



December 15, 2020

Tom Torres  
Acting Supervisor  
U.S. Forest Service  
Tonto National Forest  
2324 E. McDowell Road  
Phoenix, AZ 85006

Ref: *Assessment of Agency Official Compliance, pursuant to 36 C.F.R. § 800.9(a)  
Resolution Copper Mining Project and Land Exchange  
Tonto National Forest, Pinal County, Arizona  
ACHP Project Number: 012344*

Dear Mr. Torres:

On July 9, 2020, the Advisory Council on Historic Preservation (ACHP) was contacted by Chairman Rambler of the San Carlos Apache Tribe regarding the U.S. Forest Service (USFS), Tonto National Forest's (TNF), Section 106 consultation for the proposed Resolution Copper Project and Southeast Arizona Land Exchange. In addition to requesting prompt production and implementation of a final Programmatic Agreement (PA), Chairman Rambler also requested that the ACHP "review and report" on whether the USFS has complied with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800) for this undertaking. On July 21, 2020, we responded to Chairman Rambler with our recommendations (enclosed) on moving the consultation process forward as well as committing to review and provide an advisory opinion on the USFS' compliance with Section 106 for this project pursuant to 36 C.F.R. § 800.9(a). The ACHP undertook our assessment following our review of the revised PA in September 2020 and outreach to the San Carlos Apache Tribe, TNF staff, and other consulting parties, as necessary. Due to our ongoing participation in consultation to resolve adverse effects from this undertaking in accordance with 36 CFR § 800.6(b)(2), the ACHP primarily utilized existing records and ongoing correspondence to develop our observations and recommendations.

Our assessment considers the TNF's management of the Section 106 consultation process, including efforts to identify historic properties and the proposed methods to resolve adverse effects, and makes recommendations regarding implementation of the PA following its execution. We also review the adequacy of the TNF's effort to consult with Indian tribes in the Section 106 process. In developing our comments, we were cognizant of the constraints placed on the USFS and this undertaking by the Southeast Arizona Land Exchange and Conservation Act (Section 3003 of Public Law 113-291), which directed the land exchange between the U.S. Government (USDA and U.S. Department of the Interior) and Resolution Copper.

Based on our participation in this consultation, and a review of the existing documentation, it is evident that the TNF was challenged to conduct the consultation since initiating the review process, which hindered earlier efforts to reach consensus on ways to resolve adverse effects and may inform consulting parties' concerns regarding the TNF's ability to implement the PA. Over the last year, the TNF has made significant efforts to rectify deficiencies that the ACHP, Indian tribes, the Arizona State Historic Preservation Officer (SHPO), and other consulting parties highlighted, to bring the consultation in line with the Section 106 regulations. This effort has included the development of a tribal consultation plan, assignment of dedicated Heritage staff to manage the consultation process, and revision of the agreement in response to consulting parties' input to include a broad array of measures to resolve adverse effects. However, TNF's communications with consulting parties remain inconsistent and at times lack transparency regarding how decisions are being made. Further, it is not always clear how the TNF's Heritage, Tribal Relations, and Environmental Program are managing its consultation responsibilities. Therefore, we provide the following observations and recommendations to assist TNF in moving the Section 106 review for this undertaking to closure.

### **Management of Consultation Process.**

*ACHP Observations:* The TNF had difficulty managing the pace of consultation and coordinating the Section 106 process with other federal environmental reviews. This was most evident in the TNF's communication on the purpose and audience for consultation meetings, which was irregular and frequently erratic. Some meetings were limited to signatory parties while other meetings purportedly intended to inform and involve the broader public but were actually limited to consulting parties. It appears this confusion stemmed from TNF and its contractors' lack of clarity in delineating the Section 106 consultation from the review process and public outreach required under the National Environmental Policy Act (NEPA). In addition, TNF inconsistently managed its government-to-government consultation with Indian tribes for this undertaking and the coordination of such consultation with the Section 106 review process. While some of this confusion may have resulted from the legislated nature of the land exchange, TNF could have better communicated the requirements of the legislation while encouraging consulting parties' input in relevant aspects of the decision making process for the undertaking.

Moreover, the management and coordination of consultation meetings was inconsistent, left to agency staff who frequently presented conflicting perspectives with limited guidance or facilitation by TNF leadership. The ACHP noted improvement at the last consultation meeting in December 2019, which was facilitated by a single TNF employee and focused on critical topics in the draft agreement with assistance from SHPO and the ACHP. We remind the TNF that its ability to seek, discuss, and consider the views of other participants, and, where feasible, seek agreement is only achievable when there is a clear understanding of the topics to be discussed and representation by those agency officials who are able to take historic preservation concerns into account in their decision making.

In addition to difficulties managing the consultation process, the ACHP also observed the TNF inconsistently seeking and responding to consulting party comments in a timely manner. While the TNF has been receptive of and undertook numerous efforts to solicit comments on the draft agreement, the agency was not immediately forthcoming in its responses to comments or consistent in how consulting parties' comments were addressed. For example, the ACHP regularly requested the TNF clarify or elaborate upon approaches and decisions reached during the consultation process, such as the results of

ongoing consultation with Indian tribes or the development of expanded mitigation approaches, to understand how the TNF addressed our previous comments. We have seen similar requests in comments from other consulting parties, particularly Indian tribes, seeking more nuanced and detailed responses from TNF as to how the agency attempted to address their concerns. When coupled with sporadic consultation meetings where such revisions could have been more adequately explained, TNF left many consulting parties confused on why the draft agreement included certain provisions or not. Specifically, consulting parties did not understand how and why the agreement was changed to reflect the addition of new invited signatories, revisions to the area of potential effects (APE), or the significant expansion of the resolution of adverse effects portion of the PA. While the ACHP is supportive of these revisions and believes they significantly improve the draft agreement, the TNF could have more clearly and consistently communicated its efforts to revise the draft with all consulting parties.

*ACHP Recommendations:* In light of the significant comments and the clear concerns voiced by consulting parties on the previous draft version of the PA, the ACHP recommends the TNF provide a robust and detailed response to the comments it received following release of the latest draft agreement. In order to establish a consistent administrative record, the ACHP further recommends this response clarify TNF's efforts to seek the views of the public on the proposed undertaking's effects to historic properties. This response, which should accompany the TNF's revised and likely final version of the PA, should summarize thoroughly the nature of comments received, how they were considered, and whether changes were made to the draft PA. It should also outline the TNF's next steps and timeline concerning execution of the agreement. This response will be critical to documenting the TNF's requirement as the responsible federal agency to maintain an administrative record of the Section 106 review. As noted above, this distribution should be done widely and we recommend the TNF, particularly TNF leadership, consider making itself available following this release for any final discussions. The proposed final draft PA and the TNF's responses to comments should also be made available to the public to ensure as much transparency as possible. Such actions would help evidence the agency's decision making so far in working to finalize the agreement.

### **Tribal consultation.**

*ACHP Observations:* The ACHP has expressed concerns throughout this consultation about the TNF's efforts to effectively and consistently consult Indian tribes on the resolution of adverse effects and the development of this PA. In this case, because of the lack of robust consultation early on in the process and as the agreement was developed and revised, the USFS had difficulty managing the consideration of the effects of and development of resolution measures for the undertaking and all of its parts to historic properties of religious and cultural significance to tribes, which is an essential requirement for carrying out a Section 106 review.

*Tribal Consultation Plan.* The ACHP recognizes that the TNF has made substantial progress to address earlier missteps in its consultation with Indian tribes, including the development of a tribal consultation plan intended to guide the development of the PA and the subsequent implementation of its terms; however, it is unclear how successful this tool has been thus far. As part of our last round of comments on the draft PA, the ACHP requested the TNF provide an update on the implementation of the tribal consultation plan and on the status of the TNF's efforts to involve tribes in the development of the draft PA following the most recent meetings. To date, we have not received a response to these questions.

*ACHP recommendation.* The ACHP requests the TNF address our outstanding question and outline tribal consultation efforts undertaken since the latest version of the draft PA was released. In addition, we recommend the TNF consider including in the draft PA a requirement to consult with interested Indian tribes on any needed revision and expansion of the tribal consultation plan at regular intervals (e.g., annually). This stipulation would treat the consultation plan as a living document designed to help guide consultation with Indian tribes for the duration of the PA.

*TNF's tribal monitoring program.* As the ACHP noted in previous correspondence, the USFS' confusion over the role of the TNF's tribal monitoring program in carrying out the agency's identification efforts prevented this program from fully achieving its goal of leveraging the importance of tribal consultation and the special expertise of Indian tribes in assessing the eligibility of historic properties that may possess significance to them. It is not surprising that this initiative encountered criticism despite its collaborative aims due to frustration regarding the TNF's communication as to how the program would inform the identification process in the Section 106 review.

*ACHP recommendation.* While the TNF has undertaken extensive efforts to address those concerns regarding the tribal monitoring program, since it is the intent of the agency to continue this program as the PA is implemented, we urge the TNF to include in the draft PA a specific stipulation to allow continued evaluation and improvement of this initiative by TNF, in consultation with Indian tribes and Resolution Copper.

*Resolution of adverse effects.* We also recognize the significant work undertaken by TNF and Resolution Copper to expand the draft PA's proposed resolution of adverse effects. The revised measures, which include several mitigation funds, represent significant improvements from previous drafts where the language and commitments were vague and insubstantial given the intent and proposed effects they aimed to resolve. The ACHP appreciated TNF's response to our comments on these items. While the ACHP believes these measures and the above initiatives should strengthen and improve the TNF's consultation efforts with Indian tribes, we also acknowledge concerns voiced by multiple Indian tribes regarding the significance of the historic properties affected by the undertaking and the sheer magnitude and severity of the adverse effects to them. We also understand that the legislation requiring the land exchange constrains the range of alternatives the USFS can consider to avoid or minimize such effects.

*ACHP recommendation.* We urge TNF to give close consideration to the recent comments of Indian tribes on how these commitments in the draft PA might be improved. Further, we continue to highlight the importance of the USFS maintaining its leadership role in these measures by acknowledging its responsibility to resolve adverse effects from the undertaking and all of its parts and to consult with Indian tribes regarding its decision making throughout these efforts.

### **Leadership Involvement.**

*ACHP Observations:* We recognize and appreciate the TNF's intensified efforts at the end of 2019 to improve consultation, including the assignment of dedicated Heritage staff to focus solely on developing the PA. Yet, the agency's ability to seek consensus on the resolution of adverse effects has continued to suffer from a lack of consistent USFS leadership presence guiding the consultation process.

*ACHP Recommendation:* Given the scope and magnitude of this undertaking, the ACHP would like to emphasize the need for Regional and Washington Office level support and involvement in the final steps of this consultation and in supporting the TNF as it implements the terms of the PA following its execution.

**Next Steps.** In addition to the recommendations above, the ACHP recommends that the TNF and Southwestern Region take the following steps to conclude the consultation process and finalize the agreement and to improve consultation and management of the TNF's Section 106 program moving forward:

- Provide all consulting parties with a summary of the comments received on the latest version of the agreement along with a summary of how the TNF addressed those comments – this should be provided in advance of any initiative by the TNF to proceed with execution of the agreement;
- Respond to the ACHP's review and recommendations in this letter either separately or as a part of the TNF's response to comments on the current draft agreement;
- Consider hosting a final meeting to discuss how the TNF has responded to comments and the TNF's intent moving forward to execute the PA – such a meeting would include USFS leadership who are able to speak to the agency's commitments in the agreement;
- Request USFS Regional input on the establishment of an advisory board comprising volunteer representatives from Indian tribes with an interest in the protection of historic properties of religious and cultural significance on USFS managed lands. An advisory board would advise the TNF and other Forest Units within the Region on these matters and participate in larger USFS planning initiatives to ensure the views of Indian tribes are considered earlier in the review of a proposed undertaking. The advisory board could also provide input into the implementation of mitigation measures proposed in the current draft agreement. Such an initiative would represent a definitive and measurable commitment by the USFS to improve consultation with Indian tribes and could become a resource that would help the entire region in improving its tribal consultation responsibilities; and
- Solicit USFS Region direction on the implementation of training for USFS staff, including but not limited to Forest leadership, Line Officers, and other relevant leadership and program staff on Section 106 procedures and responsibilities. This training should consider lessons learned from this consultation process, be developed and conducted in coordination with the USFS Regional Heritage Program, and be facilitated with input from Indian tribes, SHPO, and the ACHP.

In closing, while the execution of the PA for the Resolution Copper Project and Southeast Arizona Land Exchange appears achievable, a significant amount of work and leadership engagement will be needed to ensure the successful implementation of the PA's terms and the agency's ongoing consultation efforts connected to those measures to resolve adverse effects. The ACHP remains committed to assisting the TNF in this consultation and in helping the agency carry out its Section 106 compliance responsibilities. We appreciate your consideration of our comments and recommendations on these issues.

If you or your staff have any questions or require further clarification, please contact Mr. Christopher Daniel, Program Analyst, at 202-517-0223 or via e-mail at [cdaniel@achp.gov](mailto:cdaniel@achp.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Reid J. Nelson". The signature is fluid and cursive, with a long horizontal flourish at the end.

Reid J. Nelson  
Director  
Office of Federal Agency Programs

Enclosure