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Saipan, Commonwealth of the Northern Mariana Islands

Via Electronic Mail

March 21, 2021

Richard G. Kidd, IV  
Deputy Assistant Secretary of Defense  
3500 Defense Pentagon  
Washington, DC 20301-3500

Dear Assistant Secretary Kidd:

We write to you regarding President Biden's *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships* issued in January, 86 Fed. Reg. 7491 (Jan. 26, 2021) ("Memorandum"), and the February 8, 2021 letter you sent requesting input on the how the Department of Defense can improve its regular, meaningful and robust consultation efforts. Pursuant to that request, Our Common Wealth 670 submits this comment letter to the Department of Defense ("DOD") in order to assist in the development of the "detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175," as described in the Memorandum.

As an initial matter, we would like to point out the discrepancies between the Memorandum and your own Consultation policy, Department of Defense Instruction: 4710.03 Consultation with Native Hawaiian Organizations (October 25, 2011). Your own consultation policy specifically includes Native Hawaiians, although that is not mentioned in the Memorandum. Therefore, these comments are being submitted with respect to DoDI: 4710.03.

We are aware that DOD is currently in the process of reviewing DoDI: 4710.03 and we believe that the comment deadline should be extended in light of the Memorandum. We also formally request consultation with the DOD on further development and implementation of its consultation policy in order to discuss how Chamorros and Refaluwasch (the Indigenous Peoples of the Northern Mariana Islands and those considered Northern Marianas Descent) can have a more open and ongoing communication relationship with the DOD. Our Common Wealth 670 believes that this input will be invaluable for the DOD.

The following will set out overarching recommendations for the DOD to enhance its consultation efforts. First, it is our position that DOD has not always treated concerns about impacts to our resources with appropriate solicitude. Accordingly, we strongly encourage DOD to put in place additional requirements to ensure policies, rules and permitting decisions fully consider and address

the concerns of Pacific Islanders. At a minimum, these requirements should address what meaningful and robust consultation means, what actions require consultation, when consultation should occur, and who should be involved in consultation.

At the outset, we note that the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) was endorsed by the United States on December 16, 2010, and UNDRIP Article 32 mandates that nation states consult with Indigenous Peoples “in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” We think, given the directives of the Memorandum and Executive Orders discussed herein, that free, prior and informed consent of Indigenous Peoples should be a requirement for project or agency decisions that would impact our resources and urge you to adopt provisions reflecting this principle. In 2013, the Advisory Council on Historic Preservation (“ACHP”) developed a plan to support UNDRIP.<sup>1</sup> We encourage DOD to follow the ACHP’s lead and incorporate the principles of UNDRIP in the Department’s programs.

The principle of free, prior, and informed consent is grounded in the right of self-determination. UNDRIP Article 3 also recognizes that “Indigenous peoples have the right of self-determination.” For meaningful consultation to occur, federal agencies must have a thorough understanding of the inherent rights of Indigenous Peoples set forth in the UNDRIP, treaties, compacts, federal statutes and case law.

Federal agencies must enter into the process with the goal and spirit of consultation and cooperation with the impacted Indigenous Peoples to reach common agreement on the matter at issue. Starting with the definition of meaningful consultation, the DOD’s policies should clearly establish that the primary goal of consultation is to achieve consensus or consent. Therefore, meaningful consultation requires agencies to undertake a good faith effort to reach common agreement on how to proceed with the matter. This should include clear processes for documenting the consultation, ensuring protection of culturally sensitive information, complying with local laws or protocols governing consultation, and implementing a certification process at the completion of consultation for both parties to agree that meaningful consultation occurred. It is also important to extend consultation beyond agency heads at the governmental level and increase public participation within the community and to other members who are typically not involved in the process such as the *man’Amko* (elderly). Merely cataloguing concerns does not constitute meaningful consultation. Instead, DOD must clearly communicate to us how its final decision addresses our input. Where DOD is unable to fully address our concerns, it should clearly explain its reasoning and respect the community’s decision to decline DOD’s plans.

The timing of consultation is also integral to ensuring it is meaningful and robust. Meaningful and robust consultation is a dialogue that requires the two-way exchange of information, including federal agencies sharing internal reports, analysis, deliberations and pre-decisional documents especially with the impacted community or organization. Additionally, every division within the DOD must be aware of its responsibility to meaningfully engage with Pacific Islanders in their decision-making and there

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<sup>1</sup> <https://www.achp.gov/sites/default/files/guidance/2018-07/ACHPPlanttoSupporttheUnitedNationsDeclarationontheRightsofIndigenousPeoples.pdf>

must be consistency among divisions in the process. The entire process must be fully transparent and consultation meetings should include federal decision-makers who actively participate.

Consultations should occur throughout the evolution of the project, entailing constant and continuous communications between the parties. Agencies should ensure that all information, including the potential impact of the decision, is provided to the community or organization and is presented in a manner and form that is understandable to our communities and is culturally appropriate. DOD should work with Indigenous Peoples to customize consultations and communications that are respectful and enhance communication. Information should also be presented orally and in our respective languages. In the CNMI, Chamorro, Refaluwasch and English remain the official languages in our communities. To deny our community meaningful engagement outside of these official languages is to deny our participation.

DOD should have a thorough grounding in the culture and history of the Chamorro and Refaluwasch peoples (and specifically our legal history) and consultations should be culturally appropriate. This knowledge should not be gleaned for extractivist purposes such as mining for information in order to complete defense goals in a hurried fashion. Instead, this information should be viewed as a necessary component of meaningful engagement with stakeholders and take into consideration the ongoing and changing nature of community engagement. In other words, culture and community changes and this is a process that should be respected whenever consultation occurs. This requires capacity building for federal officials, enabling them to understand the importance of the interests at stake. DOD should recognize that the Indigenous Peoples are the experts as to what effects a decision may have on us. We have a vast amount of cultural, historical, and geographical knowledge about our ancestral territory and practices, including sacred sites, which, if properly valued and appropriately protected from disclosure, can help ensure that decisions avoid negative impacts and reduce the risk of subsequent disagreement. Special attention must be given to the many ways in which projects can impact our interests. Furthermore, it is critical that when cultural knowledge does not want to be shared, this is also considered a reasonable and culturally appropriate response to DOD planning and must be respected.

Trust is essential and trust is built on relationships—every effort should be made to build relationships on an ongoing basis even before a project or decision is contemplated. Often, consultation meetings become adversarial, and the lines of communication become impinged. This ongoing consultation activity would allow local agency decisionmakers to know in advance when their decisions will impact our interests. Those of Northern Marianas Descent (Chamorros and Refaluwasch) must be provided with adequate funding for our capacity building and for resources needed to ensure our full and effective participation throughout the process. Those of Northern Marianas Descent should be remunerated for costs associated with consultations, such as providing ready access to technical expertise, attending consultations, conducting studies, and producing reports. The process must be free from intimidation, coercion, manipulation or undue influence.

Our Common Wealth 670 is also interested in how the DOD will weigh decisions that will impact the environment or our interests, including cultural and spiritual interests, against President Biden's *Executive Order on Protecting Public Health and the Environment and Restoring Science to the Climate Crisis*, E.O. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021). We would like to know how DOD intends to address existing regulations, orders, policies, and agency actions that are inconsistent with the Administration's efforts to combat climate change. What steps will DOD and its sub-agencies take to ensure decisions that

are currently in process, particularly those involving greenhouse gas emissions and fossil fuel infrastructure, will incorporate climate change objectives?

The Administration's commitment to climate change is reiterated in *Tackling the Climate Crisis at Home and Abroad*, E.O. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021), "[i]t is the policy of my Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy." Our Common Wealth 670 would like to discuss how DOD intends to carry out these directives. Executive Order 14008 also directs that agencies' approach to climate change shall protect public health, conserve land, waters, and biodiversity, and deliver environmental justice. Our Common Wealth 670 would like to discuss with the DOD opportunities to help preserve our resources and the environment while fulfilling its mission. Given the short timeframe, Our Common Wealth 670 has not had an opportunity to identify specific regulations and policies that are inconsistent with these directives. However, Our Common Wealth 670 seeks a continuing dialogue with DOD about these issues in order to help identify specific problems and find solutions.

In addition, the Administration's plan for *Advancing Racial Equity and Support for Underserved Communities through the Federal Government*, E.O. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021), calls for collaboration across agencies to ensure correction of historical inequities affecting people of color, marginalized communities, and those affected by poverty. While DOD has a history of approving projects and taking actions that are detrimental to the interests of Indigenous Peoples, there also is a history of collaboration and we hope to build upon that collaboration to see more positive outcomes. We note that the Federal Energy Regulatory Commission has announced plans to better incorporate environmental justice and equity concerns into its decision-making process by creating a new senior position to coordinate that work, and we suggest DOD should consider creating a similar senior-level position solely focused on environmental justice and equity concerns that can advise DOD decisionmakers on these issues.

Please contact Dr. Theresa Arriola at [theresaarriola@gmail.com](mailto:theresaarriola@gmail.com) in order to schedule a time to discuss these important matters. I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to be 'TA' or similar initials, written in a cursive style.

Theresa Arriola, PhD  
Chair, Our Common Wealth 670