

Case No. 1:16-cv-1534-JEB

**CHEYENNE RIVER SIOUX TRIBE**  
**EXHIBIT 3**

Case No. 1:16-cv-1534-JEB

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**STANDING ROCK SIOUX TRIBE,**

**Plaintiff,**

**v.**

**U.S. ARMY CORPS OF ENGINEERS,**

**Defendant.**

**Case No. 1:16-cv-1534-JEB**

**DECLARATION OF HAROLD FRAZIER  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

1. My name is Harold C. Frazier, and I am the Chairman of the Cheyenne River Sioux Tribe (the "Tribe").
2. My business address is P.O. Box 590, Eagle Butte, SD 57625.
3. I have been the Chairman of the Cheyenne River Sioux Tribe since 2014, and I was the Chairman from 2004 through 2008 as well. I am also a rancher and I have a ranch near Whitehorse, South Dakota. I have lived on the Cheyenne River Sioux Reservation most of my life.
4. The Cheyenne River Sioux Tribe owns the Cap Point Water Intake that was constructed by the Corps of Engineers in 2006 and 2007. The Tribe has leased the Water Intake to Mni Waste' Water Company for a lease period ending on May 28, 2038, with an automatic renewal clause for an additional 25 years ending on May 28, 2063.
5. The Mni Waste' Water system depends on the Cap Point Water Intake to operate.

6. The water system also provides water for irrigation and livestock, which are the primary source of income for the local economy. In many areas of the system, there are not alternative sources of water supply for livestock that are suitable because the aquifers are too deep to drill wells, and there is limited potential for construction of stock dams to capture runoff on the high plains.
7. The impacts to the Tribe, its tribal members, and all of the residents of the Cheyenne River Sioux Reservation of not being able to access water from the Missouri River Cap Point Water Intake would be catastrophic. This is the case even if we lose water supply for a week. I have lived through the water system losing water supply from the intakes for three days in the past, and it created a serious health and safety crisis. Imagine having to get drinking water to thousands of people spread out over an area the size of Connecticut. The result was, and would be if it happened again, not just a health and safety crisis, but an economic crisis as well and would threaten the very ability of the Tribe to govern.
8. Some of the effects we have seen in the past from not having a functioning water intake adequate to serve all those who depend on it, and other impacts we are concerned about include:
  - a) No ability to fight fires in the 17 communities served by the water system. In the past, the lack of water pressure in the system caused the death of four children in a house fire because there was no alternative water supply for firefighting in Bear Creek, South Dakota. Most of our communities lack an alternative to the current water system.
  - b) There would be no water available for dialyzing kidney patients served by the dialysis unit in Eagle Butte, South Dakota. The patients currently served would

have to be moved to other cities in South Dakota to receive dialysis. I am informed by the Tribe that currently there are 44 dialysis patients receiving dialysis in Eagle Butte, South Dakota with an average of receiving dialysis 3 times a week.

- c) There would be no water for the hospital located in Eagle Butte, South Dakota which provides health care to the entire population. Without water supply, the hospital and its clinic cannot provide services. The nearest hospitals that would have water supply potentially are over 90 miles away from Eagle Butte, South Dakota one way.
- d) There are over 1,100 diabetic patients living in the service area. There are also over 697 children under the age of 5, and 887 residents over the age of 65. These are all high risk populations for illness and death in the event that water is not available for sanitation and regular bathing.
- e) The school systems serving this entire population cannot operate without a water supply. None of the schools have enough storage to operate for longer than one day in the event of a water intake shut down.
- f) The entire population and 17 communities completely dependent on the water intake within this area the size of the state of Connecticut are over 100 miles away from any community with hotels and a separate treated water system. With Ziebach County having the highest poverty rate in the United States, and over 76% of the population being unemployed and over 80% of the population living under the poverty level, relocation to a community with clean water is not feasible for most of our residents we serve, even if it were only temporary.

- g) The lack of access to clean drinking water and water for sanitation would result in an increased risk of residents drinking from untreated stock dams and other untreated sources of water such as creeks, which in turn increases a health risk of waterborne diseases and diseases resulting from poor sanitation that existed prior to the operation of the water system back in 1975, including typhoid and dysentery. It also causes an increased risk of drinking from sources contaminated with heavy metals, arsenic and mercury, such as the Cheyenne River, which contribute to the high rates of autoimmune disorders and cancers in the population.
9. The lack of access to water would also result in a shutdown of all but essential governmental functions and place an incredible strain on EMS and law enforcement services, which are already beyond the breaking point as a result on chronic underfunding by the federal government. It would also result in shutdown of the Law Enforcement Detention facilities serving the entire reservation. The nearest potential detention facilities are over 1 ½ hours away. With over 29,000 calls for service a year, this would create a public safety crisis if there were no water supply for even a week.
10. The Tribe does not have the financial resources or income to withstand a loss of water supply for even a month. The effects on the Tribe of even a temporary loss of water supply would be devastating and would threaten our ability to govern and protect health and safety. The Tribe's primary source of income is revenue from agricultural leases and pasture leases. Without a water supply for livestock and agriculture, lessees will be entitled to a reduction in or elimination in their lease fees for the periods they are without water, and the BIA will require a reduction in livestock pastured on tribal lands to protect the land.

11. The Tribe does not have any income from real estate tax as all lands are held in trust by the United States for the benefit of the Tribe and are not taxable.
12. The Tribe does not own any casinos or other businesses that generate profits at a level that could sustain the Tribe through even a short term crisis.
13. The Tribe has no funds in reserve available to it at this time to address any emergencies occurring.
14. It is clear to me, as a tribal leader who had to try to provide for our residents during a water outage in the past, that any loss of use of the Cap Point water intake resulting from any contamination, whether that is the result of construction in the Missouri River, or an oil spill, would threaten our very right and ability to govern, and our tribal sovereignty.
15. On November 14, 2016 I received a letter from Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works) stating that the Army Corps of Engineers (“Corps”) wanted to discuss conditions of the proposed easement for crossing Lake Oahe. A true and correct copy of this letter is attached hereto at **Attachment A**.
16. On November 16, 2016 officers of the Corps met with me and other representatives of the Great Plains Tribal Chairpersons’ Association (GPTCA). Assistant Secretary Darcy confirmed that the Corps’ November 14 letters to the Tribes constituted an invitation to the tribes to provide any new information that the Tribes may have that was relevant to the Corps’ consideration of the easement. Furthermore, she told the GPTCA that her office, not the Omaha Regional Command, would be making the decision on the easement.
17. In response to this invitation to provide information concerning the easement, Tribal Attorney Mark Van Norman arranged a meeting between Assistant Secretary Darcy and

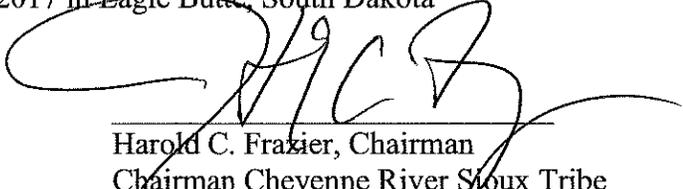
the Cheyenne River Sioux Tribe to occur on December 9, 2016, at which the Tribe proposed to provide the requested information.

18. On December 2, 2016, Colonel Henderson met with members of the Standing Rock Sioux Tribe and received technical information regarding the easement. The Cheyenne River Sioux Tribe was not invited.
19. On December 9, 2016, I attended a meeting, along with officials from other tribes, with the Corps, the Department of the Interior and the Department of Justice in Washington, D.C. At this meeting tribal officials requested information concerning the proposed Environmental Impact Study process. Assistant Secretary Darcy did not attend; instead she was represented by her principal deputy, Lowry Crook. The Federal government officials would not provide detail to the tribal officials, other than to reiterate what had been set forth in the December 4 Memorandum and to inform us that a notice regarding further action to be taken by the Corps would be published in the Federal Register by the end of the year.
20. On January 18, 2017, I sent a letter to Assistant Secretary of the Army Jo-Ellen Darcy stating that CRST must be included in the EIS process, and that CRST participate in the EIS process as a "Cooperating Agency." A true and correct copy of this letter is attached hereto as **Attachment B**.
21. On January 27, 2017, I sent a written request for government-to-government consultation on President Trump's January 24, 2017 memorandum prior to an MLA easement decision, and renewing the Tribe's request for access to documents being withheld. A true and correct copy of this letter is attached hereto as **Attachment C**.

22. On February 1, 2017 I sent a letter to the Omaha District Office with a copy to the Secretary of the Army requesting government to government consultation before issuance of the proposed easement, and renewed the Tribe's request for release of documents being withheld by the Corps. A true and correct copy of this letter is attached hereto as **Attachment D**.
23. On February 3, 2017 Colonel Henderson of the Omaha District sent a letter to me that requested the Tribe's assistance in enforcing the Omaha District's decision to close public access to Corps lands north of the Standing Rock Reservation where DAPL is crossing Lake Oahe, and in clearing the camp and its residents, citing concerns about the "fragile ecosystem in this area" and to prevent "contamination of our precious water resources." A true and correct copy of this letter is attached hereto as **Attachment E**.
24. Neither Colonel Henderson nor any other Corps official has ever responded to the Tribe's requests to engage in government to government consultation before the issuance of the easement.

I swear under the penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

Executed this 22<sup>nd</sup> day of February, 2017 in ~~Eagle Butte~~, South Dakota

  
Harold C. Frazier, Chairman  
Chairman Cheyenne River Sioux Tribe

Case No. 1:16-cv-1534-JEB

**CHEYENNE RIVER SIOUX TRIBE**  
**ATTACHMENT A**

Case No. 1:16-cv-1534-JEB



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
108 ARMY PENTAGON  
WASHINGTON DC 20310-0108

NOV 14 2016

The Honorable Harold Frazier  
Chairman, Cheyenne River Sioux Tribe  
P.O. Box 590  
Eagle Butte, South Dakota 57625-0590

Dear Chairman Frazier:

Today the Army informed the Standing Rock Sioux Tribe, Energy Transfer Partners, and Dakota Access LLC that it had completed the review of its previous decisions regarding the proposed crossing of the Dakota Access Pipeline (DAPL) under Lake Oahe. The Army has determined that additional discussion with the Standing Rock Sioux Tribe is warranted, and invited the Standing Rock Sioux Tribe to engage in discussion for an expedited period concerning the following topics:

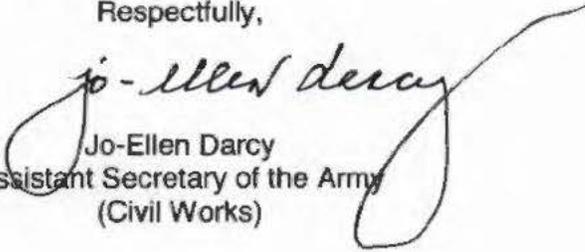
- Potential conditions in an easement for the pipeline crossing, which would further reduce the risk of a spill or rupture, hasten detection and response, or otherwise enhance the protection of Lake Oahe, the Tribe's water supplies, and its treaty rights;
- With such conditions, the risk to the Tribe of a spill from the pipeline crossing Lake Oahe at the proposed location; and
- In light of such conditions, whether granting an easement for the pipeline to cross Lake Oahe at the location currently proposed is appropriate.

While this discussion and analysis are ongoing, construction on or under Corps land bordering or under Lake Oahe cannot occur because the Army has not made a final decision on whether to grant an easement.

I also understand that you have recently requested to speak with my Principal Deputy to discuss additional issues concerning the pipeline. During this period of discussion with the Standing Rock Sioux Tribe, we likewise welcome the opportunity to confer with you to better understand any additional concerns and information you may have.

We value our government-to-government relationship and look forward to speaking with you soon.

Respectfully,

  
Jo-Ellen Darcy  
Assistant Secretary of the Army  
(Civil Works)

Case No. 1:16-cv-1534-JEB

**CHEYENNE RIVER SIOUX TRIBE**  
**ATTACHMENT B**

Case No. 1:16-cv-1534-JEB

**CHAIRMAN**

Harold C. Frazier

**SECRETARY**

EvAnn White Feather

**TREASURER**

Benita Clark

**VICE-CHAIRMAN**

Robert Chasing Hawk



P.O. Box 590  
Eagle Butte, South Dakota 57625  
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**TRIBAL COUNCIL MEMBERS****DISTRICT 1**

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Bryce In the Woods

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Edward Widow  
John Kessler

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Jim Pearman  
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Mark Knight

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Raymond Uses The Knife  
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**DISTRICT 6**

Tuffy Thompson  
Wade "Tater" Ward

January 18, 2017

Honorable Jo-Ellen Darcy  
Assistant Secretary of the Army for Civil Works  
Office of the Assistant Secretary of the Army for Civil Works  
108 Army Pentagon  
Washington, D.C. 20310-0108

**Re: NOI Comments, Dakota Access Pipeline Crossing – Request for Cooperating Agency Status**

Dear Assistant Secretary Darcy:

The Cheyenne River Sioux Tribe reviewed your January 18, 2017 Notice of Intent (Notice) to prepare an Environmental Impact Statement (EIS) under the National Environmental Policy Act for the proposed Dakota Access Pipeline (Pipeline) crossing of the Missouri River at Lake Oahe, North Dakota. The Notice states that the "Army intends to prepare an EIS to consider any potential impacts to the human environment that the grant of an easement may cause." While the notice only specifies potential impacts to the Standing Rock Sioux Tribe, the Pipeline will also have potential impacts on the Cheyenne River Sioux Tribe and our Reservation. To best ensure that the EIS fully addresses all of the Pipeline's potential impacts, we requests that the Army Corps of Engineers (Corps) include the Cheyenne River Sioux Tribe as a Cooperating Agency for the EIS.

Under CEQ regulations, the Corps is required to include Cooperating Agencies in the preparation and drafting of an EIS that have "jurisdiction by law" and "special expertise with respect to any environmental issue." 40 C.F.R. § 1501.6. The Corps is also required to "use the environmental analysis and proposals of cooperating agencies ... to the maximum extent possible...." 40 C.F.R. § 1501.6 (a)(2). CEQ regulations include Indian tribes in the definition of Cooperating Agencies "when the effects are on a reservation." 40 C.F.R. § 1508.5. The Cheyenne River Sioux Tribe meets these standards for Cooperating Agencies.

The blue represents the thunderclouds above the world where live the thunder birds who control the four winds. The rainbow is for the Cheyenne River Sioux people who are keepers of the Most Sacred Calf Pipe, a gift from the White Buffalo Calf Maiden. The eagle feathers at the edges of the rim of the world represent the spotted eagle who is the protector of all Lakota. The two pipes fused together are for unity. One pipe is for the Lakota, the other for all the other Indian Nations. The yellow hoops represent the Sacred Hoop, which shall not be broken. The Sacred Calf Pipe Bundle in red represents Wakan Tanka – The Great Mystery. All the colors of the Lakota are visible. The red, yellow, black and white represent the four major races. The blue is for heaven and the green for Mother Earth.

First, the proposed crossing of the Missouri River at Lake Oahe by the Pipeline will potentially have a substantial and direct effect on our Reservation, over which we exercise jurisdiction by law. Our Reservation is just downstream from the proposed Pipeline crossing. The eastern exterior boundary of our Reservation lies underneath Lake Oahe and over 70 miles of Missouri River shoreline are located within the exterior boundaries of our Reservation. We reserved these homelands, resources and waters in treaty with the United States. Under these treaties and other laws, we exercise legal jurisdiction over portions of Lake Oahe and have treaty fishing and hunting rights in the Lake. We also govern our Reservation lands, waters, and resources to provide for our members and future generations.

Second, we have special expertise in assessing the potential treaty, cultural, and environmental impacts of the proposed Pipeline crossing on our Reservation lands, resources, and waters. The Missouri River running through our Reservation is a “blood line” of the Sioux or Lakota people. We rely on the sacred waters of the Missouri River and Lake Oahe for our drinking water, wellbeing, and livelihood.

In addition to potential impacts directly on our Reservation, the easement for the proposed Pipeline to cross Lake Oahe is on lands reserved by the Great Sioux Nation in the 1851 Fort Laramie Treaty. 11 Stat. 749 (Sep. 17, 1851). The Cheyenne River Sioux Tribe, along with the Standing Rock Sioux Tribe and a number of other tribes in this region of the United States, is a successor-sovereign of the Great Sioux Nation. Our members have lived along the Missouri River since time immemorial—before Lake Oahe was created. Over this time period to the present we have managed these lands, resources and waters for the benefit of our members.

We also protect and preserve archeological sites, cultural sites and burial sites in this area. Since the 1990’s, the Cheyenne River Sioux Tribe has maintained a Tribal Historic Preservation Officer responsible for National Historic Preservation Act compliance throughout our Reservation and also in any area where our cultural resources may be affected by a Federal undertaking.

Inclusion of the Cheyenne River Sioux Tribe as a Cooperating Agency also helps to fulfill the Corps’ November 1, 2012 Tribal Consultation Policy (Policy). The Corps’ Policy defines consultation as an “open, timely, meaningful, collaborative and effective deliberative communication process” that begins at the “earliest planning states, before decisions are made and actions are taken; [and includes] an active and respectful dialogue concerning actions ... that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands.” Policy at 2. The Policy further requires that the Corps’ “ensure that it addresses Tribal concerns regarding protected tribal resources, tribal rights (including treaty rights) and Indian lands.” Policy at 3.

Under CEQ regulations and in fulfillment of the Corps’ Policy, the Cheyenne River Sioux Tribe looks forward to working with the Corps, other tribes, and other Federal agencies as a Cooperating Agency to provide a full analysis of the proposed Pipeline crossing of Lake Oahe and the Missouri River. Impacts to our lands, waters, natural resources, cultural sites and treaty rights from the Pipeline crossing cannot be fully or effectively analyzed without the involvement of the Cheyenne River Sioux Tribe as a Cooperative Agency. To schedule scoping meetings and

upcoming work under NEPA, please contact my Washington, D.C. counsel, Rollie Wilson, at 202-340-8232.

Very Truly Yours,



Harold C. Frazier, Chairman  
Cheyenne River Sioux Tribe

Cc: Assistant Secretary for Indian Affairs Lawrence Roberts  
Office of Tribal Justice Director Tracy Toulou  
Army Corps of Engineers Water Resources Policy and Legislation Mr. Gib Owen

Case No. 1:16-cv-1534-JEB

**CHEYENNE RIVER SIOUX TRIBE**  
**ATTACHMENT C**

Case No. 1:16-cv-1534-JEB

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Robert Chasing Hawk  
Derek Bartlett

**DISTRICT 6**

Tuffy Thompson  
Wade "Tater" Ward

January 27, 2017

The Honorable Robert Speer  
 Acting Secretary of the Army  
 101 Army Pentagon  
 Washington, D.C. 20301-1000

**Re: Tribal Consultation on Dakota Access Pipeline**

Dear Acting Secretary Speer:

The Cheyenne River Sioux Tribe formally requests government-to-government consultation with your office and the Army Corps of Engineers (Corps) leadership on the President's January 24, 2017 Memorandum to you regarding "Construction of the Dakota Access Pipeline." We make this request pursuant to Department of Defense (DoD) Instruction 4710.02 and the Corps' Tribal Consultation Policy issued on November 1, 2012 and our ongoing contact with Corps Headquarters on this issue. We have attached these documents for your convenience.

Consultation is needed as the Corps considers the President's Memorandum and prior to taking any action pursuant to the Memorandum. In addition, consultation is needed before scoping comments on the Dakota Access Pipeline (DAPL) are due on February 20, 2017. As you know, the DoD Instruction and Corps Policy require early, meaningful, and pre-decisional consultation with tribes on matters that may impact tribal lands, resources or rights. Specifically the DoD Instruction provides:

- The Heads of DoD Components are required to "[c]onsult with federally-recognized tribal governments on a government-to-government basis on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian Lands..." DoD Instruction 4710.02 Section 5.3.4.
- DoD Components are required to "involve tribal governments early in the planning process for proposed actions.... Early involvement means that a tribal government is given an opportunity to comment on a proposed action in time for the tribal

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government to provide meaningful comments that may affect the decision.” DoD Instruction 4710.02 Section 6.6.

- The administrative record for decision must “show that the Department of Defense has given careful consideration to all the available evidence and points of view before making a final decision.” DoD Instruction 4710.02 Enclosure 2 Section E2.9.

In addition, the Corps Tribal Consultation Policy requires:

- That consultation be an “[o]pen, timely, meaningful, collaborative and effectively deliberative process that emphasized trust, respect and shared responsibility. And, that “consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken;...” Corps Policy Section 3.b.
- The Corps is required to “share information that is not otherwise controlled or classified information” as part of the tribal consultation process. Corps Policy Section 5.b.(5).
- The Corps is also required to have a “dispute resolution process during the consultation process, including a provision to elevate the consultation to higher [Corps] and/or Tribal levels.” Corps Policy Section 5.d.(7).

Under the DoD Instruction and Corps Policy consultation is required before any action is taken on the President’s January 24, 2017 Memorandum regarding DAPL. The President’s Memorandum directs the Secretary of the Army to instruct the Corps to take all actions necessary and appropriate to:

- “review and approve in an expedited manner ... requests for approvals to construct and operate the DAPL....” Memorandum Section 2(a)(i).
- “consider ... whether to rescind or modify” the Corps’ December 4, 2016 memorandum regarding DAPL and “whether to withdraw the Notice of Intent to Prepare an Environmental Impact Statement” regarding DAPL. Memorandum Section 2(a)(ii).
- “consider ... prior reviews and determinations, including the Environmental Assessment issued in July of 2016 for the DAPL, as satisfying all applicable requirements of the National Environmental Policy Act....”
- “review and grant ... requests for waivers of notice periods arising from or related to [Corps] real estate policies and regulations....”
- “issue ... any approved easements or rights-of-way immediately after notice is provided to the Congress pursuant to section 28(w) of the Mineral Leasing Act....”

Each of these reviews, decisions and considerations will potentially have significant impact on the lands, resources and rights of the Cheyenne River Sioux Tribe and requires meaningful tribal consultation. Our Reservation and drinking water intake is just downstream from the proposed DAPL crossing. Our Reservation includes portions of Lake Oahe and over 70 miles of Missouri River shoreline. We reserved these homelands, resources and waters in treaties with the United States and those reserved rights have been further recognized in federal laws enacted by Congress.

Under these treaties and laws, the Tribe exercises legal jurisdiction over portions of Lake Oahe and its shoreline. The Tribe also reserved water rights in the Missouri River including Lake Oahe, and our tribal members have treaty fishing and hunting rights in the Lake. We also govern these Reservation lands, waters, and resources to provide for our members and future generations.

In addition, we are currently preparing scoping comments pursuant to a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) that was issued by the Department and the Corps on January 18, 2017 in the Federal Register. The NOI provides:

The proposed crossing of Corps property [by DAPL] requires the granting of a right-of-way (easement) under the Mineral Leasing Act (MLA), 30 U.S.C. 185. To date, the Army has not made a final decision on whether to grant the easement pursuant to the MLA. The Army intends to prepare an EIS to consider any potential impacts to the human environment that the grant of an easement may cause.

82 Fed. Reg. 5544. The Tribe has requested to be a Cooperating Agency for this EIS to provide a full analysis of the proposed crossing of the Missouri River and Lake Oahe by DAPL.

We are concerned that the Omaha District is taking actions to short-circuit this analysis without involving the Tribe as a Cooperating Agency and defying requirements for tribal consultation pursuant to the DoD Instruction and the Corps Policy. Prior to issuance of the NOI, on Friday January 13, 2017, the Omaha District Commander, Colonel Henderson, informed representatives of the Tribe that the Omaha District already completed the additional analysis that the Assistant Secretary of the Army for Civil Works determined was needed in a December 4, 2016 Memorandum and that was intended to be completed in the EIS.

The Tribe was not consulted at all about the Omaha District's additional analysis, and the Tribe has not been provided with a copy of that analysis. Without access to the additional analysis conducted by the Omaha District, the Tribe cannot assess the potential impacts of proposed crossing of Lake Oahe by DAPL or the merits of alternative routes and, as a consequence, cannot engage in meaningful consultation.

We also lack the information needed to meaningful engage in government-to-government consultation with the Department and the Corps. The Corps committed to provide the Tribe with 31 essential technical documents that were part of the Corps' administrative record, and are necessary for the Tribe to provide informed and meaningful comments as a part of the additional

analysis needed. These documents are identified in Paragraph 14 of the Assistant Secretary's December 4, 2016 Memorandum.

We have yet to receive these documents. Without access to these critical technical documents, and the ability to have the Tribe's own technical experts analyze these documents, the Tribe cannot assess the potential impacts of proposed crossing of Lake Oahe by DAPL or the merits of alternative routes and, as a consequence, cannot engage in meaningful consultation.

In *Yankton Sioux Tribe v. Kempthorne*, the U.S. District Court for the District of South Dakota determined that where an agency, "has established a policy requiring prior consultation with a tribe, and therefore created a justifiable expectation that the tribe will receive a meaningful opportunity to express its views before a policy is made, that opportunity must be given." 442 F. Supp. 774, 784 (2006). The Court found that the withholding of information relevant to what the proposed impact of the Bureau of Indian Affairs' education restructuring would be on the tribe was a violation of the requirement to meaningfully consult with the tribe. *Id.* at 785.

This requirement was recently affirmed, in *Cheyenne River Sioux Tribe v. Jewell*, when the Court found that the agency failed to engage in government-to-government consultation by failing to provide the Tribe with information necessary for the Tribe to assess the impact of the federal action. 2016 WL 4625672; 3:15-CV-03018-KES (D.S.D. Sept. 6, 2016). Without these documents and substantive discussions with Corps Officials about potential impacts on the Tribe's lands, waters, resources and rights, we cannot fulfill the requirements of the DoD Instruction and Corps Policy.

Finally, we are concerned that the President's January 24, 2017 Memorandum potentially changes or waives the Corps' Real Estate Policy in a manner that impacts the Tribe's lands, waters, resources and rights. Pursuant to Corps Real Estate Policy Guidance Letter No. 27 dated October 28, 2009, also attached here, the Corps provides Congressional Committees with notification of its intent to grant an easement under Section 28 of the Mineral Leasing Act of 1920, as amended, and a 14 day waiting period prior to executing an easement. Any change or waiver of this policy that may significantly impact tribal resources requires tribal consultation.

Colonel Henderson already committed to providing the Tribe and others with this 14 days notice of any decision to grant an easement in this case. Colonel Henderson made these commitments in a November 17, 2016 in Rapid City, SD and again with a meeting with tribes on January 13, 2017. Such notice is essential to proper administration of our government functions and our responsibility to protect the health and safety of our members. Notice will provide us with the time needed to assess and prepare for the grant of any easement and its potential impact on the Tribe's lands, waters, resources and rights.

Thank you for your consideration of this request. We understand that the Corps is currently moving forward with the EIS that was properly and lawfully noticed on January 18, 2017. The Cheyenne River Sioux Tribe is a necessary Cooperating Agency for that EIS and we are preparing scoping comments due on February 20, 2017. We look forward to consulting with

you and the Corps on the EIS and any actions being considered as a result of the President's January 24, 2017 Memorandum that would affect the EIS and the grant of an easement to DAPL.

Please contact our Washington, D.C. counsel, Rollie Wilson, at 202-340-8232 to arrange this consultation. This consultation is required to fulfill the Corps obligations under law, DoD Instruction 4710.02, the Corps Tribal Consultation Policy, Executive Orders on tribal consultation, and the Corps treaty and trust responsibilities to the Cheyenne River Sioux Tribe.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. Frazier', with a long horizontal flourish extending to the right.

Harold Frazier, Chairman  
Cheyenne River Sioux Tribe

Cc: Army Corps of Engineers Water Resources Policy and Legislation Mr. Gib Owen

THE WHITE HOUSE

Office of the Press Secretary

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For Immediate Release

January 24, 2017

January 24, 2017

MEMORANDUM FOR THE SECRETARY OF THE ARMY

SUBJECT: Construction of the Dakota Access Pipeline

Section 1. Policy. The Dakota Access Pipeline (DAPL) under development by Dakota Access, LLC, represents a substantial, multi-billion-dollar private investment in our Nation's energy infrastructure. This approximately 1,100-mile pipeline is designed to carry approximately 500,000 barrels per day of crude oil from the Bakken and Three Forks oil production areas in North Dakota to oil markets in the United States. At this time, the DAPL is more than 90 percent complete across its entire route. Only a limited portion remains to be constructed.

I believe that construction and operation of lawfully permitted pipeline infrastructure serve the national interest.

Accordingly, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct as follows:

Sec. 2. Directives. (a) Pipeline Approval Review. The Secretary of the Army shall instruct the Assistant Secretary of the Army for Civil Works and the U.S. Army Corps of Engineers (USACE), including the Commanding General and Chief of Engineers, to take all actions necessary and appropriate to:

(i) review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate, requests for approvals to construct and operate the DAPL, including easements or rights-of-way to cross Federal areas under section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. 185; permits or approvals under section 404 of the Clean Water Act, 33 U.S.C. 1344; permits or approvals under section 14 of the Rivers and Harbors Act, 33 U.S.C. 408; and such other Federal approvals as may be necessary;

(ii) consider, to the extent permitted by law and as warranted, whether to rescind or modify the memorandum by the Assistant Secretary of the Army for Civil Works dated December 4, 2016 (Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota), and whether to withdraw the Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, North Dakota, dated January 18, 2017, and published at 82 *Fed. Reg.* 5543;

(iii) consider, to the extent permitted by law and as warranted, prior reviews and determinations, including the Environmental Assessment issued in July of 2016

for the DAPL, as satisfying all applicable requirements of the National Environmental Policy Act, as amended, 42 U.S.C. 4321 et seq., and any other provision of law that requires executive agency consultation or review (including the consultation or review required under section 7(a) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a));

(iv) review and grant, to the extent permitted by law and as warranted, requests for waivers of notice periods arising from or related to USACE real estate policies and regulations; and

(v) issue, to the extent permitted by law and as warranted, any approved easements or rights-of-way immediately after notice is provided to the Congress pursuant to section 28(w) of the Mineral Leasing Act, as amended, 30 U.S.C. 185(w).

(b) Publication. The Secretary of the Army shall promptly provide a copy of this memorandum to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Majority Leader of the Senate, and the Governors of each State located along the Dakota Access Pipeline route. The Secretary of the Army is authorized and directed to publish this memorandum in the *Federal Register*.

(c) Private Property. Nothing in this memorandum alters any Federal, State, or local process or condition in effect on the date of this memorandum that is necessary to secure access from an owner of private property to construct the pipeline and facilities described herein. Land or an interest in land for the pipeline and facilities described herein may only be acquired consistently with the Constitution and applicable State laws.

Sec. 3. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

# # #



# Department of Defense INSTRUCTION

NUMBER 4710.02  
September 14, 2006

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USD(AT&L)

SUBJECT: DoD Interactions with Federally-Recognized Tribes

- References:
- (a) DoD Directive 5134.01, "Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)), December 9, 2005
  - (b) DoD Directive 4715.1E, "Environment, Safety, and Occupational Health (ESOH)," March 19, 2005
  - (c) DoD Instruction 4715.3, "Environmental Conservation Program," May 3, 1996
  - (d) Secretary of Defense Policy on "Department of Defense American Indian and Alaska Native Policy," October 20, 1998<sup>1</sup>
  - (e) through (s), see Enclosure 1

## 1. PURPOSE

This Instruction implements DoD policy, assigns responsibilities, and provides procedures for DoD interactions with federally-recognized tribes (hereafter referred to as "tribes") in accordance with References (a) through (d), Executive Order (E.O.) 13175<sup>2</sup> (Reference (e)), and the Presidential Memorandum on "Government-to-Government Relationship with Tribal Governments"<sup>3</sup> (Reference (f)).

## 2. APPLICABILITY AND SCOPE

This Instruction applies to:

2.1. The Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components").

2.2. All DoD operations, activities, and installations that require interactions with tribes.

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<sup>1</sup> Copies may be obtained via the internet at <https://www.denix.osd.mil/denix/Public/Native/Outreach/policy.html>

<sup>2</sup> Copies may be obtained via the internet at <http://www.epa.gov/fedrgstr/eo/eo13175.htm>

<sup>3</sup> Copies may be obtained via the internet at <http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html>

### 3. DEFINITIONS

3.1. Indian. A member of a tribe, as defined in subparagraph 3.5.

3.2. Indian Lands. Any lands the title to which is either held in trust by the United States for the benefit of any Indian tribe or Indian, or held by an Indian tribe or Indian subject to restrictions by the United States against alienation (Reference (d) and 32 Code of Federal Regulations (CFR) part 229 (Reference (g))).

3.3. Protected Tribal Resources. Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by or reserved by or for Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources (Reference (d)).

3.4. Tribal Rights. Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, un-extinguished aboriginal title, treaty, statute, judicial decision, Executive Order, or agreement, and that give rise to legally enforceable remedies (Reference (d)).

3.5. Tribe. A federally-recognized Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the most current Department of Interior list of tribes published in the Federal Register (Reference (c), Reference (d), and Section 1996a of 42 United States Code (U.S.C.) (Reference (h))).

### 4. POLICY

It is DoD policy to:

4.1. Meet its responsibilities to tribes as derived from Federal trust doctrine, treaties, and agreements between the United States Government and tribal governments, and to comply with Federal statutes, regulations, Presidential Memorandums, and Executive Orders governing DoD interactions with tribes.

4.2. Build stable and enduring government-to-government relations with federally-recognized tribal governments in a manner that sustains the DoD mission and minimizes effects on protected tribal resources in accordance with References (c) through (f) and 32 CFR part 22 (Reference (i)).

4.3. Fully integrate, down to staff officers and civilian officials at the installation level, the principles and practices of meaningful consultation and communication with tribes in accordance with References (a) through (f).

4.4. Take into consideration the significance that tribes ascribe to protected tribal resources on protected lands in accordance with References (c), (g), and (h); 36 CFR part 800 (Reference (j)); 43 CFR part 10 (Reference (k)); Sections 470, 470.1, and 470.a through 470.w of title 16 U.S.C. (Reference (l)); and E.O. 13007<sup>4</sup> (Reference (m)).

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<sup>4</sup> Copies may be obtained via the internet at <http://web.em.doe.gov/public/tribal/eo13007.html>

## 5. RESPONSIBILITIES

5.1. The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) shall oversee DoD interactions with tribes.

5.2. The Deputy Under Secretary of Defense for Installations and Environment (DUSD(I&E)), under the USD(AT&L), shall:

5.2.1. Develop additional policy and guidance, as needed, in accordance with Reference (a).

5.2.2. Designate responsibilities and provide procedures for DoD interactions with tribes.

5.2.3. Enhance the DoD Components' understanding of tribal issues and concerns through education and training programs and outreach activities.

5.2.4. Assist the DoD Components in identifying requirements of Presidential Memorandums, Executive Orders, statutes, and regulations governing DoD interactions with tribes.

5.2.5. As requested, assist the DoD Components with consultation and government-to-government relations with tribes to implement the following:

5.2.5.1. Support and services for eligible organizations and activities outside the Department of Defense in accordance with DoD Directive 1100.20 (Reference (n)).

5.2.5.2. The DoD Office of Small Business Programs in accordance with DoD Directive 4205.1 (Reference (o)).

5.2.6. Oversee DoD Component implementation of this Instruction, compliance with the guidance for consulting with tribes set forth in Enclosure 2, and compliance with the measures of merit set forth in Enclosure 3.

5.2.7. Coordinate with other Federal Agencies and tribal organizations, as appropriate, on tribal issues of regional and national scope.

5.3. The Heads of the DoD Components shall:

5.3.1. Integrate the requirements of Presidential Memorandums, Executive Orders, statutes, and regulations regarding DoD interactions with tribes into their mission requirements.

5.3.2. Plan, program, and budget for statutory and regulatory requirements applicable to interactions with tribes consistent with DoD guidance and fiscal policies, and within available resources.

5.3.3. Develop and implement programs to monitor, achieve, and maintain compliance with this Instruction, including compliance by installations and their tenant activities.

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5.3.4. Consult with federally-recognized tribal governments on a government-to-government basis on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands in accordance with Reference (d), Enclosure 2, and the measures of merit in Enclosure 3.

5.3.5. To the extent permitted by legal authority, provide information on opportunities for tribes to compete for requests for proposals or other potential contracting, sub-contracting, and grant or cooperative agreement instruments; for surplus equipment and property; and for education, training, or employment, as appropriate.

5.3.6. Promptly notify the DUSD(I&E) of tribal issues that have the potential to be elevated to OSD for resolution.

5.3.7. Assign tribal liaison responsibilities to staff at the Headquarters level to coordinate tribal issues with the Office of the DUSD(I&E).

## 6. PROCEDURES

6.1. The DoD Components shall consult with tribes whenever proposing an action that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.

6.2. The DoD Components shall consult with tribes in accordance with the requirements specified in References (c) through (h).

6.3. Consultation required by paragraphs 6.1. and 6.2. shall apply to proposed actions that may have the potential to significantly affect tribes, including, but not limited to: land-disturbing activities, construction, training, over-flights, management of properties of traditional religious and cultural importance, protection of sacred sites from vandalism and other damage, access to sacred sites, access to treaty-reserved resources, disposition of cultural items in accordance with Reference (k), and land use decisions.

6.4. The DoD Components shall afford tribes that have a cultural or historical affiliation with the lands encompassed by the installation an opportunity to consult on the development of the Integrated Cultural Resources Management Plan (ICRMP), and, where tribal treaty rights or other rights to natural resources potentially may be affected, Integrated Natural Resources Management Plans (INRMPs).

6.5. In consultation with tribes identified in paragraph 6.4., the DoD Components shall incorporate in applicable documentation, including ICRMPs and INRMPs, a standard process for consultation whenever issues arise between the tribe and the Component.

6.6. The DoD Components shall involve tribal governments early in the planning process for proposed actions that may have the potential to affect protected tribal rights, land, or resources, and shall endeavor to complete consultations prior to implementation of the proposed action. Early involvement means that a tribal government is given an opportunity to comment on a proposed action in time for the tribal government to provide meaningful comments that may

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affect the decision. Installations should take advantage of the processes set forth in 40 CFR parts 1500-1508 (Reference (p)) and E.O. 12898<sup>5</sup> (Reference (q)) to involve tribes in early planning.

6.7. The DoD Components are encouraged to use agreements such as Comprehensive Agreements, Memorandums of Agreement, or Memorandums of Understanding between the Department of Defense and tribal governments, as appropriate, on issues of common interest to each party. The primary goal of formalized agreements with tribal governments is to foster relationships that facilitate military training and readiness while addressing issues of importance to tribes.

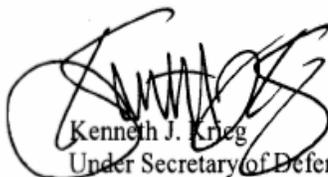
6.8. When contacting tribes, the consultation shall be initiated by the installation commander. Follow-on consultation shall be at a level agreed to by the installation commander and tribal government leadership.

6.9. Base commanders at installations that have on-going consultation and coordination with tribes shall assign a staff member to serve as a tribal liaison.

6.10. Installation personnel who conduct activities that may have the potential to affect protected tribal rights, land, or resources shall participate in training courses and workshops to raise their awareness of tribal culture and to learn about local tribal issues, especially access, use, and privacy issues, that may be affected by military operations such as low-level flights and access to sacred sites.

## 7. EFFECTIVE DATE

This Instruction is effective immediately.



Kenneth J. Krieg  
Under Secretary of Defense  
for Acquisition, Technology, and Logistics

Enclosures – 3

- E1. References, continued
- E2. Guidance for Consultation with Tribes
- E3. Compliance Measures of Merit

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<sup>5</sup> Copies may be obtained via the internet at [www.epa.gov/civilrights/eo12898.htm](http://www.epa.gov/civilrights/eo12898.htm)

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E1. ENCLOSURE 1

REFERENCES, continued

- (e) Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," November 6, 2000
- (f) Presidential Memorandum on "Government-to-Government Relationship with Tribal Governments," September 23, 1994
- (g) Title 32, Code of Federal Regulations, Part 229, "Protection of Archeological Resources: Uniform Regulations," current edition
- (h) Section 1996a of title 42, United States Code, American Indian Religious Freedom Act
- (i) Title 32, Code of Federal Regulations, Part 22, "DoD Grants and Agreements: Award and Administration," current edition
- (j) Title 36, Code of Federal Regulations, Part 800, "Protection of Historic Properties," current edition
- (k) Title 43, Code of Federal Regulations, Part 10, "Native American Graves Protection and Repatriation Regulations," current edition
- (l) Sections 470, 470.1, and 470.a through 470.w of title 16, United States Code, Conservation
- (m) Executive Order 13007, "Indian Sacred Sites," May 24, 1996
- (n) DoD Directive 1100.20, "Support and Services for Eligible Organizations and Activities Outside the Department of Defense," April 12, 2004
- (o) DoD Directive 4205.1, "Department of Defense Small Business and Small Disadvantaged Business Utilization Programs," September 11, 1996
- (p) Title 40, Code of Federal Regulations, Parts 1500-1508, "Council on Environmental Quality," current edition
- (q) Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," February 11, 1994
- (r) DoD Directive 5400.07, "DoD Freedom of Information Act Program," October 28, 2005
- (s) Federal Register, Volume 48, Page 44716, "Secretary of the Interior's Professional Qualification Standards," September 29, 1983

*DoDI 4710.02, September 14, 2006*

## E2. ENCLOSURE 2

### GUIDANCE FOR CONSULTATION WITH TRIBES

Consultation is always a dialog, with information and opinion respectfully exchanged in both directions. The following guidance is designed to facilitate the consultation process and to make it more productive.

E2.1. The DoD Components should identify official points-of-contact prior to initiating consultation with all tribes (or lineal descendants in the case of Reference (k) actions) that may have an interest in the matter under consultation. As tribal boundaries have shifted and tribes have migrated, tribes that seem far removed geographically may have a traditional interest in assets and actions at specific, present-day installations.

E2.2. Commanders and commanding officers play a prominent role in government-to-government consultation. Commander/commanding officer presence and signature is appropriate at significant milestones such as formal initiation of consultation, notification of final DoD decisions about proposed actions under consultation, and completion of any agreement document that may result from consultation.

E2.3. Commanders and commanding officers may delegate follow-up consultation functions. Designated DoD staff at the local or regional level may negotiate details and engage in routine consultation with tribal government staff or other tribal representatives delegated by tribal authorities.

E2.4. Consultation should take place at a time and in a location convenient for tribal representatives. DoD staff may find it necessary to negotiate the time and place for consultation, recognizing that many tribes do not have an operating budget that will pay for tribal representatives' transportation and per diem, and that tribal representatives may have existing work, community, and family commitments.

E2.5. DoD staff should consider several factors in scheduling consultation. Consultation may require multiple meetings over a period of months, or may be dependent upon culturally specific circumstances such as religious ceremonies conducted only at certain times of the year, availability of information sources, or certain natural resources cycles. DoD Components should start early and allow plenty of time. If there is an urgent need for expeditious consultation, the component must make this fact known to tribal contacts and negotiate an expedited timetable.

E2.6. Participating members of a particular culture are in the best position to provide the most up-to-date and accurate information about that culture; therefore culturally specific information obtained from a member of a particular culture is to be respected as expert testimony.

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E2.7. In participating in consultation, DoD staff should take into consideration and respect tribal protocols, such as the following:

E2.7.1. Tribal representatives may want to open a meeting with a traditional ceremony, although DoD representatives are under no obligation to participate.

E2.7.2. The installation may need to schedule meetings well in advance to enable the tribe to decide upon appropriate attendees such as tribal elders, traditional religious leaders, and translators.

E2.7.3. Tribal representatives may be reluctant to discuss culturally sensitive information outside of the tribe or at certain times of the year, or they may need to clear information with traditional religious leaders or tribal council members prior to making commitments.

E2.7.4. Tribal governments differ from each other in their organizational structures and corporate cultures. DoD representatives should be mindful that these differences may affect formal titles and forms of address (such as “Chief,” “Governor,” and/or “Chairman”) and other forms of protocol. Tribal representatives may be female or male, elected or not elected, political or spiritual leaders, and exhibit other variations from tribe to tribe.

E2.8. Each tribe should be consulted separately, unless affected tribes choose to act collectively.

E2.9. Without including culturally sensitive information, document the consultation in writing and place it in the administrative record. Although consent, approval, or formal agreement from tribal governments is not required to conclude the consultation process and to proceed with a project on Federal land, the record must show that the Department of Defense has given careful consideration to all the available evidence and points of view before making the final decision.

E2.10. The Department of Defense recognizes that a tribe may wish to keep confidential some of the information it may provide during consultation. Tribes should be assured that the Department of Defense will make every reasonable effort, consistent with the law, to withhold from public disclosure any specific information that a tribe identifies as confidential, especially information related to sacred sites and other traditional cultural properties. Nonetheless, tribes should also understand that the Department of Defense is required to provide public access to its records under the Freedom of Information Act (Reference (r)), except to the extent that any such records are protected from disclosure by a statutory exemption or exclusion. Consequently, tribes should be encouraged to seek the advice of their own legal counsel before providing sensitive information to the Department of Defense.

E2.11. The final decision should be placed into the administrative record and circulated to all consulting parties. It should explain the reasoning as well as the data compiled, but exclude any direct reference to culturally sensitive information provided by tribes and to information sensitive to the DoD mission.

*DoDI 4710.02, September 14, 2006*

E3. ENCLOSURE 3

COMPLIANCE MEASURES OF MERIT

E3.1. Policy Implementation

E3.1.1. The Office of the DUSD(I&E) shall assess the number of installations that have incorporated a process for consultation with tribes either as part of an ICRMP and/or an INRMP, or as an independent process in which tribal interests have been identified.

E3.1.2. A process for consultation is required only when tribes have a cultural or historical affiliation with the lands encompassed by the installation for an ICRMP, and where tribal treaty rights or other rights to natural resources potentially may be affected, for an INRMP.

E3.2. Native American Graves Protection and Repatriation Act (NAGPRA) (Reference (k))

The Office of the DUSD(I&E) shall assess the number of installations:

E3.2.1. With possession or control of any archaeological, historic, or ethnographic collections, including items held by a DoD contractor for the installation.

E3.2.2. With possession or control of items in paragraph E3.2.1., where these items have been professionally evaluated for the presence of “cultural items” as defined in Section 2 of Reference (m). “Professionally evaluated” means the items have been examined and a finding made by a person who has professional training to make an authoritative determination. At a minimum, the person making the determination shall meet the requirements of 48 FR 44716 (Reference (s)).

E3.2.3. With professionally evaluated items that meet the definition of cultural items.

E3.2.4. Retaining possession or control of NAGPRA cultural items that do not fall within the following categories:

E3.2.4.1. The cultural affiliation cannot be determined.

E3.2.4.2. Consultation is ongoing.

E3.2.1.3. No tribes have expressed an interest in the items for repatriation purposes.

E3.2.1.4. Repatriation is pending Federal Register Notice.



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

NOV 1 2012

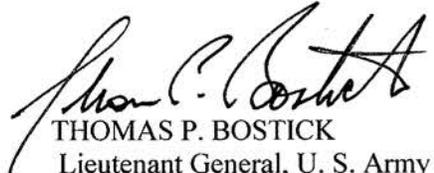
CECG

MEMORANDUM FOR Commanders, Directors and Chiefs of Separate Offices, US Army Corps of Engineers

SUBJECT: Tribal Consultation Policy

1. This memorandum affirms and formalizes current tribal consultation procedures for the U. S. Army Corps of Engineers (USACE).
2. The interaction between the federal government and federally recognized Indian Tribes (including Alaska Natives) has its origins in the U. S. Constitution and has been upheld and defined through Treaties, U.S. Supreme Court cases, various statutes and regulations, presidential documents and policies, including the Department of Defense American Indian and Alaska Native Policy, and the USACE Tribal Policy Principles, recently reissued on 10 May 2010.
3. The Policy provides an outline of our responsibilities to federally recognized Tribes as well as a framework for consulting with them. It is purposefully general in nature because each of the 565 federally recognized American Indian and Alaska Native Tribes are distinct and separate governments, requiring a consultation process that may be completely unique to them.
4. USACE recognizes the sovereign status of Tribal governments and our obligation for pre-decisional government-to-government consultation. USACE also recognizes the unique role Tribes play as partners in water resources projects and seeks to develop relationships with all Tribes who may need our assistance in their capacity building and self-determination.
5. USACE has an excellent tribal program coordinated by a tribal liaison at Headquarters and a point of contact or liaison in each District and Division office. These experts are ready to support you and answer any questions you have regarding tribal policies.
6. An accountable process to interact with Tribes is mandated in Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 06 Nov 2000, and Presidential Memorandum, *Tribal Consultation*, 05 Nov 2009. Please ensure that your staff is aware of and abides by our Consultation Policy to ensure effective and mutually beneficial relationships with tribal partners.
7. My point of contact on this issue is Dr. Georgeie Reynolds, (202) 761-5855.

Encl

  
THOMAS P. BOSTICK  
Lieutenant General, U. S. Army  
Commanding

October 4, 2012

**U.S. Army Corps of Engineers  
Tribal Consultation Policy**

1. References.

- a. U.S. Constitution, Articles I, Section 8; Article VI.
- b. National Historic Preservation Act.
- c. American Indian Religious Freedom Act.
- d. Archaeological Resources Protection Act.
- e. Native American Graves Protection and Repatriation Act.
- f. Religious Freedom Restoration Act.
- g. Executive Order 13007, *Indian Sacred Sites*, 24 May 1996.
- h. Department of Defense American Indian and Alaska Native Policy, 20 Oct 1998.
- i. Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 06 Nov 2000.
- j. Engineer Regulation 1105-2-100, *Planners Guidance Notebook*, 22 Apr 2000.
- k. Department of Defense Instruction Number 4710.02: DoD Interactions with Federally Recognized Tribes, 14 Sep 2006.
- l. Army Regulation 200-1, *Environmental Protection and Enhancement*, 13 Dec 2007.
- m. Engineer Regulation 1130-2-540, *Project Operations – Environmental Stewardship Operations and Maintenance Guidelines and Procedures*, 11 Aug 2008.
- n. Presidential Memorandum, *Tribal Consultation*, 5 Nov 2009.
- o. USACE *Tribal Policy Principles*, 18 Feb 1998 and 10 May 2010.
- p. Announcement of Presidential support for the *United Nations Declaration on the Rights of Indigenous Peoples*, Public Papers of the President, December 16, 2010.

2. Purpose. On November 5, 2009, President Barack Obama issued a Memorandum to the heads of all federally agencies entitled *Tribal Consultation* (74 Fed Reg 57881) reaffirming Executive

Order 13175, *Consultation and Coordination with Indian Tribal Governments* (65 Fed Reg 67249) signed by President William J. Clinton on November 6, 2000. E.O. 13175 requires all federal agencies to formulate “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This document affirms the U.S. Army Corps of Engineers’ (USACE) commitment to engage in consultation with federally recognized Tribes.

3. Background. There are responsibilities to Tribes resulting from the Federal Trust Doctrine, as well as from Treaties, statutes, regulations, Executive Orders and agreements between the United States government and tribal governments. Department of Defense *American Indian and Alaska Native Policy*, Department of Defense Instruction number 4710.02: *DoD Interactions with Federally Recognized Tribes*, and US Army Corps of Engineers *Tribal Policy Principles* (Attachment 1) provide guidance.

For the purposes of this policy, the following definitions are applied:

a. Tribe: Indian Tribes as defined in E.O. 13175, “an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 USC 479a.”

b. Consultation: Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands.

4. Applicability. This regulation applies to all HQUSACE elements, Major Subordinate Commands, District Commands, the Institute for Water Resources, the Humphreys Engineering Center Support Activity, and the Engineer Research and Development Center.

5. General Policy. The Tribal Policy Principles.

a. All federally recognized Tribes are sovereign governments and will be treated with respect.

(1) Sovereignty is the foundation of tribal governments.

(2) Tribes are responsible for their own governance and management.

b. The Trust responsibility will be honored and fulfilled.

(1) The federal government has a unique legal and political relationship with Tribal governments that recognizes self-government and self-determination.

(2) USACE is committed to supporting projects and programs beneficial to Tribes through partnership with them.

(3) USACE will ensure that it addresses Tribal concerns regarding protected tribal resources, tribal rights (including treaty rights) and Indian lands.

(4) USACE will protect and allow access to protected tribal resources under USACE jurisdiction to the extent practicable, and will work to develop and implement access policies as needed.

(5) USACE will share information that is not otherwise controlled or classified information.

c. USACE will maintain a government-to-government relationship with Tribes.

(1) Tribes have a unique and distinctive political and legal relationship with the United States.

(2) A Tribe may have access to the Chief of Engineers, the Assistant Secretary of the Army (Civil Works), and other high level individuals if the need arises.

(3) While most interaction will be staff to staff, decision making will be leader to leader (the head of the Tribe and the district commander), with the assistance of the local subject matter expert (typically, the Tribal Liaison).

d. Consultation will be an integral, invaluable process of USACE planning and implementation.

(1) When appropriate, potentially affected Tribes, as determined by the Corps, including Tribes whose aboriginal territories extend to the lands where an activity would occur, will be contacted by letter, telephone or e-mail sufficiently early to allow a timely review of the proposed action. If contacted Tribes notify USACE that other Tribes are potentially affected, USACE has the responsibility to notify those Tribes as well.

(2) Any activity that has the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands-individual projects, programs, permit applications, real estate actions, promulgation of regulations and policies-regardless of land status, will be reviewed at the district level by an individual who effectively interacts with Tribes, usually the Tribal Liaison.

(3) Consultation will be conducted at the district or division level under the guidance of an individual who effectively interacts with Tribes, usually the Tribal Liaison, unless there is a request for HQUSACE (and/or OASA(CW) in the case of Civil Works) input, or if HQUSACE determines input is necessary.

(4) Commands will ensure that all Tribes with an interest in a particular activity that has the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands are contacted and their comments taken into consideration.

(5) Consultation procedures for individual projects or programs may be developed at the local level to meet the needs of particular Tribe(s).

(6) In recognition of the varied organizations and customs of different Tribes, written protocols for consultation procedures may be considered and implemented at the local level with a specific Tribe.

(7) A dispute resolution process will be developed during the consultation process, including a provision to elevate the consultation to higher USACE and/or Tribal levels.

(8) Requests for consultation by a Tribe to USACE will be honored.

e. USACE will support Tribal self-determination, self reliance and capacity building by:

(1) Partnering with Tribes on studies, projects, programs and permitting procedures will be supported and promoted to the extent permitted by law and policy.

(2) To the extent permitted by law and policy, provide information on opportunities to compete for requests for proposals or other potential contracts with USACE.

(3) Sharing appropriate information on USACE programs, policies and procedures, and public documents.

(4) Utilizing Tribal knowledge for planning purposes and to inform operational activities.

(5) Supporting Tribal efforts to lease and operate water resource projects and lands, where appropriate.

(6) Identifying and implementing, within existing authority, other capacity-building opportunities as they occur.

f. Protection of natural and cultural resources.

(1) USACE recognizes the importance of strict compliance with the Native American Graves Protection and Repatriation Act (NAGPRA), the National Historic Preservation Act (NHPA) and other statutes concerning cultural and natural resources.

(2) USACE acknowledges that compliance with the above statutes may not comprise the full range of consultation, nor of cultural property and resource protection.

(3) To the extent allowed by law, USACE will protect the location of historic properties, properties of religious and cultural significance, and archaeological resources, in consultation with and when requested by the affected Tribe(s).<sup>1</sup>

6. Responsibilities of Commanders and other USACE officials interacting with federally recognized Tribes.

a. Build relationships with Tribes soon after each change of command by face-to-face interaction at the local headquarters or at tribal offices when at all possible.

b. Identify and remove procedural impediments to working with Tribes whenever possible.

c. Share appropriate Corps procedures, regulations and organizational information with Tribes.

d. Maintain open lines of communication through consultation with Tribes during the decision making process for those matters that have the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands.

e. Provide Tribes with points of contact on project-related issues, and issues in general.

f. Encourage partnerships on projects with Tribes wherever possible.

g. Encourage collaborative partnerships by other federal and state agencies with Tribes to further their goals and projects.

7. Education. To develop a proactive well-informed workforce, in-house training, workshops, and an annual meeting of USACE tribal liaisons have been developed and should be attended by Corps employees who interact with Tribes-liaisons, project managers, program managers, real estate professionals, regulators, leaders, contracting specialists, etc.

8. Accountability. To assess the effectiveness of USACE Tribal consultation, professionals who interact with Tribes will keep records of consultation meetings and other tribal interactions. These records will be accessible and can be made available for purposes of reporting to OMB through DoD as per the reporting requirement in the Presidential Proclamation of 5 Nov 2009. The report will be synthesized at HQUSACE and transmitted to DoD (OSD) on a yearly basis. A copy of this report will be distributed to federally recognized Tribes upon request.

9. Implementation. USACE will incorporate the six Tribal policy principles, including pre-decisional consultation, into its planning, management, budgetary, operational, and legislative

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<sup>1</sup> USACE will make every reasonable effort, consistent with law, to withhold this information. However, USACE is required to provide public access to its records under the Freedom of Information Act and can only withhold those records protected from disclosure under a statutory exemption or exclusion. Tribes are encouraged to seek legal advice before providing sensitive information to USACE.

initiatives, management accountability system and ongoing policy and regulation development processes.

10. General Provision: This policy does not establish new requirements, but reaffirms procedures and policies already in place, clarifies responsibilities and establishes clear measures of implementation success.<sup>2</sup>

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<sup>2</sup> This policy is not intended to, and does not grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other rights of any Indian Tribe, or to preempt, modify or limit the exercise of any such right.



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET NW  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

CEMP-CR/CECC-R

OCT 29 2008

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Real Estate Policy Guidance Letter No. 27-Official U.S. Army Corps of Engineers Real Estate Policy

1. Purpose. To establish new policy on the issuance of fuel carrying pipelines that are 24 inches or more in diameter.
2. Background. Section 28 of the Mineral Leasing Act of 1920, as amended (Title 30 U.S.C. Section 185) provides authority to grant easements for pipelines and related facilities for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom. This authority must be used for large pipelines that are 24 inches or more in diameter.
3. Policy. In order to provide a consistent policy, effective immediately the following guidance is provided:
  - a. Title 30 requires that the Secretary of the Army promptly notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate upon receipt of an application for a right-of-way. A second notification is also required if the intent of the Federal Agency is to grant the pipeline right-of-way.
    - 1) Notification upon receipt of application-District will provide a letter to the Real Estate Community of Practice (HQUSACE, CEMP-CR) for the Deputy Assistant Secretary of the Army (Installations and Housing) (DASA I&H) execution and notification to Congress. In addition to the letter, provide a copy of the application and map. A sample format is included at Enclosure 1.
    - 2) Notification on intent to grant-District will provide a letter to HQUSACE, CEMP-CR for the DASA (I&H) execution and notification to Congress. In addition to the letter, furnish an information paper and map. For review purposes, supporting documentation should also include the proposed easement, Report of Availability, and environmental analysis. If the Committee does not provide an affirmative response, District will wait 14 days following Committee notification before execution of the easement. A sample format is included at Enclosure 2.

CEMP-CR/CECC-R

SUBJECT: Real Estate Policy Guidance Letter No. 27-Official U.S. Army Corps of Engineers Real Estate Policy

3) A new easement format is also included at Enclosure 3. This replaces the format included in the Real Estate Handbook, ER 405-1-12, Chapter 8. Site-specific environmental, mitigation, cultural and operational requirements may be added. Other deviations from the format must be approved by HQUSACE (CECC-R).

b. If the pipeline only crosses an area held in less than fee, such as an easement, then the District will follow the process to consent to the fuel-carrying pipeline. No notice to Congress is required for a Consent.

c. If the pipeline right-of-way will traverse lands administered by two or more Federal agencies, the Secretary of the Interior is authorized to grant an easement after consulting with the agencies involved. The implementing regulations of the Bureau of Land Management are applicable and are at 43 C.F.R. Part 2881, et seq.

d. Applications to cross Army land should be filed on Standard Form 299, Application for Transportation and Utility Systems and Facilities on Federal Lands. (<http://www.ntia.doc.gov/frowsite/fssf299.pdf>)

e. If land is impacted in more than one District, HQUSACE CEMP-CR will designate lead Division to coordinate the action and serve as lead Point of Contact/Program Manager.

#### 4. Non-applicability.

a. This memorandum does not apply to fuel-carrying pipelines less than 24 inches in diameter. Easements for those pipelines are granted under authority of Title 10 U.S.C. Section 2668.

b. Pipelines for the aforementioned purposes are not subject to the requirements and limitations of Title 30 if they have been relocated on Government-owned lands at Government initiative and for Government benefit, as authorized by a relocation contract.

5. Duration. The policies stated herein will remain in effect until amended or rescinded by Policy Memorandums, Policy Guidance Letters, Engineers Circulars or Engineer Regulations.

CEMP-CR/CECC-R

SUBJECT: Real Estate Policy Guidance Letter No. 27-Official U.S. Army Corps of Engineers Real Estate Policy

FOR THE COMMANDER:



Encls

SCOTT L. WHITEFORD  
ACTING DIRECTOR OF REAL ESTATE

DISTRIBUTION:

COMMANDER,  
GREAT LAKES AND OHIO RIVER DIVISION (CELRD-PDS-R)  
MISSISSIPPI VALLEY DIVISION (CEMVD-TD-R)  
NORTH ATLANTIC DIVISION (CENAD-PD-E)  
NORTHWESTERN DIVISION (CENWD-PDS)  
PACIFIC OCEAN DIVISION (CEPOD-RE)  
SOUTH ATLANTIC DIVISION (CESAD-PDS-R)  
SOUTH PACIFIC DIVISION (CESPD-ET-R)  
SOUTHWESTERN DIVISION (CESWD-ET-R)

CF:

COMMANDER,  
DETROIT DISTRICT (CELRE-RE)  
HUNTINGTON DISTRICT (CELRH-RE)  
LOUISVILLE DISTRICT (CELRL-RE)  
NASHVILLE DISTRICT (CELRN-RE)  
PITTSBURGH DISTRICT (CELRP-RE)  
MEMPHIS DISTRICT (CEMVM-RE)  
NEW ORLEANS DISTRICT (CEMVN-RE)  
ROCK ISLAND DISTRICT (CEMVR-RE)  
ST. LOUIS DISTRICT (CEMVS-RE)  
ST. PAUL DISTRICT (CEMVP-RE)  
VICKSBURG DISTRICT (CEMVK-RE)  
BALTIMORE DISTRICT (CENAB-RE)  
NEW ENGLAND DISTRICT (CENAE-RE)  
NEW YORK DISTRICT (CENAN-RE)  
NORFOLK DISTRICT (CENAO-RE)  
KANSAS CITY DISTRICT (CENWK-RE)  
OMAHA DISTRICT (CENWO-RE)

CEMP-CR/CECC-R

SUBJECT: Real Estate Policy Guidance Letter No. 27-Official U.S. Army Corps of Engineers Real Estate Policy

PORTLAND DISTRICT (CENWP-RE)  
SEATTLE DISTRICT (CENWS-RE)  
WALLA WALLA DISTRICT (CENWW-RE)  
ALASKA DISTRICT (CEPOA-RE)  
HONOLULU DISTRICT (CEPOH-PP-RE)  
JACKSONVILLE DISTRICT (CESAJ-RE)  
MOBILE DISTRICT (CESAM-RE)  
SAVANNAH DISTRICT (CESAS-RE)  
ALBUQUERQUE DISTRICT (CESPA-RE)  
LOS ANGELES DISTRICT (CESPL-RE)  
SACRAMENTO DISTRICT (CESPK-RE)  
FORT WORTH DISTRICT (CESWF-RE)  
GALVESTON DISTRICT (CESWG-RE)  
LITTLE ROCK DISTRICT (CESWL-RE)  
TULSA DISTRICT (CESWT-RE)  
CECC-R

Case No. 1:16-cv-1534-JEB

**CHEYENNE RIVER SIOUX TRIBE**  
**ATTACHMENT D**

Case No. 1:16-cv-1534-JEB

**CHAIRMAN**

Harold C. Frazier

**SECRETARY**

EvAnn White Feather

**TREASURER**

Benita Clark

**VICE-CHAIRMAN**

Robert Chasing Hawk



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Bryce In the Woods

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Theodore Knife, Jr.

**DISTRICT 3**

Edward Widow  
John Kessler

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Jim Pearman  
Kevin Keckler  
Merrie Miller-White Bull  
Mark Knight

**DISTRICT 5**

Ryman LeBeau  
Raymond Uses The Knife  
Robert Chasing Hawk  
Derek Bartlett

**DISTRICT 6**

Tuffy Thompson  
Wade "Tater" Ward

February 1, 2017

**VIA FEDERAL EXPRESS AND EMAIL**

**Tracking No: 778332057536**

Colonel John Henderson  
 U.S. Army Corps of Engineers  
 1616 Capitol Ave., Ste. 9000  
 Omaha, NE 68102  
 Email: John.W.Henderson@usace.army.mil

Re: Congressional 14-Day Waiting Period

Dear Colonel Henderson,

As you know, on January 24, 2017, President Trump issued a Presidential Memorandum regarding the Dakota Access Pipeline that was recently published in the Federal Register at 82 Fed. Reg. 8661. Such Presidential Memorandum and subsequent Federal Register Notice contemplates waiving the 14-day Congressional waiting period as set forth by Army Corps of Engineers ("Corps") policy. The Corps, and you personally, have repeatedly assured the Cheyenne River Sioux Tribe and other tribal leaders that the Corps would honor the 14-day waiting period set forth in Corps policy. Waiving the waiting period would effectively violate the Corps' own consultation policies, not to mention your word.

The blue represents the thunderclouds above the world where live the thunder birds who control the four winds. The rainbow is for the Cheyenne River Sioux people who are keepers of the Most Sacred Calf Pipe, a gift from the White Buffalo Calf Maiden. The eagle feathers at the edges of the rim of the world represent the spotted eagle who is the protector of all Lakota. The two pipes fused together are for unity. One pipe is for the Lakota, the other for all the other Indian Nations. The yellow hoops represent the Sacred Hoop, which shall not be broken. The Sacred Calf Pipe Bundle in red represents Wakan Tanka – The Great Mystery. All the colors of the Lakota are visible. The red, yellow, black and white represent the four major races. The blue is for heaven and the green for Mother Earth.

Col. John Henderson  
February 1, 2017  
Page 2

It has come to our attention that the Acting Secretary of the Army, Robert Speer, transmitted the aforementioned Federal Register notice, which is simply a copy of the January 24, 2017 Presidential Memorandum, to members of the House and Senate. Such distribution of the Presidential Memorandum at 82 Fed. Reg. 8661 does not meet the notice requirement provided in 30 U.S.C. § 185(w)(2), which requires the agency head to “notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate upon receipt of an application for a right-of-way . . . .” Further, “no right-of-way . . . shall be granted until a notice of intention to grant the right-of-way, together with the Secretary’s or agency head’s detailed findings as to the terms and conditions he proposes to impose, has been submitted to such committees.” *Id.*

You personally, as well as other Corps personnel, have repeatedly told the Cheyenne River Sioux Tribe that the Corps would honor the 14-day waiting period. On November 16 and 17, 2016, you assured myself as well as all other assembled tribal chairmen at the Great Plains Tribal Chairman’s Association meeting that the Corps would honor its 14-day waiting period policy, in the event an easement was issued. Again, on January 13, 2017, at a Corps’ initiated Tribal Consultation meeting, you personally told myself and other Cheyenne River Sioux Tribe councilmen and officials that the Corps would honor the 14-day waiting period. On numerous occasions, the Corps has also guaranteed the same to the water protectors when it met with them at tribal consultation meetings at Standing Rock Sioux Tribe. Pursuant to such interactions, the Cheyenne River Sioux Tribe has relied to its detriment upon the Corps keeping its word, and more importantly, following its own consultation policies.

Furthermore, the Cheyenne River Sioux Tribe has been completely kept in the dark about any changes in the Corps process for making a decision on the granting of an easement since the Corps issued its Notice of Intent to Conduct an EIS on January 18, 2017, including the procedures for when and how the easement process will take place, how the Corps will engage in government to government consultation with the Cheyenne River Sioux Tribe, and how long such a process will last. As we communicated to the Department of the Army by letter dated January 27, 2017, consultation is required as the Corps *even* considers the President’s Memorandum and *prior* to taking any action pursuant to the Presidential Memorandum. We have included a copy of the January 27, 2017 letter delivered to the Office of the Secretary of the Army and the Corps of Engineers Office of Civil Works. Any change or waiver of Corps policy that may impact tribal resources, irrespective of whether it is done pursuant to a Presidential Memorandum, requires tribal consultation.

As you know, the Cheyenne River Sioux Tribe is engaged in a contentious legal battle over issues related to the permitting and easement process, which have been thrown into chaos by the decisions now being considered by the Corps. The path forward in this action depends upon what will happen with this now pending easement application. It is my understanding that on Monday, January 30, 2017, the judge in that case emphasized the importance of advance notice of Corps’ plan for all the involved parties. In recognition of this, the Court has currently ordered the Corps to provide notice of its plan for the easement by February 6, 2017. I hope that you can also recognize how important advance notice would be to us all, especially as it is required in the Corps’ own policies.

Col. John Henderson  
February 1, 2017  
Page 3

President Trump's Presidential Memorandum, Secretary Speer's Memorandum, and a slew of misleading press releases issued by the Senator John Hoeven and Representative Kevin Cramer of the North Dakota Delegation have created unnecessary confusion and panic among the communities we serve and created an unnecessary burden on myself and other elected leaders trying to act sensibly in this ever changing landscape. The Corps has a legal obligation to follow its statutory mandates and its policy and procedures. We urge you to take heed that we are at a time in history where our actions will be judged by future generations to come. I believe you and I can at least agree a man's word is his bond, and you have given me as well as my Tribe your word to honor the 14-day waiting period. If the Corps will not honor our treaties, at least honor your word.

Regardless of the legal posture, any surprise granting of the easement without advance notice has the likelihood of causing significant harm to tribal members who have already experienced violent interactions with North Dakota law enforcement. The Cheyenne River Sioux Tribe has members on the ground whose health, safety, and welfare will be impacted by a rash granting of the easement. Just as the Corps has an obligation to follow its policies, the Cheyenne River Sioux Tribe has an obligation to protect the safety of the people. Waiving the 14-day waiting period set forth in Corps policy would be breaking and dishonoring the Corps ongoing promises to the people and could endanger the health and safety of water protectors. We are hopeful that the Corps will abide by its obligations and communicate directly with the Cheyenne River Sioux Tribe regarding this matter forthwith.

Very Truly Yours,



Harold C. Frazier, Chairman

cc: Assistant Secretary of the Army (Civil Works)  
***via federal express: tracking number: 778332214804***

Honorable Robert Speer, Acting Secretary of the Army  
***via federal express tracking number: 778333063755***

Enclosure: January 27, 2017 CRST Request for Tribal Consultation on the  
Dakota Access Pipeline

**CHAIRMAN**

Harold C. Frazier

**SECRETARY**

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**TREASURER**

Benita Clark

**VICE-CHAIRMAN**

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Raymond Uses The Knife  
Robert Chasing Hawk  
Derek Bartlett

**DISTRICT 6**

Tuffy Thompson  
Wade "Tater" Ward

January 27, 2017

The Honorable Robert Speer  
 Acting Secretary of the Army  
 101 Army Pentagon  
 Washington, D.C. 20301-1000

**Re: Tribal Consultation on Dakota Access Pipeline**

Dear Acting Secretary Speer:

The Cheyenne River Sioux Tribe formally requests government-to-government consultation with your office and the Army Corps of Engineers (Corps) leadership on the President's January 24, 2017 Memorandum to you regarding "Construction of the Dakota Access Pipeline." We make this request pursuant to Department of Defense (DoD) Instruction 4710.02 and the Corps' Tribal Consultation Policy issued on November 1, 2012 and our ongoing contact with Corps Headquarters on this issue. We have attached these documents for your convenience.

Consultation is needed as the Corps considers the President's Memorandum and prior to taking any action pursuant to the Memorandum. In addition, consultation is needed before scoping comments on the Dakota Access Pipeline (DAPL) are due on February 20, 2017. As you know, the DoD Instruction and Corps Policy require early, meaningful, and pre-decisional consultation with tribes on matters that may impact tribal lands, resources or rights. Specifically the DoD Instruction provides:

- The Heads of DoD Components are required to "[c]onsult with federally-recognized tribal governments on a government-to-government basis on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian Lands..." DoD Instruction 4710.02 Section 5.3.4.
- DoD Components are required to "involve tribal governments early in the planning process for proposed actions.... Early involvement means that a tribal government is given an opportunity to comment on a proposed action in time for the tribal

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government to provide meaningful comments that may affect the decision.” DoD Instruction 4710.02 Section 6.6.

- The administrative record for decision must “show that the Department of Defense has given careful consideration to all the available evidence and points of view before making a final decision.” DoD Instruction 4710.02 Enclosure 2 Section E2.9.

In addition, the Corps Tribal Consultation Policy requires:

- That consultation be an “[o]pen, timely, meaningful, collaborative and effectively deliberative process that emphasized trust, respect and shared responsibility. And, that “consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken;...” Corps Policy Section 3.b.
- The Corps is required to “share information that is not otherwise controlled or classified information” as part of the tribal consultation process. Corps Policy Section 5.b.(5).
- The Corps is also required to have a “dispute resolution process during the consultation process, including a provision to elevate the consultation to higher [Corps] and/or Tribal levels.” Corps Policy Section 5.d.(7).

Under the DoD Instruction and Corps Policy consultation is required before any action is taken on the President’s January 24, 2017 Memorandum regarding DAPL. The President’s Memorandum directs the Secretary of the Army to instruct the Corps to take all actions necessary and appropriate to:

- “review and approve in an expedited manner ... requests for approvals to construct and operate the DAPL....” Memorandum Section 2(a)(i).
- “consider ... whether to rescind or modify” the Corps’ December 4, 2016 memorandum regarding DAPL and “whether to withdraw the Notice of Intent to Prepare an Environmental Impact Statement” regarding DAPL. Memorandum Section 2(a)(ii).
- “consider ... prior reviews and determinations, including the Environmental Assessment issued in July of 2016 for the DAPL, as satisfying all applicable requirements of the National Environmental Policy Act....”
- “review and grant ... requests for waivers of notice periods arising from or related to [Corps] real estate policies and regulations....”
- “issue ... any approved easements or rights-of-way immediately after notice is provided to the Congress pursuant to section 28(w) of the Mineral Leasing Act....”

Each of these reviews, decisions and considerations will potentially have significant impact on the lands, resources and rights of the Cheyenne River Sioux Tribe and requires meaningful tribal consultation. Our Reservation and drinking water intake is just downstream from the proposed DAPL crossing. Our Reservation includes portions of Lake Oahe and over 70 miles of Missouri River shoreline. We reserved these homelands, resources and waters in treaties with the United States and those reserved rights have been further recognized in federal laws enacted by Congress.

Under these treaties and laws, the Tribe exercises legal jurisdiction over portions of Lake Oahe and its shoreline. The Tribe also reserved water rights in the Missouri River including Lake Oahe, and our tribal members have treaty fishing and hunting rights in the Lake. We also govern these Reservation lands, waters, and resources to provide for our members and future generations.

In addition, we are currently preparing scoping comments pursuant to a Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) that was issued by the Department and the Corps on January 18, 2017 in the Federal Register. The NOI provides:

The proposed crossing of Corps property [by DAPL] requires the granting of a right-of-way (easement) under the Mineral Leasing Act (MLA), 30 U.S.C. 185. To date, the Army has not made a final decision on whether to grant the easement pursuant to the MLA. The Army intends to prepare an EIS to consider any potential impacts to the human environment that the grant of an easement may cause.

82 Fed. Reg. 5544. The Tribe has requested to be a Cooperating Agency for this EIS to provide a full analysis of the proposed crossing of the Missouri River and Lake Oahe by DAPL.

We are concerned that the Omaha District is taking actions to short-circuit this analysis without involving the Tribe as a Cooperating Agency and defying requirements for tribal consultation pursuant to the DoD Instruction and the Corps Policy. Prior to issuance of the NOI, on Friday January 13, 2017, the Omaha District Commander, Colonel Henderson, informed representatives of the Tribe that the Omaha District already completed the additional analysis that the Assistant Secretary of the Army for Civil Works determined was needed in a December 4, 2016 Memorandum and that was intended to be completed in the EIS.

The Tribe was not consulted at all about the Omaha District's additional analysis, and the Tribe has not been provided with a copy of that analysis. Without access to the additional analysis conducted by the Omaha District, the Tribe cannot assess the potential impacts of proposed crossing of Lake Oahe by DAPL or the merits of alternative routes and, as a consequence, cannot engage in meaningful consultation.

We also lack the information needed to meaningful engage in government-to-government consultation with the Department and the Corps. The Corps committed to provide the Tribe with 31 essential technical documents that were part of the Corps' administrative record, and are necessary for the Tribe to provide informed and meaningful comments as a part of the additional

analysis needed. These documents are identified in Paragraph 14 of the Assistant Secretary's December 4, 2016 Memorandum.

We have yet to receive these documents. Without access to these critical technical documents, and the ability to have the Tribe's own technical experts analyze these documents, the Tribe cannot assess the potential impacts of proposed crossing of Lake Oahe by DAPL or the merits of alternative routes and, as a consequence, cannot engage in meaningful consultation.

In *Yankton Sioux Tribe v. Kempthorne*, the U.S. District Court for the District of South Dakota determined that where an agency, "has established a policy requiring prior consultation with a tribe, and therefore created a justifiable expectation that the tribe will receive a meaningful opportunity to express its views before a policy is made, that opportunity must be given." 442 F. Supp. 774, 784 (2006). The Court found that the withholding of information relevant to what the proposed impact of the Bureau of Indian Affairs' education restructuring would be on the tribe was a violation of the requirement to meaningfully consult with the tribe. *Id.* at 785.

This requirement was recently affirmed, in *Cheyenne River Sioux Tribe v. Jewell*, when the Court found that the agency failed to engage in government-to-government consultation by failing to provide the Tribe with information necessary for the Tribe to assess the impact of the federal action. 2016 WL 4625672; 3:15-CV-03018-KES (D.S.D. Sept. 6, 2016). Without these documents and substantive discussions with Corps Officials about potential impacts on the Tribe's lands, waters, resources and rights, we cannot fulfill the requirements of the DoD Instruction and Corps Policy.

Finally, we are concerned that the President's January 24, 2017 Memorandum potentially changes or waives the Corps' Real Estate Policy in a manner that impacts the Tribe's lands, waters, resources and rights. Pursuant to Corps Real Estate Policy Guidance Letter No. 27 dated October 28, 2009, also attached here, the Corps provides Congressional Committees with notification of its intent to grant an easement under Section 28 of the Mineral Leasing Act of 1920, as amended, and a 14 day waiting period prior to executing an easement. Any change or waiver of this policy that may significantly impact tribal resources requires tribal consultation.

Colonel Henderson already committed to providing the Tribe and others with this 14 days notice of any decision to grant an easement in this case. Colonel Henderson made these commitments in a November 17, 2016 in Rapid City, SD and again with a meeting with tribes on January 13, 2017. Such notice is essential to proper administration of our government functions and our responsibility to protect the health and safety of our members. Notice will provide us with the time needed to assess and prepare for the grant of any easement and its potential impact on the Tribe's lands, waters, resources and rights.

Thank you for your consideration of this request. We understand that the Corps is currently moving forward with the EIS that was properly and lawfully noticed on January 18, 2017. The Cheyenne River Sioux Tribe is a necessary Cooperating Agency for that EIS and we are preparing scoping comments due on February 20, 2017. We look forward to consulting with

you and the Corps on the EIS and any actions being considered as a result of the President's January 24, 2017 Memorandum that would affect the EIS and the grant of an easement to DAPL.

Please contact our Washington, D.C. counsel, Rollie Wilson, at 202-340-8232 to arrange this consultation. This consultation is required to fulfill the Corps obligations under law, DoD Instruction 4710.02, the Corps Tribal Consultation Policy, Executive Orders on tribal consultation, and the Corps treaty and trust responsibilities to the Cheyenne River Sioux Tribe.

Sincerely,

A handwritten signature in black ink, appearing to read 'H. Frazier', with a long horizontal flourish extending to the right.

Harold Frazier, Chairman  
Cheyenne River Sioux Tribe

Cc: Army Corps of Engineers Water Resources Policy and Legislation Mr. Gib Owen

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

January 24, 2017

January 24, 2017

MEMORANDUM FOR THE SECRETARY OF THE ARMY

SUBJECT: Construction of the Dakota Access Pipeline

Section 1. Policy. The Dakota Access Pipeline (DAPL) under development by Dakota Access, LLC, represents a substantial, multi-billion-dollar private investment in our Nation's energy infrastructure. This approximately 1,100-mile pipeline is designed to carry approximately 500,000 barrels per day of crude oil from the Bakken and Three Forks oil production areas in North Dakota to oil markets in the United States. At this time, the DAPL is more than 90 percent complete across its entire route. Only a limited portion remains to be constructed.

I believe that construction and operation of lawfully permitted pipeline infrastructure serve the national interest.

Accordingly, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct as follows:

Sec. 2. Directives. (a) Pipeline Approval Review. The Secretary of the Army shall instruct the Assistant Secretary of the Army for Civil Works and the U.S. Army Corps of Engineers (USACE), including the Commanding General and Chief of Engineers, to take all actions necessary and appropriate to:

(i) review and approve in an expedited manner, to the extent permitted by law and as warranted, and with such conditions as are necessary or appropriate, requests for approvals to construct and operate the DAPL, including easements or rights-of-way to cross Federal areas under section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. 185; permits or approvals under section 404 of the Clean Water Act, 33 U.S.C. 1344; permits or approvals under section 14 of the Rivers and Harbors Act, 33 U.S.C. 408; and such other Federal approvals as may be necessary;

(ii) consider, to the extent permitted by law and as warranted, whether to rescind or modify the memorandum by the Assistant Secretary of the Army for Civil Works dated December 4, 2016 (Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota), and whether to withdraw the Notice of Intent to Prepare an Environmental Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, North Dakota, dated January 18, 2017, and published at 82 *Fed. Reg.* 5543;

(iii) consider, to the extent permitted by law and as warranted, prior reviews and determinations, including the Environmental Assessment issued in July of 2016

for the DAPL, as satisfying all applicable requirements of the National Environmental Policy Act, as amended, 42 U.S.C. 4321 et seq., and any other provision of law that requires executive agency consultation or review (including the consultation or review required under section 7(a) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a));

(iv) review and grant, to the extent permitted by law and as warranted, requests for waivers of notice periods arising from or related to USACE real estate policies and regulations; and

(v) issue, to the extent permitted by law and as warranted, any approved easements or rights-of-way immediately after notice is provided to the Congress pursuant to section 28(w) of the Mineral Leasing Act, as amended, 30 U.S.C. 185(w).

(b) Publication. The Secretary of the Army shall promptly provide a copy of this memorandum to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Majority Leader of the Senate, and the Governors of each State located along the Dakota Access Pipeline route. The Secretary of the Army is authorized and directed to publish this memorandum in the *Federal Register*.

(c) Private Property. Nothing in this memorandum alters any Federal, State, or local process or condition in effect on the date of this memorandum that is necessary to secure access from an owner of private property to construct the pipeline and facilities described herein. Land or an interest in land for the pipeline and facilities described herein may only be acquired consistently with the Constitution and applicable State laws.

Sec. 3. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

# # #



# Department of Defense INSTRUCTION

NUMBER 4710.02  
September 14, 2006

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USD(AT&L)

SUBJECT: DoD Interactions with Federally-Recognized Tribes

- References:
- (a) DoD Directive 5134.01, "Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)), December 9, 2005
  - (b) DoD Directive 4715.1E, "Environment, Safety, and Occupational Health (ESOH)," March 19, 2005
  - (c) DoD Instruction 4715.3, "Environmental Conservation Program," May 3, 1996
  - (d) Secretary of Defense Policy on "Department of Defense American Indian and Alaska Native Policy," October 20, 1998<sup>1</sup>
  - (e) through (s), see Enclosure 1

## 1. PURPOSE

This Instruction implements DoD policy, assigns responsibilities, and provides procedures for DoD interactions with federally-recognized tribes (hereafter referred to as "tribes") in accordance with References (a) through (d), Executive Order (E.O.) 13175<sup>2</sup> (Reference (e)), and the Presidential Memorandum on "Government-to-Government Relationship with Tribal Governments"<sup>3</sup> (Reference (f)).

## 2. APPLICABILITY AND SCOPE

This Instruction applies to:

2.1. The Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components").

2.2. All DoD operations, activities, and installations that require interactions with tribes.

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<sup>1</sup> Copies may be obtained via the internet at <https://www.denix.osd.mil/denix/Public/Native/Outreach/policy.html>

<sup>2</sup> Copies may be obtained via the internet at <http://www.epa.gov/fedrgstr/eo/eo13175.htm>

<sup>3</sup> Copies may be obtained via the internet at <http://www.whitehouse.gov/news/releases/2004/09/20040923-4.html>

### 3. DEFINITIONS

3.1. Indian. A member of a tribe, as defined in subparagraph 3.5.

3.2. Indian Lands. Any lands the title to which is either held in trust by the United States for the benefit of any Indian tribe or Indian, or held by an Indian tribe or Indian subject to restrictions by the United States against alienation (Reference (d) and 32 Code of Federal Regulations (CFR) part 229 (Reference (g))).

3.3. Protected Tribal Resources. Those natural resources and properties of traditional or customary religious or cultural importance, either on or off Indian lands, retained by or reserved by or for Indian tribes through treaties, statutes, judicial decisions, or executive orders, including tribal trust resources (Reference (d)).

3.4. Tribal Rights. Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, un-extinguished aboriginal title, treaty, statute, judicial decision, Executive Order, or agreement, and that give rise to legally enforceable remedies (Reference (d)).

3.5. Tribe. A federally-recognized Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the most current Department of Interior list of tribes published in the Federal Register (Reference (c), Reference (d), and Section 1996a of 42 United States Code (U.S.C.) (Reference (h))).

### 4. POLICY

It is DoD policy to:

4.1. Meet its responsibilities to tribes as derived from Federal trust doctrine, treaties, and agreements between the United States Government and tribal governments, and to comply with Federal statutes, regulations, Presidential Memorandums, and Executive Orders governing DoD interactions with tribes.

4.2. Build stable and enduring government-to-government relations with federally-recognized tribal governments in a manner that sustains the DoD mission and minimizes effects on protected tribal resources in accordance with References (c) through (f) and 32 CFR part 22 (Reference (i)).

4.3. Fully integrate, down to staff officers and civilian officials at the installation level, the principles and practices of meaningful consultation and communication with tribes in accordance with References (a) through (f).

4.4. Take into consideration the significance that tribes ascribe to protected tribal resources on protected lands in accordance with References (c), (g), and (h); 36 CFR part 800 (Reference (j)); 43 CFR part 10 (Reference (k)); Sections 470, 470.1, and 470.a through 470.w of title 16 U.S.C. (Reference (l)); and E.O. 13007<sup>4</sup> (Reference (m)).

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<sup>4</sup> Copies may be obtained via the internet at <http://web.em.doe.gov/public/tribal/eo13007.html>

## 5. RESPONSIBILITIES

5.1. The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) shall oversee DoD interactions with tribes.

5.2. The Deputy Under Secretary of Defense for Installations and Environment (DUSD(I&E)), under the USD(AT&L), shall:

5.2.1. Develop additional policy and guidance, as needed, in accordance with Reference (a).

5.2.2. Designate responsibilities and provide procedures for DoD interactions with tribes.

5.2.3. Enhance the DoD Components' understanding of tribal issues and concerns through education and training programs and outreach activities.

5.2.4. Assist the DoD Components in identifying requirements of Presidential Memorandums, Executive Orders, statutes, and regulations governing DoD interactions with tribes.

5.2.5. As requested, assist the DoD Components with consultation and government-to-government relations with tribes to implement the following:

5.2.5.1. Support and services for eligible organizations and activities outside the Department of Defense in accordance with DoD Directive 1100.20 (Reference (n)).

5.2.5.2. The DoD Office of Small Business Programs in accordance with DoD Directive 4205.1 (Reference (o)).

5.2.6. Oversee DoD Component implementation of this Instruction, compliance with the guidance for consulting with tribes set forth in Enclosure 2, and compliance with the measures of merit set forth in Enclosure 3.

5.2.7. Coordinate with other Federal Agencies and tribal organizations, as appropriate, on tribal issues of regional and national scope.

5.3. The Heads of the DoD Components shall:

5.3.1. Integrate the requirements of Presidential Memorandums, Executive Orders, statutes, and regulations regarding DoD interactions with tribes into their mission requirements.

5.3.2. Plan, program, and budget for statutory and regulatory requirements applicable to interactions with tribes consistent with DoD guidance and fiscal policies, and within available resources.

5.3.3. Develop and implement programs to monitor, achieve, and maintain compliance with this Instruction, including compliance by installations and their tenant activities.

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5.3.4. Consult with federally-recognized tribal governments on a government-to-government basis on matters that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands in accordance with Reference (d), Enclosure 2, and the measures of merit in Enclosure 3.

5.3.5. To the extent permitted by legal authority, provide information on opportunities for tribes to compete for requests for proposals or other potential contracting, sub-contracting, and grant or cooperative agreement instruments; for surplus equipment and property; and for education, training, or employment, as appropriate.

5.3.6. Promptly notify the DUSD(I&E) of tribal issues that have the potential to be elevated to OSD for resolution.

5.3.7. Assign tribal liaison responsibilities to staff at the Headquarters level to coordinate tribal issues with the Office of the DUSD(I&E).

## 6. PROCEDURES

6.1. The DoD Components shall consult with tribes whenever proposing an action that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands.

6.2. The DoD Components shall consult with tribes in accordance with the requirements specified in References (c) through (h).

6.3. Consultation required by paragraphs 6.1. and 6.2. shall apply to proposed actions that may have the potential to significantly affect tribes, including, but not limited to: land-disturbing activities, construction, training, over-flights, management of properties of traditional religious and cultural importance, protection of sacred sites from vandalism and other damage, access to sacred sites, access to treaty-reserved resources, disposition of cultural items in accordance with Reference (k), and land use decisions.

6.4. The DoD Components shall afford tribes that have a cultural or historical affiliation with the lands encompassed by the installation an opportunity to consult on the development of the Integrated Cultural Resources Management Plan (ICRMP), and, where tribal treaty rights or other rights to natural resources potentially may be affected, Integrated Natural Resources Management Plans (INRMPs).

6.5. In consultation with tribes identified in paragraph 6.4., the DoD Components shall incorporate in applicable documentation, including ICRMPs and INRMPs, a standard process for consultation whenever issues arise between the tribe and the Component.

6.6. The DoD Components shall involve tribal governments early in the planning process for proposed actions that may have the potential to affect protected tribal rights, land, or resources, and shall endeavor to complete consultations prior to implementation of the proposed action. Early involvement means that a tribal government is given an opportunity to comment on a proposed action in time for the tribal government to provide meaningful comments that may

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affect the decision. Installations should take advantage of the processes set forth in 40 CFR parts 1500-1508 (Reference (p)) and E.O. 12898<sup>5</sup> (Reference (q)) to involve tribes in early planning.

6.7. The DoD Components are encouraged to use agreements such as Comprehensive Agreements, Memorandums of Agreement, or Memorandums of Understanding between the Department of Defense and tribal governments, as appropriate, on issues of common interest to each party. The primary goal of formalized agreements with tribal governments is to foster relationships that facilitate military training and readiness while addressing issues of importance to tribes.

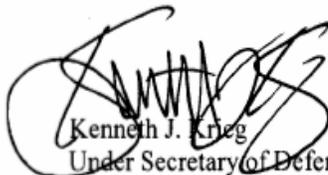
6.8. When contacting tribes, the consultation shall be initiated by the installation commander. Follow-on consultation shall be at a level agreed to by the installation commander and tribal government leadership.

6.9. Base commanders at installations that have on-going consultation and coordination with tribes shall assign a staff member to serve as a tribal liaison.

6.10. Installation personnel who conduct activities that may have the potential to affect protected tribal rights, land, or resources shall participate in training courses and workshops to raise their awareness of tribal culture and to learn about local tribal issues, especially access, use, and privacy issues, that may be affected by military operations such as low-level flights and access to sacred sites.

## 7. EFFECTIVE DATE

This Instruction is effective immediately.

  
Kenneth J. Krieg  
Under Secretary of Defense  
for Acquisition, Technology, and Logistics

Enclosures – 3

- E1. References, continued
- E2. Guidance for Consultation with Tribes
- E3. Compliance Measures of Merit

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<sup>5</sup> Copies may be obtained via the internet at [www.epa.gov/civilrights/eo12898.htm](http://www.epa.gov/civilrights/eo12898.htm)

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E1. ENCLOSURE 1

REFERENCES, continued

- (e) Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," November 6, 2000
- (f) Presidential Memorandum on "Government-to-Government Relationship with Tribal Governments," September 23, 1994
- (g) Title 32, Code of Federal Regulations, Part 229, "Protection of Archeological Resources: Uniform Regulations," current edition
- (h) Section 1996a of title 42, United States Code, American Indian Religious Freedom Act
- (i) Title 32, Code of Federal Regulations, Part 22, "DoD Grants and Agreements: Award and Administration," current edition
- (j) Title 36, Code of Federal Regulations, Part 800, "Protection of Historic Properties," current edition
- (k) Title 43, Code of Federal Regulations, Part 10, "Native American Graves Protection and Repatriation Regulations," current edition
- (l) Sections 470, 470.1, and 470.a through 470.w of title 16, United States Code, Conservation
- (m) Executive Order 13007, "Indian Sacred Sites," May 24, 1996
- (n) DoD Directive 1100.20, "Support and Services for Eligible Organizations and Activities Outside the Department of Defense," April 12, 2004
- (o) DoD Directive 4205.1, "Department of Defense Small Business and Small Disadvantaged Business Utilization Programs," September 11, 1996
- (p) Title 40, Code of Federal Regulations, Parts 1500-1508, "Council on Environmental Quality," current edition
- (q) Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," February 11, 1994
- (r) DoD Directive 5400.07, "DoD Freedom of Information Act Program," October 28, 2005
- (s) Federal Register, Volume 48, Page 44716, "Secretary of the Interior's Professional Qualification Standards," September 29, 1983

*DoDI 4710.02, September 14, 2006*

## E2. ENCLOSURE 2

### GUIDANCE FOR CONSULTATION WITH TRIBES

Consultation is always a dialog, with information and opinion respectfully exchanged in both directions. The following guidance is designed to facilitate the consultation process and to make it more productive.

E2.1. The DoD Components should identify official points-of-contact prior to initiating consultation with all tribes (or lineal descendants in the case of Reference (k) actions) that may have an interest in the matter under consultation. As tribal boundaries have shifted and tribes have migrated, tribes that seem far removed geographically may have a traditional interest in assets and actions at specific, present-day installations.

E2.2. Commanders and commanding officers play a prominent role in government-to-government consultation. Commander/commanding officer presence and signature is appropriate at significant milestones such as formal initiation of consultation, notification of final DoD decisions about proposed actions under consultation, and completion of any agreement document that may result from consultation.

E2.3. Commanders and commanding officers may delegate follow-up consultation functions. Designated DoD staff at the local or regional level may negotiate details and engage in routine consultation with tribal government staff or other tribal representatives delegated by tribal authorities.

E2.4. Consultation should take place at a time and in a location convenient for tribal representatives. DoD staff may find it necessary to negotiate the time and place for consultation, recognizing that many tribes do not have an operating budget that will pay for tribal representatives' transportation and per diem, and that tribal representatives may have existing work, community, and family commitments.

E2.5. DoD staff should consider several factors in scheduling consultation. Consultation may require multiple meetings over a period of months, or may be dependent upon culturally specific circumstances such as religious ceremonies conducted only at certain times of the year, availability of information sources, or certain natural resources cycles. DoD Components should start early and allow plenty of time. If there is an urgent need for expeditious consultation, the component must make this fact known to tribal contacts and negotiate an expedited timetable.

E2.6. Participating members of a particular culture are in the best position to provide the most up-to-date and accurate information about that culture; therefore culturally specific information obtained from a member of a particular culture is to be respected as expert testimony.

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E2.7. In participating in consultation, DoD staff should take into consideration and respect tribal protocols, such as the following:

E2.7.1. Tribal representatives may want to open a meeting with a traditional ceremony, although DoD representatives are under no obligation to participate.

E2.7.2. The installation may need to schedule meetings well in advance to enable the tribe to decide upon appropriate attendees such as tribal elders, traditional religious leaders, and translators.

E2.7.3. Tribal representatives may be reluctant to discuss culturally sensitive information outside of the tribe or at certain times of the year, or they may need to clear information with traditional religious leaders or tribal council members prior to making commitments.

E2.7.4. Tribal governments differ from each other in their organizational structures and corporate cultures. DoD representatives should be mindful that these differences may affect formal titles and forms of address (such as “Chief,” “Governor,” and/or “Chairman”) and other forms of protocol. Tribal representatives may be female or male, elected or not elected, political or spiritual leaders, and exhibit other variations from tribe to tribe.

E2.8. Each tribe should be consulted separately, unless affected tribes choose to act collectively.

E2.9. Without including culturally sensitive information, document the consultation in writing and place it in the administrative record. Although consent, approval, or formal agreement from tribal governments is not required to conclude the consultation process and to proceed with a project on Federal land, the record must show that the Department of Defense has given careful consideration to all the available evidence and points of view before making the final decision.

E2.10. The Department of Defense recognizes that a tribe may wish to keep confidential some of the information it may provide during consultation. Tribes should be assured that the Department of Defense will make every reasonable effort, consistent with the law, to withhold from public disclosure any specific information that a tribe identifies as confidential, especially information related to sacred sites and other traditional cultural properties. Nonetheless, tribes should also understand that the Department of Defense is required to provide public access to its records under the Freedom of Information Act (Reference (r)), except to the extent that any such records are protected from disclosure by a statutory exemption or exclusion. Consequently, tribes should be encouraged to seek the advice of their own legal counsel before providing sensitive information to the Department of Defense.

E2.11. The final decision should be placed into the administrative record and circulated to all consulting parties. It should explain the reasoning as well as the data compiled, but exclude any direct reference to culturally sensitive information provided by tribes and to information sensitive to the DoD mission.

*DoDI 4710.02, September 14, 2006*

E3. ENCLOSURE 3

COMPLIANCE MEASURES OF MERIT

E3.1. Policy Implementation

E3.1.1. The Office of the DUSD(I&E) shall assess the number of installations that have incorporated a process for consultation with tribes either as part of an ICRMP and/or an INRMP, or as an independent process in which tribal interests have been identified.

E3.1.2. A process for consultation is required only when tribes have a cultural or historical affiliation with the lands encompassed by the installation for an ICRMP, and where tribal treaty rights or other rights to natural resources potentially may be affected, for an INRMP.

E3.2. Native American Graves Protection and Repatriation Act (NAGPRA) (Reference (k))

The Office of the DUSD(I&E) shall assess the number of installations:

E3.2.1. With possession or control of any archaeological, historic, or ethnographic collections, including items held by a DoD contractor for the installation.

E3.2.2. With possession or control of items in paragraph E3.2.1., where these items have been professionally evaluated for the presence of “cultural items” as defined in Section 2 of Reference (m). “Professionally evaluated” means the items have been examined and a finding made by a person who has professional training to make an authoritative determination. At a minimum, the person making the determination shall meet the requirements of 48 FR 44716 (Reference (s)).

E3.2.3. With professionally evaluated items that meet the definition of cultural items.

E3.2.4. Retaining possession or control of NAGPRA cultural items that do not fall within the following categories:

E3.2.4.1. The cultural affiliation cannot be determined.

E3.2.4.2. Consultation is ongoing.

E3.2.1.3. No tribes have expressed an interest in the items for repatriation purposes.

E3.2.1.4. Repatriation is pending Federal Register Notice.



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

NOV 1 2012

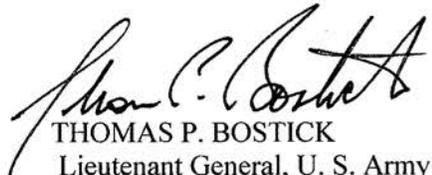
CECG

MEMORANDUM FOR Commanders, Directors and Chiefs of Separate Offices, US Army Corps of Engineers

SUBJECT: Tribal Consultation Policy

1. This memorandum affirms and formalizes current tribal consultation procedures for the U. S. Army Corps of Engineers (USACE).
2. The interaction between the federal government and federally recognized Indian Tribes (including Alaska Natives) has its origins in the U. S. Constitution and has been upheld and defined through Treaties, U.S. Supreme Court cases, various statutes and regulations, presidential documents and policies, including the Department of Defense American Indian and Alaska Native Policy, and the USACE Tribal Policy Principles, recently reissued on 10 May 2010.
3. The Policy provides an outline of our responsibilities to federally recognized Tribes as well as a framework for consulting with them. It is purposefully general in nature because each of the 565 federally recognized American Indian and Alaska Native Tribes are distinct and separate governments, requiring a consultation process that may be completely unique to them.
4. USACE recognizes the sovereign status of Tribal governments and our obligation for pre-decisional government-to-government consultation. USACE also recognizes the unique role Tribes play as partners in water resources projects and seeks to develop relationships with all Tribes who may need our assistance in their capacity building and self-determination.
5. USACE has an excellent tribal program coordinated by a tribal liaison at Headquarters and a point of contact or liaison in each District and Division office. These experts are ready to support you and answer any questions you have regarding tribal policies.
6. An accountable process to interact with Tribes is mandated in Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 06 Nov 2000, and Presidential Memorandum, *Tribal Consultation*, 05 Nov 2009. Please ensure that your staff is aware of and abides by our Consultation Policy to ensure effective and mutually beneficial relationships with tribal partners.
7. My point of contact on this issue is Dr. Georgeie Reynolds, (202) 761-5855.

Encl

  
THOMAS P. BOSTICK  
Lieutenant General, U. S. Army  
Commanding

October 4, 2012

**U.S. Army Corps of Engineers  
Tribal Consultation Policy**

1. References.

- a. U.S. Constitution, Articles I, Section 8; Article VI.
- b. National Historic Preservation Act.
- c. American Indian Religious Freedom Act.
- d. Archaeological Resources Protection Act.
- e. Native American Graves Protection and Repatriation Act.
- f. Religious Freedom Restoration Act.
- g. Executive Order 13007, *Indian Sacred Sites*, 24 May 1996.
- h. Department of Defense American Indian and Alaska Native Policy, 20 Oct 1998.
- i. Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, 06 Nov 2000.
- j. Engineer Regulation 1105-2-100, *Planners Guidance Notebook*, 22 Apr 2000.
- k. Department of Defense Instruction Number 4710.02: DoD Interactions with Federally Recognized Tribes, 14 Sep 2006.
- l. Army Regulation 200-1, *Environmental Protection and Enhancement*, 13 Dec 2007.
- m. Engineer Regulation 1130-2-540, *Project Operations – Environmental Stewardship Operations and Maintenance Guidelines and Procedures*, 11 Aug 2008.
- n. Presidential Memorandum, *Tribal Consultation*, 5 Nov 2009.
- o. USACE *Tribal Policy Principles*, 18 Feb 1998 and 10 May 2010.
- p. Announcement of Presidential support for the *United Nations Declaration on the Rights of Indigenous Peoples*, Public Papers of the President, December 16, 2010.

2. Purpose. On November 5, 2009, President Barack Obama issued a Memorandum to the heads of all federally agencies entitled *Tribal Consultation* (74 Fed Reg 57881) reaffirming Executive

Order 13175, *Consultation and Coordination with Indian Tribal Governments* (65 Fed Reg 67249) signed by President William J. Clinton on November 6, 2000. E.O. 13175 requires all federal agencies to formulate “an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This document affirms the U.S. Army Corps of Engineers’ (USACE) commitment to engage in consultation with federally recognized Tribes.

3. Background. There are responsibilities to Tribes resulting from the Federal Trust Doctrine, as well as from Treaties, statutes, regulations, Executive Orders and agreements between the United States government and tribal governments. Department of Defense *American Indian and Alaska Native Policy*, Department of Defense Instruction number 4710.02: *DoD Interactions with Federally Recognized Tribes*, and US Army Corps of Engineers *Tribal Policy Principles* (Attachment 1) provide guidance.

For the purposes of this policy, the following definitions are applied:

a. Tribe: Indian Tribes as defined in E.O. 13175, “an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 USC 479a.”

b. Consultation: Open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages, before decisions are made and actions are taken; an active and respectful dialogue concerning actions taken by the USACE that may significantly affect tribal resources, tribal rights (including treaty rights) or Indian lands.

4. Applicability. This regulation applies to all HQUSACE elements, Major Subordinate Commands, District Commands, the Institute for Water Resources, the Humphreys Engineering Center Support Activity, and the Engineer Research and Development Center.

5. General Policy. The Tribal Policy Principles.

a. All federally recognized Tribes are sovereign governments and will be treated with respect.

(1) Sovereignty is the foundation of tribal governments.

(2) Tribes are responsible for their own governance and management.

b. The Trust responsibility will be honored and fulfilled.

(1) The federal government has a unique legal and political relationship with Tribal governments that recognizes self-government and self-determination.

(2) USACE is committed to supporting projects and programs beneficial to Tribes through partnership with them.

(3) USACE will ensure that it addresses Tribal concerns regarding protected tribal resources, tribal rights (including treaty rights) and Indian lands.

(4) USACE will protect and allow access to protected tribal resources under USACE jurisdiction to the extent practicable, and will work to develop and implement access policies as needed.

(5) USACE will share information that is not otherwise controlled or classified information.

c. USACE will maintain a government-to-government relationship with Tribes.

(1) Tribes have a unique and distinctive political and legal relationship with the United States.

(2) A Tribe may have access to the Chief of Engineers, the Assistant Secretary of the Army (Civil Works), and other high level individuals if the need arises.

(3) While most interaction will be staff to staff, decision making will be leader to leader (the head of the Tribe and the district commander), with the assistance of the local subject matter expert (typically, the Tribal Liaison).

d. Consultation will be an integral, invaluable process of USACE planning and implementation.

(1) When appropriate, potentially affected Tribes, as determined by the Corps, including Tribes whose aboriginal territories extend to the lands where an activity would occur, will be contacted by letter, telephone or e-mail sufficiently early to allow a timely review of the proposed action. If contacted Tribes notify USACE that other Tribes are potentially affected, USACE has the responsibility to notify those Tribes as well.

(2) Any activity that has the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands-individual projects, programs, permit applications, real estate actions, promulgation of regulations and policies-regardless of land status, will be reviewed at the district level by an individual who effectively interacts with Tribes, usually the Tribal Liaison.

(3) Consultation will be conducted at the district or division level under the guidance of an individual who effectively interacts with Tribes, usually the Tribal Liaison, unless there is a request for HQUSACE (and/or OASA(CW) in the case of Civil Works) input, or if HQUSACE determines input is necessary.

(4) Commands will ensure that all Tribes with an interest in a particular activity that has the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands are contacted and their comments taken into consideration.

(5) Consultation procedures for individual projects or programs may be developed at the local level to meet the needs of particular Tribe(s).

(6) In recognition of the varied organizations and customs of different Tribes, written protocols for consultation procedures may be considered and implemented at the local level with a specific Tribe.

(7) A dispute resolution process will be developed during the consultation process, including a provision to elevate the consultation to higher USACE and/or Tribal levels.

(8) Requests for consultation by a Tribe to USACE will be honored.

e. USACE will support Tribal self-determination, self reliance and capacity building by:

(1) Partnering with Tribes on studies, projects, programs and permitting procedures will be supported and promoted to the extent permitted by law and policy.

(2) To the extent permitted by law and policy, provide information on opportunities to compete for requests for proposals or other potential contracts with USACE.

(3) Sharing appropriate information on USACE programs, policies and procedures, and public documents.

(4) Utilizing Tribal knowledge for planning purposes and to inform operational activities.

(5) Supporting Tribal efforts to lease and operate water resource projects and lands, where appropriate.

(6) Identifying and implementing, within existing authority, other capacity-building opportunities as they occur.

f. Protection of natural and cultural resources.

(1) USACE recognizes the importance of strict compliance with the Native American Graves Protection and Repatriation Act (NAGPRA), the National Historic Preservation Act (NHPA) and other statutes concerning cultural and natural resources.

(2) USACE acknowledges that compliance with the above statutes may not comprise the full range of consultation, nor of cultural property and resource protection.

(3) To the extent allowed by law, USACE will protect the location of historic properties, properties of religious and cultural significance, and archaeological resources, in consultation with and when requested by the affected Tribe(s).<sup>1</sup>

6. Responsibilities of Commanders and other USACE officials interacting with federally recognized Tribes.

a. Build relationships with Tribes soon after each change of command by face-to-face interaction at the local headquarters or at tribal offices when at all possible.

b. Identify and remove procedural impediments to working with Tribes whenever possible.

c. Share appropriate Corps procedures, regulations and organizational information with Tribes.

d. Maintain open lines of communication through consultation with Tribes during the decision making process for those matters that have the potential to significantly affect protected tribal resources, tribal rights (including treaty rights) and Indian lands.

e. Provide Tribes with points of contact on project-related issues, and issues in general.

f. Encourage partnerships on projects with Tribes wherever possible.

g. Encourage collaborative partnerships by other federal and state agencies with Tribes to further their goals and projects.

7. Education. To develop a proactive well-informed workforce, in-house training, workshops, and an annual meeting of USACE tribal liaisons have been developed and should be attended by Corps employees who interact with Tribes-liaisons, project managers, program managers, real estate professionals, regulators, leaders, contracting specialists, etc.

8. Accountability. To assess the effectiveness of USACE Tribal consultation, professionals who interact with Tribes will keep records of consultation meetings and other tribal interactions. These records will be accessible and can be made available for purposes of reporting to OMB through DoD as per the reporting requirement in the Presidential Proclamation of 5 Nov 2009. The report will be synthesized at HQUSACE and transmitted to DoD (OSD) on a yearly basis. A copy of this report will be distributed to federally recognized Tribes upon request.

9. Implementation. USACE will incorporate the six Tribal policy principles, including pre-decisional consultation, into its planning, management, budgetary, operational, and legislative

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<sup>1</sup> USACE will make every reasonable effort, consistent with law, to withhold this information. However, USACE is required to provide public access to its records under the Freedom of Information Act and can only withhold those records protected from disclosure under a statutory exemption or exclusion. Tribes are encouraged to seek legal advice before providing sensitive information to USACE.

initiatives, management accountability system and ongoing policy and regulation development processes.

10. General Provision: This policy does not establish new requirements, but reaffirms procedures and policies already in place, clarifies responsibilities and establishes clear measures of implementation success.<sup>2</sup>

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<sup>2</sup> This policy is not intended to, and does not grant, expand, create, or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this policy be construed to alter, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other rights of any Indian Tribe, or to preempt, modify or limit the exercise of any such right.



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET NW  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

CEMP-CR/CECC-R

OCT 29 2008

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Real Estate Policy Guidance Letter No. 27-Official U.S. Army Corps of Engineers Real Estate Policy

1. Purpose. To establish new policy on the issuance of fuel carrying pipelines that are 24 inches or more in diameter.
2. Background. Section 28 of the Mineral Leasing Act of 1920, as amended (Title 30 U.S.C. Section 185) provides authority to grant easements for pipelines and related facilities for the transportation of oil, natural gas, synthetic liquid or gaseous fuels, or any refined product produced therefrom. This authority must be used for large pipelines that are 24 inches or more in diameter.
3. Policy. In order to provide a consistent policy, effective immediately the following guidance is provided:
  - a. Title 30 requires that the Secretary of the Army promptly notify the Committee on Natural Resources of the United States House of Representatives and the Committee on Energy and Natural Resources of the United States Senate upon receipt of an application for a right-of-way. A second notification is also required if the intent of the Federal Agency is to grant the pipeline right-of-way.
    - 1) Notification upon receipt of application-District will provide a letter to the Real Estate Community of Practice (HQUSACE, CEMP-CR) for the Deputy Assistant Secretary of the Army (Installations and Housing) (DASA I&H) execution and notification to Congress. In addition to the letter, provide a copy of the application and map. A sample format is included at Enclosure 1.
    - 2) Notification on intent to grant-District will provide a letter to HQUSACE, CEMP-CR for the DASA (I&H) execution and notification to Congress. In addition to the letter, furnish an information paper and map. For review purposes, supporting documentation should also include the proposed easement, Report of Availability, and environmental analysis. If the Committee does not provide an affirmative response, District will wait 14 days following Committee notification before execution of the easement. A sample format is included at Enclosure 2.

CEMP-CR/CECC-R

SUBJECT: Real Estate Policy Guidance Letter No. 27-Official U.S. Army Corps of Engineers Real Estate Policy

3) A new easement format is also included at Enclosure 3. This replaces the format included in the Real Estate Handbook, ER 405-1-12, Chapter 8. Site-specific environmental, mitigation, cultural and operational requirements may be added. Other deviations from the format must be approved by HQUSACE (CECC-R).

b. If the pipeline only crosses an area held in less than fee, such as an easement, then the District will follow the process to consent to the fuel-carrying pipeline. No notice to Congress is required for a Consent.

c. If the pipeline right-of-way will traverse lands administered by two or more Federal agencies, the Secretary of the Interior is authorized to grant an easement after consulting with the agencies involved. The implementing regulations of the Bureau of Land Management are applicable and are at 43 C.F.R. Part 2881, et seq.

d. Applications to cross Army land should be filed on Standard Form 299, Application for Transportation and Utility Systems and Facilities on Federal Lands. (<http://www.ntia.doc.gov/frowsite/fssf299.pdf>)

e. If land is impacted in more than one District, HQUSACE CEMP-CR will designate lead Division to coordinate the action and serve as lead Point of Contact/Program Manager.

#### 4. Non-applicability.

a. This memorandum does not apply to fuel-carrying pipelines less than 24 inches in diameter. Easements for those pipelines are granted under authority of Title 10 U.S.C. Section 2668.

b. Pipelines for the aforementioned purposes are not subject to the requirements and limitations of Title 30 if they have been relocated on Government-owned lands at Government initiative and for Government benefit, as authorized by a relocation contract.

5. Duration. The policies stated herein will remain in effect until amended or rescinded by Policy Memorandums, Policy Guidance Letters, Engineers Circulars or Engineer Regulations.

CEMP-CR/CECC-R

SUBJECT: Real Estate Policy Guidance Letter No. 27-Official U.S. Army Corps of Engineers Real Estate Policy

FOR THE COMMANDER:



Encls

SCOTT L. WHITEFORD  
ACTING DIRECTOR OF REAL ESTATE

DISTRIBUTION:

COMMANDER,  
GREAT LAKES AND OHIO RIVER DIVISION (CELRD-PDS-R)  
MISSISSIPPI VALLEY DIVISION (CEMVD-TD-R)  
NORTH ATLANTIC DIVISION (CENAD-PD-E)  
NORTHWESTERN DIVISION (CENWD-PDS)  
PACIFIC OCEAN DIVISION (CEPOD-RE)  
SOUTH ATLANTIC DIVISION (CESAD-PDS-R)  
SOUTH PACIFIC DIVISION (CESPD-ET-R)  
SOUTHWESTERN DIVISION (CESWD-ET-R)

CF:

COMMANDER,  
DETROIT DISTRICT (CELRE-RE)  
HUNTINGTON DISTRICT (CELRH-RE)  
LOUISVILLE DISTRICT (CELRL-RE)  
NASHVILLE DISTRICT (CELRN-RE)  
PITTSBURGH DISTRICT (CELRP-RE)  
MEMPHIS DISTRICT (CEMVM-RE)  
NEW ORLEANS DISTRICT (CEMVN-RE)  
ROCK ISLAND DISTRICT (CEMVR-RE)  
ST. LOUIS DISTRICT (CEMVS-RE)  
ST. PAUL DISTRICT (CEMVP-RE)  
VICKSBURG DISTRICT (CEMVK-RE)  
BALTIMORE DISTRICT (CENAB-RE)  
NEW ENGLAND DISTRICT (CENAE-RE)  
NEW YORK DISTRICT (CENAN-RE)  
NORFOLK DISTRICT (CENAO-RE)  
KANSAS CITY DISTRICT (CENWK-RE)  
OMAHA DISTRICT (CENWO-RE)

CEMP-CR/CECC-R

SUBJECT: Real Estate Policy Guidance Letter No. 27-Official U.S. Army Corps of Engineers Real Estate Policy

PORTLAND DISTRICT (CENWP-RE)  
SEATTLE DISTRICT (CENWS-RE)  
WALLA WALLA DISTRICT (CENWW-RE)  
ALASKA DISTRICT (CEPOA-RE)  
HONOLULU DISTRICT (CEPOH-PP-RE)  
JACKSONVILLE DISTRICT (CESAJ-RE)  
MOBILE DISTRICT (CESAM-RE)  
SAVANNAH DISTRICT (CESAS-RE)  
ALBUQUERQUE DISTRICT (CESPA-RE)  
LOS ANGELES DISTRICT (CESPL-RE)  
SACRAMENTO DISTRICT (CESPK-RE)  
FORT WORTH DISTRICT (CESWF-RE)  
GALVESTON DISTRICT (CESWG-RE)  
LITTLE ROCK DISTRICT (CESWL-RE)  
TULSA DISTRICT (CESWT-RE)  
CECC-R

Case No. 1:16-cv-1534-JEB

**CHEYENNE RIVER SIOUX TRIBE**  
**ATTACHMENT E**

Case No. 1:16-cv-1534-JEB



**DEPARTMENT OF THE ARMY**  
**CORPS OF ENGINEERS, OMAHA DISTRICT**  
1616 CAPITOL AVENUE  
OMAHA NE 68102-4901

February 3, 2017

District Commander

Chairman Harold Frazier  
Cheyenne River Sioux Tribe  
P.O. Box 590  
Eagle Butte, SD 57625-0590

Dear Chairman Frazier:

Greetings, I hope this letter finds you well. We look forward to building on our partnership with the Cheyenne River Sioux Tribe in the coming year. Please know that I am sincerely grateful for your leadership to reduce the risk of injury or loss of life to the people who inhabited the Corps-managed federal property to the north of the Cannonball River.

Safety remains our number one priority. Due to record snowfall and long periods of frigid temperatures in the Bismarck and Fort Yates area this year, there is a high potential for spring flooding at the mouth of the Cannonball River due to spring runoff and ice jams. We fear that without closing the floodway, there will be injuries and loss of life due to flooding. We also fear that – absent remediation – there will be risk of environmental damage due to debris and waste being washed into the Cannonball River and Oahe Reservoir. Therefore, we are extending the closure of Corps-managed federal property described in the notice I provided to you by letter dated November 25, 2016 to include specifically the Corps-managed federal property adjacent to the Cannonball River on the south bank. For your reference, please find enclosed a map which delineates the Corps-managed property adjacent to the Cannonball River.

There are currently multiple violations of the regulations governing public use of these Corps-managed federal lands (36 C.F.R. §327 *et seq.*) both south and north of the Cannonball River, which pose a threat to the fragile ecosystem in this area. Specifically, these violations include unauthorized vehicles, improper disposal and burning of trash, improper disposal of human waste, unauthorized fires, unauthorized structures, and unauthorized habitation that create a high likelihood that garbage, debris, building materials, vehicles, personal property, and hazardous materials will be washed into the Cannonball River and Oahe Reservoir creating an unacceptable level of environmental damage.

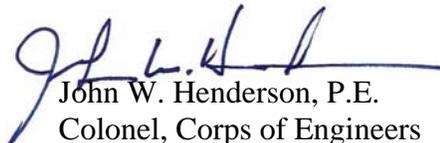
Soil erosion and non-point source pollution in these waterways is also a serious concern. On the approximately 50 acres where these camps were located, grass has been removed or destroyed due to the unauthorized placement of these structures, vehicles, personal property, and fires. Soil erosion due to a lack of vegetation cover will be exacerbated if flooding does occur, and result in contaminated sediment runoff into the Cannonball River and Oahe Reservoir.

In an effort to support ongoing initiatives to clean these areas, prevent injury and loss of life, and mitigate the high risk of environmental impacts to the waters of the Cannonball River and Oahe Reservoir, we are providing notice to camp inhabitants that all personal property will be removed immediately from this area so that remediation of the property prior to any spring flooding can continue to move forward. Owners of personal property, vehicles, or structures currently located on these lands may contact the Oahe Project Office at (605) 224-5862, extension 3420, to coordinate a time to enter this property to retrieve these items.

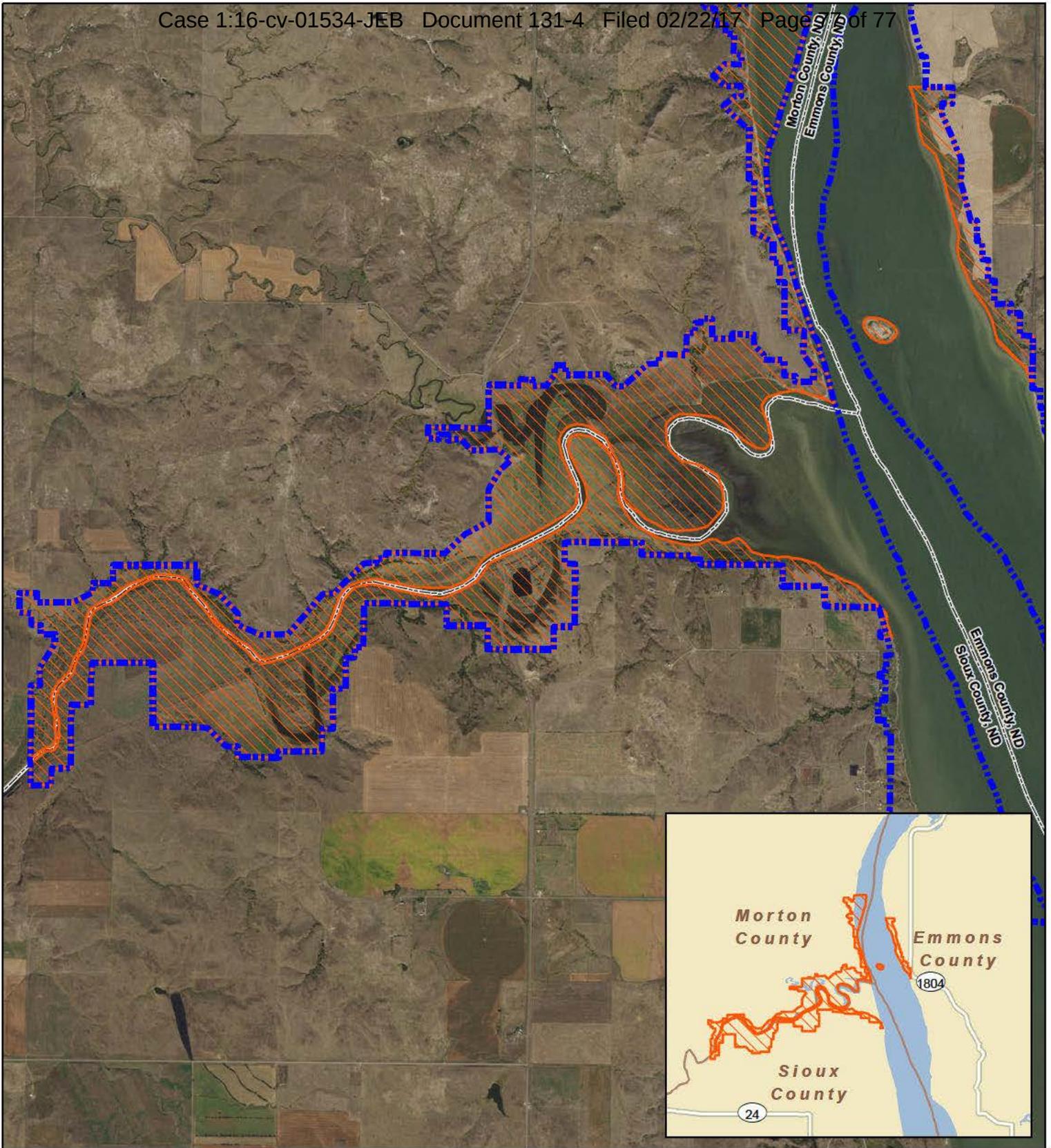
We will provide the owners of personal property until February 22, 2017 to retrieve their personal property; we respectfully request your assistance in facilitating notification of these owners and the recovery of their personal property. After such time, pursuant to 36 C.F.R. § 327.20, all remaining unauthorized structures will be removed. Pursuant to 36 C.F.R. § 327.02, all remaining vehicles will be removed and impounded. Finally, in accordance with 36 C.F.R. § 327.15, all remaining personal property will be stored at the Oahe Project Office for a period of no fewer than 90 days while the owners are located, after which time the property will be disposed.

As always, I am thankful for your assistance in this matter and your continued leadership to prevent unnecessary injury and contamination of our precious water resources. If you desire to reestablish a new area for protest on Corps-managed federal property, please contact the Oahe Project Manager, Mr. Eric Stasch, at 605-945-3400, to apply for a special use permit.

Most respectfully,

  
John W. Henderson, P.E.  
Colonel, Corps of Engineers  
District Commander

Enclosure



# Oahe Dam and Reservoir Closed to the Public



Disclaimer: The Government furnishes this data and the recipient accepts and uses it with the express understanding that the United States Government makes no warranties, expressed or implied, concerning the accuracy, completeness, reliability, usability, or suitability for any particular purpose of the information and data furnished. The United States shall be under no liability whatsoever to any person by reason of any use made thereof. Data displayed on this map are approximations derived from GIS layers and should NOT be used in place of survey data or legal land descriptions.

### Legend

-  USACE Project Boundary (Fee)
-  Closed to Public
-  Counties



## Exhibit "A"

Date: 10-January-2017

(regis1):re2\jesse\bob\_incontro\Oahe\DAPL\_Easement\Prohibited\_Area\_Jan2017\Cannonball\_Closed\_Areas.mxd