



Oglala Sioux Tribe



Office of the Vice President

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STATEMENT FROM THE OFFICE OF THE VICE PRESIDENT OF THE OGLALA SIOUX TRIBE

To Whom It May Concern:

The Oglala Sioux Tribe is a federally recognized tribe whose ancestral grounds and treaty territory lie squarely in the path of the proposed Keystone XL pipeline. As Vice President of the Oglala Sioux Tribe, a position in which I am about to begin my third consecutive term, and as a voice for my People in opposition to the proposed pipeline project, I issue this statement in order to call attention to some of the many injustices my People would suffer if the project were approved. Please note that this document constitutes merely a synopsis of some of our primary concerns and that it is neither exhaustive nor comprehensive. Moreover, there are some sentiments that simply cannot be adequately expressed from a distance through written word. I have sought, unsuccessfully, an audience with the President of the United States, Nation to Nation, so that he can more clearly understand what is at stake in this decision. Although I recognize the constraints on President Obama's time, I continue to hope that he will realize the importance of hearing for himself what is in the hearts and minds of my People. I welcome any future invitations by the leaders of this country who wish to gain a better understanding about why we have and will continue to fight the black snake pipeline that threatens our spirituality, our water, and the future of our children.

I. FORT LARAMIE TREATIES

A. Treaty Boundaries, Exclusive Use, and Unceded Lands

On April 29, 1868, the United States entered into a binding peace treaty at Fort Laramie (1868 Fort Laramie Treaty) with the Oglala, as well as with the Brulé, Santee, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Arapaho. This was the second treaty the Oglala Lakota entered into with the United States. In Article 2 of the 1868 Fort

Laramie Treaty, the United States agreed that all lands west of the Missouri River and within present day South Dakota would be “set apart for the absolute undisturbed use and occupation of the Indians herein named.” In Article 2 of the 1868 Fort Laramie Treaty, the United States further agreed that, except for individuals designated in that Treaty, and except for federal officials authorized to enter upon Indian reservations by law, “no persons ... shall ever be permitted to pass over, settle upon, or reside in the territory described in this article.” The United States stipulated and agreed in Article 16 of the Treaty that “the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulate[d] and agree[d] that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same.”

This binding agreement between Nations explicitly reserved the lands described in Article 2 for the exclusive use of the Indigenous Nations that were parties to the Treaty and expressly acknowledged that the lands described in Article 16 shall remain unceded so that the people indigenous to those lands could continue to practice their spirituality and subsistence lifestyle on them. We have never given up these rights, and we refuse to allow TransCanada to trespass on our lands and desecrate them with a toxic tar sands pipeline. The route of the proposed pipeline cuts all the way through the heart of our Treaty lands. Any encroachment of TransCanada onto our lands would constitute a trespass pursuant to the terms of the 1868 Fort Laramie Treaty and would therefore constitute a violation of the supreme law of the United States. Furthermore, any assistance by the United States through the issuance of a Presidential Permit or otherwise would make the United States an accessory to the violation of its own supreme law. The Presidential Permit must therefore be denied.

II. CONSULTATION

A. Federal Trust Responsibility Requires *Meaningful* Consultation

The United States government owes Indigenous Nations a trust responsibility which “emanates from the Constitution, Indian treaties, statutes, case law, executive orders, and the historic relationships between the federal government and Indian tribes. It applies to all federal agencies.”¹ The federal trust responsibility resulted from “the treaties through which Indian tribes ceded large portions of their aboriginal lands to the United States in return for promises to protect tribal rights as self-governing nations within the reserved lands (reservations) and certain reserved rights (i.e. aboriginal hunting, fishing, and gathering rights) to resources outside of those reserved lands.”²

¹ Consultation with Indian Tribes in the Section 106 Review Process: A Handbook, <http://www.achp.gov/regs-tribes2008.pdf>, p. 2 (Nov. 2008).

² *Id.*

As part of its trust responsibility, the federal government has an obligation to work together with Indigenous Nations through consultation and collaboration in the development of federal policies or actions that will affect them. One way this obligation has been memorialized is through Executive Orders. For example, Executive Order 13175 takes special note of the unique relationship between Indigenous Nations and the United States as set forth in the U.S. Constitution, treaties, Executive Orders, and court decisions. President Clinton issued Executive Order 13175 in order to “establish regular and *meaningful* consultation and collaboration with tribal officials in the development of Federal policies³ that have tribal implications [and] to strengthen the United States government-to-government relationship with Indian tribes” (emphasis added).

President Obama re-committed federal agencies to the trust-based duty to consult through a Memorandum for the Heads of Executive Departments and Agencies issued on November 5, 2009. The President called consultation “a critical ingredient of a sound and productive Federal-tribal relationship,” noting that “[h]istory has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results.”⁴ President Obama’s Memorandum further declared, in no uncertain terms: “My Administration is committed to regular and *meaningful* consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through a *complete and consistent implementation of Executive Order 13175*” (emphasis added).⁵

B. National Historic Preservation Act Imposes Additional Duty to Consult

Pursuant to Section 106 of the National Historic Preservation Act (NHPA), a federal agency must take into account the effect an undertaking would have on locations or objects eligible for inclusion in the National Register before that agency may authorize or expend federal funds on that undertaking.⁶ Eligible locations or objects may include “[p]roperties of traditional religious and cultural importance to an Indian tribe.”⁷ The NHPA requires federal agencies to consult with any Indigenous Nation that attaches religious or cultural significance to such properties,⁸ which means that the NHPA creates an additional duty to consult under those circumstances. Because construction of the proposed Keystone XL pipeline requires a Presidential Permit,⁹ it is considered a federal undertaking and is thus subject to the NHPA and corresponding federal regulations. This means that the State Department (as the lead agency) is required by federal statute to consult with the Oglala Sioux Tribe and with every Indigenous Nation that has spiritual, cultural, and historical ties to the land along the pipeline route.

³ The phrase “policies that have tribal implications” is defined in Section 1(a) of the Executive Order to include “actions that have substantial direct effects on one or more Indian tribes.” Because issuance of a Presidential Permit for the proposed pipeline constitutes such an action, the permitting process is governed by Executive Order 13175.

⁴ Memorandum for the Heads of Executive Departments and Agencies, President Barack Obama (Nov. 5, 2009).

⁵ *Id.*

⁶ *See* 16 U.S.C. 470f.

⁷ *See* 16 U.S.C. 470a(d)(6)(a).

⁸ *See* 16 U.S.C. 470a(d)(6)(b).

⁹ *See* Exec. Order No. 13337 (2004).

C. Meaningless Consultation on Proposed KXL Pipeline

The consultation process pertaining to this proposed project, including the original Programmatic Agreement and amendments to the Programmatic Agreement, has been wholly inadequate. The State Department's failures in this regard have been pointed out time and again to that agency both through public comments and during the so-called "consultation" process but to no avail. Despite having received and read about the shortcomings of its tribal consultation tactics, the State Department has taken no actions to improve that process over the course of this several-year process. On the rare occasion that a consultation activity occurs in person, that activity consists of lower-level staff members talking at a room of tribal leaders whose concerns fall on deaf ears. The very manner in which consultation continues to be conducted is a tribute to the fact that concerns and opinions of tribal leaders have gone unheard and unaddressed throughout this process.

Executive Order 13175 requires each federal agency to have an "accountable process to ensure meaningful and timely input by tribal officials" when engaging in tribal consultation. There is no accountability whatsoever in the State Department's activities and the only process that exists appears to be a strategy of meeting as many tribal leaders as possible in as few meetings as possible in order to most efficiently go through the motions to be able to say that tribes were "consulted." This behavior is detrimental to the relationship between Indigenous Nations and the United States and it is detrimental to the well-being of the children whose lives may be gravely affected by these decisions. Until the State Department has engaged in *meaningful* consultation, treating each Indigenous Nation as a sovereign and treating leaders with the dignity, respect, and consideration it shows to other foreign leaders, the State Department has not fulfilled its trust responsibility or its statutory responsibility and the Presidential Permit process cannot lawfully move forward.

Sincerely,

A handwritten signature in black ink that reads "Tom Poor Bear". The signature is written in a cursive, flowing style.

Tom Poor Bear
Vice President of the Oglala Sioux Tribe