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July 14, 2011

*Via E-mail to:
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The Honorable Kenneth Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW, S 4141-MIB
Washington, D.C. 20240
Attn: Ms. Mary Milam

Re: Comments regarding the Department's draft Tribal Consultation Policy

Dear Secretary Salazar:

On behalf of the Forest County Potawatomi Community ("FCPC") and the Puyallup Tribe ("Puyallup"), we respectfully submit these comments regarding the Department of the Interior Policy on Consultation with Indian Tribes ("draft Policy").

I. Introduction

These comments are submitted in response to the Department of the Interior's ("Department") notice published in the Federal Register on May 17, 2011 announcing the beginning of a 60-day public comment period on the Department's draft Policy. 76 Fed.Reg. 28,446 (May 17, 2011). These comments also support and supplement the comments provided by us on behalf of the FCPC and Puyallup ("March Comments") in response to the January 14, 2011 Dear Tribal Leader letter that opened a period for tribal comments on the first draft of the Department's Policy on Consultation with Indian Tribes ("January draft Policy").

We commend the Department for making a substantial effort to obtain tribal input on how to improve consultation with tribal governments, and continuing to work to develop the best possible consultation policy. The new draft Policy makes some important improvements to the earlier draft. However, the new draft does not incorporate many of the substantive and structural changes we

suggested, and removes some of the provisions from the earlier Draft that we view as important to the consultative process.

Below, we offer further comments to assist the Department in continuing to revise its draft Policy. With the submittal of these comments, we renew the concerns and suggestions that were made in our March Comments, and supplement them with these Comments.

II. Positive Changes in the May, 2011 Draft Policy

We commend the Department for amending the Policy to delete the alternative that would have allowed for program managers or staff, to bring tribal concerns to a decision maker, in the event the decision maker is not present. Draft Policy at 2. This change makes it clear that the decision maker must be present throughout the consultation process. We also agree with the Department's new principle that the Department's "Bureaus or Offices will seek and promote cooperation and participation between agencies with overlapping jurisdiction, special expertise, or related responsibilities regarding a Departmental Action with Tribal Implications." *Id.* Such cooperation and participation between agencies is imperative for full, effective, and efficient implementation of Departmental programs – much time and money can be saved if agencies can work through and agree on issues at the forefront of program implementation.

We also commend the Department for amending the Draft Policy to reflect that the Department's limitation on consultation on matters with regard to administrative or judicial orders is only where the Department has no discretion to act with respect to consultation. Draft Policy at 3.

In the area of accountability the Draft adopts the Tribes' recommendation that the Department gather tribal input on the Department's consultation efforts. Specifically, Section IV not requires that the annual reports on the Department's consultation efforts include "feedback from Tribes with the Bureau or Office has consulted." Draft Policy at 4. Finally, consistent with the Tribes' call for agency-wide dispute resolution procedures when the consultation efforts with tribes reach an impasse, the new draft policy includes a new section "Consultation Process Support." Under this the Office of Collaborative Action and Dispute Resolution can assist in planning or facilitating an effective consultation process. Thus, while not fully instituting a conflict resolution process, the new draft does acknowledge that process for dispute resolution is necessary.

II. The Draft Policy Removes Important Provisions That Represented Positive Steps Toward Improving Tribal Consultation

Unfortunately, there are many important provisions that were included in the previous draft Policy that have been removed in the current draft Policy. Most of those provisions deal with communication between each of the Department's Offices or Bureaus. As in our previous comments, we fully support the Department's commitment to open and transparent communication, see Draft Policy at 2. However, we find it unfortunate that the framework for effective communication that was included in the previous draft (see January Draft Policy at 3) was removed. While we suggested that the previous draft Policy be drafted in a more logical structure and the "Communication" section seemed

out of place where it was, removing all of the language that had been in that section removed important communication policies.

For example, language in the “Communication” section promoted “on-going communications concerning issues affecting Indian Tribes” following the initial notification of the opportunity for consultation. January Draft Policy at 4. Early and ongoing tribal consultation is necessary for full participation by tribes, maximizes the amount of meaningful input from tribes regarding a proposed agency action, and allows tribes to identify and comment on other issues that may arise during the consultation process. While the current draft Policy continues to require early tribal consultation, it no longer promotes the goal that consultation be continuous. If consultation is not continuous throughout the consideration, design, and implementation of the proposed Departmental action, tribal governments will not get the opportunity to comment on issues that will inevitably arise throughout the process.

Another provision that was removed from the draft Policy is its suggestion that the Department avoid “impersonal forms of communication” with tribal governments, instead suggesting the use of meetings, telephone conversations, written notices, workgroups of tribal leadership, or regular gatherings of tribes. January draft Policy at 3-4. Many Indian reservations and Alaska Native Villages are located at great distances from Department offices and urban centers. Given the state of broadband in many of these rural areas, many tribes do not have reliable access to e-mail. Providing for many non-e-mail based communication forms increases the likelihood that tribes will receive notice about proposed Departmental actions, and have the opportunity to fully participate. Avoiding impersonal forms of communication will improve the likelihood that tribal governments will fully participate. We are confident that reinstating this language into the policy will provide for increased tribal participation in consultation and result in more informed decision-making by the Department.

III. Recommendations for Improving the Draft Department of the Interior Policy on Consultation with Indian Tribes

We set forth below our recommendations for improving the draft Consultation Policy.

A. Recommendations on the Structure of the Draft Policy

We appreciate the difficult job the Department faces when attempting to address many variations of tribal concerns in a singly Policy. While the first draft Policy proposes many positive measures that will improve communication between Department agencies and Indian tribes, we fear that many of those measures will be lost in the confusing and inconsistent structure of the draft Policy. The draft Policy contains important guidelines and procedures for conducting tribal consultation, but they are buried under broad headings that give no feeling for how these guidelines and procedures relate to one another or which might be required. To reduce confusion and increase the efficacy of your tribal consultation efforts, we recommend that the Department develop a concise and well-organized Consultation Policy that is easier for the Department and tribes to follow and that gives each clear steps to meeting the Policy’s requirements.

As we commented on the previous draft Policy, as currently written, the draft Policy still spreads related principles of tribal consultation across different sections of the document, but also groups a range

of key consultation guidelines under the same subject headings. For example, the description of the Departmental activities appropriate for consultation – a component that requires significant discussion in any agency’s Consultation Policy – is located in the “Definitions” section of the Department’s draft Policy for the definition of the term “Departmental Action with Tribal Implications.” *See* draft Policy at 3. However, in the substantive body of the draft Policy, the Departmental actions that trigger consultation are briefly referenced without further explanation of how a Departmental office determines that an action may have tribal implications. We believe that this structure makes it difficult to understand where in the process consultation will be triggered by the Department.

Furthermore, the current structure of the draft Policy makes it difficult to distinguish when each required action should take place, what the roles of Department officials should be throughout each stage, and what action is available to Tribes throughout each stage. For example, the draft Policy discusses the process for tribal requests for consultation in a section that may not be obvious to tribal officials – the “Consultation Guidelines” section (Sec. VII). The descriptions of the various roles of Department officials are scattered throughout the draft Policy, while some provisions relating to agency accountability are included in sections other than the “Accountability and Reporting” section. The stages of consultation, which should be the backbone of any consultation policy, are embedded within the “Consultation Guidelines” of section VII of the draft Policy.

To make the Policy more coherent and logical, and to enable each participant to fully understand their roles and responsibilities through every step of the consultation process, we believe it is important to reorganize this policy so that all elements of the process are grouped together, and the roles of Department and Tribal officials are clearly defined within each stage of the process. The Department could consider reorganizing the Policy chronologically, beginning with the initial planning stage and the initiation of tribal consultation, being sure to be clear on when Tribes may request consultation and the Department’s required response to that request. That way, the Department could then organize the consultation requirements under the appropriate corresponding stage of consultation. For all other provisions, the Department should organize related principles and general guidelines together in relevant sections, such as “Roles and Responsibilities of Departmental Officials,” and “Agency Accountability and Performance Measures.”

B. Recommendations on Making Consultation Meaningful, Effective, and Efficient

We also believe that the training section (Sec. V.) should be improved. We commend the Department for recognizing that training both the federal governmental employees and tribal employees in the Department’s duties concerning tribal interests and the legal trust obligation of the Federal-Tribal relationship will strengthen the understanding of the relationship and increase commitment to the consultation process. However, the draft Policy should offer more logistical specifics with regard to how training should work. For example, it does not state how often training should take place. The legal and trust relationships between federal and tribal governments are important, complicated, and, unfortunately, not widely known by people who do not spend significant time around Indian Country. Education in these relationships is vital to maintaining them. The understanding of and respect towards traditional cultures and governments are imperative to truly understanding the role of Departmental officials in these relationships. As with many employers, there is a high turnover of federal employees – it is important that new employees, or those that move on to higher offices within the Department, be

trained as early as possible to maintain continuity in the level of education regarding the Federal-Tribal relationship within the Department. Therefore, in addition to requiring regular training, it is equally important that this Policy take the opportunity to make such training mandatory for employees that would operate in the capacity of “appropriate Departmental officials” during a consultation.

We also believe that Tribes should play a significant role in developing any training programs for Department employees. We have found that internal training activities in the federal government are only as effective as the amount of knowledge and preparation invested in such educational programs. Accordingly, to further an “understanding of traditional Indian cultures and governments,” the Department should make such training mandatory for all Department personnel who interact with tribes, while also requiring the involvement of tribal members, academics, or other tribal experts and advocates. To carry out training concerning the “legal trust obligation of the Federal-Tribal relationship,” we recommend that the Department’s Office of the Solicitor be integrated into the Department’s training program.

C. Recommendations on Improving the Consultation Process

The draft Policy’s descriptions in the Consultation Guidelines section (Sec. VII) of the stages of consultation are a useful start in providing consistency in tribal consultation throughout all Department agencies and offices. However, we recommend that the Department clarify this section, and include more specificity on the core consultation efforts that will occur in each stage. We also recommend that the Policy include minimum timelines for each stage.

With respect to the early stage of tribal consultation, the draft Policy states that a “Bureau or Office must notify the appropriate Indian Tribe(s) of the opportunity to consult when considering a Departmental Action with Tribal Implications.” Draft Policy at 7. It further states that “[e]ach Bureau or Office will consult as early as possible when considering a Departmental Action with Tribal Implications. *Id.* at 10. This guideline does not offer guidance on when in the “consideration” of the Departmental Action such notification should take place. We urge the Department to state when an agency should initiate consultation while considering a federal action with tribal implications.

We further urge the Department to describe the role of tribes in the initial planning stage. As currently written, Bureaus or Offices “may conduct a meeting or other forms of interaction with Indian Tribes in order to receive and evaluate comments received as part of the Initial Planning Stage.” *Id.* However, if the Bureau or Office does not conduct such interaction, there is no information on what role the tribes would have during this stage. Finally, we urge the Department to show how initial planning activities may determine whether more exhaustive tribal consultation is ultimately appropriate.

We also suggest that the role of the Department be clarified when tribes request consultation. As it is currently written, the draft Policy states that the Tribal Governance Officer “or appropriate representative will confirm receipt of a request for consultation from a Tribal Official. When the request is directed to the TGO, the request is to be forwarded to the appropriate Bureau or Office. The TGO or appropriate representative will treat an official request for consultation in an expedited fashion and respond in writing, using the most expedient methods to communicate to the Tribe, that the Department

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has received their request.” *Id.* at 10. We believe that the Policy should be changed to ensure that the Department will initiate consultation upon the receipt of such a request.

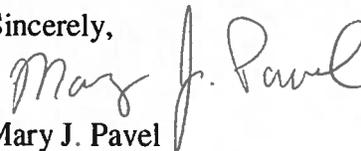
As we suggested in our January comments, we recommend that the Policy be revised to provide that “Department agencies shall initiate consultation in response to a written tribal request when the agency activity that is the subject of the request may affect Indian tribes broadly or a particular tribe significantly, and the agency activity has not previously been the subject of tribal consultation.” January Comments at 6. This change is important because it ensures that tribal consultation requests are not meaningless, but will result in Department consultation on proposed Department activities that might not be interpreted as ones that would broadly affect tribes, but will likely impact a tribe or small group of tribes.

Finally, we would like to continue to support the suggestions that were made in our previous comments. Particularly, we renew our suggestion that the Department add a provision to the draft Policy to encourage its agencies to evaluate the use of waivers of regulatory requirements as situations warrant, so that regulatory impediments to effective tribal administration of programs and services may be waived during the lengthy statutory and regulatory change period. *See id.* at 9. We further urge the Department to recognize in its Consultation Policy that there are times where consultation is required, but where privacy and protection of information are also of the utmost priority. In these instances, particularly with regard to religious practices or tribal customary law, the Consultation Policy should guarantee that culturally-sensitive information will not be made public, to the extent permitted by law. *Id.* The Policy should make clear, on all levels, that traditional and cultural understanding and respect are of utmost priority in all aspects of the Federal-Tribal relationship.

IV. Conclusion

The success of the Department of Interior’s programs is wholly dependent on the decisions your agencies and offices make. It is important that these decisions be made with utmost care, consideration, and with full information. Full and meaningful tribal consultation is imperative to the success of tribal programs, and for full functioning of all Department programs that impact tribes. We appreciate the opportunity to submit these comments for the Department’s consideration on behalf of our tribal clients.

Sincerely,



Mary J. Pavel