



SOUTHERN UTE INDIAN TRIBE

November 16, 2016

Office of the Assistant Secretary – Indian Affairs
Attn: Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW, MS 3071
Washington, DC 20240
consultation@bia.gov

Dear Mr. Roberts:

Thank you for the opportunity to provide comments on how the United States might improve consultation with Indian tribes regarding federal infrastructure decisions.

The Southern Ute Indian Tribe (Tribe) occupies the Southern Ute Indian Reservation (Reservation), which consists of approximately 700,000 acres of land located in southwestern Colorado in the Four Corners Region of the United States. Our Reservation is part of the northern San Juan Basin, an area that has seen widespread oil and gas development over a period of almost 70 years. Because of this, the Tribe has become a leading developer of energy resources in Indian Country. Revenues from natural gas development on our tribal lands are the tribe's economic lifeblood, and accordingly we have a long history of working with federal agencies and with industry to ensure that energy development occurs in an efficient and environmentally responsible manner.

Because of the Tribe's unique status as both an Indian tribe and an energy developer, we welcome the opportunity to engage in the conversation with the United States and with other tribes about how federal decision-making on infrastructure projects can be improved, and we offer the following comments:

1. Too often the United States' consultation process amounts to a "check the box" exercise without obtaining meaningful input from the tribes with whom the United States is consulting and without any real opportunity for accommodation. Like most tribes, we have experienced this frustrating reality. A letter and a three hour webinar consultation is not the Tribe's idea of meaningful or adequate consultation. Even if such a "check the box" consultation satisfies a particular statute's or federal agency's consultation policy requirements, we do not believe that it meets the United States' duties related to its most basic trust responsibility to tribes.

We agree with other commenters that, absent extraordinary circumstances and tribal approval, consultation should occur face-to-face and between tribal and federal leadership, particularly where there is a direct nexus between a proposed project and a tribe's interests, such as its land base or water source, for example. Sending staffers who have no discretion to make decisions to tribal consultations is not particularly helpful and does not constitute meaningful consultation.

2. The United States should understand that silence on an issue does not mean that an affected tribe tacitly consents to the United States' decisions. Different tribes have different capacities for responding to

Federal Register notices and requests for input on federal decisions. Where one tribe might be able to comment extensively and dedicate significant resources to an issue, another tribe might not have the ability or the expertise to weigh-in on a particular issue, even where the federal decision has the potential to directly impact that tribe's resources or work against that tribe's interests. The United States should be mindful of this fact and take reasonable steps to assure itself that an affected tribe which has not yet engaged in a particular consultation is, in fact, not interested in the discussion.

We would like to see the United States make more resources available to tribes so that they may develop the capacity necessary to meet their consultation needs and so that the United States may meet its trust responsibility to consult on a government to government basis with tribes. This could come in the form of grant funding; the provision of capacity building equipment, manpower, or other resources; or by simply assisting tribes when necessary so that the tribes may engage the United States in a meaningful way.

3. We support an expansive view with regard to the need for consultation. And we submit that, in consideration of the federal government's duty to protect tribal property and sovereignty, consultation is always appropriate in instances where the United States intends to make decisions which may affect a tribe's interests, including, among other things, a tribe's lands, citizens, or natural resources. This is the only approach that is consistent with the United States' trust responsibility to tribes.
4. We submit that the existing legal framework concerning federal infrastructure decisions could be adequate with regard to federal consultation with tribes, but only if the United States commits to a more robust consultation process that commences at the earliest stage of federal involvement on any particular project.

Thank you again for the opportunity to comment. We trust that you will take our comments into consideration and we look forward to future meetings and discussions on this most important topic.

Sincerely,



Clement J. Frost

Chairman