

Elk Valley
RANCHERIA
Crescent City, CA



2332 Howland Hill Road
Crescent City, CA 95531

Phone: 707.464.4680
Fax: 707.465.2638

November 30, 2016

VIA ELECTRONIC SUBMISSION

consultation@bia.gov

Office of the Assistant Secretary – Indian Affairs
Attn: Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW
MS 3071
Washington, DC 20240

Re: Federal Decision-making on Infrastructure Projects; Tribal Consultation

To Whom It May Concern:

Pursuant to your joint letter dated September 23, 2016, the Elk Valley Rancheria, California, a federally recognized Indian tribe (the “Tribe”), provides its comments regarding the two questions in the letter. In the letter, and based in part on the on-going Dakota Access Pipeline matter, the federal government recognized the need for a broad, nationwide dialogue on potential reforms, including: (a) changing existing regulations and procedures to better ensure meaningful tribal input and protection; and/or (b) proposing a new statutory framework to promote those goals.

In the related “Framing Paper”, the government identified a goal to promote meaningful government-to-government engagement within the existing statutory framework and to identify necessary changes to the existing framework.

The Tribe has had the opportunity to work with several federal agencies regarding a range of matters that bear on the government’s inquiries. While some of those experiences are not directly related to infrastructure or infrastructure-related projects, many are directly related to the government’s inquiries.

The Tribe generally understands that the National Historic Preservation Act (“NHPA”) requires agencies to provide the same procedural protections to archeological sites as it does for historic sites, meaning federal agencies will review undertakings that could have adverse effects on archeological sites (including those to which tribes attach religious and cultural significance). Advisory Council on Historic Preservation, Section 106 Archeology Guidance § II(A) (2009). More importantly, the regulations implementing NHPA specify that any such review shall

comply with the provisions of the Native American Graves Protection and Repatriation Act (“NAGPRA”)(requires consultation with tribes regarding the treatment and disposition of human remains and sacred objects), the American Indian Religious Freedom Act (“AIRFA”)(providing tribes with access to sacred sites and objects, and allows tribes to conduct traditional rites), and the Archeological Resources Protection Act (“ARPA”)(requiring consultation before the government can permit archaeological excavation on tribal lands). 36 CFR § 800.2(a)(4); 36 CFR § 800.3(b).

In addition to these statutes, federal agencies are bound by Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” The Executive Order was issued in 2000 “in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.” In 2009, President Obama directed federal agencies to develop a plan of action to implement the directives of EO 13175.

NHPA SECTION 106 TRIBAL CONSULTATIONS

Section 106 of the NHPA requires federal agencies to consider the effects of their “undertakings” on historic properties, which includes property of cultural or religious significance to Indian tribes and related consultation. Under the NHPA, an undertaking is broadly defined as any project, activity, or program that requires a federal permit.

For example, for oil pipelines this means that only certain portions of the project are subject to consultation when there is a federal nexus, such as a federal permit requirement, exempting the majority of construction activities occurring on private lands from NHPA oversight. This differs from interstate natural gas pipelines, which are wholly overseen and permitted by the Federal Energy Regulatory Commission. Thus, while the entire length of a gas pipeline would be subject to the NHPA, an oil pipeline is only subject to the Section 106 process for those activities that require a federal action.

Section 106 tribal consultation requirements are defined by regulations promulgated by the Advisory Council on Historic Protection (“ACHP”), which oversees the implementation of the NHPA. In general, under the ACHP’s regulations, tribes must have a reasonable opportunity to identify concerns about affected properties and to advise on the identification and evaluation of these properties vis-à-vis the undertaking. To accomplish this, the permitting agency must determine the appropriate State Historic Preservation Office (“SHPO”) and Tribal Historic Preservation Office (“THPO”) on tribal lands, initiate consultation with the appropriate SHPO and THPO officers, and identify potential historic properties (including their historic significance) within the area of potential effects for the undertaking.

The permitting agency’s evaluation must consider whether the undertaking will indirectly cause alterations in the character or use of historic properties if any such properties exist. Ultimately the permitting agency will find and document that: (a) there are no historic properties present; (b) there are historic properties present but the undertaking will have no effect upon them; or (c) there are historic properties that likely will be adversely effected and the agency may engage in additional consultation or impose modification or conditions on the project to ensure

no remaining adverse effects. After the permitting agency's finding, the SHPO/THPO has thirty days to object, otherwise the NHPA consultation process is deemed complete.

Thus, the NHPA, like NEPA, is a procedural statute, not a substantive one. This means that it does not require any particular outcome. While Section 106 requires consultation, it does not mandate that the permitting agency take any particular steps to preserve or protect an identified interest. Nor does Section 106 require tribal involvement in the planning or siting of infrastructure projects – only a consideration of identified tribal interests in the final approvals.

This complexity results in tribal discomfort with the potential effect of projects on the cultural resources of the Tribe (especially in light of the Tribe's historical relationship with land surrounding the Tribe's reservation). Federal agencies contend that they comply with the minimal consulting requirements but the mere consultation is often ineffective in thwarting the damage to cultural resources on non-federal lands.

The Tribe understands that all parties involved in a project, including the Tribe, want predictability. However, federal agency and project proponent definitions of matters of cultural significance for the Tribe are often times different. This situation is worsened by overlapping jurisdiction of various state and federal agencies and project proponents' desire to expedite their project(s).

One reason is that there is ambiguity with respect to which actions "trigger" consultation. Federal agencies often recognize when a project will have direct impacts on a tribe, e.g., the ACOE builds a dam that will flood tribal land. However, federal agencies often fail to recognize (or ignore) indirect impacts on tribes, e.g., the dam's impacts of water temperature and the impacts on salmon or cultural traditions. Because of the failure to recognize indirect impacts and the project proponent's need for expediency, federal agencies sometimes choose expediency over substantive consultation and consideration of tribal interests. This type of situation is complicated by the fact that there are no uniform standards for substantive consultation with tribes.

Commonly, "consultation" by federal agencies consists of invitations to submit comments on a proposed agency action within a specified timeframe without regard to whether the agency's notice was timely or properly delivered to a tribe. Such a federal process is at odds with what most people would consider effective consultation. The most common federal process does not allow for thorough discussion with tribes and reduces consultation to a mere paper trail in the name of establishing a timely administrative record for the good of the often non-tribal proponent of the project. Some tribes might counter that the process is different if a tribe is the project proponent, i.e., expediency is not the goal.

Finally, the consultation process does not demand a certain outcome. Rather, the consultation process is often a "check the box" type proceeding and does not ensure substantive consideration of tribal concerns or protection of tribal cultural resources.

Obstacles to Meaningful Consultation

As a result of the Tribe's participation in the Section 106 process related to a number of varied projects, the Tribe recognizes that several problems exist in that process that can be addressed by the federal government, including the following.

- *Decision-makers' lack of understanding and knowledge of protocols, cultural differences, and what cultural preservation means to tribes.*

Many federal decision-makers have little or no knowledge of tribes and are not required to undergo or otherwise engage in meaningful training regarding an understanding of tribes, cultural preservation, and "alternative" concepts of sacred sites and cultural practices. The result of the lack of training and knowledge is miscommunication, tribal frustration, distrust, and, ultimately, lack of protection for cultural resources, including protection of historic properties of religious and cultural significance to Indian tribes.

This problem can be addressed through training not just of senior officials in federal agencies, but also through mandatory training of political appointees and career staff who are often responsible for the agency decisions.

- *Some agencies demonstrate a lack of respect for traditional knowledge; misunderstanding of tribal sovereignty, the government-to-government relationship, and trust responsibilities.*

As part of the Section 106 process, federal agencies or project proponents often retain professional archaeologists, anthropologists, or others to identify historic sites. However, many of those professionals lack knowledge of tribal traditions, cultural practices, or cultural resources. Further, some non-Native professionals view tribal traditional knowledge as unreliable, inferior, or as undocumented in a western sense. As such, some professionals and related agency personnel will disregard the information provided by tribes and tribal members, employees, or consultants as self-serving for the tribe or unsupported because that knowledge is not recorded in a State Historic Preservation Office file.

In the Tribe's experience, some so-called professionals are quick to dismiss Tribal cultural knowledge as a ploy to stop a project or as otherwise "self-serving." The lack of public recordation of cultural and sacred sites or the confidentiality thereof is often times based upon state and or federal law intended to protect those sites from trespass and destruction. Ironically, the lack of recordation or public disclosure is utilized as a basis for disregarding Tribal knowledge so that projects can proceed. The circular argument utilized by some agencies and their professionals to justify proceeding without adequate consultation or protection results in tribes being denied what the law intended to occur, i.e., protection of tribal cultural resources.

This problem can be addressed through training of federal agency employees as discussed above. That training should include a history of the relationship and obligations of the United States to tribes. Likewise, appropriate employees should be cognizant of the laws underlying the consultation requirements with the goal of providing meaningful consultation and affording tribes and tribal traditional knowledge deference.

Tribes are sovereign governments pre-dating the United States and retaining the right to govern their own peoples and lands. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1] (2012) (discussing the independent origin of Indian Tribal sovereignty, which forms the foundation of the exercise of modern powers of Tribal governments). As Chief Justice John Marshall recognized in *Worcester v. Georgia*, “Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights.” 31 U.S. 515, 559 (1832). Additionally, the United States Constitution recognizes the status of tribes as sovereign governments. US Const., art. I, § 8, cl. 3. Tribes’ inherent sovereignty empowers them to govern their own citizens and territories, and tribes retain their lands and sovereign powers unless explicitly ceded through treaties or abrogated by statute. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-203 (1999).

Tribes are not merely another “stakeholder” or “special interest” in infrastructure permitting processes. Rather, tribes exercise jurisdiction over their retained lands and resources, both on and off the reservation. Federal permitting agencies nonetheless tend to treat tribes as members of the public, entitled to only limited information and the ability to submit comments rather than incorporating them into decision-making processes as non-Federal governmental entities. This is inappropriate and contrary to long-recognized Tribal sovereign rights. Additional policy guidance should emphasize the United States’ substantive legal responsibilities to tribes and the process of meaningful and effective consultation as a required activity to ensure consideration and accommodation of these substantive rights.

Finally, the Section 106 process (and other similar processes) should include not only an affirmative duty to consult, but an affirmative agreement by effected tribes to the proposed action affecting cultural resources, e.g., full informed consent by the tribe(s). That consent may be contingent upon deference to tribal interpretation of archaeological records, monitoring of construction, changes to a project, and deference to tribal knowledge of historic properties or religious and cultural significance.

- *Need for Increased Funding to Tribal Historic Preservation Officers; Recognition of Formal Role for THPOs in Consultation.*

The NHPA established the Tribal Historic Preservation Officer federal funding for THPOs has not significantly increased despite the increased number of THPOs nation-wide. Likewise, the role for THPOs is often limited to tribal lands. However, the Tribe’s ancestral territory is significantly larger than the Tribe’s reservation and associated fee and trust lands. Therefore, many federal projects that could impact Tribal cultural resources take place outside of the Tribe’s reservation. By regulation, the federal government should provide a formal role for tribes and their THPOs including an affirmative duty to consult, but an affirmative agreement by effected tribes to the proposed action affecting cultural resources, e.g., full informed consent by the tribe(s), as a pre-condition to a federal project proceeding.

- *Need for Early Consultation*

Federal agencies need to contact Indian tribes early in the process to ensure that tribes have a meaningful role in project development. Often, Section 106 consultation is delayed until

late in the environmental review process after project plans have nearly been finalized. At that late juncture, tribal input becomes a simple “check the box” exercise rather than the meaningful and substantive process that federal law intends. Early consultation can result in a federal agency taking appropriate steps to protect tribal cultural resources without undue delay or excess cost to a project.

- *Need for Tribal Role in Nationwide Permits*

Some of the recent concern and protest has arisen as a result of the failure to engage in substantive and meaningful consultation with tribes regarding the impacts of proposed nationwide permits. The appropriateness of using nationwide permits for particular projects should be re-evaluated as they come up for renewal, and the federal agencies, e.g., the ACOE, should develop an alternative for permitting large projects that cover broad areas so that Tribal impacts are fully evaluated.

In addition, if nationwide permits are utilized, federal agencies should inform tribes that there is a process by which regional conditions or case-by-case conditions may be required and may be sufficient to address and resolve specific concerns raised by tribes during the project’s review. The ACOE and affected tribes should be required to work together, in accordance with 33 C.F.R. § 330.5, to determine steps necessary to impose such modifications or conditions.

Finally, the use of nationwide permits should not be used as the basis to avoid Section 106 consultation with affected tribes.

Recent Federal Actions that Present an Opportunity for Improvement of the Consultation Process

Since 2009, the Obama Administration has taken actions to expedite Federal review of infrastructure projects as part of a larger effort to strengthen the economy and create new jobs. Tribes rely on the country’s infrastructure and have an interest in infrastructure development projects that: (1) are undertaken in a manner that is respectful to their unique considerations, and (2) allow Tribal citizens to share in the benefits of infrastructure development. Tribes play a key role in infrastructure development because they, like state and local governments, are the permitting officials for projects within their jurisdiction. Further, tribes have interests and rights that must be considered when the Federal government permits projects that impact Tribal rights, whether on or off the reservation.

In December 2015, the President signed into law the Fixing America’s Surface Transportation (“FAST”) Act, Pub. L. 114-94 (Dec. 4, 2015). Title XLI, entitled “Federal Permitting Improvement,” establishes a Federal Permitting Improvement Steering Council (“FPISC”) that, in conjunction with the Office of Management and Budget (“OMB”), has a great deal of authority to direct all Federal agencies to improve permitting processes. Section 41002(c) of the FAST Act requires that, by December 5, 2016, the FPISC make recommendations to its Executive Director regarding certain best practices, including improving coordination between Federal and non-Federal governmental entities; creating and distributing training materials useful to Federal, State, Tribal, and local permitting officials; and addressing other impacts of infrastructure permitting, as determined by the FPISC. The Executive Director,

in turn, is authorized to recommend that the OMB issue guidance to effectuate these best practices.

The FPISC and OMB should work together to issue guidance entitled Principles and Best Practices for Infrastructure permitting Relating to Indian tribes and the Federal Trust Responsibility. This guidance is necessary to fulfill obligations under the FAST Act as well as to guide industry and non-Tribal governments as they undertake infrastructure development projects with Tribal impacts. We recommend that the guidance incorporate the principles and best practices including:

- (1) all agencies involved in permitting infrastructure projects affecting Tribal lands, waters, or sacred places demonstrate compliance with Federal trust obligations, treaties, and consultation requirements;
- (2) Tribal trust compliance is integrated in all regulations and guidance for infrastructure permitting, including the FAST Act by designating a Tribal Trust Compliance Officer;
- (3) Federal policy support greater Tribal control over infrastructure on Tribal lands; and
- (4) tribes be afforded full and early participation in the Federal permitting process, including at the “purpose and need” stage, like states and local governments.

The FAST Act’s requirement for additional guidance regarding best practices builds on the Administration’s efforts over recent years to improve and facilitate the infrastructure permitting process, which expressly includes tribes.

In March 2012 President Obama issued Executive Order 13604 (“Improving Performance of Federal Permitting and Review of Infrastructure Projects”), which ordered that “Federal permitting and review processes must provide a transparent, consistent, and predictable path for both project sponsors and affected communities.... They must rely upon early and active consultation with State, local, and tribal governments to avoid conflicts (and) resolve concerns....” (Emphasis added.)

The management plan responding to this Executive Order was released in June, which provides: “Multiple tribal, State, and local governments may also have key decision-making responsibilities for a given infrastructure project—particularly for long, linear projects like roads, pipelines, and transmission lines. These tribal, State, and local permitting and review processes can also create delays and impact Federal decision-making timelines. It is imperative that Federal agencies coordinate early and continuously with other governmental jurisdictions in order to work efficiently and minimize duplication and delays.” (Emphasis added.)

Furthering the focus on modernizing infrastructure permitting, the Administration released its plan in May 2014 to accelerate and expand permitting reform government-wide. The plan states: “Time invested early to identify a project site that avoids ecologically or culturally sensitive areas can lead to a more efficient process and shorter overall project timeframes, and

can even avoid the need for Federal reviews, approvals, or licenses pertaining to those resources. Similarly, project planning and the submitted proposal should reflect the results of early consultations with relevant stakeholders, Federal, Tribal, state, and local representatives, to ensure the proposed project accounts for these perspectives up front.” (Emphasis added). Additionally, the plan provides that “[t]he NEPA Federal Lead agency will develop, in consultation with the project applicant and all relevant Tribal, state, and local governments, a Coordinated Project Plan for each major infrastructure project.” (Emphasis added.)

Still further, in September 2015, the Directors of OMB and the Council on Environmental Quality published Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects, requiring agencies to track information for infrastructure projects across their portfolios and to report a common set of timeframe metrics for all infrastructure projects seeking Federal action. Appendix A to the guidance indicates that “Tribal Trust Responsibilities Compliance” is required for all agencies for inclusion in a project schedule. However, no other guidance has been provided on how to comply with this requirement.

Accordingly, the Administration has been invested in improving infrastructure permitting and planning, while also creating a policy structure that should provide for meaningful and effective means for Tribal consultation and incorporation of Tribal authority in the procedural aspects of those infrastructure projects. In practice, however, Tribal consultation often does not occur or comes too late to influence decision-making. The ease with which Tribal priorities are ignored or dismissed is alarming, as even the Department of Interior’s concerns over Tribal water supplies and cultural resources are often ignored by other agencies.¹ Further guidance, oversight, commitment, and enforcement are required to meet the requirements of both these documents and the duties inherent in the federal trust responsibility.

Best Practices for Infrastructure Development Impacting Tribes

A. The FCC Model: Regional Mapping and Tribal Impact Evaluation

In August 2000, the Advisory Council on Historic Preservation established a Telecommunications Working Group to provide a forum for the Federal Communications Commission (FCC), the ACHP, the National Conference of State Historic Preservation Officers (Conference), individual State Historic Preservation Officers, Tribal Historic Preservation Officers, tribes, communications industry representatives, and other interested members of the public to discuss improved section 106 compliance and to develop methods of streamlining the section 106 review process. This working group was necessitated because, despite Federally mandated consultation requirements, literally tens of thousands of cell towers had been constructed across the United States with virtually no effort by the FCC, who licenses transmission from these towers, to consult with tribes. The number of towers was going to increase dramatically in the coming years and it was clear that the FCC needed to identify an effective mechanism for seeking Tribal input, while not diluting the FCC’s consultation obligation to tribes.

¹ For example, the ACOE permitted the Dakota Access Pipeline without conducting an Environmental Impact Statement (EIS) despite DOI’s objections and its request that the ACOE conduct an EIS and fully evaluate potential Tribal impacts.

In these discussions, tribes acknowledged that the construction of a universal wireless telecommunications infrastructure network was vital to the economic and social future of the United States. However, tribes strongly maintained that the Tribal interests at issue were also vital, both to the tribes, and to the United States in terms of its historic preservation goals and its national identity as a nation of diverse and vibrant peoples and cultures.

As explained in greater detail below, out of these discussions a Nationwide Programmatic Agreement was promulgated and the FCC implemented a system that provides for:

- early notification to tribes with regard to proposed cell tower sites,
- voluntary Tribal-industry cooperation to address tribal concerns,
- recognition of the appropriateness of industry paying fees to tribes for their special expertise; and
- affirmation of the FCC's ultimate obligation to consult with tribes as requested or necessary.

This system has been in place for over a decade and has expedited the communications infrastructure build-out and dramatically eased the FCC's need to consult with tribes by providing a mechanism for industry to work directly with tribes to address Tribal concerns before FCC consultation would have to be invoked.

Agency-Specific Recommendations

A. ACOE of Engineers; Repeal Appendix C and Follow ACHP Regulation

The ACOE of Engineers ("ACOE") "Procedures for the Protection of Historic Properties," codified at 33 C.F.R. part 325, Appendix C, effectively ignores the ACOE's statutory duty to consult with any Tribe that attaches religious and cultural significance to a historic property that would be affected by the issuance of an ACOE permit, depriving tribes of their statutory right to be consulted prior to issuing such a permit. Appendix C must be withdrawn.

Appendix C purports to implement the responsibilities of ACOE pursuant to the National Historic Preservation Act. Appendix C was promulgated in 1990. 55 Fed. Reg. 27003 (June 29, 1990). As discussed above, the NHPA Amendments of 1992 enacted the statutory duty on the part of Federal agencies to consult with tribes in the section 106 process when a Federal or Appendix C has not been revised to reflect this statutory mandate.

Numerous provisions of the ACHP regulations at 36 C.F.R. Part 800 implement the statutory duty of each federal agency to consult with tribes regarding effects on historic properties of Tribal religious and cultural significance. Appendix C is, in numerous ways, inconsistent with the ACHP regulations.

The ACHP has advised the ACOE that Appendix C “does not fulfill the requirements of Section 106 of NHPA.”² There are several reasons that Appendix is unlawful, including the following.

1. The ACOE has not followed the regulatory requirements for the adoption of Appendix C as alternate procedures.

Although under ACHP regulations it is permissible for a Federal agency to develop and adopt “alternate” procedures, before such alternate procedures can take legal effect, the ACHP must determine that the procedures are “consistent with” its regulations. 36 C.F.R. § 800.14(a)(2). Appendix C has not been approved by the ACHP. Therefore, Appendix C does not have legal effect and must be withdrawn.

In developing the alternate procedures, a Federal agency must conduct “appropriate government-to-government consultation with affected tribes. *Id.* § 800.14(f). The ACOE did not comply with this requirement in promulgating Appendix C. If the ACOE chooses to pursue the option of developing an updated version of Appendix C, then, it would be required to conduct government-to-government consultation.

2. Appendix C deprives tribes of statutory consultation rights.

The procedures in Appendix C operate to deprive tribes of their statutory right to be consulted when the issuance of an ACOE permit would affect a historic property to which a tribe attaches religious and cultural significance; Appendix C is inconsistent with several provisions of the ACHP regulations intended to implement this right.

ACHP regulations explicitly refer to the statutory requirement that the Federal agency official “consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking.” *Id.* § 800.2(c)(2)(ii). Appendix C does not include any language to inform ACOE officials and the regulated public regarding this statutory requirement.

At the first step in the section 106 process, the ACHP regulations provide that the federal agency official “shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.” *Id.* § 800.3(f)(2). The ACHP regulations also require the Federal agency official to consult with tribes in the identification of historic properties, including evaluating eligibility for the National Register and in making determinations of whether an undertaking may affect historic properties. *Id.* § 800.4(b), (c), (d). Appendix C, in contrast, does not require the ACOE to make any affirmative effort to identify tribes that have a right to be consulted. Rather, after the district engineer has determined that an application is complete and has made a preliminary

² Letter to Mr. David B. Olson, U.S. ACOE, “Proposal to Reissue and Modify Nationwide Permits, Docket Number COE-2015-0017 and/or RIN 07110-AA73 (August 1, 2016). The letter cites Committee to Save Cleveland’s Hulett v. U.S. ACOE, 163 F.Supp.2d 776 (N.D. Ohio 2001), case in which the court rejected ACOE’s contention that it was not bound by the ACHP regulations, but rather could follow Appendix C.

determination regarding the “presence or absence of historic properties and the effects of the undertaking upon these properties,” the district engineer issues a public notice and is supposed to send a copy to “appropriate” tribes. Appendix C, ¶ 4.a.³ The comment period is typically 30 days. 33 C.F.R. § 325.2(d)(2).

After the public notice, Appendix C does outline a process, but that process is different than the process outlined in the ACHP regulations. The district engineer may decide to conduct, or to require, further investigation regarding properties that are potentially eligible for the National Register that have not previously been evaluated. At the district engineer’s discretion, such investigations may involve consultations with tribes, among other entities. The district engineer consults with the State Historic Preservation Officer to make determinations of eligibility and to assess the effects of the permitted undertaking on historic properties. ACHP regulations provide for a 30-day review by consulting parties, including tribes, of a finding of “no historic properties affected” or “no adverse effect.” In contrast, Appendix C does not, nor does it provide an opportunity for a Tribe to ask the ACHP to participate in the process if the Tribe objects to such a finding or objects to a proposed memorandum of agreement to resolve adverse effects.

3. Appendix C is inconsistent with the requirement that the agency head approve decisions to proceed with undertakings with adverse effects.

Appendix C is inconsistent with the statutory requirement that, if a Federal agency decides to proceed with an undertaking without an agreement on the resolution of adverse effect, the decision to do so must be made by the head of the agency and cannot be delegated.

Appendix C provides that, if there would be adverse effects and there is no memorandum of agreement for the resolution of the adverse effects, the district engineer will allow the ACHP 60 days to provide comments, and then the district engineer will decide whether or not to issue the permit. This is contrary to section 110(l) of the statute, 54 U.S.C. § 306114, which provides that, if an undertaking would result in adverse effects on a historic property and there is no agreement pursuant to the ACHP regulations on the resolution of adverse effects, the agency may proceed anyway, but the decision to proceed with an undertaking without an must be made by the head of the agency and cannot be delegated. This statutory provision is implemented through section 800.7 of the ACHP regulations, documenting the consideration of the ACHP’s comments and the rationale for the decision. Appendix C does not include any text relating to that section of the ACHP regulations.

Among other inconsistencies between the ACHP regulations and Appendix C is the ACOE’ defining “historic property” and “designated historic property” as distinct terms. This is inconsistent with statute and implies giving lesser stature to previously unidentified historic properties.

³ The word “appropriate” is found in ACOE permitting regulations, without providing guidance on how to determine which tribes are “appropriate” to send a copy of the notice. 33 C.F.R. § 325.3(d)(1).

B. National Park Service

Many Tribal sacred places are eligible for the National Register as traditional cultural properties (TCPs), a kind of historic property that is the subject of a National Park Service guidance document, Bulletin 38.

Bulletin 38 provides some important guidance on applying the National Register criteria to places that hold religious and cultural significance for a tribe. For example, the word “history” may be interpreted to include oral history, and an “event” with which a place is associated may be an event in a tribe’s oral tradition, which need not be “demonstrated scientifically” to have happened;⁴ the “persons” who were significant in our past may be persons “whose tangible, human existence can be inferred on the basis of historical, ethnographic, or other research” or “persons’ such as gods and demigods who feature in the traditions of a group.”⁵ In addition, a TCP may be eligible for the Register because, through ethnographic or ethno-historical research techniques, it has the potential to yield important information.⁶ Additionally, interviews with elders are an acceptable way of developing information to fit within the TCP criteria.

The definition of TCP and criterion identified in Bulletin 38 was codified the 1992 Amendments to the National Historic Preservation Act, and Bulletin 38 remains an important guidance document. In 2012, NPS initiated a project to produce an updated edition, which has not been released yet. As this guidance is vital to federal agencies, we urge the NPS finish its revision as soon as possible and include tribal recommendations regarding the topics were identified by NPS, including describing: a “traditional” community; “continued use” by a traditional community Evolving uses of resources by a traditional community; evolving uses of resources by a traditional community; broad ethnographic landscapes; property boundaries; and resource integrity.

Conclusion

Thank you for your consideration of the Elk Valley Rancheria, California’s comments. It is clear that consultation with tribes regarding infrastructure projects can be improved. The Tribe hopes that these comments prove useful for that purpose.

Sincerely,



Dale A. Miller
Chairman

⁴ *Id.* at 12-13.

⁵ *Id.* at 13.

⁶ *Id.* at 14.