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Office of the Assistant Secretary – Indian Affairs
Attn: Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW
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Washington, DC 20240

Subject: Native American Rights Fund and the Native Village of Tyonek Comments re: *Tribal Consultation on Federal Infrastructure Decision*

Dear Principal Deputy Assistant Secretary Roberts:

On behalf of the Native Village of Tyonek (“Tyonek”), the Native American Rights Fund (“NARF”) submits these comments in support of significant federal changes to increase meaningful tribal consultation with respect to federal infrastructure decision-making. In submitting these comments, we are mindful that the opportunity to address the nation-to-nation relationship in the context of infrastructure decision-making was precipitated by the unprecedented showing of support for the Standing Rock Sioux Tribe’s opposition to the Dakota Access Pipeline (“DAPL”). The struggle there highlights the urgent need to reassess the federal government’s overall approach to permitting privately funded infrastructure projects that adversely impact Tribal interests. To avoid further violent conflict at Standing Rock, Tyonek and NARF call upon the Administration to halt all construction permits on the DAPL while it conducts a full Environmental Impact Statement (“EIS”) for the Lake Oashe crossing and deny final easement until further review of the project is guaranteed. Tyonek and NARF further call on the Administration to utilize all measures necessary to de-escalate the confrontation at Standing Rick and prevent further conflict or loss of life.

Agency Failure: an Alaska Experience – the Chuitna Coal Project SEIS process POA-2006-753

In drawing from Tyonek’s experience in opposing the development of the Chuita Coal Project, these comments are intended to supplement those of the National Congress of American Indians (“NCAI”) and comments of other Tribes to illustrate how tribal consultation has been ignored or marginalized by federal agencies in Alaska as well as else-where around the nation.

For the last 5 years, Tyonek has been attempting to consult with the United States Army Corps of Engineers (“Corps”) during its environmental review of the proposed Chuitna Mine, forty miles west of Anchorage, Alaska, along the Cook Inlet. The proposal is for an open-pit coal mine that, if constructed, would devastate the Ch’u’itnu watershed, a landscape of central cultural, historical, spiritual, and economic importance to Tyonek. NARF and Tyonek have attempted to consult with the Corps in good faith, following the Corps’s procedures. We have been deeply disappointed in and frustrated, however, by the Corps’s approach to exercising its responsibilities to provide meaningful consultation with Tyonek as it promulgates a supplemental environmental impact statement (“SEIS”).

As discussed in the attached excerpt from the journal *Environmental Practice*, in the case of the Chuitna Mine, the Corps has made a mockery of tribal consultation by:

- Allowing and directing the applicant for its permit (PacRim Coal, LP) to oversee and control the identification and evaluation of “cultural resources,” inevitably biasing this work in favor of the applicant;
- Effectively considering potential effects only on specific sites of interest to archaeologists, rather than on the Tyonek’s cultural attachments to the whole watershed;
- Consistently ignoring Tyonek’s concerns that it was forced to commission its own study at its own expense to demonstrate the watershed’s eligibility for placement on the National Register of Historic Places;
- Receiving Tyonek’s study, setting it aside and ignoring it, and then rejecting its conclusions without articulating a plausible rationale for doing so;
- Resisting requests by the Tyonek, NARF, and the Advisory Council on Historic Preservation to take the legally mandated steps necessary to verify the watershed’s eligibility for the Register;
- Similarly ignoring the Tyonek’s assertions about the potential adverse effects of the proposed mine on the watershed’s cultural significance; and
- Ignoring requests by Tyonek and NARF for meetings to discuss the matter.

The comments that follow reflect the experience of NARF and Tyonek in attempting to secure meaningful consultation with the Corps concerning the Chuitna Mine and its impact on the Ch’u’itnu watershed.

These comments are organized with reference to the general and specific questions posed by Principal Deputy Assistant Secretary of the Interior for Indian Affairs, Lawrence S. Roberts, in his

October 11, 2016, letter to tribal leaders on behalf of the Secretaries of the Interior and Defense, and the Attorney General. NARF begins with the specific questions and then address the general ones.

Specific Questions and Answers

Question 1: *“What are examples of consultations on infrastructure projects that you consider to be meaningful?”*

Answer: In our experience, those federal agencies responsible for planning and approving infrastructure projects, particularly the Corps, do not engage in meaningful consultation with Indian tribes.

Question 2: *“What factors do you consider when determining whether a consultation on an infrastructure project is meaningful?”*

Answer: We consider the following factors:

- 1. Is the consultation timely?** Is consultation initiated before key decisions are made that define the character, location, and effects of the proposed project? Usually the answer is “no.” Agencies often engage in pro-forma “consultation” *after* effectively deciding what to do. In the case of the Ch’u’itnu, while consultation has preceded decision-making, its limited nature has effectively rendered it meaningless.
- 2. Is the consultation comprehensive?** Does consultation address all relevant issues without arbitrary constraints? Does it, in particular, address all potential environmental impacts—direct, indirect, and cumulative—of the entire proposed project? The answer almost invariably is “no.” Agencies commonly resist considering many types of impacts, particularly on aspects of the environment to which tribes have cultural and spiritual attachments. The Ch’u’itnu “consultation” is deficient in this regard.
- 3. Is the consultation humane?** Are real efforts made to communicate clearly, to understand others’ points of view, to allow sufficient time for discussion of issues and achieving agreement? Again, the answer almost always is “no.” Federal agencies consistently couch their communications in esoteric, elliptical terms that frustrate and undermine consultation. The Ch’u’itnu case is a prime example.
- 4. Is the consultation respectful of tribal sovereignty, of the real-world factors that may constrain a tribe’s participation in consultation, and of tribal cultural values?** Usually the answer is “no.” Agencies routinely give lip service to tribal sovereignty, do little to respect it in practice, and they commonly ignore the cultural, economic, and other factors that complicate a tribe’s participation. This has very much been our experience in the Ch’u’itnu case.

5. **Is the consultation aimed at achieving agreement?** This is a point that is too often ignored by federal agencies; even if agreement appears unlikely, the consultation should *seek* to achieve it. The only way to be certain of avoiding agreement is not to seek it. Often, however, “consultation” appears to be regarded by agencies as merely a matter of informing tribes (often in incomprehensible language), seeking their input, and then, invariably, ignoring it.
6. **Are the government’s representatives knowledgeable about the issues involved, about tribal interests, and about the principles and methods of effective dispute resolution?** Some agencies do employ staff members with relevant training and expertise, but many do not, and often those with appropriate knowledge and training have no authority. Worse, an increasing number of federal agencies rely on self-interested applicants for their licenses and assistance to perform “consultation.” The Corps is notorious for this abrogation of its consultation responsibility, which has been blatant in the case of the Ch’u’itnu.

Question 3: *“Are there specific agencies that you find to be particularly good at consultation and what is it about how these agencies go about consultation that makes it stand out?”*

Answer: In NARF’s work on the Chuitna Mine and the Ch’u’itnu watershed, NARF has been impressed with consultation abilities of the Environmental Protection Agency (“EPA”), the National Park Service (“NPS”), the National Register of Historic Places (“NRHP”), and the Advisory Council on Historic Preservation (“ACHP”), largely because they try to make their consultations timely, comprehensive, human, respectful, and aimed at achieving agreement. Unfortunately, these agencies have little influence on the development of an Environmental Impact Statement (“EIS”) or the planning and approval of infrastructure projects. In addition, because the Corp’s Appendix C Guidance of its regulations at 33 CFR § 325 conflicts with the ACHP’s regulations found at 36 CFR 800 governing compliance with Section 106, the Corps refuses to consider direct and indirect adverse impacts to lands beyond the permit area. Consequently, impacts to lands outside the immediate permit area are ignored.

We therefore recommend that:

1. The Corps be limited in its ability to move forward with the development of an EIS or major infrastructure project when another agency calls for additional review or consultation; and
2. The Corps be required to repeal “Appendix C” and defer instead to the ACHP’s interpretation of Section 106.

Question 4: *“What can Federal agencies do to better support Tribes’ ability to provide input into infrastructure decisions?”*

Answer: Agency and government-wide planning and environmental impact assessment procedures must be revised to ensure that consultation is structured in ways that will produce positive answers to

the six questions outlined under Question 2, *supra*. Agencies and the government must train and retain staff to achieve these purposes. “Providing input,” however, is only one small part of consultation. “Input” must be *received, understood, discussed, and attended to*. Providing input is a waste of a tribe’s time if its input is ignored.

Question 5: “*What steps can Federal agencies take to ensure that Federal and non-Federal parties engage meaningfully with Tribes without overwhelming Tribes' resources?*”

Answer: This is an important technical question. Federal agencies and their applicants often bury tribes in complex paperwork that tribes cannot feasibly respond to, and then point to this paper-dump as “consultation.” We recommend the following:

1. Abandon the belief—common within the Corps—that technical experts have the answers to all questions, and that only the revelation of new data, of which the experts have not previously been aware, can justify consultation. There is little that is more insulting to tribes, and more wasteful of a tribe’s time, than responding to a tribe’s concerns by saying that they are irrelevant because they do not contain “new information”;
2. Emphasize effective communication when recruiting and training staff;
3. Give well-trained, qualified consultation oversight staff the authority to influence decision making based on the results of consultation;
4. Work with tribes to develop effective and efficient communication and consultation protocols, including ways to distinguish between proposed actions that require tribal review and those that do not;
5. Meet with tribes regularly to review communication and consultation protocols to ensure that they work and are not unduly burdensome;
6. Avoid imposing rigid, unnecessary deadlines and technical standards;
7. Avoid imposing unnecessary travel burdens and time commitments on tribes, tribal leaders, and tribal employees; and,
8. Where necessary, provide financial assistance to tribes to facilitate consultation.

General Questions and Answers

Question A: “How can Federal agencies better ensure meaningful Tribal input¹ into infrastructure-related reviews and decisions, to protect Tribal lands, resources, and treaty rights within the existing framework?”

Answers: Under the assumption that “existing framework” means the existing framework of treaties, federal laws, and regulations that pertain to the development and permitting of infrastructure projects, we offer the following:

1. Agencies should pay much closer attention than they do to the national policies set forth in Section 101 of the National Environmental Policy Act and Section 2 of the National Historic Preservation Act. These sections collectively establish that the laws’ purposes include caring for the environment on behalf of future generations. In the case of the Ch’u’itnu, it has been apparent that the Corps views NEPA and NHPA compliance as a “check-box” requirement under which it can simply require the preparation of assessments and make determinations with little consideration of their purpose. The NEPA and the NHPA require agencies to *consider the effects* of their actions, in consultation with tribes and others affected, *before making decisions*, and to *incorporate the results* of that consideration into their decision making, with a view toward advancing the national policies that justify the very existence of the laws. Most agency officials, in our experience—notably, including Corps officials—do not seem even to know that the laws *have* purposes other than to generate tedious administrative procedures and paperwork. This must be corrected.
2. Agencies and their employees at all levels should be made to understand how tribal sovereignty, tribal reserved rights, treaties, and the federal government’s trust responsibility to tribes relate to agency actions in planning and regulating infrastructure projects. All too often, tribal sovereignty and rights, and the federal government’s obligation to protect and advance tribal interests, are ignored in planning and environmental impact assessment. This must end.
3. Agencies and their employees at all levels should be forcefully and regularly reminded that *all* land in North America is traditionally Indian land, rights to which were taken from tribes under varying, but almost always unjust, circumstances; hence, tribes remain concerned about lands that may be far from their current homes, and must be consulted about infrastructure projects proposed there. In the case of the Ch’u’itnu, consultation has been confused, frustrated, and undermined by misperceptions of how contemporary land ownership affects the Tyonek’s and its members’ rights and interests.
4. Agencies should exercise flexibility in their interpretation of statutory and regulatory language—often drafted in willful or innocent ignorance of tribal rights and values—to avoid discrimination and environmental injustice. For example, in the case of the Ch’u’itnu, the

¹ Again, consultation must be understood to mean more than “providing input.” Consultation means *dialogue* aimed at achieving agreed-upon solutions.

Corps and its permit applicant, PacRim Coal, LP, have limited their consideration of impacts on “cultural aspects of heritage” (NEPA § 101(b)(4)) and “historic resources” (NHPA § 2(1)) to the consideration of direct impacts on specific locations (sites) identified as important by non-tribal archaeologists. This has allowed impacts on a wide range of significant tribal cultural resources—including culturally important water and waterways, fish, wildlife, plants, and ancestral spiritual places that have no readily apparent archaeological signatures—to go unconsidered in planning. This discriminates against the interests and values of tribes. Such narrow-minded practices must be ended.

5. Agencies need specifically to understand that traditional cultural places important to tribes and eligible for the National Register of Historic Places may include waterways like the Ch'u'itnu, expansive landscapes, the plant and animal populations that live in such waterways and landscapes, and the human activities, including subsistence and spiritual activities, that take place there. They must also understand that identifying, understanding, and managing potential impacts on such places can be done only in fair and thoughtful consultation with tribes, as required by Section 101(d)(6)(B) of the NHPA. *Only tribes* can say what places are important to tribes and how; non-tribal specialists may be able to help *interpret* what tribes value, but they themselves cannot decide what is and is not culturally significant.
6. Agencies should understand that consultation with tribes, in the words of the pertinent NHPA regulations, includes “seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them.” 36 CFR § 800.16(f). The same definition should be applied to tribal consultation generally, and agency personnel should be trained in its application. Consultation is a process of *dialogue*; it must include *seeking* tribal views in respectful and culturally appropriate ways, *discussing* those views and how they may affect infrastructure project planning, fairly *considering* such views in the course of discussion, and either *seeking agreement* on how they will be accommodated or documenting why it is not “feasible” to do so.
7. Agencies should pay much closer attention than they currently do to the requirement of NHPA Section 110(k), which prohibits issuance of a license, permit, or assistance to an applicant who has deliberately damaged a historic place with intent to avoid review of project impacts. Where damage occurs, the burden of proof must be *on the applicant* to demonstrate that it was inadvertent and not intended to frustrate agency compliance with the NHPA and the NEPA.
8. Agencies and applicants should not be allowed to use the confidentiality provisions of the NHPA (§ 304) and the Archaeological Resources Protection Act (“ARPA”) (§ 9) to keep information secret that tribes, their attorneys, and others authorized by tribes need to allow them to participate in environmental impact assessment on infrastructure projects. The confidentiality provisions were designed to protect sensitive information from release to people who were likely to misuse it, but they have come to be employed to exclude critical

cultural information from consideration during project planning. Agencies must become familiar with the controls placed by Section 304 on agency secrecy, and interpret their discretion under Section 9 similarly.

9. The NEPA and the NHPA both place responsibilities on federal agencies, but it has become common practice for agencies to rely on those proposing to build infrastructure projects to perform environmental impact assessments, including cultural assessments. This amounts to asking foxes advice about how to protect caged hens. Even the most ethical expert impact analyst is inevitably subject to influence by a client who has the power to terminate the analyst's contract. *It is essential that the U.S. government find ways to insulate impact analyses from undue influence by project sponsors.* One method might be for the government to contract with tribes to conduct impact analyses, charging project proponents for the costs of doing so. Other methods might be explored, but *something* must be done to make impact analysis honest and meaningful.

Question B: *“Where and when does the current framework present barriers to meaningful consultation? What changes to the current framework would promote these goals?”*

1. The current framework of laws and regulations governing planning and permitting infrastructure projects is unnecessarily complicated, and biased in favor of developers and their hired consultants. Regulatory procedures under the NEPA, the NHPA, the ARPA, and other laws that relate to the defining and controlling the impacts of infrastructure projects, need to be radically simplified and made more accessible to tribes. The goal should be a simple, understandable process by which impacts on *all* aspects of the environment, explicitly including all those valued by tribes *as defined by tribes*, are carefully analyzed in ways that are broadly understandable, in meaningful consultation with tribes and other interested parties. At a minimum this will require changes to the NEPA, the NHPA, the ARPA, and other regulations, but it more likely will require statutory revisions to these and other laws.
2. Although the NEPA and the NHPA clearly require that all potential environmental impacts of infrastructure projects be assessed, with the results incorporated into decision making, this simple “look before leaping” principle has been substantially lost in the welter of complicated, often self-serving, agency direction that has been issued over the years. Notable among such confusing directions are many of the Corps's procedures for the review of projects under “nationwide permits” and Appendix C to 33 CFR Part 325; but these are only among the more egregious examples. Much can be done within the existing framework to expunge such confusing and counterproductive direction, but the system itself needs thorough review and adjustment to ensure exhaustive, consultative attention to all reasonably foreseeable impacts of proposed infrastructure projects, without regard to arbitrary jurisdictional limits.

3. The current framework also needs to be revised to provide for, in a far more meaningful manner, actually *doing something* about the impacts of infrastructure project on the environment, and in particular, impacts on aspects of the environment valued by tribes. As currently written, NEPA Section 102(c) requires only preparation of a “statement” of environmental impacts, and even that need be done only where the responsible federal agency determines the impacts to be “significant.” NHPA Section 106 directs only that effects on historic properties (as determined by the responsible federal agency) be “taken into account.” As in the case of the Ch’u’itnu, the Corps and other agencies routinely use this loose language to justify doing little or nothing besides requiring the preparation of encyclopedic documents detailing (and often concealing) likely project impacts. Clearly the intent of both laws is that impacts should be identified and mitigated. This intent needs to be made explicit and attended to.
4. The current framework needs to be updated to incorporate key international principles and procedures to which the U.S. government officially subscribes, but which are now honored only in the breach. Notable among these is the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), including Article 19, which calls for states to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” The United States Department of State’s January 12, 2011, announcement of U.S. support for the UNDRIP interpreted “free, prior, and informed consent” (“FPIC”) to mean “a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.” This interpretation needs to be squared with the standard dictionary definition of “consent,” which equates it with “giving permission” (*i.e.*, being in agreement). This underscores the need for consultation to be at least *aimed* at reaching agreement (*see supra*). The U.S. government needs to give its position in this matter far greater thought, in real consultation with tribes and other indigenous groups. Adjustments are needed to the NEPA, the NHPA, the ARPA, the Endangered Species Act, the Clean Water Act, and other laws relating to the impacts of infrastructure projects on the environment, to ensure meaningful attention to the principle of FPIC. NARF is prepared to work with the government in making such adjustments.

Conclusion

In closing, Tyonek and NARF appreciate the opportunity to comment on ways to improve Federal infrastructure decision-making to uphold the United States’ trust responsibilities to Tribal Nations. We urge the Administration to take swift action to implement the recommendations submitted by Tribal Nations that address current failings of federal agencies engaged in approving federal infrastructure permits. As the situation in Standing Rock illustrates, the failings of federal agencies have culminated in great harm to Tribal people, their lands and resources, and way of life.

We urge the Administration to do everything possible to de-escalate the confrontation at Standing Rock and prevent further conflict or loss of life.

Respectfully,



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Attached:

Thomas F. King, Heather Kendall-Miller, *Indigenous Traditional Cultural Places in Environmental Impact Assessment: The Case of the Ch'u'itnu Watershed*, 18:3 ENVL. PRAC. 180 (Sept. 2016)

ENVIRONMENTAL REVIEWS AND CASE STUDIES

Indigenous Traditional Cultural Places in Environmental Impact Assessment: The Case of the Ch'u'itnu Watershed

Thomas F. King, Heather Kendall-Miller

The Ch'u'itnu (Chuit River) flows southeast out of the Chigmit Mountains into Alaska's Cook Inlet. It is undammed—a wild river that supports a healthy forest, a diversity of wildlife, and an impressive salmon spawning run. The Native Village of Tyonek lies just south of the river's mouth. The lives of the Tyonek people—also called Tubughna, a division of the Dena'ina—have been intimately intertwined with the workings of the Ch'u'itnu watershed since time immemorial. The Tubughna trap and net salmon on their way to spawning beds in the Ch'u'itnu headwaters. They hunt moose throughout the Ch'u'itnu drainage. They gather plants and harvest small game. All these vital subsistence activities are structured by Tubughna culture. There are culturally defined rules governing the harvest and sharing of salmon and the construction and maintenance of fish traps. The site of a man's first moose kill becomes a special place in his family's traditional spiritual life. The Ch'u'itnu drainage and adjacent parts of the Cook Inlet shore are simply home to the people of Tyonek Village; they have been home to them for at least a thousand years. It is hard for an outsider to fathom what this kind of time-depth means in terms of place attachment.

PacRim Coal, LLP (PacRim) proposes to construct an open-pit coal mine in the upper Ch'u'itnu drainage, shuttling the excavated coal to the mouth of the river by conveyor. On the shore of Cook Inlet it would be loaded in ships bound for China's coal-fired power plants. The project requires a permit from the U.S. Army Corps of Engineers (Corps) under Section 404 of the Clean Water Act; in deciding whether to issue the permit, the Corps must comply with Section 102(c) of the National Environmental Policy Act by performing environmental impact assessment. One aspect of the US Energy Information Administration (EIA) is the assessment of impacts on "cultural resources."

"Cultural Resources" of the Ch'u'itnu Watershed

So, what are the cultural resources of the Ch'u'itnu watershed?

The Corps' approach thus far has been to apply the term only to archaeological sites and historic buildings. The Corps and PacRim have given lip service to addressing all cultural resources important to Tubughna people—notably including the fish, wildlife, and plants vital to traditional subsistence and the cultural beliefs and practices that surround subsistence—but the only "cultural resource" studies PacRim is known to have conducted or been told by the Corps to conduct have been archaeological and building surveys. It has thus been left to the Native Village of Tyonek, at its own expense, to assemble a team of cultural anthropologists to help document Tubughna cultural resources. The team's efforts have highlighted the fact that the entire Ch'u'itnu watershed landscape, including the Cook Inlet shore southwest of the Ch'u'itnu's mouth, and offshore areas in Cook Inlet, constitute a "traditional cultural place", a type of cultural resource that may be eligible for the National Register of Historic Places and hence subject to special consideration under the National Historic Preservation Act. The Native Village's report goes on to show that the landscape is eligible for the National Register by virtue of meeting criteria published by the National Park Service.²

Having received the Village's 144-page report,³ the Corps of Engineers sat on it for almost a year and then advised the State Historic Preservation Officer that it was unable to decide whether the landscape is eligible for the Register—implying that it will treat it as not eligible. Meanwhile the Corps is processing the EIA prepared for PacRim, apparently without attention to the Native Village's expressed concerns.

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the watershed itself, with all its plants, animals, water, dirt, rocks, and human activities, and the feelings that the watershed evokes and encompasses, might be a “resource” is not something that archaeologists are often trained to grasp. So the “cultural resource” section of the impact assessment’s description of the affected environment tends to discuss only archaeological sites—and historic buildings, if any are found there.

Impacts on archaeological sites are often perceived to be easily avoided—one simply avoids disturbing the sites by shifting the project footprint a bit this way or that. If a site must be disturbed, the impact of doing so is perceived to be easily “mitigated” by paying archaeologists to excavate it. So impacts on cultural resources seldom are recognized as being significant enough by themselves to require preparation of an Environmental Impact Statement under the National Environmental Policy Act (NEPA). Nor are they seen as sufficient to demand that serious consideration be given to abandoning a project, denying a permit, or pursuing an alternative approach to meeting the project’s defined purpose.

Cultural Issues Elsewhere in EIA

Separate from its consideration of cultural resources, the Corps in the Ch’u’itnu case does acknowledge the potential for impacts on socioeconomics and subsistence—attributes whose analysis might be expected to reveal something of the intrinsic relationship among the landscape, its waters and biota, its people, and their culture. This is often the case in environmental impact assessment—cultural concerns with the environment crop up (if they crop up at all) in multiple places throughout the analysis, without coordination. However, things like socioeconomics and subsistence are usually discussed with reference to easily quantified variables like demographics, household income, formal education, and harvest size. This is all important data, but data that does nothing by itself to represent the cultural value of a place like the Ch’u’itnu watershed landscape to people like those of the Native Village of Tyonek, or to provide a basis for understanding how a project like PacRim’s proposed mine will affect it. The cultural, human value of the watershed—the major “cultural resource” involved—literally goes unconsidered. At this writing, this appears to be the case in the Corps’ Ch’u’itnu impact assessment.

Why Indigenous Groups Give Up on EIA

Confronted with such egregious cultural bias by the agency vested with authority to issue or deny a permit or approve or

disapprove a project, an indigenous group is likely to throw up its hands in despair. And when the group tells the environmental impact analysts—if it gets the chance—that the watershed (or river, bay, mountain, desert valley, or other kind of cultural landscape) is vital to its existence, it is often reduced to using words like “sacred,” which while accurate enough, leave impact analysts rolling their eyes. “Sacred,” like “historic,” is a Euroamerican abstraction that does a poor job of expressing indigenous values, but it tends to be understood by impact assessment specialists simply to mean “inviolable.” Since a resource that is truly inviolable tends to be a project-stopper, analysts often offer tortuous technical arguments to prove that the abstraction does not apply—that the resource is not, technically, “sacred” or “historic.” When such insulting, demeaning arguments are advanced, whatever communication there may have been with the community breaks down, and the indigenous group experiences another affront to its cultural integrity. Impact assessment proceeds with reference only to Euroamerican perceptions of the environment, and whatever the indigenous group valued about the environment is compromised.

Conclusions

While it is possible to ascribe dark motives to agencies like the Corps of Engineers, companies like PacRim, and their consultants, in the Ch’u’itnu case it may well be that their representatives simply do not know what to make of what the Native Village of Tyonek has told them. Government agencies and environmental consultants routinely talk and write about cultural sensitivity, environmental justice, and respect for traditional ecological knowledge, but seldom seem able to translate their rhetoric into reality—quite possibly because they simply do not know how.

The answer to the “how” question, however, is not complicated. One simply needs to approach the potentially affected community with respect, and inquire about what is important to its people in the environment—without assuming that the important thing must be an archaeological site or an old building or must be no bigger than a set number of acres or square meters. This may require the assistance of experts in cross-cultural communication, or it may not; the critical things it demands are an open mind and respect for a community’s traditional knowledge, beliefs, and modes of communication and decision-making.

Places like the Ch’u’itnu watershed are of absolutely central cultural importance to indigenous groups like the Tubughna people of the Native Village of Tyonek. The potential impacts of proposed projects on such places are simply not being

The Corps' lassitude will be resolved, in the courts if not otherwise, but let's examine the underlying issue. Why is the whole Ch'u'itnu watershed landscape a traditional cultural place? What makes it eligible for the National Register? And since the mine's impact on it clearly should be considered in the environmental impact assessment, why is the Corps having such trouble considering them?

A traditional cultural place, according to the 1990 federal guideline that defined the term, is a place whose significance is derived from "its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community."⁴ Such a place can be eligible for the National Register if it meets any one of four criteria spelled out in National Park Service regulation.⁵ The Village's report makes it clear that the Ch'u'itnu landscape is intimately associated with cultural practices and beliefs that are rooted in at least a thousand years of Dena'ina history, and that continue today as vital aspects of the community's sociocultural identity. It also shows that the landscape meets at least National Register Criterion "a"—"association with events that have made a significant contribution to the broad patterns of our history."⁶ That association is with the millennium-old lifeways, subsistence practices, and spiritual beliefs of the Tyonek people, all of which continue to function today, and all of which the people of the Village value as aspects of their identity. The landscape is much more than a mere collection of sites recognizable by archaeologists. Its significance lies in the relationships among the river and its tributaries, their salmon and other fish, their plants, wildlife and marine mammals, their air and water quality, their auditory and even olfactory qualities, and the ancient and ongoing Tubughna cultural practices and beliefs with which they all are invested.

The Corps has not challenged the Village's assertions; it has simply said that it cannot determine whether the landscape meets the National Register criteria and hence, implicitly, that it intends to set the Village's report aside and ignore it. It has also ignored the recommendation of the Advisory Council on Historic Preservation⁷ that it take the matter to the Keeper of the National Register in the Department of the Interior, who by law is the arbiter of National Register eligibility.

Addressing the Effects of a Project on Cultural Resources

When a National Register eligible place will be affected by a project, the regulations of the Advisory Council require that

the responsible federal agency apply "criteria of adverse effect" found in the Advisory Council's regulations.⁸ If the effect is found to be adverse, the agency goes on to consult with concerned parties about ways to resolve the adversity. On behalf of the Native Village of Tyonek, the Native American Rights Fund has documented the (obvious) fact that the proposed mine will have adverse effects on the Ch'u'itnu landscape's cultural attributes—by excavating the river's headwaters where salmon spawn, disrupting salmon runs, driving away wildlife, introducing industrial operations into a now-pristine natural environment, and destroying the places where Tyonek people fish, hunt, gather, and carry out spiritual activities⁹—but the Corps has ignored this documentation just as it has the eligibility study. Meanwhile, however, it continues to move forward with the development of the EIA as though the watershed's cultural significance and the proposed mine's effects on it did not exist.

Generalizing on the Ch'u'itnu Experience

However the PacRim case works out, the Ch'u'itnu landscape is a good example of the kind of cultural resource that is often of most importance to an indigenous community, and the kind that seems most difficult for federal agencies and EIA practitioners to understand. The watershed landscape, like many other such traditional cultural places, has at least the following key attributes:

1. It is a natural area, an expansive landscape of river, tributary streams, hills, valleys, and seacoast;
2. Its animals and plants are critical to its cultural significance; this may or may not have anything to do with their significance in the eyes of wildlife biologists, fisheries biologists, or endangered species specialists; and
3. It is fundamental to the identity of the people who value it; they may literally be unable to imagine themselves as themselves if it is destroyed or substantially altered.

These attributes are intrinsic to the place, and cannot be defined away, but defining them out of existence is exactly what contemporary environmental impact assessment too often does.

"Cultural resources" are usually described in environmental documents by archaeologists, who naturally focus their attention on the kinds of sites and artifacts they understand, and in which they are interested. Old living sites, campsites, and cemeteries are things that archaeologists can recognize, and to which they can relate. A watershed or other landscape may be understood as the environmental context of a group of sites, but the sites themselves—tightly defined specific locations—are the archaeologist's "resources." That

analyzed by the agencies legally responsible for doing so. Whether by accident or design, the structure and practice of environmental impact assessment discriminates against considering and addressing impacts on the valued environment of people like the Tubughna. If the United States is to have a responsible, unbiased, just system for ascertaining and addressing the environmental impacts of change, a new paradigm is in order.

Notes

- 1 National Register Bulletin 38, cited below, calls such places “traditional cultural properties,” but some indigenous groups and others object to “property” as suggesting commodification, and contemporary usage favors “places.”
- 2 36 CFR § 60.4.
- 3 Boraas, A.S., R.T. Stanek, D.R. Reger, and T.F. King. 2015. *The Ch'u'itnu Traditional Cultural Landscape: A District Eligible for the National Register of Historic Places*. Native American Rights Fund for Native

Village of Tyonek. Report submitted to the U.S. Army Corps of Engineers, the Alaska State Historic Preservation Officer, and others.

- 4 National Register of Historic Places. 1990. *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, National Register Bulletin 38, National Park Service. Available at <http://www.nps.gov/nr/publications/bulletins/nrb38/> (accessed January 24, 2016).
- 5 National Register of Historic Places Program. 1966. National Register Federal Program Regulations, 36 CFR 60.4. Available at <http://www.nps.gov/nr/regulations.htm#60.4> (accessed January 16, 2016).
- 6 See 36 CFR 60.4(a).
- 7 The independent US government agency charged with overseeing federal agency compliance with Section 106 of the National Historic Preservation Act.
- 8 See 36 CFR 800.5.
- 9 Letter of April 3, 2015 to the U.S. Army Corps of Engineers.

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