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January 29, 2010

Shaun Donovan
451 7th St., SW
Washington, DC 20410

Dear Secretary Donovan:

Thank you for requesting the views of Tribal leaders concerning President Obama's memorandum and the consultation procedures of the Department of Housing and Urban Development. I am responding on behalf of the Cherokee Nation so the Department will know our concerns, and aid in the strengthening of its consultation policy.

The *Consultation and Coordination with Indian Tribal Governments Act* (HR 5608), introduced last year by Natural Resources Committee Chairman Nick J. Rahall has sought to reaffirm and put into statute President Clinton's Executive Order 13175. By signing his memorandum of November 5th, President Obama illustrated his agreement with Congress to strengthen the government-to-government relationship with Indian Nations. Conversely, as the President himself stated, we must remember that the lack of Tribal voices in policy formulation has led to "undesirable... devastating and tragic results." In order to ensure that this does not continue, the Nation would like to make the following recommendations:

Recommendation #1 – Clarify that Tribal Consultation is Required Not Only for Development of Regulations, but Also for the Development of All Policies That Have Tribal Implications

The definition of "consultation" in the current HUD tribal consultation policy is central to establishing those circumstances in which tribal consultation is required. We accordingly recommend that this definition be revised, and that related terms be defined in order to more clearly express HUD's intent to afford tribes appropriate opportunities to participate in development of *all* "policies that have tribal implications" (including both HUD guidance documents and regulations affecting tribes). This would help distinguish tribal opportunities to participate in the shaping of federal policies and regulations from the more limited opportunity of individuals and groups to comment on proposed regulations. The suggested definitions are shown in the redlined text below:

"Tribal consultation" means the direct and interactive involvement of Indian tribes in the development of policies that have tribal implications, including coordination, collaboration, and consultation with tribes. Tribal consultation is the active, affirmative process of (1) identifying and seeking input from tribal

officials; and (2) considering tribal interest as a necessary and integral part of HUD's decision-making process. This definition adds to any statutorily mandated notification procedures intended to provide an opportunity for comment on proposed regulations by interested parties, including interested tribes. In contrast, the tribal consultation procedures place the burden on the federal agency to show that it has made a good faith effort to elicit feedback from tribes with respect to any proposed policies having tribal implications, including proposed regulations. [Note: This is based on the definition of “consultation” contained in the current HUD tribal consultation policy, with changes that expressly include references to “policies that have tribal implications,” and that strengthen HUD recognition of the governmental status of tribes during the tribal consultation process. ¹]

“Policies that have tribal implications” refers to regulations, legislative comments or proposed legislation, and other policy statements, policy guidance’s, guidance document, or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. [Note: This is based on the definition of “policies that have tribal implications” in Executive Order 13175 (November 6, 2000) (“the 2000 Executive Order”]

“Guidance document” means an agency statement of general applicability and future effect, other than a regulatory action (as defined in Executive Order 12866, as further amended, § 3(g)), that sets forth a policy on a statutory, regulatory or technical issue or an interpretation of a statutory or regulatory issue. [Note: This is based on the definition of “guidance document” in OMB Circular Bulletin No. 07-02, “Final Bulletin for Agency Good Guidance Practices.”]

“Regulations” mean an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency (see Executive Order 12866, as further amended, § 3). [Note: This is based on the definition of “regulations” in OMB Circular No. 07-02

¹ The proposed revision of the definition of “consultation” eliminates provisions requiring HUD to seek input from “Native American . . . community groups and individuals.” Such requirements are inconsistent with the 2000 Executive Order’s emphasis on tribal sovereignty and tribal rights. Our proposed revision also changes provisions concerning statutorily mandated notification procedures (which is an apparent reference to federal register notices of proposed regulations), to clarify the distinction between (1) tribal consultation during the development of both policies and regulations and (2) opportunities for comment by the general public (which would include community groups and individuals) during the promulgation of regulations.

Recommendation # 2 – *Define the Term “Tribal Officials.”*

The term “tribal officials” (which is a defined term in the 2000 Executive Order) is used only twice in the HUD tribal consultation policy, and the term “tribal government” is used much more frequently. Neither term is defined in the HUD consultation policy. We recommend that references to “tribal government” be changed throughout the HUD tribal consultation policy to “tribe” or “tribal officials,” as appropriate. We also recommend that the term “tribal officials” be defined in the HUD consultation policy. The definition should be based on the 2000 Executive Order, except that the reference to “authorized intertribal organizations” should be changed to more clearly state that an intertribal organization may represent a tribe’s views with respect to a specific matter only if expressly authorized in writing. The suggested definition is shown in the redlined text below.

G. “Tribal officials” mean the elected or duly appointed officials of an Indian tribe. For purposes of tribal consultation, such term may include intertribal organizations only if expressly authorized in writing by a tribe to represent its views during a specific identified tribal consultation process involving specified policies that have tribal implications.

Recommendation # 3 – *Include the 2000 Executive Order’s “Policy-making Criteria” in Part III (entitled “Principles”) of the HUD Tribal Consultation Policy.*

We suggest that HUD’s statement of principles in Part III of its tribal consultation policy be strengthened by including the wording contained in section 3 (“Policy-making Criteria”) of the 2000 Executive Order. Suggested changes in sub-section A and suggested new sub-sections D and E are shown in the redlined text below:

A. HUD respects Indian tribal self-government and sovereignty, will honor tribal treaty and other rights, and will strive to meet the responsibilities that arise from the unique relationship between the federal government and Indian tribes.

D. With respect to implementation of federal statutes and regulations administered by tribal officials, HUD shall afford such tribal officials the maximum administrative discretion possible.

E. When undertaking to formulate and implement policies that have tribal implications,² HUD will:

² This proposed sub-section is based on section 3.c of the 2000 Executive Order, except that the term “Federal standards” has been replaced with the defined term “policies that have tribal implications.”

1. Encourage Indian tribes to develop their own policies to achieve program objectives;
2. Where possible, defer to Indian tribes to establish standards; and
3. In determining whether to establish policies that have tribal implications, consult with tribal officials as to the need for such policies and any alternatives that would limit the scope of such policies or otherwise preserve the prerogatives and authority of Indian tribes.

Recommendation # 4 – Merge and Revise Part IV (entitled “Tribal Coordination, Collaboration and Consultation”) and Part VIII (entitled “Implementation”); Include Communication Methods and Time Frames; and Clarify that HUD Consultation with Organizations, Committees and Workgroups Cannot Be Used as a Substitute for Consultation with Individual Tribes.

We recommend a complete revision and merger of Parts IV and VIII of the Tribal Consultation Policy, in order to address three primary concerns. First, whenever possible, notice of proposed policies that have tribal implications should be provided to tribes before they are drafted. Tribes are often given an opportunity for consultation only after the proposed policy or rule has been drafted, severely limiting the amount of input in the formulation of key questions and the scope of issues considered. Federal officials should seek informal discussions with tribal officials in order to obtain a better grasp of the issues at their roots, ensuring that proposals are not based on an incomplete or one-sided understanding.

Second, the current HUD tribal consultation policy implies that consultation with organizations may replace consultation with tribal officials. In order to determine who should be consulted, one should reflect on who is affected, either directly or indirectly. If an issue is wide-sweeping and would affect all tribes, a representative from each tribe or from each region would be present when discussions begin. In some instances, Indian organizations such as the National Congress of American Indians (NCAI) could be utilized as representatives. If the policy affects only a small number of tribes, each must be given the opportunity to make their opinions known. In other instances, appropriate federal decision-makers (Assistant Secretary level and above) should be at the table, allowing them to be aware of all thoughts and concerns.

Third, both Parts IV and VIII concern implementation of the tribal consultation policy, and it will be easier for both HUD and tribal officials to implement the policy if these parts are combined. These provisions should include the establishment of timelines in the consultation process, in order to leave little room for misunderstanding and to thus limit the occurrence of unintended consequences. These provisions should also include requirements for communications informing tribes about comments received from HUD, while policies continue to be shaped, including website provision of documents submitted to HUD by tribes during the consultation process.

The recommended merged and revised Parts IV and VIII are contained in the following proposed new Part IV:

IV. Tribal Consultation Process

A. Applicability. HUD will apply this tribal consultation policy to all proposed policies that have tribal implications. Based on a government-to-government relationship and in recognition of the uniqueness of each tribe, the primary focus for consultation activities is with individual tribes. The Office of Native American Programs (ONAP), within the Office of Public and Indian Housing, will serve as the lead HUD office for the implementation of this policy. Internal HUD policies and procedures are excluded from this policy.

B. Methods of Communication. The methods of communication used will be determined by the significance of the consultation matter, the need to act quickly, and other relevant factors. The following are examples of communication means by which consultation can be accomplished: websites; broadcast fax and electronic messages; U.S. Postal Service; telephone-conference calls; video teleconferencing, multimedia; direct contact; national conferences and workshops; and formal meetings. While modern technology and group events should be utilized whenever possible to conserve funds and respect time constraints of all those involved, these methods of communication should not serve in the place of formal, face-to-face discussion.

C. Consultation with Tribes Before Drafting of Policies that Have Tribal Implications. HUD shall make reasonable efforts to consult with tribal officials concerning proposed policies that have tribal implications before such policies are drafted, in order to facilitate greater tribal participation in development of the proposed policies. Such consultation shall, at a minimum, include a notice on the HUD website of HUD's plans to develop such policies and an invitation for tribal officials to comment on items that should be included in such policies and to offer draft wording to HUD by a specified deadline, which shall not be less than thirty (30) days from the date of the notice.

D. Notice of Proposed Policies That Have or That May Have Tribal Implications; Deadlines. After proposed policies that have or that may have tribal implications have been drafted, HUD will notify tribal officials of such proposed policies, and will include a copy of the proposed policies with the notice. HUD headquarters shall be responsible for such notification, unless it has delegated such responsibility to the appropriate HUD regional Office of Native American Programs ("ONAP"), in which case each such regional ONAP will be responsible for notification of tribal officials of the tribes in the region served by such regional ONAP.

E. Deadlines for Tribal Responses. In HUD notices concerning proposed policies that may have tribal implications, HUD shall initially request tribal comments as to whether such proposed policies have tribal implications, and shall establish a deadline for tribal response to that question no less than thirty (30) days from the date of the notice. In HUD notices concerning proposed policies with tribal implications, including such policies for which HUD previously requested initial tribal response in accordance with the preceding sentence, HUD shall state a response deadline not less than sixty (60) days from the date of the notice. Nothing herein shall affect the deadlines established by federal law or regulations with regard to comments in the course of the formal agency rulemaking process for the promulgation of federal regulations.

F. Tribal Response. Tribal officials may provide recommendations concerning proposed policies that have or that may have tribal implications to HUD headquarters and/or to the Area ONAP Administrator and staff no later than the deadline established in Part IV.E. Such recommendations may be provided orally during meetings with HUD representatives or via written documents submitted to HUD representatives.

G. Meetings. Tribes may facilitate regional meetings with HUD representatives to identify and address issues relevant to HUD policies that have tribal implications. HUD will sponsor at least one national tribal consultation meeting each year. To reduce costs and conserve resources to the greatest extent feasible, tribes and HUD will include consultation meetings with regularly scheduled meetings, such as multi-agency and association meetings.

H. Reporting Mechanisms. In all cases where a tribe or tribes have been involved in the consultation process, HUD will maintain an internet website or webpage to address the informational needs of tribes and tribal leaders. Such website or webpage will include relevant HUD documents and other relevant documents, including comments submitted by other tribes. HUD will notify the tribes of the finalization of proposed policies that have tribal implications, and provide such policies to the tribes by one or more of the communication methods identified in Part IV.B of this tribal consultation policy. This notification shall specifically include a discussion of the basis for the HUD decision, including public comments received, relationship to the concerns raised in consultation, and any avenues available for further discussion, protest or appeal of the decisions.

I. Tribal Advisory Organizations, Committees and Workgroups. It may be helpful for HUD to utilize organizations, committees, or workgroups to assist in facilitating involvement of tribes in decision-making and policy development. The

use of tribal organizations, committees, and workgroups will be in coordination with, and not to the exclusion of, consultation with individual tribes. HUD will not treat such organizations, committees, and workgroups as tribal representatives unless the affected tribe has provided express written authorization of such organization, committee, or workgroup to serve as the tribe's representative with respect to specific proposed policies that have tribal implications. The tribal organizations, committees or workgroups may, in consultation with tribal officials, provide advice and consultation to the Area ONAP Administrator and staff.

J. Joint Federal/Tribal Workgroups.

1. A workgroup may be established by HUD and tribes to address specific issues or the drafting of specific policies that have tribal implications. Tribal representation should be consistent with the established standard of geographically diverse small, medium and large tribes, whenever possible.
2. Alternate workgroup members may be appointed by written notification signed by the member. Such alternates shall possess the authority of the workgroup member to make decisions on their behalf if such authority is so delegated to them in writing.
3. The workgroup shall be chaired by at least one tribal workgroup member selected by the tribal workgroup members and one HUD representative.
4. The workgroup may conduct its activities through conventional (e.g., telephone and mail), as well as innovative (e.g., e-mail and video conferences) means of communication. Meetings will be posted on the internet and will be open to the public. In addition to internet posting, HUD may also announce meetings through fax, letter, e-mail, publication in the Federal Register, or other appropriate means. Workgroup members may be accompanied by other individuals to advise them as they deem necessary.
5. Whenever possible, all workgroup products should be circulated to tribal leaders for review and comment.
6. All final recommendations will be given serious consideration by HUD.

Recommendation # 5 – Replace Part VIII (entitled “Implementation”) With a New Part VIII (to be entitled “Accountability”) to Increase HUD Accountability for Implementation of the Policy.

Although Section 7 of the 2000 Executive Order contains accountability provisions to be carried out by the Office of Management and Budget (OMB), those provisions have been largely ineffective. We believe that the likelihood of undermining tribal sovereignty will decrease if the HUD tribal consultation policy includes provisions that will establish accountability at the Department level. The inclusion of requirements for corrective action will further enhance

accountability. We recommend that Part VIII (which we have recommended be merged with Part IV) be replaced with an entirely new section in the HUD Consultation Policy, shown as follows:

XI. HUD Commitment and Accountability.

A. Employment and Training of HUD Staff. When possible, HUD shall employ staff with tribal consultation experience and expertise. HUD shall orient all employees on the tribal consultation policy, and shall provide more extensive training to employees whose work impacts Indian tribes. HUD shall use proper implementation of the policy as a factor in employee performance evaluations whenever applicable and practicable

B. Annual Assessment Meetings. HUD will convene, no less than annually, both national and Area ONAP level joint meetings between senior HUD staff and Indian tribes as a group to assess compliance with the tribal consultation policy. All relevant HUD offices shall be represented (including HUD offices identified by Indian tribes) at such meetings. HUD shall also invite the Office of Management and Budget and the President's Senior Policy Adviser for Native American Affairs to attend each national meeting. HUD shall prepare and submit a report of each area meeting to the Secretary of HUD and shall prepare and submit a report of each annual meeting to the President. HUD shall make all such reports available to the tribes for any comments before submission of such area reports to the Secretary of HUD and such annual reports to the President.

C. Corrective Action. HUD will make reasonable efforts to correct any deficiencies with regard to implementation of the tribal consultation policy.

Again, I appreciate this opportunity to assist the Department with its policy formulation. By making "regular and meaningful consultation and collaboration" a priority for his administration, the President is assuring that the government-to-government relationship cherished by the United States and Indian tribes continues to the benefit of both.

If you need any additional information or have questions, please contact the Cherokee Nation Washington Office; Paula Ragsdale, Senior Legislative Officer at (202)393-7007 or by email at pragsdale@cherokee.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Chad Smith", with a large, stylized flourish extending to the left.

Chad Smith
Principal Chief
Cherokee Nation