



# COLORADO RIVER INDIAN TRIBES

## *Colorado River Indian Reservation*

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July 14, 2017

### Via U.S. Mail and Email

Secretary Ryan Zinke  
U.S. Department of the Interior  
1849 C Street, N.W.  
Washington DC 20240

Acting Assistant Secretary Michael S. Black  
Bureau of Indian Affairs  
MS-3642-MIB  
1849 C Street, N.W.  
Washington, D.C. 20240  
*Via Email- [consultation@bia.gov](mailto:consultation@bia.gov)*

**Re: Comments of the Colorado River Indian Tribes on Executive Order 13781,  
“Presidential Executive Order on Comprehensive Plan for Reorganizing the  
Executive Branch”**

Dear Secretary Zinke and Acting Assistant Secretary Black:

On behalf of the Colorado River Indian Tribes (CRIT or the Tribes), I call upon you to consider the below recommendations in proposing a plan to reorganize the Department of Interior in response to Executive Order 13781, “Presidential Executive Order on Comprehensive Plan for Reorganizing the Executive Branch” (“Executive Order 13781”). Our recommendations are intended to supplement the comments made by tribal leaders at the Department of Interior’s Listening Session on Reorganization of the Executive Branch at the National Congress of American Indians’ 2017 Midyear Convention.

As a matter of background, CRIT is a federally recognized Indian tribe comprised of over 4,000 members belonging to the Mohave, Chemehuevi, Hopi and Navajo tribes. The approximately 300,000-acre Colorado River Indian Reservation sits astride the Colorado River between Blythe, California and Parker, Arizona. The ancestral homelands of CRIT’s members, however, extend far beyond the Reservation boundaries. Significant portions of public and private lands in Arizona, California, and Nevada were once occupied by the ancestors of CRIT’s Mohave and Chemehuevi members. Consequently, these landscapes, many of which are controlled by the Department of Interior, remain imbued with substantial cultural, spiritual, and religious significance for CRIT’s current members.

The stated purpose of Executive Order 13781 is “to improve the efficiency, effectiveness, and accountability of the executive branch...” As a tribal government, we are well aware of the challenges of providing core governmental services with limited resources. However, in confronting these conflicts on a daily basis, we never forget our responsibilities to our people. In preparing a draft plan to President Trump, I urge you to be mindful of the federal government’s fundamental legal responsibilities to tribal nations, namely, the federal trust responsibility and government-to-government consultation obligations. The unique relationship between the federal government and Indian Tribes is defined by the United States Constitution, treaties, statutes, Executive Orders, and judicial decisions. Federal responsibilities to Indian Tribes cannot be shifted to state or local governments or to the private sector. Therefore, your plan must affirm the federal government’s legal responsibilities to Indian Tribes, especially because as tribal nations, we have all experienced the federal government’s shameful legacy of broken promises. In other words, we are not opposed to improving the efficiency and accountability of federal government but not at the expense of honoring the federal government’s fundamental responsibilities to tribes.

We understand that Executive Order 13781 does not provide a specific reorganization plan for our review. However, we are apprehensive of providing comments in response to nebulous goals like “efficiency” and “effectiveness”, in part, because of the federal government’s history of broken promises to tribes. On the other hand, because we know that any changes will directly impact us, we are compelled to make our views known to you. We urge you to submit your proposed plan to tribes for review and comment and allow sufficient time for meaningful dialogue with tribes prior to approving any reorganization plans. With these points in mind, we offer the following recommendations for the Department of Interior’s consideration:


- Although we agree that reforms are needed to the Bureau of Indian Affairs, the Bureau of Indian Affairs cannot be abolished. The Bureau of Indian Affairs must be administered as a resource for fulfilling the federal government’s trust responsibilities to tribes.
- The Bureau of Indian Affairs must be staffed with professionals who understand how tribes work and do not view tribes with a “one size fits all” mentality. Indian Tribes have never been one of the same. For example, the needs of tribes located in the eastern part of the United States are different than the needs of western area tribes. These needs are driven, in part, by different industries, cultures, and resources. Staff must be able to recognize and appropriately respond to different tribal interests and needs.
- The Bureau of Indian Affairs must view its interactions with tribes as a back and forth dialogue. Specifically, the Bureau of Indian Affairs must be prepared to meaningfully receive and respond to input. This recommendation not only applies to the Bureau of Indian Affairs, but also, to other agencies within the Department of the Interior, such as the Bureau of Land Management. CRIT recently adopted a Government-to-Government Consultation Policy that outlines the requirements for adequate and lawful government-to-government consultation

with the CRIT Tribal Council. We are attaching a copy of the policy for your convenience. We strongly encourage you to use our policy as a guide to improve informed decisionmaking within the Department of the Interior and the Bureau of Indian Affairs.

- The Bureau of Indian Affairs and Indian Health Service must function as a part of the community. In our experience, the Indian Health Service has lost the connection that it traditionally had with members of our community. The provision of health care services must be based upon treating people, not mathematical equations.

Again, we look forward to receiving any draft reorganization plan(s) from the Department of Interior for review and comment. Also, we would like the opportunity to meet with you for government-to-government consultation upon acknowledgment of receipt of CRIT's Government-to-Government Consultation Policy. Please copy the Tribes' Attorney General, Rebecca A. Loudbear, at [rloudbear@critdoj.com](mailto:rloudbear@critdoj.com), and Deputy Attorney General Nancy H. Jasculca, [njasculca@critdoj.com](mailto:njasculca@critdoj.com), on all correspondence to the Tribes.

Respectfully,

 Acting  
Dennis Patch  
Chairman, Colorado River Indian Tribes

Cc: Tribal Council of the Colorado River Indian Tribes  
Tashina Harper, Executive Secretary  
Rebecca A. Loudbear, CRIT Attorney General  
Nancy H. Jasculca, CRIT Deputy Attorney General

Enclosure

## **Government-to-Government Consultation Policy of the Colorado River Indian Tribes**

The federally recognized Colorado River Indian Tribes (CRIT or the Tribes) have over 4,000 active members from four distinct tribes – the Mohave, Chemehuevi, Hopi, and Navajo. The Tribes' reservation, which encompasses nearly 300,000 acres, straddles the Colorado River in both Arizona and California. The Tribes' ancestral homelands, however, extend far beyond the current reservation boundaries, into what is now public and private land in Arizona, California, and Nevada. As a result, the Tribes' cultural resources, including sacred sites, trails, and artifacts, are found beyond the reservation boundaries as well. The Tribes are deeply committed to the ongoing protection of such resources located both on- and off-reservation.

Federal law recognizes that CRIT is a sovereign government distinct from the United States. As a result of this status, the United States must engage in government-to-government consultation with the Tribes when actions or decisions of the United States have the potential to impact the Tribes, its government, tribal land, or cultural resources. This consultation must occur before the momentum toward any particular outcome becomes too great. The purpose of this government-to-government consultation must be to obtain CRIT's free, prior, and informed consent for such actions.<sup>1</sup> Desired outcomes include an ongoing, mutually beneficial relationship between federal agencies and the CRIT Tribal Council, deference to tribal sovereignty, and informed decision-making by both the United States and the Tribes. Federal agency staff and decision-makers must view consultation as more than listening and learning sessions with Tribal Council. Instead, there must be an ongoing, dynamic relationship between federal agencies and the Tribes that is built upon the agencies' concerted effort to understand the Tribes' history, culture, and government.

The Tribes have developed this policy paper to guide future government-to-government consultation with the United States and its administrative agencies.<sup>2</sup> This paper outlines CRIT's consultation rights and the specific characteristics that comprise minimally adequate consultation under federal law. This paper also offers additional suggestions to ensure that consultation is effective and mutually respectful.<sup>3</sup> If federal agencies do not follow this policy, CRIT does not consider the communications from the agencies to meet the consultation requirements of tribal or federal law. Acknowledgement of this policy is required before an agency schedules a government-to-government meeting with Tribal Council. CRIT is committed to seeking recourse

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<sup>1</sup> United Nations Declaration of the Rights of Indigenous Peoples, Articles 19 and 32; *see also* 36 C.F.R. § 800.1(f) (defining "consultation" as "the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement with them."); BLM Manual Handbook H-8120-1 at I-2 (consultation includes "[t]reating tribal information as a necessary factor in defining the range of acceptable public-land management options.").

<sup>2</sup> 36 C.F.R. § 800.4(c)(2)(ii)(C); 43 C.F.R. § 10.5(d)(3); Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions (January 2017) ("Improving Tribal Consultation"), Key Principle 8.

<sup>3</sup> Required actions are distinguished from recommended actions by use of the words "must" and "shall" versus "should."

through all available political, legal, and media channels if this request is denied or if the agency fails to comply with this policy.

### **Why A Formal Process is Needed**

Federal agencies (including the Department of the Interior, Bureau of Land Management, and Bureau of Indian Affairs) have consistently failed to engage in adequate government-to-government consultation with CRIT and other tribes. The United States recently recognized this troubled history in suggesting needed modifications to the consultation process.<sup>4</sup> In CRIT's experience, agencies have asked for substantive tribal comments on project and policy documents after those projects and policies have already been approved or implemented. Agency staff and decision-makers have attended meetings with Tribal Council without adequate information or authority to meaningfully respond to the Tribes' concerns. Agencies have repeatedly refused to provide responses to CRIT's comments, including any explanation for why CRIT's requests cannot be accommodated. These failures have resulted in direct harm to CRIT, its members, and cultural resources of great importance to the Tribes.

As one example, BLM authorized construction of the nearly 2,000-acre Genesis Solar Energy Project on land once occupied by the ancestors of CRIT's Mohave members. The project involved significant grading along the shoreline of Ford Dry Lake, resulting in the removal of over 3,000 cultural resources over the vehement objections of the Tribes. These artifacts are now stored at the San Bernardino County Museum with no access for CRIT members. In accordance with cultural, spiritual, and religious practices, CRIT has repeatedly asked BLM to permit reburial of the Genesis artifacts, as well as any other artifacts that are inadvertently disturbed within the ancestral homeland. Yet, BLM has refused to engage in government-to-government consultation on this critical topic. Letters have been left unanswered, harmful agency policies have been issued without advance notice or consultation, and BLM officials have been unprepared to discuss their position when in-person meetings have occurred. These consultation failures have resulted in severe and ongoing harm to CRIT and its members.

### **Basis of Consultation Right**

The fundamental principle underlying CRIT's right to meaningful consultation with the United States is the Indian trust doctrine. Pursuant to this doctrine, the United States has a fiduciary duty over tribal lands and resources as Indian trust assets.<sup>5</sup> As part of this duty, the United States has an obligation to consult with CRIT about federal actions that have the potential to impact these assets or other attributes of tribal sovereignty. For CRIT, tribal sovereignty includes an obligation to protect tribal and cultural resources that are located in the ancestral homelands of CRIT members.

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<sup>4</sup> Improving Tribal Consultation, at 1-5.

<sup>5</sup> *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 788 (9th Cir. 2006); *Navajo Tribe of Indians v. United States*, 364 F.2d 320, 322 (Ct. Cl. 1966).

This fundamental consultation right is engendered in federal statutes,<sup>6</sup> executive orders,<sup>7</sup> and agency policies.<sup>8</sup> These laws help implement and explain the consultation right that stems from the Indian trust doctrine, but do not diminish it.<sup>9</sup> Where appropriate, CRIT relies on these laws to support its definition of adequate consultation.

### Characteristics of Adequate Consultation

*Tribal Sovereignty.* Government-to-government consultation must respect tribal sovereignty.<sup>10</sup> The federal government shall not treat consultation as a “box to be checked,” but as a meaningful dialogue intended to result in consensus between the United States and the Tribes.

*Addressing Tribal Concerns.* The federal government shall timely seek and review CRIT’s written and oral comments and provide comprehensive responses to Tribal concerns and requests.<sup>11</sup> Responses to written comments should generally be provided before any in-person government-to-government consultation. Prior to reaching its final decision, a federal agency must explain how that decision addresses CRIT’s concerns.<sup>12</sup> Where an agency is unable to fully address CRIT’s concerns, the agency shall clearly explain its reasoning based on the legal, practical, or policy constraints on its decision-making.<sup>13</sup> If CRIT has articulated its concerns in writing, this explanation should be in writing as well.

*Involved Parties.* Government-to-government consultation requires an in-person meeting between CRIT Tribal Council and the agency decision-maker with ultimate authority for a proposed project or action.<sup>14</sup> This decision-maker must be prepared with sufficient details about the proposed project or action, the Tribes’ history, culture and government, and the Tribes’

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<sup>6</sup> See, e.g., National Historic Preservation Act (NHPA), 54 U.S.C. §§ 302701(e), 302706(b); 36 C.F.R. § 800.5(a); Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3002(b)-(c), 3003(b), 3004(b), 3005(a)(3); 43 C.F.R. § 10.5; Archaeological Resources Protection Act (ARPA), 43 C.F.R. §§ 7.7(b)(4), 7.16(b)(2)-(3).

<sup>7</sup> Executive Orders 12875, 13007, 13175; September 23, 2004 “Memorandum on Government-to-Government Relationship with Tribal Governments”; November 9, 2009 “Memorandum for the Heads of Executive Departments and Agencies.”

<sup>8</sup> Secretarial Order 3317 § (b); Department of the Interior Policy on Consultation with Indian Tribes; BLM Manual 8210: Tribal Consultation under Cultural Resource Authorities; Bureau of Indian Affairs Government-to-Government Consultation Policy (BIA Consultation Policy) at V.1-3.

<sup>9</sup> 36 C.F.R. § 800.4(c)(2)(ii)(B); Executive Order 13175, § 2.

<sup>10</sup> 36 C.F.R. § 800.4(c)(2)(ii)(B); BLM Manual 8120 at .08(A) (“The special legal status of tribal governments requires that official relations with BLM . . . shall be conducted on a government-to-government basis.”).

<sup>11</sup> Executive Order 13175, §§ 5(b)(2)(B), 5(c)(2); Improving Tribal Consultation, Key Principle 6.

<sup>12</sup> BLM Manual 8120, Glossary of Terms (“consultation” defined to include “documenting the manner in which the [tribal] input affected the specific management decision(s) at issue.”); BLM Manual Handbook H-8120-1 at I-1; Improving Tribal Consultation, Key Principle 6.

<sup>13</sup> BLM Manual 8120 at .06(E) (“Field Office Managers and staff . . . shall document all consultation efforts.”); Improving Tribal Consultation, Key Principle 6.

<sup>14</sup> See, e.g., 36 C.F.R. § 800.2(a); BIA Consultation Policy at VI.A(4); BLM Manual 8210 at .06(A).

anticipated or specific concerns with respect to the proposed project or action.<sup>15</sup> This decision-maker should also have formal training regarding tribal sovereignty, the Indian trust doctrine, and other aspects of federal Indian law. The agency should use its staff to communicate project information to CRIT and its staff and to prepare the agency decision-maker for the government-to-government consultation. For example, prior to meeting with CRIT Tribal Council, it is the Tribes' expectation that agency staff will have provided baseline information about the project and its potential impacts to Tribal staff, such as survey results and ethnographic reports. However, CRIT does not recognize staff-to-staff discussions or communications as fulfilling the federal government's consultation responsibility.<sup>16</sup>

In addition, communications between CRIT and project applicants or proponents (where such applicants or proponents are not federal entities) are not government-to-government consultation. Such communications, however, can help to convey information and reduce conflict. Unless requested by CRIT, federal agencies shall not interfere with such communications. Finally, meetings held with representatives from multiple tribes do not constitute consultation with CRIT unless CRIT expressly agrees that consultation format.<sup>17</sup>

*Timing.* Government-to-government consultation must occur as early as practicable, so that tribal concerns can be taken into account before the momentum toward a particular project or action is too great.<sup>18</sup> Federal agencies should provide basic information about a project or action and its potential impacts to CRIT as soon as the agency begins initial planning for a project or action or a private entity approaches the agency to submit an application.<sup>19</sup> Federal agencies should keep CRIT apprised of the decision-making timeline so that the Tribes can participate at appropriate junctures. Federal agencies shall continue to consult with Tribes until they make a decision on the proposed project or action, and if requested by the Tribes or required by law, until construction or implementation of the project or action is complete.

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<sup>15</sup> See also *Pueblo of Sandia v. United States*, 50 F.3d 856, 860, 862 (10th Cir. 1995) (Section 106 "mandates an informed consultation."); BLM Manual 8120 at .06(C) ("Field Office Managers shall recognize that traditional tribal practices and beliefs are an important, living part of our Nation's heritage, and shall develop the capability to address their potential disruption . . ."); BLM Manual Handbook H-8120-1 at I-2 ("BLM's representative must be authorized to speak for the BLM and must be adequately knowledgeable about the matter at hand."); Improving Tribal Consultation, Key Principle 5.

<sup>16</sup> *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1118-19 (S.D. Cal. 2010).

<sup>17</sup> *Id.*

<sup>18</sup> 16 U.S.C. §§ 470a(d)(6), 470f (requiring consideration of historic resource impacts "*prior to the approval of . . . the undertaking*") (emphasis added); 36 C.F.R. §§ 800.1(c), 800.4(c)(2)(ii)(A); Executive Order 13175, §§ 5(b)(2)(A), 5(c)(1); Secretarial Order 3317, U.S. Dept. of the Interior, § 4(a); Dep't of the Interior Tribal Consultation Policy at 7-8; BIA Consultation Policy at VI.A; BLM Manual 8120 at .02(B) (consultation must "[e]nsure that tribal issues and concerns are given legally adequate consideration *during* decision-making") (emphasis added); BLM Handbook Manual H-8120-1 at V-5 (" . . . the BLM manager should initiate appropriate consultation with potentially affected Native Americans, as soon as possible after the general outlines of the land use plan or the proposed land use decision can be described.").

<sup>19</sup> Improving Tribal Consultation, Key Principle 3.

*Scope of Consultation.* Federal agencies must be willing to engage in consultation on any potential impacts of a proposed project or action to CRIT, its members, its land, or its cultural resources.<sup>20</sup> Consultation shall not be limited to potential impacts to properties eligible for listing on the National Register of Historic Places<sup>21</sup> or equivalent state registers, or protected by the Native American Graves Protection and Repatriation Act. If federal approval is needed for only a portion of a proposed project or action, the agency shall nevertheless consult on potential impacts from the whole of the project or action. Federal agencies should not expect CRIT to provide information about impacts to cultural resources in scientific terms and should weigh the Tribe's cultural, spiritual, historical, and anthropological input with the respect and deference that it is due.<sup>22</sup>

*Confidentiality.* Information obtained via government-to-government consultation shall be kept confidential, except to the extent that CRIT provides information in a public forum (such as via a letter submitted during a comment period or comments made at a hearing) and to the extent such information must be revealed pursuant to federal or other applicable law.<sup>23</sup> If a federal agency determines that confidential information obtained from CRIT must be revealed, the agency shall inform CRIT prior to the release and make all reasonable attempts to limit its scope. Federal agencies shall acknowledge that confidential information is not limited to the location of sites eligible for listing on the National Register of Historic Places<sup>24</sup> or protected by the Native American Graves Protection and Repatriation Act, but includes any information about sensitive resources, culture, or religious beliefs, obtained through consultation.

*Resources.* Federal agencies must recognize that government-to-government consultation consumes scarce tribal resources. Agencies should minimize costs to CRIT by conducting government-to-government consultation meetings in Parker, Arizona<sup>25</sup>; providing clear and succinct information about proposed projects or actions and their potential impacts; and ensuring that agency staff document CRIT's interests and concerns. CRIT should not be required to repeatedly provide the same information to an agency because of agency staff turnover. Agencies should explore funding sources to remunerate the Tribes for participating in consultation.

### Key Requirements

To aid in implementation of this policy, agency officials shall ensure their government-to-government consultation efforts comport with this summary of key requirements:

- Initiate consultation as early as practicable.
- Timely seek and review CRIT's written and oral comments.

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<sup>20</sup> Executive Order 13175, § 1(a).

<sup>21</sup> 36 C.F.R. § 800.4(c)(2)(ii).

<sup>22</sup> See, e.g., BLM Manual Handbook B-8120-1 at II-5.

<sup>23</sup> See 36 C.F.R. §§ 800.4(a)(4), 800.11(c); see also BLM Manual 8120 at .06(G).

<sup>24</sup> 36 C.F.R. § 800.4(c)(2)(ii)(A); see also BLM Manual Handbook H-8120-1 at V-1.

<sup>25</sup> Improving Tribal Consultation, Key Principle 4.



- Provide comprehensive responses to Tribal concerns and requests in the same format as such concerns and requests were provided to the agency.
- Explain agency decisions based on legal, practical, and policy constraints on decision-making.
- Involve agency decision-makers with ultimate authority in in-person consultation meetings.
- Sufficiently prepare for in-person consultation meetings with Tribal Council to be able to respond to and address the Tribes' concerns.
- Do not claim that communication with CRIT staff, between CRIT and project applicants, or in the presence of multiple tribes is government-to-government consultation.
- Consult on any potential impacts of a proposed project or action on CRIT, its members, its land, or its cultural resources.
- Keep information obtained via government-to-government consultation confidential.