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Ms. Mary Milam
Office of the Assistant Secretary – Indian Affairs
Department of the Interior
1849 C Street, NW
MS-4141 – MIB
Washington, D.C., 20240

Re: Comments of the Forest County Potawatomi Community (“FCPC”) and the Puyallup Tribe (“Puyallup”) on the *Department of the Interior Policy on Consultation With Indian Tribes*

Dear Ms. Milam:

On behalf of the Forest County Potawatomi Community (“FCPC”) and the Puyallup Tribe (“Puyallup”), we respectfully submit these comments on the *Department of the Interior Policy on Consultation With Indian Tribes* (“draft Policy”) in response to the letter from Secretary Salazar to Tribal Leaders, dated January 14, 2011.

The draft Policy was developed in response to the President’s November 5, 2009 Executive Memorandum, 74 Fed. Reg. 57,881 (Nov. 5, 2009), which reaffirmed the government-to-government relationship between Indian tribes and the federal government, and directed each executive agency to develop a detailed plan for consulting with tribal governments in accordance with Executive Order 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (“EO 13175”). Shortly after the President’s Memorandum was issued, DOI sent a letter to tribal leaders, requesting their input on how to implement the President’s directive. The draft policy is the product of that process.

Ms. Mary Milam
March 14, 2011
Page 2

We appreciate the substantial effort the Department made to obtain tribal input on how to improve communication between DOI subagencies and Indian tribes by hosting meetings in cities across the country with tribal representatives, establishing a Tribal Consultation Team to draft a policy, and requiring all DOI bureaus and offices to examine and change their own consultation policies to ensure consistency with the final approved DOI Consultation Policy. We offer these comments to further the productivity of those efforts.

I. DOI's Draft Policy Proposes Positive Steps to Improve Tribal Consultation

As Deputy Secretary David Hayes and Assistant Secretary-Indian Affairs Larry Echo Hawk recognized in their November 23, 2009 letter to tribal leaders, the Department of the Interior is "the primary agency responsible for interacting with Indian tribes." Commensurate with this primary role, the Department's responsibility for ensuring that its consultation policy is consistent with the special legal relationship between the United States and Indian tribes must be discharged with the utmost care. The guiding principles set forth in the draft Policy are designed to meet that standard.

We heartily agree that consultation is "a deliberative process that aims to create effective collaboration and informed decision making where all parties share a goal of reaching a decision together and it creates an opportunity for equal input from all governments," draft Policy at 1, and that "[f]ederal consultation that is meaningful, effective, and conducted in good faith makes the Department's operation and governance practices more efficient." *Id.* Equally important, the draft Policy expressly recognizes "[t]he obligation for Federal agencies to engage with Indian Tribes on a government-to-government basis" and affirms that "[f]ederal agencies meet that obligation through consultation." *Id.* These guiding principles should inform every DOI undertaking at all levels of administrative decisionmaking.

The draft Policy's recognition of the importance of timely consultation with tribes is also critically important. During the "Initiation" stage of consultation, the draft Policy directs DOI subagencies to "strive to ensure that a notice is given at least 30 days prior to a scheduled consultation" or provide an explanation for abbreviated notification periods in the event of exceptional circumstances. *See* draft Policy at 5. Early initiation of consultation, as prescribed in the draft Policy, maximizes tribal input on proposed agency action. Also significant is the draft Policy's promotion of "on-going communications concerning issues affecting Indian Tribes" following the initial notification of the opportunity for consultation. *Id.* at 4. The ongoing nature of the process allows tribes to comment on issues that may arise for the first time during the consultation process itself.

Another positive aspect of the draft Policy is the various means it identifies for DOI offices and bureaus to communicate with Indian tribes about departmental actions with tribal implications, which include meetings, telephone conversations, written notices, workgroups with tribal representatives, and regular gatherings of tribes. *See id.* at 3-4. And we appreciate the

draft Policy's incorporation of diverse consultation processes in the "Proposal Development Stage" of tribal consultation, such as negotiated rulemaking, tribal leader task forces, a series of open meetings, and single meetings. *See id.* at 7. Flexibility in consultation procedures should be encouraged in the finalized Policy, particularly given the great variation in the complexity of the subjects of consultation.

The draft Policy's outreach efforts will also significantly enhance the effectiveness of consultation. Training "to improve the Department's capacity for promoting collaboration with Tribes and executing the consultation provisions" and "to improve sensitivity and understanding of traditional American Indian cultures and governments" will improve the consistency of the consultation process. *Id.* at 3. The draft Policy also calls on DOI to advance tribal consultation throughout the federal government and inform legislators and other officials of the benefits of meaningful tribal consultation, *see id.* at 5, which will further the recognition of consultation as a critical element of Federal Indian policy. DOI also proposes to "identify and seek to address impediments, both external and internal, to improving its consultation processes," *id.* at 4, which will strengthen tribal consultation practices across the agencies.

II. Recommendations for Improving the Draft Department of the Interior Policy on Consultation with Indian Tribes

We set forth below our recommendations for improving the structure and consistency of the draft Policy, as well as its treatment of how consultation should occur, and its accountability provisions. We begin with several general suggestions.

A. General suggestions

Because the Preamble to the draft Guidance sets forth the foundation for DOI's consultation obligations to Indian tribes, it should be robust and complete. Towards that end, the Preamble should include "judicial decisions" in its list of the bases of "[t]he obligation for Federal agencies to engage with Indian Tribes on a government-to-government basis," draft Policy at 1, as does the President's Nov. 5, 2009 Memorandum. *See* 74 Fed. Reg. at 57,881. The federal government's duty to consult is based on the federal trust responsibility, which was established by Chief Justice Marshall's seminal opinions in the Cherokee cases over 175 years ago. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The "'distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people'" is a principle that "has long dominated the Government's dealings with Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)). The trust relationship is the basis of the well established rules that Congress will not be presumed to abridge treaty or property rights absent a clear expression of intent, *e.g.*, *United States v. Dion*, 476 U.S. 734, 738-40 (1986), and that ambiguous statutes affecting Indians must be construed

liberally in favor of adherence to the trust responsibility. *E.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

The Supreme Court has also recognized that the trust responsibility imposes an “overriding duty to deal fairly with Indians wherever located . . .” *Morton v. Ruiz*, 415 U.S. 199, 236 (1974). Unless the United States communicates regularly and effectively with Indian tribes, it cannot know how its actions will impact their rights and cannot protect the rights for which the government is responsible under the trust responsibility. As a court explained in *Klamath Tribes v. United States Forest Service*, 1996 WL 924509 (D. Or. 1996), “[i]n practical terms, 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.” *Id.* at *8.

We also suggest that the Department avoid any implication that tribal consultation and “adhering to the framework described in this policy” are the only ways that DOI engages with Indian tribes on a government-to-government basis. *See* Draft Policy at 1. The government-to-government relationship, which is based on the trust responsibility, permeates DOI’s duties to Indian tribes. These Departmental responsibilities also include, for example, transactions such as approving surface leases in Indian Country, and managing funds held in Individual Indian Money accounts. In a similar view, we encourage DOI to acknowledge that the tribal consultation requirements of the draft policy may be augmented by specific obligations imposed by federal statutes and regulations. For instance, the Indian Self Determination and Education Assistance Act, Pub. L. 93-638, and its implementing regulations, which allow federally recognized Indian tribes to plan, conduct, and administer governmental programs and services, require that consultation be carried out under specified circumstances. *See* 25 C.F.R. Parts 900 and 1000. Similarly, federal regulations require advance notification of sixty days, along with tribal consultation, before the Secretary of the Interior can change the boundaries of boarding schools located on Indian reservations. *See* 25 C.F.R. § 37.122. These more specific requirements augment DOI’s tribal consultation duties under the draft Policy, which applies to all Departmental actions with tribal implications.

B. Recommendations on the Structure of the Draft Policy

The draft Policy sets forth effective guidelines and procedures for conducting tribal consultation that will improve communications between DOI subagencies and Indian tribes. At the same time, the multitude of tribal concerns about the consultation process that the draft policy seeks to address in a single Policy unavoidably presents organizational challenges.

For example, in the substantive body of the draft Policy, the DOI actions that trigger consultation are only briefly referenced without further explanation of how a DOI office determines that an action has tribal implications. *See, e.g.*, draft Policy at 3, 5. Instead, the description of the departmental activities appropriate for consultation is located in the “Definitions” section of the DOI draft Policy. *See id.* at 2. Similarly, the stages of consultation,

which should be the backbone of any consultation policy, are found in the “Consultation Guidelines” section, rather than treated separately. Likewise, the draft Policy addresses requests for consultation by tribes in both the “Innovations in Consultation Practices” section and the “Consultation Guidelines” section, without placing such requests squarely within the consultation process. *See id.* at 4, 6. Similarly, descriptions of the roles of DOI officials appear throughout the draft Policy, *see id.* at 2-3, 6, and some provisions on agency accountability are included in sections other than the “Accountability and Reporting” section. *See id.* at 4-5, (“Innovations in Consultation Practices”), 8-9 (“Supplemental Policies”).

As DOI finalizes its Consultation Policy, we suggest further consideration of its organizational structure. For example, the draft Policy might be organized chronologically, beginning with the initial planning stage and the initiation of tribal consultation. Under this approach, the applicable consultation requirements would be organized under the stage(s) of consultation to which they apply. Sections such as “Consultation Guidelines,” “Innovations in Consultation Practices,” and “Accountability and Reporting,” which address general consultation requirements, would follow next in the Policy. The use of cross-references to direct readers to where the full treatment of referenced concepts appears would also make the policy easier to understand and apply.

C. Recommendations on Consistency in the Draft Policy

The draft Policy contains some ambiguities that should be considered further. For example, the draft Policy at one point states that DOI’s bureaus and offices will be “open” to consultation opportunities initiated by tribes, *see id.* at 5, but elsewhere requires the Tribal Governance Officer (“TGO”) to treat a tribal consultation request as it would treat a request from a state government. *See id.* at 6. The Department should resolve this ambiguity by mandating consultation whenever a tribe submits a written request for consultation, or seeks to discuss agency action that may affect it. To accomplish this, we propose that the draft Policy be revised to provide that “Departmental bureaus and offices shall initiate consultation in response to a tribal request when the agency activity that is the subject of the request may affect Indian tribes, and has not previously been the subject of consultation.” This clarification is particularly important to address instances in which DOI may not initially perceive its actions as affecting Indian tribes, and must rely on tribes’ unique knowledge of the ways in which they are impacted to inform the process by requesting consultation.

The broad and general exclusion of “matters that [are] undertaken in accordance with an administrative or judicial order” from the draft Policy’s definition of “Departmental Action with Tribal Implications,” *id.* at 2, is another ambiguity that should be corrected. First, an administrative or judicial order may itself direct consultation. Second, some judicial decisions are plainly important subjects for consultation. *See, e.g., Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). Finally, as written, the exclusionary text appears to be inconsistent with the broad definition of “Policies that have tribal implications” in Executive Order 13175, 65 Fed. Reg. at

Ms. Mary Milam
March 14, 2011
Page 6

67,249, and with the principle set forth in the draft Policy that it “applies in all circumstances where statutory or Administrative opportunities to consult with Indian Tribes exist.” Draft Policy at 2. DOI should clarify these inconsistencies by recognizing that whether an administrative or judicial order is a proper subject for consultation will depend on the substance of the order and the issues it addresses.

Another inconsistency within the draft Policy relates to the participation of DOI decisionmakers in tribal consultation. The draft Policy states that:

The appropriate Departmental officials [involved in consultation] are knowledgeable about the matters at hand, are authorized to speak for Interior, and have decision-making authority in the disposition and implementation of a policy or are a program manager or staff who can ensure that Tribal concerns will be brought forward to final decision makers in the event that the decision makers are not present at the consultation meeting.

Id. at 1. However, the “Consultation Guidelines” only discuss the role and participation of the Tribal Governance Officer or other “appropriate representative” in the consultation process. *See id.* at 5-7; *see also id.* at 2-3 (defining the terms “Tribal Governance Officer” and “Tribal Liaison Official”). While we appreciate DOI’s efforts to identify the responsibilities of individuals who oversee and implement tribal consultation, the draft Policy should state explicitly that agency decisionmakers will be involved in the consultation. Although there may be some stages of consultation where this is unfeasible, particularly those involving technical issues requiring staff with specific expertise, the Department should require the participation of agency decisionmakers at least once prior to taking final action.

D. Recommendations on How Consultation Should Occur

We suggest that the draft Policy describe with more specificity the consultation efforts that will occur at the “Initial Planning Stage.” The draft Policy does not presently set forth the agency’s responsibilities to tribes in this stage, nor does it state how tribal views are incorporated in “project scoping.” *See* draft Policy at 6. With respect to this early stage of tribal consultation, we urge the Department to describe the role of tribes, and discuss how consultation at the initial planning stage may enhance the effectiveness of tribal consultation at later stages.

Flexibility during the tribal consultation process is important because it allows tribes to fulfill the congressionally-mandated objectives of DOI programs. Innovative approaches to consultation, such as those described in the draft Policy, *see id.* at 4-5, increase the ability of the Department to address issues that might impact Indian tribes. Towards that end, the draft Policy should also direct DOI bureaus and offices to collaborate efficiently with state governments and

Ms. Mary Milam
March 14, 2011
Page 7

other federal agencies in executing programs under the jurisdiction of multiple governmental entities.

We also urge DOI to introduce another stage in the consultation process that would require Department agencies to inform tribes how they intend to proceed, and provide for consultation on the intended course of action, before the Department takes final action. In this pre-action stage, the Policy should state that “each Departmental bureau or office must both: (1) state how it intends to proceed, with a description of the action it plans to take and (2) describe the extent to which the bureau or office’s plan addresses tribal concerns.” At that point, Tribes should have an opportunity to submit their views on the planned action and to suggest improvements. This is especially important when there are a number of alternatives or issues under consideration when consultation is initiated, but DOI then narrows its focus significantly. In such instances, DOI should provide tribes an opportunity to submit their views on the narrower range of alternatives or issues, or the proposed course of action. This should occur prior to the draft Policy’s “Implementation of Final Federal Action Stage” where “final decisions on Departmental Action should be communicated in writing to affected Tribes, with a short explanation of the final decision.” *Id.* at 8. It is of course essential that this explanation address how tribal views were incorporated, or if not incorporated how those views were considered in the administrative decisionmaking process.

Lastly, DOI should recognize in its Consultation Policy that there are times where consultation is required, but where privacy and protection of information are also of the utmost priority. For example, information about matters relating to cultural resources, sacred sites, and plants and wildlife relied on for religious purposes, may require strict confidentiality. If DOI bureaus and agencies cannot assure such confidentiality, tribes will be reluctant to disclose important information necessary for making agency decisions. The Consultation Policy should therefore indicate that culturally sensitive information will not be made public. For administrative actions with religious or culturally sensitive implications, DOI bureaus and offices should respect a tribe’s requests for confidentiality, limit the number of agency employees with access to private information, and use up to date information technology in order to prevent unauthorized access to information.

E. Recommendations for Accountability and Transparency in the Consultation Process

As DOI recognizes in the draft Policy, “[m]ethods that ensure accountability and reporting are essential to regular and meaningful consultation.” *See* draft Policy at 4. Towards that end, the Consultation Policy should require certifications for all regulations and legislative proposals that DOI officials complied with Executive Order 13185 in a meaningful and timely manner. *See* 65 Fed. Reg. at 67,251.

Ms. Mary Milam

March 14, 2011

Page 8

Although the draft Policy provides for annual consultation reports to be submitted to the Secretary of the Interior, we suggest that the Policy require more active monitoring of agencies' consultation activities. To accomplish this, DOI should develop minimum requirements for its subagencies' consultation reports. In order to gauge the efficacy of the Department's consultation programs, these reports should include explanations of the final outcome of DOI consultation sessions and the tribal input received. It would be especially useful for tribes to see an assessment of the results of tribal consultation in the Secretary's own annual report to tribes. We further recommend that the draft Policy require DOI agencies and bureaus to maintain an online public listing of all of its consultation efforts and their status, and identify a single contact responsible for handling inquiries related to each consultation subject.

We also urge DOI to include Indian tribes as vital participants in reviewing the effectiveness of its Consultation Policy. As written, the draft Policy merely states that "[t]he Department may consider soliciting Indian Tribes' evaluation of consultation practices." See draft Policy at 4. However, as the draft Policy acknowledges elsewhere, "[t]he Department recognizes the value of communicating through a regular gathering of Indian Tribes which are meant to continue the discussion on improving consultation practices and the government-to-government relationship generally." *Id.* Thus, on at least an annual basis, the Policy should require formal opportunities to solicit tribal views, such as at national consultation meetings and regularly scheduled consultation review sessions with DOI officials. Because tribes situated in a particular region often share common needs, the Department should also consider holding regional consultation sessions to develop priorities for national meetings. We also encourage DOI not to overlook the role of national tribal organizations when requesting information and feedback from tribal governments.

Similarly, the draft Policy's commitment to hosting meaningful training opportunities, *id.* at 3, would be enhanced by providing a role for Indian tribes in developing training programs for DOI employees. In addition, to further an "understanding of traditional Indian cultures and governments," DOI should make such training mandatory for all DOI personnel who interact with Indian tribes, while also providing for the involvement of tribal members, academics, or other experts in American Indian culture where helpful.

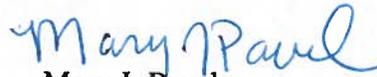
As a final measure to ensure accountability in all consultation efforts pursuant to the draft Policy, we encourage DOI to institute agency-wide dispute resolution procedures for when consultation efforts with tribes reach an impasse. Any tribe should be able to invoke the conflict resolution process by filing a written notice with the appropriate bureau or office. Tribal representatives should then be permitted to meet with the TGO, TLO, or any DOI official with decisionmaking capability to clarify issues and explore viable alternatives. A dispute resolution process for tribal consultation should ultimately conclude with a mutual understanding of the differing positions and a recommended agency action that is satisfactory to all parties.

Ms. Mary Milam
March 14, 2011
Page 9

III. Conclusion

We appreciate the opportunity to submit these comments for DOI's consideration. The success of the Department of the Interior's tribal programs is highly dependent on the decisions your bureaus and offices make and the amount of tribal participation in making these decisions. We look forward to assisting you in finalizing a Department-wide Consultation Policy and in taking a new look at the role of tribal consultation in your agencies' activities in Indian Country.

Sincerely,


Mary J. Pavel
James V. DeBergh