

**BEFORE THE U.S. BUREAU OF LAND MANAGEMENT**

**PROTEST OF THE GREAT PLAINS TRIBAL WATER ALLIANCE, INC.**

**of the**

**FINAL ENVIRONMENTAL IMPACT STATEMENT AND RESOURCE  
MANAGEMENT PLAN AMENDMENT FOR THE CONVERSE COUNTY  
OIL AND GAS PROJECT**

**BLM Reference 1610, 1790(930)**

The Great Plains Tribal Water Alliance, Inc., hereby protests the proposed Resource Management Plan Amendment and Final Environmental Impact Statement for the Converse County Oil and Gas Project. This Protest is filed pursuant to 43 CFR §1610.5-1.

**(1) Great Plains Tribal Water Alliance, Inc. – Information and Interests**

The Great Plains Tribal Water Alliance, Inc., is a non-profit corporation consisting of four federally-recognized Indian Tribes, the Standing Rock Sioux, Oglala Sioux, Rosebud Sioux and Flandreau Santee Sioux Tribes, for the purpose of advocating for the protection of Indian waters in the Great Plains Region, and advising the Great Plains Tribal Chairman's Association on water issues.

The Great Plains Tribal Water Alliance ("Tribal Water Alliance") participated in the planning process with detailed comments to the Draft Environmental Impact Statement, submitted by legal counsel on March 12, 2018 and referenced in the Final Environmental Impact Statement on pages 7-8 and H-91 – H-95, and by participation in meetings with Indian Tribes on April 18, 2018 and July 10-11, 2018.

The address of the Great Plains Tribal Water Alliance, Inc. is Post Office Box 320 Pine Ridge, South Dakota 57770, and the phone number is (605) 867-5624. This protest is filed on behalf of the Board of Directors by its Chairperson, Doug Crow Ghost (email address [dcrowghost@standingrock.org](mailto:dcrowghost@standingrock.org)). The contact information for legal counsel is Peter Capossela, Attorney at Law, PC, Post Office Box 10643 Eugene, Oregon 97440, (541) 505-4883 [pcapossela@nu-world.com](mailto:pcapossela@nu-world.com).

The Tribes comprising the Water Alliance possess Treaty rights in the Converse County project area. The Tribes are signatories of the 1851 Treaty of Fort Laramie with the Sioux, the United States recognized Sioux territory as follows:

The territory of the Sioux, or Dacatoh Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River to a point known as the Red Butte, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the headwaters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

11 Stat. 749.

Article 5 of the Treaty further guarantees our hunting and fishing rights in this area: "... the aforesaid Indian nations... do not surrender the privilege of hunting, fishing or passing over any of the tracts of country heretofore described." 11 Stat. 750.

After the Powder River War of 1866-1867, in which Lakota forces under Chief Red Cloud forced the abandonment of Fort Fetterman, the United States and the Sioux Nation entered the 1868 Fort Laramie Treaty. The 1868 Fort Laramie Treaty established the Great Sioux Reservation, comprising all of present-day South Dakota west of the Missouri River, extending to the east bank of the Missouri. 15 Stat. 635. Article 16 of the 1868 Treaty described the status of Sioux-held land that remained outside of the boundaries of the Great Sioux Reservation:

The United States hereby agrees and stipulates that the country north of the North Platte river and east of the summits of the Big Horn mountains shall be held and considered to be **unceded Indian territory**, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians, first had and obtained, to pass through the same.

15 Stat. 639 (emphasis added).

Thus, the project area for the Converse County Oil and Gas project described in the Final Environmental Impact Statement (FSEIS) is unceded Sioux Nation Treaty land. This land is part of the historical dispute surrounding the unresolved Sioux Nation Black Hills land claim. Although the land is outside of the present-day boundaries of the Sioux

Indian Reservations, the Sioux Tribes, including the Tribes of the Tribal Water Alliance, retain Treaty rights in relation to this land. These treaty rights include –

- water rights, *United States v. Winters*, 207 U.S. 564 (1908);
- hunting and gathering rights, *Herrera v. Wyoming*, 139 S. Ct. 1686, 1694 (2019);
- consultation rights when federal agencies take actions that affect Treaty rights or trust resources, 1868 Fort Laramie Treaty, Article 5, 15 Stat. 639; Executive Order 13175, 65 Fed. Reg. 767249;
- consultation rights when federal undertakings may impact traditional cultural properties, 54 U.S.C. §§302706(b), 306108);
- proprietary rights and rights of repatriation of certain burials and cultural objects on public lands within the project area, 25 U.S.C. §3002.

Significantly, the United States Supreme Court recently acknowledged that Treaty rights, such as the Treaty rights of the Water Alliance, on lands within the Converse County project area, are the “supreme Law of the land.” *McGirt v. Oklahoma*, 591 U.S. \_\_\_\_ (2020), Slip Op. at 7, *citing* United States Constitution, Art. I, sec. 8, Art. VI, cl. 2.

The members of the Indian Nations comprising the Tribal Water Alliance exercise these Treaty rights, today. Tribal members utilize the Converse County project area for hunting and fishing, gathering of traditional foods and medicinal plants, ceremonies, and gatherings related to historic events and military victories. Tribal members of the Nations comprising the Water Alliance are adversely affected by the proposed amendment to the Resource Management Plan, within the meaning of 43 CFR §1610.5-2(a), on account of the impact to water, wildlife and forage resources.

## **(2) Statement of Issues Under Protest**

The issues being protested include:

1. Whether the Resource Management Plan Amendment violates the National Environmental Policy Act (NEPA), Executive Order 12898 on Environmental Justice and related laws and Treaties, as BLM failed to properly disclose the potential impacts to waters subject to the claims of the Tribal Water Alliance members under the Winters Doctrine.

2. Whether the BLM complied with the Treaty right and administrative mandates of government-to-government consultation with the affected Indian Nations.

3. Whether the waiver of time stipulation limitations for non-eagle raptors violates the Migratory Bird Treaty Act and other applicable federal laws.

**(3) Statement of Parts of the Plan Being Protested**

The Tribal Water Alliance protests the Final Environmental Impact Statement and Proposed Resource Management Plan Amendment for the Converse County Oil and Gas Project. This includes, but is not limited to the selection of the proposed alternative and purpose and need as described in chapter 1; the findings on environmental consequences in Chapter 4; the cumulative impacts analysis in chapter 5; the environmental justice sections; and chapter 7 on Consultation.

**(4) Documents Submitted during the Planning Process**

The document submitted during the planning process was the letter of attorney Peter Capossela, dated March 12, 2018, submitted on behalf of the Board of Directors of the Tribal Water Alliance, and referenced in the Final Environmental Impact Statement on pages 7-8 and H-91 – H-95.

**(5) Statement of Reasons that Approval of the Resource Management Plan Amendment Must be Vacated**

**1. BLM Failed to Properly Disclose the Potential Impacts to Treaty-Protected Waters of the Great Plains Tribes**

As described by BLM on page 3.16-1 of the EIS: “The entire CCPA (project area) is within the Missouri River region, and drains into three basins: Cheyenne River Basin, North Platte River Basin, and Powder River Basin.” The Indian Tribes of the Missouri River Basin, including the Tribes of the Great Plains Tribal Water Alliance, possess extensive water rights under the Fort Laramie Treaties to the Missouri River main stem, the tributaries to the Missouri, and the basin’s groundwater. *See Peter Capossela, Indian*

*Reserved Water Rights in the Missouri River Basin*, 6 GREAT PLAINS NATURAL RESOURCES J. 131 (2002). Any federally-approved project that affects the waters of the basin and could affect sub-basins, such as the Cheyenne, triggers the obligation under Executive Order 13175 to consult with Tribes and respect Treaty rights. Under Executive Order 12898 on Environmental Justice, the agency must disclose the impacts to Treaty rights in any environmental impact studies prepared under NEPA. Council on Environmental Quality, *Environmental Justice Guidance Under the National Environmental Policy Act* (1997) p. 9.

The BLM failed to comply with these requirements in the Final Environmental Impact Statement on the Converse County Oil and Gas Project. Consequently, the Resource Management Plan Amendment must be vacated.

Executive Order 13175 on *Consultation and Coordination with Indian Tribal Governments* mandates that government agencies such as BLM respect Treaty rights. E.O. 13175 provides that: “**Agencies shall... honor treaty rights** and other rights.” 65 Fed. Reg. 67249 (emphasis added). In the implementation of Executive Order 12898 on Environmental Justice, “Agencies should seek tribal representation in a manner that is consistent with... treaty rights.” *CEQ Guidance*, p. 9.

The BLM stated on page H-2, “Issues concerning water rights, boundaries and treaty rights are beyond the scope of this EIS.” On its face, the Final EIS concedes that BLM failed to consider the RMPA’s impact on Treaty rights and water rights. Indian reserved water rights are rights acquired by Treaty, and are federal trust resources. 106 Stat. 4694. BLM’s scope of review in the Final EIS was far too limited. Additional evaluation of the impacts to Indian Treaty rights and water rights is required.

Of particular concern is the Cheyenne River. The RMPA holds the potential to affect water quantity and water quality in the Cheyenne River watershed.

The BLM approved the amendment based in part on a finding that “There are still substantial portions of the annual surface water volumes available for new uses in the... Cheyenne river drainage(s).” Final EIS, p. 3.16-8. That is erroneous, because the quantity of Indian Treaty water in the Cheyenne basin has not been adjudicated or compacted, and these claims may result in over-appropriation of the Cheyenne. There is uncertainty with respect to the availability of water for future appropriation in the

Cheyenne watershed. The finding that there is sufficient surface water in the Cheyenne River for the Converse County Oil and Gas project ignores the existence of Treaty-protected water to which Tribes have consumptive and instream rights downstream.

The BLM significantly increased the estimate of ground and surface water withdrawals required for 5,000 wells, from the draft EIS (page 3.16-20, "Based on a Water White Paper provided by the OG (owner group) for the Project, water requirements per well can range from 6.1 to 12.3 acre-feet.") to the Final EIS. The new estimate also sounds tentative, and lacks clarity and supporting documentation: "Water requirements may well range from 19.7 to 26.2 acre-feet." Final EIS, p. 3.16-20. That is a too wide of a range, so as to fail to disclose the actual impact of water withdrawals for oil and gas wells.

The applicable regulations require an EIS to "include the environmental impacts of alternatives... It shall include discussions of direct impacts and their significance." (40 CFR §1502.15). The Final EIS fails to adequately evaluate environmental impacts of the preferred alternative, because it does not disclose the water requirements for 5,000 new oil and gas wells.

The BLM also under-estimates the potential for groundwater contamination. The Final EIS fails to adequately evaluate the potential environmental impacts of water contamination and air pollution from hydraulic fracturing (fracking). It states on page 4.16-15,

(B) by applying the spill rate discussed for Alternative A (0.5 percent in a given year) to the number of wells that would be drilled in one year under Alternative B there potentially would be less than 3 spill incidents to affect groundwater in 1 year. It is not certain how many disposal wells would be drilled in any given year, therefore, this calculation considers only oil and gas production wells.

This significantly underestimates the chance of migration from a fracked well, and ignores the significant environmental risk posed by the injection of waste fluid. The BLM utilizes the 0.5 percent figure for estimating well failures. Based upon that figure, BLM concludes that "no impacts to usable waters from hydraulic fracturing would be expected." (*Id.* p. 4.16-15). That conclusion is contradicted by data and is erroneous.

The 0.5 percent estimate for well failures is too low. According to Anthony R. Ingraffea, a recognized expert at Cornell University, the frequency of well casing failures in the Marcellus Shale may be as high as 7 percent – 14 times higher than BLM’s estimate for Converse County. Anthony R. Ingraffea, *Fluid Migration Mechanisms Due to Faulty Well Design and/or Construction: An Overview and Recent Experiences in the Marcellus Shale Play*, pp. 8-9, (<http://www.damascuscitizensforsustainability.org/wpcontent/uploads/2012/11/PSECementFailuresCauseRateAnalysisIngraffea.pdf>). By utilizing the low figure for well casing failures, the BLM significantly under-states the potential for groundwater contamination.

Additionally, the cumulative impacts of state and federally-approved mining operations in the Black Hills have not been properly evaluated by BLM in the Final EIS.

As acknowledged by BLM, groundwater and surface water in the project area interact with one another, holding the potential of migration of contaminants from frack wells into the surface waters in the Cheyenne watershed, which are Tribal waters. At the very least, this impact must be more thoroughly evaluated by BLM as part of the NEPA process. The BLM should not ignore Tribal Treaty rights and water rights in the NEPA process, and the RMPA should be vacated.

## **2. BLM Violated Tribal Consultation Requirements**

The consultation rights of the Tribes of the Great Plains Tribal Water Alliance arise from the 1868 Fort Laramie Treaty, which commits to “keep an office open at all times for the purpose of prompt and diligent inquiry... as may be presented under the provisions of their treaty stipulations.” 15 Stat. 636. This the Treaty basis for the consultation obligations to the Tribes of the Water Alliance.

Executive Order 13175 prescribes the administrative duties for Tribal consultation by executive agencies. E.O. 13175 provides that:

The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian treaty and other rights.

Agencies shall respect Indian tribal self-government and sovereignty, honor treaty rights and other rights... (and) ensure meaningful and timely input by tribal officials...

65 Fed. Reg. 67249.

The BLM implements E.O. 13175 through BLM Manual MS-1780. The Manual establishes:

Policy direction regarding government-to-government consultation with Indian tribes relating to BLM decisions to ensure that it – Begins early in the life cycle of a proposed action... Recognizes the transparent and deliberative nature of consultation... Includes a reasonable and sustained effort to invite tribes to consult (and) offering engagement. (MS-1780 1.1).

Collect, evaluate, apply, and protect sensitive and confidential information relating to tribal concerns.... Conduct timely, respectful, and meaningful two-way communication and consultation with tribes that – Ensures appropriate opportunities for tribal input regarding the management of non-trust assets on public lands managed by BLM (and for) collaborative stewardship in management of... public land resources. (MS-1780 1.2E).

MS-1780 1.1, 1.2E.

The Final EIS fails to contain sufficient documentation to demonstrate compliance with these consultation requirements. In one and one-half pages on 7-2 –7-4, BLM describes its government-to-government consultation efforts:

July 28, 2014... BLM mailed hard copy letters to the leadership of 13 tribes... Follow-up phone calls and emails occurred into the summer of 2016... On August 1, 2016, hard copy letters were sent to two additional tribes... On August 19, 2017, a larger coordination meeting addressing multiple projects was held in Buffalo... July 27 to July 29, 2017... meetings addressing multiple projects were held in Casper...

The Final EIS includes no documentation of government-to-government consultation by BLM with the Tribes of the Great Plains Tribal Water Alliance. A record documenting early, sustained efforts to engage, develop relationships with individual Tribal leaders, accept input, attend meetings on the Reservations. listen and learn about



concerns with Treaty rights and cultural issues – there is no documentation showing that was even attempted, much less accomplished.

**3. The Waiver of Time Limit Stipulations Violate the Migratory Bird Treaty Act**

The waiver of timing limit stipulations and the decision-making authority granted to the operator group with respect to non-eagle raptor nests lack support in the record as being necessary, are poorly conceived, and delegate too much authority on mitigation decisions. This may violate the Migratory Bird Treaty Act, 16 U.S.C. §§703-713 (1919). Species that may be of special interest to the Lakota people could be affected by this.

In conclusion, “Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.” 40 CFR §1502.2(g). The Final EIS fails this test. The RMPA should be vacated accordingly.

RESPECTFULLY SUBMITTED this 31st day of August, 2020

By: *Peter Capossela*

---

Peter Capossela  
Attorney at Law PC  
Post Office Box 10643  
Eugene, Oregon 97440  
(541) 505-4883  
pcapossela@nu-world.com

Certificate of Authorization

I, Errol "Doug" Crow Ghost, serve as Chairperson of the Board of Directors of the Great Plains Tribal Water Alliance, Inc., and hereby certify that I have read the afore, and I am duly authorized to file this protest on behalf of the Great Plains Tribal Water Alliance, Inc.

Dated this 31<sup>st</sup> day of August, 2020



Errol "Doug" Crow Ghost  
Chairman, Board of Directors  
Great Plains Tribal Water Alliance, Inc.  
Post Office Box 320  
Pine Ridge, South Dakota 57770  
(605) 867-5624  
dcrowghost@standingrock.org