



File Code: 1560; 2360
Date: December 23, 2020

Reid J. Nelson
Director
Office of Federal Agency Programs
Advisory Council on Historic Preservation
401 W. F Street NW, Suite 308
Washington, DC 2001-2637

Dear Director Nelson:

Thank you for providing the ACHP recommendations regarding the NHPA process for the Resolution Copper Project and Southeast Arizona Land Exchange (letter dated December 15, 2020). The ACHP *Assessment of Agency Official Compliance, pursuant to 36 C.F.R. § 800.9(a)* provides a useful review of a long, multifaceted, and complex undertaking.

We particularly appreciate your recognition of the unique constraints created by Southeast Arizona Land Exchange and Conservation Act (Section 3003 of Public Law 113-291, herein referred to as the Act). The Act required that we complete the Section 106 consultation process in conjunction with requirements set in the 2014 National Defense Authorization Act. By Congressional direction we are engaged in a process designed to mitigate adverse effects of actions that are not subject to modification.

Management of the Consultation Process

The ACHP notes that the TNF management of the NHPA consultation process needs improvement. We have taken action to enhance both tribal relations and NHPA compliance capacity.

Regarding the current status of the PA document and your recommendation to provide “robust and detailed response to the comments it received”, the TNF has completed its consideration of comments from all parties and has developed what a final PA. This final PA will be shared with signatories, commenters and all the affected tribes. The final PA transmittal will include a detailed comment matrix that explains how previous comments were considered and will describe next steps and timeline to execute the PA.

Tribal consultation.

The TNF acknowledges the challenges we faced during tribal consultation and the NHPA compliance process. Over the last eleven years, the TNF engaged and consulted with the affected tribes on the proposed land exchange and subsequent mine project. The tribes do not



support the anticipated desecration of sacred places and ancestral sites important to them. Consequently, our good faith efforts to engage the affected tribes were often stymied by the nature of the legislated undertaking.

Years of discussions with numerous consulting tribes encouraged the development of several projects and programs to address their concerns. The programmatic agreement includes provisions for protecting historic properties of religious and cultural importance to tribes. We recognized the traditional value of the Oak Flat area with the nomination to the NRHP. We created the Apache Leap Special Management Area. The PA includes special provisions for the avoidance of medicinal plants, springs, and ancestral sites. We facilitated the completion of an extensive ethnographic report. We developed and implemented a tribal monitoring program in cooperation with the proponent and several consulting tribes. And, recognizing the impact to traditional lifeways, we supported the creation of a program to protect and restore Emory Oak groves in coordination with the proponent and several consulting tribes.

In addition to the positive results above, the TNF worked with Resolution Copper to find mutually acceptable measures to address the concerns of the affected tribes. These measures, required by Section 3003 (c) (3) of the Act, address a variety of differing concerns expressed by the tribes. Five “Off-Site Measures” are to be funded by three compensatory funds as listed in Stipulation IX of the PA. The purpose of the compensatory mitigation funds is to support the existing Tribal Monitoring Program, the existing Emory Oak Collaborative Tribal Restoration Initiative, expand tribal youth programs, establish a Tribal Education Program, and establish a Tribal Cultural Fund.

The Tribal Consultation Plan included in the PA addresses inconsistencies of the Section 106 tribal consultation process. The language of the Tribal Consultation Plan satisfies the recommended requirement to consult with interested tribes on any needed revision and expansion of the tribal consultation plan at annual intervals. A summary of recent tribal consultation is enclosed with this letter.

The Tribal Consultation Plan is incorporated into the PA as an appendix; thus, it will be implemented by the signatories upon execution of the PA. Furthermore, the TNF recognizes that the Tribal Consultation Plan is a living document. The Plan and the PA require annual consultations with the affected tribes to address any needed revisions of the Tribal Consultation Plan.

TNF’s Tribal Monitoring Program. The TNF created the Tribal Monitoring Program during our comprehensive tribal consultation efforts. Some of the tribes requested that we have tribal members participate in the Section 106 identification requirements. Some tribes also expressed interest in employment and training opportunities for tribal members. While not all tribes agree, we believe that the program has potential to grow into a more sustainable and productive program. The USFS is committed to the development of the program and playing a role in the future of the program, however the USFS role should be one that is supported by the tribes and is within our legal authorities.

One of the goals of the Tribal Monitoring Program, as described in, Stipulation IX.C.2 of the PA, will be to further develop the program administrative, training, and other requirements to enable continued and expanded work on Section 106 and Section 110 projects on public lands. This program development work will require input from the tribes and the TNF has communicated

with the tribes, via letter and other means, on their opportunities to be part of the improvement to the program. We are mindful of the administrative burden this request may entail and are working with a third-party to facilitate the required communications and coordination. This work will continue as a requirement of the PA. It is envisioned that this next phase of program development will clarify the roles of the monitors, define the long-term vision for the program, and greatly improve the likelihood of success for this program.

Resolution of adverse effects. We recognize ACHP's emphasis on the importance of the USFS leadership in these measures by acknowledging our "responsibility to resolve adverse effects from the undertaking and all of its parts and to consult with Indian tribes regarding our decision making throughout these efforts." The USFS understands that the execution of the PA is just one step in what will be a long-term commitment to the consultation process over the next many years. The Tribal Consultation Plan was developed in recognition of the expectation and our commitment to continue to improve our approach to the consultation process in regards to implementation of the PA, management of the historic properties affected by the mine, and the development of the various tribal related programs outlined the Resolution of Effects section (Stipulation IX) of the PA.

Leadership Involvement.

I am sure that the Council understands that there has been and will continue to be a significant amount of coordination at both the USFS Regional and Washington offices regarding all of the various aspects of the project that is not outwardly visible. Continued coordination at all levels of the agency will occur throughout the life of the project, as it is will be critical to successful implementation of the PA.

Next Steps

Your letter recommended that the TNF and the USFS Southwest Region undertake specific steps to conclude the consultation process and finalize the PA and to improve consultation and management of the TNF's Section 106 program moving forward. The three recommendations specific to the TNF and this project are: 1) to provide all consulting parties with a summary of the comments received on the latest version of the agreement along with a summary, 2) to respond to the ACHP 800.9 review, and 3) to consider hosting a final meeting to discuss how the TNF responded to the PA comments. The TNF has already finalized the PA comment matrix and is developing companion information for the roll out of the PA. The distribution package will include a cover letter, the complete comment matrix, the final PA and its appendices, and other relevant information that will be sent to the all of the consulting parties, including the tribes before the end of December 2020. The letter will invite the consulting parties to contact the TNF and set up individual meetings to discuss any remaining concerns they may have regarding the PA and how their comments were addressed. We believe that individual meetings will result in more open, honest, and productive discussions.

You also suggest the TNF request input from our Regional Office on 1) the "establishment of an advisory board comprising volunteer representatives from Indian tribes with an interest in the protection of historic properties of religious and cultural significance on USFS managed lands" and 2) solicit "direction on the implementation of training for USFS staff, including but not

limited to Forest leadership, Line Officers, and other relevant leadership and program staff on Section 106 procedures and responsibilities.”

Regarding your two recommendations, the TNF sent a letter (see attached) to Acting Southwest Regional Forester Sandra Watts conveying your concerns and recommendations. These two recommendations address needs beyond more than this project and would apply to other forests within the Southwest Region. As described in the letter, we are committed to engaging further with our regional leadership on how to best consider your recommendations.

The TNF remains committed to meeting and continuously improving our Section 106 and tribal government to government consultation efforts across all our projects and program areas and this exchange of information about how we can improve is useful.

Sincerely,

TOM TORRES
Acting Forest Supervisor

Enclosure



File Code: 1560; 2360
Route To:

Date: December 22, 2020

Subject: Tonto NF Consultation Request to Regional Forester

To: Sandra Watts, Acting Regional Forester

On December 15, 2020, I received a letter (see enclosed) from Mr. Reid Nelson, Director, Office of Federal Agency Programs of the Advisory Council on Historic Preservation (ACHP) in which he makes several recommendations to both the Tonto National Forest (TNF) and the Southwestern Region to improve consultation and management of the TNF's Section 106 program into the future. The recommendations are provided to us as a result of the ACHP's assessment of the TNF's Section 106 efforts related to the Southeast Arizona Land Exchange and Conservation Act (Section 3003 of Public Law 113-291), which directed the land exchange between the U.S. Government (USDA and U.S. Department of the Interior) and Resolution Copper.

More specifically, the assessment by the ACHP, pursuant to 36 C.F.R. Sec. 800.9(a), was requested by Chairman Rambler of the San Carlos Apache Tribe via a July 9, 2020 letter to the ACHP. Chairman Rambler requested both the prompt completion and implementation of a final Programmatic Agreement (PA) and to "review and report" on whether the USFS has complied with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800), for this undertaking.

In addition to numerous suggestions within the body of the Dec. 15, 2020 letter from ACHP, the letter recommends five specific "next steps" to improve the consultation and management of Section 106 efforts. Two of the five steps necessitate the involvement from the heritage and tribal programs at the regional office as follows:

1. Request USFS Regional input on the establishment of an advisory board comprising volunteer representatives from Indian tribes with an interest in the protection of historic properties of religious and cultural significance on USFS managed lands. An advisory board would advise the TNF and other Forest Units within the Region on these matters and participate in larger USFS planning initiatives to ensure the views of Indian tribes are considered earlier in the review of a proposed undertaking. The advisory board could also provide input into the implementation of mitigation measures proposed in the current draft agreement. Such an initiative would represent a definitive and measurable commitment by the USFS to improve consultation with Indian tribes and could become a resource that would help the entire region in improving its tribal consultation responsibilities; and
2. Solicit USFS Region direction on the implementation of training for USFS staff, including but not limited to Forest leadership, Line Officers, and other relevant leadership and program staff on Section 106 procedures and responsibilities. This training should consider lessons learned from this consultation process, be developed and conducted in coordination with the USFS Regional Heritage Program, and be facilitated with input from Indian tribes, SHPO, and the ACHP.

With this letter, I am hereby soliciting input from you, Acting Regional Forester, and the relevant regional office staff on the two steps described above.



Regarding the first step, please note that the possible establishment of an advisory board on matters relating to the protection of historic properties of religious and cultural significance is suggested to include the TNF as well as other forests within the region on USFS managed lands, which is obviously a much larger scope than just the Resolution Copper project area. From a forest perspective, the recommended establishment of tribal advisory groups is well-meaning but might reflect a basic misunderstanding of the reality of the demands placed on tribal governments in the Region. The tribes that we consult with are bombarded for input from the local, state and federal level and from corporations and NGOs. Participation on additional advisory boards might not yield expected results, but rather lead to additional administrative burdens on both the tribes and the forests.

I want to draw your attention to tribal advisory roles currently envisioned for the five compensatory tribal programs described within Section IX (c) of the Programmatic Agreement. Namely, the five programs include the 1) Emory Oak Collaborative Tribal Restoration Initiative, 2) Tribal Monitoring Program, 3) Tribal Youth Program, 4) Tribal Cultural Program and 5) Tribal Education Fund. For each of these programs it is envisioned that active tribal participation from the affected tribes will be invited and necessary for overall program leadership, governance and decision making. Efforts to engage the affected tribes on these programs have been underway by the TNF in order to establish the programs. Foundational documents for the various programs have been developed and shared with the tribes, and I welcome the continued input from the regional office on these documents and programs.

Regarding the second step about possible additional training, I would welcome any additional training related to Section 106 procedures and responsibilities and would make myself, our other line officers and staff employees available to learn more about Section 106 and tribal consultation outside of the Section 106 process. I would ask that any training include aspects that delve specifically into projects that have high complexity, contain significant adverse effects to historic properties, and have somewhat intractable issues related to steadfast tribal opposition to large scale surface disturbance such as copper mining projects.

Thank you for your consideration of the recommendations made by the ACHP and my thoughts on ACHP's request. The Tonto NF remains committed to meeting and continuously improving our Section 106 and tribal government to government consultation efforts across all our projects and program areas. Unfortunately, the requirements and constraints placed upon the USDA and USFS by the Southeast Arizona Land Exchange and Conservation Act have severely hindered our consultation efforts with the affected tribes due to our inability to waver from the Act's purpose to "...authorize, direct, facilitate and expedite..." the exchange of lands which includes lands considered sacred to the affected tribes. I look forward to engaging closely with you and regional staff on these matters soon.

If you or your staff have questions or want further clarification please contact myself or Travis Bone, Tonto National Forest Heritage Program Manager, at travis.bone@usfs.gov.



TOM TORRES
Acting Forest Supervisor

Enclosure