Comments of Chairman Dave Archambault, II, Standing Rock Sioux Tribe On Federal Consultation with Tribes on Infrastructure Decision Making November 22, 2016

Introduction.

On behalf of the Standing Rock Sioux Tribe, I appreciate the work of the Departments of Justice, Interior and Army in establishing this process for addressing federal consultation with tribes on infrastructure decision making. Standing Rock's experience regarding the Dakota Access pipeline has highlighted the need for this discussion and for basic reform. But the need for change goes far deeper than that. For generations, Standing Rock, and every tribe across the country, has been burdened by infrastructure projects that have been approved to benefit others, without regard to the costs and harms those projects impose on the tribes and our people. When federal decisions are made, the interests of private companies and non-Indians are deemed to be vitally important, while the interests of the tribes and Indian people are given lip service or totally ignored. That is how it has always been in the past, and this must change. This consultation provides an opportunity to take a first step toward changing the process in a good way.

A fundamental question to be addressed by this process is: do Tribal interests matter in federal decision making regarding infrastructure projects? And, if Tribal interests do matter (as we believe they must), what should be done to identify, consider

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and ultimately to protect and enforce those interests in connection with federal decision making?

Certainly, an important part of the answer involves developing appropriate processes for federal agencies to use, so that tribes are consulted in a meaningful way from the outset, that high level federal decision makers are directly involved, that issues are addressed on a collaborative basis, and that the full range of tribal rights and interests are comprehensively considered. Along these lines, we have a number of suggestions on how to improve the process.

But, as important as that is, from our perspective it is not enough. The goal of tribal consultation is not merely to give tribes a seat at the table and a chance to be heard. Rather, the core objective is to provide federal decision makers with context, information, and perspectives needed to support informed decisions that actually protect tribal interests. Our Treaty rights, the federal trust responsibility to tribes, and the environmental justice doctrine all must be given life and meaning in actual federal decisions that impact tribes. Consultation can provide the solid foundation for such decisions, but the federal agencies must be willing to recognize these principles and to do the right thing.

In other words, there are really two components to ensuring that tribal interests matter in federal decisions about infrastructure projects. First, there must be a comprehensive and properly structured process that enables tribes to participate fully. And second, there must be a heightened awareness and recognition among federal decision makers about the sources, scope and significance of tribal rights, and the need to incorporate and protect those rights in federal decisions. The objective is to seek the free, prior and informed tribal consent where fundamental tribal interests are at stake. Federal decision makers must come to understand that it is in the national interest to uphold the promises that the United States made in treaties, and to exercise discretion consistent with the duties of a trustee to tribes. And this understanding must guide every decision that impacts tribal interests.

We know that there are many good federal officials who share this goal – to have federal decisions guided by fundamental principles that support and implement tribal interests. But we recognize that more needs to be done to achieve that goal across the

federal government and across administrations. In our view, the development of a fair and inclusive process in which tribal voices can be heard on infrastructure projects is a good place to start. In this spirit, we look forward to working with the federal agencies on this consultation and beyond.

Lessons from the process regarding the Dakota Access pipeline.

The Standing Rock Sioux Tribe's opposition to the Dakota Access pipeline is based on the importance of protecting our waters and our sacred sites for the benefit of our children and generations yet to come. While our efforts are continuing, we have identified a number of lessons about the federal process so far regarding the Dakota Access pipeline. Here are just a few:

1. **Tribal interests are sometimes completely ignored under the existing process**. The Dakota Access pipeline would cut through our historic Treaty lands where our ancestors are buried, and would cross Lake Oahe – which is the water source that provides life to the Tribe and its members – a few hundred feet upstream from our Reservation. An oil spill from the pipeline into Lake Oahe would have a devastating impact on the Tribe and our economic, social and spiritual life. But, in shocking disregard for our Treaties and the federal trust responsibility, the Corps of Engineers approved a draft Environmental Assessment regarding the pipeline that completely ignored the interests of the Tribe. Maps in the draft EA omitted the Reservation, and the draft made no mention of proximity to the Reservation, or the fact that the pipeline would cross our historic Treaty lands. Basically, the draft EA treated the Tribe's interests as non-existent. This demonstrates how deeply flawed the current process is, and how important it is for tribes to be vigilant and insist on our right to be heard about matters affecting our interests.

2. **The timing of consultation is vitally important.** In connection with the Dakota Access process, the Tribe was completely left out of any consultation regarding the pipeline route – until after the route was selected that put the Tribe's interests most directly at risk. This was clearly improper even under the current process, but it reflects a basic problem – that tribes are often not included until <u>after</u> key decisions have already been made. This failure to include the Tribe until after alternatives were selected has tainted the overall process.

3. The scope of consultation must comply with both Executive Order 13175 and Section 106 of the National Historic Preservation Act. It was clear in the Dakota Access process that the Corps of Engineers did not recognize that it had any obligation to consult with the Tribe about the risk of an oil spill to the lands or waters of the Tribe – until after the Tribe raised concerns about these issues by commenting on the Draft EA (which omitted consideration of the Tribe). Part of this seemed to be a mistaken view by the Corps that consultation under section 106 of the National Historic Preservation Act was all that is required.

There are two separate and distinct consultation requirements: (1) government-to-government consultation on any agency activity affecting Tribes, generally under the authority of Executive Order 13175; and (2) NHPA section 106 consultation with Tribal Historic Preservation Officers on the impacts of federal undertakings on historic properties. Federal agencies often mix up or try to combine these into a single meeting.

Executive Order 13175 on *Consultation and Coordination with Indian Tribal Governments* requires consultation with the governing bodies of Tribes on "policy statements or actions that have substantial direct effects on one or more tribes." It provides that –

> The United States continues to work with Indian Tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and treaty and other rights… Agencies shall respect Indian tribal self-government and sovereignty, honor treaty rights and other rights… (and) ensure meaningful and timely input by tribal officials. (68 Fed. Reg. 67250).

The Corps of Engineers did not comply with these requirements for the Dakota Access Pipeline. The Corps established no defined process for either government-to-government consultation or NHPA section 106 consultation for DAPL. As a result, important Tribal interests were ignored.

4. The Corps of Engineers' narrow view of its obligations under section 106 of the National Historic Preservation Act has tragic consequences. While the National Historic Preservation Act is intended to provide a foundation for consultation

with Tribes to protect cultural resources, including burials, the Corps of Engineers interprets its obligations under NHPA in a way that puts our sacred places at risk. While the pipeline has direct and indirect impacts on cultural resources all along its corridor, the Corps took the position that it was only required to consult with us regarding a tiny portion of the pipeline. The Standing Rock Tribal Historic Preservation Office was not afforded consultation on the scope of the area of potential effects as required in 36 CFR §800.4(a)(1). The dispute over the APE was never resolved, but the Corps proceeded with identification efforts in a very narrow area. The Tribe was excluded from any process that may have taken place to address unanticipated discoveries, as required in 36 CFR §800.13.

Important discoveries have taken place during construction, including human remains, funerary items and rock cairns. Sacred Native American cultural resources have been intentionally destroyed by DAPL workers. The Tribe has been totally excluded by SHPO from the process of evaluating and mitigating impacts on Tribal historic properties discovered during the construction of DAPL. There has been no traditional cultural properties survey or input, as required by NHPA section 101(d)(6) and 36 CFR §800.4(a)(4). Existing procedures in 36 CFR Part 800 have not been followed by the Corps of Engineers and North Dakota SHPO in the construction of the Dakota Access Pipeline. This demonstrates the need for a broader approach to the exercise of federal jurisdiction under NHPA section 106, and stronger enforcement procedures for Tribes of our consultation rights under the statute and implementing regulations.

5. Environmental justice principles are too often ignored. The Dakota Access pipeline was originally designed to cross the Missouri River a few miles north of Bismarck, North Dakota – the State capital, which has a population that is about 90% non-Indian. The risk of an oil spill was deemed too great for the pipeline to be sited there, primarily because of concerns about the drinking water supply of the city, and nearby wildlife. But the risk of an oil spill from the same pipeline was determined by the Corps to be perfectly acceptable for the pipeline to be sited on the doorstep of the Standing Rock Reservation. Drinking water and wildlife mattered near Bismarck, but did not matter at Standing Rock. Placing the risk on the Tribe, which is among the nation's most economically disadvantaged populations, is contrary to basic environmental justice principles.

6. The current process is disjointed. The process for approving the Dakota Access pipeline was extremely disjointed and uncoordinated. While Dakota Access is a single pipeline, no effort was made to evaluate the proposal in a comprehensive manner, or to consider cumulative effects. Rather, there were four separate state processes, as well as uncoordinated reviews by three separate districts of the Corps of Engineers and the Fish and Wildlife Service. The federal review processes each looked at very limited aspects of the project, as if they were unrelated. And, the Corps failed even to state clearly what kind of permit or other action it was considering with respect to a particular aspect of the project. The lack of any centralized or coordinated process served to confuse what was going on, and to limit the ability of concerned parties to participate in the process. For tribes with limited resources, this was particularly troubling.

These examples illustrate some of the basic flaws in the current process regarding infrastructure decision making, and some of the obstacles tribes face in protecting our interests. We turn next to suggestions for how to structure the process to better incorporate and protect tribal interests.

Policy changes that can be accomplished without legislation.

1. Establish strong principles for Tribal consultation through an Executive Order. One fundamental problem in decision making on infrastructure projects overall is that the federal agencies lack a common understanding of what constitutes meaningful tribal consultation. To address this, we recommend that the President issue an Executive Order to more clearly define the basic elements of tribal consultation, including what constitutes meaningful consultation. This would help establish a baseline for ensuring that consultation with tribes 1) takes place from the very beginning of the process before any alternatives are selected or decisions made, 2) is established at an appropriate government-to-government level with agency officials who make the decisions, 3) is comprehensive in covering all Tribal rights and interests, 4) is collaborative in nature, 5) provides tangible outcomes, so that the federal agencies actually address and incorporate Tribal concerns and interests in their final decisions, and 6) reflects the goal of achieving full, prior and informed tribal consent. The Executive Order should:

Be grounded in the trust responsibility. The EO should expressly reaffirm that Indian tribes have a unique government-to-government relationship with the United States and have unique rights and interests to lands and natural resources both on and off the Reservation.

Require that Tribes be properly notified at the very beginning of the process. The EO should require that all potentially affected Indian tribes be identified and notified as soon as the federal agency becomes aware of a proposed project requiring federal approvals. The notice must provide sufficient detailed information about the potential scope, purpose and location of the entire project for a tribe to evaluate and determine whether it has an interest in seeking formal consultation with the federal agency. The notice must expressly state that affected Indian tribes have the right to request consultation before the agency takes any significant federal action or decision relating to a project and outline a proposed schedule for how consideration of the project by the agency will proceed.

Define "meaningful" consultation. The EO should define consultation as a process involving the open discussion and joint deliberation of all options and issues with respect to a potential project affecting Indian tribes. This requires federal decision makers to periodically and systematically confer with tribal leaders prior to taking any major federal action or making any significant decisions related to a project requiring federal approval, including preliminary and final determinations or assessments on proposed routes or alternatives.[1] Agency decision makers must listen to and give effect, to the maximum extent possible, to the views of affected Indian tribes.[2]

Clarify federal duties to consult with Tribes on a government basis overall, and specific consultation requirements under the NHPA and other statutes. The EO should clarify and expressly provide that meaningful consultation includes consultation that occurs at the beginning stages of a project, but is also required when the project is analyzed under the National Environmental Policy Act and when an agency is undertaking steps to comply with Section 106 of the National Historic Preservation Act

[1] This standard has been used in the context of Indian education. *See* 25 U.S.C. 2011(b).

[2] *See e.g.*, 25 C.F.R. 32.2 (consultation defined in the context of Indian education).

or other independent statutory obligations. Agency decision makers must also provide adequate time for negotiations with an Indian tribe relating to how tribal concerns will be addressed, mitigated and/or resolved.

Provide for DOJ and Interior participation to protect Treaty rights. The EO should require that where Indian tribes raise specific concerns or impacts to rights based on a treaty, judicial decision or federal statute, federal decision makers must ensure that the affected Indian tribes are included in any discussions or deliberations relating to how treaty rights will be protected or impacts will be mitigated. An Indian tribe should also have the authority to request the participation of the Departments of the Interior, acting through the Assistant Secretary of Interior, and Justice, acting through the Assistant Attorney General for the Energy and Natural Resources Division, in the process for the purposes of ensuring that treaty rights will not be abrogated.

Protect confidential tribal information. The EO should require that federal agencies develop protocols to ensure that Indian tribes can receive confidential information necessary to allow them to assess a proposed project and protect confidential information shared by Indian tribes relating to culturally sensitive information.

Provide that decisions protect tribal interests. The EO should require that federal decisions incorporate and reflect the best interests of the impacted Indian tribes, consistent with the United States' trust responsibility to the tribes, to the maximum extent possible. Federal agencies must recognize the importance of their obligations to tribes under the trust responsibility and that recognition must inform and guide their final decisions. Ultimately, consultation is meaningful if federal decision makers recognize that free, prior and informed tribal consent is required for any decision that impacts tribal lands, waters, treaty rights, or other interests. In this regard, federal agency decision making should be guided by principles of international law, including the United Nations Declaration on the Rights of Indigenous Peoples.

2. Require a statement that addresses how tribes could be impacted in any notice regarding an infrastructure project. Any federal notice concerning a proposed infrastructure project requiring federal approval should be required to include a written statement, prepared by the federal agency, that identifies and discusses the

manner in which the project could impact tribal interests both on and off reservation. Such a statement might be called a "Statement of Potential Tribal Impacts."

Each agency should be required, at the very outset of its federal review process, to consider which tribes could be impacted, and what the potential impacts could be. This would ensure that the process does not proceed as if tribes have no interest, when that is not the case – as occurred when the Corps of Engineers issued a draft Environmental Assessment for the Dakota Access pipeline without regard to the interests of the Standing Rock Sioux Tribe. Requiring a Statement of Potential Tribal Impacts would ensure that each agency certifies – before the process starts – that it has evaluated how a project might impact tribal interests.

The form of a Statement of Potential Tribal Impacts could be patterned on various types of notices that appear in the Federal Register – such as statements under the Unfunded Mandate Reform Act of 1995 which requires agencies to provide statements regarding federal regulatory actions that may impose costs on state, local, or tribal governments. The Statement of Potential Tribal Impacts would put Tribes on notice of impacts regarding tribal interests in land, water, sacred sites and other important matters. These statements would provide a better form of notice to tribes that would allow them to assess and determine when it is important to participate and how to maximize their role as the process moves forward.

3. Provide technical assistance to tribes to address infrastructure project reviews. One problem faced by many tribes is the massive number of notices they receive regarding various federal projects. Often these notices are unclear with respect to the potential impact on the tribe. Requiring Statements of Potential Tribal Impacts (as discussed above) would help address a part of this problem by providing more informative notice and an initial assessment of potential impacts. But there is another component of the problem – that many tribes lack the staff or technical resources to address the problems or issues arising from a particular proposal to the full extent they might hope to do so. Along these lines, technical assistance should be available to all tribes that wish to use it, to assist in evaluating the extent to which a proposal could significantly affect the tribe, and to help the tribe in preparing its position in consultations.

While there are many ways such technical assistance could be implemented, we suggest that it be funded by requiring the companies seeking federal approval of projects to pay for it, as a condition of receiving consideration for their request for a federal permit or authorization. The funds could be administered by the Department of the Interior, which could allocate the funds to tribes. With these funds, the tribes could retain the outside technical support they need to assess the potential environmental impacts of proposed projects. While no tribe would be required to participate, for tribes that want to do so, the availability of additional resources to assist in evaluating potential impacts could help provide a more robust technical analysis in support of tribal positions in consultations on infrastructure projects.

4. Train federal personnel to understand tribes, treaties, and federal Indian law. All federal personnel whose work involves approval or analysis of infrastructure projects should be required to participate in comprehensive training regarding Treaty rights, the trust responsibility, the United States' historical treatment of Indian tribes, and the vast differences among tribal cultures. This training, to the maximum extent possible, should be offered and provided by tribes and tribal organizations. It is difficult to have effective consultation if these basic principles, and the fundamental obligations of the federal government to Indian tribes, are not understood by federal personnel prior to consultation taking place.

The United States requires cultural competence training before allowing any member of the foreign service to serve in a foreign country. Similar training is needed for federal personnel who will interact with Indian tribes, given their unique legal status. This kind of training already takes place in some situations within the Interior Department. The Bureau of Reclamation, for example, has developed a training program for its regional offices to learn about the trust responsibility and Indian tribes in the context of Indian water settlements. The Reclamation training has been successful in large part because it is provided by a well-respected Indian law professor and tribal leaders who can speak about the significance of a water settlement from the tribal perspective. This kind of approach needs to be implemented more broadly across all agencies that make decisions impacting tribal rights and interests. Training must be required for all agency personnel who are involved in projects requiring federal approval where Indian tribes may be affected. Trainings, at a minimum, must include:

Overview of the trust responsibility and unique the relationship between the United States and Indian tribes.

Overview of the United States' historical policies impacting Indian tribes, including how those policies resulted in Indian tribes having significant rights and interests in off-reservation areas.

Tribal perspectives on the importance of the trust responsibility and how agency decisions have impacted tribal rights in the past.

5. Improve NHPA Implementation, including withdrawal of Corps Appendix C. The Tribe's experience with the Dakota Access pipeline highlights the need to improve how the National Historic Preservation Act is implemented with regard to properties of traditional religious and cultural importance to the Tribe.

Consultation must begin at the earliest possible time – when a project is first proposed. Early consultation ensures not only a proper evaluation of sites but also consideration of project alternatives that might avoid damage to sites. The Advisory Council on Historic Preservation's regulations require early consultation, but that did not happen in connection with the Dakota Access pipeline. 36 CFR § 800.1(c).

Consultation must begin with high level federal decision makers and should continue to involve high level decision makers at appropriate points throughout the process. For consultation to be effective, high level federal decision makers must be involved at the beginning of the process. This is necessary so that the Tribe is able to alert the federal agency to the Tribe's initial questions and concerns regarding the project, including the scope of the agency's obligation to consult, and to do so with a federal decision maker who matters. At the same time, having high level federal decision makers involved at the outset will help ensure that the agency provides the tribe with clear and definitive information about the proposed federal project or undertaking, the tasks involved and anticipated timeline for the review. With initial high level consultation, both the federal agency and the tribe can then: identify appropriate points of contact for the section 106 review; confirm the process (when and how) site visits and surveys will be conducted; and coordinate the roles of the federal agency, the applicant and the tribes in that process.

The regulations of the Advisory Council on Historic Preservation must control if any other agency's regulations conflict with the ACHP's regulations. The NHPA gives the ACHP the authority to promulgate regulations to implement the Act. 54 U.S.C. § 304108. The ACHP regulations include a process by which other federal agencies may develop alternatives to the ACHP's regulations provided that such alternatives are reviewed and approved by the ACHP. 36 CFR § 800.14. Alternative agency regulations or policies that conflict with the ACHP's regulations and which lack ACHP approval, are not valid and should not be applied.

The Corps of Engineers' Appendix C, used to address Section 106 of the NHPA, must be withdrawn, and ACHP regulations must be followed. Appendix C has long been a source of problems, as it has impeded the proper implementation of the NHPA by the Corps. The Advisory Council has itself stated that Appendix C is deeply flawed. Appendix C, adopted by the Corps in the 1980s, was never approved by the ACHP and is inconsistent with the ACHP regulations in several key respects.

One major inconsistency is the definition of the "area of potential effect" (APE) – the geographic scope of a section 106 analysis. The ACHP defines the APE as "the geographic area or areas within which an undertaking may *directly or indirectly* cause alternations in the character or use of historic properties," 36 CFR § 800.16(d). But the Corps narrowly limits the APE to only the area directly covered by a Corps' permit. 33 CFR 325, App. C(5)(f). In the context of the Dakota Access pipeline, this meant that the Corps' use of Appendix C improperly left the vast majority of the pipeline outside of the protections afforded under the NHPA.

Another major inconsistency is the process for tribal consultation. The ACHP regulations give effect to the 1992 amendments to the NHPA, which recognized that traditional cultural properties (defined as "property of traditional religious and cultural importance to an Indian tribe") may be eligible for listing in the National Register of Historic Places, and required consultation with any Indian tribe that attaches religious and cultural significance to such properties. 54 U.S.C. § 302706. The ACHP regulations require tribal consultation throughout all phases of the process – in determining the scope of the APE, identifying and evaluating historic properties, assessing potential adverse

effects, and developing plans to avoid, minimize or mitigate adverse effects.[3] The ACHP regulations also require federal agencies to recognize the tribes' special expertise with regard to properties of religious and cultural significance to the tribes. 36 CFR § 800.4(c)(1).

But the Corps' Appendix C makes no reference to traditional cultural properties at all. Likewise, Appendix C does not recognize tribal expertise regarding such sites, much less require that tribes be consulted to either identify or address potential adverse impacts to these properties. Instead, Appendix C leaves Corps officials with discretion when and how to consult with tribes. And although the Corps, in an Interim Guidance, acknowledged the need to revise Appendix C,[4] the Corps has not yet done so.

Finally, because many elements of the Corps' Appendix C are inconsistent with the 1992 amendments to the NHPA, Appendix C cannot be relied on to implement Section 106. Appendix C should be withdrawn and the Corps should implement Section 106 under the regulations promulgated by the ACHP.

Tribes should be afforded "signatory" authority with respect to NHPA issues involving traditional cultural properties including those located outside the Tribe's lands. The issue of signatory authority arises when a site that is eligible for listing on the National Register is identified and would be adversely affected by the proposed project. Under the current regulations, in these circumstances, the adverse effects may be addressed through the development of a memorandum of agreement (MOA) that sets out measures to avoid, minimize or mitigate the damage that would be done to the site. 36 CFR § 800.6(c). Although Tribes are required signatories for MOAs regarding sites on

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[3] 36 CFR § 800.2(c)(2)(ii); § 800.3(f); § 800.4(a); § 800.5(c)(2); § 800.6.

[4] Department of the Army, Directorate of Civil Works/Regulatory, Memorandum for All Major Subordinate Commands, District Commands, *Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800* (April 25, 2005) http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/techbio/InterimGuidance_25apr05.pdf; and *Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800* (January 31, 2007), http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/inter_guide2007.pdf

tribal land, the federal agencies are given discretion on whether to invite a tribe to be a signatory to the MOA – even though the affected site is significant because of its cultural or religious importance to that tribe.

All too often, tribes are not invited to be signatories for sites located outside of tribal lands. This should be corrected. The regulations should be revised to read, "Federal agencies shall invite an Indian Tribe that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties." In advance of formally amending this section of the regulations, the agencies should adopt policies under which they are encouraged to exercise their discretion to invite tribes to be signatories.

If these measures had been in effect, many of the problems regarding protection of sacred sites with the proposed Dakota Access pipeline could have been avoided. Standing Rock requested consultation early in the process, and specifically asked to participate in the archeological surveys that were to be done. This is important because only the Tribe and its members have the expertise and knowledge necessary to identify and protect properties of traditional religious and cultural importance to the Tribe.

6. Revise Nationwide Permit 12 ("NWP 12") so that crude oil pipelines are not covered. NWP 12 is a rule that is used by the Corps of Engineers to approve "utility line activities" that affect waters of the United States. For the Dakota Access pipeline, NWP 12 was the basis for Corps approval for hundreds of water crossings without the benefit of detailed environmental review. NWP 12 is currently up for renewal and it should be revised to make it inapplicable to crude oil pipelines.

NWP 12 was intended to be used in situations where there are only minimal individual and cumulative environmental effects, but this is clearly not the case where oil pipelines are involved. Oil pipelines transport hazardous liquids and pose risks to the environment that stand in stark contrast to the minimal adverse environmental impacts that might arise from the construction and maintenance of other utilities covered by NWP 12, such as electric, telecommunications, or water pipelines. Oil spills occur frequently, and with devastating environmental consequences. Oil pipelines should require individual permits, and should not be covered at all by NWP 12.

And, as the Tribe learned in connection with the Dakota Access pipeline, the short cut process established by NWP 12 fails to provide adequate protections to Treaty rights and the rights of tribes under section 106 of the National Historic Preservation Act. General Condition 17 – which applies to NWP 12 and other NWPs – briefly addresses treaty rights, but is simply inadequate to protect those rights. There is nothing in General Condition 17 that provides for appropriate consultation by the Corps with Tribes regarding Treaty rights. On the contrary, NWP 12 allows companies like Dakota Access to build oil pipelines and cross waters of the United States with either no oversight at all, or – at most – discretion to determine whether to engage the Corps at all. In either event, there is no reasonable opportunity for Tribes to engage in the process to protect their Treaty rights.

In addition, the Corps has applied NWP 12 in a manner that violates the NHPA. General Condition 20, which applies to NWP 12 and other NWPs, provides that when a project may affect properties that are listed, or eligible for listing on the National Register of Historic Places, the activity is not authorized "until the requirements of Section 106 … have been satisfied." 81 Fed. Reg. at 35,233. But the Corps construes this to mean that the permitee, not the Corps, determines whether any historic properties are present for purposes of determining whether a Preconstruction Notification is required. In this way, the Corp uses NWP12 to unlawfully delegate to non-federal entities (the pipeline companies) the Corps' responsibility to comply with Section 106 of the NHPA.

For all these reasons, crude oil pipelines should be addressed not through NWP 12, but through individual permit applications and full environmental reviews in the form of environmental impact statements. Moreover, it should be made clear that even where NWP 12 would apply (such as to electric or telecommunication lines), if a utility line crosses any reservation, historic treaty or aboriginal lands, no construction should be permitted until after full and meaningful tribal consultation is completed with all impacted tribes regarding the NHPA, Treaty rights and other tribal rights.

7. Implement Congressional mandates for pipeline safety, and require a full EIS for crude oil pipelines. The 2010 oil spill in the Kalamazoo River, which was found to be the result of weak federal regulation (NTSB Report No. NTSB/PAR-12/01), prompted Congress, the Government Accountability Office, and the National Transportation Safety Board, to direct the Pipeline and Hazardous Materials Safety

Administration (PHMSA) to undertake further study of pipeline safety issues and amend its hazardous liquid pipeline safety regulations. While PHMSA began that process in 2010, it has yet to implement most of the congressional mandates, and the lack of updated safety regulations continues to be criticized as one of the problems in preventing spills. Congress renewed its concerns about the need to get amended regulations in place. PHMSA should complete its study and undertake the necessary regulatory process for revising its pipeline safety regulations to address concerns raised by Congress and the public.

While PHMSA must complete its work, that alone would still not address all what is needed to protect water and other vital tribal interests. First, PHMSA's rules, by their very nature, are quite general. They establish minimum requirements but otherwise give the pipeline companies discretion on how to satisfy those requirements. As a result, the rules do not address how general requirements apply in particular situations. And compliance with PHMSA's rules does not by any means eliminate the risk of oil spills – as demonstrated by the numerous major oil spills that have had devastating consequences around the country. Second, PHMSA's rules do not address the problem of segmented review of pipelines. As the Tribe has seen in connection with Dakota Access, the Corps does not look at a whole pipeline when it evaluates pipeline safety (or any other issue). Instead, the Corps takes a narrow look at issues only with respect to the small areas of federal lands and waters of the United States along the pipeline route. This approach is one of the key reasons that the risk of oil spills is vastly understated.

To address these issues, <u>every major crude oil pipeline should be subject to a full EIS</u>, which examines the risk of oil spills for pipelines as a whole. In addition, any statement by the company proposing a pipeline that it is following PHMSA rules should be understood as having limited effect – and certainly must not be taken to mean that the proposed pipeline is safe or risk free. An independent risk assessment of oil spills in light of the pipeline's proposed location and design, including, in particular, an analysis of the impact that an oil spill would have on tribal communities, should be required.

8. Improve Implementation of the Environmental Justice Doctrine for Tribes. As outlined in Executive Order 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994), it is the mission of every federal agency to achieve environmental justice by identifying and addressing how federal actions disproportionately impact tribes (and other low-income

populations). Environmental justice principles are vitally important to remedy the historical problem faced by tribes – that environmental harms from federally-approved projects are often sited where they cause the most harm on vulnerable tribal communities.

The environmental justice doctrine should be a strong vehicle for addressing this injustice. But as our experience with Dakota Access reflects, the environmental justice doctrine is often implemented in a manner that places tribal communities at risk. While NEPA should require a robust environmental justice analysis for all infrastructure projects, in practice that does not happen.

To improve the implementation of the environmental justice doctrine, the Council on Environmental Quality, EPA, and the Department of the Interior should prepare a guidance document for all federal agencies on how to properly implement environmental justice principles as they affect Indian tribes in the context of infrastructure projects. The tools currently used to address environmental justice are general, and in certain respects tailored to urban settings, and therefore they do not properly measure impacts on tribes in rural communities. As the Tribe learned in connection with Dakota Access, while federal agencies should, under existing environmental justice principles, give special attention to the risks posed on tribal communities, in practice these principles are all too often misapplied or totally ignored. Guidance is needed to rectify this and ensure that environmental justice principles are properly applied to protect tribal communities.

9. Include tribes on the Permitting Dashboard Steering Committee. The "Fixing America's Surface Transportation Act" or "FAST Act" (enacted Dec. 2015) creates a process to streamline the federal permitting process for all renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing, and many other sectors. However, the FAST Act process implemented by the Federal Permitting Steering Council fails to include Indian tribal governments or recognize the federal trust responsibility to protect tribal lands, resources, and sacred places. The FAST Act process must be revised to fully integrate Indian tribes in the streamlined process, similar to the way that state and local governments are integrated – those entities are entitled to full and early participation in "purpose and need" infrastructure permitting discussions and funding for participation in federal permitting processes.

In addition, the Steering Council should be modified to include a Tribal Trust Compliance Officer who is knowledgeable about Indian tribes and tribal lands. The Tribal Trust Compliance Officer would be responsible for working with impacted Indian tribes to identify tribal concerns and ensure a process by which tribal concerns will be addressed and resolved by each agency involved in the FAST Act process in coordination and collaboration with the impacted Indian tribes. This includes a responsibility for working with the Steering Council to adjust any timelines for completion of the federal reviews for a project to accommodate additional time that may be needed to resolve tribal concerns or issues.

The Tribal Trust Compliance Officer will also coordinate with the Departments of the Interior and Justice and bring those agencies into discussions with an Indian tribe and federal agency where the rights of an Indian tribe, which are based in treaty, judicial decision or federal statute, are implicated – to ensure those rights will not be abrogated. The Tribal Trust Compliance Officer will also be responsible for working with agencies to support greater tribal control over infrastructure development on Indian lands, or lands where Indian tribes hold natural, cultural or spiritual resources.

The Steering Council has only recently received appropriations to hire permanent staff and perform its statutorily mandated duties so the situation on this matter is evolving. As it does, it is important for the Steering Council to provide information to Indian country that explains how the Steering Council will operate and outlines its roles, duties and functions relative to specific agency responsibilities during the permitting process. This will enable Indian country to provide more detailed recommendations for how Indian tribes can be incorporated into the FAST Act process.

Legislative Solutions.

1. Tribal Consultation. As discussed above, an Executive Order is one approach to addressing the need to more uniformly and properly define the contours of tribal consultation. A longer term goal is to codify those principles in an Act of Congress. In much the same manner as described in connection with the Executive Order above, this legislation should define what constitutes meaningful consultation, ensure the protection and confidentiality of tribal information shared for the purposes of protecting historical information and culturally significant or sacred sites, and require the protection

of tribal interests. In addition, legislation on consultation should provide enforceable remedies for failure to meaningfully consult.

2. NHPA Amendments. Legislation should be proposed to enhance the role of the Advisory Council on Historic Preservation. Existing law vests the ACHP with substantial authority in the Section 106 process. However, implementation of the Act would be enhanced if ACHP were given additional authority, and certain authority reaffirmed or clarified. Among other things, the ACHP should be afforded a specific role in resolving disputes between parties regarding the Area of Potential Effect, the project's potential adverse effects on eligible sites, the measures required to avoid or mitigate adverse effects, and similar matters. Such authority would have gone a long way toward addressing the problems that arose on the section 106 issues in connection with the Dakota Access pipeline. Other amendments to the NHPA may also be in order – in part depending on whether administrative action is taken to address the concerns discussed above.

3. NEPA and related matters. As noted above, the environmental review of crude oil pipelines is haphazard and incomplete – and thus puts major waters across the Nation in jeopardy in ways that harm Tribal and other interests. While in our view the Corps has the authority under existing law to require an EIS, that is not their view. Instead, they undertake a highly segmented review, looking at each water crossing as if it is a separate project, and never looking at cumulative impacts in any comprehensive way. Legislation could cure this problem. Beyond this, it may be useful to propose legislation to require Statements of Potential Tribal Impacts for all notices on federal consideration of infrastructure projects. As discussed above, these Statements would be beneficial because they would require agencies, at the outset of their process, to evaluate whether tribal interests would be affected by the proposal. Legislation could provide some permanence to the requirement of providing these Statements.

Conclusion

We appreciate the Administration's willingness to address this important matter, as we jointly work to ensure effective and meaningful protection of tribal interests in the federal decision making process regarding infrastructure projects.