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December 4, 2021

Michael Jimenez, Project Leader (michael.jimenez@usda.gov)
Constance Cummins, Forest Supervisor
Superior National Forest
8901 Grand Avenue Place
Duluth, MN 55808

RE: Supplemental Comments Opposing Proposed United States Forest Service Special
Use Permit for the Lutsen Mountains Ski Area Expansion Project

Dear Mr. Jimenez and Ms. Cummins,

These supplemental comments are submitted on behalf of WaterLegacy in opposition to issuance of a Special Use Permit (“SUP”) by the U.S. Forest Service (“Forest Service”) for the proposed Lutsen Mountain Corporation (“LMC”) Ski Area Expansion Project (“Ski Resort Expansion”) on National Forest lands within the Superior National Forest.

WaterLegacy’s prior comments, dated October 14, 2021, emphasized that the Forest Service may not approve an SUP if the proposed use is neither “consistent” nor “can be made consistent” with the applicable forest plan. 36 C.F.R. § 251.54(e)(1)(ii). The Forest Service must reject any proposal, if during the process of environmental review, tribal consultation, or public comment, the responsible official determines that the proposed use “would be inconsistent or incompatible with the purposes for which the lands are managed, or with other uses” or “would not be in the public interest.” 36 C.F.R. §§ 251.54 (e)(5)(i), (ii); 251.54(g)(4)(i).

Federal regulations also stress that an SUP cannot be issued unless terms and conditions “[m]inimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment,” 36 C.F.R. § 251.56(a)(1)(i)(B), “[p]rotect the interests of individuals living in the general area of the use who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes,” and “protect the public interest.” 36 C.F.R. § 251.56(a)(1)(ii)(E), (G).

WaterLegacy’s prior comments clearly demonstrated that only the No Action Alternative would be consistent with federal regulations, the Superior National Forest Plan, and protection of scenic integrity, lands, water, and wildlife, the rights of Lake Superior Ojibwe people, and the public interest.

In addition, under a recent Joint Secretarial Order and a Memorandum of Understanding issued by the Biden Administration, the Forest Service must deny the Ski Resort Expansion SUP to fulfill its federal responsibility to Indian Tribes for the stewardship of federal lands and to protect Tribal rights.

I. The Forest Service Must Deny the Ski Resort Expansion to Fulfill Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands.

On November 15, 2021, the Secretary of the Interior, Deb Haaland, and the Secretary of Agriculture, Thomas J. Vilsack, jointly signed Order No. 3403, the Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, which Order became effective immediately.¹ The purpose of this Order is “to ensure that the Department of Agriculture and the Department of the Interior (Departments) and their component Bureaus and Offices are managing Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes . . . and, that such management fulfills the United States’ unique trust obligation to federally recognized Indian Tribes and their citizens.” (Order at 1).

The Order specifically identifies Tribal interests in Federal lands and waters, including “wildlife, and sources of indigenous foods and medicines” and states that “many of those lands and waters lie within areas where Indian Tribes have reserved the right to hunt, fish, gather, and pray pursuant to ratified treaties and agreements with the United States.” (*Id.*) The Order states that the Departments, including the Forest Service, are “charged with the highest trust responsibility to protect Tribal interests.” (*Id.*).

To fulfill its obligations to Lake Superior Chippewa/Ojibwe Tribes — the Grand Portage, Bois Forte, and Fond du Lac Bands — that have Treaty-reserved usufructuary rights in the Superior National Forest area where the Ski Resort Expansion is proposed by LMC, the Order requires the Forest Service to ensure that its SUP Federal stewardship decision considers “how to *safeguard* the interests of any Indian Tribes such decisions may affect.” (*Id.* at 2, emphasis added).

To ensure consultation with Tribes is effective in its implementation, the Order states that consultation should “ensure that Tribes can shape the direction of management,” that the U.S.D.A. Forest Service must give “due consideration to Tribal recommendations on public lands management,” and that the Department must “consider Tribal expertise and/or Indigenous knowledge . . . particularly concerning management of resources subject to reserved Tribal treaty rights and subsistence uses.” (*Id.* at 3). The Order, further, states that where the Department doesn’t provide co-stewardship of Federal lands or waters where “federally recognized Indian Tribes have subsistence or other rights” the Department will give “deference to Tribal proposals, recommendations, and knowledge that affect management decisions on such lands wherever possible.” (*Id.* at 4).

The opposition of the Grand Portage Band of Lake Superior Chippewa to the LMC Ski Resort Expansion is a matter of public record.² The Cook County Chamber of Commerce Board of

¹ Order at 1, 5, Exhibit A, available at <https://www.usda.gov/sites/default/files/documents/joint-so-3403-stewardship-tribal-nations.pdf>.

² See “Chamber backs proposal for Lutsen Ski Hill expansion, Grand Portage objects, Chamber recants portion of its letter to the Forest Service,” *Cook County News Herald*, Nov. 5, 2021, (“Cook County Chamber Article”) Exhibit B, available at <https://www.cookcountynews-herald.com/articles/chamber-backs-proposal-for-lutsen-ski-hill-expansion-grand-portage-objects-chamber-recants-portion-of-its-letter-to-the-forest-service/>.

Directors, which initially claimed that the Ojibwe people had no interest in the Lutsen Mountains area, realized that this Chamber assertion was unfounded and retracted it. (Cook County Chamber Article). Even the Chamber admitted that if the Ojibwe people were seeking use of the affected area and white cedar trees, “certainly the rights of the Ojibwe people under the 1854 treaty would require deference.” (*Id.*)

Neither the Forest Service’s obligations to safeguard the interests of Tribes in Superior National Forest lands and waters that would be affected by the proposed Ski Resort Expansion nor deference to the rights of the Ojibwe people and their recommendations can support approval of the Ski Resort Expansion SUP. Consistent with the Joint Secretarial Order of November 15, 2021, the Forest Service must deny the SUP.

II. The Forest Service Must Deny the Ski Resort Expansion to Protect Tribal Rights.

In addition, as of November 15, 2021, the U.S. Department of Agriculture had joined more than a dozen federal Departments and Agencies in signing a Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights (“Tribal Rights MOU”).³ This MOU was signed by the Department “to affirm our commitment to protect tribal treaty rights, reserved rights and similar tribal rights to natural and cultural resources in agency decision-making.” (*Id.* at 1).

The MOU affirmed that treaties with Tribes “are part of the supreme law of the land, with the same legal force and effect as federal statutes.” (*Id.* at 2). Accordingly, “*the United States has an obligation to honor the rights reserved through treaties*, including rights to . . . off-reservation resources, and to ensure that its actions are consistent with those rights and their attendant protections.” (*Id.*, emphasis added). Based on legal precedent as well as history, the MOU concluded, “Integrating consideration of tribal treaty and reserved rights into agency decision-making and regulatory processes is consistent with the federal government's trust responsibility to federally recognized tribes and to fundamental principles of good government.” (*Id.*).

The MOU did not, in itself create new binding legal rights. Rather, the MOU affirmed that treaties between the United States and Tribes, such as the Treaty of 1854, themselves obligate federal Departments and Agencies to protect Treaty-reserved rights:

[F]ederal agencies must give effect to treaty language and ensure that federal agency actions do not conflict with tribal treaty and reserved rights . . . Treaties themselves are the source of legal authority to ensure that agency processes account for reserved treaty rights. (*Id.*)

In addition to agreeing to consultation regarding Treaty and reserved rights, the MOU affirmed the legal context for Department decisions, including the decision whether to grant or deny an SUP to allow the LMC Ski Resort Expansion to diminish access to Treaty-reserved rights and to

³ Tribal Rights MOU at 1, 6-22, Exhibit C, available at <https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf>.

impair natural resources to which Tribes have rights in the face of clearly articulated tribal opposition to the SUP. As explained by the MOU, the legal authority established by the 1854 Treaty itself conflicts with Forest Service approval of the Ski Resort Expansion SUP.

Conclusion

WaterLegacy's October 14, 2021 comments demonstrated that an SUP for the LMC Ski Resort Expansion should not be approved on the following grounds:

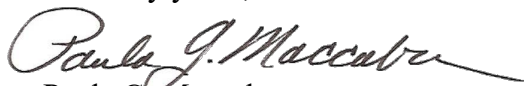
1. The Ski Resort Expansion would result in significant environmental harm to forests, wildlife, and water resources.
2. The Ski Resort Expansion would adversely affect the Ojibwe people and their access to exercise Treaty-reserved rights without offset or compensation.
3. The Ski Resort Expansion is inconsistent with the Superior National Forest Plan, including its Scenic Integrity Objective, and Objectives pertaining to Forests and Vegetation, Wildlife, and Tribal Rights.
4. The Ski Resort Expansion is neither appropriate nor in the public interest.

In addition, approval of an SUP for the Ski Resort Expansion conflicts with both Order No. 3403, the Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters, and with the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights and Reserved Rights. These recently-signed documents reflect a commitment by the Biden Administration and Secretary Vilsack, in particular, to respect the legal guardrails that were established when the United States Government signed Treaties with Tribes, including the Treaty of 1854 that reserves rights of the Lake Superior Chippewa/Ojibwe to hunt, fish, and gather plants in Ceded Territories, including the acreage of the Superior National Forest that would be affected by the LMC Ski Resort Expansion.

Where the Forest Service is presented with the option of issuing a Special Use Permit to benefit some recreational users of Superior National Forests at the expense of damaging and destroying natural resources to which Tribes have rights and reducing access to exercise Treaty-reserved rights, the Forest Service must deny the SUP. The Treaty of 1854, the recent Federal Order and MOU, and even the Cook County Chamber of Commerce are in accord: "certainly the rights of the Ojibwe people under the 1854 treaty would require deference."

Based on the above authorities, the reasons stated in our October 14, 2021 comments, and appropriate deference, WaterLegacy respectfully requests that the Forest Service adopt the No Action alternative and deny the LMC Ski Resort Expansion SUP.

Sincerely yours,



Paula G. Maccabee

WaterLegacy Advocacy Director and Counsel

Exhibits attached



Order No. 3403

Subject: Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters

Section 1. Purpose. This Secretary's Order is issued by the Secretary of Agriculture and the Secretary of the Interior (Secretaries) to ensure that the Department of Agriculture and the Department of the Interior (Departments) and their component Bureaus and Offices are managing Federal lands and waters in a manner that seeks to protect the treaty, religious, subsistence, and cultural interests of federally recognized Indian Tribes including the Native Hawaiian Community; that such management is consistent with the nation-to-nation relationship between the United States and federally recognized Indian Tribes; and, that such management fulfills the United States' unique trust obligation to federally recognized Indian Tribes and their citizens.

The Departments are responsible for the management of millions of acres of Federal lands and waters that were previously owned and managed by Indian Tribes. Those lands and waters contain cultural and natural resources of significance and value to Indian Tribes and their citizens, including sacred religious sites, burial sites, wildlife, and sources of indigenous foods and medicines. In addition, many of those lands and waters lie within areas where Indian Tribes have reserved the right to hunt, fish, gather, and pray pursuant to ratified treaties and agreements with the United States.

In managing Federal lands and waters, the Departments are charged with the highest trust responsibility to protect Tribal interests and further the nation-to-nation relationship with Tribes. The Departments recognize and affirm that the United States' trust and treaty obligations are an integral part of each Department's responsibilities in managing Federal lands. Tribal consultation and collaboration must be implemented as components of, or in addition to, Federal land management priorities and direction for recreation, range, timber, energy production, and other uses, and conservation of wilderness, refuges, watersheds, wildlife habitat, and other values. Further, in honoring these obligations, the Departments will benefit by incorporating Tribal expertise and Indigenous knowledge into Federal land and resources management.

This Order establishes how the Departments will fulfill their obligations to Federally recognized Indian Tribes, by directing the Bureaus and Agencies within each Department to undertake the following, consistent with the intent of this Order and applicable law:

- a. Ensure that all decisions by the Departments relating to Federal stewardship of Federal lands, waters, and wildlife under their jurisdiction include consideration of how to safeguard the interests of any Indian Tribes such decisions may affect;
- b. Make agreements with Indian Tribes to collaborate in the co-stewardship of Federal lands and waters under the Departments' jurisdiction, including for wildlife and its habitat;
- c. Identify and support Tribal opportunities to consolidate Tribal homelands and empower Tribal stewardship of those resources;
- d. Complete a preliminary legal review of current land, water, and wildlife treaty responsibilities and authorities that can support co-stewardship and Tribal stewardship within 180 days and finalize the legal review within one year of the date of this Order; and
- e. Issue a report within one year of this Order, and each year thereafter, on actions taken to fulfill the purpose of this Order.

Section 2. Authorities. The Departments' authorities to fulfill the terms of this Order stem from numerous ratified treaties and agreements between the United States and federally recognized Indian Tribes, along with the trust obligation owed by the United States to federally recognized Indian Tribes and their citizens, as well as applicable statutes, Executive Orders, and relevant caselaw.

The President has also issued several Executive Orders directing agencies to coordinate with federally recognized Indian Tribes for matters covered by this Order, including:

- a. Executive Order 13007 (Indian Sacred Sites) – Directing each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.
- b. Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) – Directing Federal agencies to engage in meaningful government-to-government consultation with Indian Tribes, provide regulatory and statutory waivers to Indian Tribes to increase flexible policy approaches at the Tribal level, and use consensual mechanisms

for developing regulations on issues relating to Tribal self-government, Tribal trust resources, or Indian Tribal treaty and other rights.

Section 3. Principles of Implementation. In fulfilling the requirements of this Order, including the development of agreements with federally recognized Indian Tribes for stewardship of lands and waters, the Departments affirm the following principles:

- a. Federally recognized Indian Tribes are sovereign governments with a government-to-government relationship with the United States. The Native Hawaiian Community has a government-to-sovereign relationship and uses Native Hawaiian organizations as its informal representatives. Based upon these relationships, Indian Tribes and Native Hawaiian organizations can engage directly with the Departments to address matters of mutual interest in the management of Federal lands.
- b. The Departments will collaborate with Indian Tribes to ensure that Tribal governments play an integral role in decision making related to the management of Federal lands and waters through consultation, capacity building, and other means consistent with applicable authority.
- c. The Departments will engage affected Indian Tribes in meaningful consultation at the earliest phases of planning and decision-making relating to the management of Federal lands to ensure that Tribes can shape the direction of management. This will include agencies giving due consideration to Tribal recommendations on public lands management.
- d. For landscape- or watershed-scale restoration and conservation planning, the Departments will, to the maximum extent practicable, incorporate Tribal forest land, agriculture and/or range land management plans into Federal land management planning efforts.
- e. The Departments will collaborate with Indian Tribes to educate affected communities regarding the role Tribal governments play in the stewardship of Federal public lands, waters, and wildlife, and will work to develop appropriate institutional structures to implement agreements related to co-stewardship.
- f. The Departments will consider Tribal expertise and/or Indigenous knowledge as part of Federal decision making relating to Federal lands, particularly concerning management of resources subject to reserved Tribal treaty rights and subsistence uses.
- g. Where the Departments have entered into collaborative agreements with Indian Tribes, they will incorporate dispute resolution procedures appropriate to the subject of the agreement, as authorized.

- h. Where authorizations include non-federally recognized Tribes, they will be presumed directly incorporated into this Order.

Section 4. Federal stewardship of Federal lands and waters, including wildlife and its habitat. In making management decisions for Federal lands and waters, or for wildlife and their habitat that impacts the treaty or religious rights of Indian Tribes, the Departments will incorporate the Principles of Implementation established in Section 3 of this Order.

Section 5. Co-stewardship of Federal lands and waters, including wildlife and its habitat. The Departments will endeavor to engage in co-stewardship where Federal lands or waters, including wildlife and its habitat, are located within or adjacent to a federally recognized Indian Tribe's reservation, where federally recognized Indian Tribes have subsistence or other rights or interests in non-adjacent Federal lands or waters, or where requested by a federally recognized Indian Tribe.

The Departments will identify affected Indian Tribes through use of, at a minimum, the Tribal Treaty Database (TTD), the Bureau of Indian Affairs (BIA) Tribal Land Locator Tool, the Forest Service's Tribal Connections Map Viewer, and the Office of Native Hawaiian Relations Native Hawaiian Organization List and Homestead and Beneficiary List. The Departments will:

- a. Promote the use of collaborative agreements and/or provisions in land management plans consistent with the Department's obligations under existing law;
- b. Develop and implement, whenever possible, employee performance review standards that evaluate progress toward meeting the objectives and goals of this Order, including success toward developing new collaborative stewardship agreements and enhancing existing ones;
- c. Coordinate and cooperate on co-stewardship efforts and initiatives between the Departments;
- d. Use agreements as a tool to foster cooperation on protection of treaty, subsistence, and religious rights consistent with consensual policy-making referenced in Executive Order 13175; and
- e. Evaluate and update Departmental Manuals, handbooks, or other guidance documents for consistency with this Order.

Where co-stewardship is not permitted by law, the Departments will give consideration and deference to Tribal proposals, recommendations, and knowledge that affect management decisions on such lands wherever possible.

Section 6. Tribal stewardship of lands, waters, including wildlife and its habitat. The Departments recognize that it is the policy of the United States to restore Tribal homelands to Tribal ownership and to promote Tribal stewardship and Tribal self-government. The Departments will support consolidation of tribal landholdings within reservations, including Tribal acquisition of Federal lands and private inholdings, in furtherance of this Order and consistent with applicable law.

The Departments will facilitate Tribal requests to have lands placed into trust status, including for conservation, protection of sacred sites, cultural or religious use, or exercise of subsistence or treaty reserved rights, in furtherance of this Order and consistent with applicable law.

Section 7. Expiration Date. This Order is effective immediately. It will remain in effect until its provisions are implemented and completed, or until it is amended, superseded, or revoked.



Deb Haaland
Secretary of the Interior



Thomas J. Vilsack
Secretary of Agriculture

Date: **NOV 15 2021**

<https://www.cookcountynews-herald.com/articles/chamber-backs-proposal-for-lutsen-ski-hill-expansion-grand-portage-objects-chamber-recants-portion-of-its-letter-to-the-forest-service/>.



A publication of CherryRoad Media Inc.

Chamber backs proposal for Lutsen Ski Hill expansion, Grand Portage objects, Chamber recants portion of its letter to the Forest Service

November 05, 2021

Brian Larsen

0:00 / 0:00

The Cook County Chamber of Commerce Board of Directors has written a letter of support to the U.S. Forest Service for Lutsen Mountains Corps to expand its ski hill operation on 495 acres of public land.

The Forest Service extended the public comment period on the application for special use permit filed by Lutsen Mountains until December 9, 2021.

Lutsen Mountain has proposed doubling its current 90 runs, adding seven chairlifts, a new mountain top chalet, two new base snow-making facilities, and 1260 additional parking spaces to its existing 200 parking spaces. The Superior Hiking Trail would also have to be re-routed under this plan.

In its letter to Constance Cummins, Forest Supervisor, and Michael Jimenez, Superior National Forest supervisor, the Chamber stated, "For Lutsen Mountains, the imperative is to either grow or slowly die—as so many small ski resorts have died because they could not afford the technological upgrades,

facilities improvements and ski terrain modifications that skiers demand and the industry giants—especially Vail and Alterra Mountain Co.—have the wherewithal to provide.”

The Chamber letter also points out, “It is clear that the Superior Forest staff prefers Alternative 3, which it designed, over Alternative 2, developed by Lutsen Mountains. There appear to be two principal reasons for that preference: protection of a growth of northern white cedar on the western slope of Moose Mountain and eliminating the need to move a short portion of the Superior Hiking Trail.

“As the EIS (environmental impact statement) for this project reports, the Northern White Cedar is an important tree to the Ojibwe people, and the acreage under question falls within the boundaries of the 1854 Ceded Territory. But as the EIS also reports, the 66 acres of northern white cedar affected by Lutsen Mountains’ proposal equals just 17 hundredths of 1 percent (.0017) of the 38,348 acres of northern white cedar within the 1854 Ceded Territory.

“Were the Ojibwe people and Lutsen Mountains both seeking use of these 66 acres of cedar, certainly the rights of the Ojibwe people under the 1854 treaty would require deference. But there is no evidence that the Ojibwe people have ever used or ever plan to use this specific growth of northern white cedar in any way. We respectfully suggest it is unreasonable to prohibit inclusion of this small cedar acreage in the ski-area expansion— on land the Forest Service has designated for recreational use—because of a remote chance it might at some undefined future date become a focus of Ojibwe gathering.”

But the Grand Portage Band of Lake Superior Chippewa countered the Chamber’s endorsement with this, “The Cook County Chamber of Commerce letter supporting the proposed expansion of Lutsen Mountain Corporation onto 500 acres of US Forest Service (USFS) lands reveals a lack of understanding regarding the 1854 Treaty and fiduciary responsibility of the USFS to the signatory Tribes. As the largest employer in Cook County and signatory tribe to the 1854 Treaty, we find this disappointing. To assist the Board of Directors, we offer evidence of current and historic Tribal interests and usufructuary rights, USFS rules that govern issuance of Special Use Permits, and principles regarding the interpretation of the 1854 Treaty.”

What followed was long legal discourse laying out the 1854 treaty rights granted by the U.S. to the tribes, but the letter from Grand Portage further stated, “The Chamber’s assertion betrays a fundamental lack of understanding of retained treaty rights. Just as the owner of a parcel of land holds property rights to that land regardless of whether they have recently used or developed it, the retained usufructuary rights of a signatory tribe exist regardless of current or historic usage.”

The letter from Grand Portage also argues that clearing large forest areas to create permanent open alpine ski runs on the north and south side of Moose Mountain would “negatively impact a designated trout stream and two intermittent streams that flow into Lake Superior. Removal of forest and conifer cover in upstream watersheds is associated with elevated peak flows, bank erosion, sedimentation, loss of water clarity, and increased water temperature that degrade fisheries and other sensitive aquatic life. Fragmentation of already vulnerable mature sugar maples and cedar stands, decimation

of tribally important historic rails and cultural sites, and disturbance of wetlands and other cultural resources within the expansion site likely constitute permanent losses of Treaty-reserved property rights and resources.”

The following day the Chamber of Commerce Board of Directors admitted the mistake and announced to Chamber members they would resubmit their letter of support to the Forest Service after removing the following: *Were the Ojibwe people and Lutsen Mountains both seeking use of this 66 acres of cedar, certainly the rights of the Ojibwe people under the 1854 treaty would require deference. But there is no evidence that the Ojibwe people have ever used or ever plan to use this specific growth of northern white cedar in any way. We respectfully suggest it is unreasonable to prohibit inclusion of this small cedar acreage in the ski-area expansion – on land the Forest Service has designated for recreational use – because of a remote chance it might at some undefined future date become a focus of Ojibwe gathering.*

The letter from the Chamber was signed by Executive Director Jim Boyd who said, “I regret that my words caused offense. My focus, on behalf of the Chamber board, was on using the comment period to build the strongest possible case for the original Lutsen Mountains proposal over the alternative proposal offered by the U.S. Forest Service staff.

“In a larger sense, however, please understand that no matter what words we use to make our case, it was inevitable that the Chamber and the leaders of Ojibwe community would find themselves on opposite sides of this issue. Grand Portage opposes the entire Lutsen Mountains expansion as a violation of the terms of the 1854 Treaty. The view of the Chamber board, expressed in its letter of support, is that Lutsen Mountains must expand or die, that expansion is allowed under the terms of the 1854 treaty, and that Lutsen Mountains makes a compelling case for its original expansion design.

“Now it is up to the Superior National Forest supervisor to consider those competing arguments, and others, and come to a decision. I am hopeful we can all recognize that honorable differences of opinion are possible on this important question. The Chamber’s public comments will continue to be directed only to the U.S. Forest Service as part of its formal adjudicative permitting process.”

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**MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY
COORDINATION AND COLLABORATION FOR THE PROTECTION OF TRIBAL
TREATY RIGHTS AND RESERVED RIGHTS**

among the

Advisory Council on Historic Preservation,
U.S. Department of Agriculture,
U.S. Department of Commerce,
U.S. Department of Defense,
U.S. Department of Education,
U.S. Department of Energy,
U.S. Department of Homeland Security,
U.S. Department of Housing and Urban Development,
U.S. Department of the Interior,
U.S. Department of Justice,
U.S. Department of Labor,
U.S. Department of State,
U.S. Department of Transportation,
U.S. Department of Veterans Affairs,
U.S. Environmental Protection Agency,
U.S. Office of Personnel Management,
White House Council on Environmental Quality

I. Purpose and Principles

The signatory agencies (Parties) enter into this Memorandum of Understanding (MOU) to affirm our commitment to protect tribal treaty rights, reserved rights and similar tribal rights to natural and cultural resources. The Parties intend to demonstrate that commitment through early consideration of treaty and reserved rights in agency decision-making and regulatory processes. The Parties intend to enhance interagency coordination and collaboration to protect such treaty and reserved rights and to fully implement federal government treaty obligations.

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS

Treaty-protected rights to use of and access to natural and cultural resources are an intrinsic part of tribal life and are of deep cultural, economic, and subsistence importance to tribes. Many treaties protect not only the right to access natural resources, such as fisheries, but also protect the resource itself from significant degradation. Under the U.S. Constitution, treaties are part of the supreme law of the land, with the same legal force and effect as federal statutes. Pursuant to this principle, and its trust relationship with federally recognized tribes, the United States has an obligation to honor the rights reserved through treaties, including rights to both on and, where applicable, off-reservation resources, and to ensure that its actions are consistent with those rights and their attendant protections. Accordingly, the Parties recognize the need to consider and account for the effects of their actions on the habitats that support treaty-protected rights, including how those habitats will be impacted by climate change.

Tribes, Alaskan Natives and Native Hawaiians that do not have formal treaties may also have rights that should be considered in federal decision-making and regulatory processes addressed by Parties under the framework of this MOU.

II. Background

From 1778 to 1871, the United States' relations with American Indian tribes were defined and conducted largely through treaty-making. Through these treaties, Indian tribes ceded land and other natural and cultural resources to the United States, while retaining all rights not expressly granted. The United States Supreme Court has affirmed this principle of reserved rights, explaining that treaties are "not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). Many of these treaties guaranteed the signatory tribes a unique set of rights both on and, where applicable, off reservation, including rights to health care, education and rights reserved by tribes relating to natural resources, such as the right to hunt, fish, and gather on land ceded by tribes and on reservation land retained by tribes.

The Supreme Court has explained that Indian treaties are to be interpreted liberally in favor of tribes, giving effect to the treaty terms as tribes would have understood them, with ambiguous provisions interpreted for their benefit. Treaties are to be interpreted in accordance with the federal Indian canons of construction, a set of longstanding principles developed by courts to guide the interpretation of treaties between the U.S. government and Indian tribes. This means that federal agencies must give effect to treaty language and ensure that federal agency actions do not conflict with tribal treaty and reserved rights.

Integrating consideration of tribal treaty and reserved rights into agency decision-making and regulatory processes is consistent with the federal government's trust responsibility to federally recognized tribes and to fundamental principles of good government. Treaties themselves are the source of legal authority to ensure that agency processes account for reserved treaty rights.

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS

The Parties also recognize that the United States has affirmed the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP). While not legally binding, the UN DRIP affirms the responsibility of the Parties to recognize, respect and consider tribal interpretations of their own treaty and reserved rights.

The Parties recognize that other sources of federal law may also protect treaty and reserved tribal rights relating to cultural and natural resources. The Parties intend to consider these other sources and rights as well, as part of the activities listed below.

III. Participating Agency Agreement

The Parties intend to work together to consult and coordinate with federally recognized Indian tribes, as appropriate, in developing and implementing the following actions:

1. Support the creation, integration, and use of a searchable and indexed database of all treaties between the United States government and tribal nations, to facilitate compliance with our treaty obligations and this MOU;
2. Continue and enhance the Parties' ongoing efforts to integrate consideration of tribal treaty and reserved rights early into Parties' decision-making and regulatory processes to ensure that agency actions are consistent with constitutional, treaty, reserved, and statutory rights;
3. Continue to develop, improve and share tools and resources to identify, understand, and analyze tribal treaty and reserved rights that may be adversely impacted or otherwise affected by agency decision-making, regulatory processes or other actions or inaction;
4. Strengthen its consultation policies to give clear guidance on the duties and responsibilities of the Parties to incorporate tribal treaty and reserved rights early in their decision-making process, to improve consultation and coordination with federally recognized tribes, and to provide a means of dispute resolution regarding tribal complaints of the sufficiency, timing and agency compliance with those consultation policy requirements;
5. Integrate consideration of tribal treaty and reserved rights into the Parties' ongoing work to address the climate crisis, including sharing data and information regarding how tribal treaty and reserved rights are affected by climate change;
6. Develop best practices and procedures to protect tribal treaty and reserved rights in federal decision-making and regulatory processes. Within one year of signing this MOU,

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS

each participating agency will provide to the Executive Director of the White House Council on Native American Affairs the practices and procedures it has implemented to meet this objective.

7. Establish a working group with members from each of the participating agencies. The purpose of the working group is to enhance interagency collaboration and coordination, address significant issues as they arise, and report annually on Party actions regarding tribal treaty and reserved rights. The working group intends to:
 - a. Meet monthly;
 - b. Include a sub-group of agency attorneys to provide legal support to the working group;
 - c. Facilitate interagency coordination on legal issues relating to tribal treaty rights;
 - d. Submit an initial report to the Executive Director of the White House Council on Native American Affairs within 180 days of the execution of this MOU. This Report will identify steps signatory agencies have taken to implement the original version of this MOU, signed in 2016.
 - e. Develop an annual combined report with information submitted by the Parties for Party leadership and the Executive Director of the White House Council on Native American Affairs. This annual combined report will highlight significant issues raised by representatives of Indian tribes, Indigenous organizations, and agency officials regarding the protection of treaty and reserved rights. The report will also highlight the best practices and procedures developed by Parties of the working group.

8. Train appropriate staff on how to recognize tribal treaty and reserved rights and ensure that these rights are considered early in Parties decision-making processes.

IV. General Provisions and Limitations

This MOU is a voluntary agreement that expresses the good-faith intentions of the Parties, is not intended to be legally binding, does not create any contractual or fiscal obligations, and is not enforceable by any party. It does not create any right or benefit, substantive or procedural, enforceable by law or equity, by any party, against the Parties, their officers or employees, or any other person. This MOU does not direct or apply to any person outside of the Parties.

All commitments made by the Parties in this MOU are subject to the availability of appropriated funds and budget priorities. Nothing in this MOU, in and of itself, obligates the Parties to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations. Any transaction involving transfers of funds between the

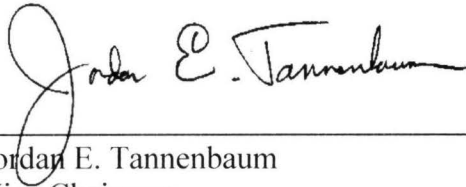
Parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

V. Administrative Provisions

1. This MOU shall be executed as of the date of the last signature and shall remain in effect for ten (10) years unless terminated or otherwise extended through a modification of this MOU. This MOU may be extended or amended upon written request from any Party and the subsequent written concurrence of the others.
2. Any Party can opt out of this MOU by providing a 60-day written notice to the other signatories.
3. Other federal agencies may participate in this MOU at any time while the MOU is in effect. Participation will be evidenced by an agency official signature on the MOU.

VI. Signatures of the Parties of the MOU on Tribal Treaty Rights

See attachments.

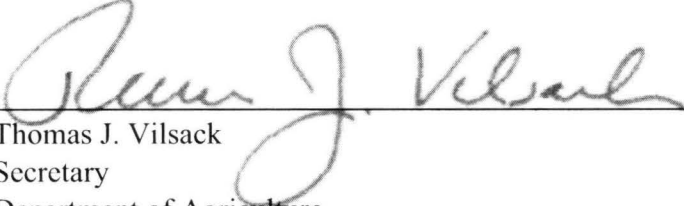


8/4/2021

Jordan E. Tannenbaum
Vice Chairman
Advisory Council on Historic Preservation

**MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY
COORDINATION AND COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY
AND RESERVED RIGHTS**

November 2021



Thomas J. Vilsack
Secretary
Department of Agriculture

Date

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS

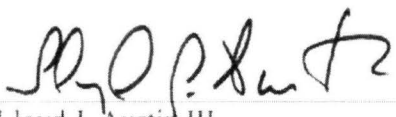


Gina M. Raimondo
Secretary
Department of Commerce

10/8/2021

Date

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS



Lloyd J. Austin III
Secretary
U.S. Department of Defense

27 Oct 2021

Date

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND COLLABORATION
FOR THE PROTECTION OF TRIBAL TREATY RIGHTS

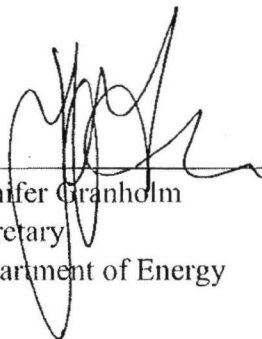


11/09/2021

Miguel A. Cardona, Ed.D.
Secretary
U.S. Department of Education

Date

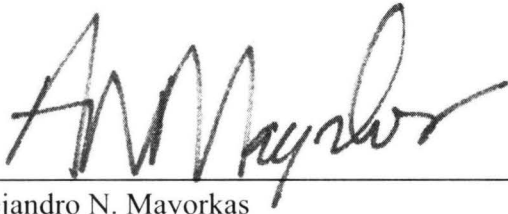
MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS



Jennifer Granholm
Secretary
Department of Energy

11/8/21
Date

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS



Alejandro N. Mayorkas
Secretary
Department of Homeland Security

10/31/2021

Date

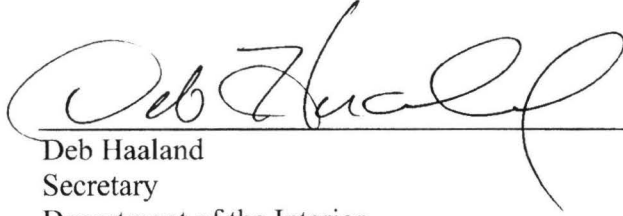
MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS

Marcia L. Fudge

Marcia L. Fudge
Secretary
Department of Housing and Urban Development

9/28/2021

Date



Deb Haaland
Secretary
Department of the Interior

AUG 05 2021

Date

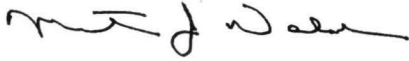


10.29.21

Merrick B. Garland
Attorney General
United States Department of Justice

Date

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS



10/28/2021

Martin J. Walsh
Secretary
U.S. Department of Labor

Date

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS

Brian P. McKeon

10/28/2021

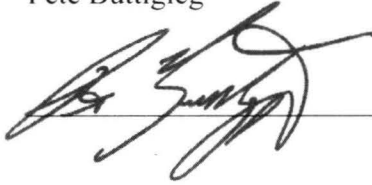
Brian P. McKeon
Deputy Secretary of State for Management and Resources
Department of State

Date

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS

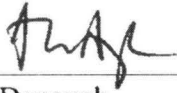
MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS

Secretary, Department of Transportation
Pete Buttigieg



Date: 10/29/2021

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY RIGHTS AND RESERVED RIGHTS



Denis McDonough
Secretary
Department of Veterans Affairs

11/9/21
Date

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS



Michael S. Regan
Administrator
U.S. Environmental Protection Agency

August 5, 2021

Date

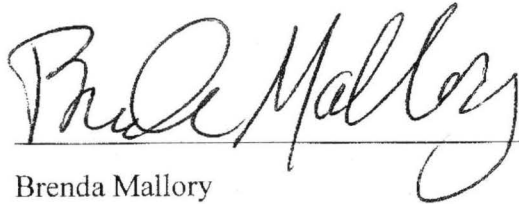
Kiran A. Ahuja

Kiran Ahuja
Director
Office of Personnel Management

10/16/2021

Date

MEMORANDUM OF UNDERSTANDING REGARDING INTERAGENCY COORDINATION AND
COLLABORATION FOR THE PROTECTION OF TRIBAL TREATY AND RESERVED RIGHTS



8/5/2021

Brenda Mallory
Chair
White House Council on Environmental Quality

Date