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Mail Code: 1101A
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**Re: SAFETEA – Proposed Withdrawal and Reconsideration
EPA Consultation Tribal Comments**

Administrator Regan:

As you recall, on October 1, 2020, the Environmental Protection Agency ("EPA") approved a request by the Governor of the State of Oklahoma ("State") to extend approval of the State's EPA-approved environmental regulatory programs into certain areas of Indian country within the State ("October 2020 Decision") under the authority of Section 10211(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005, Pub. Law 109-59, 119 Stat. 1144, 1937 (August 10, 2005) ("SAFETEA").

On December 22, 2021, the Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie) ("Wichita Tribe") received notice the EPA is now proposing to withdraw and reconsider the October 2020 Decision and is inviting comments to inform EPA's reconsideration and decision making regarding the State's request under SAFETEA. As counsel to the Wichita Tribe, we respectfully submit the following information on behalf of the Wichita Tribe:

The Wichita Tribe concurs with EPA's assessment that the "abbreviated period between the State's submission of its request under SAFETEA and EPA's approval" did not provide sufficient time for tribal consultation and consideration of alternatives. The Wichita Tribe would also urge the EPA to require conditions and procedures for "enhanced engagement with the State during program implementation in Indian country" if, in the end, Oklahoma is permitted to exercise any regulatory authority within Indian country at all.

As referenced during recent consultation discussions, Oklahoma's efforts to stake claims to regulatory authority are the result of the current state administration's desire for short-term political gain. For 15 years since the enactment of Section 10211(a), the provision lay dormant. Given such an extended period, the decision by Oklahoma's current governor to aggressively seek expansive authority over vast areas of land over which the Wichita Tribe continues to possess authority as part of its historic boundaries bears further scrutiny. Heightened scrutiny is also required in light of recent court decisions demonstrating a vast array of failed attempts by the state's current administration to secure rights against Tribes contrary to both existing law and agreements with those Tribes, particularly when the authority the state seeks is not unfettered. As noted by the court in *Oklahoma Dept. of Environmental Quality v. EPA*, 740 F.3d 185, 190

(D.C. Cir. 2014), any decision by the EPA granting a request by Oklahoma under the SAFETEA could likely be subject to the imposition of EPA-imposed conditions. These conditions need to be discussed and developed in coordination between the EPA and Oklahoma Tribes – a process that will take study, deliberation, and time.

Moreover, the EPA's initial decision to extend the State's EPA-approved environmental regulatory programs into certain areas of Indian country is inconsistent with determinations made by other federal agencies. In particular, on May 18, 2021, the Office of Surface Mining Reclamation and Enforcement determined that "Oklahoma cannot exercise its State program regulatory authority over surface coal mining and reclamation operations within the exterior boundaries of the Muscogee (Creek) Nation Reservation." 86 Fed Reg. 26941. Oklahoma challenged this decision and sought a preliminary injunction to prevent its enforcement. *Oklahoma v. Department of Interior*, Case No. 21-cv-719 (W.D. Okla.) ("Oklahoma I"). Oklahoma filed a second lawsuit on August 16, 2021, to block a subsequent decision by the Office of Surface Mining Reclamation and Enforcement relating to lands within the Cherokee and Choctaw reservations. *Oklahoma v. Department of Interior*, Case No. 21-cv-805 (W.D. Okla.) ("Oklahoma II").

Interior's decision was based on the United States Supreme Court's decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), "which legally recognized the on-going existence of the historic Muscogee (Creek) Nation Reservation in the State of Oklahoma, necessarily forecloses the State of Oklahoma's authority to implement the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") on Indian Lands within the exterior boundaries of the Muscogee (Creek) Nation Reservation." *Id.* Oklahoma's lawsuits seek to limit the application of *McGirt* to criminal matters and find that Oklahoma may exercise jurisdiction over surface coal mining and reclamation operations within the Muscogee (Creek) Nation's boundaries. On December 22, 2021, the court denied Oklahoma's request for preliminary injunction in the Oklahoma I case, which had the effect of preventing Oklahoma from operating its own surface mining regulatory programs within the Muscogee Creek Reservation.

Even in areas that have not been determined to still be reservations, Tribes and tribal members often hold significant amounts of land over which the Tribes exercise jurisdiction. In most cases, these properties have been in families since the allotment era, with the Tribal communities, as a whole, residing in the area before statehood. As a result, Tribes are a source of extensive – and often overlooked – intimate knowledge about the land, its history, its wildlife, its productivity, its development, and changes to the land from significant events such as flood, fire, and infrastructure projects.

This multi-generational attachment to the land also leads to an understanding of the importance of stewardship, so the land is preserved for future generations. Tribal communities remain dependent on the land for their survival. Tribal members hunt, fish, farm, and live on the land. The land is not an abstraction for Tribes, but is foundational for their communities.

Therefore, even if there were areas in which it might arguably be appropriate for Oklahoma to exercise a degree of environmental regulatory authority, that authority should be exercised in conjunction and partnership with the Tribal governments in those areas. Thus, if Oklahoma is allowed to exercise regulatory authority in Indian country, the EPA must condition the exercise of that authority – and the funding for those regulatory activities – on active consultation and partnership with Tribal governments. The preferred approach, however, would be to prohibit Oklahoma from exercising regulatory authority in Indian country and for the EPA to facilitate the development of regulatory plans to be enforced jointly by Oklahoma and the Tribal governments whose jurisdictions are affected.

If the EPA chooses to allow Oklahoma to exercise regulatory authority in Indian country conditioned upon consultation and coordination with Tribal governments, then such consultations should include topics such as:

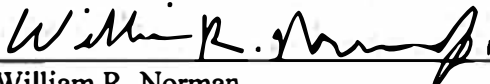
- Impacts on hunting and fishing.
- Impacts on native wildlife and plants.
- Impacts on local waterways.
- Impacts on tribal communities presented by limitations on, or expansions of, allowed development.
- Potential health impacts on youth and elders.

Time and again, as Oklahoma's Tribes have taken on more and more responsibility, they have proven themselves reliable and effective partners with the federal government for delivery of healthcare, education, and other governmental services, as well as engaging in the limited environmental regulation currently available to them. Increasing Tribal environmental regulatory authority would mean revising laws to facilitate granting Oklahoma Tribal governments treatment as states for purposes of environmental regulations. This would also mean providing funding for increasing the regulatory capacity of Tribal governments. In the end, however, facilitating this much-needed and long-desired expansion of tribal environmental programs would provide benefits for both Tribal communities AND the state.

Accordingly, the Wichita Tribe urges the EPA to withdraw and reconsider the October 2020 Decision and work with Oklahoma's Tribes and other stakeholders to develop a robust set of rules that will require cooperation between Tribal and state regulatory bodies, encourage the growth of strong Tribal regulatory structures, and help make Oklahoma a model of effective environmental regulation. Thank you for your consideration of the concerns and requests outlined in this letter.

Sincerely,

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By: 
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