

ORAL TESTIMONY OF

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FEDERAL CONSULTATION ON INFRASTRUCTURE PROJECTS

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Mystic Lake, Minnesota

Good Morning Principal Deputy Assistant Secretary Roberts, *Miiyuyam, polóov waxáamkay*, it is my privilege to be here to present comments today concerning this issue. *NuŠúunup lóoviq*/Thank you.

I. INTRODUCTION

The homeland of the *Pechaángayam*, the Pechanga People, is the Pechanga Indian Reservation located near Temecula, California (60 miles north of San Diego). Our people have called the Temecula Valley home for more than 10,000 years. This is your homeland too for we believe the world was created here in the Temecula Valley—known as *‘Exva Teméeku*.

In 1847, 18 treaties were negotiated in sequence with tribes throughout California. We Luiseño Indians were party to the 17th of these: the Treaty of Temecula. In good faith, huge land cessions were made involving most of southern California in exchange for a permanent, inviolable homeland, and the provision of goods and services to improve the health, education and welfare of my great grandfathers. Shortly after ceding these huge land tracts, and within one month of arriving back in Washington, DC with the 18 treaties, gold was found for the first time in California, near the town of Julian, about 40 miles away from us. The timing was indeed unfortunate for us because the Senate, upon hearing of the gold, elected NOT to ratify these 18 treaties. Still, our land was taken from us. Most of the goods and services promised in our treaty never materialized. With more than a hint of irony, I note that our treaty only recently saw the light of day – on September 22, 2016 at the National Museum of the American Indian.

But there's more. 26 years later in 1873, sheep farmers laid claim to the land upon which our village stood. They obtained a federal court *decree of ejectment* and on a summer day in 1875, a posse lead by the San Diego County Sheriff evicted my ancestors from their village at gunpoint and, in one fell swoop, 300 elders, women and children were loaded onto wagons with few personal effects and just dumped in a dry wash two miles away. Their former tule brush homes were burned and their livestock herds were seized to pay for court costs and the eviction itself.

On June 27, 1882, President Chester Arthur signed the executive order that established the Pechanga Indian Reservation, finally, as a homeland for my People.

We are here today because tribes have suffered losses across the nation, the result of ineffective federal laws and the failures of federal agencies to protect our tribal cultures, heritage, material resources, languages and all other aspects of what make us unique tribal peoples. On behalf of the *Pechaángayam*, we greatly appreciate your time, interest and consideration of these issues.

The Pechanga Band has been fortunate to create a Cultural Resource Department dedicated to the return, preservation and protection of our tribal ancestors and their cultural belongings. We have actively participated in hundreds of development projects that directly impact our invaluable and irreplaceable Luiseño cultural resources, and continue to do so today, working with nearly 100 federal, state, and local jurisdictions.

Despite these remarkable advances, the *Payómkawichum*, Luiseño People, continues to confront daily threats to our ancestors, tribal resources and cultural heritage. It is for this reason I am before you today to comment on the current framework that governs federal agency permitting actions and to provide some possible solutions for the future to stop these threats and reduce the loss of our culture.

II. SCOPE OF REVIEW REGARDING FEDERAL ACTIONS

I want to first address the scope of review proposed by the agencies' "Framing Paper." According to that document, the agencies intend these consultation sessions to focus on federal agency permitting actions on infrastructure projects. This suggests that we are only looking at actions on projects with a large footprint – such as the Dakota Access Pipeline – while not looking at whether the federal permitting process as a whole is flawed with respect to considerations of tribal concerns. I will tell you simply that the process, as currently administered, is at best inconsistent and more often than not results in impacts to resources of value to tribal communities.

In the interest of time, I will address some of my major concerns, which will be discussed in more depth in the Band's forthcoming written comments. First, I want to address the concern regarding the too narrow focus of the agencies approach to this problem. While large infrastructure projects do indeed pose impacts on a massive scale, we cannot overlook the fact that agency actions on even smaller projects likewise have massive impacts to tribal resources. The Pechanga Band has encountered issues with the implementation of Section 106 under the National Historic Preservation Act (NHPA) on both large scale and more limited projects (i.e., housing developments). For example, in 2001, the Pechanga Band fought the Valley Rainbow Interconnect, a 31-mile 500,000-volt transmission line proposed to plough through the Great Oak Ranch, an area that includes cultural and village sites, as well as which is home to the Great Oak.

In addition to large-scale projects such as the transmission line, Luiseño cultural resources and sacred places are threatened and destroyed by smaller projects, largely residential or commercial in nature. One example lies just south of Pechanga's southern-most reservation boundary in San Diego County, in a traditional cultural property and village site known as *Tomqav*. This area plays an important part in the Luiseño worldview, as it is where one of the major events altering the world of the *Payómkawichum* occurs. In addition to this cultural component, the area is

comprised of a large village site, which also includes multiple human remains. In short, following approval under our state environmental law of four separate projects in this area – which includes the San Luis Rey River, a jurisdictional water under the Army Corps’ control – 16 separate burials were unearthed, in addition to the “intangible” cultural values of this area and the other “tangible” resources such as rock art, habitation remains and artifacts. In this case, the Army Corps must issue a Section 404 permit under the Clean Water Act, which triggers the Section 106 consultation process under the NHPA.

While there are many issues regarding the Corps’ actions on this project, in the interests of time I want to point out the similarity this project has with those larger infrastructure projects, such as the Dakota Access Pipeline. The Corps believes that its jurisdiction is limited only to a small area of any given project, specifically “the permit area.” This approach allows the Corps to ignore the direct and indirect effects that will occur because of the permit approval. Take the *Tomqav* example as an illustration of this result. While the “permit area” is limited only to the jurisdictional waters of the four projects in this area, approval of the permit has huge direct and indirect impacts on the cultural resources – the “intangible” Traditional Cultural Property and the “tangible” resources such as human remains and rock art – that are ignored in this myopic approach. These projects will not only destroy the village site, but has impacted multiple human remains and will forever change the landscape that comprises the cultural importance of this area to my People. Thus, the approval of the permit provides for widespread impacts to these resources, but which impacts the Army Corps is “allowed” to ignore because it believes it has only a limited review area.

Under the implementing regulations for the NHPA, the “area of potential effects” is defined as a geographic area or areas within which an undertaking may directly or indirectly cause “alterations in the character or use of historic properties...” By limiting the area of potential effects to only the permit area, the Corps is simply ignoring the direct or indirect effects that an undertaking (i.e., permit approval) may have on cultural resources, such as those described in this one example. I want to note for the record that this severely limited view of the agency’s responsibility is the result of what is often referred to as, “Appendix C” to 35 C.F.R. 325. Appendix C was “promulgated” by the Corps, which simply lacks any legal authority to develop and implement its own regulations. In fact, that authority rests solely with the Advisory Council on Historic Preservation, the federal agency responsible for compliance with the NHPA, and which has already promulgated regulations. The Advisory Council has long argued that Appendix C was developed without legal authority and that the Corps acted outside its scope of authority. Appendix C is in direct conflict with both the NHPA and the regulations promulgated by the Advisory Council and must be revoked. In fact, in a 1985 case, the Los Angeles Army Corps District was found in violation of the NHPA for using Appendix C to narrow its review only to the “permit area,” thus ignoring the direct and indirect effects of its permit approval. We will expound more on this issue in our written comments.

Federal permitting actions are not just a concern on large-scale infrastructure projects. Tribes face the same issues on smaller-scale projects, such as the one I described just now. That example is only one of many that my Tribe encounters on a near daily basis. For this reason, we urge that the agencies broaden the scope of review on federal permitting actions to not just large

infrastructure projects, but to all actions requiring federal agency approval or oversight even on smaller projects.

III. THE NHPA IS INADEQUATE TO ADDRESS TRIBAL ISSUES

When the National Historic Preservation Act was passed, the focus was on concerns regarding the “historic fabric” of the United States. Further, the NHPA is a process law and does not provide for substantive protections of tribal resources. In reading the law, one can see that its focus is on historic buildings and landmarks, “tangible” items with values that are easily apparent to the general public. Consultation with tribes is not appropriately defined and has been historically used as a procedural box-checking action. I do not believe this is the way to ensure tribes’ cultural values and resources are protected, as they should be under the government’s trust responsibility.

We – tribes and federal agencies – are at a possibly game-changing juncture. As the initial consultation letter and framing paper suggests, the result of these consultation sessions and comments may result in one of two options: 1) Legislative reform of the NHPA; or, 2) New Legislation.

A. New Legislation

I believe that the best way to ensure that tribal concerns are addressed through meaningful and culturally sensitive consultation is to draft new legislation that is focused only on tribal resources. Tribal resources deserve their own protection under a framework that can accommodate the unique views of tribes, in addition to the processing of tribal information. The framework upon which the NHPA is built was not meant to incorporate these sources of information. The NHPA is best used to address resources with values that can be compared against other types of similar properties, and that have values accessible and important to a broad spectrum of individuals. This is simply not the case for tribal resources where the values are inherent to the particular community affiliated with them, or in some cases, the families or clans to which they belong. Looking at “like” properties cannot compare these values, nor can a professional (such as an architect or historian) point to the value as a type or example of a particular historic period. In sum, the NHPA is simply not built to accommodate tribal sources of value and information to Native American tribes. As such, the law will always fall short in trying to address impacts to these resources.

This very conundrum has examples in other contexts – examples that I think can help direct our conversation on how best to address federal agency permitting actions and their impacts to tribal cultural resources. For the sake of time, I’ll use just one example – the Native American Graves Protection and Repatriation Act of 1990. That law provides a framework for addressing Native American human remains, grave goods, sacred items, and objects of cultural patrimony that are either housed in museums, or found after 1990 on federal or tribal lands. I want to make two points here. First, NAGPRA was absolutely necessary because no other federal law could adequately address the unique cultural issues related to these items. The Antiquities Act of 1906, for example, addresses “archaeological items,” which are very different from human remains and the other items that NAGPRA protects. NAGPRA, then, was essential to addressing tribal

concerns about the return of their ancestors and their burial items, sacred items and objects of cultural patrimony.

The second point I want to make is that NAGPRA builds into the law a universe of appropriate sources of information for proving cultural affiliation. These sources of information include tribal oral histories and traditions, linguistics, ethnographic information and other sources that are not per se “academic” or “citable.” This is very important because tribes use these same sources of information to describe the cultural resources threatened by federal agency actions, sources that are simply inapposite to those the NHPA anticipates will help determine the presence or significance of “historic properties.” One can take pictures, find historical photos and architectural descriptions of a building or a bridge, but those sources simply cannot be replicated when describing the tribal values of a given resource.

One final point I would like to make in support of new legislation is recent legislative reform in the Pechanga Band’s state of California. Under the California Environmental Quality Act (CEQA for short), a lead agency must assess a project’s impacts to a variety of environmental areas, such as traffic, air, and biological and archaeological resources. In September 2014, CEQA was amended specifically because the original iteration of the law was simply inadequate to address tribal cultural resources and the values attributed by tribes to such resources. As such, the law now has three very significant changes – among others – that are relevant for our conversation today. First, tribes are recognized as experts in their cultural history, thus placing their information on the same level as those of scientists and academics. Second, tribal cultural resources (which include those “intangible” resources such as cultural landscapes) are now recognized as distinct from archaeological resources and must be separately analyzed under the law. Finally, these resources must include the tribal values attributed to them by the tribe. This means that an agency must consult appropriately with a tribe to gain an understanding of the tribal values of the resources, which must in turn be addressed in the final environmental document. If we look to the intent of these legislative changes, we can see how preservation laws enacted decades ago are simply inadequate to address tribal cultural values and resources, informing us all that it is time to look towards a better option to ensure tribal resources are identified and protected.

B. Reforming the NHPA

For the reasons already stated, I believe new legislation is the best route to addressing the concerns I have expressed. However, I also want to provide potential solutions under the existing framework. I have several ideas on how to amend the NHPA to address the issues I’ve spoken about today and to incorporate the tribal values in the identification and presence of and assessment of impacts to tribal resources. I will address a few ideas, which will be expounded upon in our written comments.

- Create a new category separate from “historic properties” that properly addresses the unique nature of tribal resources.
- Recognize tribes as experts with respect to their culture and resources.

- Identify proper sources of tribal information, such as is included in NAGPRA, to avoid arguments over tribal information and “scientific information,” which will assist federal agencies in properly identifying and assessing impacts to tribal resources.
- Specifically revoking Appendix C and clarifying which federal agency has authority to promulgate binding regulations to implement the law.
- Amend Section 106 to more appropriately include tribal consultation at specific junctures in the process, and to define what proper consultation is under the law.
- Address joint state/federal environmental review to avoid arguments that a federal agency is constrained by an approved project pursuant to state law.
- Amend existing NHPA regulations with tribal consultation.

These are just a few of the potential approaches and amendments that could be made to the NHPA and existing regulations that would address the shortcomings of the legal framework as it currently exists.

C. United Nations Declaration on the Rights of Indigenous Peoples

No matter which avenue is ultimately taken, it is time that the United States move beyond simply “supporting” the tenets of the UNDRIP, but rather, incorporate its articles into the law. At the heart of the Declaration are the rights of all indigenous peoples to their culture, water, cultural properties and resources, fair and meaningful consultation and outreach by the federal government. The UNDRIP provides a powerful framework upon which the federal government can build a more transparent, fair and meaningful process for federal agency actions and activities.

Respecting the ability of other tribal leaders to provide comments today, I will keep my oral statements on this subject brief and will address them in more depth in Pechanga’s written comments. However, I do want to provide some key points for your consideration as you digest comments you have heard all ready and those you will hear at the remaining consultation sessions. First, the UNDRIP provides that indigenous peoples have the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, ceremonies and literature (Article 11). Indigenous peoples have the right to participate in decision-making in matters that would affect their rights (Article 18). The Declaration requires states to consult with indigenous peoples in order to obtain, “free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them” (Article 19). Article 25 provides indigenous peoples the right to maintain and strengthen their distinctive spiritual relationship with their traditional lands, territories, waters and other resources, and to uphold their responsibilities to future generations. Finally, I want to point out Article 40, which provides the right to prompt decisions through fair and just procedures for the resolutions of conflicts and disputes.

In looking at just these few articles, I see that under current federal law and process, tribes are afforded few, if any, of the basic human rights to which we as indigenous peoples are entitled. We cannot maintain and protect our past, present and future cultures, including tribal resources because federal law simply falls short of providing a way for us to do so for the reasons I’ve already discussed. We are not allowed to participate, meaningfully at any rate, in decision-

making on matters that affect our rights, as demonstrated by the consultation issues you've heard about and the shortcomings of federal law and regulations. Finally, federal law certainly does not require consultation to obtain "free, prior and informed consent" on matters that may affect them, or we may not be here today having this conversation.

We as indigenous peoples owe not only a duty to our ancestors and present generations, but also to our future generations. The federal government owes a duty to all tribes under the federal trust responsibility to not only act in their best interests, but to also ensure that tribes can fulfill their obligations to their peoples. In our current situation, the federal government is failing in that obligation, forcing tribes to struggle and fight to keep from failing in their obligations to their own people. This outcome is certainly not what either party should endeavor to achieve.

IV. CLOSING

In closing, I first want to thank the agencies for opening these consultation sessions to address the concerns of all tribal nations with respect to federal permitting actions. My people have fought against loss for generations. First when our homelands were taken from us, when we were evicted from our villages, and then followed by generations of struggle to survive. Now, in this contemporary era we fight against the loss of our tribal heritage and identities, the loss of our tribal and natural resources, and the loss of a future in which our next generations will thrive in a world that advances their identities as tribal people. I hope that today marks a turning point for all tribal nations where our voices are heard, our cultures respected and our histories protected, and where the federal government proudly upholds its obligations to us as sovereign nations.