MOAPA BAND OF PAIUTES

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Paul Cort
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U.S. Environmental Protection Agency
Region IX
75 Hawthorne Street
San Francisco, CA 94105

Re: Consultation on the 8-Hour Nonattainment Designation for the Moapa Indian Reservation (Clark County, Nevada)

Dear Mr. Cort:

This letter requests that EPA immediately commence the consultation process with the Moapa Band of Paiutes (the "Tribe") in relation to the designation of boundaries for the Las Vegas Valley 8-hour ozone nonattainment area.

The Moapa Indian Reservation is located in Clark County, Nevada, approximately 45 miles northeast of Las Vegas (the "Reservation"). The Reservation in its entirety is held in trust by the United States for the Tribe as an entity. On April 15, 2004, the Environmental Protection Agency designated Clark County including the Reservation as a nonattainment area for the 8-hour ozone standard.

In a letter submitted to Lydia Wegman on May 18, 2004, and a follow-up conference call the next day with Ms. Wegman and other involved EPA staff, we pointed out that EPA had designated the Reservation as a nonattainment area without any meaningful consultation with the Tribe, notwithstanding EPA's trust responsibilities to the Tribe and longstanding federal and EPA policies and directives recognizing that trust responsibility and mandating that EPA consult with the Tribe on proposed actions affecting the Tribe's interests. We also addressed the merits of the designation in our letter and the conference call, explaining the severe economic impact of the designation on the Tribe and providing an 11-point analysis addressing why the nonattainment areas boundaries should not include the Reservation.

On June 18, 2004, EPA published a Federal Register notice deferring the 8-hour ozone nonattainment designation for Clark County including the Reservation. According to the notice, the deferral was necessary to provide the State and EPA time to determine whether a boundary adjustment is appropriate. The Tribe supports and commends the deferral. However, we are surprised and disappointed that the notice does not mention the Tribe or Reservation or the concerns expressed by the Tribe in our May 18, 2004 letter to EPA and our subsequent conference call with EPA. The inferences created by these omissions are that the Tribe is not

affected by the nonattainment designation and that EPA intends to deal exclusively with the State in setting the nonattainment area boundary. We understand that EPA had to act very quickly in drafting the June 18, 2004 Federal Register notice and attribute the oversight as to the Tribe and Reservation, and the implication that EPA will not be consulting directly with the Tribe, to the speed with which the agency was working. However, we want to ensure that Tribal interests and EPA's duties to the Tribe are fully factored-in to EPA's decision making process, during the 90 day boundary deferral reconsideration process.

We request confirmation that during that time period (which expires September 13, 2004) EPA will work with the Tribe in a manner consistent with the unique duties it has to the Tribe. EPA, like all federal agencies, is subject to the federal trust responsibility. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir.), cert. denied, 454 U.S. 1081 (1981). "The law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.'" *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993) (quoting *United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987)). The trust relationship overlays EPA's statutory obligations and requires that EPA consult with tribes and consider tribal interests when taking actions that may affect a reservation. *See Memorandum, Government-to-Government Relations with Native American Tribal Governments*, 59 Fed. Reg. 22,951 (Apr. 29, 1994) (each executive agency "shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments"); EPA 1984 Indian Policy ("in keeping with the Federal trust responsibility, will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments"). It is important to the Tribe that we have a clear understanding of how EPA will honor these obligations.

We are concerned that EPA is not commencing a proper Tribal consultation process in relation to the boundary determination. We understand that EPA would like the Tribe to coordinate its efforts with the State or Clark County and submit any additional information on the nonattainment boundary changes through the State. However, the Tribe is a governmental entity wholly distinct from the State and County and it is therefore not appropriate to require or expect the Tribe to participate indirectly in the process through the State or County. This sentiment has been mirrored by the County and the State, both of which have indicated a reluctance to incorporate unique Tribal concerns into a package addressing State and County interests.

To ensure that Tribal interests are adequately represented, considered and protected, EPA must consult directly with the Tribe, consistent with the process described in the July 18, 2000 guidance memorandum regarding tribal 8-hour ozone designations, to ensure that the Tribe's unique interests are being adequately considered. EPA's responsibilities to the Tribe are different from those owed to the County. Also, the Tribe's concerns relate exclusively to the Reservation (east of Las Vegas Valley), while we anticipate that the County's concerns will be focused more on the south and west sides of Las Vegas Valley.

For all of these reasons, we request that you contact us immediately regarding scheduling and procedures for consultation with the Tribe in this process. Our tentative plan is to provide EPA with a supplemental 11-point analysis by July 19, 2004. This analysis will be based on the materials submitted to Lydia Wegman on May 18, 2004. We request a reasonably prompt subsequent meeting with EPA to discuss the submittal and any EPA issues and concerns regarding it, before EPA makes its proposed designation. The Tribe also asks for a reasonable opportunity to provide additional information after that meeting, if necessary to respond to EPA's concerns. While we understand that EPA is allowing only 90 days for the deferral and reconsideration process, providing these opportunities for interaction with the Tribe is consistent with the July 18, 2000 guidance. In order to firm-up this tentative schedule, we would like to schedule a conference call with you as early as possible.

We look forward to working with you during this process and want to thank EPA for allowing this 90 day deferral so that the parties have adequate time to determine appropriate boundaries for the Las Vegas Valley nonattainment area. Please contact our attorneys John Arum and Steve Chestnut at (206) 448-1230 to set up a mutually convenient time for the conference call to discuss scheduling our submittals and EPA's responses.

Sincerely,

Phil Swain

MOAPA PAIUTE TRIBE
Phil Swain, Chairman

cc (by fax): John Arum and Steve Chestnut (Counsel for Tribe; fax: 206-448-0962)
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