



July 18, 2011

Consultation Policy Comments
Office of the Secretary
Department of the Interior, Room 5129
MIB
Washington, DC 20240

VIA ELECTRONIC MAIL (consultation@doi.gov) — HARD COPY TO FOLLOW

Re: Policy on Consultation with Indian Tribes

Comments Addressing May 11, 2011 Proposed Policy

Good afternoon:

Per the notice issued by the Department of the Interior (DOI) on May 11, 2011, and published in the May 17, 2011, *Federal Register*,¹ the Interstate Natural Gas Association of America (INGAA)² submits the following comments.

Executive Summary

Consistent with DOI's commitment to tribal sovereignty, the Proposed Policy broadly addresses the suite of tribal consultation obligations imposed on DOI by federal law. INGAA focuses its comments on one source of DOI consultation responsibility: the obligation for government-to-government consultation required by section 106 of the National Historic Preservation Act (NHPA).³ Under section 106, DOI must engage in tribal consultation, on a government-to-government basis, when a proposed interstate natural gas pipeline project might affect properties listed in or eligible for listing in the National Register of Historic Places (National Register), including properties to which a tribe attaches religious and cultural significance.

Regarding tribal consultation under section 106, INGAA urges DOI to expand its policy to reflect, authorize and embrace early and active participation by project applicants. Experience proves that early, active participation by project applicants significantly enhances the efficiency and effectiveness of the section 106 process, as measured by addressing tribal concerns, analyzing project design and siting, and involving tribal members for purposes of construction monitoring and employment. These benefits can be obtained without impeding or compromising DOI's important (and statutorily mandated) role in consulting directly with tribal governments.

¹ *Policy on Consultation with Indian Tribes*, 76 Fed. Reg. 28446 (2011) (Proposed Policy).

² INGAA is a non-profit trade association that represents the interstate and interprovincial natural gas pipeline industry operating in North America. INGAA's United States members transport more than 85 percent of the Nation's natural gas through some 185,000 miles of interstate natural gas pipelines. Many of these pipelines cross federal public land and necessarily involve permitting through DOI agencies like the Bureau of Land Management (BLM).

³ 16 U.S.C. § 470f.

INGAA specifically asks DOI to include the following measures, which are designed to integrate project applicants into the tribal consultation and coordination process:

1. *Consistent with regulations implementing section 106, a project applicant may request that DOI grant the applicant the authority to initiate direct consultation with Indian tribes (including the Tribal Historic Preservation Officer (THPO) or other representative of the tribe) with respect to a specific proposed project, as long as approved by the tribe, subject to the express caveat that this authority does not relieve the DOI of its government-to-government consultation obligation.*
2. *Consistent with DOI's responsibility for government-to-government consultation throughout the section 106 process, DOI should delegate responsibility to project applicants to act as facilitators and should rely heavily on the applicant's coordination of issues such as negotiating reroutes; hiring tribal members for project construction, if requested; and/or negotiating the details of tribal monitoring during construction, as appropriate under the circumstances.*
3. *Project applicants may participate in the section 106 process as "consulting parties," as defined in the section 106 implementing regulations issued by the Advisory Council on Historic Preservation (ACHP), thus entitling project applicants to participate in discussions and receive information about tribal concerns so that they can respond accordingly.*
4. *For undertakings involving more than one agency, DOI should include clear guidelines for coordination between agencies during the tribal consultation process to avoid duplication of efforts and project delays.*

INGAA concludes its comments by addressing two relatively specific aspects of the Proposed Policy. First, DOI should be more express in how it determines which tribes are "appropriate" for receiving notice of an opportunity to consult. DOI should either provide a standard for making this determination or note that the determination is to be made case by case. Second, DOI should develop a waiver policy to address cases where a tribe repeatedly refuses to respond to invitations to consult.

Before discussing the merits of these proposals, a brief review of the section 106 process, as applied to interstate natural gas pipeline projects, is in order.

Overview: Section 106 Tribal Consultation Requirements for Pipeline Projects

Section 106 requires federal agencies to take into account the effect that a federal undertaking may have on historic properties. "Historic properties" include any properties of traditional religious and cultural importance to an Indian tribe that meet the criteria for inclusion in the National Register.⁴ The section 106 process mandates that the agency: (1) identify historic properties potentially affected by the project, (2) assess the project's effects on those

⁴ 36 C.F.R. § 800.16(l)(i).

properties, (3) develop methods to minimize or mitigate adverse effects, and (4) consult with appropriate parties to resolve the adverse effects.

The Federal Energy Regulatory Commission (FERC) is the lead agency responsible for authorizing construction and operation of new interstate natural gas pipelines.⁵ As the lead agency, FERC is responsible for coordinating the environmental review of proposed pipelines under the National Environmental Policy Act (NEPA). Though FERC is the lead agency, authorizations from additional agencies are required before a pipeline can be constructed. For example, a pipeline crossing federal lands will likely require a right-of-way from the BLM, and other DOI bureaus and offices may also review the project, including the Fish and Wildlife Service, Bureau of Reclamation, Bureau of Indian Affairs and the National Park Service. If a project impacts tribal lands, or properties of traditional religious and cultural importance to an Indian tribe, DOI's responsibility to consult on a government-to-government basis is triggered.

General Supporting Comments

1. There is no legal bar to project applicants initiating tribal consultation, and there are significant practical advantages for allowing applicants to do so.

The section 106 regulations promulgated by the ACHP allow project applicants to participate in the process as consulting parties.⁶ The ACHP regulations further provide "[t]he agency official may authorize an applicant or group of applicants to initiate consultation with the [State Historic Preservation Officer (SHPO) or THPO] and others, but remains legally responsible for all findings and determinations charged to the agency official."⁷ Thus, even where federal agencies grant consulting party status, they "remain responsible for their government-to-government relationships with Indian tribes."⁸

DOI should affirm that if authorized by a tribe, DOI may authorize a project applicant to initiate consultation with the SHPO, the THPO, the tribe's appointed representative, or the tribe itself. In addition, DOI should clarify that any degree of consultation by the applicant is allowed if formally agreed to by the tribe. The project applicant's authority to initiate tribal consultation, however, would not relieve DOI from its own consultation obligations. DOI still would be responsible for engaging in government-to-government consultation with tribes. The project applicant would merely be initiating consultation and, in some instances, if authorized by a tribe, could become further engaged in the consultation process.

The Federal Communications Commission (FCC) provides a valuable model for allowing section 106 consultation to be initiated by a project applicant without hindering the agency's statutory obligation to conduct government-to-government consultation. In its Nationwide

⁵ 15 U.S.C. §§ 717, *et. seq.*

⁶ 36 C.F.R. § 800.2(c)(4).

⁷ *Id.*

⁸ *Id.*

Programmatic Agreement for Review of Effects of Historic Properties for Certain Undertakings Approved by the Federal Communications Commission, the FCC authorizes project applicants to initiate the section 106 process while expressly noting that it remains responsible for its government-to-government consultation obligations.⁹ Applicants are required to use good faith efforts to identify and, as appropriate, to contact any Indian tribes that might attach religious and cultural significance to historic properties that may be adversely affected by an undertaking.¹⁰ Once interested tribes have been identified, the project applicant invites them to be consulting parties.¹¹ The FCC then engages tribes in government-to-government consultation.

The FCC's approach, which relies on the project applicant to initiate consultation, has been very successful. Much of the program's success can be attributed to the FCC's recognition that project applicants are in a unique position to provide tribes with project data, maps and information, and a project applicant's ability to answer questions on the project to assist tribes in making an informed decision on whether to participate in the consultation process.

Similarly, FERC regulations allow a potential license applicant to initiate consultation under section 106 of the NHPA: "A potential license applicant may at the same time request authorization *to initiate consultation* under [section 106] and the implementing regulations at 36 C.F.R. 800.2(c)(4)." Like the FCC, FERC also has made it clear that granting authority to initiate consultation does not obviate the agency's need to initiate government-to-government consultation.

DOI should adopt an approach similar to FERC and the FCC, authorizing project applicants to initiate tribal consultation, when a tribe grants its approval to do so.¹² Project applicants can provide tribes with the best project information and can respond better to questions. Also, any degree of consultation should be permitted if expressly authorized by a tribe. As it adopts this approach, DOI should clarify that it has the ultimate responsibility to comply with its consultation duties under applicable Executive Orders, the NHPA, and departmental policy, and that allowing the project applicant to initiate the section 106 process will not affect those responsibilities.

2. Allowing project sponsors to act as facilitators not only fulfills but furthers the purposes of section 106 consultation.

Under FERC's regulations, the project sponsor, as a non-federal party, has a specific duty to assist FERC in meeting its obligations under section 106 and its implementing regulations.¹³ The project applicant acts as a facilitator to streamline consultation, and, in doing so, the project

⁹ 47 C.F.R. Part I, Appx. B.

¹⁰ *See Id.* at § IV(A).

¹¹ *See Id.* at § IV(H).

¹² INGAA strongly recommends DOI encourage tribes to engage in consultation with pipelines early in the process, so issues and concerns can be addressed before pipelines file their formal certificate applications.

¹³ 18 C.F.R. § 380.14(a).

sponsor must assist FERC in taking into account the views of interested parties, Native Americans, and tribal leaders.¹⁴ Furthermore, “[t]he project sponsor must consult with the [SHPOs and THPOs], if appropriate.¹⁵ A project sponsor may contact the Commission at any time for assistance.¹⁶

A project applicant’s application must include a cultural resources report, known in FERC parlance as Resource Report 4.¹⁷ Resource Report 4 must contain “[d]ocumentation of the applicant’s initial cultural resources consultation, including consultations with Native Americans and other interested persons (if appropriate),” as well as Overview and Survey Reports, an Evaluation Report, and a Treatment Plan, as appropriate.¹⁸ Resource Report 4 must also include written comments from SHPOs and THPOs, as appropriate, and from applicable land-managing agencies.¹⁹ The initial cultural resources consultations should establish the need for surveys. If surveys are deemed necessary by the consultation with the SHPO or THPO, the survey report must also be filed with the application.²⁰ In preparing the Treatment Plan, an applicant must conduct additional consultation with FERC staff, the SHPO, any applicable THPO and land-management agencies.²¹ To preserve confidentiality, the applicant must request privileged treatment for all material filed with the Commission containing location, character, and ownership information about cultural resources.²²

FERC’s program complies with the spirit and intent of the ACHP regulations. The purposes of the section 106 process are:

[T]o accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.²³

¹⁴ *Id.* § 380.14(a)(1).

¹⁵ *Id.* § 380.14(a)(3).

¹⁶ *Id.* § 380.14(a).

¹⁷ *Id.* § 380.12(f).

¹⁸ *Id.* § 380.12(f)(1)(i).

¹⁹ *Id.* § 380.12(f)(1)(v).

²⁰ *Id.* § 380.12(f)(2).

²¹ *Id.* § 380.12(f)(3)(ii).

²² *Id.* § 380.12(f)(4).

²³ 36 C.F.R. § 800.1(a).

FERC does not have field agents and relies heavily on project applicants to assist with consultation. The FERC process often results in the project applicant facilitating site relocations, hiring tribal members, and coordinating the details of tribal monitoring during construction activities. The end result is a streamlined process in which the tribes are able to protect historic properties of significance through direct communication with the party able to provide the necessary mechanisms to do so: the project applicant.

The Department of Housing and Urban Development (HUD) has adopted an analogous program incorporating the concept that another entity may assume the responsibility for section 106 compliance, including tribal consultation obligations. The program has been very successful and HUD has recognized the benefit of this “assumption authority.”

An end result of the Department’s “assumption authority” provisions is that Section 106 consulting parties, including Indian tribes, are in direct contact with project or program decision-makers and thus have an increased chance of influencing positive outcomes.²⁴

DOI should consider adopting an approach similar to FERC’s and HUD’s, in which project applicants are delegated responsibility to facilitate DOI’s consultation obligations. Like FERC’s regulations, DOI should set forth the responsibilities and expectations of project applicants to assist DOI in meeting its section 106 obligations. DOI should clarify, however, that in this capacity, the project applicant merely is assisting DOI to meet its consultation obligations and that the project applicant is not directly consulting. By implementing a program in which the project applicant may facilitate tribal consultation, while the agency retains its responsibility for government-to-government consultation, DOI can meet its obligations through a streamlined consultation process that benefits all parties and complies with the ACHP regulations.

3. Applicants can be integrated into the section 106 process as consulting parties.

ACHP regulations provide that an applicant for federal assistance or for a federal permit, license, or other approval is entitled to participate as a consulting party.²⁵ As a consulting party, a project applicant is entitled to receive information and should be informed contemporaneously of discussions between the tribe and the government, and a project applicant should be permitted the opportunity to provide input on decision-making. DOI should clarify the project applicant’s role as a consulting party in the section 106 process for those projects proposed on DOI-managed lands.

The consultation process should be open and transparent to all consulting parties, including the project applicant, while preserving the confidentiality necessary to protect historic properties. For example, when permissible under the ACHP confidentiality provisions,²⁶ the

²⁴ Letter from Richard Brown, Director of Office of Environment and Energy, HUD to Don Klima, ACHP (June 21, 2005), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_13724.pdf.

²⁵ 36 C.F.R. § 800.2(c)(4).

²⁶ 36 C.F.R. § 800.11(c).

locations of Traditional Cultural Properties (TCPs) should be revealed to project applicants as well as the agency. As a practical matter, a project applicant will be better suited to reroute quickly and efficiently a project if it knows the location of a TCP early in the planning process. At the same time, however, consulting parties must appreciate the sensitivity of such information and recognize that disclosure of such locations could place TCPs at risk. Therefore, all consulting parties should be required to sign binding confidentiality agreements prohibiting the disclosure of sensitive information if requested to do so by the tribe.

Project applicants traditionally have worked with tribes to ensure that proposed projects will not disturb important tribal cultural features. As the project applicant works with different government entities, landowners, and other interested parties, the project applicant often agrees to make changes and modifications to the original pipeline proposal. For example, such changes may include modifications to the proposed pipeline route or engineering methods to avoid or accommodate certain features in the area such as wildlife habitat and sacred tribal historical features that fall outside the scope of the section 106 process. With respect to accommodating tribal historical features, the applicant may agree to allow tribal monitors to be present at the construction site, subject to terms and conditions agreed upon by the applicant and the tribe. However, before any changes to the proposed project can be made, the project applicant must thoroughly understand why the change is necessary and must be able to complete new surveys and studies necessary to determine whether the requested change is feasible. To address a tribe's concerns in an efficient, effective, and timely manner, the consulting applicant should be involved in tribal discussions to the maximum extent possible. By doing so, the agency, the applicant, and the tribes will all benefit from increased communication and an increased ability of the applicant to accommodate the tribes' concerns.

It is logical and legally permissible for DOI to establish a process that ensures that tribal consultation is conducted in a manner that respects the government-to-government relationship and confidentiality, but that also allows the project applicant to participate in discussions with DOI and the tribes in a constructive, meaningful, and timely manner. INGAA therefore requests that DOI clearly define the roles and expectations of project applicants as section 106 consulting parties in tribal consultation. In doing so, DOI should be careful to distinguish between its government-to-government obligations and the traditional coordination and outreach efforts in which project applicants frequently engage.

4. Where more than one agency is responsible for ensuring section 106 compliance, tribal consultation policy should foster coordination and cooperation.

The Proposed Policy also provides DOI with the opportunity to address the roles of lead federal agencies and coordinating federal agencies during tribal consultation. When more than one federal agency is involved in an undertaking, such as the construction of an interstate natural gas pipeline, each agency has discretion to designate a lead federal agency to act on its behalf. Where a designation occurs, the lead federal agency fulfills its section 106 responsibilities and

the designating agency's 106 responsibilities collectively.²⁷ Agencies that choose not to designate a lead agency remain individually responsible for their own section 106 compliance.²⁸

As mentioned above, for applications to construct interstate natural gas pipelines, FERC is the statutory lead agency for purposes of complying with NEPA.²⁹ Of the agencies involved in the undertaking of constructing these pipelines, some choose to designate FERC as the lead agency for section 106 compliance and some choose not to. The latter arrangement often leads to a duplication of efforts, onerous response requirements on consulting parties, and delays in the section 106 process.

The Proposed Policy should clarify that in those instances when a lead agency has not been designated by all of the participating agencies, coordination between all agencies should still occur. INGAA members have been involved in projects where the same consulting parties were responding to the materials more than once from various agencies. This duplication of effort can be burdensome for tribes as well. Most tribes do not have the resources or staff to respond to the same requests from different agencies.

Specific Comments

1. DOI policy should provide a standard for determining the “appropriate” tribes to receive notice of an opportunity to consult.

Section IV.A. of the Proposed Policy states that “[a] Bureau or Office must notify the appropriate Indian Tribe(s) of the opportunity to consult when considering a Departmental Action with Tribal Implications,”³⁰ but does not specify how a bureau or office should determine which tribes are “appropriate” for notification. For example, in the context of a specific project requiring NEPA analysis, would the appropriate tribes include all tribes with reservation lands or any properties of traditional religious and cultural importance to the tribe within the spatial scope of the project's direct, indirect, or cumulative effects? Or, would the spatial limit be that imposed by the NHPA, capturing the Area of Potential Effects and only requiring consultation regarding traditional cultural properties that are eligible for listing in the National Register of Historic Places?³¹ INGAA suggests DOI define “appropriate” or acknowledge that, in this context, “appropriate” will be determined case by case.

²⁷ 36 C.F.R. § 800.2(a)(2).

²⁸ *Id.*

²⁹ 15 U.S.C. § 717n(b)(1).

³⁰ Proposed Policy, 76 Fed. Reg. at 28447.

³¹ *See* 36 C.F.R. § 800.4.

2. DOI should establish standards for determining that a tribe has waived its opportunity to consult.

The Proposed Policy also requires the bureau or office to continue making periodic efforts to initiate consultation throughout the Departmental Action when the tribe does not respond to initial consultation efforts. This policy may encourage tribes that are opposed to a Departmental Action to wait until the very end of the Action before declaring a desire to consult. Such a result would be unfair to the bureau or office as well as to the project proponent. It could also be very disruptive to the work of cooperating or lead agencies outside of the DOI. In order for a project to move forward, there must be some certainty as to when in the process a tribe may exercise its consultation rights. At some point in time prior to prejudice to other parties, the repeated failure of a tribe to respond to invitations to consult should be deemed a waiver of the tribe's opportunity to consult.

Conclusion

By providing an opportunity for project applicants to consult with tribes directly, without impairing the federal agency's role in government-to-government consultation, all parties involved can work together to streamline the permitting process while protecting historic properties. The measures detailed in these comments comply with the NHPA and ensure that the tribes' concerns are addressed in a timely, efficient, and comprehensive manner. While it would be possible for the DOI and the tribes to consult first and then bring the project proponent into the discussion, this would lack the transparency and timeliness that is important to all parties involved in large linear projects such as pipeline construction and operation. INGAA believes the Proposed Policy is a tremendous opportunity for DOI to incorporate a practical solution to a common challenge faced by the interstate pipeline industry with regard to NHPA Section 106 tribal consultation requirements.

Thank you for the opportunity to comment on DOI's Proposed Policy. Please contact us should you have any questions.

Yours respectfully,

/s/

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