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February 22, 2011

Re: Department of the Interior Policy on Consultation with Indian Tribes

Dear Secretary Salazar:

On behalf of the Cherokee Nation, I applaud the Department of the Interior's undertaking to strengthen the consultation policy pursuant to President Obama's Executive Memorandum on Federal Consultation with Indian Tribes. Improved consultation will only reinforce the relationship between the Department of Interior and Tribal Nations. It is essential that the Department of the Interior communicate with the Cherokee Nation in a manner that recognizes and respects the government-to-government relationship that Tribal Nations have with the federal government.

While the Cherokee Nation is encouraged by the increased emphasis on consultation between Department officials and Tribal leaders, I believe there are several improvements that should be made to the Department's Tribal Consultation Policy. The policy should guarantee Department officials consult with Tribal leaders, provide for independent oversight of consultation, and further clarify the meaning of certain terms.

Throughout the policy, Department officials are given significant leeway in how, when, and who communicates with Tribal leaders. The policy should be revised to increase the likelihood that important decision makers within the Department are the officials that speak with Tribal leaders. For example, Section II, Paragraph 2 requires that appropriate Departmental officials consult with Tribal leaders. However, "appropriate Departmental officials" is given a very broad definition that includes staff members that will report back to decision makers. The consultation policy should include additional safeguards to ensure that appropriate Departmental officials personally consult with the Cherokee Nation.

Additionally, the policy should provide for independent oversight to increase the likelihood that the Department is consulting with the Cherokee Nation as promised. Currently, Section III, Part G calls for an individual designated by the Department to assure compliance with the policy. The policy should provide for an individual that is independent of the Department to determine compliance. Currently, I fear that an individual designated by the Department could be influenced to overlook the shortcomings of Departmental officials.

Again, the Cherokee Nation is encouraged by the Department of the Interior's attempt to improve consultation between Departmental officials and Tribal leaders. I believe this policy is a strong first step in strengthening the relationship between the Department and the Cherokee Nation, but there are still improvements to be made. I have attached a list of comments that I believe will alleviate some of the Cherokee Nation's concerns with the new consultation policy.

Sincerely,

Chad Smith
Principal Chief
Cherokee Nation

Cherokee Nation Comments on Department of Interior Tribal Consultation Policy

- Section II, Paragraph 2 states “this policy requires that . . . appropriate Departmental officials” must be involved in the consultation process. Appropriate Departmental officials are defined as “knowledgeable about the matters at hand, are authorized to speak for Interior, and have decision-making authority . . . **or** are a program manager or staff who can ensure that Tribal concerns will be brought forward to final decision makers . . .”

The consultation policy should include guidelines to ensure that Departmental officials with decision-making authority make a good faith effort to be actively involved in the consultation process. Section II, Paragraph 2 allows for **any** Departmental staff to be involved in the consultation process as long as they issue a report back to an official with decision-making authority. Tribal governments should be ensured that decision makers will be directly involved in the consultation process with tribal leaders.

- Section III, Part G provides for a Tribal Governance Officer (TGO) that will be responsible for assuring “compliance with the entire scope of [the consultation] policy and any future policies related to the Executive Order 13175.”

The consultation policy should ensure that the TGO has the ability to be independent and without influence from Departmental officials. For the TGO to effectively assess compliance with the consultation policy, he/she should report findings independent of any influence from within or outside of the Department.

- Section V, Paragraph 1 states “each Office or Bureau is responsible for meaningful communication with Indian Tribes that promotes regular and early consultation as described in Section VIII of this policy . . . Communication methods should avoid impersonal forms of communication . . . “

The policy should specify in greater detail what constitutes an “impersonal form of communication.” An “impersonal form of communication” could be interpreted as any form of communication not involving face-to-face discussion. Many tribal officials would consider a form letter, e-mail, or phone call on behalf of a decision maker as impersonal.”

- Section VI, Paragraph 1 requires that “the heads of Bureaus and Offices will include in future annual performance plans, a standard performance measure consistent with this policy.”

The Tribal Consultation Policy should provide, in detail, what the “standard performance measure” will consist of. Also, an official independent of Bureaus and Offices should assess the success or failure of a Bureau or Office to comply with the consultation policy.

- Section VII, Paragraph 1 explains that, “the department **may** consider soliciting Indian Tribe’s evaluation of consultation practices.”

This sentence should be changed to “the department **shall** solicit Indian Tribe’s evaluation of consultation practices.”

- Section VII, Paragraph 3 explains that, “the Department leadership **may** identify opportunities to inform Legislators and other Federal officials, where appropriate, of the benefits of meaningful tribal consultation.”

This sentence should be changed to “the Department leadership **shall** identify opportunities to inform

Legislators and other Federal officials, where appropriate, of the benefits of meaningful tribal consultation.”

- Section VIII, Part D, under the “Proposal Development Stage” heading, the policy provides “the Bureau or Office may use a Tribal Leader Task Force on matters that impact Tribes across the country where negotiated rule making is impractical.” The policy states “the composition of the Task Force shall be collaboratively determined by the Tribes.”

Who will make the final decision on the composition of the Task Force? The policy should provide, in greater detail, standard guidelines for the composition of Task Forces. The current policy is too ambiguous.

- Section VIII, Part D, under the “Proposal Development Stage” heading, contemplates a “series of open meetings to consider action(s).”

The policy should contemplate what constitutes an “open meeting.” These meetings should be made available through both video conferences and face-to-face interaction.

- Section VII, Part D, under the “Implementation of Final Federal Action Stage” heading, the policy states “exigent circumstances may allow the Department to take measures that deviate from this policy, but the Department should make every effort to comply and should explain to Indian Tribes as soon as emergency circumstances arise.”

The policy should further define an “exigent circumstance.” Without further clarification, this part of the policy is open for abuse by Department officials.