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# Native American Rights Fund

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November 30, 2016

Office of the Assistant Secretary – Indian Affairs
Attn.: Office of Regulatory Affairs and Collaborative Action
1849 C Street, NW
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*Sent by U.S. Mail and by electronic mail to: consultation@bia.gov*

Dear Mr. Roberts,

I write on behalf of the 39 federally recognized tribes in the Bering Sea Elders Group (BSEG) and the Santa Ynez Band of Chumash Indians in response to the September 9, 2016 Joint Statement and framing paper requesting input on tribal consultation regarding infrastructure decision-making. Quite simply, consultation is not working as it was intended and we have encountered two very different but equally disturbing instances of federal agencies ignoring consultation in just this past year. We will explain each in turn. However, the answer to the first question in the framing paper is that agencies actually have to follow their own policies, the relevant executive orders and the law. The answer to the second question, whether any changes are necessary, is that there should be penalties for failure to follow these existing policies and, more importantly, tribal consultation should be a mandatory part of any infrastructure project.

First, the United States Coast Guard announced in 2015 it was going to hold three public meetings in preparation for a Port Access Route Study through the Bering Sea and Bering Strait off the coast of Alaska. Those meetings were planned for Juneau, Anchorage, and Nome. (DHS notice, 9110-04-P). This study is of critical importance to the more than 50 federally recognized tribes along the coast of the Bering Sea that rely on that sea for their subsistence and food security. As you may know, the Bering Strait is home to the world's largest marine mammal migrations and its fragile ecosystem is the main food source for these coastal tribes. The USCG's route study was to consider creating a single shipping lane for the increasing amount of shipping and, if one was to be created, where it should be established and what restrictions would be placed on it of any. Despite the critical importance of this area so such a large number of tribes the USCG engaged in *absolutely no tribal consultation.* They notified no tribes of their meeting, nor of the proposed route that followed. They simply published their results in the federal register and held one public meeting with a nonprofit in Nome. Tribes were completely unaware of the proposed route, so when a USCG representative discussed the route at a gathering called "the Alaskan Arctic" in August of 2015, the President of

Associated Village Council Presidents (AVCP, a nonprofit firmed pursuant to ANCSA) stood up and asked why the USCG had not consulted the Tribes. The USCG's response was that all the notices were published in the federal register and that "counted" as consultation. It was a shocking level of ignorance about tribal consultation. That situation still has not been remedied and the PARS proposal remains in limbo today, the tribes still not consulted in any fashion.

Second, we wish to express grave concern about the Army Corps of Engineers' (Corps) ongoing and repeated failure to consult with federally recognized Indian Tribes as required by federal laws and DOD's own policies. The current dispute between the Corps and the Standing Rock Sioux Tribe and others, in connection with its initial decision to issue a permit for the Dakota Access Pipeline, exemplifies the Corps' disregard for its responsibilities to Native American Tribes in decision making on matters that impact the lives and resources of tribes and their members. We have been dealing with the Corps' similar disregard for tribal consultation in other areas, and that agency seems to have an institutional or systemic problem with tribal consultation.

In 2012, the Corps issued a Section 404 permit for a large development project, the Newhall Ranch Project, in California, and did not contact, much less consult with, a single federally recognized tribe despite the fact that it falls within the aboriginal territory of the Santa Ynez Band of Chumash Indians and there were historic and cultural sites located during the NEPA process. The Corps' failure to consult in that instance is currently the subject of pending litigation.[1] Because you are likely less familiar with the Newhall Ranch issue than the Standing Rock issue, we provide an overview here.

The Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation is a federally recognized tribal government, occupying The Santa Ynez Reservation in Santa Barbara County, California. The Reservation was established on December 27, 1901, pursuant to the Mission Indian Relief Act of January 12, 1891. The Chumash people are a cultural and linguistic group comprised of several bands, and the Tribe is the only federally recognized Chumash tribe, meaning the Tribe's governing body is the sole Chumash government recognized by the United States. The ancestors of the Santa Ynez Band of Chumash Indians once numbered in the tens of thousands and lived along, and inland from, the coast of California. Ancestral Chumash territory encompassed approximately 7,000 square miles, spanning from present-day Malibu to present-day Paso Robles, and included the Newhall Ranch Project Area.

The Project Area contains historic properties and cultural resources affiliated with Chumash people. The ancestral Chumash people occupied an area spanning approximately 7,000 square miles, from the area of present-day Malibu in Los Angeles County, to present-day Paso Robles in Santa Barbara County, and inland to the area encompassed by the Project site. This area includes ancestral dwellings, burials, trade and hunting routes, gathering areas, spiritual grounds, and countless other culturally significant sites. These areas retain their significance today, and Chumash culture, religion, and spirituality remain integrally tied to these areas. Additionally, the Project Site contains Chumash historic cultural properties and sacred places, including burial grounds, sacred sites, village sites, cultural remains, and natural cultural resources that the development of the Project Area will

1 *Center for Biological Diversity, et al. v. U.S. Army Corps of Engineers, et al*., No. 15-56337 (9th Cir. filed Sept. 1, 2015).

compromise or even destroy.

Despite the wealth of cultural resources within the Project Area, and its ongoing cultural significance to contemporary Chumash people, cultural surveys in connection with the Newhall Ranch development were carried out without any involvement of or notification to the Tribe. Indeed, the Santa Ynez Chumash, the only federally recognized Chumash tribal government, was never notified of the project, of cultural surveys, of draft environmental impact statements, of proposed Historic Property Treatment Plans, of proposed programmatic agreements, nor was in any way consulted by the Corps.

The Corps issued a final Clean Water Act Section 404 permit to Newhall on October 19, 2012. The lawsuit followed. The Tribe joined the case in the Second Amended Complaint in 2014 specifically to protect their right to government-to-government consultation under several federal laws and policies. The Tribe's claim is simple: the Corps never even contacted, much less formally consulted, the Tribe about the Newhall Project. Accordingly, the Corps denied the Tribe the opportunity to participate in the identification of any historic properties, determine any adverse effects, or help resolve or mitigate those adverse effects even though the Project is in their traditional ancestral territory.

The Tribe's claim in this case centers on the National Historic Preservation Act (NHPA). The major provisions of the NHPA established the National Register of Historic Places, the appointment of a State Historic Preservation Officer by each Governor, the Advisory Council on Historic Preservation to advise the President and Congress, and—key for our purposes here—the Section 106 process. It was amended in 1992 specifically to "include Indian tribes and Native Hawaiian organizations in the historic preservation partnership."[2] The amendments effectuated this partnership by adding new provisions for Indian religious and cultural properties.

The Advisory Council on Historic Preservation regulations set forth the consultation process in detail in the implanting regulations. Called the Section 106 process, the regulations address participants in the process, initiation of the process, identification of historic properties, assessment of adverse effects, and resolution of adverse effects. Far from treating the Tribe as partners in this process as intended in the NHPA, the Corps violated each of the following provisions with respect to the Santa Ynez Band of Chumash Indians. Though there are many pieces to this one regulation, at a minimum, the Corps is required to consult with tribes, on a government-to-government basis, and provide "a reasonable opportunity to identify its concerns" about the Project Area regardless of the location of the property. None of that occurred in the Newhall Project, and the Corps continues to argue in pleadings that these failures are sufficient to meet their obligations to consult. In other words, they set the bar so low that consultation has very little meaning.

In truth, the word "consultation" has a very particular meaning in light of federal Indian policy, tribal sovereignty, the NHPA and its regulations, and in federal agencies' own policies and instructions. A number of laws and regulations, including the NHPA, require administrative agencies to consult with Indian tribes. Additionally, almost all federal agencies have written policies requiring government-

2 *Id.* at 13; NHPA, 54 U.S.C. § 300101 (Declaration of policy of the Federal Government).

to-government consultation with tribes. It is different from public notice because consultation is rooted in the legal principles of the government-to-government relationship between the United States and federally recognized tribes. It is axiomatic that the federal government, including federal agencies, has a trust responsibility to tribes. That trust responsibility creates unique burdens and responsibilities for agencies.

In accordance with these Presidential mandates, the Department of Defense (the parent agency of the Corps) was one of the first agencies to issue a formal tribal consultation policy in 1998. Signed by then-Secretary of Defense William Cohen, it addressed the trust responsibility, government-to-government relations, consultation (which it asserts is based on "a unique and distinctive political relationship between the United States and the tribes"), and natural and cultural resources protection.[3] Eight years later, the DOD issued a more comprehensive instruction specifically setting forth its policies with respect to tribes[4]:

> 6.6 The DoD Components shall involve tribal governments early in the planning process for proposed actions that may have the potential to affect protected tribal rights, land or resources, and shall endeavor to complete consultations prior to implementation of the proposed action. Early involvement means that a tribal government is given an opportunity to comment on a proposed action in time for the tribal government to provide meaningful comments that may affect the decision . . . .
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> 6.8 When contacting tribes, the consultation shall be initiated by the installation commander. Follow-on consultation shall be at a level agreed to by the installation commander and tribal government leadership.[5]

The Army Corps did not follow its own policy when it issued the permit to Newhall Ranch, and this does not appear to be an isolated incident given that the Corps committed similar failures in the Standing Rock pipeline case.

The federal government's duty to consult with tribes when making decisions that impact tribes, tribal resources, and the health and well-being of tribal citizens, is fundamental to the federal trust responsibility. Numerous federal laws, regulations, and policies exist, and there is little doubt that these could be improved. However, any law or policy will not prevent future conflicts between tribes and the federal government, as well as the private sector, unless and until federal agencies, including the USCG and Corps, follow the letter and spirit of these laws going forward. Thus, our recommendation is that these laws and policies seem fairly clear and fairly detailed; the problem is that they are not mandatory and they are not enforced. So that is our simple but important recommendation; in order to be effective and meaningful, tribal consultation must be mandatory and there must be penalties for failure to comply.

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3 U.S. DEP'T OF DEFENSE, AMERICAN INDIAN & ALASKA NATIVE POLICY (Jan. 2012), *available at* http://www.denix.osd.mil/na/upload/_American-Indian-and-Alaska-Native-Policy-Booklet-Version-2-for-Web-Posting.pdf.

4 See generally, U.S. DEPT. OF DEFENSE, INSTRUCTION NO. 4710.02 (Sept. 14, 2006), *available at* http://www.dtic.mil/whs/directives/corres/pdf/471002p.pdf.

5 *Id.* (emphasis added).

Please do not hesitate to contact us if we can provide any further information on these issues.

Very Truly Yours,

s/ Natalie A. Landreth
s/ Heather Whiteman Runs Him