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Nez Perce

TRIBAL EXECUTIVE COMMITTEE

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Dear sirs:

Thank you for providing a copy of the draft Systemwide Programmatic Agreement (PA) for our review and comment. The PA appears to have markedly changed since the last draft. We believe many of these changes are for the better. However, we still have some questions and concerns regarding the document.

One of our main concerns is the lack of references to the importance of the tribes to the FCRPS cultural resource program. The tribes have invested significant amounts of time and money into this process. Much of the funding for the tribes' involvement in the process has been paid for by the tribes. Furthermore, if the tribes had not intervened in the scoping process of the System Operation Review, the FCRPS cultural resource program would simply not exist today. The historical and ongoing importance of the tribes to this process should be noted throughout the document.

Another general concern is the discrepancy in viewpoints between the ACHP and the agencies when interacting in the workgroups. During the meetings Tom McCulloch indicated that the tribes and the agencies can agree on categories or classes of properties that will be considered eligible for the National Register under the terms of the PA. However, it has been our experience that the agencies are extremely reluctant to do this and would rather invest substantial amounts of time and money in individually evaluating properties. Our assumption is that the



agencies would prefer to restrict the numbers and types of sites that are addressed through mitigation as much as possible. This is one of the key discrepancies between the agencies and the tribes. The agencies need to agree that sites that are buried under the reservoirs can still be considered eligible for the NRHP and that the fact that they are buried can be construed as an adverse effect.

A third, and final, general point is that throughout the discussion in Richland, the agencies repeatedly mentioned that discussion of topics including the PA and the research design mandated by the PA would have to occur at the system-wide level. However, there is no mechanism to do this. This is somewhat problematic for accomplishing some of the larger goals of the FCRPS cultural resource program.

The regulations (36 CFR 800.3(a) and 36 CFR 800.3(b)) require that the agency official consult with the SHPO/THPO in identifying additional consulting parties. There was some discussion of the role of consulting parties other than the SHPOs, THPOs, and tribes at the meeting in Richland on December 13. However, more discussion will likely be necessary.

Our specific comments on the PA follow:

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- 1 The block that lists the parties to the PA should at a minimum individually list all of the full signatories to the PA. In order for the PA to affect Nez Perce lands the PA requires the signature of the THPO. Thus the Nez Perce THPO should be specifically identified rather than listed as a consulting party.
- 1 Third “whereas”. In the first line change the word “those” to “these”.
- 1 Fifth “whereas”. This section is somewhat confusing in that only the operation of the power system can be characterized as truly “coordinated”. Other undertakings addressed here are coordinated either between BPA and the Corps or BPA and BOR. If other projects that involve BPA and Corps funding or BPA and BOR funding would they still be “coordinated”. Also, it is stated that the undertaking includes “future modifications to the operating regime.” This section needs to be more specific. We think the PA would no longer be in effect if the regime shifted away from the preferred alternative identified in the SOR EIS and stipulated in the RODs.
- 2 Sixth “whereas”. The statement “the undertaking causes or may cause” should be changed to “the undertaking has caused, is causing, and will cause” adverse effects. The RODs and SOR EIS note that adverse effects have occurred as a result of the undertaking.
- 2 Tenth “whereas”. The agencies are required to consult with the THPOs from the Confederated Tribes of the Umatilla Indian Reservation, the Yakama Nation, and the Confederated Tribes of the Warm Springs Reservation in addition to the three listed in the PA. This is because these tribes have tribal lands within the APE as currently defined in the PA. Although this subject was briefly addressed during the meeting in Richland on December 13, 2006, we do not feel the agencies fully understand the difference between a THPO and a tribe under 36 CFR 800.

3 Eleventh “whereas”. Why are these two executive orders referenced to the exclusion of treaties, other executive orders, laws, regulations, and agency policies? The section needs to be modified to be more inclusive of the reasons that tribes are consulted.

3 “Now therefore,...” A sentence needs to be added to the end of this section that states what will result if the agencies fail to follow the provisions of the PA. This sentence should essentially read “Failure to follow the provisions and stipulations of this PA will result in the federal agencies following the regulations at 36 CFR 800 for each aspect of the undertaking.”

3 Stipulation I.B. “Address Section 106 NHPA compliance only.” This sentence is problematic in terms of the internal consistency of the PA. Other areas reference the agencies’ compliance with other sections of the NHPA. If the PA is intended to fulfill the agencies’ compliance with Section 106 then that is all the PA should address. If the agencies want to address other sections of the NHPA then all applicable sections should be addressed, not just a select few.

4 Stipulation I.C.2. Historic Properties Management Plan should be changed to Cultural Resources Management Plan. Addressing all properties and not just eligible properties will enable land managers conducting undertakings in the APE to have a better understanding of each project’s resources and will in the long run save time and money.

4 Stipulation I.C.4. Please specifically define what a “case-by-case basis” is.

4 Stipulation I.D. This section should note that exempt practices will only be exempt as long as the other signatory parties concur.

5 Stipulation II.A.3. This section needs to be rewritten/clarified. Identification of historic properties includes evaluation. Identification and evaluation are not two separate things. Some level of identification will be necessary throughout the entire APE. This may include a variety of methodologies to identify historic properties. Also, due to the ongoing and dynamic nature of the undertaking, it is likely that some cultural resources that are defined as ineligible may in fact be determined eligible at a later date. This is especially true when attempting to evaluate sites that are partially inundated.

The eleventh “whereas” potentially contradicts the notion that properties found to be ineligible for the National Register will receive no further consideration under terms of the PA.

5 Stipulation II.A.5. Please be more specific regarding what is or is not “cost effective.” Otherwise this could be part of the PA that is heavily debated after it is executed. It would help if a sentence were added to the end of this part that states that the agencies recognize that they still need to resolve adverse effects if they cannot be avoided.

5 Stipulation II.A.7. Please insert consulting after “other” in the first sentence.

5 Stipulation II.B. Please better define the applicability of professional qualification

standards. If the PA only applies to Section 106 of the NHPA, then please delete the reference to Section 112. Instead please use the reference to Section 112 at 36 CFR 800.2(a)(1).

- 5-6 Stipulation II.C. At the meeting in Richland on December 13, 2006, Lynn MacDonald indicated that this section was meant to be characterized as a mitigation alternative. If the PA only applies to Section 106 of the NHPA, then please delete the reference to sections 1 and 2. This section should be incorporated into a new stipulation regarding possible mitigation alternatives. The new section should pointedly mention that mitigation should be related to the criteria under which a site is eligible for inclusion in the National Register.
- 6 Stipulation II.C.2. Please define “tribal communities” and “scientific communities”. Aren’t “scientific communities” part of the “general public”? We are not aware of any difference between the two identified in the regulations.
- 6 Stipulation II.C.6. “Expansion of opportunities for heritage tourism” is something the agencies should be accomplishing as part of each agency’s recreation department and not as part of their management of cultural resources.
- 6 Stipulation II.C. Last paragraph. Section 304 of the NHPA is incorporated by reference at 36 CFR 800.6(a)(5). This reference should be used rather than a direct reference to Section 304. The word “allows” in the first sentence should be changed to “requires”. The reference to restriction of information should be more ingrained in the sections dealing with public involvement.
- 6 Stipulation II.D. We understand the reference to the 30 day request for comment period. However, this section needs to also reference the ability of the tribes to request government-to-government consultation. The section should also be rephrased to recognize that several portions of the Section 106 process require consultation between the agency and the SHPO/THPO or other consulting parties.
- 6 Stipulation II.E. BPA has currently committed funding to support activities that will be undertaken pursuant to this PA until 2012. An additional commitment of funding should be incorporated by reference into this section of the PA.
- 6 Stipulation II.F. Please insert “and signatory parties” after “Lead Federal Agencies”.
- 7 Stipulation III.A. First sentence. Please delete the word “either” and replace it with “that are potentially”.
- 7 Stipulation III.B. First sentence, third line. Please delete the word “adverse”. Application of the criteria of adverse effects (36 CFR 800.5(a)) occurs after the APE has been established (36 CFR 800.4(a)(1)) and after the identification of historic properties (36 CFR 800.4(b)). Determining adverse effects prior to determining the APE is not consistent with the regulations.

- 7 Stipulation III.D. First sentence. The word “coordination” should be changed to “consultation”. Also please insert “SHPO/THPO, affected tribes, and” in front of “appropriate consulting parties”.
- 7 Stipulation IV.A. Last sentence of the first paragraph. Please delete “The Lead Federal Agencies will set priorities” and replace with “Priorities will be”.
- 7-8 Stipulation IV.A. Our THPO has numerous questions and concerns regarding the priority list and would appreciate discussing them in person. Some of the main ones include:
- Fifth bulleted item. Please replace “endangers” with “affects”.
- Seventh bulleted item. This priority should be irrelevant with respect to whether or not an agency is required to resolve adverse effects.
- Eighth bulleted item. Are historical and cultural significance different than National Register eligibility? If so, how are they defined and who defines what is historically and/or culturally significant?
- Ninth bulleted item. Integrity is linked to the type of historic property under consideration and by what criterion (or criteria) the property is eligible for the National Register.
- Tenth bulleted item. This is solely linked to criterion D and should be broadened to reflect all four criteria.
- Thirteenth bulleted item. Agencies are required to comply with law whether or not they have funds available. Please delete this item.
- 8 Stipulation IV.B. Last line. Please delete “interested parties” and replace with “SHPOs/THPOs, affected tribes, and other appropriate consulting parties”.
- 8 Stipulation IV.B.1.c. Please reference 36 CFR 800.6(a)(5) in this section.
- 8 Stipulation IV.B.2.b. Who defines what is “of particular...cultural importance”? Historical importance should also be a consideration.
- 9 Stipulation IV.C. Second sentence. Please delete the word “values”. Delete reference to Section 304 and instead reference 36 CFR 800.6(a)(5).
- 10 Stipulation V.C.2. HPMP’s will still need the concurrence of the applicable PA signatories to be an actual compliance document.
- 10 Stipulation V.D.1. The agencies should review the PA or HPMP (CRMP) in consultation with the applicable signatory/consulting parties.

- 10 Stipulation V.D.2. Why did the agencies choose seven years for executing new PAs and HPMPs (CRMPs)?
- 11 Stipulation V.E. The word “interest” should be changed. The tribes are involved in this process for reasons in addition to interest.
- 11 Stipulation V.E.1. Please rephrase the first sentence. The SHPOs/THPOs and tribes are not simply “interested” parties. What is the difference between an affected tribe and an interested tribe? What is the difference between an affected agency and a cooperating agency? The regulations (36 CFR 800.14(a)(2)) require more than review and comment by SHPOs/THPOs and Indian tribes in developing programmatic agreements. In addition, BPA committed in their ROD to developing programmatic agreements in full cooperation with tribes.
- 12 Stipulation V.F.5. Please delete the word “scientific” and replace with “archaeological”. What is the difference between using historical and/or oral historical research as a method to identify historic properties in comparison to as a resource-specific treatment?
- 12 Stipulation V.F.9. Please delete the words “completion of”.
- 12-13 Stipulation VI. We expect this stipulation to be rewritten following the discussions in Richland on December 13, 2006. Our THPO would be happy to provide suggestions.
- 13 Stipulation VII.A. Second sentence. The sentence gives the impression that members of the cooperating groups are members of the public with respect to the PA. This is not the case. Who are the “potentially interested members of the public”? Reference should be made to 36 CFR 800.6(a)(5).
- 14 Stipulation VII.C. Earlier comments made by the Nez Perce Tribe noted that the Tribe had not been able to review the handbook referenced here. The agencies responded that the Tribe had been able to review the handbook which is untrue. Before tacitly agreeing with the handbook by referencing it in the PA, it will be necessary for the Tribe to review its contents.
- 14 Stipulation VIII.A. We agree that the agencies should meet on occasion to maintain consistency and address issues in the overall FCRPS cultural program. However, this group should not be formalized to the exclusion of the tribes.
- 15 Stipulation VIII.B.2. Please insert a sentence to note that the cooperating groups are not a substitute for consultation between the agencies, SHPOs/THPOs, and tribes under Section 106.
- 15 Stipulation VIII.C. Please add the words “consistent with funding” to the end of the first sentence.
- 16 Stipulation VIII.E. A sentence should be added to the end of this sentence referencing the sensitivity of information discussed during these annual meeting and whether or not it is

appropriate under 36 CFR 800.6(a)(5).

- 16 Stipulation X.A. Please insert “and the signatory parties” after “Agencies” in the first sentence.
- 16 Stipulation X.A.1. Please insert “and other signatory parties” after Agencies in the first sentence.
- 16-17 Stipulation XI.A. Please insert “or ACHP” at the end of the first sentence. Please insert “or ACHP” after “Agencies” in the second sentence.
- 18 Stipulation XI.F. Please insert the word “of” after “more” in the first sentence.
- 20 Stipulation XV.E. The PA will only take effect on tribal lands when it has been signed by the agencies, ACHP, and the THPO. The first sentence needs to be rephrased.
- 20 Stipulation XV. Please add a section G that should state that “If the agencies can not meet the terms of the PA due to fiscal reasons, their compliance with Section 106 must be reconsidered through consultation.”

We appreciate the agency technical staff’s willingness to meet with the tribes technical staff to discuss the PA and we look forward to additional discussions in the future. Our main suggestion in this regard is that future discussions allow time to address the PA line by line rather than in generalities. We think this would be the quickest path to constructing an agreement that all parties will feel comfortable signing. If you have any questions or need additional information, please contact our Tribal Historic Preservation Officer, Mr. Kevin Cannell.

Sincerely,



for Rebecca A. Miles, Chairman

cc: Kimberly St. Hilaire, BPA Cultural Resource Manager
Gail Celmer, Northwestern Division Archaeologist
Lynn MacDonald, Bureau of Reclamation Archaeologist