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## Tribal Input on Federal Infrastructure Decisions

1 message

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Thank you for allowing the Muscogee (Creek) Nation to provide comments on Federal Infrastructure decision-making and tribal consultation. Please see our comments below:

1) **Protection of sacred sites and burials.** Current EO 13007 and the MOU on Sacred Sites are not adequate. Sites such as the trail of tears or burials need to have better protection from development, disturbance, and possible damage beyond repair. Our sacred places seem to be less important than those of non-natives and when proposed development will cause an adverse effect to tribal cultural resources, agencies tend to promote mitigation instead of avoidance. Avoidance and protection should be the ultimate goal for federal agencies. Through meaningful tribal consultation, which should occur early in the planning stages of infrastructure projects, tribes can provide comments on cultural resources that may be impacted by the undertaking and eliminate unnecessary destruction of sacred places and burial grounds. When archaeological sites are considered eligible for inclusion of the National Register and will be impacted by a Federal undertaking we feel mitigation and data recovery are acceptable solutions but avoidance should be considered first, especially for sites that contain Native American human remains. Avoidance tends to be overlooked because it is 'easier' (cheaper) to mitigate the damage or remove burials than it is to find an alternate route, location, or Area of Potential of Effect (APE) for the undertaking. Sacred sites and burials need stronger protections at the federal and state level. Future development should not be allowed to occur on sacred sites or burials. Our ancestors deserve to rest in peace without destruction or removal, no matter where they are located.

2) **Tribal Consultation.** Despite the legal framework, executive orders, and Federal laws that encourage Federal agencies to implement Tribal Consultation, we still encounter agencies that do not consult with federally recognized tribes. This is unacceptable and we need to make Tribal Consultation mandatory. In fiscal year 2015, the Muscogee (Creek) Nation reviewed and commented on over 2,500 federal undertakings with 219 different Federal, state, and local agencies. The Historic and Cultural Preservation Department has dealt with agencies who are great at Tribal Consultation and others who are unaware of their Federal responsibilities to consult with federally recognized tribes on the protection of historic properties. We recently encountered a USACE District that has not consulted with our tribe until recently when a NAGPRA related issue arose. They told us that they issued 4,000 permits last year and none of the undertakings had an adverse effect to historic properties so they didn't need to consult with tribes. This USACE District said, based on their Programmatic Agreement (PA) with the State Historic Preservation Office that they only had to consult on projects with adverse effects. I told them that they were not complying with the National Historic Preservation Act or following the Advisory Council on Historic Preservation's (ACHP) policies. There are countless examples of agencies who have developed PA's or other formal agreements that limit their Section 106 responsibilities and for some reason they feel they are excused from consulting with tribes who have an interest in their county or state. Infrastructure projects involve multi-state and multi-agency planning that must give tribes the opportunity to comment and protect our cultural resources in our current tribal and ancestral homelands.

- **Contact Tribes** – This may seem like common sense but this is the first thing that needs to be done correctly. Federal agencies need to have current contact information for each federally recognized tribal Chief, Chairman, or Governor and each tribal THPO that has an

area of interest in the federal undertaking. Also, through consultation, agencies need to determine if tribes prefer to be contacted by letter or email or both and who the designated person of contact is for Section 106 compliance. A new administration for a tribe can lead to new appointments and new Section 106 staff or THPO's. Please be diligent to keep tribal contacts up to date so they can receive the project correspondence. Please follow up with phone calls to ensure tribes are refusing to comment or have no comment after the 30 comment period ends. Do not start construction on a project without attempting to reach the tribe via mail, email, or by phone. We have had agencies swear they sent us the project and since they didn't hear back from us they moved forward. When in reality they sent the project to someone's email that no longer worked for the tribe and we didn't receive the project for comment. Agencies need to follow up with tribes to ensure they received the project, especially the large scale, multi-state, multi-agency projects. When a Tribe requests face to face consultation, an agency should be obligated to provide this as part of our government to government relationship. Just doing letters or phone calls is not acceptable if tribes are asking to meet in person. This is what constitutes 'a good faith effort'.

3) **Programmatic Agreements.** In Programmatic Agreements under NHPA, tribes should always be able to be a full signatory and not just a concurring party or invited signatory as long as the project will impact areas where they have a historic interest, not just on tribal lands. This is very important for removed tribes and should have that special consideration.

4) **Linear Projects.** Unlike gas lines that are overseen by FERC and transmission lines that are overseen by DOE, petroleum lines are not made to provide a full cultural resource survey as the other 2 linear projects because they are permitted by the Corps and the Corps has utilized nationwide permits for these larger projects and has used their Appendix C to not only fully comply with Section 106 as the other and similar projects do. In the Corps pipeline projects under their Appendix C, the Corps only provides review of a few small water crossings that are chosen by the applicant to review. Thus in many cases hundreds of miles of land are not assessed for impacts to historic properties, cultural resources, or sacred sites. Thus putting these important and non-renewable resources at risk of being destroyed. Appendix C should be rid of, and longer linear pipelines should go through the same review process as gas pipelines and transmission lines. If anything another agency such as FERC should oversee these instead of the Corp. We need federal oversight on crude oil pipelines.

5) **Appendix C.** The Muscogee (Creek) Nation does not agree that the Corps of Engineers Appendix C appropriately and adequately covers all necessary components of NHPA Section 106 to be considered as an alternative approach to Section 106. We believe the term "undertaking" in the Corp's Appendix C does not meet the standard of "undertaking" as defined in NHPA Section 106. The Tribes were also left out of Appendix C for several key portions of NHPA Section 106, these include: Investigation, Eligibility Determination, Assessing Effects, and Consultation. While the Corps has provided some written revised Interim Guidance for Implementing Appendix C, the new permitting process still does not meet the high standard established by the NHPA Section 106, nor has any new permitting processing procedures been consulted on with the Tribes and ACHP or finalized. Thus the Muscogee (Creek) Nation believes that Appendix C does not fully comply with NHPA Section 106 regulations and that Section 106 regulations should be followed instead. The Muscogee (Creek) Nation further feels that the three tests are all satisfied for undertaking outside the waters of the United States to be included within the "permit area". 1. This activity would not occur but for the authorization of the work or structures within the waters of the United States. The justification that some linear crossings such as pipelines, transmission lines, or highways can be undertaken without the Corps authorization do not apply in this case. Those cases would be for much smaller projects, however this is a very expansive project and does meet the "but for" clause. 2. Such activity must be integrally related to the work or structures to be authorized within the waters of the United States. Or, the work or structures to be authorized must be essential to the completeness of the overall project or program. The activity in this case is essential to the completeness of the overall project, a pipeline like DAPL or Diamond would not be able to function as planned without the work authorized. 3. Such activity must be directly associated with the work or structures authorized. In this case, the activity is directly associated with the work that would be authorized.

6) **NAGPRA Culturally Unidentifiable Human Remains.** NAGPRA CUI regulations for determining who gains possession of the remains should be adjusted. Agencies and museums lean too heavily on the Indian claims commission maps. While there may not be current evidence to tie a particular tribe with remains from 2000 years ago, there should be an adjust in the wording of NAGPRA for who can show the earliest connection in an area. Because a tribe was present for example in the 1800s, doesn't mean they were the people there earlier. The Smithsonian should be made to provide a means for Tribes to claim and repatriate remains and funerary objects noted as culturally unidentifiable. As of now, these individuals will never have the opportunity to be reburied. Thus our people are still treated as objects instead of human beings.

Mvto

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**Federal and state agencies, museums, and consulting partners, as of October 1, 2015 please send all Section 106 project notices as well as all NAGPRA notices to our section 106 email: [section106@mcn-nsn.gov](mailto:section106@mcn-nsn.gov). If you have any questions, please give us a call at 918-732-7733.**