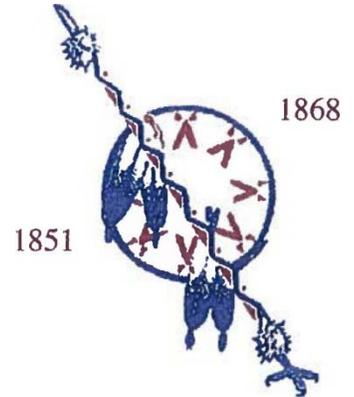




Oglala Sioux Tribe

Office of the President

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November 30, 2016

Office of the Assistant Secretary – Indian Affairs
Attn: Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW, MS 3071
Washington, DC 20240

Submitted via email to consultation@bia.gov

Re: Oglala Sioux Tribe Comments Regarding Tribal Input on Federal Infrastructure Decisions

I. Overview

The Oglala Sioux Tribe (“Tribe”) appreciates the opportunity to submit these comments regarding tribal input on federal infrastructure decision-making. The United States’ consistent failure to obtain our informed consent prior to approving infrastructure projects that impact our lands, waters, and cultural resources, is a direct violation of our rights under the 1851 Treaty of Fort Laramie and the 1868 Sioux Nation Treaty as well as an abdication of the federal government’s trust responsibilities.

The processes for evaluating environmental and historical impacts and for seeking tribal input are broken, leading to stand offs such as the one currently occurring at Standing Rock. In the absence of meaningful tribal consultation, major federal infrastructure projects can pose unique threats to tribes. The lands and resources upon which our cultures, spirituality, and subsistence depend can be altered forever or completely destroyed. In the context of large-scale infrastructure development or extractive industries, the federal government can and must do a better job of consulting with tribes. If the federal government is taking action that impacts our lands, resources, or rights, then it needs to obtain our informed consent.

Purely procedural consultation requirements with little oversight, “check the box consultation,” or downright skirting consultation requirements have been wholly insufficient for protecting tribal interests. This has led to situations like the standoff over the Dakota Access Pipeline (DAPL). The DAPL poses an imminent threat to our treaty-protected reserved water

rights and our Mni Wiconi Project, which is held in trust by the United States and provides drinking water to our Tribe as well as our tribal and non-tribal neighbors. The current standoff over the DAPL is a direct result of the breakdown in tribal consultation procedures. The fact that so many water protectors have gathered to oppose the DAPL underscores the lack of consultation for protecting tribal interests with respect to this project. We call on the Administration to deny the easement for the DAPL to cross Lake Oahe. Denial of the easement is the correct action to take in these circumstances.

Too often, when consultation occurs it involves informing tribes late in the decision-making process, documenting tribal concerns, and failing to take action to protect tribal rights. We urge the federal government to break that cycle through this specific consultation effort. Indian Country does not need another simple cataloguing of our concerns. We need decisive action to fundamentally reform the tribal consultation process so that treaty and trust obligations are fulfilled and the federal government honors tribal sovereignty and the government-to-government relationship.

We recommend that the Administration act swiftly to fully implement existing federal laws, reform administrative regulations and practice as necessary, and support the development of legislation to ensure tribal informed consent is obtained when the federal government makes infrastructure decisions that affect tribes. Specifically, we recommend that the Administration:

- Issue guidance affirming tribal rights, including the right to informed consent, and highlighting best practices for consulting with tribes and obtaining tribal consent;
- Create agency positions responsible for proactively vetting projects, consulting with tribes, and obtaining tribal informed consent;
- Require trust compliance verification by the Department of Interior or the Council on Environmental Quality (CEQ);
- Issue a statement supporting legislation creating a tribal right of action to seek judicial review of consultation and consent processes; and
- Implement policy changes within the U.S. Army Corps of Engineers (or Corps), Advisory Council on Historic Preservation (ACHP), and Environmental Protection Agency (EPA) to strengthen protection for tribal rights.

II. The Federal Responsibility: Consultation and Tribal Consent

Impacts to our treaty rights and the federal trust responsibility to tribes must be considered when the federal government approves infrastructure projects. If the federal government is taking action that impacts our lands, resources, or rights, then it needs to obtain our informed consent. The obligation to obtain our consent whenever the federal government makes decisions about infrastructure projects that affect our lands, resources, or rights is grounded in our treaties and the trust responsibility. It is also consistent with international law and best practices for facilitating infrastructure development.

A. Treaty Rights

Under the United States Constitution, treaties—including Indian treaties—are the “supreme law of the land.” U.S. Const., art. VI, cl. 2; *Worcester v. Georgia*, 31 U.S. 515, 531 (1832). The United States, including all of its subdivisions and agencies, is bound to uphold Indian treaties. Federal agencies are required to consider our treaties when authorizing infrastructure projects and ensure that such projects do not impact our treaty rights without our consent. Failure to consider and protect treaty rights is a violation of federal law and an affront to tribal sovereignty.

The Oglala Sioux Tribe is a sovereign Indian Nation and part of the Oceti Sakowin (Seven Council Fires or Great Sioux Nation). The seven divisions of the Oceti Sakowin, and bands within these seven divisions, signed many treaties with the United States. In 1851, the United States signed the Treaty of Fort Laramie with the Teton and Yankton divisions of the Oceti Sakowin. *See* Treaty of Fort Laramie, 11 Stat. 749 (Sept. 17, 1851).

The United States sought the 1851 Treaty to facilitate westward migration, ensuring passage from the Missouri basin to the West Coast. In this Treaty, the United States agreed to “bind themselves to protect the [] Indian nations against the commission of all depredations by the people of the said United States.” *Id.* at arts. 2–3. The Treaty recognized 60 million acres as the territory of the Great Sioux Nation “commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Butte, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.” *Id.* at art. 5. The Treaty also recognized rights outside of the territories demarcated for the Great Sioux Nation, stating at article 5 that “[i]t is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.” *Id.*

After violating certain terms of the 1851 Treaty by allowing incursions by non-Indians settlers beyond the bounds set in the Treaty, war broke out between the United States and the Great Sioux Nation. The United States sought to end this war by signing the Fort Laramie Treaty of 1868 with several bands of the Great Sioux Nation, including the Oglala. 15 Stat. 635 (Apr. 29, 1868). Within the previously recognized 60 million acre treaty territory, the 1868 Treaty further demarcated a 26 million acre reservation “for the absolute and undisturbed use and occupation” of the signatory tribes. Fort Laramie Treaty of 1868, art. 2. That reservation was called the Great Sioux Reservation and included all of present-day South Dakota west of the low water mark of the east bank of the Missouri River, and adjacent lands in North Dakota. *Id.* The 1868 Treaty affirmed a permanent homeland for the Great Sioux Nation, reserving to the Nation, without limitation, rights to water, natural resources, self-government, and all other rights necessary to make the Great Sioux Reservation a livable homeland. *See, e.g., Winters v. United States*, 207 U.S. 564, 564, 576–77 (1908). Additionally, the 1851 Treaty, expressly protects off-reservation rights.

Although we reject the Act of March 2, 1889, because the United States never got the required three-fourths of adult male signatures to make it a valid act under Section 28 of the Act, we note that it provided that the specified "tract of land, being a part of the Great Reservation of the Sioux Nation, in the Territory of Dakota, is hereby set apart for a permanent reservation for the Indians receiving rations and annuities at the Pine Ridge Agency, in the Territory of Dakota." 25 Stat. 888 § 1 (Mar. 2, 1889). Thus, Congress recognized our rights to water, natural resources, self-government, and all other rights necessary to make the reservation a livable homeland. *See, e.g., Winters*, 207 U.S. at 564, 576–77. As noted, however, our treaty rights extend beyond our reservation boundaries, and must be considered and protected by the federal government.

For the Oglala Sioux Tribe and Great Sioux Nation, the ultimate authorities requiring consultation and acquiescence for infrastructure are the Fort Laramie Treaties of 1851 and 1868. Articles 6 and 12 of the 1868 Treaty require consultation on issues relating to reservation land use and any cessions of land. Significantly, Article 11 requires the participation of a tribal head-man on a commission to make decisions on “works of utility or necessity”—i.e., infrastructure projects.

These treaty obligations remain in effect today. As explained by the Chief Justice John Marshall:

The Indian nations had always been considered as distinct, independent communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial.... The very term “nation,” so generally applied to them, means “a people distinct from all others.” The Constitution, by declaring treaties already made, as well as those to be made, the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words “treaty” and “nation” are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to other nations of the earth. They are all applied in the same sense.

Worcester v. Georgia, 31 U.S. 515, 559–60 (1832).

Thus, the obligations of the United States to the Great Sioux Nation under the 1851 and 1868 Fort Laramie Treaties remain in effect today, with a legal status comparable to treaties with foreign nations. This includes the obligations to consult with the Tribe on federal undertakings under Article 5 of the 1851 Fort Laramie Treaty and Article 11, clause 6 of the 1868 Fort Laramie Treaty.

Federal agencies are not permitted to unilaterally abrogate our treaty rights. Rather, federal agencies have the legal responsibility to consult with us regarding projects that could impact our treaty rights, and no project that negatively affects our treaty rights should be approved without our express and informed consent.

B. The Trust Responsibility

Originating from the treaties, the United States Constitution, and the unique government-to-government relationship between tribes and the United States, the federal government has a trust responsibility to the Oglala Sioux Tribe and all Indian Nations. This responsibility runs across all agencies, and agencies need to coordinate with each other to fulfill this responsibility. Fulfilling the trust responsibility requires obtaining our express and informed consent any time the federal government is permitting a project that could affect our lands and resources.

The Supreme Court has acknowledged "the undisputed existence of a general trust relationship between the United States and the Indian people" that informs its interpretation of more specific statutes. *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983). The United States "has charged itself with moral obligations of the highest responsibility and trust" and "should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). Although the United States is only liable in money damages if a breach of trust occurs in the context of a specific trust-creating statute, tribes have been successful in seeking injunctive relief to uphold the broader trust responsibilities of the federal government. *See generally* Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources through Claims of Injunctive Relief against Federal Agencies*, 39 *Tulsa L. Rev.* 355 (2003).

Trustees have basic duties of good faith and fair dealing, stemming from the duty of loyalty that they owe their beneficiaries. Trustees, therefore, are not permitted to take action to harm the trust corpus. As the Supreme Court noted in *United States v. White Mountain Apache*, "[e]lementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." 537 U.S. 465, 475 (2003). Under basic trust law, trustees are also prohibited from engaging in self-dealing or creating a conflict of interest without the informed consent of the beneficiary. *See* Restatement (Third) of Trusts § 78, § 78 cmts. a, b, c, & f, § 97(a)–(c). This includes obtaining the informed consent of a beneficiary whenever the trustee is engaged in "transactions in which it is reasonably foreseeable that the trustee's future fiduciary conduct might be influenced by considerations other than the best interests of the beneficiaries." *Id.* at § 78 cmt. f.

Permitting federal infrastructure projects that impact tribal lands and resources necessarily involves conflicts of interest. The federal government, in balancing various interests, is influenced by considerations other than the best interests of the tribe or tribes affected by infrastructure development projects. Under basic trust law principles, federal agencies, therefore, have a duty to obtain the informed consent of tribes when taking actions that affect tribal lands and resources.

C. International Law Supports Obtaining Tribal Consent

The United States also has an obligation under international law to seek our free, prior, and informed consent when taking actions that affect our lands, territories, and resources. The United States endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) on December 16, 2010. At that time, President Obama stated that "[w]hat matters far

more than words—what matters far more than any resolution or declaration—are actions to match those words.” The White House, *Remarks by the President at the White House Tribal Nations Conference* (Dec. 16, 2010). The Administration should now take the necessary actions to fulfill its international obligations.

UNDRIP article 19 provides that states must consult in good faith to obtain indigenous peoples’ free, prior, and informed consent when adopting measures that may affect them. Article 32(2) more specifically provides:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories or other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Further, article 29 enshrines protection for the substantive rights to conservation and protection of the environment and the productive capacity of indigenous lands, and article 32 articulates indigenous peoples’ rights “to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”

Although UNDRIP is not itself binding, the right to free, prior, and informed consent is derived from rights articulated in legally binding treaties to which the United States is a party. These rights include the right to self-determination for all people (article 1) and to culture (article 27) in the International Covenant on Civil and Political Rights as well as the rights to culture, property, and political participation under conditions of equality protected by articles 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. Domestic law regarding tribal consultation should be interpreted consistent with these international obligations.

UNDRIP’s call to engage in consultation with indigenous peoples to obtain their consent is consistent with the federal government’s purported policy of meaningful consultation. UNDRIP requires states to consult in good faith with the goal of obtaining consent. Consultation, in order to be meaningful, should always seek to reach agreement.¹ The Administration, therefore, should support and implement the free, prior, and informed consent requirement as consistent with existing United States policy based on treaties and the federal trust responsibility to tribes.

III. Consultation Failure: DAPL

The current DAPL situation is a stark example of the federal government’s failure to consult on federal decision-making on infrastructure projects. The failure of the federal

¹ For instance, in the case of *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, the D.C. Circuit recently acknowledged, even while denying a preliminary injunction, that section 106 of the National Historic Preservation Act establishes a “consultative process—designed to be inclusive and *facilitate consensus*.” No. 16-5259 (Oct. 9, 2016) (emphasis added).

government to consult with tribes about the DAPL has resulted in a grave situation. The only correct path forward now for the Administration is to deny the easement for the DAPL to cross Lake Oahe.

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” prescribes the consultation requirements for all executive agencies today. It provides that:

The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights. ... Agencies shall respect Indian tribal self-government and sovereignty [and] honor tribal treaty rights and other rights.... Each agency shall ... ensure meaningful and timely input by tribal officials.

65 Fed. Reg. 67249, 67249–50 (Nov. 6, 2000).

Section 3 of Executive Order 13175 requires all agencies to develop their own tribal consultation policies. The Department of Defense (DoD) policy requires the Army Corps of Engineers to:

Assess[], through consultation, the effect of proposed DoD actions that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands before decisions are made;

...

Consult[] consistent with government-to-government relations and in accordance with protocols mutually agreed to by the particular tribe and DoD, including necessary dispute resolution processes; [and]

Provid[e] timely notice to, and consulting with, tribal governments prior to taking any actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.²

Thus, agency actions affecting treaty rights, trust resources and Indian land trigger the consultation requirements prescribed in Executive Order 13175. As explained above, the Tribe possesses extensive reserved water rights to the Missouri River, pursuant to the Fort Laramie Treaties, under the principles enunciated by the United States Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). Water rights are treaty rights. These property rights are held in trust by the United States. See Western Water Policy Review Act of 1992, sec. 2, 106 Stat. 4694. Consequently, the impacts of the Corps of Engineers Missouri River operations, as well as approval of the DAPL, trigger the consultation requirements and protection of our treaty-based property—our water rights—under Executive Order 13175. Consultation under Executive Order 13175 is directly related to the mandate to “honor Indian treaty rights.”

² Department of Defense, *American Indian and Alaska Native Policy*, available at <http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/techbio/DoDPolicy.pdf>.

The Army Corps of Engineers failed to implement these important provisions of Executive Order 13175, in the enactment of recent federal policies affecting the treaty rights of the Oglala Sioux Tribe and Great Sioux Nation, including in the *Master Manual Review and Update* (2004) and in the *Finding of No Significant Impact for the Dakota Access Pipeline* (July 25, 2016).

Significantly, Executive Order 13175 has been re-affirmed by President Obama. His memorandum on Tribal Consultation states in part:

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results.

74 Fed. Reg. 57881, 57881 (Nov. 5, 2009).

The tragic results of the failure by the Corps of Engineers to include the voices of the Oceti Sakowin in formulating policies on the DAPL are readily apparent at the Missouri River today. With respect to the Oceti Sakowin Camp, it must be emphasized that the Oglala Sioux tribal members and other members of the Great Sioux Nation have a treaty right under the 1851 Fort Laramie Treaty to camp north of the Cannon Ball River. This land is within the Sioux Territory as defined by Article 5 of the 1851 Treaty, as stated above. Further, this land was never ceded by our Tribe as articulated in Article 16 of the 1868 Fort Laramie Treaty. Thus, the water protectors of our Tribe and the Great Sioux Nation have a treaty right to be present at the site of the Oceti Sakowin encampment to protest the DAPL.

The current standoff and events leading up to it may have been avoided if the federal government engaged in true consultation and took actions to uphold its treaty and trust obligations. Unfortunately, we have the DAPL as the prime example of the federal government's failure to consult and assess the impact of infrastructure development on tribes.

IV. The Mni Wiconi Project: An Example of Consultation Best Practices

The United States has statutory obligations to consult with tribes under federal environmental and historic preservation laws. It also has well-established executive branch policies regarding consultation. An example of best practices for federal government consultation with tribes is in relation to the Mni Wiconi Project. The Mni Wiconi Project Act of 1988, 102 Stat. 2566 (Oct. 24, 1988) was passed to provide safe drinking water to the Pine Ridge Reservation, the Rosebud Reservation, the Lower Brule Reservation, and non-Indian water districts. The Project is a monumental clean-drinking water project spanning an approximate 12,500 square mile service area and serving approximately 52,000 users with drinking water from the Missouri River.

In the Mni Wiconi Project Act, Congress specifically set forth that “the United States has a trust responsibility to ensure that adequate and safe water supplies are available to meet the economic, environmental, water supply, and public health needs of the Pine Ridge Indian Reservation, Rosebud Indian Reservation and Lower Brule Indian Reservation.” *Id.* at § 2(a). Among the purposes of the Act are to “ensure a safe and adequate municipal, rural, and industrial

water supply for the residents of the Pine Ridge Indian Reservation, Rosebud Indian Reservation, and Lower Brule Indian Reservation” and to “provide certain benefits to fish, wildlife, and the natural environment of South Dakota, including the Pine Ridge Indian Reservation, Rosebud Indian Reservation, and Lower Brule Indian Reservation.” *Id.* at § 2(b)(1).

The Act directed the Secretary of the Interior to “plan, design, construct, operate, maintain, and replace a municipal, rural, and industrial water system, to be known as the Oglala Sioux Rural Water Supply System.” *Id.* § 3(a).³ The Act provides that the “[t]itle to the Oglala Sioux Rural Water Supply System shall be held in trust for the Oglala Sioux Tribe by the United States and shall not be transferred or encumbered without a subsequent Act of Congress.” *Id.* at § 3(e). The Secretary was authorized to enter agreements to carry out her duties pursuant to the Act and entered into a self-determination cooperative agreement with the Tribe under which the Tribe constructed and operates the Oglala Sioux Rural Water Supply System. *Id.* at § 3(b); *see id.* at § 3(h).

Federal agencies must consider our rights in the Mni Wiconi Project when permitting infrastructure development projects and must fulfill the United States’ trust responsibility to protect the Project’s water.

Additionally, the Mni Wiconi Project demonstrates that tribes and the federal government can work collaboratively, reaching consensus on key issues. The Project could not be possible without the close coordination of the Tribe and the federal government given that the federal government has obligations to us as well as to the other two Tribal Project Sponsors (the

³ Section 3 of the Act provides:

- (a) AUTHORIZATION.-- ... The Oglala Sioux Rural Water Supply System shall consist of—
 - (1) pumping and treatment facilities located along the Missouri River near Fort Pierre, South Dakota;
 - (2) pipelines extending from the Missouri River near Fort Pierre, South Dakota to the Pine Ridge Indian Reservation;
 - (3) facilities to allow for interconnections with the West River Rural Water System, Lyman-Jones Rural Water System, Rosebud Sioux Rural Water System, and Lower Brule Sioux Rural Water System;
 - (4) distribution and treatment facilities to serve the needs of the Pine Ridge Indian Reservation, including but not limited to the purchase, improvement and repair of existing water systems, including systems owned by individual tribal members and other residents on the Pine Ridge Indian Reservation;
 - (5) appurtenant buildings and access roads;
 - (6) necessary property and property rights;
 - (7) electrical power transmission and distribution facilities necessary for services to water systems facilities; and
 - (8) such other pipelines, pumping plants, and facilities as the Secretary deems necessary or appropriate to meet the water supply, economic, public health, and environmental needs of the reservation, including (but not limited to) water storage tanks, water lines, and other facilities for the Oglala Sioux Tribe and reservation villages, towns, and municipalities.

Rosebud Sioux Tribe and Lower Brule Sioux Tribe). As lead Project Sponsor, we have frequent contact with the Bureau of Reclamation, and we engage one another in constructive dialogue in order to reach agreement. When necessary to move a piece of the Project forward (such as with our community water systems upgrade effort), *the Tribe calls consultation sessions with Reclamation and other relevant federal agencies*. In these meetings we openly identify issues and discuss action steps to address them.

Federal agencies need to participate and fully engage in tribally-generated consultation sessions to make such sessions productive. Federal agency staff need to be accessible and proactive in building relationships with tribal leaders and keeping them informed of issues, upcoming projects, and initiatives. There should be ongoing dialogue between tribal and federal agency representatives. Transparent communication is a sure way to have a well-run project, the operation of which promotes tribal interests and is mindful of federal interests.

V. Barriers to Effective Tribal Participation

For tribes and the federal government to work collaboratively and reach agreement on infrastructure development projects, two primary barriers in the current processes must be overcome: (1) failure to include tribes early in the process, with the goal of reaching consensus; and (2) failure to administratively and/or financially support tribal participation in the process.

A. Failure to Include Tribes Early in the Decision-making Process with the Goal of Reaching Consensus

Executive Order 13175 enshrined the United States' policy of meaningful consultation with tribes. The Executive Order provides that consultation should "ensure meaningful and timely input by tribal officials." Too often, however, tribal input is sought late in the process and discussions with tribes are not meaningful because they do not seek to reach agreement on important matters.

Tribes must be included early in the infrastructure decision-making process. Too frequently, tribal input is sought after key decisions have been reached, expectations have been formed, or investments have been made. For instance, tribes are often brought to the table after decisions about a project's scope, importance, feasibility, and timeline have already been made or are at least well under way.

Tribes should be included in the very earliest phases of infrastructure decision-making, including conversations about priorities for development. As soon as an agency is talking to the private sector about a project, it should also be talking with tribes. Early consultation, with the goal of obtaining tribal informed consent, increases the ability to address tribal concerns early in the process, reducing mitigation or avoidance costs.

Participation early in the process also enables the federal government to fulfill its statutory obligations and allows tribes to participate in the process in a meaningful way. For instance, section 106 of the National Historic Preservation Act (NHPA) requires each federal agency to take into account the effects of its undertakings on historic properties and affords the

ACHP the opportunity to comment. 54 U.S.C. § 306108. NHPA section 101(d)(6) requires that the section 106 process include prior consultation with tribes for federal or federally-assisted undertakings that potentially affect historic properties that are culturally significant to tribes. *Id.* at § 302706. This statutory requirement is incorporated into numerous provisions of the ACHP regulations. Federal agencies must make a “reasonable and good faith effort” to identify any tribe that must be consulted. 36 C.F.R. § 800.2(c)(2). Consultation must occur regarding sites with “religious and cultural significance” even if they occur on ancestral or ceded land. *Id.* at § 800.2(c)(2)(ii)(D). The identification of previously undocumented historic properties of importance to tribes requires people with appropriate expertise—including knowledge of oral traditions—and frequently will require the participation of elders. Accomplishing this identification requires tribal participation early in the process.

Consultation must mean more than merely “checking the box” and cataloguing the objections of tribes. Rather, agencies have a responsibility to sit down with tribes, engage in meaningful dialogue, and seek to reach agreement on key issues. Failure to undertake consultation with the goal of reaching consensus means that tribes expend a significant amount of staff time and resources to participate in consultations only to have agencies unilaterally determine that tribal impacts can be “mitigated.” The goal must be mutual understanding and agreement, otherwise consultation cannot be meaningful. Meaningful consultation requires that dialogue with tribal partners occur with a goal of reaching consensus.

When infrastructure projects have the potential to have significant impacts on tribes’ treaty rights, traditional lands, resources, cultures, and ways of life—such as having the potential to irrevocably alter or destroy the lands and resources upon which our cultures depend—consultation cannot be meaningful unless we have a right to say no. Although generally we wish to work with agencies to find mutually acceptable alternatives when large-scale infrastructure projects threaten our interests, sometimes the only mitigation option that is acceptable is avoidance. Thus, under certain circumstances consultation cannot be meaningful unless actual tribal consent is required.

B. Failure to Support Tribal Participation in the Decision-making Process

The other primary barrier to effective tribal participation in infrastructure decision-making is the fact that the federal government does not provide sufficient support for tribal participation. Respecting treaty rights, upholding the trust responsibility, and fulfilling statutory obligations are federal responsibilities. Frequently, however, the burden of fulfilling these responsibilities is shifted to the tribe as agencies expect tribes to expend significant resources cataloguing concerns, travelling to consultations, and expending staff resources to provide comments and feedback. Federal agencies need to assume their responsibility for ensuring notices get to the right tribal officials, for proactively vetting projects to alert tribes to projects that may significantly impact them, for ensuring that meaningful consultation occurs, and for obtaining tribal informed consent.

Tribes are often inundated with consultation notices. Sometimes these notices are not sent to the correct offices and officials. As a general rule, these notices do not adequately alert tribes about infrastructure projects that may significantly impact tribal lands, resources, or rights

because they do not make an effort to distinguish significant projects from the many other projects that tribes receive notices about. To effectively participate in consultation, tribes must expend significant resources just sifting through consultation notices and researching the intricacies of various projects. Tribes must then expend additional resources identifying significant properties, evaluating potential impacts, travelling to consultations, and drafting comments.

Our Tribe, like many others, often does not have the staff or resources to effectively participate in consultation. And the choice to participate in consultation on one project can deplete resources for participating in consultations regarding additional projects. Lack of funding, however, should not exclude us from tribal consultation. The federal government is no less responsible for protecting our treaty rights and upholding its trust and statutory obligations simply because we cannot always afford to participate in the processes that federal agencies have established.

Federal agencies must allocate sufficient administrative and financial resources to support tribal participation in consultation in order to fulfill federal responsibilities to tribes. Federal agencies also need to allocate resources to increase accountability for consultation within their own agencies and to coordinate with other agencies to ensure tribal rights are being protected.

VI. Recommended Actions for the Administration's Final Days

We strongly urge the Administration to take swift action during its remaining days to ensure that tribal rights are protected when the federal government engages in infrastructure decision-making. We recommend the following.

A. Issue Guidance Affirming Tribal Rights and Highlighting Best Practices

Federal guidance is needed to strengthen and standardize protections for tribal rights across the federal government and to communicate to private interests principles of federal Indian law that must be respected and best practices that should be employed. Under section 41002(c) of the Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94 (Dec. 4, 2015), the Federal Permitting Improvement Steering Council (FPISC) is required to make recommendations to its Executive Director concerning matters including improving coordination between federal and non-federal governmental entities, creating and distributing training materials, and addressing other impacts of infrastructure permitting. The Executive Director is then authorized to recommend that the Office of Management and Budget issue guidance to implement best practices.

We strongly recommend that the Administration work to fulfill its mandate under the FAST Act by issuing guidance that affirms tribal rights and highlights best practices. This guidance should affirm tribal rights to sovereignty and self-determination, treaty rights, the federal trust responsibility, the need to obtain tribal informed consent for projects affecting tribal lands and resources, and the need to fully implement existing laws to protect tribal rights. Best practices should include involving tribes in the infrastructure decision-making process at the very earliest stages, ensuring consultation is meaningful by seeking consensus in dialogues with

tribes, and fulfilling the federal responsibility to support tribal participation in decision-making processes by making sure notices get to the right place in the tribe, that consultation occurs, and that tribal consent is obtained.

B. Create Agency Positions Responsible for Proactively Vetting Projects, Consulting, and Obtaining Consent

The responsibility to ensure that tribal rights are not violated remains a federal responsibility. In each relevant agency, a position should be created to vet infrastructure consultation notices, preliminarily assess impacts to tribes, makes sure notices reach the correct tribal officials, proactively engage in consultation with tribes, and ensure informed consent is obtained. These officials should also work across agencies when multiple agencies are involved in assessing the impacts of infrastructure projects or in issuing permits.

C. Require Treaty and Trust Compliance Verification by Interior or the Council on Environmental Quality

In order to mitigate conflicts of interest, when an agency other than the Department of Interior is permitting an infrastructure development project, the Department of Interior should be required to verify that the federal government is meeting its treaty and trust obligations to tribes. When the Department of Interior is involved in permitting an infrastructure development project, the Managing Director of CEQ should be required to verify trust compliance.

Verification of treaty and trust compliance is needed to guard against conflicts of interest as well as to ensure that treaty obligations and trust responsibility to tribes are fulfilled regardless of which agency is doing the permitting. The content of tribal rights and the safeguards for those rights should not vary across agencies and should not be dependent upon whether a particular agency or official is familiar with the federal government's responsibilities to tribes.

D. Support Legislation Creating a Tribal Right of Action to Seek Judicial Review of Consultation and Consent Processes

Greater accountability for tribal consultation is required. We recommend that the Administration issue a statement in support of legislation creating a tribal right of action to seek judicial review of consultation and consent processes. For instance, H.R. 5379, the Requirements, Expectations, and Standard Procedures for Executive Consultation with Tribes (RESPECT) Act, introduced by Congressman Grijalva, would provide for judicial review of tribal consultations.

E. Abide by Tribes' Consultation Policies

To ensure proper consultation with tribal governments, federal agencies must not only implement federal law with respect to consultation, but it must also abide by tribal law. Some tribes, including the Oglala Sioux Tribe, have their own consultation ordinances and policies for how consultation is to occur. First, the Oglala Sioux Tribe has a provision in its Constitution on consultation. Article IV, Section 1 (a) of the Tribal Constitution empowers the Tribal Council

“(a) To negotiate with the Federal, State, and local government, on behalf of the tribe, and to advise the representatives of the Interior Department on all activities of the Department that may affect the Pine Ridge Indian Reservation.” The federal government must respect this provision of the Tribe’s Constitution and recognize that the Tribe’s Tribal Council is empowered to negotiate with the federal government on behalf of the Tribe. Federal agencies cannot simply reach out or attempt to reach out to the Tribe’s Tribal Historic Preservation Officer and state that it attempted consultation with the Tribe. Consultation must be with the tribal government. There should be no confusion between consultation under Executive Order 13175 and section 106 of the National Historic Preservation Act. Nor, should there be any disregard by a federal agency for a tribe’s own constitution.

Second, the Tribe has a consultation ordinance (Ordinance No. 11-10) which sets forth how consultation is to be conducted with the Tribe when such consultation is requested by the Tribe and when such consultation is requested by the federal government. Federal agencies should respect tribal law and abide by the protocols and requirements enacted by tribal governments. In fact, federal law has stated as much. As an example, see the American Indian Agricultural Resource Management Act, which states in part:

Unless otherwise prohibited by Federal law, the Secretary shall comply with tribal laws and ordinances pertaining to Indian agricultural lands, including laws regulating the environment and historic or cultural preservation, and laws or ordinances adopted by the tribal government to regulate land use or other activities under tribal jurisdiction.

25 U.S.C. § 3712(b). It is not enough to abide by Executive Order 13175 and federal agency policies issued pursuant to that Order. Federal agencies should also adhere to and respect tribal law.

F. Implement Agency-specific Policy Changes

1. Army Corps of Engineers

The Army Corps of Engineers should repeal Appendix C, which results in the Corps ignoring its statutory duty under section 106 of the NHPA to consult with tribes that attach religious or cultural significance to historic properties. Appendix C was issued in 1990, and it does not take into account the tribal consultation provisions added to the NHPA in 1992. Appendix C is also inconsistent with the requirement that if an undertaking would have adverse effects on a historic property and no agreement has been reached, pursuant to the ACHP regulations, on how to avoid or mitigate the adverse effects, the decision to proceed must be made by the head of the agency. *See* 54 U.S.C. § 306114. The Corps should repeal Appendix C and instead follow the applicable ACHP regulations.

The Corps should also revise its use of nationwide permits and instead develop alternatives for permitting large projects that cover broad areas so that tribal impacts are properly assessed, including assessing the cumulative impacts of projects rather than artificially segmenting review. Nationwide permits should not be used for crude oil pipelines, which by

their nature have significant environmental impacts. To the extent nationwide permits are used for projects with minimal impacts, such as utility lines, there must be a process by which regional conditions or case-by-case conditions are required to address tribal concerns. We request that the Corps rescind—or at a minimum reopen the comment period for—its proposed rule on nationwide permits, which was published at 81 Fed. Reg. 35186 (Jun. 1, 2016). The proposed rule fails to ensure that tribal consultation rights are respected; relies on Appendix C, which must be rescinded; and improperly delegates key determinations to non-federal permittees.⁴

2. Advisory Council on Historic Preservation

The ACHP should revise its regulations governing the use of memorandums of agreement (MOAs) to ensure that tribal participation in an MOA is required when a project would affect tribal rights even when the undertaking affects lands that are not within the tribe's jurisdiction.

The ACHP should also consider revising its regulations so that when companies engage in anticipatory demolition, such as what has occurred with the DAPL, federal permitting agencies will actually enforce the statutory prohibition against anticipatory demolition at section 110(k) of the NHPA. 54 U.S.C. § 306113. In the DAPL situation, the pipeline company destroyed sacred sites in order to avoid a determination that it was prohibited from continuing in clearing and grading along the pipeline's route. Unfortunately, many tribes have had similar experiences in the face of the statutory prohibition. Additionally, ACHP should implement a presumption that when a tribe says a place is sacred it will be treated as eligible for the National Register unless and until determined to be ineligible. This presumption should also apply to post-review discoveries covered by 36 C.F.R. § 800.13.

3. Environmental Protection Agency

The EPA should update its manual entitled *Policy and Procedures for the Review of Federal Actions Impacting the Environment* (1984) to include current best practices for consulting with tribes and protecting tribal rights and resources.

The EPA's procedures for reviewing environmental impact statements (EISs) should also be updated to ensure that impacts on tribes' treaty and trust rights are evaluated and that tribal consent is obtained when a project would have a significant impact on tribal rights and resources. The EPA's evaluation of an EIS should include assessing how tribes have been consulted, ensuring that tribes are involved in the EIS's identification of historic and cultural properties, its evaluation of alternatives, and its assessment of whether impacts can be mitigated.

⁴ In fact, the ACHP in its comment letter stated that the Corps' reliance on non-federal permittees to determine the potential to impact historic properties often leads to failure to adequately consult with tribes. This is another example of the need for agencies to work together to ensure that tribal rights are respected. An agency should not be permitted to move forward with actions that another agency warns will harm tribes.

CEQ should amend its regulations to protect tribes' off-reservation treaty rights, including by adding language to 40 C.F.R. § 1503(a)(2)(ii) to address not only effects that are on the reservation but effects "in an area that is protected by treaty, or an area that has traditional, cultural, or historic importance." CEQ should also issue guidance emphasizing the need for federal agencies to follow CEQ regulations and to direct agencies to have tribes take the lead in identifying historic, cultural, or religious sites.

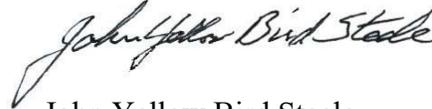
G. Practical On-the-Ground Changes

We attach a document prepared by several employees of our tribal government programs. It sets forth several practical recommendations for federal agency consultation practice. Please also review this document and incorporate those recommendations as you move forward.

VII. Conclusion

Time and again, tribes have either been altogether excluded from decision making regarding large-scale infrastructure projects, or we have participated only to have our concerns noted and dismissed. This failure to meaningfully consult with tribes has resulted in major threats to our cultures, lands, and ways of life. These threats are what have led the people to the current standoff at Standing Rock. We urge the Administration to take swift action to implement current laws, update administrative policies and practices, and support legislative changes to effectively protect tribal lands, resources, and rights in the process of permitting federal infrastructure projects.

Sincerely

A handwritten signature in cursive script that reads "John Yellow Bird Steele". The signature is written in black ink and is positioned above the printed name and title.

John Yellow Bird Steele
President

Oglala Sioux Tribe Framing Paper

Although we appreciate your attempt to consider this meeting as “consultation” many of the Tribes differ culturally, we should not be categorized and lumped into six roll out meetings. Under the “Promise Zone” designation, it is your responsibility to work with Tribes to resolve issues that hinder the tribe’s progress. But Federal Agencies fail to communicate with each other; the largest problem is the lack of standard regulations. By cutting through the red tape between the Federal Agencies, we will now be able to expedite the process for infrastructure which in turn provides a cost saving measure with more infrastructure development (planning).

Issues:

- (1) All federal agencies have different consultation processes for the same project; consultation should be consistent and based on tribal specific culture.
- (2) All Agencies need to be on the same page before approaching the Tribe.

Example: When the Highway Bill is in draft form, to the best of our knowledge, the Tribes are not consulted on what works best for all Tribes. Since “SAFETY-LUE” the large land base Tribes with legitimate roads miles have been receiving a small share compared to some Tribes that have very little land base or no land base that receive a larger sum of the funding that gets applied to roads that do not service an Indian Community. (i.e. How can the entire state of Oklahoma be grandfathered in by statute, as Indian Territory? The Oglala Sioux Tribe can claim by Treaty right, all the areas of South Dakota, North Dakota, Montana, Wyoming, Nebraska, and part of Minnesota; but are not allowed to why is this not allowed?)

Part of the problem is the interpretation that resides within CFR’s and BIA and FHWA mis-interpretation. So essentially, the regulations have no meaning when the Tribes are not consulted prior to the Final Rules being implemented.

If you look at the Regulations that apply to Tribes under the FAA they do not exist!!

Notices from all Federal Agencies meaningful consultation should include and consider the Tribe’s CORE VALUES because these greatly affect services and the Tribe’s sovereignty and jurisdiction:

(1) Land,

(2) Water,

(3) Air,

- (4) People,
- (5) Spiritual,
- (6) Historical,
- (7) Cultural,
- (8) Mandates (unfunded),
- (9) Changes to regulations,
- (10) Funding Issues (not timely, Continuing Resolutions, Prompt Payment Act violations)

Factors:

- (1) Federal Agency should come to the Tribe,
- (2) Protocol (recording for the record, bring the person(s) with authority to speak or make decisions
“don’t send the janitor to do the boss’s job!”)

Agencies: Input

- (1) Notices must include recommended changes and affects to Tribe; they should be sent out early, sent to the appropriate person at the Tribal level – program being affected, and send to the Tribal President and Executive Director (serve as gate keeper).

Engage / Resources:

- (1) Federal Agencies should consider costs to Tribes,
- (2) Federal Agencies should come to the Tribes in the respected Regions

Changes to Existing Framework:

- (1) Incorporate all applicable laws affecting Tribe’s implementation (strategic plans),
- (2) Notices given directly to the Tribe,
- (3) Hearings are not held in areas close to the Tribe,

(4) Get Tribal Council approval after Due Diligence procedure is completed by Tribe,

(5) Agencies should learn about Tribal Review, Assessment and Permitting Processes and respect the Tribe's authority and jurisdiction.

Example: The Oglala Sioux Tribe Environmental Protection Program Environmental Review and Assessment and Tech Team Permit Application Procedure. The Tech Team is responsible for issuing an Environmental Review Permit and enforcing the Oglala Sioux Tribe Environmental Code. The membership includes every program that will be affected. Core members include Natural Resources, Water Resources, Tribal Historic Preservation Office, Land Office, Environmental Protection Program, Rural Water, Transportation, Solid Waste, Water and Sewer, Tribal Employment Rights Office, Indian Health Service, Utilities Commission, Ambulance Service, Public Safety, Community Health Representative Program and Emergency Management Program.

There should be an outlined process defined within each Federal Agency that promotes tribes to follow and not be superseded by another federal agency's statutes, whereas presently the tribes are required to meet or exceed not only one statute but all statutes that apply.

Example: The Oglala Sioux Tribe Credit and Finance Program economic development project has been faced with many opposing declarations from different agencies. The land where the proposed project will be located must constantly deal with a so-called "wet lands designation." Two assessments conducted by the Bureau of Reclamation and the Oglala Sioux Tribe Environmental Protection Program does not declare this a wet lands area; but the South Dakota Department of Transportation does; this designation was based on an aerial map from Google that states this is a wet lands area.

(1) Does the Army Corp of Engineers have the authority to designate an area based on an aerial photo? Is this the same procedure utilized by the Army Corp of Engineers on fee, tribal or allotted lands within the reservation that have been in existence?

(2) How often does the Army Corp of engineers physically come to the reservation and review and assess the lands in question?

(3) How often does the Army Corp of Engineers consult with the Tribe in person?

Example: OST Department of Transportation has to abide by two different Federal Agencies when developing a construction project: FHWA & DOI (BIA) regulations when applying/ abiding by NEPA, Because the Bureau of Indian Affairs owns the roads; the Tribe must concede to their regulations, but must now also concede to FHWA Regulations because of our Direct Funding Agreement states we must abide by their regulations also. The underlying problems now exist because funding is spent by the program to address both regulations, when essentially the 2 federal agencies are trying to accomplish the same goal - "To provide a safe road to the traveling public..."
