



The Confederated Tribes of the Colville Reservation

History/Archaeology Program
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U.S. Army Corps of Engineers
Regulatory Branch, ATTN: Karen Urelius
P.O. Box 3755
Seattle, Washington 98124-3755



HA# U16-323
14.0407

RE: Special Public Notice: Nationwide Permit Reissuance Request for Comments

Dear Karen Urelius:

The Confederated Tribes of the Colville Reservation (also known as the Colville Confederated Tribes [CCT]) are governed by the Colville Business Council (CBC). The CBC has delegated to the Tribal Historic Preservation Officer (THPO) the responsibility of representing the CCT with regard to cultural resources management issues throughout the traditional territories of all of the constituent tribes under Resolution 1996-29. This area includes parts of eastern Washington, northeastern Oregon, the Palus (Palouse) territory in Idaho, and south central British Columbia.

As per the June 20, 2016 Special Public Notice issued by the U.S. Army Corps of Engineers (Corps) – Seattle District (Seattle District) regarding Nationwide Permit (NWP) reissuance, the CCT THPO is hereby submitting comments pertaining to proposed Regional General Conditions (RGCs) for the Seattle District under consideration by the Northwestern Division of the Corps. We thank you for the opportunity to provide comments. As stated, the CCT THPO is responsible for representing the CCT regarding cultural resource management issues. Other CCT programs and departments may submit their own comments on these proposed RGCs, grounded in their respective areas of expertise.

In its 2012 *User's Guide for Nationwide Permits in Washington State*, the Seattle District states that:

because of the large number of native American Tribes currently and historically utilizing fish bearing waters of the U.S. in Washington State, there is a high potential for the presence of historic properties in and near waters of the U.S.; therefore, if you will be performing an activity in waters of the U.S. in Washington State, you *should* submit a PCN and receive written approval from the Corps before work can commence [5; emphasis added].

The CCT THPO agrees that there is a high potential for historic properties in and near waters of the U.S. However, as *all NWP-permitted activities and projects are undertakings* as defined within the National Historic Preservation Act of 1966 (NHPA) (currently codified at 54 U.S.C. 300101 et seq.), and federal agencies are mandated to comply with Section 106 of the NHPA, Pre-Construction Notification (PCN) under General Condition (GC) 20 pertaining to Historic Resources should be *required* in all cases, rather than suggested.

In addition, within both the Corps' 2012 NWP, and the proposed provisions of the Corps' 2017 NWP, NWP General Condition (GC) 20 stipulates the Pre-Construction Notification (PCN) requirements for projects with the potential to cause effects to National Register of Historic Places (NRHP)-listed or -eligible historic resources. GC 20 directs federal permittees to follow their own procedures for complying with Section 106 of the NHPA. Non-federal proponents/permittees are directed, in part, to 33 CFR 330.3(g), which further directs them to 33 CFR 325 Appendix C (Appendix C). The provisions of Appendix C are also mirrored within the text of GC 20. As held in numerous federal court rulings, the provisions of Appendix C violate both the NHPA and its implementing regulations contained within Section 106, particularly as they relate to tribal consultation. It is therefore the position of the CCT THPO that the Seattle District clarify and stipulate, within the text of proposed RGC 12 pertaining to Cultural Resources and Human Burials, that all permittees within the Seattle District are required to comply with Section 106 of the NHPA.

The Seattle District continually asserts that, "The PCN is not part of the Section 106 consultation [...]" (email from Chris Jenkins, Seattle District, to Aaron Naumann, CCT, June 1, 2016). Should the Seattle District, and the Corps in general, continue to maintain that tribal consultation under the precise provisions of Section 106 of the NHPA, or under ACHP-approved alternative compliance procedures, is not mandatory, then we offer the following. It is the position of the CCT THPO that when we are provided public notice pertaining to PCN review of a potential NWP-permitted undertaking, or included as a Coordinating Agency within the PCN review process, that the 2001 memorandum *Fees in the Section 106 Process* issued by the Executive Director of the Advisory Council on Historic Preservation (ACHP) is applicable. The memorandum states that, "When the Federal agency or applicant is seeking the views of an Indian tribe to fulfill the agency's legal obligation to consult with a tribe under a specific provision of ACHP's regulations, the agency or applicant is not required to pay the tribe for providing its views." However, the memorandum also states that, "When, during the identification phase of the Section 106 process, an agency or applicant seeks to identify historic properties that may be significant to an Indian tribe, it may ask for specific information and documentation regarding the location, nature, and condition of individual sites, or actually request that a survey be conducted by the tribe. In doing so, the agency essentially asks the tribe to fulfill the role of a consultant or contractor. In such cases, the tribe would seem to be justified in requiring payment for its services, just as any other contractor."

The CCT holds that the 2001 memorandum *Fees in the Section 106 Process* similarly applies to the Corps' PCN review process, should the Corps continue to insist that the PCN review process is not "tribal consultation" as defined within Section 106 of the NHPA. Compensation to tribes for their review of PCNs and provision of information necessary to the district engineer's decision regarding NWP verification is fully warranted. The CCT THPO is in the process of drafting a fee schedule for the provision of information that has been requested outside of the boundaries of tribal consultation, and developing a process for billing the Corps and other agencies and entities as a contractor in these cases.

Thank you for consulting with the Confederated Tribes of the Colville Reservation. Please note that these comments are based on information available to us at the time of the project review.

We reserve the right to revise our comments as information becomes available. If you have any questions or concerns, please contact Karen Capuder at (509) 634-2876 or karen.capuder@colvilletribes.com. If you wish to speak with me, contact me at (509) 634-2695.

Sincerely,

A handwritten signature in black ink, appearing to read 'Guy Moura', written over a horizontal line.

Guy Moura, Tribal Historic Preservation Officer

Cc: Chron

File (KMC)

C. Paul Jenkins, Cultural Resources Program Manager, USACE-Seattle District

Lance Lundquist, Archaeologist, USACE-Seattle District

Dr. Allyson Brooks, Washington State Historic Preservation Officer

Dr. Robert Whitlam, Washington State Archaeologist