Mak◌che W◌wapi

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November 30, 2016

Lawrence S. Roberts
Principal Deputy Assistant Secretary-Indian Affairs
Office of the Assistant Secretary – Indian Affairs,
Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW, MS 3642
Washington, DC 20240

Re: Federal Consultation with Tribes Regarding Infrastructure Decision-Making

Dear Sir:

My name is Tim Mentz Sr. enrolled member of the Standing Rock Sioux Tribe. I'm the former Tribal Historic Preservation Officer for the Tribe serving from 1996 to 2008. Standing Rock had the first certified tribal historic preservation program in the nation assuming State Historic Preservation Officers (SHPO) responsibilities from North and South Dakota within our reservation boundaries on Tribal lands.

I provide these comments on behalf of Makoche Wowapi, an Indian owned environmental and cultural resource consulting firm located in Fort Yates, North Dakota. By a 2014 Standing Rock Tribal Council resolution (#425-14 attached to hard copy), Makoche Wowapi is Standing Rock Sioux Tribe's preferred contractor for providing environmental and cultural resource reviews on Federal, State and tribal infrastructure-related projects.

We were requested to submit comments by the Tribe and provide these areas that we feel need to be reviewed and considered when making your final determination how to proceed. We pray that these areas we highlight will be given full consideration as we have worked this process for a number of years and have too been frustrated how the lack of tribal involvement is non-existent within a State permitted process. We acknowledge your efforts to clarify and rectify these legal ambiguities to the benefit of all.

Thanks you for your consideration and accepting these comments. Should you have a comment or need additional information, please contact us at email address: wilsonmentz@gmail.com. Our office number is (701) 854-7093.

Sincerely,

Tim Mentz Sr.

Makoche Wowapi

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1. Problem: streamlining of infrastructure related projects

In streamlining the Federal review process, tribal input and tribal government-to-government consultation has been cut out, placing the Treaty requirement, the federal statutory requirement to consult, the Presidential Executive Order(s) addressing government-to-government consultation and the regulatory rules to consult with an Indian Tribe(s), in legal jeopardy.

To address this, Prohibit the streamlining of NEPA, NAGPRA and NHPA and other Federal laws requiring tribal government-to-government consultation within an infrastructure-related environmental and cultural review, when that proposed project has the potential to damage or destroy historic properties of religious and cultural significance or adversely affect the environment of the Nation and particularly Indian Tribes, when projects are located on State or private lands.

2.Problem: States not recognizing tribal sovereignty & Tribes do not participate in State processes

Currently, more timely and meaningful tribal input or consultation on infrastructure projects simply cannot occur when State laws and State regulatory agencies are not mandated to recognize tribal sovereignty. We have come to a point in the process where Congress has to intervene and clarify the role of States.

State regulatory agencies do not require tribal consultation for reviews of infrastructure-related projects placed on State or private lands. Because States do not require consultation by law, it discourages tribal governments from participating and the state process treats tribal governments as an individual citizen and not legally viewed as a sovereign nation, hence, Indian tribes cannot recommend “action enforcing provisions or conditions” on a State permit, approval or license. State rights cannot include controlling an infrastructure-related project review processes where potential adverse impacts to the environment, water, air and cultural resources are acceptable in a Federal review framework as is with the case of the Dakota Access Pipeline.

To address this, Congress should require as a condition for a State or State agency accepting Federal funding, financial assistance, or Federal loan guarantee, that they have to develop tribal government-to-government consultation requirements similar to the Federal laws, Executives and Federal Policy that apply to infrastructure-related projects. This could be an Executive Order or codified in NHPA, NEPA, ARPA and NAGPRA or through OMB. Congress needs to clarify how State rights could have the potential to have a “cause and effect” element to infrastructure-related projects.

3.Problem: project becoming federal "after the fact" to avoid tribal input

When States use their State codified authority to permit, license or provide financial assistance to infrastructure projects that eventually seek Federal approval, cost-share funding or federal financial loan guarantee, and it eventually turns into a federal undertaking, federal agencies are not legally bound by Congress to certify the State review processes that later in time would require federally mandated tribal government-to-government consultation processes to occur on State or private lands that have the potential to have adverse impacts to the environment or historic properties. This opportunity is lost in the legal cloud of whose authority prevails.

- Create federal requirements to consult with THPO's outside of tribal lands in a section 106 federal undertaking review when a State permitted project is located on State or private lands; and when non-federal project(s) and applicants/proponents seek Federal assistance, approval, financial assistance or the infrastructure-related project requires a Federal permit later in time.
- The State licensing or permitting must be secondary to the federal environmental review process for infrastructure-related energy projects proposed in the Nation. Such projects are often permitted in phases and eventually become Federal projects. When there is multi-state or multi-federal involvement or approval, federal environmental and cultural resource review should be applied to the entire project and not segmented Federal or State reviews that are located on State or private lands.

4.State requirements to review are too weak & there is frequently conflict between federal & state review

There is frequently a problem of state requirement to review environmental or cultural impacts as being too weak or lacking action enforcing provisions. A State regulatory agency purposefully allows an applicant to dictate or produce environmental or archaeological review documents and use these documents to meet the minimum requirements of State law.

- State law doesn't address applicants whose intention is to circumvent requirements in Federal laws or regulations whose action or activity intentionally destroys the environment or in the case of DAPL, intentionally circumventing section 106 of the National Historic Preservation Act, as amended in 1992. If States cannot improve their process of permitting of an infrastructure-related energy projects that may require a Federal permit, approval or licensing, then penalties must be assessed by the Federal lead agency including revocation of the Federal permit.
- Federal laws have recognized the right of an Indian Tribe(s) to establish their traditional, ancestral, aboriginal lands or recognize their attachment through various Treaties made between Congress and sovereign tribal nations on ceded or un-ceded lands where their cultural patrimony, sacred sites, graves and religious and culturally significant historic

properties exist. Unfortunately, environmental and cultural review processes under the federal laws are incompatible with State review processes and the federal laws become meaningless, mandated tribal government-to-government consultation becomes meaningless, or ineffectual when infrastructure development projects include State or private lands when the State or State agency are the permitting or approval agency.

The review process is clouded because existing Federal and State environmental reviews are different in scope and to the extent that State regulatory agencies do not have the stringent federal environmental review processes that require an in-depth look at what is legally enforceable on State or private lands or within the legal Federal statutory framework.

- Tribal consultation or tribal government-to-government consultation is problematic to the extent that State governments do not review environmental concerns or follow any process comparable to the Federal process (i.e. National Environmental Policy Act and the National Historic Preservation Act). State law also does not require consultation with sovereign tribal governments and does not require State governments to recognize and acknowledge tribal sovereignty.
- There is a big disparity between the consideration States give, (or are even able to give) to resource protection and preservation relative to their power to license, permit or provide financial assistance or loan guarantee to infrastructure-related projects. In other words, within the current regulatory framework it is much more difficult for a State to limit these types of infrastructure projects than it is for them to agree, approve and support them. This same disparity is carried over to the Federal agencies that are bound by federal law, through federal procedures to license, permit or provide financial assistance or loan guarantee to infrastructure-related projects.

With the current results of ACOE actions, the DAPL project should generate a review of (and seek to resolve) the legal ambiguities and procedural problems that have arisen because of land status and conflicts between State regulatory permitting verses Federal regulatory permitting.

- OMB and GAO need to take the lead to determine a concise and complete report of all the legal ambiguities and legal procedural issues when a State and the Federal government are both approval-permitting agencies when infrastructure-related energy projects are determined to be in the National interest or in a States interest.
- This report must address also the absence of tribal interests on these types of projects. Leaving out the consideration of tribal ancestral, aboriginal homelands, Treaty rights, ceded or un-ceded lands where Indian tribes have connection to creates a “ghost clause” whereby tribal interest or participation are only brought in late in time in the process or when a Federal agency wants to comply with the federally mandated tribal consultation requirements.

6. One or multiple State(s) should not have the ability to effect climate change for the whole Nation or Globally

One State, alone, should not have the ability to affect the environment or affect climate change regardless if they license or permit infrastructure-related energy projects in their respective State boundary and that are considered in the National interest. As is clear in the instance of the Dakota Access Pipeline, there is naturally a conflict of interest for the permitting State to rubber stamp a project that promotes revenue to that State. The Federal government cannot be silent anymore on these types of State promoted projects, whose interest is more importantly the State, but what about our Nation or globally?

The regulations to NEPA must be reviewed and a section must be added to address this when an environmental assessment or an environmental impact statement is required.

7.Avoid segmentation of federal reviews under NEPA – expand federal role

The position that federal agencies are prohibited by federal law from considering impacts beyond federal easements, public lands and Tribal lands based on their own devised internal regulation (Appendix C and NWP 12) is extremely problematic and requires a change in policy or law. In the DAPL case of the river crossing, the Nation Wide Permit 12 was used and must be rescinded or revised to clarify when it applies, to what type of federal action or activity it applies to and when it doesn't apply to a federal license or approval process. Also, consideration must include State and Private lands when permitting is considered.

8. Establish a Policy or Process to determine what is in the National Interest

This action stems from the so called needed infrastructure – related project Dakota Access Pipeline (DAPL) that is portrayed as in the national interest and establishing energy security for the United States but in actuality is transporting Baaken oil and possibly tar sands oil for export to overseas markets.

- Projects deemed to be in the national interest, regardless of location, should then automatically require federal approval or licensing and review (including tribal government-to-government consultation) throughout the process especially when placement of the project is within State boundaries.
- There is a need for Congress to direct federal agencies to establish a new standard or policy to certify what is in the national interest, infrastructure-related energy projects that should require stringent environmental review based on sound facts when they are requested to participate in the approval process, permitting or when federal involvement is required.

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9. Provide Policy when Federal Government agencies view Tribal Consultation Process Complete

The Department Of Energy (DOE) should be vested the authority by Policy or Executive Order (EO) to establish the level of their federal involvement in infrastructure-related energy projects. Each federal agency within their authority (i.e. Federal Highway Administration, Nuclear Regulatory Commission, Surface Transportation Board) should be required what infrastructures-related projects would be included in their authority and administer such authority as provided by law.

- A Policy or EO should determine how tribal involvement and consultation should occur, and when that government-to-government consultation process is completed. DOE, and other Federal agencies, should also be given legal responsibility to screen the projects that are deemed to be in the national interest based on security.

10. GAO Audit of current Federal agencies in compliance with EO 13175 on Tribal Consultation and how they address infrastructure-related projects

- Recommend that the General Accounting Office (GAO) investigate Federal agencies compliance with EO 13175 regarding federally mandated consultation policy or internal regulations. This report should review how tribal consultation interacts with infrastructure-related projects located on State or Private lands when said project turns into a Federal undertaking or activity later in time. Tribal comments within a environmental assessment (EA) or environmental impact statement are not reflected in the Finding of No Significant Impact (FONSI) for an EA or within a Record of Decision (ROD) for a EIS. The tribes have raised this issue numerous times but Federal agencies disregard this issue and tend to “brush it under the rug” listing it as irrelevant or lacks standing.
- In the GOA investigation, GAO should take a close look at how federally required consultation within the current statutory framework occurs with an Indian tribe on public or private-State lands when a infrastructure related project is within Indian Country.
- Since a State Historic Preservation Officer (SHPO) assumes certain Federal responsibilities by concurring or not to a Federal determination under section 106 of NHPA as in with the case of Dakota Access Pipeline, the SHPO must be bound to assure that 1.) Tribal consultation was initiated; 2.) that the Federal agency consulted on the findings with the Tribes based off of a Archaeological report and 3.) a Traditional Cultural Properties (TCP) report was generated for consultation; 4.) that consultation occurred with the determination of effects that the lead federal agency provides to SHPO.

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11. Require States to conduct Tribal Consultation

- Create a federal mandate requiring States and SHPO to conduct tribal consultation when State or regulatory agencies have the ability to approve, license or permit infrastructure-related reviews and decisions to resolve adverse effects affecting tribal/treaty lands, resources and treaty rights.
- Indian Tribes should be granted certification through their Tribal Historic Preservation Office by the National Park Service to assist State regulatory agencies in developing legal requirements to initiate government-to-government consultation between State agencies, SHPO's and Indian Tribes who place "religious and cultural significance to historic properties" outside the boundaries of Tribal Lands, regardless of location, as defined in the National Historic Preservation Act, as amended in 1992, and codifying the consultation process to make States comply. Currently under Federal law and implementing regulations, Tribes have the right to identify what is significant to them and have the ability under law to assist in the resolve of adverse effects to historic properties.
- Amend the National Historic Preservation Act of 1966 to require (rather than just allow) federal agency officials to include action enforcing provisions within the section 106 process to resolve potential adverse effects when Tribes identify historic property, regardless of location, is identified by an Indian Tribe on State or Private lands.

12. Problem: Archaeologists determining what is important to Tribes when identifying historic properties

As with the Dakota Access Pipeline, State SHPO along with consulting archaeologists from Dakota Access refuted the Standing Rock Sioux Tribe claim that historic properties of religious and cultural significance were present within the pipeline corridor. SHPO determined stone features identified by Makoche Wowapi were not archaeological sites. Sacred sites of religious and cultural significance to Standing Rock and all Oceti Sakowin Nations can only be determined by a Indian Tribes.

- Regulation 36 CFR 800 needs to strengthen the section that allows the Tribes to identify historic properties of religious and cultural significance by placing it at the same level of weigh and importance in the identification stage within section 106 of NHPA.
- Amend the regulation to include "having the Indian Tribe certify individuals, consultants or consulting firms" by Tribal resolution, to provide services to comply with the identification section of section 106 of NHPA. The Tribal resolution must have the full legal force and effect as the Secretary Interiors Guidelines for Professional Qualification.