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November 12, 2025

**Testimony of the United South and Eastern Tribes Sovereignty Protection Fund**
**For the Record of the Senate Committee on Energy and Natural Resources Hearing to "Examine the Section 106 Consultation Process Under the National Historic Preservation Act"**

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is pleased to provide the Senate Committee on Energy and Natural Resources with the following testimony for the record of the October 29, 2025 hearing to "Examine the Section 106 Consultation Process Under the National Historic Preservation Act." Section 106 of the National Historic Preservation Act (NHPA) provides a pivotal legal framework that ensures federal decision-making processes consider the rights and interests of Tribal Nations—both within and outside of our current jurisdictional boundaries. The ability of Tribal Nations to protect our sacred sites under NHPA Section 106 procedures is vital to the health and cultural well-being of current and future generations within Indian Country. Consultation with Tribal Nations through Section 106 review is a critical method by which the federal government delivers on its trust and treaty obligations to Tribal Nations and Native people.

USET SPF reminds the Committee that proper implementation of the NHPA, including Tribal consultation and engagement via Section 106, ensures Tribal Nations have a voice in federal decision-making that affects our cultural and historical rights and interests. The NHPA is integral to the protection of our sacred sites and other areas of cultural and historical significance, which support Tribal cultural continuity and community well-being across generations. Section 106 review helps to ensure that federal actions avoid damage to these critical resources and averts the potential for costly litigation. The rescission or limitation of the NHPA Section 106 procedures and requirements is an abrogation of federal trust and treaty obligations to safeguard our sacred sites and cultural and historical resources.

USET SPF is a non-profit, inter-Tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Turtle Island.[1] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Tribe (VA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

**Background on the Importance of the NHPA Section 106 Process**

Tribal Nations are and have always been inherently sovereign governments, as repeatedly affirmed by the U.S. Supreme Court. Before the arrival of colonizing forces, our territorial jurisdictions and our sacred places stretched across the continent. We held sovereign rights to govern *all* those lands and exercise our traditional lifeways, as well as obligations to steward the cultural and other resources within them. But the United States and its predecessors through war, coerced treaty making, and unilateral actions dispossessed us of or removed us from the vast majority of our homelands. All too often, Tribal Nations have since had little say in what happens to our homelands and sacred places.

Yet, the United States, in taking our lands and resources, assumed debt-based trust and treaty obligations to Tribal Nations and Tribal citizens and communities. In furtherance of those obligations, the United States enacted laws like the NHPA, whereby federal agencies must take into account and mitigate the effects of federal undertakings on historic properties, including properties of traditional religious and cultural importance to Tribal Nations, in consultation with Tribal Nations.

NHPA reviews are critical stopgaps that provide Tribal Nations a seat at the table to weigh in on federal decision-making that affects us. Without the NHPA, Tribal Nations are often stripped of a voice in protecting the lands and resources we have stewarded since time immemorial. When the NHPA review process is employed fully before action is taken, the United States receives critical advice and guidance to inform its decision-making and avoid irreversible harm.

The NHPA is also integral in protecting Tribal Nations' and Native people's religious freedoms. The current Administration has championed religious freedom as a core American value. Tribal religious practices often require access to, and preservation of, specific sacred sites and cultural items—sometimes located on land we no longer hold. The NHPA helps us protect our right to practice our religions without disruption.

**Tribal Consultation Under NHPA Section 106 is Critical for the Protection of Tribal Cultural and Historic Resources**

Section 106 of the NHPA requires federal agencies to consider the special expertise of Tribal Nations in assessing the existence of historic properties and potential impacts and mitigation measures for those historic properties, as we hold unique and exclusive knowledge about our cultural and historically significant properties. This special expertise must be respected in the process for any federal or federally assisted undertakings. We remind the Committee that Tribal Nations are the final arbiters of cultural significance for our sacred sites and areas of cultural and historic significance. It is essential that federal agencies uphold and adhere to Tribal consultation requirements to provide Tribal Nations with a reasonable opportunity to identify, evaluate, and advise on impacts to Tribal historic properties, and to participate in the resolution of adverse effects.

Congress embedded within the NHPA the recognition that places of "traditional religious and cultural importance" to Tribal Nations are historic properties deserving of protection. 54 U.S.C. § 302706(a). The NHPA recognizes that Tribal Nations have the right to be consulted—and indeed, are *required* to be consulted—when the federal government makes decisions affecting such properties, both on and off Tribal lands. *Id.* §§ 302702, 302706(b); *see also* 36 C.F.R. §§ 800.2(c)(2)(i)(A), 800.2(c)(2)(ii), 800.3(c)(1), 800.3(f)(2). The Section 106 process involves identifying historic properties, 36 C.F.R. § 800.4, assessing adverse effects on them, *id.* § 800.5, and resolving those adverse effects, *id.* § 800.6—all in consultation with relevant Tribal Nations. This "consultation requirement is not an empty formality; rather, it 'must recognize the government-to-government relationship between the federal government and Indian tribes'

and is to be 'conducted in a manner sensitive to the concerns and needs of the Indian tribe.'" *Hualapai Indian Tribe v. Haaland*, 755 F. Supp. 3d 1165, 1188 (D. Ariz. 2024) (citation omitted) (quoting 36 C.F.R. § 800.2(c)(2)(ii)(C)). Every aspect of this NHPA review process must be protected and preserved unscathed, as it is the means through which Tribal Nations secure a seat at the table for federal decision making that affects us.

It is critical that Tribal Nations are brought in at the very beginning, when the federal government is determining the scope of Section 106 review. As required by the governing regulations, federal agencies in identifying historic properties "shall," in consultation with Tribal Nations, "[d]etermine and document the area of potential effects" and "[r]eview existing information on historic properties within th[at] area." 36 C.F.R. § 800.4(a)(1)–(2). Distinct from a project's physical footprint, the "area of potential effects" encompasses "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties," and its scope "may be influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." *Id.* § 800.16(d). This scope of review is vital to identifying and ensuring full protection of Tribal historical and cultural resources that may be impacted by federal undertakings. *See Hualapai Indian Tribe*, 755 F. Supp. 3d 1165.

The NHPA must continue to be implemented with meaningful Tribal consultation, ensuring adequate time, respectful engagement, and sufficient resources for Tribal Nations. Any rescission or limitation of NHPA's Section 106 process can *never* come at the expense of the federal government's trust and treaty obligations to Tribal Nations, including the protection of our religious freedom, cultural heritage, and sacred sites, and ensuring a Tribal voice at the table for decision making. Historically, failures to effectively engage and consult with Tribal Nations have caused irreparable damage and harm to Tribal cultural resources and practices, and they have resulted in costly delays and litigation for developers and the federal government. Any proposal to expedite NHPA Section 106 reviews would directly jeopardize Tribal Nations' efforts to protect and preserve our religious freedoms and cultural heritage and conserve our culturally and historically significant areas.

Further, any attempt to condense Tribal consultation into "stakeholder" or "public" notice-and-comment processes undermines the federal government's trust and treaty obligations. It is critical that Congress maintain that federal agencies must recognize the inherent sovereign government status of Tribal Nations—a status that predates the arrival of outside forces. This status, while existing independently from the United States' affirmation by treaty or otherwise,[2] is recognized in the U.S. Constitution[3] and consistently by the U.S. Supreme Court.[4] Because of this, Tribal Nations have a unique government-to-government, Nation-to-Nation relationship with the United States. Therefore, federal agencies must not treat or define Tribal Nations as mere "stakeholders" or the "public" for NHPA Section 106 consultation purposes or any other review processes. Rather, Tribal Nations are owed direct consultation and coordination prior to any decision-making process in advance of any proposals for federal or federally assisted projects that may directly or indirectly affect our rights or cultural and historic resources. Meaningful consultation includes timely notification to Tribal Nations, direct engagement with Tribal

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[2] *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 520 (1832) (explaining retained Tribal sovereignty is based on "the settled doctrine of the law of nations"); *Haaland v. Brackeen*, 599 U.S. 255, 308 (2023) (Gorsuch, J., concurring) (describing the concept of retained sovereignty as "a long-held tenet of international law").

[3] U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause); *id.* art. II, § 2, cl. 2 (Treaty Clause); *see also id.* art. VI, cl. 2 (Supremacy Clause); *id.* art. IV, § 3, cl. 2 (Territory Clause); *id.* art. I, § 2, cl. 3 (Indians Not Taxed Clause).

[4] *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55−56 (1978); *Brackeen*, 599 U.S. at 308 (Gorsuch, J., concurring).

governments in the earliest stages of project proposals, and positively acting upon Tribal guidance and input. Inappropriately grouping Tribal Nations with "stakeholders" or the "public" would undermine Tribal consultation requirements, risking irreparable damage to our sacred sites and the cultural lifeways and well-being of Tribal Nations across the country, in violation of the federal government's trust and treaty obligations.

**Current Funding for Tribal Historic Preservation Officers to Participate in NHPA Section 106 Reviews is Inadequate, and Expedited Review Would Only Increase the Impacts of Funding Shortfalls**

As part of our inherent sovereignty, Tribal Nations have oversight and authority for environmental, cultural, and permitting reviews on Tribal lands. However, the natural resources and taxing and other authorities we would otherwise utilize to generate revenue to fund our governments, including to carry out cultural reviews, have been taken from us by the United States. These takings created debt-based trust and treaty obligations owed to us, but the United States has long failed to fully fund those obligations. This is part of why project proposals and construction on our traditional homelands located outside of our current jurisdictional boundaries often proceed with limited to no coordination with Tribal Nations. This can lead to irreparable harm to our sacred sites and areas of cultural and historical significance to our communities. Just as the federal government has trust and treaty obligations to protect our cultural heritage and lifeways, it also has obligations to empower us to exercise our inherent sovereignty and self-determination to utilize funds and other resources to protect what is important to us.

The federal funding resources available to Tribal Nations to fully participate in NHPA Section 106 review processes have always been inadequate. Many Tribal Nations are unable to fully participate in NHPA Section 106 reviews due to the lack of federal funds to support the functions of Tribal Historic Preservation Officers (THPOs) and the hiring of additional personnel with specific technical expertise required for these reviews. Further, it is important to note that, even in instances where Tribal Nations have a THPO and/or a cultural or natural resources department dedicated to conducting cultural and historic preservation, these individuals and departments are often inundated with multiple projects and permit applications that exceed available capacity and resources. Reviews of these projects can be lengthy because they are often broken into multiple, segmented reviews of a single project and span multiple agency jurisdictions and oversight authorities. Additionally, these individuals and departmental staff may fulfill multiple roles within their Tribal government due to the historic and persistent failures of the federal government to fund its trust and treaty obligations, including appropriating the necessary resources for these positions. It is not uncommon for a THPO/cultural resource manager to also fulfill the role of a natural resource manager or serve in an emergency management role, for example. Additionally, when a Tribal Nation steps in to use its own general government funds to support its THPO office, that Tribal Nation is making the hard decision to pull funding from other essential community services.

The lack of federal support and funding for THPO and Tribal cultural preservation activities was highlighted directly during the Committee's October 29, 2025 hearing. According to testimony provided during the hearing by Steven Concho, THPO for the Pueblo of Acoma, in Fiscal Year 2024 (FY 2024) an estimated $23 million was appropriated to fund an average of nearly $100,000 annually per THPO. This appropriation amount is woefully inadequate to cover the costs to maintain or hire additional staff, cover the costs of travel to project sites, manage review and permitting caseloads, and appropriately and consistently participate in review processes. While the number of recognized THPOs and consultation requests increases as Tribal Nations and the federal government make strides towards a fuller implementation of the NHPA, the funding for THPOs and their offices has remained stagnant and consistently underfunded.

Ultimately, Congress must support additional funding for Tribal Nations and THPOs, as well as for federal agencies, to conduct and fully participate in NHPA Section 106 reviews. Providing sufficient resources for Tribal Nations to adequately participate in the NHPA Section 106 review process and consultation activities will ultimately result in expedited review and permitting timelines and potentially avoid costly litigation and public backlash.

**The Training and Retention of Federal Personnel is Essential to Upholding NHPA Section 106 Consultation Requirements**

In addition to fully funding resources that support THPO activities and the hiring of additional personnel and technical expertise, Congress must also fund the federal personnel who are essential to supporting Tribal Nations in the NHPA Section 106 consultation and review processes. Until the federal government upholds its trust and treaty obligations to fully fund THPO offices, Tribal Nations will continue to rely on federal personnel for technical assistance for various environmental, cultural, and historical review and permitting processes. These reviews require specific technical expertise and knowledge that Tribal Nations may not have in-house yet, and thus they rely on federal personnel to provide that expertise as part of the United States' trust and treaty obligations. USET SPF stresses the importance of agencies having sufficient federal staffing to provide technical support for Tribal Nations as well as engage in early and meaningful Tribal consultation as required for timely NHPA Section 106 reviews.

Tribal Nations have become increasingly concerned with the federal government's reductions in force (RIFs) and deferred resignation and early retirement program incentives, as these will inevitably affect Tribal consultation activities required by Section 106 of the NHPA (among many other important programs). The loss of knowledgeable federal personnel in these areas combined with the decades-long insufficient and stagnant funding for THPOs will further exacerbate the ability of Tribal Nations in the NHPA Section 106 review process, especially if Congress streamlines or condenses the direct Nation-to-Nation consultation requirements under Section 106. Without these resources, Tribal consultation during the NHPA Section 106 review process amounts to an unfunded mandate, as we are not provided with the necessary resources and assistance to effectively participate in these processes. Under these circumstances, our silence in a Section 106 process should never be interpreted as consent to a project—but sometimes it is.

**Conclusion**

The NHPA was enacted by Congress with the intention of upholding trust and treaty obligations to Tribal Nations by pulling out a seat at the federal decision-making table so that we may protect our cultural and historical resources. It was meant to honor the unique legal and diplomatic relationship between Tribal Nations and the federal government—rooted in centuries of sovereign-to-sovereign engagement and formalized through the U.S. Constitution, treaties, statutes, Executive Orders, and judicial decisions. While USET SPF is not necessarily opposed to improving NHPA Section 106 and other environmental and permitting review processes *in principle*, we remind Congress that all such review processes must always occur in conjunction with Tribal consultation to ensure that Tribal Nations are involved, and we must be provided the necessary financial and technical assistance support to fully participate in consultation processes. Any resulting modifications of these reviews must protect our inherent rights, and we assert that this must not be accomplished at the expense of Tribal sovereignty and preservation of our cultural lifeways.

In addition, USET SPF remains opposed to any and all NHPA regulatory or policy revisions that would compress the NHPA Section 106 review process, which would further limit Tribal consultation and our

participation in these critical reviews. Any such limitations would undermine federal trust and treaty obligations to Tribal Nations that ensure the protection of Tribal sacred sites and cultural and historical resources in perpetuity. History has shown that inadequate Tribal consultation leads to irreparable damage and harm to Tribal cultural resources and religious practices, and it often results in costly litigation activities. Any legislative proposals to expedite the NHPA Section 106 review process absent early and meaningful Tribal consultation would directly jeopardize Tribal Nations' efforts to protect and preserve our religious freedoms and cultural heritage and conserve our culturally and historically significant areas. Finally, Congress must provide the necessary appropriations to fully fund THPOs and provide the necessary federal technical assistance and resources for Tribal Nations to fully participate in NHPA Section 106 review processes and other consultation activities. We look forward to continuing to work with the Committee and Congress to ensure the preservation of legal protections for Tribal cultural and historic properties, which includes requirements to engage in early and meaningful consultation with Tribal Nations and the resources necessary to fully participate in these critically important processes.