

November 30, 2016

Lawrence S. Roberts, Principal Deputy Assistant Secretary  
Attention: Office of Regulatory Affairs and Collaborative Action  
U.S. Department of the Interior  
1849 C Street NW  
Washington D.C. 20240

RE: Comments of the Standing Rock Sioux Tribe Water Resources Control Board –  
Consultation for the Protection of Tribal Water

Dear Mr. Roberts:

I serve as Chairman of the Standing Rock Sioux Tribe Water Resources Control Board. I write to address the problems we face with the Army Corps of Engineers and other federal agencies with government-to-government consultation on projects affecting Tribal waters, including the Missouri Basin Pick-Sloan Program and the Dakota Access Pipeline.

The Standing Rock Indian Reservation consists of 2.3 million acres of farm and range land in the central northern plains. Water is essential to make our Reservation a permanent homeland, which is the purpose of the establishment of the Great Sioux Reservation, of which we are a part, in the Fort Laramie Treaty of April 29, 1868. (15 Stat. 635). Under the principles established by the United States Supreme Court in *Winters v. United States*, (207 U.S. 564 (1908)), our Tribe possesses extensive water rights to the Missouri River, its tributaries and the groundwater of the upper Missouri Basin.

The Corps of Engineers built six massive dams on the Missouri River main stem under the Missouri Basin Pick-Sloan program. Authorized by Congress in the Flood Control Act of 1944, Pick-Sloan was designed as the comprehensive development of the water resources of the Missouri Basin, providing flood control, hydropower and water supply throughout 10 states. The Corps of Engineers estimates that Pick-Sloan provides national economic development benefits of \$1.8 billion annually. Our Tribe receives none of these benefits.

The Oahe Dam and Reservoir, Pick-Sloan's largest multi-purpose storage component, is located on the Standing Rock Reservation. The Corps of Engineers' forcibly acquired 56,000 acres of Missouri River bottomlands at Standing Rock, for the site of the Oahe Reservoir. This was our Reservation's most fertile and valuable farm and timber land, with adequate water supplies for community gardens and agriculture, wild fruits, traditional medicinal plants, and fish and wildlife. Four Tribal communities on our Reservation were relocated by the Army during the winter of 1960, to make way for the Corps of Engineers' flood control project. The wooded bottomlands were destroyed.

The construction and operation of the Missouri River main stem dams by the Corps of Engineers has resulted in the inundation of our Reservation's best land, and the degradation of our waters. Missouri River water flows are managed by the Corps under the Missouri River Master Water Control Manual, in order to benefit downstream navigation and water intakes. This diminishes the water supplies available on the Standing Rock Reservation for drinking water, agriculture and other beneficial uses.

The Corps' management of the Missouri River also adversely impacts Standing Rock land and water through the use of Nationwide Permit 12 for oil and gas pipeline crossings, such as the Dakota Access Pipeline. The horizontal directional drilling near Cannon Ball, North Dakota adversely affects total dissolved solid (TDS) levels in the Missouri River, important habitat and nesting grounds for bald eagles, as well as cultural sites, many of which have already been destroyed during pipeline construction. An oil spill would have devastating consequences for our drinking water supplies, and fish and wildlife.

Under section 34-301 of the Standing Rock Sioux Tribe Code of Justice, the Water Resources Control Board is responsible for advising the Tribal Council on matters affecting the Reservation's water, and for regulating activities that affect our water. Accordingly, I write to express my concerns with the manner in which the Corps of Engineers and other agencies fail to adequately consult with our Tribe on projects and policies affecting our water.

Many federal agencies (including the Army Corps of Engineers) hold pro forma meetings with Tribes and then totally ignore Tribal concerns, but call it consultation. These meetings are often held in cities hundreds of miles from the nearest Indian Reservations, such as the November 17 meeting in Rapid City. One regional meeting may be held for up to 50 Tribes. The actual decision-maker is rarely present. Often, if a meeting even takes place at all, it occurs too late. A decision document may already have been released, forcing Tribes to take a position on a project which is a *fait accompli*.

For example, the Army Corps of Engineers' District Commander first met with the Standing Rock Sioux Tribe's governing body on February 28, 2016 – nearly three months after the release of a draft Environmental Assessment on Dakota Access Pipeline. By the time the Corps met with the Tribe and purported to consult on DAPL, most of the environmental review work was already completed – the Corps had already adopted the proposed environmental review document prepared by the oil company.

That is not consultation. Statutes and executive orders are to be interpreted based upon the plain meaning of their words. "Consultation" means "to have regard for." (<http://merriam-webster.com/dictionary/consult>). Thus, genuine consultation means more than a meeting – in order for there to be consultation, the final decision must take into account the concerns of the consulting party. The lack of "regard" for Tribal concerns is the main problem with the Corps of Engineers and other agencies in failing to consult with Tribes.

Executive Order 13175 applies to "policy statements or actions that have substantial direct effects on one or more Indian tribes." This includes impacts on water. 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 Indian 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...*

Section 3 of E.O 13175 requires all agencies to develop their own Tribal consultation policies. The Department of Defense policy requires the Corps of Engineers to –

*Assess... through consultation, the effect of DoD proposed actions that may have the potential to significantly affect protected tribal resources, tribal rights and Indian lands before decisions are made.*

*Providing timely notice to, and consulting with, tribal governments prior to taking any actions (that) affect protected tribal resources... (and) Consulting consistent with government-to-government relations and in accordance with protocols mutually agreed to by the particular tribe and DoD, including necessary dispute resolution processes.*

Executive Order 13175 has been re-affirmed by the President Obama. His memorandum on Tribal Consultation states in part –

*History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at time, tragic, results. (74 Fed. Reg. 57881, Nov. 5, 2009).*

Water rights are treaty rights. As such, they are also rights of our Tribe and Tribal members. These property rights are held in trust by the United States. Consequently, the impacts of the Corps of Engineers Missouri River operations, as well as approval of the Dakota Access Pipeline, trigger the consultation requirements and protection of our Treaty-based property – our water rights, under Executive Order 13175. Under E.O. 13175, consultation is directly related to the mandate to “honor Indian treaty rights.” The Corps of Engineers failed to implement these important provisions of E.O. 13175, in the enactment of recent federal policies affecting the Standing Rock Reservation, including the *Master Manual Review and Update* (2004) and in the *Finding of No Significant Impact for the Dakota Access Pipeline* (July 25, 2016). The tragic results of the failure by the Corps of Engineers to include the voices of the Standing Rock Sioux Tribe in formulating policies on the Dakota Access Pipeline are readily apparent at Cannonball community today.

Moreover, water-level fluctuations and the resulting erosion of Oahe Reservoir lands caused by water releases at Oahe Dam damage cultural sites on the Standing Rock Reservation, and accordingly trigger the NHPA section 106 consultation requirement with the Standing Rock THPO, as well.

Many agencies rely on public scoping hearings for Tribal consultation. 40 CFR §1501.7. Public hearings do not constitute government-to-government consultation with Tribal governments under E.O. 13175. Similarly, neither letters nor emails constitute consultation. Telephone contacts do not constitute consultation. Agencies have published lists of email contacts or the dates of form letters and characterize that as Tribal consultations. It is an insult to suggest a routine email or form letter signify the level of government-to-government relationship contemplated in E.O. 13175 and President Obama's Memorandum.

When agencies such as the Corps of Engineers fail to consult on NEPA reviews for infrastructure projects, Tribes lose the opportunity to exercise important rights. Timely consultation, as required under section 3 of E.O. 13175, enables Tribes to exercise their right to have input into the scope of the NEPA review. The NHPA section 106 regulations require inter-agency coordination of NEPA review with section 106 consultation. 36 CFR §800.8. This is a significant point of dispute with respect to the Dakota Access Pipeline.

Tribes also have the right to participate in the preparation of environmental reviews as cooperating agencies. 40 CFR §1502.6. This is an important right, because agencies often fail to fully evaluate the on-Reservation environmental impacts of off-Reservation impacts. That is exactly what has occurred with the Dakota Access Pipeline.

The Corps of Engineers is currently in a public process akin to rulemaking for the renewal of Nationwide Permit 12 for pipeline river crossings. This includes Nationwide Permit 12, which was used to approve DAPL. The permit is overly broad with respect to the type of projects subject to the nationwide and exempt from the requirement for individual permits. NWP 12 should not be renewed.

The definition of "utility" for use of NWP 12 includes oil and gas pipelines, which potentially have far greater environmental impact than power lines, access roads, or other utility infrastructure. The use of NWP 12 for oil and gas pipelines is improper. At the very least, the term "utility" must be re-defined to exclude any oil and gas pipeline. NWP 12 is used by the Corps of Engineers to circumvent Tribal consultation and the thorough environmental review of oil and gas pipelines. As implemented by the Corps of Engineers, NWP 12 violates E.O. 13175, as well as the federal Clean Water Act.

NWP 12 also violates NHPA section 106 and the implementing regulations. The incorporation of inadequate Corps of Engineers' consultation procedures at 33 CFR Part 325 App. C denies Tribes the full opportunities for consultation prescribed at 36 CFR Part 800. NWP 12 should not be renewed, and pipeline and other projects impacting Tribal waters should be approved on case-by-case basis, with full Tribal consultation and environmental and cultural resources review.

The Corps of Engineers regulations for section 106 (33 CFR Part 325 App. C) violate the consultation procedures established by the Advisory Council at 36 CFR Part 800. The Corps relies on Appendix C for NHPA compliance on projects such as DAPL. Appendix C must be

rescinded by the Corps of Engineers, by rule. The Corps must fully comply with 36 CFR Part 800, for the Dakota Access Pipeline and the Missouri Basin Pick-Sloan program.

Sincerely,

Tim Mentz, Sr.  
Chairman, Water Resources Control Board  
Standing Rock Sioux Tribe