



The Confederated Tribes of the Colville Reservation  
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December 8, 2006

Tribal Affairs – DKT-7  
P. O. Box 14428  
Portland, OR 97293-4428

Re: Draft FCRPS Systemwide PA Comments.

Dear Tribal Affairs Officer:

Thank you for this opportunity to comment on this draft of the Systemwide Programmatic Agreement. We do appreciate the effort required to draft this document and respond to and incorporate all of the comments. This latest draft is different than previous versions. The differences appear to be a result of three factors: polished editing, incorporating comments from reviewers, and avoidance of certain issues through careful wordsmithing. Because the agreement differs from preceding drafts, it was necessary to have our staff thoroughly review the document in its entirety.

Agreement documents set a tone for negotiation and implementation. In the second paragraph of the introductory letter it states the undertaking “may” threaten sites and “have the potential” to adversely affect historic properties. We hoped we were beyond such qualification and hedging of issues. Generations of technical, managerial and policy level people will follow the conclusion of these negotiations. They need clear language so certain issues do not continually return to the table. The undertaking threatens sites and adversely impacts historic properties.

Language in the introductory letter, the title of the programmatic agreement, the agreement itself, and responses to the previous comments carry the subtle implication that this is a Lead Federal Agency agreement. Emphasis is placed on meeting agency and interagency needs. Several references specifically invoke or imply federal agency decision making authority. The records of decision from the System Operation Review and the agencies’ Native American policies mandate a cooperative process for cultural resource management. Please be reminded the implementing regulations for section 106 confer responsibility for compliance, not decision making authority. 36 CFR Part 800.2(a) is reproduced below with pertinent portions highlighted.

**§ 800.2 Participants in the Section 106 process.**

(a) *Agency official.* It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or

tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) *Professional standards.* Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) *Lead Federal agency.* If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) *Use of contractors.* Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) *Consultation.* The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

In drafting the agreement, it seems the development of cultural resource management along the Columbia River has been forgotten or overlooked. Tribes played a critical role in making agencies aware of the crisis before us, the irrevocable loss of many thousands of archaeological, religious, cultural, and burial sites. Tribes committed tens of thousands of hours on cultural resource management meetings and planning, and on preparing or reviewing cultural resource management documents since the inception of the System Operation Review. If not for our efforts, many of the staff, programs, and funds committed to historic preservation in the Federal Columbia River Power System would not exist, yet we remain marginalized outsiders in the implementation of the program.

We see a lack of continuity in personnel and policy and little cultural understanding on the part of some agencies. For instance, as one of our technical staff paraphrased the words of former Walla Walla District Commander, Lt. Colonel Randy Glasser, 'We want to work cooperatively, but you people must understand there has to be compromises and concessions on both sides.' Without being too dramatic but remaining factual, we understand that our land was taken. We were forced from our homes and riverside camps. We were hunted and killed during the "Indian" wars for defending our homeland from illegal encroachment. The United States forced us on reservations and dammed the rivers. Life-sustaining salmon runs were decimated and the air, land, and water were polluted. Looters and academics alike removed the remains of our ancestors from the ground. Because of the Kennewick Man case, the Walla Walla District is even denying us our ethnicity and heritage by suggesting that the people and materials found in archaeological

and burial sites may not be Native American. This is true even for a site in the heart of territory determined by the Indian Claims Commission to be exclusive use lands, studied for almost a half century as a Native American site, and that is an integral site in defining many Native American cultures in the Columbia Plateau. Those are our concessions and compromises. In return, federal agency staff have spent several thousand hours at the conference table with tribal people and expended a sum less than 10% of the annual Grand Coulee Dam payment to the United States Treasury. Within the last seventy years we believe less than 100 million dollars have been spent by the Lead Federal Agencies for compliance with national historic preservation laws.

While the document has promise, we have numerous remarks. Below find our specific correction requests, questions, and comments on the draft Systemwide Programmatic Agreement (PA).

- **Loophole statements in the PA:** The wording of the PA indicates that adherence fulfills Section 106 compliance and yet actions will only be considered if *feasible and cost effective*. Therefore, if all actions are determined *non feasible and non cost effective*, the agencies would still be compliant without expending any effort. **Page 3: NOW, THEREFORE** states “and that adherence to the terms of the PA shall satisfy the Lead Federal Agencies’ Section 106 responsibilities for addressing the effects of the undertaking on historic properties.” **AND Page 5, #5** states “Seek to avoid or minimize adverse effects on historic properties *when feasible and cost effective...*” **AND Page 8 last bullet [referencing page 7 last sentence “The Lead Federal Agencies will set priorities based on a variety of factors, which include, but are not limited to”]** “the *availability of funds.*”
- **Question:** Who determines feasibility and cost effectiveness?
- **Question:** How are feasibility and cost effectiveness determined?
- **Correction:** Introductory Letter – paragraph 2 – Remove qualifiers “have the potential to” and “may” when characterizing effects to historic properties.
- **Page 1 Comment:** Why is this version of the draft the “Final Draft”? It carries the presumption the next generation of the PA will be sent for signature regardless of the comments received by participants other than the Lead Federal Agencies (since we were informed all Federal Lead Agencies concurred on the present language).
- **Page 1 Correction:** Title – All regulatory authorities should be listed in the title. This includes Tribal Historic Preservation Officers for tribes with lands in the APE.
- **Page 1 Question:** Whereas 4 and 5 – Why aren’t transmission lines included?
- **Page 2 Correction:** Whereas 6 – Change “the undertaking causes or may cause direct or indirect adverse effects” to “the undertaking causes direct and indirect adverse effects”.
- **Page 4 Correction:** II.A – Needs to stipulate cooperating group.
- **Page 4 Correction:** II.A.2 – First sentence should read, “Develop a mechanism for prioritizing *background research*, identification, evaluation, *identification of impacts* and treatments...” Italicized portions added to more accurately reflect the section 106 process.
- **Page 4 Question:** II.A.2 – Who determines whether the undertaking “contributes” to or is the “principle cause” of an adverse impact? Answer should include consultation and the Cooperating Groups.
- **Page 5 Clarification:** II.A.3 – Please clarify why inventory is replaced with prioritization.

- **Page 5 Correction:** II.A.4 – Please include reference to either or both the Records of Decision and Cooperating Groups.
- **Page 5 Question:** II.A.5 – Who determines if an action is “cost effective”? Answer should include consultation and the Cooperating Groups.
- **Page 5 Correction:** II.A.6 – Please include reference to Cooperating Groups.
- **Page 7 Comment:** III.B – Caution should be exercised not to relieve other agencies of their responsibilities. For example, a Public Utility District suggested many impacts of their undertaking are the direct result of Grand Coulee Dam operations.
- **Page 7 Comment:** IV.A. – First bullet. What is meant by “nature” of historic properties
- **Page 8 Comment:** IV.A – Second and third bullet. Statements appear redundant.
- **Page 8 Correction:** IV.B – First sentence should read, “... further discussion with interested parties *and as prioritized by the Cooperating Groups* in development of the Project-specific PAs or HPMPs.” Italicized portions added to more accurately reflect the Records of Decision from the System Operation Review and the agencies’ Native American policies.
- **Page 8 Comment:** IV.B.1(b) – Please define “unrestricted”. Unrestricted access may not be necessary to do background research, inventory, evaluation, impact analysis or mitigation.
- **Page 8 Correction:** IV.B.1(c) – There is no “public” access to collections. Please end sentence with “...allow for *use of the collection according to 36 CFR Part 79.10.*” Italicized portions added to more accurately reflect appropriate laws. The same holds true for IV.B.2(c), IV.B.3(c), and IV.B.4(c).
- **Page 9 Comment:** IV.C – Explain in greater detail. Spell out as in the previous section.
- **Page 9 Question:** IV.D – Will there be times when the Lead Federal Agencies hold easements that do not require fee-title holder consent or authorization? Perhaps the statement should be modified to include acknowledgement of provisions in easements.
- **Page 10 Question:** V.D – Please clarify when project-specific PAs or HPMPs must be completed and that they be reviewed or renewed whenever the Systemwide PA is amended.
- **Page 13 Correction:** VI.B – Again, this PA does not include “professional researchers”, replace with “Cooperating Groups”. If it is the intent of the Lead Federal Agencies to address their obligations to the general public, this is not the appropriate instrument.
- **Page 14 Footnote:** This is the first mention of the role of the cooperating group. It should be stated near the beginning of the document.

The stated purpose of the PA, as provided in Stipulation I, appears to center on regulatory and compliance issues. All parties to the PA are federal agencies (as land managers, land owners, regulators, or those undertaking actions), historic preservation officers, and tribes with interests in the projects. Tribes are specifically identified in various parts of the National Historic Preservation Act, the section 106 implementing regulations, and various other mandates for full and active consulting roles.

In response to a similar concern by the Confederated Tribes of the Colville Reservation during review of the previous draft [assigned Comment #133], the responder referenced 36 CFR Part 800.2(d)(1 and 2). As stated in original text from which Comment #133 was drawn:

“The respondent(s) note, “NHPA directs agencies to include all interested parties.” Yes, the NHPA does direct agencies to consult with all interested parties, including the public; professional researchers are part of the public with no additional status under NHPA.

The PA is not with “all interested parties”. Most of the parties have professional researchers in their employ; parties are free to contract with professional consultants.

We went on to say, “Note that the public is only involved through agency procedures and/or at appropriate points.” Both statements remain true. There is no objection to any party of the PA utilizing “professional researchers”. The objection is to codifying “professional researchers” as a class with standing in the PA. The respondent(s) also refer us to Comment #79, suggesting that the Washington State Department of Archaeology and Historic Preservation requested the inclusion of “professional researchers”. Our reading of the comment and the response suggests nothing more than we have recommended, if the agencies need professional advice, they have the ability to contract for that service.

The respondent(s) also failed to note that 36 CFR Part 800.2(d) clearly invokes either the NEPA comment process for incorporating public comment or to utilize the mechanism in Subpart B 800.3(e): “*Plan to involve the public.* In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).” This is our point.

- **Page 14 Correction:** VIII, first sentence – Please see our introductory comments on the agencies decision making authority. Replace the first sentence with wording consistent with 36 CFR Part 800.2. For example: *While the Lead Federal Agencies have a statutory obligation to fulfill the requirements of section 106 and take legal and financial responsibility for compliance relating to the undertaking, ...*”
- **Page 15 Correction:** VIII.B.1&2 – Please insert “recommendations” into the list of Cooperating Group responsibilities.
- **Page 15 Correction:** VIII B, last sentence – Please rephrase to, “The Lead Federal Agencies *remain responsible for all required findings and determinations* recommended by the Cooperating Groups. Italicized portions replace previous language to reflect more accurately the section 106 process.
- **Page 15-16 Correction:** VIII.E – Remove “... and the interested public.” from participant list. These meetings reveal site locations, sensitive cultural details, and privileged contract information.
- **Page 17 Comment:** XI.A – This leaves conflict resolution in the hands of the Lead Federal Agencies, it does not even concede to recommendations of the ACHP. Do the Lead Federal Agencies believe tribes will find it in their sovereign interest, find that the agencies are fulfilling their trust responsibilities, or believe the agencies are complying with the records of decision and agency Native American policy if the tribes allow all final arbitration to be dictated by the Lead Federal Agencies? A better mediation device needs to be incorporated into the PA.
- **Page 17 Correction:** XI.A.5 – Replace “decision” with “determination.

- **Page 18 Correction: XI.B** – Replace “decision” with “determination.
- **Page 18 Correction: XI.C** – Replace “decision” with “determination.
- **Page 18 Correction: XI.F** – First Sentence Typo, insert “of” to state ...or more *of* the Lead Federal Agencies...

We shall close this letter with the exact words our Tribal Historic Preservation Officer used to close her January 30, 2006 comment letter on the previous draft of the PA. “Thank you for taking time to review these comments. It is becoming clearer why the 1997 PA was never finalized. We desire the PA to be a signed and functional document. Hard decisions are going to have to be made. We are prepared to come to the table to resolve these issues in a cooperative manner.” If we can be of assistance, or if you need to discuss policy level issues, please contact me at (509) 634-2218. If you have any management or technical questions related to our comments, please contact Camille Pleasants, Tribal Historic Preservation Officer, at (509) 634-2654.

Sincerely,



Michael E. Marchand  
Chairman, Colville Business Council

cc: Doug Seymour – CBC Culture Committee Chair  
John Sirois – Cultural Preservation Administrator  
Camille Pleasants – Tribal Historic Preservation Officer  
Guy Moura – TCP Coordinator  
John Pouley – Archaeologist III  
310907 Correspondence File  
Chrono