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Via e-mail to [consultation@bia.gov](mailto:consultation@bia.gov)

Elizabeth K. Appel  
Office of the Assistant Secretary – Indian Affairs  
Attn: Office of Regulatory Affairs & Collaborative Action  
1849 C Street, NW  
MS 3642  
Washington, DC 20240

**Re: Federal Consultation with Tribes Regarding Infrastructure Decision-Making**

Dear Ms. Appel,

The Rosebud Economic Development Corporation (REDCO) submits this comment in response to the Federal Government’s (the “Federal Government”) invitation to engage in tribal consultation regarding future Federal decision-making on infrastructure projects, and how future tribal consultation can prospectively allow for timely and meaningful tribal input. *See* Letter from the U.S. Department of the Interior (DOI), Department of Justice (DOJ), and Department of the Army (Sep. 23, 2016), *available at* [https://www.doi.gov/sites/doi.gov/files/uploads/final\\_dtl\\_consultation\\_infrastructure\\_signed.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/final_dtl_consultation_infrastructure_signed.pdf).

REDCO is a tribally chartered corporation owned by the Rosebud Sioux Tribe (the “Tribe”). REDCO was established to foster economic growth and generate revenue for the Tribe through job creation and community development, and engages in various types of infrastructure projects with the Tribe and other partners.

REDCO appreciates the Federal Government’s efforts to better ensure meaningful tribal input into future reviews and decisions related to infrastructure in order to protect tribal lands, resources, and treaty rights. REDCO supports future infrastructure developments in collaboration with tribal input and Federal decision making; however, REDCO also believes that robust and significant tribal consultation should be required and implemented consistently when tribal interests are involved in future infrastructure decisions. REDCO welcomes the opportunity to offer the following comments that both encourages more meaningful consultation within the existing framework and identifies areas of necessary change.

## A. Federal Agencies' Implementation of Existing Tribal Consultation Policies Must Be Consistent

In 2000, President Clinton implemented Executive Order 13175 “in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.” Exec. Order 13175, Consultation and Coordination With Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 9, 2000). President Obama renewed focus on the policy with his “Memorandum for the Heads of Executive Departments and Agencies.” Presidential Memorandum, Tribal Consultation, Published at 74 Fed. Reg. 57881 (Nov. 5, 2009). It states that, “meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.” *Id.* The Memorandum calls for all government agencies to develop and submit consultation policies that satisfy the guidelines of Executive Order 13175. Later, Executive Order 13604, “Improving Performance of Federal Permitting and Review of Infrastructure Projects” (Mar. 22, 2012), mandated implementation consistent with Executive Order 13175 and President Obama’s Memorandum of November 5, 2009; thereby, elevating the Memorandum to Executive Order status.

REDCO recognizes that the Federal Government has made efforts to comply with the above referenced Executive Orders through developing tribal consultation policies and submitting annual reports. That being said, REDCO commends the Federal Government for acknowledging that there is room for improvement, especially with regards to the policies’ implementation. As stated in the U.S. Department of Justice’s (“DOJ”) Policy Statement on Tribal Consultation, the policies are merely *pro forma* if meaningful consultation does not occur. DOJ Policy on Tribal Consultation at III.C., available at <https://www.justice.gov/sites/default/files/otj/docs/doj-memorandum-tribal-consultation.pdf>. Tribal consultation policies serve little purpose if they are arbitrarily followed by different Federal agencies. Judge Skavdahl’s Order on Motions for Preliminary Injunction in *State of Wyoming et al v. U.S. Dept. of the Interior, et al*, Case No. 2:15-CV-043-SWS (D. Wyo. Sept. 30, 2015) provides an excellent example of a situation where adequate consultation did not take place within the U.S Department of the Interior (“DOI”) rulemaking effort.

The Wyoming district court held that when implementing its regulations on hydraulic fracturing (the “BLM Rule”), the Bureau of Land Management (“BLM”) failed to consult with the Ute Indian Tribe on a government-to-government basis, as required by the DOI’s own policies and procedures. The BLM insisted that it had engaged in extensive tribal consultation when promulgating the BLM Rule by holding four regional tribal consultation meetings, by offering to meet with tribal representatives individually after the initial regional meetings, and by distributing copies of the draft rule for comment in January 2012. *Wyoming v. Interior* at 38. After the BLM Rule was published, in June 2012 and again in May 2013, the BLM held additional tribal meetings and conducted additional and limited outreach. *Id.* The court did not buy BLM’s explanation. “The BLM’s efforts,” Judge Skavdahl concluded, “reflect little more than that offered to the public in general. The [DOI] policies and procedures require extra, *meaningful* efforts to involve tribes in the decision-making process.” *Id.* (emphasis in original). In reaching this result, and italicizing the word “meaningful,” the judge noted that BLM spent more than a year developing the BLM Rule before initiating any consultation with Indian tribes. BLM did make two changes to its 96-page draft

rule; however, the two changes were minimal, and did not address tribes' expressed concerns. BLM's meetings were "more intended as informational and outreach sessions," as opposed to consultations where tribal representatives' expressed concerns were addressed. *Id.* at n. 34. Those concerns, which included a desire by several tribal organizations that BLM either consider an exemption to the BLM Rule or an opt-out provision for tribes wishing to exercise their own regulatory authority of hydraulic fracturing, were "summarily dismissed" by BLM. *Id.* at 39.

As demonstrated in *Wyoming v. Interior*, the application of an existing consultation policy is critical. Consultation must actually occur "*before* the affected Department component has arrived at a decision." DOJ Policy on Tribal Consultation at III.C. (emphasis added); see DOI Policy on Consultation with Indian Tribes at VII.E.1 (consultation will occur "as early as possible when considering a Departmental Action with Tribal Implications") (emphasis added); see also Exec. Order 13604 (Federal permitting processes "must rely upon *early* and active consultation with . . . tribal governments [will] avoid conflicts . . . [and] resolve concerns") (emphasis added). The consultation process for federal permitting and infrastructure projects must be a collaborative process. See DOI Policy on Consultation with Indian Tribes (defining collaboration as "[DOI] working together to implement this [Consultation] Policy" and "Indian Tribes should be considered appropriate collaborative partners"); also see DOJ Policy on Tribal Consultation at Introduction (this Policy "reflects the [DOJ's] commitment to regular and meaningful consultation and collaboration with tribal officials;" and Exec. Order 13604 (agencies must improve infrastructure permitting processes through collaboration with tribal governments). Tribal concerns must be adequately considered during the consultation process. See DOJ Policy on Tribal Consultation at III.D. (a consultation summary "will include a synopsis of Tribal concerns and issues and a description of the [Department] component' s consideration of these concerns and issues"); see also DOI Policy on Consultation with Indian Tribes at VII.B.2.c. (Tribal Liaison Officers' responsibilities shall include "[a]dvocating opportunities for and consideration of the positions of Indian Tribes").

In many situations, if the Federal Government simply acted in accordance with the existing framework set forth in its tribal consultation policies then negative results from insufficient consultation could be avoided. Perhaps agencies could benefit from continued efforts for developing guidance documents and mandatory training for Federal agency employees. It should be noted that not all Federal agencies have made the same efforts with regards to implementing Exec. Order 13604, or their tribal consultation policies are minimal or limited. Additional policy implementations should be developed. Consistent application of robust tribal consultation policies across all Federal agencies will help ensure that consultative obligations are more uniformly applied.

## **B. The Federal Government Should Require the Army Corps. of Engineers to Amend 33 C.F.R. 325, Appendix C(8).**

In 1966, Congress enacted the National Historic Preservation Act ("NHPA"). 54 U.S.C. §§ 300101, *et seq.* The NHPA was intended to "foster conditions under which our modern society and our historical property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations." *Id.* at § 300101. One mechanism Congress implemented to further the NHPA was requiring the head of Federal agencies having direct or indirect jurisdiction over a proposed

federally approved undertaking to take into account the effect the undertaking could have on a historic property. *Id.* at § 306108. Historic properties are properties included, or eligible for inclusion, on the Nation Register of Historic Places (“National Register”). *Id.* at §§ 300308, 300311.

Properties of traditional religious and cultural importance to an Indian tribe are potentially eligible for inclusion on the Nation Register (“Eligible Property”). *Id.* at § 302706(a). Moreover, the NHPA requires Federal agencies to consult with an Indian tribe when a federally approved undertaking could have an impact on an Eligible Property. *Id.* at § 302706(b); *see also* 54 U.S.C. § 306108. Therefore, the NHPA mandates that Federal agencies consult with impacted Indian tribes when a federally approved undertaking could have a direct or indirect impact on an Eligible Property.

The entity tasked with implementing the NHPA is the Advisory Council on Historic Preservation (“ACHP”). *Id.* at 300303; *see also* 54 U.S.C. § 304101. ACHP is authorized to promulgate regulations necessary to implement how Federal agencies should review whether an undertaking will impact an Eligible Property. *Id.* at § 304108; *see also* 54 U.S.C. § 306108. Therefore, both the Congressional legislation, and ACHP’s overarching regulatory authorization, mandate that any regulation promulgated by ACHP must require consultation between Indian tribes and Federal agencies when an undertaking could impact an Eligible Property.

ACHP has also promulgated regulations authorizing all Federal agencies to develop regulatory procedures to implement the undertaking review process. *See* 36 C.F.R. § 800.14(a). Any Federal agency taking advantage of ACHP’s authorization must implement regulations consistent with the ACHP’s regulations. *Id.* Thus, if a Federal agency voluntarily determines to implement NHPA’s obligations, the Federal agency must do so consistent with the ACHP’s existing regulatory scheme.

The U.S. Army Corps of Engineers (“USACE”) is one Federal agency that has decided to implement the NHPA internally through the promulgation of its own federally approved undertaking regulatory scheme. *See* 33 C.F.R. part 325; *see also* 55 *Fed. Reg.* 27003 (June 29, 1990). However, the USACE’s promulgated regulations are inconsistent with the NHPA mandate, and ACHP’s regulations. Specifically, the USACE’s Appendix C reads, in part:

At any time during permit processing, the district engineer may consult with the involved parties to discuss and consider possible alternatives or measures to avoid or minimize the adverse effects of a proposed activity. The district engineer will terminate any consultation immediately upon determining that further consultation is not productive and will immediately notify the consulting parties.

33 C.F.R. 325, Appendix C(8) (emphasis supplied). This is not the standard. As noted above, ACHP’s regulations “require” USACE to consult with Indian tribes when USACE’s review of an undertaking could have an impact on an Eligible Property. Such tribal consultation is mandatory and not optional. Moreover, such mandatory consultation cannot cease based on USACE’s unilateral determination that consultation is not “productive.” Put simply: USACE’s regulation is inconsistent with the NHPA and ACHP’s governing regulations.

Perhaps even more alarming, USACE appeared to understand that its regulations were not up to par when initially promulgated. In responding to comments aimed at USACE's consultation obligation, USACE stated:

A few comments question the adequacy of the consultation provision. Consultation can be very beneficial in resolving issues and considering alternatives to avoid or minimize adverse effects. Therefore, we fully intend to use consultation in the permit process when appropriate. We believe we have provided for adequate time to consult on the issues in most cases.

55 Fed. Reg. at 27001-27002 (emphasis supplied). In accordance with the NHPA and ACHP's regulations, USACE does not have the discretion to determine when consultation is "appropriate." Rather, USACE is required to consult with Indian tribes when a decision could impact an Eligible Property. The requirement to consult with Indian tribes is mandatory.

Consequently, the Federal Government should require USACE to modify its current regulations to conform to the NHPA and ACHP mandate. USACE's regulation is invalid, and not authorized in accordance with law, until such action is taken.

### **C. Conclusion**

REDCO appreciates and recognizes the intricacies involved with implementing uniform standards for tribal consultation policies across Federal agencies, and REDCO commends the Federal Government's efforts to improve tribal consultation on infrastructure decision-making. In many instances, Federal agencies can benefit from following through with the components of consultation policies that are already in place. Other situations, as with the USACE's Appendix C, will warrant modification and revision of existing policies. Thank you for the opportunity to submit these comments for consideration.

Sincerely,



Wizipan (Garriott) Little Elk  
Executive Director  
Rosebud Economic Development Corporation