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October 17, 2016

**TRIBAL CONSULTATION COMMENT PERSPECTIVE**

The DOJ, DOI, and Army sent a joint letter dated September 23, 2016 to Tribal Leaders inviting tribes to participate in consultation sessions scheduled in October and November. The consultation sessions are to solicit feedback on Federal tribal consultation for infrastructure-related projects. I strongly believe that the Great Sioux Nation must work together in order to have a united front to make this process more meaningful. In anticipation of upcoming listening sessions, the Cheyenne River Sioux Tribe is putting forward the following broad-based comments/initiatives for change regarding the consultation process.

**Indian treaties are Federal law, and the United States is bound to consult with Indian nations and tribes on all matters that implicate treaty rights. Executive Order 13175 (2000).**

- For thousands of years before the United States, Indian nations and tribes were independent sovereign nations, with original rights to self-determination, self-government and territorial integrity. The Constitution of the United States acknowledges Indian tribes as sovereigns, and authorizes treaty-making with Indian tribes.
- The United States Constitution acknowledges Indian nations and tribes as sovereigns, with a treaty relationship with the United States. binds the Federal Government to honor its treaties with Indian nations.
- The treaties establish our reservations as permanent homelands of Indian peoples.

The blue represents the thunderclouds above the world where live the thunder birds who control the four winds. The rainbow is for the Cheyenne River Sioux people who are keepers of the Most Sacred Calf Pipe, a gift from the White Buffalo Calf Maiden. The eagle feathers at the edges of the rim of the world represent the spotted eagle who is the protector of all Lakota. The two pipes fused together are for unity. One pipe is for the Lakota, the other for all the other Indian Nations. The yellow hoops represent the Sacred Hoop, which shall not be broken. The Sacred Calf Pipe Bundle in red represents Wakan Tanka – The Great Mystery. All the colors of the Lakota are visible. The red, yellow, black and white represent the four major races. The blue is for heaven and the green for Mother Earth.

- As a function of the United States' sacred obligation, the federal agencies must consult with tribes on federal projects, including especially major infrastructure projects, to consider and avoid negative impacts on Indian treaty rights and trust resources, including Indian lands, natural resources, and waters and Indian reservation environments as permanent homelands of our Indian peoples.

### **Background: 1851 Treaty with the Sioux and 1868 Sioux Nation Treaty**

Indian nations were originally sovereign independent nations prior to the formation of the United States. Indian nations were incorporated into the United States through treaties, which recognized our inherent rights to self-government, territorial management, and territorial integrity. The Dakota, Nakota, and Lakota Oyate of the Oceti Sakowin, or Seven Council Fires of the Great Sioux Nation, are the original peoples of Minnesota, Iowa, North and South Dakota, Nebraska, Montana, Wyoming and Colorado.

The 1851 Treaty with the Sioux acknowledges the original territory of the western Sioux Nation as extending from the Heart River in North Dakota down to Nebraska, which includes the area of the Dakota Access Pipeline.

The Sioux Nation fought wars with the United States to protect our people, our land, our waters, our territory and our sovereignty from invasion. At the close of Red Cloud's War, the United States offered peace, including withdrawal of the United States Army from our territory.

In our 1868 Sioux Nation Treaty, the Great Sioux Nation reserved all of our lands from the low water mark on the east bank of the Missouri River west through the Black Hills to the 104<sup>th</sup> Meridian, South Dakota's western border. In the treaty, our Sioux Nation tribes also preserved 44 million acres of unceded Indian lands in North Dakota, Montana, Wyoming, Nebraska, and Colorado. The 1868 Treaty also expressly preserved the Sioux Reservations on the east bank of the Missouri River, including the Crow Creek and Yankton Sioux Reservations. In addition, the United States reserved the lands on the east bank of the Missouri River as a protection zone to prevent encroachment on our Great Sioux Reservation.

Our Sioux Nation tribes own our lands, natural resources, and waters. The United States holds the title to our lands, natural resources, and waters in trust to protect us from alienation of our territory and interference with our treaty rights. Traditionally, our Lakota, Nakota, and Dakota people relied on hunting and fishing for subsistence, and our treaties protect our rights to hunt and fish throughout our Sioux Nation territory. Spearfish, South Dakota, for example, is named in honor of one of our traditional fishing areas in the Black Hills. The Sioux Nation Treaty also acknowledges our rights to pursue agriculture, including farming, ranching, forestry, and other forms of economic development, including metallurgy, sawmills, etc.

The Cheyenne River, Crow Creek, Lower Brule, Oglala, Rosebud, Santee, and Standing Rock Sioux Tribes and Yankton Sioux Tribes are all constituent tribes of the Great Sioux Nation and signatories to the 1868 Sioux Nation Treaty.

Under the 1851 Treaty and the 1868 Treaty, our Sioux Nation tribes reserved our original territory as our “permanent home,” with the United States’ promise that our lands would be a livable home. Naturally, our treaties reserve our waters as an essential part of our territory. Under the *Winters* doctrine, our Sioux Nation tribes own the water in the Missouri River, with first priority above all other users.

### **The Sioux Nation Tribes and the Missouri River Dams and Reservoirs**

In the 1950s and 1960s, the Sioux Nation Tribes were asked to make substantial sacrifices when the United States determined to dam the Missouri River for flood control. The primary purpose of the Pick-Sloan projects was to protect downstream cities and towns from the Missouri River’s annual floods with secondary purposes of generating electricity and providing for recreation.

The Sioux Nation tribes along the Missouri River made great sacrifices to protect downstream cities and towns, including St. Louis, Missouri. For example, the Cheyenne River Sioux Tribe gave up 104,000 of its best bottom land acreage on the Reservation with the inundation of the original Cheyenne Agency tribal headquarters, tribal member homes, churches, schools, and sacred sites. The dislocation was devastating.

Under Public Law 83-776, the Sioux Nation treaty was affirmed, the Cheyenne River Sioux Tribe maintained our hunting and fishing rights, grazing rights, mineral rights and timber rights in the Army Corps taking area. Our reservation boundaries remained unchanged at the center of the Missouri River. We continue to own the water in the River.

In May 2016, the Army Corps determined that it could not authorize a coal distribution center in proximity to the Lummi Tribe’s treaty-protected fisheries, where the Corps authorized activity would have more than de minimis impacts on treaty fishing rights. Without congressional authority, the Army Corps determined that it had no right to interfere with treaty protected rights.

Our Sioux Nation tribes use the Missouri River for our drinking water, we have treaty rights to hunt and fish, reserved rights to graze livestock along its banks, and it is our source of water for irrigating crops. Under our Treaty, we own reserved waters in the Missouri River. Yet, the Army Corps turned its back upon our Sioux Nation tribes and plans to approve the DAPL to run oil under the Missouri River without consulting with our tribal governments. Indeed, the Army Corps has not even consulted with the Secretary of the Interior and the Secretary of Agriculture who are our partners in our Missouri River tribal drinking water projects. The Army Corps is violating our treaty rights, statutory rights, and your policy on sustainable Indian nations, President Obama.

We have seen the devastation wrought by oil spills in the Gulf of Mexico, where BP had build “fail safe” systems to run its oil platform. BP’s systems failed catastrophically—despite their best planning. We have seen government planners provide lead poisoned water to the

residents of Flint, Michigan. We have seen the EPA pour out poison mine waters into Colorado waters in the name of “clean-up,” only to poison Navajo Nation waters downstream.

As we Lakota say, *Mni Wiconi*—“water is life.” The Army Corps must not threaten our treaty rights and risk our children’s lives with the dangerous DAPL project without even conducting an Environmental Impact Statement!

*Among our Sioux Nation tribes, we sacrificed to protect American cities downstream on the Missouri River from flooding*—sacrificed our sacred oak trees, our wildlife, our best river bottom lands, our very homes for flood control. The Army Corps of Engineers must not sacrifice our people again for an oil pipeline in violation of our treaties.

**Consultation must be tailored to treaty rights and must consider all treaty signatories**

- The treaties of the Sioux people, like those of many other tribes, have been affirmed by later statutes and set forth present-day rights of the tribes.
- The treaties predate the current reservation boundaries and the current location of the many Sioux bands on their present-day reservations. The treaties were signed by the many bands of the Sioux people in common and set forth expansive treaty boundaries that are common to the many bands.
- Consequently, the Sioux people’s treaty territory is broader than the present-day reservation boundaries, and the treaty rights in this territory are shared in common among all of the signatories to the treaties.
- This means that the United States cannot limit its consultation to the present-day tribe whose present-day boundaries are closest to the area or trust property affected. Instead, the United States must understand what treaty governs what territory and what present-day tribes were signatories to that treaty, and then both notify and consult all affected tribes.
- When the United States fails to properly understand the full scope of its treaty obligations, all tribes are not notified of projects when they should be and they are not properly consulted, which violates tribal treaty rights.
- At a minimum, the United States should notify and consult with tribes as to federal projects that affect the following:
  - Areas within the treaty boundaries of tribes;
  - Trust resources, especially water, to which a tribe may have a treaty right or a property interest;
  - State or national historic sites;
  - Areas commonly/historically significant to tribes; and
  - Cultural landmarks with historic significance to the tribes.

**There is a lack of consistent implementation and strong policies across federal agencies**

- Disparity exists among federal agencies on how consultation is actually implemented. Oftentimes, those agencies with little regular contact with tribes have more thorough and

adequate consultation efforts and policies than those agencies who work with tribes regularly.

- There must be strong minimum standards for implementation and development of consultation policies across federal agencies.
- All federal agencies must consistently implement these policies.
- In order for consultation to be meaningful, these policies must include, but should not be limited to, requiring consulting agencies to do the following:
  - Provide tribes with all pertinent information before consultation in a timely manner;
  - Coordinate with tribes before consultation begins, especially with development of an agreement on consultation timelines before consultation even begins;
  - Consult only with tribal representatives who has been authorized to engage in government-to-government consultation by the tribal government;
  - Make every effort to conduct tribal consultation at the seat of tribal government or in tribal territory;
  - Ensure that federal participants in tribal consultation have actual decision-making authority
  - Provide written confirmation that the agency has considered tribal comments and concerns and the agency's response, whether positive or negative; and
  - Obtain resolution of approval from the tribe that the United States has met its satisfactorily consulted with the tribe and the tribe agrees with the United States' response to tribal concerns in each instance.

#### **Change in federal agency structure and appointment of tribal consultation head within the administration**

- All federal agencies should have a full-time tribal liaison position. However, when consultation occurs, each agency must ensure that those federal participants have decision-making authority and these consultation sessions are not simply "listening sessions" with no results.
- There should be at least one position within the administration to oversee all tribal consultation across all federal agencies.

#### **Change in executive oversight of policy differences among federal agencies**

- Multiple federal agencies administer laws, policies, and regulations that affect tribes and Indian Country.
- The agencies have demonstrated that they frequently disagree as to the substance and application of laws, policies, and regulations that apply to tribes in ways that have a profound effect on tribes' rights.
- No sound mechanism exists to resolve these differences between agencies, and the lack of such resolution harms tribes and forces tribes and other stakeholders to seek resolution of these differences in an adversarial forum.
- The United States should elevate the White House Council on Native American Affairs to the White House Council on Native Nations to be co-chaired by the Vice President and the Secretary of the Interior, so that the White House Council on Native Nations is

empowered to resolve policy differences among federal agencies and refer these matters to the President for resolution where necessary.

<b>Support legislation that codifies and protects tribal consultation rights</b>
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- Although treaty obligations, the general trust responsibility, executive orders, and some agency regulations require government-to-government consultation with tribes, there is no federal legislation that codifies and protects these rights.
- Without legislation, tribes' right to enforce the consultation requirement is not as strong as it could be.
- The United States should endorse legislation like H.R. 5379, the RESPECT Act, to codify the United States' government-to-government consultation policy with Indian nations and tribes.
- In addition to provisions already in the RESPECT Act, the United States should support substantive enactments including but not limited to the following:
  - Require negotiated rulemaking as to consultation with tribes; and
  - Impose penalties on agencies and officials that fail to comply with their consultation requirements.