



Preserving America's Heritage

December 11, 2018

D. Peter Helmlinger
Brigadier General
U.S. Army Corps of Engineers
Northwestern Division
PO Box 2870
Portland, Oregon 97208-2870

Ref: *Proposed Sonoita Creek Ranch Compensatory Mitigation Site Project*
United States Army Corps of Engineers, Santa Cruz County, Arizona
ACHPConnect Log Number: 013453

Dear General Helmlinger:

On November 20, 2018, the Advisory Council on Historic Preservation (ACHP) received U.S. Army Corps of Engineers' (Corps) request to review its finding of no adverse effect (NAE) for the referenced undertaking. This request was made by the Corps in accordance with 36 CFR § 800.5(c)(2)(i) of the regulations implementing Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108; 36 CFR part 800). On November 30, 2018, the ACHP notified the Corps that it was extending its review period for an additional 15 days pursuant to 36 CFR § 800.5(c)(3)(i).

The Corps provided notification of its finding of NAE to the Arizona State Historic Preservation Officer (SHPO), Indian tribes, the ACHP, and other identified consulting parties in a letter dated September 27, 2018. Following this, the SHPO concurred with the Corps' finding on October 23, 2018, as did several other consulting parties. On October 24, 2018, the Corps received notice from the Tohono O'odham Nation's (Nation) Tribal Historic Preservation Officer (THPO) that they did not concur with the Corps' finding. Through subsequent communications, the Corps attempted to resolve the dispute; however, the Nation's THPO reaffirmed their position via email on November 9, 2018. The Corps subsequently forwarded the dispute to the ACHP.

Based on our review of the documentation the Corps has provided, and discussions with Corps staff and the Nation's THPO, it is the ACHP's advisory opinion that USACE has correctly applied the criteria of adverse effect to this undertaking.

The undertaking consists of mitigation actions that will be required for issuance of the Corps' Clean Water Act Section 404 permit. The permit and associated mitigation are proposed in conjunction with the Rosemont Copper Mine Undertaking. The Rosemont Copper Company (Rosemont) proposes to develop a mine on private lands and within the U.S. Forest Service's (USFS) Coronado National Forest (CNF). The USFS was designated lead federal agency and conducted Section 106 compliance for the proposed mine project, with the Corps participating in the consultation as a Cooperating Agency and as a Signatory to the Memorandum of Agreement (MOA) that was executed in 2013 to set forth the resolution of adverse effects to historic properties from the development of the mine. The proposed Sonoita Creek Ranch mitigation actions were not developed at that time and therefore were not evaluated in that Section 106 review for the Rosemont Mine undertaking or referenced in the 2013 MOA, and the Corps subsequently initiated a new Section 106 review

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

for those actions.

As part of the mitigation, Rosemont has acquired four parcels of private land within the Santa Cruz River Watershed for mitigation activities that are to include stream, floodplain, and upland restoration activities within the Rail X Ranch and Sonoita Creek Ranch. The proposed work includes rehabilitation of Sonoita Creek and tributary channels within both parcels, reestablishment of floodplain benches and uplands that buffer the channel, and pond enhancement for native species. The Corps decided to conduct a new Section 106 review for this undertaking for several reasons, including its determination that the proposed site for the mitigation was outside of the area of potential effects (APE) considered in the 2013 MOA and additional efforts would be necessary to identify historic properties that may be located within the mitigation parcels.

Finding of No Adverse Effect

In reviewing how the criteria of adverse effect have been applied, the ACHP was guided by the regulations, which state (at 36 CFR § 800.5(a)(1)):

An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

A finding of NAE by the agency official is appropriate when the undertaking's effects do not meet the criteria of adverse effect or the undertaking is modified or conditioned to avoid adverse effects.

It is the ACHP's advisory opinion that the Corps has correctly applied the criteria of adverse effect to this undertaking. The Corps appears to have made a reasonable and good faith effort to carry out appropriate historic property identification efforts and through consultation with the SHPO, Indian tribes, and other consulting parties, determined that the proposed undertaking could avoid adverse effects to identified historic properties. Based on the documentation provided, the Corps received initial SHPO concurrence with its identification efforts and determination of NAE for the undertaking in September of 2017. It also received concurrence from several other consulting parties (including the Arizona State Land Department, the CNF, the White Mountain Apache Tribe, and the San Carlos Apache Tribe); no objections were forthcoming at that time. The Corps did receive requests for additional information from the Nation and Pima County, and the requested documents, which included the revised Habitat Mitigation and Monitoring Plan, were provided for their review. The Corps did not receive any subsequent objections from the Nation or Pima County or any other consulting party to its determination of no adverse effect.

After this initial review and consultation, the Corps identified locations of two proposed fence lines that did not fall entirely within the original APE and therefore were not surveyed as part of the Corps' earlier identification efforts. The Corps undertook further identification efforts resulting in an addendum to its survey efforts and provided this update to consulting parties on September 27, 2018. The Corps identification efforts in the addendum did not present any substantively new information concerning identified historic properties. The document also discussed the indirect effects of the proposed action. The Corps then reaffirmed its NAE finding, to which the SHPO again concurred along with other consulting parties except for the Nation, which objected on October 24, 2018.

In its objection, the Nation's THPO stated that they did not concur with the Corps' determination of no adverse effect and that a cultural landscape study would be necessary to further evaluate the impacts from the proposed undertaking. In communication between the Nation and the Corps attempting to resolve the dispute, a second

correspondence from the THPO indicated that "...while there will be no adverse effect on individual cultural sites, there will be an adverse effect on the cultural and natural landscape of the Sonoita Creek project area." The Corps disagreed that any further identification effort would be necessary in the project area. Relying on guidance found in the *National Park Service Preservation Brief 36: Protecting Cultural Landscapes: Planning, Treatment and Management of Historic Landscapes*, the Corps determined it lacked sufficient information to identify an additional historic landscape in the project area. The Corps asked the Nation to clarify its suggestion that a cultural landscape or another historic property may be present in the area or how the proposed mitigation actions might affect such a property but the Nation provided no further information.

The Section 106 regulations do not specify to what extent a federal agency is required to engage in prospective studies in areas where a tribe indicates there may be historic properties of concern that may be affected by an undertaking. In this instance, the ACHP notes that the Corps made significant outreach efforts to the Nation and other consulting parties, and there had been no such indication, either now or previously, that any additional identification efforts would be warranted. To the contrary, the Corps did not receive any prior objections from the Nation to its original 2017 NAE finding or identification efforts, nor from any other consulting party. The only new information provided in the addendum in 2018 concerned revisions APE caused by changes in two proposed fence lines. The Nation's response to the addendum in October 2018 was the only statement expressed throughout the review of the mitigation actions that suggested any additional historic resources might be affected. Having attempted to consult further with the Nation and lacking any additional clarifying information to support further identification work, the ACHP believes the Corps took into account the available input from consulting parties to ensure its efforts were both *reasonable* in terms of intensity and scale and carried out in *good faith* through its development and execution.

In a related manner, while it appears the Corps has adequately taken into account the potential effects of the Sonoita Creek Ranch Compensatory Mitigation Site Project on historic properties via this additional Section 106 review process, the ACHP would recommend for future undertakings that involve multiple required parts, such as offsite mitigation associated with Corps permits, the Corps address all the related parts of the larger undertaking through a single review process, resulting in a Section 106 agreement document that provides clear directions for ongoing review and consultation as needed.

Based on the above information, it is the ACHP's advisory opinion that the Corps has adequately taken reasonable steps to identify historic properties, assessed and consulted on the potential effects of the undertaking, and that these steps support its finding of NAE. In accordance with 36 C.F.R. § 800.5(c)(3)(ii)(B), the Corps is now required to take into account this advisory opinion in reaching a final decision on its finding of effect, and provide to the ACHP, SHPO, and other consulting parties a summary of how these advisory comments were considered by the Corps. Once the summary of the decision has been sent to the ACHP and other parties, the agency official's responsibilities are fulfilled for this step in the Section 106 process.

If you or your staff have any questions or require further clarification, please contact me directly at 202-517-0206 or rnelson@achp.gov, or Mr. Christopher Daniel, Program Analyst, at 202-517-0223 or via e-mail at cdaniel@achp.gov.

Sincerely,



Reid J. Nelson

Director

Office of Federal Agency Programs