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July 18, 2011

**VIA EMAIL AND FIRST-CLASS MAIL**

Ken Salazar, Secretary  
Department of the Interior  
1849 C Street NW, MS 4141-MIB  
Washington, D.C. 20240

Through:

Consultation Policy Comments  
Department of Interior  
Room 5129 MIB  
Washington, D.C. 20240  
consultation@doi.gov

**Re: Comments on proposed DOI Tribal Consultation Policy**

Dear Mr. Salazar:

On behalf of the Pueblo of Laguna, this letter provides comments on the Department of Interior (“DOI”) Proposed Policy on Consultation with Indian Tribes (“Proposed Policy”), as published at 76 Fed. Reg. 28,446 (May 17, 2011).

As explained below, the Proposed Policy should be revised as follows: (1) the Proposed Policy should be promulgated as a regulation; (2) Section I should be revised to clearly state that consultation with Indian tribes is a legal requirement for policies that have tribal implications; (3) Section II should be revised to recognize the fundamental principles of the fiduciary relationship, inherent tribal sovereignty, and self-determination that guide consultation with Indian tribes, as well as additional governing policymaking criteria; (4) Section III should be revised to clarify “substantial direct effect” and what administrative orders are exempt, and to correct typographic errors; (5) Section VII should be revised to clarify the requirements for meaningful consultation; and (6) Section VII also should be revised to clarify that consultation will take place well in advance of proposed Departmental action. Further explanation for each of these matters is provided in this letter, and it is accompanied by a redline version of the Proposed Policy showing corresponding recommended revisions.

**1. The Proposed Policy should be promulgated as a regulation.**

On November 5, 2009, President Barack Obama stated in a published Presidential Memorandum that “[m]y Administration is committed to regular and *meaningful* consultation . . . with tribal officials. . . .” Tribal Consultation Memorandum for Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881 (Nov. 5, 2009) (emphasis added). Also, at the first White House Tribal Nations Summit, where that Presidential Memorandum was issued, President Obama committed to fulfill federal responsibilities to Indian tribes. And at the second White House Tribal Summit, in 2010, President Obama declared that actions matter far more than words and that he expects his administration to be held to a standard of having its actions match its words. More recently, Secretary of Interior Ken Salazar stated that “[the Department’s] goal is a comprehensive, transparent and efficient policy *on which the Tribes can rely.*” DOI, Press Release: Secretary Salazar, Assistant Secretary Echo Hawk Submit Draft Consultation Policy to Tribal Leaders (Jan. 14, 2011) (emphasis added). As such, the “draft policy contains detailed *requirements* and guidelines for Interior officials and managers. . . .” *Id.* (emphasis added). In short, it is clear that federal-tribal consultation must be a meaningful, reliable, and binding requirement. *See generally Quechan Tribe of Fort Yuma Indian Reservation v. United States Dep’t of Interior*, 755 F. Supp. 2d 1104, 1108 (S.D. Cal. 2010) (completing required consultation entails adequately and meaningfully consulting tribes and considering what they have to say before approving a project). Anything short of these principles will fail to achieve the goals and relevant standards set forth by President Obama and Secretary Salazar.

As currently drafted, the Proposed Policy fails to meet all these specified consultation principles because it neither is binding on Department staff nor creates a meaningful consultation mechanism upon which Indian Tribes can rely. In particular, the Proposed Policy does not provide Indian Tribes with a basis to ensure that the Department will consult as stated under the Proposed Policy. That is necessary to be able to confirm that the Department’s actions will match its and the President’s words, such as under the existing regulations providing for tribal consultation under Section 106 of the National Historic Preservation Act, 36 C.F.R. Section 800.2(c)(2). The need for an enforceable Department-wide tribal consultation policy is especially significant in light of the Department’s current position in pending tribal trust mismanagement litigation that it is only subject to fiduciary duties to Indian tribes that are expressly or specifically set forth in statutes or regulations. Therefore, the Proposed Policy must be promulgated and codified as a regulation to ensure that it is binding, meaningful, reliable, and enforceable. Otherwise, all the related policy pronouncements will just be hollow words. Accordingly, the enclosed revised redline of the Proposed Policy reflects that it will be a promulgated regulation.

**2. Proposed Policy Section I should be revised to clearly state that consultation with Indian tribes is a legal requirement for policies that have tribal implications.**

Section I of the Proposed Policy states generally that DOI has an obligation to consult with Indian tribes. This Section should be revised to clarify that consulting with Indian tribes is a legal requirement for policies with tribal implications. The Proposed Policy is being issued pursuant to the 2009 Presidential Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 9, 2009), and Executive Order 13175, on Consultation and Coordination with Indian Tribal Governments, 65

Fed. Reg. 67,249 (Nov. 9, 2000). Executive Order 13175 applies to specifically defined “[p]olicies that have tribal implications[.]” *Id.* at 67,249 (Section 1(a)). It also expressly provides that “[e]ach agency *shall* have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” *Id.* at 67,250 (Section 5(a); emphasis added). Moreover, for any draft final regulation that has tribal implications, “each agency shall include a certification from the official designated to ensure compliance with this order stating that the *requirements* of this order have been met in a meaningful and timely manner.” *Id.* at 67,251 (section 7(a), emphasis added); *see also id.* (similar requirement for proposed legislation in Section 7(b)). Indeed, failure to comply with a consultation policy violates the distinctive trust obligation that applies to federal dealings with Indians. *Oglala Sioux Tribe v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979). The Proposed Policy therefore should be revised to clarify its scope and mandate. And as above, given the Department’s current effort to minimize the scope of its fiduciary responsibilities to Indian Tribes, the Proposed Policy must be codified as a regulation to ensure that there will be an accountable process to ensure meaningful and timely consultation.

**3. Proposed Policy Section II should be revised to recognize the fundamental principles of the fiduciary relationship, inherent tribal sovereignty, and self-determination that guide consultation with Indian tribes, as well as additional governing policies.**

Section II of the Proposed Policy expressly provides “Guiding Principles” for DOI’s consultation with Indian tribes. However, the principles stated there notably omit the three “fundamental principles” that are stated in Executive Order 13175—which the Proposed Policy is intended to implement—which “shall” guide agencies in “formulating or implementing policies that have tribal implications[.]” 65 Fed. Reg. at 67,249 (Section 2). In particular, all such consultation must be guided by the “trust relationship with Indian tribes[.]” Indian tribes’ “inherent sovereign powers over their members and territory[.]” and “the right of Indian tribes to self-government . . . and self-determination.” *Id.* (Sections 2(a)-(c)). All three of these fundamental principles must be expressly recognized in the Proposed Policy.

In particular, the Proposed Policy must clearly recognize that the fiduciary duty owed to Indian tribes means compliance with statutes and regulations “at a minimum[.]” *Quechan Tribe*, 755 F. Supp. 2d at 1110 (S.D. Cal. 2010) (citing *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006)). In addition, the Supreme Court has “analogized the Government to a private trustee” “in limited contexts,” where “particular ‘statutes and regulations . . . clearly establish fiduciary obligations of the Government’ . . .” *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2322-23, 2325 (2011) (quoting *United States v. Mitchell* (“*Mitchell II*”), 463 U.S. 206, 226 (1983)). Moreover, “[o]nce federal law imposes such duties, the common law ‘could play a role.’” *Jicarilla*, 131 S.Ct. at 2325 (quoting *United States v. Navajo Nation*, 129 S.Ct. 1547, 1558 (2009)). Accordingly, wherever tribal trust assets are involved or implicated, the United States’ fiduciary duties are not limited to the express terms of statutes and regulations, but also include common-law fiduciary duties. *See, e.g., United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476-77 (2003); *Mitchell II*, 463 U.S. at 225; *Cobell v. Norton*, 392 F.2d 461, 472 (D.C. Cir. 2004); *Cobell v. Norton*, 240 F.3d 1081, 1100-01 (D.C. Cir. 2001). For example, the Department itself has formally interpreted its legal duties as requiring that it discharge its trust responsibilities for Indian trust assets “with a high degree of skill, care, and loyalty.” 303 DM 2.7. Thus, just as the Department

might consider “environmental and conservation obligations” when managing Indian trust assets, *Jicarilla*, 131 S. Ct. 2328, so too must the Department consider potential competing impacts for Indian trust assets when making decisions affecting environmental or conservation matters.

Finally, the Proposed Policy also should recognize and incorporate additional governing policymaking criteria outlined in Sections 3(a)-(c) of Executive Order 13175 and Articles 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which has been publically endorsed by President Obama and formally supported by the U.S. Department of State. The Executive Order requires that agencies encourage Indian tribes to develop their own policies to achieve program objectives, defer to Indian tribes to establish standards where possible, and consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes. 65 Fed. Reg. at 67,249-50. The UN Declaration recognizes—not as a mere aspiration, but as a matter of legally binding current international law—that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, and that states shall consult and cooperate in good faith with indigenous peoples through their own representative institutions in order to obtain their free, prior, and informed consent before states adopt and implement administrative measures that may affect them. G.A. Res. 61/68, U.N. Doc. A/61/L.67, at arts. 18-19 (Sept. 7, 2007). As indicated in the enclosed redline, these matters should be reflected in the binding regulation that codifies the Department’s tribal consultation policy.

**4. Proposed Policy Section III should be revised to clarify “substantial direct effect” and what administrative orders are exempt, and to correct typographic errors.**

Section III of the Proposed Policy defines “Departmental Action with Tribal Implications” to which the Proposed Policy applies, in part by reference to activities that “may have a substantial direct effect on [a] Tribe or Tribal members[.]” In addition, the definition exempts from the Proposed Policy “matters that [are] undertaken in accordance with an administrative or judicial order.” While the reference to “substantial” is likely taken from the definition of “policies that have tribal implications” in Section 1(a) of Executive Order 13175, 65 Fed. Reg. at 67,249, the term “substantial” is nonetheless overly vague. For comparison, “significant” has been defined at length for use under the National Environmental Policy Act, including separately regarding context and intensity. *See* 40 C.F.R. § 1508.27. In addition, the term “administrative order” should be defined narrowly, so that it is not misunderstood to mean that anything that an agency unilaterally or informally so orders is exempt from the consultation mandate of Executive Order 13175. Finally, as noted in the Proposed Policy clauses quoted above, “an” should be inserted before “Indian Tribe” and before the word “undertaken” either “are” should be inserted or “that” should be deleted.

While the Pueblo of Laguna made all of these comments previously regarding the initial draft consultation policy, the Department did not even address the typographical errors. This heightens and exemplifies the Pueblo’s concern that the consultation requirement be “conducted in a manner sensitive to the concerns and needs of the Indian tribe[s]” and that it must not be merely “an empty formality[.]” *Quechan Tribe*, 755 F. Supp. 2d at 1108-09 (quoting 36 C.F.R.

800.2(c)(ii)(C)). Accordingly, for reference in avoiding overlooking the Pueblo's comments again, they are shown in the enclosed redline.

**5. Proposed Policy Section VII should be revised to clarify the requirements for meaningful consultation.**

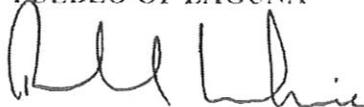
Section VII provides consultation guidelines. This section should be revised to clarify that "[m]eaningful communication means tribal consultation well in advance with the decision maker or with intermediaries with clear authority to present tribal views to the BIA decision maker." *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995). Also, the section should provide with clarity that mere invitations to attend public meetings do not amount to meaningful government-to-government consultation. *Quechan Tribe*, 755 F. Supp. 2d at 1118-19. This section of the Proposed Policy also should recognize that meaningful consultation is not determined by mere *pro forma* recitals, or the sheer volume or size of documents or the number of letters, reports, or meetings. *See id.* More importantly, written consent from Tribal governments is a necessity if the Department plans to use any form of a Tribal Leader Task Force.

**6. Proposed Policy Section VII should be revised to clarify that consultation will take place well in advance of proposed Departmental action.**

Section VII of the Proposed Policy states that DOI must provide up to 30 days' advance notice of consultation, but does not specify when consultation will take place in relation to proposed Departmental action. This Section should be revised to clarify that consultation will take place well in advance of Departmental action, to ensure that DOI "shall have an accountable process to ensure meaningful and timely input by tribal officials" as required by Executive Order 13175. *See* 65 Fed. Reg. at 67,250 (Section 5(a)). Specifying a minimum advance time for consultation before Departmental action will allow Indian tribes adequate time to prepare, investigate, and respond to DOI's consultation request. Failing to initiate consultation sufficiently in advance of Departmental action will not allow for required meaningful and timely consultation. *See Quechan Tribe*, 755 F. Supp. 2d at 1118 (criticizing BLM for not meeting with tribe until "well after the project was approved"); *Lower Brule Sioux Tribe*, 911 F. Supp. at 401 ("meaningful consultation means tribal consultation in advance"); 75 Fed. Reg. at 78,201 (EPA Policy Section V.C that "Consultation should occur early enough to allow tribes the opportunity to provide meaningful input").

For further reference regarding each of these comments, please see the enclosed redlined revision of the Proposed Policy. Please contact my office with any questions regarding these comments.

Very truly yours,  
PUEBLO OF LAGUNA



Richard Luarkie  
Governor

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Enclosure