



**THE COWLITZ INDIAN TRIBE  
COMMENTS ON THE ADVISORY COUNCIL ON HISTORIC PRESERVATION'S  
PROPOSED PROGRAM COMMENT ON ACCESSIBLE, CLIMATE-RESILIENT, AND  
CONNECTED COMMUNITIES**

October 4, 2024

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The Cowlitz Indian Tribe appreciates this opportunity to provide written comments on the Advisory Council on Historic Preservation's (ACHP or Council) proposed Program Comment on Accessible, Climate-Resilient, and Connected Communities. In general, the Cowlitz Indian Tribe supports the federal government's efforts to streamline development of climate-friendly housing and transportation projects and understands that the Council developed this proposed Program Comment in an effort to further important climate goals. Cowlitz has grave concerns, however, that the proposed Program Comment will result in the inadequate review of potential adverse effects from transportation projects on Tribal remains and cultural and archeological resources. For that reason, the Cowlitz Indian Tribe asks that ACHP reconsider the proposed Program Comment as it affects properties of religious and cultural significance to Indian Tribes, particularly in the context of the climate-friendly transportation-related activities not requiring further Section 106 review described in Appendices C-1 and C-2 of the Program Comment.

***Section 106 Background and Proposed Program Comment***

Section 106 of the National Historic Preservation Act<sup>1</sup> requires that federal agencies consider how their actions will affect historic properties, which include sites of religious and cultural significance to Indian Tribes, including Tribally-identified sacred sites, before they spend federal funds or move ahead with a federal undertaking (*i.e.*, a project, activity, or program funded and under jurisdiction of a federal agency).<sup>2</sup> As part of the Section 106 process, the federal agency must consider public views about historic preservation issues and must consult with federally-recognized Indian Tribes about potential adverse effects on sites of Tribal religious and cultural significance when making final project decisions. The proposed ACHP Program Comment sets out "alternative" compliance approaches for federal agency undertakings as follows:

1. For undertakings that the federal agency deems will have no or minimal potential to adversely affect sites of Tribal religious and cultural significance, as set forth in several

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<sup>1</sup> 54 U.S.C. § 306108; implementing regulations at 36 C.F.R. Part 800.

<sup>2</sup> See 36 C.F.R. § 800.16(y); Proposed Program Comment at 20.

appendices, including Appendix C-1 (transportation-related activities), the agency may proceed with the undertaking without conducting further review under Section 106.

2. For undertakings for which certain conditions or exclusions are satisfied, as set forth in the appendices, including Appendix C-2 (transportation-related activities), a federal agency may proceed with the undertaking if it satisfies the conditions, exclusions or requirements set out in the appendices, and documents how it has satisfied those conditions or requirements.

Appendix C-1 provides that activities related to bridge work, “*provided that they exclusively affect previously disturbed ground,*” do not require further Section 106 review.<sup>3</sup> Appendix C-1 also provides that work on transportation ground surfaces (including replacement of material like pavement, traffic signals, construction fencing, transit shelters, landscaping, and removal of trees) does not require further Section 106 review, if the work is “located entirely within *previously disturbed right of way.*”<sup>4</sup> Appendix C-2 provides that work on bridges does not require further Section 106 review, even if it creates “new *ground disturbance* in previously undisturbed soils, if a *qualified authority* makes a written determination that such activity will have no adverse effects on a historic property” (which includes sites of Tribal religious and cultural significance).<sup>5</sup>

### ***The Cowlitz Indian Tribe***

The Cowlitz people have lived in what is now southwestern Washington since Time Immemorial, and our Ancestors are buried throughout the region.<sup>6</sup> The Cowlitz Indian Reservation is located off Interstate 5 near Ridgefield, in Clark County, Washington. Washington and Oregon are in the process of replacing a section of Interstate 5 that spans the Columbia River and connects the two states (the Interstate Bridge Replacement (IBR) project). The Cowlitz have had a presence within the footprint of the IBR project for centuries,<sup>7</sup> which is why the Cowlitz Indian Tribe is particularly concerned about the proposed Program Comment provisions that would affect Section 106 compliance for bridge projects and their potential impact on Tribal remains and cultural resources. Last month, in fact, the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), as part of the ongoing, required consultation under Section 106 of the NHPA, determined that the IBR project would have adverse effects to historic properties (which includes sites and artifacts of Tribal religious and cultural significance).<sup>8</sup> Indeed, in the 1950s, the initial

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<sup>3</sup> Proposed Program Comment, Appendix C-1 at 39-40 (italics in original).

<sup>4</sup> *Id.* at 37-39.

<sup>5</sup> Proposed Program Comment, Appendix C-2 at 42 (italics in original).

<sup>6</sup> *See, e.g.*, U.S. Department of the Interior, Bureau of Indian Affairs, Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe at 128-30 (April 2013).

<sup>7</sup> *See id.*, *see also* <https://www.cowlitz.org/our-story>.

<sup>8</sup> *See* Letter from U.S. Department of Transportation, FHWA Washington Division, FHWA Oregon Division, and FTA to Dr. Allyson Brooks, SHPO [WA], Department of Archaeology & Historic Preservation at Table 1, at 2 (Sept. 19, 2024).

construction of Interstate 5 disturbed the graves of “a minimum of 14 individuals.”<sup>9</sup> Within the last two decades, several Ancestors were reinterred within the IBR project footprint as part of an Inter-Tribal Consortium guided by the Cowlitz Indian Tribe and resulting in an Inter-Tribal Agreement, to a location that was deemed unlikely to be impacted by future development. These individuals were determined to be of Native American descent but could not be ascertained to be members of a specific Tribe. Nevertheless, given the Cowlitz historical presence in this area, there is little question that Cowlitz Ancestral remains are located within the area of the IBR project.

### ***Comments on the Proposed ACHP Program Comment***

As an initial matter, the Cowlitz Indian Tribe recommends that the ACHP Program Comment should not apply nationwide to federal agency evaluation of the effects of major infrastructure projects on sites of Tribal religious and cultural significance. Instead, the impact that major infrastructure projects may have on Tribal remains and other Tribal cultural resources should be evaluated through the full Section 106 process – there should not be a blanket exemption from Section 106 compliance in cases where a federal agency anticipates that there will be no or minimal potential for a project to adversely affect such resources.

#### No Section 106 Review for Undertakings that Affect Previously Disturbed Ground

Appendix C-1 (for transportation-related activities) and the IBR project illustrate the reasons why a blanket exemption from Section 106 review is not advisable. Appendix C-1 would exempt activities related to bridge work from further Section 106 review, provided that such activities “exclusively affect previously disturbed ground.” But the fact that ground may have previously been disturbed does not necessarily mean that there are not Tribal cultural or archeological resources or Tribal sacred sites in the disturbed area. As noted above, Native American remains were re-interred in and around the IBR project area during the initial construction of I-5 – meaning that those areas are previously disturbed – yet those same areas where there are Tribal remains would be exempted from further Section 106 compliance under the proposed Program Comment.

The proposed definitions of “previously disturbed ground” and “previously disturbed right-of-way” in the proposed Program Comment do not fix this problem – there simply should not be an across-the-board assumption that previously disturbed areas have a reduced likelihood of possessing Tribal remains or culturally significant sites or artifacts. For example, a plowed field might be considered “disturbed” in this context, as the depth of disturbance is similar to that of a paved road. However, the archaeological deposits (and the potential for encountering Native American remains) is unchanged. Everything below that depth remains intact despite years of repeated use. The same applies to an undertaking such as the IBR project. Exemptions for previously disturbed areas and determinations that there is “no or minimal potential” to adversely affect sites of Tribal religious and

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<sup>9</sup> Notice of Inventory Completion: U.S. Department of the Interior, National Park Service, Fort Vancouver National Historic Site, Vancouver, WA; Correction, 76 Fed. Reg. 35013 (June 15, 2011). In fact, the bodies found during the I-5 construction were initially thought to be those of nine individuals; the number was later increased. See Notice of Inventory Completion: U.S. Department of the Interior, National Park Service, Fort Vancouver National Historic Site, Vancouver, WA, 74 Fed. Reg. 24874 (May 26, 2009).

cultural significance should be made by qualified archaeologists, not by federal agency staff or project managers who may not have proper training.

The Program Comment indicates that if it is determined “through consultation with *Indian Tribes* ... or otherwise that a proposed *undertaking* covered in this Program Comment could potentially result in an *effect*” on sites with “traditional religious and cultural significant to an *Indian Tribe* ...,” that the federal agency may not use the Program Comment but instead must follow the standard Section 106 review process set out in the regulations.<sup>10</sup> This approach sets up a convoluted process to opt out of the Program Comment and puts the burden on Tribes to show that there could be an effect. It also is entirely unclear what kind and what extent of consultation would be required, which Tribes would be consulted, and how this would fit in with the usual Tribal consultation process required under Section 106, or existing programmatic agreements, like those with the FHWA, Washington Department of Transportation, and all the Tribes in Washington State. In fact, it would appear that the Program Comment would violate the existing agreement that applies to transportation undertakings in Washington State – which was carefully negotiated with all the Washington Tribes and has been effective in streamlining transportation projects, including projects like the IBR.

In addition to concerns about protecting religious and cultural resources, a blanket exemption for previously disturbed areas, particularly as drafted in the proposed Program Comment, may also be setting up federal projects for costly and lengthy delays – should Ancestral Remains or cultural artifacts ultimately be found, for example, where Section 106 compliance was not required for a bridge project because it exclusively affected previously disturbed ground. Given the Cowlitz Indian Tribe’s historical and modern presence in the footprint of the IBR project, the Tribe has serious concerns that the proposed Program Comment will effectively clear the way for further disturbance of the remains of Tribal Ancestors and may not have the desired effect of streamlining transportation and other federal climate-friendly projects. Application of this Program Comment to the IBR project could have disastrous consequences for the Cowlitz Indian Tribe, the local community, and the federal government, as occurred in 2004 at the Hood Canal Bridge graving dock project, which cost the project \$84 million in delays, and destroyed the exposed graves of Elwha Klallam Tribal Ancestors.<sup>11</sup>

No Section 106 Review for Undertakings in Previously Undisturbed Areas If a “Qualified Authority” Determines the Activity Will Have No Adverse Effects on Tribal Sites/Artifacts

Appendix C-2 raises similar concerns, by providing that bridge work does not require further Section 106 review, even if it creates new ground disturbance, if a “qualified authority” makes a written determination that such activity will have no adverse effects on sites of Tribal religious and cultural significance.<sup>12</sup> Although this portion of the Program Comment would exempt a project from further Section 106 review only if there is a written determination by a “qualified authority,” the definitions of “qualified authority” and “relevant Indian Tribe” are vague and will not ensure that

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<sup>10</sup> See Proposed Program Comment at 7-8 (italics in original).

<sup>11</sup> See, e.g., <https://www.historylink.org/File/7344>.

<sup>12</sup> Proposed Program Comment, Appendix C-2 at 42.

adverse effects on significant Tribal religious and cultural resources will not occur. For example, a “qualified authority” is defined as a “qualified professional” meeting certain Secretary of the Interior standards, or “a person recognized by the relevant Indian Tribe ... to have expertise ... in identification, evaluation, assessment ... and treatment of effects to historic properties of religious and cultural significance to their Indian Tribe.”<sup>13</sup> But the definition does not define or specify what is the “relevant Indian Tribe” for purposes of a federal undertaking. In the case of the IBR project, there are multiple Indian Tribes in Washington and Oregon that have some connection to the area surrounding the project. The Cowlitz Indian Tribe has both historical and modern connections to the area where the IBR project is being undertaken, and the Cowlitz Reservation is closest to the IBR project site -- but the Program Comment does not provide any criteria or even guidance for how a federal agency would determine which Tribe (or Tribes) will be considered “relevant” for purposes of identifying a qualified authority (who in turn would determine if the project would have adverse effects on any Tribal religious or cultural resources).

Nor does the proposed Program Comment specify who at the relevant Indian Tribe would constitute a qualified professional. The proposed Program Comment references the Secretary of the Interior’s Professional Qualifications Standards, but this document does not directly discuss knowledge of Tribes and their cultures and practices. Further, the webpage for the Professional Qualifications Standards on the Department of the Interior website specifically states that “[t]he Standards are not designed to identify the best or ideal person for any position.”<sup>14</sup> If the ACHP intends to rely on these definitions in the Program Comment, it needs to include more specific criteria for determining who is properly considered a qualified authority (and which is the relevant Tribe). These criteria are crucial in determining which Tribe and what officials will play a role in assessing whether Section 106 compliance is needed, and ultimately, what protections will be in place for Tribal traditional and cultural sites impacted by federal projects. In the case of the IBR project, Cowlitz is very concerned about the potential for adverse effects to its religious and cultural resources, without proper consultation.

### ***Conclusion***

The Cowlitz Indian Tribe appreciates the Council’s efforts in developing the proposed Program Comment, but the Tribe has serious concerns that the proposed Program Comment, as written, will not adequately protect Tribal religious and cultural resources. In the context of the IBR project, this approach could have devastating consequences for the Tribe, the federal government, and the local community, destroying the remains of Tribal Ancestors and resulting in millions of dollars of delays. The Tribe respectfully requests that the ACHP consider the Tribe’s comments and suggestions and make them part of the record for the proposed Program Comment, and further requests that ACHP not move forward with this Program Comment until these concerns are addressed. If you have further questions about any of these comments, please feel free to contact me or James Gordon,

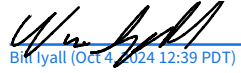
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<sup>13</sup> Proposed Program Comment at 18.

<sup>14</sup> See <https://www.doi.gov/pam/asset-management/historic-preservation/PQS>.

the Cowlitz Tribal Historic Preservation Officer, at (360) 957-3004 and [jgordon@cowlitz.org](mailto:jgordon@cowlitz.org). Thank you for your consideration.

Sincerely,



William Iyall (Oct 4, 2024 12:39 PDT)

William Iyall, Chairman  
Cowlitz Indian Tribe