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**Via E-Mail to consultation@doi.gov
and First Class Mail**

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

Re: Comments of Quechan Indian Tribe on Proposed Policy on Consultation with
Indian Tribes, 76 Fed. Reg. 28446

Dear Secretary Salazar:

On behalf of the Quechan Tribe of the Fort Yuma Indian Reservation, we submit the following comments on the Department of the Interior's proposed Policy on Consultation with Indian Tribes, published May 17, 2011 in the Federal Register. 76 Fed. Reg. 28446 (the "Consultation Policy").

I. The Foundations of the Consultation Duty.

The United States has a legally binding, and constitutionally based, obligation to consult with Indian nations on a government-to-government basis. All agencies of the United States government have a legal duty to meaningfully consult with Indian nations when their actions may affect tribal lands, assets, or other tribal trust resources.

The United States' consultation duty derives from the government-to-government relationship between the United States and Indian nations, recognized by the Supreme Court for nearly two hundred years. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (recognizing Indian tribes as "domestic dependent nations"); *see also* Cohen's Handbook of Federal Indian Law, § 2.02[2] (2005 ed.) (noting that the term "domestic dependent nations" demonstrates that tribes are "sovereigns possessing a government-to-government relationship with the United States").

The federal government's duty to consult with tribes as sovereigns also arises from the federal trust relationship that exists between the United States and Indian nations. Beginning with the *Cherokee Nation* case, and continuing in a long line of subsequent case law, the United

States Supreme Court has confirmed that the United States stands as a fiduciary and a trustee with respect to Indian tribes and their tribal trust resources. *See e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (citing “the unique trust relationship between the United States and the Indians”); *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (recognizing existence of fiduciary trust relationship and right of Indians to sue for breach of trust); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (noting that the United States, in its dealings with Indian nations, “has charged itself with moral obligations of the highest responsibility and trust”).

Government-to-government consultation serves as an integral component of fulfilling the fiduciary trust relationship. “A procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian tribe in the decision-making process to avoid adverse effects on treaty resources.” *Klamath Tribes v. United States*, 1996 WL 924509 (D. Oregon, 1996). The legal duty of federal agencies to consult with Indian nations has been expressly and repeatedly affirmed and re-affirmed in numerous statutes, regulations, executive orders, and presidential memorandums. The federal government’s failure to meaningfully consult on matters concerning tribal trust resources “violates the distinctive obligation of trust incumbent upon the Government in its dealings with [the Indians].” *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979).

The Department of the Interior has substantial obligations and responsibilities with regard to Indian nations and consultation between Interior’s agencies and Indian nations is critical. On February 24, 1995, the Assistant Secretary of Indian Affairs issued an advisory memorandum to all DOI Bureau and Office Heads entitled “Guidance on the Federal/Tribal Government-to-Government Policy” which confirmed that “the government-to-government relationship . . . is Constitutionally derived, and is firmly rooted in Supreme Court doctrine and federal statutory law.” Interior Departmental Manual 512 DM2, Section 2, effective December 1, 1995, states that “it is the policy of the Department of the Interior to recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members, and to consult with tribes on a government-to-government basis whenever plans or actions affect tribal trust resources, trust assets, or tribal health and safety.” Other Departmental documents, including but not limited to Secretarial Order 3206 confirm Interior’s legal obligation to consult on matters affecting Indian tribes.

The legal obligation to meaningfully consult has also been the subject of numerous directives from the President, including President Clinton’s May 14, 1998, and November 6, 2000 Executive Orders 13084 and 13175, entitled *Consultation and Coordination with Indian Tribal Governments*. President Obama has also affirmed the United States legal and trust obligations to engage in “regular and meaningful” government-to-government consultation in a November 5, 2009 Presidential Memorandum on Tribal Consultation.

The Department of the Interior, its bureaus, agencies, and offices, have a legally binding duty to meaningfully consult on a government-to-government basis when agency actions affect tribal interests. Department policy must faithfully promote and facilitate effective, meaningful, and good faith consultation.

II. Examples of Deficiencies in Past Consultations With the Quechan Tribe

The Quechan Tribe has substantial experience engaging in government-to-government consultation with bureaus, agencies, and offices within the Department of the Interior. In certain instances, Interior has failed in its duty to meaningfully consult with the Tribe. The Tribe summarizes some of the key deficiencies that have occurred in the Department's approach to consultation with the Quechan Tribe and other Indian nations:

A. Interior Must Meaningfully Include Tribes Early in the Process.

For consultation to be effective and meaningful, it must commence at a stage where tribal input can meaningfully assist in development of, or result in changes in, the proposed agency action. Too often, consultation does not occur until late in the review process, when positions have already been firmly established, and the agency or other interested parties are unwilling to change their minds about a project or action. It is critical for the Department to begin consultation at the earliest stages of the planning process in order to learn the Tribe's views. This is especially important when the Department is proposing actions that could affect tribal cultural resources on public lands outside of the Fort Yuma Indian Reservation, but within the Tribe's broader traditional territory. In most cases, the first entity that the Department should contact when it receives a proposal that could affect cultural resources or other trust resources is the tribal government. Many private applicants, and in some cases, agency officials, will not have the proper understanding of the affected trust resources. Early consultation with Indian nations is imperative.

B. Consultation is an Ongoing Process; Not Just One Meeting.

While consultation must begin early in the agency proceeding, it is equally important that Indian nations be treated as consulting partners through the entire development of the agency action. In most cases, meaningful consultation cannot be completed with one meeting. Consultation is an ongoing process that will likely require multiple meetings between the Tribe and agency officials as the proposed action is developed and refined.

C. Consultation Must Be Completed Before A Decision Is Made.

In some instances, the Department has approved an action before the required consultation process has concluded. For example, under the regulations implementing Section 106 of the National Historic Preservation Act, the Department must consult with tribes regarding impacts and mitigation to historic and cultural resources before approving an undertaking. In actions affecting the Quechan Tribe, agencies within the Department have attempted to defer the required Section 106 consultation process until after approving the undertaking. This is unlawful under the NHPA regulations and also inconsistent with the United States' overriding obligation to consult with Indian tribes. Once a project is approved, there is little to consult about. In all cases, consultation must be conducted and concluded prior to the agency action.

D. Multi-Tribal or General Public Meetings Are Not A Substitute for Individual Tribal Government-to-Government Consultation.

In the Tribe's experience, the Department often conducts project status meetings that include all interested parties, tribes, and members of the general public when it is conducting review of a controversial project (i.e., an approval for development on public lands). These project status meetings are often used to convey information from the Department to the interested public. They are a useful part of the administrative process. However, these general public meetings are not a substitute for required government-to-government consultation. This is especially true in matters involving impacts to sensitive cultural resources, where Indian nations and their members are often reluctant to divulge information outside of a confidential setting. Indian nations have a unique status under the law and the Department is required to engage with them on an individual government-to-government basis.

E. Notice and Comment Procedures Are Different Than Consultation.

In the Tribe's experience, the Department has often confused the notice and comment procedures available under the Administrative Procedures Act and NEPA, with the separate obligation to consult with Indian nations. Indian tribes certainly have the equal right and opportunity to provide written comments as part of the administrative record, but federal law requires more than that. There is a difference between comments and consultation. Consultation requires that the Department more closely involve Indian nations in the development of policies or actions that will affect their interests. Indian nations must be involved in the formulation of the Department actions and not just provided an opportunity to react to something developed by the Department in isolation from the Tribe.

F. Indian Tribes Should Have Access to Draft Documents and Underlying Data Needed to Make Consultation Meaningful.

In the Tribe's experience, the Department has often engaged in consultation without providing consulting Indian tribes with draft documents or underlying data being relied upon in the Department's decision-making process. The ability for Indian nations to meaningfully consult is impaired if they do not have access to adequate information.

G. Government-to-Government Means Consultation Between Actual Decision-Makers

In *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995), the Court held that "meaningful consultation means tribal consultation in advance [of the decision] with the decision maker or with intermediaries with clear authority to present tribal views to the . . . decision maker." Too often, Interior has attempted to meet its consultation obligations by sending low-level staff members to meet with the Tribal Council. While meetings between Interior and Tribal staff remain an important component of informed consultation, as discussed in more detail below, consultation has not occurred until there are meetings between the decision-makers.

H. While Consultation Must Occur At A Government-to-Government Level, Communications With Staff and Other Tribal Members Are Also A Necessary Part of the Process and Should Be Encouraged.

Government-to-government consultation means that Interior officials with final decision-making authority over a matter must consult directly with the Quechan Tribal Council to obtain the Council's views and input. However, in order for the Tribal Council to have adequate information, it is critical that meetings and other communications also occur between Tribal staff members and Interior staff members. For example, in matters involving cultural resources, it will often be necessary for the Tribal Historic Preservation Officer (THPO) to have access to cultural resource studies and data, which the THPO can then pass on and summarize for the Tribal Council in advance of consultation. The Tribe is aware of instances where Interior employees have refused to provide information or meet with the THPO on matters where tribal consultation is required. This is not acceptable. Interior must continue to communicate with Tribal staff members as part of, and in support of, consultation with the Tribal Council.

I. Mere Contact or General Outreach Towards A Tribe Is Not Consultation.

Interior has often confused "contact" with tribal staff, members, or submission of letters to the Tribal Council, as satisfying its obligation to meaningfully consult. There will be many times during an administrative proceeding in which Interior officials or employees will communicate with a member or official from the Tribe regarding the agency action. However, this is not necessarily government-to-government consultation. In the Tribe's experience, Interior meticulously documents every time that one of its officials comes into contact with a tribal member or official in order to prove that it is "consulting" with the Tribe. However, it is clear under the law that not every contact or communication between Interior and a tribal member constitutes consultation with the Tribe. As discussed above, consultation must occur on a government-to-government level between decision-makers of the Tribe.

J. Interior Sometimes Consults With Too Many Tribes, Including Tribes Without A Direct Interest.

The Tribe understands that there will often be many Indian nations with an interest in an agency action and that it will be challenging to conduct the required individual meaningful consultations with all interested tribes. However, in the Tribe's experience, Interior often casts the net of consulting tribes too broadly in a given action, thus unnecessarily increasing the burdens associated with consultation and simultaneously diminishing the effectiveness of consultation with Indian nations who are the most affected. For example, Interior sometimes will invite all Arizona tribes to consult on a matter just because the action is geographically located within Arizona. This approach is arbitrary and leads to ineffective consultation. Interior should make more effort, or establish more effective procedures, to determine what Indian nations are actually affected by an action and limit consultation to those tribes. Narrowing the number of consulting Indian nations will likely increase Interior's ability to effectively consult with those tribes that have a direct interest in the agency action.

III. *Quechan Tribe v. Department of the Interior, Case No. 10cv2241 (S.D. Cal.)*

The Tribe is currently involved in litigation with the Department of the Interior regarding its failure to meaningfully consult with the Tribe regarding the impacts of a utility-scale solar project, the Imperial Valley Solar Project, on cultural resources of significance to the Tribe. This litigation involves many of the deficiencies in consultation that are noted above. The District Court agreed with the Tribe's argument that Interior had failed to adequately meet its consultation obligation and enjoined development of the project.

This litigation involves the proposed development of 30,000 solar collectors on 6,500 acres of BLM-managed land located west of the Fort Yuma Indian Reservation and within the Tribe's traditional territory. Over 459 cultural resources have been identified within the Project area. Throughout the administrative process, which included requirements under Section 106 of the National Historic Preservation Act, the Tribe repeatedly requested consultation with Interior. The Tribe also objected to Interior's decision to defer completion of the Section 106 process until after the Project was already approved.

Interior published its Record of Decision approving the Project on October 13, 2010. The Tribe filed suit on October 29, 2010 and the Court entered a preliminary injunction against the Project on December 15, 2010. The District Court opinion is a strong affirmation of Interior's obligation to meaningfully consult. Some quotations from the December 15 order include:

"The consultation requirement is not an empty formality; rather, it 'must recognize the government-to-government relationship between the Federal Government and Indian tribes' and is to be 'conducted in a manner sensitive to the concerns and needs of the Indian tribe.'"

"In other words, that BLM did a lot of consulting in general doesn't show that its consultation with the Tribe was adequate under the regulations. Indeed, Defendants' grouping tribes together (referring to consultation with "tribes") is unhelpful: Indian tribes aren't interchangeable, and consultation with one tribe doesn't relieve the BLM of its obligation to consult with any other tribe that may be a consulting party under the NHPA."

"The BLM's communications are replete with recitals of law (including Section 106), professions of good intent, and solicitations to consult with the Tribe. But mere pro forma recitals do not, by themselves, show BLM actually complied with the law. As discussed below, documentation that might support a finding that true government-to-government consultation occurred is painfully thin."

"In fact, the documentary evidence doesn't show BLM ever met with the Tribe's government until October 16, 2010, well after the project was approved. All available evidence tends to show that BLM repeatedly said it would be glad to meet with the Tribe, but never did so."

“BLM’s invitation to ‘consult,’ then, amounted to little more than a general request for the Tribe to gather its own information about all sites within the area and disclose it at public meetings. Because of the lack of information, it was impossible for the Tribe to have been consulted meaningfully as required in applicable regulations. The documentary evidence also discloses no ‘government-to-government’ consultation. While public informational meetings, consultations with individual tribal members, meetings with government staff or contracted investigators, and written updates are obviously a helpful and necessary part of the process, they don’t amount to the type of ‘government-to-government’ consultation contemplated by the regulations. This is particularly true because the Tribe’s government’s requests for information and meetings were frequently rebuffed or responses were extremely delayed as BLM-imposed deadlines loomed or passed.”

“That said, government agencies are not free to glide over requirements imposed by Congressionally-approved statutes and duly adopted regulations. The required consultation must at least meet the standards set forth in 36 C.F.R. § 800.2(c)(2)(ii), and should begin early. The Tribe was entitled to be provided with adequate information and time, consistent with its status as a government that is entitled to be consulted. The Tribe’s consulting rights should have been respected. It is clear that did not happen here.”

IV. The Proposed Policy on Consultation Does Not Adequately Address the Deficiencies Identified By The Tribe.

The Tribe appreciates the Department’s overall effort to promote effective and meaningful government-to-government consultation, but it is not clear that implementation of the new proposed policy would achieve that goal. The policy is drafted at a very general level. Although the policy’s Summary states that “the policy would establish standards for improved consultation,” the substantive portions of the policy do not actually provide much specific guidance on how Department officials should conduct government-to-government consultation with affected tribes. It also is not clear how the proposed policy on consultation fits in with the existing NEPA and NHPA processes, which often will be simultaneously ongoing when Interior actions affect tribal resources.

The Tribe agrees with the statements in the Preamble about the United States’ obligations to consult. As described in the comments above, the duty to consult is a legally binding obligation of the United States. The Tribe also generally agrees with the policy’s Guiding Principles. However, the Tribe believes that the “appropriate Departmental officials” for consultation purposes are those with actual decision-making authority over the action, or the official who will be in charge of the administrative proceeding leading up to the final decision and who has direct contact and access with the ultimate decision-maker. Consultation with the decision-maker is necessary to ensure that the decision-maker is fully aware of the views, concerns, and recommendations of the Tribe.

The Tribe fully agrees with the statement in the Guiding Principles that consultation should begin early in the process, that there should be an “open and free exchange of information,” and that Indian tribes should be included in “all stages of the Tribal consultation process and decision-making process.” However, again, the substantive portions of the policy lack specific details on how to achieve these principles.

The Tribe does not object to the Department’s efforts for “Accountability and Reporting,” but is concerned about the policy’s focus on creating reports about “the documents and correspondence with Indian tribes to satisfy [consultation].” A list of letters or correspondence sent to or received from the Tribe is not necessarily a good way to assess consultation efforts. Reports should also describe what meetings took place between the decision-makers and explain how the Tribal consultation shaped, or did not shape, the final decision. Descriptions of budget expenditures are also, in the Tribe’s view, a poor way to judge the effectiveness of consultation.

Regarding Section V of the policy, the Tribe agrees that training of Department officials is an important way to improve consultation efforts, but is concerned that training could be limited by funding shortfalls. Likewise, high-level meetings designed to discuss efforts to improve consultation practices, as described in Section VI, may also be worthwhile.

The Tribe believes that Section VII, which addresses the Consultation Guidelines, falls short in providing specific direction on how to achieve effective consultation. Section VII(A), regarding Initiation of Consultation, provides that notice of consultation should be “given at least 30 days prior to a scheduled consultation.” In the Tribe’s experience, the Department and the Tribe generally reach mutual agreement on the dates for consultation meetings. The Department does not simply set a firm date, as suggested by this guidance, and then send out notice that a “consultation” will occur on the specific date. The Tribe suggests that the policy require the Department to seek out and reach agreement with the Tribe on mutually-agreeable dates for consultation meeting(s). Such dates for consultation meetings should be no earlier than 30 days from the date that the Tribe receives the relevant notification package from the United States, which would include all relevant information and technical materials necessary for an effective and informed consultation meeting.

Regarding the creation of Tribal Governance Officers (TGO) and Tribal Liaison Officers (TLO), the Tribe is not opposed in principle, so long as it is clear that the actual consultation will still occur between the actual decision-makers on a government-to-government basis. It is the Tribe’s understanding that the overall role of the TGO and TLO positions is to manage and oversee the consultation processes, but not to replace consultation with actual decision-makers.

Section VII(E) describes “Stages of Consultation.” The Tribe agrees that the Department should “consult as early as possible when considering a Departmental Action with Tribal Implications,” but is concerned that the lack of additional specific guidance on when consultation should begin will lead to disputes in the future. Interior and affected tribes may have differing interpretations as to when consultation should or could begin.

The proposed policy also fails to recognize that many Departmental actions affecting tribal interests will require compliance with NEPA and/or Section 106 of the National Historic Preservation Act. Both of those laws have established time-frames and processes, and consultation will coincide with those processes. The inter-relation between the NEPA and Section 106 processes and the proposed consultation policy is somewhat unclear. For example, does the Department intend that consultation in the “Initial Planning Stage” would occur prior to scoping in the NEPA process?

The discussion of the “Proposal Development Stage” correctly states that Indian tribes “should be considered as appropriate collaborative partners.” The Tribe believes that this statement is true for all agency actions affecting the Tribe’s interests, and not just “where negotiated rulemaking or a Tribal Leader Task Force is created” as the policy suggests. The “Proposal Development Stage” also discusses the timing of consultation and states that the consultation process should be designed to be “consistent with both Tribal and Bureau schedules.” Other statements in the policy focus heavily on the “schedule” for consultation and the possibility that the Administrative Procedures Act or other federal laws may prohibit continued discussion. It is relatively rare, in the Tribe’s experience, that there will be an express legal requirement that reduces the timeframe for consultation. Consultation should continue until no further productive progress can be made. The policy should clearly state that no decision may be made until consultation is affirmatively concluded.

The policy lists “Negotiated Rulemaking,” “Tribal Leader Task Force,” “Series of Open Tribal Meetings,” and “Single Meetings” as examples of appropriate processes for the Proposal Development Stage. The Tribe agrees that “Single Meetings” (i.e., meetings directly between only the affected tribe and the Department) “are particularly appropriate for local, regional, or single Tribe issues.” Given that most agency actions with a direct impact on the Tribe are of a local, regional, or single Tribe issue, the Tribe suggests that the policy place more focus on the importance of “Single Meetings” between the Department and individual tribes. In most instances, this will be the most effective and meaningful way to consult. The policy also states that the Department should “host” the meetings; however, the Tribe believes that consultation may often be most effectively conducted on the affected Reservation. In some cases, including those where cultural resources are affected, concerns for confidentiality may mandate single meetings as the only possible means of consultation.

The Department should delete the “Disclaimer” from the policy, as it is unenforceable and will only cause confusion and disputes in the future. The obligation to consult is well-established by law. The Department’s legal duty to consult precedes and pre-dates this proposed policy and is judicially enforceable, regardless of what the Disclaimer says.

In conclusion, the Tribe believes that the policy should provide more detail about the key aspects of consultation, such as which officials should be involved in consultation, the role of technical staff in assisting and facilitating consultation, how consultation is integrated with the NEPA and NHPA process, how consultation should be continued and managed throughout the administrative process, how tribal views and ideas should be incorporated into the decision-making process, and how to determine when consultation has concluded, among others. The

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policy would be more useful to the Departmental officials conducting consultation, and the affected consulting tribes, if clearer standards were put into place. The current proposed policy is simply too general to be of much use.

Thank you for your consideration to the Tribe's comments. The Tribe looks forward to productive government-to-government consultations in the future.

Sincerely,

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

A handwritten signature in black ink, appearing to read 'Thane D. Somerville', with a long horizontal flourish extending to the right.

Thane D. Somerville
Attorneys for the Quechan Indian Tribe