MESCALERO Apache TRIBE

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VIA EMAIL TO lawrence.roberts@bia.gov; Elizabeth.Appel@bia.gov; & consultation@bia.gov

The Honorable Larry Roberts, Acting Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street, NW, MS 3071
Washington, D.C. 20240

Re: Comments on Tribal Government Input in Federal Infrastructure Decision-Making

Hon. Roberts:

I write on behalf of the Mescalero Apache Tribe to submit the attached comments regarding government-to-government consultation, federal decision-making on infrastructure projects, and the protection of Indian lands, waters, treaty rights, sacred places and Native community health and environments. The comments below urge the Administration to educate all relevant agency officials about Indian treaty rights both on and off-reservation, sacred places, and the U.S. trust responsibility to tribal governments and Native people. We also urge the Administration to adopt and implement best practices throughout the federal agency decision-making process when considering infrastructure projects that could impact Indian lands, waters, treaty rights (both on and off-reservation), sacred places and Native community health and environments. We recommend changes to several specific federal agencies to ensure that their decisions protect tribal government interests.

I. BACKGROUND

There is a long history of infrastructure projects approved by the Federal government over the objections of Tribal Nations have significantly damaged tribal lands, waters, treaty rights, and sacred places. The vast majority of federal lands are carved out of the ancestral homelands of Indian tribes. The historical and spiritual connection of tribes to these federal lands was never extinguished. Courts acknowledge that tribes retain treaty rights to hunt, fish, and gather on unoccupied federal lands. Federal laws acknowledge the continued right of Native Americans to access federal lands to pray, conduct ceremony, and gather medicinal plants. Federal laws and executive orders also require federal land managers to consult with tribal governments prior to taking action that would impact the integrity of federal lands.

II. FEDERAL AGENCY TRAINING AND EDUCATION

- ***Tribal sovereignty and the status of Indian tribes as separate governments under the U.S. Constitution.*** Tribes are sovereign governments pre-dating the United States and retaining the right to govern their own peoples and lands. The U.S. Supreme Court has long-acknowledged that "Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights." The U.S. Constitution's Commerce Clause recognizes the status of tribes as separate sovereign governments. Indian tribes retain inherent sovereign authority to govern our citizens and territories. Tribes are not merely "stakeholders" or "special interests" in the federal infrastructure permitting processes. Rather, tribes exercise jurisdiction over their retained lands and resources, both on and off the reservation. **Additional policy guidance should emphasize the United States' substantive legal responsibilities to tribes and the process of meaningful and effective consultation as a required activity to ensure consideration and accommodation of these substantive rights.**

- ***The legal obligation of the United States to uphold Indian treaty rights – both on and off-reservation.*** Federal law and Supreme Court decisions require federal agencies to consider impacts to tribal treaty rights and to protect (not abrogate) those treaty rights in the federal decision-making process. This tenet must be integrated into and analyzed during the federal review and approval process for projects when Tribes raise concerns or objections based on impacts to or interference with their treaty rights. Federal responsibilities under treaties are significant. Federal agencies have no authority to take unilateral action that would abrogate treaty rights. Accordingly, treaties have been construed by federal courts to reserve and protect a number of rights, both on and off reservation, such as water rights to support on-reservation activities; off-reservation hunting and fishing rights; and off-reservation rights to travel on public highways. Given the breadth of federal projects occurring outside of Indian reservations or trust lands, but on historic tribal lands, it cannot be emphasized enough that federal agencies must understand and recognize that treaty rights frequently extend off-reservation and it is unnecessary that tribes have title to the land. Such off-reservation treaty rights can include commercial uses, and their exercise is not limited to methods used at the time these rights were reserved. To ensure that Indian treaty rights are adequately considered and protected, these principles must be recognized, implemented, and followed by all federal agencies.

- ***The legal and moral obligation of the United States' trust obligation to tribal governments and Native people.*** Federal agencies have a duty to uphold the federal trust responsibility to tribes and Indian people. Obtaining tribal consent for federal actions that affect them is the clearest way to uphold the trust responsibility. The federal trust responsibility includes fiduciary obligations for the management of Indian trust lands and natural resources, including the duty to act with good faith and loyalty. The federal trust responsibility—as recognized by the courts, Congress, and the President—runs across all branches of government, and each agency is responsible for upholding the United States' unique obligations to tribes. **To meet this solemn trust obligation, when agencies are considering projects that may have negative impacts on tribal trust resources, they should seek to uphold the federal trust responsibility by obtaining the informed consent of the potentially impacted tribe.**

- ***Federal obligations incurred under federal laws, including Title 25 of the U.S. Code, the National Environmental Policy Act (NEPA), the National Historic Protection Act (NHPA), the Native American Graves Protection and Repatriation Act (NAGRPA), and other relevant laws.*** In carrying out its obligations and responsibilities to substantively and effectively include tribes in infrastructure permitting and development, the federal government must also adhere to its duties under various environmental, historic, and cultural protection statutes. These statutes stand as a congressional declaration of the United States' responsibilities not only to the environment and other resources, but to tribal governments as well. In concert with the trust, treaty, and consent provisions outlined above, the federal government may look to statutes to guide its actions with respect to tribes.

III. AGENCY-WIDE BEST PRACTICES

- ***Develop programmatic agreements establishing and implementing systems for consultation with tribes.*** In August 2000, the Advisory Council on Historic Preservation (ACHP) established a Telecommunications Working Group to provide a forum for the Federal Communications Commission (FCC), the ACHP, the National Conference of State Historic Preservation Officers (Conference), individual State Historic Preservation Officers, Tribal Historic Preservation Officers, tribes, communications industry representatives, and other interested members of the public to discuss improved NHPA section 106 compliance and to develop methods to streamline the section 106 review process. Out of these discussions a Nationwide Programmatic Agreement was promulgated and the FCC implemented a system that provides for: early notification to tribes with regard to proposed cell tower sites; voluntary tribal-industry cooperation to address tribal concerns; recognition of the appropriateness of industry paying fees to tribes for their special expertise; and affirmation of the FCC's ultimate obligation to consult with tribes as requested or necessary. This is a model for other federal agencies.

- ***Consult and coordinate early with Indian tribes when considering the planning of federal projects and provide early, adequate notice to tribal governments and ensure open information sharing about all aspects of an infrastructure project under consideration.*** Tribes should be included in infrastructure decision-making from the very earliest stages, including being involved in key decisions regarding priorities for development. Tribes should also be included in any discussions regarding particular projects. For instance, as soon as federal agencies are discussing projects with private parties or state governments, they should also be talking to tribes. Early consultation ensures that problems are identified and resolved in a timely fashion, preventing costly delays down the line. Similarly, tribes must receive full information about projects as soon as possible. Tribes are often faced with relying on public notices and news releases about projects while states are included in decision-making and scoping processes from the very beginning. In addition to being early in the process, meaningful consultation should always be undertaken with the goal of reaching consensus. Without this goal, there is no actual consultation—rather, the federal government merely notifies tribes of their intentions and catalogues tribal concerns. Just like in any other discussions between parties with interests at stake in a particular venture, the federal government and tribes should be sitting down with one another, engaging in meaningful back and forth, and reaching agreement to facilitate project development.

- ***Provide funding for tribal governments to fully participate in federal processes to approve or permit infrastructure projects on or near Indian lands.*** Oftentimes, funding is necessary for tribes to become educated about their rights under various statutes and develop the capacity to exercise those rights. For instance, Tribal Historic Preservation Offices require the resources to analyze and respond to the myriad notices of consultation that they receive regarding federal infrastructure projects. Identification of tribal historical sites or assessment of potential impacts to tribal resources requires the time and resources of already underfunded tribal governments. Support is needed for tribes to be able to participate in permitting processes in a meaningful way.

- ***Develop tribal impact statements and a Trust Responsibility Compliance Officer.*** The proposed Policy Statement addresses the need for concrete action in two respects. First, it would require the preparation of an Indian Trust Impact Statement before any agency takes action which may harm or threaten tribal lands, waters, treaty rights, or cultural resources. Such a statement should include a statement on the need for tribal consent or that extraordinary circumstances touching upon significant national interests requires that the action move forward despite a lack of consent. Second, the Policy Statement suggests that a determination that a compelling national interest outweighs tribal interests should be reviewed by a Tribal Trust Compliance Officer. To avoid conflicts of interest, the Secretary of Interior should serve as Tribal Trust Responsibility Compliance Officer for all other federal agencies. For Department of Interior permits and approvals, the Managing Director of the Council on Environmental Quality should serve as Tribal Trust Responsibility Compliance Officer.

- ***Evaluate cumulative impacts and regional environmental impacts on Indian lands, treaty rights (on and off-reservation), sacred places, and tribal community health and environment.*** Environmental and cultural assessments should take into account cumulative impacts, as well as impacts to the regional environment, including tribal rights and resources in the region. Federal agencies should conduct regional mapping, not just project specific mapping, in order to fully evaluate unintended or unforeseen consequences. A project map may not show the full area that could be affected by environmental or other hazards that could ensue from an individual infrastructure project. Projects should be assessed based on their broad impacts rather than artificially segmenting or narrowing the scope of review. Lead agencies should be assessing the potential impacts and consulting with states and Indian tribes early in the process, particularly for long, linear projects like roads, pipelines, and transmission lines.

IV. AGENCY-SPECIFIC RECOMMENDATIONS

A. Army Corps of Engineers

- ***Repeal Appendix C and Follow ACHP Regulation.*** The Army Corps of Engineers' "Procedures for the Protection of Historic Properties," codified at 33 C.F.R. part 325, Appendix C, ignores the Army Corps' statutory duty to consult with any tribe that attaches religious and cultural significance to a historic property that would be affected by the issuance of an Army Corps permit. The NHPA Amendments of 1992 enacted the statutory duty on the part of federal agencies to consult with tribes in the section 106 process. Appendix C has not been

revised to reflect this statutory mandate. The procedures in Appendix C operate to deprive tribes of their statutory right to be consulted when the issuance of a Corps permit would affect a historic property to which a tribe attaches religious and cultural significance. Appendix C is inconsistent with several provisions of the ACHP regulations intended to implement this right. Appendix C is inconsistent with the statutory requirement that, if a federal agency decides to proceed with an undertaking without an agreement on the resolution of adverse effect, the decision to do so must be made by the head of the agency and cannot be delegated. We urge the Administration to withdraw Appendix C.

- ***Re-Evaluate the Nationwide Permit (NWP) Process in Accordance with ACHP Comments.*** The appropriateness of using nationwide permits (NWP) for projects that potentially impact Indian treaty rights (both on and off-reservation), sacred places, the federal trust responsibility, and Indian lands, waters and environments should be re-evaluated as they come up for renewal, and the Corps should develop an alternative for permitting large projects that cover broad areas so that tribal impacts are fully evaluated. In particular, the Army Corps should prohibit application and utilization of Nationwide Permit 12 for crude oil pipelines. At a minimum more generally, in conjunction with the utilization of nationwide permits, where tribes have raised significant concerns in relation to a proposed project, federal policy should require federal agencies to evaluate whether additional steps or analysis are needed to evaluate and address tribal impacts. This should include independent evaluation of environmental justice as it pertains to impacted tribes and/or the need for additional agency reviews under NEPA or NHPA with the tribes as cooperating agencies to identify and resolve issues of concern. If the activity proposed to be taken under an NWP "may have the potential to cause effects to historic properties listed, or eligible for listing in, the National Register of Historic Places" General Condition 20, entitled "Historic Preservation" requires the proponent to file with the Corps. However, this General Condition fails to adequately provide for compliance with NHPA section 106. The ACHP explained several flaws in General Condition 20 in its comment letter to the Army Corps on the proposed rule reissuing the NWPs. General Condition 20 provides that "[w]hen reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act." The ACHP understands the term "current procedures" as a reference to Appendix C, and the ACHP regards those procedures as inadequate for compliance with NHPA section 106. As stated above, Appendix C is not consistent with existing law and must be rescinded. The wording of General Condition 20 should refer to the ACHP regulations, at least until any alternate procedures that the Army Corps may develop have been approved by the ACHP. General Condition 20 delegates key decision-making to non-federal permittees. This improper delegation includes the threshold determination of whether the permitted activity has the potential to affect historic properties. As pointed out by the ACHP in its comment letter, the Corps' practice of relying on the permittee to determine the potential to cause effects to historic properties "often leads to the Corps' failure to adequately consult with Federally recognized Tribes regarding the identification of, and assessment of effects on, historic properties of religious and cultural significance to them that may be affected by the undertaking." General Condition 20 does not acknowledge the statutory duty of the Army Corps to consult with tribes in the section 106 process, as provided in NHPA section 101(d)(6). 54 U.S.C. § 302706. The failure to consult with tribes early in the process leads to situations in which tribal sacred places are damaged or

destroyed before they are even evaluated for eligibility for the National Register. In other situations, tribal sacred placed are identified and evaluated for eligibility only after options for avoiding impacts have been limited by the permittee's conduct in reliance on the NWP process. The Corps should revise its NWP rules in accordance with the ACHP comments.

B. Advisory Council on Historic Preservation

In many federal projects, and in the current Dakota Access Pipeline case, tribes have raised the very serious concern of companies engaging in "anticipatory demolition" in order to avoid the section 106 process in its entirety. This troubling practice is a reality that many tribes have experienced. The NHPA provides protections against anticipatory demolition under section 110(k). However, this statutory provision only applies if the tribal sacred place has been determined to be eligible for the National Register and it has been intentionally damaged by an applicant. Since so many places of religious and cultural significance for tribes takes specialized expertise and knowledge which can only be provided by tribes themselves, archaeological surveys often miss such places. The ACHP must enforce its "reasonable and good faith effort" consultation requirement, so that early and meaningful consultation occurs before any key decisions or actions are taken. In addition, all federal agencies should be directed to follow the National Parks Service guidance, Bulletin 38. Anticipatory demolition may also occur when potentially eligible properties are encountered in connection with construction activities *after* the section 106 process has been completed. Such discoveries are especially likely when compliance is documented with a Programmatic Agreement rather than an Memorandum of Agreement. Section 800.13 of the ACHP regulations addresses post-review discoveries and provides that the federal agency office, "in consultation with the SHPO/THPO, may assume a newly-discovered property to be eligible for the National Register for purposes of section 106." To protect against anticipatory demolition in this context, ACHP should implement a presumption that, if a tribe says a place is sacred, it should be treated as eligible for the Register unless and until determined to not be eligible. With respect to post review discoveries, this might be accomplished by a guidance document that says to interpret the word "may" in paragraph 800.13(c) as "will." Such a presumption should be crafted so that it operates to establish the element of intent to cause significant adverse effects.

C. Federal Energy Regulatory Commission

Tribal governments have longstanding concerns with the Federal Energy Regulatory Commission's (FERC) views of its role in carrying out the federal trust responsibility as an independent federal agency. In its 2003 Policy Statement on Consultation with Indian Tribes in Commission Proceedings, FERC states that it "will endeavor to work with Indian tribes on a government-to-government basis, and will seek to address the effects of proposed projects on tribal rights and resources through consultation pursuant to the Commission's trust responsibility . . . ." However, FERC goes on to say that its consultation authorities are limited because "[a]s an independent regulatory agency, the Commission functions as a neutral, quasi-judicial body, rendering decisions on applications filed with it, and resolving issues among parties appearing before it, including Indian tribes." This includes not engaging in off the record, or ex parte, communication with tribes, even in a consultation setting. Therefore, if a tribe disagrees or raises

concerns during a consultation or meeting with FERC, the Commission has to end the meeting if the other parties are not present.

Further, FERC's Guidelines for Reporting on Cultural Resources Investigations for Pipeline Projects directs project proponents to assist the Commission in meeting its obligations under section 106 of the NHPA and states that the project sponsor "should attempt to consult with the SHPO/THPO, Indian tribes, and applicable land-managing agencies." This inappropriately and unlawfully delegates FERC's obligations under section 106 to a third party. Despite recognizing its federal trust responsibility, FERC's policies place tribes on equal footing with project proponents instead of acknowledging tribal governmental status. Further, FERC seeks to delegate its statutory role to project proponents. FERC sees its role in enforcing the federal trust responsibility as being more of a judge or mediator between various interests, not as an agency charged with upholding it. Therefore, when the interests of FERC, a project proponent, and tribes align, as is the case with some dam removals, it creates a positive outcome for all parties. However when their interests do not directly align, and tribes voice their concerns with a project directly to FERC, more often than not, FERC directs the tribe to speak to the project proponent instead of the Commission itself. This allows FERC to play a passive role in the trust responsibility and creates a more adversarial atmosphere instead of a collaborative one. This is not to say the Tribes are adverse to speaking to project proponents; nor is it to say that those discussions cannot be beneficial. Rather, the point is that FERC cannot and should not absent itself from this process. We recommend that FERC, through tribal consultation, revise its tribal consultation policies to further acknowledge and strengthen its direct role in protecting the tribal resources through its trust federal trust responsibility obligations. FERC's policies and guidance documents must also be updated to allow for early, open, and consistent communication between FERC and tribal governments. FERC must also clarify that, as a federal agency, it is solely responsible to uphold its federal trust responsibility obligation to tribal governments.

FERC should also increase the size of its staff involved in reviewing energy project applications and preparing the Environmental Impact Statement for each project. Currently, FERC staff is insufficient to ensure adequate tribal consultation in the process leading up to issuing a certification. Additional staff may help FERC carry out its responsibilities to provide early notice to tribes, fully evaluate the potential for a project to impact tribes, and consult with tribes regarding potential effects to tribal rights and resources.

D. Nuclear Regulatory Commission

Throughout the infrastructure consultations, many tribal leaders noted issues with the Nuclear Regulatory Commission's (NRC) consultations and interactions with tribal governments. As an independent regulatory agency funded through dues from the industry which it regulates, a majority of concerns the center around how the NRC implements its federal trust responsibility. The NRC took an important step in improving its tribal policies by releasing a revised *Tribal Protocol Manual: Guidance* for NRC Staff in 2014. The Guidance is currently under review after a comment period, and we believe that it can be further strengthened. As pointed out in comments provided by the ACHP, the NRC requires its staff to conduct "outreach in an effort to encourage [t]ribes to participate in the NRC regulatory process when agency

policies have a *substantial direct effect* on one or more Indian [t]ribes." While the "substantial direct effect" is consistent with Executive Order 13175, because of the type of hazardous materials the NRC regulates and the potential for serious impacts to tribal lands and natural resources, the NRC should broaden this term because what tribes might consider a "substantial direct effect;" for example the impact to reserved treaty or trust right to hunting, gathering, and fishing rights in historical lands, might not be in considered by the NRC. This highlights the need for further tribal engagement and collaboration.

E. National Park Service

Many tribal sacred places are eligible for the National Register as traditional cultural properties (TCPs), a kind of historic property that is the subject of a National Park Service guidance document, Bulletin 38. Bulletin 38 provides important guidance on applying the National Register criteria to places that hold religious and cultural significance for a tribe. For example, the word "history" may be interpreted to include oral history, and an "event" with which a place is associated may be an event in a tribe's oral tradition, which need not be "demonstrated scientifically" to have happened; the "persons" who were significant in our past may be persons "whose tangible, human existence can be inferred on the basis of historical, ethnographic, or other research" or "'persons' such as gods and demigods who feature in the traditions of a group." In addition, a TCP may be eligible for the Register because, through ethnographic or ethnohistorical research techniques, it has the potential to yield important information. Additionally, interviews with elders are an acceptable way of developing information to fit within the TCP criteria. The definition of TCP and criterion identified in Bulletin 38 was codified the 1992 Amendments to the National Historic Preservation Act, and Bulletin 38 remains an important guidance document. In 2012, NPS initiated a project to produce an updated edition, which has not been released yet. As this guidance is vital to federal agencies, we urge the NPS finish its revision as soon as possible and include tribal recommendations regarding the topics were identified by NPS, including describing: a "traditional" community; "continued use" by a traditional community Evolving uses of resources by a traditional community; evolving uses of resources by a traditional community; broad ethnographic landscapes; property boundaries; and resource integrity.

F. Environmental Protection Agency

The EPA plays a critical role in federal infrastructure project permitting by providing comments on EIS's prepared by other agencies. There are several steps the EPA can take to improve protection of tribal rights and resources. The EPA should update its 1984 manual entitled "Policy and Procedures for the Review of Federal Actions Impacting the Environment." Since the manual was published, there have been many developments in the federal government's understanding of its responsibilities to tribes, including consultation requirements. The manual should be updated to include the most up to date best practices for engaging tribes and protecting tribal rights and resources. EPA should also improve its procedures for reviewing EIS's to ensure consideration of impacts to tribes, including impacts to trust property and treaty rights. The EPA regional office should initially review each project to determine whether it will have an impact on tribes. To the extent a project would affect tribes, the EPA should evaluate how tribes have been involved in the process, including in the evaluation of alternatives and the

identification of historic and cultural properties. This analysis should inform EPA's responses to EIS's.

G. Council on Environmental Quality (CEQ)

CEQ should amend its regulations at 40 C.F.R. § 1503(a)(2)(ii) to ensure that off-reservation rights are protected. The current regulation addresses "when the effects may be on a reservation." The following language should be added: "or in an area that is protected by treaty or an area that has traditional, cultural, and historic importance." Finally, CEQ should issue a strong statement to all federal agencies stressing the importance of following CEQ regulations in every respect, including involving tribes early in the process and having tribes take the lead in carrying out the tasks of identifying historic, cultural, and religious sites.

In conclusion, thank you for undertaking this process to re-evaluate and improve the federal approval and permitting process to ensure that these processes meet the United States' solemn legal and moral obligations to Indian Country. And, thank you in advance for considering these comments. Please feel free to contact me if you have any questions.

Sincerely,

Danny H. Breuninger, Sr.
President