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By Electronic Mail to David.Sanborn@osd.mil

David Sanborn
Senior Tribal Liaison
Department of Defense
1225 South Clark Street, Suite 1500
Arlington, VA 22202

Re: Department of Defense tribal consultation policy

Dear Mr. Sanborn:

In response to the Department of Defense's letter of December 16, 2009, the Forest County Potawatomi Community ("FCPC" or "Tribe") submits these comments on the Department's current consultation policy and plan of action. FCPC is committed to working with the Department to implement President Obama's November 5, 2009 Memorandum ("President's Memorandum") directing all federal agencies to submit a detailed plan of action to implement the policies and directives of Executive Order 13,175, Consultation and Coordination with Indian tribal Governments, 65 Fed. Reg. 67,249 (2000) ("EO 13175"). We first briefly describe FCPC and its history. We then discuss the legal principles on which EO 13175 is based, and set out our suggestions for enhancing the Department's current consultation policy, set out in the Department of Defense American Indian and Alaska Native Policy ("DoD Indian Policy"), and proposed plan of action.

Background

The Forest County Potawatomi Community is a federally recognized Indian tribe which maintains a government-to-government relationship with the United States. 74 Fed. Reg. 40,218 (Aug. 11, 2009). The Tribe is organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461-479, has a membership of more than 1,200 people, and exercises governmental authority under a Constitution originally adopted on February 6, 1937. The FCPC landbase includes a Reservation of over 12,000 acres located in northern Wisconsin, and a small amount of trust land in the Milwaukee area.

The Tribe regulates persons and activities in tribal territory, operates a tribal court system, and provides services in numerous areas that include emergency management, health services, education, environmental protection, natural resources, and cultural resources. The Tribe also operates numerous federal programs pursuant to contracts entered into with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act ("Self-Determination Act"), 25 U.S.C. §§ 450-458bbb-2, the purpose of which is to enable FCPC to develop a "strong and stable tribal government[]," capable of administering quality programs and developing the econom[y] of their [] communit[y]." 25 U.S.C. § 450a(b). In addition, after years of carrying out programs of the Indian Health Services ("IHS") under Title I of the Self-Determination Act, in 2005 FCPC entered into a Compact and Funding Agreement with the Secretary under Title V of the ISDEAA.

The Potawatomi have a long history in what is now Wisconsin and the Midwest states, and are parties to over forty treaties with the United States involving the traditional territory of the Potawatomi in southern Michigan, the northern half of Indiana and Illinois, and eastern Wisconsin. These include the Treaty of Fort Harmar in 1789 and the Treaty of Greenville in 1785 – under which the United States established peace and friendship with the Potawatomi and recognized their rights to the territory they occupied.

In the early 1800s, pressure by non-Indian settlers for land increased, and the United States sought to acquire more Potawatomi land by treaty. In the treaties that were subsequently negotiated, the United States recognized the rights of the Potawatomi to the lands that they used and occupied, and assumed an obligation to protect them. Under the treaties, the United States promised not only to compensate the Potawatomi for the lands acquired, but also agreed to provide for their education, subsistence and support, and to establish reservations where the Potawatomi could continue to live. However, after the

Treaty of Chicago in 1833, most of the Potawatomi people were forcibly removed from the last of their lands east of the Mississippi River. Some of the Potawatomi, opposing the forced removal and fearing for their lives, fled north. As a result, several thousand Potawatomi moved to refuges in upper Canada, many hundreds moved north along both shores of Lake Michigan to territory away from non-Indian settlement, and a few hundred remained in southeast Wisconsin and southern Michigan.[1]

The Forest County Potawatomi Community descends from the Potawatomi Indians who would not leave Wisconsin.[2] For many years, these Potawatomi simply lived on lands in northeastern Wisconsin. After petitioning Congress for relief, Congress appropriated funds in 1913 to allow them to acquire land in trust under the 1884 Indian Homestead Act and to build homes on those lands.[3] In the years that followed, Congress continued to appropriate funds to assist in the education and support of the Potawatomi Indians in Wisconsin.[4] In 1988, the Tribe's lands were recognized as having reservation status.

Significantly, the dispersion of the Potawatomi throughout the United States and Canada as a result of federal Indian policy following the 1833 Treaty of Chicago did not separate the Potawatomi from one another. The Potawatomi Tribes, including those in Canada, meet annually for a Potawatomi Gathering. These Gatherings play a vital role in

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[1] James Clifton, *The Prairie People, Continuity and Change in Potawatomi Indian Culture 1665-1965*, University of Iowa Press (1998) at 185, 309-310.

[2] Clifton, *supra* note 1 at 310-11.

[3] Act of June 30, 1913, 38 Stat. 102.

[4] *E.g.*, Act of April 4, 1910, 36 Stat. 269 (appropriates $25,000 for the support, education and civilization of the Potawatomi Indians who reside in the State of Wisconsin and to investigate their condition); Act of August 24, 1912, 37 Stat. 518 (appropriates $7,000 for the support, education and civilization of the Potawatomi Indians who reside in the State of Wisconsin); Act of May 18, 1916, 39 Stat. 123 (appropriates $100,000 for the support and civilization of the Wisconsin Band of Pottawatomie Indians, which funds are to be reimbursed from the annuities estimated to be due to these Indians under their treaties with the United States); Act of March 2, 1917, 39 Stat. 969 (similar to 1916 Act); Act of May 25, 1918, 40 Stat. 561 (appropriates $75,000 for the support and civilization of the Wisconsin Band of Pottawatomie, to be reimbursed from the funds due under their treaties with the United States).

maintaining the Potawatomi Tribes' shared culture and history. The location of the Potawatomi Gatherings is rotated among the Potawatomi Tribes, including the Canadian Potawatomi. The August 2008 Potawatomi Gathering and Language Conference was hosted by the Potawatomi of Wapole Island.[5]

Discussion

A. The Consultation Duties Imposed by EO 13175 are Based on Settled Principles of Federal Law.

The basic purpose of EO 13175 is to direct that all federal agencies conduct their relationships with Indian tribes in accordance with the Fundamental Principles set forth in Section 2 of that order, which recognizes the federal trust responsibility, tribal rights of self-government and tribal sovereignty, and reaffirms the Self-Determination policy which has guided the Federal Government's relationship with Indian tribes since 1970.[6] Section 2 of EO 13175 provides as follows:

> Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following principles:
>
> (a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

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[5] See *Potawatomi Traveling Times*, Vol 14, Issue 5 (September 1, 2008) available at http://www.fcpotawatomi.com/index.php/2008-PDF-Archives/Sept-2008.html

[6] *See* Richard Nixon, Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970).

> (b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.
>
> (c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Id.

In recognizing the separate sovereign status of Indian tribes and the trust relationship between Indian tribes and the United States, the Fundamental Principles reflect well-settled law. Since Justice Marshall issued his seminal opinions in the Cherokee cases over 175 years ago, both of which involved the question of whether Georgia state statutes were applicable to persons residing on lands secured to the Cherokee Nation by federal treaties, federal law has made clear that Indian tribes are separate sovereigns, with a relationship to the United States that is based on the federal trust responsibility. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In the first of these cases, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that it lacked original jurisdiction over a suit filed by the Cherokee Nation to enjoin enforcement of the Georgia statutes because the Cherokee Nation was not a "foreign state" within the meaning of that term in Article III of the Constitution. Chief Justice John Marshall, writing for the Court, agreed with the Cherokee Nation's contention that it was a "state" in the sense of being "a distinct political society . . . capable of managing its own affairs and governing itself." *Id.* The Court went on to hold that rather than being "foreign states," Indian Tribes were subject to the protection of the United States and might "more correctly, perhaps, be denominated domestic dependent nations." *Id.* at 17. Chief Justice Marshall concluded that "[t]heir relation to the United States resembles that of a ward to his guardian." *Id.*

In the second Cherokee case, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court invalidated the Georgia statutes at issue in *Cherokee Nation*, holding that Indian tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." *Id.* at 557. In so ruling, the Court construed the Cherokee treaties as "explicitly recognizing the national character of the Cherokee and their right of self-government . . . [and] assuming the duty of protection, and of course, pledging the faith of the United States for that protection." 31 U.S. (6 Pet.) at 556. Taken together the Cherokee decisions impose a trust duty on the federal government to protect Indian tribes' lands, resources and rights of self-government. Indeed, as the decision in *Northwest Sea Farms Inc. v. United States Army Corps of Engineers*, 931 F. Supp. 1515 (W.D. Wash. 1996), subsequently made clear, the trust responsibility applies to all actions of the federal government that may affect Indian tribes. *Id.* at 1520 (citing Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981)).[7]

Since then, the Court has repeatedly reaffirmed these basic principles, acknowledging that "[o]riginally the Indian tribes were separate nations within what is now the United States." *William v. Lee*, 358 U.S. 217, 218 (1959), and that as separate nations they "exercised virtually unlimited power over their own members as well as those who were permitted to join their communities." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Then, as now, Indian tribes relied on their inherent sovereignty as a source of power to govern. As the Court explained in *United States v. Wheeler*, 435 U.S. 313 (1978), "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their

[7] We do not agree that the federal trust responsibility is limited in the manner described in the DoD Indian Policy, *see id.* at 3, 6 and Annotated Policy Attachment 1, nor in our view is it possible to comprehensively define the federal government's trust responsibilities in the abstract. Indeed, the purpose of consultation is, in part, to assess the impacts of proposed federal action on the tribe's rights and interests and the federal government's trust responsibility – this cannot effectively be done in advance of consultation. We therefore reserve our position on the scope of the federal government's trust responsibility.

independent status." *Wheeler*, 435 U.S. at 323. The Court has also reaffirmed the "undisputed existence of a general trust relationship between the United States and the Indian People," *United States v. Mitchell*, 463 U.S. 206, 225 (1983), and has held that because of the trust relationship, Congress will not be presumed to abridge Indian 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 federal trust responsibility also includes the duty to consult with tribes to insure their understanding of federal actions that may affect their rights and to insure federal consideration of their concerns and objections with regard to such actions. As the 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. These principles are well settled. *E.g., Morton v. Ruiz*, 415 U.S. 199 (1974) (denial of general assistance benefits to Indians living near the reservation held to be "inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id.* at 236 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)); *HRI, Inc. v. EPA,* 198 F.3d 1224, 1245 (10th Cir. 2000) ("in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies") (quoting *Felix S. Cohen's Handbook of Federal Indian Law* 225 (1982)); *Midwater Trawlers Cooperative v. U.S. Dep't of Commerce,* 139 F.Supp. 2d 1136, 1145-46 (W.D. Wash. 2000) (consultation grounded in the trust relationship) *aff'd in part and rev'd in part*, 282 F.3d 710 (9th Cir. 2002).

Simply stated, the purpose of EO 13175 is to protect the rights recognized in the Fundamental Principles through the consultation process. In so doing, EO 13175 makes clear that the long venerated principles of federalism in our constitutional structure apply equally to tribal governments.

B. The Importance of Consultation by the Department of Defense.

Consultation is the process by which representatives of the Federal Government and Indian tribes discuss agency actions that may affect the rights and interests of Indian

tribes. As a result of the tribes' implementation of the Supreme Court decisions recognizing tribal authority over persons and activities in Indian country, and legislation enacted by Congress in furtherance of the Self-Determination policy, Indian tribes are now operating judicial systems, managing natural resources and the reservation environment, running hospitals, and managing tribal enterprises, among other activities. In addition, many tribes are now partners with federal and state government agencies on important issues, including law enforcement, child welfare and environmental matters. For example, working with the Environmental Protection Agency to protect the Reservation environment, the Tribe recently redesigned its Reservation from Class II to Class I status under the Clean Air Act. Hopefully, through effective utilization of the consultation process, tribes can work with the DoD to formulate policies consistent with the tribes' activities in these and other areas.

The consultation process also seeks to avoid conflicts between the tribes' rights and proposed federal action. When such conflicts do arise, the Department's policy should be to resolve them in a manner consistent with the Federal Government's trust responsibility to Indians, and tribal rights to lands, natural resources, self-government and sovereignty. In this regard, we emphasize that the challenges of the consultation process are largely a reflection of the importance of that process both to the Federal Government and to Indian tribes. Today, consultation is an integral part of the government-to-government relationship, and has become the basic means by which Indian tribes and the United States work out differences over proposed federal agency actions.

C. Suggestions for the Department of Defense's Tribal Consultation Policy.

We turn to our specific suggestions on how the Department can improve the consultation process so as to meet the requirements of EO 13175. We make suggestions in the following three areas: (1) the Department's actions which trigger consultation; (2) the stages of a meaningful consultation process; and (3) who should participate in consultation for the Department.

1. The Department's policy should more clearly define what Federal actions require the Department to initiate consultation.

Under current DoD policy, actions that "may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands" trigger inquiry as to whether the consultation process should be initiated. DoD Indian Policy at 2. This is

somewhat similar to the requirement under EO 13175, under which Departmental "policies with tribal implications," as defined in section 1(a), are subject to the consultation requirements set forth in the Order. It is important to recognize, however, that under EO 13175, "policies with tribal implications" means "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." *Id.*, § 1(a). The DoD policy should clarify that under EO 13175, the actions which trigger consultation include all legislative, policy, and regulatory actions of the Department that fall within this definition.

Sections 3-5 of EO 13175 then describe the consultation duties which arise when Departmental policy, legislative, or regulatory actions have tribal implications. We discuss each separately below.

Section 3 addresses consultation in the formulation and implementation of policymaking that affects Indian tribes. *Id.*, sec. 3. Significantly, section 3 applies to the *formulation* of policy, as well as its implementation. Thus, tribal views must be considered *before* such policy decisions are made. In formulating and implementing policy, Section 3 requires that the agency adhere to the Fundamental Principles set forth in § 2, and to the additional criteria set forth in Sections 3(a) to (c). The additional criteria require that the Department respect tribal self-government, tribal rights, and seek to fulfill the trust responsibility, *id.* at 3(a); grant tribal governments maximum administrative discretion with respect to statutes administered by tribal governments, *id.* at 3(b), encourage the tribes to develop their own policies to achieve program objectives, *id.* at 3(c)(1), and defer to Indian tribes to establish their own standards where possible. *Id.* at 3(c)(2). Consultation is specifically required in determining whether to establish federal standards, and must include discussion of the need for federal standards, and alternatives to limit their scope and preserve tribal autonomy. *Id.* at 3(c)(3).

To maximize its effectiveness, consultation under Section 3 should be initiated as soon as the need to develop policy that has tribal implications has been identified by the agency. Consultation at this stage may result in a decision that the problem, though initially seen as creating the need for policy formation by the agency, is best left to the tribes to address in the exercise of their rights of self-government. At the same time, it is possible that the need to develop a policy may be identified by Indian tribes as well as from within the agency.

Section 4 of EO 13175 addresses legislative proposals, which the Department shall not submit to Congress if they are inconsistent with the policymaking criteria in Section 3. In some instances, the Department will want to consult with Indian tribes in making this determination – and should do so if consultation is requested by a tribe. Section 3 further provides that a legislative proposal that has tribal implications which seeks to establish Federal standards may be submitted *only* if the consultation that is required by Section 3(c)(3) has been completed. In such consultation, the Fundamental Principles set forth in Section 2, as well as the specific criteria set forth in Section 3(a) and (c)(1) and (2), should be addressed. Consultation on legislative proposals under Section 4 should be initiated as soon as it clear that the legislation would implement policies that have tribal implications.

Section 5 addresses consultation in the development of regulatory policies that have tribal implications. Like the reference in § 3 to the "formation" of policy, the reference to its "development" in § 5(a) recognizes that consultation should include discussion of both the problem to be addressed and how to solve it, rather than simply providing an opportunity for tribes to comment on the agency's proposed solution. Under Section 5, consultation on the development of regulatory policies that have tribal implications should begin once the agency has identified a problem that affects Indian tribes which the agency has responsibility to address.

To make the agency accountable to the tribes, the consultation policy must be written. Under Section 5(a), the agency must also develop "an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." As indicated previously, the requirement here is plainly pre-decisional. It applies to the "development of regulatory polices," rather than to a preconceived solution. The agency must also designate an official with primary responsibility for ensuring that the agency consults with Indian tribes in accordance with the requirements of EO 13175. *Id.*, § 5(a). Currently, the DoD's website introduces the person designated as Senior Tribal Liaison, but the addition of easily accessible contact information for reaching the Senior Tribal Liaison or his staff would be very helpful.

Section 5 also conditions an agency's power to issue regulations that have tribal implications on compliance with specific consultation duties. These duties apply in two circumstances: *first*, when the regulation would impose "substantial direct compliance costs" on tribal governments that are not statutorily required, § 5(b); and *second*, when the regulation would preempt tribal law, § 5(c).

Direct compliance costs may be imposed if the funds needed to pay such costs are provided by the federal government, § 5(b)(1), or if prior to promulgating the regulation, the agency has satisfied the detailed requirements of § 5(b)(2). That subsection requires the agency to show that it consulted with tribal officials "early in the process of developing the proposed regulation," § 5(b)(2)(A); provide a tribal impact statement in a separate part of the preamble to the regulation describing the consultation with tribal officials, summarizing their concerns and the agency's position on the need for the regulation, and stating the extent to which tribal officials' concerns were met, § 5(b)(2)(B); and make available to the Director of OMB any written communications submitted to the agency by tribal officials. § 5(b)(2)(C).

Regulations that would preempt tribal law may be promulgated only if the agency satisfies the same requirements as are set forth in § 5(b)(2). That is, the agency must show that it consulted with tribal officials "early in the process of developing the proposed regulation," § 5(c)(2)(A); provide a complete tribal impact statement, § 5(c)(2)(B); and make available to the Director of OMB any written communications submitted to the agency by tribal officials. § 5(c)(2)(C).

In addition, section 5 requires that when issues that relate to tribal self-governance, tribal trust resources, or treaty or other Indian rights are concerned, the agency must consider other consensual mechanisms for developing regulations, including specifically negotiated rulemaking. § 5(d).

Section 6 of EO 13175 requires each agency to review and streamline its processes for waivers of statutory and regulatory requirements. § 6(a). Section 6 also specifically requires an agency to consider any application for a waiver of statutory or regulatory requirements of agency programs with a view towards increasing flexibility at the tribal level where a waiver is consistent with Federal policy objectives. § 6(b). Agencies are required to make a decision on such a request within 120 days of its receipt, or as otherwise provided by law, and if it is not granted, must provide a timely written decision explaining why it was denied. § 6(c). These requirements apply to statutory and regulatory requirements that are discretionary and subject to waiver by the agency. § 6(d).

Finally, section 7 of Executive Order 13175 addresses accountability by imposing specific requirements on regulations and legislative proposals. In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866, an agency must include a certification from the federal official designated to ensure

compliance with Executive Order 13175 "that the requirements of this order have been met in a meaningful and timely manner." § 7(a). A similar certification must accompany the transmittal of any proposed legislation that has tribal implications. § 7(b).

2. The Department's current consultation policy should be specific about timetables and procedural requirements

The current DoD policy establishes a two-step process. In the first stage, DoD personnel will informally contact interested tribes "whenever there is any real possibility that tribal interests may be affected by proposed DoD actions". DoD Indian Policy at 2. This is meant to overcome the fact that the agency "may not always recognize the effect [its] actions may have on tribal interests unless [it] asks." *Id.* If it is clear from the initial discussion that tribal interests will be *significantly* affected by the proposed action, the DoD will initiate more formal consultation process. *Id.* The formal consultation process contains these following stages: consultation planning; initiating consultation; conducting consultation, and after action. *Id.* at 9-10.

We suggest that the DoD's consultation policy could be improved by adding more specific guidelines. First, notice of the consultation must be given sufficiently in advance to allow the tribes to prepare for it. The more complex the matter, the more lead time should be afforded the tribes to prepare for the consultation. DoD currently only requires that "timely notice" be given to tribes. DoD Indian Policy at 6. We would propose that absent exigent circumstances, a minimum of 30 days notice should be required.

The DoD consultation policy does a good job of laying out the steps for initiating formal consultation. The policy requires the installation commander to send a letter to the head of the tribal government, identifying participating installation officials, suggesting issues for consultation, and proposing a schedule. DoD Indian Policy at 9. The letter must be accompanied by follow up action, even if there is a lack of response. *Id.* Furthermore, the tribe must be provided with all the information necessary for the tribe to participate meaningfully in the consultation, including relevant points of contact, general information on base operations and military training, and specific information regarding issues for consultation. *Id.*

However, missing from the current DoD policy is a specific stage where the Department is focused on thoroughly understanding the tribe's views on the issues. We suggest that after the stage where the tribes learns about the agency's proposal and absorbs all the necessary information, there should be an opportunity for the tribes to

present their full views on the proposal, and its impact on tribal interests. In less complex matters, this stage might be combined with the previous stage where DoD shares information with the tribes. In other instances, it will require an additional meeting, and sufficient time for the tribes to prepare. At this stage, a primary objective of the Department should be to gain a full understanding of the tribes' views. The Department's representatives will want to ask questions at this stage, just as the tribes' representatives did at the previous stage. Once that understanding has been achieved, an informed exchange may occur on the issues raised by the proposal. This stage of the consultation is implied in the DoD's current ten-step protocol for consultation, but highlighting the importance of understanding the tribes' perspective would enhance the DoD policy since that is what tribal consultation is all about.

After the consultation, DoD currently requires that the outcome of the consultation be documented, and that a draft be provided to the tribe prior to finalizing. But more importantly, in our opinion, the agency should state how it plans to proceed, including the action it intends to take. That presentation should also address the extent to which the agency's plan addresses tribal concerns. Once the Department has decided how it plans to proceed, tribes should have an opportunity to submit their views on that plan, how it affects the tribe, and how it might be improved. Otherwise, the tribes will have no opportunity to bring the benefit of the consultation process to bear on the agency's decision.

Finally, we suggest that the last stage of the consultation process should involve the announcement of the agency's action, accompanied by a statement of its compliance with the consultation policy of the agency. And throughout the process, the agency should maintain a real-time, public listing, available on its web page of all consultation activities and their status. This initiative would complement DoD's current effort outlined in its action plan to promote to the tribes the revamped Native American Issues pages of the DENIX website and related online resources.

3. The Department's policy should state who will participate in consultation for the Department.

DoD's current consultation policy stresses the communication between tribal leadership and installation commander and installation staff. DoD Indian Policy at 4. We have two comments here. First, we suggest that it is crucial to include in the consultation a senior decisionmaker from the DoD, that is, a person who has responsibility for making the decision on the matter that is the subject of consultation. As

the DoD recognizes, the "single most important element of consultation is to initiate the dialogue with potentially affected tribes before decisions...are made." *Id.* at 5. Without the presence of someone with the authority to make the decision, the consultation process losses its effectiveness. Second, the Department official with primary responsibility for implementing the Department's consultation policy should participate in the consultations (in this case, the Senior Tribal Liaison). This will allow the Department to bring the benefit of prior consultation experience to bear on the consultation process in each instance.

On the tribal side, the decision on who should participate is a matter for the Tribe to determine in the exercise of its powers of self-governance. Tribes will likely direct the participation of tribal officials who are best informed on the subject matter to which the consultation relates, and a tribal policymaker, who can speak more generally to the questions of tribal policy that discussion of the impact of the agency's proposal on the tribe is likely to raise.

In some situations, national tribal organizations may have valuable input and can play a helpful role in the consultation process. DoD's consultation policy raises the issue of contacting the appropriate tribal officials, noting that "many tribes have relatively few enrolled members and only a limited staff to respond to [its] requests." DoD Indian Policy at 5. The national tribal organizations typically have contact information and often have mechanisms for communication that can be helpful to federal agencies in getting information to the appropriate tribal official. This is not a substitute for direct communication and consultation with each tribe, but might be used to supplement and improve agency communications.

Conclusion

Meaningful consultation improves policy-making because it results in increased knowledge on the part of both the federal agency staff and tribes. We look forward to working with the Department to enhance the practicality and effectiveness of its consultation process.

Respectfully submitted,

FOREST COUNTY
POTAWATOMI COMMUNITY

Jeffrey A. Crawford
Attorney General

cc: Forest County Potawatomi Community Executive Council