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March 14, 2011

Secretary Ken Salazar  
Department of the Interior  
1849 C Street NW  
MS 4141- MIB  
Washington, D.C. 20240

**RE:** Department of Interior Draft Tribal Consultation Policy

Dear Secretary Salazar:

The Central Council of the Tlingit and Haida Indian Tribes of Alaska (Central Council) is the tribal government representing over 27,000 Tlingit and Haida Indians worldwide. We are a sovereign entity and maintain a government-to-government relationship with the United States. Central Council's headquarters are in Juneau, Alaska. Our commitment to serving the Tlingit and Haida people however extends much further.

We appreciate the opportunity to comment on the Draft Tribal Consultation Policy (draft policy), and acknowledge that much effort has gone into the development of the existing draft. In the spirit of offering meaningful input we offer our candid observations.

In our opinion, the policy erroneously holds the 'process of consultation' up as the measure of success. We strongly contend that the consultation process should be the means to an end; not the end product. Superficial consultation is tiresome and costly for all parties involved the draft policy should be rewritten.

The policy should provide more than framework for agency interaction with the Tribes; in making a commitment to significant consideration of tribal input, and convey the expectation that some accommodation was made in light of that input. It should identify these as the minimum outcomes of the consultation process. When a consultation is anticipated, tribal governments must be informed, advised, as well as included in federal actions and decision making. We expect our input to be incorporated and manifested in federal actions and activities.

Please do not continue to confuse the purpose of consultation. Consultation is not the Native National Environmental Policy Act, its purpose has nothing to do with gaining efficiency within the government as is stated throughout the draft policy. By engaging in consultation, the Department of Interior acknowledges that our tribal and sovereign rights extend from our indigenous use of and occupancy of the lands. We should have a say in how those lands and resources are being managed now.

An associated concern is that agents of the Federal government are not in the best position to determine what actions affect tribes. An important part of self-determination is "maximum Indian participation in the management of federal programs and services for Indians". From the ground level up through national policy making, we need to establish governmental peer relationships that afford us visibility into pending activities, rather than "notification" at the discretion of the agencies.

President Obama recognized the need for this in his meeting with the Tribes on November 5, 2009 when he said "Without real communication and consultation, we're stuck year after year with policies that don't work on issues specific to you and on broader issues that affect all of us. And you deserve to have a voice in both. And I want to be clear about this: Today's summit is not lip service. We're not going to go through the motions and pay tribute to one another, and then furl up the flags and go our separate ways. Today's sessions are part of a lasting conversation that's crucial to our shared future."

During that meeting the President also said, "And that's why I want you to know that I'm absolutely committed to moving forward with you and forging a new and better future together. It's a commitment that's deeper than our unique nation-to-nation relationship. It's a commitment to getting this relationship right, so that you can be full partners in the American economy, and so your children and your grandchildren can have an equal shot at pursuing the American Dream."

An additional key point is the draft policy should manifest the tenets of Federal Indian Law. Since the core principles of federal Indian law were pronounced by Chief Justice Marshall over two centuries ago, it is well understood that due to the federal government's "Plenary Power" over Indian affairs, the two sovereigns are considered on unequal footing. Seminole Nation v. United States, 316 U.S. 286, 296 (1942). As companion to this well recognized trust responsibility is the canon of federal Indian law which holds that statutes and programs passed for the benefit of Native Americans be liberally construed for the most expansive protections and benefits allowable by law.

As the federal government intends to improve its government-to-government consultation, policies proposed should incorporate this over-riding trust responsibility toward Native American tribes and be drafted in a manner protective of tribal interests.

In order to effectuate both Congressional and Presidential mandates, federal agencies must establish meaningful consultation with Indian tribes. To relegate most of the policy to permissive directions like "may" or "should", is to strip the policy of actual meaning, and leave its most important sections to the 'discretion' of the agency.

The reasoning behind Indian Self Determination legislation and Executive Orders for meaningful tribal consultation is if left to its own device, federal agencies are not fully informed of the federal governments unique trust obligations to Indian tribes, and often violate or overlook these trust principles. By making most of the relevant provisions of this policy discretionary, the policy in effect provides nothing other than business as usual. In lacking an enforcement action should an agency ignore trust and consultation principles, the policy does not do much to change the status quo.

Finally, we do not accept the primary definitions for "consultation" or "collaboration." The definitions chosen are not appropriate to this context, which makes the document null. Also, in several areas there are loop holes where "the policy" is defined by "the policy" or contains gratuitous statements such as "...including tribes in all stages of Tribal consultation..." We encourage a rewrite paying special attention to Section VIII, which is able to provide good "Consultation Guidelines" yet at present does not.

We fully believe that the Department of the Interior intends to produce a meaningful consultation policy. We believe that a rewritten policy may embody best practices, respect tribal sovereignty as well as reflect the tenets of Federal Indian law.

Sincerely,

A handwritten signature in black ink that reads "Edward K. Thomas". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Edward K. Thomas  
President

Cc: Mary Milam, DOI