Signtalker, LLC
Les McConnell, Owner
An Indian Owned Company
P.O. Box 1572, Oregon City, 97045

National Park Service, Joe Watkins
Office of Tribal Relations
1201 Eye Street N.W.
Washington, DC 20005

RIN-AD84

April 30, 2015

Mr. Watkins:

This letter is in response to Federal Register notice dated April 20, 2015, RIN-AD84, for gathering certain plants by federally recognized American Indian Tribes within National Park System lands (NPS lands). Recognizing traditional cultural uses of plants by an Interior departmental agency was a good step in 1966. Continuing those former authorizations with more specific parameters involving tribal governments may serve both tribes and the NP Service (Agency) in most instances across America.

As stated in Title 54 USC, the Agency is responsible for managing public use of resources within its jurisdiction. The proposal to enter into agreements with federally recognized Indian tribes to "allow" tribal members to gather plants represents a new and much different approach. Since Indian nations are not a part of the public, several specific accommodations must be made when developing governmental agreements. No federal agency is authorized to regulate or otherwise limit the exercise of treaty-reserved rights – which are tribal rights to be administered by the respective tribal governing bodies.

Nothing in the 1916 Organic Act precludes the exercise of such rights. Similarly, Congress did not withdraw Park lands from open and unclaimed land status; the lands are still part of the public domain. Involving tribal governments in agreements whereby the Agency determines when or how or even which species may be gathered is inconsistent with federal laws and court cases that have affirmed that only tribes may administer the exercise of those rights. There is a federal court case commonly known as the "Hick's Case" about hunting when an elk that was taken within a National Park. The federal district court decision was to protect the Roosevelt Elk species. The judge also confirmed that NPS lands remain in the public domain and are still "open and unclaimed" as provided in the various treaties throughout the Pacific Northwest. The ruling did not prohibit treaty hunting within the Park; it prohibited the taking of that specific species. Even though the case was not appealed to the Ninth Circuit, the decision is a good starting point to better understanding the status of "open and unclaimed lands." Unlike the treaty language: "usual and accustomed areas" for taking fish, "open and unclaimed" land has no similar court adopted meets and bounds descriptions or mapped illustrations.

Now, after 99 years of relative silence about treaty reserved rights, the Agency is proposing to usurp tribal authorities by negotiating government-to-government agreements. The rule would make tribal governments subservient to a Superintendent or Regional Director approval through a regulatory process. The Agency fails to acknowledge that the Secretary of Interior is the

primary trustee of American Indian rights and resource interests and therefore must honor and protect those rights as well as the opportunity for tribal members to exercise such rights. Treaty rights are non-tangible property rights and subject to protections under the 5th Amendment of the U.S. Constitution. The Agency is not authorized to grant permission to or otherwise control tribal governments who have sole authority to administer the exercise of off-reservation treaty-reserved rights. The lack of action to honor and protect treaty rights may be a breach of Interior's assigned trust responsibility to tribal governments. A rule that usurps tribal authorities most certainly will constitute a breach of trust.

Similar efforts to control tribal gathering rights have been attempted by the U.S. Fish and Wildlife Service (FWS) under the guise of the Endangered Species Act (ESA). Nothing in the ESA alters treaty rights or restricts the exercise of such rights and no federal agency has been delegated an authority to regulate those rights. I experienced that issue first hand while still employed by the U.S. Forest Service, when a tribe selected a single western red cedar tree for constructing a traditional canoe. The FWS administrative arguments and opposition to harvest one tree dragged on for two years before the tribe and the Forest Service prevailed and the tribe harvested one tree from NFS land for their canoe project. The above treaty provisions do not apply to all Indian tribes in America. To date about 42 tribes retain such rights in the Pacific Northwest and in the Great Lakes region.

The proposed rule cites an Executive Order dated 1994 to introduce the government-to-government relationship between Indian tribes and the U.S. More appropriately, the first documentation of a governmental relationship was the Indian Reorganization Act of 1934. Even earlier, the U.S. originally affirmed tribal sovereignty when the Continental Congress ratified the first Indian treaty in 1778. The more commonly used definition for treaty is "a contract between two sovereigns", i.e. two governments. Thereafter, the King of England included an affirmation of lasting tribal sovereignty in the Treaty of Ghent in 1814. Sometimes called the Treaty of Peace and Amenity, this treaty brought to a close the War of 1812, which was between the U.S. and Great Britain. Even though tribes were not signatories to that treaty, Indian tribal sovereignty was preserved at the insistence of the British Crown.

The example provided in the Federal Register on page 21675 for El Malpais, acknowledges traditional use for cultural and religious purposes. Because of the subject matter, the agency appears to be in conflict with the First Amendment of the U.S. Constitution. The rule proposes that Agency develop governmental agreements addressing religious use of natural resources and places such use in control of tribal governments. That is inconsistent with existing law.

Any such agreement between tribes and the Agency risks creating tensions between tribal governments and their traditional elders and religious leaders. These regulations must include a discussion about the American Indian Religious Freedom Act (AIRFA) and the Indian Civil Rights Act of 1968 (ICRA). Both statutes are about individual Indian rights. Tribal governments should not be involved with religious and spiritual activities, including individual members who gather plants for specific religious purposes. See 25 USCA, 1302.2. for a list of court cases leading up to the passing of the ICRA. This rule, based on government-to-government agreements, would operate in direct conflict with the above-named statutes.

In addition to separating individual rights from tribal rights issues, there are many federally recognized Indian tribal governing bodies comprised of multiple Indian tribes – and not all of

those respective tribes share historic land uses or spiritual beliefs in the same locations. In some instances, tribes were forced onto existing Indian reservations even though there was no historical relationship with the tribes already on that reservation. Some tribal cultures, by choice, do not participate in political actions therefore; will never have a voice in tribal government decisions.

It is commendable that the Agency consulted with Cherokee tribal members in North Carolina. It should be noted however, that there is only one Cherokee Nation, whose tribal headquarters is located in Tahlequah, Oklahoma. That much larger population of Cherokee peoples is descended from Indian families who were driven from their traditional homeland and re-located in Indian Territory, now known as Oklahoma. That does not mean those Indian people gave up their traditional and religious beliefs and practices because they could no longer access historic lands and the resources thereon. Instead, they adapted to the new environment and retained whatever parts of their original cultures they could salvage, given the circumstances. Consultation in this instance appears both selective and incomplete.

The proposed rule, again at page 21675, explains that separate meetings with Lookinghorse, AFN and others took place - yet there is no provision to accommodate their specific needs, which are traditional, cultural, religious and spiritual in nature. Those consultations should have provided the agency with insight as to how tribal governments cannot be involved in making spiritual and religious use agreements with a federal agency – as a matter of law.

Government-to-government agreements, as outlined on page 21676, may be well and good for those tribes without off-reservation treaty reserved rights. That part of the proposed rule might proceed for the remainder of the tribal governments across America. Section 2.1(d) however, mentions that there would be no effect on existing treaty rights or the taking of wildlife or fish. Yet the proposed rule limits gathering to plants. Rather than seek an authorization for an exemption from existing rules and law, the Agency needs to honor treaty rights and work with tribes to forge some agreement about what species might be taken, keeping in mind that the species harvested is not a federal decision and that those resources are treaty resources. As drafted, the rule seems to be selective as to what treaty provisions the Agency intends to honor.

In Section 2.6(c), regarding the ability to protect certain information gathered: Both Tribal governments and state governments have exemptions for requests under the Freedom of Information Act. There should be more than a "belief" that the Agency can protect sensitive information because it is a matter of law. This needs to be an affirmative statement that sensitive information will be protected.

Section 2.6(h) wrongly requires that a Regional Director approve an agreement. That is not an option where treaty rights are concerned.

Section 2.6(f) proposes that tribal governments identify who within a tribe is designated to gather. This cannot apply to tribal governments for religious practitioners.

The relationship of the proposed rule to proposed U.S. Forest Service regulations: Fundamentally, the relationship is quite different, because the Forest Service is not delegated the same trust responsibility as Interior and its agencies. While the Forest Service must honor the exercise of treaty rights, that agency has no trust duty to protect those rights. The Forest

Service continues to use the term "free use" when addressing requests from tribes to gather resources on NFS lands. There is no authorization for the Forest Service to collect money from Indian Nations; hence, "free use" is a misapplied term. For tribes with treaty rights, exercising those rights is not a matter of requesting to do so. Instead, as stated above, there is an obligation for the agency to honor those rights. Neither agency should facilitate tribal controls for the individual right to gather plants for religious purposes. As a technical matter, the proper term for lands administered by the Forest Service is National Forest System (NFS) lands – not "USFS lands", which implies ownership. Again, a treaty right to gather is not subject to approval by any federal agency. Concerns about how much paperwork is generated by the proposed rule and by two separate agencies are small questions when considering the possibility of legal action to address the unresolved rights issues – which would likely generate ten times the paperwork. More closely associated with paperwork volume: this proposed rule must be re-written in its entirety to make it consistent with existing law.

The government-to-government relationship described on page 21675 cannot apply to tribes with treaty rights, because in those instances there are no "avenues for cooperative NPS-tribal government oversight of member activities..." No federal agency has authority to oversee religious uses or treaty activity conducted by tribal members.

Part 2: The Agency should re-name this part to include reference to treaty tribes and uses by individual Indians consistent with the ICRA. This section must include gathering options for spiritual and religious purposes as well as the Secretary of Interior's trust responsibility to honor and protect treaty-reserved rights.

Invoking the National Historic Preservation Act may not get the desired results of sound relations with Indian peoples because that statute is also inconsistent with existing laws because tribal governments are the focus where religious uses and religious leaders are concerned. In addition, the Advisory Council's authorizations at Title 2, section 202, have yet to be adhered to or fulfilled.

I have covered all of this subject matter in my recent book: American Indian Consultation, © 2009, second printing. One may request a copy through e-mail: signtalker.llc@gmail.com.

Sincerely,

Les McConnell