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November 18, 2020

Matthew P. Oreska
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street Northwest
Washington, DC 20503
matthew.p.oreska@omb.eop.gov

Re: Follow up to National Association of Tribal Historic Preservation Officers' November 17, 20202, Meeting with the Office of Information and Regulatory Affairs
RIN 1024-AE49 | 1024-DOI/NPS | National Register of Historic Places

Dear Mr. Oreska:

This letter is submitted by the Native American Rights Fund on behalf of the National Association of Tribal Historic Preservation Officers ("NATHPO") in response to specific questions raised by you and staff at the Office of Information and Regulatory Affairs during NATHPO's Executive Order 12,866 meeting with the OIRA on November 17, 2020. This letter also conveys some information and documents discussed during that meeting that were not previously submitted to the OIRA.

Congressional Reports and Explanatory Statements. NATHPO's and Native Village of Tyonek's joint comments submitted to the OIRA on October 30, 2020, included a discussion of legislative reports and explanatory statements published by the United States House of Representatives and United States Senate concerning the National Park Service's ("NPS") National Register of Historic Places ("National Register") rulemaking. These reports and explanatory statements expressed Congress's concerns with the rulemaking and the NPS's lack of meaningful consultation with Tribes.

Following the submission of Native Village of Tyonek's and NATHPO's joint comments to the OIRA, the Senate on November 10, 2020, released its 2021 fiscal year funding bills, including for the Department of the Interior. In its accompanying explanatory statement, the Senate again expressed its concerns over the NPS's National Register rulemaking:

> *National Register of Historic Places*.—The [Senate Appropriations] Committee is concerned by the March 1, 2019, proposal by the [NPS] to modify the long-standing procedure used to nominate properties for inclusion on the National Register of Historic Places (84 Fed. Reg. 6996). The Committee spoke to this concern in the explanatory statement to accompany Public Law 116-94, and *directed the* [*DOI*] *to complete meaningful government-to-government consultation with Tribes pursuant to Executive Order 13175* and consult with other Federal land management

> agencies, State and tribal historic preservation officers, or other key stakeholders prior to the finalizing or implementing the rule. *The Committee is not aware of any subsequent efforts by the* [*DOI*] *to comply with the directive from fiscal year 2020 prior to the implementation of the rule*.[1]

This, and the previous reports and explanatory statements highlight Congress's continuing concerns with and objections to the NPS's National Register rulemaking.

Treaties and other Statutes. During the meeting, your staff asked whether there were any treaties or other statutes relevant to this rulemaking. While some Treaties have been interpreted as protecting tribal cultural resources and imposing on the federal government an obligation to protect such resources,[2] in the context of this rulemaking, treaties are understood best as a source of the federal government's trust responsibility to Tribes.[3] The National Historic Preservation Act ("NHPA") and other "federal statutes aimed at protecting Indian cultural resources, located on both Indian and public land, demonstrate the government's comprehensive responsibility to protect those resources and, thereby established a fiduciary relationship."[4] The NHPA specifically recognized that "[p]roperty of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion in the National Register[]" of Historic Places.[5] In the context of this rulemaking, the federal government's and the NPS's trust responsibility means not promulgating regulations that inhibit Tribes' ability to utilize the NHPA to protect their cultural resources and that are inconsistent with, conflict with, and are unsupported by the NHPA.

Your staff also asked about other statutes that may be implicated by the NPS's rulemaking. While the focuses of NATHPO's and Native Village of Tyonek's comments have been on the rulemaking's effect on NHPA programs—the National Register and the Section 106 process—the changes to the National Register regulations will affect programs and reviews under other statutes, administered by other agencies. For example, Section 4(f) of the Department of Transportation Act requires the Secretary of Transportation to determine whether a Department of Transportation program or project will affect certain resources, including "historic sites."[6] The Secretary of Transportation can approve a program or project that adversely effects a historic site only if "there

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[1] U.S. Senate, Comm. on Appropriations, *Explanatory Statement for the Department of Interior, Environment, and Related Agencies Appropriations Bill, 2021*, at 46 (2020) (emphasis added), *available at* https://www.appropriations.senate.gov/download/fy21-interior-report.

[2] *See generally* Erik B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. 475, 514 (2005) ("Where treaty rights, either explicit or reserved, exist and are applicable, they are important claims for Native American tribes seeking to protect their cultural use of public lands."); Wesley J. Furlong, *"Salmon is Culture, and Culture is Salmon": Reexamining the Implied Right to Habitat Protection as a Tool for Cultural and Ecological Preservation*, 37 PUB. LAND & RESOURCES L. REV. 113, 125 (2016) (quoting *United States v. Washington*, 506 F. Supp. 187, 204 (D. Wash, 1980), *aff'd in part, rev'd in part* 694 F.2d 1347 (9th Cir. 1982), *aff'd in part, vac'd in part* 759 F.2d 1353 (9th Cir. 1985)) ("The district court found there could be 'no doubt that one of the primary purposes of the [Stevens] [T]reaties . . . was to reserve the tribes the right to continue fishing as an economic and cultural way of life.'" (emphasis added)).

[3] *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §5.04[3][a], at 412-15 (Nell Jessup Newton ed., 2015 supp. 2019).

[4] *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1109 (S.D. Cal. 2008) (citations omitted).

[5] 54 U.S.C. § 302706(a).

[6] 49 U.S.C. § 303.

is no prudent and feasible alternative" and "the program or project includes all possible planning to minimize harm."[7] The Secretary of Transportation can approve the program or project if the effect will be *de minimis*.[8]

A "historic site" is synonymous with "historic property." It is defined in the Department of Transportation's regulations as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in the National Register. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization that are included in, or are eligible for inclusion in, the National Register."[9] In making its determination about whether a Department of Transportation program or project will affect a historic site, Section 4(f) directs the Secretary of Transportation to utilize the Section 106 process.[10] In many states, the Department of Transportation's Section 106 responsibilities have been delegated to state departments of transportation,[11] meaning that states assume the responsibility of complying with both Section 4(f) and Section 106 reviews.

The rulemakings changes to the determination of eligibility processes would prevent Tribes from securing determinations of eligibility from the Keeper of the National Register of Historic Places ("the Keeper") in the Section 106 process when they disagree with the lead federal agency's determination. The rulemaking's changes to the nomination process would also prevent Tribes from listing properties on the National Register and ensuring their consideration in the Section 106 process. While this will affect the Section 106 process, as discussed above, it will also affect Section 4(f) determinations, which are informed by on the Section 106 process, as Section 4(f) applies to "historic sites" which are defined as historic properties.

Additionally, Section 522(e)(3) of Surface Mining Control and Reclamation Act ("SMCRA") prohibits surface coal mining operations on lands "which will adversely affect any publicly owned park or places included in the National Register[.]"[12] This prohibition applies only to properties *listed* on the National Register, not properties that are merely *eligible* for listing on the National Register.[13] This prohibition does not apply (1) if the operator has valid existing rights;[14] (2) to a qualifying existing operation;[15] or (3) "if the regulatory authority and the Federal, State, or local

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[7] *Id*. § 303(c)(1)-(2).
[8] *Id*. § 303(d)(1)(A).
[9] 23 C.F.R. § 774.17; *accord* 54 U.S.C. §§ 300308; 302706(b); 36 C.F.R. § 800.16(l).
[10] 49 U.S.C. § 303(d)(2)(A)-(C) ("With respect to historic sites, the Secretary may make a finding of de minimis impact only if-- (A) the Secretary has determined, in accordance with the consultation process required under section 306108 of title 54, United States Code, that-- (i) the transportation program or project will have no adverse effect on the historic site; or (ii) there will be no historic properties affected by the transportation program of project; (B) the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and (C) the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).").
[11] *See* 23 U.S.C. § 302.
[12] 30 U.S.C. § 1272(e)(3); 30 C.F.R. § 761.11(c).
[13] *See Ind. Coal Council, Inc. v. Lujan*, 774 F. Supp. 1385, 1399 (D.D.C. 1991), *vac'd as moot sub nom. Ind. Coal Council, Inc. v. Babbitt*, No. 91-5397, 1993 WL 184022 (D.C. Cir. Apr. 26, 1993).
[14] 30 C.F.R. § 761.11 (citing *id*. § 761.16).
[15] *Id*. (citing *id*. § 761.12).

agency with jurisdiction over the park or place jointly approve the operation."[16] The regulatory authority is the federal Office of Surface Mining Reclamation and Enforcement ("OSMRE") or the state office of surface mining approved under the SMCRA.[17] The agency with jurisdiction over a the "place" (i.e., historic property) is the relevant state historic preservation office ("SHPO").[18] The Section 106 process may be used to determine whether a surface coal mining operation will affect historic property and Section 522(e)(3) applies.[19]

The rulemaking's proposed changes to the owner objection provisions and the appeals process would prevent Tribes from listing historic properties to the National Register. While this would affect Tribes' participation in the National Register and the potential consideration of these properties in the Section 106 process, it would also mean that these properties would not be eligible for the protections afforded by SMCRA Section 522(e)(3), which applies only to listed properties.

NATHPO's and Native Village of Tyonek's comments—along with most other commenters—have focused on the rulemakings implications for different NHPA programs: the National Register and the Section 106 process. Despite this focus, as discussed above, the rulemaking would affect other programs and agency review processes that involve historic properties. While the NPS has attempted to downplay the rulemakings regulatory significance, in fact, the rulemaking would not only affect NPS-administered programs under the NHPA, but also the NHPA Section 106 process administered by the Advisory Council on Historic Preservation ("ACHP"), the Department of Transportation Act Section 4(f) process administered by the Department of Transportation and state departments of transportation, and SMCRA Section 522(e)(3) administered by OSMRE and state offices of surface mining.

Case Studies of the Effects of the Rulemaking. During the meeting, you asked for cases studies or examples of Section 106 processes and how they would have been affected if the proposed rulemaking was in place. One example of how the rulemaking would have a detrimental effect on Tribes is Native Village of Tyonek's experience seeking a determination of eligibility for the Ch'u'itnu Traditional Cultural Landscape during the U.S. Army Corps of Engineers'-led Section 106 process for the proposed Chuitna Coal Mine.

During the Section 106 process Native Village of Tyonek identified that the proposed mine was located within a cultural landscape eligible for inclusion on the National Register. The USACE refused to undertake a reasonable and good faith effort to identify and evaluate the cultural landscape for National Register eligibility.[20] Accordingly, Native Village of Tyonek was forced to

[16] *Id.* § 761.11(c) (citing *id.* § 761.17(d)).
[17] *See id.* pts. 900-950.
[18] *C.f. id.* § 761.16(d)(2)(ii) (In making a valid existing rights determination, the regulatory authority must provide notice to "[t]he owner of the feature causing the land to come under the protection of § 761.11, and, when applicable, the agency with primary jurisdiction over the feature . . . . For example, both the landowner and the [SHPO] must be notified if the surface coal mining operations would adversely impact any site listed on the National Register[.]").
[19] *See id.* § 740.13(b)(3)(iii)(D) (applicants must include in their application package "[a] statement of the classes of properties of potential significance within the disturbed area, and a plan for the identification and treatment, in accordance with 36 CFR part 800, or properties significant and listed or eligible for listing on the National Register[.]").
[20] *See* 36 C.F.R. § 800.4(b)(1).

undertake this work itself. Over the course of two years, Native Village of Tyonek conducted ethnographic and archaeological research and compiled a 150-page report on the landscape's National Register eligibility which it submitted to the USACE in April 2015. The report documented the National register eligibility of the entire Ch'u'itnu (Chuitt River) watershed in Southcentral Alaska, encompassing the proposed mine site and its related infrastructure.

The USACE did nothing with the report; it refused to consider the landscape in the Section 106 process and refused to make a determination of eligibility. After over a year of refusing to consider the Ch'u'itnu Traditional Cultural Landscape, Native Village of Tyonek was finally able to have the ACHP in May 2016 request the USACE seek a formal determination of eligibility from the Keeper on the Ch'u'itnu Traditional Cultural Landscape.[21]

In July 2016, the USACE made a determination of eligibility, finding that only half of the landscape was eligible for the National Register, conveniently excluding from its determination the portions of the Ch'u'itnu watershed that contained the actual proposed mine site. The USACE submitted this determination to the Alaska SHPO who, in August 2016, refused to render an opinion on the eligibility of the landscape. The USACE never requested a formal determination of eligibility form the keeper, despite the ACHP's Section 106 regulations requiring it to do so if requested by the ACHP. Ultimately, the mining project proponent went bankrupt and the project was scrapped.

Native Village of Tyonek's experience highlights the perils of the proposed rulemaking. Tribes and Native Hawaiian organizations have a statutory right to have places of traditional religious and cultural significance determined eligible for inclusion on the National Register and be consulted with in the Section 106 process about such properties. The rulemaking abdicates the Keeper's ultimate authority to make determinations of eligibility in the Section 106 process by making its determination contingent on receiving a request from both the SHPO and the federal agency and removing its authority to make a determination contrary to the determination made by the federal agency. The substantive provisions of the Section 106 process—the assessment of effects and the resolution of adverse effects—are contingent on the identification of historic properties. The rulemaking removes the only safety valve Tribes and Native Hawaiian organizations have when federal agencies refuse to determine historic properties eligible and thus take them into account in the Section 106 process.

* * *

NATHPO appreciates the opportunity to engage in a productive conversation with the OIRA on the critical issue to Tribes, THPOs, and Native Hawaiian organizations. Hopefully this additional information will provide the OIRA a better sense of the rulemaking's impact. Should you have any additional questions, please do not hesitate to contact me at: wfurlong@narf.org.

Respectfully,

[21] *See id*. § 800.4(c)(2).

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c.c.

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