



CHEROKEE NATION
OFFICE OF THE SECRETARY OF
NATURAL RESOURCES

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Sara Hill
Secretary of
Natural Resources

November 30, 2016

Ms. Elizabeth K. Appel, Director
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
1849 C Street, NW, MS 3071
Washington, DC 20240

Dear Ms. Appel:

This letter is in response to the September 23, 2016 request from the Department of Interior, Department of Justice, Department of the Army, and other federal agencies to the Cherokee Nation announcing the Departments' commitment to formal government-to-government consultation for input on federal infrastructure decisions.

The United States' Government has a unique relationship with American Indian governments as set forth in the Constitution of the United States, treaties, statutes, court decisions, executive orders and memoranda. Of these tribal governments, the Cherokee Nation ("Nation") is the largest federally recognized Indian tribe in the United States with more than 315,000 citizens. The Nation's ancestral lands in Georgia, North Carolina, Tennessee, and Alabama were once home to thousands of Cherokee men, women, and children who were forcibly removed to present-day Oklahoma on the Trail of Tears pursuant to the 1830 Indian Removal Act. Today, our tribal headquarters are located in Tahlequah, Oklahoma, and our tribal jurisdiction covers most or all of 14 counties in northeastern Oklahoma.

In response to the specific questions the presented in the September 23, 2016 consultation announcement, the Cherokee Nation respectfully submits the following:

Within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights?

- a) The federal government should require federal agencies to strictly follow all existing consultation policies, and take steps to ensure that federal agencies are responsive to issues raised during tribal consultations. If federal agencies solicit tribal comment but do not substantively respond to the concerns raised by the tribes, then the consultation opportunity is not meaningful.
- b) Federal agencies need to enter into Programmatic Agreements with federally recognized tribes early in the process for major infrastructure projects. Under a Programmatic Agreement, many process related issues can be addressed before problems are encountered. When issues then arise during construction, tribes and federal agencies will already have a negotiated framework than either party can use to resolve the issue.
- c) Federal agencies should consider adopting a mapping and consultation system similar to the Federal Communication Commission's Regional Mapping & Tribal Impact Evaluation model. With this type of model, tribal sacred sites can be identified early during the routing of infrastructure projects.
- d) The Nation also strongly encourages the Federal Permitting Improvement Steering Council to take the following actions:
 - o Create a Tribal Trust Compliance Officer who is culturally competent with regard to the history and legal status of lands currently and previously held by removed tribes to ensure tribal trust compliance is incorporated into all regulations and guidance;
 - o Adopt policies to ensure that federally recognized tribes, like states, are provided funding to participate in the federal permitting process and afforded the opportunity to participate early in "purpose and need" infrastructure permitting;
 - o Adopt policies that ensure all agencies issuing permits affecting current and ancestral tribal lands, waters and sacred places demonstrate tribal trust compliance.
- e) All departments and federal agencies should define the "Scope of Review" as "Area of Potential Effects" provided for in 36 C.F.R. § 800.16(d) and not "Permit Area" as provided for in 33 C.F.R. Part 325.
- f) The U.S. Army Corps of Engineers Appendix C must be repealed in its entirety, and redrafted to be consistent with existing federal law and fulfill the purpose and spirit of Section 106.

(2) Should new legislation be proposed to Congress to alter that statutory framework and promote those goals?

There is undoubtedly a need for legislation to alter the existing statutory framework. The Nation proposes the following legislative action items:

- a) Legislation should nullify all existing federal regulations and policies that limit tribal engagement, and make it clear that agencies involved in infrastructure permitting must engage in meaningful tribal consultation.
- b) Different federal agencies involved in infrastructure permitting should be required to communicate with one another. Information uncovered during one agency's

review should be shared with other agencies reviewing related aspects of the same infrastructure project. Tribal issues raised during a consultation with one agency should be shared with other agencies reviewing the same project.

- c) The National Historic Preservation Act should be amended to include language requiring mitigation of adverse effects, and establish a procedure for verifying that mitigation before final approvals/permits are issued.
- d) New legislation should create a right of action that would permit federally recognized tribes an opportunity to seek judicial review if meaningful tribal consultation does not occur.

The Nation applauds this effort to improve the federal decision-making processes that affect tribal lands, resources, and treaty rights. Critical infrastructure projects need a streamlined and effective permitting process, and that means ensuring that laws, regulations and policies are fully consistent with the United States' obligations to federally recognized tribes.

Sincerely,

A handwritten signature in black ink that reads "Sara Hill". The signature is written in a cursive, flowing style.

Sara E. Hill
Secretary of Natural Resources
Cherokee Nation