



# Oregon

Theodore R. Kulongoski, Governor

## Parks and Recreation Department

State Historic Preservation Office

725 Summer St. NE, Suite C

Salem, OR 97301-1266

(503) 986-0707

FAX (503) 986-0793

www.hcd.state.or.us

10 June 2008

Kimberley St. Hilaire  
Bonneville Power Administration  
P.O. Box 3621  
Portland OR 97208-3621



Re: Comments on FCRPS Draft PA dated 1/31/2008

Dear Kimberley,

Having received the latest draft of the Federal Columbia River Power System (FCRPS) Programmatic Agreement (PA), and having had our recent meeting to discuss our office's comments on the draft PA, I wanted to take a moment to draft up my summary comments on this latest draft. However, before doing so I would like to state that it is clear that this draft has undergone major revisions and our office is pleased to see the work that has been accomplished. We believe it to be a much stronger document, and one that actually has a purpose, as opposed to my comments on the previous draft. My specific comments on the latest draft are included below:

### Revised PA General Comments

The initial portion of the PA includes a number of Whereas statements outlining the basis for the document. The 11<sup>th</sup> Whereas summarizes the various tribes that the Lead Federal Agencies routinely consult with. Our office has recently been notified by Oregon's Legislative Commission on Indian Services that the Confederated Tribes of the Grand Ronde Reservation should be consulted for any projects in the Cascade Locks area which would fall within the Bonneville Pool area. I wanted to be sure that you are aware that the Grand Ronde may need to be contacted with regards to this PA in the future. Some wording should be included that will allow future tribes to be added without having to redo the whole PA.

My specific review comments regarding PA stipulations are listed below:

<u>Stipulation</u>	<u>Page</u>	<u>Comment</u>
II (A)-2	4	Stipulation states that all potentially affected properties will be evaluated for NR eligibility. Is this a reasonable stipulation given agencies' current funding and staffing? Do you really mean <u>ALL</u> properties or only those that are actually affected?
II (A)-3	4	It is important to realize that site eligibility can change if new information becomes available or a project's level of effect changes. A site determined not eligible can later be reevaluated and found eligible (and vice-a-versa). This section should be written to remain open to the possibility of change.



<u>Stipulation</u>	<u>Page</u>	<u>Comment</u>
II (F)	6	Oregon SHPO believes that no PA should extend for a period of thirty years. Too many changes can occur on the landscape and within an office's staff to make this a viable timeline. Our office rarely signs a PA with a greater duration of 15 years and feels that 20 years should be a maximum time line fitting for this PA.
III (A)	6	The APE should include all mitigation areas that are created or directly impacted by a proposed action under this PA. If wetland/wildlife mitigation areas are created due to damage of existing areas by dam related projects, these areas need to be considered part of the APE. As written I am unsure if such areas are included.
III (C)-2	6	"Principle causative factor"? How does one quantitatively acknowledge and measure such things? This stipulation was in the earlier PA and I still find it difficult to see how the federal agencies intend to address it? Oregon SHPO has had a difficult time discussing this problem with agencies in the Hells Canyon area and would not expect the problem to be resolved any easier here. Serious consideration should be focused on how one is to determine judging "level of cause" and addressing only "the increment of effect caused by their operations."
III (D)	7	Portion of first sentence "due to attenuation, intervening effects, or other factors" should be removed.
IV (B)-3 <sup>rd</sup> bt.	7	Our office has no problem with the addition of HPRCSIT (Historic Properties of Religious and Cultural Significance to Indian Tribes) to this stipulation, as recommended by CTUIR but we believe that the term TCP should remain due to other ethnic groups within the larger project area (e.g., Chinese, Basque) that may have significant properties needing protection.
IV (B)-12 <sup>th</sup> bt.	8	I would like to see some discussion (or know where such information will be considered) in the defining of research objectives within the System wide Research Design. This remains an interesting concept but one that hasn't really been addressed. In the earlier PA I asked if such a design was even possible. I see no new information here that will help to flesh out such a possibility.
IV (C)-2 <sup>nd</sup> bt.	8	Our office concurs that the curation guidelines mentioned in the PA for access and future research potential for artifacts collected under federal projects (whether on federal, non-federal public or private lands) need to remain compatible to 36CFR79.
V- 2 <sup>nd</sup> sentence	9	TCP's can be associated with other ethnic groups beside Indian Tribes. "And others" should be included at the end of this sentence.
V (C)	9	I know that some discussion has occurred among the Lead Federal Agencies and Tribes over the process or need to determine eligibility for TCP's in a project area. Is eligibility really the main concern here or more what the level of effect on such properties may be and how does one mitigate such an effect. I believe the process of eligibility is more complicated than this stipulation lets on and some rewording is needed to address determining "level of effect" and potential mitigation strategies.

<u>Stipulation</u>	<u>Page</u>	<u>Comment</u>
VI (C)-5	10	Stipulation should include providing a schedule for <u>identifying properties</u> and evaluating all <u>potentially affected</u> unevaluated properties.
VI (C)-6	10	Defining “thresholds” for when a project would trigger a reassessment of Section 106 compliance activities can be difficult and not always possible in a general PA. Such thresholds may be more sites specific. I suggest that some reconsideration of rewording or rethinking this stipulation be done.
VIII (A)	12	I see no direct tie in with the Annual Report, Annual Work Plan , Project Research Design, and System-wide Research Design. These should all be tied closely together, especially for items within the specific project. I believe that most project-specific areas lack a real, well thought out and supported research design and thus completed products (whether testing, evaluation or monitoring reports) remain hanging out there without a direct tie in to a “needs assessment” or an evaluation for future direction. If PA’s (system-wide and project-specific) are going to be drafted than a priority needs to be spent on developing suitable research designs. While mentioned in this PA, no substantial data is provided to see how or in what direction such a PA will focus. A system-wide research design may be more of a concept on paper than is possible to flesh out. If so, what bearing will this have on the umbrella PA?
IX (E)-1	15	Sentence I mentions Stipulation IX.E.3. I think you mean to refer to IX.E.2 here.
X	16	First sentence references a Stipulation IX.E.6. There is no such stipulation (E only has 3 subparts).What does this refer to?
XI (B)-3a	18	Delete this section. The ACHP has stated that they will always weigh in if a dispute arises between federal agencies and objecting parties (as per Tom McCulloch during our recent meeting).
XII (E)	19	This stipulation should only be required in the case of a formal objection. If a consulting party contacts SHPO/THPO staff to discretely discuss a concern or objection to the PA, not all comments or contacts need to be passed on to the Lead Federal Agencies. Such a stipulation would limit the freedom of all parties to discuss freely their feelings regarding a given issue.
XV	20	Our office still wonders how many Tribes will finally agree to sign such an umbrella PA. If most or all Tribes refuse to sign it, what is the value of such a document? Discussions with Tribes at past FCRPS meetings and the time involved by the Lead Federal Agencies in getting to this level of a draft document has shown that there is a major problem with the concept of the “umbrella” PA among tribal peoples.
Attachment 3	30	<b>Area of Jurisdiction:</b> Is “tribal land” actually defined under NHPA?
Attachment 3	31	<b>Federal Land Managing Agency:</b> Need to include the possibility of other federal land managing agencies involvement (e.g., USF&WS, BIA).
Attachment 3	32	A definition for “ <b>National Register of Historic Places</b> ” should be included.
Attachment 3	33	<b>Traditional Cultural Property</b> – First sentence should read a property that <u>may be</u> eligible for inclusion (not is eligible).

<u>Stipulation</u>	<u>Page</u>	<u>Comment</u>
Attachment 4	35	<b>Treatment Plan Principles-1<sup>st</sup></b> bullet: Sentence should end with phrase “that are being adversely affected by an undertaking.”
Attachment 4	35	<b>Treatment Plan Principles-5<sup>th</sup></b> bullet, last sentence should read “The SHPO would be involved if a TCP <u>is</u> on lands outside of reservation boundaries.” (not was on lands)
Attachment 4	36	<b>Annual Work Plans:</b> Connection to Project-specific Research Design? System-wide research design?
Attachment 5	37	Examples of activities not covered under this PA should include the BPA’s Fish & Wildlife component.
Attachment 6	39	3. Areas of “existing fill” or “where existing ground disturbance is so extensive” needs to be quantified and documented. Currently Oregon SHPO has found that Lead Federal Agencies do not possess an adequate level of documentation to substantiate this inclusion. If such a stipulation is to be included all areas that may be treated under it needs to be initially reviewed and cleared. For example, once adequate documentation is provided to our office and concurrence is reached that an island was totally created from dredge spoils, no further Section 106 review should be needed on such lands.
Attachment 6	39	11. Demolition and removal of buildings less than 50 years of age should involve some level of review before demolition due to possibility of agency tearing down structures rather than protecting them once they turn 50 years of age. Such actions have been known to have occurred in the past under various federal land managing agencies.
Attachment 6	40	12. Activity list should begin with the word “Routine”.
Attachment 6	40	18. Our office has major problems with this activity list. As written an agency could replace a telephone pole with a fiber optic line without review. Telephone poles could be replaced where no previous survey has been conducted. Historic dikes and levees could be removed without documentation. Pipelines could be replaced with larger pipelines that would impact undisturbed soils. The inclusion of “less than 50 years of age” could be used to keep the caveat for replacing dikes and levees but the remaining activities should still require project review due to their potential to adversely affect historic properties that may have not been assessed during initial construction projects. We have no problem with the inclusion of “signs” (as requested by the Corps in an email dated 2-1-2008) here, however, areas should have been surveyed in the past to be sure that the activity is not occurring within a site.
Attachment 6	40	19. Approval of the excavation of small (<6”) bores would only work if the areas had already been surveyed and were found to not be within a known site.
Attachment 6	40	20. If repair, placement and installation can be completed without any ground disturbance, this activity may fit here.
Attachment 6	40	21. Window repair and replacement needs a standard review process. Even though the original windows may not be in a historic structure, there replacement could impact the evaluation of the structure.

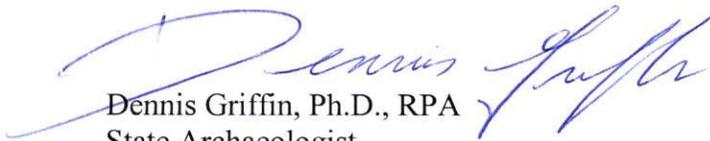
<u>Stipulation</u>	<u>Page</u>	<u>Comment</u>
Attachment 6	40	22. All lands within “existing facilities” have not suffered the same degree of disturbance. This activity is based on knowing the past level of disturbance that has occurred at a property.
Attachment 6	40	24. Remove the word “widening” from the sentence. Define “previously disturbed.” Is this meant to only mean in-kind disturbance?
Attachment 6	40	25. Culverts should be removed from this activity list.

In summary, I find that the PA has some merit and that with the thought that has gone into the latest draft; our office does see a purpose for such a PA. However, our office also feels that it is important that Tribes throughout the Columbia River system also feel that it meets their needs, in regards to what an umbrella PA can offer. I think that we all can agree that the project-specific PA’s will include the heart of discussions and ways of addressing potential impacts to cultural sites. The individual working groups will work with the Lead Federal Agencies, SHPOs and other agencies to draft up the project-specific PA’s, research designs and specifications for identifying, evaluating, mitigating and monitoring affects on known historic properties. These are discussions our office looks forward to participating in.

When last we met you mentioned that the Lead Federal Agencies would attempt to redraft the Attachment 6 list due to our discussions. My comments here are meant to summarize the January draft and I look forward to seeing any later revisions as they are completed.

If you have any questions regarding any of the above comments or would like additional information from our office concerning my review, feel free to contact me at your convenience.

Sincerely,



Dennis Griffin, Ph.D., RPA  
 State Archaeologist  
 (503) 986-0674  
[dennis.griffin@state.or.us](mailto:dennis.griffin@state.or.us)

cc. Roger Roper, OR SHPO  
 Chrissy Curren, OR SHPO  
 Sarah Jalving, OR SHPO

---

**From:** Wernham, Richard T NWS [mailto:Richard.T.Wernham@usace.army.mil]  
**Sent:** Friday, February 01, 2008 9:19 AM  
**To:** St Hilaire, Kimberly R - KEC-4  
**Cc:** Brengle, Craig S NWS; Celmer, Gail C NWD; Grant, David M NWS; Salo, Lawr V NWS; Beauregard, Laura M NWS  
**Subject:** FCRPS Systemwide Programmatic Agreement - Draft dated 1/31/08 - Comment

I would like to see some additional wording added to a number of the listed activities in attachment 6, "Routine FCRPS Activities For This Undertaking That Do Not Require Section 106 Consultation".

Installation of signs are mentioned for buildings or structures in #16 but, are not included for roads, parking lots, in park areas, facility grounds and trails. I would suggest the following be added to the numbered exceptions:

# 18. Add the word "*signs*" to the list of activities.

# 24. Add to the end of the sentence, "*and associated signage.*"

# 25. Insert the following wording, "*signing and sign maintenance*" between *brushing* and *or* in the second line.

Thank you for allowing me to comment on the draft Programmatic Agreement.

Richard T. Wernham  
Supervisory Natural Resource Manager  
Libby Dam Project, COE



*Nez Perce*

TRIBAL EXECUTIVE COMMITTEE  
P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

May 27, 2008

Kimberley St. Hilaire  
Bonneville Power Administration  
Attn: KEC-4  
P.O. Box 3621  
Portland, OR 97208

Dear Ms. St.Hilaire:

Thank you for another opportunity to express our concerns with the Federal Columbia River Power System (FRPS) Programmatic Agreement (PA). We have outlined our concerns as follows and we look forward to a response:

- 1) "Whereas(# 12)" identifies the President's Memorandum on "Government to Government Relations with Native American Tribal Governments" and Executive Order 13175. The tribe understands that all agencies must work within the guidance as established by the executive orders but The Nez Perce Tribe (and possibly others) has guidance on Government to Government Consultation that identifies the process and objectives of consultation aside from the workgroups. Many agencies and their representatives have preconceived notions on what consultation is and too often it doesn't align with the tribes' concept of what it is. It would be good to note in Section II.B (page 5) that the process must be mutually defined to be effective. The consultation policy the Nez Perce Tribe has established will be provided to the agencies.
- 2) There is concern about the emphasis on National Register eligible sites (See page 4, II.A3). Is there to be a formal Determination of Eligibility completed for each site, or is it just the opinion of the researchers and/ or managers? For sites determined not eligible for listing on the NRHP, will they be ignored? Comment 156 suggests that Stipulation IV includes language that sites will be considered eligible until a formal DOE is done (I think the appropriate regulation is Executive Order 11593).
- 3) Clarify "degree of integrity" as it relates to management of properties. (See page 7, Sect IV.Bullet #6). Is there a clearly identifiable point at which a property no longer has integrity? If it is inundated does it still retain integrity? To what degree? Will this be worked out with input from the tribes? Provide a little rationale for how this will be approached.
- 4) Correct Section XV.B (page 20). The text in the second sentence reads "Stand-along" and should be corrected to "Stand-alone."

5) The statement in XVI. E (page 21) reads, "This PA may be executed in any number of counterparts, each of which when executed shall be deemed to be an original, and all of which when taken together shall constitute one and the same agreement." This statement is confusing to the reader and should be clarified.

Sincerely,

A handwritten signature in cursive script that reads "Samuel N. Penney".

Samuel N. Penney, Chairman  
Nez Perce Tribal Executive Committee



May 12, 2008

"The History and Preservation People"

**Our mission: to educate through the identification, preservation, and interpretation of Idaho's cultural heritage.**  
[www.idahohistory.net](http://www.idahohistory.net)

**C.L. "Butch" Otter**  
Governor of Idaho

**Administration**

2205 Old Penitentiary Road  
Boise, Idaho 83712-8250  
Office: (208) 334-2682  
Fax: (208) 334-2774

**Archaeological Survey of Idaho**

210 Main Street  
Boise, Idaho 83702-7264  
Office: (208) 334-3847  
Fax: (208) 334-2775

**Historical Museum and Education Programs**

610 North Julia Davis Drive  
Boise, Idaho 83702-7695  
Office: (208) 334-2120  
Fax: (208) 334-4059

**Historic Preservation Office**

210 Main Street  
Boise, Idaho 83702-7264  
Office: (208) 334-3861  
Fax: (208) 334-2775

**Historic Sites Office**

2445 Old Penitentiary Road  
Boise, Idaho 83712-8254  
Office: (208) 334-2844  
Fax: (208) 334-3225

**Public Archives and Research Library**

2205 Old Penitentiary Road  
Boise, Idaho 83712-8250

**Public Archives**

Office: (208) 334-2620  
Fax: (208) 334-2626

**Research Library**

Office: (208) 334-3356  
Fax: (208) 334-3198

**Oral History**

Office: (208) 334-3863  
Fax: (208) 334-3198

Ms. Kimberly St. Hilaire  
Bonneville Power Administration  
P.O. Box 3621  
Portland, Oregon 97208-3621

RE: 1/31/2008 Draft Programmatic Agreement for the Section 106 Review of the Operations of Federal Columbia River Power System

Dear Ms. Hilaire:

Thank you for requesting our views on the most recent draft Programmatic Agreement (PA) for Section 106 Review of the operations of the Federal Columbia River Power System. I appreciate meeting with you and the other agency representatives to discuss the agreement. This version is a significant improvement over the last one. Below are our comments on this draft:

Whereas, page 2: As I stated in the meeting, the Coeur d'Alene Tribe should be listed as a THPO.

II.A.3. This stipulation should be reworded to account for the reevaluation of a property over time, as provided for in the regulations: Section 36CFR8004 (2)(c)(1) states that *The passage of time, changing perceptions of significance or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or not eligible.*

III.A.C.2. As with the last draft, we are concerned about the problem of protracted deliberations to determine what increment of effect is attributable to the operations of the Lead Federal Agencies, while erosion or other effects on sites continue.

III.D. The language in this stipulation is confusing and troubling. It would be improved by ending the first sentence after the word "effects."

VII.A.3 The Annual Report should describe accomplishments with reference to the Annual Work Plan. Also, if a regional research design is developed, then the Annual Work Plan should also provide an update on work that contributed to the regional research design.

VII.B. The Annual Work Plan should also attempt to plan work that contributes to the regional research design. As written, these three



The Idaho State Historical Society is an Equal Opportunity Employer.

Kimberly St. Hilaire  
May 12, 2008  
Page 2

documents--the Annual Report, the Annual Work Plan, and the regional research design—are stand alone and have little or no relation to one another. This does not make sense.

XI. During the five year review, a consulting party that did not originally sign the PA should be provided an opportunity to sign.

Signatories: Again, the Coeur d'Alene should be listed as a THPO.

Attachment 3. Area of Jurisdiction: In the last sentence, includes lands within a reservation boundary should be enclosed in parentheses; the regulations do not define tribal trust lands as 'tribal lands.'

Federal Land Managing Agency: This should be reworded to account for new federal land managing agencies in the future, such as the BLM. Now it recognizes four specific federal agencies. Over the life of the PA (30 years), management authority may change. If a finite set of agencies is being listed, should the BIA be listed here?

National Register: The "National Register of Historic Places" should be defined, not just the "National Register."

Traditional Cultural Property: This definition should state that a TCP "may be" eligible. As stated, all TCPs are eligible. As you, TCPs, like other property types, may or may not be eligible for the National Register.

Attachment 4: The last sentence of the fifth bullet down on page 35 should say "...TCP is on lands outside of reservation boundaries" instead of "was outside."

Attachment 6: First, we are pleased that exempted undertakings will still have to be reviewed by agency cultural resource specialists. With that said, we believe that some of the exemptions should be revised or deleted:

1. "Relinquishment of easement..." This exemption should specify that these are easements or non-fee interests where the agency currently has little or no control.

11. "Demolition or removal of buildings or structures..." This exemption should be deleted. We are worried about buildings or structures being demolished purposefully just before they reach the 50 year mark, or the demolition or removal of a building or structure whose eligibility has changed over time from not eligible to eligible. Demolition and removal are drastic steps that should be taken only after full review by the SHPO/THPO.

Kimberly St. Hilaire  
May 12, 2008  
Page 3

12. "Maintenance, repair, or modification..." This exemption should be reworded to include only "Routine maintenance and repair to the interior or exteriors of existing buildings and structures less than 50 years old."

20. "Repair, replacement, and installation..." Two sentences should be added the end of this exemption: "This exemption does not include window repair or replacement. Work affecting windows will undergo the standard review process."

24. "Maintenance and widening..." Widening should be deleted.

Again, we appreciate all of the agencies' efforts on this PA. If you have any questions, please feel free to contact me at 208-334-3847, ext. 107.

Sincerely,

A handwritten signature in cursive script that reads "Susan Pengilly".

Susan Pengilly  
Deputy SHPO

-----Original Message-----

From: Wilmoth, Stan <swilmoth@mt.gov>

To: Celmer, Gail C NWD

Sent: Fri Jun 06 08:14:16 2008

Subject: RE: FCRPS PA Discussions - May 28th

Gail: please find attached comments/questions re: attachment 6 of FCRPS PA. I have not attempted to do anything with the rest of the PA draft since I enter tardy.

Attachment 6-

Introductory paragraph. Decisions on exemptions made by CRS. That is good, but is there a reason to - if it is not done elsewhere - to make sure the CRS meets the SOI standards for appropriate CR? I think in many cases it is a good requirement - engineers could in some agencies serve as CRS. That is usually NOT good. Secondly it states here that decisions will be documented. Where/how? Should there be a short list in the Annual Report? Maybe under A.3.b.?

1) I do not know what #1 means so I would not like to agree with it.

2) I know that many, including the ACHP sometimes, think that this is fine. I have doubts as it stands. If the BLM transfers land to the Army National Guard (which is federal but has no CR staff and no one in the state that meets the SOI standards to be their CRS - it is a potential Adverse Effect. We have such a deal going right now. BLM agrees with me - the ArmyNA does not. But it's going to happen. I don't know - but at a minimum there should be a caveat that the receiving agency has comparable CR program, staff and training, or a PA agreement be part of transfer should be required.

11) How about changing the years from 50 to 45? And to clarify that any exempted additions are also non historic? Again as an example we have WWII and cold war structures that the military is playing games with that these clarifications would be useful to have.

12) Less than 45 years....

19) Does mean inside recorded archaeological sites or features? TCPs? If that is a possibility it needs to be modified.

20) I think SOI standards need to be referenced and a requirement for action to be reversible.

23) The guzzlers I know about are all in the ground. Are there non ground disturbing designs?



The Confederated Tribes of the Colville Reservation  
P.O. Box 150, Nespelem, WA 99155

Phone: (509) 634-2200  
FAX: (509) 634-4116



March 28, 2008

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 review and comment on the January 31, 2008 draft of the Systemwide Programmatic Agreement for cultural resource management in the Federal Columbia River Power System. Substantial and positive changes have been made since the last draft. We appreciate the effort required to prepare this document and respond to and incorporate all of the comments from the previous draft. This latest draft is vastly improved over earlier versions and most of our earlier comments have been addressed. However, one key issue that we repeatedly bring up remains – decision making authority

While removed from the rest of the document, the federal agencies specifically invoke or imply federal agency decision making authority, as follows:

**“IX. CONSULTATION, COMMUNICATION, AND COORDINATION”**

“While the Lead Federal Agencies retain final decision making authority for all their actions relating to the undertaking, communication, coordination, and consultation are integral to the PA’s success at both systemwide and Project levels. To achieve this, PA participants need clear, agreed upon roles and responsibilities that are consistent across staff transfers and replacements as follows:”

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, again, 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. It also clearly states that while the agency is responsible for findings and determinations, findings and determinations can use designees to prepare information, analyses and recommendations. Such designees would be the Working Groups.

**§ 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.

...

(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.

One reason this is an important point is because, after 12 years of negotiation and discussion, the agencies are still unwilling to commit, in writing, to co-management and cooperative decision making. This is reflected in the section on "PA participants ... clear, agreed upon roles and responsibilities":

**"IX. CONSULTATION, COMMUNICATION, AND COORDINATION**

...

**"C. Cooperating Group Responsibilities.**

A decision by the Lead Federal Agencies to proceed when the Cooperating Group is unable to provide input in a timely or agreed upon manner is not a violation of this PA."

This leaves open the possibility of agencies moving forward with their own agenda if they have forced the other group members from the table. Consultation rights are not abdicated by tribes if they do not sit at the table, it means the agency or agencies must find another mechanism for consulting at the technical and management levels, or resolve working group difficulties to be in compliance with agency policy and the SOR RODs. Law still requires government to government consultation prior to agency action.

This ability for "Agencies to proceed" also leaves open the possibility of agencies moving forward with their own agenda when the rest of the working group members have reached consensus, or are in unanimous agreement, but the agency does not agree. These are not remote possibilities; the Confederated Tribes of the Colville Reservation already encountered two agencies engaging in the unilateral actions describe in this and the preceding paragraph.

Moving away from the body of the PA, the two categorical exclusions below, #s 18 and 25, are problematic because it presumes significant resources don't exist just because of previous disturbance. For instance, a culvert or fiber optic line might transect an unrecorded significant site. Section 106 would require we identify the property prior to evaluating integrity, so the fact a site is disturbed does not mean it doesn't have to be recorded. And, while the exact footprint of the previous disturbance might not adversely impact an undisturbed portion of a significant property, when does anyone really stay in the exact same footprint?

"18. Excavations for removing or replacing tile, ditches, fire lines, dikes, levees, pipes, pipelines, cables, power poles, telephone lines, fiber optic lines, gates, and cattle guards, where no such excavations, including heavy equipment operation, would take place outside of the original zone of disturbance."

"25. Maintenance within existing road or parking lot profiles, such as repaving, grading, cleaning inboard ditches, repairing, brushing or replacing culverts, guards, and gates within existing disturbed areas."

Thank you for your time and commitment to working cooperatively toward the preservation and perpetuation of significant cultural resources. Should you have questions concerning our comments, please contact Camille Pleasants, our Tribal Historic Preservation Officer, at (509) 634-2695.

Sincerely,



Mike Marchand  
Chairman, Colville Business Council

cc: Deb Louie -- CBC Culture Committee Chair  
Dan Brudevold -- Land and Planning Director  
Camille Pleasants -- Tribal Historic Preservation Officer  
Gus Moura -- TCP Coordinator  
John Pouley -- Field Director  
310908 Correspondence File  
Chrono



Confederated Tribes  
of the  
Umatilla Indian Reservation  
Department of Natural Resources  
***Cultural Resources Protection Program***  
P.O. Box 638 73239 Confederated Way  
Pendleton, Oregon 97801  
(541) 276-3629 Fax (541) 276-1966



April 10, 2008

Kimberly St. Hilaire  
Cultural Resources Program Manager  
Environment, Fish and Wildlife, KEC-4  
Bonneville Power Administration  
Post Office Box 3621  
Portland, Oregon 97208-3621

Dear Ms. St. Hilaire:

Thank you for the opportunity to comment on the latest (January 31, 2008) *Systemwide Programmatic Agreement for the Management of Historic Properties affected by the Multipurpose Operations of Fourteen Projects of the Federal Columbia River Power System for Compliance with Section 106 of the National Historic Preservation Act (PA)*. The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Cultural Resources Protection Program (CRPP) appreciates that the Bonneville Power Administration, U.S. Army Corps of Engineers, and Bureau of Reclamation (Agencies) took the time to meet with us on March 18 to discuss our concerns about this draft; the CTUIR found the meeting particularly productive. We feel that PA has dramatically improved since the previous draft.

At the March 18 meeting, the CTUIR focused on trying to gain an understanding of how the FCRPS will operate differently under the PA than it currently does. It is our understanding that until the project specific programmatic agreements or historic property management plans are adopted, there will be no real change, with two exceptions. The scope of the PA includes what had previously been separate undertakings, which had followed 36CFR800. We remain curious to see how these projects will be addressed, and whether the changes will be different at different reservoirs. The PA's Attachment 5 is a good effort toward explaining the undertaking, but it is still unclear how consulting parties will understand which compliance system is being followed and who the lead federal agency or agencies will be for a given aspect of the undertaking. We also discussed the exempted activities listed in Attachment 6. The CTUIR has specific problems with a number of the activities in this list; rather than detail our numerous concerns, our recommendation is to develop exempted activities lists in the individual programmatic agreements and not have a list at all in this overall PA.

Another subject discussed at the meeting is how consultation will work if a tribe is not part of a Cooperating Group. The CRPP suggested that the Agencies identify the specific tasks each Cooperating Group is expected to complete and commit to involving each affected tribe in those tasks, whether through a Cooperating Group or some other mechanism. This subject is of critical importance; the CTUIR must be assured that consultation regarding this ongoing undertaking is not limited by the functionality of individual Cooperating Groups.

We appreciate the efforts that Agencies have made to clarify issues surrounding historic properties of religious and cultural significance to Indian Tribes (HPRCSIT). As discussed, we support using this cumbersome term rather than "traditional cultural property" because, as stated in the Advisory Council on

Historic Preservation's draft *Consultation with Indian Tribes in the Section 106 Review Process: Guidelines* (May 2007; emphasis in original),

Within the Section 106 process, the appropriate terminology for sites of concern to tribes is **“historic property of religious and cultural significance to an Indian tribe.”** Unlike the term TCP, this phrase appears in NHPA and the Section 106 regulations. **It applies strictly to tribal sites, unlike the term TCP.** Furthermore, Section 101(d)(6)(A) of NHPA reminds agencies that historic properties of religious and cultural significance to Indian tribes may be eligible for the National Register. Thus, it is not necessary to use the term TCP when considering whether a site with significance to a tribe is eligible for the National Register as part of the Section 106 process. The NPS Bulletin 38 guidelines are helpful, however, in providing an overview of how National Register criteria are applied.

There is another complication involved with the term TCP: Bulletin 38 has sometimes been interpreted as requiring that an Indian tribe demonstrate continual use of a site in order for it to be considered as a TCP. The NHPA and the Section 106 regulations reflect the understanding that tribes have frequently been geographically separated from historic properties of religious and cultural significance to them by no fault of their own, and thus do not carry any requirement to demonstrate continual use.

The CTUIR supports a provision within the PA to assess HPRCSITs thematically, or in groups, rather than evaluating each site individually. We look forward to further discussion regarding the role of the State Historic Preservation Offices (or in some cases Tribal Historic Preservation Offices) in eligibility determinations regarding HPRCSITs when the specific tribe and the Agencies are in agreement. As we noted in the meeting, we are unclear about what expertise a SHPO (or a THPO from another tribe) would add to the discussion of eligibility for HPRCSITs when the tribe and Agencies are in agreement.

At the meeting, we had considerable discussion about the rights of Tribes who do not sign the PA. This began as a discussion of the use of the terms “signatory parties” and “consulting parties.” It is the CTUIR's position that affected tribes, signatory or not, must be consulted with regarding any amendment to the PA. Since the PA is basically a re-write of the regulations implementing the National Historic Preservation Act, changes to the alternative regulations are undoubtedly an undertaking with the potential to affect historic properties to which tribes attach religious and cultural significance. The PA's termination clause recognizes a role for all of the consulting parties. We recommend ensuring that consulting parties are afforded appropriate rights under this agreement.

As we have discussed throughout the development of this PA, it is difficult to understand it in the context of 36CFR800 because rather than achieving the goals of the alternative procedures laid out in 36CFR800.14, this document outlines a plan for developing alternative procedures on the project level in the future. This becomes particularly problematic with the statement on page 3, “Now, therefore, pursuant to 36CFR800.14(b), the Lead Federal Agencies shall take into account the effects of the undertaking on historic properties in accordance with the following stipulations, and adherence to the terms of this PA shall satisfy the Lead Federal Agencies' Section 106 responsibilities for addressing the effects of the undertaking on historic properties.” We understand that this terminology is present in most PAs developed under 36CFR800.14, but from the CTUIR's point of view, the Agencies cannot claim to have satisfied their Section 106 responsibilities until all of the individual project specific PAs have been completed; until that time the Agencies must follow the process laid out in 36CFR800. Execution of this PA is merely evidence of a step toward satisfying the Agencies' responsibilities.

The CTUIR expressed disappointment at the meeting that the Agencies had not addressed most of the language we recommended adding to the PA in our previous comments. As we stated then, the CTUIR

hoped the PA would “reflect a spirit of cooperation between the Agencies and Tribes. Such a cooperatively prepared document would be more similar to the Missouri River programmatic agreement in terms of tone and content.” We suggested the addition of a number of Whereases taken from Agency policies (see Attachment 1; we still recommend adding them). As an example we mentioned the Agencies’ response to the whereas regarding trust responsibility.

The suggested language from the CTUIR (comment 136) was to add:

Whereas the Federal Government has a trust responsibility to Indian Tribes, which includes the duty to act ‘with good faith and utter loyalty to the best interests of the Indians’. The Lead Federal Agencies will act in accordance with the Federal trust responsibility, including government-to-government consultation whenever the Lead Federal Agencies’ ‘plans or actions affect trust resources, trust assets, or Tribal health and safety’. The Lead Federal Agencies will treat sacred and culturally significant places as subject to the Federal trust responsibility and therefore Tribes must be engaged in consultation before decisions are made, and Tribes expect to participate in making decisions and in carrying out decisions regarding these resources.

This language was taken from different portions of the Missouri River programmatic agreement. The Agencies’ response to this comment was that this Whereas would not be included because:

The Systemwide PA addresses NHPA Section 106 responsibilities, and therefore does not affect Federal trust responsibilities to tribes. Whereas #12 affirms the government-to-government relationship between tribes and the Federal government, and the Lead Federal Agencies intend to enter into government-to-government consultation when appropriate. Whereas #10 references Agency tribal policies, and acknowledges that the undertaking affects historic properties with traditional religious and cultural importance to tribes.

In our meeting, the Agencies suggested they do not have a trust responsibility to protect cultural resources because they are not trust assets. The following are the lead agencies’ policies on trust resources and trust responsibility.

Bureau of Reclamation, <http://www.usbr.gov/native/naao/policies/policy.html>

**Trust Resources:** The United States government has an Indian trust responsibility to protect and maintain rights reserved by or granted to Indian Tribes or Indian individuals by treaties, statutes, and executive orders. Reclamation, as a federal executive agency, shares this responsibility.

Corps of Engineers, <http://www.usace.army.mil/cw/cecw-p/pgls/pgl57a.pdf>

**TRUST RESPONSIBILITY** - The U.S. Army Corps of Engineers will work to meet trust obligations, protect trust resources, and obtain Tribal views of trust and treaty responsibilities or actions related to the Corps, in accordance with provisions of treaties, laws and Executive Orders as well as principles lodged in the Constitution of the United States.

Bonneville Power Administration, <http://www.bpa.gov/Corporate/KT/Trblpolicy.pdf>

**I.** BPA recognizes that a trust responsibility derives from the historical relationship between the Federal government and the Tribes as expressed in Treaties, statutes, Executive Orders, and Federal Indian case law. Using these legal underpinnings, BPA and the Tribes will work cooperatively to arrive at an understanding of how the trust responsibility applies to a government-to-government relationship.

The Bureau of Reclamation policy recognizes that the trust responsibility extends to protect rights of tribes granted by statute. The Corps of Engineers policy does not define trust resources, but acknowledges an obligation to obtain tribal views on trust responsibilities in accordance with the laws of the United States. The Bonneville Power Administration policy acknowledges that some of the trust responsibility’s foundation is in statutes. These three policies are consistent on the point that statutory

rights granted to tribes are relevant to the trust responsibility. Trust resources can be secured by treaty or by statute; the trust responsibility remains the same.

The Agencies' response to comment 136 and statements in our meeting entirely miss the point that the United States owes tribes the trust responsibility to care for rights and resources in their control which are subject to tribal rights under treaty or statute. Perhaps the underlying disagreement is a confusion regarding the foundations of the United States trust responsibility to tribes. In only the narrowest sense does this area of law overlap with the Law of Trusts. The trust resources at issue (cultural resources) may or may not be trust assets, but this does not affect the statutory obligations of the federal agencies with regards to the tribes. For instance, the Bureau of Reclamation has defined trust assets as follows:

Indian Trust Assets (ITAs) are legal interests in property held in trust by the United States for Indian Tribes or individuals. The Secretary of the Interior, acting as the trustee, holds many assets in trust. Examples of objects that may be trust assets are lands, minerals, hunting and fishing rights, and water rights. While most ITAs are on reservations, they may also be found off-reservations. The United States has an Indian trust responsibility to protect and maintain rights reserved by or granted to Indian Tribes or Indian individuals by treaties, statutes, and executive orders. These are sometimes further interpreted through court decisions and regulations.<sup>1[1]</sup>

This acknowledges that trust responsibility includes those rights protected by statute, in addition to those reserved by treaty. There is no debate that tribes have rights to be consulted under the National Historic Preservation Act, the Archaeological Resources Protection Act, and the Native American Graves Protection and Repatriation Act. These tribal rights are explicitly enumerated in those statutes and regulations; the United States has an obligation to manage cultural resources in consultation with Indian tribes. The acknowledgement that the United States has a trust responsibility to manage these resources does not expand or contract any existing legal obligation the agencies already have.

The action agencies should, at the very least, rewrite the 10<sup>th</sup> Whereas to state:

Whereas the Federal Government has a trust responsibility to Indian Tribes, the Lead Federal Agencies will act in accordance with that responsibility, including government-to-government consultation whenever the Lead Federal Agencies' plans or actions affect trust resources or trust assets. The Lead Federal Agencies will treat historic properties of religious and cultural significance to Indian Tribes as subject to the Federal trust responsibility and therefore Tribes must be engaged in consultation before decisions are made, and Tribes expect to participate in making decisions and in carrying out decisions regarding these resources.

In terms of specific changes, the CRPP recommends the following.

- Add the Bureau of Reclamation's policy to Whereas 10 (<http://www.usbr.gov/native/naao/policies/policy.html>)
- Remove Stipulation III(C).
- Please clarify what is meant by the text I have italicized in Stipulation III(D): "The APE may be discontinuous or interrupted, excluding geographic areas where the undertaking does not cause effects due to *attenuation, intervening effects, or other factors.*"
- We do not agree with the Bureau of Reclamation's insistence on the sentence in Stipulation IV(C) "Access terms for evaluation or treatment shall be sufficient to ensure that any materials collected will be permanently curated under conditions that allow for appropriate care, use, and access." We do not deny that such terms are appropriate in some cases; they may not be appropriate in all cases. Decisions about individual situations should be made on a case by case basis by the consulting parties; this overarching PA should not place an absolute prohibition on all excavation without provisions for permanent curation.

---

<sup>1[1]</sup> [http://www.usbr.gov/mp/cao/field\\_offices/new\\_melones/RMP/RIR/5.0-Indian\\_Trust\\_Assets.pdf](http://www.usbr.gov/mp/cao/field_offices/new_melones/RMP/RIR/5.0-Indian_Trust_Assets.pdf)

- Add the word “cultural” in Stipulation VII(B) so that it reads, “The Systemwide Research Design would be developed to encourage consideration at the Project level of research, cultural, and educational objectives that have application on a broader, potentially regional level.”
- Add “context statements” to Stipulation VII(B)(1).
- The first sentence of Stipulation X is confusing.
- Stipulation XII describes the dispute resolution process. For signatory parties, the ACHP may determine not to consider the dispute “in which case the Agencies may proceed with the proposed action.” Under this PA, we are not clear what the proposed action is or under what circumstances the Agencies would not proceed with it.
- Attachment 4, Treatment Plan Principles. Add “that are being adversely affected by the undertaking” to the first bullet.
- Attachment 4, Treatment Plan Principles. Remove “The SHPO would be involved if a TCP was on lands outside of reservation boundaries” from the fifth bullet.
- Attachment 4, Treatment Plan Principles, sixth bullet. Remove the fourth sentence, as it is understood that the mitigation option is tied to the National Register criteria and it is up to the consulting parties to consider the feasibility and cost on a case by case basis. Also remove “consistent with Agency authorities” from the fifth sentence as nothing can be done under this PA that is not consistent with Agency authorities.

Thank you again for soliciting our comments regarding this document. If the Agencies have any questions about our comments, please feel free to contact me, Shawn Steinmetz, or Catherine Dickson at (541) 276-3629 or tearafarrow@ctuir.com, shawnsteinmetz@ctuir.com, or catherinedickson@ctuir.com.

Respectfully,



Teara Farrow  
Program Manager

cc: Johnson Meninick, Yakama Nation  
 Vera Sonneck, Nez Perce Tribe  
 Camille Pleasants, Confederated Colville Tribes  
 Sally Bird, Confederated Tribes of Warm Springs Reservation of Oregon  
 Marcia Pablo, Confederated Salish and Kootenai Tribes of the Flathead Reservation  
 Kevin Lyons, Kalispel Tribe of Indians  
 Randy Abrahamson, Spokane Tribe of Indians  
 Jill Wagner, Coeur d'Alene Tribe  
 Josephine Shottanana, Kootenai Tribe of Idaho  
 Rex Buck, Wanapum Band  
 Chuck James, BIA  
 Ken Johnston, BPA  
 Jamae Hilliard Creecy, BPA  
 Rebekah S. Pettinger, BPA  
 Lynne MacDonald, Bureau of Reclamation  
 Jill Lawrence, Bureau of Reclamation  
 Gail Celmer, Corps of Engineers  
 Joel Ames, Corps of Engineers  
 G. Paul Cloutier, Corps of Engineers  
 Rob Whitlam, Washington Department of Archaeology and Historic Preservation  
 Dennis Griffin, Oregon State Historic Preservation Office  
 Stan Wilmoth, Montana State Historic Preservation Office  
 Suzie Neitzel, Idaho State Historic Preservation Office  
 Tom McCulloch, ACHP

## **Attachment 1: Recommended Language to Add to the PA**

Whereas the impacts of system operations could eventually destroy a large percentage of the cultural resources within the APE; the cumulative effect would be the loss of heritage sites and traditional cultural resources from a river system in an entire region.

Whereas the Lead Federal Agencies have committed to implement, in full cooperation with affected Tribes and agencies, agreements, plans, and actions for management of the impacts to cultural resources. Individual Tribes' desired approach and preferred methods for cultural resources management will be a major consideration in the development, as well as the implementation, of each of the long-term management plans.

Whereas it is the policy of the Lead Federal Agencies to preserve, protect, and manage significant archaeological, historical, and traditional cultural properties within the APE in accordance with the NHPA and other applicable statutes, executive orders, and regulations.

Whereas it is the policy of the Lead Federal Agencies to uphold the terms of treaties between the United States and Indian Tribes, and executive orders regarding Indian Tribes.

Whereas the Lead Federal Agencies are required by Section 101(d)(6) of the NHPA to consult with any Indian Tribe that attaches religious and cultural significance to historic properties that may be affected by undertakings as defined in the NHPA.

Whereas the Federal Government has a trust responsibility to Indian Tribes, which includes the duty to act 'with good faith and utter loyalty to the best interests of the Indians'. The Lead Federal Agencies will act in accordance with the Federal trust responsibility, including government-to-government consultation whenever the Lead Federal Agencies' 'plans or actions affect trust resources, trust assets, or Tribal health and safety'. The Lead Federal Agencies will treat sacred and culturally significant places as subject to the Federal trust responsibility and therefore Tribes must be engaged in consultation before decisions are made, and Tribes expect to participate in making decisions and in carrying out decisions regarding these resources.

Whereas this PA is designed to facilitate the development of processes and strategies to minimize, avoid, or mitigate the ongoing adverse impacts the operation of the FCRPS caused.

Whereas this PA seeks to create a shared stewardship document that will ensure that sacred and cultural places are regarded and understood from various, including Tribal, viewpoints, and that Tribal values and customs (not just archaeological values and customs) are applied to the protection of these places. Until now, archaeological values have been dominant over Tribal values, and archaeological values have contributed to the destruction of sacred places.

Whereas this PA's fundamental value is respect: respect for the rivers; the sacred and cultural places; Tribal values, culture, and beliefs; Tribal people and their contribution to the history and environment of the Columbia River system; for the sacrifices Tribal people have made so that newcomers can have flood control, irrigated crops, navigation, electricity, and recreational activities. When Tribal representatives talk about Tribes' cultures, needs, and issues, they will be taken as seriously as archaeologists are when they talk about Tribes' ancestors, culture, and interests.