



Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302



National Congress of American Indians
1516 P Street NW
Washington, D.C. 20005

To: Mr. Joe Watkins
National Park Service
Office of Tribal Relations and American Cultures
1201 Eye Street N.W.
Washington, DC 20005.

Fr: National Congress of American Indians
Embassy of Tribal Nations
1516 P Street NW
Washington, DC 20005

Native American Rights Fund
1506 Broadway
Boulder, CO 80302

Dt: July 20, 2015

Re: Comments on NPS-2015-0002-0001 – Proposed Rule on Gathering of Certain
Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional
Purposes – RIN 1024-AD84

I. Introduction

These comments are submitted by the Native American Rights Fund (NARF) regarding the draft National Park Service (NPS) regulation, Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, published in the Federal Register on April 20, 2015. (RIN 1024-ADF84)

We offer these comments regarding the proposed rule on behalf of the National Congress of American Indians (NCAI). NCAI was established in 1944 with the conviction that tribal sovereignty—the ability of tribal governments to make and enforce laws that meet the needs of their communities—is critical to the success of

American Indians and Alaska Natives. NCAI is the oldest, largest, and most representative advocacy group representing Indian Country. Governed by a board of 16 elected tribal leaders, NCAI is a membership organization that serves the interests of 567 federally recognized tribes, state recognized tribes, and 5.2 million American Indian and Alaska Native citizens.

The purpose of the proposed regulation is to permit the gathering and removal of traditional plants or plant parts that were originally prohibited in 1983 under 36 C.F.R. § 2.1. Existing NPS regulations allow for the personal use or consumption of “fruits, berries, nuts, or unoccupied seashells” by the general public, subject to certain conditions designated by the superintendent of the national park. 36 C.F.R. § 2.1(c) (1983). However, Tribes or tribal members are not permitted to gather plants or plant parts on parklands for traditional purposes except where specific statutes or treaties grant rights to do so. 36 C.F.R. § 2.1(d) (1983).

The proposed rule would remove the existing prohibition on the taking, use, or possession of plants or plant parts provided the taking, use, or possession is permitted under an agreement between NPS and an Indian Tribe. *Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes*, 80 Fed. Reg. 21674 §2.1(d), §2.6(b) (proposed Apr. 20, 2015) (to be codified at 36 C.F.R. pt. 2).

II. The Regulatory Authority of the National Park Service

The Organic Act of 1916, as amended, created the National Park Service and defined its purpose as to “conserve the scenery, natural and historic objects, and wild life in the [National Park] System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 54 U.S.C. § 100101.

The Organic Act of 1916 authorizes the Secretary of the Interior to make “such regulations as the Secretary considers necessary or proper for the use and management of [National Park] System units.” (54 U.S.C. § 100751(a)). Under this legal policy and background we recommend NPS add and alter the following elements to the proposed rule.

III. Proposed NPS Regulations

Section 2.1(d): Preservation of Natural, Cultural, and Archeological Resources: Under the current proposed rule, NPS would only permit the gathering and removal of plants or plant parts for traditional purposes.

We recommend NPS also allow minerals traditionally gathered by tribes for religious purposes, artistic endeavors, and personal consumption to be included in the proposed rule.

For many Indian Tribes, traditional gathering practices did not just include plants or plant parts. Tribes also gathered minerals for religious purposes, artistic endeavors, and personal consumption. Notable examples of such minerals include salt, special sands for sand painting, and special clays for pottery. These minerals are tremendously important in the traditional cultures of many Indian tribes, and often occur in limited areas such as national parks. Because each Tribe is unique, by including this provision, the NPS will ensure that the tribal agreements entered into under the proposed rule reflect the traditional cultural practices specific to each Tribe.

Section 2.6(b): Agreements between the NPS and Indian Tribes: NPS proposes to authorize agreements between NPS and Indian Tribes that would allow and regulate tribal gathering and removal of plants or plant parts for traditional purposes in park units. However, these agreements would be accompanied by a permit under § 1.6, which would authorize the gathering and removal activities.

We recommend NPS have the agreement negotiated between a tribal government and a park function as a permit, each tailored to authorize gathering of plants and / or minerals under tribal oversight.

Under the current proposed rule, Tribes and their members would be required to obtain a separate permit for each gathering action under the requirements of 36 C.F.R. § 1.6 (1983). This provision renders the proposed rule meaningless. Under § 1.6 tribal members already have the option to obtain a permit from a park superintendent that would authorize an otherwise prohibited or restricted activity. 36 C.F.R. § 1.6 (1983).

By having the agreement negotiated between a tribal government and a park function as a permit, NPS and Tribes would save valuable time and resources taken in registering and granting all of these permits. Furthermore, NPS would strengthen its government-to-government relationship with Indian tribes by promoting and recognizing Indian Tribe's rights to self-governance and tribal sovereignty.

In addition, by treating the agreements as permits, NPS would facilitate park access to individual tribal members. A tribal member would then be able to show tribal identification to gain access to a park, rather than seek an individual permit from the Tribe or park superintendent.

Section 2.6(c): Tribal Request: The NPS “believes that under existing law it can protect sensitive or confidential information submitted by tribes.” See e.g., 54 U.S.C. § 307103. Pursuant to this section, NPS “shall withhold from disclosure to the public information about the location, character, or ownership of 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 property; or (3) impede the use of a traditional religious site by practitioners.” 54 U.S.C. § 307103(a)(1)-(3).

Although NPS can protect “the location, character, or ownership of historic property,” we recommend NPS also include a provision that will protect the location and use of natural resources Tribes may gather from the public.

There is concern that once Tribes enter into these agreements with NPS, the location and use of natural resources Tribes collect will be at risk to the public gaining access to the data under the Freedom of Information Act (FOIA), or other similar statutes. Specifically, through the agreements between tribal governments and parks, a database of what specific plants and medicines are being gathered will naturally be created. Tribes across the United States want to protect that information, and prevent it from being abused.

Section 2.6(f)(9): Commercial Use of Natural Resources: In the proposed regulation, NPS will require that all agreements negotiated with Indian Tribes include a statement that prohibits the commercial use of natural resources, previously prohibited under 36 C.F.R. § 2.1(c)(3)(v) (1983).

We recommend NPS permit minor commercial use of natural resources in the tribal government and park agreements.

Plants and minerals gathered by tribal members are often used in the production of pottery, baskets, and other works of art and artisanship. The products of such use are sometimes offered for sale, even in national park gift shops. Under the current language in the proposed rule, NPS would be prohibiting even small sales of craftsmanship that entrenches on the artisan culture associated with traditional tribal gathering practices. By permitting minor commercial use of natural resources, NPS would instead promote tribal tradition and culture and allow park

visitors to also learn about the artistic cultures associated with traditional tribal gathering practices.

IV. Compliance with Other Laws, Executive Orders, and Department Policy

National Environmental Policy Act (NEPA): NPS proposes to have each agreement between tribal governments and parks undergo its own NEPA environmental impact analysis, on a case-by-case basis. This places a significant burden on both Tribes and parks, and may prevent them from entering into agreements. Tribes especially lack the necessary resources to conduct a NEPA analysis on all natural resources that may be gathered under this proposed rule.

We recommend NPS treat agreements covering the minor gathering activities, provided for in this regulation, as categorical exclusions under NEPA.

Categorical exclusions are defined as “a category of actions which do not individually or cumulatively have a significant effect on the human environment and . . . for which, therefore, neither an environmental assessment nor an environmental impact statement is required.” 40 C.F.R. §1508.4 (1978). Categorical exclusions “do not induce significant impacts to planned growth or land use for the area; do not require the relocation of significant numbers of people; do not have a significant impact on any natural, cultural, recreational, historic or other resource; do not involve significant air, noise, or water quality impacts; do not have significant impacts on travel patterns; or do not otherwise, either individually or cumulatively, have any significant environmental impacts.” 23 C.F.R. § 771.117 (1987).

V. Conclusion

We hope these recommendations are helpful to the National Park Service in its commitment to the stewardship of the land and resources with Indian Tribes. For more information, please contact:

Colby D. Duren
Staff Attorney & Legislative Counsel
National Congress of American Indians
P: (202) 466-7767 Ext. 237
cduren@ncai.org

Brett Shelton
Staff Attorney
Native American Rights Fund
P: (303) 447-8760 Ext. 134
shelton@narf.org