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Sent via E-Mail

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**Re: Comments by the Native Village of Tyonek on the National Park Service's Notice of Tribal Consultation Regarding Proposed Rulemaking for the National Register of Historic Places
National Park Service (NPS) RIN (1024-AE49)**

Deputy Assistant Secretary Hambleton:

This letter is submitted by the Native American Rights Fund on behalf of the Native Village of Tyonek, in response to the National Park Service's ("NPS") notice of tribal consultation¹ for its proposed rulemaking RIN (1025-AE49) regarding the regulations implementing the National Register ("National Register") of Historic Places and the Section 106 process.² The Native Village of Tyonek strongly objects to the adequacy of the NPS's tribal consultation regarding the proposed rulemaking.

I. Background

On March 1, 2019, the NPS published a notice of proposed rulemaking for the regulations implementing the National Register and the Section 106 process. On April 30, 2019, the Native American Rights Fund, on behalf of the Native Village of Tyonek, submitted the enclosed comments on the notice of proposed rulemaking to the NPS. In these comments, the Native Village of Tyonek objected to the NPS's refusal to engage in government-to-government consultation with federally recognized tribes regarding the potential impacts of the proposed rulemaking, in violation

¹ 84 Fed. Reg. 24,179 (May 24, 2019).

² 84 Fed. Reg. 6,996 (Mar. 1, 2019).

of Executive Order 13,175,³ Presidential Memorandum of November 5, 2009,⁴ the Department of Interior Policy on Consultation with Indian Tribes (“Tribal Consultation Policy”),⁵ and the National Historic Preservation Act (“NHPA”).⁶

On May 24, 2019, the NPS published a notice of tribal consultation regarding its proposed rulemaking for the National Register regulations. The notice states that the NPS will hold a single consultation meeting on June 24, 2019, in Sparks, Nevada, in association with the National Congress of American Indians’ mid-year conference and a single teleconference on July 1, 2019. The NPS’s efforts to engage in tribal consultation regarding the proposed rulemaking are insufficient and fail to meet the standard of consultation required by Executive Order 13,175, Presidential Memorandum of November 5, 2009, the Tribal Consultation Policy, and the NHPA.

II. Inadequate Consultation

Executive Order 13,175 mandates: “[N]o agency shall promulgate any regulation that has tribal implications . . . , unless . . . the agency, prior to the formal promulgation of the regulation . . . consulted with tribal officials early in the process of developing the proposed regulations.”⁷ Executive Order 13,175 defines “policies that have tribal implications” as:

[R]egulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.⁸

Presidential Memorandum of November 5, 2009, further directs every federal agency to adopt a tribal consultation policy “implement[ing] the policies and directives of Executive Order 13,175.”⁹ Pursuant to this directive, the Department of the Interior developed and adopted its Tribal Consultation Policy.

³ See Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).

⁴ See Tribal Consultation: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881 (Nov. 5, 2009) (hereinafter Consultation Memo.).

⁵ See Dep’t of Interior, *Department of Interior Policy on Consultation with Indian Tribe* (2011), available at <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf> (hereinafter Tribal Consultation Policy); see also Department of Interior Policy on Consultation with Indian Tribes, Secretarial Order No. 3,317 (Dec. 1, 2011), available at <https://www.doi.gov/sites/doi.gov/files/migrated/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf>.

⁶ See 54 U.S.C. §§ 302706(b), 306108.

⁷ Exec. Order No. 13,175, § 5(b)(2)(A), 65 Fed. Reg. at 67,249.

⁸ *Id.* § 1(a), 65 Fed. Reg. at 67,249.

⁹ Consultation Memo., 74 Fed. Reg. at 57,881.

The Tribal Consultation Policy requires that every bureau and office within the Department of the Interior, including the National Park Service,¹⁰ “will consult with Indian Tribes as early as possible when considering a Departmental Action with Tribal Implications.”¹¹ The Tribal Consultation Policy defines “Departmental Action with Tribal Implications” as:

Any Departmental regulation[or] rulemaking . . . that may have a substantial direct effect on an Indian Tribe on matters including, but not limited to: 1. Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on federally managed lands; . . . 3. An Indian Tribe’s formal relationship with the Department; or 4. The consideration of the Department’s trust responsibilities to Indian Tribes.¹²

It is the obligation of each bureau and office to “notify the appropriate Indian Tribe(s) of the opportunity to consult pursuant to this Policy” when considering a department action with tribal implications.¹³

Consultation is not an amorphic concept. Instead:

Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility. Communication will be open and transparent without compromising the rights of Indian Tribes of the government-to-government consultation process. Federal consultation conducted in a meaningful and good-faith manner further facilitates effective Department operations and governance practices.¹⁴

The NHPA also requires the NPS to consult with federally recognized tribes and Native Hawaiian organizations when its proposed actions have the potential to affect historic properties of traditional religious and cultural significance to tribes or Native Hawaiian organizations.¹⁵ Pursuant to the Advisory Council on Historic Preservation’s regulations, consultation is “the process of seeking, discussing, and considering the view of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.”¹⁶

Consultation pursuant to the NHPA must “commence early in the planning process.”¹⁷ It must provide a reasonable opportunity for tribes and Native Hawaiian organizations “to identify [their]

¹⁰ See *Government-to-Government Consultation*, NAT’L PARK SERV. (June 12, 2017), <https://www.nps.gov/subjects/tek/g2g.htm> (last visited Apr. 28, 2019).

¹¹ Tribal Consultation Policy, *supra* note 5, at § VII(E)(1), 11 (emphasis added).

¹² *Id.* § III, 3.

¹³ *Id.* § VII(A), 7.

¹⁴ *Id.* § II, 2.

¹⁵ 54 U.S.C. § 302706(b).

¹⁶ 36 C.F.R. § 800.16(f).

¹⁷ *Id.* § 800.2(c)(2)(ii)(A).

concerns about historic properties.¹⁸ This consultation must “be conducted in a sensitive manner respectful of tribal sovereignty”;¹⁹ “must recognize the government-to-government relationship between the Federal Government and Indian tribes”;²⁰ and must “be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.”²¹

The single consultation meeting and single teleconference announced in the notice is woefully insufficient to satisfy the NPS’s tribal consultation obligations. While the Tribal Consultation Policy acknowledges that the NPS may be able to satisfy its tribal consultation obligations with a single meeting, single meetings “are particularly appropriate for *local or regional issues*, or a Tribe-specific issue.”²²

The proposed rulemaking is a national issue and affects every tribe throughout the United States. The national significance and potential impacts of the proposed rulemaking is evidenced by the sheer volume of comments submitted by tribes and tribal organizations from across the United States. The national implications of the proposed rulemaking make it therefore inappropriate and unacceptable for the NPS to host only one in-person tribal consultation meeting and one teleconference. Indeed, Congress has expressed its concerns over the NPS’s lack of meaningful consultation regarding the proposed rulemaking.²³

Government-to-government consultation must be more than the opportunity provided to the public to comment on the proposed rulemaking.²⁴ “The [Department of the Interior] policies and procedures require extra, *meaningful* efforts to involve tribes in the decision-making process.”²⁵ Simply allowing tribes to express their views and concerns on an already drafted proposed rule change is not consultation.²⁶

It is the NPS’s obligation to shoulder the burden of consultation and to uphold its trust responsibility.²⁷ It is unacceptable for the NPS to expect or require tribes to shoulder the burden of consultation by incurring the costs of traveling to Sparks, Nevada. This burden is particularly acute for the Native Village of Tyonek and other tribes in rural Alaska. Additionally, while teleconferences are convenient, they are not consultation and do not satisfy the NPS’s overarching trust responsibility to engage in meaningful consultation. Teleconferences do not facilitate “a

¹⁸ *Id.* § 800.2(c)(2)(ii).

¹⁹ *Id.* § 800.2(c)(2)(ii)(B).

²⁰ *Id.* § 800.2(c)(2)(ii)(C).

²¹ *Id.*

²² Tribal Consultation Policy, *supra* note 5, § VII(E)(2), 13 (emphasis added).

²³ H. Rep. No. 116-100, at 39 (2019), *available at* <https://www.congress.gov/116/crpt/hrpt100/CRPT-116hrpt100.pdf> (“The [House Appropriations] Committee also expects the United States to enter into meaningful government-to-government consultation with affected tribes prior to finalizing any changes to the regulation.”).

²⁴ *Wyoming v. U.S. Dep’t of Interior*, 136 F. Supp. 3d 1317, 1345-46 (D. Wyo. 2015), *vacated as moot sub nom. Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016).

²⁵ *Id.* at 1346 (emphasis in original).

²⁶ *Id.*

²⁷ *Accord* 36 C.F.R. § 800.2(a) (“It is the statutory obligation of the federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance.”).

discussion, conference, or forum in which advice of information is sought or given, or information or ideas are exchanged,”²⁸ nor do they facilitate “seeking, discussing, and considering the view of other participants.”²⁹ The NPS’s proposed consultation appears designed to limit, as much as possible, tribes’ participation and input in this rulemaking process. Accordingly, the NPS’s proposed consultation violates Executive Order 13,175, Presidential Memorandum of November 5, 2009, the Tribal Consultation Policy, and the NHPA.

The Native Village of Tyonek therefore requests that the NPS engage in *meaningful* consultation by hosting at least one tribal consultation meeting in Anchorage, Alaska, as well as consultations throughout the United States in, at a minimum, every Bureau of Indian Affairs (“BIA”) region.³⁰ Furthermore, because the proposed rulemaking affects Native Hawaiians’ and Native Hawaiian organizations’ ability to nominate and protect historic properties of traditional religious and cultural significance to them, the NPS must also hold in-person consultations with Native Hawaiian organizations in Hawai’i.³¹ Additionally, the Native Village of Tyonek again requests government-to-government consultation with the NPS and the Department of the Interior in Tyonek, Alaska, regarding the proposed rulemaking.

III. Conclusion

The Native Village of Tyonek reiterates its adamant objections to the proposed rulemaking. The proposed changes to the National Register regulations would inhibit tribes’ and Native Hawaiian organizations’ ability to protect places of traditional religious and cultural significance by enacting additional barriers to their ability to nominate and determine eligible places of traditional religious and cultural significance. The proposed rulemaking is unsupported by, and contradicts, the plain statutory language of the NHPA. Furthermore, the NPS has not provided a meaningful explanation justifying the need for the proposed rulemaking. Indeed, Congress has questioned the need for and motivation behind this proposed rulemaking.³² The Native Village of Tyonek respectfully requests that the NPS suspend the rulemaking process and engage in meaningful government-to-government consultation with federally recognized Indian tribes, including the Native Village of Tyonek, regarding the proposed changes.

Should you have any questions, please do not hesitate to contact me by email at wfurlong@narf.org or by telephone at (907) 276-0680. The Native Village of Tyonek looks forward to your response to its request for government-to-government consultation.

²⁸ Nat’l Park Serv., *National Park Service Management Policies* 156 (2006), available at https://www.nps.gov/policy/MP_2006.pdf.

²⁹ 36 C.F.R. § 800.16(f).

³⁰ BIA regions include: Alaska Region; Eastern Region; Eastern Oklahoma Region; Great Plains Region; Midwest Region; Navajo Region; Northwest Region; Pacific Region; Rocky Mountain Region; Southern Plains Region; Southwest Region; and Western Region.

³¹ See 54 U.S.C. § 302706(a)-(b); 36 C.F.R. § 800.2(c)(ii).

³² H. Rep. No 116-110, at 39 (“It remains unclear to the [House Appropriations] Committee what problems the [NPS] is trying to solve by its proposal. This Committee does not believe that the proposed changes are required by the minor amendments that Congress made to the [NHPA] in 2016.”).

Respectfully,



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Staff Attorney
NATIVE AMERICAN RIGHTS FUND

c.c.

President Arthur Standifer
Native Village of Tyonek

Representative Raúl M. Grijalva, Chair
House Committee on Natural Resources

Representative Deb Haaland, Chair
Subcommittee on National Parks, Forests, and Public Lands
House Committee on Natural Resources

Representative Ruben Gallego, Chair
Subcommittee for Indigenous Peoples of the United States
House Committee on Natural Resources

Representative Nita M. Lowey, Chair
House Committee on Appropriations

Representative Betty McCollum, Chair
House Committee on Appropriations
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John M. Fowler, Executive Director
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