

Phone Call Summary

Date: Friday, August 23, 2019

Subject: Interim Storage Partners license application -- NHPA Section 106 consultation with non-federally recognized tribes

Attendees: NRC

Texas Historical Commission

James Park, Project Manager

Drew Sitters, West Texas Regional

Esther Houseman, Legal Counsel

Archaeologist/Project Reviewer

Summary:

The purpose of the call was to discuss and clarify the role of tribal groups formally recognized by the State of Texas within the National Historic Preservation Act Section 106 consultation process. The discussion focused on the following five questions posed by Mr. Park:

1. What is the status of non-federally recognized tribes within the State of Texas? In particular, what is the State process for recognizing such tribes and what "rights" does that process accord a recognized tribe?
2. How many non-federally recognized tribes have received recognition by the State? Which tribes are these?
3. On the Texas Historical Commission's (THC's) website, there is a page (<https://www.thc.texas.gov/project-review/tribal-consultation-guidelines>), on which there is a link to a frequently asked question (FAQ) regarding consultation with Indian groups that are not federally recognized. In the answer to that particular FAQ, the website states, "There is no legal requirement to consult with Indian groups or tribes that are not recognized by the federal government; however, non-federally recognized tribal groups may comment on a project or undertaking as an "interested party." How is "interested party" defined with respect to this answer?
4. On the same FAQ webpage and for the same question/answer, a distinction is made between "consult" and "comment" with respect to non-federally recognized tribes within the State. How is the THC defining these terms with respect to this FAQ answer?
5. With respect to the Advisory Council on Historic Preservation's (ACHP's) guide to working with non-federally recognized tribes (attached), it states on page 7, "Some state laws and regulations include special provisions for non-recognized tribes that need to be factored into planning for projects that require compliance with state laws." Does the State of Texas have such laws and/or regulations?

With respect to the first and second questions, Mr. Sitters stated that the State's process occurs through a resolution passed either by the State House of Representatives or by the State Senate. The two examples of which Mr. Sitters was aware are House Resolution 812 in 2009 honoring the Lipan Apache Tribe of Texas and Senate Resolution 989 in 2015 honoring the Texas Band of Yaqui Indians. The State process does not accord such tribes or tribal groups special status or rights, but rather it honors or acknowledges the history and contributions of the tribe/tribal group within the State.

Regarding the third question, Mr. Sitters stated that "interested party" is not defined in the State's regulations. In researching the question, Mr. Sitters noted that the ACHP's regulations at 36 CFR 800 identify interested parties as those with a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties. The statement on the THC website refers to Section 106/federal projects as cited above. It is up to the lead Federal Agency to handle the task of determining who may be an interested party.

Concerning the fourth question, Mr. Sitters pointed to the definitions for consultation and comment at 36 CFR 800.16(e) and (f), wherein:

"(e) Comment means the findings and recommendations of the Council formally provided in writing to the head of a Federal agency under section 106.

(f) Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process."

Mr. Sitters stated that the State of Texas does not have any laws or regulations concerning non-federally recognized tribes. In response, Mr. Park asked about the State's laws governing historic properties. Mr. Sitters identified the [Antiquities Code of Texas](#) (please also see the [Texas Administrative Code](#)), which requires state agencies and political subdivisions of the state — including cities, counties, river authorities, municipal utility districts, and school districts — to notify the THC of ground-disturbing activity on public (the Antiquities Code of Texas does not apply to above ground resources [e.g., historic buildings] unless listed on the National Register of Historic Places or nominated/listed as a State Antiquities Landmark). Mr. Park asked about private entities conducting work on private land within the State. Mr. Sitters replied that in those situations, the Antiquities Code of Texas would not apply unless there is a designated State Antiquities Landmark located on the property; however, the private entities are encouraged to conduct "due diligence" surveys for historic properties in advance of ground-disturbing work and to submit the results of the surveys to the THC for its records.

No other items were discussed.