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DEPARTMENT OF THE INTERIOR

National Park Service

36 CFR Part 2

[NPS-WASO-AILO-15846; PX.XVPAD0522.0.1]

RIN 1024-AD84

**Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for
Traditional Purposes**

AGENCY: National Park Service, Interior

ACTION: Final rule

SUMMARY: The National Park Service is establishing a management framework to allow the gathering and removal of plants or plant parts by enrolled members of federally recognized Indian tribes for traditional purposes. The rule authorizes agreements between the National Park Service and federally recognized tribes that will facilitate the continuation of tribal cultural practices on lands within areas of the National Park System where those practices traditionally occurred, without causing a significant adverse impact to park resources or values. This rule respects those tribal cultural practices, furthers the government-to-government relationship between the United States and the tribes, and provides system-wide consistency for this aspect of National Park Service-tribal relations.

DATES: This rule will be effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Joe Watkins, Office of Tribal Relations and American Cultures, National Park Service, 1201 Eye Street NW, Washington, DC 20005, 202-

354-2126, joe_watkins@nps.gov.

SUPPLEMENTARY INFORMATION:

Executive Summary

Gathering and removing plants or plant parts is currently prohibited in National Park System areas unless specifically authorized by federal statute or treaty rights or conducted under the limited circumstances authorized by an existing regulation codified at 36 CFR 2.1(c).

This rule authorizes the National Park Service (NPS) to enter into agreements with federally recognized Indian tribes to allow for the gathering and removal of plants or plant parts from National Park System areas for traditional purposes. Only enrolled members of a federally recognized tribe will be allowed to collect plants or plant parts, and the tribe must be traditionally associated with the specific park area. This traditional association must predate the establishment of the park. The plant gathering must meet a traditional purpose that is a customary activity and practice rooted in the history of the tribe and is important for the continuation of the tribe's distinct culture. Authorized plant gathering must be sustainable and may not result in a significant adverse impact on park resources or values. The sale and commercial use of plants or plant parts within areas of the National Park System will continue to be prohibited by NPS regulations at 36 CFR 2.1(c)(3)(v).

This rule does not affect any existing statutory or treaty right to gather plants within areas of the National Park System.

Before gathering may occur within a park area, an Indian tribe must submit a written request to the park Superintendent for an agreement to allow tribal members to collect plants or plant parts. After a request is made, the Superintendent has 90 days to acknowledge receipt of the request and initiate consultation with the tribe. If the Superintendent does not initiate

consultation within 90 days, then the tribe may submit the request to the Regional Director. If all of the criteria for entering into an agreement are met, the Superintendent will begin negotiations with the tribe for a gathering agreement in consultation with any other tribe that has gathering rights under treaty or federal statute or is party to a valid plant-gathering agreement with the NPS for that area. The NPS must prepare an environmental assessment meeting the requirements of the National Environmental Policy Act of 1969 (NEPA). If the proposed gathering would have a significant adverse impact on the environment, then the NPS may not authorize it. The NPS must prepare a finding of no significant impact before any plant gathering agreement may become effective. All plant-gathering agreements must be concurred in by the NPS Regional Director and must contain specific elements set forth in the rule, and all plant-gathering activities must be conducted in accordance with the terms and conditions of a special use permit issued by the Superintendent. The activities allowed by the permit must fall within the scope of activities agreed upon in the gathering agreement and analyzed in the environmental assessment.

The NPS will provide guidance to the park areas and participating tribes about how to implement this rule. Model agreements, templates, and other documents may be a part of the guidance, including suggestions for baseline documentation and monitoring protocols for gathering activities in each park area.

Background

The NPS has a unique relationship with Indian tribes, which is strengthened by a shared commitment to stewardship of the land and resources. This relationship is augmented by the historical, cultural, and spiritual relationships that Indian tribes have with the park lands and resources with which they are traditionally associated.

Indian tribes practiced their traditional harvests of plants and plant parts on or from lands

that are now included in areas of the National Park System long before the arrival of European settlers. Much of this activity is currently prohibited by NPS regulations in 36 CFR part 2. The fundamental purpose of this rule is to relax this prohibition in limited circumstances to allow traditional gathering and removal of plants or plant parts while ensuring that there is no significant adverse impact to park resources and values.

Cooperation in the continuation of tribal traditions is at the heart of this rule. The NPS has a long history of encouraging Indian arts and crafts in national parks for the education and enjoyment of the public, and to support the continued practice of cultural traditions. The teaching and sharing of tribal traditions associated with national parks is an important part of the NPS mission. The rule provides new opportunities for the NPS and tribal governments to work together in support of the continuation of sustainable Indian cultural traditions that make up a unique and irreplaceable part of our national heritage.

The NPS has allowed limited gathering by hand of certain renewable natural resources since at least 1960. *See* 36 CFR 1.2(c) and 2.10(b) (1960) (allowing visitors to “pick and eat . . . such native fruits and berries as the superintendent may designate” in most NPS-administered areas and authorizing the superintendent of a national recreation area to “permit the collection or removal of natural objects,” respectively). In 1966 the NPS expanded this authority for NPS-administered recreational areas, allowing the gathering or collecting for personal use of reasonable quantities of natural, renewable products (e.g., seashells, fruits, berries, driftwood, and marine deposits of natural origin). 31 FR 16650, 16654 (1966). Existing NPS regulations at 36 CFR 2.1(c), promulgated in 1983, allow for the personal consumption of “fruits, berries, nuts, or unoccupied seashells” by the general public, subject to certain conditions.

Existing NPS regulations at 36 CFR 2.1(d) do not allow tribal members to gather plants

or plant parts in park areas for ceremonial or religious purposes, except where federal statutes or treaties grant rights to do so. Traditional tribal gathering and removal, however, occurred in many areas that are now part of the National Park System, and not all of these activities are authorized by treaty or federal statute. This rule provides an orderly and consistent process to allow limited gathering and removal of plants or plant parts for traditional purposes under agreements between the NPS and federally recognized Indian tribes.

Over the past 20 years, studies in ethnobotany and traditional plant management, along with consideration of traditional ecological knowledge in scientific symposia and scholarly gatherings, have increased greatly. Research findings have shown that traditional conservation of plant species includes gathering and management techniques as well as social and cultural rules for avoiding over-exploitation (Berkes 2012; Blackburn and Anderson 1993; Anderson 2005; Deur and Turner 2005). Traditional gathering is carried out in ways that ensure plant replacement and abundance by using specific harvest criteria and foraging and cultivation strategies (Anderson 1993; Turner and Peacock 2005). The example of Pomo basketry and the husbandry and gathering of sedge plants to ensure continuing quality and quantity of basketry supplies is well known (Peri and Patterson 1976), and other wild plant species necessary for basket making such as willow and fern are managed similarly through harvesting, burning, and cultivation techniques (Ortiz 1993). Wild plant species used for food have been managed for thousands of years by native groups using specific gathering techniques to maximize both harvest and sustainability (McCarthy 1993; Farris 1993; Parlee and Berkes 2006), and the general management of landscapes and ecosystems by native peoples have been well documented (e.g. Hammett 2000; Nabhan 2000).

Research has shown that traditional gathering, when done with traditional methods (i.e.,

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by hand, without power tools) and in traditionally customary quantities, may help to conserve plant communities. Hand tools—for example, rakes, sticks, and knives—were the dominant means used by tribes to harvest plants in the past. Limiting plant harvesting to hand tools (those not powered by fossil fuels or electricity) limits secondary auditory and visual impacts of plant gathering. In addition, hand tools are consistent with activities that are allowed in areas that are categorized as eligible, study, proposed, recommended, or designated wilderness. A definition of “traditional gathering” has been added to the rule to clarify that gathering activities may be conducted only using hand tools.

This rule is consistent with NPS Management Policies 2006 (Management Policies) 4.2.1, the agency’s top-tier written policy guidance, which directs the NPS to inventory, monitor, and research traditional knowledge and authorizes the NPS to support studies designed to understand the traditional resource management practices of Native Americans. The NPS Cultural Anthropology Program has engaged in research on traditional ecological knowledge and indigenous resource management for over 20 years. A recent example is centered on Sleeping Bear Dunes National Lakeshore in Michigan, where tribal members of the Grand Traverse Band of Ottawa and Chippewa Indians, the Little Traverse Bay Bands of Odawa Indians, and the Little River Band of Ottawa Indians helped to document the presence of culturally significant Odawa plant species and the specifics of cultural use (Stoffle et al. 2015). The NPS and tribal governments can draw on this research and may conduct further research to ensure that traditional tribal gathering and removal does not have a significant adverse impact on park resources or values. To the extent that it is appropriate and does not compromise tribal traditional knowledge, park visitors may also learn about the cultures associated with traditional tribal gathering practices.

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This rule requires that the NPS comply with all applicable federal laws, including NEPA, before entering into an agreement that will allow gathering and removal of plants or plant parts in a National Park System area. These environmental reviews will document how the proposed traditional gathering activities may affect particular species of plants in ecosystems and locations within a park area.

Authority to Promulgate the Rule

What is commonly known as the NPS Organic Act, as amended and supplemented, established what is now the NPS and directed the Secretary of the Interior, acting through the NPS, to “promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” 54 U.S.C. 100101(a). The NPS Organic Act further authorizes the Secretary to prescribe “such regulations as the Secretary considers necessary or proper for the use and management of [National Park] System units.” 54 U.S.C. 100751(a).

Government-to-Government Relationship with Indian Tribes

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951); Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” of November 6, 2000; President Obama’s Executive Memorandum on Tribal Consultation of November 5, 2009; Department of the Interior Secretarial Order No. 3317 of December 1, 2011, and Department of the Interior Departmental Manual Part 512, “American Indian and Alaska Native Programs;” the

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NPS has evaluated the potential effects of this rule on federally recognized Indian tribes and has determined that it has direct tribal implications.

Tribal Consultation

The NPS held six tribal consultation meetings in the “Lower 48” regarding this rule. NPS regional and park staff consulted with Indian tribes to select meeting locations in or near areas of the National Park System where gathering by tribal members has been discussed. One hundred and fifty representatives from 50 tribes attended meetings held from May through July 2010, in Bar Harbor, Maine; Flagstaff, Arizona; Pipestone, Minnesota; Yurok, California; Suquamish, Washington; and Cherokee, North Carolina. An additional meeting was held at Pipestone, Minnesota, in September 2010. Staff in Alaska contacted more than 70 federally recognized Indian tribes traditionally associated with parks in Alaska. Consultation then occurred with those tribes that requested it. Additionally, general presentations were given at two statewide conventions: the Alaska Tribal Leaders Summit in Fairbanks during the annual meetings of the Alaska Federation of Natives in October 2010 and the annual Bureau of Indian Affairs Providers Conference in Anchorage in December 2010. A conference call with traditional elders and tribal people not representing tribal governments was conducted in June 2010 at the request of Arvol Looking Horse, Keeper of the Sacred White Buffalo Calf Pipe of the Lakota, Dakota, and Nakota Nation of the Sioux. Park managers and staff attended these consultation meetings and participated in the discussions. The major concerns of representatives of tribal governments and the NPS are summarized and addressed here.

Gathering Limited to Enrolled Members of Federally Recognized Indian Tribes

Tribal representatives supported the concept that only enrolled members of federally recognized Indian tribes be allowed to gather and remove park resources for traditional purposes.

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This rule limits gathering and removal of plants or plant parts to members of an Indian tribe or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe under the Federally Recognized Tribe List Act of 1994, 25 U.S.C. 479a. This requirement limits gathering and removal to members of Indian tribes with which the United States has a government-to-government relationship. Other groups that may be traditionally associated with park areas, including non-federally recognized tribes and Native Hawaiian groups, do not have the same legal and political relationship with the United States and therefore this rule does not extend to such groups. If a group later becomes federally recognized, the rule would then extend to it. The rule provides avenues for cooperative NPS-tribal government oversight of member activities on park lands to ensure that traditional gathering and removal remains sustainable with no significant adverse impacts to park resources or values, consistent with Management Policies 8.2.

Gathering Limited to Indian Tribes Traditionally Associated with Specific Park Lands

A central purpose of the rule is to support the continuation of Indian cultural traditions on lands that are now administered as areas of the National Park System. The rule allows gathering only by members of Indian tribes traditionally associated with specific park areas. Respecting the special and longstanding connections that Indian tribes have with parklands prior to the establishment of park areas is specifically acknowledged in Management Policies 1.11, which states that the “formal legal rationale for the relationship between the NPS and tribes is augmented by the historical, cultural, and spiritual relationships that American Indian tribes have with park lands and resources.” The NPS believes there are approximately 433 federally-recognized tribes that may be traditionally associated with locations within approximately 215 areas of the National Park System. The NPS does not know, and has no way to estimate, how

many of those tribes will be interested in entering into gathering agreements under this rule.

Government-to-Government Agreements

The NPS and tribal representatives supported agreements between tribal governments and the NPS to establish the conditions for gathering in park areas. These agreements will respect both tribal sovereignty and the NPS's authority to manage park resources and will authorize traditional tribal gathering in ways that may be administered flexibly to respond to local resource concerns. The participating tribal government will be responsible for designating which tribal members may gather in accordance with the terms and conditions set forth in the agreement and the subsequently issued special use permit.

Protecting Park Resources

Tribal representatives expressed deep concern for the long-term health of park ecosystems. Reminding the NPS of their long history of productive and protective relationships with such ecosystems, they expressed willingness to accept limitations on gathering to protect park resources. Although not required by this rule, NPS and tribal representatives may use this opportunity to develop park-specific plant gathering management plans to ensure the long-term health of any park resource that may be gathered. These plans would be in addition to the environmental review documents that are required by this rule and NEPA.

Respect for Tribal Cultural Traditions

Tribal representatives stressed that each Indian tribe is unique and that tribal agreements entered into under the rule should allow for traditional cultural practices specific to each tribe.

Traditional Gathering Needs May Be Site-Specific to National Park Lands

Tribal representatives expressed that some national park areas contain places where tribal members historically have gathered plant resources. Using a particular gathering site within a

national park area may be vital to the continuation of a cultural tradition that cannot be met at locations outside the park, or even at alternative locations within it. Thus, even though some plants or plant parts may be available outside park lands, tribal members may still reasonably desire to gather at traditionally significant locations inside a park area. The rationale for in-park gathering of plants or plant parts that are also available outside park boundaries must be documented on a case-by-case basis under § 2.6(d) of the rule. The information used to make this determination may be subjected to peer review by qualified specialists from both the tribal and academic communities.

Collaborative Research and Administration

Tribal representatives expressed the desire to work with the NPS to create and maintain the knowledge base needed to manage gathering and removal and to leave park resources unimpaired for future generations. This may include joint research and monitoring, training programs for tribal members and park staff, and ongoing consultation regarding park resources.

Relationship of the Rule to Existing Regulations

Existing NPS regulations, promulgated in 1983, prohibit “possessing, destroying, injuring, defacing, removing, digging, or disturbing from its natural state” living or dead wildlife or fish, plants, paleontological specimens, or mineral resources, or the parts or products of any of these items, except as otherwise provided in NPS regulations. 36 CFR 2.1. The new rule, to be codified at 36 CFR 2.6, creates an exception to current regulations by authorizing resource- and location-specific agreements between the NPS and federally recognized Indian tribes to gather and remove plants or plant parts for traditional purposes.

Plants or plant parts gathered under this rule may not be used for “benefits sharing,” which allows for the commercial use of research results derived from material collected in a park

area through the specimen collection permit procedures in 36 CFR 2.5. *See* Management Policies 4.2.4.

This rule does not affect 36 CFR 2.1(c)(1), which allows a park Superintendent to designate certain fruits, berries, nuts, or unoccupied seashells that may be gathered by hand for personal use and consumption, subject to a determination that the gathering or consumption will not adversely affect park wildlife, the reproductive potential of a plant species, or otherwise adversely affect park resources.

This rule amends § 2.1(d), which now states that “[t]his section [36 CFR 2.1] shall not be construed as authorizing the taking, use or possession of fish, wildlife, or plants for ceremonial or religious purposes, except where specifically authorized by federal statutory law, treaty rights or in accordance with § 2.2 [wildlife protection] or § 2.3 [fishing].” This rule authorizes the gathering and removal of plants or plant parts for traditional purposes under NPS-tribal agreements but does not alter the prohibition on taking, using, or possessing fish or wildlife for such purposes.

NPS areas in Alaska

In many of the National Park System units in Alaska, 36 CFR 13.35 regulates the gathering and collection of natural products and allows for the limited gathering of a wider range of natural products than are included in this rule. Except for the four park areas¹ listed in § 13.35(a), § 13.35(c) allows gathering, by hand and for personal use only, of renewable resources like natural plant food items (e.g., fruits, berries, and mushrooms) that are not threatened or endangered species; driftwood and uninhabited seashells; and plant materials and minerals that are essential to the conduct of traditional ceremonies by Native Americans. This

¹ Klondike Gold Rush National Historical Park, Sitka National Historical Park, the former Mt. McKinley National Park, and the former Katmai National Monument.

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rule has no practical effect within these units in Alaska where §13.35(c) applies, because this rule allows for a more limited scope of collection than does the Alaska-specific regulation. The rule applies to the park areas in Alaska listed in § 13.35(a) and to parks in the remainder of the United States. The rule does not address subsistence activities that are authorized in Alaska by 36 CFR 13.400-13.495.

Summary of and Responses to Public Comments

On April 20, 2015, the NPS published the proposed rule in the Federal Register (80 FR 21674). The rule was open for public comment for 90 days, until July 20, 2015. The NPS reopened the comment period from August 12 through September 28, 2015 (80 FR 48280). The NPS invited comments through the mail and the Federal eRulemaking Portal at <http://www.regulations.gov>.

The NPS received 90 pieces of correspondence with comments on the proposed rule: 37 from federally recognized tribes, 40 from private citizens, 10 from non-profit organizations, and three from state governments. In general, the comments fell into the following categories:

- Authority to promulgate the rule
- Compliance with NEPA
- Tribal consultation process
- Process for authorizing gathering activities
- Commercial use of gathered plants and plant parts
- Treaty rights
- Tribal Self-Governance Act
- National Historic Preservation Act and Traditional Cultural Properties

A summary of comments and NPS responses is provided below followed by a table that lists changes the NPS has made in the final rule based on comment analysis and other considerations.

Authority to Promulgate the Rule

1. Comment: Several comments questioned the NPS's authority to promulgate the rule, asserting that the NPS Organic Act precludes the NPS from allowing any "consumptive" uses of park resources like the gathering and removal of plants or plant parts.

NPS Response: The NPS Organic Act, as amended and supplemented, directs the NPS "to conserve the scenery, natural and historic objects, and wild life" in areas of the National Park System. 54 U.S.C. 100101(a). The conservation mandate in the Organic Act does not mean, however, that the NPS must preserve every individual member of every species of plant and animal and every rock, mineral, and other inorganic feature in a park area. Likewise, it does not mean that the NPS may not authorize members of the public to collect, gather, or consume certain park resources under carefully circumscribed conditions. Indeed, the NPS has long interpreted the conservation mandate in the Organic Act to allow the limited collection, gathering, or consumption of specifically identified park resources as long as the impacts from those activities do not result in the impairment of park resources or values.

For example, as mentioned above, the NPS has allowed the limited gathering by hand of certain renewable natural resources in park areas for personal use or consumption since at least 1960,² an activity currently authorized under 36 CFR 2.1(c).³ The NPS has also allowed recreational fishing in park areas since at least 1943,⁴ an activity currently authorized under 36 CFR 2.3. NPS regulations also allow the taking of plants, fish, wildlife, rocks, and minerals

² See 36 CFR 1.2(c) and 2.10(b) (1960) (allowing visitors to "pick and eat, but not carry out of the parks and monuments, such native fruits and berries as the superintendent may designate" in most NPS-administered areas and authorizing the superintendent of a national recreation area to "permit the collection or removal of natural objects," respectively).

³ The NPS promulgated the current authorization in 1983, when it last comprehensively revised its public-use regulations. 48 FR 30252 (1983).

⁴ See 36 CFR 2.4 and 6.4 (1943) (allowing fishing in various national parks and monuments and in recreational demonstration areas, respectively).

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pursuant to a specimen collection permit, which may be issued for the purpose of research, baseline inventories, monitoring, impact analysis, group study, or museum display. 36 CFR 2.5. The NPS believes that the gathering and removal activities authorized by this rule, conducted in accordance with the terms and conditions of the NPS-tribal gathering agreements and the NPS-issued special use permits that will implement those agreements, constitute a limited and appropriate (albeit consumptive) use of park resources that will not result in the impairment of those resources.

The fact that Congress has in certain instances explicitly directed the Secretary to allow the gathering or consumption of park resources by members of American Indian tribes⁵ does not call into question the NPS's discretionary authority to promulgate this rule under the authority of the NPS Organic Act. On the contrary, those park-specific statutes reflect Congress's awareness that the NPS's now-longstanding regulatory limitation on the taking, use, or possession of fish, wildlife, or plants for ceremonial or religious purposes in 36 CFR 2.1(d)⁶ has had a negative

⁵ See, e.g., §5(e) of the Timbisha Shoshone Homeland Act, Pub. L. No. 106-423, 114 Stat. 1875, 1879 (2000) (directing Secretary of Interior to permit Timbisha Shoshone Tribe's continued use of park resources in "special use areas" in Death Valley National Park, California, "for traditional tribal purposes, practices, and activities," not including the taking of wildlife); §2101 of the Cerro Grande Fire Supplemental, Division C of the Act of July 13, 2000, Pub. L. No. 106-246, 114 Stat. 583, 592 (directing Secretary of Interior to allow enrolled members of Pueblos of San Ildefonso and Santa Clara to collect plants or plant products and minerals in Bandelier National Monument, New Mexico); 16 U.S.C. 460uu-47 (directing Secretary of Interior to "assure nonexclusive access to [El Malpais National Monument and El Malpais National Conservation Area, New Mexico] by Indian people for traditional cultural and religious purposes, including the harvesting of pine nuts"); and 16 U.S.C. 698j (directing Secretary of Interior to permit members of Miccosukee Tribe and Seminole Tribe "to continue their usual and customary use and occupancy of Federal or federally acquired lands and waters within [Big Cypress National Preserve, Florida], including hunting, fishing, and trapping on a subsistence basis and traditional tribal ceremonials").

⁶ 36 CFR 2.1(d) is currently phrased as a limitation on a Superintendent's authority under other subsections of 36 CFR 2.1: "This section shall not be construed as authorizing the taking, use or possession of fish, wildlife or plants for ceremonial or religious purposes, except where specifically authorized by Federal statutory law, treaty rights, or in accordance with §2.2 or §2.3." That language first appeared in the NPS's regulations in 1983, when the NPS last comprehensively revised its public-use regulations. The NPS added that language to the final rule in response to comments on the proposed rule. In doing so, the NPS explained, "The Service recognizes that the American Indian Religious Freedom Act directs the exercise of discretion to accommodate Native religious practice consistent with statutory management obligations. The Service intends to provide reasonable access to, and use of, park lands and park resources by Native Americans for religious and traditional activities. However, the National Park Service is *limited* by law and regulations from authorizing the consumptive use of park resources." 48 FR 30255 (1983)

impact on tribes and traditional tribal cultural practices and its recognition that allowing traditional uses of park resources is an issue of great importance to federally recognized Indian tribes (as well as to the United States government). Accordingly, Congress acted to nullify the NPS's regulatory provision in those specific instances. Congress's actions, however, do not imply that the NPS lacks discretionary authority under the NPS Organic Act to modify its general regulatory scheme to better address and accommodate tribal interests and concerns throughout the National Park System.

This rule is also consistent with written guidance interpreting the NPS Organic Act that is contained in the Management Policies, the agency's top-tier written policy guidance. As discussed above, the NPS has long understood that the mandate in the Organic Act to avoid impairment does not mean a mandate to avoid all impacts to park resource or values. The policies expressly acknowledge that "virtually every form of human activity that takes place within a park has some degree of effect on park resources or values, but that does not mean the impact is unacceptable or that a particular use must be disallowed." Management Policies 1.4.7.1. They also emphasize that the NPS Organic Act and other relevant statutes "give the [NPS] the management discretion to allow impacts to park resources and values when necessary and appropriate to fulfill the purposes of a park, so long as the impact does not constitute impairment of the affected resources and values." Management Policies 1.4.3. The policies define impairment as:

an impact that, in the professional judgment of the responsible NPS manager, would harm the integrity of park resources or values, including the opportunities

(emphasis added). The NPS Organic Act does indeed limit the NPS's authority to allow the consumptive use of park resources; however, it does not prohibit it. As discussed above, the NPS has long allowed certain consumptive uses of park resources and may allow the park-specific consumptive use of resources authorized by this rule as long as those resources are conserved overall and the consumptive use does not result in the impairment of park resources or values.

that otherwise would be present for the enjoyment of those resources or values. Whether an impact meets this definition depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts.

Management Policies 1.4.5.

In addition to impairment, the policies discuss the related concepts of “unacceptable impacts” to park resources or values and “appropriate use” of park areas. Unacceptable impacts “are impacts that fall short of impairment, but are still not acceptable within a particular park’s environment,” Management Policies 1.4.7.1, and an appropriate use of a park area is one that is “suitable, proper, or fitting for a particular park, or to a particular location within a park.”

Management Policies 1.5. Under the policies the NPS manager must determine which uses are appropriate in a particular location within the particular park area and may not allow unacceptable impacts to park resources or values.

If the traditional gathering and removal of certain plants or plant parts for traditional purposes by enrolled members of federally recognized Indian tribes that are traditionally associated with the park area is authorized and conducted in accordance with this rule, then the NPS believes that it is a suitable, proper, and fitting—and therefore appropriate—use of park resources. The rule defines “traditional association” as “a longstanding relationship of historical or cultural significance between an Indian tribe and a park area predating the establishment of the park area” and a “traditional purpose” as “a customary activity or practice that is rooted in the history of an Indian tribe and is important to the continuation of that tribe’s distinct culture.” Under the rule a tribe that wishes to gather and remove plants or plant parts from a park area must provide certain information to the NPS about its traditional association with the park area, and the NPS must determine, based on all available information, that the tribe is in fact traditionally associated with the park area and is proposing to gather and remove plants or plant

parts within the park area for a traditional purpose.

Helping tribes maintain traditional cultural practices through access to plants or plant parts in park areas where the tribe has a traditional association helps fulfill one of the purposes of the National Park System, as described in Management Policies 1.11:

As the ancestral homelands of many American Indian tribes, parks protect resources, sites, and vistas that are highly significant for the tribes. Therefore, the Service will pursue an open, collaborative relationship with American Indian tribes to help tribes maintain their cultural and spiritual practices and enhance the Park Service's understanding of the history and significance of sites and resources in the parks. Within the constraints of legal authority and its duty to protect park resources, the Service will work with tribal governments to provide access to park resources and places that are essential for the continuation of traditional American Indian cultural or religious practices.

The tribal gathering of plants or plant parts authorized by this rule is also consistent with Management Policies 8.9, which states that the NPS "generally supports the limited and controlled consumption of natural resources for traditional religious and ceremonial purposes and is moving toward a goal of greater access and accommodation."

The NPS also believes that the elements of this rule, and the requirements embedded in them, will ensure that any gathering and removal activities authorized by the rule will not result in unacceptable impacts to, or impairment of, park resources or values. Requests for gathering activities that would result in unacceptable impacts or impairment will be denied. The safeguarding elements of the rule include:

- Requiring that before tribal gathering activities may occur, the NPS and the tribe enter into a formal gathering agreement and the NPS issue the tribe a special use permit implementing the agreement. § 2.6(b)
- Requiring that a tribe submit a formal request demonstrating threshold eligibility for negotiating a gathering agreement with the NPS. § 2.6(c)
- Requiring that the Superintendent complete certain requirements before the NPS will enter into a gathering agreement. § 2.6(d)
- Requiring that the NPS complete an environmental assessment and a finding of no significant impact under NEPA prior to entering into a gathering

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- agreement with an Indian tribe. § 2.6(d)
- Requiring that specific terms be included in each gathering agreement. § 2.6(f)
 - Requiring that each gathering agreement be concurred in by the NPS Regional Director. § 2.6(g)
 - Allowing the Superintendent to close park areas to gathering of plants and plant parts to protect environmental or scenic values or to protect natural resources. § 2.6(h)
 - Allowing the Superintendent to suspend an agreement or permit if terms or conditions are violated or if unanticipated or significant adverse impacts occur. § 2.6(i)

The required agreement between the NPS and the tribe must include the elements listed in

§ 2.6(f) of the rule. These elements include:

- A description of the specific plants or plant parts that may be gathered and removed.
- Specification of the size and quantity of the plants or plant parts that may be gathered and removed.
- Identification of the times and locations at which the plants or plant parts may be gathered and removed.
- Identification of the methods that may be used for gathering and removal, which will be limited to gathering by hand without power tools.
- Protocols for monitoring gathering and removal activities and thresholds above which NPS and tribal management intervention will occur.

These contractual provisions will enable the NPS to monitor the severity, duration, and timing of any impacts from the gathering activities to prevent unacceptable impacts to, or impairment of, park resources or values.

In addition to the terms of the gathering agreement, gathering activities will be subject to the terms and conditions of a special use permit issued by the NPS to the tribe that will further ensure that gathering and removal of plants or plant parts do not cause unacceptable impacts to, or impair, park resources or values. The permit requirement will enable the NPS to modify the terms and conditions governing the collecting of plants or plant parts as circumstances change or

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new information comes to light. The permits will also identify the specific members of the tribe who are designated by the tribe to gather plants at a particular location within a park area. The NPS may not issue a permit unless it first determines that doing so is consistent with the criteria listed in 36 CFR 1.6(a). Finally, the rule allows the Superintendent to close any park area to gathering activities for various reasons, including the need to protect natural resources. These closures will apply notwithstanding the terms or any agreement or permit executed under the rule. The Superintendent may also suspend an agreement or permit if terms or conditions are violated or if unanticipated or significant adverse impacts occur.

This rule also requires the NPS to analyze the potential impacts of the proposed gathering and removal activities in accordance with the requirements of NEPA (by preparing an environmental assessment and a finding of no significant impact), the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), and other applicable laws. The NPS may allow gathering and removal activities only if, during that compliance process, it determines that the proposed activities will not result in a significant adverse impact on park resources or values.

Some comments suggested that that if Congress intended 54 U.S.C. 100101 to give the NPS discretion to allow plant gathering, it would have been unnecessary for Congress to grant the Secretary of the Interior specific authority in 54 U.S.C. 100752 “to provide for the destruction of such . . . plant life as may be detrimental to the use of any System unit.” The NPS believes that the latter statute is not relevant to this rule because by its own terms it concerns and authorizes management actions by the NPS or its agents or contractors; it does not apply to the consumptive use of park resources by members of the public. Rather, this rule falls under the broad discretionary authority granted to the NPS by 54 U.S.C. 100101(a) and 54 USC 100751(a).

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Moreover, 54 U.S.C. 100752 authorizes management actions directed at plants that the NPS has determined are “detrimental” to the use of a particular park area. Those management actions are often intended to eradicate plant species that are exotic or otherwise inimical to a park area. The tribal gathering authorized by this rule is not directed at “detrimental” plants. In any event, because of the requirements and safeguards built into this rule, the tribal gathering authorized by it will never result in the destruction or eradication of any plant species in a park area.

Finally, some comments stated that the Food, Conservation, and Energy Act of 2008 (Farm Bill) suggests that Congress must grant the NPS specific statutory authority to allow tribes to gather plants in NPS areas. The Farm Bill authorizes the U.S. Forest Service (USFS) to provide trees, portions of trees, or forest products from lands administered by the USFS to Indian tribes free of charge for noncommercial traditional and cultural purposes (25 U.S.C. 3055). As explained above, the NPS believes that the NPS Organic Act already grants it the discretionary authority to allow the limited consumptive use of plants or plant parts authorized by this rule.

In the proposed rule the NPS requested comment about how the NPS and the USFS can coordinate their separate processes for requesting approval to remove natural products from their adjacent lands. Some comments encouraged the NPS to adopt the USFS rule rather than create a rule specific to NPS areas. This the NPS may not do. The NPS and the USFS operate under significantly different statutory regimes. As a result, the gathering and removal of plants or plant parts from NPS lands must be governed by regulations and policies different from the regulations and policies that will govern the removal of trees, portions of trees, or forest products from adjacent USFS lands. Therefore, it is not possible for the NPS to simply adopt the USFS rule. Although the NPS will encourage its park managers to coordinate informally with the managers of nearby USFS lands to eliminate duplicative requests for information and to more efficiently

accommodate tribal requests and concerns, Indian tribes must negotiate a gathering agreement with the NPS in addition to any requirements imposed by the USFS on its adjacent lands.

Compliance with NEPA

2. *Comment:* Many comments questioned the appropriateness of the NPS using a NEPA categorical exclusion for the promulgation of this rule. Additional comments requested that the NPS prepare a national environmental impact statement to assess the environmental impacts of the rule on all areas of the National Park System. Several comments stated that extraordinary circumstances listed in 43 CFR 46.215 exist and that a categorical exclusion therefore may not be used, per 43 CFR 46.205(c).

NPS Response: The Department of the Interior's regulations implementing NEPA state that regulations whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis, which will later be subject to the NEPA compliance process, are categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement. 43 CFR 46.210(i).

The only action occurring at this time is the publication of the rule. The only immediate result of this action will be that Indian tribes may submit to the NPS requests to enter into agreements. The specifics of those agreements and any implementing permits are not known at the time of adoption of the rule. The effects of these future potential actions cannot be analyzed now because they are too broad, speculative, and conjectural to be meaningfully evaluated. They can be evaluated only at the time of the negotiation of a gathering agreement between the NPS and the tribe.

The rule requires that before entering into a gathering agreement with an Indian tribe, the NPS must analyze potential impacts of the proposed gathering and removal under all applicable

federal laws, including NEPA, and that the NEPA compliance process must conclude with a finding of no significant impact. All proposed gathering activities in particular park areas or locations will therefore be subjected to analysis through the NEPA compliance process, after the NPS has received enough information about those activities (e.g., Indian tribe, location, duration, plant species, timing) to conduct a meaningful analysis of potential impacts to the environment. This analysis will include impacts, including cumulative impacts, to relevant plant species that are gathered illegally in some park areas (such as ramps and ginseng, where appropriate). Any gathering activities that would cause a significant impact may not be authorized. The NPS accordingly expects that parks will not prepare any environmental impact statements under this rule.

The NPS has reviewed the extraordinary circumstances listed in 43 CFR 46.215 and has confirmed that none apply to this action.

Tribal Consultation Process

3. *Comment:* Several comments questioned whether the NPS adequately consulted with tribes prior to the publication of the proposed rule, and some comments requested the NPS redo consultation with all individual tribes with face-to-face meetings.

NPS Response: The NPS held six consultation meetings across the country to discuss the proposed rule. All federally recognized tribes located in the 48 contiguous states received invitations to attend one or more of these meetings. NPS staff in Alaska conducted consultation with tribal entities who requested it, and a telephone conference was requested and held. Any gathering agreements developed as a result of this rule will be established after consultation between the specific tribe and NPS staff at the relevant park. The NPS believes it has met its consultation requirements under Executive Order 13175 and the Department of Interior

Consultation Policy and does not plan to hold any additional consultation meetings regarding the promulgation of this rule.

4. Comment: Many comments called for a more explicit statement of when and with whom consultation should occur before entering into a gathering agreement, and periodically during the term of the agreement.

NPS Response: Language has been added to the rule requiring park Superintendents to engage in a consultation process with any tribe requesting a gathering agreement both before finalizing the details of the agreement and during periodic reviews of the status of the gathering activities under the agreement. The number of meetings and length of the initial consultation process will vary by park and local circumstances, but park Superintendents will undertake the NPS consultation process with tribes as the mechanism for creating the agreements. This includes consultation with any tribes that have gathering rights under treaty that may be impacted by an agreement with another tribe. It is possible that periodic consultation will be called for and necessary during the life of the agreements, not just for their creation. It is also expected that consultation will be required for the periodic review of the gathering activity results and analysis of impacts. The gathering agreements should stipulate when such consultation will occur, while leaving open the possibility of additional ad hoc consultation as necessary.

Process for Authorizing Gathering Activities

5. Comment: Many comments noted that the process for requesting and entering into an agreement is burdensome to tribes. Some tribes noted they will need to negotiate and execute different agreements with different park areas. Other comments called for the process to be simplified, such as allowing any member of a tribe with a valid agreement to gather plants rather than requiring the tribes to provide the names of specific tribal members who may gather within

the park. One comment noted that the process will be harder on smaller tribes with less staff to work on the process.

NPS Response: As explained in more detail above, the process for requesting and entering into a gathering agreement ensures that the gathering activities do not result in unacceptable impacts to park resources, particularly plants. Formal requests for gathering agreements, the terms of each gathering agreement, the environmental analyses required for each agreement, and the terms and conditions of each special use permit must be tailored to the unique biological conditions, resources, values, and enabling legislation for each park area. Requiring the permits to identify the members who are designated by the tribe to gather plants will allow the NPS to verify that a person gathering plants within the park is authorized to conduct that activity.

6. *Comment:* A number of comments suggested that the tribes, not the NPS, should permit plant gatherers and manage the process of gathering plants within park areas.

NPS Response: Congress delegated management responsibility for the National Park System to the NPS. Only the NPS has the legal authority to issue discretionary special use permits to authorize the gathering of plants or plant parts in areas of the National Park System. This rule does not apply to situations where a tribe has a legal right to gather plants or plant parts in the park area under a treaty or federal statute.

7. *Comment:* A number of comments stated that the overall process from initial request to permitting of gatherers is antithetical to traditional plant gathering practices, which is conducted primarily in private or with families and is based upon traditional knowledge that is not necessarily in written form or derived through a formal process that requires the submission of paperwork and formal determinations.

NPS Response: The rule establishes a fair and transparent process to allow plant gathering that requires deliberation, defines key terms and common language, and identifies actions that must be taken before gathering activities can occur. Although the process in this rule may run counter to traditional methods of gathering, the NPS believes the steps required by this rule are necessary to safeguard plant communities and the larger biological communities and processes, consistent with the NPS's statutory mandates to conserve the resources and values of the National Park System. The NPS believes that the documentation required by this rule will best ensure that impacts to park resources or values have been objectively and rigorously considered and that gathering activities comply with the terms and conditions agreed upon by the NPS and the tribes.

8. *Comment:* A number of comments suggested there should be a time limit for the NPS to answer a tribal request for a gathering agreement.

NPS Response: The NPS agrees there should be a time limit for an initial response from the park Superintendent, but the NPS also needs adequate time to review the merits of a request. The NPS has added a 90-day limit for a park Superintendent to initially respond to a tribe's request to enter into a plant gathering agreement. The time needed to enter into the agreement will not be subject to a deadline and will vary based on negotiations between the tribe and the NPS, and will be influenced by the resources, values, and other circumstances present at the park. The NPS believes that requiring a set amount of time for finalizing any agreement would be detrimental to the government-to-government consultation process, which should be given the time necessary to reach a conclusion.

9. *Comment:* A number of comments noted there was no conflict resolution or alternative dispute resolution section in the rule and that there should be some means for tribes to appeal

NPS decisions.

NPS Response: The NPS has added an appeal process to the rule. If a Superintendent denies a tribe's request for a gathering agreement, then the Superintendent will provide the tribe with a written decision setting forth the reasons for the denial. The tribe may appeal the Superintendent's written decision to the NPS Regional Director within 60 days after receiving it. The appeal should set forth in writing the basis for the tribe's disagreement with the Superintendent's decision. Within 45 days after receipt of the tribe's written appeal, the Regional Director will affirm, reverse, or modify the Superintendent's decision, explaining the reasons for the appeal decision in writing, and promptly send a copy of the decision to the tribe. The Regional Director's appeal decision will constitute the NPS's final agency decision on the matter.

10. Comment: A number of comments asked who will monitor plant gathering and some suggested that tribes monitor plant gathering.

NPS Response: The rule requires that all gathering agreements contain protocols for monitoring gathering and removal activities, and thresholds above which NPS or tribal management intervention will occur. The NPS has on-going inventorying and monitoring projects for vascular plants in most park areas. Additionally, the NPS or other federal agencies may be monitoring federally threatened and endangered species in certain park areas. Tribes may request to join the NPS's efforts to monitor any effects of gathering of plant species on NPS-administered lands. Joint monitoring work will be agreed upon in the gathering agreement and may also be included in the terms and conditions of a special use permit.

11. Comment: Many tribes questioned the ability of the NPS to protect confidential information about who does the gathering and where the gathering occurs within a park area.

These comments were based on a desire to prevent unauthorized people from collecting plants or plant parts and to protect the privacy of qualified plant gatherers as they participate in ceremonies associated with plant gathering.

NPS Response: During the process of consulting with tribes in order to enter into gathering agreements and to issue permits for gathering activities, the NPS may obtain information that the tribes consider sensitive or confidential, including the identity of tribal members who are authorized to gather plants or plant parts. As part of these consultations, the NPS will discuss ways to limit the scope of such information to the extent possible and to avoid releasing such information to the extent permitted by applicable laws. For example, in some circumstances NPS may be able to use identifiers other than personal names to designate tribal members who are authorized to gather plants or plant parts. To the extent permitted by applicable law, including 54 U.S.C. 100707, the Archaeological Resources Protection Act, and the NHPA, the NPS will withhold from public disclosure information about the specific location, character, and nature of resources on park lands.

12. Comment: Several comments felt that too much discretion is vested in the park Superintendent. For example, the rule states the Superintendent “may” negotiate and enter into an agreement with a tribe. The rule also allows the Superintendent to determine and document, based on information provided by the Indian tribe or others, that the Indian tribe has a traditional association with the park area, and that the Indian tribe is proposing to gather and remove plants or plant parts in the park area for a traditional purpose.

NPS Response: The discretionary authority granted to Superintendents recognizes that they are subject-matter experts regarding management of the park area and have been delegated responsibility to take action and respond to changing circumstances that may affect the

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values and resources of a park area. The discretion granted to Superintendents is consistent with long-established discretionary authority granted to Superintendents in other sections of 36 CFR to make management decisions for NPS areas based upon a variety of criteria. The rule also requires Superintendents to obtain the written concurrence of the Regional Director to any agreement before it goes into effect. When reviewing formal requests for agreements and when determining whether the criteria have been met to enter into an agreement, Superintendents consult with the tribe and rely upon information provided by the tribe, as well as input and advice from NPS staff with subject matter expertise.

Superintendents will use all relevant forms of evidence made available to them to make a decision on traditional association, including oral history and evidence from the Indian Claims Commission.

13. Comment: Some comments requested that the Regional Director's role in agreements be circumscribed, while others requested the Regional Director's role be expanded in decision making.

NPS Response: NPS Regional Directors supervise park Superintendents. Requiring the Regional Director to concur before any agreement is signed ensures an important layer of review of decisions made by Superintendents that will help ensure that decision-making criteria are applied consistently across the regions of the National Park System. Regional Directors have regional staff that can assist park staff with the work required to negotiate gathering agreements and issue permits. The proposed rule required the Superintendent to obtain the Regional Director's written concurrence before issuing or terminating a permit. The NPS has removed this requirement in the final rule to allow Superintendents and Regional Directors to determine what type of permit review process is most appropriate for a particular park and region. The rule still

requires the Regional Director to concur with all gathering agreements. Superintendents may not issue permits that authorize activities that exceed the scope of activities agreed to by the Regional Director in the gathering agreement.

14. Comment: A few comments asked the NPS to clarify the type of agreement that will be used, while others suggested the use of a Memorandum of Understanding (MOU) or Memorandum of Agreement (MOA).

NPS Response: Section 5.2.2 of the MPs directs the NPS to establish mutually beneficial agreements with interested groups to facilitate consultation and cooperative management approaches with respect to culturally important natural resources. The goal of such agreements is to allow traditionally associated peoples, such as tribes eligible to negotiate gathering agreements under this rule, to exercise traditional cultural practices in parks to the extent those practices are allowable by law, are appropriate uses for the park area, and will not cause unacceptable impacts or impairment.

The selection of a specific type of agreement depends upon what is agreed upon between the NPS and the tribe. For example, depending on the details of the arrangement, the NPS may use a memorandum of understanding, a memorandum of agreement, or a general agreement to document its relationship and agreement with the tribe. The type of agreement for plant gathering is best left to the consultation and negotiation process rather than specified in the rule.

15. Comment: A few comments believe the rule is too rigid and will preclude “opportunistic” plant gathering when a gatherer sees a plant they did not anticipate.

NPS Response: As explained in more detail above, the process for requesting and entering into a gathering agreement, and the requirement to obtain a permit for gathering activities, exist to ensure that the gathering activities do not result in unacceptable impacts to

park resources, particularly plants. Opportunistic or spontaneous gathering of plants not identified in the gathering agreement and permit issued by the NPS will not be allowed. Tribal members may gather only plants or plant parts identified in the gathering agreement and permit, subject to the terms and conditions listed in the permit. An agreement and permit may be amended, however, to include additional plant species as explained in the response to the following comment.

16. Comment: A few comments asked if a gathering agreement could be amended at a later date.

NPS Response: An agreement may be amended if the proposed change is mutually agreed upon by the NPS and the tribe, concurred with by the Regional Director, and formally executed either as an amendment to the existing agreement or as an entirely new agreement. Adjustments to gathering activities that are consistent with an existing agreement will not require a new agreement and may be included in the terms and conditions of the special use permit issued by the NPS. Amendments or adjustments to gathering activities that are not within the scope of environmental impacts analyzed under NEPA when the original agreement was executed must be subject to additional environmental review prior to taking effect.

17. Comment: A number of comments suggested that all agreements should have a clause prohibiting the gathering of species listed as threatened or endangered under the ESA.

NPS Response: The NPS agrees and has modified the rule to require all agreements to prohibit the gathering of any species listed as threatened or endangered under the ESA, and to prohibit gathering activities in critical habitat for any species designated under the ESA. In addition to the plants listed under the ESA, the NPS or tribes may want to identify other plant species of special concern that will not be gathered. The NPS will engage in consultation under

Section 7 of the ESA if the environmental analyses required before entering into a gathering agreement identify potential adverse effects upon listed species or critical habitat.

Commercial Use of Gathered Plants and Plant Parts

18. Comment: A number of comments objected to the prohibition against any commercial use of plants or plant parts gathered under this rule. Comments generally agreed that there should be no sale of raw plants or plant parts. However, they requested that the NPS reconsider the use of limited quantities of plants and plant parts in the manufacture of traditional American Indian handicrafts.

NPS Response: The rule requires that gathering agreements contain a statement that the sale or commercial use of natural products is prohibited under existing NPS regulations at 36 CFR 2.1(c)(3)(v). This prohibition applies, like other NPS regulations, to activities occurring within the boundaries of areas of the National Park System, as described in 36 CFR 1.2. The NPS acknowledges that some tribal members may wish to use plants or plant parts gathered under this rule to make and sell traditional handicrafts such as baskets outside of the park area. This limited commercial use of plants or plant parts gathered in park areas may help tribes maintain traditional cultural practices, which is a primary purpose of this rule. Accordingly, this rule does not purport to regulate or prohibit this activity. The NPS will continuously monitor the impact of plant gathering on park resources and values and will adjust, through the permitting process, the quantity of plants or plant parts that may be gathered by tribal members in the park. If the use of plants or plant parts gathered in the park to make and sell traditional handicrafts begins to have an impact on park resources or values, then the NPS will curtail the authorized gathering activities accordingly.

Treaty Rights

19. Comment: Several comments referred to the possible abrogation or diminishment of, or infringement upon, existing treaty rights held by tribes to gather plants within NPS areas. Some comments identified concerns that plant gathering by members of a tribe operating under an agreement would negatively impact the ability of other tribes to exercise treaty rights to gather the same plant species.

NPS Response: This rule does not purport to abrogate, diminish, or regulate the exercise of treaty rights held by federally recognized Indian tribes, including any rights to gather plants or plant parts in NPS-administered park areas.

If the NPS determines that it is not sustainable to allow gathering under an agreement provided for in this rule and under a treaty, the rights to gather under treaty will take precedence over gathering under an agreement. It is possible that limits will need to be placed on gathering a particular plant species under an agreement to ensure that the activity is conducted in a sustainable manner. If the environmental analysis conducted prior to finalizing an agreement indicates that limits need to be stipulated, these limits will be included in the gathering agreement. If subsequent monitoring indicates an adverse impact to the species warranting additional limits, then the agreement can be amended to include those limits, or the additional limits can be placed in the permits issued for gathering activities. The rule also gives the Superintendent the authority to close park areas, or portions thereof, to gathering and removing plant species that are subject to gathering under an agreement and permit, in order to protect natural resources.

Tribal Self-Governance Act

20. Comment: A few comments asked if the Tribal Self Governance Act could be employed to manage the plant gathering agreement at a park or as a method to substitute for the

permit process.

NPS Response: Title II of the Indian Self-Determination Act Amendments of 1994 (Pub. L. 103–413, the “Tribal Self-Governance Act”) instituted a permanent self-governance program at the Department of the Interior. Under the self-governance program, certain programs, services, functions, and activities, or portions thereof, in Interior bureaus other than the Bureau of Indian Affairs are eligible to be planned, conducted, consolidated, and administered by a tribe that has an executed self-governance compact with the Federal government. Under section 403(k) of the Tribal Self-Governance Act, funding agreements may not include programs, services, functions, or activities that are inherently federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe. The NPS believes that assessing the impacts of the gathering of plants or plant parts on park resources and values, negotiating an agreement with a tribe to gather plants or plant parts within a park area, and monitoring the impacts of the authorized gathering activities on park resources and values are inherently federal functions that are not eligible for inclusion in a self-governance funding agreement.

National Historic Preservation Act and Traditional Cultural Properties

21. Comment: A number of comments noted there is a relationship between plant gathering areas in park areas and areas for which a Traditional Cultural Property (TCP) nomination would be appropriate or may already exist.

NPS Response: A TCP is a natural resource or area eligible for nomination to the National Register of Historic Properties under the NHPA. National Register eligibility criteria are distinct from the considerations and determinations under this rule. While some plant species have enhanced cultural significance because of their specific location, not every plant-gathering

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location will have enhanced cultural significance simply because the plants are found there. TCPs do not necessarily correlate with plant-gathering locations. The different purposes and eligibility requirements for TCP nominations under the NHPA make using the TCP process an unworkable substitute for the process for authorizing plant gathering under this rule.

Changes in the Final Rule

After taking the public comments into consideration and after additional review, the NPS made the following substantive changes in the final rule:

§ 2.6(a)	Added definitions for “Plants or plant parts” and “Traditional gathering”
§ 2.6(c)(2)	Clarified that after receiving a request that contains the required information, the Superintendent will begin consultation with the requesting tribe in order to develop an agreement and will consult with any other tribe that has gathering rights in that park area.
§ 2.6(c)(2)	Added a requirement that the Superintendent provide an initial response within 90 days after receiving a tribal request to enter into a gathering agreement. If the Superintendent fails to initiate consultation within 90 days, then the tribe may submit the request to the Regional Director.
§§ 2.6(d)(2) and 2.6(d)(3)	Combined these two related paragraphs into a single paragraph and added a requirement that the NPS prepare an environmental assessment and a finding of no significant impact that meets the requirements of NEPA before entering into an agreement to allow traditional gathering and removal.
§ 2.6(d)(4)	Removed a redundant requirement that, before entering into a gathering agreement, the Superintendent must determine that the proposed gathering activities meet the requirements for issuing a permit under 36 CFR 1.6(a). This issue is addressed in paragraph 2.6(f)(2), which requires that permits be issued in accordance with section 36 CFR 1.6.
§ 2.6(f)(1)(v) (§ 2.6(f)(5) in	Added a requirement that all agreements contain language prohibiting the gathering of any species listed as threatened or endangered under

proposed rule)	the Endangered Species Act.
§ 2.6(f)(1)(xi)	Added a requirement that all agreements require periodic reviews of the status of gathering activities under the agreement.
§2.6(f)(1)(xiii)	Added a requirement that a permit issued under a gathering agreement identify the tribal members designated by the tribe to gather plants or plant parts under the permit.
§ 2.6(g)	Removed requirements that the Superintendent must obtain the written concurrence of the Regional Director before issuing a permit.
§ 2.6(k)	Added a new section explaining the right of tribes to appeal decisions made by the Superintendent to the Regional Director.

Section by Section Analysis

Section 2.1(d) – Preservation of natural, cultural and archeological resources

The rule modifies the existing prohibition in this section on the taking, use, or possession of plants for ceremonial or religious purposes, by adding an exception for the gathering and removal of plants or plant parts by members of a federally-recognized Indian tribe in accordance with the requirements of this rule. The rule does not nullify or abrogate any existing statutory or treaty rights, nor does it affect rules governing the taking of fish or wildlife.

Section 2.6(a) – What terms do I need to know?

This section defines the following terms that are used in the rule: Indian tribe, Plants or plant parts, Traditional association, Traditional purpose, Traditional gathering, and Tribal official. The NPS added a definition to the final rule that defines “plants or plant parts” as vascular plants or parts of vascular plants. No other types of plants may be gathered or removed under this rule. The NPS added this definition to clarify that non-vascular plants such as bryophytes (e.g. mosses, lichens, and liverworts) and fungi (e.g. mushrooms) are not covered under this rule and may not be collected under a gathering agreement. There is limited historical

evidence that non-vascular plants were used by tribes for traditional purposes. The primary use of non-vascular plants is commercial.

Section 2.6(b) – How will the Superintendent authorize gathering and removal?

This section provides a summary of the process for authorizing a tribe to gather and remove plants or plant parts in a park area. The rule authorizes agreements to allow and manage tribal gathering and removal of plants or plant parts for traditional purposes in park areas. The agreements will explicitly recognize the special government-to-government relationship between Indian tribes and the United States, and will be based upon mutually agreed upon terms and conditions subject to the requirements of §2.6(d). The agreements will serve as the framework under which the NPS will allow tribal gathering and removal and will be implemented by an accompanying permit issued by the NPS under §1.6, which will authorize the gathering and removal activities.

Section 2.6(c) – How must a tribe request to enter into an agreement?

This section explains how a tribe must request a gathering agreement from the NPS. The Superintendent will respond within ninety (90) days to a properly submitted request from the appropriate tribal official expressing interest in entering into an agreement for gathering and removal based on tribal traditional association with the park area, and on the continuation of traditional tribal cultural practices on park land. The tribal request must include a description of the traditional association that the Indian tribe has to the park area, a brief explanation of the traditional purposes to which the gathering and removal activities will relate, and a description of the gathering and removal activities that the Indian tribe is interested in conducting.

Section 2.6(d) – What are the criteria for entering into agreements?

This section identifies criteria that must be met before the NPS will enter into a gathering

agreement with a tribe. The rule requires the Superintendent to determine that the Indian tribe has a traditional association with the park area; determine that the Indian tribe is proposing to gather and remove plants or plant parts in the park area for a traditional purpose; analyze potential impacts of the proposed gathering activities under NEPA, NHPA, ESA, and other applicable laws; determine that the proposed gathering and removal activities will not result in a significant adverse impact on park resources or values; and determine that the agreement for the proposed gathering and removal meets the requirements for issuing a permit under 36 CFR 1.6(a).

Section 2.6(e) – When must the Superintendent deny a request to enter into an agreement?

This section explains that the Superintendent must deny a request from a tribe to enter into a gathering agreement if any of the criteria in paragraph (d) cannot be met.

Section 2.6(f) – How will agreements be implemented?

This section explains that gathering agreements, at a minimum, must require that the tribal government identify who within the tribe is designated to gather and remove; how such individuals will be identified; what plants or plant parts may be gathered and removed; and limits on size, quantities, seasons, or locations where the gathering and removal may take place.

Agreements will also establish NPS-tribal protocols for monitoring park resources subject to gathering and removal operating protocols, and remedies for noncompliance in addition to those set out in the rule. In the case of noncompliance by members of the tribe, the NPS will initially apply these agreed-upon remedies and, if warranted, seek prosecution of specific violators, prior to terminating the agreement. This section also provides for any special conditions unique to the park area or tribal tradition that may be included within the scope of existing law. The NPS will authorize the tribe to manage gathering and removal by tribal

members, subject to the conditions of the agreement. Gathering agreements will be implemented through a permit issued by the park for the authorized gatherers under 36 CFR 1.6.

Section 2.6(g) – What concurrence must the Superintendent obtain?

This section requires the Regional Director to approve any agreement entered into under the rule.

Section 2.6(h) – When will the Superintendent close areas to gathering and removal?

This section explains the Superintendent's authority to close park areas to gathering and removal, notwithstanding the terms of any agreement or permit executed under this rule. The Superintendent may close a park area to gathering and removal when necessary to maintain public health and safety, protect environmental or scenic values, protect park resources, aid scientific research, implement management responsibilities, equitably allocate the use of facilities, or avoid conflict among visitor use activities. Those criteria are drawn verbatim from the existing NPS regulation authorizing closures generally, 36 CFR § 1.5(a). Under that regulation, the Superintendent may close all or a portion of a park area to all public use or to a specific activity or use for one of the enumerated reasons. It is important to note that an order closing a park area to gathering and removal does not suspend, rescind, or otherwise affect the underlying tribal gathering agreement, which remains in effect. Except for emergencies, the Superintendent will provide appropriate public notice of any closures in accordance with § 1.7. The Superintendent will also provide written notice of the closure directly to any tribe that has an agreement to gather and remove plants or plant parts from the close area.

Section 2.6(i) – When may an agreement or permit be suspended or terminated?

This section explains when an agreement or permit may be suspended or terminated by the NPS. The rule allows the NPS to suspend or terminate an agreement or permit where terms or

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conditions are violated or unanticipated or significant adverse impacts occur. The Superintendent must prepare a written determination justifying the action. A termination is subject to the concurrence of the Regional Director. Termination of an agreement or permit will be based on factors such as careful analysis of impacts on park resources and the effectiveness of NPS-tribal agreement administration. The NPS also may address violations of a permit under 36 CFR 1.6(g).

Section 2.6(j) – When is gathering prohibited?

Gathering and removal of plants or plant parts remains prohibited, except as authorized under this rule (including the terms and conditions of an agreement and permit issued under this rule), or as otherwise authorized by federal statute, treaty, or another NPS regulation.

Section 2.6(k) – How may a tribe appeal a decision under this rule?

This section explains that tribes have the right to appeal a decision made by the Superintendent to deny a request for an agreement. Decisions on appeal will be made by the Regional Director pursuant to the procedures in this rule.

Compliance with Other Laws, Executive Orders, and Department Policy.

Regulatory Planning and Review (Executive Orders 12866 and 13563).

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that

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reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (RFA).

This rule will not have a significant economic effect on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*). This certification is based on information contained in the report titled, “Cost-Benefit and Regulatory Flexibility Analyses” available for review at https://www.nps.gov/tribes/final_rule.htm.

Small Business Regulatory Enforcement Fairness Act (SBREFA).

This rule is not a major rule under 5 U.S.C. 804(2), the SBREFA. This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions.
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

This determination is based on information from “Cost-Benefit and Regulatory Flexibility Analyses” available for review at https://www.nps.gov/tribes/final_rule.htm.

Unfunded Mandates Reform Act (UMRA).

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or

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unique effect on State, local or tribal governments or the private sector. It addresses use of NPS lands only. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630).

This rule does not effect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

Federalism (Executive Order 13132).

Under the criteria in Executive Order 13132, the rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. This rule only affects use of NPS-administered lands. It has no outside effects on other areas. A Federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988).

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation with Indian tribes (Executive Order 13175 and Department policy).

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175, and

have identified direct tribal implications. We have consulted with tribes on a government-to-government basis as explained above in this rule.

Paperwork Reduction Act of 1995.

This rule contains a collection of information that the Office of Management and Budget (OMB) has approved under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has assigned OMB Control Number 1024-0271, which expires XX/XX/2019. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Title: Gathering of Certain Plants or Plant Parts by Federally Recognized Indian Tribes for Traditional Purposes, 36 CFR 2.

OMB Control Number: 1024-0271.

Service Form Number: None.

Type of Request: New Collection

Description of Respondents: Indian tribes.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Estimated Number of Respondents: 30.

ACTIVITY	ESTIMATED NO. OF ANNUAL RESPONSES	COMPLETION TIME PER RESPONSE (hours)	ESTIMATED TOTAL ANNUAL BURDEN HOURS
Initial written request from	20	4	80

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an Indian tribal official			
Agreement with Indian tribe	5	20	100
Appeals	5	10	50
Total	30	-----	230

An Indian tribe that has a traditional association with a park area may request that we enter into an agreement with the tribe for gathering and removal from the park area of plants or plant parts for traditional purposes. The agreement will define the terms under which the Indian tribe may be issued permits that will designate the tribal members who may gather and remove plants or plant parts within the park area in accordance with the terms and conditions of the agreement and the permit.

(1) The initial request from an Indian tribe that we enter into an agreement with the tribe for gathering and removal of plants or plant parts for traditional purposes. The request must include the information specified in § 2.6(c).

(2) The agreement, which defines the terms under which the Indian tribe may be issued a permit. To make determinations based upon tribal requests or to enter into an agreement, we may need to collect information from those Indian tribes who make requests and from the specific tribal members. The agreement must contain the information specified in § 2.6(f).

During the final rule stage, we made one change in our information collection requirements. We added a new section on the appeals process, outlining the right of tribes to appeal decisions made by the Superintendent to the Regional Director. Appeals should set forth the substantive factual or legal bases for the tribe’s disagreement with the Superintendent’s decision and any other information the tribe wishes the Regional Director to consider.

During the proposed rule stage, we solicited comments on the information collection requirements. We addressed all comments in the preamble above. A number of comments addressed the issue of the information requested under this rule. These comments fell within three broad categories:

(1) *Is there a basic need for the information?* Some comments questioned why we need to collect the information specified in the gathering rule, suggesting instead that the individual tribes are better suited to identify the people, plants, places, and methods by which plant gathering would take place.

NPS Response: Under the rule, tribes identify the specific details of their proposed plant gathering and provide that information to the Superintendent for consideration. This information is necessary to meet our legislated and regulatory responsibilities to conserve park resources, particularly plants. Because parks have different biological conditions and plants as well as different enabling legislation, the information we collect under this rule is required to develop NEPA environmental documents and to determine whether specific communities of plants or plant parts are healthy enough to be included in a plant gathering agreement.

(2) *Why is there a need for a tribe to provide specific details about the plant gathering?* Some comments called the level of detail required for the agreements “overly burdensome” and raised the question as to whether or not we need to collect: specific lists of tribal members who would be allowed to collect plants and plant parts, specific lists of the plants targeted for gathering by the tribal members, specific locations from which the plants would be gathered, specific times where the plant gathering would take place, and specific descriptions of the traditional methods to be used to gather the plants.

NPS Response: We believe the information is necessary to minimize impacts to park

resources and values, allow for efficient implementation of agreements, and prevent unauthorized gathering. We believe that this rule is broad enough to allow latitude in the specificity required to create workable agreements between the NPS and traditionally associated tribes. Permits issued under the agreements must list tribal members who will gather plants or plant parts during the time period covered by the permit. Tribal members who are authorized to gather plants are encouraged to have tribal identification cards in their possession during gathering activities. In addition to the permitted tribal members, tribes will need to provide a list of plants or plant parts to be gathered under the agreements, general time frames when the gathering of plants or plant parts would take place, and a general description of the proposed method of gathering so that the NPS can continue to ensure that there will be no significant adverse impacts to park resources. We believe that the categories of information that we will collect are necessary to develop the environmental assessment and finding of no significant impact under NEPA and to determine whether or not the communities of plants or plant parts desired are healthy enough to be included within a plant gathering agreement.

(3) Can the NPS protect the sensitive information tribes provide about traditional methods of gathering, traditional uses of plants and plant parts, and so forth? Many tribal respondents questioned our ability to protect confidential information about who does the gathering and plant gathering locations.

NPS Response: See NPS Response to Comment 11 above.

We did not change our information collection requirements based on these comments. The public may comment at any time on the accuracy of the information collection burden in this rule. You may send comments on any aspect of these information collection requirements to the Information Collection Clearance Officer, National Park Service, 12201 Sunrise Valley Drive

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(Mail Stop 242), Reston, VA 20192.

National Environmental Policy Act (NEPA).

This rule does not constitute a major federal action significantly affecting the quality of the human environment. A detailed statement under NEPA is not required because the rule is covered by a categorical exclusion. The Department of the Interior Regulations for implementing NEPA at 43 CFR 46.210(i) and the NPS NEPA Handbook at ¶ 3.2(H) allow for the following to be categorically excluded: “policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA-compliance process, either collectively or case-by-case.”

The NPS has determined that the environmental effects of this rule are too broad, speculative, or conjectural for a meaningful analysis. In order to enter into an agreement for gathering of natural products under the rule, the NPS will first need to receive a request from an appropriate tribal official. While there are a number of Indian tribes that may qualify for an agreement under the rule, the NPS can only speculate at this point as to which Indian tribes will request an agreement, which park areas will be affected, and what specific resources specific Indian tribes will request to collect. Because of this, the NPS has explicitly required that it prepare an environmental assessment and a finding of no significant impact that meets the requirements of NEPA for each gathering agreement, on a case-by-case basis. The activities allowed by the permit must fall within the scope of activities agreed upon in the gathering agreement. As a result, no collection of plants or plant parts will occur under this rule until after a site-specific NEPA analysis is completed.

The NPS has also determined that the rule does not involve any of the extraordinary

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circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

Effects on the Energy Supply (Executive Order 13211).

This rule is not a significant energy action under the definition in Executive Order 13211.

A Statement of Energy Effects is not required.

Drafting Information.

The primary authors of the proposed rule were Patricia L. Parker, Ph.D., Chief, American Indian Liaison Office; Frederick F. York, Ph.D., Regional Anthropologist, Pacific West Region; and Philip Selleck, Associate Regional Director for Operations, National Capital Region. The primary authors of the final rule were Joe Watkins, Ph.D., Chief, American Indian Liaison Office; Michael J. Evans, Ph.D., Chief, Cultural Anthropology/Ethnography, Midwest Region; Timothy Cochrane, Ph.D., Superintendent, Grand Portage National Monument; and Dr. Meredith Hardy, Archeologist, Southeast Archeological Center.

List of subjects in part 2

National parks, Native Americans, Natural resources

For the reasons given in the preamble, the National Park Service amends 36 CFR Part 2 as follows:

PART 2 – RESOURCE PROTECTION, PUBLIC USE AND RECREATION

1. The authority citation for Part 2 continues to read as follows:

Authority: 54 U.S.C. 100101, 100751, 320102.

1. In §2.1, revise paragraph (d) to read as follows:

§2.1 Preservation of natural, cultural and archeological resources.

* * * * *

- (d) This section shall not be construed as authorizing the taking, use, or possession of

fish, wildlife, or plants for ceremonial or religious purposes, except for the gathering and removal of plants or plant parts by enrolled members of an Indian tribe in accordance with §2.6, or where specifically authorized by federal statutory law, treaty, or in accordance with §2.2 or §2.3.

* * * * *

2. Add §2.6 to read as follows:

§2.6 Gathering of plants or plant parts by federally recognized Indian tribes.

(a) *What terms do I need to know?* The following definitions apply only to this section.

Indian tribe means an American Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe under the Federally Recognized Tribe List Act of 1994, 25 U.S.C. 479a.

Plants or plant parts means vascular plants or parts of vascular plants. No other types of plants may be gathered or removed under this section.

Traditional association means a longstanding relationship of historical or cultural significance between an Indian tribe and a park area predating the establishment of the park area.

Traditional gathering means the method of gathering plants or plant parts by hand or hand tools only. Traditional gathering does not include the use of tools or machinery powered by electricity, fossil fuels, or any other source of power except human power.

Traditional purpose means a customary activity or practice that is rooted in the history of an Indian tribe and is important to the continuation of that tribe's distinct culture.

Tribal official means an elected or duly appointed official of the federally recognized government of an Indian tribe authorized to act on behalf of the tribe with respect to the subject matter of this regulation.

(b) *How may the Superintendent authorize traditional gathering and removal?* After receiving a request from an Indian tribe to gather plants or plant parts within a park area, the Superintendent may enter into an agreement with the tribe to authorize the traditional gathering and removal of plants or plant parts for traditional purposes. The agreement will describe the terms and conditions under which the Superintendent may issue a gathering permit to the tribe under § 1.6 of this chapter. The permit will designate the enrolled tribal members who are authorized to gather and remove plants or plant parts within the park area.

(c) *How must a tribe request to enter into an agreement?* (1) A tribal official must submit to the Superintendent a written request to enter into an agreement under this section that contains the following:

- (i) A description of the Indian tribe's traditional association to the park area;
- (ii) A description of the traditional purposes to which the traditional gathering activities will relate; and
- (iii) A description of the traditional gathering and removal activities that the tribe is interested in conducting, including a list of the plants or plant parts that tribal members wish to gather and the methods by which those plants or plant parts will be gathered.

(2) Within 90 days after receiving a request that contains the information required by paragraph (c)(1) of this section, the Superintendent will initiate consultation with the requesting tribe in order to develop an agreement. If a Superintendent fails to initiate consultation within 90 days after receiving such a request, then the tribe may submit the request to the Regional Director. The Superintendent will also consult with any other tribe that has gathering rights in that park area under a treaty or federal statute or is party to a valid plant-gathering agreement with the NPS for that park area.

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(d) *What are the requirements for entering into agreements?* Before entering into an agreement to allow gathering and removal, the Superintendent must:

(1) Determine, based on available information, including information provided by the tribe itself, that the tribe has a traditional association with the park area and is proposing to gather and remove plants or plant parts within the park area for a traditional purpose; and

(2) Comply with all applicable federal laws, including the National Environmental Policy Act of 1969, the National Historic Preservation Act, and the Endangered Species Act. The compliance for the National Environmental Policy Act of 1969 must consist of an environmental assessment and must conclude with a finding of no significant impact, which must also document the determinations required by paragraph (d)(1) of this section. The Superintendent may not enter into an agreement that will have a significant adverse impact on park area resources or values.

(e) *When must the Superintendent deny a tribe's request to enter into a gathering agreement?* The Superintendent must deny a tribe's request to enter into a gathering agreement if any of the requirements of paragraph (d) of this section are not satisfied.

(f) *What must agreements contain and how will they be implemented?* (1) An agreement to gather and remove plants or plant parts must contain the following:

(i) The name of the Indian tribe authorized to gather and remove plants and plant parts;

(ii) The basis for the tribe's eligibility under paragraphs (c)(1)(i) and (ii) of this section to enter into the agreement;

(iii) A description of the system to be used to administer traditional gathering and removal, including a clear means of identifying the enrolled tribal members who, under the permit, are designated by the Indian tribe to gather and remove;

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(iv) A means for the tribal government to keep the NPS regularly informed of which enrolled tribal members are designated by the tribe to gather and remove;

(v) A description of the specific plants or plant parts that may be gathered and removed. The gathering agreement may not authorize the gathering of any species listed as threatened or endangered under the Endangered Species Act;

(vi) Specification of the size and quantity of the plants or plant parts that may be gathered and removed;

(vii) Identification of the times and locations at which the plants or plant parts may be gathered and removed;

(viii) A statement that plants or plant parts may be gathered only by traditional gathering methods, i.e., only by hand or hand tools;

(ix) A statement that the sale or commercial use of natural products (including plants or plant parts gathered under the agreement) is prohibited in the park area under §2.1(c)(3)(v);

(x) Protocols for monitoring traditional gathering and removal activities and thresholds above which NPS and tribal management intervention will occur;

(xi) A requirement that the NPS and the tribe engage in periodic reviews of the status of traditional gathering activities under the agreement through consultation;

(xii) Operating protocols and additional remedies for non-compliance with the terms of the agreement beyond those provided in this section, including mitigation, restoration, and remediation;

(xiii) A requirement that a permit issued under the agreement identify the tribal members who are designated by the tribe to gather plants or plant parts under the permit;

(xiv) A list of key officials; and

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(xv) Any additional terms or conditions that the parties may agree upon.

(2) Agreements will be implemented through a permit issued in accordance with § 1.6 of this chapter. Activities allowed by a permit must fall within the scope of activities agreed upon in the agreement.

(g) *What concurrence must the Superintendent obtain?* Before executing any gathering agreement, the Superintendent must obtain the written concurrence of the Regional Director.

(h) *When may the Superintendent close areas to gathering and removal?* (1)

Notwithstanding the terms of any agreement or permit executed under this section, the Superintendent may close park areas, or portions thereof, to the traditional gathering and removal of plants or plant products for any of the following reasons:

- (i) Maintenance of public health and safety;
- (ii) Protection of environmental or scenic values;
- (iii) Protection of natural or cultural resources;
- (iv) Aid to scientific research;
- (v) Implementation of management plans; or
- (vi) Avoidance of conflict among visitor use activities.

(2) Closed areas may not be reopened to traditional gathering and removal until the reasons for the closure have been resolved.

(3) Except in emergency situations, the Superintendent will provide public notice of any closure under this section in accordance with § 1.7 of this chapter. The Superintendent will also provide written notice of the closure directly to any tribe that has an agreement to gather and remove plants or plant parts from the closed area.

(i) *When may the Superintendent suspend or terminate an agreement or permit?*

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(1) The Superintendent may suspend or terminate a gathering agreement or implementing permit if the tribe or a tribal member violates any term or condition of the agreement or the permit.

(2) The Superintendent may suspend or terminate a gathering agreement or implementing permit if unanticipated or significant adverse impacts to park area resources or values occur.

(3) If a Superintendent suspends or terminates a gathering agreement or implementing permit, then the Superintendent must prepare a written determination justifying the action and must provide a copy of the determination to the tribe.

(4) Before terminating a gathering agreement or implementing permit, the Superintendent must obtain the written concurrence of the Regional Director.

(j) *When is gathering prohibited?* Gathering, possession, or removal from a park area of plants or plant parts (including for traditional purposes) is prohibited except where specifically authorized by:

- (1) Federal statutory law;
- (2) Treaty rights;
- (3) Other regulations of this chapter; or
- (4) An agreement and permit issued under this section.

(k) *How may a tribe appeal a Superintendent's decision not to enter into a gathering agreement under this rule?* If a Superintendent denies a tribe's request to enter into a gathering agreement, then the Superintendent will provide the tribe with a written decision setting forth the reasons for the denial. Within 60 days after receiving the Superintendent's written decision, the tribe may appeal, in writing, the Superintendent's decision to the Regional Director. The appeal should set forth the substantive factual or legal bases for the tribe's disagreement with the

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Superintendent's decision and any other information the tribe wishes the Regional Director to consider. Within 45 days after receiving the tribe's written appeal, the Regional Director will issue and send to the tribe a written decision that affirms, reverses, or modifies the Superintendent's decision. The Regional Director's appeal decision will constitute the final agency action on the matter. Appeals under this section constitute an administrative review and are not conducted as an adjudicative proceeding.

(1) *Have the information collection requirements been approved?* The Office of Management and Budget has reviewed and approved the information collection requirements in this section and assigned OMB Control No. 1024-0271. We will use this information to determine whether a traditional association and purpose can be documented in order to authorize traditional gathering. We may not conduct or sponsor and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. You may send comments on any aspect of this information collection to the Information Collection Clearance Officer, National Park Service, 12201 Sunrise Valley Drive (Mail Stop 242), Reston, VA 20192.

* * * * *

Dated:

Karen Hyun, Ph.D.
Deputy Assistant Secretary for Fish and Wildlife and Parks