



October 10, 2016

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

Re: Comments on Infrastructure Decision-Making Consultation

Dear Assistant Secretary Roberts, Assistant Secretary Darcy, and Director Toulou:

On behalf of the Mashantucket Pequot Tribal Nation (MPTN) of Mashantucket, Connecticut, I thank you for seeking tribal input on how the Federal government can better engage tribes on decision-making for future infrastructure projects. This is an issue of great importance to us, given the magnitude of which Indian country has expressed support for the Standing Rock Sioux Tribe (SRST) in their protest of the Dakota Access Pipeline (DAP). Although the SRST and the DAP situation has brought these issue to the forefront, I'd like to note that countless tribal historic properties have been destroyed over the last two centuries, due to federal undertakings.

Our tribe stands together with the Standing Rock Sioux Tribe, and we respectfully request that your agencies commit to a new comprehensive environmental review of the DAP, as well as engage in consultations with the Standing Rock Sioux Tribe to determine the areas of potential effects along the entire route of the pipeline. We further call on President Obama to reject the project altogether as he did the Keystone XL pipeline.

Unfortunately, construction has already commenced on the DAP, and some of the SRST's religious and sacred sites were destroyed in the process. Last month, journalists and tribal delegates on location at Standing Rock posted videos that featured the pipeline construction crew bulldozing Standing rock ceremonial and burial sites. Those heartbreaking videos were

widely circulated, and those sacred and burial sites are now forever destroyed. The Federal government must not allow this to happen again.

Tribal governments must be consulted early on, during the pre-licensing phase of the process, to adequately identify historic properties and assess the potential impact of the undertaking. After all, this is a normal practice; as federal agencies consult regularly with cities and local municipal governments on similar projects. It is imperative that tribal governments be extended the same respect and consultation—government to government—as is required by law.

Furthermore, environmental justice for Indian country cannot be achieved through mechanisms that are culturally irrelevant, insensitive, or worse--culturally destructive. When tribes are not included in the planning and identification process, or to assess potential environmental, historical and ceremonial impacts, those sites are often destroyed, which is the case for the SRST. The Mashantucket Pequot Tribal Nation and other tribes in the Northeast have also experienced the destruction of our historic properties.

Government-to-government consultations with Federal agencies are supposed to involve a comprehensive review of a proposed development so that a tribe's cultural and natural resources are protected, but this does not always happen. Reasons for such oversights often involve communication breakdown, and agencies under pressure to approve a project will often disregard tribal concerns to adhere to development timelines.

Federal laws that mandate government-to-government consultation with tribes in protection of historical properties include the American Indian Religious Freedom Act (AIRFA), Antiquities Act, Archeological Resources Protection Act (ARPA), Native American Graves Protection and Reparations Act (NAGPRA), National Environmental Protections Act (NEPA), and National Historic Preservation Act (NHPA). However, within these laws exist ambiguous language "loopholes" that circumvents the process. These loopholes enable a project to move forward regardless of a tribe's objection, which leads to unnecessary destruction of many identified sites. Such loopholes must be fixed. Furthermore, changes to these laws should more properly comport with specific United Nations Declaration of the Rights of Indigenous People (UNDRIP) standards concerning indigenous people's rights to their lands.¹

Additionally, programs and offices such as the Tribal Historic Preservation Office (THPO) are severely underfunded, which leaves tribes without the resources to actively participate in the process of identifying, protecting, and preserving their cultural or religious historical sites. Adequate funding of these programs is needed for tribes to fully participate in the process.

¹ See President Obama, 'Remarks by the President at the White House Tribal Nations Conference' (16 December 2010).

Below are recommendations on how the Federal government can ensure that tribes are adequately consulted on federal infrastructure undertakings, and in turn, protect tribal historic and ceremonial lands.

OUR RECOMMENDATIONS:

- Federal agencies are obligated to consult with tribes on a government-to-government basis according to the U.S. Constitution, treaties, statues, executive orders, and policies.
 - Federal agencies must not delegate their responsibility to engage in consultations with tribal governments to project proponents, their legal team, or consultants. Consultation should occur directly between tribes and federal agencies regarding concerns about historic properties of religious and cultural significance that may be affected by an undertaking. Federal agencies must consult directly with tribes to request information that they may possess about the presence of historic properties in the Area of Potential Effects for any undertaking.
- All federal agencies must make a “reasonable and good faith effort” to identify historic properties, including consulting with tribes directly to identify and assess adverse effects to historic properties.²
- Language in federal statues must be clarified to ensure that agencies are held accountable when they do not adhere to mandated protocols. This language must also require all federal agencies--including those with independent status, such as the Federal Energy Regulatory Commission—to follow these mandates.
- Tribes must be involved and consulted during the pre-licensing phase to ensure that:
 - Cultural and religious sites are properly identified and not disturbed by applicants
 - All mechanisms are protected, such as confidentiality of information regarding sensitive cultural resources
 - Reducing the process in order to mitigate any damage done to these sites.³
- When identifying historic properties and addressing environmental injustice in Indian country, first right should be given to tribes so that the identification process is conducted in a culturally relevant manner--directed by the culture itself.

² See United Nation’s Declaration on the Rights of Indigenous Peoples, Article 26.3

³ See United Nation’s Declaration on the rights of Indigenous Peoples, Article 12.1, 27.1

- If sites are destroyed, “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”⁴
- Adequate federal funding should be appropriated to the THPO in order to eliminate inequities in program funding, and to ensure tribal environmental capacity to protect Indian Country, and all tribal historic, cultural and ceremonial sites.

Thank you for hearing our concerns on this matter. Should you want to discuss these matters further, please contact me at 202.536.6419 or MPTNCommunications@mptn-nsn.gov.

Sincerely,



Rodney Butler
Tribal Council Chairman

⁴ See United Nation’s Declaration on the Rights of Indigenous Peoples, Article 11.2