

YAKAMA NATION'S POSITION PAPERS



**Government-to-Government Listening Session
Seattle, WA**

October 25, 2016

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Position Paper in Support of An Executive Order Requiring Native Nations' Informed Consent To Federal Undertakings Of Potential Impact To Tribal Sacred Sites

Presented by the Confederated Tribes and Bands of the Yakama Nation¹
October 25, 2016

The Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) requests that President Obama issue a new Executive Order or amend Executive Order 13,007 to require that the United States obtain the informed consent of Native Nations before it takes any action of implication to Indian sacred sites, especially and including those sites in which Indian Peoples practice their rights reserved by Treaties between the United States and Native Nations.

A. As to Sacred Sites, Executive Order 13,007 Should Be Updated, Or a New Executive Order Issued, To Reflect Primacy of Treaty Rights Under Domestic Law.

Executive Order 13,175, titled “Consultation and Coordination With Indian Tribal Governments,” is expressly rooted in “the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions.”² Likewise, Executive Order 13,007, titled “Indian Sacred Sites,” stands “in furtherance of Federal treaties . . . in order to protect and preserve Indian religious practices.”³ In keeping with Executive Order 13,007, Congress declared “it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites . . . and the freedom to worship through ceremonials and traditional rites.”⁴

The United States Constitution makes clear that the Treaties entered into between the United States and Native Nations “**shall be the supreme Law of the Land.**”⁵ As a general rule, Indian Treaties reserve certain lands for the exclusive use and occupation of the Indians whose ancestor(s) signed the Treaty; such lands are commonly known as reservation lands.⁶ In addition, Native Nations retain the “usual privileges of

¹ The Confederated Tribes and Bands of the Yakama Nation reserve the right to supplement this position paper as new or additional information is available.

² President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009). *See also* President William J. Clinton, Government-to-Government Relations with Native American Tribal Governments: Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 22,951, 22,952 (Apr. 29, 1994); Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998); Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,251 (Nov. 6, 2000).

³ President William Clinton, 61 Fed. Reg. 26771 (May 24, 1996).

⁴ *See also* 42 U.S.C. § 1996.

⁵ U.S. Const. Art. VI, Cl. 2 (emphasis added).

⁶ *See, e.g.,* Treaty with the Yakama, 12 Stat. 951 (1859), art. 2; Treaty with the Nez Percés, 12 Stat. 957 (1855), art. 2; Treaty of Medicine Creek, 10 Stat. 1132 (1854), art. 2; Treaty of Point Elliot, 12 Stat. 927

occupancy”⁷ in aboriginal lands “ceded” by Treaties,⁸ “unless such rights were clearly relinquished by treaty or have been modified by Congress.”⁹ Included in the “usual privileges of occupancy” is the right to access and maintain traditional sacred sites and to engage in gathering, hunting, fishing and related religious activities thereon.¹⁰ Neither national, state nor local government agencies may “qualify, restrict or in any other way interfere with the full exercise of those rights.”¹¹ Insofar as reservation or “ceded” lands established or reestablished “by statute, agreement, or executive order generally have the same legal ramifications as those created by treaty,”¹² all 567 Native Nations possess usufructuary—i.e., residual proprietary rights short of title, like the right to hunt in open and unclaimed areas—and other property rights throughout aboriginal Indian Country.

B. International Law Requires Bi-Lateral Consultation And Consent To Alter Any Federal Treaty Rights Or Duties..

Under principles of customary international law, unless otherwise stated, all Indian Treaties invoke mutually binding obligations between parties.¹³ These obligations must be interpreted in “good faith” and in a manner that fulfills the purpose of the Treaty at the time of formation.¹⁴ Termination or a change in the scope of a Treaty can occur **only by consent of the parties** or pursuant to the terms of the Treaty itself.¹⁵ That consent can only be obtained through **bilateral nation-to-nation consultation**.¹⁶

The duty of consultation vis-à-vis informed consent is “a generally accepted principle in international law.”¹⁷ Domestic law mirrors that duty. For example, federal law already

(1859), art. 2; Treaty of Point-No-Point, 12 Stat. 933 (1855), art. 2; Treaty of Neah Bay, 12 Stat. 939 (1855), art. 2; Treaty of Olympia, 12 Stat. 971 (1855), art. 2.

⁷ *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 351 (7th Cir. 1983).

⁸ See, e.g., Treaty of Fort Laramie With Sioux, 11 Stat. 749 (1851), art. 5; Treaty with the Sioux, 15 Stat. 635 (1868), art. 2; Treaty with the Yakama, 12 Stat. 951 (1859), art. 3; Treaty with the Nez Percés, art. 3; Treaty of Medicine Creek, art. 3; Treaty of Point Elliot, art. 3; Treaty of Point-No-Point, art. 4; Treaty of Neah Bay, art. 4; Treaty of Olympia, art. 3.

⁹ *United States v. Dion*, 476 U.S. 734, 738 (1986) (internal citation omitted).

¹⁰ *Lac Courte Oreilles*, 700 F.2d at 352 (citing e.g. *United States v. Michigan*, 471 F.Supp. 192 (W.D.Mich. 1979), aff’d in relevant part, 653 F.2d 277 (6th Cir.), cert. denied, 454 U.S. 1124 (1981); *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976)); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 178 (1999); *Oneida Indian Nation v. Sherrill*, 337 F.3d 139, 148 (2nd Cir. 2004) (affirming tribal usufructuary rights over “ceded” tribal lands).

¹¹ *United States v. Washington*, 384 F.Supp. 312, 334 (W.D. Wash. 1974); see also *id.*, at 337 (“[T]hat the exercise of [a treaty] right may be limited in any way by the police power of the state, without having previously received the authority to do so from Congress, seems to be diametrically opposed to relevant treaty law . . .”).

¹² *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1202, n.3 (10th Cir. 2002) (citation omitted). This is offered without prejudice to any Native Nation’s position regarding their exclusive or primary aboriginal territory.

¹³ Restatement (Third) Foreign Relations Law of the United States, § 325 (1986) [hereinafter *Restatement*].

¹⁴ Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

¹⁵ *Restatement*, *supra* note 12, at § 332.

¹⁶ See generally *id.*

¹⁷ S. James Anaya, *Indigenous Peoples’ Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT’L & COMP. L. 7 (2005); UNITED NATIONS DECLARATION ON THE RIGHTS OF

contemplates that the United States obtain a Native Nation's informed, in fact written, consent before taking certain federal actions implicating the Native Nation's reserved or reservation Native lands.¹⁸ Further, many Native Treaties expressly require "consultation" by the United States with the Native Nation signatory prior to certain federal actions being taken under the terms of, or otherwise of implication to, the Treaty.¹⁹ Although domestic consultation often "does not require the [United States] to obtain the appropriate Indian tribes' consent" before taking certain federal action contemplated by statutes²⁰—including the National Environmental Policy Act (NEPA) and Section 106 of National Historic Preservation Act²¹—consultation and consent *are* required when the federal action implicates Treaty lands or resources.²²

C. Federal Courts Have Recognized The Treaty Rights To Bi-Lateral, Nation-to-Nation Consultation And Consent.

Consider *Confederated Tribes and Bands of Yakama Nation v. U.S. Department of Agriculture*, wherein a U.S. District Court issued an injunction against the United States, enjoining a federally permitted private development within the Yakama Nation's off-reservation aboriginal hunting, fishing and gathering area, as reserved to the Yakama by Article III of the Treaty With the Yakama. The District Court found there were "serious questions about whether Defendants adequately consulted with the Yakama Nation *as required by the Yakama Treaty of 1855*," despite the fact that the Treaty does not express a "consultation" obligation.²³ Indeed, the United States' consultation and

INDIGENOUS PEOPLES, G.A. Res. 61/295 U.N. Doc. A/RES/61/295 (Sept. 13, 2007), art. 32 [hereinafter *UNDRIP*] (Nation "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."); *Id.*, art. 19 (Nation "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain . . . free, prior, and informed consent . . . before adopting and implementing legislative or administrative measures that may affect them."); *see also id.*, art. 10, 11, 18, and 29; *see also* Special Rapporteur on the Rights of Indigenous Peoples, *Rep. on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. A/HRC/12/34 (July 15, 2009).

¹⁸ 25 C.F.R. § 151.8 ("A tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition."); *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 142 F.3d 1325 (10th Cir. 1998) (applying 25 C.F.R. § 151.8); 25 U.S.C. § 324 ("No grant of right-of-way over and across any lands belonging to a tribe . . . shall be made without the consent of the proper tribal officials."); 25 U.S.C. § 3002(c)(2) (prohibiting the intentional excavation or removal of Native American cultural items from tribal lands without the "consent of the appropriate . . . Indian tribe"); 25 U.S.C. §§ 1321-1326, 1322(a) ("consent of the Indian tribe" required for states to assume criminal or civil jurisdiction in Indian Country); *Kennerly v. Dist. Ct. of Ninth Judicial Dist. Of Mont.*, 400 U.S. 423, 428 (1971) (same); 25 U.S.C. § 179 (imposing monetary penalty for driving stock to graze on lands of Indian tribe without its consent)

¹⁹ *See, e.g.*, Treaty With The Kaskaskia, Peoria, Etc., 10 Stat. 1082 (1854), art. 7; *see Peoria Tribe of Indians of Okla. v. United States*, 390 U.S. 468 (1968).

²⁰ *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 209 F.Supp.2d 1008, 1023 (D.S.D. 2002) (emphasis deleted).

²¹ 16 U.S.C. § 470 *et seq.*

²² *See e.g. Klamath Tribes v. United States*, No. 96-0381, 1996 WL 924509 (D. Or. Oct. 2, 1996).

²³ 2010 WL 3434091, at *4 (emphasis added).

consent duty is intrinsic to all Treaties.²⁴ And under customary international law, Native Nations enjoy “the right to the recognition, observance, and enforcement of treaties” and to have the United States, as Nation-State, “honor and respect such treaties.”²⁵

CONCLUSION

Although both Executive Orders 13,175 and 13,007 reflect the importance of Indian Treaties and contemplate federal consultation with affected Native Nations, neither Executive Order embodies the United States’ duty to obtain Native Nations’ informed consent as is normative under the Treaties and other existing federal law, especially in order to “protect and preserve” Indian sacred sites.

The Yakama Nation requests that President Obama issue a new Executive Order or amend Executive Order 13,007 to require that the United States obtain the informed consent of Native Nations before it takes any action of implication to Indian sacred sites, especially and including those sites in which Indian Peoples practice their rights reserved by Treaties between the United States and Native Nations.

Also, Executive Order 13,007 provides that ‘Sacred site’ means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion’ But “sacred site” should not be narrowly defined vis-à-vis “Federal land.” That term should instead be defined vis-à-vis federal undertaking.²⁶

²⁴ Restatement, *supra* note 12, at § 332.

²⁵ *UNDRIP*, *supra* note 16, at art. 37. President Obama announced the United States’ support for UNDRIP on December 16, 2010. See Press Release, U.S. Dept. of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010) available at <http://www.state.gov/documents/organization/184099.pdf>.

²⁶ 36 CFR § 80016(y) (“Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.”).

Position Paper in Support of Regional EIS for Oil, Coal, and Liquid Natural Gas Projects Throughout the Pacific Northwest

Presented by the Confederated Tribes and Bands of the Yakama Nation¹
October 25, 2016

The Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) calls upon the Obama Administration to (1) immediately stop all federal actions related to oil, coal, and liquid natural gas² processing and transportation in and through the Pacific Northwest region, and (2) prepare one or more regional environmental impact statement(s) as presently allowed by the National Environmental Protection Act³ to consider the significant impacts of fossil fuel processing, transportation, and export on our inherent and treaty-reserved rights.

The projects presently proposed and under review in piecemeal applications will have undeniably *regional* impacts. Among these impacts are violations of, or undue burdens on, the rights of several if not all Native Nations in the Pacific Northwest. The federal government has the authority to conduct regional EIS’s when projects are geographically related so that cumulative impacts may be appropriately addressed. Given the significant and disparate impacts the Yakama Nation has borne, and will continue to bear, as a result of the fossil fuel industry’s plans for our region, we demand immediate executive action prescribing government-to-government consultation in developing a regional EIS as an initial step towards addressing the fundamental problems with the current federal policy on tribal government consultation.

A. Factual Background

Since time immemorial, the Yakama Nation has exercised our traditions and culture in harmony with our natural environment. When we negotiated our Treaty, we reserved rights to hunt, fish, gather roots and berries, and freely practice our religion as it was intended by our ancestors; these practices sustain our People and culture to this day. Since those rights were first negotiated and reserved by law, they have been under near-constant attack by private and governmental actors.

Today, the fossil fuel industry has used the inadequate consultation policies of the U.S. Army Corps of Engineers (among other federal agencies) to wage a tactical campaign undermining our rights and culture while transforming the Yakama homelands into an international fossil fuel transportation and export hub.

The Yakama Nation is fighting these efforts on several fronts, including in state, federal, local, and administrative forums. For example, the Corps has been asked to issue a permit for a plan to construct a coal loading facility at Coyote Island in the Columbia River. The Yakama Nation,

¹ The Confederated Tribes and Bands of the Yakama Nation reserve the right to supplement this position paper as new or additional information is available.

² Hereafter “LNG”

³ Hereafter “Regional EIS”

along with other Native Nations with reserved fishing and other usufructuary rights demanded the Corps prescribe a regional EIS for this project considering other coal-related transportation and export plans for the Pacific Northwest. Unfortunately, the Corps failed to exercise its lawful discretion to require a Regional EIS, which would have helped us protect our imperiled rights in this area. Fortunately, the State of Oregon denied a state-issued permit, which led the Corps to stay its limited review pending appeal of that denial.⁴ The Corps should still demand a regional EIS regarding this and other fossil-fuel-related proposals should the matter be taken up again by the federal government.

The Coyote Island project is one of many such fossil fuel-related projects appearing in our region. The Yakama Nation is fighting coal, oil, and LNG proposals in areas where Yakamas have treaty-reserved rights in and around the Columbia River Gorge, and throughout its Ceded Lands. We are working with our relatives of the Lummi Nation in fighting a coal export facility at Cherry Point, and of the Swinomish Indian Tribal Community in fighting the transportation of Bakken Crude Oil through its reserved lands. We are collectively fighting these projects on a project-specific and site-specific basis. In each of these projects—addressed piecemeal by federal, state, and local governments—the fossil fuel industry seeks to narrow the scope of their so-called “Areas of Potential Effect (APE)” to the greatest extent possible. They demand our Trustee ignore treaty rights directly impacted by these projects because, although rail and barge traffic may increase several fold, cumulative impacts fall outside the industry-orchestrated and federally approved narrow APEs. Thus, the regional impacts of these projects, including regional impacts to the Yakama Nation’s rights, are ultimately ignored because the Corps refuses to perform a Regional EIS and instead acquiesces to the fossil fuel industry’s strategy of having these projects reviewed in the vacuum of their narrow APEs.

B. A Regional EIS on Oil, Coal, and LNG Projects is Appropriate Given the Number of Project Proposals and the Cumulative Impacts of those Proposals on the Region.

The National Environmental Protection Act (“NEPA”) requires all federal agencies to consider whether major federal actions will have a significant impact on the environment.⁵ Major federal actions are defined to include:

Adoption of programs, such as a **group of concerted actions** to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.⁶

Any such major federal actions are also considered ‘broad federal actions,’ which may trigger the need for a geographically based environmental impact statement, such as a Regional EIS.⁷

⁴ nwp.usace.army.mil/Media/News-Releases/Article/497350/corps-places-coyote-island-terminal-permit-application-review-on-hold/

⁵ 42 U.S.C. 4332(2).

⁶ 40 C.F.R. 1508.18(b)(3) (emphasis added).

⁷ 40 C.F.R. 1502.4(b).

The United States Supreme Court has further clarified that a Regional EIS is appropriate when an agency considers “several proposals for coal-related actions that will have a cumulative or synergistic environmental impact on a region . . .”⁸. In other words, federal agencies should conduct Regional EIS’s where there are several related actions that will have a cumulative environmental impact on a region.

Although the Supreme Court in describing the propriety of a Regional or “programmatically” EIS ultimately concluded that the federal government did not act arbitrarily and capriciously in deciding against a Regional EIS, the federal judiciary has made it clear that federal agencies may not escape good faith cumulative impacts analysis by examining projects in a piecemeal manner when they are geographically and otherwise related. For example, in one case, the Forest Service decided to avoid a comprehensive EIS analyzing the cumulative impacts of constructing a timber road.⁹ The U.S. Court of Appeals for the Ninth Circuit determined that although the agencies are provided a wide discretion in determining the scope of an EIS, an analysis considering the cumulative impacts of several related actions in a single EIS was required where, as was the case there, the timber road itself would facilitate an increase in timber sales; the impacts of which sales the agency had failed to consider.¹⁰ The court in that case held that to not “require [a comprehensive EIS] would permit dividing a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.”¹¹ Indeed, the United States’ courts have held that “[w]here there are large scale plans for regional development,” a regional EIS *and* a site-specific EIS must be prepared.¹²

In the case involving a timber road, the Forest Service argued that the timber sales likely to follow the construction of the road were “too uncertain and too far in the future to analyze their impacts together with those of the road.”¹³ Here, in several of the fossil fuel projects proposed for our region, the fossil fuel industry largely *admits that their projects will with certainty result in immediate* and significant increases in rail, barge, and ship traffic, all of which undermine the Yakama Nation’s rights and, in some cases, entirely eradicate the ability to exercise those rights in certain areas. The industry claims, however, that the impacts to the Yakama Nation’s rights resulting from such significant and widespread increases in industrial traffic *must* not be considered in their project-by-project piecemeal EIS’s because those impacts are beyond the scope of their disingenuously limited and narrow APEs.

This is precisely why a Regional EIS is a necessary first step to addressing the systematic violations of the Yakama Nation’s rights resulting from these so-called developments.

Thus, because the Corps is actively considering several proposed coal, oil, and LNG facilities in the Pacific Northwest, which taken together will have a significant environmental impact on our

⁸ *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

⁹ *Thomas v. Peterson*, 753 F.2d 754 (9th Cir.1985)

¹⁰ *Id.*

¹¹ *Id.* at 758; see also *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1407 (9th Cir.1985) (“Where there are large-scale plans for regional development, NEPA requires both a programmatic and a site-specific EIS. 40 C.F.R. § 1508.28, 1502.20[.]”) (additional citations omitted).

¹² *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir.1990).

¹³ *Churchill Cty. v. Norton*, 276 F.3d 1060, 1076–77 (9th Cir. 2001), opinion amended on denial of reh’g, 282 F.3d 1055 (9th Cir. 2002), citing *Thomas*, 753 F.2d at 759.

region, a Regional EIS is the only appropriate way to mandate consideration of the Yakama Nation's rights and culture. The actions are both major federal actions and broad federal actions because they constitute a group of concerted actions to implement fuel infrastructure throughout the Pacific Northwest, which triggers the opportunity for the Corps to perform a Regional EIS. To date, the Corps has been unwilling to do so.

CONCLUSION

We respectfully request that the Obama Administration exercise its authority to direct the Corps to stop all work on oil, coal, and LNG infrastructure projects throughout the Pacific Northwest, and perform a Regional EIS, in individual consultation with the Yakama Nation and regional Native Nations, in addition to site-specific EIS's, to consider the significant impacts of those projects on the environment. The cumulative impacts of oil, coal, and LNG projects proposed throughout the Pacific Northwest pose a significant threat to the environment, which will have a disparate, and indeed devastating negative impact on the Yakama Nation and our treaty-reserved rights, our culture, our religious practices, and indeed our entire way of life.

Position Paper in Support of the United States Army Corps of Engineers' Withdrawal of Appendix C

Presented by the Confederated Tribes and Bands of the Yakama Nation¹
October 25, 2016

The Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) call upon the United States Army Corps of Engineers (“Corps”) to withdraw its regulations and guidance, including 33 C.F.R. 325 Appendix C², which purport to implement Section 106 of the National Historic Preservation Act (“NHPA”). The Corps implemented Appendix C without congressional authorization or the Advisory Council on Historic Preservation’s (“ACHP”) approval, and on numerous occasions Appendix C’s substantive language ignores or contradicts ACHP’s regulations implementing the NHPA, 36 C.F.R. Part 800. The underlying problems with Appendix C have directly led to, caused, or facilitated the destruction of tribal culture, sacred sites, violations of Treaty rights, and other impacts to tribal peoples that might have been avoided in the absence of Appendix C.

Despite these legal shortcomings and in ignorance of the federal government’s Treaty and trust responsibilities to the Yakama Nation, the Corps has wielded Appendix C as a weapon, depriving us of a meaningful voice to assert our inherent and Treaty-reserved rights to protect our culture. These acts of cultural genocide must end. The Corps must withdraw Appendix C.

A. The Corps Implemented Appendix C Without Congressional Authorization.

Congress enacted the National Historic Preservation Act of 1966 to “foster conditions under which modern society and our historic property can exist in productive harmony”³ Section 106 of the NHPA requires federal agencies to consider the effects of their approval, funding, or licensing of undertakings on historic properties,⁴ and empowers the ACHP to administer and issue regulations implementing Section 106.⁵ In other words, the *only* agency with congressional authorization to issue regulations to implement Section 106 is the ACHP.⁶

Despite this limitation, the ACHP issued regulations purporting to allow federal agencies to promulgate their own regulations to implement Section 106.⁷ Congress did not authorize the ACHP to further delegate its rulemaking authority to other federal agencies, and it is questionable whether a federal court would uphold ACHP’s delegation.⁸ Given this lack of

¹ The Confederated Tribes and Bands of the Yakama Nation reserves the right to supplement this position paper as new or additional information is made available.

² Hereafter “Appendix C.”

³ 54 U.S.C. 300101(1).

⁴ 54 U.S.C. 306108.

⁵ 54 U.S.C. 304102.

⁶ 54 U.S.C. 304108.

⁷ 36 C.F.R. 800.14(a).

⁸ See Melissa Lorentz, Note, *Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers’ Section 106 Regulations are Invalid*, 40 Wm. Mitchell L. Rev 1580, 1603-1606 (2014).

statutory support for ACHP's delegation of rulemaking authority to federal agencies, including the Corps, the Corps should withdraw Appendix C and rely on ACHP's implementing regulations, 36 C.F.R. Part 800.

B. The Corps is Imposing Appendix C on the Yakama Nation Without the ACHP's Approval.

ACHP's regulations implementing Section 106 only allow other federal agencies to substitute their own Section 106 regulations with ACHP's prior approval.⁹ In 1990, the Corps issued Appendix C to implement Section 106 and replace the ACHP's implementing regulations, but the Corps failed to obtain ACHP approval.¹⁰ In 2012, ACHP informed the Corps that Appendix C "is in fundamental contradiction to the government-wide regulation governing the protection of historic properties," and confirms that the ACHP "has not approved Appendix C."¹¹ At least one federal court has similarly rejected the Corps' use of Appendix C without ACHP approval.¹² Despite these admonitions, the Corps persists in using Appendix C. Given the lack of regulatory authority for Appendix C, the Corps should withdraw Appendix C and rely on ACHP's implementing regulations.

C. Appendix C Improperly Ignores or Contradicts ACHP's Regulations Implementing Section 106 to the Yakama Nation's Detriment.

ACHP's implementing regulations require federal agencies who propose substitute regulations to ensure that such regulations are "consistent with the [ACHP's] regulations"¹³ Despite this unambiguous requirement, Appendix C impermissibly differs from ACHP's implementing regulations in a number of ways, including (1) the scope of the Area of Potential Effects ("APE"), (2) the requirements for obtaining the Yakama Nation's informed consent, and (3) the confidentiality protections afforded to traditional knowledge concerning culture.

The most egregious inconsistency between Appendix C and ACHP's implementing regulations concerns the definition of an APE in a given undertaking.¹⁴ ACHP requires that federal agencies determine the APE for proposed federal undertakings, within which the federal agencies must consider project impacts to historic properties.¹⁵ ACHP defines APE as "the geographic area or areas within which an undertaking may directly **or indirectly** cause alterations in the character or use of historic properties"¹⁶ In contrast, Appendix C defines APE as the "permit area,"¹⁷ which tends to be much narrower in scope than ACHP's definition allows. This inconsistency

⁹ 36 C.F.R. 800.14(a).

¹⁰ See Letter from John Fowler, ACHP Executive Director, to Amy Klein, Corps (Jan. 17, 2012) (on file with Yakama Nation Office of Legal Counsel); Letter from John Fowler, ACHP Executive Director, to Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works (Aug. 19, 2016) (on file with Yakama Nation Office of Legal Counsel).

¹¹ *Id.*

¹² *Comm. To Save Cleveland's Hulets v. United States Army Corps*, 163 F. Supp. 2d 776 (N.D. Ohio 2001).

¹³ 36 C.F.R. 800.14(a).

¹⁴ See *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985) (rejecting Corps' use of Appendix C to define area of potential effect because, in part, Appendix C had not been approved by the ACHP).

¹⁵ 36 C.F.R. 800.4(a).

¹⁶ 36 C.F.R. 800.16(d)(emphasis added).

¹⁷ 33 C.F.R. 325 app. C(5)(f).

limits the Yakama Nation's opportunity to protect the elements of its culture that are clearly affected by a federal undertaking, but which lie outside of the Corps' "permit area." In other words, Appendix C allows the Corps to ignore the indirect impacts of a federal undertaking that impact and often times destroy Yakama culture..

Regarding consultation, Appendix C limits the Corps' self-imposed consultation requirements to engage with the Yakama Nation on impacts to our culture, which are often caused by development projects under Corps purview. First and foremost, we reject the federal government's general position that it is only obligated to *consult* with the Yakama Nation on projects affecting our interests, rather than obtain our informed consent. However, in Appendix C the Corps fails to meet even the most basic consultation requirements prescribed by ACHP's implementing regulations.¹⁸ ACHP requires that federal agencies consult with the Yakama Nation when our cultural interests "may be affected by an undertaking," on the scope of the APE, the identification of historic properties, potential impacts to those historic properties, and the resolution of any such impacts.¹⁹ Appendix C does not have any consultation requirement.²⁰

Further, Appendix C does not provide adequate protections for the confidentiality of sensitive cultural and religious information. ACHP's implementing regulations require federal agencies to withhold confidential information about the location, character, or ownership of a historic property to protect "the use of a traditional religious site by practitioners."²¹ These confidentiality concerns are critical for the preservation of our cultural sites and objects, which have been constantly subject to looting and deliberate destruction since non-indigenous occupation of our lands commenced. Appendix C, on the other hand, only protects confidential information when there is a substantial risk of harm, theft, or destruction of the information.²² This lack of protection and onerous burden on those seeking protection to establish "substantial risk," forces the Yakama Nation to face the no-win decision of whether to protect our cultural information from disclosure, or destruction.

Given these inconsistencies between Appendix C and ACHP's implementing regulations—all of which violates ACHP's implementing regulations and directly threatens our ability to protect our culture—the Corps should withdraw Appendix C.

D. The Corps Has No Legal Authority to Ignore and Authorize the Destruction of the Yakama Nation's Culture.

The Corps' assertion of authority to dictate the manner and method of the treatment of Yakama culture using Appendix C is rooted in a history of American domination and dehumanization of Native Nations that must be acknowledged and rejected. When European 'explorers' first invaded our lands they purported to claim the land under the Doctrine of Discovery, which is a Christian-based doctrine of domination and dehumanization that seeks to deprive Native Peoples

¹⁸ See, e.g., *Sayler Park Vill. Council v. United States Army Corps of Eng'rs*, 2003 U.S. Dist. LEXIS 7104, 13 (S.D. Ohio 2003) (admonishing the Corps for generally failing to meet ACHP's consultation requirements).

¹⁹ 36 C.F.R. 800.2(c)(2)(ii).

²⁰ Lorentz, *supra* note 6, at 1598-1599.

²¹ 36 C.F.R. 800.11(c)(1).

²² 33 C.F.R. 325 app. C(4)(c).

of our right to land where we have thrived since time immemorial. In *Johnson v. M'Intosh*, the United States Supreme Court used the Doctrine of Discovery as the legal basis for the United States' asserted claim to our lands and properties.²³

Despite this history, the Yakama Nation reserved our inherent sovereign rights in a bilateral treaty with the United States to preserve and protect our natural, religious, and cultural rights.²⁴ These Treaty-reserved rights to culture were never ceded to the United States or Corps, and are recognized by the Supremacy Clause of the U.S. Constitution as the supreme law of the land.²⁵ Therefore, under federal law the United States and the Corps have no authority or jurisdiction to take any action affecting our culture – whether directly or indirectly – without the Yakama Nation's express informed consent. Appendix C stands in direct contradiction to our inherent and Treaty-reserved sovereign rights, and must be withdrawn.

CONCLUSION

The Corps' Appendix C is without a statutory basis or regulatory basis, is inconsistent with the ACHP's regulations implementing Section 106 of the NHPA, and ignores the Yakama Nation's inherent and Treaty-reserved rights to our cultural properties. Such ignorance of the federal government's Treaty and trust responsibilities to the Yakama Nation denies us of the ability to assert and protect our rights, interests, and cultures in what amounts to cultural genocide. This should not be tolerated by either the federal government, the Yakama Nation, or any Native Nation moving forward. The Corps should immediately withdraw Appendix C.

²³ *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

²⁴ See *United States v. Winans*, 198 U.S. 371 (1905) (announcing the Reservation of Rights Doctrine).

²⁵ U.S. Const. art. VI, cl. 2.

Yakama Nation Consultation with the United States of America: A History of Broken Promises and Destruction

Presented by the Confederated Tribes and Bands of the Yakama Nation
October 25, 2016

Hanford Nuclear Reservation, Celilo Falls, and the Fossil Fuel Highway Story

The People of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) have lived in and around N’chi Wana – who you call the Columbia River - and her tributaries since time immemorial. Our people have fished from her waters, and we have hunted, and gathered our traditional foods and medicines in the lands surrounding this great river, and in the basin it cuts from the mountains to the sea. The United States threatened our Ancestors that they would walk knee-deep in Yakama blood if they did not sign a treaty and give up our aboriginal homelands in exchange for a small portion of our territory and rights reserved forever to us. Our Ancestors made sure that the sacrifices they made under threat of genocide would still provide some measure of security against total eradication of our ways, our culture, and the means with which we feed and care for ourselves and our loved ones.

For that reason, the Treaty of 1855 with the Yakama, a compact between the sovereign nation of the Yakama People and the United States of America, is much more than “a piece of paper” or a contract. It holds the power—when it is honored by the United States—to protect those rights we have left, and to preserve our culture, our religion, and our waters and our lands not only for our People today, but also for those who are yet to come. This is why we are so strongly opposed to the fossil fuel industry’s plans to transform our region into a global fossil fuel transportation and export superhighway. We cannot and will not sit idle while our people are faced with a different kind of genocide than the one the United States threatened us with in 1855, but a genocide nonetheless.

Over the past century and a half, outside private enterprises and governments have ravaged the Yakama People’s ancestral lands and waters. In their schemes of “development” for “economic progress,” they leave a visible wake of destruction. They nearly eradicated a Native culture that demands reverence for the environment. And their direct and indirect actions have diminished the resources upon which the Yakama People have always relied for sustenance, cultural practices, and spiritual health.

We have continued to defend our homelands and our freedoms – Yakama, like most Native Nations, has a proud history as voluntary soldiers not only for the Yakama Nation but also for the United States. While our fathers, uncles and brothers were fighting against genocide and fascism in World War II, the United States once again demanded further great sacrifice from the Yakama people. In selecting sites for the Manhattan Project, the United States sought areas with specific resource needs including vast land expanses and immediate access to large quantities of fresh cool water. Fortunately for the freedom of the western world, these resources were available in the central plains of the area ceded by Yakama in our Treaty and the Hanford Nuclear Reservation remains in testament. The Hanford Nuclear Reservation is at the

confluence of N'chi Wana, the Yakama River, and the Snake River. That the area was of immense sacred importance, that it was an traditional hub of commerce for the Yakama and other Native Nations in the area, and that it continued to include sites of subsistence fishing, hunting, and gathering for the Yakama Nation was of no consideration to the United States. The white towns and farmers that were evacuated and relocated were compensated for their inconvenience. The Yakama people whose very history and ways of life were destroyed were told merely that their use would be suspended for only a few years. It has been over three quarters of a century since we have been unable to access our sacred and cultural areas, and the on-going destruction from research and development that reaches far beyond the boundaries of the Hanford Nuclear Reservation is expected to last for untold centuries into the future.

Another constant visual reminder of the destructive pattern inflicted by industry on our lands, our waters, and our People is the literal destruction of Celilo Falls. This area, home of our Sk'in-pah People, among others, was in fact the hub of civilization for Yakama People. Indeed, many Native Nations of the Columbia Basin congregated in this area for purposes of intra-tribal commerce, cultural and religious practices. Not only were the Celilo Falls the best fishing grounds Yakama People had available to them, the falls and lands surrounding them were sacred to us. The Celilo Falls area is the source of the Yakama creation story, the very genesis of our culture and religious beliefs. Half a century ago, onlookers watched as the completion of The Dalles Dam silenced the falls and destroyed this sacred area, including villages, places of worship, and the final resting grounds of our Ancestors. While the deliberate destruction of Celilo Falls and its surrounding villages is emblematic of the destruction the Yakama People have suffered at the hands of industrial developers and their governmental enablers, dams have had concrete and tangible effect of eroding the Yakamas' right to take fish from N'chi Wana and its tributaries.

Today, outsiders have opened new fronts in the war against the Yakama People, including the effort to transform our region into a fossil fuel superhighway.

In recent years, we have watched as the federal government destroyed our cultural resources by erecting newer and bigger power lines through our most sacred sites, and areas where our Ancestors have been laid to rest. We witnessed a railroad knowingly bulldoze a tribal cemetery for what it called "routine road maintenance," leaving our Ancestors remains scattered or in piles. We see wind energy and other development companies cut off our access to our medicines, our foods, and our berries, all of which should fall under the protection of our reserved Treaty rights, and dig up or destroy sacred and historic sites. We watch as barges and other boat traffic interfere with our fishers and their Treaty-reserved right to take fish for sustenance, for our elders, for religious ceremonies, and for their livelihoods. Increases in rail traffic pose constant dangers to tribal fishers accessing Treaty-protected sites, and have even made use of some of these sites impossible or impractical and dangerous.

Our aboriginal homelands, our traditional ways, and our very existence as Yakama People are all under siege. We are under siege from every geographic direction and throughout our territories.

Like the dams, the fossil fuel and these other industrial campaigns are hailed as essential elements for economic development and progress while simultaneously destroying the ancient

Yakama way of life. As it has always done since its arrival into our lands, industries are waging a war of cultural genocide against us. But the definition of “progress” cannot be limited to pecuniary gain without regard to the long-term damages these industries will inflict on our aboriginal homelands. We cannot allow the false narrative of the fossil fuel industry to go unanswered. Our way of life must be protected, and it is up to our trustee to assist us with this endeavor by honoring the Treaty rights our Ancestors negotiated and preventing our demise.

The Christian-Premised Context of U.S. Federal Decision-Making Relative to Native Nations

In 1954, the U.S. Justice Department revealed the religious context of United States decision-making, relative to federally recognized Indian “tribes.” That year, the Justice Department stood before the United States Supreme Court made and very peculiar Christian-premised argument: The Tee-Hit-Ton Indians should not receive monetary compensation for a federal taking of timber from lands the Tee-Hit-Ton Indians claimed as their territory.

What was the Christian-premised basis of the Justice Department’s argument? Simply this: As a result of grants by popes dating back to the year 1344, the Christian nations of Europe, had acquired “jurisdiction over the lands of heathens and infidels.” One wonders, “Did the U.S. attorneys fail to notice the time-frame they were referencing was four centuries before the creation of the United States Constitution between 1787 and 1789, and nearly six hundred years before the Tee-Hit-Ton case?”

The U.S. Departments of Justice, Interior, and the Army are now asking us as elected leaders how the U.S. government can better consider our input as the elected leaders of our nations with regard to federal decision-making. One way in which this can be accomplished is by those three departments answering a specific question: What was the *constitutional* basis for the U.S. Justice Department decision-making and argumentation in 1954 that revealed the conceptual foundation of U.S. federal Indian law based upon Christianity and papal decrees issued centuries before the United States was even created?

The United States government can only make *valid* decisions and arguments within the scope of the U.S. Constitution. The extent to which the U.S. government has made decisions and arguments outside of that scope is the extent to which the U.S. government has made invalid decisions and arguments. It is invalid for the United States to claim to possess dominating authority or “ultimate dominion” over our lands and our nations based on the idea of “Christian people” supposedly “discovering” the lands of “heathens” and “infidels,” and claiming, on the basis of Christianity, papal decrees of the fifteenth century and royal charters, that the “discovering” Christians have the right to dominate the non-Christian nations and their lands.