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THE SUQUAMISH TRIBE

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November 30, 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 - Consultation with Department of Justice, Department of Interior, and U.S. Army Corps of Engineers

Dear Assistant Secretary Roberts:

The letter transmits the Suquamish Tribe's comments concerning Federal decision-making on infrastructure projects that requires timely and meaningful tribal input in response to the October 11, 2016 letter from the Department of Justice (DOJ), the Department of Interior (DOI) and the U.S. Army Corps of Engineers (Corps). The Suquamish Tribe is a signatory to the 1855 Treaty of Point Elliott, one of the Stevens Treaties. Elected officials of the Suquamish Tribe attended and offered testimony at the listening session with the DOJ, DOI, and the Corps on October 25, 2016 in Seattle, Washington.

1. The Existing Framework Does Not Promote Meaningful Government-to-Government Engagement with Tribes for Decision-making on Infrastructure Projects

a. Tribal Consultation Policies

Despite President Barack Obama's November 5, 2009 Presidential Memorandum on Tribal Consultation that directed Federal Executive Departments and Agencies to update detailed plans of actions to implement tribal consultation policies and directives as set forth in the 2000 Executive Order 13175, there has been little to no improvement in the federal government's meaningful engagement or consultation with tribal governments concerning infrastructure projects. A fundamental disconnect exists in the way in which federal agencies and federal lead agencies engage or do not engage in tribal consultation. It is more common that Federal agencies inconsistently interpret and misinterpret the purpose and meaning of tribal consultation and treat tribal consultation as a "check the box" process, especially when not compelled by statute

Many statutory frameworks do not require tribal consultation such as the National Environmental Policy Act (NEPA), Endangered Species Act (ESA) and other laws. The Rivers and Harbors Act (RHA)

does not require tribal consultation in the existing statute but federal case law compels the Corps to consult with tribes concerning proposed infrastructure project permit applications and to determine if the impacts to treaty rights are greater than *de minimis*. The Corps regulatory permit application review process, as demonstrated by the current conflict at the Dakota Access Pipeline (DAPL), does not guarantee meaningful tribal consultation will occur when traditional tribal cultural properties and tribal cultural resources will be impacted when the Corps has discretion to consult or not in Appendix C of its regulations.

To illustrate this disconnect, the Corps Tribal Consultation Policies[1] provide six principles that guide Corps activities and operations and address the Corps consultation requirements with Tribes are:

- Meet the Trust responsibility;
- Honor the government-to-government relationship;
- Acknowledge the inherent sovereignty of Tribes;
- Engage in pre-decisional consultation;
- Protect natural and cultural resources when possible; and
- Find opportunities to use existing authorities to encourage economic capacity building and growth.

The Supreme Court has recognized the "undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The obligation of the trust relationship has been interpreted to impose the highest fiduciary duty owed in conducting "any Federal government action" which relates to Indian tribes. *Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir. 1981) (EPA owes a fiduciary duty in its action); *Pyramid Lake Tribe v. Navy*, 898 F. 2d 1410, 1420 (9th Cir. 1990) (Navy owes fiduciary duty in its action); *Northwest Sea Farms v. United States Army Corps of Eng'r*, 931 F.Supp. 1515, 1520 (1996) (fiduciary duty applies to permit decisions by the Corps); *Muckleshoot v. Hall*, 698 F. Supp. 1504, 1510-11(1988) (fiduciary duty applies to permit decisions by the Corps).

In carrying out its fiduciary duty, it is the government's responsibility to ensure that Indian treaty rights are given full effect. See *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). Federal agencies have a duty to investigate potential adverse impacts of treaty-secured resources thoroughly, and not simply make a "judgment call" or balance competing interests in choosing the appropriate course of action. See *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1973); *Northwest Sea Farms*, 931 F. Supp. at 1521.

The Corps website expressly addresses the Corps pre-decisional consultation requirements with Tribes, "The U.S. Army Corps of Engineers will involve Tribes collaboratively, before and throughout decision making, to ensure the timely exchange of information, the consideration of disparate viewpoints and the utilization of fair and impartial dispute resolution processes." Other key Department of Defense (DOD) consultation principles articulated in DOD policies include, but are not limited to, building stable and

[1] "US Army Corps of Engineers (CORPS) Update on Compliance with Policies and Directives of President Obama's Memorandum on Tribal Consultation, 5 Nov 2009" July 25, 2011; American Indian and Alaska Native Policy and Department of Defense Instruction Number 4710.02: DoD Interactions with Federally-Recognized Tribes (2006).

enduring government-to-government relations with tribes and integrating consultation such as:

> Recognizing that there exists a unique and distinctive political relationship between the United States and the tribes that mandates that, whenever DoD actions may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands, *DoD must provide affected tribes an opportunity to participate in the decision-making process that will ensure these tribal interests are given due consideration in a manner consistent with tribal sovereignty authority* (m); (emphasis added)
>
> *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 affected protected tribal resources, tribal rights, and Indian lands*; (emphasis added)
>
> *Providing 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*; (emphasis added)

The Corps failing to engage in meaningful and timely tribal consultation when federal actions impact tribal rights and resources has a long history that, sadly, remains true today. On October 25, 2016, many tribal leaders from across the Pacific Northwest and across the country provided concrete examples of examples where tribal rights and resources were impacted by federal actions where federal agenices failed to meaningfully engage with tribes. The conflict at the DAPL project is a vivid example of that failure.

Unless compelled by statute, lead federal agencies either fail to follow tribal consultation requirements or fashion their approach to tribal consultation in a manner that suites the lead agency's outcome. For example, the U.S. Navy as lead agency under NEPA commonly treats tribes like the public – accepts scoping comments and comments on a draft Environmental Impact Statement (EIS) but does not meaningful engage with tribes under NEPA to determine impacts to treaty reserved rights. The Navy publishes a final EIS and a Record of Decision not based on meaningful consultation with tribes. Instead, these final documents are solely focused on the Navy's perspective and preferred outcome. The Navy consistently underestimates impacts to treaty-reserved rights and resources and includes mitigation to off-set treaty impacts that tribes have not agreed to.

Another example is the Federal Energy Regulatory Commission's (FERC) tribal consultation policy that encourages government-to-government consultation while at the same the Commission has in the past informed the Tribe (Admiralty Inlet Pilot Tidal Project) that their rules prohibit off–the-record communications between the Commission and outside of the Commission. FERC claims that engaging in tribal consultation requires them to "issue a public notice of the meeting, allow interested parties to attend as observers, and prepare a summary of the meeting, and place the summary in the record of the proceeding." FERC apparently misunderstands its trust obligation and the importance underlying its tribal consultation policy.

b. Statutory Framework

The Tribe's experience shows that attempting to address the issue of tribal consultation from the top does not trickle down to change in-grained institutional practices of agency management and staff at all levels and across local federal agencies – by district or by region. Pressure from agency headquarters has little effect to change these institutional practices. That is why legislative changes need to be made.

Only a few federal statutes compel tribal consultation, such as the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and the Archeological Resources Protection Act of 1979. Existing tribal consultation policies are not working across the family of federal agencies and across many different jurisdictional boundaries, including geographic boundaries. New legislation should be passed to strengthen statutes related to project permit application review and compel federal agencies to engage in tribal consultation to include consideration of impacts to treaty-reserved rights and resources on- and off-reservation. Improved statutory language would place a legal obligation on federal agencies to meet their tribal consultation and trust obligations duties when reviewing infrastructure and other project permit applications.

In addition, statutory changes are needed to expand the definition of a "project area" under NEPA, RHA, and other project permit review statutes to eliminate the segmentation of project impacts that are inextricably linked by activity and/or by resource (soil, water, and other). A full scale review of a proposed project's impact is necessary when tribal rights and resources are at stake especially given tribes' ancestral histories and hunting, fishing, and gathering rights off-reservation land.

c. Fast-Tracking of Infrastructure Projects.

Tribal consultation is broken. Fast-tracking infrastructure projects when the existing tribal consultation framework is not working will only lead to more DAPL-like conflicts. At a minimum, we urge you to more narrowly tailor those projects that qualify for fast-tracking and not allow fast tracking on all infrastructure projects, especially where projects may adversely affect tribal treaty rights and interests. As mentioned above, dividing a proposed project into segments to minimize the cumulative impacts from a proposed project places the burden on tribe(s) to defend their rights rather than evaluating the project impacts as a whole. Most tribes retain off-reservation reserved treaty rights that require protection by federal trustees under the trust obligation. Infrastructure projects that span a large geographic area should be required to be reviewed as an individual permit application not a nationwide permit to ensure that impacts to tribal rights and resources are fully and meaningfully addressed.

2. The Corps' Appendix C (National Historic Preserve Act Regulations) Should be Repealed.

a. Background

The intent of National Historic Preservation Act (NHPA) is to protect places of historic, architectural, and/or cultural significance and to provide a meaningful balance between preservation and new construction by incorporating the consideration of historic properties and traditional cultural properties (TCPs) in federal agency planning. Prior to the NHPA, desecration of tribal sacred sites,

including those used since time immemorial for religious, cultural, and ceremonial purposes, was common place. The Advisory Council on Historic Preservation (ACHP), the independent federal agency charged by Congress with overseeing implementation of the NHPA, remains the sole federal agency authorized by statute to promulgate implementing regulations for Section 106.[2] For decades the ACHP has repeatedly expressed its view that the Corps application of Appendix C (Section 106 regulations) on proposed projects does not fulfill the agency's responsibility under the NHPA and is not in compliance with Section 106 of the NHPA. Consistent application of Section 106 regulations across agencies is essential to maintain integrity of the Section 106 process and to protect historic properties and TCPs. The NHPA provides a much more expansive recognition that TCPs play a major role in protecting indigenous cultural beliefs, customs, and practices. The NHPA requires tribal consultation as part of the NHPA process to help ensure that impacts on TCPs are considered and provides confidentiality for and protection of cultural information disclosed by tribes.[3] If a historic site and/or TCP is identified as a site that could be impacted by a project , the federal agency must determine whether the project will have an adverse impact on the property and must consider the views of consulting parties. The agency may consider direct and indirect effects that are far away in distance or time, including cumulative effects, as long as the effects are reasonably foreseeable.[4] If an agency determines there will be an adverse effect, then the agency is required to consult with the Tribal Historic Preservation Office (THPO) or the State Historic Preservation Office (SHPO) and other consulting parties to develop alternatives to avoid, minimize, or mitigate the adverse effects.[5]

The Corps' Appendix C Section 106 regulations are not only problematic, particularly for tribes, but they significantly conflict with and are not in compliance with the NHPA and ACHP's regulations, provide less protection of historic properties and TCPs, and are invalid. The protection of traditional cultural properties and historical places was not within Congress's purview in 1802 when it enacted legislation to permanently establish the Corps.[6] In the 1980s, the Corps promulgated its own Section 106 regulations (Appendix C), without the ACHP's approval, as a component of its general permit program and appears to be "the primary method of eliminating unnecessary federal control."[7] The Corps' longstanding mission is in part "to strengthen our Nation's security, energize the economy and reduce risks from disasters."[8] The emphasis on economic development in the Corps mission statement may be one of the underlying bases for the Corps stated regulatory policy "to avoid unnecessary regulatory controls"[9] and that policy gives rise to the incompatibility the ACHP's regulations. The Corps

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[2] *See* 54 U.S.C. § 304108(a); *see also* 54 U.S.C. § 306102(b)(5)(A) (requiring federal agency procedure to be consistent with the NHPA's regulations).
[3] 54 U.S.C. § 302701(e); Protection of Historic Properties, 65 Fed. Reg. 77,698 (proposed Dec. 12, 2000) (final rule codified as amended at 36 C.F.R. § 800 (2013).
[4] 36 C.F.R. § 800.5 (a) (2013).
[5] *Id.* § 800.6 (a).
[6] See Act of Mar. 16, 1802, ch. 9, 2 Stat. 132; The National Trust on Historic Preservation published a report that suggests the organic act of a federal agency affects its implementation of Section 106 of the NHPA. Nat'l Trust for Historic Pres. The National Forest System: Cultural Resources at Risk 11 (May 2008).
[7] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986) (codified as amended at 33 C.F.R. § 325 app. C (2013)); 33 C.F.R. § 320.1 (a) (3).
[8] Mission and Vision – Headquarters U.S. Army Corps of Engineers, http://www.Corps.army.mo:/About/Mission-and-Vision/ (visited on October 3, 2016).
[9] 33 C.F.R. § 320.1 (a) (3).

application of Appendix C is a root cause of the current dispute associated with the Dakota Access Pipeline project.

As compared to the ACHP's regulations, the Corps Appendix C regulations significantly limit the Corps responsibilities. Appendix C, therefore, is less protective of historic properties and TCPs while at the same time provides more protection of economic interests. Several key components of Appendix C that are inconsistent with the NHPA and offer significantly less protection include:

(1) Appendix C Significantly Decreases the Area of Potential Effect. Appendix C significantly limits the Corps geographic scope/ jurisdiction of the "area of potential effect" (APE) to the "permit area" (reliance on the "waters of the United States") rather than using a definition of APE consistent with the ACHP's regulations that defines the APE as the geographic area(s) within which an undertaking may *directly or indirectly* cause alterations in the character or use of historic properties. The ACHP regulations further define the APE as influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking. Even if the Corps argues that is jurisdiction is constitutionally limited to "waters of the United States,"[10] Congress can invoke its jurisdiction over Indian affairs to require the Corps to consider impacts on TCPs.[11]

(2) Appendix C Significantly Narrows the Definition of Adverse Effects. Appendix C significantly limits the CORPS's responsibility by narrowing the definition of adverse effects in a manner that does not follow the law, and is not in sync with the ACHP's regulations. The limitation of the APE to the "permit area" combined with the narrowing of the definition of "adverse" effect ignores the ACHP's regulatory requirements that consider direct and indirect effects that are far away in distance or time, including cumulative effects, as long as the effects are reasonably foreseeable. This in turn creates unnecessary and unauthorized risk for historic properties and TCP's.

(3) Appendix C Does Not Require Tribal Consultation. Appendix C does not require consultation with tribes but provides merely that tribes "may be consulted as part of the district engineer's investigations"; it does not require consultation with tribes at any point.[12] The ACHP's regulations require tribal consultation and consultation with THPO and SHPO. Further, if the district engineer deems there is little likelihood that historic properties exist or will be affected, only a public notice is required. Public notice is not an adequate procedure for government-to-government consultation. Government-to-government consultation is most effective when commenced as early as possible in the federal decision-making process. Finally, Appendix C grants the Corps the sole right to terminate consultation, unlike the ACHP regulations that provide for other parties to terminate consultation.

(4) Appendix C Fails to Fully Protect Confidentiality. The NHPA and the ACHP's regulations require agencies to withhold confidential information during the process of identifying historical

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[10] *Rapanos v. United States*, 547 U.S. 715, 741 (2006).

[11] *See United States v. Lara*, 541 U.S. 193, 201-02 (2004) (jurisdiction over relations with other sovereigns, including Indian nations, is vested in the federal government through the "necessary concomitants of nationality.")

[12] 33 C.F.R. § 325 App. C (5) (e)(2013) ("[I]nvestigations *may* consist of . . . further consultations with . . . Indian tribes . . . ." (emphasis added); *Id.* § 325 App. C(9)(a) ("[*M]ay* coordinate . . . with . . . any appropriate Indian tribe . . . ." (emphasis added).

properties/TCPs "when disclosure may cause significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners."[13] Appendix C only protects information from disclosure when there is a "substantial risk of harm, theft, or destruction."[14] Unlike the ACHP's regulations, this provision does not include language that protects the integrity of TCPs for the purpose of cultural practice. Although destruction of a property is of concern, the cultural uses of a TCP are often significant and are not offered protection by Appendix C. A lower standard of confidentiality is allowed in Appendix C.

b. Unauthorized Delegation of Rulemaking Authority

Three federal courts have enjoined the Corps from using Appendix C, holding that Appendix C is inconsistent with the ACHP's regulations.[15] Congress did not explicitly or implicitly delegate regulatory authority to the Corps to promulgate its own Section 106 regulations under an authorizing statute; a federal agency does not have independent legislative power. If Congress intended to delegate authority to other agencies besides the ACHP, it would have done so explicitly.[16] By promulgating and utilizing regulations that narrow its Section 106 responsibilities, the Corps has violated both the intent and the letter of the law. In addition, Appendix C allows the Corps to avoid the Section 106 review process and has the effect of excluding analysis of TCPs as mandated by Congress.[17] Although Appendix C may reflect the Corps mission to promote economic development, the Corps mission and authorizing statutes do not adequately integrate historic preservation into the agency's mandate and give rise to the desecration of sacred sites. The NHPA and the ACHP's regulations should consistently govern historic preservation when a federal agency has a conflicting mission that is likely to prioritize other values over historic preservation.

For all the above reasons, the repeal of Appendix C will eliminate the application of incongruent regulations that provide less protection for historic properties and TCPs during the permit review of a proposed development project, will foster integrity and consistency in future application of the Section 106 regulatory process, and will provide certainty for all stakeholders, including project developers. The Corps must comply with all federal laws in its review of permit applications, including the NHPA.

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[13] 36 C.F.R. § 800.11(c) (1).
[14] 33 C.F.R. § 325 App. C (4) (c) (2013).
[15] *See Colo. River Indian Tribes v. Marsh*, 605 F.Supp.1425, 1437 (C.D. Cla.1985) (invalidating Corps definition of "permit area"); *Comm. To Save Cleveland's Huletts v. U.S. Army Corps of Eng'rs*, 163 F. Supp.2d 776, 791-92 (N.D. Ohio 2001) (voiding permit for Corps failure to wait for ACHP comments); *Salyer Park Vill. Council v. U.S Army Corps of Eng'rs*, 2003 WL 22423202, at *4 (S.D. Ohio Jan. 17, 2003) (permanent injunction because Corps improperly terminated consultation). *But see Sierra Club v. Slater*, 120 F.3d 623, 636 (6th Cir. 1997) (holding that the Corps could follow a provision in Appendix C that allows the Corps to rely on a lead agency in complying with the NHPA); *McGehee v. U.S. Army Corps of Eng'rs*, 2011 WL 2009969 at *5 (W.D. Ky. May 23, 2011)(holding that ACHP and Corps definition of the APE did not conflict under the circumstances).
[16] *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.")
[17] *See* 54 U.S.C. § 302706.

If you have any questions, please contact me at your convenience. We appreciate your consideration of the Tribe's comments.

Respectfully,

for Bardow M. Lewis MLA

Bardow M. Lewis, Vice-Chairman
Suquamish Tribe