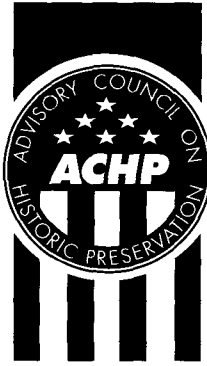


John L. Nau, III
Chairman

Susan S. Barnes
Vice Chairman

John M. Fowler
Executive Director



Preserving America's Heritage

February 23, 2007

The Honorable Arden L. Bement, Jr.
Director
National Science Foundation
4201 Wilson Boulevard
Arlington, VA 22230

Dear Mr. Bement:

In accordance with Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800), I am writing to convey to you the final comments of the Advisory Council on Historic Preservation (ACHP) on the Very Energetic Radiation Imaging Telescope Array System (VERITAS) project at Kitt Peak National Observatory in southern Arizona.

On December 8, 2005, the National Science Foundation notified the ACHP of its determination that the proposal to provide grant funding for completion of construction of VERITAS would have an adverse effect to Kitt Peak, a property determined eligible for inclusion in the National Register of Historic Places. Kitt Peak, known to the Tohono O'odham Nation (Nation) as Ioligam Doag, also described as I'toi's Garden, is a sacred site and place of religious and cultural significance throughout the Nation's history.

The project was proposed to be located in Horseshoe Canyon on Kitt Peak and includes construction of an initial four telescopes, support structures, and infrastructure. Construction of the infrastructure for the project was commenced, and largely completed, including roads, four concrete pads, utilities, and a water storage tank, without Section 106 review. However, after litigation acknowledging NSF's commitment to conduct Section 106 consultation, NSF initiated such consultation in May 2005 and consulted with the Arizona State Historic Preservation Officer (SHPO), the Nation, and others until December 20, 2006. At that time NSF notified the ACHP of its determination that the participants in the process had failed to agree on the terms of a memorandum of agreement for the undertaking. NSF requested ACHP comment, which the ACHP agreed to provide by February 27, 2007.

NSF is a co-funding agency with the Department of Energy, the Smithsonian Institution, and others for the VERITAS project. The proposed VERITAS site, Horseshoe Canyon, is within the boundaries of land in use by NSF for astronomical research purposes as part of Kitt Peak Observatory pursuant to the terms of a lease entered into in 1958 between NSF and the Papago Indian Tribe. (The Nation has now returned to use of its traditional name, the Tohono O'odham Nation). The lease, which was congressionally authorized and is overseen by the Bureau of Indian Affairs (BIA) pursuant to BIA's leasing regulations, remains in effect in perpetuity as long as astronomical research activity continues.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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In January 2006, the Nation and NSF hosted a Section 106 consultation and nation-to-nation meeting that was attended by representatives of the ACHP, the Arizona SHPO, BIA, and others. The Nation's Chairwoman and representatives of their legislature, the district governments, tribal elders, and other voices spoke to the significance of the mountain and its meaning to the Tohono O'odham people. Although the Nation, the Arizona SHPO, and the ACHP reinforced the importance of consideration of avoidance alternatives by NSF, the status of prior construction critically limited such options and discussion focused on what measures might provide mitigation of adverse effects to the historic property. After the Nation indicated its objection to a draft memorandum of agreement, NSF elected to terminate further consultation and seek the formal comments of the ACHP.

Findings:

The ACHP believes there have been a number of flaws in how Section 106 review for this project has been carried out. Certainly the important principle that Section 106 review be undertaken in the early stages of project planning was seriously compromised when construction was commenced prior to Section 106 consultation. We also regret that the ACHP, in its effort to show deference to nation-to-nation consultation, did not take a more active role in consultation when it could have perhaps helped NSF and the other consulting parties to overcome impediments to reaching consensus.

Beyond Section 106, however, the ACHP has an even larger concern for underlying problems with how NSF, as a long-term leaseholder, has managed this historic property. Under Section 110 of the National Historic Preservation Act, Federal agencies are required to assume responsibility for the preservation of historic properties they own or control. Federal agencies are directed to have in place preservation programs that provide for the identification and nomination of historic properties to the National Register of Historic Places and to manage and maintain historic properties under their jurisdiction or control in a way that considers the preservation of their historic and cultural values. Such preservation activities should be conducted in close consultation with key stakeholders.

Furthermore, President Bush, through his *Preserve America* initiative, has placed a high premium on stewardship of our Nation's heritage assets. Executive Order 13287, *Preserve America*, directs Federal agencies to provide leadership in preserving heritage assets and for all Federal agencies with real property management responsibilities to report to the ACHP and the Secretary of the Interior on an established schedule on their historic properties and their management needs. It is troubling, in light of the current dispute over Kitt Peak, that NSF previously notified the ACHP that the provisions of the Executive Order did not apply to it, presumably because it did not own or control real property. This is clearly inconsistent with the long-term lease NSF holds at Kitt Peak.

Recommendations:

Based on these concerns, the ACHP offers the following recommendations:

- I. Consistent with NSF's responsibilities as a leaseholder under Section 110 and Executive Order 13287, NSF, in consultation with the Tohono O'odham Nation and the Bureau of Indian Affairs, must manage Kitt Peak, in accordance with Section 110(a)(2) of the National Historic Preservation Act. As an important step in achieving the purposes of Section 110, NSF, working closely with the Nation and the Arizona SHPO, should explore nomination of Kitt Peak for listing on the National Register of Historic Places and develop a preservation management plan that safeguards, to the maximum

extent possible, those features of Kitt Peak that qualify it for listing in the National Register of Historic Places. The nomination and management plan should be developed on a schedule agreed upon by NSF, the Nation, and the Arizona SHPO. NSF should report to the ACHP on its progress toward establishment of a preservation program pursuant to Section 110(a)(2) of NHPA in accordance with Section 3 of the Preserve America Executive Order.

II. NSF should reconsider alternative locations for the VERITAS project away from Kitt Peak in light of the Tohono O'odham Nation's resolution of December 13, 2006. NSF should resume consultation with the Nation to resolve the adverse effects caused by premature project construction and with the Arizona SHPO and stakeholders to explore alternatives for siting the VERITAS project at another location.

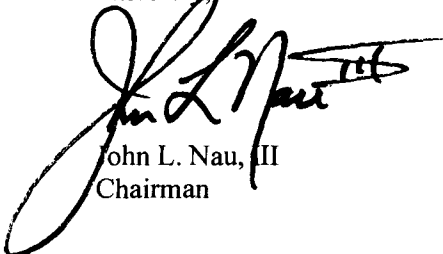
III. Because NSF and the Nation will have a continuing need to work together in the future to address effects of astronomical research facilities at Kitt Peak National Observatory, the ACHP encourages NSF to enter into discussions with the Nation to identify actions NSF can take in the future to decommission existing facilities at Kitt Peak as they become obsolete. NSF should consult with stakeholders pursuant to Section 106 for the restoration of the landscape where decommissioned facilities are proposed for removal. At the very least, NSF should begin formalizing binding commitments and timetables reflecting the outcome of consultation with the Nation.

IV. In future Section 106 reviews, NSF should ensure that agency staff involved in planning receive formal Section 106 training and conduct thorough studies to ensure early consideration of historic properties when undertakings have the potential to affect historic properties, including properties of religious and cultural significance to the Nation, other Indian tribes, and Native Hawaiian organizations.

The ACHP believes that an open and mutually respectful relationship between NSF and the Nation is essential for the harmonious co-existence of these neighbors on Kitt Peak/loaligam Doag. We urge the NSF to give serious consideration to the views of the Tohono O'odham Nation and the ACHP's recommendations regarding actions NSF should take to fully meet the spirit and intent of Section 106.

In accordance with Section 106 of the National Historic Preservation Act, you must take into account and respond to these comments of the ACHP prior to reaching a final decision on the VERITAS project. In accordance with Section 110(l) of the NHPA and the Section 106 implementing regulations, this responsibility cannot be delegated. Your response to the ACHP comments must be documented in accordance with 36 CFR Section 800.7(c)(4).

Sincerely,

A handwritten signature in black ink, appearing to read "John L. Nau, III". The signature is stylized with a large, looping initial "J" and a long horizontal stroke extending to the right.

John L. Nau, III
Chairman