CONFEDERATED TRIBES OF
COOS, LOWER UMPQUA AND SIUSLAW INDIANS
1245 Fulton Ave. - Coos Bay, OR 97420
Telephone: (541) 888-9577 1-888-280-0726 Fax: (541) 888-2853

Via email to consultation@bia.gov

November 30, 2016

The Honorable Larry Roberts, Assistant Secretary – Indian Affairs (Acting)
U.S. Department of the Interior
1849 C Street, NW, MS 3071
Washington, D.C. 20240

Re: Comment on Tribal Government Input in Federal Infrastructure Decision-making

Dear Secretary Roberts:

The U.S. Departments of the Army, Interior, and Justice have invited representatives from all federally-recognized Indian Tribes to participate in formal, government-to-government consultations on how federal decision-making on infrastructure projects can better allow for timely and meaningful Tribal input. The three agencies hoped these consultations would focus on how the federal government could better ensure meaningful Tribal input into infrastructure-related decisions and the protection of Tribal lands, resources, and treaty rights, and also explore with Tribes whether new legislation should be proposed to Congress to alter the current statutory framework to promote those goals.

I write to submit the following comments based on this unprecedented invitation, and with the hope that the Trump Administration will continue this and other efforts begun under the Obama Administration to empower all of America's Tribal Nations to protect our lands, waters, treaty rights, and sacred places.

I also urge you to reach out if there are questions or concerns about any of these comments. Consultation must be a two-way conversation, or it will be of little use.

Sincerely,

Mark Ingersoll

Mark Ingersoll
Chairman

EXECUTIVE SUMMARY

Recognizing that hundreds of pages of comments will be submitted under this invitation, the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians of Oregon (Confederated Tribes) will primarily focus on examples and recommendations based on our first-hand experience.

This Comment first provides a brief history of the Confederated Tribes to provide background. The Comment then describes the Jordan Cove LNG projects – the most significant federal infrastructure project that has confronted the Confederated Tribes since our restoration in 1984.

Finally, this Comment uses our experience with the Jordan Cove LNG project to discuss the following issues: (1) Agencies like FERC and USACE often seem to view applicants and other government entities as allies, and Indian Tribes as adversaries; (2) Whether intentional or inadvertent, government-to-government consultations between agencies and Tribes are usually a case of "too little, too late"; (3) "Government-to-government" consultations are rarely conducted between political equals; (4) Tribes are regularly barred from meaningful participation in Project and Programmatic Cultural Resource Protection Memoranda of Agreement (MOAs); (5) Potential conflicts of interest exist where private archeological surveyors perform crucial pre-approval work on projects subject to NEPA and NHPA; (6) FERC avoids its Section 106 responsibilities by invoking self-serving ex parte rules; (7) Tribes usually must provide their own funding to fully participate in federally permitted infrastructure projects; (8) Agencies seem either reluctant or ill-suited to properly evaluate cumulative and regional environmental impacts on Indian lands, treaty rights (on and off-reservation), sacred places, and Tribal community health and environment; (9) Army Nationwide Permits and Appendix 'C' regulations delegate far too much authority to project proponents; (10) Federal agency focus on the National Register criteria can lead to destruction of traditional cultural properties and other irreplaceable cultural resources; and (11) Tribes, applicants, and permitting agencies could all benefit if the Advisory Council on Historic Preservation had enhanced enforcement authority and additional resources.

The Confederated Tribes also expressly concur in the analysis, and in the core principles and best practices recommended in "Comments on Tribal Trust Compliance and Federal Infrastructure Decision-making" submitted separately by the National Congress of American Indians.

A BRIEF HISTORY OF THE CONFEDERATED TRIBES

Stewardship and protection of our lands, waters, treaty rights, and sacred places is a way of life for the Confederated Tribes, and has been for thousands of years.

Our ancestral homeland encompasses approximately 1.6 million acres of resource-rich lands lying along a 75-mile long (as the Raven flies) section of the Oregon coast, and extending inland across the Coast Range to Oregon's interior valleys. Our ancestors were the stewards and caretakers of all these lands since time immemorial, and they continued in that role until the late 1850s when our people were rounded up, imprisoned, and removed from our lands under force of arms under color of a dishonored and unratified treaty.

After more than 125 years of struggle and sacrifice, however, in 1984 Congress swept away the effects of 1950s-era termination, restored all rights and privileges, and extended federal recognition to the Confederated Tribes.

Since restoration, our people have worked tirelessly to rebuild our relationship with our lands, resources, and distinct Tribal cultures. We have also built a modern system of government and administration, with thriving commercial operations which employ hundreds of members and non-members in living-wage jobs across our five-county service area in southwestern Oregon.

Through our Department of Culture and Natural Resources (Department), we have resumed our roles of stewards and caretakers of the lands and resources that were once managed by our ancestors. The Department embraces our Tribe's lessons and lifeways to protect, inform, and enhance the lives of our people, the health of our environment, and the sustainability of our community by striving to ensure the economic, environmental, cultural, and social needs of the Tribe are secured and sustained through implementation of holistic natural resource management strategies.

Within the Department, we now have a full-time professional Tribal Historic Preservation Officer (THPO) who serves as the primary point of contact for state, local, federal, and private parties who wish to build or operate modern infrastructure which may threaten archaeological resources or historic properties. The Department also includes scientists engaged in air quality, water quality, and other disciplines important to the Confederated Tribes.

In the next section we will discuss the Jordan Cove LNG project – a good example of bad federal agency interaction with Tribal Nations where a myopic federal agency with only one goal in sight has helped to create enormous and costly problems for the Confederated Tribes, for the project's applicants, and for a local community that looks to Jordan Cove LNG as a way to finally overcome crushing economic problems that have afflicted our region since the downturn of the lumber industry in the 1980s.

JORDAN COVE LNG

The largest and most difficult federally-licensed projects that have ever confronted the Confederated Tribes and our neighboring Tribes are the proposed Jordan Cove Energy Project (FERC Docket No. CP13-483), and the proposed Pacific Connector Gas Pipeline (FERC Docket No. CP13-492). For sake of simplicity, we will refer to these inseparable infrastructure efforts jointly as "Jordan Cove LNG."

Jordan Cove LNG is a decade-long effort led by a Canadian company to build and operate a massive industrial infrastructure project. This project is on an unprecedented scale for our largely unspoiled ancestral homeland here on the Oregon coast.

If authorized, Jordan Cove LNG would include: a 232-mile-long, 3-foot diameter gas pipeline spanning the breadth of southern Oregon; a gas liquefaction plant across Coos Bay from the town of North Bend; deepened access from the Coos Bay navigation channel to a new marine terminal; a marine slip with berths for enormous ocean-going LNG vessels and tug boats; a permanent berth for construction and maintenance barges; a 420-megawatt (MW) natural gas–fired power plant and 230-kilovolt (kV) transmission lines; an emergency response facility; public road and highway modifications; temporary workforce housing; and various other projects and activities.

The Confederated Tribes have never opposed the Jordan Cove LNG project in principle. However, we have been forced to devote extraordinary amounts of staff time, legal resources, and scarce funding over the past decade in an effort to compel the Federal Energy Regulatory Commission (FERC) to simply do what is required of them by the National Historic Preservation Act (NHPA), and by FERC's federal trust responsibility.

Because elements of Jordan Cove LNG and inter-related harbor modifications involve the regulatory role and responsibilities of the U.S. Army Corps of Engineers (USACE) under Section 404 of the Clean Water Act and Section 10 of the Rivers & Harbors Act, FERC's resistance is compounded by USACE's efforts to delegate its own NHPA and federal trust responsibilities to FERC.

The balance of this Comment will be devoted to specific problems faced by the Confederated Tribes, and by our neighboring Tribes, as we have struggled to compel FERC and USACE to consult openly and willingly with our Tribes, and to compel FERC and USACE to adequately address the many concerns we have

raised about the archeological resources, human burials, and sacred places that will be utterly destroyed if the Jordan Cove LNG project is approved as currently designed.

1. Agencies like FERC and USACE often seem to view applicants and other government entities as allies, and Indian Tribes as adversaries.

This is a bias that seems to permeate the Section 106 consultation environment.[1] The experience of the Confederated Tribes with FERC and the Jordan Cove LNG project is a clear and continuing example of this agency bias at work.

Even a cursory review of the NEPA record for both the Jordan Cove LNG import and export projects reveals a striking contract between how FERC has interacted with the applicants and other governmental entities on the one hand, and how FERC has "consulted" with "Indian tribes that may have historically occupied or used the project area" on the other hand.

Since more than a decade ago when FERC was first approached by the proponents of Jordan Cove LNG to approve an LNG import facility,[2] there has clearly evolved a very close working relationship between the applicant, FERC staff, and the NEPA third-party contractor Tetra Tech.[3] This close relationship continued unabated when the applicants abandoned their LNG import business scheme in 2012, and switched to an LNG export business model in 2013.[4]

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[1] Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties, and affords the Advisory Council on Historic Preservation a reasonable opportunity to comment. The historic preservation review process mandated by Section 106 is outlined in regulations issued by ACHP. Revised regulations, "Protection of Historic Properties" (36 CFR Part 800), became effective August 5, 2004.

[2] FERC authorized both the Jordan Cove LNG import terminal and the Pacific Connector gas pipeline on December 17, 2009. Final Environmental Impact Statement for Jordan Cove Energy and Pacific Connector Gas Pipeline Project, Docket Nos. Docket Nos. CP13-483 and CP13-492 at Sec. 1.0 (Sep. 2015) (hereinafter "Export FEIS").

[3] As discussed further below, this not uncommon relationship can raise serious ethical concerns where the agency is responsible for the NEPA study and for selecting and supervising the third-party NEPA contractor, but where the applicant pays the NEPA contractor's bills. Ironically, perhaps the clearest description available of how FERC handles this agency-applicant relationship, is found in *another* agency's NEPA guidance. See Surface Transportation Board, "Policy Statement On Use Of Third-Party Contracting In Preparation Of Environmental Documentation" at nn.24-25 and accompanying text (Mar. 19, 2001) avail. at https://www.stb.gov/stb/environment/contracting_seacss25a.html.

[4] Export FEIS at Sec. 1.0.

Early in the Jordan Cove LNG import project FERC also established close working relationships several federal cooperating agencies, and established clear ground rules for how these agencies would meet and interact both during the NEPA study period, and after FERC grants a certificate allowing the applicants to proceed with the project.[5] FERC even extended cooperating agency status to Douglas County, Oregon.[6] And Jackson County, Oregon went as far as waiving any and all permit requirements in deference to FERC.[7]

Against a backdrop of such harmony and cooperation, FERC's statements in both the import and export Environmental Impact Statements with respect to Tribal consultation are glaringly devoid of any meaningful attempt at a two-way conversation between FERC and the Tribes.

Between 2006 and 2009, FERC's "consultation" with the Oregon State Historic Preservation Officer (SHPO) was handled almost entirely by the applicants and their contractors.[8] Meanwhile, FERC's "consultation" efforts with Tribes were limited to issuing a NEPA Notice of Intent (NOI) to the general public, a series of written communications between the Tribes and FERC, attendance at public meetings by self-described Tribal members and spokespersons, and attendance by representatives of the Cow Creek Tribe at "multiple interagency meetings with the FERC staff during the Pre-filing period."[9] The remainder of so-called "consultations" exhaustively cataloged by FERC were merely staff-to-staff contacts between the Tribes and the applicants, or between the Tribes and the applicants' contractors.

Between 2009 and 2015, FERC's "consultation" for the Jordan Cove LNG export project was not significantly different from its earlier efforts on behalf of the same applicants' abandoned import project. There was more direct interaction the second time around between the SHPO and FERC staff, but most communications were still between the SHPO, the applicants, and the applicants' contractors.[10] FERC observed that the Confederated Tribes and the

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[5] Final Environmental Impact Statement for Jordan Cove Energy and Pacific Connector Gas Pipeline Project, Docket Nos. CP07-444-000 and CP07-441-000 at Sec. 1.1 (May 2009) (hereinafter "Import FEIS"); Export FEIS at Sec. 1.1.
[6] Import FEIS at Sec. 1.1.
[7] On June 18, 2013 Jackson County provided a Land Use Compatibility (LUCS) indicating that the project was not subject to the land development standards of the Jackson County Land Development Ordinance "because it would be authorized by the FERC." Therefore, no conditional use permits would be necessary. Export FEIS at Table 1.4.1-1.
[8] Import FEIS at Sec. 4.10.1.1.
[9] Id. at Sec. 4.10 citing table 1.6-1.
[10] Export FEIS at Sec. 4.11.1.

"Coquille Tribe of Indians"[11] signed FERC's MOA as "concurring" parties in 2011, but cited no government-to-government meetings, and failed to provide any background regarding how this Tribal concurrence came to pass.[12] FERC also cataloged one meeting between FERC staff and the Cow Creek Tribe in March 2013. However, with respect to a meeting requested in July 2015 by the Confederated Tribes to "continue government-to-government consultations," FERC chose to issue the Final EIS in the midst of "ongoing discussions" regarding such a meeting.[13] The remainder of so-called "consultations" cataloged by FERC were limited to public notices, letters, public meeting opportunities, and contacts between the Tribes and the applicants and/or the applicants' contractors.[14]

No one can legislate a change in personal or professional attitude. But before a federal employee can work effectively and meaningfully with any Tribe, they must first understand the federal government's fundamental obligations and responsibilities to Tribes. To that end, all federal personnel whose work may impact Tribal Nations, both on- and off-reservation, should be required to participate in comprehensive training regarding the federal trust responsibility. Such training should also assist federal employees to understand that Tribes differ in language, customs and traditions. Mandatory training should also teach federal employees the history of Tribal removal and dislocation, and alert the employee to the fact that the geographic area where they work, and where there may be no obvious Tribal presence, may well be the ancestral homeland of a Tribe now located in Oklahoma, Kansas, or some other state.

Training, to the maximum extent possible, should be provided by experts in the field and, at a minimum, should include: (1) an overview of the trust responsibility and unique relationship between the United States and Tribes; (2) an overview of the United States historical policies impacting Tribes, including how those policies resulted in Tribes having significant rights and interests in off-reservation areas; and (3) Tribal perspectives on the importance of the trust responsibility and how agency decisions have impacted Tribal rights in the past.

If it is not readily apparent at the outset that a project will impact Tribal rights or interests, training of federal employees should occur as soon as possible once the need is recognized. However, the NHPA and other pertinent statutes should be amended to make clear that in no event should lack of training

[11] Should read "Coquille Indian Tribe."
[12] Export FEIS at Sec. 4.11.1.2.
[13] Id.
[14] Id.

constitute an excuse for failure to include, meet, or consult meaningfully with Tribes.

2. Whether intentional or inadvertent, government-to-government consultations between agencies and Tribes are usually a case of "too little, too late."

Agencies like FERC often carefully catalog in NEPA documents every contact or communication with a Tribe, no matter how inconsequential. If a Tribe is mailed a notice of the agency's intent (NOI) to prepare an environmental impact statement (EIS), it is listed as a consultation event. If a Tribe responds to the NOI, it is listed as a consultation event. If a Tribe's member speaks at a NEPA public meeting, it is listed as a consultation event.[15]

These one-way communications do not constitute a conversation. And as discussed in the next section, almost never are these so-called "government-to-government consultations" conducted between political equals.

The better way would be for agencies to consult and coordinate early with Indian Tribes when considering the planning of federal projects. In addition to providing early and adequate notice to Tribal governments, agencies should facilitate open information sharing about all aspects of an infrastructure project under consideration.

Tribes should also be included in infrastructure decision-making from the very earliest stages, including being involved in key decisions regarding priorities for development.

Early consultation ensures that problems are identified and resolved in a timely fashion, preventing costly delays down the line. Similarly, Tribes must receive full information about projects as soon as possible; Tribes are often faced with relying on public notices and news releases about projects while state and local governments are often included in decision-making and scoping processes from the very beginning. As soon as federal agencies are discussing projects with private parties or state governments, they should also be talking to Tribes that may be affected by these projects.

In addition to being early in the process, meaningful consultation should always be undertaken with the goal of reaching consensus. Without this goal, there is no actual consultation. Rather, the federal government merely notifies

[15] See generally Import FEIS at Sec. 4.10.

Tribes of their intentions and catalogues Tribal concerns. Just like in any other discussions between parties with interests at stake in a particular venture, the federal government and Tribes should be sitting down with one another, engaging in meaningful back-and-forth, and reaching agreement to facilitate project development.

In March 2012 President Obama issued Executive Order 13604 ("Improving Performance of Federal Permitting and Review of Infrastructure Projects"), which ordered that "Federal permitting and review processes must provide a transparent, consistent, and predictable path for both project sponsors and affected communities…. They must rely upon early and active consultation with State, local, and Tribal governments to avoid conflicts (and) resolve concerns…." The management plan responding to this Executive Order was released in June, which provides: "Multiple tribal, State, and local governments may also have key decision-making responsibilities for a given infrastructure project – particularly for long, linear projects like roads, pipelines, and transmission lines. These Tribal, State, and local permitting and review processes can also create delays and impact federal decision-making timelines. It is imperative that federal agencies coordinate early and continuously with other governmental jurisdictions in order to work efficiently and minimize duplication and delays."

Codifying the common-sense and respectful approach set forth by Executive Order 13604 would be a good start that would benefit agencies, applicants, stakeholders, and Tribes alike. Such an approach could also help avoid the kinds of late-project delays that the Confederated Tribes have had to demand for the Jordan Cove LNG project, simply because of FERC's early-project refusals to talk openly and candidly with the Confederated Tribes.

3. "Government-to-government" consultations are rarely conducted between political equals.

We have already discussed the lack of actual face-to-face consultations with FERC, USACE, and others in the Jordan Cove LNG projects in a quantitative sense. But equally frustrating is the qualitative deficiency of such communications.

Cheyenne River Sioux Chairman Harold Frazier expresses this frustration very well. "We come with authorities from our tribal council to negotiate," Frazier has said. "A lot of times there are no decisionmakers sitting across the table from us. They always say they'll take it back to their superiors and get back to

us, and they never do." Yet these authorities "check the box" that says they have consulted, Frazier said, and consider the matter closed.

Standing Rock Chairman Dave Archambault II echoes these concerns, saying, "Too often tribes are invited to speak to low level agency representatives during the consultation process in infrastructure projects. We pour our hearts out to them as we share what's important to us," he said. "When these officials go back to Washington to share our concerns, our message is lost. We need to be in that room with the decision makers."

Government-to-government consultations cannot be deemed "meaningful" if they are not conducted between federal and Tribal officials who are empowered with the same levels of negotiating authority.

Ideally, there would be one uniform federal guideline for Section 106 government-to-government consultations between federal and Tribal officials, and that guideline would be issued by ACHP. At minimum, if individual agencies are allowed to continue promulgating their own consultation guidelines, the NHPA should be amended to require that ACHP review and approve those agency guidelines.

4. Tribes are regularly barred from meaningful participation in Project and Programmatic Cultural Resource Protection Memoranda of Agreement (MOAs).

Historically, agencies have strongly resisted including Tribes in project and programmatic agreements. No agency spokesperson would admit it openly, but the agency concern often seems to be that party status would afford a Tribes too much power – or at least enough power to compel actual compliance with NEPA and NHPA mandates.

In the case of Jordan Cove LNG, the Confederated Tribes were compelled in 2011 to accept a take-it-or-leave-it offer of "Other Tribal Concurring Party" status in a Memorandum of Agreement (MOA) between FERC, BLM, USFS, and the Oregon SHPO.

"Other Tribal Concurring Party" effectively means the Tribe has no power whatsoever. We cannot enforce the MOA. We cannot terminate the MOA. We cannot demand amendment of the MOA. The Confederated Tribes could withdraw from the MOA, but that would have no impact on the project.

The Jordan Cove LNG project MOA was deeply flawed from the beginning, but it became utterly irrelevant in 2012 when the applicants changed the project from LNG import to LNG export. That change expanded the project scope substantially by adding a 420-megawatt (MW) natural gas–fired power plant to the project on lands the Confederated Tribes have identified as the likely site of significant cultural resources and human burials.

The Oregon SHPO has recently opined that the proposed construction techniques would be "catastrophically destructive to deeply buried archaeological sites and human remains, whose existence is highly probable based on a preponderance of evidence."[16] Nevertheless, FERC's response was to allow its applicant to rebut the SHPO's concerns. And the stalemate continues while the Confederated Tribes are forced to continue expending staff time and resources on what FERC staff calls a "dead project"[17], … when, that is, it suits FERC to do so.

We believe the NHPA should be amended to provide that all interested Indian Tribes or Native Hawaiian organizations that attach religious and/or cultural significance to historic properties located off Tribal lands shall be invited as party signatories to any Project or Programmatic Agreement which purports to satisfy agency responsibilities under Section 106 of the NHPA. Such Tribes or organizations must have all the authority of any other party signatory to these MOAs, including authority to amend and/or terminate the Agreement.[18] The only exception to this strict requirement for inclusivity should be where the lead agency can document, with Secretary of the Interior concurrence, the permanent incapacity or inability of a Tribe or Native Hawaiian organization to carry out all duties of a party signatory.[19]

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[16] Letter from Christine Curran (SHPO) to Heather E. Campbell (FERC) dated October 11, 2016.
[17] On March 11, 2016, FERC issued its *Order Denying Applications for Certificate and Section 3 Authorization* (Order). Significantly, FERC's denial rested on a threshold determination of economic cost benefit analysis that involved weighing a lack of demonstrated demand against the inevitable need to condemn private property along the pipeline route. According to the Commission, "this is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered." Thus, when dismissing the applications, FERC was not required to make determinations with respect to an array of critical environmental, socio-economic, and cultural resource protection issues associated with the Project. The Applicants and the State of Wyoming filed applications for rehearing pursuant to Section 15 U.S.C. § 717r of the Natural Gas Act. On May 11, 2016 FERC issued a "tolling order" which will allow for more time to consider the motions for reconsideration. Meanwhile the applicant, confident that FERC will grant its motion and summarily approve the project, continues to seek other federal, state and local permits.
[18] See 36 C.F.R. § 800.6(c)(2) for additional guidance.
[19] See also ACHP Guidance on Section 106 Agreement Documents.

This topic is further addressed below at item 11, which discusses the need for enhanced enforcement authority and additional resources for the ACHP.

5. Potential conflicts of interest exist where private archeological surveyors perform crucial pre-approval work on projects subject to NEPA and NHPA.

As discussed above, FERC's clear preference in the Jordan Cove LNG context has been to start a discussion between the Tribes and the applicants' contractors, then to back away. However, neither the applicants nor their contractors owe any trust duty to the Tribes. The Tribes also have real reason to question whether experts hired by the applicant share the Tribes' concern for our cultural patrimony.

40 C.F.R. § 1506.5 (part of EPA's NEPA regulations) makes the lead agency (or the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest) responsible for selecting the NEPA preparation contractor, for furnishing guidance, and for participating in the preparation of the environmental impact statement. Contractors employed to prepare an environmental impact statement must sign a disclosure statement stating that they have no financial or other interest in the outcome of the project.[20]

As long ago as 1983,[21] the CEQ noted there were those who argued against strict conflict of interest rules in NEPA work. However, the CEQ, while recognizing that most contractors would conduct their studies in a professional and unbiased manner, observed that NEPA conflict of interest requirements are necessary to ensure a better and more defensible EIS for the federal agencies, and serve to assure the public that the analysis in the EIS has been prepared free of subjective, self-serving research and analysis.

Based on these sound public policy rationales, the NEPA regulations continue to include a requirement that "[c]ontractors shall execute a disclosure

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[20] The CEQ has noted that this conflict of interest provision does not apply when the lead agency is preparing the EIS based on information provided by a private applicant. In that situation, the private applicant can obtain its information from "any source." Such sources could include a contractor hired by the private applicant to do environmental, engineering, or other studies necessary to provide sufficient information to the lead agency to prepare an EIS. However, the "agency must independently evaluate the information and is responsible for its accuracy."

[21] Council on Environmental Quality (CEQ) guidance at 48 Fed. Reg. 34263 (July 28, 1983).

statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project."[22]

However, there is no such affirmative requirement for environmental, archeological, or other subcontractors hired to provide information to the NEPA Contractor, or to the private applicant. Nor is there any conflict of interest requirement whatsoever for contractors hired by project applicants to conduct archeological and other surveys as part of a stand-alone Section 106 consultation. As CEQ rightly worried, performance of such work by parties which would suffer financial losses if, for example, a "no action" alternative were selected, "could easily lead to a public perception of bias."

Our recommendation is that both the NEPA and NHPA be amended to make absolutely clear that the responsibilities for carrying out Congress's cultural protection objectives rests solely with federal agencies, and cannot be delegated to a private party.

In particular, the NEPA and the NHPA should both include a requirement that any contractor or subcontractor hired by a private applicant to perform archeological studies upon which the federal agency will rely in making a final decision, shall "execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project." NEPA and NHPA should also ensure the decision-making federal agency must independently evaluate the information, and take responsibility for its accuracy.

We acknowledge that some may worry that such requirements would overly burden multidisciplinary firms because of links to a parent company which has design and/or construction capabilities, out of concern that a contractor bidding on NEPA work may be excluded from future design or construction contracts, or where a project proponent wishes to have their own contractor provide environmental information. While the current NEPA regulations do not generally intend these outcomes where an EIS contractor or subcontractor has no agreement to benefit from the construction or operation phase of the project, or where there exists no incentive clause or guarantee of any future work on the project, archeological survey or monitoring work performed by a private applicant falls into a special category of risk – of potential damage to or destruction of cultural resources or human burials which cannot be undone or mitigated if it is discovered too late that pre-approval archeological survey work

[22] 40 C.F.R. § 1506.5(c).

was performed with improper pro-approval bias. Given the irreplaceable and/or sacred nature of cultural resources or human burials, a higher standard must prevail.

6. FERC avoids its Section 106 responsibilities by invoking self-serving ex parte rules that improperly force Tribes to choose between direct Section 106 consultation with the agency on the one hand, or preserving party status for legal future appeals on the other hand.

In the Jordan Cove LNG project, the Confederated Tribes have been repeatedly told by FERC staff member Paul Freidman that FERC cannot participate in any communications with the CTCLUSI because the Tribes are "parties to the proceeding" and he is "restricted by the FERC's ex-parte rules."[23]

Given FERC's relationship with industry, it's not surprising that allegations of improper ex parte communication are often levelled at FERC.[24] These allegations are so common that FERC felt compelled to request a scholarly study by an administrative professor from George Washington University to help them figure out their own rules.[25]

Whether out of lack of knowledge, or out of a desire to deny an Indian Tribe like ours its right to meaningful Section 106 consultation, agency staffers like FERC's Paul Friedman appear to regularly overstate the ex parte problem.

To avoid any such problems in the future, the NHPA should be amended to make clear that Section 106 consultation requirements are of paramount importance. Notwithstanding any agency rules or regulations which purport to restrict government-to-government consultations or communications with an Indian Tribe that has merely preserved its legal rights by claiming a right to intervene, the amended NHPA should state unequivocally that until such time as an intervenor has formally disputed a material issue in an agency adjudacatory setting, or has initiated a legal proceeding by the filing of a complaint against FERC, then non-decisional agency staff must continue to engage in all communications necessary to complete the Section 106 consultation process.

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[23] Email from Paul Friedman (FERC) to Tyler Krug (USACE) with cc to Confederated Tribes THPO dated December 10, 2015.
[24] See, e.g., Duke Energy Corporation & Cinergy Corporation, Order Denying Rehearing, Docket No. EC05-103-001 (Feb. 5, 2007); National Grid plc & KeySpan Corporation, Order Denying Rehearing, Docket No. EC06-125-001 (Feb. 4, 2008).
[25] See Richard J. Pierce, Jr., *Federal Energy Regulatory Commission Ex Parte Regulations and Practices* (Nov. 27, 2006).

If statutory amendment is not possible, we recommend that FERC, through Tribal consultation, revise its Tribal consultation policies to further acknowledge and strengthen its direct role in protecting the Tribal resources through its federal trust responsibility. FERC's policies and guidance documents must also be updated to allow for early, open, and consistent communication between FERC and Tribal governments. FERC must also acknowledge it is solely responsible for meeting its federal trust responsibility obligation to Tribal governments.

As others have suggested, FERC should also increase the size of its staff involved in reviewing energy project applications. Currently, FERC staff seems insufficient to ensure adequate Tribal consultation in the process leading up to issuing a certificate. Additional staff may help FERC carry out its responsibilities to provide early notice to Tribes, fully evaluate the potential for a project to impact Tribes, and consult with Tribes regarding potential effects to Tribal rights and resources: but only if they are first properly trained to fully appreciate the federal trust responsibility to Tribes.

Empowered regional FERC Tribal Liaisons of an appropriate paygrade and seniority, and specifically tasked with facilitating Tribal consultations, could also be beneficial.

7. Tribes usually must provide their own funding to fully participate in federally permitted infrastructure projects.

With respect to Jordan Cove LNG, the Confederated Tribes have spent more than a decade engaged in self-funded interactions with FERC, USACE, the applicants, and the applicants' contractors. In addition to the federal projects, the Confederated Tribes have been forced to expend significant resources on monitoring and contesting state and local permitting actions which fall outside the federal ambit, but which nevertheless threaten our cultural patrimony. All these activities rob the Confederated Tribes of funds and resources needed to pursue our own priorities: health care, education, elder benefits, cultural enrichment, and other traditional Tribal programs.

Adequate funding is necessary for Tribes to become educated about their rights under various statutes, and to develop the capacity to exercise those rights. For instance, Tribal Historic Preservation Offices require the resources to analyze and respond to the myriad notices of consultation that they receive regarding federal infrastructure projects. Identification of Tribal historical sites or assessment of potential impacts to Tribal resources requires the time and

resources of already underfunded Tribal governments. Financial support is crucial if Tribes are to be able to participate in federal permitting processes in a meaningful way.

The ACHP Consultation Handbook explains that it is permissible – though not mandatory – for a federal agency to pay travel expenses for Tribal representatives and otherwise "use available resources to overcome financial impediments to effective tribal participation." It is also permissible for an agency, or for an applicant for federal funding or a federal permit, to compensate a Tribe for its services in identification and evaluation of historic properties. Though compensation is not required, the Handbook explains that when an agency or applicant asks a Tribe for "specific information or documentation regarding the location, nature, and condition of individual sites, or even request[s] that a survey be conducted by the tribe," the Tribe is essentially being asked to perform a role "similar to that of a consultant or contractor." Tribes are recognized sources of information about historic properties of religious and cultural significance to them, agencies should "reasonably expect" to pay Tribes for their work.

In keeping with this guidance, it is reportedly not uncommon for the applicants for pipelines and other infrastructure projects to offer compensation to Tribes for conducting TCP surveys and otherwise documenting information about places that may be historic properties. In the experience of the Confederated Tribes, however, some business-savvy applicants seem to be believe such funding is a legitimate bargaining chip that can be used to force a Tribe to make concessions in other areas. That practice should be neither condoned nor encouraged by federal agencies.

It is appropriate and efficient for an applicant seeking permits or other federal action to provide funding for governmental processes. This is by no means a foreign concept for the provision of services from governmental entities.[26] These funds may be reasonably included in application or permit fees, or required as part of the process an applicant must undertake to complete requirements. Alternatively, federal agencies should prioritize the need to comply with Tribal trust and treaty responsibility, and fund the Tribes so they may participate in infrastructure development procedures.

[26] See, e.g., 10 U.S.C. § 2695 (in connection with a real property transaction with a non-federal person or entity, the Secretary of a military department may accept amounts provided by the person or entity to cover administrative expenses incurred by the Secretary in entering into the transaction).

In light of the enormous and important role the play under the NHPA, Congress should also increase the federal funding provided to the various SHPOs with significant Tribal lands duties.[27]

8. Agencies seem either reluctant or ill-suited to properly evaluate cumulative and regional environmental impacts on Indian lands, treaty rights (on and off-reservation), sacred places, and Tribal community health and environment.

Environmental and cultural assessments should take into account cumulative impacts, as well as impacts to the regional environment, including Tribal rights and resources in the region. Projects should be assessed based on their broad impacts rather than artificially segmenting or narrowing the scope of review. Lead agencies should be assessing the potential impacts and consulting with states and Indian Tribes early in the process, particularly for long, linear projects like roads, pipelines, and transmission lines.

9. Army Nationwide Permits and Appendix 'C' regulations delegate far too much authority to project proponents while denying Tribes meaningful consultation on projects on or near Indian lands.

Our comments thus far have focused on FERC and the poor effort at consultation on the Jordan Cove LNG projects. However, these projects also include significant analysis and decision-making by USACE. Moreover, the abundance of navigable waters and wetlands in the ancestral territory of the Confederated Tribes mean we can expect a great deal of interaction with USACE in the future as a lead or cooperating agency.

One example of the challenges faced by the Confederated Tribes is USACE Project No. NWP-2010-406/1 in support of an Oregon International Port of Coos Bay (Port) permit application requesting USACE authorization to conduct sediment sampling under Nationwide Permit (NWP) No. 6 (Survey Activities). While sounding innocent enough, this sampling work is really part of a much larger effort to deepen the Coos Bay navigation channel. And while claiming this channel deepening has nothing to do with the Jordan Cove LNG project, those applicants have offered funding for the Port's work. Meanwhile, USACE regulatory staff applied the Appendix 'C' regulations to define the project area as only being as large as each individual test boring. And by positing there

[27] Established in 1977, the Historic Preservation Fund (HPF) is the funding source of the preservation awards to the States, Tribes, local governments, and non-profits. Authorized at $150 million per year, the funding is provided by Outer Continental Shelf oil lease revenues, not tax dollars.

would be no affect on historic properties, USACE sought to delegate all its Section 106 duties to the non-federal permittee.[28] While clearly on a different magnitude of scale, this seems to be precisely the approach USACE took at Standing Rock which led to this very comment effort.

The Army's "Procedures for the Protection of Historic Properties,"[29] ignores USACE's statutory duty to consult with any Tribe that attaches religious and cultural significance to a historic property that would be affected by the issuance of an Army Corps permit, depriving Tribes of their statutory right to be consulted prior to issuing such a permit.

The NHPA Amendments of 1992 enacted the statutory duty on the part of federal agencies to consult with Tribes in the section 106 process. Appendix 'C' has not been revised to reflect this statutory mandate.

The procedures in Appendix 'C' operate to deprive Tribes of their statutory right to be consulted when the issuance of a Corps permit would affect a historic property to which a Tribe attaches religious and cultural significance; Appendix 'C' is inconsistent with several provisions of the ACHP regulations intended to implement this right.

Appendix 'C' is also inconsistent with the statutory requirement that, if a federal agency decides to proceed with an undertaking without an agreement on the resolution of adverse effect, the decision to do so must be made by the head of the agency and cannot be delegated.

We urge USACE to withdraw its Appendix 'C' regulations, and to instead follow the ACHP regulations which explicitly embrace the NHPA requirement that the federal agency official must "consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking."[30]

We further urge that USACE re-evaluate the appropriateness of using nationwide permits for any projects with the potential to impact Indian treaty rights (both on- and off-reservation), sacred places, the federal trust responsibility, and Indian lands, waters and environments. As pointed out by the ACHP, USACE's practice of relying on permittees to determine the potential to cause effects to historic properties "often leads to the Corps' failure to

[28] "Issuance of Nationwide Permits," promulgated as Nationwide (NWP) Permit Conditions, 33 CFR Part 330 at 3-4 (March 19, 2012).
[29] 33 CFR Part 325, Appendix 'C'.
[30] 36 C.F.R. § 800.2(c)(2)(ii).

adequately consult with federally recognized Tribes regarding the identification of, and assessment of effects on, historic properties of religious and cultural significance to them that may be affected by the undertaking." USACE should develop an alternative for permitting large projects that cover broad areas so that Tribal impacts are fully evaluated.

Additional commentary on this important subject may be found in the comments submitted separately by the National Congress of American Indians, and by other Tribes.

10. Federal agency focus on the National Register criteria can lead to destruction of traditional cultural properties and other irreplaceable cultural resources.

An enormous and ongoing challenge faced by the Confederated Tribes is the tendency for federal agencies to "consult" with the SHPO, then to check off the Section 106 box without ever contacting the Tribes if the SHPO's database reveals no listed or eligible properties in the project area.

In Oregon the Tribes are fortunate to have an engaged and knowledgeable SHPO. However, the process can still break down at the stage where Tribal resources are to be identified so that the effects on them may be considered.

Part of the problem is that many archaeologists and other professionals employed by applicants may not be able to identify Tribal resources for lack of training or familiarity with the sites and resources.

In other instances, Tribes may have intentionally withheld information because of concerns about data disclosure, either inadvertently, or willfully by tribunals or applicants.

As appears to be the case with the Dakota Access Pipeline, NHPA reviews for Tribal cultural resources may be based on studies or surveys done decades ago by non-Indian staff employed by infrastructure companies. This is yet another path to disregard of the Section 106 processes, and for the dismissal of Tribes' interests in protecting their cultures and traditional resources.

To overcome these challenges, federal agencies must monitor compliance with Section 106 at the earliest stages of infrastructure project planning, and must provide for stringent requirements that Tribal entities, including THPOs, be included in project initial scoping and review.

To achieve better integration of the Section 106 process into the NEPA process, agencies should also implement a valuable guidance document jointly published by ACHP and CEQ in 2013 entitled NEPA AND NHPA: A HANDBOOK FOR INTEGRATING NEPA AND SECTION 106.

11. Tribes, applicants, and permitting agencies could all benefit if the Advisory Council on Historic Preservation had enhanced enforcement authority and additional resources.

The ACHP has been an invaluable asset to the Confederated Tribes as the ACHP has repeatedly engaged FERC regarding FERC's troubled approach to consultation on the Jordan Cove LNG project. However, FERC's responses point up a central problem – an agency whose name starts with "Advisory" will only have so much clout when dealing with an agency like FERC which sees its primary mission as helping non-federal applicants to push through their projects.

Under ACHP's regulations, if a federal agency finds an adverse effect during the consultation with the SHPO/THPOs, Tribes, and the AHCP, the process typically concludes with a memorandum of agreement (MOA) specifying how adverse effects will be avoided, minimized, or mitigated.[31] An MOA is a legally enforceable document which "shall govern the undertaking and all of its parts."[32] And without an MOA to signify fulfillment of agency responsibilities under the NHPA,[33] the agency is barred from issuing "any license, permit, or approval for an undertaking to proceed."[34]

The MOA process begins begin with the federal agency, SHPO/THPO, and other consulting parties (including Tribes) consulting "to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties."[35] The lead agency must notify the ACHP, and in some circumstances must invite the ACHP to participate in the consultation. A Tribe may also ask the ACHP to participate. The ACHP makes the decision whether or not to participate, based on the criteria in Appendix A of 36 CFR Part 800.

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[31] 36 C.F.R. § 800.6(c)
[32] NHPA § 110(l), 54 U.S.C. § 306114.
[33] 36 C.F.R. § 800.6(b)(1)(iv) ("If the agency official and the SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a memorandum of agreement.").
[34] COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, AND ADVISORY COUNCIL ON HISTORIC PRESERVATION, NEPA AND NHPA: HANDBOOK FOR INTEGRATING NEPA AND SECTION 106 at n.29 and accompanying text (2013), citing 16 U.S.C. § 470f (repealed and replaced with same provisions by 54 U.S.C. § 306108).
[35] 36 C.F.R. § 800.6(a).

While all consulting parties can participate in the negotiations, an MOA may still be signed even if some consulting parties object. The regulations use the term "signatories" for the parties that have the authority to execute an MOA, but also provide for "invited signatories" and "concurring parties" whose signatures are not required to execute the MOA. While there can be no MOA without the signatories, an MOA has legal force if signed by the signatories regardless of whether invited signatories or concurring parties have signed on.

Thus, if the ACHP has participated, an MOA cannot take effect without ACHP signature. Under the existing regulations, a Tribe does *not* have the power to block an MOA for an undertaking that would not affect Tribal lands under its jurisdiction. However, the ACHP *can* block such an MOA. If a Tribe is concerned that the federal agency officer and SHPO may agree on measures to resolve adverse effects that the Tribe finds unacceptable, the Tribe must ask the ACHP to participate in the consultation and to decline to sign if the proposed measures to resolve adverse effects are not acceptable. However, the ACHP's ability to do so is constrained by both staffing and funding limitations.

A strengthened and better-resourced ACHP could be more aggressive about joining MOAs on projects where Tribes have been denied signatory status by the lead agency – where Tribes have been deprived of the ability to delay or stop construction of a project if the Tribe believes proposed mitigations simply will not adequately protect their sacred places.[36]

The ACHP should also update its regulations and guidance to empower Tribes with signatory status so that their participation is required for an MOA to pass legal muster. Too often Tribes pour their limited resources and staff time into projects, but then are not allowed to sign the MOA except as a weak "concurring" party as was the case with the Confederated Tribes on the 2011 Jordan Cove LNG MOA. Tribes must have a strong, proactive role in protecting their sacred places as a full partner in the federal process.

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[36] Signatory status is crucial because **only** signatories have authority to execute, amend or terminate an MOA. 36 C.F.R. § 800.6(c)(2) empowers a lead federal agency to invite an Indian Tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off Tribal lands to be a signatory to an MOA concerning such properties. This section also advises a lead agency official to invite "any party that assumes a responsibility under a memorandum of agreement to be a signatory." 36 C.F.R. § 800.6(c)(1) provides the authority for ACHP to participate as a signatory to a project MOA.

Protecting Against Anticipatory Demolition

Even after FERC Commissioners had voted in March 2016 to deny Jordan Cove LNG a certificate, the applicants and their contractors continued to press the SHPO for archeological permits that would have allowed them to continue survey work, without Tribal oversight, in highly sensitive areas. Fortunately, the Confederated Tribes were able to successfully resist those efforts, and the applicants eventually withdrew their permit requests.

In many federal projects, as in the current Dakota Access Pipeline case, Tribes have raised the very serious concern of companies engaging in "anticipatory demolition" in order to avoid the section 106 process in its entirety. This very troubling practice is a reality that many Tribes have unfortunately experienced.

The NHPA does provide some protections against this under section 110(k) which provides:

> Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant that, with intent to avoid the requirements of section 306108 of this title [NHPA section 106], has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed the significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.[37]

This statutory provision only applies if the Tribal sacred place has been determined to be eligible for the National Register, however, and if the sacred place has been intentionally damaged by an applicant. Conversely, this statute does **not** protect a sacred place that has not yet been determined eligible for the Register. Nor is it effective if an applicant claims to have been unaware of the existence of the sacred place.

Since so many places of religious and cultural significance for Tribes require specialized expertise and knowledge which can only be provided by the Tribes themselves, archaeological surveys often miss such places. The ACHP must enforce its "reasonable and good faith effort" consultation requirement,[38] so

[37] NHPA § 110(k), 54 U.S.C. § 306113.
[38] 36 C.F.R. § 800.4.

that early and meaningful consultation occurs before **any** key decisions or actions are taken.

Anticipatory demolition may also occur when potentially eligible properties are encountered in connection with construction activities *after* the section 106 process has been completed. Such discoveries are especially likely when compliance is documented with a Programmatic Agreement rather than an MOA. Section 800.13 of the ACHP regulations addresses post-review discoveries. Paragraph 800.13(c) provides that the federal agency office, "in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106."

To protect against anticipatory demolition in this context, ACHP should implement a presumption that if a Tribe says a place is sacred, it shall be treated as eligible for the Register unless and until determined to not be eligible. With respect to post-review discoveries, this could be accomplished by changing the word "may" in paragraph 800.13(c) to "will," or by ACHP issuing guidance to the same effect.