FOREST COUNTY POTAWATOMI COMMUNITY

Legal Department

Jeffrey A. Crawford
Jo Swamp
Aaron Loomis

Douglas W. Huck
Sara M. Drescher
Marybeth Herbst-Flagstad

Dennis Puzz, Jr.
Kimberly M. Vele
Michael B. Wacker

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 Forest County Potawatomi Community ("FCPC" or "Tribe") supports the proposed rule issued by the National Park Service ("NPS") to authorize agreements with Indian tribes to allow the gathering of plants on national park lands for cultural purposes. *See* Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 80 Fed. Reg. 21,674 (Apr. 20, 2015). The proposed rule, like the existing NPS regulation that allows gathering for consumption purposes, 36 C.F.R. § 2.1(c), is both environmentally-sustainable and well within the authority of the NPS to promulgate. Indeed, traditional gathering is more protective of natural resources than gathering for consumption purposes because to sustain cultural traditions, the resources relied on must be available for future generations as well, and traditional gathering is based on that understanding. In other words, traditional gathering is inherently a sustainable activity. Indian tribes have also long had to deal with the

depletion of the resources on which their cultures' vitality depends. The reduction of the tribal land base, the increasing population and growing residential and recreational development near their reservations, and the too frequent and often irreversible degradation of the environment as a result of municipal and industrial activities have made pure resources and medicinal plants harder to find. And though others are primarily responsible for these impacts, the tribes have adapted to them, and are keenly aware of the need to gather on a basis that is sustainable, for both the resources and their cultures depend on their doing so.

We also endorse the provisions of the proposed rule that provide for the negotiation of traditional gathering agreements between tribes and park Superintendents. In our view, the negotiation process provides the flexibility that is needed to accommodate each tribe's traditional association with park lands and specific gathering needs, as well as the unique circumstances of each park. Our additional comments offer suggestions to improve that process, and to ensure that the proposed rule will provide individual gatherers a fair opportunity to engage in the traditional gathering practices necessary to sustain their distinct cultures.

We begin by providing an overview of FCPC's interest in the proposed rule, which, as we also show, arises from our unique history.

I. The Forest County Potawatomi Community

The Forest County Potawatomi Community is a federally recognized Indian tribe with a government-to-government relationship with the United States. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1944 (Jan. 14, 2015). FCPC is organized under the Indian Reorganization Act of 1934, 25

U.S.C. § 461-479, has a membership of more than 1400 people, and exercises governmental authority under a Constitution originally adopted on February 6, 1937.

FCPC has a substantial interest in the proposed NPS rule arising from the Tribe's reliance on the natural environment, including the plants, fish, animals, forests and waters, of our Reservation lands and traditional territory, for our cultural, spiritual, and economic welfare. The Tribe's cultural identity is inextricably linked to the natural environment. For generations, plants have played a critical role in the Tribe's religious, ceremonial, and cultural practices and traditions, and in the gathering of traditional medicines. As the United States Court of Appeals for the Seventh Circuit recently recognized in upholding EPA's decision to redesignate FCPC's Reservation to Class I status under the Clean Air Act, "[t]he cultural and religious traditions of the Forest County Potawatomi Community . . . often require the use of pure natural resources derived from a clean environment." *Michigan v. U.S. EPA*, 581 F.3d 524, 525 (7th Cir. 2009). FCPC's interest in gathering the resources necessary to support its culture extends throughout present-day and historic Potawatomi territory. The FCPC land base includes the Forest County Potawatomi Reservation in northeastern Wisconsin, which is a unique and vital part of the Great Lakes Region ecosystem, and trust lands in the Milwaukee area as well as Fond du Lac County. These lands are located in close proximity to the Ice Age National Scenic Trail, which winds through Potawatomi territory in southern Wisconsin and then heads north, passing west of Milwaukee, to its end point in Potawatomi State Park in Door County, Wisconsin. The historic territory of the Potawatomi is much larger, and includes southern Michigan, lands in northern Ohio, the northern half of Indiana and Illinois, and southern Wisconsin.

The Reservation encompasses 12,000 acres and is mainly composed of upland hardwood forest. It is largely surrounded by the Nicolet National Forest, which encompasses 661,000 acres and shelters over 400 natural spring ponds and 1,170 lakes. *See* Exploring the Nicolet National Forest (Information Provided by the National Forest Service), http://www.exploringthenorth.com/nicolet/nicmain.html (last accessed July 17, 2015). The Headwaters National Wilderness area lies within seven miles of the Reservation, while a State Wildlife management area adjacent to the eastern portion of the Reservation contains spring ponds, secluded lakes, and a number of historically and culturally significant properties.

The Potawatomi's use and occupancy of their historic territory is documented by over forty treaties with the United States to which the Potawatomi are a party. Under many of these treaties, the Potawatomi reserved rights to hunt, fish, and gather on lands ceded by the treaty. For instance, under the Treaty of Oct. 16, 1826, 7 Stat. 295, the Potawatomi reserved "the right of hunting upon any part of the land hereby ceded, as long as the same shall remain the property of the United States." *Id*. art. 7. The area ceded under the 1826 Treaty includes the Indiana Dunes National Lakeshore. Other treaties reserving usufructuary rights in Potawatomi territory confirm the importance of hunting, fishing and gathering to Potawatomi culture. *See, e.g.*, Treaty of Greenville, art. VI, Aug. 3, 1795,, 7 Stat. 49 (reserving the right "to hunt within the territory and lands which they have now ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States."); Treaty of Prairie du Chien, art. VII, July 29, 1829, 7 Stat. 320 (reserving "[t]he right to hunt on the lands herein ceded, so long as the same shall remain the property of

the United States, is hereby secured to the nations who are parties to this treaty."). In sum, the Potawatomi treaty history demonstrates that the Potawatomi traditional territory includes much of the Midwest, and that hunting, fishing, and gathering are a vital element of Potawatomi culture that extends over that same area.

The Potawatomi treaty history also explains how FCPC came to reside in northeastern Wisconsin. In the early 1800s, pressure by non-Indian settlers for land increased, and the United States sought to acquire more Potawatomi land by treaty. In the treaties that were subsequently negotiated, the United States recognized the rights of the Potawatomi to the lands that they used and occupied, and assumed an obligation to protect them. Under the treaties, the United States promised not only to compensate the Potawatomi for the lands acquired, but also agreed to provide for their education, subsistence and support, and to establish reservations where the Potawatomi could continue to live. However, after the Treaty of Chicago in 1833, most of the Potawatomi people were forcibly removed from the last of their lands east of the Mississippi River. Some of the Potawatomi, opposing the forced removal and fearing for their lives, fled north. As a result, several thousand Potawatomi moved to refuges in Upper Canada, many hundreds moved north along both shores of Lake Michigan to territory away from non-Indian settlement, and a few hundred remained in southeast Wisconsin and southern Michigan.[1]

[1] James Clifton, THE PRAIRIE PEOPLE: CONTINUITY AND CHANGE IN POTAWATOMI INDIAN CULTURE 1665-1965, at 185, 309-310 (1998).

The Forest County Potawatomi Community descends from the Potawatomi Indians who would not leave Wisconsin.[2] For many years, they lived on lands in northeastern Wisconsin. In 1913, Congress appropriated funds to allow the Wisconsin Potawatomi to acquire land in trust under the 1884 Indian Homestead Act and to build homes on those lands.[3] In the years that followed, Congress continued to appropriate funds to assist in the education and support of the Wisconsin Band of Potawatomi Indians.[4] In 1935, the Wisconsin Band of Potawatomi voted to accept the Indian Reorganization Act ("IRA") pursuant to 25 U.S.C. § 478, and in 1937, organized under a Constitution adopted in accordance with the IRA, 25 U.S.C. § 476, under which they became known as the Forest County Potawatomi Community. In 1988, FCPC's lands were recognized by Congress as having reservation status. Act of Nov. 1, 1988, Pub. L. No. 100-581, tit. VI, § 601(a), 102 Stat. 2938, 2945.

[2] *Id.* at 310-11.

[3] Act of June 30, 1913, ch. 4, § 24, 38 Stat. 77, 102.

[4] *E.g.*, Act of April 4, 1910, ch. 140, § 26, 36 Stat. 269, 288 (appropriates $25,000 for the support, education and civilization of the Potawatomi Indians who reside in the State of Wisconsin and to investigate their condition); Act of August 24, 1912, ch. 388, § 24, 37 Stat. 518, 539 (appropriates $7,000 for the support, education and civilization of the Potawatomi Indians who reside in the State of Wisconsin); Act of May 18, 1916, ch. 125, § 25, 39 Stat. 123, 156-57 (appropriates $100,000 for the support and civilization of the Wisconsin Band of Potawatomi Indians, which funds are to be reimbursed from the annuities estimated to be due to these Indians under their treaties with the United States); Act of March 2, 1917, ch. 146, § 24, 39 Stat. 969, 991 (similar to 1916 Act); Act of May 25, 1918, ch. 86, § 25, 40 Stat. 561, 589 (appropriates $75,000 for the support and civilization of the Wisconsin Band of Potawatomi, to be reimbursed from the funds due under their treaties with the United States).

II. Traditional Tribal Gathering Is A Sustainable Activity.

For Indian tribes, the gathering of plants in a manner that is respectful of the natural environment is necessary to maintain a spiritual relationship with the natural world, as well as the purity of the gathered plants for ceremonial purposes. Gathering also has social importance – the gathering activity itself, as well as the preparation and use of plants in ceremonial and religious activities, build and sustain social relationships and provide a vital means of handing down traditional knowledge from one generation to the next.

The gathering of plants for medicinal purposes – to cure sicknesses and maintain well-being – is also an important traditional practice of the Potawatomi. In sum, the survival of Potawatomi culture is dependent on the respectful use of natural resources, and requires that this be done on terms which ensure the availability of those resources for future generations.

FCPC's environmental ethic and cultural teachings require respect for all living things. The Tribe continually demonstrates a strong commitment to the environment and believes it is the Tribe's duty to protect and enhance resources both on and off the reservation. The Tribe's commitment to these values is formalized in its Environmental Mission Statement, which provides that:

> The traditional values of the Forest County Potawatomi Community teach us to respect all living things, to take only what we need from Mother Earth, and to preserve the air, water, and soil for our children. Reflecting these values, we take leadership in creating a sustainable and healthy world. We resolve to reduce our own environmental impacts and to take steps to remedy the impacts of others. We encourage others to do the same. We also seek legislative and policy changes that protect the environment for all people, including generations to come.

One of FCPC's most firmly held beliefs is that "long-term human survival is dependent upon the respectful use of nature's resources and that such use itself assures the perpetual harmony upon which survival ultimately depends."[5] For these reasons, accommodating the Tribe's need to gather plants for cultural, religious, and medicinal purposes is not a threat to park resources, and the NPS should move forward with the rule and formally allow Indian tribes to gather in NPS units.

III. The NPS Has Authority to Issue This Rule.

Allowing the negotiation of agreements for the gathering of plants for traditional purposes by Indian tribes is well within the Secretary's broad grant of authority 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 authorizes the NPS to regulate the use of the National Parks for the purpose of "conserv[ing] the scenery, natural and historic objects, and wild life in the [National Park] System units and . . . provid[ing] 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 also 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 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.*

[5] Charles E. Cleland & Richard A. Carlson, THE ELDERS SPEAK: NATURAL RESOURCE USE BY THE FOREST COUNTY POTAWATOMI COMMUNITY 15 (2002).

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.*[6] 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.

In this instance, the balancing process weighs heavily in favor of the proposed rule. The proposed rule balances the cultural interests that tribal members have in gathering activities that are essential to preserving traditional cultural and religious practices with the ecological demands of maintaining the scenery and wild life in the parks "unimpaired for the enjoyment of future generations." And it does so in measured terms that protects park resources. As currently drafted, the proposed rule requires the park Superintendent to determine that the Indian tribe has a traditional association with the park area, that 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," § 2.6(d)(3). Just as NPS balanced policies to allow non-Indian gathering while meeting its statutory conservation and management mandate, *see* 36 C.F.R. § 2.1(c), it has done so in drafting the proposed rule. While we share concerns about the current language in § 2.6(d)(3) and suggest some modifications to enhance the negotiation process with tribes, *supra* at 10-11, the inherent sustainability of traditional tribal

[6] 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, 1452-54 (9th Cir. 1996); *S. Utah Wilderness Alliance v. NPS*, 387 F. Supp. 2d 1178, 1189-90 (D. Utah 2005) (NPS authority to regulate parks under the Organic Act's broad objectives leaves the agency with "the task of further defining and applying this standard.").

gathering ensures that such activity is consistent with the conservation mandate of the Organic Act.

Indeed, the proposed rule is needed to remedy an inequity that now exists under NPS regulations. As noted, those regulations already permit the general public to gather and consume plant parts on park lands, 36 C.F.R. § 2.1(c). But at the same time, the regulations forbid members of federally recognized Indian tribes from gathering for religious or cultural purposes, except where otherwise required by federal law, *id.* § 2.1(d). That is hardly fair and the NPS's proposed rule is needed to correct that unfairness.

IV. Suggestions for Making the Proposed Rule More Practical and Workable for Indian Tribes.

The proposed rule authorizes tribal gathering under the terms of an agreement with the tribe negotiated by the park Superintendent. The flexibility provided by reliance on the negotiation process under the proposed rule is of benefit, given the different circumstances of each park and each tribe. At the same time, the proposed rule should ensure that negotiations are conducted in good faith, and that tribes are given a fair opportunity to present information about their traditional practices, whether or not prior federal policies disrupted those practices, and that tribal confidentiality and cultural knowledge are protected in the negotiation process.

A. Enhancing the Effectiveness of the Criteria for Entering into Agreements.

Because traditional tribal gathering is an inherently sustainable activity, *see supra* at 7-8, it will not have an adverse impact on park resources or values. Accordingly, the proposed § 2.6(d)(3), which 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, should not prevent the negotiation of a gathering agreement under the proposed rule. Nevertheless, the bare language of the present § 2.6(d)(3) exposes the tribe to just that risk.

To address that problem, we suggest the following modifications. First, given the sustainable nature of traditional gathering practices, a presumption that traditional gathering will be consistent with park values should be incorporated in the rule. Second, if in a specific instance a park Superintendent is concerned that traditional gathering practices would have significant adverse impacts on park resources, the proposed rule should require the Superintendent to engage in consultation with the tribe concerning the basis of that view and provide the tribe with an opportunity to respond to that view. This is important because in these instances, the tribe and the Superintendent share the same basic concern – protecting the resource to ensure its availability for future generations. Accordingly, consultation may well lead the parties to agree on terms to address specific issues of this kind without otherwise denying the tribe the opportunity to gather for cultural and religious purposes. But if following consultation, the Superintendent continues to believe that the proposed gathering activity would adversely affect park resources, that position should be articulated in writing, and the tribe should have a right to appeal.

B. The Historical Suppression of Gathering Activities Should Not Be Used Against the Tribes Under the Proposed Rule.

For a long time, Indians have been forbidden from engaging in traditional gathering on park lands. That history should not justify continued disruptions to those practices under the "determine and document" requirement of § 2.6(d)(1). To avoid that result, the proposed rule should direct Superintendents that if there are periods of time in the historical record in which gathering did not take place because it was banned by a federal agency or effectively suspended as a result of federal policies, such periods of time cannot be relied on to show that a tribe lacks a traditional association with park lands or has not used plants on park lands for traditional purposes under § 2(d)(1).

Superintendents should also have maximum flexibility to accept a range of information in "[d]etermin[ing] and document[ing], based on information provided by the Indian tribe or others, and other available information" that the tribe has a traditional association with the park and that its proposed gathering is a traditional use of the park. To accomplish that objective, the rule should make clear that Superintendents can rely on many different types of information to make § 2.6(d)(1) determinations, including but not limited to tribal oral history, anthropological writings, historical records, and determinations of traditional uses and associations by judicial bodies like federal courts or the Indian Claims Commission. It is important that tribes may submit, and Superintendents may consider, as many different types of reliable information of traditional associations and uses as are available, particularly since federal policies that

prevented the open practice of traditional gathering may have made some forms of documentation unavailable.

C. The Confidentiality of Sensitive Tribal Cultural Knowledge Should Be Protected.

Knowledge about tribal cultural practices is often highly sensitive, and it may be offensive or improper to share this information widely with non-members. That concern plainly extends to information used to show traditional associations and use under the proposed rule. Accordingly, we are pleased that the proposed rule states that NPS "believes that under existing law it can protect sensitive or confidential information submitted by tribes." 80 Fed. Reg. at 21,677 (citation omitted). We support the NPS's efforts to protect the confidentiality of sensitive cultural information, as absent such protections some tribes may not be willing to negotiate gathering agreements. We suggest that the NPS enhance the effectiveness of this commitment in the proposed rule by directing Superintendents to take all measures authorized under federal law to protect confidential information from disclosure before using it to make the determination that an agreement is justified.

V. The Agreements Should Be Implemented with Respect for Tribal Traditional Knowledge and in Accord with the NPS's Consultation Responsibility.

We support implementation of the proposed rule in a manner that respects traditional tribal knowledge about gathering activities and meets the NPS's obligation to consult with tribes as governments with specialized and unique knowledge needed to craft tribal-NPS agreements.

A. Traditional Tribal Knowledge of the Time and Place for 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 and is based on collective ecological knowledge. In this sense, traditional gathering actually reinforces the broader conservation purposes of the National Parks. This basic connection between traditional gathering and sustainability should inform the terms and conditions of agreements between tribes and NPS.

More specifically, the proposed § 2.6(f)(7), which requires agreements to address the "times and locations" at which plants may be gathered, can be used as a vehicle for making traditional knowledge a part of the negotiating process, e.g., by deferring to tribal traditional knowledge about how gathering varies by season and location. Many tribes do not have a single time period for gathering particular plants but recognize the ecological conditions necessary for specific species of plants and gather accordingly or rely on ceremonial needs that are not always constant.

Some plants are collected only during certain times of the year, and some plants may be gathered for different uses at different times of the year. The appropriate gathering period is instead based on understanding how plants grow and how they are best used for traditional purposes. We believe that it is proper and important for the parties to give deference to such traditional knowledge and suggest that the NPS request Supervisors to give deference to traditional knowledge and needs when determining the sustainable times and locations for gathering and removal of plants and plant parts.

B. Identifying Tribal Members and Monitoring Gathering Activities.

The proposed rule includes provisions addressing the identification of tribal members and the monitoring of traditional gathering activities. § 2.6(f)(3)-(4). We agree that the regulations

should include such provisions, but urge that the regulations address these issues in a clear and straightforward matter. That is easily done.

Traditional gathering is generally practiced in small groups – typically a family, clan, or a few community members together. Even in the aggregate, the number practicing traditional gathering tends to be small – particularly as compared to the number of visitors to the National Park System. De minimus gathering in large NPS units should not be impeded by bureaucratic requirements. In these situations, all tribal members should be authorized to undertake traditional gathering activities.

In such instances, tribal identification cards are an appropriate method for identifying tribal members who may gather plants. These cards provide the name of the tribe, the member's name, and his or her photograph. Federal, state and tribal officials already rely on tribal identification cards for a wide range of purposes, such as law enforcement, health care, and social services eligibility. The proposed regulations should specify that tribal identification cards provide a ready and appropriate means of identifying tribal members who may engage in a traditional gathering activity. In many (perhaps 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, e.g., 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 specific circumstances such as these, 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.

The proposed rule should also provide each tribe an opportunity, at its option, to assume a role in monitoring. This will help improve the administration of agreements between the NPS and the tribes. And it is easily done, as many tribes have natural resource departments, or other institutions, like tribal colleges, which have expertise in the tribe's traditional use and stewardship of these resources. Agreements between the NPS and tribes could encourage and support studies of traditional gathering practices. Proposed § 2.6(f)(10) and (11) could easily be amended to include responsibility-sharing provisions by stating that "monitoring" under subsection (f)(10) and "operating protocols and additional remedies" under subsection (f)(11) can be shared tribal-NPS responsibilities. We urge that this be done.

C. Consultation Should Precede Termination or Suspension of an Agreement.

The proposed rule addressing suspension or termination, § 2.6(i), should be modified to promote compliance through communication and consultation, rather than punitive action. 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. While the concurrence of the Regional Director is required for termination, § 2.6(i)(3), the proposed rule appears to give Superintendents discretion to suspend or terminate even for the most minor

infractions. We urge the NPS to modify this provision to provide greater 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. By communicating with tribes before taking severe actions, the NPS will be acting in accord with the principles of tribal consultation that apply to federal agencies.

D. The Definition of "Commercial Use."

Under the proposed rule, § 2.6(f)(9) agreements must contain a statement reiterating that "commercial use of natural resources" is prohibited under existing NPS regulations, *see* 36 C.F.R. § 2.1(c)(3)(v). The proposed rule and current NPS regulations do not define "commercial use," but subsection 2.6(f)(9) can reasonably be understood to mean that gatherers cannot directly profit from the plants they collect. *See Edmonds Inst. v. Babbitt*, 93 F. Supp. 2d 63, 71-72 (D.D.C. 2000) (holding that it is reasonable for NPS to determine that the collection of scientific specimens in a park is not a "commercial use" when the permits did not allow the sale of those specimens and the collectors would not derive profit directly from use of the specimens). This is an important issue for tribes, because some plants are traditionally used in creating handicrafts and other pieces of material culture. While such crafts are not created for commercial purposes, they may be mistaken for goods that are being created to trade or sell to non-members. If NPS enforcement rangers mistakenly believe that tribal members are gathering

plants for commercial purposes, they could cite tribal members for violating § 2.6, which could result in suspension or termination of the overall tribal-NPS agreement under § 2.6(i). To address this problem, we ask NPS to amend the requirement of § 2.6(f)(9) to require agreements to state that commercial use of natural resources is prohibited, but that NPS understands that the creation of crafts and other material culture is not necessarily a commercial use, unless those items are intentionally being made for the purposes of sale or trade.

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

The proposed rule, § 2.6(j), recognizes a distinction between gathering done under the new rule and gathering rights held under other sources of federal law, like treaties, statutes, or other regulatory provisions. We agree that the proposed rule should not in any way affect the rights held by Indian tribes under other legal authorities. We suggest that NPS make this explicit in the regulations by adding language making clear that nothing in the proposed rules unsettles, or is intended to unsettle, any other rights held by Indian tribes under federal law.

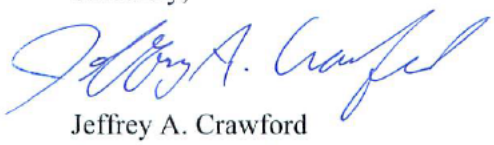
VII. The NPS Should Coordinate Its Rule with Forest Service Rules.

NPS also asked for comments on how its proposed rule might be implemented jointly or in coordination with U.S. Forest Service ("USFS") rules on traditional gathering in National Forests. 80 Fed. Reg. at 21,677-78. As is recognized in the Federal Register notice, tribes may have traditional gathering areas that lie in part within USFS-administered land and in part within NPS-administered land. While we understand that each agency must address those matters under its own regulations, we encourage measures that would streamline the process. One way this might be done is for NPS to consider the USFS's approval of forest product requests when

deciding whether to grant a request to negotiate a gathering agreement. For example, if USFS has approved a tribal request to engage in gathering activities for traditional and cultural purposes, that decision might be given presumptive effect for a tribal request to engage in similar activities on NPS lands that also lie within the tribe's traditional territory. This presumption could be rebutted if there are specific differences between the activity on USFS and NPS lands, or if different environmental factors affect plants on USFS and NPS lands.

Thank you for your consideration of these comments.

Sincerely,



Jeffrey A. Crawford
Attorney General