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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MONTANA**
**GREAT FALLS DIVISION**

ROSEBUD SIOUX TRIBE and FORT BELKNAP INDIAN COMMUNITY,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, in his official capacity as Secretary of the Interior; BUREAU OF LAND MANAGEMENT; JOHN MEHLHOFF, in his official capacity as the State Director of the Montana/Dakotas State Office of the Bureau of Land Management,

Defendants.

Case No. CV-20-109-GF-BMM-JTJ

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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Plaintiffs, by and through their undersigned attorneys, allege on information and belief as follows:

## INTRODUCTION

1. This case arises from the United States Bureau of Land Management's ("BLM") January 22, 2020, grant of a right-of-way ("ROW") to TransCanada Keystone Pipeline, L.P., for the Keystone XL Pipeline ("Pipeline") to cross 44.4 miles of BLM-administered land and 1.88 miles of United States Army Corps of Engineers ("Army Corps")-administered land in Montana, commencing at the United States-Canada border. *See* 85 Fed. Reg. 5,232 (Jan. 29, 2020).

2. Between 2007 and 2013 TransCanada Keystone Pipeline, L.P., a wholly-owned subsidiary of a Canadian corporation, TC Energy Corporation (together, "TransCanada"), attempted to secure a presidential permit to build the Pipeline.

3. Intended for the international market, the highly toxic "tar sands" crude oil would pass more than 1,000 miles through the United States, connecting the tar sands mining fields of Alberta, Canada, to the Gulf Coast of the United States.

4. Twice, the United States Department of State ("State Department") denied TransCanada a presidential permit for the Pipeline, finding that it was not in the national interest.

5. In 2017, President Trump issued a Memorandum "invit[ing] TransCanada . . . to promptly re-submit its application" for the Pipeline. Construction of the Keystone XL Pipeline, 82 Fed. Reg. 8,663, § 2 (Jan. 24, 2017).

6. Acting on President Trump's invitation, TransCanada sought, yet again, the State Department's approval to construct the Pipeline. Just fifty-six days later, the State Department granted TransCanada a presidential permit (the "2017 Permit"). *See* 82 Fed. Reg. 16,467 (Apr. 2, 2017).

7. The State Department's issuance of the presidential permit to TransCanada was unlawful, and in November 2018, the United States District Court for the District of Montana vacated the 2017 Permit. *See Indigenous Envtl. Network v. U.S. Dep't of State* ("*IEN III*"), 347 F. Supp. 3d 561, 580-81 (D. Mont. 2018).

8. On March 29, 2019, while an appeal of that decision was pending in the United States Court of Appeals for the Ninth Circuit, President Trump took extraordinary action to unilaterally revoke the 2017 Permit and grant a

new presidential permit to TransCanada (the "2019 Permit"). 84 Fed. Reg. 13, 101 (Apr. 3, 2019).

9. On January 22, 2020, BLM issued a Record of Decision, 85 Fed. Reg. 5,232 (Jan. 29, 2020) ("2020 ROD"), granting TransCanada a ROW and temporary use permit ("TUP") to cross federal lands in Montana that are managed by the BLM and Army Corps.

10. In the Pipeline's proposed path are the homelands of the Oceti Sakowin (otherwise known as the Great Sioux Nation) and the Gros Ventre and Assiniboine Tribes, to which the Plaintiffs Rosebud Sioux Tribe ("Rosebud") and Fort Belknap Indian Community ("Fort Belknap") (together, "the Tribes"), respectively, maintain historical, cultural, governmental, traditional, and spiritual ties.

11. The Pipeline would cross and impact Rosebud territory and water, some of which is held in trust by the United States, and the traditional territory and water of Fort Belknap.

12. Nevertheless, TransCanada has not obtained Rosebud consent to cross Rosebud territory as required by the Fort Laramie Treaty of 1868, federal right-of-way and mineral statutes, and Rosebud's regulatory and inherent authority over its territory.

13. The BLM has also not fully analyzed the impact the Pipeline will have on the Tribes' territories, and in particular the Tribes' water resources and lands held in trust.

14. In granting the 2020 ROW, BLM failed to analyze and uphold the United States' treaty obligations to protect the Tribes.

15. The BLM also failed to properly analyze the Pipeline's potential impacts on the Tribes' water resources and rights; potential impacts on Tribal treaty rights and territory; the potential impact of spills on tribal members and natural resources; or the potential impact of the Pipeline on the people, cultural resources, spiritual and religious beliefs, and historic properties in the path of the Pipeline. These failures violate the National Environmental Policy Act ("NEPA"), the 1851 Fort Laramie Treaty, the 1855 Lame Bull Treaty, the 1868 Fort Laramie Treaty (collectively, "the Treaties"), and the obligations that those treaties impose.

16. Further, the BLM failed to properly consult with the Tribes as required by the Treaties and United States Department of Interior ("Interior Department") policy.

17. BLM's approval was therefore arbitrary, capricious, and not in accordance with the law.

18. Because of the many procedural and substantive failings, the 2020 ROD, ROW, and TUP issued by the BLM must be vacated.

## JURISDICTION AND VENUE

19. This action arises under the 1851 Treaty of Fort Laramie, 11 Stat. 749 (1851); the Lame Bull Treaty of 1855, 11 Stat. 657 (1855); the 1868 Treaty of Fort Laramie, 15 Stat. 635 (1868); NEPA, 42 U.S.C. §§ 4321 *et seq.*; and the Administrative Procedures Act ("APA"). 5 U.S.C. §§ 701-706. The APA waives Defendants' sovereign immunity and these actions are against the law, beyond Defendant's authority, and therefore sovereign immunity does not apply. *Id*. § 702.

20. Jurisdiction is therefore proper pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

21. Jurisdiction also is proper pursuant to 28 U.S.C. § 1362, which provides that "district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

22. This Court has authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201-2202, and its inherent authority to issue equitable relief. Injunctive relief also is authorized for APA claims pursuant to 5 U.S.C. §§ 705-706.

23. Venue is proper pursuant to 28 U.S.C. § 1391 because the actions challenged herein took place in this judicial district. The ROW and TUP challenged herein authorize TransCanada to construct, connect, operate, and maintain the Pipeline across federal lands within Montana. Without these authorizations, construction of the Pipeline could not occur.

24. Venue also is proper because Plaintiff Fort Belknap resides in the District of Montana.

25. Assignment is proper in the Great Falls Division because the ROW and TUP authorize TransCanada to construct, connect, operate, and maintain the Pipeline and its related facilities within the Great Falls Division. In addition, Plaintiff Fort Belknap Indian Community is located within the Great Falls Division.

**THE PARTIES**

26. Plaintiff ROSEBUD SIOUX TRIBE is a federally-recognized Indian tribe located on the Rosebud Indian Reservation in South Dakota. 85

Fed. Reg. 5,462, 5,465 (Jan. 30, 2020). Rosebud is responsible for the health, safety, and welfare of its members. Also known as the Sicangu Oyate, Rosebud is a branch of the Lakota people and is part of the Oceti Sakowin (Sioux Nation).[1] Rosebud has almost 35,000 members, many of whom reside in the territory that the Pipeline would cross, including in Tripp County, South Dakota. The Rosebud Indian Reservation was established in 1889 after the United States' partition of the Great Sioux Reservation. Created in 1868 by the Fort Laramie Treaty, the Great Sioux Reservation covers all of West River, South Dakota (the area west of the Missouri River), as well as parts of North Dakota, northern Nebraska, and eastern Montana.

27. Plaintiff FORT BELKNAP INDIAN COMMUNITY of the Fort Belknap Reservation of Montana is a federally-recognized Indian tribe. 85 Fed. Reg. at 5,463. The Fort Belknap Indian Reservation is homeland to the Gros Ventre (Aaniiih) and the Assiniboine (Nakoda) Tribes, the two tribes that form the government of Fort Belknap. Under Fort Belknap's constitution and charter, the Fort Belknap Indian Community Council is recognized as

[1] The Oceti Sakowin consists of the Seven Council Fires, the Thíthuŋwaŋ (Teton or Lakota), Bdewákaŋthuŋwaŋ (Mdewakanton), Waȟpéthuŋwaŋ (Wahpeton), Waȟpékhute (Wahpekute), Sisíthuŋwaŋ (Sisseton), Iháŋkthuŋwaŋ (Yankton), and Iháŋkthuŋwaŋna (Yanktonai).

the governing body on the Fort Belknap Reservation and is charged with the duty of protecting the health, security, and general welfare of its tribal members. Fort Belknap has nearly 8,000 members who reside throughout the Fort Belknap Indian Reservation, the State of Montana, and the United States. The proposed Pipeline will cross the traditional territory, sacred sites, and cultural sites of the tribes of Fort Belknap.

28. Collectively, Rosebud and Fort Belknap are referred to as "Plaintiffs" or "the Tribes."

29. Defendant UNITED STATES DEPARTMENT OF THE INTERIOR is a federal agency. The Interior Department conserves and manages the United States' natural resources and cultural heritage, and is charged with implementing Indian right of way and Indian mineral statutes. The Interior Department houses the Bureau of Indian Affairs, the Office of the Special Trustee for American Indians, as well as the BLM whose actions are at issue in this Complaint. The Interior Department receives, reviews, and approves or denies right-of-way applications and mineral lease applications, and is responsible for enforcing those provisions. As a federal agency, the Interior Department is obligated to act in accordance with all

federal treaties, laws, and regulations, and to uphold its duties to the Tribes pursuant to the United States' trust responsibility and the treaties.

30. Defendant DAVID L. BERNHARDT ("Secretary Bernhardt") is sued in his official capacity as the Secretary of the Department of the Interior. Secretary Bernhardt signed the BLM's 2020 ROD granting the ROW and TUP to TransCanada. The Secretary of Interior is required to ensure that the Interior Department complies with all federal treaties, laws, and regulations, and upholds its duties to the Tribes pursuant to the treaties.

31. Defendant BUREAU OF LAND MANAGEMENT is a federal agency housed within the Interior Department. The BLM has the authority to receive, review, approve or deny applications for Mineral Lease Act ROWs and TUPs. As a federal agency, the BLM is obligated to act in accordance with all federal treaties, laws, and regulations, and to uphold its duties to the Tribes pursuant to the United States' trust responsibility and the treaties.

32. Defendant JOHN MEHLHOFF ("State Director Mehlhoff"), is sued in his official capacity as the State Director of the Montana/Dakotas State Office of the BLM. State Director Mehlhoff signed the BLM's 2020 ROD granting the ROW and TUP to TransCanada. State Director Mehlhoff is

required to ensure that the BLM complies with all federal treaties, laws, and regulations, and upholds its duties to the Tribes pursuant to the federal trust responsibility and treaties.

33. Collectively, the Interior Department, the BLM, Secretary Bernhardt, and State Director Mehlhoff are referred to as "Defendants."

## FACTUAL BACKGROUND

### I. TransCanada's Permit Applications

34. TransCanada first submitted a presidential permit application to the State Department on September 19, 2008, for the construction, connection, operation, and maintenance of the Pipeline and related facilities across the United States-Canada border in Philips County, Montana.

35. As early as 2009, Rosebud told the United States that the United States failed to properly contact the Rosebud leadership, and failed to provide any detailed route or map of the Pipeline so that Rosebud could understand the impacts of the Pipeline.

36. In 2009, Rosebud advised the United States that it understood the Pipeline would cross Tripp County, South Dakota, and that Rosebud had trust lands and historic, cultural, and religious sites in Tripp County.

37. Rosebud also advised in 2009 that it was critical to have tribal involvement in the archeological surveys that were to be conducted for the Pipeline.

38. Rosebud also advised that the Bureau of Indian Affairs ("BIA") should be involved in the process because they have a fiduciary responsibility to the Tribes, and the BIA was integral to the process.

39. On January 18, 2012, Secretary of State John F. Kerry ("Secretary Kerry") denied TransCanada's first permit application. *See* 77 Fed. Reg. 5,679 (Feb. 3, 2012).

40. On May 2, 2012, TransCanada submitted its second permit application for the Pipeline and related facilities across the United States-Canada border.

41. When TransCanada submitted its second permit application, the State Department was required to initiate new permit review processes pursuant to both the NEPA and the National Historic Preservation Act ("NHPA").

42. In the second permit application, TransCanada proposed a new alignment in Nebraska, with the goal of avoiding the Sand Hills Region, at the request of the State of Nebraska.

43. Yet, TransCanada failed to propose a new alignment that avoided Tribal Treaty lands as requested by sovereign tribal governments.

44. During the second permit application process, in early 2014, Rosebud advised the United States that the Pipeline would cross treaty lands, and in particular Tripp County, where the United States holds lands in trust for Rosebud.

45. Rosebud also advised the United States that it maintains jurisdiction over trust lands and waters within Tripp County, and that the Pipeline would adversely affect reserved water rights and resources, among other things. *See* Exhibit A, attached.

46. Rosebud further advised that the State Department incorrectly identified lands in Tripp County as Yankton Sioux Tribe lands, rather than Rosebud lands, and that there were several factual and legal errors because of that misidentification.

47. Rosebud advised that it had not been properly consulted given the misidentification of its lands and advised that there was still time for proper consultation, but that because of the legal and factual errors it would not sign the amended Programmatic Agreement that was developed for the Pipeline pursuant to the NHPA.

48. Rosebud advised that the 2014 environmental impact statement ("2014 EIS") was factually and legally flawed given the misidentification of its lands in Tripp County, and that its lands within Tripp County lie within the original boundaries of the Rosebud Sioux Reservation as established by the 1851 and 1868 Fort Laramie Treaties and the Act of March 2, 1889, ch. 405, 25 Stat. 888, and that there were trust lands within Tripp County.

49. On November 6, 2015, the State Department published its Record of Decision and National Interest Determination, wherein Secretary Kerry again denied TransCanada's permit application because it was not in the national interest. *See* 80 Fed. Reg. 76,611 (Dec. 9, 2015).

50. One of the factors that Secretary Kerry considered in determining that the Pipeline was not in the national interest was "the concerns of some Indian tribes raised in the context of the proposed Project regarding sacred cultural sites and avoidance of adverse impacts to the environment, including to surface and groundwater resources."

51. On January 24, 2017, President Trump signed a Memorandum "invit[ing] TransCanada . . . to promptly re-submit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline." 82 Fed. Reg. at 8,663, § 2.

52. The Memorandum also "waived . . . any authority [the President] retained to make the final decision regarding the issuance of the Presidential Permit," *Indigenous Env't Network v. U.S. Dep't of State* ("*IEN I*"), No. CV-17-29-GF-BMM, 2017 WL 5632435, *5 (D. Mont. Nov. 22, 2017), ensuring that the State Department's issuance of a permit to TransCanada was an agency action. *Id*. at *12 ("[T]he State Department's publication of the [record of decision and national interest determination] and its issuance of the accompanying Presidential Permit constitute agency action.").

53. On January 26, 2017, just two days later, TransCanada submitted to the State Department its third permit application for the construction, connection, operation, and maintenance of the Pipeline and its related cross-border facilities.

54. On February 10, 2017, the State Department acknowledged that it had received TransCanada's third permit application and announced that it would review the application in accordance with the Memorandum. 82 Fed. Reg. 10,429 (Feb. 10, 2017).

55. "The State Department further announced that it would seek no further public comment on the national interest determination because it

already had taken public comment in February 2014"—three years earlier. *IEN I*, 2017 WL 5632435, at *3 (citing 82 Fed. Reg. at 10,429).

56. On March 23, 2017, just fifty-six days after TransCanada's third permit application was submitted, the State Department issued the 2017 Permit. *See* 82 Fed. Reg. at 16,467.

57. The State Department's 2017 Record of Decision documented TransCanada's agreement to follow all tribal laws and regulations with regard to the construction and operation of the Pipeline. U.S. Dep't of State, *Record of Decision and National Interest Determination: TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Keystone XL Pipeline* at 30 (Mar. 23, 2017) ("2017 ROD/NID"), *available at* https://www.state.gov/wp-content/uploads/2019/02/Record-of-Decision-and-National-Interest-Determination.pdf.

58. In November 2018, the Montana District Court vacated the 2017 ROD/NID and held it the issuance of the 2017 Permit to be unlawful. *See IEN III*, 347 F. Supp. 3d at 580-81.

59. On March 29, 2019, while the State Department appealed this decision to the Ninth Circuit, President Trump took extraordinary action to

unilaterally revoke the 2017 Permit and grant a new presidential permit to TransCanada. *See* 84 Fed. Reg. at 13,101.

60. The 2019 Permit acknowledges the continued obligation of TransCanada and the United States to comply with the NEPA, and APA, as well other federal law, including treaties with the Plaintiff Tribes, and tribal law when it says: "The construction, connection, operation, and maintenance of the Facilities (not including the route) shall be, in all material respects and as consistent with applicable law, as described in the permittee's application for a Presidential permit filed on May 4, 2012, and resubmitted on January 26, 2017." *Id*. at 13,101-02.

61. On January 22, 2020, the Interior Department and BLM issued the 2020 ROD granting TransCanada a ROW and TUP for the Pipeline.

62. When the Interior Department and the BLM issued the 2020 ROD recommending the approval of the Mineral Leasing Act ROW and TUP to TransCanada they did so in violation of NEPA and in violation of the duties owed to the Tribes under the 1851 Fort Laramie Treaty, the 1855 Lame Bull Treaty, and the 1868 Fort Laramie Treaty.

## II. The 2019 SEIS

63. In 2018, this Court remanded the 2017 Permit decision to the State Department, which had conducted the NEPA analysis on the Pipeline to that point, for further consideration.

64. As a result, the State Department began work on a supplemental environmental impact statement, which it completed in December of 2019 ("2019 SEIS").

65. The 2019 SEIS purports to address the deficiencies the Court identified by supplementing the State Department's 2014 EIS, produced during its review of TransCanada's second permit application.

66. The BLM, for its 2020 ROD and the issuance of the ROW and TUP, adopted and relied upon the State Department's 2019 SEIS.

## III. Comments on the 2019 SEIS

67. Rosebud and Fort Belknap have put the United States on notice that its NEPA analysis and compliance has been faulty, and, as noted, Rosebud informed the United States that the Pipeline would cross trust lands and waters in Tripp County as early as 2009.

68. Indeed, Rosebud objected to the construction of the Pipeline in 2014 and asserted it was not in the national interest. *See* Exhibit A.

69. In 2018, the Tribes sued the United States, including the Interior Department and State Department, for failure to properly analyze and consider the Tribes' treaties and treaty rights and resources, among other things.

70. During the NEPA process for the 2019 SEIS, the Tribes advised the United States of the following:

- That it had treaty obligations to protect the Tribes' resources and rights;
- That it did not properly consult with the Tribes on the draft 2019 SEIS;
- That the Tribes had pending litigation against the United States that outlined numerous issues and that the draft 2019 SEIS did not address the issues identified in the lawsuit;
- That the BLM was not in compliance with the NHPA;
- That the Pipeline would cross Rosebud lands and waters and that the United States has an obligation to protect Rosebud lands and waters and obtain its consent to put a Pipeline on its lands;
- That the draft 2019 SEIS did not consider the impact of the Pipeline on the Tribes' lands and waters, and that the draft 2019 SEIS incorrectly stated the Pipeline will not cross treaty lands;
- That the region of influence and area of potential effects in the draft 2019 SEIS was arbitrary, capricious, and

illogical because it does not include the area that a potential spill could impact;

- That the draft 2019 SEIS noted the Pipeline will have a disproportionate impact on the Tribes, but an alternative route to avoid the Tribes' treaty lands was not considered as was suggested in 2014;

- That the draft 2019 SEIS did not utilize the most up to date spill data;

- That the draft 2019 SEIS admitted the pipeline will substantially and negatively burden the spiritual practices of native people, but nevertheless the draft 2019 SEIS did not consider whether BLM's approval would be a violation of the Religious Freedom Restoration Act; and

- That the conclusions from the analysis on climate change were arbitrary, capricious, and not in accordance with the law.

71. These issues were not remedied in the final 2019 SEIS.

72. The Interior Department and BLM did not consult with the Tribes as required by their own tribal consultation policies before issuing the 2019 SEIS or 2020 ROD.

## IV. The Treaty Obligations

73. As sovereign governments, Rosebud and Fort Belknap have entered into treaties with the United States on a government-to-government basis, and maintain jurisdiction over their territory. 1851 Treaty of Fort

Laramie; Lame Bull Treaty of 1855; 1868 Treaty of Fort Laramie; *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 808-09 (9th Cir. 2011) (Tribal Nations have jurisdiction over their territory).

74. In the 1851 Fort Laramie Treaty, the United States promised to "protect" Rosebud and Fort Belknap "against the commission of *all* depredations by the people" of the United States. 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 594 (1904) (emphasis added).

75. The history, purpose, and negotiations of the 1851 Fort Laramie Treaty show that the protection of tribal natural resources was a fundamental and pressing concern for the tribes going into the 1851 treaty negotiations.

76. In the 1855 Lame Bull Treaty, the United States promised to "protect" Fort Belknap against "depredations" which "white men residing in or passing through their country may commit."

77. The history, purpose, and negotiations of the 1855 Lame Bull Treaty show that the protection of tribal natural resources was a fundamental and pressing concern for the tribes.

78. The 1868 Fort Laramie Treaty requires that Rosebud's consent be obtained by anyone wishing to pass over or settle upon Tribal lands.

79. The history, purpose, and negotiations of the 1868 Fort Laramie Treaty show that integrity of tribal lands and obtaining tribal consent to cross tribal lands were fundamental concerns.

## V. The 2019 SEIS Failed to Address the Comments and the 2020 ROD is Unlawful

80. NEPA requires federal agencies to prepare a "detailed statement" for any "major Federal actions significantly affecting the quality of the human environment." *IEN III*, 347 F. Supp. 3d at 571 (quoting 42 U.S.C. § 4332(2)(C)).

81. The detailed statement, or EIS, must include a "full and fair discussion" of the effects of the proposed action, including those on the "affected region, the affected interests, and the locality." *Id.* at 572 (quoting 40 C.F.R. §§ 1502.1, 1508.27(a)). For a "site-specific action, significance would usually depend upon the effects in the locale[.]" *Indigenous Env't Network v. U.S. Dep't of State* ("*IEN II*"), 317 F. Supp. 3d 1118, 1120 (D. Mont. 2018) (quoting 40 C.F.R. § 1508.27(a)).

82. NEPA's "full and fair discussion" requirement directs an agency to look at a Project's "direct" and "indirect" effects. 40 C.F.R. § 1508.8(a)-(b) (2020). Indirect effects include those "caused by the action and are later in

time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (2020); *IEN III*, 347 F. Supp. 3d at 575.

83. An agency must take a "hard look" at the environmental consequences of its decision to satisfy NEPA. *IEN III*, 347 F. Supp. 3d at 572 (quoting *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001)).

84. This "hard look" applies to the "entire pipeline" because it "remains interrelated and requires one EIS to understand the functioning of the entire unit." *IEN II*, 317 F. Supp. 3d at 1123.

**a. The 2020 ROD and 2019 SEIS Incorrectly Conclude that No Federal Lands are Crossed Outside of Montana, and that No Indian Lands Are Crossed, or Even Within One Mile of the Pipeline.**

85. The 2020 ROD states that "[n]o federal lands are crossed by the [Pipeline] outside of MT."

86. The 2014 EIS, which is incorporated into both the 2020 ROD and 2019 SEIS, states that the "proposed Project does not cross any tribal lands, such as Indian reservations[,]" and that "no federal land in South Dakota will be crossed."

87. But TransCanada has admitted the Pipeline will cross Rosebud mineral estates that are held in trust by the United States. *See* Pls.' Resp. in

Opp'n to TransCanada Defs.' Mot. for Summ. J. at 13-14, *Rosebud Sioux Tribe v. Trump*, No. 4:18-cv-00118-BMM (D. Mont. Feb. 25, 2020), ECF No. 111; Pls.' Mem. In Supp. of Summ. J. at 13-14, *Id.* (D. Mont. Feb. 25, 2020), ECF No.114; *see also* TransCanada's Mem. In Supp. of Summ. J. at 5, 13, 21-22, *Id.* (D. Mont. Jan. 24, 2020), ECF No. 97; TransCanada's Statement of Undisputed Facts ¶ 27 and Ex. 5 (Hofer Decl.) attached thereto at ¶¶ 8,9., *Id.* (D. Mont. Jan. 24, 2020), ECF Nos. 98 and 98-5.

88. The 2019 SEIS relies on a generic low-detail map to assert that "the preferred route analyzed within this SEIS avoids tribal lands and tribal trust lands as demonstrated in the image on the following page." That map failed to provide sufficient detail to show the true impacts on Indian lands.

89. At its most extreme, the 2014 EIS states that the Pipeline "does not cross or come within 1 mile of any tribal lands."

90. This is belied by the map in the 2019 SEIS and the information TransCanada has provided that shows the Pipeline within a couple hundred feet of Indian land. *See* TransCanada's Mem. In Supp. of Summ. J. at 19, *Rosebud Sioux Tribe*, ECF No. 97 (admitting that, at bare minimum, the Pipeline is "*adjacent* to property owned by Rosebud" or the United States in

trust); Fowlds Decl. & Aff., *Rosebud Sioux Tribe*, ECF No. 98-6 (maps showing the Pipeline would be within roughly 200 feet of Indian land held in trust).

91. Further, the 2019 SEIS looked only at the "easements" and "authorized activity" along the pipeline route, which is a deeply flawed way of analyzing the environmental impact of a pipeline.

92. The relevant analysis to determine whether the Pipeline crosses Indian land is to look at where the effects are to occur.

93. Both the Area of Potential Effect ("APE") and the spill area are larger than the narrow view of the "easements" that TransCanada has provided. Pls.' Mem. In Supp. of Summ. J. at 16-17, *Rosebud Sioux Tribe*, ECF No. 114 (showing the APE at 300 feet and the spill zone at 1,200-5,000 feet, then showing the "easement" at only 150 feet).

94. According to the 2019 SEIS, the APE is at least 150 feet from the Pipeline corridor on both sides. And for a spill, the area of effect would be between 1,200 to 5,000 feet from the release point on the surface. 2019 SEIS at 5-2.

95. Given this area of effect, the 2019 SEIS did not take a hard look at the impact of the Pipeline on tribal lands because it wrongly concludes the Pipeline will not be within even one mile of Indian lands.

96. Given these faulty conclusions, the United States has failed to prevent depredations, or take a hard look at the reasonably foreseeable direct and indirect impacts of the Pipeline on the Tribes and their lands. 40 C.F.R. § 1508.8(b); *IEN III*, 347 F. Supp. 3d at 575.

**b. The 2020 ROD and 2019 SEIS Fail to Mention, or Analyze, Rosebud Mineral Estates.**

97. The 2020 ROD, 2019 SEIS, and 2014 EIS all fail to mention that the Pipeline would cross Rosebud mineral estates held in trust, and there is no analysis of the United States' obligations pursuant to the treaties or its Indian mineral regulations.

98. TransCanada has admitted that the Pipeline easement would cross mineral estates held in trust by the United States, and Rosebud owns these Indian lands. *See* Pls.' Resp. in Opp'n to TransCanada's Defs.' Mot. for Summ. J. at 13-14, *Rosebud Sioux Tribe*, ECF No. 111; Pls.' Mem. In Supp. of Summ. J. at 13-14, *Id.*, ECF No. 114; TransCanada's Mem. In Supp. of Summ. J. at 5, 13, 21-22, *Id.*; TransCanada's Statement of Undisputed Facts, ¶ 27 and Hofer Decl. ¶¶ 8, 9, *Id.*, ECF Nos. 98 and 98-5.

99. These trust estates are legally "Indian lands." 25 C.F.R. § 211.3.

100. The United States has a "responsibility to protect the Tribes' mineral estate." *Shoshone Indian Tribe of Wind River Reservation v. United States*, 52 Fed. Cl. 614, 628 (2002) (citing 43 C.F.R. § 3590.2(i)).

101. Included in this responsibility "is the duty to prevent mineral trespass." *Id*.

102. Federal law defines trespass as the "extraction, severance, injury, or removal" of "mineral materials." 43 C.F.R. § 9239.0-7.

103. Construction of the Pipeline would extract, sever, injure, or remove Rosebud's mineral estate, which the United States must prevent.

104. And a Pipeline through the mineral estate certainly interferes with the Tribe's right to access its mineral estate.

105. The United States failed to take a hard look at these issues, and to prevent such depredations, and that is contrary to federal law.

**c. The 2020 ROD and 2019 SEIS Fail to Take a Hard Look at Fort Belknap or Rosebud Water Resources.**

106. The 2019 SEIS fails to analyze the impact the Pipeline will have on all of Fort Belknap or Rosebud's water rights and resources.

107. The Pipeline would impact Fort Belknap and Rosebud federally-reserved water rights and resources.

108. The Pipeline would cross the Ogallala aquifer, the White River, and the Milk River, and the Mni Wiconi water project, in which the Tribes have federally-reserved rights.

109. The failure to acknowledge these facts and the threats posed, and fully analyze them, violates the anti-depredation provisions of the treaties, and is not a "hard look."

**d. Interior Failed to Take a Hard Look at a Route that Avoids the Tribes' Treaty Lands.**

110. Throughout the process there have consistently been comments that the United States should avoid, or at least evaluate a route that avoids, tribal treaty lands.

111. The Scoping Report for the 2014 EIS states that "[t]he Supplemental EIS should evaluate an alternative route to avoid the sovereign Lakota territory encompassed by the boundaries of the Great Sioux Reservation as identified in the 1851 and 1868 Fort Laramie Treaties."

112. No such route has been analyzed.

113. In 2019, the United States received comments that "the pipeline should be rerouted to avoid impacts to tribal treaty lands and tribal way of life," and that the United States failed to consider an alternative that avoided

disproportionate impacts to tribes on their ability to hunt, fish, and utilize natural resources, as was suggested prior to the 2014 EIS.

114. No such alternative was analyzed, rather the United States asserted that the preferred route avoids tribal lands, but not necessarily treaty lands.

115. Indeed, TransCanada has admitted it would be crossing Rosebud mineral estates held in trust, which are treaty lands.

116. Given the treaty obligation to avoid depredations and the "existence of reasonable but unexamined alternatives," the 2020 ROD should be declared void and construction enjoined until treaty obligations are upheld, and it analyzes a route that avoids the treaty lands.

**e. The 2020 ROD, the 2019 SEIS, and the 2014 EIS Fail to Fully Analyze the Pipeline's Impact on Tribal Religious Beliefs and the United States' Responsibility under the Religious Freedom Restoration Act.**

117. The 2019 SEIS notes that the Pipeline could significantly affect tribal culture and beliefs and threaten the transfer of traditions to younger generations.

118. The 2019 SEIS analyzed the American Indian Religious Freedom Act and its requirements to provide access to sacred sites, but did not

analyze the federal government's obligations under the Religious Freedom Restoration Act ("RFRA").

119. Under RFRA, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability[.]" 42 U.S.C.A. § 2000bb-1.

120. The 2020 ROD and 2019 SEIS did not analyze whether the Pipeline approval would substantially burden the exercise of religion of tribal members.

121. There was not a "hard look," and the BLM must analyze its authorizations in light of RFRA given that it has acknowledged tribal culture and beliefs will be significantly affected by the Pipeline.

**f. TransCanada has not Obtained or Met all Necessary Approval or Permitting Requirements as Required by the 2020 ROD, and Must be Required to Obtain Those Approvals.**

122. The 2020 ROD requires TransCanada to obtain all necessary approval or permitting requirements.

123. The 1868 Treaty of Fort Laramie requires TransCanada to obtain Rosebud consent to cross Rosebud mineral estates.

124. TransCanada has not obtained Rosebud consent.

125. TransCanada also expressly agreed to follow all tribal laws and regulations with regard to the Pipeline: "TransCanada Keystone Pipeline, L.P. has agreed to . . . follow all state, local, and tribal laws and regulations with respect to the construction and operation of the proposed Project[.]" 2017 ROD/NID, *supra*, at 30.

126. TransCanada has not complied with the Tribes' laws and regulations with regard to the Pipeline.

127. TransCanada must be required to obtain all necessary approval or permitting requirements from the Tribes as the 2020 ROD requires. *United States v. Jenks*, 22 F.3d 1513, 1519 (10th Cir. 1994) ("A party may be enjoined from committing certain acts without proper authorization from an authorized agency official.").

**g. The 2020 ROD and 2019 SEIS Failed to Take a Hard Look at the Effect of Man-Camps on Native Women and Children.**

128. The 2020 ROD, 2019 SEIS, and 2014 EIS also fail to take a hard look or provide meaningful analysis of whether and how man-camps and the influx of out-of-state workers related to the construction, operation, and maintenance of the Pipeline will affect the health, welfare, and safety of Tribal members, and in particular Native women and children.

129. The 2014 EIS and 2019 SEIS assume that any such impacts are "associated with boom towns and/or longer term operations . . . where a largely male workforce may be residing for months or years."

130. But the 2014 EIS and 2019 SEIS go on to note that the construction camps for the Pipeline would be operational for 6 to 8 months.

131. Given this length of time, the United States was required to look at the man-camps' "direct" and "indirect" effects on Native communities and people. 40 C.F.R. § 1508.8(a)-(b). Indirect effects include those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id*. § 1508.8(b); *IEN III*, 347 F. Supp. 3d at 575.

132. There is no meaningful analysis about how the largely male man-camps will impact or affect Native communities, and in particular Native women and children. There is only a discussion about a camp code, but not about the effects on the Tribes or their members.

133. This fails to protect against depredations, and is not a "hard look."

**h. COVID-19 Is New Information Requiring Supplementation.**

134. "NEPA imposes a continuing duty on federal agencies to supplement new and relevant information." *IEN III*, 347 F. Supp. 3d at 576.

135. "A supplement proves necessary if the new information presented is sufficient to show the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Id*. (citations omitted).

136. The COVID-19 pandemic is new information that affects the quality of the Tribes' environment to a significant extent and it has not been considered.

137. The influx of out-of-state workers that may have COVID-19 will affect the health, welfare, and safety of Tribal members, and their ability to monitor the workers in the man-camps that come to nearby Tribal communities.

138. The pandemic has also significantly affected the oil markets, and that must be considered.

139. Defendants should be required to supplement their analysis to take into consideration the COVID19 pandemic. *Id*.

**FIRST CLAIM FOR RELIEF**
**National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.***
**Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.***

140. Plaintiffs re-allege and reincorporate by reference all the allegations set forth in this Complaint as if set forth in full.

141. NEPA requires agencies to take a hard look at the impacts that major federal actions will have on the human environment.

142. The federal trust responsibility requires that agencies take into consideration tribal treaty and other rights during the NEPA process. *Nw. Sea Farms, Inc. v. U.S. Army Corps of Eng'rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996).

143. The Interior Department and BLM did not look at the history, purpose, and negotiations of the relevant treaties, understand how the Tribes' understood the treaties, and based on that understanding set forth its obligations under the treaties in the 2020 ROD or 2019 EIS. Thus, there was no hard look at the Treaties and the United States' obligations established by those Treaties.

144. The 2020 ROD and 2019 SEIS further fail take a hard look at the impact the Pipeline will have on the Tribes as described in this complaint.

145. Defendants' failure to take a hard look at these issues in the Final Supplemental EIS violates NEPA and its implementing regulations.

146. Therefore, Defendants' publication of the 2020 ROD and issuance of the ROW and TUP to TransCanada is "arbitrary, capricious, an

abuse of discretion, [and] not in accordance with law," 5 U.S.C. § 706(2)(A), and "without observance of procedure required by law." *Id*. § 706(2)(D).

**SECOND CLAIM FOR RELIEF**
**Breach of 1851 Fort Laramie Treaty**

147. Plaintiffs re-allege and reincorporate by reference all the allegations set forth in this Complaint as if set forth in full.

148. The Interior Department and BLM's failure to comply with NEPA is a de-facto violation of the 1851 Fort Laramie Treaty.

149. The Interior Department and BLM's failure to follow its own consultation policy is a violation of the 1851 Fort Laramie Treaty.

150. The Interior Department and BLM have failed to protect the Tribes from depredations under the 1851 Fort Laramie Treaty.

151. Therefore, Defendants' publication of the 2020 ROD and issuance of the ROW and TUP to TransCanada is "arbitrary, capricious, an abuse of discretion, [and] not in accordance with law," 5 U.S.C. 706(2)(A), and "without observance of procedure required by law," *id*. § 706(2)(D), and the Court must "compel agency action unlawfully withheld." *Id*. § 706(1).

**THIRD CLAIM FOR RELIEF**
**Breach of 1855 Lame Bull Treaty**

152. Plaintiffs re-allege and reincorporate by reference all the allegations set forth in this Complaint as if set forth in full.

153. The Interior Department and BLM's failure to comply with NEPA is a de-facto violation of the 1855 Lame Bull Treaty.

154. The Interior Department and BLM's failure to follow its own consultation policy is a violation of the 1855 Lame Bull Treaty.

155. The Interior Department and BLM have failed to protect the Tribes from depredations under the 1855 Lame Bull Treaty.

156. Therefore, Defendants' publication of the 2020 ROD and issuance of the ROW and TUP to TransCanada is "arbitrary, capricious, an abuse of discretion, [and] not in accordance with law," 5 U.S.C. 706(2)(A), and "without observance of procedure required by law," *id*. § 706(2)(D), and the Court must "compel agency action unlawfully withheld." *Id*. § 706(1).

**FOURTH CLAIM FOR RELIEF**
**Breach of 1868 Fort Laramie Treaty**

157. The 1868 Fort Laramie Treaty requires Tribal consent to cross tribal lands.

158. The United States has an obligation to ensure that Rosebud's consent is obtained before issuing a federal permit to someone that will cross Rosebud's lands.

159. TransCanada has admitted the Pipeline will cross Rosebud lands.

160. TransCanada has not obtained Rosebud's consent to cross its lands with a Pipeline.

161. The United States' failure to ensure Rosebud's consent is obtained to place a Pipeline across its lands is a breach of the 1868 Fort Laramie Treaty.

162. Therefore, Defendants' publication of the 2020 ROD and issuance of the ROW and TUP to TransCanada is "arbitrary, capricious, an abuse of discretion, [and] not in accordance with law," 5 U.S.C. 706(2)(A), and "without observance of procedure required by law," *id*. § 706(2)(D), and the Court must "compel agency action unlawfully withheld." *Id*. § 706(1).

**FIFTH CLAIM FOR RELIEF**
**Failure to Consult**

163. Plaintiffs re-allege and reincorporate by reference all the allegations set forth in this Complaint as if set forth in full here.

164. The Interior Department's *Policy on Consultation with Indian Tribes* ("*DOI Tribal Consultation Policy*") requires consultation for: "Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an Indian Tribe on matters including, but not limited to: 1. Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on federally managed lands; 2. The ability of an Indian Tribe to govern or provide services to its members; 3. An Indian Tribe's formal relationship with the Department; or 4. The consideration of the Department's trust responsibilities to Indian Tribes." *DOI Tribal Consultation Policy*, § III, *available at* https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf.

165. The *DOI Tribal Consultation Policy* requires: "Each Bureau or Office will consult with Indian Tribes as early as possible when considering a Departmental Action with Tribal Implications." *DOI Tribal Consultation Policy*, § VII(E)(1).

166. Defendants failed to consult with the Tribes, as well as all other federally recognized Indian tribes, in a manner that satisfied their obligations under the *DOI Tribal Consultation Policy* in issuing the 2020 ROD.

167. Defendants' failure to adhere to its own tribal consultation policies in issuing the 2020 ROD is unlawful and violates the APA. *C.f. Nat'l Small Shipments Traffic Conf., Inc. v. Interstate Commerce Comm'n*, 725 F.2d 1442, 1449 (D.C. Cir. 1984); *Wyoming v. U.S. Dep't of Interior*, 136 F. Supp. 3d 1317, 1346 (D. Wyo. 2015), *vacated as moot sub nom. Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016).

168. Therefore, Defendants' publication of the 2020 ROD and issuance of the ROW and TUP to TransCanada is "arbitrary, capricious, an abuse of discretion, [and] not in accordance with law," 5 U.S.C. 706(2)(A), and "without observance of procedure required by law," *id*. § 706(2)(D), and the Court must "compel agency action unlawfully withheld." *Id*. § 706(1).

**RELIEF REQUESTED**

WHEREFORE, Plaintiffs request that the Court:

1. Declare that Defendants violated the NEPA and the APA as described in this complaint;

2. Declare that Defendants violated 1851 Fort Laramie Treaty as described in this complaint;

3. Declare that Defendants violated 1855 Lame Bull Treaty as described in this complaint;

4. Declare that Defendants violated 1868 Fort Laramie Treaty as described in this complaint;

5. Declare that Defendants violated the APA and its own consultation policies as described in this complaint;

6. Issue injunctive relief rescinding, setting aside, and holding unlawful Defendants' 2020 ROD and 2019 SEIS, requiring Defendants to fully comply with the APA, NEPA, and the Treaties, and prohibiting any activity in furtherance of the construction, connection, operation, and maintenance of the Pipeline and related facilities;

7. Award Plaintiffs fees and costs pursuant to 28 U.S.C. § 2412 and otherwise authorized by law; and

8. Grant such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED, this 17th day of November, 2020.

*/s/ Wesley James Furlong*
Natalie A. Landreth (*pro hac vice* forthcoming)

Wesley James Furlong (MT Bar. No. 42771409)
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rflannery@bresnan.net

*Counsel for Plaintiff Fort Belknap Indian Community*

**Plaintiffs' Exhibit A**

Rosebud Sioux Tribe Letter (Jan. 31, 2014)

Rosebud Sioux Tribe Letter (Mar. 5, 2014)

Rosebud Sioux Tribe
Cyril L. Scott, President
SICANGU OYATE
P.O. BOX 430
ROSEBUD, SD 57570
Phone (605) 747-2381 Fax (605) 747-2434

William 'Willie' Kindle
Vice-President
Louis Wayne Boyd
Treasurer
Linda L. Marshall
Secretary
Glen Yellow Eagle
Sergeant-at-arms

January 31st, 2014

Jack C. Jackson, Jr.
Senior Advisor and Liaison for Native American Affairs
US Department of State
Bureau of Oceans and International Environmental and
Scientific Affairs
Office of Environmental Quality/Transboundary Issues(OES/EQT)
2201 C Street, N.W. Room 2726
Washington, DC 20520

Dear Mr. Jackson,

REQUEST FOR REVIEW AND CONCURRANCE, AMENDED PROGRAMMITIC AGREEMENT, KEYSTONE XL PIPELINE PROJECT

I write this letter in response to your letter of December 24, 2013, regarding your request for review and concurrence with the amended Programmatic Agreement (PA) for the proposed Keystone XL Pipeline Project (Project) by signing as a concurring party on the designated signatory page. The Rosebud Sioux Tribe cannot agree to sign as a concurring party on the PA and furthermore, objects to the amended PA for the following reasons.

The amended PA mistakenly identifies the Yankton Sioux Tribe as the consulting Tribe for tribal lands within the jurisdiction of the Rosebud Sioux Tribe located in Tripp County, Rosebud Sioux Tribe Reservation, South Dakota. The misidentification of "Tribal lands" in the amended Programmatic Agreement results in errors in fact, and errors in law resulting in substantial non-compliance of the amended Programmatic Agreement with applicable federal law and federal regulations governing the proposed construction of the TransCanada Keystone XL Pipeline.

The Rosebud Sioux Tribe is a federally recognized sovereign Indian tribe organized pursuant to the Act of June 18, 1934, 48 Stat. 984, as amended, and is governed by a Constitution and By-laws ratified on November 23, 1935, and approved by the Secretary of the Interior, Harold L. Ickes, on December 16, 1935, and as amended. The Rosebud Sioux Tribe Reservation includes tribally-owned trust lands and allotted lands owned by enrolled tribal members within Todd, Tripp, Mellette, Gregory, and Lyman Counties, South Dakota.

The Rosebud Sioux Tribe has jurisdiction of all trust and restricted lands located in the counties of Lyman, Todd, Tripp, Mellette, and Gregory counties of South Dakota, of the Rosebud Sioux Tribe established by the 1851 and 1868 Treaty of Fort Laramie and the Act of March 2, 1889, 25 Stat. 888.

EXHIBIT NO. 2

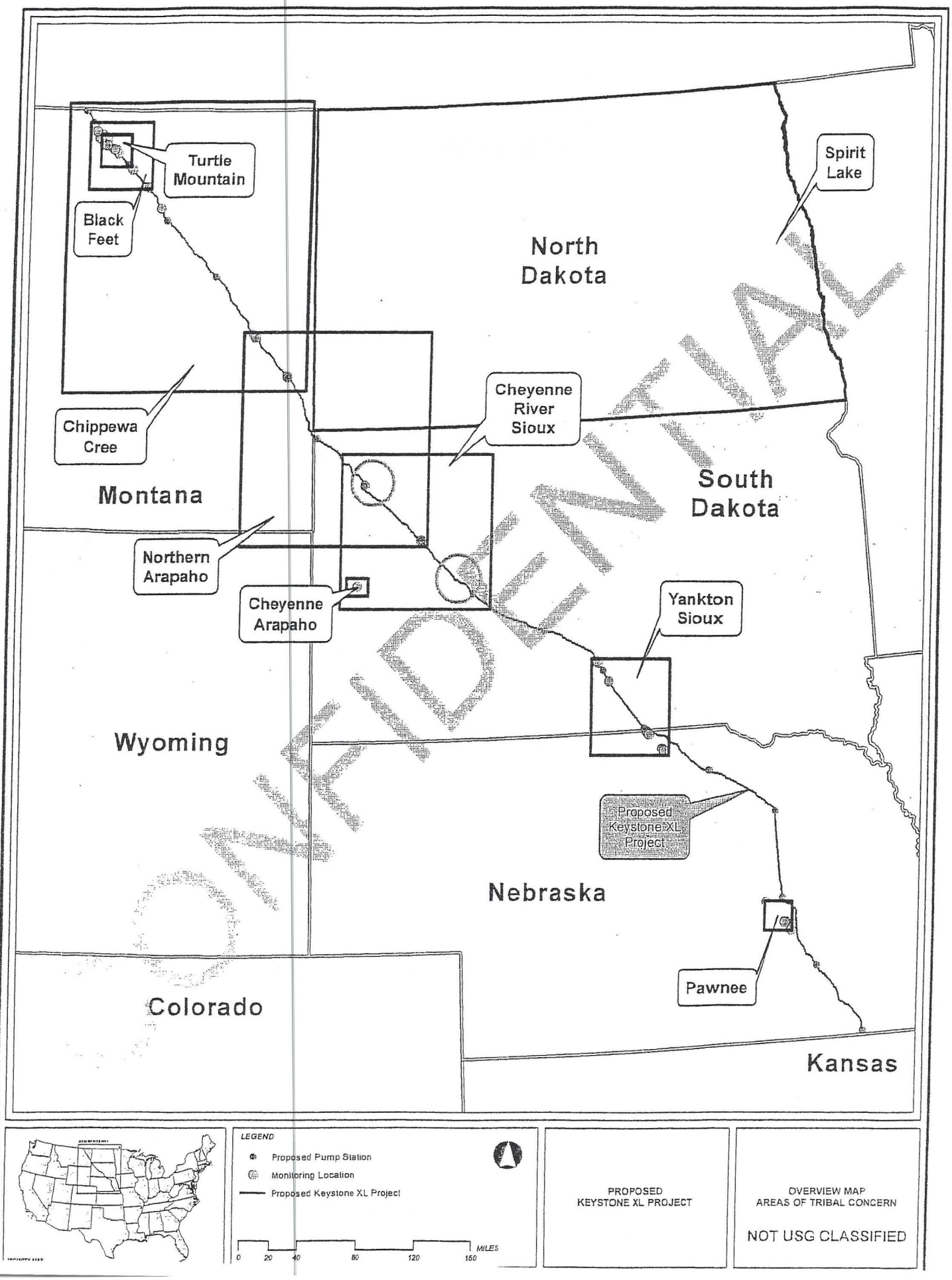
Turtle Mountain
Black Feet
Spirit Lake
North Dakota
Chippewa Cree
Cheyenne River Sioux
Montana
South Dakota
Northern Arapaho
Cheyenne Arapaho
Yankton Sioux
Wyoming
Proposed Keystone XL Project
Nebraska
Pawnee
Colorado
Kansas
LEGEND
Proposed Pump Station
Monitoring Location
Proposed Keystone XL Project
0 20 40 80 120 160 MILES
PROPOSED KEYSTONE XL PROJECT
OVERVIEW MAP AREAS OF TRIBAL CONCERN
NOT USG CLASSIFIED

EXHIBIT NO. 1

The PA does not meet the goal of consultation required by Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 et. seq., with the proper Indian Tribe, to identify historic properties potentially affected by construction of the Keystone XL Pipeline, assess its affects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

Appendix A of the Tribal Monitoring Plan, PA, containing a map of the proposed construction route of the Keystone XL Pipeline, mistakenly identifies Tripp County as an area of tribal consultation with the Yankton Sioux Tribe. Tripp County is an area that lies within the original boundaries of the Rosebud Sioux Tribe as established by the 1851 and 1868 Treaty of Fort Laramie and Act of March 2, 1889 25 Stat.888, and contains tracts of tribally-owned and allotted lands within the jurisdiction of the Rosebud Sioux Tribe.

It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that the agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. Title 36, Part 800, 36 C.F.R. §800.2 (a). The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process, and should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. 36 C.F.R. §800. 2 (a)(4). When an Indian tribe has not assumed the responsibilities of the SHPO ("State Historic Preservation Officer") the agency official shall consult with a representative designated by such Indian tribe in additional to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. 36 C.F.R. § 800.2 (c)(2)(B)(ii). Section 101 (d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious or cultural significance to historic properties that may be affected by an undertaking, regardless of the location of the historic property. 36 C.F.R. §800.2(c)(2)(B)(ii). It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. 36 C.F.R. § 800.2(c)(2)(B)(ii)(A). The Federal Government has a unique legal relationship with Indian tribes set for the in the Constitution of the United States, treaties, statutes, and court decisions, and consultations with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. 36 C.F.R. § 800.2(c)(2)(B)(ii)(B). Consultations with an Indian tribe must recognize the government-to-government relationship between the Federal government and tribes. 36 C.F.R. §800.2(c)(2)(B)(ii)(C). When Indian tribes and Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires federal agencies to consult with Indian tribes in the section 106 process, and federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part. 36 C.F.R. §800.2(c)(2)(B)(ii)(D).

The incorrect designation of "Tribal lands", in Tripp County, Rosebud Sioux Tribe Reservation, as lands within the Yankton Sioux Tribe Reservation in the amended Programmatic Agreement

results in the following mistakes, errors in fact and errors in law, that create substantial non-compliance of the amended Programmatic Agreement with applicable federal law and federal regulations governing the proposed construction of the TransCanada Keystone XL Pipeline:

1. The seventh WHEREAS, page 2, states, "WHEREAS, the DOS... has consulted with...Indian tribes who may ascribe religious and cultural significance to historic properties that may be affected by the undertaking... consistent with 36 Part 800..."
   a. Misidentifying Tripp County as part of the area under the jurisdiction and control of the "Yankton Sioux Tribe" instead of the "Rosebud Sioux Tribe", adjacent to the route of the proposed pipeline construction zone, and the resulting lack of consultation with the Rosebud Sioux Tribe regarding those "tribal lands" threatens, jeopardizes, and fails to identify and protect any historic properties that the Rosebud Sioux Tribe ascribes religious and cultural significance.
2. The ninth WHEREAS, page 5, "the DOS provided Indian tribes the opportunity to provide information about historic properties of concern to Indian tribes and conduct Traditional Cultural Property ("TCP") studies within the proposed Project APE, as summarized in Attachment I,"
   a. Misidentifying Tripp County as part of the area under the jurisdiction and control of the "Yankton Sioux Tribe" instead of the Rosebud Sioux Tribe, adjacent to the proposed pipeline construction corridor, and the resulting lack of consultation with the Rosebud Sioux Tribe has prevented the Rosebud Sioux Tribe from planning and taking part in Traditional Cultural Properties ("TCP") studies.
3. Part 1 C., Standards and Definitions.
   a. "Coordination Plan: A plan that, pursuant to Stipulations V.B and V.D, describes the coordination of construction with identification and evaluation of cultural resources, treatment of adverse effects, and protection of unanticipated discoveries." The "Coordination Plan" that contains "tribal lands" in Tripp County and lists the wrong tribe, the Yankton Sioux Tribe, in the place of the proper consulting Tribe, the Rosebud Sioux Tribe, jeopardizes historic and cultural properties, and does not properly plan for identification and evaluation of cultural resources, treatment of adverse effects, and protection of unanticipated discoveries.
   b. "Consulting Indian Tribes: Indian tribes that have consultative roles in the Section 106 process consistent with 36 C.F.R. § 800.2(c)." DOS has misidentified the "Yankton Sioux Tribe" as the "consulting Indian tribe", rather than the Rosebud Sioux Tribe, as having "Tribal Lands" within Tripp County. DOS has therefore failed to identify "tribal lands" of the Rosebud Sioux Tribe located in Tripp County adjacent to the pipeline corridor or misidentified areas containing "tribal lands" of the Rosebud Sioux Tribe. The PA either has not identified or misidentified the Rosebud Sioux Tribe as the "Consulting Indian Tribe" for "tribal lands" Tripp County, South Dakota.
   c. "Determination of Effect: A determination made by a Federal agency in regards to a Project's effect upon a historic property consistent with 36 C.F.R. Part 800." Department of State cannot make a proper determination of effect upon historic properties without proper and meaningful consultation with the Rosebud Sioux Tribe regarding the areas not identified as tribal lands within Tripp County, South Dakota.

d. "Tribal Monitoring Plan: A plan that, pursuant to Stipulation V.E and Attachment E, identifies appropriate areas for monitoring construction by tribal members appointed by their respective tribes. These tribal members shall meet the qualifications as noted by Stipulation V.E.3. The plan's principal goal is to reduce the potential for impacts to previously unidentified historic properties that may also be properties of historic and religious and cultural significance to Indian tribes that meet the National Register criteria (see 36 C.F.R. § 800.16(1)(a)." The Tribal Monitoring Plan that misidentifies Tripp County as "tribal lands" of the Yankton Sioux Tribe fails in its principle goal to reduce the potential for impacts to previously unidentified historic properties that also may be properties of religious and cultural significance to Indian tribes by failing to consult with the proper Indian Tribe with lands in the construction corridor, the Rosebud Sioux Tribe.

4. "KEYSTONE XL PROJECT-PIPELINE CONSTRUCTION B. (1). Page 10, 11. "In consultation with the SHPOs, designated representatives of consulting Indian tribes, and other consulting parties, the DOS will make a reasonable and good faith effort to complete the identification and evaluation of historic properties within the APE for each construction spread, including in areas yet to be surveyed outlined in Attachment A, prior to the initiation of construction of that spread, consistent with 36 C.F.R. §§800.4 (a),(b), and (c)." A reasonable and good faith effort to complete the identification and evaluation of historic properties cannot be accomplished without proper consultation and participation of the Rosebud Sioux Tribe in Tripp County, South Dakota, prior to initiation of construction of that Spread.

B. 2. (a). "In the identification and evaluation of historic properties to which Indian tribes may attach religious and cultural significance, the DOS will take into consideration information through consultations and through the protocols for the TCP studies, post-review discovery, and the Tribal Monitoring Plan, as set forth in this PA." The Department of State should consult with the Rosebud Sioux Tribe on "tribal lands" located in Tripp County, to avoid the risk of failing to properly identify and evaluate historic properties Indian tribes may attach religious and cultural significance. The Rosebud Sioux Tribe should be the consulting Indian Tribe for Tripp County, rather than the Yankton Sioux Tribe.

B.2.(b). "In the event identification of historic properties cannot be completed for any Construction Spreads prior to construction, Keystone will develop and submit a Coordination Plan for the DOS to review and approval pursuant to Stipulation V.D. The Coordination Plan must describe the measures Keystone will use to implement and complete the identification and evaluation of cultural resources and appropriate consultation before any historic properties are adversely affected by vegetation clearing and construction activities related to that spread." The proposed pipeline has not received final approval for construction, therefore, there is sufficient time and opportunity for the DOS to consult with the Rosebud Sioux Tribe for identifying and evaluating historic properties in Tripp County, South Dakota.

C. 1. "Treatment of Historic Properties. Whenever feasible, avoidance of adverse effects to historic properties will be the preferred treatment. In consultation with the DOS, ACHP, SHPOs, designated representatives of consulting Indian tribes. and other consulting parties, Keystone may elect to consider and implement avoidance

measures prior to completing the evaluation of historic properties." The areas of proposed pipeline construction in Tripp County, South Dakota, should be properly identified as areas within the original boundaries of the Rosebud Sioux Tribe defined by the 1851 and 1868 Treaties of Fort Laramie and the Act of March 2, 1889, 25 Stat. 888. The PA should identify the Rosebud Sioux Tribe as the consulting Tribe in Tripp County, not the Yankton Sioux Tribe, for the construction corridor in Tripp County, South Dakota.

C.4., page 12. "If, after consultation, the DOS determines that the adverse effect cannot be avoided, Keystone will draft a comprehensive Treatment Plan for each adversely effected historic property." The areas of proposed pipeline construction in Mellette and Tripp Counties, South Dakota, should be properly identified as areas within the original boundaries of the Rosebud Sioux Tribe defined by the 1851 and 1868 Treaties of Fort Laramie and the Act of March 2, 1889, 25 Stat. 888. The PA should identify the Rosebud Sioux Tribe as the consulting Tribe in Tripp County, not the Yankton Sioux Tribe, for the construction corridor in Tripp County, South Dakota.

D.2. (a). page 13. "A Coordination Plan will be prepared for each state and will include those measures developed by Keystone pursuant to Stipulations V.B and V.C to complete the identification and evaluation of historic properties, and, as appropriate, mitigation of adverse effects to them during and coordinated with vegetation clearing and construction activities." The areas of proposed pipeline construction in Tripp County, South Dakota, should be properly identified as areas within the original boundaries of the Rosebud Sioux Tribe defined by the 1851 and 1868 Treaties of Fort Laramie and Act of March 2, 1889, 25 Stat. 888. The PA should identify the Rosebud Sioux Tribe as the consulting in Tripp County, not the Yankton Sioux Tribe, for the construction corridor in Tripp County, South Dakota.

E.1.(b). page 14. " Historical Trail and Archaeological Monitoring Plan ("HTAM Plan") and Tribal Monitoring Plan.

b. "The Tribal Monitoring Plan outlines areas that have been previously identified by Indian tribes, either through the preparation of Traditional Cultural Property reports or through consultation, that warrant monitoring during clearing and trenching for potential effects to previously unidentified historic properties that may include properties of religious and cultural significance to an Indian tribe and that meet the National Historic criteria. (See 36 C.F.R. § 800.16(1)(1)." The areas of proposed pipeline construction in Tripp County, South Dakota, should be properly identified as areas within the original boundaries of the Rosebud Sioux Tribe defined by the 1851 and 1868 Treaties of Fort Laramie and Act of March 2, 1889, 25 Stat. 888. The PA should identify the Rosebud Sioux Tribe as the consulting Tribe in Tripp County, not the Yankton Sioux Tribe, for the construction corridor in Tripp County, South Dakota.

For the reasons stated above, the Rosebud Sioux Tribe cannot sign the amended Programmatic Agreement as a concurring party, and objects to the amended PA on that basis. Please consider the remarks of the Rosebud Sioux Tribe in amending the PA to properly identify, preserve and protect cultural and historic properties that may be effected by the Proposed Keystone XL Project.

Sincerely,

Cyril Scott, President
Rosebud Sioux Tribe
cc: Rosebud Sioux Tribal Council
Rosebud Sioux Tribe Treaty Commission
RST Legal Department

EXHIBIT NO. 3

12-18-13

Weldon Loudermilk
Great Plains Regional Director
United States Bureau of Indian Affairs

Date

EXHIBIT NO. 4

**ROSEBUD SIOUX TRIBE**
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Cyril Scott, President
Willie Kindle, Vice President
Julia M. Peneaux, Secretary
Byron Wright, Treasurer
Glen Yellow Eagle, Sergeant-at-Arms

March 5, 2014

U.S. Department of State Bureau of Energy Resources
Room 4843
Attn. Keystone XL Public Comments
Washington, DC 20520

Dear Sir/Madam,

COMMENTS REGARDING THE NATIONAL INTEREST DETERMINATION FOR TRANSCANADA KEYSTONE PIPELINE AND OBJECTIONS TO THE CONSTRUCTION OF THE TRANSCANADA XL PIPELINE ADJACENT TO TRIBAL AND ALLOTED LANDS WITHIN THE REGULATORY JURISDICTION OF THE ROSEBUD SIOUX TRIBE AND WITHIN THE 1851 TREATY OF FORT LARAMIE AND 1868 TREATY OF FORT LARAMIE BOUNDARIES

I write this letter on behalf of the Rosebud Sioux Tribe to comment on the National Interest Determination for the approval of the Presidential Permit for the construction of the TransCanada Keystone XL Pipeline. The Rosebud Sioux Tribe objects to the construction of the TransCanada Keystone XL Pipeline and recommends the President Barak Obama find that it is not in the national interest of the United States to approve the construction of the TransCanada Keystone XL Pipeline and deny the application for Presidential Permit for the following reasons.

## FACTUAL BACKGROUND

The Rosebud Sioux Tribe is a federally recognized sovereign Indian tribe organized pursuant to the Act of June 18, 1934, 48 Stat. 984, as amended, (Indian Reorganization Act), and governed pursuant to a Constitution and Bylaws ratified on November 23, 1935, and approved by the Secretary of the Interior, Harold L. Ikes, on December 16, 1935.

The Rosebud Sioux Tribe Reservation includes tribally-owned trust lands and allotted lands owned by enrolled tribal members within Todd, Tripp, Mellette, Gregory, and Lyman Counties, South Dakota, established by the 1851 and 1868 Treaty of Fort Laramie and the Act of March 2, 1889, 25 Stat. 888.

The United States Supreme Court in Rosebud Sioux Tribe v. Kniep, 430 U.S. 584, 615 (1977), held that the legislative history of acts opening up Todd, Mellette, Tripp, and Lyman Counties to settlement demonstrated a legislative intent to diminish the boundaries of the Rosebud Reservation to remove certain lands in South Dakota from the jurisdiction of the Rosebud Sioux Tribe, but also stated, with regard to lands held in trust in those counties, Footnote 48, as follows: "To the extent the members of the Rosebud Sioux Tribe are living on allotted land outside the Reservation, they, too, are on "Indian Country" within the definition of 18 U.S.C s

1151, and hence subject to federal provisions and protections." 430 U.S. at 615, Footnote No. 48.

THE FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEYSTONE XL PIPELINE CONCLUDING THERE ARE NO SIGNIFICANT IMPACTS ON CULTURAL RESOURCES IS BASED UPON ERRORS IN FACT AND ERRORS IN LAW CONTAINED IN THE AMENDED PROGRAMMATIC AGREEMENT.

The Final Supplemental Environmental Impact Statement, Keystone XL Project, Chapter 1, Section 1.6.1, Tribal and SHPO Consultation, Tribal Consultation, provides;

> "Following Keystone's 2012, Presidential permit application, the Department began additional government-to government consultation consistent with Section 106 of the NHPA for the current Supplemental EIS process for the proposed Project. As the lead federal agency for the proposed Project, the Department is continuing throughout the Supplemental EIS process to engage in consultation on the Supplemental EIS, the proposed Project generally, and on cultural resources consistent with Section 106 of the NHPA with identified consulting parties, including federal agencies, state agencies, State Historic Preservation Offices (SHPOs), the Advisory Council on Historic Preservation, and interested federally recognized Indian tribes (70 Federal Register 71194) in the vicinity of the proposed project. Starting in September 2012, the Department notified Indian tribes of its intent to amend the Programmatic Agreement to reflect changes to the proposed Project route since 2011 and comments received from consulting parties. Tribal meetings were held in October 2012 in Montana, South Dakota, and Nebraska, and May 2013 in South Dakota. Discussion of the consultation efforts and a complete list, to date are included in Section 3.11.4.3, Tribal Consultation, and the amended Programmatic Agreement (see Appendix E, Amended Programmatic Agreement and Record of Consultation."
> Final Supplemental Environmental Impact Statement, Keystone XL Project, pg. 1.6-1.

Appendix A of the Tribal Monitoring Plan, Programmatic Agreement, (Exhibit No. 1), containing a map of the proposed construction route of the Keystone XL Pipeline, mistakenly identifies Tripp County as an area of tribal consultation with the Yankton Sioux Tribe. Tripp County is an area that lies within the original boundaries of the Rosebud Sioux Tribe as established by the 1851 and 1868 Treaty of Fort Laramie and Act of March 2, 1889 25 Stat.888, and contains tracts of tribally-owned and allotted lands within the jurisdiction of the Rosebud Sioux Tribe.

It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that the agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. Title 36, Part 800, 36 C.F.R. §800.2 (a). The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process, and should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. 36 C.F.R. §800. 2 (a)(4). When an Indian tribe

has not assumed the responsibilities of the SHPO ("State Historic Preservation Officer") the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. 36 C.F.R. § 800.2 (c)(2)(B)(ii). Section 101 (d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious or cultural significance to historic properties that may be affected by an undertaking, regardless of the location of the historic property. 36 C.F.R. §800.2(c)(2)(B)(ii). It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. 36 C.F.R. § 800.2(c)(2)(B)(ii)(A). The Federal Government has a unique legal relationship with Indian tribes set for the in the Constitution of the United States, treaties, statutes, and court decisions, and consultations with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. 36 C.F.R. § 800.2(c)(2)(B)(ii)(B). Consultations with an Indian tribe must recognize the government-to-government relationship between the Federal government and tribes. 36 C.F.R. §800.2(c)(2)(B)(ii)(C). When Indian tribes and Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires federal agencies to consult with Indian tribes in the section 106 process, and federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part. 36 C.F.R. §800.2(c)(2)(B)(ii)(D).

The United States Department of State has the statutory obligation to meet the requirements of Section 106 of the NHPA and has legal and financial responsibility for Section 106 Compliance. 36 C.F.R. §800.2 (a). The consultations planned by the Department of State did not designate the Rosebud Sioux Tribe as the "consulting Tribe" for construction activities in Tripp County, Rosebud Reservation, for coordinating compliance with National Environmental Policy Act, Native Graves Protection and Repatriation Act, the Archeological Resources Protection Act, and agency specific legislation. 36 C.F.R. §800.2(a)(4). When an Indian Tribe has not assumed the responsibilities of the State Historic Preservation Office, as it was in this matter, the Department of State is required to consult with the representative designated by the Indian Tribe in addition to the SHPO regarding undertakings occurring or affecting historic properties on the lands of the Rosebud Sioux Tribe. 36 C.F.R. §800.2 (c)(2)(B)(ii). These consultations did not occur with the Rosebud Sioux Tribe, instead the amended PA designated the Yankton Sioux Tribe as the "consulting Indian Tribe." The Department of State should have consulted with the Rosebud Sioux Tribe on tribal lands in the disestablished area of the Rosebud Sioux Tribe Reservation, Tripp County, pursuant to Section 101(d)(6)(B) of the NHPA, an area that Indian Tribe attaches "religious or cultural significance to historic properties that may be affected by an undertaking, regardless of the location of the historic property." 36 C.F.R. §800.2(c)(2)(B)(ii). The Department of State failed to identify Tripp County as an area containing lands of the Rosebud Sioux Tribe, and therefore failed to "make reasonable and good faith effort to identify Indian Tribes and Hawaiian organizations that shall be consulted in the section 106 process." 36 C.F.R. §800.2(c)(2)(B)(ii)(A). The Department of State failed to consider Tribal lands of the Rosebud Sioux Tribe in Tripp County, containing cultural resources and historic properties located in the disestablished portion of the Rosebud Sioux Tribe Reservation, and therefore failed to comply with the Section 101 (d)(6)(B) of the NHPA. 36 C.F.R. §800.2(c)(2)(B)(ii)(D).

The incorrect designation of "Tribal lands", in Tripp County, Rosebud Sioux Tribe Reservation, as lands within the Yankton Sioux Tribe Reservation in the amended Programmatic Agreement results in the following mistakes, errors in fact and errors in law, that create substantial non-compliance of the amended Programmatic Agreement with applicable federal law and federal regulations governing the proposed construction of the TransCanada Keystone XL Pipeline:

1. The seventh WHEREAS, page 2, states, "WHEREAS, the DOS… has consulted with…Indian tribes who may ascribe religious and cultural significance to historic properties that may be affected by the undertaking… consistent with 36 Part 800…"
   a. Misidentifying Tripp County as part of the area under the jurisdiction and control of the "Yankton Sioux Tribe" instead of the "Rosebud Sioux Tribe", adjacent to the route of the proposed pipeline construction zone, and the resulting lack of consultation with the Rosebud Sioux Tribe regarding those "tribal lands" threatens, jeopardizes, and fails to identify and protect any historic properties that the Rosebud Sioux Tribe ascribes religious and cultural significance.
2. The ninth WHEREAS, page 5, "the DOS provided Indian tribes the opportunity to provide information about historic properties of concern to Indian tribes and conduct Traditional Cultural Property ("TCP") studies within the proposed Project APE, as summarized in Attachment I,"
   a. Misidentifying Tripp County as part of the area under the jurisdiction and control of the "Yankton Sioux Tribe" instead of the Rosebud Sioux Tribe, adjacent to the proposed pipeline construction corridor, and the resulting lack of consultation with the Rosebud Sioux Tribe has prevented the Rosebud Sioux Tribe from planning and taking part in Traditional Cultural Properties ("TCP") studies.
3. Part 1 C., Standards and Definitions.
   a. "Coordination Plan: A plan that, pursuant to Stipulations V.B and V.D, describes the coordination of construction with identification and evaluation of cultural resources, treatment of adverse effects, and protection of unanticipated discoveries." The "Coordination Plan" that contains "tribal lands" in Tripp County and lists the wrong tribe, the Yankton Sioux Tribe, in the place of the proper consulting Tribe, the Rosebud Sioux Tribe, jeopardizes historic and cultural properties, and does not properly plan for identification and evaluation of cultural resources, treatment of adverse effects, and protection of unanticipated discoveries.
   b. "Consulting Indian Tribes: Indian tribes that have consultative roles in the Section 106 process consistent with 36 C.F.R. § 800.2(c)." DOS has misidentified the "Yankton Sioux Tribe" as the "consulting Indian tribe", rather than the Rosebud Sioux Tribe, as having "Tribal Lands" within Tripp County. DOS has therefore failed to identify "tribal lands" of the Rosebud Sioux Tribe located in Tripp County adjacent to the pipeline corridor or misidentified areas containing "tribal lands" of the Rosebud Sioux Tribe. The PA either has not identified or misidentified the Rosebud Sioux Tribe as the "Consulting Indian Tribe" for "tribal lands" Tripp County, South Dakota.
   c. "Determination of Effect: A determination made by a Federal agency in regards to a Project's effect upon a historic property consistent with 36 C.F.R. Part 800." Department of State cannot make a proper determination of effect upon historic properties without proper and meaningful consultation with the

Rosebud Sioux Tribe regarding the areas not identified as tribal lands within Tripp County, South Dakota.

d. "Tribal Monitoring Plan: A plan that, pursuant to Stipulation V.E and Attachment E, identifies appropriate areas for monitoring construction by tribal members appointed by their respective tribes. These tribal members shall meet the qualifications as noted by Stipulation V.E.3. The plan's principal goal is to reduce the potential for impacts to previously unidentified historic properties that may also be properties of historic and religious and cultural significance to Indian tribes that meet the National Register criteria (see 36 C.F.R. § 800.16(1)(a)." The Tribal Monitoring Plan that misidentifies Tripp County as "tribal lands" of the Yankton Sioux Tribe fails in its principle goal to reduce the potential for impacts to previously unidentified historic properties that also may be properties of religious and cultural significance to Indian tribes by failing to consult with the proper Indian Tribe with lands in the construction corridor, the Rosebud Sioux Tribe.

4. "KEYSTONE XL PROJECT-PIPELINE CONSTRUCTION B. (1). Page 10, 11. "In consultation with the SHPOs, designated representatives of consulting Indian tribes, and other consulting parties, the DOS will make a reasonable and good faith effort to complete the identification and evaluation of historic properties within the APE for each construction spread, including in areas yet to be surveyed outlined in Attachment A, prior to the initiation of construction of that spread, consistent with 36 C.F.R. §§800.4 (a),(b), and (c)." A reasonable and good faith effort to complete the identification and evaluation of historic properties cannot be accomplished without proper consultation and participation of the Rosebud Sioux Tribe in Tripp County, South Dakota, prior to initiation of construction of that Spread.

B. 2. (a). "In the identification and evaluation of historic properties to which Indian tribes may attach religious and cultural significance, the DOS will take into consideration information through consultations and through the protocols for the TCP studies, post-review discovery, and the Tribal Monitoring Plan, as set forth in this PA." The Department of State should consult with the Rosebud Sioux Tribe on "tribal lands" located in Tripp County, to avoid the risk of failing to properly identify and evaluate historic properties Indian tribes may attach religious and cultural significance. The Rosebud Sioux Tribe should be the consulting Indian Tribe for Tripp County, rather than the Yankton Sioux Tribe.

B.2.(b). "In the event identification of historic properties cannot be completed for any Construction Spreads prior to construction, Keystone will develop and submit a Coordination Plan for the DOS to review and approval pursuant to Stipulation V.D. The Coordination Plan must describe the measures Keystone will use to implement and complete the identification and evaluation of cultural resources and appropriate consultation before any historic properties are adversely affected by vegetation clearing and construction activities related to that spread." The proposed pipeline has not received final approval for construction, therefore, there is sufficient time and opportunity for the DOS to consult with the Rosebud Sioux Tribe for identifying and evaluating historic properties in Tripp County, South Dakota.

C. 1. "Treatment of Historic Properties. Whenever feasible, avoidance of adverse effects to historic properties will be the preferred treatment. In consultation with the

DOS, ACHP, SHPOs, designated representatives of consulting Indian tribes, and other consulting parties, Keystone may elect to consider and implement avoidance measures prior to completing the evaluation of historic properties." The areas of proposed pipeline construction in Tripp County, South Dakota, should be properly identified as areas within the original boundaries of the Rosebud Sioux Tribe defined by the 1851 and 1868 Treaties of Fort Laramie and the Act of March 2, 1889, 25 Stat. 888. The PA should identify the Rosebud Sioux Tribe as the consulting Tribe in Tripp County, not the Yankton Sioux Tribe, for the construction corridor in Tripp County, South Dakota.

C.4., page 12. "If, after consultation, the DOS determines that the adverse effect cannot be avoided, Keystone will draft a comprehensive Treatment Plan for each adversely effected historic property." The areas of proposed pipeline construction in Mellette and Tripp Counties, South Dakota, should be properly identified as areas within the original boundaries of the Rosebud Sioux Tribe defined by the 1851 and 1868 Treaties of Fort Laramie and the Act of March 2, 1889, 25 Stat. 888. The PA should identify the Rosebud Sioux Tribe as the consulting Tribe in Tripp County, not the Yankton Sioux Tribe, for the construction corridor in Tripp County, South Dakota.

D.2. (a). page 13. "A Coordination Plan will be prepared for each state and will include those measures developed by Keystone pursuant to Stipulations V.B and V.C to complete the identification and evaluation of historic properties, and, as appropriate, mitigation of adverse effects to them during and coordinated with vegetation clearing and construction activities." The areas of proposed pipeline construction in Tripp County, South Dakota, should be properly identified as areas within the original boundaries of the Rosebud Sioux Tribe defined by the 1851 and 1868 Treaties of Fort Laramie and Act of March 2, 1889, 25 Stat. 888. The PA should identify the Rosebud Sioux Tribe as the consulting in Tripp County, not the Yankton Sioux Tribe, for the construction corridor in Tripp County, South Dakota.

E.1.(b). page 14. " Historical Trail and Archaeological Monitoring Plan ("HTAM Plan") and Tribal Monitoring Plan.

b. "The Tribal Monitoring Plan outlines areas that have been previously identified by Indian tribes, either through the preparation of Traditional Cultural Property reports or through consultation, that warrant monitoring during clearing and trenching for potential effects to previously unidentified historic properties that may include properties of religious and cultural significance to an Indian tribe and that meet the National Historic criteria. (See 36 C.F.R. § 800.16(1)(1)." The areas of proposed pipeline construction in Tripp County, South Dakota, should be properly identified as areas within the original boundaries of the Rosebud Sioux Tribe defined by the 1851 and 1868 Treaties of Fort Laramie and Act of March 2, 1889, 25 Stat. 888. The PA should identify the Rosebud Sioux Tribe as the consulting Tribe in Tripp County, not the Yankton Sioux Tribe, for the construction corridor in Tripp County, South Dakota.

The PA does not meet the goal of consultation required by Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470 et. seq., with the proper Indian Tribe, to identify historic properties potentially affected by construction of the Keystone XL Pipeline, assess its affects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties. The Rosebud

Sioux Tribe submitted its comments on the amended Programmatic Agreement, Keystone XL Pipeline, to Mr. Jack C. Jackson, Jr., on January 31, 2014. Exhibit No. 2.

The Environmental Impact Statement, finding no significant impact on cultural resources, is based upon incorrect factual and legal assumptions, was prepared without proper consultation with the Rosebud Sioux Tribe, the Indian Tribe with jurisdiction of allotted lands adjacent to the KXL Pipeline construction corridor. The EIS is therefore improperly prepared, and its findings based upon erroneous factual and legal assumptions under federal law.

THE DEPARTMENT OF STATE WILL CONSULT WITH THE DEPARTMENT OF INTERIOR IN FOCUSING ON WHETHER THE PROPOSED PROJECT SERVES THE NATIONAL INTEREST. THE UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, IN SIGNING OFF ON THE AMENDED PROGRAMMATIC AGREEMENT, KEYSTONE XL PIPELINE, FAILED TO PERFORM ITS TRUST RESPONSIBILITY TO THE ROSEBUD SIOUX TRIBE, AND THEREFORE APPROVAL OF THE PROJECT IS NOT IN THE NATIONAL INTEREST.

The Bureau of Indian Affairs, in signing off on the amended Programmatic Agreement, (Exhibit No. 3), failed in its trust responsibility to the Rosebud Sioux Tribe, for the following reasons: 1) by failing to review the amended Programmatic Agreement and Tribal Monitoring Plan before signing off on the PA; 2) by failing to comment or take action to correct the wrongful designation of Tripp County as an area within the jurisdiction of the Yankton Sioux Tribe; 3) failing to identify those allotted and tribal trust tracts in Tripp County lying within the original treaty boundaries of the Rosebud Sioux Tribe and recognized by the United States Supreme Court as being part of "Indian Country": 4) by failing to comment or take corrective action to identify the Rosebud Sioux Tribe as the "Consulting Indian Tribe" in the Tribal Monitoring Plan, amended Programmatic Agreement.

The Rosebud Sioux Tribe submitted its letter of objections to the Hon. Sally Jewel, Secretary, Department of Interior, on February 19, 2014. Exhibit No. 4.

APPROVAL OF THE PRESIDENTIAL PERMIT FOR THE CONSTRUCTION OF THE PROPOSED KEYSTONE XL PROJECT IS INCONSISTENT WITH PRESIDENTIAL EXECUTIVE ORDERS NOS. 13175 AND 12898, AND THEREFORE IS NOT IN THE NATIONAL INTEREST.

Executive Order 13175, signed by President William J. Clinton on November 6, 2000, provides by authority vested in the office of the President by the Constitution and the laws of the United States of American, that the United States, in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes, provides for the United States to recognize the rights of the Indian Tribes to self-government and supports tribal sovereignty and self-determination, and that federal agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal government and Indian Tribal governments.

Executive Order 13175 was reaffirmed by the MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, signed by President Barak Obama, November 5, 2009.

The construction of the TransCanada XL Pipeline crosses lands within and adjacent to the lands within the Treaty boundaries of 1851 Treaty of Fort Laramie and the 1868 Treaty of Fort Laramie. The Rosebud Sioux Tribe is a successor to the signatory Great Sioux Nation Tribes to the 1851 Treaty of Fort Laramie and the 1868 Treaty of Fort Laramie. The tribal nations of the Great Sioux Nation have retained aboriginal and treaty rights to those lands, including protection of grave sites and sacred sites, (Native American Graves Protection and Repatriation Act, 25 U.S.C. Section 3001 et. seq., Pub. L. 101-601), protection of cultural, religious and historical sites, (National Historic Preservation Act of 1966,16 U.S.C. Section 470 et. seq., Pub. L. 89-665), and protection of the Oglala Aquifer from contamination of potential catastrophic levels protection of Tribally reserved waters rights under the Winters Doctrine, and protection of our lands and waters on the tribal aboriginal treaty lands from desecration from tar sands sludge spills. The portion of the Oglala Aquifer located within the tribal lands in South Dakota, and the Rosebud Sioux Tribe Indian Reservation, are adjacent to and threatened by the construction of the TransCanada XL Pipeline.

The Rosebud Sioux Tribe has regulatory jurisdiction to regulate land use and potential harmful discharges into Reservation waters on tribally-owned trust lands and allotted trust lands owned by enrolled members of the Rosebud Sioux Tribe within Todd, Tripp, Mellette, Gregory, and Lyman Counties of South Dakota. The construction of the TransCanada XL Pipeline does not cross any tribal or allotted trust lands, but the proposed route lies adjacent to tracts of tribally owned trust and allotted trust parcels of land in Tripp County, South Dakota and is located in "Indian Country" defined by federal statute as "Indian Country." 18 U.S.C. § 1151 (a). The construction of the Pipeline, and a possible spill or release of tar sands sludge from the Pipeline, poses a direct threat to two of the most important assets of the Rosebud Sioux Tribe, its lands and its water resources.

The damage caused by a release of tar sands sludge to Tribal trust and allotted lands could destroy and result in the loss of the essential character and beauty of the Rosebud Reservation, result in the destruction of the historical and cultural values and traditions of the Tribe, increase air, water, and solid waste pollution, and increase the possibility of contamination from the Oglala Aquifer and surface water supplies, and result in the deterioration of the standards of living, quality of life, welfare and well-being of all Reservation residents.

Executive Order 12898, signed by President William Clinton on February 11, 1994, directs federal agencies to make achieving environmental justice as part of the mission by indentifying and addressing, as appropriate, disproportionately high adverse human health or environmental effects of its activities on minority and low-income populations. The United States and its federal agencies must make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human heath, environmental, and social effects of its programs, policies, and activities on minority and low-income populations.

Todd County, South Dakota, also an area encompassing the Rosebud Sioux Tribe Indian Reservation, is the second poorest County in the United States. A spill of the tar sands sludge from the TransCanada Pipeline in Tripp County, South Dakota, would have a direct impact on the economic security, health, welfare and general well-being of the Tribe and its members residing in both Tripp and Todd Counties.

## CONCLUSION

The Final Environmental Impact Statement for the Keystone XL Pipeline project is based upon legal and factual errors, omissions, and does not comply with applicable federal statutes, regulations, and court decisions. The proposed project does not serve the national interest, and the application for the Presidential Permit must be denied.

Respectfully submitted,

Cyril Scott, President
Rosebud Sioux Tribe
cc: Rosebud Sioux Tribal Council

## APPENDIX

## EXHIBITS

1. Overview Map, Appendix A of the amended Programmatic Agreement.
2. Letter, Request for Review and Concurrence, to Jack C. Jackson, Jr., Senior Advisor and Liaison for Native American Affairs, US Department of State, from Cyril Scott, President, Rosebud Sioux Tribe, January 31, 2014.
3. Signature Page, Programmatic Agreement, Great Plains Regional Director, US Bureau of Indian Affairs, date, December 18, 2013.
4. Letter, Position of Rosebud Sioux Tribe on EIS, TransCanada Keystone XL Pipeline, and the Federal Trust Responsibility of the Bureau of Indian Affairs, to Hon. Sally Jewel, Secretary, US Department of Interior, from Cyril Scott, President, Rosebud Sioux Tribe, February 19, 2014.