



# Oregon

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**To:** Energy Facility Siting Council

**From:** Christopher M. Clark, Senior Siting Analyst & Rules Coordinator

**Date:** May 13, 2022

**Subject:** Agenda Item E (Action Item): Protected Areas, Scenic Resources, and Recreation Standards Rulemaking. Supplemental information regarding historic properties of religious and cultural significance to Indian tribes for the May 26-27 Council meeting.

**Attachment:** Draft Notice of Proposed Rulemaking (to be provided to Council in supplemental packet)

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## SUMMARY AND STAFF RECOMMENDATION

During its meeting on April 22, 2022, the Energy Facility Siting Council (Council) requested that staff provide additional information on whether existing standards adequately address impacts to historic properties of religious and cultural significance to Indian tribes, and whether these properties could be included as “protected areas” within the context of the Protected Areas Standard. In response to these requests, this report:

- Describes how historic properties of religious and cultural significance to Indian tribes are addressed under federal law and the Council’s Historic, Cultural and Archaeological Resources Standard.
- Provides an overview of the Council’s Protected Areas standard and the types of properties it covers.
- Advises that historic properties, including properties of religious and cultural significance to Indian tribes, that are listed on the National Register of Historic Places could be included as “protected areas” under the Council’s Protected Areas Standard, and explains potential challenges to implementing such an approach.
- Recommends future rulemaking to align procedures for the Council’s review of impacts to historic properties of religious and cultural significance to Indian tribes and other cultural resource with the Section 106 Process used by federal agencies.

Staff’s other recommendations for the Protected Areas, Scenic Resources, and Recreation Standards Rulemaking are as presented during agenda Item C of the April 22, 2022, Council meeting. A draft Notice of Proposed Rulemaking reflecting these recommendations will be provided to the Council in its supplemental packet prior to the May 26-27, 2022 meeting.

## **EXISTING STANDARDS FOR THE PROTECTION OF HISTORIC PROPERTIES OF RELIGIOUS AND CULTURAL SIGNIFICANCE TO INDIAN TRIBES.**

The National Historic Preservation Act specifies that properties of traditional religious and cultural importance to an Indian tribe may be eligible for inclusion on the National Register of Historic Places.<sup>1</sup> The Act requires federal agencies to consult with tribes when taking an action or making a decision that could affect such a property, regardless of its location. The process of consulting with tribes to identify properties of religious and cultural significance, and to assess and resolve adverse impacts that may result from a federal undertaking is often referred to as the “Section 106 Process” due to the location of the requirements in the Act.<sup>2</sup>

Executive Order 13007, issued by President Bill Clinton, further requires federal land managing agencies to accommodate access to and ceremonial use of Indian sacred sites on federal lands, and to avoid adversely affecting the physical integrity of such sacred sites. While the Section 106 Process is often used by federal agencies to meet the requirements of Executive Order 13007, a sacred site does not need to be eligible for listing on the National Register to be protected under the Order.<sup>3</sup>

Neither the Section 106 Process nor Executive Order 13007 apply to the Council or other state agencies; however, the Council’s Historic, Cultural and Archaeological Resources Standard similarly requires the Council to consider and address the potential adverse impacts that the siting, construction, and operation of an energy facility may have on resources that have been listed on, or would likely be listed on, the National Register in making its decision to issue a site certificate.<sup>4</sup> It is important to note that the Council may not use this standard as the basis to approve or deny an application for a renewable energy facility, but it may impose conditions of approval to ensure compliance with the standard to the extent the Council determines appropriate.<sup>5</sup>

The Council’s rules also require the Department to provide any tribe identified by the Legislative Commission on Indian Services (LCIS) as affected by the proposed facility and the State Historic Preservation Office with the opportunity to provide input on the proposed facility’s potential impacts on historic and cultural resources, including the recommendations regarding the size and location of analysis areas for the Application for Site Certificate.<sup>6</sup> For several recent applications, applicants have been required to describe potential significant impacts to all historic, cultural, and archaeological resources within the facility site boundary, and for above-ground resources, including historic properties of religious and cultural significance to Indian tribes, within the area extending 1-mile from the site boundary. Applicants are also encouraged to independently consult with tribes to identify and resolve potential impacts on important tribal resources.

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<sup>1</sup> 54 USC 302706

<sup>2</sup> 36 CFR Part 800

<sup>3</sup> Advisory Council on Historic Property. “The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106” April 24, 2018. Accessed, May 11, 2022 from: <https://www.achp.gov/digital-library-section-106-landing/relationship-between-executive-order-13007-regarding-indian>

<sup>4</sup> ORS 469.501(1)(f) and OAR 345-022-0090(1).

<sup>5</sup> ORS 469.501(4) and OAR 345-022-0090(2).

<sup>6</sup> OAR 345-001-0010(51)(o); 345-015-0120; 345-020-0011(1)(p)

## **PROTECTED AREAS AND HISTORIC PROPERTIES**

The Council has adopted a separate standard to address impacts to areas designated for protection by the state or federal government.<sup>7</sup> The Protected Areas standard identifies several categories of designated protected areas, including, but not limited to national parks and monuments, wilderness areas, wildlife refuges and management areas, and state parks and natural areas. It does not identify properties of religious or cultural significance to Indian tribes as protected (although such properties may exist within the current listed categories of protected areas).

With some exceptions, the applicant must avoid siting a facility in a protected area. To issue a site certificate for a proposed facility located outside a protected area, Council must find that the facility, taking into account mitigation, is not likely to result in a significant adverse impact to the protected area. In its Notice of Intent an applicant must describe a proposed facility's potential significant impacts, including visual impacts and impacts from noise and traffic, to protected areas within 20 miles of the proposed facility. Based on the recommendations of reviewing agencies, including tribes identified by the LCIS as being potentially affected by the proposed facility, the Department may establish a smaller or larger analysis area for the application. Unlike the Historic, Cultural and Archaeological Resources Standard, there is no restriction on the Council's ability to approve or deny a renewable energy facility's application for site certificate based on the proposed facility's compliance with the Protected Areas Standard.

The National Register of Historic Places is the official list of properties recognized by the federal government as worthy of preservation for their historic, archaeological, or cultural significance. Any person, local government, agency, or tribe may nominate a historic property for inclusion on the register, but the final determination of a property's significance is made by the National Parks Service on behalf of the U.S. Secretary of Interior. A property may be determined to be eligible for listing if it is significant at a local, state, national, or international level.<sup>8</sup>

Because the determination is made by the federal government, the inclusion of a property on the National Register can be considered to be similar to the designation of a protected area, and some historic properties, such as National Historic Landmarks, may already be treated as protected areas under the Council's rules. Depending on the type of property listed and the evaluation of its significance, however, listing on the National Register is not always intended to confer the same level of protection, and staff would not recommend that Council pursue a rule change to include all properties listed on the National Register as protected areas.

The Council likely could add a particular subset of listed historic properties, such as historic properties of religious and cultural significance to Indian tribes, as a new category of "protected area." This would require the applicant to identify potential impacts to listed properties within 20-miles of the proposed facility site boundary in its Notice of Intent and would preclude an energy facility from being constructed or operated within the boundaries of a listed tribal

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<sup>7</sup> OAR 345-022-0040

<sup>8</sup> For a general discussion of the criteria, see: National Parks Service. National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation. Revised 1995. Available at:

[https://www.nps.gov/subjects/nationalregister/upload/NRB-15\\_web508.pdf](https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf)

religious or cultural site. While expanding the scope of the protected areas standard to include historic properties of religious and cultural significance to Indian tribes listed on the National Register could help identify and address potential impacts to some traditional religious and cultural properties and places, it is likely that there would also be significant challenges in implementing this approach.

The specific location and boundaries of many sacred sites and other historic properties of religious and cultural significance to Indian tribes are protected from public disclosure under state and federal law.<sup>9</sup> In some cases, tribes themselves may not want to, or may not be able to, disclose information about the specific location or significance of traditional religious and cultural properties and places. For these reasons, many sites that may be eligible to be listed on the National Register are not actually listed, and those that are may have had their address or location redacted from published documents. For this reason, an applicant may not be able to identify historic properties of religious and cultural significance to Indian tribes in the same way as it would identify other protected areas, which are generally easily identifiable from publicly available documents.

In addition, the Protected Areas Standard may not be well suited to address impacts to religious and cultural sites. The Protected Areas Standard typically requires an assessment of visual impacts, impacts from noise or traffic, and other impacts to the qualities or values for which an area is protected. While these assessments are generally subjective in nature, they do depend on a certain degree of quantitative evaluation which may not appropriately identify or resolve potential impacts to religious or cultural properties. For example, the assessment of visual impacts typically used to support Council findings attempt to measure the magnitude of impact of a viewer participating in recreational use of a protected area, which would not necessarily be comparable to the magnitude of impact on a traditional practitioner's ceremonial or religious use of the same area.

#### **SUMMARY OF COUNCIL OPTIONS AND RECOMMENDATION FOR FUTURE RULEMAKING**

Based on staff's review, the Council could expand the Protected Areas Standard to include historic properties of religious and cultural significance to Indian tribes that are listed on the National Register of Historic Places or could continue to rely on the existing Historic, Cultural and Archaeological Resources Standard to protect these resources. While staff presents these two options without recommendation, staff recommends that additional rulemaking is needed to better align the review of impacts to properties of traditional, cultural, and religious importance with the Section 106 process.

##### Option 1: Expand Protected Areas Standard

The Council could expand the Protected Areas Standard to include historic properties of religious and cultural significance to Indian tribes that are listed on the National Register of Historic Places. Doing so would likely result in the identification of more potentially affected properties but would still fail to address eligible properties that are not listed and may not be well suited to address impacts to religious or cultural values.

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<sup>9</sup> ORS 192.345(11)  
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### Option 2: Rely on Historic, Cultural, and Archaeological Resources Standard

The Council's Historic, Cultural and Archaeological Resources Standard provides a framework for the protection of historic properties of religious and cultural significance to Indian tribes and other traditional cultural properties that have been listed on, or are determined to be likely eligible for listing on, the National Register of Historic Places, however, as currently implemented only properties in the immediate vicinity of a proposed facility are likely to be identified and addressed unless a tribe provides specific comments or recommendations during the siting review process.

### Recommendation for Future Rulemaking

Regardless of whether the Council decides to expand the Protected Areas Standard or rely on the existing Historic, Cultural and Archaeological Resources Standard to protect historic properties of religious and cultural significance to Indian tribes and other sacred sites, staff recommends that amending the procedures for the Council's coordination with tribes to better align the review of impacts to properties of traditional, cultural, and religious importance with the Section 106 process. This may make the process for identifying and addressing impacts to cultural resources more effective by expanding opportunities for consultation with tribes, and coordination with tribal agency staff and the State Historic Preservation Office and streamline the process for identifying and protecting sacred sites and sites of archaeological significance to tribes. While some improvements can likely be made under the existing rules, additional rulemaking would likely be needed to obtain input from tribes and other stakeholders and fully implement changes to the Historic, Cultural, and Archaeological Resources Standard and the implementing information requirements and procedural rules. The Council has already included a rulemaking project to address issues related to the Historic, Cultural and Archaeological Resources Standard and improve early coordination between tribes and applicants on its rulemaking schedule.