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Swinomish Indian Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476
* 11404 Moorage Way * La Conner, Washington 98257 *

*Via Electronic Mail:
consultation@bia.gov*

November 28, 2016

Mr. Lawrence S. Roberts
Principle Deputy Assistant Secretary for Indian Affairs
Office of Regulatory Affairs & Collaborative Action
1849 C Street NW, MS 3642
Washington, DC 20240

Re: Comments on Consultation with DOI, DOJ and CORP

Dear Assistant Secretary Roberts,

As a result of Standing Rock and widespread tribal resistance against the Dakota Access Pipeline, you and the Departments of the Interior, Justice, and Army have invited consultation on how Federal decision making on infrastructure projects can better account for protection of Tribal rights and inclusion of Tribal views and needs. This letter provides supplemental information and comments to the earlier remarks of Swinomish Chairman Brian Cladoosby, during these face-to-face consultations.

A. Fast-Tracking of Infrastructure Projects. At Swinomish, we appreciate your effort to pause and evaluate how the interests of a treaty tribe might better be evaluated, as the federal government seeks to streamline and fast-track review and approval of “infrastructure.” As a starting point, we urge you to more narrowly define those projects that qualify for fast-tracking. These should not include projects adversely affecting treaty tribe interests, until prior, informed consent has been provided by the affected tribe. Second, we urge you to adopt firm rules and guidelines for federal permitting agencies that take a landscape approach to tribal cultural viewpoints, rather than allowing what has become a standard practice of piecemealing the review of broader project impacts with a narrow definition of “project” or “area of potential effect.” Too often, these projects are divided into discrete areas or segments, to avoid review of the total, cumulative impact across the tribal landscape. For example, Tribes with reservations near a project may also hunt and fish a substantial distance away from the project site itself, in areas where intensified rail or shipping transportation for the project is occurring. Finally, with respect to how fast-tracking occurs, we urge you to review how many times federal agencies have allowed projects to proceed under nationwide permits, or as mere “maintenance,” even though the project involves expansion of an existing footprint or intensity

of activity and even though a treaty tribe has registered opposition or concern. In those circumstances, the Nationwide permit process and “maintenance” exceptions should not be utilized. See, e.g., General Condition No. 17 (Tribal Rights).

B. Section 106, NHPA Review. Swinomish supports and incorporates by reference the detailed comments of the Suquamish Tribe: *The Army Corps of Engineers’ Appendix C (National Historic Preservation Act Regulations) Should be Repealed*. For reasons that defy logic, the Corps’ “Appendix C” regulations do not require consultation with affected tribes, even though the Advisory Council on Historic Preservation’s (ACHP) regulations require this, 36 C.F.R. Part 800, and even though Department of Defense policies for “Interactions With Federally-Recognized Tribes” mandate it.¹

Recently, this disconnect in federal policy at the Corps was the source of a major conflict between Swinomish and the Seattle District, as the District reviewed Section 106, NHPA, impacts of a proposed coal terminal at Ferndale, WA. The project involved transport of up to 34 trains per day over an old railway bridge spanning our vital fishery and 2-3 capesize vessels transiting our Usual & Accustomed fishing area. Our experience with the Corps’ Section 106 process for this project was that the District staff were either poorly trained in consultation policies or disregarded them (for example relying on email exclusively to announce “take it or leave it” general informational meetings and defining them as “consultations”); the staff held Section 106 “consultation” meetings with the applicant and its consultants but without Swinomish, Yakama or other tribes who had expressed interest in Section 106 review (See May 6, 2015 NWS-2008-0260, Section 106 Consulting Party Meeting Notes by Pacific International Terminals); staff failed to provide relevant documents on the Section 106 review process requested by Swinomish in writing; and the District defined its “area of potential effect” very early in the process before it had even met with Swinomish to discuss that definition or traditional cultural properties. As a result, Swinomish was not afforded a meaningful opportunity to provide input into the effect of the project on properties of spiritual and cultural importance to the tribe. We believe this error would have been avoided if the Corps were following ACHP procedures for consultation.

To his credit, the District Engineer’s decision on Lummi treaty fishing rights for this project did appear to recognize a Lummi “traditional cultural property” that was an area larger than the narrowly defined project area, and acknowledged that treaty fishing areas had a spiritual value. That approach is a step in the right direction from our reading of the statute.

¹ <https://www.denix.osd.mil/na/upload/American-Indian-and-Alaska-Native-Policy-Booklet-Version-2-for-Web-Posting.pdf>

C. “Meaningful” Consultation Requires Tribal Involvement – Not a One Way Street.

The situation in Standing Rock is one with which Swinomish is very familiar. Too often, Corps staff solicit comments from our staff and then proceed ahead without any indication of how our comments were considered or incorporated into the decision. When we request information on this, or the process itself, we meet a blank wall of silence. Inexplicably, we are told to follow the procedures set up for public review of documents, “FOIA,” on the very subject matter of our consultation with the Corps. Working behind that procedural wall, District staff often take weeks or even months to provide us with timely, relevant information necessary for our elected leaders to make decisions regarding a proposed project or our consultation with the Corps itself.

This detached and minimalist approach to consultation with treaty tribes is a breach of the most sacrosanct trust obligation the federal government has in dealing with us. It is a classic “one-way street” of communication. That is not meaningful consultation. This minimalist approach is also described as a “check the box” approach. It is an affront to our sovereignty, as it directly impedes the functioning of tribal government. It also leads to conflict and feelings of mistrust that result in litigation and standoffs over principle. If DOI, DOJ and the USACE sincerely wish to reform the consultation process, the following must be articulated again, and resolved:

1. Consultation Mandates Must be Enforced and Utilized.

We appreciated your effort to clarify these consultation mandates and believe you can and should go further with respect to Homeland Security agencies. You restated in Attachment A to your letter dated Oct. 11, 2016 that the “legal framework” includes Executive Order 13175 and its direction to all federal agencies to conduct “meaningful consultation and collaboration with [T]ribal officials on policy decisions that have [T]ribal implications.” The emphasis in federal permitting and policy practice should be first and foremost on “meaningful.” If it is not meaningful to the affected tribe, it frankly is a mockery to call it a consultation.

Specifically, the Corps of Engineers is directed to conduct meaningful consultation and collaboration with our Tribe when it comes to fast-tracking or reviewing any permit decision, under Department of Defense Instruction No. 47102.2 (Interactions With Federally-Recognized Tribes), and U.S.A.C.E. *Tribal Consultation Policy* (Nov. 1, 2012). The DOD Instruction mandates the following of the Corps at the District level:

- Taking appropriate steps to remove any procedural or regulatory impediments to DoD working directly and effectively with tribes on activities that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands; and
- Assessing, 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 (k);

This reference to footnote (k) includes the following text:

(k) The single most important element of consultation is to initiate the dialogue with potentially affected tribes before decisions affecting tribal interests are made. Meaningful consultation demands that the information obtained from tribes be given particular, though not necessarily dispositive, consideration; this can happen only if tribal input is solicited early enough in the planning process that it may actually influence the decision to be made. Consultation is worth very little if decisions have already been made.

Thus, the quality of the consultation at the very earliest stage in the process is the key to whether a consultation will be “meaningful” from the tribal perspective.

The 2012 *Memorandum for Commanders, Directors and Chiefs of Separate Offices, US Army Corps of Engineers, Tribal Consultation Policy* specifically reinforces this focus on the individual tribe. It directs that requests for consultation by a tribe to the USACE “will be honored.” Thus, if a tribe does not feel the consultation or level of engagement was meaningful, the Corps should continue that dialogue, rather than move forward with the permit process without the tribe.

2. Meaningful Consultation Requires Tribal Feedback.

The 2012 *Memorandum* contains another directive that forces the District staff to regroup and reinitiate dialogue with a tribe if the result of the first interaction was not meaningful from the tribal perspective: “Consultation procedures for individual projects or programs may be developed at the local level to meet the needs of particular Tribes.” This directive echoes footnote (k), above, which clarifies the meaning of “meaningful consultation” cited in Executive Order 13175:

Meaningful consultation demands that the information obtained from tribes be given particular, though not necessarily dispositive, consideration; this can happen only if tribal input is solicited early enough in the planning process that it may actually influence the decision to be made.

In order for early input from a tribe to have the potential to “influence the decision to be made,” tribes need answers to their questions, they need timely responses to information, and they need time to digest the information and provide meaningful responses.

3. Meaningful Consultation Requires Clarifications, Information and Time.

Over and over, Swinomish sees consultations fail because they miss one or more of the following three cardinal elements of communication:

1. The tribe’s questions about the process and requests for clarification must be addressed in writing with sufficient detail until the tribe finds the answer satisfactory. Tribes must be notified at the outset of the process of the precise nature of applications, not after applications are deemed 100% “complete,” which is a process completely at the control of the applicant.
2. Tribal requests for information should be prioritized among other workloads and the information should be provided, without requiring “queuing” or typical Freedom of Information

Act procedures. Project reviews should be put on hold until tribes receive information that is relevant and central to their decision making process.

3. The tribes' response to requests for information that suggest more time is needed should be honored unless the process requirements would not allow it, in which case the tribe should be notified of the specific regulation preventing additional time. Tribal governments have limited budgets and multiple projects to review and respond to. Their resources may not permit immediate responses of detailed information. The tribe may also have internal procedures for the release of information that must be honored.

The Corps' 2012 *Memorandum* contains further directives that mandate attention to these three areas for improved communication and consultation:

- b. Identify and remove procedural impediments to working with Tribes whenever possible.**
- c. Share appropriate Corps procedures, regulations and organizational information with Tribes.**
- d. Maintain open lines of communication through consultation with Tribes during the decision making process for those matters that have the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands.**

The Corps' failure to implement effective consultation policies and procedures have resulted in repeat instances where Swinomish has been unable to track permit processes, comment, or prepare for meetings or consultations with the Corps.

4. Case Study: Gateway Pacific Terminal.

Over the past three years, Swinomish sought unsuccessfully to get timely responses to requests for information from the Seattle District regarding the Gateway Pacific Terminal. Repeatedly, counsel for the Seattle District opined that tribes should not receive information from the District unless they followed the exact same procedures the public has to follow to obtain information, through FOIAs. Requiring federally-recognized tribes to submit FOIA requests in order to obtain specific information, requiring advance payment of fees prior to providing the information, and delays in that case of over four months, adversely affected the tribe's understanding of Corps decisions and its ability to accurately evaluate the impacts to tribal resources and rights in a timely manner that would precede a decision on treaty rights. In that case, we believe the actions of the Seattle District staff were inconsistent with the DoD and Corps consultation policies cited above. That lack of requested information delayed the Tribes' ability to prepare for a meeting the District sought to schedule to discuss the project proposal and its effect on treaty rights.

5. Recommendation: Create a Designated Consultation Officer.

Specific directives for consultation policies already provide clear mandates to provide tribes with requested information and to develop specially tailored consultation protocols unique to each tribe as a sovereign nation; the problem is that these mandates are not being implemented by District Engineers at the local level. We call upon the Secretary of the Army to issue immediate detailed instructions implementing these mandates, to each of the Corps' District Engineers through changes in the structure and duties of the tribal liaison office, as follows:

1. The District Tribal Liaison shall be an independent officer, reporting directly to the District Engineer; the name of the Liaison should be changed to "Tribal Consultation Officer;"
2. For each District, the Tribal Consultation Officer should maintain and update complete maps of tribal interests within that District, including lists of both specialized contacts and tribal elected officials.
3. At the very outset of any permit, policy, or funding proposal the Tribal Consultation Officer should work with the designee of each tribal chairman to develop a written protocol for consultation with that tribe on the proposal that includes a timeline, appropriate staff-level contacts and exchanges, and the all-important step of in-person consultation by the District Engineer with elected leaders, sovereign to sovereign, at times during the process requested by the tribal chairman.
4. The Tribal Consultation Officer should maintain a detailed log of each interaction by the District with the tribe (with continuing written updates by District staff to the Officer) from pre-planning to final decision, as part of the record.
5. During any pre-application review and during review of any permit application, policy proposal or funding proposal, the Consultation Officer should have the duty to provide information requested by the tribe within five business days (with exceptions for voluminous document requests), and the District shall not require tribes to use procedures for public records requests under FOIA in order to obtain requested information. Requests for information should be honored even if projects are in the "pre-application" phase, i.e., not yet deemed 100% complete. (In the case study, above, this seemed to be a device used to impede the flow of information to Swinomish).

D. Prior, Free and Informed Consent

Swinomish supports and incorporates by reference the comments of the Yakama Nation submitted to you during this process. While recognizing there is a process necessary to implement this principle, it is so widely recognized internationally and among corporate governance policies in our Country that it deserves immediate implementation. At a minimum, agencies should be required to articulate in writing why the prior, free and informed consent of a tribe affected by a proposal or policy was not obtained, including a detailed statement of the

efforts made by the agency to obtain that consent and the statutory basis for failing to adhere to the tribes' position. Where a treaty tribe elects not to consent, the federal government should consider denying the policy or project proposal on that basis alone, independent of other statutory reviews.

If you have any questions or need any additional information, please contact my Government Affairs Liaison, Debra Lekanof, 360-391-5296 or email her at dlekanoff@swinomish.nsn.us, to arrange a meeting.

Sincerely,

A handwritten signature in cursive script that reads "Brian Cladoosby".

Brian Cladoosby, Chairman
Swinomish Indian Tribal Community

cc: Mr. John Dossett, NCAI: jdossett@ncai.org
Ms. Colby Duren, NCAI cduren@ncai.org