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OFFICE OF GOVERNOR

November 17, 2020

Paul J. Ray, Administrator
Attn: Matthew P. Oreska
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street Northwest
Washington, D.C. 20503
matthew.p.oreska@omb.eop.gov
oira_submission@omb.eop.gov

Re: Review of National Historic Preservation Act Rulemaking, RIN 1024-AE49

Dear Mr. Oreska:

I write to you on behalf of the Santa Clara Pueblo in opposition to the rulemaking undertaken by the Department of the Interior's (Department) National Park Service to revise 36 C.F.R. Part 60 and 36 C.F.R. Part 63. These regulations govern the listing of properties on the National Register of Historic Places (National Register) pursuant to the National Historic Preservation Act (NHPA). You have heard from many voices within and outside of Indian Country opposing this rulemaking, and the Santa Clara Pueblo joins in this outcry.[1]

I understand the Department has provided the rulemaking to the Office of Information and Regulatory Affairs (OIRA) for review under Executive Order 12866. This rulemaking is significant for a number of reasons, including its effect on tribal communities and public health. I urge you to conduct a close review of the rulemaking during your allotted review time in light of the many stakeholders' concerns, including those of the Santa Clara Pueblo. I also urge you to meet with tribes on this important rulemaking, as it uniquely impacts us.

The rule as proposed would have very real consequences for tribes, including the Santa Clara Pueblo, as the NHPA is extremely important to us. Tribes are inherently sovereign governmental entities to which the United States owes a trust responsibility. Regardless, the United States has stripped tribes of legal title to most of our aboriginal territory, often relocating tribes entirely off

[1] Attached are the comments previously submitted on April 22, 2019, by the Santa Clara Pueblo on the proposed rule.

our homelands. This means many tribes have important interests tied to land to which they do not have legal title—including, for example, interests related to cultural resources. Without legal mechanisms in place, tribes often lack a voice in important federal decision making processes affecting land to which we have sacred ties.

The NHPA is one legal mechanism that allows tribes a seat at the table, requiring that federal agencies identify historic properties within a federal undertaking's area of potential effect and assess and resolve adverse effects on those historic properties. *See* 54 U.S.C. § 306108; 36 C.F.R. Part 800. Historic properties, which are covered by the NHPA, are defined to include certain cultural resources that are included on or eligible for inclusion on the Historic Register. 54 U.S.C. § 300308. Thus, a cultural resource's determination of eligibility for or inclusion on the National Register, *see* 54 U.S.C. §§ 302101–08, qualifies it as a historic property and thereby cements its protection under the NHPA.

In carrying out the NHPA's review processes, the NHPA mandates that federal agencies must consult with tribes each step of the way. *See, e.g.,* 54 U.S.C. § 302706(b); 54 U.S.C. § 306102(b)(4). With regard to listings on the National Register, the NHPA states that "[p]roperty of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register." 54 U.S.C. § 302706(a); *see also* 54 U.S.C. § 306102(b)(2). Tribes have the knowledge, expertise, and capacity to identify cultural resources and evaluate them for inclusion on the National Register.

The proposed rule contradicts the NHPA and harms tribes in important ways. For example, its revisions limit the role of tribes in requesting properties be added to or otherwise assessed for eligibility for the National Register, where the NHPA does not call for these limitations. The revisions also limit tribes' ability to appeal a federal agency's refusal to nominate a property for the National Register, where the NHPA contains broad appeal provisions. Importantly, in the context of a potential historic property owned by multiple landowners—such as a historic district—the revisions give fewer landowners who happen to hold a larger area of land within that property more power. The revisions allow owners of a majority of the land area to prevent a property from being listed, where the NHPA only allows a majority of the individual owners to prevent such listing.

Additionally, the Department has not engaged in proper tribal consultation on this rulemaking, asserting instead that it will have no direct effect on tribes. In recognition of the government-to-government relationship between the United States and tribes and to implement its trust obligations, the Executive Branch has taken on a duty to consult with tribes on federal policies that have tribal implications. Executive Order 13175, titled "Consultation and Coordination with Indian Tribal Governments," was issued in 2000. Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000). The Department has complied with this presidential mandate by enacting a tribal consultation policy. Dep't of Interior, *Department of Interior Policy on Consultation with Indian Tribes*; *see also* DEP'T OF INTERIOR, Sec. Order No. 3317, DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES (2011). Despite the importance of the NHPA to tribes and in contravention of Executive Order 13175 and its own consultation policy, the Department did not engage in sufficient tribal consultation on this rulemaking.

On behalf of the Santa Clara Pueblo, I urge you to conduct a close review of this rulemaking. I also request a meeting with you to discuss this important rule.

Sincerely,

Governor J. Michael Chavarria
Santa Clara Pueblo

CC:
Joy Beasley, National Park Service
joy_beasley@nps.gov and consultation@nps.gov

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INDIAN PUEBLO
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April 22, 2019

Via first class mail and e-fling on www.regulations.gov

Ms. Joy Beasley
Acting Associate Director
Cultural Resources Partnerships and Science & Keeper
of the National Register of Historic Places
National Park Service
1849 C Street NW, MS 7228
Washington, D.C. 20240

Re: **Santa Clara Pueblo's Comments on National Park Service's Proposed Rule regarding listing of properties on the National Register of Historic Places, 84 Fed. Reg. 6996 (March 1, 2019), Regulation Identifier Number 1024-AE49 ("Proposed Rule")**

Dear Ms. Beasley:

Santa Clara Pueblo submits the following comments regarding the above-referenced Proposed Rule from the National Park Service ("NPS") to revise regulations governing the listing of properties on the National Register of Historic Places ("National Register"). Any such regulatory revisions cannot and must not abrogate the statutory requirements owed to Indian tribes by federal agencies under Section 106 of the National Historic Preservation Act, P.L. 89-665, 80 Stat. 915, 54 U.S.C. § 306108 ("NHPA") and meaningful government-to-government consultation must occur with interested tribes prior to any action on the Proposed Rule in accordance with Executive Order 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000)("Executive Order 13175").

I. The Proposed Rule must be amended to ensure it does not abrogate tribal consultation requirements

A. *Tribal consultation is required for the National Register nomination process and the entirety of the NHPA Section 106 process*

Section 106 of the NHPA requires federal agencies "to take into account the effects of the undertaking" on historic properties. 54 U.S.C. § 306108. An undertaking is a project, activity, or program either funded, permitted, licensed, or approved by a federal agency. Undertakings may take place either on or off federally controlled property.

NHPA requires that federal agencies "*shall* consult with any Indian tribe . . . that attaches religious and cultural significance" to a property potentially adversely affected by an undertaking under Section 106. 36 C.F.R. § 800.2(c)(2)(ii). This requirement applies regardless of the location of the property. The NHPA uses the term "property of traditional religious and cultural importance to an Indian tribe," 54 U.S.C. § 302706(a), but "traditional cultural property" or "TCP" is now widely used as a term of art to describe a property that has religious or cultural importance to an Indian tribe, and that term will be used herein. TCPs identified through the NHPA Section 106 process may be eligible for listing on the National Register. *Id.*[1]

In identifying potentially affected properties, the federal agency must "[g]ather information" from tribes about TCPs "including those located off tribal lands," 36 C.F.R. §800.4(a)(4), and consult with the State Historic Preservation Officer ("SHPO") to determine the site's National Register eligibility. *Id.* at §800.4(c). If the tribe does not agree with the federal agency's National Register eligibility determination, the tribe is entitled to ask the Advisory Council on Historic Preservation for a determination. *Id.* at § 800.4(c)(2). The agency "shall ensure" the Section 106 process provides interested tribes

> a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.

Id. at §800.2(c)(2)(ii)(A).

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[1] A TCP is eligible for the National Register where it is associated "with cultural practices or beliefs of a living community that(a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." U.S. Dep't of the Interior, National Park Service, Cultural Res. Nat'l Register, Federal Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (revised,1998)("Bulletin 38").

NHPA's Section 106 and its implementing regulations require extensive tribal consultation to inform both the federal agency and the SHPO because often only the tribes have the specialized knowledge required to identify TCPs that could be adversely affected by federal undertakings. [2] At Santa Clara Pueblo, our tribal cultural committee and Tribal Historic Preservation Officer ("THPO") have knowledge about our cultural resources and sacred sites and landscapes that are integral to our identity, spirituality, and survival as a people and that are simply not known by archaeologists and cannot be ascertained from literature reviews.

A tribe's right to consultation regarding potential adverse effects on properties eligible for listing in the National Register stems from the statutory requirements of the NHPA but is reinforced by the federal government's trust responsibility to the Indian tribes. *See, e.g., HRI, Inc. v. EPA*, 198 F.3d 1224, 1245-46 (10th Cir. 2000)(trust duty must have substantive bearing on federal agencies addressing statutes or regulations of general applicability in situations affecting tribal interests and "federal government bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction"). Moreover, tribal consultation cannot be treated as a *pro forma* requirement, but must, instead, be meaningful. *See* discussion of Executive Order 13175 in Section II, *infra*. Only through meaningful consultation with tribes can an agency identify TCPs and understand their significance and eligibility for the National Register, and therefore be able to assess how any relevant property qualities may be altered by the federal undertaking.

B. *The Proposed Rule is otherwise contrary to the NHPA*

The Proposed Rule specifies that the Keeper of the National Register ("Keeper") may only determine the eligibility of properties for listing in the National Register for the NHPA Section 106 process after consultation with, and request from, both the appropriate SHPO and the concerned federal agency. 84 Fed. Reg. at 6998. In addition, the Proposed Rule appears to disallow an option for SHPOs to submit nominations of federal property for the National Register. *Id.* Often, National Register nominations pertain to properties of cultural and religious significance to the tribes and it is not uncommon for the boundaries of a TCP that could be

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[2] As noted in NPS' Bulletin 38:

> Traditional cultural properties are often hard to recognize. A traditional ceremonial location may look like merely a mountaintop. . . . As a result, such places may not necessarily come to light through the conduct of archeological, historical, or architectural surveys. The existence and significance of such locations often can be ascertained only through interviews with knowledgeable users or the area, or through other forms of ethnographic research."

Bulletin 38 at 2.

eligible for nomination to the National Register to be located on federal land or a mix of federal and non-federal lands.

The Proposed Rule thus appears to improperly cut off the ability of SHPOs in consultation with tribes to nominate historic properties located on federal land. The Proposed Rule also appears to allow federal agencies to block the Keeper from opining on consensus decisions of SHPOs and THPOs made through the NHPA process.

The Proposed Rule cites the National Historic Preservation Amendment Act of the National Park Service Centennial Act, P.L. 114-289 ("2016 NHPA Amendments") as justification for these revisions, *see* 84 Fed. Reg. at 6697-6698, but the 2016 NHPA Amendments provide no such support. The 2016 NHPA Amendments set up various funds and reauthorized the Historic Preservation Fund. Those amendments should be not turned on their head to provide federal agencies the opportunity to halt any National Register Activities on lands they manage and to circumvent the full panoply of tribal consultation requirements provided in the NHPA.

To add insult to injury, the Proposed Rule also appears to gut the ability for the tribes and the public to appeal a federal agency's refusal to nominate a property to the National Register. *See* 84 Fed. Reg. at 6698. The Proposed Rule specifies that the Keeper can no longer hear an appeal of a federal agency's refusal to nominate a property unless the agency's Federal Preservation Officer forwards the nomination to the Keeper. This improperly allows federal agencies the ability to indefinitely table National Register nominations. At the same time, the Proposed Rule also "provide(s) that a property shall not be listed in the National Register if objections are received from either (i) a majority of the land owners, as existing regulations provide; or (ii) owners of a majority of the land area of the property." *Id.* There is absolutely no statutory support in either the NHPA or the 2016 NHPA Amendments for establishing a feudal voting system that elevates the standing of large land owners over that of interested tribes, and such a scheme is not sanctioned by 54 U.S.C. § 302105.

II. The process for issuing the Proposed Rule was flawed and must be amended to comport with Tribal consultation requirements of Executive Order 13175 and current Department of Interior policy

The Proposed Rule states that tribal consultation was not required in accordance with Executive Order 13175 prior to the issuance of the rule because the Proposed Rule "will not have a substantial direct effect on federally recognized Indian tribes." 84 Fed. Reg. at 7000. This is an erroneous determination which must be corrected through immediate government-to-government consultation with all affected tribes before any further action is taken on the Proposed Rule.

Executive Order 13175 states that every federal agency "shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies

that have tribal implications." Executive Order 13175 at §5(a). "Policies that have tribal implications" is defined to include "actions that have substantial direct effects . . . on the relationship between the Federal Government and Indian tribes." *Id.* at §1(a). As described in section I, *supra*, the Proposed Rule, if adopted, would prevent federal agencies from fulfilling their statutory duties to Indian nations in accordance with the NHPA. That constitutes a substantial direct effect on the relationship between the federal government and Indian tribes, thereby triggering the requirement for government-to-government consultation.

Moreover, the current Department of the Interior Policy on Consultation with Indian Tribes, *see* www.doi.gov/tribes/Tribal-Consultation-Policy ("DOI Consultation Policy"), which specifically references fulfillment of Interior's tribal consultation obligations under Executive Order 13175 in its preamble, *see* DOI Consultation Policy at §1, states that its Interior "shall" carry out various consultation requirements described therein for any "Departmental Action with Tribal Implications." *Id.* at VII(E). "Departmental Action with Tribal Implications" is defined as "[a]ny Departmental . . . rulemaking . . . that may have a substantial direct effect on an Indian tribe on matters including but not limited to: (1) Tribal cultural practices . . . or access to traditional areas of cultural or religious importance on federally managed lands." *Id.* at §III. Clearly, the Proposed Rule qualifies as one meriting government-to-government consultation under this definition.

III. Conclusion

Based on the foregoing, Santa Clara Pueblo urges the NPS to initiate formal consultation with our Pueblo and all affected tribes, as required by federal law and the DOI Consultation Policy, before this rulemaking proceeds further. At a minimum, the Proposed Rule must be amended to address the concerns stated herein.

Sincerely,

J. Michael Chavarria
Governor

cc: Hon. Tom Udall
Hon. Martin Heinrich
Hon. Ben Ray Lujan
Hon. Deb Haaland
Hon. Xochitl Torres-Small

cc *via e-mail* only:

Santa Clara Pueblo Tribal Council Officers and Members
Mel Tafoya, Santa Clara Pueblo Tribal Administrator
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