Coordination burdens grow dramatically as projects cross multiple jurisdictions, sovereigns, and hundreds of miles. Together, these structural dynamics generate uncertainty, increase litigation risk, strain institutional capacity, and complicate infrastructure deployment. They also often leave tribes in a reactive position late in project planning.

Modernizing Section 106 can address these structural mismatches through a framework of earlier engagement and clearer closure. This paper recommends introducing a screening-level phase of engagement earlier in project planning. This would entail early consultation triggers, predictive geospatial screening, broad tribal areas-of-interest mapping, and collaborative routing models that help identify potential conflicts before routing decisions become fixed. Site-specific identification and consultation can still happen in later stages after a project footprint is defined.

The paper recommends reforms that would:

- **Create an earlier, screening-level engagement process for major linear infrastructure.** For such projects, Congress should require corridor-level cultural-resource screening at the Notice of Intent or pre-application stage. This screening should identify affected tribes, broad areas of cultural concern, and potential routing conflicts before agencies select a preferred route. This should not entail full archaeological surveys or full Section 106 review across every hypothetical corridor.

- **Pair earlier engagement with clearer closure.** Congress should create statutory safe harbors for agencies that follow prescribed notice, screening, documentation, confidentiality, and follow-up procedures. Agencies that satisfy those requirements should receive a rebuttable presumption that they met the "reasonable and good faith effort" standard. Congress should also reduce the time litigants have to bring NHPA claims, make the Record of Decision the final agency action, and limit late-stage injunctions.
- **Apply the same screening logic to the Army Corps' Appendix C problem.** For major linear projects with limited federal touchpoints, agencies should conduct early route-level cultural-resource screening rather than either preserving fragmented crossing-by-crossing review or requiring full corridor-wide Section 106 review. High-risk segments identified through screening should receive focused consultation and identification.
- **Strengthen confidentiality and information-sharing systems.** Congress and agencies should protect tribal cultural information through stronger FOIA protections, standardized confidentiality protocols, secure-access administrative records, and limited-access review mechanisms for necessary consulting parties. Agencies should be able to document tribal consultation without publicly disclosing sacred-site information.
- **Build capacity and improve consultation infrastructure.** Congress should provide durable funding for State and Tribal Historic Preservation Officers, compensate tribes when they provide expert identification and evaluation services, and support collaborative field-based models such as the Acoma Model. Agencies should also standardize documentation and metadata requirements and develop centralized, searchable records systems, subject to appropriate confidentiality protections.
- **Resolve agency implementation barriers.** Congress should mandate lead-agency designation and coordination for multi-jurisdictional linear projects, expand programmatic agreements and program alternatives for repeat infrastructure categories, and create a clear Federal Energy Regulatory Commission exception to *ex parte* limits for government-to-government tribal consultation.

Together, these reforms would preserve meaningful consultation and historic preservation while durably aligning the Section 106 process with the infrastructure needs of the twenty-first century.

Contents

This research draws on interviews conducted between January and May 2026. Interviews were conducted on a not-for-attribution basis.

I. Introduction

In 1966, Congress passed the National Historic Preservation Act (NHPA), and President Lyndon Johnson signed it into law.[1] NHPA was a response to widespread destruction of historic places from post-war urban renewal and interstate highway construction.[2] Today, the United States confronts a different set of challenges—a set of energy transitions and difficulty deploying large projects through complex permitting systems. As the nation seeks to modernize and expand infrastructure, the procedural friction within NHPA project reviews can slow projects.

If the NHPA worked in isolation, it might not need reform. In most contexts, consultations under NHPA's Section 106 are efficient and uncontroversial. In practice, however, NHPA operates alongside an array of federal and state permitting requirements. When Section 106 obligations compound with the National Environmental Policy Act (NEPA) and other regulatory hurdles, cumulative coordination burdens become evident. These pressures appear heaviest in long, linear infrastructure projects—e.g., electric transmission lines and pipelines—that cross multiple state and federal jurisdictions.[3] Policy analysts also worry about proposals that never advance to the review stage, because projected permitting costs and risks render them infeasible at the outset—the so-called "invisible graveyard" of infrastructure projects.[4] As a result, there is no reliable way to account for cumulative permitting costs.

What makes the NHPA uniquely challenging to reform—politically and substantively—is its significance to Native American tribes. NHPA primarily protects non-tribal historic places. But the most complex permitting challenges revolve around the evaluation of impacts on places of religious and cultural significance to tribes. Of particular note, a pattern of structural failure between NEPA and NHPA frequently leaves sovereign tribal nations in a reactive posture late in the planning process when options are or appear limited. This makes it harder to resolve conflicts and converts routine government-to-government consultations into a locus of friction and delay. Given the significance and prominence of these concerns, this analysis focuses on the tribal consultation framework.

Following the 1992 NHPA amendments, federal agencies must consult with tribes regarding properties of traditional religious and cultural importance, regardless of whether those properties are located on tribal lands.[5] Attempting to reform the NHPA requires navigating the federal government's trust responsibilities, tribal sovereignty, and the protection of sacred cultural heritage.

NHPA's defenders often object to characterizing the statute as a burden. They argue that its procedural requirements rarely stop projects.[6] And NHPA reform can sound like a threat to Native American interests. Correspondingly, much of the NHPA literature focuses on improving protection for tribal historic and cultural resources.

Analysts have devoted comparatively less attention to how Section 106 functions within infrastructure permitting for large projects. To help fill this gap, this analysis examines the procedural and institutional challenges that arise in geographically expansive infrastructure projects, where recurring Section 106 tensions are often most acute. Multi-jurisdictional projects can place sustained strain on the Section 106 process, particularly when consultation involves culturally sensitive resources. These tensions stem from structural mismatches between a procedural consultation framework and the operational realities of modern infrastructure deployment. Combined with NEPA and other permitting requirements, these pressures can generate uncertainty, coordination challenges, and late-stage disputes.

Along with the Breakthrough Institute's map of Section 106 regulations, this analysis offers a chance to evaluate whether Section 106 implementation can be meaningfully improved upon.

II. Linear Infrastructure Projects and National Historic Preservation Act Section 106

NHPA requires a federal agency to consider possible effects on historic properties before approving a project or spending money on it. In the language of NHPA, the project is known as an "undertaking."[7]

"Historic properties" include any property eligible for listing on the National Register of Historic Places.[8] Agencies with undertakings must look for unlisted but eligible properties, including those not yet identified. These requirements arise under NHPA's most well-known provision, Section 106.

Unlike a conventional historic building, Native American cultural properties can implicate intergovernmental and political sensitivities. Tribes protect information regarding these sacred sites or ancestral landscapes to prevent looting or desecration. As a result, the resources are often unknown to developers when project planning begins. And unlike standard historic resources, evaluating tribal impacts requires a government-to-government consultation process that recognizes their status as sovereign nations, distinct from the general public.[9] Confidential tribal resources and sovereign consultation requirements often become the focal point for complex and contentious delays in linear infrastructure development.

The Advisory Council on Historic Preservation (ACHP) is the federal agency responsible for creating Section 106 implementing regulations. Those regulations (36 C.F.R. 800) translate Section 106's consultation mandate into a structured review process involving up to seven types of institutional actors—and potentially many more individual actors—working in coordination.[10] The federal agency responsible for Section 106 implementation must identify historic properties, assess effects, consult with the State or Tribal Historic Preservation Officer (SHPO and THPO, respectively), notify the public, and afford the ACHP an opportunity to comment. All of this must generally take place before an agency approves funds or issues a permit.

The Section 106 process contains mechanisms that produce foreseeable coordination failures on complex projects. This matters for project deployment and meeting modern energy and infrastructure needs. Each process failure introduces uncertainties that raise developer risk and project costs. For the biggest projects that contribute the most to broad-based social welfare—often, long linear projects crossing multiple state boundaries—we need to assess whether NHPA has struck a proper balance of interests.

III. Structural Sources of Friction in Section 106 Review

For large linear infrastructure projects, recurring difficulties in Section 106 review emerge from structural tensions between the architecture of the Section 106 process and the operational realities of modern infrastructure deployment. As project complexity increases, so too does the number of potential failure points.

In linear infrastructure reviews, several recurring forms of institutional friction are discernible:

- **Sequencing and path dependency:** Section 106 consultation and cultural resource identification frequently occur after major project assumptions, routing decisions, and permitting investments have begun to solidify. As infrastructure planning advances, the practical flexibility available to agencies, tribes, and developers may narrow substantially. This sequencing dynamic makes it harder to incorporate tribal input and cultural resource concerns into route planning and alternatives analysis. In turn, it can complicate alternatives analysis, increase redesign costs, and contribute to disputes regarding the legitimacy and timing of consultation.
- **Fragmented information and administrative coordination:** Section 106 review distributes responsibilities across numerous institutions operating under different timelines, authorities, and informational constraints. Agencies, tribes, applicants, SHPOs, THPOs, consulting parties, and courts may all possess only partial visibility into the broader consultation landscape. Tribal cultural information may also be confidential, geographically diffuse, sensitive, or difficult to evaluate through conventional survey methodologies. These conditions can generate coordination difficulties, procedural inconsistency, and uncertainty regarding identification, consultation, documentation, and decision-making obligations.
- **Scale mismatch between historic preservation review and linear infrastructure development:** The scale of linear infrastructure projects creates complex coordination demands involving multiple agencies, jurisdictions, tribes, and consulting parties across long geographic corridors. As project scale increases, the review process may experience escalating coordination burdens, administrative strain, and prolonged uncertainty. Long corridor projects can therefore bog down with fragmented consultation, inconsistent timelines, and drift.

Together, these structural dynamics distribute uncertainty and risk across the Section 106 process in uneven and sometimes unpredictable ways. These pressures can accumulate even where participants act in good faith and comply with existing legal requirements. Agencies may face litigation exposure and administrative burdens tied to consultation adequacy and documentation. Developers and permit applicants may absorb redesign costs, permitting delays, and uncertainty regarding routing feasibility late in project development. Tribes may confront pressures to disclose culturally sensitive information within procedural timelines that do not align with tribal consultation practices or confidentiality expectations.

The sections that follow examine these recurring points of friction in greater detail.

IV. NEPA and NHPA: Misaligned Sequences

In general, linear infrastructure projects with a connection to the federal government require environmental review under NEPA. NEPA acts as the dominant procedural framework governing the federal infrastructure planning and permitting process. Even though NHPA is a separate legal authority, NHPA's Section 106 consultation process often occurs as part of the larger planning and review effort under NEPA.

Under NEPA, an agency preparing an Environmental Impact Statement must evaluate "alternatives to the proposed action" in detail.[11] These alternatives must be "technically and economically feasible" and meet the project's "purpose and need."[12] For linear infrastructure, these alternatives usually consist of theoretical routes the project could take. The Section 106 consultation process is often one of several regulatory requirements that a NEPA Record of Decision is meant to finalize.[13]

The interaction between NEPA and NHPA creates recurring coordination and sequencing difficulties in large infrastructure reviews. The two statutory frameworks are formally integrated in federal permitting practice. But they serve different purposes, rely on different information, and operate using different procedures. In practice, this can result in project assumptions solidifying before cultural resource identification and tribal consultation processes mature.

Indeed, the NEPA-NHPA interaction contains a vexing structural pattern: NHPA consultation tends to happen late in the NEPA process. Some observers maintain that federal agencies treat NEPA as the planning process while relegating NHPA to late-stage compliance. However, the pattern of late NHPA consultations is so regular across agencies, administrations, and decades that it points to structural weaknesses in the NEPA-NHPA interaction.

In theory, the NHPA and NEPA processes are designed to run concurrently. Early cultural resource identification would ideally inform the selection of NEPA alternatives.

However, applying meaningful Section 106 consultation across each hypothetical NEPA alternative for a large linear project is impractical. Although current ACHP regulations and guidance encourage agencies to initiate Section 106 early to inform the selection of NEPA alternatives, the guidance does not require agencies to identify and evaluate historic properties across each route.[14] This exposes a key tension. The regulatory guidance pushes for early, upstream NEPA-NHPA integration. But the practical realities of linear infrastructure make surveying multiple hypothetical corridors challenging.

First, conducting identification across multiple potential corridors would likely overwhelm SHPOs and THPOs.[15] These offices struggle with limited funding to keep pace with current project volumes.[16] Second, demanding upfront consultation on vast areas that may never be developed conflicts with tribes' legitimate reluctance to disclose the location of culturally significant and sacred sites due to well-founded fears of looting, desecration, or public exposure.[17] Federal agency requests for evidentiary support for tribal claims can strain tribal capacity and create tension. Tribes tend to view Indigenous Knowledge and tribal expertise as sufficient.

Furthermore, meaningful historic resource identification—the kind that identifies specific resources, not predictive models—requires a defined footprint. That cannot exist until planners fix the route. Before approving an undertaking, the agency must define the Area of Potential Effects (APE), identify historic properties within it, and assess effects on them. Each step depends on a fixed project footprint. For a thousand-mile transmission line or pipeline, a route is not fixed at the outset. Indeed, the point of the NEPA process is that it is deliberative. NEPA forces agencies to think before choosing a route. This often yields changes to avoid or mitigate harms. But it can make specific resource identification harder at early stages.

NEPA's sequencing rule, as enforced by courts, discourages agencies from making commitments that appear to prejudge the outcome of environmental review before NEPA is complete.[18] This also discourages agencies from conducting corridor-wide, site-specific consultation across multiple hypothetical routes. Agencies may worry that a plaintiff or court could characterize intensive route-specific consultation, mitigation planning, or accommodation efforts along particular corridors as prematurely narrowing alternatives or prejudging the NEPA process. As a result, agencies may defer detailed consultation and cultural resource identification until a preferred alternative has begun to emerge. But that sequencing can reduce flexibility for tribes, agencies, and applicants.

The Section 106 regulations attempt to bridge this gap by allowing "phased identification" for large corridors. With phased identification, agencies are only required to "establish the likely presence of historic properties... through background research, consultation and an appropriate level of field investigation."[19] Agencies may defer final evaluation. However, establishing "likely presence" does not resolve the problem of identifying and protecting specific sites before route commitments harden. By deferring site-specific identification and consultation until the route is essentially locked in, "phased identification" structurally works against the early engagement needed to avoid impacts.

ACHP has pushed agencies to run Section 106 consultation parallel to NEPA's natural resource analysis. In practice, that effort has not succeeded.[20] The ACHP has no power to enforce its regulations over agencies that don't adhere to procedural requirements. Without a mechanism to force early compliance, agencies frequently postpone intensive Section 106 identification and consultation efforts, in part to minimize ongoing administrative burdens. Furthermore, because NHPA does not require an agency to select the option that best avoids adverse effects, early consultation cannot compel a different project outcome. This weakens agencies' incentive to invest in early consultation, even when it might benefit all parties.

The persistence of late consultation suggests a structural mismatch between NEPA's planning structure and NHPA's identification requirements. Of course, our hypothesis that this is primarily a legal-structural problem might be wrong. The root cause may indeed be entrenched agency culture. Observers note that the Section 106 process has meaningfully improved in certain agencies over the years, particularly within the Bureau of Land Management (BLM). But if BLM's progress supports the theory that the NEPA-NHPA breakdown is a cultural problem rather than a structural inevitability, it also highlights how difficult cultural change is to achieve. Relying on gradual, agency-by-agency cultural shifts is difficult to replicate across the federal government.

Regardless of whether the NEPA-NHPA misalignment is driven by regulatory structure or bureaucratic culture, a statutory forcing function is the surest solution to the process breakdown. Such a statutory change can help overcome both barriers.

V. Foreseeable Process Failures

A. Outreach Non-Response as a Structural Bottleneck

Key provisions in the Section 106 regulations can generate delay due to predictable patterns in agency decision-making when managing uncertainty. The regulations establish timelines under which agencies may proceed following non-response from consulting parties. But agencies are often reluctant to exercise that authority in practice. Political sensitivities, litigation risk, and a desire to respect the federal trust responsibility to tribal sovereignty make agencies reluctant to advance projects without tribal participation.

Under the regulations, if an agency initiates consultation by requesting a "review of a finding or determination," and the SHPO or THPO fails to respond within 30 days, the agency is legally authorized to proceed to the next step in the process.[21] Similarly, an agency may proceed with its undertaking if it receives no response 30 days after reaching out to a consulting THPO or SHPO to share a documented finding that a project will not affect historic properties or have no adverse effect.[22]

Yet agencies and applicants often struggle to know if they have satisfied the "reasonable and good faith effort" standard for outreach when consulting parties don't respond.[23] The telecommunications sector illustrates this vulnerability. In 2005, the Federal Communications Commission (FCC) was forced to issue a declaratory ruling to clarify how the agency could move forward with siting cell phone towers after facing a large administrative backlog. The FCC noted that it had more than 1,500 pending tower sites referred to the Commission, because tribes or Native Hawaiian Organizations had not responded to applicant inquiries.[24] The FCC addressed this issue within the telecommunications context by instituting a definitive timeline for non-response: if a tribe fails to respond to an applicant's initial inquiries and subsequently does not answer the FCC within a final 20-day window, the tribe is deemed to have no interest, and the applicant's pre-construction Section 106 obligations regarding that tribe are legally discharged. This timeline provides a predictable off-ramp for telecommunications developers. But it does not resolve this vulnerability across the rest of the federal government.

B. Coordination Failures Across Sovereigns and Jurisdictions

Section 106 review scales unevenly as infrastructure projects expand geographically. Linear projects can involve dozens of consulting parties, multiple SHPOs and THPOs, overlapping federal jurisdictions, and consultation obligations spanning hundreds of miles. With increased scale, the consultation framework experiences escalating coordination strain.

This strain shows up in attempts to coordinate among historic preservation authorities. The regulations allow SHPOs to designate a lead SHPO to act on their behalf. But the choice to make such a designation is discretionary.[25] And designated lead SHPOs cannot make binding decisions on behalf of other SHPOs or THPOs without the latter's agreement. Consequently, federal agencies and project proponents must often navigate the fragmented and conflicting requirements of multiple jurisdictions and sovereigns.[26]

Even this voluntary consolidation cannot extend to THPOs and tribal consultation. Each tribe is a sovereign nation. Federal agencies must consult individually with every affected tribe on a government-to-government basis. A linear project may therefore require dozens of concurrent bilateral consultations.

This fragmentation can place substantial administrative strain on large interstate infrastructure reviews. The TransWest Express transmission project illustrates this structural trap.[27] Spanning four states—Wyoming, Colorado, Utah, and Nevada—the project required a large, corridor-wide Section 106 review. To streamline compliance, the involved federal agencies designated BLM's Wyoming State Office as the lead federal agency, per the regulations.[28]

However, the regulatory framework provided no equivalent mechanism to force the consolidation of the state-level reviews. Because lead SHPO designation is voluntary, the BLM had to negotiate a complex Programmatic Agreement with the four individual SHPOs. Rather than navigating a unified historic preservation standard for the 725-mile corridor, the lead federal agency and the project developer had to satisfy the distinct procedural, consultative, and mitigation demands of four state offices. The regulations offer no mechanism to unify the states' approaches. This created the conditions for a fragmented and administratively heavy compliance process.

For legal reasons, neither the statute nor regulations can force the designation of a lead SHPO or require that a lead SHPO have decision-making authority that binds other states. Making such a designation mandatory would likely run afoul of the Tenth Amendment's anti-commandeering principles. As the Supreme Court established in *Printz v. United States* and *New York v. United States*, the federal government cannot compel state officials to administer federal regulatory programs.[29]

C. Conflicts Between Section 106 and Agency Statutory Authorities

Section 106 and its implementing regulations set uniform consultation requirements for every federal agency.[30] Agencies may use their own procedures to substitute for the standard process.[31] Beforehand, the ACHP must review those procedures and find them "consistent" with ACHP's baseline regulations. This consistency requirement makes alternative procedures challenging for agencies whose statutory authority is poorly matched to the standard process.

a. The U.S. Army Corps of Engineers' "Small Federal Handle" Problem

The longstanding dispute over the U.S. Army Corps of Engineers' (the Corps) "Appendix C" regulations illustrates how fragmented jurisdictional frameworks can generate recurring uncertainty within Section 106 implementation for linear infrastructure projects. Differences between Corps procedures and ACHP regulations have generated persistent disagreement regarding consultation obligations, identification standards, and the scope of agency review responsibilities. These institutional inconsistencies can complicate already complex infrastructure permitting processes.

The Corps frames this limitation as a jurisdictional necessity. Because the agency's authority over discrete water crossings is narrower than the broad Area of Potential Effects required by standard Section 106 review, its internal procedures (Appendix C) strictly confine analysis to the immediate "permit area."[32] Historically, the agency argued that "time and jurisdictional constraints" dictate these boundaries.[33] In the Corps' historical view, adopting the ACHP's expansive regulations would compel the Corps to evaluate cultural impacts associated with parts of the project outside the agency's regulatory reach.[34]

The Corps' approach primarily implicates oil pipeline projects. The Federal Energy Regulatory Commission regulates interstate natural gas pipelines, which produces a corridor-wide nexus and corresponding NHPA obligation. But oil (and hazardous liquid) pipelines have no analogous federal permit covering the whole project.

As a result, for long oil pipelines, the vast majority of the corridor can fall outside federal permitting. In turn, most oil pipeline impacts on historic resources do not enter a Section 106 process.

The ACHP declared that Appendix C was "inconsistent" with Section 106 regulations.[35] Per the ACHP, Corps procedures impermissibly changed the required scope of analysis and curtailed consultation rights. The ACHP declined to approve Appendix C as a counterpart to Section 106 regulations. Tribal representatives viewed Appendix C as an unlawful evasion of Section 106 responsibilities.[36]

For developers of linear infrastructure, Appendix C often results in disputed findings, adversarial consultation dynamics, and litigation. Indeed, this mismatch in procedural practice creates a recurring legal argument for project opponents: the Corps should have reviewed the pipeline as a single continuous project, rather than chopping it into a string of small water crossings.[37]

This "small federal handle" became the core legal question in the development of the Dakota Access Pipeline (DAPL).[38] DAPL is a 1,168-mile crude oil pipeline from the Bakken fields in North Dakota to Patoka, Illinois, completed in 2017. The project crossed four states and hundreds of water bodies. Federal authority covered only about 37 miles of the route.[39] The Corps issued about 200 separate verifications along the corridor and treated each as a discrete federal action with its own narrow Area of Potential Effects.[40] Of particular note, the Corps issued a cluster of authorizations at the Lake Oahe crossing, half a mile upstream of the Standing Rock Sioux Tribe's reservation. The Lake Oahe crossing became the focus of mass protests.[41]

The Standing Rock Sioux and Cheyenne River Sioux Tribes argued that the Corps should evaluate DAPL as a single continuous federal undertaking for Section 106 purposes. They further maintained that the Corps' practice of conducting historical preservation review only at water crossings artificially segmented the pipeline and excluded vast stretches of territory, including any sites of cultural or spiritual significance located between crossings. But the corridor-wide effects fell outside any Section 106 frame the Corps was prepared to apply.[42] By the time courts heard many of the tribes' NHPA claims, substantial portions of construction were complete.[43] That sequencing failure limited the practical ability of the consultation process to influence routing decisions.

b. FERC's *Ex Parte* Rules

The FERC context illustrates how fragmented procedural frameworks and agency-specific institutional constraints can complicate Section 106 consultation. Because FERC adjudicates licensing decisions like a court, it operates under strict rules that generally prohibit private, off-the-record communications with decisionmakers during contested proceedings.[44] These are FERC's *ex parte* rules. They permit certain communications in limited circumstances, including some involving tribal agencies.[45] But FERC staff often limit post-application interactions to avoid exposure to the merits of a contested case or creating the appearance of improper influence.

FERC's own Policy Statement warns that its independent, quasi-judicial status limits its ability to engage in government-to-government consultation during contested cases.[46] Further, FERC establishes its consultation procedures on a "case-by-case" basis. With this *ad hoc* approach, tribes can't predict when or whether meaningful consultation is possible. Instead, FERC's stated practice is to formally address tribal input within its written environmental and decisional documents.

This accumulation of coordination challenges can undermine the collaborative dialogue Section 106 regulations contemplate.

D. Institutional and State Capacity Constraints

The Section 106 framework depends on the administrative capacity of SHPOs, THPOs, tribes, and federal agencies. Large linear infrastructure projects can generate consultation volumes that strain institutional staffing, technical expertise, and review timelines across multiple jurisdictions simultaneously. These capacity pressures may contribute to delays, inconsistent consultation practices, and uneven review outcomes.

Funding is a perennial challenge for NHPA consulting parties. The federal Historic Preservation Fund (HPF) is a primary source of funding for SHPOs and THPOs. The HPF is a fixed annual pool that allocates funding by formula.[47] As tribes add THPOs, the formula divides the same pool into more shares, reducing the resources available to each office to conduct consultations. Tribes argue that resources are insufficient.[48] Congress has funded the HPF with stop-gap measures since 2023, when its long-term authorization lapsed.

SHPO and THPO staff are specialized and rare. SHPOs typically hold professional degrees in archaeology, history, or related fields.[49] SHPOs sit within a state government and must navigate complex federal procedural systems. Similarly, a THPO must be fluent in both specific tribal interests and federal processes. Not every tribe has that kind of expertise. Federal funding to support that capacity can itself be a source of tension. Some tribes may also be cautious about relying on federal funding for consultation capacity because of concerns about preserving institutional independence and maintaining control over culturally sensitive processes.

Federal agency staff often face similar institutional pressures. Agencies assign NHPA responsibilities to small teams that manage large permitting portfolios under competing statutory deadlines. Agencies contend with staff turnover and uneven familiarity with tribal consultation practices. These chronic challenges complicate efforts to sustain consistent consultation relationships across long project timelines. In projects spanning years and jurisdictions, cumulative capacity constraints can produce procedural drift, delayed coordination, and inconsistent consultation.

Capacity limitations also make early consultation difficult to operationalize in practice, particularly where agencies, SHPOs, and THPOs would need to evaluate multiple potential corridors simultaneously.

VI. Administrative-Law Vulnerabilities Created by Procedural Ambiguity

A. Deferred Identification and Late-Stage Litigation Risk

The regulations allow agencies to defer final identification of historic properties until after the agency decides to permit or pursue the project. This is a practical accommodation to relieve the sequencing pressures associated with large linear infrastructure. In practice, however, deferred identification can allow major routing and permitting decisions to solidify before consultation and cultural resource evaluation are complete. As a result, agencies may lose opportunities to prioritize the avoidance of adverse effects—as opposed to minimization or mitigation—during earlier planning stages. Agencies instead rely on post-decision Programmatic Agreements (PAs) and mitigation measures to resolve newly identified concerns.

From a developer's perspective, mitigating an adverse effect means the project can move forward. From a tribal perspective, however, mitigation frequently equates to the loss of sacred sites and cultural heritage.

These deferred mitigation promises become binding obligations under the Administrative Procedure Act (APA). Correspondingly, under phased compliance, these obligations create litigation exposure during later stages of project development and construction.

The SunZia transmission project illustrates this dynamic. In 2015, BLM approved SunZia's route through Arizona's San Pedro Valley using a phased Section 106 approach that deferred portions of cultural resource identification and treatment planning until after the Record of Decision (ROD).[50] Consultation regarding the Arizona Historic Properties Treatment Plan continued years later as the agency prepared to authorize construction. By the time tribes formally asserted a valley-wide Traditional Cultural Property (TCP, also known as Traditional Cultural Places or Traditional Cultural Landscapes) and requested rerouting, BLM's position was that the route was final.[51]

The Tohono O'odham Nation challenged BLM's 2023 Limited Notices to Proceed (LNTPs) to construction, arguing that the agency had not satisfied its Section 106 obligations. In 2025, the Ninth Circuit held that the LNTPs constituted final agency actions because they represented BLM's final determination that the PA requirements had been satisfied.[52] The ruling allowed the challenge to proceed despite the issuance of a ROD nine years earlier and the APA's six-year statute of limitations.[53]

The SunZia litigation demonstrates how phased compliance can shift unresolved Section 106 disputes until the later stages of linear infrastructure deployment. The Ninth Circuit's approach may also expand the viability of similar APA challenges involving deferred identification and phased mitigation commitments. In turn, these forms of late-stage litigation exposure can affect project financing, construction timelines, and long-term infrastructure planning.

B. Binding Mitigation Commitments and MOA/PA Enforcement

The ACHP's implementing regulations convert many Section 106 mitigation commitments into enforceable obligations that can create litigation exposure for agencies and infrastructure projects. Under the regulations, an executed Memorandum of Agreement

(MOA) or Programmatic Agreement (PA) becomes legally binding. This lets plaintiffs challenge whether an agency adequately carried out mitigation measures.[54] In practice, this can transform consultation commitments into recurring points of procedural vulnerability under the APA.

This litigation exposure stems in part from a regulatory choice. The NHPA requires only that agencies "take into account" the effects of their undertakings and afford the ACHP an opportunity to comment.[55] Federal courts interpret Section 106 as a procedural "stop, look, and listen" statute that imposes no substantive requirement to engage in any particular preservation activities or dictate a specific outcome.[56] Yet the ACHP regulations require agencies to pursue ways "to avoid, minimize or mitigate" adverse effects. Although this approach codified practices agencies had already adopted, it formally embedded the role of mitigation in Section 106 implementation.[57]

This requirement converts the search for mitigation into an obligation that plaintiffs can challenge as inadequate even when the agency has otherwise fulfilled consultation.[58] MOAs and PAs for large linear projects routinely defer important details to later treatment plans or rely on broad mitigation stipulations. Monitoring requirements, data recovery obligations, and reporting commitments may remain iterative throughout project implementation. Each commitment can become a point of dispute regarding whether the agency satisfied its Section 106 obligations. Plaintiffs may argue a stipulation is too vague to verify, too deferred to evaluate, or not being carried out. In Breakthrough's internal review of NHPA litigation, compliance with an MOA is a recurring subject of federal court challenges.

C. Escalation Costs and Defensive Administration

The Section 106 framework can create institutional incentives that discourage agencies from exercising their formal procedural authority aggressively during consultation disputes. These dynamics reflect broader patterns of litigation exposure, procedural ambiguity, and uneven risk allocation within the Section 106 process. Although agencies retain legal authority to proceed in certain circumstances, the administrative and political costs associated with failed consultation can make agencies reluctant to terminate negotiations or override objecting parties.

When consultation breaks down, ACHP regulations permit the agency official, the SHPO, THPO, or the ACHP to terminate the consultation process.[59] If an agency official chooses to terminate consultation, the regulations require escalation to senior agency leadership and formal ACHP review. Section 110(l) of the NHPA further requires the agency head to personally consider the ACHP's comments and document the final decision regarding whether to proceed.[60] The agency head may not delegate this final responsibility. These procedures can generate a detailed administrative record that later becomes the focus of APA litigation.[61]

In practice, agencies may view formal termination as institutionally costly even where they believe consultation demands are unreasonable. Plaintiffs may challenge whether the agency properly considered ACHP comments, complied with procedural timelines, or unlawfully delegated decision-making responsibilities. In *Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transportation Board*, the Third Circuit ruled against an agency that terminated consultation.[62] The court found the agency failed to give the ACHP's comments "genuine attention and consideration."

From the point of view of agency personnel, escalation presents only unpalatable choices. They can continue negotiations and tolerate prolonged consultation impasses. Or they can create nondelegable work for the most senior agency executive. But doing so exposes the executive to political and litigation risks.

When SHPOs or other parties become nonresponsive, agency reluctance to proceed with the project can implicate politics and institutional culture. In a recent industry case study gathered for this research, the Colorado SHPO made a demand for a 500-mile archeological survey for Xcel Energy's Power Pathway transmission project. A 500-mile archeological survey could exceed what many participants regard as a "reasonable and good faith effort" to identify historic resources. Consultation stalled after the developer challenged the request. Under the regulations, if a SHPO fails to respond within 30 days, the agency has the explicit regulatory authority to proceed to the next step.[63] Yet, the Fish and Wildlife Service (FWS)—the bureau responsible for Section 106 implementation and compliance—did not invoke its authority to proceed nor escalate the impasse.

The stalemate broke at the end of the Biden Administration. FWS appointees overruled the SHPO and said the NHPA process could proceed without the 500-mile survey. That process took 18 months. The agency's choice not to exercise its authority to proceed likely reflected the institutional and political sensitivities associated with overriding a SHPO during an active consultation dispute. When politics intervenes in this way, the Section 106 framework offers no mechanism to force quicker resolution, potentially leaving projects subject to prolonged uncertainty.

D. Ambiguity in "Reasonable and Good Faith" Identification

Section 106 regulations require agencies to make a "reasonable and good faith effort" to identify historic properties within the Area of Potential Effects.[64] This requirement reflects one of the core structural tensions in Section 106 review for linear infrastructure projects. Agencies and developers often plan with incomplete and asymmetrical information. Tribal cultural knowledge may be sensitive, confidential, geographically diffuse, or difficult to evaluate through conventional surveys. Identification efforts can remain iterative deep into project development. This complicates routing certainty and long-term project planning.

Rather than providing a bright-line rule for "reasonable and good faith effort," the regulations and the ACHP's official guidance establish a flexible balancing test.[65] The test requires the agency to weigh factors like the magnitude of the undertaking, the degree of federal involvement, past planning, and the likely nature of historic properties in the area. Because this guidance relies on subjective balancing, good faith parties examining the same project can reach different conclusions about what effort is reasonable. The agency may conclude that a desktop review and targeted field survey satisfy the standard. A SHPO or tribe may insist that the same project requires a full pedestrian survey of the corridor or the identification of Traditional Cultural Properties with corresponding extended tribal consultation.[66]

Federal courts have highlighted the litigation risks of the "reasonable and good faith effort" standard. In *Pueblo of Sandia v. United States*, the Tenth Circuit ruled that the Forest Service failed to meet the "reasonable and good faith effort" standard during the identification phase of a canyon management project.[67] The agency had mailed letters to local tribes requesting detailed information about historic sites and spoke at tribal meetings. During communications between the agency and tribe, tribal members indicated that sacred sites existed but stated they were unwilling to disclose details due to religious and cultural prohibitions. Yet, the court ruled that the Forest Service acted unreasonably by accepting tribal silence rather than aggressively pursuing further consultation. Given this court history, agencies are less likely to firmly cap their efforts under the "reasonable and good faith effort" standard. It is difficult to know what a court will find sufficient.

Operational disputes over what constitutes a "reasonable and good faith effort" can also prolong consultation. For the Power Pathway transmission project, the Colorado

SHPO's request for a 500-mile archaeological survey likely exceeded what the regulations and ACHP guidance required. ACHP guidance notes that consulting parties like SHPOs do not dictate the scope of identification efforts and that the standard does not necessarily require "[g]round verification of the entire APE."[68] Yet the dispute remained unresolved for an extended period. This shows how the flexible nature of the standard can create uncertainty about how to satisfy identification obligations. To agency officials, this uncertainty looks like APA litigation risk and possible political consequences.

E. Ambiguity and Discretion in Adverse Effect Determinations

Determining whether an undertaking will have an adverse effect on historic properties is often a source of uncertainty. The regulatory criteria are broad and context-dependent.[69] This creates room for consequential disputes over whether to conduct further Section 106 consultation. A finding of no adverse effect generally closes consultation. A finding of adverse effect initiates negotiation over mitigation measures and potential Memoranda of Agreement (MOAs). Yet, the breadth of the criteria allows parties to advance competing interpretations of what constitutes an adverse effect.

The regulations establish formal procedures for resolving disputes over adverse-effect findings. But agencies may remain reluctant to exercise that authority in practice. Consulting parties are allowed to object to findings of no adverse effect. Nonresponsive parties create uncertainty over whether the agency has satisfied its consultation obligations. Although agencies have regulatory authority to proceed after specified review periods, litigation exposure and procedural uncertainty discourage agencies from closing consultation. Decisions like *Pueblo of Sandia v. United States* reinforce these concerns by demonstrating courts' willingness to scrutinize the adequacy of agency consultation and identification efforts even where agencies believed consultation had stalled.

For large linear infrastructure projects, agencies may also use Programmatic Agreements to phase adverse-effect determinations over time.[70] This approach provides flexibility for corridor-scale projects. But it can also allow unresolved disputes regarding historic property effects to persist into later stages of project implementation, including construction. The *SunZia* litigation illustrates how these phased structures may contribute to renewed APA litigation after permitting and investment decisions have occurred.

F. Documentation, Confidentiality, and APA Review

Documentation deficiencies in Section 106 review frequently contribute to litigation risk and procedural delay. The Section 106 regulations contain requirements for the agency to document its decision-making. The resulting administrative record acts as the institutional memory that allows later reviewers, consulting parties, and courts to understand what the agency knew, relied on, and decided.

Plaintiffs cannot sue directly under the NHPA, because it lacks a private right of action. Instead, litigants challenge Section 106 compliance under the APA.[71] Courts reviewing agency actions under the APA place heavy weight on administrative documentation and procedural defensibility. This creates a form of litigation-driven administrative pressure in which agencies must maintain consultation legitimacy, preserve confidentiality, and build a defensible record across complex infrastructure reviews.

To survive APA review, agencies must demonstrate that they examined the evidence and articulated a "rational connection between the facts found and the choice made."[72] Courts have emphasized that Section 106 documentation must be "sufficiently detailed" to permit meaningful judicial review.[73] An agency's discretion to make decisions under Section 106 does not include a right to act "perfunctorily or arbitrarily."[74]

ACHP regulations codify this standard.[75] An agency making any finding must support it with sufficient documentation to enable reviewing parties to understand its basis.[76] Yet, in practice, documentation gaps are common. Agencies do not always adequately document how Areas of Potential Effects evolve over the course of project review. "No Adverse Effect" findings may rely on conclusory reasoning that falls short of regulatory expectations. And when agencies produce a weak administrative record, plaintiffs can point to that inadequacy in court. For example, in *National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, a federal court invalidated a project permit.[77] The court said the agency's documentation failed to adequately explain why the criteria for adverse effects were inapplicable. This rendered the agency's effect determination unlawful.

This documentation failure is a recurring challenge with tribal consultation. Under the statute and regulations, agencies must withhold sensitive information about historic properties from public disclosure if releasing it risks harm to the property.[78] Harm includes looting or impeding traditional religious practices. Agencies wishing to build a defensible record therefore face a tension between the APA's demand for thoroughness and Section 304's demand for confidentiality.

The Tenth Circuit's decision in *Pueblo of Sandia v. United States* highlights this vulnerability. When tribes hesitate to share details about sacred sites, agencies can struggle to navigate the confidentiality requirements while still creating an administrative record sufficient to withstand APA review.[79]

Confidentiality obligations can complicate continuous documentation practices. Agencies may rely on non-disclosure agreements, consultation protocols, or oral histories to protect tribal resources.[80] Tribal input can remain siloed in private communications rather than become part of the administrative record. In turn, agencies may need to reconstruct portions of the record later in the process. The resulting documentation deficiencies can become a recurring source of legal and procedural vulnerability.

VII. Policy Recommendations–Earlier Engagement, Clearer Closure

The current system often fails all parties. Tribes are brought into consultation after routing assumptions have hardened. Agencies face unclear standards and litigation exposure. Developers confront late-stage uncertainty after major investments have already been made. A better framework would move Section 106 concerns earlier in the process while reducing the risk that consultation becomes an open-ended source of project-stopping litigation.

One goal of Section 106 reform should be to redesign the process so that consultation begins when it can still meaningfully shape project planning. Reform should also give agencies and developers clearer rules for when the process is complete. These goals point toward a coherent set of reforms that would improve outcomes for tribes, agencies, and project developers alike.

The central idea is earlier engagement paired with clearer closure. For major linear infrastructure projects, Congress should require early corridor-level screening at the NEPA Notice of Intent or pre-application stage. That screening should identify affected tribes, broad areas of cultural concern, and potential routing conflicts before agencies select a preferred route. But it should not require full archaeological surveys across every hypothetical corridor. Instead, agencies should use tiered screening, geospatial areas-of-interest tools, existing records, tribal input, and focused fieldwork only where objective triggers indicate heightened risk. This would give agencies and developers a better opportunity to incorporate tribal concerns into routing decisions without multiplying full Section 106 reviews across routes that may never be built.

This earlier engagement model would necessarily expand agencies' consultation obligations. If Congress requires agencies to engage tribes earlier in the planning process without changing litigation incentives, it risks creating additional procedural hooks for delay or litigation. Congress should therefore pair these earlier consultation obligations with statutory safe harbors and greater procedural certainty for agencies. Agencies that follow prescribed notice, screening, documentation, confidentiality, and follow-up procedures should receive a rebuttable presumption that they satisfied the "reasonable and good faith effort" standard. Congress should also make the Record of Decision or equivalent major approval the presumptive final agency action for NHPA claims, shorten limitations periods for phased-consultation challenges, and limit project-stopping injunctions once construction is underway. Courts should balance the scale of project disruption against the seriousness of the procedural error, especially where the agency acted in good faith and the alleged defect can be cured without halting construction.

The same principle should guide reform of the Army Corps' Appendix C problem. The answer should not be to preserve fragmented review that ignores corridor-wide cultural risks. But neither should Congress impose full corridor-wide archaeological survey obligations on every oil pipeline with a narrow federal permit. For major linear projects with a limited federal handle, agencies should conduct early route-level cultural-resource screening, not full route-level Section 106 review. If screening identifies high-risk segments, agencies should conduct focused consultation and identification in those areas. This approach would reduce the legal and legitimacy problems created by project segmentation without turning every narrow federal approval into an unlimited corridor-wide compliance exercise.

Congress should also improve the information architecture that makes earlier consultation possible. Reform should create stronger information-security protections for tribal cultural information. Reasonable measures include a specific FOIA exemption, standardized confidentiality protocols, secure-access administrative records, and limited-access review mechanisms for SHPOs, THPOs, agencies, and other necessary consulting parties. Agencies should be able to document the fact and influence of tribal consultation without exposing sacred-site information to public disclosure. Geospatial areas-of-interest systems should also allow tribes to identify broad regions of concern without disclosing precise site locations.

This model also requires stronger institutional capacity and agency-specific implementation reforms. Congress should provide durable funding for SHPOs and THPOs, compensate tribes when they provide expert identification and evaluation services, and support collaborative models such as the Acoma Model, where tribal experts work with agency and applicant teams to solve routing problems in the field. Agencies should maximize programmatic agreements for transmission and other repeat infrastructure categories. Documentation and metadata requirements should be standardized across agencies. Documents must be in a centralized, searchable database powered by a large language model, taking into consideration confidentiality considerations. Congress should mandate lead-agency designation and coordination for multi-jurisdictional projects. And there should be a clear FERC exception to *ex parte* limits for government-to-government tribal consultation.

Taken together, these reforms would enable earlier engagement, more meaningful consultation, and clearer closure while reducing the risk of late-stage project disruption.

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