THE HOPI TRIBE

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September 26, 2013

Robert Lorenz, District Engineer
Eastern Arizona District Office
Indian Health Service
5448 S. White Mountain Blvd., Suite 220
Lakeside, AZ 85929

Re: Your letter of August 2, 2013

Dear Mr. Lorenz:

This is in response to your letter of August 2, 2013, asking for direction on how to proceed to drill the second well at the Turquoise site for the Hopi Arsenic Mitigation Project (HAMP) in light of questions raised by First Mesa Consolidated Villages (FMCV); requesting Tribal input on the best way to obtain village approvals for the proposed facilities; asking about the means of resolving FMCV concerns with serving the BIA's Keams Canyon water system; asking whether formal rights-of-way will be required for HAMP; and announcing the intent of the IHS and BIA to propose a planning study for the work that will be necessary to connect to the three BIA/BIE water systems to serve Keams Canyon, Hopi Junior-Senior High School, and Second Mesa Day School. This letter provides context and guidance to you on the first four of the subjects and comments on the fifth subject.

The first three issues deal in various ways with village jurisdiction. Village jurisdiction on the Hopi Reservation is, as you know, a matter of some controversy within some Hopi villages, between some Hopi villages, and between some villages and the Tribe as represented by the Hopi Tribal Council. The question of who can speak for each village is also sometimes less than clear. Let me provide as much clarity on the subject as is possible.

1. **How to proceed on drilling the second well at the Turquoise site for HAMP in light of questions raised by FMCV.**

   The short answer is promptly and without further ado. I have directed Mr. Lionel Puhuyesva to authorize Yellow Jacket Drilling Services, LLC, to proceed with the second well at the Turquoise site.

   The more detailed answer is that the Hopi Tribe is a union of the self-governing Hopi and Tewa villages created by the villages under a constitution as amended from time to time with the approval of the Secretary of the Interior or his or her designated representative.

It vests substantial governing power in the Hopi Tribal Council, which acts by resolution or enactment of laws and, typically, the resolutions are carried out and the ordinances implemented by the Chairman, but other officials including village officials may be designated to carry out all or specific portions of a resolution or ordinance. The Hopi Tribal Council is authorized, among other things, to "represent and speak for the Hopi Tribe in all matters for the welfare of the Tribe, and to negotiate with the Federal, State, and local governments . . ." Article VI, Sec. 1(a). "Assignment of use of farming land within the traditional clan holdings of the Villages [which are enumerated] as in effect at the time of approval of [the] Constitution, shall be made by each village . . . Unoccupied land beyond the clan and village holdings shall be open to the use of any member of the Tribe, under the supervision of the Tribal Council." Article VII. The Turquoise well sites are unoccupied land. The Hopi Tribal Council may also use the Tribal Council fund, which would include grants made to the Tribe by federal agencies such as the ones from EPA for what we now call HAMP, "for the welfare of the Tribe," and can make ordinances "to protect the . . . welfare of the Tribe." Art. VI, Sec. 1(f) and (g). These broad powers are vested in the Hopi Tribal Council, not the Hopi villages. The Hopi Tribal Council can also "delegate any of [its] powers . . . to committees or officers, keeping the right to review any action taken." Art. VI, Sec. 1(l).

The villages retained a limited set of powers, including deciding on how they would be organized, as set out in Art. III, Sec. 2-3; Art. IV, Sec. 4-5; Art. VII, Sec. 1; and Art. VIII, Sec. 1 and 3. None of these other than the assignment of farming land involved authority over land, and the assignment of farming land was subject to Article VII and has been interpreted to mean assignment for farming purposes. The Turquoise drilling sites are not farmed.

Thus, the Hopi Tribal Council is and was the proper authority to authorize entering into the agreements for HAMP with IHS and was and is the proper authority to provide for the use of Hopi land for HAMP. The Turquoise well sites are not subject to village approval.

In the case of the wells being drilled at the Turquoise site, the Hopi Tribal Council has already acted to make the Turquoise lands available for drilling by authorizing a resolution to enter into an agreement with IHS to plan for and drill the water wells, by authorizing the selection of a contractor to drill the two proposed wells at the site, and by entering into the drilling contract. Hopi Resolutions H-035-2010, June 15, 2010, and H-018-2013, March 25, 2013, respectively. Implicit in authorizing the drilling of the wells at the Turquoise site is use of the site for the wells.

The delegation for carrying out the drilling contract was to the Tribal Chairman ("to take other actions on behalf of the Hopi Tribe, as may be necessary or desirable to carry out the intents and purposes of [the] Resolution"), and the Hopi Water Resources Program, which is headed by Lionel Puhuyesva ("the Hopi Water Resource Program shall have the responsibility to ensure that the Hopi Tribal actions intended by this Resolution are carried out in accordance with its terms."). H-018-2013. The Tribal Constitution is abundantly clear that the Hopi Tribal Council has the authority to negotiate with IHS on behalf of the Tribe, to approve the awarding of contracts for such work, and to assign

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responsibility for carrying out the Tribe's responsibilities under such contracts and has done so. There is nothing in the Tribal Constitution authorizing Hopi villages to negotiate with federal agencies. Mr. Puhuyesva is under direction from me to carry out the contract, including directing Yellow Jacket Drilling Services to drill the second well and I am assured that he will do so without further delay.

The authority of the Hopi Tribal Council to exercise jurisdiction over Hopi Reservation lands has also been made clear by the U.S. Courts and has been upheld by the Interior Department's Board of Indian Appeals (IBIA). In the case of authority over the Hopi Reservation, title was quieted in the Hopi Tribe under Healing v Jones, Civ. No. 58-579, Findings of Fact, Conclusions of Law, and Judgment (D. Ariz. Sept. 28, 1962), rather than in any other tribe or in the Hopi villages.[1] As the IBIA concluded, "Accordingly, under Healing [a particular site within the traditional and immediate area of First Mesa Village] is held in trust by the United States for the Tribe, not First Mesa and/or the members of First Mesa." First Mesa Consolidated Villages v. Phoenix Area Director, Bureau of Indian Affairs, 26 IBIA 18, 23 (1994).[2] IBIA also concluded that the Hopi Tribal Council as well as BIA must authorize the lease of Hopi Reservation land and must designate with sufficient specificity the Tribal official designated to execute a lease to ensure that the official who executes the lease is authorized to do so. 26 IBIA 29-30. Leasing in this case was simply a manifestation of the control of Hopi Reservation land vested by the Hopi Constitution in the Tribal Council.

Your letter also identified Section 106 of the National Historic Preservation Act as a reason to secure village leadership approvals for work on Hopi lands. Our reading of this act leads us to conclude that it does not apply to the question at hand. Among other things, Sec. 106 of the Act applies to recognized tribes, and the Hopi villages are not federally recognized Tribes; the Hopi Tribe is. Mr. John Hamilton has argued that NEPA requires that village approvals be received by IHS. There is nothing in NEPA, however, that justifies that view. NEPA is a procedural statute and has no bearing on the issue.

We understand that IHS has refused to notify Yellow Jacket Drilling Services to transfer its drilling equipment to the second Turquoise well drilling site based on these wholly spurious claims. We would like to remind IHS here that section 4.01 of the Standard General Conditions of the Construction Contract, which is included as part of the Project Manual for the Yellow Jacket contract, requires the "Owner" (the Tribe), not IHS, to furnish the site to the contractor and insist that IHS not intrude into this Tribal responsibility. The Tribe has furnished the site and the contractor has successfully occupied it. Also, we believe that IHS's action in not authorizing Yellow Jacket to shift its drilling operations to the second site interferes with the contract timing to achieve

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[1] "Title in and to the part of the 1882 reservation described in the preceding paragraph of this judgment is quieted in the Hopi Indian Tribe for the common use and benefit of the Hopi Indians, subject to the trust title of the United States, and such land is henceforth a reservation for the Hopi Indian Tribe." Healing Judgment, para. 2.

[2] In the particular case, the question at hand was whether the First Mesa had authority to enter into a lease within an area traditionally occupied by First Mesa. The IBIA ruled that the lease was valid because the Hopi Tribal Council had authorized First Mesa to enter into the lease. In this particular case, it had authorized First Mesa to execute the lease, but that was a function of delegation by the Council under Art. VI, Sec. 1(l). See 26 IBIA 25, 30. What was critical was that the Hopi Tribal Council had authorized the action; otherwise it would have been invalid.

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project milestones and remind IHS that this, too, is an exclusive function of the Tribe and can only be effected by a change order which must be executed by the Tribe and the contractor, not IHS under section 12.02 of the Standard General Conditions, which are part of the Tribe's contract with Yellow Jacket.
Having summarized the Tribe's and villages' relative authorities with regard to the Turquoise wells, there are still issues on implementing HAMP that must be resolved by the Tribe jointly with the villages for HAMP to be a success. I turn to that in the next section.

2. The best way to obtain village approvals for the proposed facilities.

There is no question that HAMP must be a joint venture between the Hopi villages of First and Second Mesas and the Tribe. As a result, the Hopi Tribal Council enacted the Hopi Public Utility Act to clarify the responsibilities that the Tribe would take on through the Hopi Public Utility Authority (HPUA) and Hopi Public Utility Commission. HPUA, will be responsible for the HAMP wells, pipelines, and other related facilities to be used to wholesale water to the villages, which will continue to operate their village water systems to deliver HAMP water to homes, businesses and other entities. The Tribe does not propose to take over any of the village water systems unless a specific village requests that HPUA do so and negotiates an arrangement for that purpose with HPUA. Thus, HPUA will be responsible for providing adequate and reliable quantities of potable water that meet all water quality standards to villages on a wholesale basis at a reasonable cost and the villages will need to agree to accept the water and cover the costs. There are many details to this set of basic transactions, but we are convinced that all of the Hopi villages want HAMP to be successful and the Hopi Tribal Council has worked hard to assure that HAMP succeeds.

We see the mutual agreement required for such success as a two-step process. First, we are preparing for consideration by the Hopi Tribal Council and the villages a Memorandum of Agreement (MOA) between the Tribe and villages that lays out the basic relationships and commitments of all of our governments needed to successfully implement HAMP. The commitments will necessarily involve understandings about the location and protection of HAMP pipeline corridors and areas for HAMP-related facilities. We will be discussing the MOA with the villages to fine tune it and address concerns that are raised and we believe each of the villages will want to sign the MOA in order to avail themselves and their members of the abundant supply of clean water that it will provide.

The Hopi Tribal Council is also aware that the financing of HAMP rests in substantial part on financial participation by the Bureaus of Indian Affairs and Indian Education, including the participation by IHS that has already been discussed with IHS. We believe most of the villages are already on board with this and that the remainder will be supportive as we discuss the financing realities of both constructing and operating HAMP with them. These financing arrangements and commitments will also be covered in the MOA.

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The MOA will also recognize that a subsequent detailed water service agreement between each village or its water system authority and HPUA will be required as a second step. The villages understand that and, subject to reasonable water rates and assurances of adequate supply, agree that this is necessary.

We also believe that the MOA among village officials and the Tribe will obviate the need for IHS officials unnecessarily involving themselves in the internal affairs of the Hopi Tribe. As you know, identifying who specifically is authorized to represent a particular village is sometimes less than clear and a matter of contention. To illustrate the difficulty of getting involved in intra-tribal matters, the Hopi Appellate Court, the Hopi Tribe's highest court, on September 10, 2013, concluded in a case involving the governance of Mishongnovi that the:

> Hopi Constitution expressly recognizes that the retained aboriginal Village sovereignty to decide how [Mishongnovi] is governed is retained by the Village, not the Kikmongwi, after the adoption of the 1936 Hopi Constitution. We further hold that the term "leader" as used in Article III, Section 3, limits the role of the Kikmongwi, in relationship to the Hopi Tribe, to a formal spokesman, communicator, or head of state for the Village, as opposed to the lawful government of the Village." Duwahoyeoma *et al.* v. Hopi Tribe. e*t al.,* The Hopi Tribe Appellate Court No. 2012-AP-0002 at 44-45.

The manner in which the Village decides on its form of government was determined by the Court to be an internal matter for the Village and beyond the subject matter jurisdiction of the Hopi courts so long as the issues involved wholly internal disputes. Id. at 44. The Court, however, asserted jurisdiction over questions concerning village organization and leadership for the narrow purpose of determining whether the Tribe and/or its officials acted lawfully, such as when a dispute is not wholly internal and involves entities outside the Village such as the Tribe or its officials. Id. Such a case, for instance, could be where the Tribe recognizes a particular entity in a village as its government or agent for the government for the purpose of committing tribal funds for a project and the Tribe's choice is challenged. Additionally, the Appellate Court rejected a challenge to the authority of the Village of Mishongnovi's Interim Board of Directors to act as the government of the Village. Id. at 43-44.

We believe it will be more useful for the Hopi Tribal Council and its representatives, including myself, to sort out with the villages that participate in HAMP how the will of each village is expressed and who can sign the MOA and water service agreement for each village. The IHS can then simply rely on its agreements with the Tribe as authorized by the Hopi Tribal Council. An example of such agreement on behalf of the Tribe and villages is found in the Memorandum of Agreement among the Indian Health Service and the Hopi Tribe, Project No. PH-E37, which in large measure governs the Turquoise well project. Under the agreement, the Tribe spoke both for itself and the villages when it granted permission for the IHS and its representatives to enter upon or across tribal lands under the control of the Tribe without charge. We believe this

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approach will also be helpful in avoiding situations where the IHS attempts or thinks it needs to attempt to interpret communications from various persons who may purport to speak for a particular village.

3. **The best means of resolving FMCV concerns with serving the BIA's Keams Canyon water system.**

   Having addressed questions 1 and 2, above, we can quickly resolve this question. The means of resolving FMCV concerns with serving the BIA's Keams Canyon water system should be dealt with as an intra-tribal issue and covered in the MOA between the Tribe and the villages. The MOA will address the route and arrangements for connection of the BIA's Keams Canyon water system to HAMP.

4. **Will formal rights-of-way be required for HAMP?**

   In the main, the answer is no. As you are aware, a previous General Counsel's office opinion has already concluded that the Hopi Tribe does not need to grant itself a right-of-way for Reservation land used for its own operations. That said, the Hopi Tribal Council is quite aware of the need for a legal designation of corridors to construct, operate, maintain, and repair the HAMP facilities and will enact legislation to protect them and, as construction is complete, adjust such corridors to the limited amounts of land needing to be set aside and protected for the HAMP facilities. Additionally, we will need to take a careful look at the terms of existing rights-of-way, such as the one for Arizona route 264, and, possibly, of existing leases to determine whether BIA, right-of-way holder, or lessee approval of routes crossing such rights-of-way or leases are required. We will work through that with BIA and, in the case of the two schools, with BIE as well. It may be that there are some portions of the HAMP pipeline route that will require a modification of a right-of-way agreement. In either case, the designation of the corridors or rights-of-way will be done through formal means since the facilities will need to be legally protected as well as physically and operationally protected.

5. **The IHS proposes a planning study for the work that will be necessary to connect to the three BIA/BIE water systems to serve Keams Canyon, Hopi Junior-Senior High School, and Second Mesa Day School.**

   The Hopi Tribe has been working for several years to secure a written agreement from the Department of the Interior that it will participate in HAMP to secure domestic water supplies for the Keams Canyon, Hopi Junior-Senior High School, and Second Mesa Day School water systems including covering its share of HAMP costs. The Assistant Secretary – Indian Affairs has told us on several occasions that he supports HAMP and that BIA and BIE will participate in it. We understand that Indian Affairs' participation will include financial support for HAMP. We keep being advised by staff of the Assistant Secretary – Indian Affairs that they are working on the agreement and identifying the funding sources and that the agreement draft should be completed "soon." Earlier this month, we were advised that they expected to have a proposed agreement before the end of September; previously it had been by the end of July. We have

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provided a copy of your proposed draft agreement with minor modifications to the Assistant Secretary's staff and think it likely that the Hopi Tribal Council would support it if Indian Affairs is willing to participate in it. We thank you for taking the initiative in suggesting the planning agreement.

In closing, I would like to thank you for bringing these questions to the Tribe's attention. We also appreciate your and your staff's dedication and hard work in helping the Tribe make HAMP a reality to assure that the drinking water of the villages of First and Second Mesas meets appropriate water quality standards including those for arsenic.

Sincerely,

LeRoy N. Shingoitewa, Chairman
Hopi Tribe

cc: Robert McSwain, Deputy Director for Management Operations, IHS
Admiral Ronald C. Ferguson, Assistant Surgeon General and Director of Sanitation Facilities Construction, Public Health Service
Dorothy A. Dupree, Area Director, Phoenix Area, Indian Health Service
Tom Heintzman, Director, Sanitation Facilities Construction, Phoenix Area, Indian Health Service

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