PECHANGA INDIAN RESERVATION
Temecula Band of Luiseño Mission Indians

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VIA Electronic Mail
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Mr. Lawrence Roberts
Principal Deputy Assistant Secretary – Indian Affairs
Office of Regulatory Affairs and Collaborative Action
1849 C Street, NW, MS 3642
Washington, DC 20240

RE: Pechanga Band of Luiseño Indians Comments on Federal Decision-Making on Infrastructure Projects

Dear Assistant Secretary Roberts:

These comments are submitted on behalf of the Pechanga Band of Luiseño Indians, a federally-recognized and sovereign Indian Nation. We appreciate the opportunity to provide our comments and concerns, which supplement our oral comments delivered on November 15, 2016 during the consultation session held at Mystic Lake, Minnesota.

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.

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 our 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 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 the *Pechaángayam*.

While the Pechanga Band has a Cultural Resource Department dedicated to the return, preservation, and protection of our tribal ancestors and their cultural belongings, the *Payómkawichum*, Luiseño People, continue to confront daily threats to our ancestors, tribal resources, and cultural heritage. We submit these comments 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. We hope our comments regarding the current framework governing federal agency permitting actions provide some possible solutions for the future to stop these threats and reduce the loss of our tribal resources – both cultural and natural.

I. REVIEW OF CONSULTATION AND FEDERAL DECISION-MAKING PROCESS CANNOT BE LIMITED ONLY TO "INFRASTRUCTURE" PROJECTS

Almost all federal agency decisions affect tribes and their resources (cultural and natural) because even those lands that are not part of reservations are still part of the aboriginal territories of this country's first peoples. Knowing that tribal resources may be impacted by a federal decision – whether on a large or small undertaking – we believe that the scope of review proposed by the agencies' "Framing Paper" is much too narrow. According to that document, the agencies intend these consultation sessions and comments to focus on federal agency permitting actions on infrastructure projects, suggesting that this process is only to review actions on projects with a large footprint – such as the Dakota Access Pipeline. This approach fails to consider whether the federal permitting process as a whole is flawed with respect to considerations of tribal concerns. As demonstrated by the examples provided in our oral testimony, the process often results in irreparable damage and impacts to tribal resources no matter the size of a project.

While large infrastructure projects do indeed pose impacts on a massive scale, we cannot overlook the fact that agency actions on smaller projects likewise have substantial 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). In our oral comments we spoke about 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, a 1,000 year old oak tree (making it one of the oldest living oak trees in the Western United States). We would refer you to those comments for additional information so as to not repeat our prior testimony, which is already part of the record.

In addition to large-scale projects like the Valley Rainbow Interconnect, Luiseño cultural resources and sacred places are threatened and destroyed by smaller projects, largely residential or commercial in nature. In our oral comments, we provided one example that will destroy a traditional cultural property (TCP) 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, and contains human remains. Since this example was addressed in our oral comments, we again refer you to that testimony for additional details. The main point we hope to make with this illustration is the similarity these non-infrastructure projects have with larger infrastructure projects. The Army Corps of Engineers (Corps or ACOE) 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 already impacted multiple human remains and will forever change the landscape that comprises the cultural importance of this area to the *Payómkawichum*. Thus, the approval of the permit provides for widespread impacts to these resources that the ACOE is "allowed" to ignore because it believes it has only a limited review area.

Federal permitting actions are not just a concern on large-scale infrastructure projects. As demonstrated above and in our oral comments, tribes face the same issues on smaller-scale projects. The *Tomqav* example is only one of many that our 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 all actions requiring federal agency approval or oversight, regardless of the size and scope of the undertaking.

II. 33 C.F.R. 325: Appendix C – Procedures for the Protection of Historic Properties must be Repealed

The National Historic Preservation Act (NHPA) provides the Advisory Council on Historic Properties (the Council) authority to promulgate regulations to implement the law. The heart of the NHPA is Section 106, which governs the process under which federal agencies must consult with federally-recognized Indian tribes regarding the presence of, and impacts to, "historic properties" – i.e., tribal resources. The Council promulgated regulations, found at 36 CFR Part 800, which lays out the particulars of the Section 106 process and compliance with the NHPA. Unfortunately, the Army Corps has stepped beyond its authority and "promulgated" its own regulations, which are in direct conflict with the NHPA, and its implementing regulations.

The Council has long argued that Appendix C was developed without legal authority and that in so developing the appendix, the Corps acted outside its scope of authority. Appendix C is in direct conflict with both the NHPA and the regulations promulgated by the Council and must be repealed. In fact, in *Colorado River Indian Tribes v. Marsh* (1985) 605 F. Supp. 1425, 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. The court noted that,

> Under [Appendix C], the Corps' responsibility to protect properties that may qualify for inclusion in the National Register was limited to the "permit area," while the Corps' responsibility to protect properties that have been listed in or determined eligible for inclusion in the National Register by the Secretary of Interior extended to the "affected area." By definition, the "affected area," which includes that area where both direct and indirect effects of the proposed work or structure could reasonably be expected to occur, encompasses a larger area than the "permit area"... Properties that may qualify for inclusion are treated differently from properties listed in or determined eligible for the National Register. Under a literal reading of [Appendix C], the Corps would not be responsible for a property that was of immense archeological and historical significance and was within the "affected area" but outside the "permit area," if that property was not listed in or determined eligible for the National Register... *The distinction between properties and differing scopes of responsibility is at odds with NHPA and its regulation.*" *Colorado River Indian Tribes*, 605 F. Supp. at 1437 (Emphasis Added).

Appendix C is not a legal counterpart to the regulations properly promulgated by the Council, and further, ACOE does not have authority to promulgate such regulations. In trying to justify its action, ACOE has said that the Office of Management and Budget (OMB) approved the Appendix, suggesting that somehow the Corps convinced OMB that it had authority to promulgate the Appendix in the first instance. Unfortunately, Appendix C is an end run around the regulations and has worked to allow the Corps to avoid its full responsibilities under the NHPA. The regulations require the identification of historic properties and consideration of an undertaking's effects within an area or areas of potential effects (APE). Appendix C, however, limits the identification and effect consideration to a "permit area" that largely represents only the area of the Corps' jurisdiction. This ignores areas where direct and indirect effects will occur, in addition to the cumulative effects that a permit approval may have on a given tribal resource. As the court stated in *Colorado River Indian Tribes*, this result is at odds with both the NHPA and its implementing regulations.

The regulations and Section 106 give equal consideration to places listed on the National Register and unlisted places that meet the National Register criteria. Part of the responsible federal agency's duty is to figure out if unevaluated places meet the criteria, in consultation with the State Historic Preservation Officer (SHPO) and tribes. Appendix C, in contrast, only addresses "designated historic properties," a term that seems to include only listed places and those where both the Corps and the SHPO agree meet the register criteria. This allows the Corps to ignore unlisted places and to act as a passive participant; meaning that if no one else, for example, a tribe, demonstrates the significance of the place, the Corps does not have to look any further to identify potential historic

properties covered by the NHPA. Unfortunately, in our experience, even when we do demonstrate the presence and significance of a given tribal resource, the Corps often refuses to consider the potential resource because it is not "designated," or we are told that ACOE cannot consider the larger ramifications of their permit approval (because they are limited to the "permit area" only) even though impacts will occur to a tribal resource as a direct result of the action.

Section 106 and its regulations charges federal agencies with implementing its requirements. Appendix C, however, is different. Under Appendix C, the Corps publishes a notice that an application has been filed and allows interested parties to "react." In preparing the permit notice, the onus is on the applicant to gather certain data regarding the presence of historic properties. Thus, it is left to the applicant's consultants to determine whether tribal resources may be affected and it largely ignores tribal interests as consultation does not occur. In fact, this process is a complete abdication of the ***Corps'*** responsibility – as an arm of the federal government – to consult with affected tribes. The Corps cannot delegate its mandate to consult, on a government-to-government basis with Indian tribes, to a consultant. This is not only a direct violation of Section 106, but also of the federal trust responsibility, Executive Order 13175, and the Presidential Memorandum on Tribal Consultation. In our experience, despite the fact that the regulations impose consultation mandates on the Corps, the ACOE uses Appendix C as a shield to avoid or minimize consultation and the identification of historic properties and impacts thereto.

In summary, Appendix C is in direct conflict with both the NHPA and the implementing regulations, resulting in the destruction of cultural resources, sometimes with limited or no tribal consultation. As such, it is imperative that Appendix C be expressly repealed to avoid any further violations of the NHPA, federal regulations, and the government's trust responsibility.

III. NHPA IS INADEQUATE FOR TRIBAL RESOURCE 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 emphasis 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. We 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 and federal law.

As noted in our oral comments, tribes and federal agencies are at a juncture where together we can change the future of federal agency actions and their impacts to tribal resources. 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.

First, the Pechanga Band believes it is time for new legislation that can take into consideration the unique nature of tribal resources and the special trust relationship between tribes and the federal

government. The current rubric of historic preservation simply does not fit with the distinctive character of tribal cultural and natural resources, and it is time to consider a new approach. If new legislation is not the answer, then it is imperative that the NHPA be amended to create a new framework that can appropriately consider tribal resources and the concerns of tribal nations vis-à-vis federal agency actions. Below we offer some thoughts on new legislation, in addition to possible solutions to amend existing federal law to address the shortcomings of the NHPA as it exists today.

A. New Legislation

Pechanga believes 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. We know this is a necessity from experience – after years of battling losses of our cultural heritage under the California Environmental Quality Act (CEQA), Pechanga sponsored legislation that made sweeping changes to CEQA, creating a new framework under which tribal cultural resources are assessed and addressed during the state process. Through these efforts, Pechanga recognizes that tribal resources deserve their own protection under a legal structure that can accommodate the unique cultures and views of tribes, in addition to the processing of tribal information.

The framework upon which the NHPA is built was not meant to incorporate tribal sources of information. The NHPA is best used to address resources with values that can be compared against other types of similar properties (such as buildings and bridges), 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 constructed to accommodate tribal sources of value and information. 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 we can use to consider how best to address federal agency permitting actions and their impacts to tribal resources. One of the most illustrative examples that parallels our discussion today is the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). 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. NAGPRA provides a great illustration of the challenge tribes and federal agencies face under the current NHPA framework. First, NAGPRA was absolutely necessary because no other federal law could adequately address the unique cultural values related to the items covered under that law. Both the Antiquities Act of 1906 and the Archaeological Resources Protection Act of 1979 for example, address "archaeological items," which are very different from human remains and the other items that fall under NAGPRA's protection. NAGPRA was essential to address tribal concerns about the return of their ancestors and their burial items, sacred items, and objects of cultural patrimony.

No other existing federal law could adequately identify, protect, and return these items to their communities, thus necessitating a change in the existing federal framework to more appropriately consider these items.

The other component of NAGPRA that is helpful for our discussion is that the law contains a universe of appropriate sources of information for proving cultural affiliation to the items covered by the law. These sources of data 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 tribal 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. Pechanga has encountered this disconnect between what the NHPA anticipates as "evidence" of historic properties and what tribal information is provided to describe the presence of tribal resources in many of our Section 106 consultations. Crafting new legislation that helps define the appropriate sources of information regarding tribal resources will assist tribes in preserving their invaluable resources, and also assist the federal agency in complying with the law and with their mandates under the federal trust responsibility.

An additional example of the necessity of new legislation focused on tribal resources is found in California. The California Environmental Quality Act (CEQA) was passed in 1970 and governs the environmental review of covered projects. Under the law, an agency making a discretionary decision (i.e., approving a residential development or commercial building) must assess the project's impacts in a variety of environmental areas, such as traffic, air, and biological and archaeological resources. Until recently, tribal resources were addressed under "archaeological" resources and for over 40 years, tribes have been pitted against archaeological consultants in describing their cultural resources and their inherent tribal values. The law simply was not designed to use tribal information in assessing these resources and the impacts thereto, and agencies had a difficult time when faced with tribal resources that could not be described in terms of scientific value.

However, that changed in September 2014 when CEQA was amended (through Assembly Bill 52) specifically because the original iteration of the law was inadequate to address tribal cultural resources and the values attributed by tribes to such resources. As such, the law now has four very significant changes – among others – that are most relevant for our comments on this issue. First, tribes are recognized as experts in their cultural history, placing their information on the same level as those of scientists and academics. This reduces – and we hope in time, will eliminate – the battle between tribes and scientists that has thus far governed our experience in protecting our cultural resources under state law.

Second, tribal cultural resources (which are defined to include "intangible" resources like cultural landscapes) are now recognized as distinct from archaeological resources and must be separately analyzed under the law. In addition, these resources must include the tribal values attributed to them by the tribe. This means it is essential that an agency 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. Failing to do so is a fatal flaw in the environmental document and subjects the agency to potential liability.

The fourth major change in state law was to build in a consultation mandate under which agencies must consult, on a government-to-government basis, with tribes on the presence of tribal cultural resources and the potential impacts thereto by a given project. This means that the agency must start talking with the tribe prior to determining the level of environmental review necessary (in California, the highest level of review is via an Environmental Impact Report, and the lowest level is a negative declaration) so that a proper analysis of tribal cultural resources and impacts can be completed. The law also requires additional consultation on certain substantive issues such as avoidance of resources, mitigation of impacts to resources, and other considerations. It is key to note that prior to AB 52, tribes in California were treated as "members of the public" for comment purposes, having little to no direct say in what resources may be present and the impacts that a given project may have to them. Under federal law, tribes are, generally, treated as sovereign governments, something we knew in California was key to having a voice in the treatment of our cultural heritage.

With those examples in mind, the Pechanga Band has a few suggestions for what new legislation may contain to address the shortcomings of current federal law and regulation. First, we suggest looking at a consultation structure wherein tribes must be consulted at the earliest possible stage of an undertaking. If we look to AB 52's consultation structure for guidance, we can see the importance of bringing in tribes at the beginning of an undertaking review, and to continue consultation as the project progresses. Consultation cannot be just a "box-checking" exercise, but must be meaningful, with respect for each party's sovereignty. Consultation not only is important to understand tribal concerns about impacts to cultural and natural resources, but to also identify tribal resources that may be impacted and which may be hard to assess with the "naked eye." Tribes hold the knowledge of their histories and identities and federal law must recognize the importance of the information that tribes can provide.

Part of the new legislation must require agencies to assess impacts to tribal resources, using tribal values and information. As we see with Appendix C, agencies use outside archaeological consultants to identify and describe tribal resources. Unfortunately, archaeologists are limited by their discipline to those things with scientific values – tribal values are not scientific values. Tribes are the most knowledgeable about their cultural histories and tribal cultural resources (villages, burials, ceremonial sites), yet their expertise is ignored. There is a strong tendency to accept "scientific" views from archaeologists regarding the presence of cultural resources, while ignoring tribal information about such resources. Having legislation that requires and accepts tribal information on the same level as "scientific" information is essential to addressing the shortcomings in the current federal framework. Another problem we have encountered when trying to describe tribal resources to federal agencies is that tribal information is often dismissed as not "citable" or "verifiable." Federal law and regulations must acknowledge that tribal songs, stories, customs, and traditions are just as valid sources of information as an archaeological report, and we believe even more so when looking at the tribal values of such resources.

One additional issue we see is the ability of an applicant to drive the permitting process. In our experience, this has meant that the federal agency is unable to meet the mandates of the NHPA and implementing regulations to the extent the law requires. We have had applicants threaten to "force" the ACOE, for example, to find that a resource did not exist or did not meet the eligibility criteria for the National Register. We have also experienced the APE or "permit area" being driven by an applicant, putting ACOE in the position of failing to protect tribal resources/historic properties as the law requires. We believe that regulations implementing the new law must provide agencies the ability to meet the mandates of federal law and not be subject to the pressure of the applicant. One issue that must be addressed is the use of an applicant's consultant to determine the APE, the presence or absence of historic properties (tribal resources), and the eligibility of properties. Folding into the law and regulations the tribal values and requirements for tribal input and information will also assist with addressing this concern because tribes will be, at a minimum, on equal footing with the consultant. However, we believe the government must do more than just provide an equal playing field. Tribes are sovereign nations, to which the government owes a trust responsibility. The law should treat tribes as such and our information and concerns should rise above those of the applicant or their consultant.

Any new law must not just recognize tribal expertise and information as valid, but must require that such values be incorporated into the agency's environmental review and resultant document. Again, if we look to AB 52, it mandates that a new section, Tribal Cultural Resources, be included in any environmental document, and which must include the tribal values attributed to the resources that may be impacted by the project. These values can only be obtained from the tribal community that holds them, which in turn necessitates the tribes' involvement in the drafting of environmental documents that reflect these values. Environmental documents that address impacts to tribal resources must, as a matter of respect and fulfilment of the trust responsibility, include the tribe's voice as part of the analysis.

One other issue that we face in California is that a project can be approved through the state environmental process, and when it gets to the federal agency for permitting, usually ACOE, we are told that their role is limited. One issue they identify is that the project has been approved by the lead agency under state law, thus they cannot take any action that may interfere with the decision of that agency. Another part of the problem is Appendix C, which allows the Corps to avoid looking past the "hole in the mud" and assessing the direct and indirect effects of its approvals. State laws should not be allowed to serve as a discharge of federal obligations. The regulations should be updated to require joint state/federal review when there will be federal involvement as it is usually known at the beginning of a project what federal permits will be required. In California, state law "suggests" that this be the correct approach, but unfortunately, it rarely happens in that sequence. We are hopeful that more robust language in federal law would help in our efforts to enjoy concurrent state and federal review to ensure maximum protection of our tribal resources.

One final thought on new legislation is to require the development of guidance for agencies on identifying tribal resources, such as Bulletin 38 (TCPs) and make it binding on agencies, rather

than something they could potentially ignore. Identification and determination of impacts to historic properties should not just focus on the tangible, but also recognize and analyze impacts to intangible resources. Given the difficulty for those who are not members of the community that attributes value to these resources, binding guidance on how to make such determinations will assist greatly in tribes' efforts to protect and preserve their tribal resources.

Overall, if we look to the intent of these proposed legislative changes, we can see how preservation laws enacted decades ago are simply inadequate to address tribal cultural values and resources in our contemporary world, informing us all that it is time to look towards a better option to ensure tribal resources are identified and protected. Even if new legislation is not a viable option, these changes could be made to existing federal law, much like California did with AB 52. However, it is our position that new legislation makes the most sense and would provide a cleaner and more workable framework moving forward.

B. Reforming the NHPA

Even though Pechanga believes that new legislation would be the best solution, we also want to provide potential solutions under the existing framework. Below are several ideas on how to amend the NHPA to address the issues covered in both these written comments and our oral comments, and how we might consider incorporating tribal values in the identification and presence of and assessment of impacts to tribal resources.

First, as we did through AB 52, a new a category must be added to the NHPA to separate traditional "historic properties" from the unique nature of tribal resources. Separating out these two kinds of resources would ensure that each is treated according to their inherent values, and would work toward alleviating the shortcomings that we see in existing federal law. Another key amendment would be to recognize tribes as experts with respect to their culture and resources. Ways in which the law could be amended to achieve this outcome are outlined above in our comments regarding potential new legislation. Given the difficulties that federal agencies have in identifying and assessing tribal resources using proper sources of tribal information, we suggest the law be amended to create a universe of resources from which information can and must be gathered, 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.

Part of folding in tribal values and information is creating stronger consultation mandates. To that end, we suggest amending Section 106 to more appropriately include tribal consultation at specific junctures in the process, and to define what proper consultation is under the law. Again, we could look to the examples of how the state of California achieved this through AB 52 for guidance on how this might be addressed, in addition to focused consultation sessions with tribes.

Further, as we have already argued, Appendix C must be repealed and the law should be clarified as to which federal agency has authority to promulgate binding implementing regulations. We would also suggest amendments that address the joint state/federal environmental review to avoid arguments that a federal agency is constrained by an approved project pursuant to state law. We have already described the issues we face in California – and there may be other states in which

this is an issue, too – and we would refer you to those suggestions for additional insight on how to address this conflict.

Finally, the regulations implementing the NHPA have not been addressed since 2004, with more substantive revisions having been done over 30 years ago. It is past time for the Council to reopen and review the existing regulations, at a minimum, to address tribal consultation concerns. Additionally, the regulations must be changed to expressly reject the Army Corps' Appendix C and any similar attempts by federal agencies to limit their obligations under the NHPA and Section 106. Tribal consultation needs to be strengthened in the regulations. Government-to-government consultation with tribal leaders and federal officials with the authority to take action must be defined. Consultation must occur early and often, before applicants determine their development plans, in order to avoid impacting cultural resources. We know from experience that once an applicant has invested time and money in a design, it is nearly impossible to achieve redesign to avoid impacts to tribal resources. In addition, consultation must happen prior to the preparation of an Environmental Assessment and/or Environmental Impact Statement as the presence of cultural resources should determine the level of environmental review. Additional amendments to the regulations would include folding in the tribal values and incorporating tribal information as discussed above. Any changes to the existing regulations should be geared toward addressing the gaps in federal law that result in the loss of tribal resources.

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. We would welcome the opportunity to provide additional substantive comments and suggestions in more focused sessions so that we can address our concerns in a manner that respects each other's sovereignty and the federal trust responsibility.

IV. 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, and 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.

First, Article 11 of 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, technologies and visual and performing arts, and literature. Current law does not foster this ideal because as it exists today, the framework is inadequate to consider the tribal values of resources that are the "manifestations of their cultures." This results all too often in the destruction of tribal resources, making it impossible for tribes to exercise this basic human right.

Article 12 provides the right to maintain, protect, and have access in privacy to their religious and cultural sites. Current law also does not allow for such considerations since landscapes and "non-

tangible" resources are difficult for agencies to understand and document, and thus, to protect. Further, in our experience, the applicant has too much ability to drive the process, resulting in inadequate Section 106 consultation, and the improper evaluation of historic properties and their eligibility, in addition to a minimization of tribal concerns. The law and regulations should incorporate the consideration of access to religious and cultural sites when taking action on an undertaking. There are creative ways to accommodate an applicant's needs along with tribal values and access to sites of religious and cultural importance, but without legal guidance, tribes are unlikely to see the benefits of such creative planning.

The UNDRIP protects the right of indigenous peoples to participate in decision-making in matters that would affect their rights, through their chosen representatives, in accordance with their own procedures (Article 18). In our experience, we face resistance from federal agencies regarding tribal processes. Each tribe has a unique process for making decisions that affect tribal resources and those processes can take time. We have worked with some applicants who expect decisions in a matter of hours, not understanding that some decisions require approval from the Band's membership – a process that can take a minimum of 30 days depending on the timing. Tribes do not function as corporations and we believe it is the agency's responsibility to educate applicants on the differences between tribes and ordinary businesses. Federal law should build in appropriate timelines that can accommodate tribal processes, while providing the applicant and federal agency with the ability to complete the process. We also believe that developing consultation timeframes that bring the tribes in at the earliest possible stage will help alleviate the tension we experience from an applicant who wants their permit immediately, but yet the agency must complete consultation under Section 106 and any resultant mitigation measures arising from that consultation.

One of the key provisions of the UNDRIP 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). As tribes, we recognize the reality that many of our cultural and sacred sites are located on lands no longer under our jurisdiction. In Pechanga's case, much of our reserved ancestral lands were taken from us by the failure to ratify the Treaty of Temecula, and as a result, our fight to preserve our cultural heritage largely occurs off our reservation. We know this to be the contemporary circumstances of many tribes and therefore, the idea of "free, prior and informed consent" is that much more important. At the heart of this idea is the ability of tribes to be heard by federal agencies on decisions that affect them, not in a manner that serves only to ensure minimal compliance with the law, but in a way that is meaningful, honest, and respectful. If tribes are part of the process early on, the potential to obtain free, prior, and informed consent on issues that affect them is a much more likely outcome. There is no better example of this concept than that which is happening with the Dakota Access Pipeline – the very impetus for why we are having this conversation and submitting these comments. We urge the agencies participating in this endeavor to look at the DAPL and to learn from the mistakes made during the process and see what could have been done differently to avoid the travesty we are witnessing today.

Article 24 protects the right of indigenous peoples to their traditional medicines, including the conservation of medicinal plants, animals and minerals. Unfortunately, in our experience the ability to access these resources is restricted by the agency's inability to understand the nature of

these resources to tribes. Gathering areas are destroyed often and arguing that they are part of a cultural landscape has been difficult. We are engaged in a project right now with ACOE where the "permit area" will affect a traditional medicinal and food-gathering area. In identifying this as a landscape, we are arguing that this area not only provided food and medicine prehistorically, but that we have informants in the historic era that also used to gather here. When we look at this place, we see how it fits on the "indigenous planning" landscape, if you will. Our villages were not placed via happenstance – they were founded in areas where access to food, water and medicine was easy, and where conditions lent themselves to security and safety. The area we are talking about in this example is akin to the "grocery store" in contemporary society. It is vitally important to the landscape because of its role in feeding and healing the *Payómkawichum.* Due to the lack of guidance on how to describe this area, the Corps is struggling with understanding how it is a landscape to the Pechanga people, and thus, whether it is a "historic property" under the NHPA. Having proper guidance in federal law would assist the agency in learning about landscapes and how tribal people view them and their importance.

As was described in our oral comments, the most holy of places for the *Payómkawichum* – the site of our creation – was under threat by a mining company only a few short years ago. 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. In the fight to save our creation area, we were confronted with a "battle of the experts" in defining the nature of this place to Pechanga. The applicant hired a non-Indian consultant to rebut the *Payómkawichum* creation story and argue that the mountain we say is holy really is not. Had Pechanga not protected this site with every resource available to us, we would have lost that connection to the place where we were born as a people, where our identity as *Payómkawichum* is rooted. Our children would never know what this place looks like; they would never be able to experience the true nature of this place, and how it defines them as indigenous people, a loss that is indescribable. While this project was not the subject of federal agency action, the experience demonstrates many of the same issues we do face with federal actions. What this example shows is that federal law must protect the rights of indigenous peoples to maintain these spiritual relationships with their traditional lands and other resources. Proper consultation, consideration of tribal information, and acknowledgement of tribal values will help ensure that this fundamental right of tribal peoples is protected.

We also want to point to Article 31, which provides the right to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions. Further, this article acknowledges that indigenous people also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. Current law makes it nearly impossible to protect and develop cultural heritage and knowledge because tribal concerns are often not considered, so such information is lost. Tribes are also not able to maintain, control, protect, or develop intellectual property over their heritage and knowledge because of the historical misappropriation of such information by academics and scientists and the destruction of resources, and loss of language and knowledge through genocide.

Finally, we want to look at Article 40, which protects our right to access to and prompt decisions through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Current law is not just or fair, particularly as related to conflicts and disputes regarding federal permitting and construction actions for all the reasons contained in these comments and those we provided on November 15th. If a tribe disagrees with the determination regarding a historic property or the impacts thereto, there is no true recourse for tribes. The agency simply moves ahead with approval of the permit, and the applicant can begin constructing their project. Lawsuits almost always fail because of the lack of teeth in federal law, and further, tribes should not be required to seek remedies through the courts, particularly due to what amounts to violations of the trust responsibility. We believe the federal government can, and should, do better to meet its unique obligations to tribal nations.

In looking at these articles, we 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. For example, 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 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 already raised 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 hope that through this consultation process, we can work together to develop a more respectful way to respect the inherent rights of all tribes and the goals of federal agencies.

V. OTHER FEDERAL INITIATIVES

There are a few other issues we would like to address in these comments as they relate to federal permitting actions on infrastructure projects. We understand the need for infrastructure development; however, the processes designed to achieve those goals must be created in partnership with tribes so that their concerns about early and adequate involvement in covered projects is guaranteed.

A. Executive Order 13604

In March 2012, the President issued Executive Order 13604 ("Improving Performance of Federal Permitting and Review of Infrastructure Projects"), with the goal of maximum efficiency for Federal infrastructure permitting. Projects that would fall under this rubric include surface transportation, aviation, ports, waterways, water resource projects, energy generation, electricity transmission, broadband, and pipelines. The Order also created a steering committee, headed by OMB and the Council on Environmental Quality (CEQ).

The Steering Committee issued an implementation plan in 2014, but it is unclear to what extent tribes were involved in the process. The plan identifies that tribes may have concerns related to

infrastructure projects, in addition to having key decision-making responsibilities. The Plan also recognizes that federal agencies have an obligation to consult with tribes and "obtain approvals for actions that may occur on or affect Tribal lands." To foster close collaboration with tribal governments, the plan proposes to develop "best practices for coordination with Tribal, state and local Governments." The plan then directs the steering committee agencies to identify opportunities to develop agreements with *local and state governments* for early participation and coordination, information sharing on information related to the planning, siting, and review of proposed major infrastructure projects (including environmental, scientific, cultural, and historic data).

It is concerning that the committee recognizes the need to coordinate early with tribes and to develop best practices to achieve that goal, and yet, provides only for states and local governments to share information that may relate to tribal concerns (i.e., environmental, cultural, and historic data). How would it be possible for states and local governments to obtain sufficient information on environmental and cultural concerns, particularly as they relate to tribal concerns, absent communication with the tribes themselves? The simple answer is that it is not possible, and we believe that similar agreements should be developed with tribes to ensure their information is also shared with respect to infrastructure projects. Perhaps the intent of the committee is to have similar agreements with tribes, but as currently drafted, that does not appear to be the case. Further, have "best practices" actually been developed, and if so, were tribes invited to participate in the development of those practices? And if not, when will such guidance be developed?

Finally, we wish to draw attention to the potentially limited reach of any best practices if the focus is only on actions that occur on Tribal lands. As we noted earlier, due to a variety of historical factors, many tribal resources that are still important to tribes today are located off tribal lands, but within tribes' aboriginal territories. Impacts to tribal resources located off reservation must still be considered as the federal action will trigger the NHPA and Section 106. While tribes are most certainly concerned about impacts to cultural and natural resources located on tribal lands, the same concerns exist with respect to such resources outside reservation boundaries. Any guidance and/or best practices must include consideration of these factors, in addition to those identified in the existing plan.

As the situation with DAPL teaches us, there are clear holes in the federal permitting process on large infrastructure projects (and as we point out, smaller projects as well). We suggest that the 2014 plan be reviewed and revised, in consultation with tribes, to ensure that our concerns are addressed in the document. Even if there was tribal consultation on the original iteration of the plan, circumstances have evolved since June 2014 that necessitate taking another look at how the steering committee has complied with the President's executive order. This is one approach that would allow for the goals of maximizing efficient permitting of infrastructure projects, while also providing tribes a key role in the process in order to avoid and if necessary, minimize, impacts to tribal resources.

B. Fixing America's Surface Transportation (FAST) Act

In December 2015, the President signed the FAST Act into law which provides long-term funding certainty for surface transportation infrastructure planning and investment (highways and public transportation projects). The FAST Act builds off the framework developed in Executive Order 13604; however, we do not believe there was any tribal consultation prior to passage of the law. The Act includes provisions that may have implications for historic preservation and the Section 106 review process.

In Exhibit A to the "Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects" developed in September 2015, there is a mention of "Tribal Trust Responsibilities Compliance," but that is not defined, there are no perimeters or action items associated with this notion, and there is no identified process for working with tribes. Further, no additional best practices or guidance has been proffered since the Guidance was developed more than a year ago. In order to appropriately and adequately ensure compliance with the government's trust responsibility, we suggest the following best practices be considered in the development of any forthcoming guidance:

(1) All agencies involved in permitting infrastructure projects affecting tribal lands, aboriginal lands, waters, or sacred places must demonstrate compliance with federal trust obligations, treaties, and consultation requirements under federal law;
(2) Require full and early participation by tribal governments in the federal permitting process, including at the "purpose and need" stage, like states and local governments;
(2) Integrate the concept of Tribal Trust Responsibility Compliance in all regulations and guidance for infrastructure permitting, including the Steering Committee and the FAST Act by designating a Tribal Trust Compliance Officer;
(3) Develop federal policy support that demands greater tribal control over infrastructure on tribal and aboriginal lands; and
(4) Require direct tribal involvement or consent as evidence that tribal concerns over lands, waters, and sacred places have been addressed.

These are just a few ideas that we believe are necessary when developing any best practices or guidance related to the consideration of tribal concerns for federal permitting activities. As with the development of any policy that might affect tribes – consistent with the principles of the trust responsibility, federal law, Executive Order 13175 and the Presidential Memorandum on Tribal Consultation – meaningful tribal consultation is essential. Tribes must have a place at the table when discussing the development of guidance that directly implicates their interests. We look forward to further discussion on the development of best practices and guidance under the FAST Act to ensure the government meets its obligations to tribes.

VI. CONCLUSION

In conclusion, the Pechanga Band would like to thank the agencies and the federal government for taking the time to host consultation sessions, and to review these comments concerning the federal permitting process. As you have heard throughout these sessions, the protection of tribal resources is one of the most pressing concerns for tribal nations in our contemporary world. We fight daily to save our tribal culture, our heritage, and our identities, in addition to our natural resources.

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 act in their best interests, and ensure that tribes can fulfill their obligations to their peoples. In our contemporary experience, 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. We hope that this process is just the first step in achieving better outcomes for tribal nations.

Sincerely,

Mark Macarro
Tribal Chairman

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