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April 11, 2012

David J. Hayes
Deputy Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Re: Comments on Draft Policy on Consultation with ANCSA Corporations

Dear Deputy Secretary Hayes:

I am writing to you individually and on behalf of Tanacross, Inc., an Alaska Native Village Corporation formed under the Alaska Native Claims Settlement Act ("ANCSA"). I am President of that corporation and a member of the Tanacross Tribe in the Upper Tanana Region of the State of Alaska. I am also the General Manager of Din e'h LLC, which was formed by the ANCSA village corporations in the Upper Tanana (Dot Lake Native Corporation, Northway Natives Inc., Tanacross, Inc., and Tetlin Native Corporation) to coordinate development activities on Native land.

We support your efforts to establish a consultation policy including ANCSA corporations and agree with the many excellent comments already submitted and available on your Consultation website. We offer the following discussion from a case-specific perspective based on our recent experience with what we consider to be a lack of consultation and due respect in a proposed land exchange in the Tetlin National Wildlife Refuge.

Background

As an ANCSA Village Corporation, Tanacross, Inc., has responsibility to manage its lands and resources for the benefit of its Native shareholders. One land resource shared by the members of Din e'h is surface ownership of approximately 100 miles of designated Transportation Corridor. This corridor has been determined to be the

best route for a variety of possible projects running between Alaska and the Lower 48 through western Canada, such as railroad extension, gas and oil pipelines, water transmission lines, and electrical power transmission lines. One of these projects is the Alaska Pipeline Project which, until recently, designated its preferred route from Prudhoe Bay, through these corridor lands and through Canada, to markets in the Lower 48. Most critically, this corridor adjoins the only established right of way through land owned by Canadian First Nations.

The route was initially determined as part of the Haines to Fairbanks Pipeline in 1954 and later identified in the 1970's as part of the Alaskan Northwest gas pipeline project. Interest in developing the right-of-way was revived more recently in 2007 with the State of Alaska's passage of the Alaska Gasline Inducement Act ("AGIA"). In 2008, the State awarded a license under AGIA to construct the pipeline to TransCanada Corporation. In 2009, TransCanada partnered with ExxonMobil, the largest holder of North Slope gas reserves, and together they became known as the Alaska Pipeline Project ("APP").

Timing of the Land Exchange

We now understand from recent communications that in July of 2011, APP informed the U. S. Fish and Wildlife Service ("FWS"), that it was interested in a land exchange to transfer 400 acres of land from the Tetlin National Wildlife Refuge to a private entity known as The Conservation Fund. We understand that by November of 2011, the terms of the proposed land exchange were developed and a conceptual agreement had been negotiated. The terms agreed to are as follows:

- 1) FWS would transfer about 400 acres to The Conservation Fund;
- 2) The transfer would take place without reference to Title XI of ANILCA;
- 3) The Conservation Fund would transfer 515 acres in Texas to the Neches National Wildlife Refuge; and
- 4) APP would donate an additional \$500,000 to The Conservation Fund to be used to acquire additional land for the FWS.

Title XI of ANILCA

The purpose of the exchange was to relieve FWS and APP of the obligations of Title XI of the Alaska National Interest Lands Conservation Act ("ANILCA"), and give APP free control over right-of-way development on the last two miles of the corridor in Alaska. The justification for processing the land exchange outside of ANILCA was two-fold: there was not enough time to comply with Title XI and meet AGIA deadlines, and the parties lacked sufficient experience with the Title XI process.

ANCSA and ANILCA are related. Section 17(d)(2) of ANCSA directed the Secretary of the Interior to make the withdrawals of public lands that eventually became reserved under ANILCA. Section 101 of ANILCA recognizes the importance of subsistence to rural residents of Alaska and the need to satisfy the economic and social needs of Alaska and its people. The Congressional findings in ANILCA Title XI, section 1101, recognize the need for a single comprehensive statutory authority for the approval or disapproval of applications for transportation routes through conservation units, such as the Tetlin National Wildlife Refuge. Section 1104 establishes the procedure for exercising that authority. Finally, the applicable laws on exchanges in ANILCA section 1302 are written with a presupposition that the purpose of an exchange is to acquire land for conservation units, not convey it in furtherance of a private firm's interest in a development project.

Department Notice to ANCSA Corporations

Northway Natives, Inc., a member of Din e'h LLC, first learned of the land exchange informally on January 10, 2012, by email sent from FWS to the village to book the community hall for a meeting. On January 12, 2012, we learned from the Office of the Federal Coordinator that, without any consultation, the land exchange was essentially "a done deal". While Tanacross or Din e'h would have an opportunity to comment on the land exchange at a later date, it would prove to be the case that the basic terms of the exchange were set prior to any notice.

Further, FWS sought legal advice from its Solicitor's office and that advice was provided in December 2011. We understand the advice was Title XI of ANILCA and the requirements of FERC could be meshed into an administrative process. However, that advice was offered AFTER the deal had been struck in concept a month earlier.

Thus, without consultation with the most interested Village Corporations, FWS committed to transfer 400 acres of wildlife refuge land out of federal ownership. The terms of the pipeline right-of-way would be set by private parties, APP and The Conservation Fund. The terms of the right-of-way would not reflect the best interests of the Federal government, and would be injurious to the interests of Alaska Native people of the Upper Tanana.

The Effect of the Proposed Action on ANCSA Corporations and Shareholders.

Having the land leave Federal ownership will impact Alaska Native people in the four villages, the shareholders of the Village Corporation members of Din e'h, in several ways:

- 1) The land is culturally important to the people of the Upper Tanana, especially the Northway tribe and deserves protection.
- 2) The State of Alaska subsistence rules will replace federal subsistence rules to the detriment of Alaska Native people in the Upper Tanana.
- 3) Northway Natives Inc. will lose the preference under Section 1307 of ANILCA to contract for the provision of revenue-producing visitor services.
- 4) The replacement land in Texas has no exchange value to the Village Corporations in the Upper Tanana Region.
- 5) The monetary value of the 400 acres of wildlife refuge was set by an appraisal which did not include comparable sales from Din e'h members and, we suspect, does not recognize the lands as "Transportation Corridor Lands." We have not seen the appraisal, but it will be offered in negotiations with APP (and any other future developer) to lower the value of the right-of-way on Din e'h lands should the Alaska Pipeline Project proceed.
- 6) The Tetlin land to be exchanged adjoins the only right-of-way through Canadian First Nations land and is a keystone parcel for any type of linear development between the Lower 48 and Alaska through Canada. Din e'h, which sees jobs and contracts as the way to transform the economic and social well-being of our people, is opposed to giving one firm an exclusive right to future development in the region.

Keeping these lands in Federal ownership will avoid these negative impacts. Title XI of ANILCA would retain the land in Federal ownership while allowing APP to acquire an easement, should one be needed. Despite testimony to this effect in the belated consultation process, USFWS continues to proceed with the land exchange at APP's request. As stated during the February 21, 2012, Government to Government meeting, Tribal Elder Darlene Northway thought that the Refuge would be the bodyguard for our land—and would protect it and not try to take money for it.

Access to Information

Order No. 3317 directing early, government-to-government consultation with the Tribes was signed by the Secretary on December 1, 2011, and yet we remain largely uninformed about the proposed Tetlin land exchange. An in-person request to review the exchange appraisal and the FWS case file was denied on January 24, 2012. Din e'h filed an information request under the Freedom of Information Act, ("FOIA"), on February 13, 2012, to obtain access to this information. The initial FWS response on March 1, 2012, was to request payment of \$4,140.00 estimated

expenses, before FWS would begin to respond to the FOIA. While FWS subsequently agreed waive those fees, that took time and as of this date nothing has been provided to us.

The Lessons for Consultation Policy

The proposed Tetlin land exchange was a decision by FWS to transfer land from a wildlife refuge established by ANILCA to private ownership in order to accommodate the interests of TransCanada and ExxonMobil. While this may fall under the meaning of an "operational activity" in the current definition, it would be best to clarify that the Policy on Consultation applies to actions effecting title to, or classification of, federal lands considered by the Department's Bureaus and Offices.

1. The definition of *Departmental Action with ANCSA Corporation Implications* should be amended to include: "Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding changes, or operational activity, including actions to transfer, convey, exchange or reclassify interests in land, that may have a substantial direct effect on an ANCSA Corporation . . ."
2. The definition of *Departmental Action with ANCSA Corporation Implications* should be amended to include actions: "within 50 miles of ANCSA Corporation land, water areas and resources."
3. The definition of *Departmental Action with ANCSA Corporation Implications* should be amended to add actions that may: "have the potential to significantly affect the economic and social needs, including the health, education and welfare, of their Native shareholders."
4. The definition of *ANCSA Corporation* should be amended to include: "or an association or incorporation of such corporations formed to address development issues in a particular geographic area."

The proposed Tetlin land exchange would negatively affect the subsistence rights of the Native shareholders of Northway Natives Inc., by shifting the game management rule from federal to state control and eliminating certain rights under ANILCA. At the same time, the land exchange affects the land management duties of the other Native Village Corporation members of Din e'h LLC. The Village Corporations have a responsibility imposed on them by ANCSA to manage their land resources, here, the pipeline right-of-way, for the benefit of their Native shareholders. They are entitled to consultation on a significant federal land transaction in their area that is directly related to that resource.

Finally, the four Village Corporations in the Upper Tanana Region have organized as a limited liability company under state law to share the effort and the expense of addressing large scale development activities in their region. The Consultation Policy should recognize the benefits of such associations and include them in the definition of ANCSA corporations where appropriate.

5. Section VII, Consultation Guidelines, (Tribes) at E. 1., should be amended to read: "Each Bureau or Office shall consult with Indian Tribes as early as possible when considering a Departmental Action with Tribal Implications."

Early consultation must be mandatory for consultation to be effective. The Tetlin land exchange was first considered by FWS in July of 2011. By the time FWS contacted Northway Natives Inc., in January of 2012, the premise for expedited consideration had been accepted, the parties agreed that the pipeline right-of-way provisions of ANILCA were too cumbersome to follow and the essential terms of the exchange were negotiated. At that stage, meaningful consultation was no longer possible. The Village Corporations could comment, attend subsequent meetings, or object, but they were precluded from contributing to the decision-making process.

The premise for expedited consideration of the exchange, APP's need to comply with state AGIA deadlines, was not accurate in the first instance and has been completely removed by Governor Parnell's shift in focus away from the Canadian route to an in-state LNG pipeline. While the latter might not have been clear in the summer of 2011, consultation with the Village Corporations would have certainly have added perspective to the FWS decisions to expedite consideration of the exchange and to abandon compliance with the requirements of ANILCA. As a result of these decisions, FWS is now prepared to convey 400 acres out of federal ownership for a need that no longer exists.

Title XI of ANILCA defines the procedure for granting a pipeline right-of-way and it applies to the Tetlin National Wildlife Refuge, which was created by ANILCA. Section 1104 of Title XI provides a list of matters to be considered by FWS before granting a pipeline right-of-way in a wildlife refuge. These matters are in many instances related to topics appropriate to adequate consultation. On their own, FWS, TransCanada and ExxonMobil decided that the requirements of Title XI were too cumbersome to follow. Din e'h would have offered a different perspective if consulted. Thus, the lack of early consultation in this case eliminated not one, but two opportunities for the Village Corporations and their Native shareholders to meaningfully participate in decisions effecting federal land management in their regions.

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6. Consultation must be accompanied by full and adequate information about the project, the process used to reach the current course of action, and other factors that may adversely affect the interests of ANCSA Corporations and their shareholders.

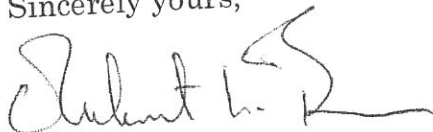
It goes without saying that a FOIA request should not be required in order for an ANCSA Village Corporation to access information about the Department's land and policy decisions. Consultation without information will not benefit the ANCSA Corporations or the Department. In the case of the proposed Tetlin land exchange, we have yet to receive a response to the FOIA request.

In the context of a FOIA request, the perception is that FWS, the agency entrusted with management of the wildlife refuge under ANILCA, is now going through the files deciding what it should or should not produce to Din e'h. Whether this is happening in consultation with APP or not, the perception is not in any way consistent with the leadership direction provided to the Department by Executive Order 13175, President Obama's November 5, 2009, Memorandum on Tribal Consultation, or Secretarial Order No. 3317.

There may be sensitive information in a file that should be protected. In the case of the proposed Tetlin land exchange, however, we would suggest that the minimum information that should be provided to the ANCSA Village Corporations of the Upper Tanana is not confidential and should include: the original request and supporting information from APP, the suggested terms of the exchange, the Departmental authority for the action, the reason for demanding expedited consideration, the need for the exchange, the basis for valuing the exchange, the feasibility of the project, an explanation of the benefits, public values and negative impacts of the proposed exchange, and, in this case, an explanation of what happens if the pipeline is never built.

We hope that the foregoing comments from a case-specific point of view will be considered and will be helpful in your efforts. We thank you for the opportunity to participate in this process.

Sincerely yours,



Robert L. Brean