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MEMORANDUM

October 3, 2016

To: Tribal Clients

From: Hobbs, Straus, Dean & Walker, LLP

Re: *NCAI Webinar: Consultations on Tribal Input into Federal Infrastructure Decisions*

On September 30, 2016, the National Congress of American Indians (NCAI) held a webinar entitled “Consultations on Tribal Input into Federal Infrastructure Decisions.” The webinar was held in response to the September 23, 2016 announcement by the Departments of the Interior, Justice, and the Army inviting tribes to participate consultations regarding federal infrastructure decisions.

The Obama Administration Calls for Consultation

The Obama Administration’s September 23rd consultation announcement requested tribal input on the following two questions:

- (1) Within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights?; and
- (2) Should new legislation be proposed to Congress to alter that statutory framework and promote those goals?

To gather tribal input regarding these questions and to engage in government-to-government consultation, the Administration announced it would hold a listening session on October 11th at the NCAI Annual Convention in Phoenix; hold a total of five in-person consultations in Seattle, Albuquerque, Billings, Minneapolis, and Rapid City; and wrap up with a phone consultation on November 21, 2016.¹ The Administration is also accepting written comments until Friday, November 30, 2016, and these comments may be submitted at consultation@bia.gov.

NCAI Framing Paper Workgroup

NCAI Executive Director Jacqueline Pata reported that an NCAI workgroup would put together a framework paper covering the following areas:

¹ Details for the listening session and consultations are available at <http://www.bia.gov/WhoWeAre/AS-IA/ORM/TribalInput/index.htm>.

- (1) historical perspective, including the history of the National Historic Preservation Act (NHPA) and the inclusion of tribal properties;
- (2) contemporary issues and tribal stories;
- (3) existing processes and areas in which tribal access or consideration of tribal concerns is curtailed;
- (4) the trust responsibility and the connection to tribal consultation;
- (5) consultation and the right of consent, including government-to-government negotiations and how to make consultation a more collaborative process;
- (6) administrative solutions, including regulatory fixes, memorandums of agreement and programmatic agreements, updating relevant executive orders, and analyzing the role of the United Nations Declaration on the Rights of Indigenous Peoples;
- (7) congressional solutions, including analyzing reform to NHPA, the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), and other laws; and
- (8) a tribal communications strategy to advance Indian Country advocacy and counter opposition.

Ms. Pata stated that NCAI will be looking for volunteers to help draft and review sections of this framework paper.

Panelists Discuss Current Framework, Pitfalls, and Opportunities

Vanessa Ray-Hodge, a partner with Sonosky Chambers presented an overview of federal policies impacted by tribal consultation. She stated that upcoming efforts to reform tribal consultation should impact all federal agencies and should attempt to make policy and regulatory changes before the end of the Obama Administration. Additionally, she stated that there must be efforts to form a path forward for legislative proposals, which likely would not be implemented prior to the end of the current administration. Ms. Ray-Hodge stressed that decisions that emerge from the upcoming consultation should not be limited to infrastructure projects but should rather apply to any situation in which tribal interests are at stake. Ms. Ray-Hodge addressed the need for federal agencies to use their discretion to perform more environmental review than is required under current law; to consult with tribes early in the process; and to involve tribes in the scoping of projects, particularly in situations where projects are fast tracked.

Greg Smith from our office provided information about Section 106 of the NHPA, which requires consideration of impacts on tribal historic properties when a federal undertaking occurs. He stated that Section 106 applies to all federal agencies, including independent executive agencies, requiring them to evaluate whether an undertaking has the potential to affect historic property, to determine if an adverse effect may occur, and decide what to do if an adverse impact will occur. The process for determining if there is an adverse effect, with regard to tribes, involves consulting with tribes and negotiating a resolution. He stressed, however, the procedural nature of the NHPA, which does not require that projects are halted if adverse effects cannot be

mitigated. The agency has final decision-making authority whether to proceed, cancel or modify a project to address adverse effects. Mr. Smith discussed the importance of dialogue in the consultation process, providing the example of the construction of cell towers by the Federal Communications Commission (FCC). He described the dialogue that occurred between tribes and companies in that situation, noting that all documentation made clear that the consultation obligation remains with the FCC, but highlighting the ability of tribes and companies to work together to mitigate impacts on tribal historic sites.

Paul Moorehead, an attorney at Powers, Pyles, Sutter & Verville, described two congressional measures currently pending to address tribal consultation in the context of federal infrastructure projects. He reported that Representative Gwen Moore (D-WI) succeeded in getting an amendment to the Water Resources Development Act (WRDA), H.R. 5303, requiring review of policies, regulations, and guidance regarding the US Army Corps of Engineers (USACE) projects that may have an impact on tribal cultural or natural resources. The amendment identifies nine areas of study regarding tribal consultation. The WRDA passed the House 399 to 25, and further action is expected in the lame duck session. Additionally, Representative Raul Grijalva introduced the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes (RESPECT) Act, H.R. 5379, in June 2016. The bill would establish specific requirements agencies must meet to implement accountable tribal consultation processes and would provide a right to judicial review. Mr. Moorehead reported that the House Natural Resources Subcommittee on Indian, Insular, and Alaska Native Affairs held a hearing on the bill in June but that the full Committee markup schedule was unknown and it is not clear the bill will receive further consideration.

During the question and answer session following the panel presentations, participants stressed the need for implementation of current consultation requirements as well as attention to changes that could be made in laws and policies. Participants also emphasized the need for interagency consultation and accountability in the consultation process. Dean Suagee of our office reported that the Advisory Council on Historic Preservation (ACHP) is preparing, as part of its 50th anniversary review, recommendations on strengthening the national historic preservation program. The ACHP is accepting comments through October 17, 2016. Additionally, Mr. Suagee stated that in June the USACE issued a proposed rule to reissue and modify nationwide permits. He recommended that tribes urge the USACE to reopen the comment period for the proposed rule.

Conclusion

NCAI will be working to develop the tribal framework paper to submit to the Administration. We will keep you updated as this and other consultation efforts move forward. Please do not hesitate to contact us if you would like any further information or assistance preparing a comment.