

THE NAVAJO NATION



BEN SHELLY PRESIDENT
REX LEE JIM VICE PRESIDENT

July 15, 2011

Ken Salazar
Secretary
United States Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Consultation Policy Comments
Department of the Interior
Room 5129
MIB, Washington, DC 20240

Re: Proposed Policy on Consultation with Indian Tribes, 76 Fed. Reg. 28446

Dear Secretary Salazar:

The Navajo Nation ("Nation") takes this opportunity to comment on the draft Policy on Consultation with Indian Tribes ("Policy") published by the Department of the Interior ("Department") in the Federal Register on May 17, 2011 at 76 Fed. Reg. 28446. While the Nation appreciates the efforts of the Department to implement President Obama's November 5, 2009 Executive Memorandum for compliance with President Clinton's Executive Order 13175 on Consultation with Indian Tribes, in accordance with the Department's unique federal trust responsibility to tribes, the Nation believes that the Department must and can do better in developing a Policy for meaningful consultation with Indian tribes.

The obligation to meaningfully consult with Indian tribes on federal actions and decisions affecting those tribes extends to all federal departments and agencies. The federal government's obligation is based on the government-to-government relationship and general trust responsibility to Indian tribes under the United States Constitution, treaties, statutes, executive orders, and federal case law. However, your Department has a unique fiduciary responsibility to Indian tribes that should and must be expressly recognized and incorporated into the Policy. Of all federal departments and agencies, your Consultation Policy is truly the most critical to the continuing sovereignty of Tribal governments, the wellbeing of Indian peoples, and the ongoing federal-tribal government-to-government relationship.

First, the Department is the primary trustee of Indian tribes and Indian peoples. Specifically, (a) the Bureau of Indian Affairs ("BIA") is the federally designated land manager of tribal trust properties and tribal natural resources; (b) the Bureau of Indian Education ("BIE") administers BIE schools, P.L. 93-638 contract schools, as well as grant schools and scholarships; (c) the Department funds other critical services of tribes either directly or through P.L. 93-638 self-determination contracts; and, (d) the Office of Special Trustee in the Department is the primary fiduciary of Indian trust accounts. Second, in the case of

natural resource tribes like the Navajo Nation, several of the Department's agencies directly impact tribal trust resources through the permitting and oversight process. These include the Office of Surface Mining Reclamation and Enforcement ("OSM"), the Office of Natural Resources Revenue ("ONRR") (formerly Minerals Management Service), and the Bureau of Reclamation ("BOR"). Third, the Bureau of Land Management ("BLM"), the U.S. Fish and Wildlife Service ("F&W"), and the National Park Service ("NPS") manage federal lands and resources that are adjacent to, contiguous with, or migrate across tribal lands. These public lands include aboriginal lands that contain historical cultural patrimony of tribes, and where tribes retain hunting, fishing and other aboriginal use rights. In the case of the Navajo Nation, the NPS actually administers a National Park located directly on Navajo tribal trust lands at Canyon de Chelly, and its actions and decisions continue to have profound and sometimes disastrous impacts on Navajo cultural resources located there (such as where Park employees have dug up and carried off hundreds of human remains from the Park without the Nation's consent, or even consulting with the Nation). Clearly, the Department's unique fiduciary responsibility and relationship to Indian tribes, and the potential impacts to tribes by its agencies' decisions and actions, must be better incorporated into and acknowledged in the Department's draft Policy on Consultation with Indian Tribes.

The Navajo Nation, in addition to urging the Department to bolster the language in the Policy to expressly recognize the unique fiduciary responsibility of the Department and its agencies to Indian tribes, has the following concerns and comments:

- In accordance with President Obama's November 5, 2009 directive to federal agencies for each to submit "a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175," and the Department's special trust responsibility, the language in the draft Policy should be *mandatory* and not *precatory*. For example, the language that "Bureaus or Offices *will seek and promote* cooperation and participation between agencies with overlapping jurisdiction, special expertise, or related responsibilities regarding a Departmental Action with Tribal Implications" should be changed to "Bureaus or Offices *shall ensure* cooperation and participation . . ." Precatory language throughout the document should be changed to mandatory language.
- Similarly, given the Department's unique fiduciary responsibility to Indian tribes, the Department's proposed disclaimer at Section IX of the Policy is inappropriate and should be stricken in its entirety. Tribes should have legal recourse to guarantee that the Department and its agencies comply with their duty to meaningfully consult with tribes on actions and decisions with tribal implications. Adding the disclaimer renders the proposed Policy and the entire process disingenuous, and is wholly inconsistent with past Department tribal consultation guidelines which the Department acknowledged were legally enforceable by tribes. *See Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717-719 (8th Cir. 1979).
- "Meaningful Consultation for a Departmental Action with Tribal Implications" should be specifically defined. The Nation suggests the following: "Meaningful Consultation' means a government to government process for deciding a Departmental Action with Tribal Implications where the decisionmaker has not yet made a preliminary decision, where the consultation is not merely for informational purposes but where the decisionmaker genuinely seeks tribal input and

the consulting tribe(s) has an actual ability to impact the final decision, where the decisionmaker incorporates the comments and wishes of the consulting tribe(s) in making its decision, where the final decision is fully explained to the consulting tribe(s), and where the final decision is fully consistent with the Department's recognized fiduciary responsibility to the consulting tribe(s) and its tribal trust resources."

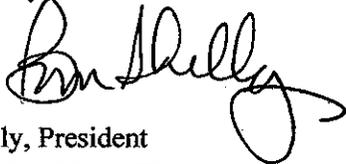
- Where a Departmental Action with Tribal Implications involves multiple agencies, one agency should be designated as the lead agency for coordinating multi-agency consultation with Indian tribes. The process for designating such a lead agency for consultation should be identified in the Policy, and involve input from the affected tribe(s). This is critical, because the current multi-agency consultation status quo is inefficient and unproductive at best, and nonexistent at worst.
- The definition of a Departmental Action with Tribal Implications should also include: (a) all agency or Department formal or informal *recommendations* or *comments* to other governmental departments or agencies, whether federal or state, where any such other department or agency is considering any action or decision that will impact one or more Indian tribes; and (b) any *budget proposal* by an agency or the Department which will impact funding to one or more tribes where such funding (1) is based on the political status of the tribe, or (2) is partially or wholly derived from any federal fee or tax on a tribal trust resource.
- The term "substantial" as used in the definition of a Departmental Action with Tribal Implication is vague and would potentially exclude countless Departmental actions or decisions that are of significance to tribes and which should require tribal consultation. Accordingly, the term "substantial" should be stricken from the definition.
- The term "direct effect" is similarly problematic. The unique government-to-government relationship between the federal government and Indian tribes as recognized in the federal Constitution triggers the legal requirement for consultation whenever an action or decision will impact tribes regardless of whether such impact is incidental or may similarly affect a state or local government. Accordingly, "direct effect" should be changed to "impact."
- Likewise "operational activity" under the definition of a Departmental Action with Tribal Implication should be changed to "action or decision," to ensure that all agency actions and decisions impacting tribes require consultation whether or not specifically part of the agency's official "operations."
- Pursuant to its trust responsibility, the Department and its agencies should be *required* to engage in "negotiated rulemaking" whenever a rule has the potential to adversely impact an Indian tribe or tribal trust resources, and not merely where the agency deems it "appropriate." Likewise, in accordance with its unique fiduciary responsibility to Indian tribes and tribal trust resources, the Department, and its agencies, should not adopt, or recommend to another agency for adoption in a rulemaking, any rule that would adversely impact one or more Indian tribes when such a rule is within agency discretion and not required by law. *See, e.g., Jicarilla Apache Tribe v. Supron*

Energy Corp., 782 F.2d 855, 857 (10th Cir. 1986), rehearing *en banc* of *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555 (10th Cir. 1986) (adopting Judge Seymour's dissenting opinion at 1567 that "[w]hen the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one 'reasonable' choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe"). The "negotiated rulemaking" portion of Section VII(E)(2) of the Policy should be redrafted accordingly.

- At Section V. "Training," subsection "E" should be added as follows: "This training will involve coordination among all federal agencies to establish a comprehensive understanding of Federal Indian Law as it governs the relationship between the federal government and Indian Nations. The goal of this training shall be to address the current inconsistent agency interpretation and application of federal laws, agency regulations, Executive Orders, and agreements with Indian Nations. This training will ensure that all federal agencies will understand and respect the full authority of Indian Nations, under the current landscape of Federal Indian Law as developed by the U.S. Supreme Court, to implement their respective Tribal preference laws and other laws and policies that promote and protect tribal sovereignty."
- A mere "summarized explanation" of the final decision to be provided to consulting tribes is grossly inadequate. Instead, any final decision for a Departmental Action with Tribal Implications should include a detailed explanation how each consulting tribe's comments and recommendations were considered and incorporated into the decision, and if not, why not, and, finally, how the decision is fully consistent with the Department's trust responsibility to the consulting tribe(s).

The Navajo Nation appreciates this opportunity to comment on the Department of Interior's draft Policy on Consultation with Indian Tribes and hopes that its suggestions are duly considered and incorporated into any final Policy. Please do not hesitate to contact me or Attorney General Harrison Tsosie if you have any questions about the Nation's comments or would like to personally discuss the Nation's serious concerns with the Policy as drafted.

Respectfully,



Ben Shelly, President

THE NAVAJO NATION

xc: Harrison Tsosie, Attorney General, Navajo Nation
Johnny Naize, Speaker, Navajo Nation Council