Tanana Chiefs Conference

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July 20, 2015

SUBREGIONS:
Upper Kuskokwim
McGrath
Medfra
Nikolai
Takotna

Lower Yukon
Anvik
Grayling
Holy Cross
Shageluk

Upper Tanana
Dot Lake
Eagle
Healy Lake
Northway
Tanacross
Tetlin
Tok

Yukon Flats
Arctic Village
Beaver
Birch Creek
Canyon Village
Chalkyitsik
Circle
Fort Yukon
Venetie

Yukon Koyukuk
Galena
Huslia
Kaltag
Koyukuk
Nulato
Ruby

Yukon Tanana
Alatna
Allakaket
Evansville
Fairbanks
Hughes
Lake Minchumina
Manley Hot Springs
Minto
Nenana
Rampart
Stevens Village
Tanana

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

Comments of Dena' Nena' Henash on
Proposed Rule Regarding Gathering of Plants in National Parks

Dear Mr. Watkins:

Dena' Nena' Henash ("the Tanana Chiefs Conference" or "TCC") represents the thirty-seven federally-recognized Native Alaskan Villages of Interior Alaska. Since 1915, the Tribal Chiefs of our region have banded together to protect native land rights and the traditional hunting, fishing and gathering rights of our people. We are deeply interested in the National Park Service's ("NPS") proposed rule on traditional gathering of plants.

The Tanana Chiefs Conference supports the proposed rule issued on April 20, 2015, "Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes," 80 Fed. Reg. 21,674 (Apr. 20, 2015). This rule would address an inequity in the existing NPS regulations permitting the gathering of plants on national park lands for consumption, 36 C.F.R. § 2.1(c), but not for the religious or cultural purposes by the members of federally recognized Alaska Native Villages and Indian tribes. *Id.* § 2.1(d). The proposed rule will protect our people's access to culturally-critical plants that have been gathered since time immemorial. The proposed rule will continue to build and help to improve the relationship between Alaska Native Villages and tribes and the NPS.

The basic mechanism provided in the new rule – the negotiation of agreements between tribes and Park Superintendents – provides the flexibility that is needed to accommodate each Alaska tribe's traditional association with park lands by providing the tribe a fair opportunity to gather on those lands. We offer suggestions to improve the effectiveness of the negotiation process, as a means of providing tribes a fair chance to engage in the gathering activities necessary to sustain our distinct cultures. We also suggest amendments to the rule to ensure that it adequately protects individual gatherers engaged in traditional gathering activities.

Overall, Dena' Nena' Henash, on behalf of our member tribes, believes that the rule is a positive step forward. We commend the NPS for proposing it.

I. Tribal Gathering Is Essential to Cultural Practices That Are at the Core of Indian Identity and Its Sustainability Is an Essential Part of Gathering.

The new rule would correct the existing inequity in NPS regulations, which permit the general public to gather and consume plant parts on park lands, 36 C.F.R. § 2.1(c), but forbids members of federally recognized Indian tribes from gathering for religious or cultural purposes, except where otherwise required by federal law, *id.* § 2.1(d). This rule has

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prevented tribal members across the country from engaging in traditional activities on park lands, while at the same time allowing others to gather and consume parts of plants on those lands. It permits ordinary uses of plants for some, namely consumption, but denies ordinary uses for others, namely the traditional use of plants for Indian cultural and religious purposes. The proposed rule would remedy this discrepancy by permitting federally recognized tribes and their members to continue traditional gathering practices that are essential to their cultural identities. In so doing, the rule fulfills NPS's trust responsibility to consult with tribes on matters that affect their interests – in this case, our tribes' interest in preserving traditional cultural and religious practices. *See* Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). This rule will affect several parks in Alaska, including one partially within our service region.[1]

TCC has 37 member tribes in interior Alaska. For a hundred years, our member tribes have worked together to address issues related to the use of our lan ds and our relationships with the federal government. TCC was formally incorporated in 1962, and we provide numerous services to our members, including health care, alcohol recovery programs, hazardous fuel reduction projects, home construction, forestry services, land management, and fish and wildlife management. We provide these and other services in a region of Alaska covering approximately 235,000 square miles, an area comparable to the size of Texas. Our tribes' members have lived a traditional lifestyle and maintained a spiritual hundreds of lakes, immense lowland taiga, dozens of rivers including the massive Yukon, and tens of thousands of caribou, moose, bears, sheep, and other animals, and many different types of plants of all kinds. Our members have long engaged in gathering of those plants for traditional purposes, including traditional medicine, religious and cultural ceremonies, and subsistence.[2]

For our tribes and their individual members, the social and spiritual importance of gathering is inseparable from its sustainability – both are necessary to maintain a relationship with the natural world and preserve tribal culture.[3] For that reason, accommodating tribes' cultural needs to gather plants for cultural, religious, and medicinal purposes is not a threat to park resources. Gathering connects tribal people and the natural world – and accordingly the health of each depends on the other.[4]

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[1] Our region and traditional lands include six NPS units – Yukon-Charley Rivers National Preserve, Gates of the Arctic National Park & Preserve, Kobuk National Preserve, and Denali National Park & Preserve. The proposed rule will not impact our members' ability to access most of these parks for gathering purposes under current federal law. *See* 80 Fed. Reg. 21,676 (citing 36 C.F.R. § 13.35(c)). However, these rules will be implemented in Denali National Park, which is partially within our region and is exempted from the separate gathering regulations that apply to many NPS units in Alaska, 36 C.F.R. § 13.35(a).

[2] *See* Jeff Stokes, Div. of Subsistence, Alaska Dep't of Fish & Game, NATURAL RESOURCE UTILIZATION OF FOUR UPPER KUSKOKWIM COMMUNITIES 291-304 (1985).

[3] Marla R. Emery, *Who Knows? Local Non-Timber Forest Product Knowledge and Stewardship Practices in Northern Michigan*, 13 J. OF SUSTAINABLE FORESTRY 123, 130-31, 134 (2001).

[4] *See, e.g.*, David Ruppert, *Building Partnerships Between American Indian Tribes and the National Park Service*, 21 ECOLOGICAL RESTORATION 261 (2003).

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Specific stewardship practices vary by tribe and resource, but they have in common that gatherers must observe certain customs when gathering.[5] These are in place to protect against overuse and ensure the long term sustainability of the resource. Tribal custom may require tribal members to rotate gathering sites on an annual basis, perform certain ceremonies before beginning harvest, practice selective gathering across a landscape, regularly visit harvesting sites to look for any negative impacts of harvest, and, if necessary, adapt harvest methods to minimize or eliminate long term damage, which now includes adaptation due to climate change impacts.[6] The net effect of these practices is to limit gathering by tribal custom. There is also a simple, practical reason why our members engage in sustainable gathering: our subsistence lifestyle demands a healthy ecosystem that will continue to produce the plants on which our traditional cultures depend.

Because traditional gathering and our subsistence lifestyle requires continued access to traditional plants, the sustainability of tribal social, cultural, and spiritual activities depend on the continuing health and longevity of the ecosystem in which these resources are found. This has always been the case, both here and in the Lower 48. Sustainability was a critical part of the land management practices that tribes engaged in before the European arrival. Tribes used a variety of techniques to ensure that culturally important plants such as grasses, roots, berries, and wildflowers were available for traditional purposes. These methods included pruning, digging, and irrigating to maintain plant populations at such levels that the tribe could engage annually in their social, cultural, and religious activities. Across the country, unique ecosystems such as prairies, meadows, and open canopy forests were sustained, in part, as a result of sustainable tribal management of cultural plants. Tribal traditional knowledge is steeped in sustainability, and as a result native the harvest of culturally important plants on NPS lands will not negatively affect the character or ecological integrity of NPS lands.

Tribes' understanding of plant communities, gained through generations of gathering activity, can be an important part of ensuring an ecosystem's sustainability. Research examining the impact of tribal harvesting on culturally important plants has shown that tribal gathering both enhances and conserves the biodiversity of the habitat where culturally important species are found, and that the decline of Native gathering has led to a decline in the historic distribution, abundance, and quality of culturally important plant communities.[7]

As these resources diminish, the traditions that rely on them become threatened.[8] In the face of this biological and cultural decline, traditional gathering practices and knowledge can

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[5] *See, e.g.*, STANDING ROCK SIOUX TRIBAL CODE OF JUSTICE TIT. IX, *available at* http://www.standingrock.org/data/upfiles/files/Title%209%20GF-W.pdf.

[6] Leslie M. Johnson Gottesfeld, *Conservation, Territory, and Traditional Beliefs: An Analysis of Gitksan and Wet'suwet'en Subsistence, Northwest British Columbia, Canada*, 22 HUMAN ECOLOGY 443, 451-52 (1994); Rebecca Templin Richards, *What the Natives Know: Wild Mushrooms and Forest Health*, 95 J. OF FORESTRY 5 (1997).

[7] Robin Wall Kimmerer, *Native Knowledge for Native Ecosystems*, 98 J. OF FORESTRY 4, 7-8 (2000).

[8] Daniela J. Shebitz & Robin W. Kimmerer, *Re-establishing Roots of a Mohawk Community and a Culturally Significant Plant: Sweetgrass*, 13 RESTORATION ECOLOGY 257 (2005).

assist federal land managers in restoring and maintaining biodiversity in the parks while also meeting their federal trust responsibility to tribes.[9]

The cultural importance of gathering activities should not be understated – the processing, distributing, consuming, and celebrating of plants are times for maintaining social relationships, developing cultural identity, and passing knowledge between generations. Access to plant resources is important for traditional medicinal purposes.[10] Living with the land is a huge component of who we are as Native people.

Given the importance of cultural plant resources to our tribes, the minor impact of gathering, and the potential for traditional ways to complement the NPS's existing ecological restoration efforts, the NPS should move forward with the rule and formally allow Natives to gather in NPS units.

II. The NPS Has Authority to Issue This Rule.

Allowing the negotiation of agreements for the gathering of plants for traditional purposes by Alaska Native Villages and Indian tribes is well within the Secretary's broad grant of authority under the NPS Organic Act of 1916, 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. 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.* at 827.[11] 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

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[9] *See, e.g.*, *Completion of Native Prairie and Split-Rail Fence*, NAT. RESOURCES NEWSL. (Forest Cnty. Potawatomi Cmty., Wis.), Oct.-Dec. 2011, at 4, *available at* https://www.fcpotawatomi.com/wp-content/uploads/2015/02/Qtr_4_2011_Newsletter.pdf (describing the Tribe's effort to restore native prairie in the area).

[10] TANANA CHIEFS CONFERENCE, RESOLUTION NO. 2015-09 (Mar. 19, 2015), *available at* https://www.tananachiefs.org/resolutions/2015-2/resolution-no-2015-09/ (referring to the importance of cultural plants as medicine).

[11] 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.").

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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. The proposed rule requires the Park Superintendent to determine that the tribe has a traditional association with the park area, that the proposed gathering is a traditional use of the park area by the tribe, and that the gathering and removal activities "will not result in a significant adverse impact on park resources or values," § 2.6(d)(1), (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.

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 tribes from gathering on most park lands 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.

III. The Rule Should Give Tribes a Fair Opportunity to Enter Agreements.

The rule envisions that NPS will authorize tribal gathering after negotiating a gathering agreement with the gathering tribe. To effectuate that policy, the proposed rule should ensure that tribes have a fair opportunity to actually reach the negotiation stage and enter agreements. This rule should be implemented with some additional provisions that respect the unique situation facing NPS and tribes in Alaska, and that clarify what types of information tribes can submit for their requests to be granted by the NPS.

A. Definition of "Indian Tribe" and Agreements with Multiple Tribes.

There are significant differences between how tribes in the Lower 48 states are organized, and how Alaska Natives are organized. Alaska Native Villages and Indian tribes are distinct political communities just like tribes in the rest of the country. But there are more tribes in Alaska than any other state – Alaska has over 231 federally recognized tribes. And importantly, most Alaskan tribes are members of regional nonprofit tribal organizations, which are not widespread in the Lower 48. These tribal organizations are made up of federally-recognized Alaska Native Villages and Indian tribes, are qualified to contract with the United States under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-450n)[12], and Alaskan tribes act through them in their governmental capacities. The regional

[12] The ISDEAA authorizes the Secretary of Interior to enter into self-determination contracts with "tribal organization[s]" to "plan, conduct, and administer programs or portions thereof" operated for the benefit of Indians. 25 U.S.C. § 450f(a)(1). Tribal organizations include legally established organizations controlled by Alaska native villages. *Id.* § 450b(*l*) (defining tribal organizations as legally established organizations "controlled, sanctioned, or chartered" by the recognized governing body of any "Indian tribe"); *id.* § 450b(e) (defining Indian tribe to include "any Alaska Native village"); *Bristol Bay Area Health Corp. v. IHS*, DAB CR185, 1992 WL 685314, at *1-2 (Health & Human Servs. Mar. 27, 1992) (a non-profit corporation incorporated by Alaska Native villages to provide health services is a "tribal organization" under §250b(*l*)). *See Aleutian Pribilof Islands Ass'n v. Kempthorne*, 537 F. Supp. 2d 1, 4-5 (D.D.C. 2008) (BIA contracted with Alaska Native regional non-profit corporation under ISDA); *Kwethluk Ira Council v. Juneau Area Dir., BIA*, 26 I.B.I.A. 262, 263 (1994) (regional non-profit corporation

tribal organizations represent their member tribes' common interest in many areas, and may wish to do so in this context as well. However, under the current rule, a Superintendent may only negotiate an agreement with an "Indian tribe" as defined in the rule at § 2.6(a). Although that definition includes federally recognized Alaskan tribes and Alaska Native Villages, it does not explicitly include regional tribal organizations such as Dena' Nena' Henash.

We urge the NPS to amend the definition of "tribe" in the proposed rule so that the rules can most effectively operate in the Alaska context. We ask that the definition of "tribe" be amended to make it clear that Alaskan tribal organizations such as our organization can negotiate agreements with Park Superintendents on behalf of their member tribes. Simply put, Alaska regional tribal organizations should be treated as "tribes" under the proposed rule, just as they are treated and recognized in the Indian Self-Determination and Education Assistance Act.

Additionally, because many small tribes in Alaska might have made the same traditional use of the same plants or plant parts in the same park areas, numerous tribes or regional tribal organizations may wish to negotiate use agreements for the same park. Given that in Alaska, there are over 231 tribes and at least four NPS units to which the proposed rule would apply, the sheer numbers could present significant logistical challenges to Park Superintendents in this state if the NPS were required to negotiate separate agreements with each tribe that has traditional associations with a given park area.

We do not believe that the proposed rule prevents a Superintendent from negotiating one agreement with multiple tribes. However, for clarity, we ask NPS to amend the proposed rule to give Superintendents the affirmative power to negotiate and enter into an agreement with multiple tribes or with tribal organizations such as TCC in situations where multiple tribes have an interest in gathering in the same park. This would be of special benefit in Alaska, where there are many relatively small tribes that already coordinate their activities through regional tribal organizations, but we believe it would also be of use in other parts of the country where multiple tribes may have traditional use areas in the same park.

B. 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. We have great respect for NPS personnel overall, and many of our tribes have worked closely with NPS related to issues of access and land use in Alaskan NPS units. But in our view, the language as currently drafted leaves a risk of arbitrary action. It is possible that this provision, without more, could be used by isolated

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contracted with BIA as tribal organization under ISDA). *See also J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1165-66 & n.5 (D.S.D. 2012) (non-profit formed and governed by Indian tribes entered into self-governance contracts under ISDA). TCC is an organization that was established by, and is controlled by, its member tribes, which are recognized Alaska Native villages. Therefore, it can negotiate self-determination contracts.

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NPS Superintendents to deny tribal applications for agreements in a manner that would undermine the intent of the proposed rule. A tribe's right to engage in traditional gathering practices for religious or cultural purposes must not be dependent only on an individual Superintendent's understanding of how those practices are consistent with "park values."

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, she should be required, by the rules, 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, her position and the basis for it should be articulated in writing, and the tribe should have a right to appeal.

C. Documentary Requirements.

The federal policies that appropriated Native lands for non-Native use and forbade Native people from traditional gathering on some Alaska park lands had severe impacts on the actual practice of traditional gathering. Although the proposed rule lifts the current, inequitable ban on traditional gathering on the park land where it once occurred, the rule should also recognize that the fact that tribal practices were banned in the past should not justify continued disruptions to those practices. To that end, the 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, this cannot be used to show that a tribe lacks traditional associations with park lands or has not used plants on park lands for traditional purposes under the proposed § 2(d)(1) inquiry.

Additionally, disruptions to tribal practice should be taken into account when accepting and weighing information under the "determine and document" requirement of § 2.6(d)(1). The proposed § 2.6(c) requires tribes to request agreements by submitting an explanation of their traditional association with the park area and an explanation of the traditional purposes to which the gathering will relate. Under proposed § 2.6(d), the Superintendent must then "[d]etermine and document, 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. The proposed regulation does not describe what types of information should be used by the Superintendent or the tribe in documenting traditional uses and associations. Superintendents should have maximum flexibility to accept a range of information in making this determination. Given that federal policies prevented the open practice of traditional gathering, some forms of documentation might not be able to capture enough relevant information in all cases.

We suggest that the rule should be amended to further clarify that Superintendents can rely on many different types of information to make § 2.6(d) determinations, including but not limited to tribal oral history, anthropological evidence, historical records, and determinations of

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traditional uses and associations by judicial bodies like federal courts or the Indian Claims Commission. The rule should also include illustrative examples of each of these types of evidence. For instance, "oral history" should include all spoken tribal cultural knowledge of past uses, including but not limited to stories, legends, and family histories.

The flexibility we urge should allow Superintendents to accept as many types of information as possible. But it should not be understood to require a tribe to submit evidence gathered by others, or implemented in a way that requires tribes to hire expensive experts to produce studies affirming what the tribe already knows. Showing traditional associations and uses should not be, and practically speaking does not have to be, an exhausting exercise. Hiring consultants and seeking other outside opinions may be too onerous for many tribes, especially smaller ones. Even if anthropological information or outside studies are an acceptable source of information, tribes are typically the best source of information about their own traditional uses and associations.

With that in mind, we request that the NPS amend its proposed rule to state explicitly that a tribe or tribal organization does not need to rely on any materials or data from other parties to show traditional associations. Tribes, like our members, have their own information that show traditional land use and associations, including maps, traditional place names, tribal studies, and tribal land use or management plans. They should not be required to augment this existing knowledge by commissioning expensive new research in order to undertake traditional gathering and traditional uses.

D. Confidentiality of Sensitive Tribal Cultural Knowledge.

The confidentiality of the information used to show traditional associations and use is also critically important to many tribes. Knowledge about tribal cultural practices is often private or sensitive, and it may be offensive or improper to share this information widely with non-members. The proposed rule requires the submission of information, describing traditional practices, which the NPS will then use to document those practices. This raises serious concerns about the confidentiality of tribal cultural knowledge, and could dissuade tribes from requesting agreements in the first place. 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 support the NPS's efforts to protect the confidentiality of sensitive cultural information. We suggest that the NPS strengthen this commitment by adding language to the regulations that directs Superintendents to take all measures authorized under federal law to keep sensitive information that is submitted to them confidential and protect it from public disclosure. If a tribe designates information that it submits to a Superintendent as confidential, or informs the Superintendent that other information relating to its agreement request is confidential, then the Superintendent should take whatever legal steps he or she can to protect that information from disclosure before using it to make his or her determination that an agreement is justified. We ask that the proposed § 2.6(d) be amended to so provide.

IV. The Agreements Should Be Responsive to Practical Considerations, Respect Tribal Traditional Knowledge, and Be in Accord with the NPS's Consultation Responsibility.

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Gathering agreements, once effective, should be responsive to practical considerations, including the need to amend agreements from time to time. Additionally, the agreements should recognize that traditional tribal gathering cannot be undertaken without respect for traditional tribal knowledge. The proposed rule provides many mechanisms by which traditional tribal knowledge can be taken into consideration when crafting tribal-NPS agreements. We support implementation of the rule in a manner that reflects practical considerations, has due respect for tribal knowledge and meets the NPS's obligation to consult with tribes as governments who have specialized and unique knowledge of the ecology of national park lands. To that end, we suggest several amendments to the proposed rule.

A. Amendments to Agreements.

Over time, as agreements are implemented, NPS and the tribe may find that an agreement does not meet the needs it was written to serve. Unforeseen or changed circumstances, mistakes in drafting, or unexpected consequences, could all impact the implementation of an agreement and might require a quick response. There may not be enough time to negotiate a new agreement, or the parties might not want to go through the process of negotiating an entire agreement to address one issue. Concurrence of the Regional Director should not be necessary such cases. We recommend that the NPS amend the proposed rule to add a new subsection, stating that, at the request of the tribe, the parties can amend their agreements, and that amendments of existing agreements, once accepted by the tribe and the Superintendent, do not require the Regional Director's concurrence to go into effect.

B. Regular Consultation and Liaisons.

A tribal-NPS agreement will be best implemented when both parties have a strong knowledge of each other's interests in the exercise of traditional gathering. It is important for tribal members to know how the NPS understands the agreement and how NPS believes it should be implemented in light of the park service's statutory mandate. At the same time, it is important for NPS personnel, including both park rangers and administrators, to understand the tribal members' traditions, and the legal context in which these agreements are being negotiated. Education is particularly important in Alaska, which has unique tribal organizations and where some NPS units have existing use regimes that don't exist in other parts of the national park system. Many NPS personnel working in Alaska are not originally from Alaska, or may have only dealt with tribes from the Lower 48 states, and so may not be familiar with the issues at stake here. Because cooperation requires mutual understanding, we suggest adding a new subsection to the proposed rule, requiring regular meetings between NPS personnel and tribal officials, so that both sides can discuss their interests, the tribe's plans for gathering, the NPS's plans for park management, both parties' plans for monitoring and enforcement, and any other relevant issues.

In between regular meetings, it would also be useful for the NPS and tribe or tribal organization to each appoint a liaison who is responsible for communicating about the implementation of the agreement. We believe that the proposed § 2.6(f)(13) could be amended to clarify that the list of key officials should include liaisons appointed by NPS and the tribe who will be primarily responsible for sending and receiving information about the implementation of

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the agreement. Both liaisons should have professional backgrounds or life experience in Indian traditional use and traditional knowledge.

C. Deference to Traditional Tribal Knowledge and Practices.

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, we teach our children the importance of each 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, and how the seasons of plant growth may be changing. In accordance with traditional understanding of how plants grow and how they are best used for traditional purposes, many tribes do not have a single time period for gathering particular plants. The appropriate gathering period varies by purpose and plant. 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 proposed § 2.6(d)(7), which requires agreements to address the "times and locations" at which plants may be gathered, is a vehicle for such traditional knowledge to be made part of the negotiating process but should not become an obstacle to traditional use. We suggest that the regulations direct Supervisors to give deference to traditional knowledge when discussing with tribes the times and locations for gathering and removal of plants and plant parts. The impacts of climate change are also affecting the seasonal patterns of plant growth, and so traditional knowledge is in the process of evolving to match changes in the environment. Superintendents should also take the potential impacts of climate change into account when negotiating agreements, and provide for flexibility of gathering times and places where plant growth has been impacted by our changing climate.

We believe it is also important that agreements and permits use the traditional tribal terms as well as scientific or European-American names to refer to plants and plant parts. This would help tribal members identify what they can gather under their permits, and also helps further build a relationship of trust and respect between tribes and the NPS. We ask NPS to amend proposed § 2.6(f)(5) to require agreements to describe plants and plant parts by their traditional Alaska Native and Indian names, as well as by scientific or other names.

D. Monitoring Gathering Activities.

Monitoring and enforcement requirements must also respect tribal customs and traditions. Many tribes have important customs relating to how gathered materials may be used, where they may be taken, and how they can be handled. Monitoring and enforcement rules should not require tribal members to violate their customs and traditions in order to show that their gathering has complied with the agreement. A subsection should be added to the proposed rule, directing Superintendents to take traditions and customs into account when negotiating monitoring and enforcement requirements.

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We also think that the proposed regulations should give tribes a role in monitoring. We, and many other tribes, want to be involved directly in monitoring and regulating gathering by our members. This would reduce the workload on NPS enforcement rangers, while respecting the tribes' interest in regulating the conduct of tribal members and the exercise of traditional cultural practices. It would also help create an atmosphere of trust and cooperation to ensure full compliance with agreements. The rule should contain a provision allowing the NPS and tribes or tribal organizations to share monitoring responsibilities.

To that end, we believe that the proposed § 2.6(f)(10) and (11) provide a mechanism for agreements to contain responsibility-sharing provisions. We suggest that one or both could be amended to state that "monitoring," under subsection (f)(10) and "operating protocols and additional remedies" under subsection (f)(11) can be shared tribal-NPS responsibilities, or solely tribal responsibilities. Further, we recommend that NPS amend proposed § 2.6(f) to add a new subsection, providing that tribes and the NPS can negotiate contracts as part of, or supplementary to, gathering agreements, under which tribes can take over the NPS's non-essential federal functions related to monitoring and enforcing the terms of the agreement. NPS has statutory authorization to negotiate such contracts under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f(a)(1)(E). It should use that authorization to authorize such contracts in this rule.

E. Termination or Suspension of an Agreement.

The proposed rule addressing suspension or termination, proposed § 2.6(i), could be modified to promote compliance through communication and consultation, rather than the threat of 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 unduly broad discretion to suspend or terminate, even for the most minor infractions. We would 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.

F. 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. The proposed rule and current NPS regulations do not define "commercial use," but one court has held that it is reasonable for NPS to interpret "commercial use" in its regulations to mean to profit from the sale of park resources. *Edmonds Inst. v. Babbitt*, 93 F. Supp. 2d 63, 71-72 (D.D.C. 2000). But this is also an ambiguous understanding of "commercial use" that we believe the NPS should address in its proposed rule.

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We are against the commercialization of traditional plants or using traditional gathering to make money, and we strongly support NPS's ban on the *commercial* use of traditionally gathered plants. But Alaskan tribal members also traditionally gather plants to trade and barter with other Alaska Natives. These practices are a part of our traditional way of life, and a fundamental part of our culture. Therefore, we ask that the NPS amend proposed § 2.6(f)(9) to allow traditional bartering and trading activities.

V. 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 tribes under other legal authorities. Nothing in the NPS's proposal appears to evince any intent to unsettle other use or access rights to federal lands. 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 tribes under federal law.

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

NPS also asks 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,

TANANA CHIEFS CONFERENCE

Victor Joseph
President and Chairman