NPS-2015-0002-0059

Excerpt from memorandum: "Comments of the Hualapai Tribe on National Park Service Proposed Rule: Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes." The file has been uploaded.

SUMMARY OF COMMENTS

The Hualapai Tribe supports the general intent of the proposed rule as expressed in the preamble: to continue Indian tribal cultural traditions that are rooted in specific parks. The restoration of traditional tribal ethnobotanical practices in park areas could yield benefits not just for Indian tribes but also for the American people. The proposed process for negotiation and approval of an agreement between NPS and a tribe, however, does not give appropriate weight to such potential benefits. Although a primary objective of the proposed policy is to facilitate the continuation of traditional practices, the permitting processes by which the policy would be implemented is anything but traditional. To require tribal members to get a permit from the NPS Superintendent, as set out in the proposed process, is untenable. For many traditional practitioners, especially elders, requiring them to navigate through their own tribal governments to obtain authorization to get that permit from the NPS Superintendent, will present another set of obstacles, as many traditional practitioners, especially elders, generally have few interactions with their governments agencies. Many elders do not necessarily speak English fluently, or do so as a second language, and so filling out forms to obtain a permit would be a burden that will likely have the effect of discouraging them from participating. In addition, as a Hualapai traditional practitioner has informed the tribal staff members who contributed to this memorandum, there may be instances in which an individual encounters a culturally significant plant that they were not necessarily looking for (or they may not have been on a plant collecting activity in the first place). In such a case, the Hualapai teaching is that the plant has found the person, not the other way around. Being required to leave the area to fill out paperwork, wait for a permit, and return to collect the plant(s) is simply not practical, and certainly not traditional.

We are concerned that, under the rule as proposed, a tribe that seeks to negotiate an agreement with NPS to allow its tribal members to engage in traditional gathering and removal of plants and plant parts would be required to bear a disproportionate share of the burden of justifying the agreement and persuading NPS officials to exercise discretionary authority to execute it. We believe that greater fairness in the allocation of the burden between NPS and the tribe could be achieved by expressly acknowledging the historic significance of places where tribes traditionally gathered plants which are now located within units of the National Park System. Such places will in all likelihood be eligible for the National Register of Historic Places as traditional cultural properties (TCPs). When these places are recognized as historic properties, then NPS has a statutory mandate to manage them in a way that preserves the characteristics that invest them with historic significance, which, in the case of TCPs includes traditional cultural practices such as gathering plants and plant parts. Since the NPS has this statutory mandate, it is appropriate for a share of the burden of justifying an agreement to be borne by NPS, rather than for most of the burden to be borne by the tribe.

We recommend that the bureaucratic process for carrying out an agreement be simplified by eliminating the need for the NPS Superintendent to issue permits to individual tribal members. Instead, we recommend that an agreement document such as a Memorandum of Agreement (MOA) be negotiated between NPS and an individual tribe, under which individual tribal members are allowed to undertake collecting activities. An MOA could include general information about the tribes historical connections to one or more specific parks and provide some (less than exhaustive) information about collecting practices and plants and minerals of cultural significance. An MOA could incorporate language that provides for public outreach by tribes to inform their members of the policy, and by NPS (in partnership with tribes) to promote education for the general public about the tribes cultural and historical connections to park lands and the natural resources they depended upon. We recommend that any such agreement not be required to designate specific tribal members who are allowed to gather, or be required to issue permits for individual tribal members. We also

recommend that the final rule allow certain persons who are not tribal members to be present when the gathering takes place, such as tribal government employees, consultants, and volunteers, should individual tribes wish to incorporate such language into an agreement.

The Great Spirit created Man and Woman in his own image. In doing so, both were created as equals. Both depending on each other in order to survive. Great respect was shown for each other; in doing so, happiness and contentment was achieved then, as it should be now.

The connecting of the Hair makes them one person; for happiness or contentment cannot be achieved without each other.

The Canyons are represented by the purples in the middle ground, where the people were created. These canyons are Sacred, and should be so treated at all times.

The Reservation is pictured to represent the land that is ours, treat it well.

The Reservation is our heritage and the heritage of our children yet unborn. Be good to our land and it will continue to be good to us.

The Sun is the symbol of life, without it nothing is possible – plants don't grow – there will be no life – nothing. The Sun also represents the dawn of the Hualapai people. Through hard work, determination and education, everything is possible and we are assured bigger and brighter days ahead.

The Tracks in the middle represent the coyote and other animals which were here before us.

The Green around the symbol are pine trees, representing our name Hualapai – PEOPLE OF THE TALL PINES –

HUALAPAI TRIBE
OFFICE OF THE CHAIRPERSON

Sherry J. Counts
Chairwoman

Philbert Watahomigie, Sr.
Vice Chairman

P.O. Box 179 • Peach Springs, Arizona 86434 • (928) 769-2216
1-888-769-2221

July 17, 2015

National Park Service
Dr. Joe Watkins
Office of Tribal Relations and American Cultures
1201 Eye Street, NW
Washington, DC 20005

RE: Regulation Identifier Number 1024-AD84; National Park Service Proposed Rule: Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 80 Fed. Reg. 21674 (April 20, 2015)

Dear Dr. Watkins:

On behalf of the Hualapai Tribe, this letter transmits a memorandum of comments on the proposed rule. The Hualapai Indian Reservation in northwestern Arizona occupies approximately one million acres bordering 108 miles of the Colorado River in the western Grand Canyon area. Aboriginally, as a primarily hunting and gathering society that also engaged in small-scale farming, the Hualapai people formerly utilized about seven times more land area. Over countless generations the Hualapai became knowledgeable about a vast landscape, populated by familiar landmarks, varied ecological zones and niches, places to obtain natural resources for food and tools, ancient settlement areas, and burial grounds. Many places that are important to the Hualapai people are now outside of the Tribe's recognized territorial jurisdiction. Some of these places are within areas that are now subject to the land management authority of the National Park Service, including Grand Canyon National Park and Lake Mead National Recreation Area.

With respect to Grand Canyon National Park, the Hualapai Tribe considers the entire Grand Canyon, from rim to rim, to be a culturally significant landscape, which includes hundreds of particular places that hold religious and cultural significance. The Tribe has ongoing collaborative relationships with Grand Canyon National Park in several contexts, including two decades of involvement in the Glen Canyon Dam Adaptive Management Program. The Tribe is also a signatory to the multiple party

programmatic agreement concerning impacts from implementation of the Colorado River Management Plan for Grand Canyon National Park.

The Hualapai Tribe supports the general intent of the proposed rule as expressed in the preamble: "to continue Indian tribal cultural traditions that are rooted in specific parks." The restoration of traditional tribal ethnobotanical practices in park areas could yield benefits not just for Indian tribes but also for the American people. The proposed process for negotiation and approval of an agreement between NPS and a tribe, however, is too bureaucratic and does not give appropriate weight to the potential benefits. The enclosed comment memorandum provides detailed recommendations for fixing some of the shortcoming in the proposed rule. Some of our major recommendations are summarized in this letter.

Under the rule as proposed, a tribe that seeks to negotiate an agreement with NPS to allow its tribal members to engage in traditional gathering and removal plants and plant parts at locations within park areas would be required to bear an unfair share of the burden of justifying the agreement and persuading NPS officials to exercise discretionary authority to execute it. The burden on tribes could be alleviated if NPS were to take more responsibility itself, which we believe it is statutorily obligated to do. NPS should expressly acknowledge the historic significance of places where tribes traditionally gathered plants which are now located within units of the National Park System. Such places will in all likelihood be eligible for the National Register of Historic Places as traditional cultural properties (TCPs). When these places are recognized as historic properties, then NPS has a statutory mandate to manage them in a way that preserves the characteristics that invest them with historic significance. In the case of TCPs, these characteristic include traditional cultural practices such as gathering plants and plant parts. Since the NPS has this statutory mandate, it is appropriate for NPS to bear a share of the burden of justifying an agreement, rather than for most of the burden to be borne by the tribe.

In many cases, tribes will be reluctant to provide detailed information to NPS regarding gathering practices and locations, out of concerns such as the risk of harm to historic properties. In the final rule, NPS should more clearly explain its proposed reliance on section 304 of the National Historic Preservation Act as authority to withhold sensitive information from disclosure to the public. Since this authority is only applicable if the location at issue is eligible for the National Register Historic Places, the final rule should provide a process for such a determination of eligibility, if such a determination has not already been made.

We also recommend that the bureaucratic process for carrying out an agreement be simplified by eliminating the need for the NPS Superintendent to issue permits to individual tribal members. Instead, the final rule should provide that an agreement may authorize any enrolled tribal member to engage in plant gathering. The final rule might also, at a tribe's option, authorize the tribe to issue documentation in the nature of individual permits to tribal members. Requiring individual tribal members to obtain permits from the NPS Superintendent will, as a practical matter, be a substantial impediment to the resumption of traditional gathering by tribal members.

In addition to NPS sharing the burden of justifying an agreement with a tribe, we recommend lightening the burden in two key ways: (1) for compliance with the National Environmental Policy Act, NPS should establish a categorical exclusion, rather than require an environmental assessment in every case; and (2) for compliance with the National Historic Preservation Act, NPS should make use of the "program comment" option under the regulations of the Advisory Council on Historic Preservation, rather than the standard process.

Thank you for your consideration of the enclosed comment memorandum, which was prepared by staff of the Hualapai Department of Cultural Resources (HDCR) and Dean Suagee, of Hobbs, Straus, Dean & Walker, LLP. For further discussion of the issues raised, please contact Loretta Jackson-Kelly, THPO – Director, HDCR, or Peter Bungart, Senior Archaeologist, at (928) 769-2234.

Respectfully,

Philbert Watahomigie, Sr.
Vice-Chairman
Hualapai Tribal Council

The Great Spirit created Man and Woman in his own image. In doing so, both were created as equals. Both depending on each other in order to survive. Great respect was shown for each other; in doing so, happiness and contentment was achieved then, as it should be now.

The connecting of the Hair makes them one person; for happiness or contentment cannot be achieved without each other.

The Canyons are represented by the purples in the middle ground, where the people were created. These canyons are Sacred, and should be so treated at all times.

The Reservation is pictured to represent the land that is ours, treat it well.

The Reservation is our heritage and the heritage of our children yet unborn. Be good to our land and it will continue to be good to us.

The Sun is the symbol of life, without it nothing is possible -- plants don't grow -- there will be no life – nothing. The Sun also represents the dawn of the Hualapai people. Through hard work, determination and education, everything is possible and we are assured bigger and brighter days ahead.

The Tracks in the middle represent the coyote and other animals which were here before us.

The Green around the symbol are pine trees, representing our name Hualapai – PEOPLE OF THE TALL PINES –

HUALAPAI TRIBE
OFFICE OF THE CHAIRPERSON

Sherry J. Counts
Chairwoman

P.O. Box 179 • Peach Springs, Arizona 86434 • (928) 769-2216
1-888-769-2221

Philbert Watahomigie, Sr.
Vice Chairman

COMMENTS OF THE

HUALAPAI TRIBE

ON

NATIONAL PARK SERVICE PROPOSED RULE: GATHERING OF CERTAIN PLANTS OR PLANT PARTS BY FEDERALLY RECOGNIZED INDIAN TRIBES FOR TRADITIONAL PURPOSES, 80 FED. REG. 21674 (APRIL 20, 2015)

Regulation Identifier Number 1024-AD84

July 17, 2015

OVERVIEW OF THE PROPOSED RULE

The proposed rule would authorize agreements between National Park Service (NPS) and Indian tribes to allow tribal members to engage in traditional gathering and removal of plants and plant parts at places within units of the National Park System. To qualify for such an agreement, a tribe would have to explain to NPS that it has a "longstanding relationship of historical or cultural significance [with] a park area predating the establishment of the park area." Since 1983, National Park Service (NPS) regulations have prohibited the traditional harvesting of plants and plant materials by Indian people at places that are now within units of the National Park System. There are a few exceptions, but prohibition is the general rule. The proposed rule would revise an existing exception to the general prohibition by authorizing agreements between NPS and a tribe to allow the resumption of traditional gathering.

SUMMARY OF COMMENTS

The Hualapai Tribe supports the general intent of the proposed rule as expressed in the preamble: "to continue Indian tribal cultural traditions that are rooted in specific parks." The restoration of traditional tribal ethnobotanical practices in park areas could yield benefits not just for Indian tribes but also for the American people. The proposed process for negotiation and approval of an agreement between NPS and a tribe, however, does not give appropriate weight to such potential benefits. Although a primary objective of the proposed policy is to facilitate the continuation of traditional practices, the permitting processes by which the policy would be implemented is anything but traditional. To require tribal members to get a permit from the NPS Superintendent, as set out in the proposed process, is untenable. For many traditional practitioners, especially elders, requiring them to navigate through their own tribal governments to obtain authorization to get that permit from the NPS Superintendent, will present another set of obstacles, as many traditional practitioners, especially elders, generally have few interactions with their government's agencies. Many elders do not necessarily speak English fluently, or do so as a second language, and so filling out forms to obtain a permit would be a burden that will likely have the effect of discouraging them from participating. In addition, as a Hualapai traditional practitioner has informed the tribal staff members who contributed to this memorandum, there may be instances in which an individual encounters a culturally significant plant that they were not necessarily looking for (or they may not have been on a plant collecting activity in the first place). In such a case, the Hualapai teaching is that the plant has found the person, not the other way around. Being required to leave the area to fill out paperwork, wait for a permit, and return to collect the plant(s) is simply not practical, and certainly not traditional.

We are concerned that, under the rule as proposed, a tribe that seeks to negotiate an agreement with NPS to allow its tribal members to engage in traditional gathering and removal of plants and plant parts would be required to bear a disproportionate share of the burden of justifying the agreement and persuading NPS officials to exercise discretionary authority to execute it. We believe that greater fairness in the allocation of the burden between NPS and the tribe could be achieved by expressly acknowledging the historic significance of places where tribes traditionally gathered plants which are now located within units of the National Park System. Such places will in all likelihood be eligible for the National Register of Historic Places as traditional cultural properties (TCPs). When these places are recognized as historic properties, then NPS has a statutory mandate to manage them in a way that preserves the characteristics that invest them with historic significance, which, in the case of TCPs includes traditional cultural practices such as gathering plants and plant parts. Since the NPS has this statutory mandate, it is appropriate for a share of the burden of justifying an agreement to be borne by NPS, rather than for most of the burden to be borne by the tribe.

We recommend that the bureaucratic process for carrying out an agreement be simplified by eliminating the need for the NPS Superintendent to issue permits to individual tribal members. Instead, we recommend that an agreement document such as a Memorandum of Agreement (MOA) be negotiated between NPS and an individual tribe, under which individual tribal members are allowed to undertake collecting activities. An MOA could include general

information about the tribe's historical connections to one or more specific parks and provide some (less than exhaustive) information about collecting practices and plants and minerals of cultural significance. An MOA could incorporate language that provides for public outreach by tribes to inform their members of the policy, and by NPS (in partnership with tribes) to promote education for the general public about the tribe's cultural and historical connections to park lands and the natural resources they depended upon. We recommend that any such agreement not be required to designate specific tribal members who are allowed to gather, or be required to issue permits for individual tribal members. We also recommend that the final rule allow certain persons who are not tribal members to be present when the gathering takes place, such as tribal government employees, consultants, and volunteers, should individual tribes wish to incorporate such language into an agreement.

We recommend that, in the final rule, NPS clearly explain its proposed reliance on section 304 of the National Historic Preservation Act as authority to withhold sensitive information from disclosure to the public. This authority is only applicable if the location at issue is eligible for the National Register Historic Places. The final rule should provide a process for such a determination of eligibility to be made, if such a determination has not already been made before the tribe proposes to enter into an agreement with NPS for harvesting plants and plant parts.

In addition to sharing the burden of justifying an agreement, we also recommend lightening the burden in two key ways: (1) for compliance with the National Environmental Policy Act, NPS should establish a categorical exclusion, rather than require an environmental assessment in every case; and (2) for compliance with the National Historic Preservation Act, NPS should make use of the "program comment" option under the regulations of the Advisory Council on Historic Preservation, rather than the standard process.

We also recommend that the final rule specifically provide that limited commercial use of plant parts may be allowed under an agreement, and that gathering certain kinds of minerals may also be allowed. Finally, we recommend that the final rule include provisions to allow for collaboration between NPS and a tribe to pursue options in the event that climate change renders a place where a tribe has traditionally gathered plants no longer suitable for gathering, or even capable of supporting the growth of culturally important plant species.

INTRODUCTION

NPS regulations prohibit possession or removal of plants or plant parts taken from park areas, subject to certain exceptions. 36 C.F.R. § 2.1. Subsection (d) provides an exception for conduct that is "specifically authorized by Federal statutory law, treaty rights," but makes it clear that without such specific authorization, the exception does not include taking, use, or possession "for ceremonial or religious purposes." The proposed rule would change the wording of subsection (d) as indicated below (with new language underlined and language to be deleted struck through):

> (d) This section shall not be construed as authorizing the taking, use or possession of fish, wildlife or plants ~~for ceremonial or religious purposes~~, except for the gathering and removal for traditional purposes of plants or plant parts by members of an Indian tribe under an agreement in accordance with § 2.6, or where specifically authorized by Federal statutory law, treaty rights, or in accordance with § 2.2 or 2.3"

Thus, the general prohibition on gathering for "ceremonial or religious purposes" would be deleted and authorization would be added for agreements between NPS and a tribe that would allow tribal members to engage in "traditional" gathering and removal. (Section 2.2 addresses hunting within park areas, and section 2.3 addresses fishing; neither section is particularly relevant to the proposed rule.)

This would be a long-overdue change in federal policy. The preamble includes several statements by the NPS articulating some of the expected benefits of this change in policy, including:

> Managing the various areas of the National Park System in a manner that helps tribes maintain their cultural traditions and relationships with the land may contribute to the protection and stewardship of such areas.
>
> The proposed rule would provide new opportunities for the NPS and tribal governments to work together in support of the continuation of sustainable Indian cultural traditions that make up a unique and irreplaceable part of our national heritage.

The preamble also says, "Cooperation in the continuation of tribal traditions is at the heart of this proposed rule change." We believe that the likelihood of mutually beneficial cooperation between NPS and particular tribes would be substantially improved if the final rule incorporates improvements such as those recommended in this memorandum.

A new section 2.6 would set out the procedural steps and substantive requirements for entering into such agreements. Under proposed section 2.6, an interested tribe would have to take the initiative to seek such an agreement; the NPS Superintendent would have the authority to enter into such an agreement but would first have to make determinations on four factors in favor of the agreement and would also have to obtain the concurrence of the NPS Regional Director. As such, the general prohibition would be removed, and it would be replaced with discretionary authority on the part of NPS officials, with the tribe bearing most of the burden for persuading the NPS officials to exercise their discretionary authority.

This approach falls short. As the preamble says, these "Indian cultural traditions … make up a unique and irreplaceable part of our national heritage." 80 Fed. Reg. 21674. The process for negotiating and implementing agreements as set out in the proposed rule simply does not give appropriate weight to the knowledge and values inherent in tribal cultural traditions.

DETAILED COMMENTS

The order of presentation below corresponds to the order in which these issues arise in the text of the proposed rule at 80 Fed. Reg. 21680-81. We also raise three points that address issues not covered in the proposed rule.

Authority

The shortcomings of the proposed rule may be due, at least in part, to the narrow way in which the legal authority for this rule is framed, without recognition of other statutory authorities that the rule would also serve. As the authority for its promulgation, the proposed rule cites two sections of the statute commonly known as the NPS Organic Act of 1916, as amended. 54 U.S.C. §§ 100101, 100751(a) (as redesignated by Pub. L. No. 113-287). Section 100101 states the "fundamental purpose" of the National Park System, which is "to conserve 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." Section 100751(a) vests the Secretary of the Interior with broad authority to prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units." These two statutory sections are briefly discussed in the preamble of the proposed rule. Given the policy statement in section 1000101, the discussion in the preamble immediately prior the heading "Authority," appears to be particularly important in justifying the proposed rule as being consistent with the fundamental purpose stated in the NPS Organic Act, especially the following statement (at 80 Fed. Reg. 21675):

> Research has shown that traditional gathering, when done with traditional methods and in traditionally established quantities, does not impair the ability to conserve plant communities and can help to conserve them, thus supporting the NPS conclusion that cooperation with Indian tribes in the management of plant resources is consistent with the preservation of national park lands for all American people.

While the two cited sections of the amended NPS Organic Act may constitute sufficient authority for the promulgation of this rule, other statutory authorities could be cited to reinforce and provide additional support for the policy embodied in the rule. Two other statutes that could be cited include the National Historic Preservation Act of 1966 (NHPA), as amended, and the American Indian Religious Freedom Act of 1978 (AIRFA). While the NPS Organic Act *allows* NPS officials to enter into agreements with tribes, NHPA and AIRFA provide authority to encourage NPS officials to execute such agreements.

National Historic Preservation Act. The only explicit mention of NHPA in the proposed rule is in subsection 2.6(d)(2), which requires the NPS Superintendent to "Analyze potential impacts of the proposed gathering and removal in accordance with the requirements the National Environmental Policy Act, National Historic Preservation Act, and other applicable laws." Limiting the discussion of NHPA to a compliance issue is puzzling, given the lead role of NPS in implementing many facets of NHPA. We address compliance with NHPA section 106 later in this memorandum. At this point, we suggest that NHPA should be relied upon as a source of legal authority for the proposed rule.

More specifically, we believe that, pursuant to NHPA section 110(a) and relevant guidance documents issued by NPS, practically any place within a national park area with which a tribe has a "traditional association" should be presumed to be eligible for the National Register of Historic Places. As defined in the proposed rule, "traditional association" means "a longstanding relationship of historical or cultural significance between an Indian tribe and a park area predating the establishment of the park area." In many cases, such places will qualify as traditional cultural properties (TCPs) as defined in *National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties*. Such places would almost certainly be TCPs if tribal access for carrying on cultural practices was not prohibited by NPS regulations. However, *Bulletin 38* says, "The fact that a property may have gone unused for a lengthy period of time, with use beginning again only recently, does not make the property ineligible for the Register." *Bulletin 38*, at 16. Moreover, in assessing the integrity of a possible TCP for determining its eligibility for the Register, it "must be considered with reference to the views of traditional practitioners; if its integrity has not been lost in their eyes, it probably has sufficient integrity to justify further evaluation." *Id.* at 10.

In the preamble to the proposed rule, NPS implicitly acknowledges that places where tribes engaged in gathering plants are eligible for the National Register. In the discussion of section 2.6(c), the preamble says, "NPS believes that under existing law it can protect sensitive or confidential information submitted by tribes (see *e.g.*, 54 U.S.C. 307103)." The reference is to section 304 of the National Historic Preservation Act (as re-designated by Pub. L. No. 113-287, formerly codified at 16 U.S.C. § 470w-3). This statutory authority directs the relevant federal official to:

> withhold from disclosure to the public, information about the location, character, or ownership of a *historic property* if the Secretary and the agency determine that disclosure may—
>
> (1) cause a significant invasion of privacy;
> (2) risk harm to the historic resources; or
> (3) impede the use of a traditional religious site by practitioners.

(Emphasis added.) As defined in the statute:

> [T]he term "historic property" or means any prehistoric or historic district, site, building, structure, or object *included on, or eligible for inclusion on the National Register*, including artifacts, records, and material remains related to the district, site, building, structure, or object.

54 U.S.C. § 300308 (formerly codified at 16 U.S.C. § 470w(5)) (emphasis added). Thus, if NPS believes it can use NHPA section 304 to withhold information from disclosure, then NPS must also believe that the places within national park areas where tribes traditionally engaged in gathering plants are eligible for the National Register.

If these places are eligible for the National Register, then NHPA section 110(a)(2)(B) provides that NPS "shall ensure … that such properties … are managed and maintained in a way

that considers the preservation of their historic, archaeological, architectural, and cultural values ..." 54 U.S.C. § 306102(b)(2) (as re-designated by Pub. L. No. 113-287, formerly codified at 16 U.S.C. § 470h-2(a)(2)(B)).

Thus, rather than tribes being required to take the initiative to persuade the NPS Superintendent to exercise discretionary authority and enter into an agreement to let tribal members gather plants, NPS officials should be taking the initiative and seeking help from tribes to identify places with which tribes have traditional associations and collaborating with tribes to manage such places in ways that preserves their historic and cultural values. We suggest that acknowledging the responsibilities of NPS under NHPA section 110(a) will enhance the likelihood that NPS will realize the stated intent of the proposed rule: "to continue Indian tribal cultural traditions that are rooted in specific parks."

Moreover, when the places where tribes have traditionally gathered plants are recognized as historically significant *because* tribes traditionally gathered plants there, NPS can manage such places as historic properties, and such management would then directly serve the "fundamental purpose" of the National Park System. As such, the justification for the proposed rule would not depend on the NPS finding, quoted above, that "traditional gathering ... does not impair the ability to conserve plant communities and can help to conserve them." Rather, "cooperation with Indian tribes in the management of plant resources" would simply be a logical way to manage these historic properties so that the characteristics that give them historic significance – traditional gathering of plant resources – are preserved. Such cooperation should draw upon tribal traditional ecological knowledge (TEK), that is, the cumulative knowledge developed over generations of interactions with the environment, including traditional management practices. By making use of TEK, cooperative management could move beyond conservation and actually promote the health of plant communities through responsible harvesting, pruning, and stewardship. Such an approach could enhance the characteristics of places that invest them with historic significance.

American Indian Religious Freedom Act. The proposed rule uses the terms "traditional purpose" and "tribal cultural traditions," but avoids mentioning tribal "religious" or "ceremonial" practices except when these terms are used in statutes or regulations cited in the preamble. This avoidance of references to tribal "religious" traditions is so consistent that it must be intentional. We are aware that an earlier draft of the proposed rule (dated March 2011) did include an express reference to AIRFA, as follows:

> While some traditional purposes may have ceremonial or religious components, the overall intent of the proposed rule is the continuation of Indian tribal cultural traditions that are rooted in the history of specific parks. This goal is consistent with the policy guidance set forth in the American Indian Religious Freedom Act (AIRFA) of 1978 (42 U.S.C. 1996).

While it is reasonable for the proposed rule to emphasize cultural traditions and the historical roots of certain traditions in specific park areas, it also seems disingenuous to ignore the implications of the proposed rule for AIRFA. In tribal traditions, some of the places where

tribes have traditionally gathered plants are considered to be sacred. As codified at 42 U.S.C. § 1996, AIRFA proclaims:

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

AIRFA, enacted as Pub. L. No. 95-341, was passed as a congressional Joint Resolution, and only the "Resolved" clause is codified. The uncodified "Whereas" clauses, however, include important statements of congressional findings regarding the importance tribal religions in tribal cultures. In some contexts, it is artificial to draw distinctions between tribal religions and tribal cultures. Some of the "Whereas" clauses are particularly relevant to this proposed rule, including:

> Whereas the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems;
> * * *
> Whereas the lack of a clear, comprehensive, and consistent Federal policy has often resulted in abridgment of religious freedom for traditional American Indians;
> Whereas such religious infringements result from the lack of knowledge or the insensitive and inflexible enforcement of Federal policies and laws premised on a variety of laws;
> Whereas such laws were designed for such worthwhile purposes as conservation and preservation of natural species and resources but were never intended to relate to Indian religious practices and, therefore, were passed without consideration of their effect on traditional American Indian religions;
> Whereas such laws and policies often deny American Indians access to sacred sites required in their religions ...

AIRFA also mandated the preparation of a report to Congress, which was delivered in 1979. FEDERAL AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT; P.L. 95-341 (August 1979) (*AIRFA Report*). The issue of gathering plants within park areas for ceremonial purposes is specifically mentioned in the *AIRFA Report*: "As a result of ongoing consultation, many park areas have waived fees for Native American spiritual visits and have accommodated traditional practitioners' needs for access to sacred sites and gathering plants for ceremonial purposes." *Id.* at 44. The *AIRFA Report* included the following recommendation for administrative actions by land managing agencies:

> First, each federal agency can accommodate Native American religious practices to the fullest extent possible under existing federal land and resource management statutes. This accommodation could be reflected in each agency's regulations, policies and enforcement procedures with regard to access to federal land areas, gathering and use of natural substances endowed with sacred significance by Native American religious groups, provisions for group and individual activities on federal lands and other appropriate subject matter.

Id. at 62. The general regulatory prohibition on gathering plants and plant parts, including if done for ceremonial or religious purposes, which was promulgated in 1983, appears to have simply ignored this recommendation. Indeed, the statement in the preamble of the proposed rule that it has been "20 years since Indian tribes brought the issue of gathering to the attention of NPS leadership," 80 Fed. Reg. 21675, appears to overlook the fact that this issue was brought to the attention of NPS leadership in 1979, some 36 years ago. It is long past the time that this infringement of religious freedom should have been rectified.

Religious freedom, after all, is a fundamental American value, enshrined in the First Amendment to the U.S. Constitution. While the Supreme Court has rejected claims by tribal religious practitioners that the First Amendment should operate to block federal agencies from carrying out land management decisions that damage tribal sacred places on federal lands, the Court also said, "The Government's right to the use of its own land .. need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988).

After the Court's ruling in *Lyng*, President Clinton issued Executive Order 13007, "Indian Sacred Sites," which provides that each land managing federal agency:

> shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.

(May 24, 1996, 61 Fed. Reg. 26771, 42 U.S.C. § 1996 notes). In the current Administration, five federal agencies, including the Department of the Interior, have executed an interagency Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (2012), http://www.achp.gov/docs/SacredSites-MOU_121205.pdf.

Not all traditional gathering of plants is done for religious purposes, but in many cases there is a religious aspect in traditional gathering. When there is, AIRFA provides legal authority for accommodating tribal religious practices, and Executive Order 13007 provides direction from the President to exercise such authority.

Permits to be Issued by the NPS Superintendent

Under the rule as proposed, the NPS Superintendent of a park area could enter into an agreement with a federally recognized Indian tribe to authorize gathering and removal of plants or plant parts for traditional purposes. As proposed, subsection 2.6(b) would provide:

> This agreement will define the terms and conditions under which the tribe may be issued permits that designate members who may gather and remove plants or plant parts within the park. The agreement will be implemented through permits, which the Superintendent will issue under Sec. 1.6 of this chapter.

We are aware that the March 2011 draft of the proposed rule would have allowed an agreement such as an MOA to avoid the step of having the NPS Superintendent issue permits to individuals. Rather, the agreement could have provided for the tribe to issue the documentation authorizing individuals to do the gathering. The March 2011 draft included the following sentence:

> Such an agreement will authorize the Indian tribe to designate enrolled members of the Indian tribe to gather plants, plant parts, or minerals within the park area in accordance with the terms and conditions of the agreement.

In other words, the agreement would have functioned as a permit. Changing this approach to one in which the authorized individual tribal members must be issued permits by the NPS Superintendent adds a bureaucratic step that may have the practical effect of discouraging tribes from seeking such agreements. Perhaps this bureaucratic step would not be objectionable if the issuance of permits by the NPS Superintendent were just a ministerial act, but, in that case, it would still be unnecessary.

We recommend taking the approach of the March 2011 draft – let the agreement serve as the permit. The final rule should allow the agreement to cover all enrolled tribal members and not just those "authorized" by the tribe since, as previously noted, many traditional practitioners, especially elders, tend to have little interaction with their governments or government agencies. If there really is a need for individual tribal members to have documentation in the nature of a permit in their possession when they gather plants in accordance with an agreement, then the final rule should let the tribe provide the documentation to tribal members. If an agreement is in effect, though, we believe that a tribal membership card should be sufficient.

Persons other than Tribal Members

As proposed in subsection 2.6(b), only tribal members could be authorized to engage in traditional gathering. While we do not object to this limit, we do recommend that the rule provide that an agreement between a tribe and NPS could authorize tribal government employees, consultants, and volunteers to be present when the gathering takes place. Such employees and consultants could include professionals such as ethnobotanists and cultural anthropologists and others who contribute to studies regarding the effects of gathering. Employees and volunteers might also include people whose role it is to help transport tribal elders to locations that are not readily accessible to people with mobility challenges. The rule should make it clear that such persons may accompany tribal members who are authorized to do the gathering.

Information to be Provided when Requesting an Agreement

As proposed, subsection 2.6(c) would require a tribe seeking an agreement to provide certain information to NPS, including:

> (1) An explanation of the Indian tribe's traditional association to the park area;

(2) An explanation of the traditional purposes to which the gathering activities will relate; and
(3) A description of the gathering and removal activities that the tribe is interested in conducting.

The NPS Superintendent would then be required to make the four determinations set out in proposed subsection 2.6(d) and would also be required to obtain enough information from the tribe, and possibly also from tribal members, so that the agreement would address all the items listed in subsection 2.6(f). The preamble of the proposed rule discusses the information collection requirements. 80 Fed. Reg. 21678-79. We are particularly concerned about item (4) in the preamble discussion, which corresponds to item (7) in subsection 2.6(f) of the proposed rule:

Identification of the times and locations at which plants or plant parts may be gathered and removed; ...

While we recognize that NPS has a legitimate need for such information, we would be reluctant to provide such information without assurances that the information will not be released to the public. We expect that other tribes would have similar concerns. We want to avoid situations in which authorized tribal members are impeded from gathering plants and plant parts by people of the general public who show up to watch, or harass, the Indians doing the gathering. This would be particularly troublesome in situations in which the gathering is a religious practice. Furthermore, as noted above, in some cases tribal members may not even know that they will encounter a traditionally used plant when they are in a park. Requiring the tribal member to leave and get a permit and then return to collect is unreasonable.

The recommendation made earlier in this letter regarding the National Historic Preservation Act provides a way that NPS could revise the proposed rule to address this concern. This begins with acknowledging that practically any place within a park area where a tribe has traditionally harvested plants or plant materials would likely qualify for the National Register of Historic Places as a traditional cultural property (TCP). If a location at which a tribe has traditionally engaged in such harvesting has been determined eligible for the National Register, then, as discussed earlier, NHPA section 304, 54 U.S.C. § 307103, authorizes NPS to "withhold from disclosure to the public information about the location, character, or ownership of a historic property" if NPS determines that disclosure may:

(1) cause a significant invasion of privacy;
(2) risk harm to the historic property; or
(3) impede the use of a traditional religious site by practitioners.

The rule should provide a process for such a determination of eligibility to be made, if such a determination has not already been made before the tribe proposes to enter into an agreement with NPS for harvesting plants and plant parts. In the preamble to the final rule, NPS should more clearly explain its proposed use of its authority to withhold information from disclosure to the public.

Compliance with the National Environmental Policy Act

As proposed, subsection 2.6(d) would require the NPS Superintendent to:

> (2) Analyze potential impacts of the proposed gathering and removal in accordance with the requirements of the National Environmental Policy Act, the National Historic Preservation Act, and other applicable laws.
> (3) Document a determination that the proposed gathering and removal activities will not result in a significant adverse impact on park resources or values.

As discussed in the preamble, this means that, for NEPA compliance, each agreement would require an environmental assessment (EA) and a finding of no significant impact (FONSI). 80 Fed. Reg. 21677. Elsewhere in the preamble, as quoted earlier in this letter, NPS stated a general finding: "Research has shown that traditional gathering, when done with methods and in traditionally established quantities, does not impair the ability to conserve plant communities and can help to conserve them." 80 Fed. Reg. 21675.

Given this general finding by NPS, we believe that entering into an agreement with a tribe to authorize traditional gathering should be a candidate for the establishment of a categorical exclusion. As explained in a guidance document issued by the Council on Environmental Quality (CEQ), one of the circumstances in which an agency may establish a new or revised categorical exclusion is when the agency determines that a class of actions "can be categorically excluded because it is not expected to have significant or cumulative environmental effects." CEQ, Memorandum for Heads of Federal Departments and Agencies, Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act (Nov. 23, 2010), *reprinted* 75 Fed. Reg. 75628, 75632 (Dec. 6, 2010). Such a determination could be made for agreements with tribes to authorize traditional gathering. Review of such proposed agreements for the possible existence of extraordinary circumstances pursuant to the DOI NEPA implementing procedures, 43 C.F.R. § 46.215, should be adequate to identify any such proposed agreement for which the preparation of an EA would be appropriate.

To illustrate the appropriateness of establishing a categorical exclusion for agreements with tribes to authorize traditional gathering, we direct your attention to several of the categorical exclusions in the NPS NEPA implementing procedures, at 516 DM § 12.5, including:

> C. Actions Related to Development.
> * * *
> (4) Routine maintenance and repairs to cultural resource sites, structures, utilities and grounds under an approved Historic Structures Preservation Guide or Cyclic Maintenance Guide; or if the action would not adversely affect the cultural resource.
> * * *
> D. Actions Related to Visitor Use.
> * * *
> (2) Minor changes in amounts or types of visitor use for the purpose of ensuring visitor safety or resource protection in accordance with existing regulations.
> * * *

(5) Issuance of permits for demonstrations, gathering, ceremonies, concerts, arts and crafts shows, etc., entailing only short-term or readily mitigable environmental disturbance.

* * *

E. Actions Related to Resource Management and Protection.

* * *

(4) Stabilization by planting native plant species in disturbed areas.

* * *

(6) Restoration of noncontroversial native species into suitable habitats within their historic range and elimination of exotic species.

If the places where gathering occurs pursuant to an agreement are treated as historic properties that tribes are helping to manage, then some of the activities tribes would be carrying out might well be covered by items C(4), E(4), and E(6). In addition, after this proposed rule is issued as final, item D(2) could arguably apply if the final rule does not explicitly require an EA and FONSI.

The establishment of a categorical exclusion for agreements with tribes to authorize traditional gathering would serve to encourage tribes to seek such agreements by substantially reducing the burden associated with persuading NPS to enter into such agreements. While subsection 2.6(d) of the proposed rule says that "the Superintendent must" carry out the analysis required for NEPA compliance, the DOI NEPA implementing procedures authorize NPS to adopt an EA prepared by the tribe. 46 C.F.R. § 46.320. Given the practical limits on NPS resources, the burden of preparing the EA is likely to fall on the tribe.

Another reason that this approach to NEPA compliance would be advisable is that it could reduce the risk of damage to the places where plants are gathered by avoiding disclosure to the public of the locations and timing of gathering practices. If an EA is required for the approval of an agreement, as a practical matter, it will be quite difficult to avoid disclosure of such information.

Compliance with the National Historic Preservation Act

As noted above, proposed subsection 2.6(d) would also require the NPS Superintendent to document compliance with the National Historic Preservation Act. As proposed, this means compliance with the regulations of the Advisory Council on Historic Preservation (ACHP). 36 C.F.R. part 800. As discussed earlier, a location for traditional gathering will most likely be eligible for the National Register as a traditional cultural property (TCP). Under the standard process in the ACHP regulations, 36 C.F.R. §§ 800.3 – 800.13, a decision by NPS to enter into an agreement would require a finding of no adverse effect. 36 C.F.R. § 800.5.

If the location is eligible for the Register as a TCP, and the agreement provides for the restoration of traditional activities that contribute to its historic significance, then it would appear very unlikely that the effects would be adverse. The possibility of adverse seems almost nonexistence, unless the place is eligible for the Register for some reason in addition to being a TCP. If a place is eligible because it is a TCP and not for some other reason, then requiring the

approval of an agreement to go through the standard process in the ACHP regulations would be a bureaucratic waste of effort.

The ACHP regulations, however, do offer an alternative way to achieve compliance with NHPA. One approach would be for NPS to ask the ACHP to provide program comments pursuant to 36 C.F.R. § 800.14(e). Such program comments could provide for the possible scenario in which a property is eligible for the Register for some reason in addition to being a TCP. NPS should consult with the ACHP to fashion a way to avoid unnecessary effort.

Minor Commercial Use

As proposed, subsection 2.6(f)(9) requires any agreement to explicitly prohibit any commercial use. We note that the March 2011 would have allowed limited commercial uses. The relevant language in that draft provided:

> (e) *Limited commercial uses not prohibited*: A request to gather may not be denied solely because the products of such gathering may sometimes be sold. The sale of traditional crafts created in whole or in part from resources gathered pursuant to an agreement authorized by this section is not prohibited.

The categorical prohibition on the sale of traditional crafts that incorporate materials that have been gathered from park areas draws a bright-line distinction that may be at odds with tribal cultural traditions. NPS should restore this language from the March 2011.

Minerals

The March 2011 draft would have allowed for gathering of certain kinds of minerals, in addition to plants and plant parts. Throughout that draft, the proposed rule routinely referred to plants, plant parts, and minerals. The preamble of that draft included the following statement:

> Gathering of minerals authorized by this proposed rule would include renewable minerals that are naturally redeposited and used for traditional purposes such as gathering salt for personal consumption, and clay for painting and creating pottery.

The current proposed rule mentions "minerals" but a single time, in the paragraph in the preamble that refers to NPS Units in Alaska. 80 Fed. Reg. 21676. That paragraph notes that existing regulations, codified at 36 C.F.R. § 13.35, authorize gathering "plant materials and minerals that are essential to the conduct of traditional ceremonies by Native Americans." There is nothing in the preamble to explain why minerals would not be covered by the proposed rule, if a tribe can show that it traditionally gathered minerals at a location within a park area. The final rule should allow for gathering culturally important minerals if a tribe can make such a showing. In the absence of explicit authorization, gathering of minerals would remain subject to the general prohibition. 36 C.F.R. § 2.1(a)(1)(iv).

Climate Change

The proposed rule completely ignores the implications of climate change for restoring the practice of gathering plants and plant parts at traditional locations within National Park areas. Changes such as warmer and drier climate zones may result in such traditional locations no longer supporting culturally important botanical communities. In some park areas, as the climate changes, other locations may become suitable locations for such plant life. For example, the suitable zone for some plant species may migrate to higher elevations as warming proceeds. There may be a range of options for collaboration between NPS and particular tribes in fashioning strategies for adaptation to climate change. The final rule should make allowance for such collaboration. If culturally important plants no longer grow where they formerly did, or if the health of the botanical community at a traditional location renders any harvesting unwise, such circumstances should not categorically preclude a tribe from entering into an agreement with NPS to allow for gathering plants, which could include efforts to help botanical communities adapt to changing conditions.