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July 26, 2008

BY EMAIL: [jpata@ncai.org](mailto:jpata@ncai.org)

Jacqueline L. (Johnson) Pata  
Executive Director  
National Congress of American Indians  
1301 Connecticut Ave., Suite 200  
Washington, DC 20036

**Re: *NBC's Rescission of Rule Permitting 50% of Tribal Council Costs in Tribal Indirect Cost Rates***

Dear Ms. Pata:

We have been asked by our client, the Mississippi Band of Choctaw Indians, to summarize for NCAI the factual and legal grounds rendering invalid NBC's decision to rescind prior Interior policy which permitted inclusion of up to 50% of tribal council costs in tribal indirect cost pools without additional justification.

1. Beginning with Federal Management Circular FMC 74-4 (July 18, 1974) and continuing through the initial publication of OMB Circular A-87 in 1981 and subsequent revisions thereof issued in 1995, 1997, 2004 and 2005 (the latter two issued as regulations at 2 C.F.R. Part 225 following APA rulemaking procedures), the federal government has generally prohibited inclusion of "general government expenses" (including legislative salaries and expenses) in indirect cost pools used to calculate indirect cost rates. See, 60 Fed. Reg. 26484 (May 14, 1995); 62 Fed. Reg. 45934 (Aug. 29, 1997); 69 Fed. Reg. 25970 (May 10, 2004); and, 70 Fed. Reg. 51910 (Aug. 31, 2005). All versions of A-87 issued from and after 1995 expressly referenced tribal councils along with state and local legislatures as examples of legislative bodies covered by that rule. See, 60 Fed. Reg. 26484 (May 14, 1995).

2. In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* ("ISDA") Section 450j-1(k)(11) provides that:

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Without intending any limitations, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

\* \* \* \*

(11) Expenses of a governing body of a tribal organization that are attributable to the management and operation of programs under this subchapter.

3. Since at least 1978 the Department of the Interior, initially through the Office of Inspector General ("OIG") and later through the National Business Center ("NBC"), after OIG's indirect cost determination functions were transferred from OIG to NBC effective January 1, 2003, has consistently interpreted OMB Circular A-87 as permitting the inclusion of up to 50% of tribal council salaries and expenses in tribal indirect cost pools without requiring further justification. See, OIG letter of July 30, 1999:

...our office adopted the policy of allowing Indian organizations to include 50 percent of the cost of tribal government (the chief executive's office and the tribal council) in the indirect cost pool in 1978. We instituted this policy, with the agreement of the Office of Management and Budget and other Federal agencies, to recognize that after the passage of the Indian Self-Determination and Education Assistance Act in 1975 (25 USC § 450), the conduct and administration of Federal programs represented a significant portion of Indian tribal business. However, the Office of Management and Budget amended Circular A-87 in 1995. Although the Circular allows a portion of the salaries and expenses of the chief executive and related staff of "federally recognized Indian tribal government" it specifically prohibited the salaries and other expenses of Indian tribal councils (Attachment B, part 23a(1)) as an allowable cost. As a result of the 1995 amendments to the Circular, we believe as that our policy of including 50 percent of tribal council expenses in the indirect cost pool must change. However, we will continue to include 50 percent, or more if documented, of the expenses of the chief executive and related staff in the indirect cost pool.

4. As noted above, OIG's prior interpretation of A-87 was called into question by new language set out at §§ 23(a) and (b) in Attachment 2 to the version of OMB Circular A-87 published in 1995. That provision provided *inter alia*:

**23. General government expenses.**

a. The general costs of government are unallowable (except as provided in section 41). These include:

(1) Salaries and expenses of the Office of the Governor of a State or the chief executive of a political subdivision or the chief executives of federally-recognized Indian tribal governments;

(2) Salaries and other expenses of State legislatures, tribal councils, or similar local governmental bodies, such as county supervisors, city councils, school boards, etc., whether incurred for purposes of legislation or executive direction;

\* \* \* \*

b. For federally-recognized Indian tribal governments and Councils Of Governments (COGs), the portion of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and his staff is allowable.

5. Section 23 of the Circular failed to reference 25 U.S.C. § 450j-1(k)(11) or other applicable ISDA provisions. 25 U.S.C. §§ 450j-1(a), 450j-1(a)(3)(A), 450j-1(a)(2), 450j-1(a)(3)(A)(i), and 450j-1(a)(3)(A)(ii). Section 23 also failed to acknowledge that tribal council costs are a type of tribal government costs which § 450j-1(k)(11) allows tribes to include in their indirect cost pools. Any ambiguity as to the meaning and effect of these ISDA provisions must be construed in favor of the tribes. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10<sup>th</sup> Cir. 1997) (Nationwide class action holding that ambiguities in ISDA must be resolved in favor of ISDA contractors under Indian canon of statutory construction). Section 23 was later reissued without change in the 2004 and 2005 versions of the Circular published at 2 C.F.R. Part 225 in Attachment 2 as § 19 (Vol. 69, Fed. Reg. 25970, 25983 (May 10, 2004); Vol. 70 Fed. Reg. 51910, 51918 (August 31, 2005). However, OMB Circular A-87 itself provides that at 2 C.F.R. § 225 (2008), Appendix A, § C Basic Guidelines, subpart 1.d.: "Factors affecting allowability of costs. To be allowable under Federal awards, cost must meet the general criteria: . . . d. Conform to any limitations or exclusions set forth in these principles, Federal laws, terms and conditions of the Federal award, or other governing regulations as to types or amounts of cost items." Under this provision, statutory requirements respecting allowability of types of indirect costs trumps any more restrictive language of the Circular.

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6. OIG acknowledged in its July 30, 1999 letter that § 450j-1(k)(11) and other provisions of ISDA supported inclusion of tribal council costs in tribal indirect cost pools. However, in light of the new language added in 1995 as § 23, *supra*, OIG then sought further OMB guidance by letter of January 14, 2000. That letter expressly inquired whether OIG's prior policy and interpretation of OMB Circular A-87 of allowing the inclusion of up to 50% of tribal council salaries in indirect cost pools without further justification (the "50% rule"), should be rescinded. OMB responded by letter of June 12, 2000. That letter instructed that there were circumstances when a portion of tribal council salaries could properly be included in indirect cost pools. The OMB letter also neglected to reference the provisions at 25 U.S.C. § 450j-1(k)(11) or the other ISDA provisions noted above.

7. In October, 2000, following issuance of OMB's letter of June 12, 2000, and taking into account the applicable ISDA provisions, Charles Wiebe, Deputy Regional Audit Manager, OIG, met with a number of tribal representatives, including Joe Webster, Esq. of Hobbs, Straus, Dean & Walker, appearing on behalf of NCAI, to address pending tribal indirect cost issues, including the status of the 50% rule. Mr. Wiebe advised that OMB was relying upon OIG to seek a resolution of a number of issues regarding tribal indirect cost rates including how to handle tribal council costs. Mr. Wiebe further indicated that the OMB had not suggested a better approach for addressing tribal council salaries than the 50% rule and that OIG would continue to adhere to the 50% rule as reflecting an acceptable interpretation of OMB Circular A-87 unless OMB otherwise objected. OIG subsequently continued to adhere to the 50% rule. This is evidenced by OIG's website instructions for calculation of indirect cost rates for tribes and tribal organizations as issued from 2000 through 2007, and by the many indirect cost rate agreements executed for those years in accordance with that rule.

8. Typical of these OIG instructions is the following from the July 28, 2002 OIG website (last updated April 25, 2002), copy appended as Exhibit A, which appeared under the heading "Preparing Indirect Cost Rates" and the subheading "Unallowable Costs" which provided as follows:

**Unallowable Costs.** Unallowable costs are defined in O M B Circular A-87, Attachment B, which states that costs such as fines and penalties, contributions and donations, entertainment, and most interest expenses are unallowable in the indirect cost pool and are also excluded from the direct cost base. Under Section 23 of Attachment B, general government costs are unallowable, including the (1) salaries and other expenses of tribal

councils, (2) costs of the judiciary branch of government, (3) costs of prosecutorial activities (unless authorized and treated as a direct cost to a specific program), and (4) costs for other general types of government services such as fire and police protection, unless provided for as a direct cost in program regulations. Federally recognized Indian tribal governments, however, can include in the indirect cost pool that portion of the salaries and expenses directly attributable to managing and operating federal programs by the chief executive and his/her staff. (*See O M B letter of June 12, 2000*). For Native American Organizations, we allow 50 percent of tribal council costs in the indirect cost pool without supplementary documentation. (Emphasis in italics added).

9. These website instructions re-confirmed the Interior Department's longstanding interpretation of OMB Circular A-87 (even after issuance of its 1995 version and OMB's letter of June 12, 2000) pursuant to which the 50% rule was determined to be lawful under that Circular. Hundreds of indirect cost rates have been negotiated and indirect cost rate agreement have been signed in the ensuing years in reliance upon this interpretation. Indeed, this policy remained in place after NBC assumed responsibility for indirect cost determinations for the Department as of January 1, 2003. It was not until mid-year 2007 that NBC's website instructions altered Interior's explanation of how tribal council salaries were to be treated in negotiating indirect cost pools, deleting any reference to the 50% rule. See, NBC instructions on "Preparing and Submitting Indirect Cost Proposals" under subheading "Unallowable Costs" dated 5/25/2007:

Unallowable costs are defined in OMB Circular A-87, Attachment B, which states that costs such as fines and penalties, contributions and donations, entertainment, and most interest expenses are unallowable in the indirect cost pool and are also excluded from the direct cost base.

Under Section 23 of Attachment B, general government costs are unallowable, including the

1. salaries and other expenses of tribal councils,
2. costs of the judiciary branch of government,
3. costs of prosecutorial activities (unless authorized and treated as a direct cost to a specific program), and

4. costs for other general types of government services such as fire and police protection, unless provided for as a direct cost in program regulations.

Federally recognized Indian tribal governments, however, can include in the indirect cost pool that portion of the salaries and expenses directly attributable to managing and operating federal programs by the chief executive and his/her staff. (see OMB letter of June 12, 2000).

10. Separate instructions published on the same NBC website as of 5/25/2007 under the heading "First and Second Year Only Sample Proposal Native American Organization (Revised 03/15/04)" under the heading "Indirect Personnel Justifications" still provided:

**COUNCIL MEMBERS:** Council members sitting on the Tribal Council receive a meeting stipend for their attendance. They establish policy, set direction, and approve all major decisions for the Tribe and its operations. 50 percent of the Council members' expenses are chargeable to the indirect costs. (Emphasis added).

Thus, taken as a whole, the NBC's website instructions for calculating indirect costs as issued in 2007 continued to acknowledge adherence to the 50% rule.

11. Later, in 2007, NBC through various emails advised a number of tribes that it would no longer honor the 50% rule. The following was typical of those communications:

While we allowed 50 percent of the general government expenses in your FY 2007 indirect cost rate negotiation, please note that general government expenses (tribal council expenses) are considered an unallowable expense. Salaries and other expenses of the tribal council incurred for purposes of legislation or executive direction are unallowable. However, there may be instances, particularly in smaller tribes, where a council member or chief executive wears two hats. For example, a council member or chief executive might also be the director of the tribe's personnel unit. In such cases, it would be acceptable to charge a pro-rata share of the time or salary of the council member to the indirect cost pool. In order to substantiate these costs, the tribe must document through survey of effort

reports for tribal council personnel or by some other reasonable means including personnel activity reports. These procedures are in accordance with 2 CFR 225 (formerly OMB Circular A-87), Appendix B, Section 19, and OMB letter dated June 12, 2000, addressed to the Department of Interior, Office of Inspector General. ([www.nbc.gov/acquisition/ics/documents/pdf/icpproc.pdf](http://www.nbc.gov/acquisition/ics/documents/pdf/icpproc.pdf)). Starting with the FY 2008 indirect cost rate negotiation, tribal council expenses will generally not be allowed in the indirect cost pool. Only the portion of general government salaries and expenses directly attributable to managing and operating federal programs will be allowed in the indirect cost pool if they are adequately documented as described above. Further, the unallowable costs which benefit from indirect costs will receive an appropriate allocation of indirect costs by the inclusion in the appropriate base used to distribute indirect costs in accordance with 2 CFR 225, Appendix A, Section C.3.b. (Emphasis added).

12. NBC's website as of 7/23/2008 under the heading "Acquisition Services" under a chart entitled, "Cited Unallowable Cost Reference Sheet" at Item 6 subsequently provided:

<b>Cited Unallowable Costs</b>	<b>Reference</b>
	<b>2 CFR 225</b>
6. General Government Expenses—including Expenses of the tribal council, judiciary, tribal court, and police and fire services.	Appendix B.19
<ul style="list-style-type: none"><li>For federally-recognized Indian tribal governments and Councils of Governments, the portion of salaries and expenses directly attributable to managing and operating Federal programs by the chief executive and his staff is allowable. Salaries must be documented by certified payroll or other verifiable means.</li><li>Note: Enrollment and election costs are Considered functions of the general government And are unallowable.</li></ul>	OMB letter, dated 06/12/2000

13. NBC did not engage in any consultation process or any APA notice and comment rulemaking process (per 5 U.S.C. § 553) before issuing its 2007 policy change and NBC has never published its new interpretation of A-87 and its decision to rescind the 50% rule in the Federal Register pursuant to 5 U.S.C. § 552 or otherwise.

14. NBC and the Interior Solicitor's Office have confirmed that NBC's new interpretation of OMB Circular A-87 and the OMB letter of 6/12/2000 as reflected in its emails to various tribes and in the changes to its website, reflect a determination by NBC that it will no longer permit the inclusion of 50% of tribal council salaries in indirect cost pools without further justification under the prior rule, commencing with rates negotiated for FY 2008. This constitutes a complete policy reversal by Interior as to this rule.

15. NBC and the Interior Solicitor's Office have now also confirmed NBC's position that NBC has the authority to make this policy change on its own without any tribal consultation and without utilizing any APA notice and comment or Federal Register publication procedures. *See*, NCAI letter of December 27, 2007 to Carl Artman, then Assistant Secretary—Indian Affairs.

16. NBC is a part of the Department of the Interior. All of its authority derives from delegations of authority issued by the Secretary at 212 DM 10 (last modified 7/31/07) which included the authority delegated at 10.5 thereof, "To negotiate indirect cost rates with Indian tribes and certain agencies on Insular Areas and State Governments."

17. There is no question that this complete change in Interior's interpretation of OMB Circular A-87 and its decision to rescind the 50% rule constitutes a "rule" under the APA, 5 U.S.C. § 551(4):

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing; (Emphasis added).

18. Significantly, OMB has published nothing respecting the 50% rule since its letter of June 12, 2000 and, as noted above, the language of Attachment 2, ¶ 19 of OMB

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Circular A-87 as it appears in the 2004 and 2005 versions of the Circular is identical to the language of Attachment 2, ¶ 23 of the 1995 version of the Circular. In other words, there has been no change in the law respecting OMB Circular A-87 or the 50% rule and OMB has issued no objections to NBC's continued adherence to that rule. Thus, the new interpretation of A-87 now relied upon by Interior to justify rescission of the 50% rule did not come from OMB, it was initiated within Interior at NBC. As noted above, the 50% rule was originally adopted by Interior as a permissible interpretation of A-87. That interpretation was adopted prior to the 1988 and 1994 amendments to ISDA. The 1994 amendments to ISDA forbid Interior to issue any new binding rules or regulations affecting ISDA contractors or compact tribes respecting indirect contract support costs ("indirect costs"). 25 U.S.C. § 450k(a)(1). And, even if that statute conferred such authority, no policy or regulation affecting ISDA contractors or compact tribes could lawfully be issued by Interior except after notice to certain specified Congressional committees and Federal Register publication. (25 U.S.C. § 450k(c)) and then only after engaging tribes in a negotiated rulemaking process per 25 U.S.C. § 450k(d). It is also clear that no division of Interior has the authority to issue "federal program guidelines, manuals or policy directives" binding on tribes respecting indirect costs except as "otherwise agreed to by the Contractor and the Secretary, or otherwise required by law." 25 U.S.C. § 450(c) § 1(b)(11). Since rescission of the 50% rule directly affects tribes and tribal organizations which engage in ISDA contracting or compacting, no division of the Interior Department, including NBC, presently has the legal authority to rescind the 50% rule. Any rescission of that rule would have to come from OMB and OMB hasn't spoken on this issue.

19. Moreover, Interior and OMB are obliged to construe ambiguous rules applicable to Indians in the manner most advantageous to them. Interior has, for the last 30 years, construed the ISDA and OMB Circular A-87 as permitting OIG/NBC to apply the 50% rule. Interior has no authority to reverse course on this issue through issuance of a change in policy which it initiated. Even if Interior had the authority to issue substantive rules depriving tribes of the benefits conferred under the 50% rule through reinterpretation of the OMB Circular, Interior would be required to adhere to the special procedural requirements for policy changes grounded in 25 U.S.C. § 450k, or APA notice and comment rulemaking procedures to do so. *See, authorities cited infra.*

20. There are solid grounds for arguing that this policy change constitutes a "substantive" rule under the APA, rather than an "interpretative" rule, and that none of the other APA rulemaking or publication exceptions apply. *Russ v. Sullivan*, 500 U.S. 173 (1991) (although agency may change its regulations and its interpretation of a statute through notice and comment rulemaking, it may not constructively rewrite the regulation

which was expressly based on an express interpretation of a statute, through internal memorandums or directives incorporating a totally different interpretation and effecting a totally different result), cited with approval in *National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al.*, 125 S.Ct. 2688, 2700 (2005); *Ohio Department of Human Services v. United States Department of Health and Human Services*, 862 F.2d 1228 (6<sup>th</sup> Cir. 1988) (agency's new interpretation of regulation issued without notice and comment was invalid for that reason where Medicaid plan issued under prior interpretation was accepted but was disapproved under the new interpretation); *Phillips Petroleum Company v. Johnson*, 22 F.3d 616 (5<sup>th</sup> Cir. 1994) (Interior Department's unpublished internal agency memorandum which effected change in valuation method for valuing natural gas liquid products was invalid because not issued through notice and comment procedures); *Batterson v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980) (if agency is empowered to issue substantive (legislative) rules new rules which change prior requirements must be issued per APA rulemaking procedures); *McKenzie v. Heckler*, 602 F.Supp. 2250 (D. Minn. 1985) (Social Security Administration's new policy on how to process disability and SSI claims was not an interpretative rule since the new policy "established a binding norm" which "determined the rights and interests of affected parties."); *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034-1035 (D.C. Cir. 1999) (FAA's new interpretation of existing regulations which took a different position than reflected in "FAA's thirty-year interpretation...[which] had become an authoritative departmental interpretation" was invalid for failure to promulgate the new interpretation via APA notice and comment procedures: "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, which requires notice and comment."); *Federal Farm Credit Banks Funding Corporation v. Farm Credit Administration*, 731 F.Supp. 217 (E.D.Va. 1990) (when agency issues new interpretation of accounting rules it applies (though those rules were promulgated by another agency), the APA notice and comment requirements apply to the issuance of the new interpretation where that interpretation substantively changes the accounting rules that would otherwise apply to parties affected by those rules).

21. However, as will be shown below, it is not necessary to answer those APA questions in order to demonstrate that the Interior Department cannot now lawfully rescind the 50% rule (even if it otherwise had the substantive power to do so) without engaging in consultation with Indian tribes and tribal organizations as required by applicable tribal consultation policies. NBC, an agency of the Department of the Interior, unilaterally rescinded the 50% rule in 2007. It did not consult with tribes about this change and, in fact, told tribes that no tribal consultation policy applied to it. In fact Presidential Executive Order 13175 (65 Fed. Reg. 67249 (Nov. 9, 2000) requires

consultation with tribes by any federal agency "when undertaking to formulate and implement policies that have tribal implications." In addition this policy change directly affects contracts with the Bureau of Indian Affairs and the Indian Health Service under the ISDA. The BIA tribal consultation policy applies to any "action" defined to include a proposed or formally contemplated activity. decision...plan, policy, procedure...that uniquely or significantly affects Indian tribes..." The Department of Health and Human Services tribal consultation policy provides that "consultation with Indian Tribes will occur to the extent practicable and permitted by law before any action is taken that will significantly affect Indian tribes." These BIA and DHHS consultation policies apply here because their acquiescence in NBC's decision to rescind the 50% rule is itself a policy decision which those agencies cannot make without engaging in tribal consultation. Clearly these consultation requirements apply in the circumstances here and cannot be avoided simply by the Interior Secretary's delegation of authority to NBC to negotiate indirect cost rates for tribal self-determination contractors and self-governance compact tribes. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8<sup>th</sup> Cir. 1979) (BIA conflict of interest rule which affected tribal rights to self-governance held invalid in part because agency had not consulted with Indian tribes as required by policy established by the ISDA which the court found "created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views" before the agency issues major policy decisions affecting tribal self-governance and their ability to exercise rights conferred under ISDA); *Mescalero Apache Tribe v. Rhoades*, 804 F.Supp. 251 (D. N.M. 1992) (DHHS conflict of interest rule which affected tribal rights to self-governance held invalid in part on same grounds as articulated in *Oglala Sioux Tribe of Indians v. Andrus*, *supra*).

22. Likewise, Interior cannot lawfully rescind or cease implementing the 50% rule without doing so through APA (§ 553) rulemaking (notice and comment) and Federal Register (§ 552) publication procedures. As a division of the Interior Department, NBC is bound by the Department's published policies regarding "Public Participation in Rulemaking." These policies have been established and published through various Federal Register notices and in various Departmental Manual provisions:

- a. 36 Federal Register 8336 (May 4, 1971), (copy appended as Exhibit B). That notice provides in part:

Notice is hereby given of the policy of the Department of the Interior to give notice of proposed rule making and to invite the public to participate in rule making in instances where not required by law.

\* \* \* \*

The law [APA] excepts from these [notice and comment] requirements matters relating to public property, loans, grants, benefits, or contracts.

\* \* \* \*

Therefore, effective immediately, all offices and bureaus of the Department in issuing rules and regulations relating to public property, loans, grants, benefits, or contracts, are directed to utilize to the fullest extent possible the public participation procedures of 5 U.S.C. § 553.

\* \* \* \*

Where, as provided by 5 U.S.C. § 553, it is determined that such procedures in public rule making would be impracticable, unnecessary or contrary to the public interest, a specific finding to this effect shall be published with the rules or regulations in question. Such exceptions are not to be favored and should be used sparingly, as, for example, in emergencies and in instances where public participation would be useless or wasteful because proposed amendments to regulations cover minor technical matters. (Emphasis added).

- b. 43 Federal Register 35754 (August 11, 1978), (copy appended as Exhibit C). That notice promulgated an interim rule which was more comprehensive than the 1971 notice and reflected interim guidelines approved by the Secretary of the Interior July 26, 1978. That interim rule contemplated the formal issuance of a final rule to be codified at 43 C.F.R. Part 30, after consideration of public comments and that interim rule has been reflected in the Interior's Departmental Manual at 301 DM 2 since July 26, 1978. It appears, however, that no final rule was issued pursuant to the 1978 Federal Register notice, hence no C.F.R. provision was ever codified at 43 C.F.R. Part 30. The gist of the interim rule published in the 1978 Federal Register notice was recapitulated in Interior's Departmental Manual at 301 DM 2.
- c. The 1978 Federal Register notice provided in part that:

The goal of the guidelines is to further the policy of the Department of offering the public

meaningful opportunity for participation in decision-making processes leading to actions and politics which may significantly affect or interest it.

\* \* \* \*

2.1 *Policy.* The Department of the Interior will offer the public meaningful opportunities for participation in decisionmaking processes leading to actions and policies which may significantly affect or interest them.

2.2 *Definitions.*

A. "Public" means affected or interested individuals, including consumers' organizations and special interest groups; officials of local, State, and Indian tribal governments; and officials of other Federal agencies.

B. "Participation" means systematic opportunity for the public to know about and express their opinions on possible Departmental actions and policies; and to know that their views are considered in shaping decisions and become part of the record of the decisionmaking process.

\* \* \* \*

2.4. *Responsibility.*

A. Officials at every level of the Secretariat and all bureaus and offices are responsible for considering public participation early in decisionmaking processes leading to actions or policies which:

\* \* \* \*

C. Those guidelines supplement laws, regulations, policies and guidelines mandating or governing public involvement in administrative action. In determining whether to solicit public participation in a decisionmaking process, and in determining the form of the participation, Department officials must consider particularly:

\* \* \* \*