



Outlook

[External] Program Comment on Certain Housing, Building, and Transportation Activities

From Margaret Berger <margaret@crcwa.com>

Date Fri 13-Dec-24 5:31 PM

To Program Alternatives <program_alternatives@achp.gov>

I am providing comments on the revised program comment (PC) in my capacity as a cultural resources management professional and as the Government Affairs Representative of the Association for Washington Archaeology. The revised program includes more specific processes and definitions, but still comes up short in the following ways:

- It is still unclear what problem the PC is attempting to solve. The PC again fails to provide concrete data such as statistics like delays or denial rates, etc., that would demonstrate the barriers in the Section 106 process.
- The PC would still conflict with many local preservation ordinances, leading to complexity, confusion, and further project delays.
- The lack of consultation with State and Tribal Historic Preservation Officers included in the PC is still concerning. The desire for more efficiency and expediency is understandable, but side stepping consultation will actually lead to more negative outcomes for preservation and delays.
- The PC still essentially gives federal agencies unchecked power to make their own determinations on how historic resources would be impacted.
- The revised PC still does not require mitigation for adverse effects, a key component of the Section 106 process.

Historic preservation should play an important role in creating affordable housing and addressing energy efficiency in buildings, but I remain concerned about the PC and the process in which it was initiated, and ultimately feel it will do more harm than good.

Sincerely,

Margaret Berger

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Margaret Berger, M.A., RPA

Principal Investigator

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C. Timothy McKeown PhD

Washington – Vienna – Canberra

15 December 2024

The Honorable Sarah C. Bronin
Advisory Council for Historic Preservation
401 F Street NW, suite 308
Washington DC 20001

Dear Chair Bronin:

I write to comment on the proposed revised ACHP Program Comment on Certain Housing, Building, and Transportation Activities. My comments and recommendations focus narrowly on the need to clarify the applicability of Federal law in three sections of the document. Article IV, Section 3, Clause 2 of the Constitution gives Congress the exclusive right to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States..." The United States is only subject to state or local law when the Congress has clearly waived sovereign immunity. There are three specific sections in the proposed revised program comment where this distinction is less than clear.

Tribal Lands

Section II.D. states that the program comment does not apply to any undertaking on Tribal lands, nor to any undertaking that may affect historic properties located on Tribal lands, unless explicitly authorized by the tribe. Section X. of the program comment reiterates the definition of tribal land at 36 CFR § 800.16(x): "all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities." The Supreme Court and the Department of the Interior has previously ruled that this particular phrase as used in other statutes has the effect of foreclosing application of relevant state laws on any lands within the exterior boundaries of an Indian reservation.¹

¹ See *McGirt v. Oklahoma*, 140 S Ct. 2452 (2020) regarding jurisdiction of the Major Crimes Act, 18 U. S. C. §1153; See *Oklahoma v. U.S. Dept. of the Int.*, 577 F. Supp. 3d 1266, 1270 (W.D. Okla. 2021) regarding jurisdiction of the Surface Mining Control and Reclamation Act, 30 U.S.C. 1300; See 88 FR 86482 (Dec. 13, 2023) regarding jurisdiction of the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3002.

I recommend that you revise the definition of Tribal lands in section X.I. as follows to make sure that the scope of the foreclosure is clear.

Tribal lands, as provided in 36 CFR § 800.16(x), means all lands within the exterior boundaries of any Indian reservation, including state or private inholdings, and all dependent Indian communities.

Confidentiality

Section III.B.4. of the revised draft program comment discusses confidentiality-related obligations by stating: “Federal agencies must keep sensitive information provided by Indian Tribes or Native Hawaiian Organizations confidential to the extent authorized by applicable federal laws, such as Section 304 of the National Historic Preservation Act, or by applicable State and local laws.” The Freedom of Information Act (5 U.S.C. § 552) requires Federal agencies to provide full or partial disclosure of previously unreleased or uncirculated information and documents controlled by the United States government upon request. Federal control of records includes records in the possession or control of a Federal agency, as well as records produced by Federal contractors or grantees which are under the control of the Federal agency at the time they are requested and which the Federal agency has read and relied upon. FOIA defines nine categories of records that may be exempt from disclosure, and Section 304 of the National Historic Preservation Act provides another. However, I am unaware of any instance where the Congress has authorized a Federal agency to withhold records from disclosure based on State or local law. I recommend that you revise the above-mentioned statement as follows:

Federal agencies must keep sensitive information provided by Indian Tribes or Native Hawaiian Organizations confidential to the extent authorized by applicable federal laws, such as Section 304 of the National Historic Preservation Act, ~~or by applicable State and local laws.~~

Disposition of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony

Section V.B. of the revised draft program comment discusses the disposition of human remains, funerary objects, sacred objects, and objects of cultural patrimony discovered during implementation of an undertaking. The last sentence of the paragraph states: "The federal agency will comply with state burial laws and with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 CFR part 10, in regard to any human remains, funerary objects, sacred objects, or items of cultural patrimony found on federal or Tribal land." As explained above, state or local laws apply to Federal actions only when specifically directed by Congress, and I am unaware of any such direction for the disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony. On Federal lands, disposition of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony is governed by Section 3 of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3002), while disposition of non-Native American human remains and funerary objects over 100 years old is governed by the Archaeological Resources Protection Act. State or local law do not apply in any way, and that should be clear in the Program Comment. For Federal undertakings on non-Federal lands, disposition of non-Native American human remains or funerary objects is purely subject to applicable State or local law and the sponsoring Federal agency is not involved. For discoveries as part of Federal undertakings on non-Federal lands, state or local law would govern the discovery, but disposition would be governed by both state/local law and the Native American Graves Protection and Repatriation Act if the entity that has possession or control of the discovered Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony receives Federal funds (and is thus considered a "museum"). That entity is required to comply with both the state and Federal requirements up until the point there is a conflict, after which the Federal law generally preempts the state or local requirements. I recommend that you revise the third sentence as follows to make this distinction clear:

For discoveries on Federal land, tThe federal agency will comply with ~~state burial laws and the Archaeological Resources Protection Act and its implementing regulations, 43 CFR 7, and with~~ Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 CFR part 10, Subpart B, ~~in regard to any human remains, funerary objects, sacred objects, or items of~~

cultural patrimony found on federal or Tribal land. For discoveries on non-Federal land, state burial law governs the discovery, excavation, and disposition, unless the human remains, funerary objects, sacred objects, or objects of cultural patrimony are Native American and the controlling entity also receives Federal funds, in which case disposition is covered by both State law and the collections provisions of NAGPRA and Subpart C of its implementing regulations.

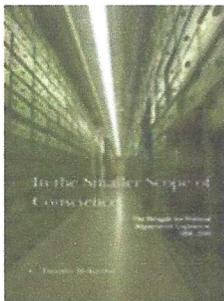
Please feel free to contact me if you have any questions regarding my recommendation.

Sincerely,

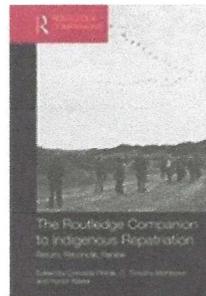


C. Timothy McKeown PhD
Legal Anthropologist/Repatriation Consigliere

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Senior Adjunct Research Fellow, *Centre of Heritage and Museum Studies, Australian National University*



**In the Smaller Scope
of Conscience: The
Struggle for National
Repatriation
Legislation, 1986-
1990**



**The Routledge
Companion to
Indigenous
Repatriation:
Return,
Reconcile, Renew**

500 9th Street
New Cumberland, PA 17070
December 15, 2024

The Honorable Sara Bronin, Chair
Advisory Council on Historic Preservation
401 F. Street, NW, Suite 308
Washington, D.C. 20001

RE: Draft Program Comment on Certain Housing, Building, and Transportation Activities
Draft dated November 15, 2024

Dear Chair Bronin,

With respect to the above-referenced draft Program Comment, I wish to submit my comments. In general, I do agree with the comments provided by the National Conference of State Historic Preservation Officers (dated December 15, 2024), so I will not duplicate their comments here.

In addition, I would note that there are additional problems with the draft:

- Under Section VI. Dispute Resolution, the draft allows that any person may file a dispute over the implementation for any particular undertaking, which would include *any member of the public* (my emphasis). This is in contrast to 36CFR800.2C, which does at least minimally require a consulting party as a member of the public to have a demonstrated interest in the undertaking. The Section lays out a process for resolving the dispute; however, there is a flaw in the assumption that all disputes filed by a member of the public will be in good faith. I do not hold that faith and do expect that disputes might be filed by individual actors, in quantity, with no regard to their particular nexus or interest in the undertaking. Modern technology, including the current availability of Artificial Intelligence, would make this a relatively painless process with respect to the filer. The resulting process for resolution that is proposed, or frankly any logical process that might be proposed, would lead to unnecessary delays in the undertaking that should by their nature have little or no historical impacts. For this reason alone, I would expect that no Federal Agency would adopt these procedures as an improvement over their existing processes or over any existing programmatic agreements. It would be a non-starter.
- Under Section III. Alternative Compliance Approaches, B.3, Effect of a Finding of Potential Effect on Certain Properties, Indian Tribes and Native Hawaiian organizations are given the ability to opt out of the Program Comment and follow review under Section 106, 36CFR800.6-8. However, State Historic Preservation Officers are not afforded the same courtesy. This seems to create a double standard under 36CFR800.
- Under Appendix A: Activities Not Requiring Further Review, 5. Work on Bridges, bridges denoted as alternative transportation infrastructures have a number of minor activities

that would not require further Section 106 review. Alternative transportation infrastructure could include structures used not only for pedestrian and bicycle purposes, but also for transit purposes, which I read to include bridges designed for light rail or buses. How are these structures different from other bridges in design or function that convey vehicular traffic? Given the Program Comment is titled for certain Transportation Activities, it seems to be double standard to allow one structure function but not another, even though to the average observer both structures would appear to be the same, and in a number of instances have reverted from one function to the other or have served both at one time.

I would note that my concerns over confusion in the primacy of this program comment versus other existing programmatic agreements have largely been cleared up. Still, there might be other problematic language that I have failed to recognize, but given NCSHPO comments and the points noted above I would consider this Program Comment to be substantially flawed. Its issuance, especially in light of the change in Administrations and commensurate philosophy regarding historic preservation and regulation, would seem ill-advised. As noted in my previous comments, Agency- or state-level programmatic agreements would seem to be much more effective in considering those undertakings or activities that are unlikely to affect historic resources.

Sincerely,

A handwritten signature in black ink that reads "Ira Beckerman". The signature is written in a cursive style and is followed by a long horizontal line that extends to the right.

Ira Beckerman, PhD, RPA



Outlook

[External] Comment on Program Comment

From Kirk Ranzetta <kranzetta@gmail.com>

Date Mon 16-Dec-24 3:00 AM

To Program Alternatives <program_alternatives@achp.gov>

Dear ACHP,

My concerns regarding this Program Comment remain the same as those filed with the first draft of the Proposed Program Comment on Certain Housing, Building and Transportation Activities.

Regards,

Kirk Ranzetta



Outlook

[External] Draft Program Comment on Certain Housing, Building, and Transportation Activities

From Brad White <bradfordjwhite36@gmail.com>**Date** Thu 12-Dec-24 3:51 PM**To** Program Alternatives <program_alternatives@achp.gov>

Dear Staff,

Thank you for the opportunity to comment on the above-reference program comment dated November 15, 2024. I thought the original program comment submitted for comment was very good. The updated program comment is even better. It clearly identifies the activities that do not require review and those that will need more thorough and thoughtful action. It is well past time for the Section 106 process to be improved to allow projects to move forward that have little or no impact on historic resources or historic fabric. I believe the updated draft also has important safeguards to ensure that assessments of impact are not left solely to the agencies proposing the undertakings.

Thanks again for the opportunity to comment and the time and attention you have made to addressing the issues raised by previous comments.

Happy holidays,
Brad White

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Brad WhiteBradfordJWhite36@gmail.com