

Honorable Eric Holder
Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Attorney General Holder:

On November 5, 2009, President Obama held an historic meeting with tribal government leaders from across the United States. It was a proud day for our country as President Obama promised to improve the partnership between the federal government and tribal nations. As an initial step toward fulfilling his promise, the President issued an Executive Memorandum that, among other things, reaffirmed the United States Government's commitment to the consultation requirements set out in Executive Order 13175.

On March 31, 2010 President Obama signed Public Law 111-154, commonly referred to as the PACT Act, which went into effect on June 29, 2010. Before that effective date, and in recognition of the federal government's articulated commitment to consultation, Kenneth Melson, Director of the United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, held an in person consultation event to solicit tribal comments on the PACT Act. That event was held on June 8, 2010 at the National Museum of the American Indian in Washington D.C. Numerous tribal entities made written submissions to the ATFE detailing concerns regarding the proper scope of PACT Act enforcement in Indian Country. The ATFE provided no materials to tribal participants in advance of or at the meeting. Additionally those federal representatives who did attend were unable to respond to questions presented by the tribal participants. It was not until November 18, when ATFE issued its summary of comments, that tribal participants had any information regarding ATFE's regulatory intentions. In that summary, ATFE stated that "[i]n the near future, ATF will issue an Interpretive Rule that will set forth the Bureau's views on the Act's requirements." Unfortunately, ATFE has largely ignored the comments offered by participating tribes and tribal members in connection with ATFE's June 8, 2010 consultation. Although Rule has not yet been issued, based upon the positions set forth in the November 18 comments, there is little doubt that without serious reconsideration of Tribal rights, the Rule will be a disaster for commerce in Indian Country. The implementation of the PACT Act, primarily through your ATFE bureau, will eviscerate the fourth largest economic engine available to tribes and tribal members throughout the United States.

If the consultation requested in this letter is not conducted, there will be no tribal input in this planned "Interpretive Rule" and no opportunity for the federal government to ensure its actions comply with its trust responsibilities to tribes and tribal members.

Given ATFE's actions to date, its stated plan to enter an "Interpretive Rule" is likely to significantly and negatively impact tribal interests throughout the country. Therefore, the undersigned Tribes write to request that, prior to issuance of any further "Interpretive Rule" or other written position on enforcement of the PACT Act in Indian Country, the

Department of Justice join with the Department of Interior to conduct an in depth consultation with Tribes throughout the United States. The purpose of the proposed consultation is to address serious concerns with ATFE's unwarranted interpretation of the PACT Act and that bureau's approach towards legitimate tribal interests involved in the marketing of tobacco products on reservations.

We ask that this consultation be administered in an inclusive manner, to ensure maximum participation by all tribes, but especially participation by small, financially limited tribes that rely extensively on tobacco sales as a means of pursuing economic independence. We specifically request that consultation meetings be scheduled, at a minimum, in New York, California, Washington, Minnesota, New Mexico and Florida. At these meetings, we request discussion of ATFE's current position regarding enforcement, guidance and regulation under the PACT Act, including at least the following:

1. Scope of "lawfully operating" as that term is used in 15 U.S.C. § 375(4)(B);
2. Scope of "Delivery sales" in regard to wholesale shipments made to reservation retailers intended for resale in a "face to face" transaction;
3. The PACT Act "list;" and
4. PACT Act definition of "interstate commerce" and its relationship with commerce occurring between different Indian reservations.

Of particular concern is item 1. The November 18 comments set forth that the ATFE has taken the position that to be "lawfully operating" a business must possess all state licenses regardless of whether that business is operating on an Indian Reservation. This represents a wholesale incorporation of state law into Indian Country. The ATFE position is preposterous and specifically prohibited by the plain language of the PACT Act. Indian owned businesses have contacted the ATFE on this issue to prompt further discussion, without results. For example, see attached hereto a December 20, 2010 letter from Lance Morgan, CEO of Ho-Chunk, Inc., a political and economic subdivision of the Winnebago Tribe of Nebraska to ATFE Division Chief Crisanto Perez. Clearly, the ATFE has taken a legally untenable position on this issue requiring further consideration and discussion.

Further meetings will help increase dialogue and cooperation with tribal governments on these important issues. We want to make it as easy as possible for the Department of Justice to engage with tribal leaders in developing an approach to PACT Act implementation well in advance of any further regulatory commitments by ATFE.

Our fundamental request is that the federal government not follow the same course it did after the June 8, 2010 meeting. Accordingly, we ask that you go beyond dialogue and truly take action to meet the federal government's responsibilities in Indian Country in connection with the sale of tobacco products by Tribes and tribal members.

Tribal governments have a unique status in our federal system under the U.S. Constitution and numerous federal laws, treaties, and federal court decisions. Indian tribes have the power to engage in on reservation economic activity free from state and intrusive federal regulation. We also have the responsibility to provide a broad range of

governmental services to our citizens, and must be able to draw upon our sovereign status to provide the economic means to fulfill this responsibility. We therefore look forward to working with you on these important issues in a manner that will ensure implementation of the federal government's commitment to engage in meaningful consultation.

There is an issue of immediate concern. In its November 18 comments the ATFE indicates that the list of banned shippers provided for in the PACT Act is currently being compiled. It is not clear when this list will actually be finalized and operative. We trust that the government will provide the 14 days prior notice required by 15 U.S.C 376a(e)(1)(E)(ii) to all persons that are going to be on the list and the opportunity to challenge their inclusion on the list as required by 15 U.S.C 376a(e)(1)(E)(iii). Please contact or have one of your staff contact Lance Morgan at any time if we can be of assistance, and to work with us to coordinate this consultation process.

Sincerely,