



**OPENING REMARKS OF SARA C. BRONIN**  
Chair of the Advisory Council on Historic Preservation

Delivered to the Historic and Cultural Preservation Roundtable:  
“Strengthening Historic and Cultural Preservation”

November 29, 2023

It is my honor to be here today as the Chair of the Advisory Council on Historic Preservation.

The Advisory Council is the nation’s historic preservation agency, with 24 members, including 11 Presidentially-appointed members, and representatives of 10 federal agencies and 3 preservation organizations.<sup>1</sup> We administer and implement key provisions of the National Historic Preservation Act, including the Section 106 review process, which requires federal agencies to assess the impacts of their undertakings on historic resources. We also advise Congress, the Executive Branch, and state and local governments on historic preservation policy.

On the Section 106 side of our work, the Advisory Council has embarked upon a record number of streamlining initiatives to ensure that communities are getting the infrastructure they need, and we have actively engaged with the Federal Permitting Improvement Steering Council as one of 16 federal-agency members. Our track record of supporting successful project resolutions and our commitment to further streamlining are the principal reasons we generally oppose legislative exemptions to Section 106. I am happy to discuss our streamlining initiatives – including efforts currently underway related to housing – in the question-and-answer period.

Today, I want to highlight our agency’s adoption and implementation of the federal government’s first Policy Statement on Climate Change and Historic Preservation<sup>2</sup> – and to ask for your partnership in advancing its principles. Consider the Statue of Liberty, closed for 8 months following Superstorm Sandy; the Alaska Native town of Newtok, entirely relocated due to sea level rise; and Lahaina in Hawai’i, decimated by wildfire. Contemporary conversations about climate change often overlook how it is already disrupting our connections to our past and cultural heritage.

With that context, I will make my first ask: that we work together to draft legislation creating a climate heritage office. We must be an international leader in this sphere. A U.S. climate heritage office could help us modernize approaches to disaster, develop creative mitigation and adaptation strategies, and fortify historic infrastructure. It could also identify and coordinate needed research, and train professionals and community members on best practices. We cannot create this office with existing staff or funding. At the Advisory Council, one person works part-time on climate change issues. If we continue to under-resource the federal government response, we will lose more irreplaceable places forever.

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<sup>1</sup> For more information about the Advisory Council on Historic Preservation, see Appendix A.

<sup>2</sup> For a copy of this policy statement, see Appendix B.

Second, I ask you to expand federal support for research on climate change and historic and cultural resources. We must identify the best materials, methods, and structures to adapt these resources to fire, flood, and other threats. We need research on renewable energy, energy efficient building elements, and other sustainability features to inform amendments to building, energy, and zoning codes. And we need economic analysis on which financial incentives and investments would maximize retention of historic places at risk. We must also understand Native and Indigenous practices that can inform effective climate resilience strategies.

Third, I ask you for federal funding to digitize information about the nation's heritage. It is extremely difficult to protect historic places when we don't know where they are. Of course, some information, including information related to tribal and archaeological resources, must remain confidential. But the vast majority of historic places can and must be identified on a national map that integrates state, tribal, and local information. With that map, we could not only locate sites most at risk, but we could also help accelerate the Section 106 permitting process. It's an investment well worth making.

So that's three things: a climate heritage office, research, and digitization. We look forward to partnering with you to advance these ideas.

Next, you will hear from four panelists who represent key constituencies and also serve as members of the Advisory Council. The Advisory Council's Presidentially-appointed Tribal Member, Chairman Reno Franklin, will discuss our recent Policy Statement on Burial Sites, Human Remains, and Funerary Objects,<sup>3</sup> and a pending Policy Statement on Indigenous Knowledge. The other panelists will promote the permanent reauthorization of the Historic Preservation Fund, enhancements to the federal rehabilitation tax credit, and additional funding for state and tribal historic preservation offices. The Advisory Council strongly supports these fundamental components of the national historic preservation program.<sup>4</sup>

Thank you for convening this important conversation.

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<sup>3</sup> For a copy of this policy statement, see Appendix C.

<sup>4</sup> For recent official Advisory Council on Historic Preservation correspondence to Congress regarding these and other pieces of legislation, see Appendix D.



**APPENDICES TO TESTIMONY OF SARA C. BRONIN**  
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**APPENDIX A: About the Advisory Council on Historic Preservation**

**APPENDIX B: Policy Statement on Climate Change and Historic Preservation**

**APPENDIX C: Policy Statement on Burial Sites, Human Remains, and Funerary Objects**

**APPENDIX D: Advisory Council on Historic Preservation Recent Comments on Legislation**

## **APPENDIX A: About the Advisory Council on Historic Preservation**

The Advisory Council on Historic Preservation was created by the National Historic Preservation Act of 1966 to promote the preservation, enhancement, and sustainable use of our nation's diverse historic resources. It is responsible for administering the Section 106 review process and for advising the President, Congress, the Executive Branch, and state and local governments on historic preservation policy, among other responsibilities.<sup>5</sup>

The Advisory Council consists of 24 members, including 11 Presidentially-appointed members, and representatives of 10 federal agencies and 3 preservation organizations. These 24 members, including the full-time Chair who heads the agency, meet several times per year to conduct business.

The Advisory Council's staff numbers fewer than fifty, but they are responsible for administration of the Section 106 review process, robust public education, engagement and capacity building, policy development, and engagement on Tribal, Indigenous, and Native Hawaiian issues. The Advisory Council works actively to ensure the guiding principle of the National Historic Preservation Act: "to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations."<sup>6</sup>

### ***Section 106 Administration***

Section 106 of the National Historic Preservation Act calls for all projects carried out, licensed, permitted or funded by federal agencies to "take into account the effect of the undertaking on any historic property."<sup>7</sup> The Advisory Council on Historic Preservation plays a pivotal role in administering over 110,000 such assessments each year. The Advisory Council facilitates this process, providing guidance and expertise to federal agencies, state and tribal historic preservation offices, state and local governments, and other stakeholders. Through collaboration and consultation, the Advisory Council ensures that the Section 106 reviews are conducted comprehensively, balancing the need for development and progress with the imperative to preserve the nation's rich cultural heritage. By leveraging its diverse membership and expertise, the Advisory Council contributes to informed decision-making, fostering a harmonious integration of federal initiatives with the preservation of historic and culturally significant sites and structures.

The Advisory Council's regulations governing the Section 106 process contain a robust set of program alternatives that can provide federal agencies with a more flexible approach to ensure the requirements of Section 106 review are achieved and historic preservation concerns are balanced with other federal mission requirements and needs. These program alternatives can allow agencies to tailor the Section 106 review process for a group of undertakings or an entire program that may affect historic properties.<sup>8</sup> Program alternatives include

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<sup>5</sup> 54 U.S.C. § 304102.

<sup>6</sup> 54 U.S.C. § 300101.

<sup>7</sup> 54 U.S.C. § 306108.

<sup>8</sup> 36 C.F.R. Part 800.

programmatic agreements, exempted categories, standard treatments, program comments, and alternate procedures. These alternatives can help fit Section 106 reviews with other federal agency procedures, standardize procedures for repeated undertakings, or address a whole category of historic sites or properties.

Program alternatives can improve the effectiveness and efficiency of Section 106 reviews and streamline routine interactions while focusing effort on the more complex projects or historic properties most important to communities. They can also help interpret and raise awareness about important historic properties and strengthen the state, tribal, and local partnerships critical to their care. At present the Advisory Council has the largest number of program alternatives ever under development.

As a member of the Federal Permitting Improvement Steering Council, the Advisory Council participates in facilitating Congressionally-approved expenditures for infrastructure development by developing Section 106 program efficiencies; promoting the early and meaningful engagement of key stakeholders, including Indian Tribes and underserved communities; and advancing the use of digital tools and data to better inform Section 106 reviews and project planning.

### ***Policy Statement Development and Guidance***

The Advisory Council on Historic Preservation fulfills its mandate to both administer the Section 106 process and advise state and local governments through the formulation and dissemination of comprehensive policy statements. These statements serve as authoritative policies, offering guidance, strategic recommendations, and best practices that assist state and tribal historic preservation offices in administering Section 106 reviews. Additionally, they support state and local entities in navigating complex historic preservation policy issues and identify key areas for further policy research. By drawing on the collective expertise of its diverse membership and knowledgeable staff, the Advisory Council develops policy statements that address contemporary challenges while upholding the principles of the National Historic Preservation Act. These documents serve as invaluable tools and provide a framework to make informed decisions that balance public policy goals with the preservation of cultural heritage.

In 2023, the Advisory Council produced two critical policy statements, including one on Climate Change and Historic Preservation,<sup>9</sup> as well as a policy statement on Burial Sites, Human Remains, and Funerary Objects.<sup>10</sup> These two policy statements direct not only best practices for federal agencies undertaking Section 106 reviews, but present a compelling model for all levels of government to adopt on these critical issues. In addition, the Advisory Council is currently finalizing a policy statement on Housing and Historic Preservation as well as a policy statement on Indigenous Knowledge. More information on each of these four adopted and pending statements follows.

Historic properties are experiencing escalating climate impacts that are increasingly leading to their damage and destruction. In June 2023, the Advisory Council adopted its Climate Change

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<sup>9</sup> See Appendix B.

<sup>10</sup> See Appendix C.

and Historic Preservation Policy Statement to define more clearly connections between climate change and historic properties. The policy statement will promote informed federal decision making, responsible federal stewardship of historic properties, and consideration of climate impacts during Section 106 reviews. The Advisory Council also has designed the policy statement to assist communities and Tribal, state, and local governments as they plan for, mitigate, and adapt to climate impacts. The policy addresses the importance of making historic properties more resilient, of considering such properties during disaster preparedness and response, and of reusing historic buildings to help contribute to decarbonization. Effects to sacred sites and other properties significant to Indian Tribes and Native Hawaiian organizations are highlighted in the policy statement, as are the disproportionate impacts of climate change on historic places in underserved communities. Implementation of the policy statement is taking place now and is expected to require the development of additional information and guidance.

Human remains, burial sites, and funerary objects are significant to all peoples. The Advisory Council is addressing increasing concerns related to their treatment and working to ensure they receive appropriate consideration in federal decision making. In March 2023, the Advisory Council unanimously adopted its Policy Statement on Burial Sites, Human Remains, and Funerary Objects. Compared to an earlier policy statement that addressed some of the same issues, the new policy statement better accounts for the views of Indian Tribes, Native Hawaiians, the African American community, and Indigenous Peoples; includes actionable tasks; utilizes more inclusive language; and aligns the policy with current Department of Interior priorities, including the Federal Indian Boarding School initiative. The policy statement formally recognizes that the places most often disturbed are those associated with Indian Tribes, Native Hawaiians, Indigenous People, racial and ethnic minorities, and low-income communities. It also acknowledges the impact of climate change on sites, cemeteries, and associated cultural practices, which further threatens their identification and protection. In April 2023, the Advisory Council released template language that assists federal agencies with incorporating the policy into their Section 106 agreement documents. It also presented on the policy statement alongside Indian Tribes and the National Congress of American Indians at the United Nations Permanent Forum on Indigenous Issues. In June 2023, the Advisory Council issued a companion guidance document advising on interpretation and implementation of the policy statement. Further implementation of the policy is already underway and is expected to result in the need for additional training and guidance.

The Advisory Council interacts regularly with Indian Tribes and Native Hawaiians, who have long identified the need to integrate Indigenous Knowledge into the federal historic preservation framework. Indigenous Knowledge is a body of observations, oral and written knowledge, innovations, practices, and beliefs developed by Indian Tribes and Indigenous Peoples through interaction and experience with the environment. Indigenous Knowledge is part of the best available science and should be integrated into and accounted for during federal decision making. The Advisory Council has a legal responsibility to ensure Indian Tribes and Native Hawaiian organizations are both afforded an opportunity to consult during the Section 106 process and that their Indigenous Knowledge and expertise are fully considered. To advance understanding of Indigenous Knowledge, the Advisory Council developed an information paper on Traditional Knowledge and the Section 106 process and serves as a co-chair on the White House Council on Native American Affairs Indigenous Knowledge Subcommittee's Reporting

and Implementation Subgroup. The pending policy statement will advise federal agencies on ways to effectively incorporate Indigenous Knowledge into other historic preservation activities, including compliance with EO 13007, “Indian Sacred Sites,” and carrying out the broad historic preservation responsibilities agencies have under Section 110 of the NHPA.

To address the nation’s housing crisis, existing buildings – including historic buildings – must be rehabilitated and reused for housing; the housing shortage is not a problem we can build our way out of through new construction. Older and historic buildings are a critically important subset of naturally occurring affordable housing, and nonresidential historic buildings can be adapted for use as housing. In 2006, the Advisory Council issued its Policy Statement on Affordable Housing and Historic Preservation, which includes several principles that address the importance of flexibility and streamlining in Section 106 review of affordable housing projects. To ensure that Advisory Council policy is fully addressing the current challenges of the housing crisis, the Advisory Council is developing a new policy statement on housing and historic preservation that will build upon and incorporate the Advisory Council’s 2006 policy statement. On a related note, the Advisory Council continues to work with the Department of Housing and Urban Development regarding its implementation of the White House’s Housing Supply Action Plan and the role historic buildings can play in meeting the goals of that plan.

### ***Legislative Positions***

The Advisory Council on Historic Preservation is directed to “advise the President and Congress on matters relating to historic preservation.”<sup>11</sup> Under this authority, the Advisory Council votes on whether to endorse pending legislation before Congress. Recently the Chair of the Advisory Council has written to members of Congress concerning the following pieces of legislation (reproduced in full in Appendix D):

- Historic Preservation Fund Reauthorization Act (H.R. 3350)
- Historic Tax Credit Growth and Opportunity (HTC-GO) Act (H.R. 1785)
- Section 4 of the Save Oak Flat from Foreign Mining Act (H.R. 1351)
- Chaco Cultural Heritage Area Protection Act (S. 1404)
- Lower Energy Costs Act (H.R. 1), specifically regarding proposed Section 106 exemptions

At the Advisory Council’s last business meeting, it considered additional legislation and voted to:

- Oppose the provisions of the American Broadband Deployment Act (H.R. 3557), the Broadband for Americans through Responsible Streamlining Act (H.R. 4141), and the CLOSE THE GAP Act (S. 2855) that would exempt projects from review under Section 106
- Support the Truth and Healing Commission on Indian Boarding School Policies Act (S. 1723)
- Support the School Infrastructure Modernization Act (S. 1523) and the Rehabilitation of Historic Schools Act (H.R. 3181)
- Support the American Battlefield Protection Program Enhancement Act (H.R. 3448)

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<sup>11</sup> 54 U.S.C. § 304102.

Correspondence on these positions will be sent to Congress in the near future.

### ***Advancing a More Inclusive Preservation Program***

The national historic preservation program was created, in part, to identify and protect sites and landscapes that tell the stories of all Americans and to honor and preserve their heritage. This section covers a few highlights of the ways in which the Advisory Council on Historic Preservation works to advance a more inclusive historic preservation program.

The Advisory Council has the important statutory responsibility of ensuring that Indian Tribes and Native Hawaiian organizations are afforded the opportunity to be consulted and actively involved throughout the Section 106 process, as federal or federally funded or permitted projects have the capacity to impact historic properties of religious and cultural significance to them. As discussed above, the Advisory Council is addressing some policy issues of concern to Indian Tribes and Native Hawaiian organizations that can arise during Section 106 consultation through recently adopted and pending policy statements. The Advisory Council continues to develop training and guidance resources and is actively participating in the White House Council on Native American Affairs to assist federal agencies, Indian Tribes, and Native Hawaiian organizations with consulting more effectively. These efforts can improve consultation and can lead to better preservation outcomes and more expeditious and predictable Section 106 reviews.

Climate impacts resulting from sea level rise, extended drought, increased severity of invasive species, severe storm events, and extreme wildfire, among other examples, have the potential to impact or destroy sacred sites, cultural practices, landscapes, and cultural properties that are significant to Indian Tribes and Native Hawaiian organizations. Last year, the Advisory Council, in consultation with Indian Tribes and Native Hawaiian organizations, developed a plan that identifies strategies the Advisory Council can take in an attempt to mitigate and combat such climate impacts.

Last year, the Advisory Council advanced several efforts related to implementing the Tribal Treaty Rights Memorandum of Understanding and the Sacred Sites Memorandum of Understanding (MOUs). These MOUs intend to advance consideration of treaty rights and sacred sites in federal decision making, create guidance and resources to assist federal agencies in their decision making, and increase capacity of Indian Tribes and Native Hawaiian organizations in representing their interests through consultation.

The Advisory Council is also a member of White House Council on Native American Affairs Indigenous Traditional Ecological Knowledge workgroup, in participation with 25 other federal agencies, to draft guidance related to the incorporation of Indigenous Knowledge into federal decision making. As a member of the White House Council on Native American Affairs Climate Adaptation Subcommittee, the Advisory Council is jointly facilitating implementation of a monthly interagency speaker series led by Indigenous representatives meant to educate federal personnel regarding various topics of interest, including historic preservation, sacred sites, and Indigenous Knowledge. In 2022, the Advisory Council signed the Native Languages Memorandum of Agreement at the request of the White House Council on Native American Affairs.



The Advisory Council has also developed a number of programs with historically black colleges and universities, including the Cultural Heritage in the Forest program co-sponsored by the U.S. Department of Agriculture. And it has committed to establishing strong, multi-faceted relationships with Tribal youth and college students – including initiating a formal partnership with Salish Kootenai College, the only Tribal college or university with a degree program in Tribal historic preservation.

**APPENDIX B: Policy Statement on Climate Change and Historic Preservation**



## ACHP CLIMATE CHANGE AND HISTORIC PRESERVATION POLICY STATEMENT

America's historic properties—important places that help to define and connect people to their communities—are experiencing escalating climate impacts that are increasingly leading to their damage and destruction. The Advisory Council on Historic Preservation (ACHP) has developed this policy statement to define more clearly connections between climate change and historic properties, to articulate policy principles the ACHP will integrate into the Section 106 process, and to guide public-serving institutions on how they may acknowledge, plan for, mitigate, and adapt to climate change impacts on historic properties.

### SCOPE OF THE ISSUE

In 2014, the Union of Concerned Scientists released an important report, *National Landmarks at Risk: How Rising Seas, Floods, and Wildfires Are Threatening the United States' Most Cherished Historic Sites*. Through a series of case studies illustrating climate change impacts to well-known historic places (many of them federally owned and managed), the report concluded that:

*Many of the United States' iconic landmarks and heritage sites are at risk as never before. Sea level rise, coastal erosion, increased flooding, heavy rains, and more frequent large wildfires are damaging archaeological resources, historic buildings, and cultural landscapes across the nation. From sea to shining sea, a remarkable number of the places where American history was made are already under threat. The geographic and cultural quilt that tells the American story is fraying at the edges—and even beginning to be pulled apart—by the impacts of climate change.*

While that report focused on “iconic” sites, all kinds of historic buildings and neighborhoods, archaeological sites, Tribal sites and resources, and culturally important landscapes (both designed and natural) throughout the country (collectively, “historic properties”), as well as associated intangible cultural heritage, are at risk from a broad range of potential climate impacts, including sea level rise; extreme weather events; increased wildfires; drought; melting permafrost and erosion; and temperature changes. These impacts are both direct and cumulative, and threaten not only historic properties but also the terrestrial and aquatic flora and fauna associated with historically and culturally important places. The loss of or damage to historic properties from such climate impacts can irrevocably change a community's sense of place and erode people's sense of personal identity and cultural stability.

Among the historic properties affected by climate change are sacred sites, landscapes, and other properties of religious and cultural significance to Indian Tribes and Native Hawaiian organizations (NHOs). These historic properties frequently are inseparable from the natural landscape and reflect a symbiotic relationship between nature and culture that is increasingly threatened by climate change. As described in the 2021 *Status of Tribes and Climate Change Report*, authored by the Status of Tribes and Climate Change Working Group convened by the Institute for Tribal Environmental Professionals:

*Tribes have long faced many challenges in protecting and preserving [Tribal cultural resources], including from the multiplying effects of climate change. From the erosion of ancient burials out of coastal bluffs on the Pacific coast to the disruption of habitats and life cycles for traditional subsistence foods and medicines in the Great Plains and the weathering and loss of ancient*

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*petroglyphs and pictographs in the Southwest, climate change is threatening Tribal cultural resources ranging from tangible archaeological sites to intangible cultural beliefs and values.*

Listening sessions and other outreach efforts with Indian Tribes and NHOs regarding climate impacts have helped to shape this policy statement and underscore the severity of these impacts.

It also is important to acknowledge the often-disproportionate impact of climate change on disadvantaged and underserved communities. These communities generally are limited in their ability to plan for and adapt to climate change, often lacking management and decision-making authority for key resources, and thus may be constrained in addressing impacts on historic properties.

## **ROLE OF THE FEDERAL GOVERNMENT**

The ACHP, an independent federal agency created by the National Historic Preservation Act (NHPA), works to promote the preservation, enhancement, and sustainable use of our nation's diverse historic resources. It is the ACHP's responsibility to "advise the President and Congress on matters relating to historic preservation, recommend measures to coordinate activities of federal, state, and local agencies and private institutions and individuals related to historic preservation, and advise on the dissemination of information pertaining to those activities" (54 U.S.C. § 304102). The ACHP has developed this policy statement in keeping with this mandate.

In accordance with the NHPA, the federal government is to be a national preservation leader, manage and care for historic properties under its control, and foster both nonfederal, governmental, and private preservation activities. Section 110 of the NHPA (54 U.S.C. §§ 306101-306107; 306109-306114) sets out the broad historic preservation responsibilities of federal agencies and is intended to ensure that historic preservation is fully integrated into their ongoing programs. Section 106 of the NHPA (54 U.S.C § 306108) requires federal agencies to consider the effects of projects they carry out, approve, or fund on historic properties. As the ACHP issues the regulations (36 C.F.R. Part 800) that guide federal agencies in completing review of federal projects under Section 106, this policy statement applies to the consideration of climate change issues during Section 106 reviews.

Climate change adds new challenges to fulfilling federal responsibilities under the NHPA and calls for creative approaches. All federal agencies should be considering impacts to historic properties as part of their climate change planning. Progress is being made in this regard, but much more remains to be done. The National Park Service has issued several studies and guidance documents to guide both its own response to climate change and to assist others. Building upon and expanding such federal guidance will be vitally important.

## **INTENDED AUDIENCE**

Given the leadership role of the federal government in addressing both climate impacts and historic preservation, the following policy principles seek to promote informed federal decision making and responsible stewardship of historic properties. The ACHP also has designed this policy statement to assist community groups, nonprofit organizations, and Tribal, state, and local governments (collectively, along with federal agencies, "public-serving institutions") as they seek to address the impacts of climate change on historic properties important to the people they represent.

## POLICY PRINCIPLES

### *Gathering Information*

1. **Public-serving institutions should work collaboratively to assemble information about previously designated or documented historic properties and to identify previously undesignated or undocumented historic properties, with priority on areas with the highest potential for climate impacts.** We cannot protect historic properties if we do not know where and what they are. Climate change effects can be felt anywhere, and thus public-serving institutions should establish the long-term goal of assembling accurate, georeferenced information about historic properties, known and unknown, wherever they are. In the near term, public-serving institutions should prioritize surveying known and unknown historic properties in areas where severe effects to historic properties can be readily anticipated, whether from direct climate threats or expected impacts from climate change adaptation and mitigation solutions. Precedence should be given to areas where there has been little previous survey for historic properties or where an existing survey is outdated. Often, these priority areas include disadvantaged and underserved communities that may previously have received limited attention and that may lack resources to undertake surveys of their own. Flexibility in the design and function of survey projects can help to advance equity goals in identification of historic properties.

Consistent with their missions and authorities, federal agencies should both prioritize the survey and identification of federal historic properties threatened by climate change and—through funding and technical assistance—encourage Tribal, state, local, and nongovernmental survey efforts. Federal agencies are required under Section 110 of the NHPA (54 U.S.C. § 306102) to identify historic properties under their jurisdiction or control; however, additional resources are needed if agencies are to accelerate efforts to identify historic properties as part of climate change planning. In the process of conducting these surveys and documenting Tribal sites and resources, federal agencies should act in accordance with the confidentiality provisions of Section 304 of the NHPA (54 U.S.C. § 307103).

2. **When planning to address climate impacts on historic properties, public-serving institutions should seek out and incorporate adaptation and mitigation strategies grounded in Indigenous Knowledge.** Indian Tribes and NHOs possess a body of observations, oral and written knowledge, innovations, practices, and beliefs developed through interaction and experience with the environment. The expertise embodied by such Indigenous Knowledge and its contemporary use by Indian Tribes and NHOs can be critically important to the development of climate change adaptation and mitigation strategies. It is paramount that Indigenous Knowledge is considered when addressing climate impacts on historic properties of direct concern to Indian Tribes and NHOs. Indigenous Knowledge also can contribute to developing climate-related strategies for other historic properties, for example when Indigenous Knowledge of wildfire management assists in making areas and communities more resilient to wildfire threats.

### *Planning for Climate Change*

3. **Public-serving institutions should consider impacts to historic properties as an integral part of climate-related planning and implementation.** Governments—federal, Tribal, state, and local—and other public-serving institutions are working to prepare for and adjust to both current and projected impacts of climate change. Efforts include climate protective infrastructure projects, such as living shorelines and seawalls; climate resilient infrastructure projects where roads, sewers, waterlines, etc. are built or retrofitted to better resist climate impacts; and efforts to relocate threatened historic buildings out of climate risk-prone areas. To ensure effects to historic properties are not overlooked, thus leading to their destruction or making them more difficult to later address, public-serving institutions must proactively account for historic properties during climate change planning and implementation activities. Doing so not only serves to help protect historic properties but also supports other aspects of public agency missions and community priorities that benefit from the

continued stewardship of historic properties. At the macro level of consideration, expanding and enhancing discussion of historic properties in the periodic National Climate Assessment developed by the U.S. Global Change Research Program would be beneficial.

4. **Public-serving institutions should consider impacts to historic properties as an integral part of disaster preparedness and response.** While some climate change impacts, such as sea level rise, progress gradually, others, such as wildfires and extreme weather events, present immediate natural hazards. Plans for disaster preparedness and disaster response should assess the vulnerability of historic properties, delineate actions to help reduce or avoid disaster impacts on historic properties, and explain how such properties will be treated during post-disaster recovery efforts. Federal disaster assistance programs should encourage and incentivize Tribal, state, and local governments to incorporate such considerations into disaster preparedness and response planning. Historic building relocation should be prioritized in the context of federal or state government buyout programs where at-risk properties are acquired to reduce future disaster losses.
5. **Public-serving institutions serving communities experiencing climate change-related migration, including community-driven relocation of entire communities, should address the impacts of such migration on historic properties in their planning strategies.** Adapting to the changing climate will in some cases mean population shifts into, out of, and within communities, resulting in a number of possible impacts to historic properties. Historic properties in areas experiencing population increases consequently may be threatened by development pressures. Historic properties in risk-prone areas experiencing population decreases may suffer from neglect and displacement of residents with long-standing ties to the area. In extreme situations, entire populations of communities may need to relocate to escape climate-induced impacts, triggering difficult choices regarding the abandonment or possible relocation of historic properties. Considering such migration-based effects during climate adaptation planning is critical to reducing negative effects to historic properties, culture, and community.

### *Climate Change Mitigation*

6. **Public-serving institutions should contribute to decarbonization by promoting reuse of older and historic buildings and by encouraging the thoughtful retrofit of such buildings to improve operational energy efficiency.** About 39 percent of global carbon emissions come from the construction and operation of buildings. This impact can be reduced by reusing existing buildings, thus avoiding the embodied carbon emissions inherent in new construction, including the carbon associated with the manufacturing and transportation of new materials and the removal and disposal of building materials from demolished buildings. Reuse of existing buildings in urban areas also contributes to climate change mitigation by promoting density, helping to combat urban sprawl and its attendant negative environmental impacts. In terms of operational impacts, carbon emissions can be reduced by making existing buildings more energy efficient.

Since approximately 40 percent of America's building stock is at least 50 years old, it is critical that reuse and energy retrofit of older and historic buildings (including enhanced electrification and increased energy efficiency standards) be fundamental priorities. In worst case scenarios, where a historic building will not be retrofitted and demolition cannot be avoided, practices such as deconstruction and reuse of salvageable materials should be employed to reduce the demolition's carbon impact. Federal, Tribal, state, and local governments should lead by example through the management of the older and historic buildings in their real estate portfolios and encourage private sector action through funding and other incentives. As part of portfolio management decision making, consideration should be given to using full life-cycle accounting to value the embodied carbon in historic buildings versus new construction in order to facilitate fact-based decision making. In addition, government standards and programs that promote the rehabilitation of historic properties should be assessed to ensure that they align with climate mitigation and adaptation goals; that they

facilitate a variety of modern uses; and that they encourage implementation of energy efficiency measures as integral to thoughtful preservation of historic buildings.

7. **Development of clean energy projects and climate-friendly transportation infrastructure projects should be expedited through efficient and effective permitting processes and environmental reviews (including Section 106 reviews), while still ensuring full consideration of potential impacts to historic properties.** Reducing climate change will require significant investment in large-scale clean energy projects (such as solar farms, wind farms, hydropower plants, geothermal plants, new and expanded transmission facilities, carbon capture and sequestration projects, and mining of key minerals needed for clean energy technologies) as well as smaller-scale distributed generation projects, such as rooftop solar panels, that generate electricity at or near where it will be used. Climate-friendly transportation infrastructure projects—including rail, bus rapid transit, bicycle infrastructure, and pedestrian infrastructure—also are critical to climate change mitigation since the transportation sector is responsible for more greenhouse gas emissions than any other sector of the American economy.

Environmental reviews and permitting processes for these types of important projects, especially those with minimal and small-scale impacts, should be managed in such a way as to proceed expeditiously. However, potential adverse effects to historic properties must be carefully addressed. Of particular concern, such projects (particularly those with landscape-scale impacts) can threaten sacred sites and other properties of religious and cultural significance to Indian Tribes and NHOs, sometimes striking at the very heart of their cultures. During Section 106 review of clean energy projects and climate-friendly transportation infrastructure projects, federal agencies should explore use of program alternatives to tailor and expedite the review process while at the same time ensuring the consultation process is accessible, meaningful, and transparent to the wide variety of consulting parties and stakeholders, including Indian Tribes and NHOs.

### *Equity*

8. **Public-serving institutions should recognize that historic properties important to disadvantaged and underserved communities may be disproportionately affected by climate change and that such communities often are ill-equipped to undertake needed interventions.** Disadvantaged and underserved communities tend to lack the economic and political capital to plan for and adapt to climate change and may not have direct control over decision-making for community resources. Many such communities also are particularly susceptible to the physical impacts of climate change. For example, low-income residents and people of color disproportionately reside in flood-prone urban areas. Also, disadvantaged groups are more likely to reside in older housing stock that is in greater need of weatherization and energy retrofitting. Such constraints may hinder disadvantaged and underserved communities in trying to make the places they care about—including historic properties—more resilient to climate impacts. Public-serving institutions should recognize and seek to address this problem by helping those affected identify their historic properties, assess their community’s vulnerability, and develop strategies to balance appropriate adaptation and mitigation responses with the need to preserve their community identity and sense of place.
9. **Federal, state, and local government entities that oversee planning, permitting processes, and environmental reviews (including Section 106 reviews) for climate adaptation and climate mitigation projects should consult regarding historic properties with Indian Tribes, NHOs, and disadvantaged and underserved communities, and capacity building options should be explored for supporting their participation in consultation.** The Section 106 process under the NHPA already requires federal agency consultation with Indian Tribes, NHOs, and other consulting parties. Here, the ACHP reiterates that consultation is necessary and important to ensuring climate adaptation and mitigation projects address impacts to historic properties of importance to Indian Tribes, NHOs, and disadvantaged and underserved communities. Soliciting and considering their views should be

done proactively, early in planning, and throughout environmental reviews and permitting processes. During development of adaptation and mitigation strategies, local knowledge (the information held by local communities and individuals) and the Indigenous Knowledge of Indian Tribes and NHOs can be valuable assets to planning.

In some cases, limited resources may constrain the active participation of disadvantaged and underserved communities in consultation. Federal, state, and local government entities should consider options for strategic financial investments or other assistance to help with needed capacity development. The ACHP previously has recommended capacity-building support for consulting parties pursuant to the agency's "Guidance on Assistance to Consulting Parties in the Section 106 Review Process." Since many Indian Tribes have been incorporating consideration of climate change into their environmental reviews and permitting processes for decades, climate-related project planning should seek to adopt or align with existing practices and standards, where feasible.

### *Flexibility*

10. **The federal government should expand and more flexibly apply its guidance on the treatment of historic properties threatened by climate change.** Federal standards significantly influence the rehabilitation of historic properties, public and private alike, because they are often adopted or adapted by state and local governments and referenced in private party actions (such as preservation easements). The federal government should accelerate the development of additional guidance for acceptable treatments of historic buildings, sites, and landscapes facing climate risks. The guidance should extend beyond flooding to the broad range of climate impacts, should incorporate the latest technological innovations and material treatments, and should increase flexibility in retrofitting buildings to be more resilient while preserving their historic character as much as possible. Likewise, the National Flood Insurance Program should be reviewed to explore how the program might further encourage the modification or relocation of historic buildings to enhance their resiliency, and to evaluate the impacts of waivers issued for historic properties upon community and building resiliency, public cost, and economic growth.
11. **Public-serving institutions should develop sensitive and creative solutions to help communities accept and contend with the reality that many historic properties will have to be altered if they are to survive climate change, and many others inevitably will be lost to climate impacts.** Interventions to protect historic properties from climate impacts or reduce such impacts may necessitate changes to the properties or their surroundings that are less than ideal. Such actions, while saving the properties from loss, may result in negative effects. Public-serving institutions should start talking more openly about these issues, should guide communities in how to triage priorities regarding what properties to surrender to climate destruction, and should develop sensitive and sensible strategies to help residents deal with such losses.
12. **Consideration of alternatives during environmental review of climate-related projects, including during Section 106 review, should be approached flexibly to promote development of nimble, innovative, and expeditious ways to protect historic properties.** Section 106 review and other environmental reviews provide structured processes for exploring alternatives to avoid or minimize any adverse impacts of climate adaptation and mitigation projects. Since the evolving climate crisis poses new and complex challenges for the protection of historic properties that need to be addressed on an increasingly accelerated timeline, it is important that consideration of alternatives be rooted in flexibility and creativity.

### *Education*

13. **Public-serving institutions, and especially governments, should train employees regarding climate change impacts on historic properties.** Given the scope and magnitude of the climate change effects that federal, Tribal, state, and local governments must address, it is understandable that



impacts to historic properties may not be prioritized as highly as some other issues. However, it is critical that there be awareness of such impacts and of the importance of addressing them. Raising awareness through proactive training of government staff is essential. Agencies at all levels of government should have opportunities to learn from each other and to share information, strategies, and examples. Notably, it also is important for them to increase their understanding of relevant international approaches to protecting historic properties from, and adapting them to, climate change.

14. **Public-serving institutions should educate the media and the public about climate change impacts on historic properties and what can be done to address them.** The general public needs to be aware of the worldwide climate-related threats to historic properties and the adaptation and mitigation options that might help to address those threats. Consciousness raising efforts are needed. Likewise, there needs to be outreach to explain how environmental review processes, including Section 106 review, provide opportunities for the public to comment on the climate dimensions of projects as they arise. Such educational efforts are important to help ensure the public can effectively advocate for protecting historic properties of importance to them.

### *Collaboration*

15. **Cooperative efforts across agencies, between levels of government, and within communities are critically important.** The impacts of climate change on historic properties are so wide-ranging and potentially severe that collaboration among public-serving institutions, including federal, Tribal, state, and local governments, community groups, and nonprofit organizations, is essential. Likewise, collaboration with those in the environmental, infrastructure, transportation, energy, private, and philanthropic sectors will be necessary for progress. Cooperation and forging of partnerships will enhance implementation of each of the principles discussed above. Federal agencies can take a leadership role in this regard through their own collaborative work and by encouraging such work through funding and technical assistance.

### **GLOSSARY**

- **Adaptation:** Adjustment in natural or human systems to a new or changing environment that exploits beneficial opportunities or moderates negative effects. (*U.S. Global Change Research Program Web Site Glossary*)
- **Climate change-related migration:** Migration that can be attributed largely to the slow-onset impacts of climate change on livelihoods owing to shifts in water availability and crop productivity, or to factors such as sea level rise or storm surge. (*White House Report on the Impact of Climate Change on Migration, 2021*)
- **Community-driven relocation:** Moving a community or portions of a community away from a hazard prone area to a new location with lesser exposure to hazards or their impacts. (*Department of Housing and Urban Development's Climate Resilience Implementation Guide: Community Driven Relocation, 2022*)
- **Historic property:** Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization and that meet the National Register criteria. (*Protection of Historic Properties, 36 CFR Part 800*)
- **Mitigation:** Measures to reduce the amount and speed of future climate change by reducing emissions of heat-trapping gases or removing carbon dioxide from the atmosphere. (*U.S. Global*

*Change Research Program Web Site Glossary*) [To avoid confusion, this policy statement does not employ the term “mitigation” as used in the context of Section 106 review, where it means reducing the severity of a project’s adverse effects to historic properties.]

- **Resiliency/resilient:** A capability to anticipate, prepare for, respond to, and recover from significant multi-hazard threats with minimum damage to social well-being, the economy, and the environment. (*U.S. Global Change Research Program Web Site Glossary*)

*June 16, 2023*

**APPENDIX C: Policy Statement on Burial Sites, Human Remains, and Funerary Objects**



## ADVISORY COUNCIL ON HISTORIC PRESERVATION POLICY STATEMENT ON BURIAL SITES, HUMAN REMAINS, AND FUNERARY OBJECTS

March 1, 2023

**Preamble.** The Advisory Council on Historic Preservation (ACHP) developed this policy statement to establish a set of principles and rules that the ACHP will encourage federal agencies to adopt as they carry out their day-to-day responsibilities under Section 106 of the National Historic Preservation Act (NHPA). This statement also establishes a set of standards and guidelines that federal and state agencies, local entities, Indian Tribes, industry applicants, and other relevant entities should, at a minimum, seek to implement in order to provide burial sites, human remains, and funerary objects the consideration and protection they deserve.

This policy statement is not bound by geography, ethnicity, political or socioeconomic status, or a system of belief and recognizes that the respectful consideration for burial sites, human remains, and funerary objects is a human rights concern shared by all. However, the burial sites, human remains, and funerary objects of certain groups of people, including but not limited to Indian Tribes, Native Hawaiians, enslaved Africans and their descendants, and other Indigenous Peoples, have a higher probability of being unmarked and undocumented and thus more likely to be affected by development projects. As such, this policy statement emphasizes the need for consultation and coordination with those communities, including seeking consensus in decision making and providing deference to their practices, protocols, and preferences, where feasible.

Section 106 requires agencies to consult and seek agreement with consulting parties on measures to avoid, minimize, or mitigate adverse effects to historic properties. Accordingly, and consistent with Section 106, this policy does not recommend a specific outcome from the consultation process. Rather, it focuses on issues and perspectives that federal agencies should consider while carrying out their consultation and decision-making responsibilities. The ACHP will incorporate these principles in its work and encourages federal agencies and other entities to apply the principles in this policy any time there is potential to encounter burial sites, human remains, or funerary objects.

In many cases, burial sites, human remains, and funerary objects are subject to other applicable federal, Tribal, state, or local laws or protocols that may prescribe a specific outcome, such as the Native American Graves Protection and Repatriation Act (NAGPRA). In those scenarios, the federal agency should identify and follow all applicable laws or protocols and implement any prescribed outcomes. NHPA and NAGPRA are separate and distinct laws, with separate and distinct implementing regulations and categories of parties that must be consulted.<sup>1</sup> Compliance with one of these laws does not equate to or fulfill the compliance requirements of the other. Implementation of this policy and its principles does not, in any way, change, modify, or detract from NAGPRA or other applicable laws.

**Authority:** The authority for this policy stems from the ACHP's statutory responsibility to advise on matters relating to historic preservation (which includes the role of Indian Tribes, Tribal Historic

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<sup>1</sup> The ACHP's publication [Consultation with Indian Tribes in the Section 106 Process: The Handbook](#) (2021) and the National Association of Tribal Historic Preservation Officers' publication [Tribal Consultation: Best Practices in Historic Preservation](#) (2005) provide additional guidance.

Preservation Officers [THPOs], and Native Hawaiian organizations [NHOs] in that process), to advise the President and Congress regarding historic preservation matters, and to recommend methods to federal agencies to improve the effectiveness, coordination, and consistency of their historic preservation policies. While the ACHP recognizes that not all burial sites, human remains, and funerary objects may constitute or be associated with historic properties eligible for or listed in the National Register of Historic Places, the consideration and treatment of such places fall within the concerns of the historic preservation community.<sup>2</sup>

This policy statement recognizes the unique legal and political relationship between the federal government and federally recognized Indian Tribes as set forth in the Constitution of the United States, treaties, statutes, and court decisions, and acknowledges that the federal Indian trust responsibility is a legal obligation under which the United States “has charged itself with moral obligations of the highest responsibility and trust” toward Indian Tribes.<sup>3</sup> Part of the ACHP’s trust responsibility is to ensure that the regulations implementing Section 106 incorporate the procedural requirement that federal agencies consult with Indian Tribes and NHOs that attach religious and cultural significance to historic properties that may be affected by undertakings the federal agency proposes to carry out, license, permit, or assist.<sup>4</sup> In general, the trust responsibility establishes fiduciary obligations on the part of federal agencies to Tribes, including a duty to protect Tribal lands and cultural and natural resources for the benefit of Tribes and individual Tribal members.

The ACHP views its trust responsibility as encompassing all aspects of historic resources including intangible values.<sup>5</sup> As part of that trust responsibility, the ACHP offers this policy statement to inform how the Section 106 consultation process should consider burial sites, human remains, and funerary objects.

**Principles.** The care for and consideration of burial sites, human remains, and funerary objects is of significant social and moral consequence in the United States and U.S. territories. When burial sites, human remains, or funerary objects are or have the potential to be encountered during the planning or implementation of a proposed federal undertaking, the following principles should be adhered to:

**Principle 1:** Burial sites, human remains, and funerary objects should be treated with dignity and respect in all circumstances regardless of National Register eligibility or the circumstances of the action. This includes, but is not limited to, all times prior to and during consultation, during field surveys, when handling must occur, in documenting and/or reporting, if treatment actions occur, and in all other forms of interaction.

**Principle 2:** Disturbing or disinterring burial sites, human remains, or funerary objects, when not requested by descendants, associated Indian Tribes or NHOs, or required by applicable law or regulation, should not be pursued unless there are no other alternatives available and only after consultation with descendants or associated communities and fully considered avoidance of impact and preservation in place.

**Principle 3:** Only through consultation, which includes the early and meaningful exchange of information and a concerted effort to reach consensus, can informed decisions be made about the identification, documentation, National Register eligibility, and treatment of burial sites, human remains, and funerary objects.

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<sup>2</sup> 54 U.S.C. §§ 304102 and 304108

<sup>3</sup> *Seminole Nation v. United States*, 316 U.S. 286 (1942)

<sup>4</sup> [“The Advisory Council on Historic Preservation’s Statement on Its Trust Responsibility”](#) (Advisory Council on Historic Preservation, 2004)

<sup>5</sup> [“Policy Statement Regarding the Council’s Relationship with Indian Tribes”](#) (Advisory Council on Historic Preservation, 2000)

**Principle 4:** To the maximum extent possible, decision making should give deference to the treatment requests of descendants or associated communities. Where known, and in accordance with applicable law, cultural practices of the descendants or associated communities should be followed if burial sites, human remains, or funerary objects may be encountered, are inadvertently identified, impacted, or must be disinterred.

**Principle 5:** The Indigenous Knowledge held by an Indian Tribe, NHO, or other Indigenous Peoples is a valid and self-supporting source of information. To the fullest extent possible, deference should be provided to the Indigenous Knowledge and expertise of Indian Tribes, NHOs, and Indigenous Peoples in the identification, documentation, evaluation, assessment, and treatment of their burial sites, human remains, and funerary objects.

**Principle 6:** Burial sites, human remains, and funerary objects are important in and of their own right. They may also constitute or be part of a sacred site and may include or incorporate several possible elements of historic significance including religious and cultural significance. The integrity of burial sites, human remains, and funerary objects is best informed by those who ascribe significance to them.

**Principle 7:** Burial sites, human remains, and funerary objects are frequently associated with cultural practices, sacred sites, Indigenous Knowledge, and other forms of culturally sensitive actions and/or information unique to a people. Maximum effort should be taken to limit the disclosure of confidential or sensitive information through all available mechanisms including, but not limited to, the proper handling and labeling of records, limiting documentation to necessary information, and through the application of existing law.

**Principle 8:** The federal Indian boarding school system directly targeted American Indian, Alaska Native, and Native Hawaiian children in the pursuit of a policy of cultural assimilation that coincided with territorial dispossession. In partnership with the historic preservation community, federal agencies should seek to implement the recommendations identified in the Department of the Interior's *Federal Indian Boarding School Investigative Report* by supporting community-driven identification, documentation, interpretation, protection, preservation, reclamation, and co-management of burial sites, human remains, and funerary objects across that system, including marked and unmarked burial areas, and supporting repatriation where appropriate.

**Principle 9:** The legacies of colonization, including cultural assimilation, forced relocation, and slavery, have led to an uneven awareness of where and why practitioners are likely to encounter burial sites, human remains, and funerary objects across the United States and its territories. The historic preservation community has a key role in expanding public education to support greater awareness of and consideration for the histories and lifeways of Indian Tribes, Native Hawaiians, enslaved Africans and their descendants, and Indigenous Peoples including recognizing and respecting the historical trauma that these groups and individuals may experience.

**Principle 10:** Access to and/or repatriation of burial sites, human remains, and funerary objects should be enabled through fair, transparent, and effective mechanisms developed in conjunction with descendant communities to the fullest extent of the law.

**Principle 11:** Human remains and funerary objects may be relocated or removed from a location by or at the request of descendant communities for a variety of reasons. The continued presence of human remains or funerary objects may not be essential to the ongoing significance and integrity of a site or its relevance to a broad theme in history. The historic significance and integrity of such sites are best determined in consultation with lineal descendants and/or associated communities.

**Principle 12:** Climate change can impact the burial sites, sacred sites, cemeteries, and associated cultural practices significant to Indian Tribes, NHOs, and other groups of people. Climate plans should be developed in consultation and should include mechanisms to support the advanced identification and protection or treatment of these locations.

**Principle 13:** Respectful consideration of burial sites, human remains or funerary objects may require additional assistance from consulting parties to properly identify, document, evaluate for National Register eligibility, and/or conduct treatment actions. If a federal agency requests or relies on an Indian Tribe, NHO, or other party to carry out activities that are the federal agency's responsibility under the NHPA, the Indian Tribe, NHO, or other consulting party should be reimbursed or compensated.<sup>6</sup>

**Implementation of the Policy.** Implementation of this policy statement is the responsibility of the ACHP's leadership and staff; however, the ACHP recognizes that appropriate expertise and experience to ensure effective implementation may also reside in other parties. Accordingly, the ACHP commits to advancing consideration of burial sites, human remains, and funerary objects in the Section 106 process with its preservation partners through the following:

- A. Train ACHP staff regarding the implementation of this policy statement.
- B. Development of informational resources that address the NHPA, Section 106, and the following:
  - i. The Federal Indian Boarding School Initiative
  - ii. The intersection of NAGPRA
  - iii. Acquiring and managing sensitive information
  - iv. Climate change and burial sites, human remains, and funerary objects
  - v. Best practices in the treatment of marked and unmarked burial sites, human remains, and funerary objects.
- C. ACHP staff will seek opportunities to implement the policy principles into Section 106 agreement documents and program alternatives to advance consideration of burial sites, human remains, and funerary objects.
- D. The ACHP will advise federal agencies, Indian Tribes, Tribal and State Historic Preservation Officers, and NHOs in their development of historic preservation protocols for appropriate consideration of burial sites, human remains, and funerary objects.
- E. Encourage federal agencies and other relevant parties to give full and meaningful consideration to burial sites, human remains, and funerary objects consistent with this policy statement.

**Policy Review Period.** The ACHP commits to reviewing this policy statement approximately every five years from the date of its adoption to ensure its continued applicability. The ACHP executive director will seek input regarding the need to update this policy statement through appropriate ACHP committees, including Federal Agency Programs and Native American Affairs. Amendments shall be pursued when the executive director or ACHP members determine that such action is required and/or would significantly improve the policy statement. This policy statement shall be in effect until rescinded by ACHP members.

**Definitions.** The definitions provided below are meant to inform the application of this policy statement. However, terms such as burial site, intact, disturbance, and human remains, among others, often require the input of associated parties to more fully understand how to interpret or apply each term. The

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<sup>6</sup> Consistent with ACHP's [Guidance on Assistance to Consulting Parties in the Section 106 Review Process](#), when the federal agency (or in some cases the applicant) seeks the views and advice of any consulting party in fulfilling its legal obligation to consult with them, the agency or applicant is not required to pay that party for providing its views.

definitions provided below are intended to be inclusive and to advance the preservation and protection of burial sites, human remains, and funerary items, as appropriate.

- **Burial Site:** Any location, whether originally below, on, or above the surface of the earth, where human remains are or have been located.
- **Confidential:** Information that is protected by law, regulation, or federal policy. Preserving authorized restrictions on information access and disclosure, including means for protecting personal privacy and proprietary information
- **Consultation:** The process of seeking, discussing, and considering the views of other participants and, where feasible, seeking agreement with them. A foundational activity in the Section 106 review process.
- **Consulting parties:** Persons or groups the federal agency consults with during the Section 106 process. They may include the State Historic Preservation Officer; Tribal Historic Preservation Officer; Indian Tribes and Native Hawaiian organizations; representatives of local governments; applicants for federal assistance, permits, licenses, and other approvals; and/or any additional consulting parties.<sup>7</sup> Additional consulting parties may include individuals and organizations with a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.<sup>8</sup>
- **Culturally sensitive:** Tangible and intangible property and knowledge which pertains to the distinct values, beliefs, and ways of living for a culture. It often includes property and knowledge that is not intended to be shared outside the community of origin or outside of specific groups within a community.<sup>9</sup>
- **Disturbance:** Disturbance of burial sites that are listed in or eligible for listing in the National Register of Historic Places likely would constitute an adverse effect under Section 106. An adverse effect occurs when "an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, setting, materials, workmanship, feeling, or association".<sup>10</sup> Determination of what constitutes a "disturbance" should be defined in consultation with proper deference provided to the views and opinions of descendant individuals and/or communities.
- **Funerary objects:** Objects that, as part of the death rite or ceremony of a culture, are reasonably believed to be associated with human remains.
- **Historic property:** Any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization and that meet the National Register of Historic Places criteria.<sup>11</sup>
- **Human remains:** The physical remains of a human body including cremains, fragmented human remains, hair, and fluid, among other components. When human remains are believed to be comingled with other material (such as soil or faunal), the entire admixture should be treated as human remains.
- **Indian Tribe:** An Indian Tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act<sup>12</sup>, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.<sup>13</sup>
- **Indigenous Knowledge (IK):** Information provided by an Indian Tribe, Tribal member, Native Hawaiian, or other Indigenous person uniquely reflective of their knowledge, experience, understanding, or observation relating to cultural resources, practices, or actions. Indigenous Knowledge often constitutes sensitive information.

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<sup>7</sup> Based on 36 CFR § 800.2(c)

<sup>8</sup> 36 CFR § 800.2(c)(6)

<sup>9</sup> "[Native American Archival Materials](#)," (First Archivist Circle, 2007)

<sup>10</sup> 36 CFR § 800.5(a)(1)

<sup>11</sup> 36 CFR § 800.16(1)

<sup>12</sup> 43 U.S.C. § 1602

<sup>13</sup> 36 CFR § 800.16(m)



- **Native Hawaiian:** Any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the state of Hawaii.<sup>14</sup>
- **Native Hawaiian organization (NHO):** Any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.<sup>15</sup>
- **Preservation in place:** Taking active steps to avoid disturbing a burial site, human remains, or funerary objects including, to the maximum extent practical, any access, viewsheds, setting, and/or ongoing cultural activity that may be associated with the location.
- **Section 106:** That part of the NHPA which establishes a federal responsibility to take into account the effects of undertakings on historic properties and to provide the ACHP a reasonable opportunity to comment with regard to such action.
- **Sensitive:** Information that may be protected by law, regulation, or federal policy; information that may be identified as sensitive by the sponsoring entity/original source.
- **State Historic Preservation Officer (SHPO):** The official appointed to administer a state's historic preservation program.<sup>16</sup>
- **Tribal Historic Preservation Officer (THPO):** The official appointed or designated to administer the Tribe's historic preservation program.<sup>17</sup>
- **Treatment:** Measures developed and implemented to avoid, minimize, or mitigate adverse effects to historic properties.

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<sup>14</sup> 36 CFR § 800.16(s)(2)

<sup>15</sup> 36 CFR § 800.16(s)(1)

<sup>16</sup> 54 U.S.C. § 302301

<sup>17</sup> 54 U.S.C. § 302702

**APPENDIX D: Advisory Council on Historic Preservation Recent Comments on Legislation**

Hon. Sara C. Bronin  
Chair

Jordan E. Tannenbaum  
Vice Chairman

Reid J. Nelson  
Executive Director



March 28, 2023

The Honorable Kevin McCarthy  
Speaker of the House  
U.S. House of Representatives  
Capitol Building, H-232  
Washington, DC 20515

The Honorable Hakeem S. Jeffries  
House Minority Leader  
U.S. House of Representatives  
Capitol Building, H-204  
Washington, DC 20515

Dear Speaker McCarthy and Minority Leader Jeffries:

As consideration of the Lower Energy Costs Act (H.R. 1) proceeds, the Advisory Council on Historic Preservation (ACHP) would like to provide comments on Section 20214 of the bill, which addresses permitting for accessing federal energy resources from nonfederal surface estate. Under specified circumstances, federal drilling permits would not be required, and subsequent oil, gas, and geothermal exploration and production activity would not be subject to certain environmental reviews, including review under Section 106 of the National Historic Preservation Act (54 U.S.C. §306108) (Section 106). The ACHP is the independent federal agency that is charged with advising the President and Congress on historic preservation matters and oversees the Section 106 review process. In that capacity, the ACHP urges removal of references to Section 106 in Section 20214 of H.R. 1, since administrative options already are available to permit streamlining of Section 106 review.

Section 106 of the NHPA requires federal agencies to consider the effects of projects, carried out by them or subject to their assistance or approval, on historic properties and to provide the ACHP an opportunity to comment on these projects prior to a final decision on them. Because of Section 106, federal agencies must assume responsibility for the consequences of such projects on historic properties and be publicly accountable for their decisions. In the almost six decades since the passage of the National Historic Preservation Act, Congress has usually avoided crafting legislative exemptions to Section 106, since they can cause confusion in the administration of the government-wide Section 106 process and are typically unnecessary. Exemptions to Section 106 review are often problematic, since they may result in project impacts to historic properties not being reviewed and considered adequately, if at all. In the case of Section 20214 of H.R. 1, the oil, gas, and geothermal exploration and production activity could proceed if a state permit is issued, but state permitting processes may or may not consider impacts to historic properties.

Since the regulations that implement Section 106 (36 C.F.R. Part 800) already provide a variety of tools—known as program alternatives—to adapt and streamline the review process to the needs of agency programs, the ACHP has consistently advised against the use of legislative exemptions, and Congress typically has agreed with such advice. Having these tools available simply negates the need for legislative exemptions from Section 106 review. In lieu of a legislative exemption, the ACHP would be happy to explore options with relevant federal agencies regarding how use of program alternatives could streamline Section 106 review for oil, gas, and geothermal exploration and production activity addressed by Section 20214 of H.R. 1. Likewise, the ACHP can assist agencies in integrating review of projects under Section 106 and the National Environmental Policy Act (as recommended in joint guidance published by the

ADVISORY COUNCIL ON HISTORIC PRESERVATION

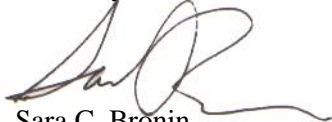
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ACHP and the Council on Environmental Quality), thus even further expediting environmental review of the projects addressed by Section 20214.

Last year's Inflation Reduction Act provided significant multi-year funding for a number of federal agencies—including the Department of the Interior (DOI)—to improve environmental review of infrastructure projects. The fruits of that investment should facilitate the permitting process for the oil, gas, and geothermal exploration and production activity addressed by Section 20214, further suggesting that exemption of such projects from Section 106 review is not needed. Further efficiencies could be achieved through additional funding for State Historic Preservation Officers (SHPOs) and federally recognized Indian tribes, key partners whom agencies must consult in making decisions and reaching conclusions during Section 106 review. The ACHP has encouraged the Federal Permitting Improvement Steering Council and DOI to consider ways in which they might help enhance SHPO and tribal capacity. Congress also has a critical role to play through the level of funding provided to SHPOs and tribes through the Historic Preservation Fund in the FY 2024 budget.

For the reasons discussed above, the ACHP urges removal of references to Section 106 in Section 20214 of H.R. 1. Please feel free to contact me if you have any questions on this advice or if the ACHP can be of any assistance during further consideration of H.R. 1. Our Executive Director Reid Nelson can also be reached at [rmelson@achp.gov](mailto:rmelson@achp.gov). Thank you.

Sincerely,



Sara C. Bronin  
Chair

cc:

House Committee on Natural Resources  
House Committee on Transportation and Infrastructure  
House Committee on Energy and Commerce  
House Committee on Agriculture  
House Committee on the Budget

Hon. Sara C. Bronin  
Chair

Jordan E. Tannenbaum  
Vice Chairman

Reid J. Nelson  
Executive Director



July 31, 2023

The Honorable Bruce Westerman  
Chairman  
House Natural Resources Committee  
U.S. House of Representatives  
1324 Longworth House Office Building  
Washington, DC 20515

The Honorable Raúl Grijalva  
Ranking Member  
House Natural Resources Committee  
U.S. House of Representatives  
1324 Longworth House Office Building  
Washington, DC 20515

The Honorable Tom Tiffany  
Chairman, Subcommittee on Federal Lands  
House Natural Resources Committee  
U.S. House of Representatives  
1324 Longworth House Office Building  
Washington, DC 20515

The Honorable Joe Neguse  
Ranking Member, Subcommittee on Federal Lands  
House Natural Resources Committee  
U.S. House of Representatives  
1324 Longworth House Office Building  
Washington, DC 20515

Dear Chairman Westerman, Ranking Member Grijalva, Subcommittee Chairman Tiffany, and Subcommittee Ranking Member Neguse:

I am writing to express the support of the Advisory Council on Historic Preservation (ACHP) for the Historic Preservation Fund Reauthorization Act (H.R. 3350). Established by the National Historic Preservation Act of 1966, the ACHP is the independent federal agency charged with advising the President and Congress on matters relating to historic preservation. The proposed bill would reauthorize the Historic Preservation Fund (HPF) and increase its annual funding level. Reauthorization of the HPF is an urgent need since the fund's current authorization expires on September 30. Prompt reauthorization is necessary to ensure uninterrupted deposits into the fund and ensure predictability for this critically important source of federal funding for historic preservation.

As you know, the HPF is foundational to the national historic preservation program, providing annual funding to support the work of State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs). Such work forms the backbone of preservation activity in the nation, including conducting surveys of historic properties; preparing nominations to the National Register of Historic Places; assisting federal agencies in reviewing the historic preservation impacts of federal projects in accordance with Section 106 of the National Historic Preservation Act; assisting in federal Historic Tax Credit project reviews; implementing disaster recovery grants; and conducting preservation education and planning.

The HPF also is a major source of funding for competitive preservation grant programs. Through such programs, Congress directs funds to address timely and pressing preservation needs. In FY 2023, HPF grant programs include the following: Underrepresented Communities Grants; Save America's Treasures Grants; African American Civil Rights Grants; Historically Black Colleges and Universities Grants; Paul Bruhn Historic Revitalization Grants; Semiquincentennial Grants; and History of Equal Rights Grants.

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The HPF does not use taxpayer dollars. Annually, \$150 million in annual Outer Continental Shelf revenue from oil and gas leases is deposited into the fund. However, this funding level has not been increased since 1976. Growing workloads for SHPOs and THPOs, expansion of HPF-funded competitive grant programs, an increasing number of designated THPOs, plus inflation have helped to make this funding level inadequate. The proposed bill would increase the amount deposited annually in the HPF from \$150 million to \$250 million. This is in keeping with recent congressional and Administration support for appropriating more than \$150 million annually from the fund. The President's Budget since FY 2022 has called for increased appropriations for the HPF, and Congress appropriated \$204.515 million for FY 2023.

Increasing funding for the HPF would help preserve more of the historic places that Americans care deeply about. There would be more opportunities for competitive grant funding but also for capacity building for SHPOs and THPOs, which is critically important. Now and in coming years, the anticipated influx of federal projects to address critical issues such as energy development and infrastructure permitting, disaster planning and resilience, and climate change adaptation would benefit from SHPO and THPO funding levels sufficient to ensure their effective participation in the planning and review of such projects.

The proposed bill would reauthorize the HPF for 10 years. The ACHP has advocated in the past for permanent authorization for the HPF to enhance the certainty of continued funding support. The ACHP supports the proposed bill as written but hopes that the alternative of permanent authorization can continue to be considered as the reauthorization process moves forward.

Please feel free to contact me if the ACHP can be of any assistance during further consideration of the Historic Preservation Fund Reauthorization Act, or your staff may wish to follow up with ACHP Executive Director Reid Nelson at [rnelson@achp.gov](mailto:rnelson@achp.gov). Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sara C. Bronin', written in a cursive style.

Sara C. Bronin  
Chair

Hon. Sara C. Bronin  
Chair

Jordan E. Tannenbaum  
Vice Chairman

Reid J. Nelson  
Executive Director



August 1, 2023

The Honorable Joe Manchin  
Chairman  
Committee on Energy and Natural Resources  
United States Senate  
Dirksen Senate Office Building, SD-304  
Washington, DC 20510

The Honorable John Barrasso  
Ranking Member  
Committee on Energy and Natural Resources  
United States Senate  
Dirksen Senate Office Building, SD-304  
Washington, DC 20510

Dear Chairman Manchin and Ranking Member Barrasso:

I am writing to express the support of the Advisory Council on Historic Preservation (ACHP) for S. 1404, the Chaco Cultural Heritage Area Protection Act. Established by the National Historic Preservation Act of 1966, the ACHP is the independent federal agency charged with advising the President and Congress on matters relating to historic preservation. The ACHP has a long history of concern for the protection of the unique resources of the Chaco region and is pleased that S. 1404 would promote their long-term preservation. The bill would prevent future leasing and development of oil, gas, and minerals on federal lands within a 10-mile buffer zone around Chaco Culture National Historical Park. It would not affect existing leases or rights and would not apply to minerals owned by private, state, or Tribal entities.

The development of the area's rich deposits of energy resources need not occur at the cost of impairing irreplaceable cultural properties and Tribal ways of life. Chaco is one of only 24 World Heritage Sites in the United States, demonstrating the ancient architectural and engineering achievements of people who inhabited it for more than 400 years. The effects of continued minerals development stand to directly impact Chaco's distinctive monumental buildings, ceremonial urban center, and archaeological and cultural resources. What's more, Chaco and its surroundings are of transcendent spiritual and traditional cultural importance to Tribes of the region and rich with sacred sites of utmost importance to them. Without federal intervention, minerals development is likely to significantly impair the traditions and Tribal way of life that has endured for centuries.

We have come to understand the threats that development can pose to fragile historic properties and Tribal lifeways through the role the ACHP plays in the federal historic preservation review process established by Section 106 of the National Historic Preservation Act (54 USC § 306108). In its capacity as the administrator of the Section 106 regulations, the ACHP has been involved in Section 106 reviews for oil and gas development in the Chaco region for more than two decades.

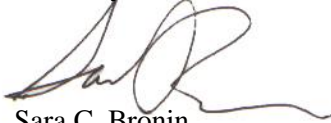
Given our long involvement in this area, the ACHP urges the Committee to support this important legislation. At the same time, the ACHP notes that other actions, such as a comprehensive management plan for lands under the control of both the Bureau of Indian Affairs and the Bureau of Land Management, the protection from development for nonfederal lands within the Chaco landscape, and the engagement of local Tribes in the management of the greater Chaco Culture area (including continued development and implementation of the *Honoring Chaco Initiative*), are desirable to further manage and protect these resources.

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Please feel free to contact me if the ACHP can be of any assistance during further consideration of the Chaco Cultural Heritage Area Protection Act. In addition, your staff may wish to follow up with ACHP Executive Director Reid Nelson at [rnelson@achp.gov](mailto:rnelson@achp.gov). Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sara C. Bronin', with a long horizontal flourish extending to the right.

Sara C. Bronin  
Chair

cc: Subcommittee on Federal Lands  
Subcommittee on Energy and Mineral Resources



Hon. Sara C. Bronin  
Chair

Jordan E. Tannenbaum  
Vice Chairman

Reid J. Nelson  
Executive Director



August 11, 2023

The Honorable Bruce Westerman  
Chairman  
House Natural Resources Committee  
U.S. House of Representatives  
1324 Longworth House Office Building  
Washington, DC 20515

The Honorable Raúl Grijalva  
Ranking Member  
House Natural Resources Committee  
U.S. House of Representatives  
1324 Longworth House Office Building  
Washington, DC 20515

Dear Chairman Westerman and Ranking Member Grijalva:

I am writing to express the support of the Advisory Council on Historic Preservation (ACHP) for Section 4 of the Save Oak Flat From Foreign Mining Act (H.R. 1351). Established by the National Historic Preservation Act of 1966, the ACHP is the independent federal agency charged with advising the President and Congress on matters relating to historic preservation. Enactment of the provisions of Section 4 would avert impending threats to the Chí'chil Bìldagoteel Historic District (also known as Oak Flat), a historic place of profound importance to multiple Indian Tribes because of the role it plays in their religious and cultural traditions.

As you know, the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act (NDAA) for FY 2015 (Public Law 113-291) mandates a land exchange that will result in transfer of a parcel in Tonto National Forest containing Oak Flat to Resolution Copper Mining, LLC. Proposed mining at the site would cause the ground surface to collapse, creating a subsidence crater between 800 and 1,115 feet deep and roughly 1.8 miles across. A substantial portion of Oak Flat would be damaged or destroyed.

Section 4 of the Save Oak Flat From Foreign Mining Act would do the following: 1) repeal Section 3003 of the FY 2015 NDAA, thus stopping the land exchange; and 2) withdraw Oak Flat from future disposal or use for mining or geothermal leasing. At this time, legislative action to stop the land exchange and mine development appears to be the only option for protecting Oak Flat and the hundreds of archaeological sites that also would be affected if mining proceeds.

The ACHP's views on this matter are informed by our participation in the Forest Service's review of the land exchange and mining project pursuant to Section 106 of the National Historic Preservation Act (54 USC § 306108) and the careful consideration of public comments we received during the review. Section 106 requires that federal agencies take into account the effect of undertakings they propose to carry out, license, approve, or fund on historic properties, which they accomplish by following the ACHP's Section 106 implementing regulations, "Protection of Historic Properties" (36 CFR Part 800). Through the Section 106 review process, consultation between federal agencies and stakeholders (including Indian Tribes) typically results in agreement on alternatives that would avoid, minimize, or mitigate adverse effects on historic properties. In the case of Oak Flat, however, no such agreement could be reached given the nature and significance of the historic properties and the magnitude of the impacts. Ultimately, the

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ACHP terminated further consultation and issued formal comments to the Secretary of Agriculture (see attached). These comments provide further detail supporting the need for legislative action to stop the land exchange and protect Oak Flat from future mining or other development.

The historic significance of Oak Flat cannot be overstated and neither can the enormity of the adverse effects that would result to this historic property from its transfer and subsequent use for mining. The ACHP urges the committee to support reversing authorization of the land exchange and withdrawing Oak Flat from future mining activity, as provided for in Section 4 of H.R. 1351. Should you have any questions or would like to discuss this further, please feel free to contact me, or your staff may wish to follow up with ACHP Executive Director Reid Nelson at [rmelson@achp.gov](mailto:rmelson@achp.gov). Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sara C. Bronin', with a long horizontal flourish extending to the right.

Sara C. Bronin  
Chair

Attachment

cc: Subcommittee on Federal Lands  
Subcommittee on Energy and Mineral Resources



March 29, 2021

The Honorable Tom Vilsack  
Secretary of Agriculture  
1400 Independence Avenue SW  
Washington, DC 20250

**Ref:** *Resolution Copper Mining Project and Land Exchange  
Tonto National Forest, Pinal County, Arizona*

Dear Mr. Secretary:

In accordance with Section 106 of the National Historic Preservation Act (54 USC § 306108) (NHPA) and its implementing regulations, “Protection of Historic Properties” (36 CFR Part 800), I am conveying to you the final comments of the Advisory Council on Historic Preservation (ACHP) regarding the U.S. Department of Agriculture (USDA) Forest Service (FS) Tonto National Forest’s (TNF) proposed Resolution Copper Project and Southeast Arizona Land Exchange. On February 11, 2021, the ACHP terminated Section 106 consultation, having determined that further consultation to reach an agreement would be unproductive. I would again like to express the ACHP’s appreciation for USDA’s intervention on March 1, 2021, halting the statutory timeline to transfer the land for the project as this will allow you more time to consider our comments at this critical juncture. In accordance with 36 CFR § 800.7(c), the ACHP is providing these comments, which you must consider and respond to before reaching a final decision on the undertaking.

### **Background**

On December 19, 2014, President Barack Obama signed into law the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291) (NDAA), which directed a land exchange between the U.S. Government (USDA and Department of the Interior) and Resolution Copper Mining, LLC (Resolution Copper) for the purposes of extracting copper deposits known to be present in lands within the TNF. In the exchange, Resolution Copper would receive 2,422 acres of National Forest System (NFS) land known as the Oak Flat Federal Parcel in return for 5,344 acres of private land owned by Resolution Copper. The land exchange would facilitate Resolution Copper’s proposed copper mine by removing the Oak Flat parcel from federal ownership, therefore eliminating the mining restrictions put in place by Public Land Order 1229.

As the agency required by law to transfer the property, the FS is responsible for carrying out the Section 106 review and consultation regarding both the proposed Resolution Copper Project and the Southeast Arizona Land Exchange (jointly, the undertaking). The NDAA did not modify the Section 106 requirements for this undertaking. However, because the NDAA requires specific actions be taken by the FS, the parties to the Section 106 review were unable to consider alternatives that would avoid all adverse effects to historic properties. Further, the NDAA placed additional requirements on the FS and Resolution

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Copper regarding consultation with Indian tribes and impacts on cultural and archaeological resources. This included seeking “*to find mutually acceptable measures to—(i) address the concerns of the affected Indian tribes; and (ii) minimize the adverse effects on the affected Indian tribes resulting from mining and related activities on the Federal land conveyed to Resolution Copper*” and, as part of the agency’s analysis under the National Environmental Policy Act (NEPA), identifying “*measures that may be taken, to the extent practicable, to minimize potential adverse impacts on those resources, if any.*” These NDAA requirements are independent of the standard Section 106 procedural requirements, adding further complexity to the consultation process. The Programmatic Agreement (PA) that was being negotiated under Section 106 referenced the agency’s concurrent compliance with these measures in the NDAA. The NDAA also established a timeline for the land exchange, requiring it to occur no later than 60 days of the FS issuance of the Final Environmental Impact Statement (FEIS).

## **Undertaking**

The undertaking consists of the General Plan of Operations (GPO) to be approved by TNF for an underground copper mine submitted by Resolution Copper on land currently administered by the TNF, the Arizona State Land Department (ASLD), and private landowners, and the exchange of lands between Resolution Copper and the United States as directed by the NDAA. The GPO to conduct mining operations includes the mine site, associated infrastructure, a transportation corridor, and a tailings storage facility. Resolution Copper proposes to conduct mining using a technique known as panel caving, which uses a network of shafts and tunnels constructed below the ore body located within the Oak Flat Parcel. While the proposed mining would occur underground, the removal of the ore would cause the ground surface to collapse, creating a subsidence area at the Oak Flat Federal Parcel that would result in a crater between 800 and 1,115 feet deep and roughly 1.8 miles across. Additionally, several alternatives are being considered for the permanent disposal and management of the mine tailings, including an alternative on Bureau of Land Management (BLM) administered lands. The undertaking spans the life of the mine, which is envisioned to occur in three distinct phases: construction, operations, and reclamation, spanning roughly 56 years. At the end of operations, facilities would be closed and reclaimed in compliance with permit conditions.

## **Historic Properties and Effects**

The TNF made an extensive effort to identify historic properties, including the development of a comprehensive area of potential effects (APE) to guide identification efforts. The APE divides the effects of the undertaking to three zones—physical effects within the project footprint and Oak Flat Federal Parcel; auditory effects within two miles of the project footprint and Oak Flat Federal Parcel; and visual/atmospheric/socioeconomic effects within six miles of the project footprint, including the historic districts of Globe and Miami, Arizona. To support identification efforts within the APE, the TNF, with the assistance of Resolution Copper, also implemented a tribal monitoring program that utilized inventories/survey efforts conducted with tribal monitors and tribal field visits to identify historic properties of traditional religious and cultural importance within the APE. These efforts were used to expand and augment existing and ongoing identification efforts including past surveys and ethnographic studies conducted by and in consultation with Indian tribes.

Early on in the consultation process, the TNF determined that the undertaking would result in adverse effects to numerous identified historic properties, including the National Register of Historic Places-listed Chí’chil Bıldagoteel Historic District, known also as Oak Flat. The TNF identified Oak Flat as a historic property of religious and cultural significance to Indian tribes and a Traditional Cultural Property (TCP) significant to multiple Apache tribes. The TNF previously recognized the site as having physical and spiritual integrity essential to the continuation of traditional Western Apache cultural practices, particularly to the San Carlos Apache Tribe. On March 4, 2016, the National Park Service listed Oak Flat

on the National Register as a historic district and TCP under Criteria A, B, C, and D with particular emphasis on its association with Apache oral history and as a venue for ongoing Apache participation in traditional social activities. As part of the undertaking, Chi'chil Bildagoteel Historic District would be directly and permanently damaged by the subsidence area proposed for the Oak Flat transfer parcel.

At the time of the release of the final draft PA, the TNF had identified 644 archaeological sites in the portions of the APE that included the Oak Flat Federal Parcel, GPO project areas, and the proposed tailings locations. Of these, 506 sites were determined eligible for the National Register, 22 required further evaluation, one was a natural gas line exempt from further Section 106 review, and 116 sites were determined not eligible for the National Register. Forty-two of these eligible sites would leave federal ownership, along with the Chi'chil Bildagoteel Historic District, as part of the land exchange and would be permanently damaged by proposed mining operations. Another 377 of these sites would be affected by the TNF's proposed preferred alternative for the processing and disposal of mine tailings, which would occur on state and private lands.

In addition to these identified historic properties and known adverse effects, the TNF also identified several other properties of traditional religious and cultural importance within the APE that would require further evaluation. The TNF determined that further identification efforts would be required for various portions of the APE, specifically those zones related to auditory, visual, atmospheric, and socioeconomic effects. To address this, the TNF proposed to phase the identification of additional historic properties. The TNF had further determined that the undertaking would result in numerous potential auditory, visual, and atmospheric effects to known and yet to be identified historic properties.

### **Section 106 Process**

The ACHP recognizes that this consultation posed unique challenges for all parties involved. The constraints placed on the consultative process due to the legislated nature of a substantial portion of the undertaking juxtaposed with the magnitude of the adverse effects to historic properties severely restricted the TNF's ability to consider alternatives to avoid or minimize those effects. Further, attempting to resolve adverse effects to historic properties as immensely important as Oak Flat, a property of religious and cultural significance to Indian tribes, in addition to potentially affecting more than 500 other sites eligible for listing on the National Register, made reaching agreement on appropriate steps to resolve these effects very difficult.

Based on the documentation provided, the TNF appears to have initiated consultation with Indian tribes for the undertaking in 2015 following passage of the NDAA, though these efforts were not consistently characterized as Section 106 consultation. Records provided to the ACHP also suggest that as early as 2003, the TNF had carried out preliminary discussions with affected Indian tribes concerning the potential land exchange, exploratory activities by Resolution Copper, and the development of historic property inventories and ethnographic surveys. It is not clear whether any of these interactions were characterized as Section 106 consultation. On March 31, 2017, the TNF initiated consultation with the Arizona State Historic Preservation Officer (SHPO). On December 7, 2017, the TNF notified the ACHP of its finding of adverse effect for this undertaking, and on December 21, 2017, the ACHP informed the TNF that it would participate in the consultation.

Consultation has included the SHPO; the Fort McDowell Yavapai Nation, the Gila River Indian Community, the Hopi Tribe, the Mescalero Apache Tribe, the Pueblo of Zuni, the Salt River Pima-Maricopa Indian Community, the San Carlos Apache Tribe, the Tonto Apache Tribe, the White Mountain Apache Tribe, the Yavapai-Apache Nation, the Yavapai-Prescott Indian Tribe, the Ak-Chin Indian Community, the Fort Sill Apache Tribe, the Pascua Yaqui Tribe, and the Tohono O'odham Nation; and other consulting parties, including Archaeology Southwest, Arizona Mining Reform Coalition, Boyce

Thompson Arboretum, Inter Tribal Association of Arizona and others, and resulted in the development of a draft PA that would provide a mechanism for further identification and evaluation of historic properties as the undertaking was implemented, as well as a broad array of measures to attempt to resolve identified adverse effects. Because of the size and complexity of the undertaking and the scale of the adverse effects, the PA included a suite of proposed mitigation measures. These measures included treatment plans for data recovery efforts for the numerous historic properties that would be physically destroyed or damaged as part of the undertaking, including a specific plan developed solely for the Oak Flat Parcel. The agreement also featured a variety of off-site measures in the form of mitigation funds that would support tribal initiatives, including cultural resources, education, and youth programs; archaeological database funding; and development funds for historic properties in the local community. While initially these measures were vaguely defined, the TNF, through consultation and clarifying communication with Resolution Copper, refined and clarified them in the draft PA.

On July 9, 2020, Terry Rambler, Chairman of the San Carlos Apache Tribe, requested that the ACHP support the prompt completion of the PA and that it review and report on whether the TNF has complied with Section 106 regarding this consultation. On July 21, 2020, the ACHP responded to Chairman Rambler with its recommendations on moving the consultation process forward as well as committing to review and provide an advisory opinion on the TNF's compliance with Section 106 for this project pursuant to 36 CFR § 800.9(a). The ACHP undertook this assessment following its review of the revised PA in September 2020 and outreach to the San Carlos Apache Tribe, the TNF staff, and other consulting parties. Based upon the ACHP's ongoing participation in consultation, the ACHP was able to utilize many existing records and ongoing correspondence. On December 15, 2020, the ACHP provided its observations and recommendations to the TNF on how to continue moving the Section 106 consultation process forward. The letter recommended TNF provide consulting parties with a summary of responses to comments received on the latest version of the PA, respond to the ACHP's recommendations on improving transparency in communication and consultation, and consider hosting a final meeting of consulting parties to discuss how the TNF responded to comments and its intent to finalize and execute the PA. Additionally, the ACHP provided two recommendations to the TNF that were focused on broader, long-term efforts to improve Section 106 consultation within the Southwestern Region.

On December 23, 2020, the TNF responded to the ACHP's letter, and on December 29 released the final version of the PA, indicating its intent to move forward with its execution. On January 8, 2021, to inform the ACHP's decision on whether to sign the proposed PA, the ACHP again requested the TNF provide clarification on several items, including its coordination of the Section 106 review with the development of the FEIS under NEPA. On January 15, 2021, the TNF released the FEIS, which included an unsigned version of the PA. The issuance of the FEIS triggered the statutory timeline in the NDAA, requiring the TNF to execute the land transfer within 60 days.

On January 26, 2021, the TNF responded to the ACHP's January 8 letter. The TNF's response included correspondence from the Regional Forester regarding the ACHP's long-term recommendations. The same day, the TNF provided a copy of the final PA for the ACHP's signature. All other Signatories (the TNF and SHPO) and Invited Signatories (the BLM, U.S. Army Corps of Engineers, Resolution Copper, Salt River Project, Arizona State Land Department, and Arizona State Museum) had signed the agreement. On February 11, 2021, the ACHP terminated consultation pursuant to 36 CFR § 800.7(a)(4) and notified Acting TNF Supervisor Tom Torres accordingly. On March 1, 2021, the FS announced that USDA had directed the TNF to withdraw the Notice of Availability and rescind the FEIS and draft Record of Decision for the Resolution Copper Mining Project and Land Exchange. Following discussions with FS staff, the ACHP learned that the decision to withdraw the FEIS halted the statutory timeline to transfer the land for the project following the publication of the FEIS.

Execution and implementation of the proposed PA for this undertaking would have been one way for the TNF to fulfill its Section 106 responsibilities for this undertaking. Because the ACHP terminated consultation in this case, however, it is now your responsibility, as the head of the agency, to consider and respond to these advisory comments in reaching your decision on the undertaking in order to complete the Section 106 process. In accordance with the statute, you may not delegate this responsibility. 54 U.S.C. § 306114.

To inform the development of these comments to you, the ACHP solicited input from consulting parties and the public. The ACHP received more than 500 comments regarding the proposed undertaking and its potential effects to historic properties from consulting parties and members of the public. The ACHP submits the following findings and recommendations to you for your consideration in making your final decision on this undertaking.

### **ACHP Findings**

*Chi'chil Bildagoteel (Oak Flat) is a historic property of profound importance to multiple Indian tribes and plays a significant role in their religious and cultural traditions, and the proposed measures in the PA are not sufficient considering the severity of adverse effects to this property and numerous other historic properties.*

The historic significance of Oak Flat cannot be overstated and neither can the enormity of the adverse effects that would result to this property from the undertaking. Oak Flat would be directly and permanently damaged with a substantial portion of the property being destroyed through subsidence. In addition, hundreds of other historic properties would be destroyed or otherwise adversely affected by the undertaking. The ACHP recognizes the intent of the PA's mitigation measures to account for the loss of these historic sites. While the ACHP routinely advises agencies to seek creative ways to mitigate adverse effects where possible, it finds the mitigation measures within the PA to be wholly inadequate in light of the magnitude of adverse effects to this and other historic properties of such significance to numerous Indian tribes. The importance of attempting to develop adequate measures to resolve adverse effects in this case is further underscored by Section 110(a) of the NHPA, which requires the agency to give special consideration to preserving the historic and cultural values of the nationally significant Oak Flat (54 U.S.C. § 306102(b)(2)).

*The Tonto National Forest was frequently challenged to effectively and consistently consult Indian tribes on the resolution of adverse effects and in the development of the PA.*

Multiple Indian tribes notified the ACHP of their concerns that the TNF's consultation with them was inadequate, and the delay in TNF addressing these concerns diminished the effectiveness of its early efforts to consult. The TNF struggled to manage its consultation efforts with Indian tribes and to ensure that consultation informed the overall Section 106 review for this undertaking. It is clear that the TNF intended to carry out tribal consultation, including government-to-government consultation, and solicit tribal input. However, the TNF's records show the undertaking was not fully defined for Indian tribes at the outset of the Section 106 review process and that the agency's early outreach efforts to tribes often lacked transparency and consistency. The ACHP recognizes the TNF undertook efforts later in the process that worked to improve consultation, such as the development of the tribal consultation plan.

*The Tonto National Forest had difficulty managing the pace of consultation and coordinating the Section 106 process with other federal environmental reviews.*

As previously observed in the ACHP's assessment provided to the TNF on December 15, 2020, pursuant to 36 CFR § 800.9(a), the TNF was inconsistent in managing the pace of consultation and coordinating

the Section 106 process with other federal environmental reviews and the concurrent requirements of the NDAA. The TNF's communication on the purpose of, and audience for, consultation meetings was often irregular and erratic. There was a general lack of clarity delineating the Section 106 consultation from the NEPA review process and public outreach. This confusion was further exacerbated by the TNF's efforts to meet the requirements of the NDAA regarding consultation with Indian tribes and measures to minimize impacts on cultural and archaeological resources. The ACHP recognized the improvements made by TNF in the Section 106 consultation process but also noted that valuable time was lost due to miscommunications during earlier consultation. Lastly, the publication of the FEIS, which started the statutory 60-day time limit for the land transfer, challenged the TNF's ability to conclude the Section 106 review for this undertaking within the stated timelines.

*Due to its controversial nature and the high level of public interest in this undertaking and its effects, the Tonto National Forest would have benefitted from expertise within the Region and Washington Office to assist it in managing this consultation.*

Throughout the Section 106 review, the ACHP highlighted the challenges faced by the TNF during this consultation, including the inability of the TNF staff to commit to certain measures and persistent confusion regarding the timeline for completing the Section 106 process. The ACHP recognizes the concerted efforts of the TNF's Heritage, Tribal Relations, and Environmental Program staff as they sought to manage and maintain the consultation process along with the other concurrent reviews. However, the scope and magnitude of this undertaking exhibited the clear need for stronger agency support to the TNF to respond to consulting party questions and concerns, specifically those of Indian tribes. Efforts such as the dedicated Heritage staff assignment from the Region would have been more beneficial to this consultation had it occurred sooner and would have been strengthened by parallel assignments across the Tribal Relations and NEPA programs as well. While recognizing consultation was centered at the TNF, the ACHP encouraged more direct avenues for the TNF to seek support and resources from the Region, including such things as facilitation support for consultation meetings. The need for this support was further emphasized by the complex role Regional and Washington leadership appear to have had in the management of the FEIS schedule (which due to its implications on the timing of the land exchange further complicated and constrained the management of the Section 106 process). The ACHP believes more outwardly visible and transparent communication on the role the FS leadership had in this decision process and the constraints placed on the TNF would have aided the TNF in communicating with consulting parties on its decision process.

### **Undertaking Recommendations**

*USDA should work with the Administration and Congress to take immediate steps to amend or repeal the legislation directing the transfer or otherwise prevent it from happening as proposed.*

The ACHP was encouraged by the USDA's decision on March 1, 2021, to direct the TNF to withdraw the Notice of Availability and rescind the FEIS and draft Record of Decision (ROD) for the project. It is also encouraged by the FS' commitment to consult Indian tribes and other stakeholders further on the effects of this undertaking on, among other resources, historic properties. The ACHP urges the FS to explore directly with the Administration and Congress, and in consultation with other stakeholders, any and all opportunities to amend or repeal the exchange portion of the NDAA. It is evident that legislative action in this situation to stop this exchange would provide the most complete and appropriate protection of Oak Flat and the hundreds of other historic properties that stand to be affected by the transfer and subsequent mining activities.



*USDA should use further discussions with Indian tribes and other stakeholders to develop and evaluate alternatives and further modifications to the undertaking that might avoid adverse effects while also pursuing additional steps to modify or prevent the land transfer.*

As part of its efforts to conduct additional consultation with Indian tribes and evaluate its required environmental, cultural, and archaeological analyses for the project, the TNF, with the support of FS leadership, should take further steps in discussions with all stakeholders to develop and reevaluate any alternatives or modifications to the undertaking that could avoid or minimize adverse effects to historic properties. Such efforts should include a reassessment of alternative and more sustainable mining techniques in an effort to prevent subsidence at Oak Flat, including, if feasible, those techniques that were previously considered and rejected by the FS and Resolution Copper. Further, USDA should employ all measures at its disposal to incentivize the consideration of such alternatives.

*If USDA chooses to proceed with the undertaking as described, the Forest Service should commit to carrying out mitigation measures in the proposed PA, in consultation with the consulting parties.*

If USDA decides to proceed with the undertaking as described, the ACHP recommends the FS commit to implementing the terms of the PA, including but not limited to the phased identification process, the historic property treatment plans, and the listed mitigation measures in cooperation with Resolution Copper and the other invited signatories and in consultation with the consulting parties. These terms could be incorporated in to the final ROD and/or as part of other agreements made with Resolution Copper and other signatories. As stated earlier, the NDAA includes independent requirements that the FS must meet (e.g., to address the concerns of Indian tribes and minimize the adverse effects on the affected Indian tribes resulting from mining and related activities) that extend beyond and in addition to the procedural requirements of Section 106. The ACHP encourages USDA to exercise its authority to the fullest extent to fulfill these requirements alongside the proposed measures in the PA. Furthermore, the ACHP recommends the TNF, Resolution Copper, Indian tribes, and other consulting parties continue to consult over the life of the project to continue to evaluate and seek ways that might minimize adverse effects to historic properties as mining progresses both through the utilization of new mining techniques and in response to mine production. Given the FS' renewed commitment to consultation with Indian tribes, the ACHP recommends their efforts occur at a government-to-government level, with senior FS leadership, utilizing the full breadth of the FS' resources to support such consultation.

### **General Recommendations**

*The Forest Service should evaluate how the Regional and Washington Offices can provide more timely guidance and support for controversial or challenging Section 106 consultations.*

USDA should allocate resources within the FS for identifying and supporting complex Section 106 reviews early in the planning process that, while maintaining the individual Forest Unit's autonomy, could strengthen the agency's ability to carry out the consultation process. This is particularly salient given the frequent pressure placed on the FS Heritage Programs for large scale and complex undertakings. Such resources could include providing project-specific consultation support, including but not limited to additional staffing, facilitation support, and funding for travel to assist consulting party attendance at meetings. The identification of such consultations earlier on and the engagement of Regional and Washington Offices would allow these offices to convey best practices and lessons learned from other similar consultations and even consider detailing more experienced Heritage Staff to assist in certain consultations. The FS should leverage its existing network of heritage professionals to create a mechanism to direct knowledge, support, and resources to individual Forest Units when a controversial or challenging Section 106 consultation is identified.

*The Forest Service should work to identify and implement opportunities to better coordinate environmental and historic preservation reviews for large-scale projects.*

USDA and the FS should work with stakeholders to evaluate the existing guidance on consultation on mining activities in NFS lands, and to identify internal and Administration-driven improvements that might be pursued, particularly in how the various environmental reviews are managed as a part of this process. This consultation was emblematic of many of the challenges and constraints affecting previous and ongoing consultations regarding mining-related undertakings. The FS should seek perspectives from a broad array of stakeholders, including SHPOs, Tribal Historic Preservation Offices, Indian tribes, industry representatives, and other interested parties. These discussions should aim to assist the FS in developing a more collaborative approach, in keeping with the FS' policy regarding Heritage Management, which seeks to “[f]ully integrate opportunities for preservation, protection, and utilization of cultural resources into land use planning and decisions,” by identifying and fostering the implementation of more sustainable mining activities on NFS lands (Forest Service Manual- Chapter 2360 Heritage Program Management).

*The Forest Service should pursue initiatives to strengthen early coordination with Indian tribes in this Region regarding proposed mining activities.*

USDA should continue to leverage and expand upon the FS initiatives such as the “Tribal Cultural Sensitivity Training” under development in the Southern Region and the annual “To Bridge a Gap” conference that includes participants from the Southern and Eastern Regions. These and other such efforts represent innovative measures to develop and improve relationships with Indian tribes, and through these relationships, work to improve the Section 106 consultation process. The ACHP’s previous recommendation to consider establishing an advisory board comprised of representatives from Indian tribes with an interest in the protection of historic properties of religious and cultural significance on FS-managed lands was born out of the benefits the ACHP has seen from Region-wide initiatives by the FS to engage in long-term consultation relationships with Indian tribes. The ACHP recommends the FS leverage the extensive resources available within the Offices of Tribal Relations and Heritage Resources to implement expanded consultation with Indian tribes.

## **Conclusion**

Given the potential magnitude of impacts to highly significant historic properties, the ACHP urges USDA to carefully consider and carry out these recommendations. Section 800.7(c)(4) of the Section 106 regulations requires you, as the head of the agency, to take these comments into account in reaching a final decision on the undertaking. As mentioned above, per Section 110(l) of the NHPA (54 USC § 306114), you may not delegate this responsibility. A summary of your decision regarding the undertaking that contains the rationale for the decision and evidence of consideration of the ACHP’s comments must be provided to the ACHP before making a final decision on the undertaking and shared with the Section 106 consulting parties and the public.

As the USDA and FS continue to consult on the potential effects of the proposed undertaking, the ACHP may provide additional advisory comments or technical assistance based on its responsibilities pursuant to the NHPA. If, however, the proposed undertaking and the potential effects to historic properties change, TNF should reinstate the Section 106 review process with all consulting parties including the ACHP, to take into account the potential effects of the modified undertaking.

As the heads of federal agencies, we have a responsibility to exercise leadership in the preservation of the nation’s irreplaceable cultural heritage. In that spirit, I hope you will see these recommendations as a wise

path forward.

I look forward to your response.

Sincerely,

A handwritten signature in blue ink, appearing to read "Rick Gonzalez", with a stylized flourish extending to the right.

Rick Gonzalez, AIA  
Vice Chairman

Hon. Sara C. Bronin  
Chair

Jordan E. Tannenbaum  
Vice Chairman

Reid J. Nelson  
Executive Director



August 14, 2023

The Honorable Jason T. Smith  
Chairman, Committee on Ways and Means  
U.S. House of Representatives  
Longworth House Office Building  
Washington, DC 20515

The Honorable Richard E. Neal  
Ranking Member, Committee on Ways and Means  
U.S. House of Representatives  
Longworth House Office Building  
Washington, DC 20515

Dear Chairman Smith and Ranking Member Neal:

I am writing to express the support of the Advisory Council on Historic Preservation for the Historic Tax Credit Growth and Opportunity (HTC-GO) Act (H.R. 1785). Established by the National Historic Preservation Act of 1966, the Advisory Council on Historic Preservation is the independent federal agency charged with advising the President and Congress on matters relating to historic preservation. The existing Historic Tax Credit is the single most important federal incentive for the rehabilitation of historic buildings. The provisions of the HTC-GO Act would make this tax credit even more effective, further incentivizing the rehabilitation of historic buildings throughout America.

As you know, the Historic Tax Credit supports projects that rehabilitate income-producing historic buildings—commercial and industrial buildings, hotels, apartment buildings, residential rental properties, and other key contributors to our economy and our communities—while ensuring that their historic character is preserved. The HTC-GO Act would make the tax credit more impactful in coming years, particularly in situations where it can be most needed. The bill would raise the existing credit temporarily through 2028; encourage small projects by making them eligible for a permanently increased credit; make it easier to pair the Historic Tax Credit with the Low-Income Housing Tax Credit; increase the number of buildings eligible to use the credit; and make the credit easier to use by nonprofits.

Enhancing the existing Historic Tax Credit is important not merely to continue the credit's impressive decades-long track record for catalyzing community redevelopment and preserving historic buildings. Rehabilitation of historic properties can assist in tackling key issues facing the nation, including climate change and the housing shortage. Reuse of older and historic buildings creates fewer carbon emissions than new construction, and the thoughtful retrofit of such buildings makes them more resilient to climate impacts and more energy efficient. Likewise, older and historic residential buildings are important sources of naturally occurring affordable housing, and nonresidential historic buildings can be adapted for use as housing. An updated Historic Tax Credit would help to encourage more rehabilitation projects addressing these challenges.

Illustrating how the credit can be used to facilitate affordable housing development, I draw your attention to the 2023 winner of the [ACHP/HUD Secretary's Award for Excellence in Historic Preservation](#), the Commodore Place Apartments in Cleveland, Ohio. This \$40 million project rehabilitated a 100-year-old

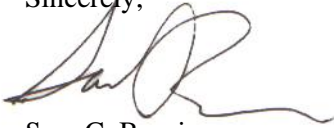
ADVISORY COUNCIL ON HISTORIC PRESERVATION

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former hotel and apartment building to include 144 units of affordable housing, and the Historic Tax Credit was a critical component of the financing. The project is a stellar example of the credit being used to address the housing crisis and rejuvenate neighborhoods.

Please feel free to contact me if the Advisory Council on Historic Preservation can be of any assistance during further consideration of the HTC-GO Act. In addition, your staff may wish to follow up with Executive Director Reid Nelson at [rnelson@achp.gov](mailto:rnelson@achp.gov). Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sara C. Bronin', with a long, sweeping horizontal line extending to the right.

Sara C. Bronin  
Chair