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July 20, 2015

RIN 1024-AD84; National Park Service; Department of the Interior

National Park Service

Joe Watkins

Office of Tribal Relations and American Cultures

1201 Eye Street, NW

Washington, DC 20005

Dear Mr. Watkins:

The Standing Rock Sioux Tribe supports the proposed rule issued by the National Park Service ("NPS") that would authorize traditional tribal gathering of plants on NPS lands. 80 Fed. Reg. 21,674 (Apr. 20, 2015). The proposed rule addresses a longstanding problem – that NPS regulations have unnecessarily and unfairly impeded tribal members from undertaking important cultural and religious plant-gathering activities on NPS lands. NPS regulations permit gathering of plants on NPS lands for consumption, 36 C.F.R. § 2.1(c), but not for religious or cultural purposes of Indian tribes, *id.* § 2.1(d). The NPS's proposed rule would seek to correct this problem by authorizing agreements between federally recognized tribes and the NPS, under which traditional tribal gathering practices can be restored and maintained on NPS lands. The proposed rule takes a measured approach, requiring particularized agreements that provide the terms and conditions for gathering, while recognizing that traditional tribal gathering activities promote and enhance a core purpose of the NPS – the sustainability of the resources and their protection for future generations. While the Tribe here offers some important suggestions to enhance the effectiveness of the proposed regulations, the basic approach of the proposed regulations is fundamentally sound.

I. Tribal Gathering is Essential to Lakota/Dakota Culture and a Sustainable Activity

Sustainable gathering is a fundamental aspect of tribal culture. From time immemorial, members of the Standing Rock Sioux Tribe have collected plants across the traditional territory

RIN 1024-AD84; National Park Service; Department of the Interior
Comments on Proposed Regulations
July 20, 2015
Page 2

of the Great Sioux Nation. That territory extends from Minnesota, through the Dakotas, and into Nebraska, Wyoming and Montana. The collection of plant life has been an integral part of the Dakota and Lakota culture. Tribal members have continuously gathered plants for food, medicine, artwork, and tools. Families and extended families have been collecting over 400 different types of plants in places their great-great grandparents showed them. The methods of gathering are guided by traditional Lakota and Dakota protocols and practices. These practices require that plants be treated in a sustainable way that ensures their vitality and availability in perpetuity. Unfortunately, the NPS's current regulations have interfered with the ability of tribal members to engage in traditional gathering practices, and to a considerable degree have been a substantial obstacle to the continuation of beneficial and sustainable gathering.

When cultural practices are forbidden, tribal members suffer from an overall loss of cultural knowledge gained from those practices. Tribal members cannot pass important traditional values and understandings of plant collection to future generations. These include the traditional methods of sustainable gathering. For example, traditional tribal teachings prescribe precise rules for gathering certain plants, including only gathering a certain percentage of the plants to allow sustainable growth. By allowing tribal members to practice their traditions and culture in the open and without fear, NPS's proposed rule opens the doors for traditional, sustainable gathering methods to be taught to other tribal members and passed down to future generations.

This new rule would also correct the uncertain and uneven enforcement of access rules on protected federal lands that either blocks access to gathering, or unfairly exposes tribal members to legal penalties. The Tribe is aware of some circumstances in which tribal members have been allowed to gather on protected federal and state lands, but park enforcement varies from park to park. For example, officials at one national park in recent years have permitted an ethnobotany class from the Tribe's Sitting Bull College to collect and gather plants in the park's boundaries for one week a year. By contrast, another nearby national park strictly prohibits collection of any plants or items and park officials have issued tickets to individual tribal members who have violated this prohibition. Under the proposed rule, the parks and tribes will have the opportunity to negotiate agreements that could give tribal members access to parks under clear, established guidelines, eliminating current confusion regarding traditional gathering activities in the parks.

The history of the Sioux Nation and the Standing Rock Sioux Tribe includes repeated actions by the federal government to take the Tribe's lands. Time and again the federal government broke its word with the Tribe and took lands it had promised to the Tribe forever. Even within the current Standing Rock Sioux Reservation, the federal government continued to take tribal lands, including 56,000 acres of land that were taken for the Oahe Dam project in 1958. This was the most productive land on the Reservation, and included many of the most significant areas for traditional tribal gathering activities. The loss of Tribal lands has had a devastating impact on the Tribe, and in this context it has meant that many traditional plants are either extremely scarce or not available at all on the Tribe's own lands. This history underscores the importance of traditional gathering activities on federal lands. Given the importance of

gathering to the Tribe, the limited impact of gathering on NPS units, and the potential for ecological restoration, the NPS should move forward with the rule and formally allow Native Americans, including members of the Standing Rock Sioux Tribe, to gather in NPS units.

II. The NPS Has Authority to Issue This Rule.

The NPS plainly has authority to promulgate this rule under the NPS Organic Act of 1916, ch. 408, 39 Stat. 535 (codified as amended at 54 U.S.C. § 100101 et seq.). The Organic Act created the NPS and obligated it to “promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 54 U.S.C. § 100101(a). The Act further authorizes the Secretary to make “such regulations as the Secretary considers necessary or proper for the use and management of the [National Park] System units.” *Id.* § 100751(a).

Courts have recognized that the Organic Act gives NPS broad discretion to decide how best to achieve the Act’s general mandate. *See Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1452 (9th Cir. 1996). “[W]hile the Act clearly directs the NPS to regulate parks pursuant to broad objectives, the agency is left with the task of further defining and applying this standard.” *S. Utah Wilderness Alliance v. NPS*, 387 F. Supp. 2d 1178, 1189 (D. Utah 2005). Moreover, courts read the Organic Act “as permitting the NPS to balance the sometimes conflicting policies of resource conservation and visitor enjoyment” *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 826 (10th Cir. 2000). “The test for whether the NPS has performed its balancing properly is whether the resulting action leaves the resources ‘unimpaired for the enjoyment of future generations.’” *Id.* As a result, courts will accord *Chevron* deference to the NPS’s construction of the Organic Act. *See Bicycle Trails Council*, 82 F.3d at 1452.

Allowing the gathering of plants for traditional purposes by Indian tribes, with time, place and manner governed by tribal-NPS agreements, is well within the broad grant of authority given to the Secretary under the Organic Act. The proposed rule requires the park Superintendent to determine that the Indian tribe has a traditional association with the park area, the proposed gathering is a traditional use of the park area by the Indian tribe, and that the gathering and removal activities “will not result in a significant adverse impact on park resources or values.” The proposed rule balances the cultural interests that tribal members have in gathering with the ecological demands of maintaining the scenery and wild life in the parks “unimpaired for the enjoyment of future generations.” The proposed rule strikes a reasonable balance, well within the overall framework provided by the Organic Act.

III. Recommendations for Improving the Proposed Rule

A. Criteria for Entering into Agreements.

As discussed above, traditional tribal gathering is a sustainable activity which places the highest value on protecting resources for the future. Properly understood and implemented, traditional tribal gathering should not have an adverse impact on park resources or values at all. The proposed § 2.6(d)(3) simply provides that a Superintendent must document that proposed gathering “will not result in a significant adverse impact on park resources or values” before negotiating an agreement to allow such gathering. And since sustainability is the fundamental principle underlying both traditional tribal gathering and park purposes, a finding of “no significant adverse impact” should be a routine matter. Nevertheless, this language, without more, could be used in a manner that would unfairly limit tribal gathering activities.

To prevent this, we suggest that this provision be modified to add procedural safeguards that protect tribal interests while still preventing significant adverse impacts on park lands. First, given the sustainable nature of traditional gathering practices, it should be presumed that traditional gathering will be consistent with park values. Second, if the Superintendent believes that, contrary to this presumption, the gathering activity would adversely affect the resource, he should be required, to first engage in consultation with the tribe regarding the basis for his view and provide the tribe with an opportunity to respond. Consultation might lead to alternative approaches for addressing the matter. But if, following consultation and consideration of the tribe’s position, the Superintendent continues to believe that the proposed gathering activity would adversely affect the resource, his position and the basis for it should be articulated in writing, and the tribe should have a right to appeal.

B. Traditional tribal associations with park areas.

Many Tribes have traditional associations with lands far beyond their current reservation boundaries. As noted above, Standing Rock has a traditional relationship with lands extending several states beyond its current Reservation, which is located in North and South Dakota. For the proposed rule to work as intended, the NPS must gain a proper understanding of a tribe’s traditional association with park areas. First, NPS must give appropriate weight in its consideration of this issue all available types of information. This should include contemporary use and practice, tribal oral history, anthropological evidence, historical records, and determinations by courts and the Indian Claims Commission regarding traditional tribal use of the areas in question. In different cases, different categories of information will provide the proper foundation for establishing a tribal association with the park area, and the rule should specify that all these forms of information shall be considered, if available.

Second, NPS should not arbitrarily limit how recently a tribe must have been present in an area for a traditional association to be present under the proposed rule. Tribes have strong connections with lands that last across many generations. If a traditional association exists and

remains meaningful to the tribe today, NPS should not deny the tribe an opportunity to enter an agreement regarding traditional gathering.

Third, tribes should not be penalized as a result of the existing NPS regulations that have disrupted and prohibited traditional tribal gathering activities. The proposed rule should make it clear that a tribe's traditional association with a park area is maintained, notwithstanding periods of non-use, arising from the NPS interference with traditional gathering.

C. Confidentiality of Sensitive Tribal Cultural Knowledge.

In the proposed rule, the NPS says that it "believes that under existing law it can protect sensitive or confidential information submitted by tribes." 80 Fed. Reg. at 21,677. We agree that NPS may keep such information confidential and we strongly support its intent to protect the confidentiality of sensitive cultural information. The cultural and religious practices of the Standing Rock Sioux Tribe require that certain ceremonies and other activities be private and confidential and there is no valid reason why our most sensitive religious matters should be publicly disclosed.

D. Deference to Traditional Tribal Knowledge of Seasonal and Location-Specific Gathering.

Traditional gatherers understand the time, place, and manner in which each plant may be gathered to enable that plant to replenish itself and flourish. This traditional knowledge is passed down from generation to generation – as grandparents and parents teach their children the cultural importance of the particular type of plant and the need for it to be protected and sustained. In this sense, with its fundamental emphasis on sustainability, traditional gathering supports the broader conservation purposes of the National Parks. And this basic connection between traditional gathering and sustainability should inform the terms and conditions of agreements between tribes and NPS.

One important way for this connection to be honored is for agreements to give deference to tribal knowledge about how gathering varies by season and location. In traditional Lakota and Dakota gathering, the appropriate gathering period varies by purpose and plant. Some plants are collected only during certain times of the year. For instance, red willow bark is only collected in the coldest months of the year. We believe that it is proper and important for the parties to give deference to traditional knowledge when negotiating the times and locations of gathering.

E. Identifying Tribal Members and Monitoring Gathering Activities.

The proposed rule includes provisions concerning the identification of tribal members and the monitoring of tribal traditional gathering activities. § 2.6(f)(3)-(4). While we agree that the regulations should include provisions to ensure that traditional tribal gathering activities are properly undertaken by tribal members (and not others), this should be a straightforward matter.

In most cases, traditional gathering by members of the Standing Rock Sioux Tribe is practiced in small groups – typically a family, *tiospaye* (extended family), or a handful of community members together. Even in the aggregate, the number practicing traditional gathering tends to be small – particularly in the context of the scale of the National Park System. Small amounts of gathering in large NPS units should not be impeded by unnecessary bureaucratic requirements. In these situations – which will likely be the vast majority of cases – all tribal members should be authorized to undertake traditional gathering activities, in park areas where the Tribe has a traditional association.

Where this is the case, the method for identifying tribal members who may gather plants is simple. Standing Rock issues tribal identification cards to its members. These cards provide the name of the tribe, the member's name, and his or her photograph. Federal, state and tribal officials all rely on these tribal identification cards for a wide range of purposes, such as law enforcement, health care, and social services eligibility. Indeed, some NPS units already use tribal identification cards as an informal method for identifying tribal members who are allowed to enter the park for free. The regulations should specify that tribal identification cards provide an appropriate means of identifying tribal members who may engage in a traditional gathering activity. In most instances, no more should be required.

There may, however, be specific resources for which the tribe and the NPS agree additional protection is necessary, based on the specific facts and circumstances. For example, a particular plant may thrive in normal years in a particular NPS unit, but may be stressed in connection with an unusual drought or other environmental factor. In such circumstances, traditional gathering activities may need to be limited – perhaps temporarily – to protect the resource, and to maintain the plants' long-term health. Where this occurs, an agreement between the tribe and the NPS could define the specific protection needed, and the appropriate limits for traditional gathering. The tribe would then issue permits to the tribal members who are authorized to engage in this activity and the conditions for doing so. The tribe could inform the NPS of the members who are authorized. But it would be up to the tribe to determine how to distribute the available permits.

We would also add that the rule should also provide each Tribe an option to participate in the monitoring of traditional gathering. Both the Tribe's Environmental Protection Agency and Sitting Bull College have expertise regarding traditional gathering and a cooperative role could be mutually beneficial. We also hope that agreements under these proposed rules would provide a foundation for Federal funding of more detailed tribal studies of traditional gathering practices and allow for expanded use of traditional ecological knowledge in existing NPS monitoring practices.

F. Termination or Suspension of an Agreement.

The proposed rules suggest that any violation of an agreement or permit – or any “unanticipated or significant impacts,” § 2.6(i)(2) – may result in suspension or termination.

RIN 1024-AD84; National Park Service; Department of the Interior
Comments on Proposed Regulations
July 20, 2015
Page 7

While the concurrence of the Regional Director is required for termination, § 2.6(i)(3), the proposed rule appears to give Superintendents unduly broad discretion to suspend or terminate, even for the most minor infractions. We would urge the NPS to modify this provision to emphasize fairness where concerns arise concerning compliance. First, no agreement or permit should be suspended or terminated without prior consultation with the tribe. Second, efforts should be made to provide for a cure, and consideration should be given to less severe violations, prior to any suspension or termination. And third, where agreement cannot be reached, a clear administrative appeal mechanism should be available (and specified in the regulations) regarding any proposed termination. Requiring communication with tribes before taking severe actions will lead to greater mutual understanding between the parties and better protection of tribal and park interests alike.

G. The Definition of “Commercial Use.”

Under the proposed rule, agreements must contain a statement reiterating that “commercial use of natural resources” is prohibited under existing NPS regulations. §2.6(f)(9). Traditional gathering activities are associated with cultural and religious practices, not profit-making, and the Tribe does not object to the “commercial use” provision of the proposed rule. At the same time, some traditional plants are used for creating handicrafts and other kinds of material culture, for use in traditional activities. NPS must recognize that that plants gathered for traditional purposes may properly be used in these ways – without rendering the activity “commercial.” Here again, if questions arise, consultation with the Tribe would be in order.

H. Tribal Rights Held Under Other Laws Must be Protected.

The proposed rule, § 2.6(j), recognizes that gathering rights are also protected under other sources of federal law, including treaties, statutes, or other regulatory provisions. We suggest that NPS make explicit in the regulations that nothing in the proposed rules affects or diminishes any other rights held by Indian tribes under federal law.

Thank you for your consideration of these comments.

Sincerely,



Dave Archambault II, Chairman
Standing Rock Sioux Tribe