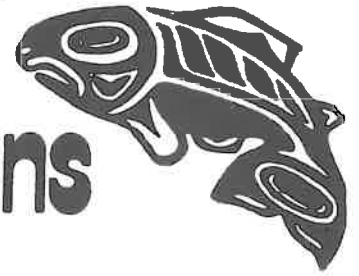




Puyallup Tribe of Indians



November 30, 2016

VIA ELECTRONIC MAIL

Office of the Assistant Secretary – Indian Affairs
ATTN: Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW
MS 3071
Washington, D.C. 20240

RE: Comments Regarding Federal Agency Government to Government Consultation
in Response to Joint Letter to Tribal Leaders Dated September 23, 2016

The Puyallup Tribe provides the following pursuant to the request for written comments made by the U.S. Department of the Interior, U.S. Department of Justice, and the U.S. Department of the Army (collectively, the “Federal Agencies”) on September 23, 2016, regarding how federal decision making must allow for proper consultation with tribes. The Tribe’s representative Lisa Anderson also provided oral testimony at the meeting in Seattle on October 25, 2016. Specifically, the Federal Agencies requested comments on how the Federal Agencies could better ensure meaningful consultation to protect tribal lands, resources, and treaty rights within the existing statutory framework or whether new legislation should be enacted to promote meaningful consultation.

The Puyallup Tribe, pursuant to its rights under the Medicine Creek Treaty, demands that all federal agencies engage in meaningful consultation, with a full, early, and truthful exchange of all necessary information in fulfillment of the United States’ already existing obligations under treaties and federal law. The Federal Agencies call attention to the current situation at Standing Rock as highlighting the need for additional considerations as to how to meaningfully consult with tribal nations. It is imperative that the Federal Agencies recognize that Standing Rock is one example of the Federal Agencies’ failure to meaningfully consult with tribes, but such failures occur across the country every day. The Puyallup Tribe has experienced complete disregard of the consultation obligations, and Army Corps policies, when attempting to address the Tacoma LNG Plant and its associated pipelines proposed to be constructed within and adjacent to the Puyallup Reservation in Washington.

The Puyallup Tribe is a federally recognized Indian tribe with its reservation located in Tacoma and surrounding communities in the State of Washington. The Tacoma LNG Plant and its associated pipelines are proposed to be constructed within and adjacent to the 1873 Survey Boundary for the Puyallup Reservation. In addition to other lands, the Tribe owns land directly across the waterway from the proposed Tacoma LNG Plant site. The lands owned by the Tribe directly across the waterway are used as restoration sites providing critical and essential fish habitat, as cultural sites, and as marinas for both recreational and commercial boat traffic.

The Tribe, through the Medicine Creek Treaty of 1854, reserved treaty rights to fish in the waters surrounding the LNG Plant site and waters that will be impacted by the development and use at the proposed project site. The impacts to the waters, shorelines, habitat, and surrounding shoreline properties and uses go to the heart of the Tribe's culture and livelihood with potential impacts to fish, other wildlife, and natural resources, as well as impacts to the health and welfare of Tribal members. As is secured in Article VI, cl. 2 of the United States Constitution, the Medicine Creek Treaty "shall be the supreme Law of the Land." As affirmed by *U.S. v. Washington*, the rights arising from the Medicine Creek Treaty cannot be diminished or derogated absent express authority from Congress.

The Puyallup Tribe was notified of the LNG Plant Permit Application as part of the regular permit comment period dictated by the Clean Water Act and Rivers and Harbors Act, long after significant decisions were made, including conclusions contained in a Biological Evaluation ("BE") under the Endangered Species Act. The Corps did not contact the Tribe to either discuss the decisions contained in the BE, nor did it consult with the Tribe to utilize any of the Tribe's extensive data regarding listed species utilization at the site. Furthermore, the Environmental Protection Agency never initiated any notice to the Tribe when originally approving a variance in 2012 to TOTE Maritime, the only potential customer for the Tacoma LNG Plant, to comply with international air regulations which would foreseeably result in siting of the LNG Plant on or adjacent to the Puyallup Reservation.

The Tribe's lands across the waterway from the site, which are held in trust by the United States, will be impacted by the construction and operation of the proposed plant as well as by the construction of the fueling terminal. These tribal lands include restoration sites containing some of the last essential habitat for fish in Commencement Bay. The materials evaluated by the Corps, prepared and considered long before any notice to the Tribe, fail to address the true impacts to fish, three species of which are listed under the Endangered Species Act. Furthermore, the analysis of the risks to human safety which would be created by the proposed LNG plant and its associated pipelines fails to address the true dangers that exist to the Tribe, its members living within a few short miles of the plant, and the citizens of Tacoma.

The Consultation Policy of the Corps requires that, among other elements of truthful and meaningful consultation, Commanders and other Corps officials interacting with federally recognized Tribes will "[i]dentify and remove procedural impediments to working with Tribes whenever possible." The Corps has, instead, maintained impediments to tribes' receiving and meaningfully reviewing relevant information as part of any consultation on the LNG Plant Permits. In September, 2015, after being notified as a result of the regular permitting public notification, Tribal technical staff requested all documents in the permitting file for review prior to technical staff meeting in person to discuss the technical matters so that Tribal leadership could be briefed prior to any leadership government to government consultation. Corps technical staff agreed to provide such materials. Unfortunately, sharing of the technical information did not occur as promised. Instead, Corps staff informed Tribal staff that they were told they could not share any information prior to the meeting, but would instead provide the file for review during the meeting and Tribal staff could copy materials deemed relevant. However, on November 9, 2015, during the in-person meeting, Army Corps staff did not bring any of the file materials. Instead, the Tribe was notified by Army Corps counsel it would need to complete a Freedom of Information Act request for any information relating to the details of the permit

analysis, including coordination with the EPA due to the presence of significant contamination at the site. The Tribe submitted its FOIA on November 10, 2015. After waiting the full response period, the Tribe received only ten pages of the file, which consisted of over 100 pages of documents. The remaining pages were withheld under FOIA as pre-decisional documents. The Tribe continues to remain unaware of the contents of the file prior to making the final permit decision.

The Tribe submitted comments in writing according to the process set out in federal environmental laws, providing evidence of contamination within the waterway for the project site that required significant emergency cleanups, and demonstrating that the applicant conveniently could show no testing of sediments at the site had been completed in spite of surrounding sediments being heavily contaminated. Furthermore, the Tribe submitted contrary data concerning fish presence at the site and fish presence and spawning utilization in surrounding waters. Technical staff for the Corps dismissed the Tribe's submissions for unknown reasons. Leadership for the Corps and the Tribe met in July of 2016 and the Tribe made it clear it remained opposed to the siting of the LNG Plant and associated pipelines and facilities within and adjacent to the Tribe's Reservation. Tribal leaders made it clear that the Tribe's data showed significant risks to the health, safety, and welfare of Tribal members and extensive impacts on fish.

The Army Corps issued the permits for the LNG Plant on September 27, 2016. In spite of numerous inquiries by Tribal staff regarding the permit issuance and requests to receive the permits once they were issued, the Army Corps did not send any notice or permit documents to Tribal staff. The Tribe received a copy of the permit from the applicant on October 5, 2016. The Tribe was told by the Corps it must complete a FOIA request to receive the permit, any associated documents, and the decision memorandum. After submitting the FOIA request, the Tribe received the permit and the decision memorandum – notably not the documents relied upon for the decision memorandum – on October 25, 2016.

Forcing Tribes to go through FOIA is clearly not consistent with the Corps Consultation Policy. The Corps Policy requires the Corps to remove impediments to information sharing, and ensure the Corps shares information for meaningful input on Corps decision making to meet obligations the Corps holds as a result of treaties, the U.S. Constitution, and the federal trust obligation. The Corps recognizes it has a duty to share information in a timely manner to allow for meaningful tribal input, yet regularly withholds such information from tribes needed to allow the tribes' meaningful input on decisions impacting protected tribal resources. The Corps policies are more than just ideals on paper, but rather enforceable where such policies require consultation and information sharing and create a justified expectation that the tribe will have meaningful access to the information and a meaningful opportunity to express its views before decisions are made. *Lower Brule Sioux Tribe v. Deer*, 911 F.Supp. 395, 399 (D.S.D. 1995) (citing *Oglala Sioux Tribe*, 603 F.2d at 721).

The series of events described above are commonplace among federal agencies when those agencies are initiating the decision making process for actions that will affect tribes, their treaty rights, and tribal resources. It is impossible to even reach any consensus required through the consultation process if the Tribe first can't even be appropriately informed as to the action being taken or the basis for that action. Early notification, prior to permitting notifications, along

with a full and truthful sharing of information is essential to conducting any meaningful consultation. The Puyallup Tribe maintains that under current law, this is not only essential, but already required. Tribes, as sovereign nations, are entitled to such information under current law but such legal obligations often go unmet. It is imperative that such obligations are met immediately.

Since such obligations already exist under current federal law through treaties, the U.S. Constitution, and court decisions, it is difficult for the Tribe to propose new legislation to repeat what already exists. While the Tribe will closely review any and all such appropriate legislation, such efforts will take time and will, undoubtedly, be refined to perhaps only create ambiguities when such obligations already exist and should be complied with immediately. The need to meaningfully consult with tribes is urgent, and such obligations must be met without waiting for further statutory refinement. To the extent that any future legislation creates ambiguities, or worse impairs, rights already held by tribes as sovereign nations through treaties or other federal law, such legislation is invalid without the express consent of tribal nations.

The Puyallup Tribe appreciates the joint efforts of the U.S. Department of Interior, U.S. Department of Justice, and U.S. Department of the Army to address the failures to meaningfully consult with tribal nations, as highlighted by the recent events at Standing Rock. The Tribe remains hopeful that immediate steps will be taken to meet all federal agency obligations to meaningfully consult with tribal nations existing in treaties, the U.S. Constitution, and federal law.

Sincerely,



Bill Sterud, Chairman
Puyallup Tribe of Indians

cc: Senator Patty Murray
Senator Maria Cantwell
Congressman Adam Smith
Congressman Denny Heck
Congressman Derek Kilmer