



AGUA CALIENTE BAND OF CAHUILLA INDIANS
TRIBAL COUNCIL

RICHARD M. MILANOVICH CHAIRMAN • JEFF L. GRUBBE VICE CHAIRMAN
KAREN A. WELMAS SECRETARY/TREASURER • JEANNETTE PRIETO-DODD MEMBER • VINCENT GONZALES III MEMBER

February 10, 2010

Ms. Dorothy Robyn
Deputy Under Secretary of Defense
Office of the Under Secretary of Defense
3000 Defense Pentagon
Washington, D.C. 20301-3000

Re: November 5, 2009 Presidential Memorandum Concerning Tribal Consultation

Dear Deputy Under Secretary Robyn:

On behalf of the Agua Caliente Band of Cahuilla Indians, let me thank you for your recent request for comment regarding the implementation of President Obama's Presidential Memorandum on Tribal Consultation. We appreciate the sincerity of this Administration's efforts to engage with Indian Country and listen to the counsel and experience of tribes in crafting policy affecting tribal communities and the Nation-to-Nation relationship with the United States.

Consultation is a cornerstone for a productive, respectful and authentic government to government relationship between tribes and the federal government. Indeed, the history of federal-tribal relations demonstrates conclusively that when the United States has implemented policies, however well-meaning, without proper engagement, without asking the tribes themselves what they want, the result has generally been failed policies, all too often with tragic consequences. Thus, we agree with the general idea that meaningful consultation has great virtues and is a necessary precondition to the development of sound Indian policy.

Of course, the key word is "meaningful." Where federal agencies have already decided a policy direction and "go through the motions" of consulting with tribes, that is meaningless. Consultation has to occur at a time where important choices are still available. Too often in the past, it seems that by the time tribal leaders are consulted, policy options are limited to a few possible directions. Engagement must occur well earlier than that. The guiding principle must be that the federal government consults with tribal governments at the outset of determining policy rather than only consulting on implementation of a policy determined without tribal input. Tribes must be part of the development of the fundamental policy direction as well as the method of its execution.



Re: November 5, 2009 Presidential Memorandum Concerning Tribal Consultation
Page 2 of 5

We further believe that successful consultation must be judged by consideration, among other things, of the quality of the action steps that follow. Talking is only step one. Better implementation with all deliberate haste of the agreements arrived at through consultation is essential. Specific length of time, adequate notice, a known process for receiving and digesting information into a form that is useable and quantifiable. Consultation must be a meaningful dialogue that reflects the outcome of give and take between parties rather than “checking a box” and having the federal government implement the policy as it intended from the outset. To guard against this we need to have some measure that our input was considered and how it affected the outcome.

Finally, and perhaps most importantly, it is not enough that consultation occur only after a particular policy matter is ready for deliberation and ultimate decision. Federal agencies have broad authority to address a wide variety of matters. Ordinarily, the agencies have not consulted with tribal governments as to what the priorities for the agency should be. Should the agency spend its resources on processing land-into-trust applications, reforming the Indian trust management system, renewable energy development, ensuring responsiveness of agency and regional offices or any number of other matters? How does the agency choose which issues to address first?

In our estimation, it is important that before deciding what the priorities are, where to focus limited resources and how to tackle these matters, tribes should be regularly consulted. Put another way, it is as important to tribes what matters are addressed as it is the policy adopted. There are too many issues out in Indian Country that tribes widely believe are pressing and vital, yet they continue year after year, in some cases decade after decade, without resolution and without being addressed. Prioritizing for an agency what matters to deal with first has rarely triggered consultation, yet it should. It is our view that a sound consultation policy must include this prioritization-of-issues component.

Below are more specific answers to the queries presented.

- *What DoD actions or actions of the Military Departments should initiate consultation?*

Any federal action that has a material effect on tribes should be subject to consultation. The consultation process should also afford the tribes some mechanism by which to initiate consultation in order to spur the Department to action. Fulfilling the spirit of Executive

Order 13175 requires an ongoing dialogue with tribes as they are identified as being affected by federal policy.



Moreover, it should not take a discrete federal action to trigger consultation. Tribes should be included in the overall policy dialogue and in aiding the Department to prioritize matters before it.

- *What procedures best ensure meaningful and timely consultation?*

Tribes must be involved at the earliest feasible stages – even in determining Department priorities. Moreover, it is woefully inadequate to commence consultation only when implementing a predetermined policy. Tribes should be involved in the determination of what the policy goal should be and then selecting and shaping the actual policy.

- *How could the Department enhance its consultation efforts?*

Consultation should involve all tribes possibly impacted by the policy. This should necessarily include tribes who will not be affected because the Department will not utilize its limited resources to address matters of concern to that tribe because it is focusing elsewhere.

- *How could the Department encourage more military installations to engage in meaningful and timely consultation with tribes?*

Consultation may well vary depending on the issue and the circumstances. What is important is the candid exchange of ideas at a pre-decisional stage with the actual decisionmakers. It is not enough that only staff participate. The person actually deciding policy must be part of the discussions and hear directly from affected tribes. Part of meaningful consultation is accountability. Department officials must demonstrate that they fully considered the arguments made, and, at the end of the process, they must justify any departures from the policy direction affected tribes have asked be adopted.

- *What additional steps should the Department consider taking to enhance the capacity of Military Departments and personnel to engage in consultation?*

Each bureau, office and agency should assign a senior level individual to serve on a Department-wide Indian policy working group. This working group should coordinate policy generally and specifically consultation efforts regarding matters that may impact numerous offices of the Department. The working group should also be charged with searching out and eliminating duplicative activities and eliminating the red tape that far too often impedes development in Indian Country.



Re: November 5, 2009 Presidential Memorandum Concerning Tribal Consultation
Page 4 of 5

- *What additional steps should the Department consider taking to enhance the awareness of tribal governments about DoD policy on consultation as well as the Federal statutes that trigger consultation?*

There are important considerations regarding the timing of consultation, and timelines should be used and notice provided in advance of the timelines. As an initial matter, prior to consultation, tribes must be provided notice well in advance with all necessary material for them to evaluate and assess with aid of counsel. In most cases, a minimum of 30 days should be provided. Second, face to face consultation must consider other important pre-scheduled events that may impact availability of many tribes. After the consultation session, tribes should be afforded some time for additional written submissions as often matters are discussed during a consultation session and additional comments are necessary upon additional reflection. Finally, decisions regarding the policy choices made and timing of implementation should be announced at the time of consultation so that tribes can plan accordingly.

- *What additional steps could the Department take to promote collaboration and stronger government-to-government relationships with tribes?*

Consultation may be supplemented with less formal complements such as workshops or conferences, however, the importance of government to government dialogue should not be lost in turning to alternative forms of information sharing and gathering. Formal consultation is distinct because the Department should take the position that, where possible, policies consistent with the desires of tribes should be adopted. Self-determination must mean, at a minimum, that there is a presumption that tribes ought to guide and shape Indian policy and federal action.

- *How should the Department enhance efforts to build the capacity of military and civilian personnel to protect natural and cultural resources of interest to tribes?*

The Department should initiate a special natural and cultural resource consultation process that permits tribes and the Department-wide Indian policy working group, which should be created, to discuss this matter further. It is essential that tribes, each of which have different

natural and cultural resources to protect, are able to coordinate with the Department how to further this commendable goal.

- *How should the Department measure the progress of its ongoing efforts to consult and coordinate with tribes?*



*Re: November 5, 2009 Presidential Memorandum Concerning Tribal Consultation
Page 5 of 5*

All too often policies are adopted after consultation that seem at odds with the majority of the comments made by tribes, yet there is no justification or explanation of that decision and why a decision more consistent with tribal input was not adopted. The net result—whether true or not—is that tribal participants perceive that they were not heard and that consultation was an exercise in box-checking. Accordingly, effective consultation includes follow-up necessarily in the form of justification and explanation of a decision and why alternative policies supported by one or more stakeholders were not adopted.

- *What, if any, alternatives might be employed such as conferences, workshop sessions, or task forces to improve communication and coordination with tribes?*

Thank you again for your sincere efforts to implement the President's goal of a mutually respectful relationship with Indian Country and please feel free to contact us to discuss these suggestions as well as provide any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard M. Milanovich".

Richard M. Milanovich
Chairman, Tribal Council
**AGUA CALIENTE BAND OF
CAHUILLA INDIANS**

RMM: lf
TC-11321-02-10