



Joe Watkins, Office of Tribal Relations and American Cultures
1201 Eye Street, NW
Washington, D.C. 20005

June 20, 2015

RE: RIN 1024-AD84, Comments on Gathering of Certain Plants and Plant Parts by Federally-Recognized Tribes for Traditional Purposes

Dear National Park Service:

On behalf of First Nations Development Institute (First Nations), I am writing in response to the NPS's request for further comments on the Gathering of Certain Plants and Plant Parts by Federally-Recognized Tribes for Traditional Purposes. Founded in 1980, First Nations serves Native communities across the U.S. and has successfully managed more than 1,000 grants to tribal programs and community organizations throughout Indian Country, totaling \$22 million in community investment. Since 2011, First Nations has provided funding to 137 separate organizations through the Native Agriculture and Food Systems Initiative (NAFSI). The NAFSI is designed to help tribes and Native communities build sustainable food systems through traditional farming, gardening and ranching practices to help improve the diet, health and nutrition of countless Native children, families and communities.

First Nation's Development Institute has been working with tribal food producers and agriculturalists for over 20 years through our Native Agricultural and Food Initiative. Through the initiative, First Nations has worked with Indigenous food systems throughout the continental United States, Hawaii, and Alaska. Over and over again, one of the major concerns of Indigenous people throughout is the focus on traditional food sources, many of which are gathered in places like the National Park system. It is because of this work that we submit these comments.

Tribes and their relationships with their food systems, including sources of food that predate current jurisdictions of National Park boundaries, are essential for the practice of Tribal sovereignty. One scholar has stated, "Tribes retain sovereign powers that have not (a) been ceded through treaties or other agreements, (b) divested by the courts (both by Justice Marshall) and in the later cases



regarding implicit divestiture, or (c) lost through Congress' exercise of plenary power over tribes."¹ These regulations come dangerously close to placing the burden of proof on tribes to prove their gathering rights, rather than placing the burden on federal players to prove why specific rights should or should not be limited. First Nations would like to address the following sections of the NPS's application process and make the following recommendations:

1. Section 2.6(c) Tribal Request

The current proposed process is as follows:

1. The Tribe makes the request
2. NPS responds to the appropriate tribal official entering into the agreement

According to this proposed section of the agreement, the Tribe's request should include a description of the Tribe's traditional association with the requested park area; a brief explanation of traditional practices regarding plant gathering and removal; and finally, a description of gathering and removal activities that the Tribe will conduct in the area.

This process, at first glance, seems relatively simple. However, requiring the Tribe or Tribal community to describe its' needs and activities is often very complicated because it pertains to confidential and sacred knowledge. Often, Indigenous knowledge is communicated via specific channels. For example, Indigenous knowledge about lands, plants, and purposes are communicated orally and inter-generationally. Therefore, documentation of Indigenous knowledge is often contained within the oral history of a tribe, meaning it is only passed down by word of mouth from one generation to the next. This tradition makes it difficult to provide written documentation of traditional gathering and removing activities. Furthermore, it is very unlikely that Tribes would be willing or able to share this type of information with the broader public. In fact, requiring Tribes to describe Indigenous knowledge outside of these channels requires great consideration, legal protections, and, more often than not, an oral format. As such, we would like to request alternative methods for Tribes to request access to important areas within National Park lands.

Recommendation: (1) Allow Tribes the option of an oral format so that their requests are not limited to a written format or academic documentation (2) Allow requested information to be general enough so that Tribes do not have to divulge sacred information (3) Establish legal protections that ensure information is protected and sensitive, and will not be used for any other purpose than to make a

¹ King, Mary Ann. "Co-Management or Contracting? Agreements Between Native American Tribes and The US National Park Service Pursuant to the 1994 Tribal Self-Governance Act" Harvard Environmental Law Review (2007).



request for entry (4) Establish legal protections that ensure that the Tribe's information remains property of the Tribe and is not owned by anyone other than the requestor.

2. Section 2.6(d) Criteria for Entering into an Agreement

The proposed Section 2.6 (d) requires the Superintendent (rather than the Tribe) to determine what constitutes “traditional use” of the park; analyze any potential impacts of the proposed gathering in accordance with the National Environmental Policy Act and other applicable laws; and document a determination that the proposed gathering and removal will not result in a significant adverse impact, and is consistent with the requirements of other applicable laws and regulations.

As it is written, the proposed rule suggests that the superintendent will determine whether the proposed gathering is a “traditional use” of the park by the Indian Tribe. This suggestion is problematic in that Superintendents alone retain the power to engage in agreements with Indian Tribes. We are concerned that the Superintendent's openness to engage and formalize agreement with Tribes will be dependent on the Superintendent's knowledge of the Tribe, its cultural norms, and of the Tribe's policy and procedures.. In addition, the external or internal opposition to tribal interests can play a major part in the willingness of the superintendent to develop and maintain relationships with the tribes. Quite often, the National Park Service, as an agency and as individual's working for the National Park Service, are the biggest hurdles for tribal gathers.² This gives the superintendent a huge sway of discretion, not unlike the same discretion the superintendent may have without these regulations. In short, the Superintendent's ability to engage or retain relationships with the Tribe will be key to the success of any and all formal agreements under these regulations or any other legal instruments, as is the case, with any federal agency entering into agreements with tribes over very sensitive topics such as traditional gathering.

Furthermore, the Superintendent is expected to be knowledgeable about biology, forestry, and other life sciences. However, the spirituality or theology or custom and practices of Indian tribes is beyond the scope of his/her job description, often making it difficult for him/her to judge the merits of a Tribe's traditional practices. One has to question whether this is even a sound approach. However, conversations with tribal leadership should aid in the superintendent's ability to assist tribes. Therefore, it is recommended the superintendent have quarterly tribal meetings within his forest district with special focus on having a Tribal-National Park Service “meet and greet” early in the appointment process or even informal meetings in the spirit of cooperation and trust building that

² *Supra* at 524 and 526.



can only come with relationship. Of course, this regulation should not circumvent the Secretary of The Department of Interior's mandate to sit down with self-governance tribes under the Tribal Self-Governance Act, which requires the Secretary of the Department of Interior to sit down with tribes on activities administered by the Department of Interior that affect tribes. Instead, these regulations should be a more inclusive process of Tribes who do not fit the narrow prerequisites for co-management agreements under the Tribal Self-Governance Act.

Recommendation: Each Superintendent should give deference to a governmental authority within the Tribe. The Superintendent and Tribe should work together to discuss their individual responsibilities prior to the agreement stage during required regularly scheduled Tribal meetings within the superintendents district. The superintendent will be responsible for noting and knowing and initiating dialogue with the tribal partners who use his or her district for gathering. Then, within the agreement stage, the Tribe should name a tribal authority or person or committee according to their government structure that would act as a liaison to the superintendent for the sole purpose of reviewing requests. While the proposed rule states, "There should be a clear means for identifying appropriate tribal members, under the permit, are designed by the Indian tribe to gather and remove and a means for the tribal government to keep the NPS regularly informed of which tribal members are the current and gathering and removal designees of the Indian tribe..," Tribal participation, as a government agencies, prior to the individual permitting stage, would represent a significant step in developing a government to government relationship under this regulation. Limiting participation of Tribes in any number of individual list making would undermine the value of having a regulation that seeks to develop a workable federal/tribal relationship. Engaging tribes prior to the individual permitting process would also be in line with other legal mechanisms applicable to the National Park Service such as the Tribal Self-Governance Act ("TSGA").

3. Section 2.6(e) Denial of Request to Enter Into Agreement

The proposed rule would require the NPS to deny a request to enter into an agreement with a Tribe if sufficient information does not exist to demonstrate the Tribe's traditional association or traditional purpose to access park resources.

Again, this section highlights the need to accept general oral accounts or tribal accounts of the relationships between the tribe and park or the Tribe and the resource gathered. The relationships that Tribes have with lands are vast and academia has only documented a tiny fraction of these histories and relationships. The primary and most relevant sources of information and history regarding some land bases may remain with the Tribe. Sometimes tribal land associations go far beyond their present tribal community locations. Sometimes they span over thousands of miles. Moreover, there are times when lands are significant to more than one Tribe. This information is



only rarely (if, in fact, ever) documented academically or in written form. Therefore, in order to include the most relevant information, “sufficient information” should include oral histories and stories from tribal communities.

Recommendation: Develop a process for the Superintendent to accept oral communications of need.

CONCLUSION

First Nations is writing in support of this agreement between the NPS and federally-recognized tribes because it empowers designated tribal members to gather and remove plants and/or plant parts for traditional purposes. Research indicates that traditional plant gathering practices have the potential to protect and conserve lands. Traditional Indigenous gathering practices are especially beneficial as they have evolved over thousands of years, consider the natural cycles of the plants and land and have become a part of a natural part of the reproductive cycles of the many of plants gathered which in turn effects many ecosystems of which those plants are a part. David Ruppert states:

...living Indian cultures offer cultural resource protection that goes far beyond the protection of archaeological sites or abandoned ruins. Through traditional resource collecting and the applications of traditional knowledge related to this collecting activity, Indian peoples maintain their living cultural heritage as well as continue to affect and shape the environment around them. If land management agencies have an interest, in understanding the histories of the lands and resources they manage, they would benefit by finding ways to incorporate indigenous management techniques into their own management regimes.³

The significance of traditional gathering practices to tribes and tribal culture cannot be overstated. Tribes that are able to gather traditional plants for food, medicinal, and ceremonial purposes are better equipped to address social and economic disparities that so often plague tribal communities.⁴ Furthermore, tribal access to traditional plant sources is a continuation of natural resource management that predates current understandings of natural resource management. The earlier

³ Ruppert, David, *Building Partnerships Between American Indian and the National Park Service*, 21 Ecological Resotation (2003).

⁴ Centers for Disease Control and Prevention (2013). Traditional Foods in America: A compendium of stories from the Indigenous food sovereignty movement in American Indian and Alaska Native communities.



tribes are involved in managing resources the more likely the benefits are to be had by the tribe, the National Park Service, and ultimately, the American people.

We applaud the US Forest Service for attempting to address the need of gathering within these proposed rules and hope that the rules help further the beneficial US-Tribal relationship in the stewardship of our precious lands.

Sincerely,

Raymond Foxworth (*Navajo Nation*)
First Nations Development Institute
2432 Main Street, 2nd Floor | Longmont, CO 80501
T: 303.774.7836 | F: 303.774.7841 | www.firstnations.org