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November 30, 2016

Ms. Elizabeth K. Appel  
Director  
Office of Regulatory Affairs &  
Collaborative Action  
1849 C Street, NW  
Mail Stop 3071  
Washington, D.C. 20240

Subject: Consultation – Federal Decision Making on Infrastructure Projects

Dear Ms. Appel:

The United Auburn Indian Community (“UAIC”) is pleased to submit its comments in response to the government-to-government consultation that is evaluating federal decision making on infrastructure projects, as outlined in a September 23 letter to tribal leaders from the Departments of the Interior, Justice, and Army.

UAIC’s ancestral lands are in Central Northern California. We have trust lands in Placer County, and ancestral lands in Amador, Butte, El Dorado, Nevada, Placer, Plumas, Sacramento, San Joaquin, Sierra, Solano, Sutter, Yolo and Yuba counties.

Unfortunately, like many tribes, our experience consulting with federal agencies on infrastructure projects under Section 106 of the NHPA has generally been a negative one. Some agencies do not consult with UAIC on projects of significance to the Tribe within our ancestral lands. Other agencies perform the minimum required in the consultation process and routinely ignore important issues raised by UAIC.

After the Katrina and Rita disasters, levee repair work has been funded by President Obama’s American Recovery and Reinvestment Act of 2009. While much of the levee work in our area is being done by local agencies, Section 106 consultation is triggered by the need for federal permits from the U.S. Army Corps of Engineers. This permitting process, under which the Army Corps grants permission for these levee repair projects to occur, triggers Section 106 consultation, which in theory should provide a process to protect and minimize damage to important cultural resources. But in reality, it is the deficiencies in this process that have caused the most harm.

As an example, the Army Corps was involved in permitting a 44-mile levee reconstruction project along the Feather River in Sutter County called the Feather River West Levee Project.

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This project went through a comprehensive environmental review process under both state and federal law. An Environmental Impact Report was prepared under California's Environmental Quality Act and an Environmental Impact Statement was prepared under the National Environmental Policy Act. During the environmental review process, the agencies' archaeological consultants claimed there would be no significant adverse effects to any cultural resources. However, prior to the completion of those studies, UAIC brought forward specific information about burial mounds and historic village sites that were within the project footprint. It was clear that the planned construction activities would significantly and adversely affect them. Finding ways to minimize or prevent these adverse effects would have required a tremendous amount of government consultation, coordination, planning, and exploratory work.

Unfortunately, none of these steps was taken. The Army Corps' relied on the results of the surveys, inventories, and testing conducted by their archaeological consultants, which predictably did not uncover any cultural resources or burial sites, and ignored the tribal representatives and tribal elders who identified the sites and provided information about their likely location.

Thus, when the backhoes began pulling the remains of our ancestors out of the burial mounds, they were treated as "inadvertent finds" and "post-review discoveries" even though we had told the agencies exactly where they would be encountered. This status, combined with UAIC's lack of signatory status on the project's Programmatic Agreement, allowed the work to continue at a frantic pace. The digging never stopped, the remains kept piling up, and our tribal monitors could not keep up. The burials were pulled out faster than we could return them to the ground so they could continue their journey to the other side. We had no ability to prevent the continuing desecration and little time even for proper and respectful reburials. Grave goods buried with our ancestors were separated from them, and taken away to be "studied" by archaeological consultants. The trauma and emotional pain made our people on site physically ill. In all, more than 400 intact burials were unearthed and enough smashed up bones to account for thousands more were brought out of the ground by heavy machinery. In our view, all of this damage was caused by deficiencies in the Section 106 consultation process. We had the information to prevent the damage, but the process failed us.

In the next four years, similar levee reconstruction projects will be conducted by other local agencies on both sides of the Sacramento River under the same permitting process with the Army Corps. As they did along the Feather River, our ancestors buried their people in mounds along the river banks that were later incorporated into early levees. We are praying for a better outcome, but if the consultation process does not improve, there is little reason to expect one.

In other examples, the Federal Energy and Regulatory Commission, Bureau of Reclamation and the U.S. Forest Service have used similar consultation procedures to make unilateral agreements between signatories that limit UAIC's role and recognized government authority. In one case involving the FERC permitting process for a hydro power project on an old debris dam six miles from our historic reservation, FERC delegated the government-to-government consultation to the project developer. Needless to say, the project developer had even less incentive to engage in a thorough and productive consultation process.

It is important for you to understand the challenges UAIC has faced, but we recognize that the purpose of *this* consultation process is to talk about solutions. We have four recommendations that we believe would improve the consultation process and better protect the rights of tribes who participate in that process.

1) Tribes must be full signatory parties to Section 101, 106, 110, and 111 agreements when federal infrastructure projects are contemplated within an Indian tribe's ancestral lands. This must include off-reservation projects that have the potential to adversely affect historic properties of religious and cultural significance. Without full signatory status, tribes lack the ability to meaningfully participate in developing the processes intended to protect historic sites. Federal agencies accept comments from tribes, but have wide discretion in the ways the comments are addressed. Without meaningful participation in the development of these agreements, tribes and their THPOs will continue to be ignored.

In our case, this authority would impact public works projects occurring along the American, Bear, Feather, Sacramento, and Yuba Rivers within UAIC's traditional homelands. Without this authority, we believe our tribal legacy is in danger and we will suffer significant losses to our cultural heritage.

We recognize that some agencies oppose this recommendation because it would provide tribes with the authority, as a signatory, to terminate an agreement. We believe, however, that there are ways to address this concern while still granting the signatory authority we seek.

If tribes are not given a meaningful role in developing these agreements, either through full signatory authority or some other mechanism, it will continue to allow the following adverse outcomes, all of which we have seen:

- A lack of "meaningful good faith" consultation;
- Federal non-compliance violations under 36 C.F.R. Part 800, the Advisory Council's regulations, and conflicting regulations adopted by the Army Corps in Appendix C;
- A failure of federal agency and SHPO reviewers to interpret and implement appropriate state and federal burial and NAGPRA laws;
- Ground disturbing activities resulting in irreparable harm to burial grounds, sacred sites, and cultural items previously identified by a tribe, but ignored in the decision-making process because the process is driven by archaeologists and their values rather than by tribes and our values;
- The issuance of permits and adoption of agreements **after** ground disturbing activities have begun and other potential violations from such actions, or such project activities, on staging areas, roads, ponds, basins, and other facilities and resources;

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- And, finally, the failure to complete Historic Property Management Plans and Treatment Plans **prior to** issuance of a permit or the initiation of ground disturbing activities.

2) The scope of infrastructure consultation must include consideration of long term operations and maintenance agreements. Using levees, dams and reservoirs as examples, there are a lot of ground disturbing activities that occur after the federal permitting agency has completed consultation and the project has been constructed – activities that impact human remains and cultural items under the umbrella of “minor” or “routine” maintenance work. Currently, the Army Corps takes the position that long term operations and maintenance issues are not appropriate for consultation. Unfortunately, this undermines much of the work done to protect historic sites because the ongoing maintenance activities continue to damage them.


3) There needs to be clearer guidance for lead federal agencies regarding the confidentiality of information provided by tribes both on and off tribal lands. This includes both data sharing and the confidentiality of reports that are generated prior to our sacred sites being listed on, or determined to be eligible for listing on, the National Register of Historic Places, as required under Section 304 of the NHPA.

While Section 304 provides a framework for protecting confidentiality, in practice many agencies are reluctant to apply the framework. Clearer best practices would help prevent the release of confidential information to other consulting parties or to other tribes who have no right to the information. This in turn would allow tribes to more confidently share information with agencies and their consultants early in the Section 106 process, which will help identify sites that are likely to be impacted.

4) The Army Corps’ Appendix C must be withdrawn and replaced with the Advisory Council on Historic Preservation’s regulations. UAIC has experienced all of the problems caused by the inconsistent alternative procedures contained in Appendix C, including the narrow definition of adverse effects, the lack of confidentiality, the limited scope of areas of potential effect, and the lack of tribal authority in tribal consultations.

We believe these four recommendations could alleviate many of our concerns. We appreciate the opportunity to provide our views in response to this government-to-government consultation. Please feel free to contact us with any questions, or if you need additional information from us.

Sincerely,



Gene Whitehouse  
Chairman