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Eastern Region DOI-DOJ-DOD Consultation on Federal Infrastructure Projects USET Sovereignty Protection Fund Tribal Leader Talking Points

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As a part of its response to the crisis at Standing Rock, the Obama Administration, through the Departments of Interior, Justice, and Defense, has initiated consultation with Tribal Nations on the permitting of federal infrastructure projects. With a goal of ensuring what is occurring at Standing Rock never happens again, the consultation centers on two primary questions: (1) within the existing statutory framework, what should the federal government do to better ensure meaningful Tribal input into infrastructure-related reviews and decisions and the protection of Tribal lands, resources, and treaty rights; and (2) should new legislation be proposed to Congress to alter that statutory framework and promote those goals?

As the member Tribal Nations of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) well know, the failures in the consultation process that resulted in the crisis at Standing Rock are not unique to the Great Plains. As a result of federal infrastructure expansion in the eastern United States, USET SPF member Tribal Nations continue to face irreparable damage to ancient sacred sites, as well as potential threats to public health.

General Talking Points

- USET SPF member Tribal Nations stand with Standing Rock in calling upon the Obama Administration to halt all construction permits on the Dakota Access Pipeline (DAPL) while it conducts a full Environmental Impact Statement (EIS) for the Lake Oahe crossing and deny the final easement until further review of the project is guaranteed.
- Though DAPL is bringing failures in the consultation process associated with federal infrastructure projects to the national stage, USET SPF member Tribal Nations continue to experience the same types of failures here in the east. Whether an Army Corps highway project in the everglades or the expansion of natural gas pipelines in southern New England, USET SPF Tribal Nations find that our cultural, spiritual, and natural resources are often impacted in spite of requirements to consult.
- Broadly, the U.S. must work to reform the Tribal consultation process, as conducted by agencies across the federal government. Tribal Nations continue to experience inconsistencies in consultation policies, the violation of consultation policies, and mere notification of federal action as opposed to a solicitation of input. Letters are not consultation. Teleconferences are not consultation. Providing the opportunity for Tribal Nations to offer guidance and then failing to honor that guidance is not consultation.
- Meaningful consultation is a minimal standard for evaluating efforts to engage Tribal Nations in decision-making, and in the context of high-stakes infrastructure projects, Tribal consent is required to fulfill the federal treaty and trust responsibilities. The determination of what level of consultation

is required should come from Tribal Nations. Meaningful consultation requires that dialogue with Tribal partners occur with a goal of reaching consent.

- It is time for a Tribal Nation-defined consultation model, with dual consent as the basis for strong and respectful diplomatic relations between two equally sovereign nations. In the short term, we must move beyond the requirement for Tribal consultation via Executive Order to a strengthened model achieved via statute. In the long term, we must return to the achievement of Tribal Nation consent for federal action as a recognition of sovereign equality and as set out by the principles of the United Nations Declaration on the Rights of Indigenous Peoples.

Specific Recommendations

- All federal agencies, including independent federal agencies, must be required to adhere to existing consultation policies with additional oversight from the White House. Tribal Nations must have the opportunity to regularly review and provide comments on the efficacy of existing policies. Policies must be amended and improved at the request of Tribal Nations.
- Tribal Nations must certify that meaningful consultation has taken place before federal infrastructure projects can move forward. Meaningful consultation includes engaging with Tribal Nations at the very beginning of any planning, assessment, or review processes on a nation-to-nation basis and positively acting upon Tribal guidance and input. Tribal consent should be required when infrastructure projects have the potential to have significant impacts on Tribal Nations' traditional lands, resources, cultures, and ways of life. New legislation may be needed to require Tribal consent.
- Since 2009, as part of the efforts to strengthen the economy and create new jobs, the Obama Administration has taken actions to expedite federal review of infrastructure projects. The Fixing America's Surface Transportation (FAST) Act of 2015 streamlines and expedites permitting for federal infrastructure projects, a process that fails to include Tribal Nations. The Office of Management and Budget (OMB), however, has the ability to ensure the Federal Permitting Improvement Steering Council adopts policy that includes Tribal Nations and honors the federal trust responsibility. Tribal policy recommendations for the Council include:
 - All agencies issuing permits for infrastructure projects affecting Tribal lands, waters, or sacred places must demonstrate Tribal trust compliance.
 - A Tribal Trust Compliance Officer, who is knowledgeable about Indian tribes and tribal lands, should be appointed to the Federal Permitting Improvement Steering Council to make sure that the tribal trust compliance is integrated into all regulations and guidance implementing the FAST Act and any other federal infrastructure permitting in any agency.
 - Tribal governments must be provided, in a manner similar to state governments, full and early participation in "purpose and need" infrastructure permitting discussions.
 - Tribal governments must be provided, in a manner similar to state governments, funding for participation in federal permitting processes.
- The United States and all federal agencies must exercise appropriate oversight in the siting and construction of infrastructure projects. If private entities or government contractors are harming Tribal resources, as reported by Tribal Nations or others, the federal government must investigate and take appropriate action. This includes work stoppages, withdrawals of permits, and legal action.

- Federal agencies must not have the ability to move forward with major infrastructure projects when another agency, and particularly the Department of Interior, calls for additional review or consultation.
 - For instance, the Army Corps of Engineers should not have permitted the Dakota Access Pipeline DAPL when the Department of Interior, Environmental Protection Agency, and Advisory Council on Historic Preservation (ACHP) all called for further review.
- The Army Corps of Engineers must repeal "Appendix C" from its existing Tribal Consultation Policy, as it contains language implying consultation is optional for the agency. Similarly, all federal agencies should be required to remove this type of language from existing policies.
- Federal agencies must be prohibited from delegating consultation or Section 106 responsibilities to third parties, such as energy and communications companies, or non-Tribal archaeologists and historians. Only the representatives of Tribal Nations, including Tribal leaders and Tribal Historic Preservation Officers (THPOs), can determine whether a place or item has Tribal cultural, historic, or spiritual significance. Tribal Nation representatives must have the unhindered opportunity to assess and evaluate all crossings or sites of any potential infrastructure projects. Tribal knowledge and tradition must supersede all other assessments and opinions. Permit applicants and their representatives should never be allowed to make key determinations regarding Tribal interests.
 - Funding for the vital work of THPOs must be increased, as it has been level since 1992.
- The National Historic Preservation Act (NHPA) must be amended to include language requiring the mitigation of adverse effects and avoidance of sacred sites in order to gain project approval. Tribal Nations will certify whether appropriate mitigation has taken place.
- New legislation is needed to create a right of action to seek judicial review of consultation.
- The United States must take steps to fully implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), particularly Articles 11 and 32, which speak to prior and informed consent, as well as the mitigation of adverse environmental, economic, social, cultural or spiritual impact.
- Federal agencies should provide comprehensive training to all employees on working effectively with Tribal Nations and fulfillment of the federal trust responsibility. This training should be designed in consultation with Tribal Nations.