ASSOCIATION ON AMERICAN INDIAN AFFAIRS
Protecting Sovereignty ◦ Preserving Culture
Educating Youth ◦ Building Capacity
SINCE 1922

March 9, 2020

Ruben Gallego, Chairman
Subcommittee for Indigenous Peoples of the United States
c/o Ariana Romeo, Subcommittee Policy Aide
Ariana.Romeo@mail.house.gov

Re: Questions from Democrat members about the February 26, 2020 Hearing, "Destroying Sacred Sites and Erasing Tribal Culture: The Trump Administration's Construction of the Border Wall."

Dear Chairman Gallego,

Thank you for your invitation to testify and provide further comment on the important and serious topic of the protection of Native American sacred places, religious practices and cultural heritage. Tribal Nations and their citizens cannot recover from centuries of trauma and dispossession caused by assimilative federal policy, unless we can protect and maintain the places where we can go to become whole again.

In addition, with these responses, we respectfully request that the Subcommittee do their best to stop the Council on Environmental Quality from proceeding with their proposed update to the regulations implementing the National Environmental Policy Act, Docket CEQ-2019-0003-0001 that will extinguish many Tribal Nation rights of consultation to protect cultural heritage sites. I have attached the Association's comments to public comment on the rulemaking.

Below are the responses from the Association on American Indian Affairs to questions from Representatives Grijalva, Haaland and Garcia.

Questions from Rep. Grijalva:

1. Based on your organization's experience, can you speak to any examples where Tribal consultation was utilized successfully?

The Association on American Indian Affairs does not often hear about the *successes* in consultation – we hear from Tribes that need assistance or who have not been properly consulted. But there are successes,

and they are more often than not reliant on the quality of the relationship between the Tribe and the federal agency staff involved in the project.

Often, successful consultation with Tribes is dependent on the federal agency staff involved in the consultation because there are no consistent Tribal consultation policies throughout the federal system. Where federal agency staff understand how to work respectfully with Tribes and the importance of protecting Native American cultural heritage, then there can be successful consultation. Unfortunately, Tribal consultation is dependent on an agency's consultation policy developed out of Executive Order 13175 – and federal agencies differ on the robustness of their consultation policies, and they are horribly inconsistent between agencies when compared.

Congress can support the success of Tribal consultation with a progressive piece of legislation that sets forward a process that all executive agencies must follow consistently for Tribal consultation when a federal action has the potential to affect a Tribal Nation. Consultation must be redefined to be substantive and implement the UN Declaration on the Rights of Indigenous Peoples. In addition, Congress could put "teeth" in current legislation – such as the National Environmental Policy Act, the National Historic Preservation Act, and the Native American Graves Protection and Repatriation Act – that establishes a priority and supremacy for the protection of Tribal cultural heritage, religious practices and environmental protection over destructive development that harms those interests.

2. Would you say that Tribal consultation can be of benefit to agencies that are striving to create programs and projects that positively affect all Americans?
Absolutely. Tribal Nations are the first protectors of the environment and often base decision making on long-term benefits, versus short-term benefits. By consulting Tribes, federal agencies will avail themselves of unique benefits stemming from Native American belief, experience, and expertise. For example, many Tribal Nations value their obligations to the next seven generations, a belief that supports sustainability not only for Tribes and Nations, but for everyone. In partnership with Tribes, the federal government can better serve all Americans and develop long-term sustainability into projects.

Land development in the U.S. seeks quick short-term economic rewards only, which often causes substantial harm to future sustainability, environmental health and cultural resource protection. Tribal consultation that is substantive and not merely a box to check, can support sustainable planning. The U.S. must amend its current policies for land development and create legislation that mandates sustainability and environmental protection – not just when it is convenient but consistently and all-of-the-time. Land and resource development must be sustainable and prioritize long-term environmental protection over short-term economic reward. No waivers.

Questions from Rep. Haaland:
1. Your testimony mentions Secretary Bernhardt's recent visit to Chaco Canyon and the temporary development ban that resulted from his discussions with Tribal officials. Based on your experience, what solutions are needed to better protect Tribal sacred sites?
When federal officials engage with Tribes on the ground and experience first-hand the importance of sacred sites to the Tribal Nations that revere them, all parties benefit. Direct, in-person involvement by U.S. government decision-makers exposes them to information that then can be used to adopt policies that better serve the public, and provides sustainability prioritizing long-term environmental protection

over short-term economic reward. The case of Secretary Bernhardt's visit to Chaco Canyon is a clear example of the value to U.S. officials of connecting in person with Native Americans about Native American sacred sites and culture – all federal officials that make decisions affecting Tribal Nations should be mandated to visit the communities their decisions affect.

Of course, in-person visits are one tool to safeguard Tribal sacred sites today and for successive generations. Additional tools must include:

- A clear and consistent U.S. policy statement that prioritizes long-term planning and protection over short-term economic rewards, and prioritizes American Indian religious freedom, and the federal government's responsibility to protect sacred sites, water, and the environment;
- The adoption of new federal legislation that clearly and consistently requires substantive Tribal consultation, which implements the UN Declaration on the Rights of Indigenous Peoples and free, prior and informed consent principles, and prioritizes long-term planning and protection for cultural heritage, sacred sites, and a clean environment.
- Legislation that clearly states that Tribal consultation requirements cannot be waived, as the government-to-government relationship and the U.S. trust responsibility requires Tribal consultation in all circumstances. No waivers for Tribal consultation.

Questions from Rep. Garcia:

1. Can you elaborate on the importance of place-based spiritual practices to Tribal Nations and their citizens?

Traditional religious and ceremonial practices of Native Americans are often inseparably bound to specific areas of land. Much of that sacred land today is outside of Tribal jurisdiction and is located on federal, state and private lands – and is protected in a checkerboard fashion. Regarding the border wall, migrations between places have always occurred and the area has a rich history that will be forever destroyed with the wall. Such is not sustainable and makes all efforts for consistent protection of sacred places untenable. Moreover, the failure of a consistent environmental policy regarding any land development means that sacred places and cultural heritage are not protected, and threatens the long-term sustainability for all of us.

Late Native American theologian Vine Deloria, Jr. contrasts western religion's temporal framework with Native American religious beliefs' spatial framework: "The vast majority of Indian [T]ribal religions […] have a sacred center at a particular place, be it a river, a mountain, a plateau, valley, or another natural feature. This center enables the people to look out along the four dimensions and locate their lands, to relate all historical events within the confines of this particular land, **and to accept responsibility for it**. Regardless of what subsequently happens to the people, the sacred lands remain as permanent fixtures in their cultural or religious understanding."

2. In what ways has the federal trust responsibility evolved to include the consideration and protection of Tribal sacred sites?

In exercising its authority over American Indian and Alaska Native affairs, there is a "distinctive obligation of trust incumbent upon the [federal] Government that involves moral obligation of the highest responsibility." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The basis for this special legal relationship between Indian people and the federal government is found directly in the

Constitution and memorialized in treaties. This trust relationship applies to all federal agencies and to all actions that may potentially affect Tribal Nations.

This responsibility has also been affirmed by statute to apply to the protection of religion and sacred sites. In 1978, Congress enacted the American Indian Religious Freedom Act (AIRFA), which includes the declaration that it is "the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Ekimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship though ceremonials and traditional rites." Unfortunately, AIRFA was found by the courts to be unenforceable and not much more than a policy statement, leaving Tribes and their citizens with no way to protect sacred sites.

The legislation that applies to the protection of sacred sites, which includes but is not limited to the National Environmental Policy Act, the National Historic Preservation Act, the Archaeological Resources Protection Act, and the Native American Graves Protection and Repatriation Act, only provides for a procedural right for Tribal consultation. This legislation does not prioritize the long-term sustainability of resources and the environment, and does not prioritize leaving sacred sites and archaeological areas alone. Instead, they allow Tribes to be heard and their positions to be considered, but the federal agency can act however it would like if it follows those procedures, as long as it is not arbitrary and capricious.

If Congress established strong policy and legislation that prioritized long-term environmental protection over short-term economic reward, implemented the UN Declaration on the Rights of Indigenous Peoples and required the free, prior and informed consent of Tribes where sacred, archaeological or other environmental areas were affected, then the environmental and preservation laws would actually mean something. And please, no waivers for Tribal consultation.

Yakoke,

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Executive Director

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March 10, 2020

Submitted via eRulemaking Portal: https://www.regulations.gov/document?D=CEQ-2019-0003-0001
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Council on Environmental Quality
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Re: Demand for Tribal Consultation on proposed update to the regulations implementing the National Environmental Policy Act, Docket CEQ-2019-0003-0001

Dear Associate Director Boling:

The Association on American Indian Affairs ("Association") submits the following comments on the Council on Environmental Quality's (CEQ) proposed changes [Docket No. CEQ-2019-0003-0001] to the implementing regulations for the National Environmental Policy Act (NEPA) at 40 CFR 1500-1505 and 1507-1508.

The Association is the oldest non-profit serving Indian Country protecting sovereignty, preserving culture, educating youth and building Tribal capacity. The Association was formed in 1922 to change the destructive path of federal policy from assimilation, termination and allotment, to sovereignty, self-determination and self-sufficiency. Throughout its 98-year history, the Association has provided national advocacy on watershed issues that support sovereignty and culture, while working at a grassroots level with Tribes to support the implementation of programs that affect real lives on the ground.

The Association's vision: *to create a world where diverse Native American cultures and values are lived, protected and respected*, has demanded that the Association dedicate significant resources to protecting Native American cultural, religious, and sacred places. These special land areas are often called "sacred sites," but are used by Tribes and their citizens in a variety of ways – and always as places that must be protected and secured in consultation with Tribal governments.

What the CEQ has called for in its proposed regulatory changes are the result of a misguided reform effort whose ultimate outcome would be heavily biased in favor of development interests and would both undermine protections for our irreplaceable cultural and environmental resources and fail to produce the efficiencies it seeks. The Association calls upon CEQ to withdraw these proposed regulations and enter into required consultations with Tribal Nations.

The proposed rule changes were developed without Tribal consultation. CEQ's Instead, CEQ simply issued a letter on January 13, 2020 to Tribal leaders inviting them to participate in the two public meetings. Federal law, including Executive Order 13175, requires agencies to engage in government-to-government consultation with Tribes when considering regulatory changes that would affect Tribal Nations. Given the magnitude of the proposed changes, and the importance of NEPA in protecting Tribal cultural resources, this rulemaking clearly requires formal tribal consultation.

For this reason, the Association requests that the agency cease its rulemaking process and undertake appropriate Tribal consultations on the proposed changes to the NEPA regulations immediately. Tribal consultations should occur in various regions throughout Indian Country, such that Tribal concerns are broadly reflected in this rulemaking process. These consultations must occur prior to any proposed rulemaking.

There is one benefit in the proposed rules, which is that Tribes are specifically invited to comment when the effects are off-reservation (as opposed to only when there are on-reservation effects). 40 C.F.R. § 1503.1(a)(2)(ii), § 1506.6(b)(3)(ii). However, there are many downfalls of the proposed rules, including limiting NEPA review, eliminating the review of indirect and cumulative effects, and creating barriers to judicial review. Further, these regulations were proposed with very limited and fast-tracked Tribal consultation, even though the proposed rule states that this is not a regulatory policy with Tribal implications.

Nevertheless, it is the Association's opinion that the overall effort to revise the NEPA review process as proposed is badly flawed and does not protect Tribal interests or the interests of health, safety and welfare of all peoples for the additional following reasons:

1. **Disregarding Environmental Justice**

NEPA reviews are one of the primary ways the federal government considers the frequently disproportionate impacts that large-scale, highly disruptive projects and facilities have on people of color, Indigenous peoples, and poor and immigrant populations. Central to consideration of disproportionate burdens is the consideration of cumulative impacts, which result from past, present, and reasonably foreseeable future actions in a project area. **The current proposal explicitly eliminates the requirement to consider cumulative impacts, § 1506.7**. Further, the CEQ's Environmental Justice Guidance under NEPA, which outlines environmental justice principles and considerations in the NEPA process, would be rescinded.

§1508.1(g) would redefine "effect" to mean impacts of an action that are "reasonably foreseeable" and that "may include" impacts that occur later or farther from (in distance) the area of proposed effect. This would also gut the existing law and regulation's coverage of indirect and cumulative effects of projects, especially in regard to historic properties where context, setting, and viewscapes are important

considerations. In another example, CEQ wants to link "reasonableness" of a program alternative to include consideration of "technical feasibility," "consistency," "practicality," and "affordability." Under these terms, it would be easy for both agencies and proponents to arbitrarily limit NEPA reviews and the identification of potential alternatives. The most troubling aspect of these changes is that agencies and project proponents would be able to make these determinations without an opportunity for public comment.

2. Giving the Fox the Keys to the Henhouse

Companies would be allowed to write their own environmental reviews, and federal contractors would no longer need to disclose conflicts of interests or financial stakes in the projects they are reviewing. § 1506.5(c). This would remove the government-to-government requirement between Tribes and federal agencies, relegating that important mandate and fiduciary responsibility to a non-governmental contractor in violation of federal laws.

In addition, the reason NEPA has long required agencies to maintain responsibility of reviews is because they are charged with making decisions in the public interest. Industry makes decisions based on profit and would have no incentive to consider any alternatives to a proposal, or to take a hard look at its environmental consequences. This would relegate NEPA to a bias one-sided report – giving the proponent all power at the expense of our Tribal Nations' and the public's health, safety and welfare.

3. Loopholes to Avoid Environmental Review and Public Input

The proposed rules provide several avenues for agencies to avoid NEPA review. Agencies could attempt to avoid NEPA altogether by claiming that they are providing "minimal" funding for or have "minimal" involvement in a private development proposal. §§ 1501.1(a)(1) & 1508.1(q). If that doesn't work, an agency could claim that complying with NEPA would be inconsistent with Congress's intent under another statute, or that an entirely different process designed to satisfy other goals could serve as a substitute for environmental analysis and public review under NEPA. Those decisions could be made on a case-by-case basis (i.e., behind closed doors with the polluter). § 1501.1(a)(4)-(5) & (b).

4. Prioritizing Speed of Approvals Over Review and Tribal Consultation

Where NEPA would apply, agencies would be encouraged to do the bare minimum level of analysis. Environmental Assessments and Environmental Impact Statements would be subject to short and strict timelines, and environmental documents would be limited in page numbers. Detailed environmental impact statements would only be prepared as a last resort, and a proposed action's impacts to irreplaceable archaeological resources, parks, wilderness, endangered species, or other sensitive resources would no longer be a factor in consideration of whether detailed analysis is necessary. §§ 1501.3, 1501.4, 1501.5, 1501.10.

The shortened timeline for environmental review and limited document length could pose substantial barriers to Tribal consultation. Agencies, on fast tracks for approval, can speed through Tribal consultation, exacerbating existing shortcomings with federal agency implementation of Tribal consultation requirements. The strict page limits and timelines may also pose barriers to effective consultation under the National Historic Preservation Act.

5. Pushing Polluter Priorities Over Community Concerns

In the rare instance that a proposal would need to go through full environmental review, it could be prejudiced from the get-go, with the so-called "purpose and need" defined by the private company seeking approval. § 1502.13. If industry designs the purpose and need, it sets the stage for NEPA review on narrow terms: the only alternatives that must be considered would need to fit that purpose and need, and they must be "economically and technologically feasible" for the company. §§ 1502.14, 1508.1(z). In other words, all roads would lead to industry development, and the government could absolutely ignore alternative courses of action proposed by Tribes and members of the public who depend on healthy forests and wildlife habitat, clean air and water, and other resources, for cultural and religious practices, as well as health and safety.

6. Ignoring Severe Environmental and Health Impacts

Indirect effects are completely deleted from the proposed regulations. Analysis of impacts associated with a proposal to mine, drill, or log would be limited to those deemed to have "a reasonably close causal relationship to the proposed action," with no requirement to analyze indirect or cumulative effects that are considered to be "remote in time, geographically remote, or the product of a lengthy causal chain" (i.e., climate change). § 1508.1(g).

7. Institutionalizing Climate Denial into Federal Decision-making

It is long-settled that agencies are required to consider not only the impacts a federal decision may have on the climate crisis, but also the impacts of climate change on federal projects. The primary way federal agencies have considered climate impacts is through analysis of indirect and cumulative impacts, which this proposal explicitly eliminates. § 1506.7. By eliminating indirect and cumulative impact analyses, this proposal allows the government to approve environmentally destructive projects, such as oil pipelines, with no consideration of their contribution to climate change. It also puts communities at risk by allowing agencies to fund projects that are less resilient to severe drought, stronger hurricanes, and more severe weather.

8. Attempts to Silence the Public and Shut the Courthouse Doors

The government could claim that public comments are not "specific" enough or do not include reference to data sources and scientific methodologies and therefore are deemed "forfeited." §§ 1500.3(b), 1503.3(a), 1503.4. Comments that are not submitted within the agency's strictly imposed time limits would not be considered. §§ 1500.3(b), 1501.10, 1503.3(b), 1503.4. Then, if aggrieved communities or individuals want to challenge an inadequate NEPA analysis in court, they may be precluded from doing so if they did not meet the "exhaustion" requirements and could potentially even be required to provide a bond. § 1500.3(b)-(c). These requirements place undue burdens upon Tribal Nations and others potentially impacted by proposed projects, and can shield agencies from litigation in the event of improper procedure. Once in court, the agency may claim that the court must presume that it followed the law, based on a certification in its record of decision. § 1502.18.

9. Heavily Weighted in Favor of the Developer

CEQ published the proposed regulatory changes on January 10, 2020, in accordance with the directives established under Executive Order 13807 (issued August 15, 2017), which set forth a path for "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure." Among the steps already taken under EO 13807 were the creation of a "One Federal Decision" standard on project reviews through a single, unified NEPA document and the formation of

an interagency working group to evaluate the environmental review processes to "identify impediments to efficient and effective environmental review and authorizations for infrastructure projects." The proposed regulatory changes before us today constitute the end result of this process, which was tainted from the beginning by the administration's desire to greatly limit both the scope and duration of the review requirements, thus reducing the amount of avoidance, minimization, mitigation, and remediation work needed to ensure sound environmental and cultural resources stewardship. For example, the requirement of an economic analysis [§1501.2(b)(2)] to justify NOT carrying out types of NEPA work will likely incentivize the constraining of evaluation and mitigation activities.

10. Create New and Problematic Policies Reducing NEPA Compliance

Under the proposed changes, agencies would be authorized to arbitrarily decide that non-federal actions that meet an undefined "minimal" level of federal involvement would be exempt from NEPA requirements under a new Threshold Applicability Analysis [§1501.1]. Agencies would also be allowed to designate some federal projects as "non-major" [§1507.3] based on an arbitrary percentage level; there would be a significant expansion in the number of Categorical Exclusions [§1506.7]. Further changes such as the replacement of "exorbitant" with "unreasonable" would act to limit the universe of potential alternatives, reduce study or permit areas, and allow federal agencies and permit applicants to ignore resources that most certainly will be adversely affected. The proposed changes will increase ambiguity in the process and reduce its ability to identify environmental and cultural resource baselines, evaluate significance and effects, and work to avoid and minimize adverse effects.

11. Limit Public Involvement

The language contained in §1500.3(b)(3) would prevent comments NOT submitted during the formal EA and EIS comment periods from being considered later in the process. It is understandable and reasonable for agencies and project proponents to want comments to be submitted in a timely manner to avoid having to go back and rework designs and the review process itself simply to accommodate stakeholders who were late in submitting comments. Nevertheless, one of the fundamental goals of NEPA is to incorporate, to the maximum extent practicable, the viewpoints of the public on development projects that use public funds and/or lands. This is to ensure that the mistakes of pre-NEPA project and facilities construction are not repeated. Further, some flexibility in the ability of interested parties to provide comments is necessary when new issues and information arise over the course of a NEPA process. This is a common occurrence. Language must be added to the proposed rule that would require project managers to take into account—even after the expiration of the formal comment period—new and substantive issues raised by the public.

12. Rejects the Scale and Complexity of Projects

The changes put forward by CEQ make no distinction between minor proposals with no or minimal effects and large projects with major impacts on the landscape. CEQ seeks more clarity and efficiency from the NEPA process, and small-scale actions with minimal environmental risk would clearly benefit from such a framework. Yet the draft changes before us would produce exactly the opposite effect—larger, more complex, and better-funded proposals would be incentivized to reduce their NEPA compliance responsibilities, while small project proponents would be placed under the same regulatory burdens as their bigger colleagues.

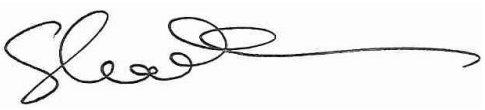
13. Cultural Resources Would Suffer Adverse Impacts

It is difficult to underestimate how Tribal cultural heritage would be adversely affected by these proposed changes. While NEPA and the National Historic Preservation Act are distinct laws, with their own implementing regulations, there is a synergy between the two statutes that is both mutually beneficial and reinforcing. The current NEPA regulations integrate NEPA and National Historic Preservation Act (NHPA) compliance and enforcement, ensuring that NEPA documents disclose information about cultural resources and that these resources are considered during a project planning process so that efforts can be made to avoid and minimize impacts to historic properties. NHPA Section 106 activities benefit because NEPA documents reach a broad audience, expanding the audience for disclosing information to the public about the presence of resources and potential impacts. Section 106 reviews, if done early and properly, will inform the development and evaluation of NEPA program alternatives and the creation of strategies to avoid and minimize impacts. The proposed changes, by reducing the amount of NEPA work to be done, would inappropriately reduce the scope of analysis for federal actions and eliminate or reduce requirements for consulting with federally recognized Tribes and coordinating with other stakeholders.

CEQ's proposed changes are contrary to the long-standing practice of ensuring that our Tribal Nations' and generally the nation's cultural heritage is protected for future generations. Under the CEQ proposal, cultural resources would no longer receive the consideration and protection they do today. **Once cultural resources and historic properties are destroyed or degraded, they are lost forever; they are NOT renewable resources.** If we do less to identify and protect cultural heritage areas, it will inevitably lead to a significant loss of our cultural heritage and environmental integrity.

If you have questions, please do not hesitate to contact me at shannon.aaia@indian-affairs.org or 240-314-7155.

Yakoke,



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