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May 21, 2010

Col. Reinhard W. Koenig
U. S. Army Corps of Engineers, Alaska District, CEPOA-DE
P.O. Box 6898, Elmendorf AFB
Anchorage, Alaska 99506

John Pavitt
U. S. Environmental Protection Agency, Alaska Operations Office
222 West 7th Avenue, Box 19
Anchorage, Alaska 99513

Subject: Request to meet with Corps and EPA regarding Six Tribes being cooperating agencies on any EIS on a potential Pebble mine, and potential request for joint-lead agencies.

Dear Colonel Koenig and Mr. Pavitt:

I and my co-counsel Thomas E. Meacham represent six federally-recognized tribes on matters (including litigation) related to a potential Pebble mine in Southwest Alaska. These tribes are: (1) the Nondalton Tribal Council, (2) Koliganek Village Council, (3) New Stuyahok Traditional Council, (4) Ekwok Village Council, (5) Curyung Tribal Council (Dillingham), and (6) Levelock Village Council. Mr. Meacham and I would like to meet with representatives of your agencies to discuss the fact that these six tribes may request to be cooperating agencies on any environmental impact statement (EIS) regarding a proposed Pebble mine.

We also represent the Alaska Independent Fishermen's Marketing Association (AIFMA) and Trout Unlimited, Inc. (TU) in the pending litigation. On behalf of all eight clients, we would also hope to discuss their potential request that joint-lead federal agencies be designated on any EIS.

I. Our tribal clients may request cooperating-agency status.

Our threshold concern is to discuss, sooner rather than later, the six tribes potentially being cooperating agencies. The Pebble Limited Partnership (PLP) has said that it may submit mine permit applications in 2011.[1] The six tribes need to understand what they might be undertaking as cooperating agencies. They may seek grant funds. Your agencies presumably would want to understand what role the tribes might play as cooperating agencies.

[1] Prior to January 2010, PLP said it expected to commence the permitting process in 2010. In January 2010, PLP's chief executive officer, John Shively, announced that PLP would not be ready to file applications at least until 2011.

Federal regulations provide that "cooperating agencies" are those having jurisdiction by law or special expertise relevant to either (1) any impact at issue in an EIS, or (2) a reasonable alterative. The regulations provide that recognized tribes may be cooperating agencies.[2] Cooperating agencies should assist during scoping.[3] Thus, lead or joint-lead agencies should designate cooperating agencies *before* scoping. Cooperating agency status for appropriate non-federal agencies "should be routinely solicited," and should be designated *no later* than the scoping process.[4] EPA recommends that Alaska tribes make early requests for cooperating agency status, in order to address subsistence and traditional ecological knowledge.[5] Thus, an early discussion of this subject in relation to Pebble will facilitate EPA's recommendation.

These six tribes meet both federal grounds for eligibility,[6] and as explained below are *uniquely* positioned to do so in several respects.

A. Regarding impacts at issue, these tribes offer knowledge of subsistence and traditional ecological knowledge.

We would like to hear your views on whether these federally-recognized tribes can assist regarding (1) environmental and social impacts at issue, particularly with respect to subsistence, and (2) updating, generating and evaluating subsistence-related information that could be useful in an EIS, particularly if done in cooperation with other agencies.[7]

These six Alaskan tribes offer traditional ecological knowledge of subsistence use areas, harvest practices, and resources in the Kvichak and Nushagak drainages. Most subsistence at

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[2] 40 CFR 1508.5.

[3] 40 CFR 1501.6(b)(2).

[4] Memo for Heads of Fed. Agencies, Exec. Off. of President, CEQ, July 28, 1999, re cooperating agencies, http://ceq.hss.doe.gov/nepa/regs/ceqcoop.pdf. Prior to scoping, lead or joint-lead agencies are designated and they request other agencies, such as tribes, to be cooperating agencies.

[5] *See*, EPA, http://www.akforum.com/eProceedings/NEPA.ppt#305,1,National Environmental Policy Act (NEPA) & Tribal Involvement at Alaska Environmental Forum (2008). ADNR made similar recommendations regarding large mines, and offered the Pogo Mine as an example of the State and 12 tribes maintaining government-to-government relationships.

[6] They can also assist in scoping, as contemplated by NEPA regulations. Further, treating tribes as cooperating agencies also implements Executive Order 13175 and the President's recent memorandum on tribal consultation (Mem. for Heads of Executive Departments and Agencies, re: Tribal Consultation (Nov. 5, 2009.))

[7] These six tribes are uniquely positioned to address the adequacy or inadequacy of existing subsistence-related information. In *Nondalton Tribal Council, et al., v. State ADNR, et al.*, Case No. 3AN-09-46 CI (3rd Jud. Dist., Alaska), these six tribes, AIFMA and TU assert that the Alaska Department of Natural Resources in its current 2005 Bristol Bay Area Plan, which applies to lands at Pebble, failed to update or rely upon its inventory of subsistence use areas, as required by state statute. For purposes of an EIS, federal agencies may need more accurate subsistence-related information than that presently existing in the 2005 Bristol Bay Area Plan.

issue in Pebble-related matters is by members of the tribes who reside in the drainages, and hunt, fish and gather resources there. These six tribes include the largest in the drainages, *i.e.*, the Curyung Tribe, which has about 2400 members. Tribal members are the substantial focus of subsistence studies by agencies and contractors of PLP. Tribal members are likely to bear the direct, indirect and cumulative impacts of governmental decisions related to any proposed Pebble mine, associated facilities, and other reasonably foreseeable events if a mine is permitted.

Moreover, asking these tribes to be cooperating agencies would be particularly appropriate in light of PLP's recent decision to terminate its Technical Working Groups (TWGs), of which there were approximately ten. As you know, they had been composed of federal and state officials who, in an advisory capacity, had sought for years to properly advise PLP as it progressed toward an EIS, including with respect to review PLP's baseline study plans before they were implemented, and to review the results. We understand that difficulties arose between PLP and the agencies with respect to these and other matters. The minutes of the last TWG Steering Committee on October 27, 2009 reflect that TWG members from multiple agencies recommended a TWG on subsistence.[8] PLP's decision to terminate the TWGs, in effect, means that such a group will not exist for purposes of advising PLP prior to submission of applications for permits. Cooperating agency status of the tribes may help to remedy this shortcoming.

B. These tribes are in a unique position with respect to any alternatives that would propose to permit a Pebble mine.

We would also like to discuss with you that these six tribes have special knowledge and perspective about the 2005 Bristol Bay Area Plan (2005 BBAP) of the Alaska Department of Natural Resources (ADNR), and are in a unique position with respect to any alternatives that would propose to permit a Pebble mine.

Federal regulations, at 40 CFR § 1506.2(d), provide that to integrate an EIS into state planning processes, an EIS shall discuss any inconsistency of a proposed action with any approved state land use plan; and where inconsistency exists, the EIS should describe the extent to which the federal agency would reconcile its proposed action with the plan. In other words, an EIS on any potential Pebble mine will have to consider and analyze the applicable state land use plan.

In that respect, all alternatives in an EIS that would permit a Pebble mine will be based upon the 2005 BBAP. It is the principal state land use plan presently in effect is the area. It applies to all state-owned lands in the Bristol Bay drainages. These include the Kvichak and Nushagak drainages, which are mostly state-owned lands and which include the state lands that are subject to the Pebble mining claims and most of the potential access corridor to them from Williamsport on Cook Inlet.[9] Speaking generally, the State's area plans essentially perform two

[8] *See* Minutes, TWG Steering Comm., Oct. 27, 2009, at http://ADNR.alaska.gov/mlw/mining/largemine/pebble/twg/pebble102709.pdf (last visited January 27, 2010).

[9] ADNR's 2005 BBAP also applies to state "settlement lands" where employees of PLP and others may be housed.

functions: (1) they classify units of state land according to primary uses, and (2) they adopt guidelines and statements of intent. The classifications, guidelines and statements of intent guide state land use decisions in a particular area for about twenty years after a plan is adopted. Thus, all action alternatives in an EIS that would permit a Pebble mine will be *shaped* by the pertinent land use classifications, guidelines and statements of intent of the applicable state area plan, which is currently the 2005 BBAP. For example, the 2005 BBAP classified state land, and established guidelines and statements of intent, by methods which included:

1. using primarily *marine* criteria, such as whether land is a walrus haulout, to determine whether *inland uplands* qualify for classification as fish and game habitat;
2. *excluding moose and caribou* from the process of designating and classifying land as habitat;
3. having *no land use classification category for subsistence hunting and fishing*, while ADNR has one for *sport hunting and fishing*; and
4. defining recreation as *excluding* sport hunting and fishing for purposes preparing the 2005 BBAP.

As long as the 2005 BBAP is in effect, every alternative in an EIS that would permit a Pebble mine will rest upon such methods of creating the current land classifications, guidelines, and statements of management intent. That will put federal agencies in the position of having to explain in pubic and on the record, for purposes of 40 CFR § 1506.2(d), why they would entertain federal permit applications to develop state land where the state classifications, guidelines and statements of intent rest upon such methods. To ignore those methods is contrary to 40 CFR § 1506.2(d) and would beg the question of what the classifications, guidelines and statements of intent would be in the absence of the 2005 BBAP. No one can answer that question. Thus, regardless of whether such state methods are lawful under state law, and we believe they are *not*, we doubt that federal or state agencies can engage in the legally required, reasoned decision-making necessary to approve federal or state permits as long as the 2005 BBAP is in place. The 2005 BBAP appears to be fatal from a legal standpoint to an EIS that supports the issuance of permits for Pebble.[10]

The six tribes, AIFMA and TU have sued ADNR in state court to have the current the 2005 BBAP declared unlawful.[11] The case is still its early stages and is undecided. Most of our clients' claims challenge the *methods* that ADNR used to classify state land, and to establish guidelines and statements of intent. These methods, which are addressed in an accompanying enclosure,[12] were applied to state lands at Pebble, to the access corridor, and to areas where Pebble-related settlement may occur. If the litigation is successful, then ADNR will have to develop a new Bristol Bay Area Plan, and any permit applications for a Pebble mine will be delayed. If the litigation is unsuccessful, then the 2005 BBAP will stand unless otherwise revised.

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[10] *See* Briefing Paper, Part II, attached to enclosed letter to Rep. Edgmon.
[11] *Nondalton Tribal Council, et al., v. ADNR, et al.*, Case No. 3AN-09-46 CI (3rd J. Dist., Ak).
[12] *See*, accompanying letter to Rep. Bryce Edgmon and Briefing Paper, Part I, attached thereto.

In either event, for purposes of developing alternatives in an EIS, federal agencies would probably benefit from having both ADNR and these tribes as cooperating agencies, because together they have different perspectives about many factual issues related to the 2005 BBAP. These tribes offer views that can supplement those of ADNR, help to develop alternatives, evaluate impacts, and inform the public and decision-makers about Pebble and the applicable area plan. On the other hand, if these tribes are not asked to be cooperating agencies, then federal agencies will be more likely to acquire an incomplete understanding of factual issues related to the 2005 BBAP, such as those described above concerning ADNR's methods of classifying land, and establishing guidelines and statements of intent. Finally, for purposes of developing and evaluating the alternatives required in an adequate EIS, the tribes with assistance of counsel can offer perspectives on the adequacy of current state and federal subsistence laws in the context of whether an increased population in the area on account of a Pebble mine is likely to increase conflicts over fish and game resources.[13]

II. Pursuant to 40 CFR 1501.5(d), our clients may request designation of joint-lead agencies under an interagency agreement that preserves the authority of all federal agencies to refer disputes to CEQ under 40 CFR 1504.

As said at the outset, all eight of our clients (six tribes, AIFMA and TU) may request, pursuant to 40 CFR 1501.5(d), that joint-lead federal agencies be designated under an interagency agreement that would preserve to each lead or cooperating federal agency its right to refer disputes with another lead or cooperating federal agency to the President's Council on Environmental Quality (CEQ), under 40 CFR 1504. We would appreciate discussing this issue with appropriate Corps and EPA officials.

Thank you for your attention to these matters.

Sincerely yours,

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cc:
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Dennis Andrew, President, New Stuyahok Traditional Council
Luki Akelkok, President, Ekwok Village Council

[13] *See* Briefing Paper, Part III, attached to enclosed letter to Rep. Edgmon. Without foreclosing future positions of our clients, we would be less than candid if we did not acknowledge that for the reasons stated in the enclosed letter and its attached briefing paper, these six tribes may support a range of alternatives in a draft EIS that is prepared for public review *only if* each rests upon prior enactment of refuge or critical habitat area legislation by the Alaska legislature.

Thomas Tilden, President, Curyung Tribal Council
Sergie Chukwak, President, Levelock Village Council
David Harsila, President, Alaska Independent Fishermen's Cooperative Association.
Tim Bristol, Alaska Director, Trout Unlimited, Inc.
Rep. Bryce Edgmon, Chair, Hs. Fisheries Committee, Alaska House of Representatives