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April 30, 2019

Attention: Joy Beasley
Acting Associate Director
Cultural Resources, Partnerships, and Science &
Keeper of the National Register of Historic Places
National Park Service
1849 C Street, N.W.
MS7228
Washington, D.C. 20240

*ATTN: Regulation Identifier Number 1024-AE49*

**Re: NCAI Comments in Response to National Park Service Proposal to Change Regulations Governing Federal Agency Nomination of Properties to the National Register of Historic Places Pursuant to the National Historic Preservation Act**

Acting Associate Director Beasley:

The National Congress of American Indians (NCAI) is the oldest and largest national organization made up of Alaska Native and American Indian tribal governments advocating on behalf of American Indian and Alaska Native tribal nations and their citizens. NCAI submits the following comments in response to the National Park Service's (NPS) March 1, 2019 notice of proposed rule changes entitled "National Register of Historic Places" (RIN) 1024-AE49 (Proposed Rule). NCAI also requests that the comment deadline be extended to allow for meaningful tribal consultation before the Department of the Interior (DOI) finalizes any regulatory changes.

***Background and Overview***

Protecting cultural traditions, practices, sacred spaces, and historically and archaeologically significant places, sites, and landscapes for current and future tribal citizens is a core mission of NCAI to which tribal nations are strongly committed.

NCAI has several resolutions that speak to the importance of cultural heritage protection to tribal nations.

NCAI Resolution SAC-12-044 "Support for Tribal Inclusion in National Historic Preservation Act Process" notes that sacred places are sources of spiritual renewal and represent important assets for all tribal nations. SAC-12-044 also highlights the significant role Tribal Historic Preservation Officers (THPOs) play in the management and protection of tribal cultural resources as well as the necessity of their inclusion in the preservation process.

NCAI Resolution REN-13-065 "Protection and Preservation of Culturally Significant Sites, Areas, and Landscapes" highlights Indian Country's commitment to preserve Native cultural values; manage access; and protect use of sacred sites, areas, and landscapes, including those inside reservation boundaries and within traditional territories. Specifically, REN-13-065 highlights the December 2012 "Memorandum of Understanding (MOU) Among the U.S. Department of Defense, Department of the Interior, Department of Agriculture, Department of Energy, and the Advisory Council on Historic Preservation Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites." As you know, this MOU acknowledges that "Federal land managing agencies hold in public trust a great diversity of landscapes and sites, including many culturally important sites held sacred by Indian tribes." The MOU also recognizes "such sacred sites may also be eligible for the Nation Register for Historic Places as historic properties of religious and cultural significance to Indian tribes." Moreover, Part IV of the MOU, titled "Participating Agency Agreement," commits the participating agencies to work together and consult with Indian tribes to explore "mechanisms for building tribal capacity to participate fully in consultation with Federal agencies."[1]

Lastly, NCAI Resolution PHX-16-001 "Recognition of the 50th Anniversary of the National Historic Preservation Act of 1966 (P.L. 89-665)" addresses the importance of the National Historic Preservation Act (NHPA) to tribal nations and the significant role NHPA plays in managing archeological sites, sacred places, historic buildings and structures, and the cultural landscapes important to them. Resolution PHX-16-001 acknowledges that tribal participation in historic preservation has increased as a result of: 1) the 1990 publication of National Register Bulletin 38 "Guidelines for Evaluating and Documenting Traditional Cultural Properties"[2] and 2) the 1992 amendments to NHPA which provide a mechanism for tribal nations to assume State Historic Preservation Officer (SHPO) responsibilities on tribal lands through the creation of THPO offices.[3] Resolution PHX-16-001 also highlights the importance of National Register eligibility status as a vital condition precedent to the management of on-, and importantly, off-reservation cultural resources through the Section 106 process. Resolution PHX-16-001 also notes that in spite of innumerable comments, conferences, and summits, inadequate agency engagement in government-to-government consultation remains a perennial problem.

This tribal commitment to protect cultural resources is embedded in NHPA. The Act states, "it is the general policy of the Federal Government, in cooperation with other nations and *in partnership with* States, local governments, Indian tribes…to – administer federally owner, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future

[1] Memorandum of Understanding (MOU) Among the U.S. Department of Defense, Department of the Interior, Department of Agriculture, Department of Energy, and the Advisory Council on Historic Preservation Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites, https://www.achp.gov/sites/default/files/2018-06/MoUfortheCoordinationandCollaborationfortheProtectionofIndianSacredSites2012.pdf. (last visited Apr. 30, 2019).
[2] Guidelines for Evaluating and Documenting Traditional Cultural Properties, https://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf. (last visited Apr. 30, 2019).
[3] As of April 29, 2019, there were 185 THPO offices, http://www.nathpo.org/thpos/find-a-thpo/, (last visited Apr. 30, 2019).

generations."[4] NHPA, specifically 54 U.S.C. § 306108, commonly known as "Section 106,"[5] is vital to ensuring tribal involvement in the process of evaluating the effects federal undertakings have on properties that are included *or are eligible for inclusion* on the National Register of Historic Places (NRHP) (emphasis added).[6] Importantly, the intent of NHPA is expressed in the Act's policy statement and through the Section 106 consultation and review process and its accompanying regulations.[7] Both speak to partnerships as a basis for protecting historic properties of significance.[8]

NCAI focuses the first part of its comments providing general background information on the federal trust responsibility and its implications on implementation of NHPA. The second portion of these comments focuses on the NPS decision *not* to consult with tribal partners based on the statement that "NPS has evaluated this rule under the criteria in Executive Order (EO) 13,175 and under the Department's tribal consultation policy and has determined that tribal consultation is not required because the rule will not have a substantial direct effect on federally recognized Indian tribes."[9] The last part of our comments highlight specific sections of the Proposed Rule that are concerning to tribal nations.

## 1. The Federal Government Has Fiduciary Obligations Towards Tribal Nations, Including the Protection of Tribal Cultural Resources and Heritage

Federally recognized tribal nations have a unique legal and political relationship with the United States that is defined by the U.S. Constitution, executive orders, treaties, statutes, and court decisions. The Constitution grants Congress plenary and exclusive authority to legislate on tribal affairs.[10] Supreme Court case law has long recognized that tribal nations are distinct political entities that pre-date the existence of the United States and that have retained inherent sovereignty over their lands and people since time immemorial.[11] Furthermore, the Supreme Court has determined that the United States assumed a fiduciary obligation to tribal nations in exchange for the historic taking of the immense lands and natural resources necessary to establish the United States.[12]

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[4] 54 U.S.C. § 300101(3). [emphasis added]. See also, *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 108 (1978) (stating the NHPA involves "a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance").

[5] 54 U.S.C. § 306108, "The head of any federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of and federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property."

[6] 54 U.S.C. § 300308, defining "Historic Property" to mean "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.

[7] 36 C.F.R. Part 800.

[8] Section 1 of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515. See also, Exec. Order No. 11,593, 36 Fed. Reg. 8921 (May 13, (1973) "Protection and Enhancement of the Cultural Environment".

[9] 84 Fed. Reg. 41 6996, 7000 (Mar. 1, 2019).

[10] *U.S. v. Lara*, 541 U.S. 193, 200 (2004) (explaining that "[t]his Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that [plenary and exclusive] power").

[11] *Worcester v. Georgia*, 31 U.S. 515 (1832).

[12] *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831). See also, Indian Tribal Justice Support Act of 1993, 25 U.S.C. §§ 3601-31 (stating, "The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government"); *United States v. Mitchell*, 463 U.S. 206, 225 (1983), (reiterating "the

Consequently, the United States acts as trustee for tribal rights and interests. These responsibilities include considerations to protect tribal cultural heritages when developing policies or actions, and in implementing policies and actions. EO 13,175 and agency policies requires DOI to engage in full and meaningful consultation regarding actions that may impact tribal nations. Executive Order 13,175 describes such actions as "policies that have tribal implications," stating further:

> 'Policies that have tribal implications' refers to regulations, legislative comments or proposed legislation, and other policy statements of actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.[13]

Similarly, DOI's Policy on Consultation with Indian Tribes states DOI "honors the government-to-government relationship between the United States and Indian Tribes, and complies with the Presidential Memorandum of November 5, 2009, which affirms this relationship and obligates the Department to meet the spirit and intent of EO 13,175."[14] DOI's Departmental Manual Chapter 5, Section 4, (titled 'Consultation') again reiterates this point, stating "bureaus and offices must consult with tribes and ANCSA Corporations whenever a DOI plan or action with tribal implications arises."[15]

NPS, as a federal agency, has failed to meets its obligations under EO 13,175, DOI's Policy on Consultation with Indian Tribes, and NHPA.

**2. The NPS' Claim There is No Significant Direct Effect on Federally Recognized Tribes is Inaccurate.**

Pursuant to the Administrative Procedure Act, an agency's "substantive decision must be supported by 'substantial evidence' in the administrative record."[16] NCAI requests the findings and evidence used by NPS to determine "that tribal consultation is not required [in considering the Proposed Rule] because the rule will not have a substantial direct effect on federally recognized Indian tribes."[17] NCAI submits that this determination constitutes a "substantive decision" in the rulemaking process.

Lacking that input, NPS' determination with respect to its tribal consultation duties fails to meet the legal standard for agency action under 5 U.S.C. § 706(2). NPS has not articulated a "satisfactory explanation for its action including a rational connection between the facts found and the choice

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undisputed existence of a general trust relationship between the United States and the Indian People"); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

[13] Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000) "Consultation and Coordination with Indian Tribal Governments".

[14] Department of the Interior Policy on Consultation with Indian Tribes, https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf, (last visited Apr. 30, 2019).

[15] Department of the Interior Departmental Manual, 512 DM 5 (2015), https://www.doi.gov/sites/doi.gov/files/uploads/dm_chapter_5_procedures_for_consultation_with_indian_tribes.pdf, (last visited Apr. 30, 2019).

[16] *National Lifeline Ass'n. v. FCC*, No. 18-1026, 2019 WL 1549886 (U.S. Ct. Apps. D.C., Apr. 10, 2019).

[17] *Id.* at 9.

made,"[18] thus making tribal comments during the notice and comment period, specifically comments that articulate direct effects of the Proposed Rule on tribal nations, critical to this rulemaking process. Rather, NPS offered no explanation, nor has it provided substantial evidence to support its EO 13,175 determination. Lastly, NPS failed to consider an important aspect of the problem it sought to address – the relationship between the effect of its rulemaking on determining National Register eligibility at 36 C.F.R. § 63.4(c) and tribal interests.

### a. The National Park Service Incorrectly Claims that the Proposed Rule Will Not Have a Substantial Direct Effect on Federally Recognized Indian Tribes.

NPS' decision not to consult with tribal nations is based on the claim that "NPS has evaluated this rule under the criteria in EO 13,175 and under the Department's tribal consultation policy and has determined that tribal consultation is not required because the rule will not have a substantial direct effect on federally recognized Indian tribes."[19] NPS relies on a narrow interpretation of the meaning of "substantial direct effects on one or more tribes." NCAI asserts the Proposed Rule will have substantial direct effects on tribes, specifically in how determinations of eligibility are made. For NPS to claim otherwise is misguided and counter to a reasonable understanding of federal landholdings, EO 13,715, NHPA itself, and NHPA's relationship to tribal interests.

#### i. Federal landholdings

The vast majority of federal landholdings were, relative to tribal history, considered Indian Territory somewhat recently. While tribal nations currently occupy areas defined under federal law as "Indian country,"[20] such lands are a small fraction of their traditional homelands which stretched sometimes across entire regions of the modern United States. For this reason, many parts of federal landholdings, and private land holdings as well, include areas of historic or cultural significance to tribal nations.

This reality should be considered when NPS considered whether the Proposed Rule has a substantial direct effect on tribal interests in this instance. It is also critical to understand that EO 13,175 and DOI's Policy on Consultation with Indian Tribes apply where there are such effects "on one or more Indian tribes." In other words, substantial direct effects on just one tribe is enough to trigger consultation with an Indian tribe or tribal nations.

To this end, Section 106 consultations are informative for how NPS should view its duty to consult under EO 13,175 and DOI's Consultation Policy. The Section 106 regulations state the Section 106 consultation requirement applies "regardless of the location of the historic property,"[21] and reminds officials that "Federal agencies should be aware that frequently historic properties of religious and cultural significance [to tribes] are located on ancestral, aboriginal or ceded lands."[22] This includes properties located on federal lands or managed by federal agencies.

NCAI highlights two properties that are significant to tribal nations and located on and managed by federal agencies. These examples are meant to be illustrative and by no means exhaustive.

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[18] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).
[19] *Id.* at 8.
[20] 25 U.S.C. § 1151.
[21] 36 C.F.R. § 800.2(c)(2)(ii).
[22] 36 C.F.R. § 800.2(c)(2)(ii)(D).

### 1. Cave Rock

De'ek Wadapush ("rock standing grey"), more commonly known as Cave Rock, is one of if not the most important historic place to the Washoe Tribe of Nevada and California. In 1993, shortly after the 1992 NHPA amendments providing for the creation of THPOs passed Congress, the Tribe notified land managers and federal agencies of the significance of the location. By 1996 the Forest Service Lake Tahoe Basin Management Unit (FS) determined the location was eligible for inclusion in the NRHP as a Traditional Cultural Property.[23] In 1997, the FS closed the location to climbing, a popular pastime at Cave Rock, due to its cultural and historical significance to the Tribe. Ultimately, the Section 106 consultation process, triggered by a positive determination of eligibility for listing in the National Register, meant all parties had a better understanding of the importance and complexity of the site as well as appropriate management goals and processes.[24]

### 2. Indian Boarding Schools

Between 1889 and 1960, there were 357 Indian boarding schools operating in 30 states. By 1926, approximately 83 percent of Indian school-aged children were attending boarding schools throughout the United States. General Henry Pratt, founder of the Carlisle Indian Industrial School in Pennsylvania, stated:

> A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only on this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.[25]

Indian boarding schools are places of deep, painful histories and trauma. Some, including the Carlisle school, are listed in the National Register.[26] Because of the often traumatic and long-lasting effects the Indian boarding school experience has had on survivors and their descendants, it is essential the statutory and regulatory process for determining eligibility not be limited. Tribes must be involved in discussions about appropriate methods of management of these locations. The difficult management decisions associated with a delicate and sensitive location, like an Indian boarding school, is precisely the situation 36 C.F.R. § 63.4(c) contemplated and why parties with a relationship to a historic place, let alone a federal agency, should not have a pocket veto that through inaction could delay important heritage management decisions.

Next, our comments highlight a couple areas of concern with the Proposed Rule which further necessitate an extension of the comment period to allow for meaningful tribal consultation on these matters.

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[23] *Id.* at 2.

[24] https://www.achp.gov/sites/default/files/2018-07/Cave%20Rock.pdf; see also, *The Access Fund v. U.S. Dept. of Agriculture*, 499 F.3d 1036 (9th Cir. 2007).

[25] The National Native American Boarding School Healing Coalition, https://boardingschoolhealing.org/education/us-indian-boarding-school-history/. (last visited Apr. 30, 2019).

[26] National Register of Historic Places Inventory-Nomination Form for Carlisle Indian Industrial School National Historic Landmark, https://npgallery.nps.gov/NRHP/GetAsset?assetID=5f1603a1-d20b-41a3-8158-bd65ebdca54e, (last visited Apr. 30, 2019).

### ii. Determinations of Eligibility

The proposed rule announces revisions to, among other sections, 36 C.F.R. § 63.4(c). As currently written, 36 C.F.R. § 63.4(c) provides:

> If necessary to assist in the protection of historic resources, the Keeper, upon consultation with the appropriate State Historic Preservation Officer and concerned Federal agency, if any, may determine properties to be eligible for listing in the National Register…Such determinations may be made without a specific request from the Federal agency or, in effect may reverse findings on eligibility made by a Federal agency and State Historic Preservation Officer.

Importantly, this section allows the Keeper[27] to make an independent determination of National Register eligibility without requiring a specific request to do so from a federal agency. In contrast, the Proposed Rule would amend 36 C.F.R. § 63.4(c) to limit the Keeper to making determinations of eligibility *only after* consulting with a designated preservation officer.

This change would have two important implications for tribal nations. First, it removes the Keeper's ability to disagree with a federal agency's determination of eligibility, or lack of eligibility. Additionally, the Proposed Rule removes the ability of the Keeper to settle a potential variance between federal agency, SHPO, and THPO assessments of the same property. In this connection, the Proposed Rule effectively creates a federal-agency pocket veto on the nomination process, and decreases the likelihood properties will be determined eligible for the National Register and receive protections under the NHPA.

Second, the Proposed Rule removes a potentially expeditious mechanism for determining whether or not a property is eligible for nomination to the National Register, thereby triggering the Section 106 review process.[28] As currently written, 36 C.F.R. § 63.4(c) allows the Keeper to make a determination of eligibility without having received a request for such a determination. The Proposed Rule would remove this authority. Given the sometimes lengthy formal National Register nomination process and limited resources and time constraints of projects, the existing mechanism allows for a prompt determination of eligibility. As a result, there is greater certainty regarding a project's future procedural requirements, especially in terms of formal tribal government-to-government consultation and development of mitigation and management decisions and procedures.

## 3. Conclusion

For the aforementioned reasons, NCAI opposes the Proposed Rule as currently drafted. We again urge DOI to extend the comment period for this rulemaking to allow adequate time for meaningful government-to-government consultation with tribal nations.

[27] 36 C.F.R. § 60.3(f), "The Keeper is the individual who has been delegated the authority by NPS to list properties and determine their eligibility for the National Register. The Keeper may further delegate this authority as he or she deems appropriate."

[28] 36 C.F.R. § 800.1, "Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties…"; *Id.* at 5.

In closing, NCAI thanks you for the opportunity to submit these comments and looks forward to further discussion on how NPS regulations may be revised – consistent with federal laws – to ensure tribal participation is properly integrated and tribal interests properly considered. Please contact Darren Modzelewski, NCAI Policy Counsel, at dmodzelewski@ncai.org or (202) 466-7767 with any further thoughts or questions.

Sincerely,

Jacqueline Pata
NCAI Executive Director

CC:

David Bernhardt, Secretary of the Interior
Jim Cason, Associate Deputy Secretary, Department of Interior
Tara Sweeney, Assistant Secretary, Indian Affairs
John Tahsuda, Principle Deputy Assistant Secretary, Indian Affairs