



# Oglala Sioux Tribe

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*Vice President- Thomas Poor Bear*

*Executive Assistant- Gene Tyon*

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August 31, 2020

Director (210)  
Attention: Protest Coordinator  
P.O. Box 261117  
Lakewood, CO 80226

Re: Protest Final Environmental Impact Statement for Converse County Oil and Gas Project  
(DOI-BLM-WY-P060-2014-0135-EIS)

Dear Sir,

Pursuant to Title 43 C.F.R. § 1610.5-2, regulations for filing a Valid Protest, the Oglala Sioux Tribe ("OST") files a Letter of Protest to "The Final Environmental Impact Statement (FEIS) and Proposed Resource Management Plan Amendment (RMPA) for the Converse County Oil and Gas Project" in Wyoming. The Oglala Sioux Tribe ("OST") is a member of the Great Plains Tribal Water Alliance ("GPTWA") who submitted comments to the Draft Environmental Impact Statement (DEIS). A copy of the Letter of Protest is attached hereto as Exhibit "A" and incorporated herein by reference.

Moreover, the OST also participated in the planning process at two government-to-government consultations between officials and employees of the Bureau of Land Management ("BLM"), and officials and liaisons of the OST and other tribes.<sup>1</sup> The BLM Manual 1780 Tribal Relations (P) (12/15/16) provisions on tribal consultations regarding public-land activities has four (4) essential elements:

1. Identifying appropriate tribal governing bodies and individuals from whom to seek input.
2. Talking with appropriate tribal officials and/or individuals and asking for their views regarding land use proposals or other pending BLM actions that might affect traditional tribal activities, practices, or beliefs relating to particular locations on public lands.

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<sup>1</sup> BLM Manual 1780 Tribal Relations (P), Chapter 1 H., p. 1-11 requires BLM Project Managers to "work with tribal liaisons to facilitate government-to-government consultation with Indian tribes by promoting open and ongoing dialogue. They ensure that documentation of tribal consultation is maintained and complete in the administrative record." [emphasis supplied].

3. Treating tribal information as a necessary factor in defining the range of acceptable public-land management options.
4. Creating and maintaining a permanent record to show how tribal information was obtained and used in the BLM's decision-making process.<sup>2</sup>

The first government-to-government consultations was a two-day meeting held at the Prairie Wind Casino Hotel on April 17-18, 2018, at which time the OST expressed its concerns as set forth in Tribal Executive Committee Resolution No. 18-55XB, the meeting agenda and press release, copies of which is attached hereto as Exhibit "B" and incorporated herein by reference, and verbal comments made by both tribal and BLM officials at the two-day consultations meeting.

The second government-to-government consultations was a two-day meeting held at the Pierre Chamber of Commerce Building (Community Room), 800 W Dakota Avenue, Pierre, South Dakota on July 10-11, 2018. A copy of the July 10, 2018 meeting minutes taken by BLM (and all the comments included therein) are attached hereto as Exhibit "C" and incorporated herein by reference. A copy of the July 11, 2018 meeting minutes taken by BLM (and all the comments included therein) are attached hereto as Exhibit "D" and incorporated herein by reference.

This protest is filed on behalf of the OST and other Sioux tribes that are parties to the GPTWA protest letter, and who attended the April 17-28, 2018 and July 10-11 government-to-government consultations referenced above. The mailing address to which correspondence regarding this protest should be directed is as follows:

Jennifer Spotted Bear, Secretary  
Oglala Sioux Tribe  
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**Authorization to Sign Protest for the Oglala Sioux Tribe**

I, Tom Poor Bear, Vice-President of the OST, file this Letter of Protest on "The Final Environmental Impact Statement (FEIS) and Proposed Resource Management Plan Amendment (RMPA) for the Converse County Oil and Gas Project"

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<sup>2</sup> No Record of Decision should be issued by BLM on the Converse County Oil and Gas Project until BLM complies with all the binding policy requirement for engaging in meaningful government-to-government consultations and collaboration with the OST and other concerned federally Indian tribes that are contained in BLM Manual 1780. The OST protests BLM's failure to comply with all of the policy requirements of the Manual in preparing the DEIS and FEIS for the project.



### **Justification for submission of Protests by the Oglala Sioux Tribe**

The justification for submitting this Protest against BLM is three-fold.

1. The First Protest is against BLM is for including an origin history of the Sioux tribes in the FEIS in relations to the Black Hills and surrounding area (including Converse County) that is based on speculation of white historians and did not include any history from Sioux spiritual leaders and historians that is based on empirical evidence that cultural resources, stone features, sacred sites and burial sites throughout Converse County and surround area are of Sioux origin and not based on speculative history; .
2. The Second Protest is against the BLM Authorizing Officer Stephanie Connolly who was responsible for preparing the Draft Environmental Impact Statement ("DEIS"), has failed to fulfill the intent and process outlined in the National Environmental Policy Act (NEPA) and implementing regulations.
3. The Third Protest is on the Final Environmental Impact Statement ("FEIS") itself, as being "Deficient" and the OST position is we "**OBJECT**" to the Draft EIS, the Supplemental EIS and the Final EIS. (36 CFR 800.8 (C) (1) & (2) (ii)).

### **Interest of Protest of the Oglala Sioux Tribe**

The OST is a member of the GPTWA composed of four (4) federally recognized member tribal governments that submitted comments to the DEIS, as set forth in Exhibit "A." The OST is the closest tribal government near Converse County (100 miles East) and the OST Pine Ridge Reservation was named specifically in the DEIS because BLM expanded its review to areas outside of the DEIS coverage when identifying potential impacts.

The concerns of the OST are set forth in this instant Protest letter against the FEIS that includes the speculative origin history that needs to be corrected,, as well as the concerns that were addressed and fully articulated in Resolution No. 18-55XB, and comments the comments that were provided to BLM by OST officials and officials from other tribes at both the April 17-18, 2018 and July 10-11, 2018 government-to-government consultations referenced above.

**PROTEST NUMBER ONE:** In Section 3.2.3.4 Tribal History Overview (page 3.2-29 of the FEISJ), states in part that:

The Sioux are Siouan language speakers who may have originated in North Carolina but were first historically documented in 1640 in Minnesota (Kaelin and the Pikes Peak Society 2008). \* \* \* After their enemies, the Chippewa, obtained firearms from Canadian traders in the 1700s, the Sioux moved westward to the Black Hills of western South Dakota. \* \* \* By the 1830s the Oglala and Brulé moved into eastern Wyoming (Deaver 1996), pushed west by EuroAmerican settlers

The origin and migration theory of the Sioux Indians by historians such as Kaelin, Pikes Peak Society and Deaver is based primarily a paradigm created by James Mooney in his manuscript "The Siouan tribes of the East" (Mooney, 1895).<sup>3</sup> The OST protests BLM's reliance on the Sioux origin and migration theory since it is based mostly on speculation and conjecture and contradicts other origin theories of Siouan speaking people like the Mandans:

Ethnologists and scholars studying the Mandan subscribe to the theory that, like other Siouan-speaking people (possibly including the Hidatsa), they originated in the area of the mid-Mississippi River and the Ohio River valleys in present-day Ohio. \* \* \* *This migration is believed to have occurred possibly as early as the 7th century but probably between 1000 CE and the 13th century*, after the cultivation of maize was adopted. It was a period of a major climatic shift, creating warmer, wetter conditions that favored their agricultural production.<sup>4</sup> \* \* \* *Later the Pawnee and Arikara moved from the Republican River north along the Missouri River.*<sup>5</sup> [emphasis supplied].

This would place the Mandans, a Siouan speaking people, migrating to the Missouri River in 500 A.D. or 900-1200 A.D. Again, origin theories of Siouan speaking people are based on speculation and conjecture.

The FEIS should have included Lakota spiritual leaders, like Pete Catches who described the Sacredness of the Black Hills to the Lakota people in this way:

To the Indian spiritual way of life, the Black Hills is the center of the Lakota people. There, ages ago, before Columbus traveled over the sea, seven spirits came to the Black Hills. They selected that area, the beginning of sacredness to the Lakota people. Each spirit brought a gift to the Lakota people. Our people that have passed on, their spirits are contained in the Black Hills. This is why it is the center of the universe, and this is why it is sacred to the Oglala Sioux. In this life and the life hereafter, the two are together.<sup>6</sup>

The OST protests the inclusion of the Sioux origin and migration theory from North Carolina in the FEIS on the basis that it is based on speculation and conjecture. The origins of the Sioux in the FEIS should have been based on the history and testimony from Lakota spiritual leaders such as Pete Catches and Leonard Little Finger, and Sioux historians such as Johnson Holy Rock and Vine Deloria, Jr.<sup>7</sup>

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<sup>3</sup> Mooney, James. 1895. "The Siouan tribes of the East." *Bureau of American Ethnology Bulletin*. 22:1-101.

<sup>4</sup> Hodge, Frederick Webb, Ed. *Handbook of American Indians North of Mexico*. *Bureau of American Ethnology and the Smithsonian Institution*, p. 796 (1906), (Reprinted in New York: Rowman and Littlefield, 1971. ISBN 1-58218-748-7).

<sup>5</sup> Id.

<sup>6</sup> Gonzalez, Mario "The Black Hills: The Sacred Land of the Lakota and Tisistsistas," *Cultural Survival Quarterly*, p. 62 (Winter, 1996).

<sup>7</sup> Little Finger, Holy Rock and Deloria on quoted on p. 27.



The FEIS also omits a discussion that ancient petroglyphs in the Black Hills that have been identified as Lakota in origin. (Linea Sundstrom, *Storied Stone: Indian Rock Art in the Black Hills Country* (March 22, 2004). In the Sundstrom book *Storied Stone*, she states in part that:

Ancient petroglyphs and paintings on rocky cliffs and cave walls preserve the symbols and ideas of American Indian cultures. From scenes of human-to-animal transformations found in petroglyphs dating back thousands of years to contact-era depictions of eagle trapping, rock art provides a look at the history of the Black Hills country over the last ten thousand years. *Storied Stone* links rock art of the Black Hills and Cave Hills of South Dakota and Wyoming to the rich oral traditions, religious beliefs, and sacred places of the Lakota, Cheyenne, Kiowa, Mandan, and Hidatsa Indians who once lived there.

Based on the historical record documented by individuals studying the Lakota and their movements, we have continued to layer our Oral Knowledge of our Elders on our connection to the Black Hills and surrounding areas including the areas in eastern Wyoming, i.e., 1851 Treaty territory, over the academic record based on numerous studies too many to list here. The Sundstrom book is only one example we provide to support our connection to Converse County and the surrounding areas in the five-state region of the Great Plains.

**PROTEST NUMBER TWO:** The concerns of the OST are articulated in Resolution No. 18-55XB that was submitted to BLM and discussed at the April 17-18, 2018 government-to-government consultations meetings at the Prairie Wind Casino Hotel between BLM, OST and other tribes. The OST protests the failure of BLM for withholding Resolution No. 18-55XB (Exhibit “B”) and failing to address each of the OST’s concerns in the resolution in the FEIS, and also for withholding BLM’s notes containing the comments made by both BLM and OST officials, and officials from other tribes who participated in the April 17-18, 2018 government-to-government consultations, all of which should have been included in the DEIS.

**PROTESTG NUMBERE THREE:** In the July 10-11, 2018 government-to-government consultations at the Pierre Chamber of Commerce Building, BLM stated that whatever was provided on these two days of consultations would be considered in the DEIS and a BLM RESPONSE will be given at that time to questions of the tribes. OST has an interest in learning what became of all the issues they raised and why BLM failed to include these meeting notes in the comment section of the DEIS. Because BLM stated the comments will be included in the DEIS, OST protests the failure of BLM for withhold the meeting notes containing comments given to BLM by OST and other tribes that were supposed to be included in the DEIS.

### **Statement of Reasons**

The OST contends that there are reasons why it is protesting the FEIS. The OST believes that “the statutory requirements contained in the National Environmental Policy Act (NEPA) have not been met.” The basis for this protest against the FEIS for the Converse County Oil and Gas Project are identified in the Interest of Protest listing above and for reasons to be outlined below.

**(a) The BLM have failed to meet the requirements of NEPA**

The NEPA obligates every Federal agency to prepare an adequate environmental impact statement *before* taking any major action, which includes issuing a Record of Decision (“ROD”) and issuing a license or permit approval. The statute does not permit an agency to act first and comply later. And it also does not permit an agency to condition performance of its obligation on a showing of irreparable harm. There is no such exception in the statute.

The NEPA requires federal agencies to prepare a detailed Environmental Impact Statement (EIS) for any “proposed” major federal action that “significantly affect(s) the quality of the human environment,” 42 U.S.C. § 4332(2)(C), including granting a license, *see* 10 C.F.R. § 51.20(b)(8). Further the National Historic Preservation Act (NHPA), as amended in 1992, requires Federal agencies to initiate consultation including fulfilling its responsibilities regarding consultation with Native American tribes under the NHPA, 54 U.S.C. § 306108.

The OST contends that the BLM Authorizing Officer Stephanie Connolly failed to develop and complete the minimum requirements of NEPA. The BLM Authorizing Officer Stephanie Connolly also failed her responsibilities overseeing the NEPA process which required her to develop a complete record listing “all” commenters to the DEIS and the FEIS. By these actions she limited BLM RESPONSEs to certain detailed comments on treaty rights and water rights from the GPTWA; and failed to list the OST comments and concerns in Resolution No. 18-55XB, and comments on the DEIS provided at the government-to-government consultation meetings held at the Prairie Winds Casino Hotel on April 17-18, 2018, on the Pine Ridge Reservation and the Pierre Chamber of Commerce Building on July 10-11, 2018.

NEPA requires that “all agencies of the Federal government shall...include in every recommendation or report on proposals for...major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official” on:

1. The environmental impact of the proposed action;
2. The environmental impact of the proposed action;
3. Any adverse environmental effects which cannot be avoided should the proposal be implemented;
4. Alternatives to the proposed action;
5. The relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and
6. Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.



42 U.S.C. § 4332(2)(C). The statutory provision requires agencies to take a “*hard look*” at environmental consequences before undertaking any such action.<sup>8</sup> The environmental effects that must be assessed include “aesthetic, historic, cultural, economic, social, or health” effects. 40 C.F. R. § 1508.8(b); *see* 42 U.S.C. § 4331(b)(4) (declaring that “preserv[ing] important historic, cultural, and natural aspects of our national heritage” is an element of national environmental policy).

The statute’s requirement that a detailed environmental impact statement be made for a “proposed” action makes clear that agencies must take the required hard look *before* taking that action.<sup>9</sup>

**b.) A summary of continuing reasons is submitted herein, which includes but not limited to, the following:**

**1.) The Oglala Sioux Tribe protests BLM Authorizing Officer Stephanie Connolly for prohibiting the disclosure of comments made by OST and other Tribes; and failing to include the BLM meeting notes of a government-to-government consultation meeting initiated by the Bureau of Land Management (BLM) with the Oglala Sioux Tribe, and other Sioux Tribes, at the Pierre Chamber of Commerce, Community Room -800 W Dakota Ave, Pierre, South Dakota into the record of the Draft Environmental Impact Statement for Converse County Oil and Gas Project.**

The OST on two separate occasions have met with BLM in a government-to-government consultation meeting, one in April 2018 at the Pine Ridge reservation; and another at Pierre, South Dakota in July 2018. At both meetings BLM remained in these two meetings accepting concerns and were provided comments on the adverse effects the Operators Group will produce if the Converse County Oil and Gas Project Environmental Impact Statement were to be approved.

BLM Authorizing Officer Stephanie Connolly failed to fulfill her responsibilities to gather and include all comments into the DEIS. The OST governing body has lost the ability to raise and voice their concerns regardless if the people on Pine Ridge reservation are the closest Indigenous

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<sup>8</sup> *See Robertson v. Methow Valley Citizens*, 490 U.S. 332, 350 (1989). (“The sweeping policy goals announced in 101 of NEPA are thus realized through a set of “action-forcing” procedures that require that agencies take a “‘hard look’ at environmental consequences . . . and that provide for broad dissemination of relevant environmental information”).

<sup>9</sup> *See, e.g., Pub.Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1081 (D.C. Cir. 2016) (holding that an agency’s decision to issue a lease for a wind power project “without first obtaining sufficient site-specific data...violated” NEPA (internal quotation marks omitted)); *New York v. Nuclear Regulatory Comm’n*, 681 F.3d 471, 476 (D.C. Cir. 2012) (“Under NEPA, each federal agency must prepare an [EIS] before taking a ‘major Federal action[] significantly affecting the quality of the human environment.’” (quoting 42 U.S.C. § 4332(2)(C))).



people to this project area. Because of that this FEIS cannot move to a Record of Decision (ROD) and we request the BLM and Wyoming State Director not to approve this FEIS move to a ROD because of these outlined “deficiencies.” See Exhibits “C” and “D” (Notes: Government-to-Government Consultation for Converse County EIS), Pierre Chamber of Commerce, Community Room, 800 W Dakota AVE, Pierre, South Dakota.

It was pointed out that true consultation has not occurred and must still occur. The issue of BLM having limited authority on split estate issues when private landowners who agreed to have access to the federal minerals below their land but refuse to have identification of historic properties identified or historic properties of religious and cultural significance. The issue of human remains is also a huge concern given the state law in Wyoming allows for the private landowner to own human remains found on their land. The OST objects to this and protests landowners controlling disposition of our relative, their burial site and ownership of their grave goods or funerary objects.

**2.) The OST protests the failure of BLM to respond in the Draft EIS on the letter dated March 12, 2018 of the Great Plains Tribal Water Alliance (GPTWA) that identified adverse impacts to the treaty rights of the Oglala Sioux Tribe, and other treaty tribes, and this letter is incorporated in its entirety herein as Exhibit “A”**

OST has the potential to receive the most residual adverse effects this type of infrastructure development can produce including Converse County Oil and Gas Project.

The OST allege that the DEIS failed to adequately identify the environmental effects on OST and other tribes, their cultural, religious, historical-prehistoric resources, burials, and sacred sites. These resources are not only Federal Trust Assets-trust resources they are protected by the Fort Laramie Treaty of 1851, Federal law, and Executive Orders. (GPTWA March 12, 2018, p.6, para. 3)

The DEIS failed to identify the concerns of OST and other tribes, which subsequently affected the responses in the Supplemental EIS and the FEIS. By this action of BLM, their decision failed to carry over the consultation concerns of OST that could have been placed into the NEPA record in the DEIS; which included the lack of consultation (BLM Notes July 10-11, 2020); and the lack of fulfilling BLM’s trust responsibility to trust resources by not addressing treaty rights of OST and other tribes<sup>10</sup>. (See GPTWA Comments p. 2, para 5, line 1).

*A core requirement of NEPA is that an agency decision maker must consider an adequate environmental review before deciding on a licensing, permitted action or approval. If OST*

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<sup>10</sup> Federal agencies, as part of the Federal Government, are the trustee of the OST and other Sioux tribes and must always act in their best interests in approving federally sanctioned energy projects on their aboriginal/treaty lands such as the Converse County Oil and Gas Project. See *Covelo Indian Community v. FERC*, 895 F.2d 581 (9<sup>th</sup> Cir. 1990) (all government agencies have “fiduciary” responsibilities to tribes, and must always act in their interests of the beneficiaries); and *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 100 (8<sup>th</sup> Cir. 1989) (“[T]he existence of a trust duty between the United States and an Indian or Indian tribe can be inferred from the provisions of a statute, treaty or agreement, reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people”).

*allows the BLM to supplement and cure an inadequate NEPA document after the agency has already made a licensing decision, the fundamental purpose of NEPA is lost and opens the FEIS to be challenged.*

*As provided here, the comments to the GPTWA and BLM's responses are unacceptable. The OST provided these entries from the DEIS listing of commenters and provides BLM's response. Because BLM responded as "beyond the scope of this DEIS" it does not address the concerns of GPTWA and OST. Because of this the position of OST is this DEIS is inadequate, does not fulfill the "hard look" required by NEPA from a Federal agency and renders the DEIS and FEIS "deficient." We provide the following comments of GPTWA and BLM responses to justify our position.*

### **GPTWA Comments and BLM Responses in DEIS**

NO4/02<sup>11</sup> Under the Winters Doctrine, Indian Tribes possess water rights for all present and future beneficial uses to waters arising on, flowing through, bordering, and subsurface to the Reservation and Treaty lands. Water rights are Treaty rights, implicitly reserved in the Treaties in order for the Reservations to become permanent homelands for the Tribes. (Felix S. Cohen's Handbook on Federal Indian Law §19.93 (2011 ed.)). The DEIS contains no mention of the reserved water rights of the Great Sioux Nation to the Cheyenne River, even though its waters are potentially impacted by the preferred alternative.

BLM RESPONSE: Issues concerning water rights, boundaries and treaty rights are beyond of the scope of this EIS.

N04/03 The Cheyenne River is an extremely important water source for the Great Sioux Nation, and it flows into the Missouri River, the primary water source for the Water Alliance Tribes. The Oglala Sioux and other Tribes of the Sioux Nation possess reserved water rights to the Cheyenne River, downstream from the Converse County Oil and Gas Project. All of the Tribes of the Great Sioux Nation possess extensive water rights to the Missouri River main stem, of which the Cheyenne is a major tributary. The Powder River is a tributary to the Yellowstone River, which flows into the Missouri River. The Powder River is also an important watershed for the Lakota. This area comprises the Tribes' traditional hunting grounds and is unceded Treaty land of the Sioux. Under Article 16 of the Fort Laramie Treaty of 1868: 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, without the consent of the Indians... (15 Stat. 639). Thus, the Sioux Nation enjoys extensive Treaty rights in the project area, including reserved water rights to the Missouri River and Cheyenne River downstream from the project area. Significantly, Indian water rights include the right to adequate water quality for all beneficial uses. "Upstream, non-Indian users may be required to limit their diversions as necessary to achieve or preserve the required quality of tribal water rights." (Cohen's Handbook on Federal Indian Law §19.93). In the Draft EIS, the

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<sup>11</sup> GPTWA Comments: Start on page H-91 of the DEIS [For whatever reason the comments start at (02). (N04 Represents Doc ID) (02 Represents Comment ID)].



BLM failed to consider the existence of downstream Tribal water claims to the Cheyenne River, and the potential adverse impacts to these waters that may result from the project.

BLM RESPONSE: See BLM RESPONSE to comment NO\$-02

N04/04 In fact, the Draft EIS erroneously states “There are still substantial portions of the annual surface water volumes available for new uses in the... Cheyenne river drainage.” (BLM, Draft EIS, p. 3.16-6). This statement appears designed to justify the significant upstream water diversions associated with the oil and gas project. Indian water claims in the Cheyenne River basin remain unresolved, and the BLM suggestion that there is substantial available water for non-Indian development conflicts with Indian water claims to the Cheyenne River.

BLM RESPONSE: The purpose of the NEPA (EIS) process is to disclose potential project impacts. The BLM appreciates that you have identified your specific concerns regarding the impacts disclosed in the DEIS. Issues concerning water rights, boundaries and treaty rights are beyond of the scope of this EIS.

N04/05 Moreover, the preferred alternative poses a risk of contamination to the Cheyenne River and its headwaters, further jeopardizing Tribal water rights in the Cheyenne watershed. This is evidenced on page 3.16-16 of the Draft EIS: “Within the Northeast Wyoming River Basin, there are several streams in portions of Converse County that are also rated as high or medium-high sensitivity because of the interaction with groundwater, including Antelope Creek, Dry Fork Cheyenne River, the confluence of Dry and Lightning creeks, and Box Creek.” Thus, the groundwater is jeopardized by fracking and the injection of waste water, and the groundwater “interrelates” with surface water in the Cheyenne River headwaters. For these reasons, the Draft EIS violates the Winters Doctrine water rights of the Tribes of the Great Plains Tribal Water Alliance.

BLM RESPONSE: As described in the EIS (Section 4.16.1.2), hydraulic fracturing and injection of waste water would have a very small potential to contaminate useable groundwater.

N04/06 The diversion of ground water for oil and gas development in this area is already considerable, with 12,400 acre-feet in current production. (BLM, Draft EIS, p. 3.16-23). Nevertheless, the Draft EIS fails to accurately describe the future water diversions that will be required for the Converse County Oil and Gas Project. It states on 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.”

BLM RESPONSE: See BLM RESPONSE to Comment B11-154.

N04/07 The Converse County Oil and Gas Project would significantly accelerate oil and gas development and magnify the impacts in the affected water basins. A total of 5,000 new wells would be authorized. Consequently, based upon the oil companies’ estimate, the water requirements will range from 30,500 acre feet to 61,500 acre-feet (5,000 wells multiplied by 6.1-12.3 acre-feet per well). That is too wide of a range to accurately determine the impacts of the water diversions on the water resources in the affected area. The Draft EIS lacks sufficient data to determine the environmental impacts of the significant water withdrawals associated with the



Converse County Oil and Gas Project. The Council on Environmental Quality regulations governing NEPA 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 Draft 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.

BLM RESPONSE: The Draft EIS discloses the water use associated with the proposed project in Section 2.4.3.4. Baseline conditions for water resources are discussed in Section 3.16 and impacts are discussed in Section 4.16. Note that the text has been revised to include updated water use numbers provided by the Operator Group.

N04/08 Nevertheless, the BLM gives different estimates of water use on page 4.16-14. This section states, “Under Alternative B (the preferred alternative), 5,000 wells would be drilled over a 10-year period. Water for drilling operations primarily would be from groundwater sources and would be approximately 7,000 acre-feet per year or an average of 13.1 acre-feet per well.” (BLM, Draft EIS, p 4.16-14). On page 3.16-20 the BLM utilizes industry estimates of 61,500 acre-feet of ground water withdrawals over a 10-year period, and on page 4.16-14 the BLM estimates total water use to be 70,000 acre-feet. Thus, the BLM utilizes wildly different water diversion estimates in different parts of the Draft EIS.

BLM RESPONSE: Comment noted. According to the comment, “on page 3.16-20 the BLM utilizes industry estimates of 61,500 acre-feet of ground water withdrawals over a 10-year period.” The 61,500 acre-feet is not in the text of page 3.16-20.

N04/09 Moreover, the BLM relied upon incomplete and outdated data on the groundwater resources. The Draft EIS states that “Groundwater flow in the entire CCPA (project area) is not well documented due to a lack of monitoring wells.” (Id p. 3.16-15). There is considerable reliance on an outdated study by Hochkiss and Levings published in 1986. That is inadequate for a baseline evaluation of impacts to groundwater.

BLM RESPONSE: The commenter did not mention the more recent citations in the same sentence, which include Thamke, et al. (2014) and Long et al. (2014) that are in substantial agreement with the Hotchkiss and Levings (1986).

N04/10 Significantly, the location of points of diversion are not identified. The Draft EIS opines that “all water for the Project would be obtained from these 50 new wells.” (Id. p. 4.16-14). The BLM assumes that the wells would be “equally distributed” throughout the project area. Id. That unverified assumption leads to the conclusion of “isolated and very localized cones of depression” in the affected aquifers. (Id.). The conclusions relating to impacts on ground water resources are based upon unverified assumptions of the locations of the points of diversion, and therefore lack credibility.

BLM RESPONSE: Without site-specific information, a programmatic EIS cannot predict where future wells are going to be placed. Reasonable assumptions have been made, which is why the groundwater model ran two general hypothetical cases, one with distributed well locations and the other with closely spaced wells.

N04/11 In sum, the BLM totally ignores the existence of Indian water claims in the Cheyenne River watershed, and fails to disclose the potential impacts of contamination to Indian waters.

BLM RESPONSE: See BLM RESPONSE to comment N04-02.

N04/12 The estimate of water use lacks credibility.

BLM RESPONSE: See BLM RESPONSE to Comment B11-154.

N04/13 There is insufficient information on the potential impacts to Indian water rights from the very high intensity development contemplated in the preferred alternative. The Draft EIS fails to disclose the impacts of the preferred alternative on Indian water rights, in violation of NEPA.

BLM RESPONSE: See BLM RESPONSE to comment N04-02.

N04/14 The Draft EIS fails to adequately evaluate the potential environmental impacts of water contamination and air pollution from hydraulic fracturing (fracking). It states on page 4.16-14, (B)y 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. (Id. p. 4.16-14). Thus, the BLM underestimates the percent chance of migration from a fracked well, and ignores the significant environmental risk posed by the injection of waste fluid. The Draft EIS 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 blatantly 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/PSECementFailureCauseRateAnalysisIngraffea.pdf>). Studies documenting ground water contamination in close proximity to frack wells abound, but BLM ignores them. (E.g. Ingraffea (2012); Avner Vengosh et al., A Critical Review of the Risks to Water Resources from Unconventional Shale Gas Development and Hydraulic Fracturing in the United States, [www.pubs.asc.org/est](http://www.pubs.asc.org/est) (2014); U.S. Environmental Protection Agency, Draft Investigation of Groundwater Contamination near Pavilion, Wyoming (2011), [https://www.epa.gov/sites/production/files/documents/EPA\\_ReportOnPavilion\\_Dec-8-2011.pdf](https://www.epa.gov/sites/production/files/documents/EPA_ReportOnPavilion_Dec-8-2011.pdf)). In doing so, the Draft EIS contains erroneous conclusions that vastly underestimate the risk posed to groundwater, and, as groundwater interacts with surface water in the project area, to the Cheyenne, Platte and Powder Rivers.

BLM RESPONSE: Thank you for expressing your concerns. The BLM has based its estimates of number of spills that could impact groundwater on available recent literature sources

appropriate to the proposed development in the CCPA and current regulatory programs such as the State of Wyoming's UIC program.

N04/15 Methane gas contamination is a significant concern, but is not properly evaluated by BLM. As reported by Vergosh, "reports of stray gas contamination in some unconventional shale gas development in the northeastern Appalachian Basin (U.S.) and Montney and Horn River Basins (Canada) may be associated with leaking of oil and gas wells." (Vergosh, Environ. Sci. Technol. 2014, p. 8338). A Study by the National Academy of Sciences determined that average methane concentrations in domestic wells near fracking sites were 17 times higher than wells in inactive areas. (Stephen G. Osborn et al., "Methane Contamination of Drinking Water Accompanying Gas-well Drilling and Hydraulic Fracturing," Proceedings of the National Academy of Sciences 108 no. 20, (May 17, 2011) <http://www.pnas.org/content/early/2011/05/02/1100682108.full.pdf+html>). The concentration of methane was found to be proportionate to the distance from the frack site.

BLM RESPONSE: Information on stray methane gas has been added to the subsection entitled "Groundwater Contamination from Other Sources." Biogenic methane gas occurs in coals and sandstones in the Lower Tertiary rocks in the basin. If coal seams and associated gas-charged sandstones are used as water sources (aquifers), there is potential for methane gas hazards. This methane gas hazard is not caused by hydraulic fracturing.

N04/16 A recent study evaluated the mobility of contaminants found in fracking fluids, and reached troubling conclusions. (Jessica D. Rogers et al., A Framework for Identifying Organic Compounds of Concern in Hydraulic Fracturing Fluids Based on Their Mobility and Persistence in Groundwater, [www.pubs.asc.org/est](http://www.pubs.asc.org/est) (2015)). The study found: Of 996 organic fracturing fluid compounds identified by the U.S. Environmental Protection Agency and FracFocus for four states, data were available to perform an additional screening of 659 compounds for sufficient mobility and persistence to reach a water well under fast and slow groundwater transport scenarios. For the fast transport scenario, 15 compounds identified on at least 50 FracFocus reports were predicted to have an elevated exposure potential. (Environ. Sci. Technol. Lett. 2015, p. 158).

BLM RESPONSE: The migration of the chemicals is constrained because of factors such as limited fracture height, gradients that inhibit upward flow, local geologic conditions, and the extremely low permeability of the shale beyond artificially created fractures.

N04/18 The Environmental Protection Agency (EPA) issued a draft report in 2011, in BLM RESPONSE to concerns expressed by residents of Pavilion, Wyoming, with potential contamination of their drinking water wells from nearby fracking. EPA groundwater sampling confirmed the fears of Pavilion community members: 6 Detection of high concentrations of benzene, xylenes, gasoline range organics, and total purgeable hydrocarbons in ground water samples from shallow monitoring wells near pits indicates that pits are a source of shallow ground water contamination in the area of investigation. Pits were used for disposal of drilling cuttings, flowback and produced water. There are at least 33 pits in the area of investigation. (EPA 2011, p. 33).



BLM RESPONSE: The conditions at Pavillion are different from the CCPA in that the hydrocarbon-bearing formation at Pavillion is also the aquifer used for water supply. The initial study by the USEPA did not account for other potential sources of contaminants not sourced by oil and gas operations such as contaminated septic systems, poorly maintained water wells, maintenance shop sumps, fuel tanks, chemical tanks, unlined dipping vats, unpermitted waste dumps, and animal confinement areas.

N04/19 A follow-up study by the U.S. Geologic Survey confirmed elevated levels of specific conductance, pH, methane, ethane and propane. (USGS, Groundwater-Quality and Quality-Control Data for Two Monitoring Wells Near Pavilion, Wyoming, p. 26 (2012)). Indeed, in Pavilion, the groundwater supplies for an entire community were polluted, with no feasible remediation. The health of farm animals was affected, with livestock suffering blindness and a high rate of stillborn births.

BLM RESPONSE: See BLM RESPONSE to Comment N04-18.

N04/21 BLM totally ignored the experience in Pavilion. With respect to the contamination of groundwater from fracking fluids, BLM wrote: (N)o impacts to usable waters from hydraulic fracturing would be expected... (D)ue to the physical constraints on fracture growth and regulatory requirements, there would be an extremely low risk of impacts to usable waters and the risk would not change because of the increased number of wells to be drilled. (BLM Draft EIS, p. 4.16-15). Geophysical constraints are diminished by the fracking process itself – the injection of fracking fluids under extremely high pressure creates fractures and fissures, causing new pathways for the migration of contaminants. Indeed, Rogers et al. documented that numerous contaminants common in fracking fluid are mobile and persistent. The Draft EIS lacks sufficient data to support the finding of no risk to groundwater. Available studies raise concern with groundwater contamination from fracking fluids, and the experience of Pavilion bears this out.

BLM RESPONSE: See BLM RESPONSE to Comment N04-16.

N04/23 With respect to contamination from produced water, the Draft EIS states: Impacts due to surface spills under Alternative B (the preferred alternative) still present a very small risk to groundwater (due to) the small volume of expected spills, the low spill rate, and the regulatory requirements to remediate spills of potentially hazardous materials. (BLM, Draft EIS, p. 4.16-15). The Draft EIS discloses that the preferred alternative will result in the production of significant volumes of waste water. However, it does not disclose how the waste water will be disposed of or recycled. In fact, the report identifies “a potential shortage of injection capacity under Alternative B.” (Id. p. 4.16-16). Thus, “Evaporation ponds could provide excess disposal capacity as well.” (Id.)

BLM RESPONSE: Comment noted. The remainder of referenced paragraph states that increased disposal well capacity could be obtained by converting underperforming production wells to water disposal wells. In addition, evaporation ponds could provide the excess disposal capacity.

N04/24 The use of surface storage ponds could increase run-off and contamination. The ponds attract wildlife, which are already stressed by the current level of oil and gas development. The ponds also intensify harmful air emissions. As explained by Vengosh: Spills or leaks of hydraulic fracturing and flowback fluids can pollute soil, surface water, and shallow groundwater with organics, salts, metals, and other constituents. A survey of surface spills from storage and production facilities at active well sites in Weld County, Colorado that produces both methane gas and crude oil, showed elevated levels of benzene, toluene, ethylbenzene, and xylene (BTEX) components in affected groundwater. (Vengosh, 2014, p. 8340).

Thus, there is extensive literature documenting concerns with ground and surface water pollution from fracking. The BLM ignored this in the Draft EIS, and accordingly the report lacks adequate analysis to support the preferred alternative. At the very least, the impacts of fracking are sufficiently controversial and in need of additional study, to justify a more realistic evaluation of the risk to ground and surface water. (40 CFR §§108.27(b)(4) & (5)). None of this was done by BLM. For these reasons, the no action alternative is required.

BLM RESPONSE: Comment noted. Impacts from hydraulic fracturing are noted in Section 4.16.2.2.

**3.) The OST protests the failure of BLM to respond in the Draft EIS on the failure to engage in timely, meaningful government-to-government consultation with the OST, other treaty tribes and with the GPTWA which OST is a member.**

The OST provides these sections of the section 106 regulations as it appears the staff of BLM Authorizing Officer Stephanie Connolly failed to comply with these requirements to be included in the DEIS. These sections are referenced to show the required consultation.

The OST along with the other tribes claim all cultural sites and historic and prehistoric resources, sacred sites, burials, and environmental resources as resources of “religious and cultural significance to tribes.” (36 CFR § 800.2 (C) (2))

The OST alleges that BLM failed to initiate consultation under section 106 of the National Historic Preservation act (NHPA) as amended in 1992 on the findings and determination of effects BLM reviewed and concurred with on archaeological reports previously and today. Because BLM cannot produce any field notes on any sites visits BLM said happened since 2014 during the initiation of the DEIS, those consultation process which should have made the NEPA record are non-existent. This eliminates the voice of OST and other tribes and diminishes the “reasonable and good faith effort.”

The OST alleges the environmental and section 106 records are incomplete for this DEIS in relation to consultation. There is no record that BLM consulted on the archaeological surveys or site visits with the Tribal Historic Preservation Officers. This issue was brought up at the BLM meeting in Pierre, South Dakota government-to-government consultation meeting. OST raised the question, “why aren’t the consultation notes with THPO and BLM not in the DEIS?” The



BLM has yet to respond to these questions at the Pierre, South Dakota meeting with BLM and OST. (BLM Notes July 10-11, 2018)

OST alleges that the BLM failed to initiate the *timing* requirement in 36 CFR § 800.1 (c) of government-to-government consultation with OST and other tribes.

36 CFR § 800.1 (c) *Timing* states:

The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit agency official from conducting or authorizing nondestructive project planning activities...The agency official shall ensure that the section 106 process *is initiated early in the undertaking's planning*, so that a broad range of alternatives may be considered during the planning process for the undertaking. (NHPA, 54 U.S.C. § 306108). [emphasis supplied].

The OST contend if the Converse County Oil and Gas Project FEIS proceeds to a ROD and is permitted to go forward without consultation, and not addressing concerns of OST and other tribes, a tribal CRM firm will not be able to conduct a survey in a timely manner; and what will be lost is consultation on the identification phase of land survey(s) requirement contained in (36 CFR § 800.2 (C) (2) (ii) & (D)). BLM staff may contend that consultation was initiated with THPO's since 2014 but have not produce any evidence to the contrary. When BLM was asked about this information why THPO consultation is not included in the DEIS to establish the record for the THPO's, BLM did not reply to this question. These following sections, quoting verbatim from the regulations for section 106 will all be lost to the inadequate process BLM staff had responsibility to in developing this DEIS.

36 CFR § 800.2 (C) (2) (ii) states that:

Section 101 (d) (6) (B) of the act requires the agency official to consult with an Indian Tribe...that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies *regardless of location* of such properties.” Such Indian tribe...shall be a consulting party.” [emphasis supplied].

36 CFR § 800.2 (C) (2) (ii) (D) states that:

When Indian Tribes...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 such Indian Tribe...in the section 106 process. 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*. [emphasis supplied].

36 CFR § 800.4 (*Identification of historic properties*) states that:

(a) “...the agency official shall:



{2} Review existing information on historic properties within the *area of potential effects*, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential *effects* on historic properties;

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties *including those located off tribal lands*, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe...may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites.” [emphasis supplied]

*(b) Identify historic properties.*

*“Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe...that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.”*

(1) Level of effort. *“The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects...”*

(2) Phased identification and evaluation. *“Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the*

*undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.” [emphasis supplied].*

In the beginning of this Letter of Protest in #2, the OST states “BLM Authorizing Officer Stephanie Connolly who was responsible for preparing the Draft Environmental Impact Statement (“DEIS”). The OST contends there was a breakdown in compliance.

The OST alleges that the BLM staff failed to assist the Authorizing Officer with providing information for the DEIS to comply with “*Coordination with the National Environmental Policy Act*” 36 CFR § 800.8 of the regulations. These requirements to the regulations were ignored or forgotten taking away the opportunity of OST and other tribes to engage in the NEPA process.

### **§ 800.8 Coordination With the National Environmental Policy Act.**

#### **(a) General principles:**

(1) Early coordination. Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet the requirements of the National Environmental Policy Act (NEPA). Agencies should *consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner.*

(2) Consulting party roles. SHPO/THPOs, Indian tribes, and Native Hawaiian organizations, other consulting parties, and organizations and individuals who may be concerned with the possible *effects* of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration.

(3) Inclusion of historic preservation issues. *Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects.* [emphasis supplied].

BLM produced three EIS’s, but they do not contain any analysis of project impacts on the cultural, religious, historical-prehistoric resources, burials and sacred sites of the OST and other tribes. All three documents are silent on these concern(s) of OST and other tribes. Because of this decision by BLM, these cultural, religious, historical-prehistoric resources, burials, and sacred sites have now been opened to potential destruction; and will not be identified in any tribal cultural survey and catalogued to be included for the FEIS. The appropriate process to include at this point is a proposing an alternative process referenced as a “Programmatic Agreement (PA) but BLM states BLM at this time are not developing a PA per 36 CFR 800 regulations.



The OST contends that by not including a PA that followed the regulation requirement in Subpart C, Program Alternatives, 36 CFR 800.14 into the FEIS, BLM cannot piece-meal the DEIS and cannot achieve a ROD. BLM cannot also use 36 CFR § 800.8 to comply with the “hard look” clause required in the NEPA process. Based on the lack of a PA attached to the FEIS, the FEIS is rendered “inadequate” and is determined “Deficient” by OST and “Objects” to the FEIS.

**The FEIS must identify mitigation measures sufficient to protect the OST and other tribes’ ownership of their cultural, religious, historic-prehistoric resources, burials and sacred sites that may be affected by the Converse County Oil and Gas Project. This will not be achieved because there is no listing in any of the (3) EIS documents of these concerns expressed by OST and other tribes.**

### **Responsibility of BLM Nation-Wide to Environmental Concerns**

Wyoming is one of the country’s top energy producers on public lands. BLM works in coordination with the State of Wyoming and has the responsibility to offer oil and gas lease sales. The BLM Wyoming manages more than 245 million acres of public land located primarily in 12 Western states, including Alaska. The BLM also administers 700 million acres of sub-surface mineral estate throughout the nation. In fiscal year 2018, the diverse activities authorized on BLM-managed lands generated \$105 billion in economic output across the country. This economic activity supported more than 471,000 jobs and contributed substantial revenue to the U.S. Treasury and state governments, mostly through royalties on minerals.

The OST recognizes that the BLM Wyoming has a huge responsibility to consider managing 245 million acres of public land located primarily in 12 Western states, including Alaska; and administers 700 million acres of sub-surface mineral estate throughout the nation. Because of this responsibility BLM is encouraged to consider the potential economic growth of Converse County and the state of Wyoming. Initiating the NEPA process it gives the public and tribal Nations the opportunity to express their concerns and express their treaty rights to this area.

This does not legally relieve the BLM with the mandates of NEPA because of the economic impact this project will have for Wyoming. OST points to the responsible authorizing Federal Officer Stephanie Connelly and the staff of the BLM Wyoming office for developing the DEIS to consider information collected during this EIS timeline but failed their duty; and BLM failed to list the required tribal consultation input outlining OST and other tribes *expected impacts* including the *environmental impacts* with this project.

In the FEIS it states that:

The purpose of this EIS is to evaluate potential impacts resulting from implementing future plans and applications related to this proposal; to facilitate the decision-making process to approve, approve with modifications, or disapprove the proposed project or project components based on an evaluation of the expected impacts; and to the extent possible, minimize or avoid environmental impacts.



OST contends that there are potentially thousands of un-recorded/unidentified cultural resources and burials within the entire area of CCPA. OST also objects to the five applicants listed as the Operator's Group, using only archaeology to control the identification process. OST and other tribes want a certified Indigenous Cultural Resource Management (CRM firm) to conduct the tribal identification phase survey(s) per 36 CFR 800 Subpart B, and § 800.3 -to – § 800.6 contained in the regulations.

The inevitable destructive and damage may well be perpetrated upon non-renewable cultural, religious, historic-prehistoric resources, along with the destruction of our sacred sites and burials because of the limiting the comments by OST and other tribes.

The OST alleges in this "Protest" that compliance to these sections presented here also are not visible within the DEIS, the SEIS and the FEIS. Based on our evidence to support a "Protest" of OST and other tribes, outlining the purposes stated here why this is "deficient," the FEIS cannot proceed to a Record of Decision.

**4.) The OST protests the failure of BLM to respond in the Draft EIS on the: (a) adverse impacts to the area affected by the Converse County Oil and Gas Project that are Sioux Nation Treaty lands under the 1868 and 1851 Fort Laramie Treaties. Executive Order 13175 prohibits the BLM from violating the Fort Laramie Treaties; and (b) impacts on Treaty rights and hunting and fishing rights, in violation of Executive Order 12898 on Environmental Justice.**

**(a) Historical and present-day structure of the Sioux Nation (Oceti Sakowin)**

The Sioux Nation (also known as the Oceti Sakowin) is comprised of seven divisions: (1) Mdewakantonwan; (2) Sissetonwan; (3) Wahpe'kute; (4) Wahpetonwan; (5) Ihanktonwan; (6) Ihanktonwanna; and (7) Titunwan (Teton). *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147, 162 (1970). Divisions numbers (1) through (4) are collectively known as eastern Sioux or Santee Sioux.

The Teton Division is comprised of seven distinct, sovereign bands: (1) Blackfeet; (2) Brule; (3) Hunkpapa; (4) Minneconjou; (5) No Bows; (6) Oglala; and (7) Two Kettle. The members of these bands currently reside generally on the following reservations in South Dakota:

Sihasapa (Blackfeet)	Cheyenne River and Standing Rock Reservations
Sicangu (Brule)	Rosebud and Lower Brule Reservations
Hunkpapa	Standing Rock Reservation
Hohwuju (Minneconjou)	Cheyenne River Reservation
Itazipco (No Bows)	Cheyenne River Reservation
Oglala	Pine Ridge Reservation
Oohenunpa (Two Kettle)	Cheyenne River Reservation

The Sioux Tribe of the Fort Peck Reservation also includes Hunkpapa, Cut Head Dakota and members of various Teton bands.

The tribes that are signatory to the 1851 Fort Laramie Treaty include only the Yankton and Teton Divisions of the Sioux Nation. *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147 (1970) (The "Sioux or Dahcotah Nation" with which the United States negotiated at Fort Laramie and in which title was recognized by the Treaty of September 17, 1851, included the Teton and Yankton divisions of Sioux. Neither the Yanktonais division, nor any of the four eastern divisions were included in the term "Sioux or Dahcotah Nation").

So, today the Sioux tribes who have rights to the Converse County, Wyoming area of the 1851 Sioux Treaty territory are the Fort Peck Sioux Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Lower Brule Sioux Tribe, Rosebud Sioux Tribe, Oglala Sioux Tribe, and the Yankton Sioux Tribe.<sup>12</sup> The 1851 Treaty "recognized" the underlying aboriginal Indian title of these tribes to the 1851 Treaty area.

**(b) Converse County is unceded 1851 Sioux Treaty lands.**

From a legal perspective, it cannot be disputed that the Teton and Yankton Sioux were signatories to the 1851 Treaty, and that Article 5 of the treaty described 60 million acres of territory that included Converse County as Sioux territory.<sup>13</sup> 24 Ind. Cl. Comm. at 147. And that the 1851 Treaty recognized Sioux bands underlying aboriginal title to the area.

And it also cannot be disputed that Article 5 of the 1851 Treaty also contained the following language in regards to Sioux hunting, fishing and travel rights:

*It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described. [emphasis supplied].*

What this meant was that, even though the 1851 Treaty recognized the Little Big Horn River and Yellowstone River areas as Crow territory and the Republican Fork of the Smokey Hill River as Cheyenne territory, the Sioux bands still reserved the right to hunt, fish, and pass over those areas. This included the area east of the summits of the Bighorn Mountains and the Yellow Stone River territory.<sup>14</sup>

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<sup>12</sup> Several of the historic Sioux bands reorganized under Section 16 of the 1934 Indian Reorganization Act (IRA), 25 U.S.C. 5123. For example, the Minneconjou, Now Bows, Blackfeet and Two Kettle bands reorganized as one tribe called the Cheyenne River Sioux Tribe under the IRA. The Upper Brule band reorganized as the Rosebud Sioux Tribe and Oglala Band reorganized as the Oglala Sioux Tribe. The reorganized tribes still retain all their treaty rights under 25 U.S.C. §§ 71 and 5128.

<sup>13</sup> Article 5 of the 1851 Treaty described the Teton and Yankton territory as follows: "commencing at the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork 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 head-waters of the Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning."

<sup>14</sup> The words "do not abandon or prejudice any rights or claims they may have to other lands" in Article 5 of the 1851 Treaty included underlying aboriginal title claims to Crow or Cheyenne 1851 Treaty lands that the Sioux bands used and



**(c) The Powder River War of 1866-1868**

Unconsented encroachments on the 1851 Treaty territory by the United States and its citizens resulted in the Powder River War of 1866-1868 between the United States and the Teton bands. Peace was concluded between the United States and the Teton bands by treaty on April 29, 1868 (15 Stat. 635). The 1868 Treaty provided for a mutual demobilization without terms of surrender on either side.

**(d) The 1868 Fort Laramie Treaty**

Also, the 1868 Treaty re-recognized the right of the Sioux bands to hunt in the 1851 Treaty area that was described as “unceded” territory land under Article 16 of the Treaty. Articles 11 recognized the rights to hunt in the Article 16 unceded territory north of the North Platte River. The Article 16 unceded territory included the Crow 1851 Treaty territory east of the summits of the Bighorn Mountains and the Yellow Stone River territory as long as there were buffalo there to justify a chase. In other words, the Sioux retained an expanded hunting right to hunt in both of the unceded Sioux and Crow 1851 treaty territories under Articles 16 and 11 of the 1868 Treaty.

**(e) Effect of Article 1 of the 1877 Black Hills Act on Converse County**

Then Article 1 of the 1877 Black Hills Act (19 Stat. 254) not only confiscated the Black Hills in violation of the three-fourths adult male signatures requirement in Article 12 of the 1868 Treaty it also provided that “and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including the privileges of hunting; and article 16 of said treaty is hereby abrogated” It is the purported “cession” of the Converse County area and the abrogation of Article 16 of the 1868 Treaty that opened Converse County up to non-Indian homesteading, and the current exploitation of 1851 Treaty tribes mineral resources.

**(f) Indian Claims Commission findings in Docket 74**

In 1976, the ICC concluded its evaluation of the Sioux 1851 territory that included Converse County in Docket 74 and awarded monetary compensation for the “cession” of the territory under Article 2 and 11 of the 1868 Treaty. See *Sioux Tribe v. United States*, 38 Ind. Cl. Comm. 485, 485-86, 530 (1976). Then, the ICC rendered its final decision on the merits, land valuation and offsets. *Sioux Tribe v. United States*, 42 Ind. Cl. Comm. 214 (1978).

The question of off-sets against the monetary award came before the ICC on a motion filed by the Docket 74 Sioux tribes for “an order that no offsets, either payments on the claim or gratuities, be

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occupied “for a long time.” *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419 [1970]; *Turtle Mountain Band v. United States*, 23 Ind. Cl. Comm. 315 (1970) (exclusive use and occupation “for a long time” by a tribe is sufficient to give aboriginal title”).



deducted” from the award.” Id., 42 Ind. Cl. Comm. at 214. The ICC then found that “[i]n determining whether certain payments made by the United States are consideration for Indian lands the Commission must look to see what the parties agreed to” in the 1868 Treaty. Id., 42 Ind. Cl. Comm. at 216.

After examining the history behind the Sioux Docket 74 claim, the ICC found that:

The Indian Peace Commission presented the proposed treaty to the Sioux bands in a series of councils held in the spring of 1868. \* \* \* At these councils, after hearing an explanation of the terms of the treaties, the Sioux Generally voiced these sentiments; . . . 2 – they were unwilling to cede any of their lands; . . . [emphasis supplied].

Sioux Tribe v. United States, 42 Ind. Cl. Comm. At 224.

The ICC further found that:

From this recitation it is clear that, based on the presentation of the United States negotiators, the Indians cannot have regard the 1868 Treaty as a treaty cession. Nowhere in the history leading up to the treaty or in the negotiations themselves is there any indication that the Untitled States was seeking a land cession or that the Sioux were willing to consent to one. On the contrary, the evidence is overwhelming that the Sioux would never have signed the treaty had they thought they were ceding any land to the United States. \* \* \* Thus, the context of our inquiry, any payments made by the United States cannot be construed as consideration for the lands ceded. [emphasis supplied].

Sioux Tribe v. United States, 42 Ind. Cl. Comm. at 226.

In reaching that determination, the ICC found that the historical evidence indicates that:

- (1) The Indians would fight to the death to retain the Powder River country, 42 Ind. Cl. Comm. At 241;
- (2) Two Lance, a Two Kettle, indicated that his people did not want to give up their land, Id. at 241;
- (3) One Horn stated that the Sioux would never cede their country, Id. at 248;
- (4) Sitting Bull announced that he had no intention of selling any land to the whites; Id. at 249;
- (5) General Sanborn added that the government understood “when you tell us that you don’t want to receive any present, that you don’t wish to be thought of as selling your land. We are not going to give you the goods in exchange for any land . . . .”; Id. at 251; and
- (6) After the terms concerning the extent of Sioux territory and the provisions keeping out white people were read to him, Red Cloud finally signed the treaty, Id. at 252.

Then, the ICC made this surprising conclusion:

[W]hat ever the intentions of the signatory parties, the 1868 Treaty did in fact effectuate a cession. \* \* \* The history of this case makes it clear that the treaty was an attempt by the

United States to obtain peace on the best terms possible. ***Ironically, this document, promising harmonious relations, effectuated a vast cession of land contrary to the understanding and intent of the Sioux. . . .*** [T]he defendant may not offset any part of the cost of these goods and services as payments on plaintiffs' claim for compensation. [emphasis supplied].

*Sioux Tribe v. United States*, 42 Ind. Cl. Comm. at 229.

**(g) The United States offer to the Docket 74 Sioux tribes to settle Docket 74**

In 1980, the Court of Claims remanded Docket 74-A to its trial division (United States Claims Court), since the life of the Indian Claims Commission terminated in 1978 and all pending cases in the ICC were transferred to the Court of Claims. The Claims Court determined on remand that the only issue remaining in the case concerned the amount of offsets to be allowed against the \$43,949,700 land valuation award. The United States made an offer to the tribal claims attorneys in 1978 to settle the offset issue in docket 74-A for \$4,200,000. The attorneys accepted the offer with conditions. The conditions were rejected by the United States, but the original offer was left open. The claims attorneys subsequently recommended acceptance of the offer to the Sioux tribes. See *Cheyenne River Sioux Tribe v. United States*, 806 F.2d 1046 (Fed. Cir. 1986). The Sioux tribes rejected the offer and demanded (among other things) the return of all federal lands to the 48 million acre area.

In 1983, the United States renewed its offer to settle the offset issue in Docket 74. The Sioux tribes refused to consider the offer. The Claims Court then ordered the Sioux Tribes' counsel to formally present the settlement offer to the tribes, and further directed the tribes, through their governing bodies, to consider and act upon the offer. *Sioux Tribe of Indians v. United States*, 3 Cl. Ct. 536 (1983).

In 1983 and 1984, the Oglala Sioux Tribal Council passed two resolutions to withdraw from Docket 74 because it did not want to be a party to the U.S. Government's perpetuation of fraud on its own tribal members. Resolutions Nos. 83-160 and 84-47. The Claims Court and later the Federal Circuit Court of Appeals on appeal would not allow OST to withdraw from the case.

In 1985, the Claims Court entered an order implementing the government's settlement offer of \$39,749,000 as its final judgement and terminated Docket 74. *Sioux Tribe of Indians v. United States*, 8 Cl. Ct. 80 (1985). The court concluded that Docket 74 had become "an uncontrolled quagmire" and that "[t]he simple fact that four of the reservation tribes are refusing to accept any settlement or award of this court, which does not include the return of their land, is indicative of the plaintiffs [sic] refusal to comprehend, after 35 years of litigation, that this Court can only award money judgements. The OST appealed the Claims Court's decision terminating Docket 74 to the US Court of Appeals for the Federal Circuit.

In 1986, the Federal Circuit held that the claims court improperly imposed upon the parties a settlement offer to which they had not consented, vacated the \$39,749,700 award, and remanded the case to the Claims Court "for further proceedings in accordance with this opinion." *Cheyenne River*

*Sioux Tribe v. United States*, 806 F.2d 1046 (Fed. Cir. 1986). The Federal Circuit made a suggestion to the U.S. attorney and claims attorneys on how to bring closure to Docket 74:

"In vacating the judgment of the Claims Court and remanding for further proceedings, we are not suggesting that a complete trial on all of the offset issues will be required ...[T]he parties may be able to stipulate the total dollar amount of various categories of offsets to which the government is entitled. *If the parties can so stipulate, this may be action that counsel for the Sioux Tribe can take as part of the normal conduct of litigation without the necessity for obtaining the approval of their clients* (emphasis supplied). *Id.* [emphasis supplied].

In 1987, the OST filed a Petition for a Writ of Certiorari with the United States Supreme Court to review the final decision of the Federal Circuit. Even though the OST prevailed in getting the Federal Circuit to vacate the Claims Court's decision terminating Docket 74, the OST requested the Supreme Court to review the Claims Court's holding that Article 2 of the 1868 treaty effectuated a cession of Sioux Territory. The U.S. Supreme Court denied the OST's Petition for a Writ of Certiorari. *Oglala Sioux Tribe v. United States*, 107 S. Ct 3184 (1987).

After the Supreme Court denied the OST's Petition for a Writ of Certiorari, the attorneys for the US government and the Sioux Tribes filed a stipulation of facts "regarding the offsets of the government in this case" and a joint motion "to enter Judgment in accordance with the Stipulation of Facts." The attorneys stipulated to \$3,703,892.98 in government offsets, and further stipulated that upon approval of the stipulation by the court, "A final judgment may be entered in the Sum of \$40,245,807.02." Both the stipulation and joint motion were signed by the OST claims attorney on behalf of the Sioux tribes *Oglala Sioux Tribe and Rosebud Sioux Tribe v. United States*, 862 F2d 275 (Fed. Cir 1988).

The Claims Court subsequently entered a final judgment that "plaintiff [Sioux tribe] recover from the United States the sum of \$43,949,700 less stipulated offsets of \$3,703,892.98 for a net amount of \$40,245,807.02." *Id.* .

On September 28, 1987, the Oglala Sioux Tribe and Rosebud Sioux Tribe filed a motion for relief from judgment on the basis that "the attorneys who appeared on behalf of the plaintiffs and agreed to the stipulation and entry of judgment took these actions without notice to or approval of plaintiffs as required by law." The Claims Court denied the motion. *Id.*

In 1988, the Federal Circuit affirmed the Claims Court's denial of the OST and Rosebud Sioux Tribe's motion for relief from judgment. *Id.* In a dissenting opinion, Judge Newman stated that:

The entry of judgment is surely not a routine 'evidentiary stipulation' such as is encountered in day to day trial management: not only because the stipulation disposes of some 3.7 million dollars in moneys previously adjudged to be due the Sioux Indians; but because counsel for both sides knew that since at least 1979 tribes representing the majority of Sioux Indians had given instructions contrary to the settlement. The record contains two resolutions of the Oglala Sioux Tribal Council informing counsel that it no longer sought money damages, but wanted to pursue legal and legislative strategies to gain return of ancestral lands. These resolutions also directed counsel to have the Oglala Sioux Tribe dismissed from this litigation...



A lawyer cannot be authorized by a court to make a settlement and bind the client contrary to the client's wishes. Nor can either the court or the United States ignore the tribes' several attempts to discontinue Mr. Lazarus' representation. The court does not discuss the asserted violation of 25 U.S.C. 81.

In light of this extended history, the Claims Court's acceptance of the Stipulation of Facts and the grant of the Joint Motion to Enter Judgment is incongruous; and its denial of appellants' motion for relief [from judgment] under Rule 60 (b) is in plain error, in light of the undisputed assertion that they were given no prior notice of the settlement. Id.

In 1989, Assistant Secretary of the Interior for Indian Affairs issued a report entitled "Results of Research Report of Judgment Funds to the Sioux Tribe of Indians in Docket 74 before the United States Claims Court" to the two Bureau of Indian Affairs Area offices serving the Docket 74 Sioux tribes. The Report" contained the following language regarding distribution of the \$40,245,807.02 award:

The Act of October 17, 1973, as amended, requires that we submit a Secretarial Plan to Congress within one year from the date of appropriations of the funds... In this case, the Secretarial Plan must be submitted to Congress on or before June 4, 1990. Following a 60-day Congressional review period, the Secretarial Plan will become effective, if a joint resolution of disapproval is not passed by Congress. The funds will then become available to the beneficiary entities. *If we do not meet the December deadline and if we do not submit a Secretarial Plan within the specified One Year period, as has occurred in the case of Docket 74-B, legislation will be required to provide for the use of the funds.* [emphasis supplied].

Since no plan was adopted by the Sioux bands prior to the June 4, 1990, deadline, the funds cannot be distributed without new legislation authorizing the distribution of funds. In the meantime, the \$40,245,807.02 award (minus 10% attorney fees) has been deposited in interest bearing accounts by the secretary of the interior. And the OST has rejected the Docket 74 monetary award since 1989.

The BLM is hereby put on both actual and constructive notice that the OST has never ceded its 1851 Treaty lands or mineral rights in Wyoming, and has rejected the monetary award in Docket 74 since 1983, and still claims ownership of all lands, minerals, water and other natural resources within the Article 16, 1868 Treaty unceded territory in Wyoming, that includes all of Converse County, and also protests the approval of the FEIS for the Converse County Oil & Gas Project on this basis. The OST has exhausted all of its federal judicial remedies in Docket 74, and its claims to all lands, minerals, waters and other natural resources will remain until they are resolved through mutual agreement that is ratified by congressional legislation.

#### **10.) Final EIS section 3.2.3.4: Tribal History Overview**

The FEIS section 3.2.3.4. contains erroneous language titled "Sioux" and deliberately disenfranchise the Lakota to Unci Make (Grandmother Earth) and changes the presence and occupation of the Lakota/Dakota/Nakota of Oceti Sakowin (Seven Camp Fire People) attempting to change the Lakota narrative on who we are as a people and where the Lakota/Dakota/Nakota

originated. These individuals making this statement (Kaelin and the Pikes Peak Society 2008) cannot justify their position when the archaeological record of Converse County tells a different story...of human occupation within the areas in Converse County “well over 10,000 years.” That refers to the Indigenous populations still within this area.

“Our creation story of the Lakota tells us we originated from the southern Black Hills coming from Wind Cave” (Johnson Holy Rock, Reginal Cedar Face 1976, Members Black Hills Sioux Nation Council). At this meeting with the elders, Vine Deloria Jr. stated “because the anthropologists and archaeologist want to control our story where we originated they came up with this silly notion that we came from North and South Carolina and migrated to the Midwest and eventually into the Black Hills area,” which Vine Deloria Jr. stated was false. This was some of the reasons that moved him to make it his lifetime goal to straighten out the academic record. “It was the opposite, the Lakota and Dakota moved from the Black Hills region outward, still holding a continuous presence and control of the Black Hills area and moved out seeking and discovering other Indigenous people as they moved into the cardinal directions away from the Black Hills (Vine Deloria Jr. 1976).” We understood because we encountered other Indigenous people in all directions and the presence of our language remained there.

Leonard Little Finger, a Lakota spiritual leader told about his family’s spiritual connection to the Black Hills for the past 500 years as follows:

In 1883, my grandfather, Saste, was a child of seven years. With his parents, he traveled in a group into the Black Hills in South Dakota for a sacred prayer journey to Washun Niye, *a site from which Mother Earth breathes*. \* \* \* My grandfather and I are from a sub-band of the Teton, a member of the Nation of the Seven Council Fires. We are called the Mniconjou, or People Who Plant Near the Water. *In the 1500s, one of our villages was the location of present day Rapid City along the streams of Mniluzahan Creek, or Rapid Creek, which is today's northern gateway to the Black Hills of South Dakota. Our family has had a spiritual relationship with this special land for over 500 years.*<sup>15</sup>  
[emphasis supplied].

Pete Catches who described the Sacredness of the Black Hills to the Lakota people in this way:

**To the Indian spiritual way of life, the Black Hills is the center of the Lakota people. There, ages ago, before Columbus traveled over the sea, seven spirits came to the Black Hills. They selected that area, the beginning of sacredness to the Lakota people.** Each spirt brought a gift to the Lakota people. Our people that have passed on, their spirits are contained in the Black Hills. This is why it is the center of the universe, and this is why it is sacred to the Oglala Sioux. In this life and the life hereafter, the two are together.<sup>16</sup>

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<sup>15</sup> Little Finger, Leonard, We Walk On Our Ancestors: The Sacredness of the Black Hills (Cultural Survival Quarterly Magazine (March, 2014)

<sup>16</sup> Gonzalez, Mario, “The Black Hills: The Sacred Land of the Lakota and Tisistsistas,” Cultural Survival Quarterly, p. 62 (Winter, 1996).



Our Elders have a continuous repeating memory of the knowledge of the Black Hills and surrounding area that includes Converse County in Wyoming long before statehood. This statement(s) in the Draft EIS and FEIS referencing section 3.2.3.4 is not correct and must be eliminated.

The Oglala Sioux Tribe along with other Sioux Tribe, request again a government-to-government consultation meeting on certain sections of the FEIS; If the only purpose of the language contained in this FEIS is to change history of a people it will not go unchallenged. This ethnocentric approach went out the door in the 1990's and the language in this section is one example of the concern OST has when someone wants to dis-possess us from our world view using discretionary verbiage and challenges our collective memory of our land included in Converse County.

The following language is taken out of the FEIS which states in part:

*"Sioux  
The Sioux are Siouan language speakers who may have originated in North Carolina but were first historically documented in 1640 in Minnesota (Kaelin and the Pikes Peak Society 2008) ...."*

The OST responded to this erroneous and speculative comment on pgs. 3-4 and 22-23 herein.

#### **11. Supporting Documentation of Lakota Presence**

The Oglala Sioux Tribe provided comments in August 30, 2018 in another BLM - NEPA Environmental Assessment comment period for the "Anchulz Oil and Gas Project (AOGP) which was in Converse County, Wyoming. The Oglala Sioux Tribe again in this EA had to defend against the BLM consultants attempt to erase the Lakota/Dakota presence in Converse County by challenging tribes to justifying their connection to the Black Hills, their creation story and the areas surrounding the Black Hill.

*The Heritage Resources and Native American Religious Concerns and Traditional Cultural Properties* for the Anchulz Oil and Gas Project EA states in part the following:

*The EA lists the area as "over 10,000 years of human occupation has been documented throughout the region." It goes on to say, "the prehistoric period encompasses the indigenous Native American occupation of the region." Id. at Section 3.5.*

These statements in the EA put the tribes, specifically the Lakota/Dakota, within the Converse County Wyoming area, in the prehistoric period and this alone carries legal weigh in the environmental review process to allow Indian tribal governments to not only have involvement in the NEPA process as a cooperating agency but also having a significant role in the identification of "historic properties of religious and cultural significance" (TCP's) to Indian tribes (Section 101 (d) (6) (B) of NHPA). This longevity of influence and occupation should provide Indian tribes particularly Oglala Sioux Tribe with involvement in resolving any potential



adverse effects to “historic properties of religious and cultural significance, burials, disposition of human remains and TCP’s.

The AOGP (EA) goes on to reveal with scientific data the approximate age of the area that includes stone feature(s), these features are specific to the Lakota/Dakota in which we are the only people who can claim association and attachment to them. This section states in part:

*These inventories recorded primarily prehistoric sites with elements such as lithic scatters, hearths, fire altered rock, and stone features...There are no historic sites of importance noted. Many sites remain unevaluated for inclusion in the National Register of Historic Places.*

*This area where these sites are located in the Anchulz Project APE, are very ancient and considerations must be provided by BLM how the Oglala Sioux Tribe and their THPO remain included in the process when an entity such as Anchulz or any other oil company want to lease, develop through mineral extraction Federal minerals regardless if these minerals are below private lands. Also, what is below are potential discoveries of human remains.*

*It cannot be over-stated by Oglala Sioux Tribe and other Oceti Sakowin bands that these burials belong to the Lakota and Dakota because for example, the Power River Wars between 1866 to 1868 commonly referred to as the Red Cloud wars also occurred in this area. Not all belong to the “allies” of the Lakota and Dakota people. Resolving the issue of human remains is missing in the EA and not addressed to the satisfaction of the Oglala Sioux Tribe. Because the EA does not state a Programmatic Agreement (PA) will be developed, the inadvertent discovery of human remains is a high probability and must be addressed to the satisfaction of the tribes. [emphasis supplied].*

The OST will continue to raise these very same concerns in every future NEPA document and is the very reason we share these comments again. These were in previous NEPA reviews as provided with the information in another EA. BLM may consider this as irrelevant and not a part of this review but OST and other tribes continue to be repetitious in stating our position on these erroneous positions of individuals being referenced in NEPA documents for Federal agencies, and OST protests this continuous attacks on our existence within the Great Plains and within the Powder River countries and other areas identified in our treaties.

**12. To further support our argument with Section 3.2.3.4 we list the following:**

Sioux aboriginal title to Converse County. In Section 3.2.3.4 Tribal History Overview (page 3.2-29 of the FEISJ), states in part that:

The Sioux are Siouan language speakers who may have originated in North Carolina but were first historically documented in 1640 in Minnesota (Kaelin and the Pikes Peak Society 2008). \* \* \* After their enemies, the Chippewa, obtained firearms from Canadian traders in the 1700s, the Sioux moved westward to the Black Hills of western South

Dakota \* \* \* By the 1830s the Oglala and Brulé moved into eastern Wyoming (Deaver 1996), pushed west by EuroAmerican settlers.

Merriam-Webster on-line dictionary defines the word “Siouan,” as (1) an American Indian language family of central and southeastern North America, and (2) a member of any of the peoples speaking Siouan languages.<sup>17</sup> Tribes belonging to the Siouan linguistic stock in the Upper Missouri River watershed area include the following: Sioux (Dakota/Lakota/Nakota); Crow; Mandan, Hidatsa; Winnebago; Ojibwa; Osage; Iowa; Missouri; Kansas; and others.

The origin and migration theory of the Sioux Indians by historians such as Kaelin, Pikes Peak Society and Deaver is based primarily a paradigm created by James Mooney in his manuscript “The Siouan tribes of the East” (Mooney, 1895).<sup>18</sup> The OST protests BLM’s reliance on the Sioux origin and migration theory as included in the FEIS since it is based mostly on speculation and conjecture and contradicts other origin theories of other Siouan speaking people like the Mandans:

Ethnologists and scholars studying the Mandan subscribe to the theory that, like other Siouan-speaking people (possibly including the Hidatsa), they originated in the area of the mid-Mississippi River and the Ohio River valleys in present-day Ohio. \* \* \* *This migration is believed to have occurred possibly as early as the 7th century but probably between 1000 CE and the 13th century, after the cultivation of maize was adopted.*<sup>[13]</sup> It was a period of a major climatic shift, creating warmer, wetter conditions that favored their agricultural production.<sup>19</sup> \* \* \* *Later the Pawnee and Arikara moved from the Republican River north along the Missouri River.* [emphasis supplied].

This would place the Mandans, a Siouan speaking people, migrating to the Missouri River in 600 A.D. or 900-1200 A.D. Again, origin theories of Siouan speaking people by white historians are based on speculation and conjecture.

The FEIS should have included Lakota spiritual leaders, like Pete Catches who described the Sacredness of the Black Hills to the Lakota people in this way:

To the Indian spiritual way of life, the Black Hills is the center of the Lakota people. There, ages ago, before Columbus traveled over the sea, seven spirits came to the Black Hills. They selected that area, the beginning of sacredness to the Lakota people. Each spirit brought a gift to the Lakota people. Our people that have passed on, their spirits are

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<sup>17</sup> Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/Siouan>. Accessed 21 Aug. 2020.

<sup>18</sup> Mooney, James. 1895. “The Siouan tribes of the East.” Bureau of American Ethnology Bulletin. 22:1–101.

<sup>19</sup> Hodge, Frederick Webb, Ed. *Handbook of American Indians North of Mexico*. Bureau of American Ethnology and the Smithsonian Institution, p. 796 (1906), (Reprinted in New York: Rowman and Littlefield, 1971. ISBN 1-58218-748-7).

contained in the Black Hills. This is why it is the center of the universe, and this is why it is sacred to the Oglala Sioux. In this life and the life hereafter, the two are together.<sup>20</sup>

The OST protests the inclusion of the Sioux origin and migration theory from North Carolina in the FEIS on the basis that it is based on speculation and conjecture. The origins of the Sioux in the FEIS should have been based on the history and testimony from Lakota spiritual leaders such as Pete Catches.

The Teton and Yankton Sioux bands did not migrate from North Carolina to Minnesota. This is complete nonsense. Nor did the Teton and Yankton Sioux get pushed out of Minnesota by the Chippewa in the 1700s; they were already in Dakotas and the Black Hills area prior to the 1700s.

Charles Pierre Le Sueur, a French fur trader, visited the Upper Mississippi - Missouri River country as early as 1683, and the Missouri River Basin in what is now central South Dakota around 1699. When he returned to France in 1701, he had a French geographer named De l'Isle make a map of areas he visited including central South Dakota. The map shows Teton and Yankton residing on the east side of the Missouri River in the late 1600s. A copy of the De l'Isle map is attached hereto as Exhibit "E" and incorporated herein by reference.

In this regard, it should also be kept in mind that Siouan speaking Mandans were already residing along the Missouri for 1,000 years before Le Sueur visited the Missouri River in the late 1600s. The Teton Sioux, as shown on the Le Sueur/De l'Isle map, were already residing along the Missouri River many years prior to when the Yankton Sioux settled at the confluence of the James River and Missouri River in South Dakota. So, it is possible that the Sioux, like the Siouan speaking Mandans, were probably already residing along the Missouri River in present day South Dakota several hundred years before Le Sueur's visit to the Missouri River. This would even be before the Arikara came up the Missouri River from the south.

Aside from the inconsistent speculation and conjecture of white historians on when the Sioux occupied the Missouri River, Black Hills and Converse County areas, from a legal perspective, it cannot be disputed that the Teton and Yankton Sioux were signatories to the 1851 Treaty, and that the treaty defined 60 million acres of territory that included Converse County as Sioux territory. And that the 1851 Treaty recognized underlying Sioux aboriginal title to the areas. And it cannot be denied that the 1851 Treaty also contained the following language at the end of Article 5:

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

What this meant was that, even though the 1851 Treaty recognized the Little Big Horn River and Yellowstone River areas as Crow territory, the Sioux still reserved the right to hunt, fish, and pass over those areas under Article 5 of the Treaty. Also, the 1868 Treaty re-recognized the right of the Sioux bands to hunt in those areas under Articles 11 and 16 of the Treaty.

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<sup>20</sup> Gonzalez, Mario "The Black Hills: The Sacred Land of the Lakota and Tisistsistas," Cultural Survival Quarterly, p. 62 (Winter, 1996).



So, who “owns” the cultural resources, including rock features, in Converse County? The answer is simple. Converse County was identified as “unceded” Sioux territory under Article 16 of the 1868 Treaty. The Indian Claims Commission (ICC) considered it as unceded Sioux territory in Docket 74.

## 11.) Rights to Disposition of Native American human remains and objects

The Native American Graves Protection and Repatriation Act (NAGPRA) provides in part as follows:

### 25 U.S.C. §3002. Ownership states:

The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)-

- (1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or
- (2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony-
  - (A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
  - (B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
  - (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe-
    - (1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or
    - (2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects. [emphasis supplied].

First, the Oglala Sioux Tribe and other Teton tribes claim ownership under Section (a) (2) (B) above of all cultural resources, including rock features, and human remains associated with rock

features, as well as other cultural resources and burial sites since these items can be identified as Sioux.<sup>21</sup>

Secondly, The Oglala Sioux Tribe and other Teton tribes claim ownership under both Section (a) (2) (C) and (a) (2) (C) (1) above of all cultural resources, including rock features, and human remains associated with rock features, as well as other cultural resources and burial sites that can be identified as Sioux since Converse County was included in the 60 million acre territory recognized as Teton Sioux territory in the 1851 Treaty and in a final judgment of the ICC and Court of Claims in Docket 74. See *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577 (1965). (1851 treaty recognized title in the "Sioux or Dahcotah Nation" to approximately 60 million acres of territory situated west of the Missouri River)

Moreover, as noted above, the 1851 Treaty "recognized" aboriginal title of the Teton Sioux tribes over the 60-million-acre territory. The Final Report of the ICC (1978), p. 129, provides that 20 to 50 years seems judicially acceptable as "a long time" [to establish aboriginal Indian title under appropriate circumstances," citing *United States v. Seminole Indians*, 180 Ct. Cl. 375 (1968), and *Sac and Fox Tribe v. United States*, 179 Ct. Cl. 8 (1967). The Teton Sioux occupied the Converse County area long enough to establish aboriginal Indian title under the Seminole and Sac and Fox cases.

The BLM cannot ignore language in the 1851 and 1868 Treaties or NAGPA, or ICC and Court of Claims decisions, in the final EIS for the Converse County Oil and Gas Project. As trustee of the Oglala Sioux Tribe, BLM has a duty to include these items in the EIS. Accordingly, the OST respectfully requests that BLM, as the Tribe's trustee, to hold off on issuance of a ROD until after concerns in this Protest are resolved to the satisfaction of the OST and other 1851 Treaty signatory tribes.

Respectfully submitted,

Date: 8-31-20



Tom Poor Bear, Vice-President  
Oglala Sioux Tribe

cc: OST Land Committee  
OST Legal Department  
OST Natural Resource Department

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<sup>21</sup> The OST also claimed ownership of human remains and ownership rights to all Native American cultural resources excavated or discovered on federal or private lands in Converse County as asserted in Resolution No. 55XB, p. 6.

**ATTACHED OST DOCUMENTS SUPPORTING THIS PROTEST:**

1. Exhibit "A" – March 12, 2018 GPTWA letter of protest
2. Exhibit "B" – OST Executive Committee Resolution No. 18-55XB
3. Exhibit "C" – July 10, 2018 minutes from Pierre government-to-government consultations
4. Exhibit "D" - July 11, 2018 minutes from Pierre government-to-government consultations
5. Exhibit "E" – De l'Isle map



# **EXHIBIT "A"**

**(March 12, 2018 GPTWA LETTER OF PROTEST)**

**Peter Capossela, P.C.**  
*Attorney at Law*  
Post Office Box 10643  
Eugene, Oregon 97440  
541/505-4883  
pcapossela@nu-world.com

*Sent via electronic mail to –  
Wy\_CasperMail@blm.gov*

March 12, 2018

Bureau of Land Management  
Wyoming High Plains District  
2987 Prospector Drive  
Casper, Wyoming 82604-2968

Attention: Converse County Oil and Gas Project Environmental Impact Statement  
LLWYP06000  
1790  
DOI-BLM-WY-P060-2014-1035-EIS

Dear Bureau of Land Management:

I represent the Great Plains Tribal Water Alliance, Inc., a non-profit organization comprising the Standing Rock Sioux, Rosebud Sioux, Oglala Sioux and Flandreau Santee Sioux Tribes, working together to protect Treaty-based water rights in the Missouri River Basin. I write on behalf of the Board of Directors in reference to the *Converse County Oil and Gas Project Draft Environmental Impact Statement* (“Draft EIS”).

As described by BLM in the Draft 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.” (BLM, *Converse County Oil and Gas Project Draft Environmental Impact Statement*, p. 3.16-1). Thus, the Converse County Oil and Gas Project touches upon the very reason the Great Plains Water Alliance exists – to protect the Tribes’ valuable water in the Missouri Basin, as well as important sub-basins. Accordingly, I express the Alliance’s opposition to the preferred alternative in the *Converse County Oil and Gas Project Draft Environmental Impact Statement*.

### **The Converse County Oil and Gas Project Threatens Indian Water Rights**

Over forty years ago, the prominent Indian water rights scholar William H. Veeder presented testimony to a U.S. Senate committee on the impacts of energy development on Indian water. Veeder stated that “the energy crisis is truly an Indian crisis.” (*Missouri River Basin Indus. Water Mktg.: Hearing Before the Subcomm. on Energy Research and Water Res. of the Comm. on Interior and Insular Affairs*, 79<sup>th</sup> Cong. 141 (1975)). By promoting an extremely accelerated pace of development in the *Converse County Oil and Gas Project Draft EIS*, the BLM makes Veeder’s words ring true – Indian water is in jeopardy from unrestrained development in the Cheyenne River headwaters.

Under the Winters Doctrine, Indian Tribes possess water rights for all present and future beneficial uses to waters arising on, flowing through, bordering, and subsurface to the Reservation and Treaty lands. Water rights are Treaty rights, implicitly reserved in the Treaties in order for the Reservations to become permanent homelands for the Tribes. (*Felix S. Cohen's Handbook on Federal Indian Law* §19.93 (2011 ed.)). The Draft EIS contains no mention of the reserved water rights of the Great Sioux Nation to the Cheyenne River, even though its waters are potentially impacted by the preferred alternative.

The Cheyenne River is an extremely important water source for the Great Sioux Nation, and it flows into the Missouri River, the primary water source for the Water Alliance Tribes. The Oglala Sioux and other Tribes of the Sioux Nation possess reserved water rights to the Cheyenne River, downstream from the Converse County Oil and Gas Project. All of the Tribes of the Great Sioux Nation possess extensive water rights to the Missouri River main stem, of which the Cheyenne is a major tributary.

The Powder River is a tributary to the Yellowstone River, which flows into the Missouri River. The Powder River is also an important watershed for the Lakota. This area comprises the Tribes' traditional hunting grounds, and is unceded Treaty land of the Sioux. Under Article 16 of the Fort Laramie Treaty of 1868:

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, without the consent of the Indians... (15 Stat. 639).

Thus, the Sioux Nation enjoys extensive Treaty rights in the project area, including reserved water rights to the Missouri River and Cheyenne River downstream from the project area. Significantly, Indian water rights include the right to adequate water quality for all beneficial uses. "Upstream, non-Indian users may be required to limit their diversions as necessary to achieve or preserve the required quality of tribal water rights." (*Cohen's Handbook on Federal Indian Law* §19.93). In the *Draft EIS*, the BLM failed to consider the existence of downstream Tribal water claims to the Cheyenne River, and the potential adverse impacts to these waters that may result from the project.

In fact, the *Draft EIS* erroneously states "There are still substantial portions of the annual surface water volumes available for new uses in the... Cheyenne river drainage." (BLM, *Draft EIS*, p. 3.16-6). This statement appears designed to justify the significant upstream water diversions associated with the oil and gas project. Indian water claims in the Cheyenne River basin remain unresolved, and the BLM suggestion that there is substantial available water for non-Indian development conflicts with Indian water claims to the Cheyenne River.

Moreover, the preferred alternative poses a risk of contamination to the Cheyenne River and its headwaters, further jeopardizing Tribal water rights in the Cheyenne watershed. This is evidenced on page 3.16-16 of the Draft EIS: "Within the Northeast Wyoming River Basin, there are several streams in portions of Converse County that are also rated as high or medium-high



sensitivity because of the interaction with groundwater, including Antelope Creek, Dry Fork Cheyenne River, the confluence of Dry and Lightning creeks, and Box Creek.”

Thus, the groundwater is jeopardized by fracking and the injection of waste water, and the groundwater “interrelates” with surface water in the Cheyenne River headwaters. For these reasons, the *Draft EIS* violates the Winters Doctrine water rights of the Tribes of the Great Plains Tribal Water Alliance.

The *Draft EIS* makes clear that the project will have significant environmental impact in the Cheyenne River watershed. Table 4.16-3 identifies 36,585 acres of surface disturbance in the Cheyenne watershed that will be impacted by the preferred alternative.

The diversion of ground water for oil and gas development in this area is already considerable, with 12,400 acre-feet in current production. (BLM, *Draft EIS*, p. 3.16-23). Nevertheless, the *Draft EIS* fails to accurately describe the future water diversions that will be required for the Converse County Oil and Gas Project. It states on 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.”

The Converse County Oil and Gas Project would significantly accelerate oil and gas development and magnify the impacts in the affected water basins. A total of 5,000 new wells would be authorized. Consequently, based upon the oil companies’ estimate, the water requirements will range from 30,500 acre-feet to 61,500 acre-feet (5,000 wells multiplied by 6.1-12.3 acre-feet per well).

That is too wide of a range to accurately determine the impacts of the water diversions on the water resources in the affected area. The *Draft EIS* lacks sufficient data to determine the environmental impacts of the significant water withdrawals associated with the Converse County Oil and Gas Project. The Council on Environmental Quality regulations governing NEPA 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 *Draft 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.

Nevertheless, the BLM gives different estimates of water use on page 4.16-14. This section states, “Under Alternative B (the preferred alternative), 5,000 wells would be drilled over a 10-year period. Water for drilling operations primarily would be from groundwater sources and would be approximately 7,000 acre-feet per year or an average of 13.1 acre-feet per well.” (BLM, *Draft EIS*, p 4.16-14). On page 3.16-20 the BLM utilizes industry estimates of 61,500 acre-feet of ground water withdrawals over a 10-year period, and on page 4.16-14 the BLM estimates total water use to be 70,000 acre-feet. Thus, the BLM utilizes wildly different water diversion estimates in different parts of the Draft EIS.

Moreover, the BLM relied upon incomplete and outdated data on the groundwater resources. The *Draft EIS* states that “Groundwater flow in the entire CCPA (project area) is not well documented due to a lack of monitoring wells.” (*Id.* p. 3.16-15). There is considerable

reliance on an outdated study by Hochkiss and Levings published in 1986. That is inadequate for a baseline evaluation of impacts to groundwater.

Significantly, the location of points of diversion are not identified. The *Draft EIS* opines that “all water for the Project would be obtained from these 50 new wells.” (*Id.* p. 4.16-14). The BLM assumes that the wells would be “equally distributed” throughout the project area. *Id.* That unverified assumption leads to the conclusion of “isolated and very localized cones of depression” in the affected aquifers. (*Id.*). The conclusions relating to impacts on ground water resources are based upon unverified assumptions of the locations of the points of diversion, and therefore lack credibility.

In sum, the BLM totally ignores the existence of Indian water claims in the Cheyenne River watershed, and fails to disclose the potential impacts of contamination to Indian waters. The estimate of water use lacks credibility. There is insufficient information on the potential impacts to Indian water rights from the very high intensity development contemplated in the preferred alternative. The *Draft EIS* fails to disclose the impacts of the preferred alternative on Indian water rights, in violation of NEPA.

#### **The *Draft EIS* Fails to Accurately Evaluate the Impacts of Hydraulic Fracturing on Ground and Surface Water**

The *Draft EIS* fails to adequately evaluate the potential environmental impacts of water contamination and air pollution from hydraulic fracturing (fracking). It states on page 4.16-14,

(B)y 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. (*Id.* p. 4.16-14).

Thus, the BLM underestimates the percent chance of migration from a fracked well, and ignores the significant environmental risk posed by the injection of waste fluid.

The *Draft EIS* 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 blatantly 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/PSECementFailureCauseRateAnalysisIngraffea.pdf>).

Studies documenting groundwater contamination in close proximity to frack wells abound, but BLM ignores them. (E.g. Ingraffea (2012); Avner Vengosh et al., *A Critical Review of the Risks to Water Resources from Unconventional Shale Gas Development and Hydraulic Fracturing in the United States*, [www.pubs.asc.org/est](http://www.pubs.asc.org/est) (2014); U.S. Environmental Protection Agency, *Draft Investigation of Groundwater Contamination near Pavilion, Wyoming* (2011), [https://www.epa.gov/sites/production/files/documents/EPA\\_ReportOnPavilion\\_Dec-8-2011.pdf](https://www.epa.gov/sites/production/files/documents/EPA_ReportOnPavilion_Dec-8-2011.pdf)). In doing so, the *Draft EIS* contains erroneous conclusions that vastly underestimate the risk posed to groundwater, and, as groundwater interacts with surface water in the project area, to the Cheyenne, Platte and Powder Rivers.

Methane gas contamination is a significant concern, but is not properly evaluated by BLM. As reported by Vergosh, “reports of stray gas contamination in some unconventional shale gas development in the northeastern Appalachian Basin (U.S.) and Montney and Horn River Basins (Canada) may be associated with leaking of oil and gas wells.” (Vergosh, *Environ. Sci. Technol.* 2014, p. 8338). A Study by the National Academy of Sciences determined that average methane concentrations in domestic wells near fracking sites were 17 times higher than wells in inactive areas. (Stephen G. Osborn et al., “Methane Contamination of Drinking Water Accompanying Gas-well Drilling and Hydraulic Fracturing,” *Proceedings of the National Academy of Sciences* 108 no. 20, (May 17, 2011) <http://www.pnas.org/content/early/2011/05/02/1100682108.full.pdf+html>). The concentration of methane was found to be proportionate to the distance from the frack site.

A recent study evaluated the mobility of contaminants found in fracking fluids, and reached troubling conclusions. (Jessica D. Rogers et al., *A Framework for Identifying Organic Compounds of Concern in Hydraulic Fracturing Fluids Based on Their Mobility and Persistence in Groundwater*, [www.pubs.asc.org/est](http://www.pubs.asc.org/est) (2015)). The study found:

Of 996 organic fracturing fluid compounds identified by the U.S. Environmental Protection Agency and FracFocus for four states, data were available to perform an additional screening of 659 compounds for sufficient mobility and persistence to reach a water well under fast and slow groundwater transport scenarios. For the fast transport scenario, 15 compounds identified on at least 50 FracFocus reports were predicted to have an elevated exposure potential. (*Environ. Sci. Technol. Lett.* 2015, p. 158).

The backwater produced in fracking wells can contain frack fluid contaminants and naturally-occurring salts and radioactive substances from deep rock formations. The migration of produced waters has caused tremendous damage to surface and ground water.

The Environmental Protection Agency (EPA) issued a draft report in 2011, in response to concerns expressed by residents of Pavilion, Wyoming, with potential contamination of their drinking water wells from nearby fracking. EPA groundwater sampling confirmed the fears of Pavilion community members:



Detection of high concentrations of benzene, xylenes, gasoline range organics, and total purgeable hydrocarbons in ground water samples from shallow monitoring wells near pits indicates that pits are a source of shallow ground water contamination in the area of investigation. Pits were used for disposal of drilling cuttings, flowback and produced water. There are at least 33 pits in the area of investigation. (EPA 2011, p. 33).

A follow-up study by the U.S. Geologic Survey confirmed elevated levels of specific conductance, pH, methane, ethane and propane. (USGS, *Groundwater-Quality and Quality-Control Data for Two Monitoring Wells Near Pavilion, Wyoming*, p. 26 (2012)). Indeed, in Pavilion, the groundwater supplies for an entire community were polluted, with no feasible remediation. The health of farm animals was affected, with livestock suffering blindness and a high rate of stillborn births.

The Powder River valley is the historic and Treaty-protected hunting grounds of the Tribes of the Great Plains Tribal Water Alliance. The potential impacts of contamination to ground and surface water, and the wildlife that depends on this habitat, is significant, yet inadequately evaluated by BLM in the *Draft EIS*.

BLM totally ignored the experience in Pavilion. With respect to the contamination of groundwater from fracking fluids, BLM wrote:

(N)o impacts to usable waters from hydraulic fracturing would be expected... (D)ue to the physical constraints on fracture growth and regulatory requirements, there would be an extremely low risk of impacts to usable waters and the risk would not change because of the increased number of wells to be drilled. (*BLM Draft EIS*, p. 4.16-15).

Geophysical constraints are diminished by the fracking process itself – the injection of fracking fluids under extremely high pressure creates fractures and fissures, causing new pathways for the migration of contaminants. Indeed, Rogers et al. documented that numerous contaminants common in fracking fluid are mobile and persistent. The *Draft EIS* lacks sufficient data to support the finding of no risk to groundwater. Available studies raise concern with groundwater contamination from fracking fluids, and the experience of Pavilion bears this out.

To be sure, BLM points to no specific regulations that protect groundwater from fracking fluid. In fact, on December 29, 2017, BLM promulgated a Final Rule *rescinding* the modest regulations on fracking previously issued by the Obama administration. (82 Fed. Reg. 61924). The Energy Policy Act of 2005 exempts fracking operations from the Safe Drinking Water Act UIC requirements, and the industry has won exemption from the disclosure of the constituents of fracking fluid, as trade secrets. There are no “regulatory requirements” to protect groundwater from fracking fluids.

With respect to contamination from produced water, the *Draft EIS* states:

Impacts due to surface spills under Alternative B (the preferred alternative) still present a very small risk to groundwater (due to) the small volume of expected spills, the low spill rate, and the regulatory requirements to remediate spills of potentially hazardous materials. (BLM, *Draft EIS*, p. 4.16-15).

The *Draft EIS* discloses that the preferred alternative will result in the production of significant volumes of waste water. However, it does not disclose how the waste water will be disposed of or recycled. In fact, the report identifies “a potential shortage of injection capacity under Alternative B.” (*Id.* p. 4.16-16). Thus, “Evaporation ponds could provide excess disposal capacity as well.” (*Id.*)

The use of surface storage ponds could increase run-off and contamination. The ponds attract wildlife, which are already stressed by the current level of oil and gas development. The ponds also intensify harmful air emissions. As explained by Vengosh:

Spills or leaks of hydraulic fracturing and flowback fluids can pollute soil, surface water, and shallow groundwater with organics, salts, metals, and other constituents. A survey of surface spills from storage and production facilities at active well sites in Weld County, Colorado that produces both methane gas and crude oil, showed elevated levels of benzene, toluene, ethylbenzene, and xylene (BTEX) components in affected groundwater. (Vengosh, 2014, p. 8340).

Thus, there is extensive literature documenting concerns with ground and surface water pollution from fracking. The BLM ignored this in the *Draft EIS*, and accordingly the report lacks adequate analysis to support the preferred alternative. At the very least, the impacts of fracking are sufficiently controversial and in need of additional study, to justify a more realistic evaluation of the risk to ground and surface water. (40 CFR §§108.27(b)(4) & (5)). None of this was done by BLM. For these reasons, the no action alternative is required.

Very truly yours,



Peter Capossela  
Attorney at Law

cc: Board of Directors  
Great Plains Tribal Water Alliance, Inc.

## **EXHIBIT “B”**

**(Oglala Sioux Tribe Executive Committee Resolution No. 18-55XB)**



RESOLUTION OF THE EXECUTIVE COMMITTEE  
OF THE OGLALA SIOUX TRIBE  
(An Unincorporated Tribe)

RESOLUTION OF THE EXECUTIVE COMMITTEE OF THE OGLALA SIOUX TRIBE REQUESTING GOVERNMENT-TO-GOVERNMENT CONSULTATIONS WITH THE UNITED STATES BUREAU OF LAND MANAGEMENT AND THE UNITED STATES FISH AND WILDLIFE SERVICE ON THE FINDINGS OF THE DRAFT ENVIRONMENTAL IMPACT STATEMENT (EIS) FOR THE CONVERSE COUNTY (WYOMING) OIL AND GAS PROJECT.

OST authority to protect its tribal trust property

WHEREAS, the Oglala Band of the Teton Sioux is a sovereign band of Indians with attendant powers that reorganized the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" ("OST") by adopting the benefits of the Indian Reorganization Act ("IRA") of June 18, 1934, (25 U.S.C. § 5101 et seq.), and a Constitution and Bylaws under Section 16 of the Act, (25 U.S.C § 5123), and

WHEREAS, Article III, Section 1 of the Tribal Constitution provides that the governing body of the Oglala Sioux Tribe is the "Oglala Sioux Tribal Council," and

WHEREAS, the Tribal Constitution empowers the Tribal Council to:

1. "To negotiate with the Federal, State, and local governments, on behalf of the tribe, and to advise the representatives of the Interior Department on all activities of the Department that may affect the Pine Ridge Indian Reservation" under Article IV, Section 1 (a);
2. To protect and preserve the property, wild life and natural resources - gases, oil, and other materials, etc. - of the tribe . . ." under Article IV, Section 1 (m); and
3. "To adopt laws protecting and promoting the health and general welfare of the Oglala Sioux Tribe and its membership" under Article IV, Section 1 (w), and

The 1825, 1851 and 1868 Treaties

WHEREAS, the OST enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with (25 U.S.C. § 71) and (25 U.S.C. § 5128), including rights and privileges under the Treaty of July 5, 1825 with the Sioune and Oglala Tribes (7 Stat. 252), the Fort Laramie Treaty of September 17, 1851 (11 Stat. 749), and the Fort Laramie Treaty of April 29, 1868 (15 Stat. 635), and

WHEREAS, the following 1825 Treaty provisions are pertinent and are directly applicable to the Draft Environmental Impact Statement ("Draft EIS") for the Converse County (Wyoming) Oil and Gas Project:

1. Article 2 of the 1825 Treaty, which provided that the OST agreed that it "reside[d] within the territorial limits of the United and . . . claim[ed] their protection", and
2. The Article 3 of the 1825 Treaty, which provided that the United States "agreed to bring the OST "under their protection . . . .", and
3. Under Articles 2 and 3 of the 1825 Treaty, the OST became a protectorate nation of the United States and established the initial government-to-government and trust relationship between the OST and the United States, and

WHEREAS, since the ratification of the 1825 Treaty, the trust relationship between the United States and OST (and other Indian tribes) has been continuously recognized by U.S. Presidents and the U.S. Congress as follows:

1. In President Clinton's Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Tribal Governments), which provides in Sections 2 (a) that the "Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes . . . ." and in Section 3 (a) that "[a]gencies 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";
2. In Acts of Congress, including the Mni Wiconi Act of October 24, 1988, P.L. 100-516, 102 Stat. 2566, which acknowledged in Section 2. (a) (4) that "the United States has a trust responsibility to ensure that adequate and safe water supplies are available to meet the economic, environmental, water supply and public needs of the Pine Ridge Indian Reservation"; and
3. In federal court decisions, including *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d ,1094, 1100 (8<sup>th</sup> Cir. 1989) ("[t]he existence of a trust duty between the United States and an Indian or Indian tribe can be inferred from the provisions of a statute, treaty or other agreement, reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people"); and *Covelo Indian Community v. FERC*, 895 F.2d 581 (9<sup>th</sup> Cir. 1990) (all government agencies have

"fiduciary" responsibilities to tribes, and must always act in the interests of the beneficiaries), and

WHEREAS, Article 5 of the 1851 Treaty is pertinent and directly applicable to the Draft Environmental Impact Statement ("EIS") for the Converse County Oil and Gas Project as follows:

1. Article 5 described and acknowledged the ownership of the OST and other Teton Sioux and Yankton Sioux signatory tribes to a 60 million acre tract of territory, and fishing and travel rights, described as follows:

The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz: The territory of the Sioux or Dahcotah 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: thence up the north fork 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 head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning. \* \* \* *It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of . . . fishing or passing over any of the tracts of country heretofore described.*

2. All of Converse County, Wyoming, north of the North Platte River is located within the 1851 Sioux Treaty territory;
3. The "Sioux or Dahcotah Nation" with which the United States negotiated at Fort Laramie and in which title was recognized by the Treaty of September 17, 1851, included the Teton and Yankton divisions of Sioux, see *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147 (1970); and
4. The OST is one of seven Teton Sioux bands that are parties to the 1851 Treaty, and therefore has existing, unextinguished water and fishing rights within Converse County; and
5. Water rights, fishing rights and access rights, and the right to exercise such rights (among other rights) over property are classified as "usufructuary rights," but such OST's rights under the 1851 Treaty in Converse County, Wyoming should not be construed as an abandonment of the OST's underlying claims to



the 1851 Treaty territory in Wyoming as asserted and claimed by the OST in Indian Claim Commission Docket 74, and as articulated in part by Judge Newman's dissenting opinion in *Oglala Sioux Tribe and Rosebud Sioux Tribe v. United States*, 862 F2d 275 ([Fed. Cir. 1988]), and

WHEREAS, Article 2 of the 1868 Treaty is also pertinent and directly applicable to the Draft Environmental Impact Statement ("EIS") for the Converse County Oil and Gas Project as follows:

1. Article 2 established the Great Sioux Reservation in western South Dakota; and
2. The Pine Ridge was carved out of the Great Sioux Reservation by Section 1 of the Act of March 2, 1889, 25 Stat. 888; and
3. The Cheyenne River also abuts the Pine Ridge Indian Reservation and so the middle channel of the river where it abuts the reservation is located within the boundaries of the reservation.

OST water and fishing rights in Converse County, Wyoming

WHEREAS, the OST has rights (along with other 1851 Treaty signatory Sioux tribes) in the territory constituting Converse County, Wyoming, including but are not limited to, the following:

1. Existing, unquantified OST aboriginal water rights in the Cheyenne River that traverses Converse County, Wyoming from its headwaters to the South Dakota state line (and includes the interconnecting ground water system that supplies water to the river) based on exclusive use and occupation of the 1851 Treaty territory "for a long time," see, e.g., *Turtle Mountain Band v. United States*, 23 Ind. Cl. Comm. 315 (1970) (exclusive use and occupation "for a long time" by a tribe is sufficient to give aboriginal title);
2. Existing unquantified OST Winters Doctrine water rights in the Cheyenne River, which abuts the Pine Ridge Indian Reservation, to fulfill the present and future water needs of the reservation under the doctrine, including the right to use such water rights for beneficial uses that includes maintaining wildlife habitat, i.e., fishing rights and irrigation;
3. Existing, unextinguished fishing rights in the Cheyenne River that includes;
  - a. A corresponding 1851 Treaty right to maintain the Cheyenne River inhabitable for the OST's fisheries from the

headwaters of the river in Converse County to the South Dakota state line, i.e., water rights that impose a duty on BLM and F&WLS to protect both the OST's water rights and fishing rights from hydraulic fracking contaminates and other contaminates that will negatively impact and/or destroy the fishing rights in the river, see, e.g., *United States v. Adair*, 723 F.2d 1394, 1408-1415 (9th Cir. 1983) ("*Adair II*"), cert. denied sub nom, *Oregon v. United States*, 467 U.S. 1252, 104 S. Ct. 3536, 82 L. Ed. 2d 841 (1984). (off-reservation treaty right to fish implied reservation of water to support tribal fisheries); *Dep't of Ecology v. Yakima Reservation Irrigation Dist.*, 850 P.2d 1306, 1317 (Wash. 1993) (Washington Supreme Court recognized that tribes with treaty language . . . reflecting a reservation of aboriginal rights to fish also have water rights for instream flow habitat protection);

- b. A corresponding Winters Doctrine right to maintain the Cheyenne River inhabitable for wildlife, i.e., fishing rights (as well as irrigation) as a beneficial use free from hydraulic fracking contaminates and other contaminates upstream in Converse County that will negatively impact and/or destroy the use of the river for such purpose, see., e.g., *United States v. Alpine Land & Reservoir Co.*, 788 F. Supp. 2d 1209 (D. Nev. 2011) ("the Tribe retains a *Winters* right . . . to water to maintain the fishery"), citing *Nevada v. United States*, 463 U.S. 110 (1983), and

**OST on-reservation Cheyenne River water rights and fishing rights**

WHEREAS, the OST also has existing unextinguished water rights and fishing rights within the Pine Ridge Indian Reservation under the 1851 and 1868 Treaties, including the portion of the Cheyenne River and river bed that abuts the reservation; that Public Law 280, 25 U.S.C. § 1332 (b), defines the scope of the State of Wyoming's civil authority to regulate the OST's water rights and 1851 Treaty fishing rights in the Cheyenne River from Converse County Wyoming to the South Dakota state line as follows:

- (b) Alienation, encumbrance, taxation, and use of property; hunting, trapping or fishing.

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian tribe . . . that is held in trust by the United States . . .; or shall

authorize regulation of the use of such property in a manner inconsistent with any Federal treaty . . .; or shall deprive any . . . Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty . . . with respect to. . . fishing or the control, licensing, or regulation thereof, and

WHEREAS, The OST's aboriginal and/or Winters Doctrine water rights in the Cheyenne River includes water rights upstream to Converse County, Wyoming; that the Wyoming State Engineer has no authority to regulate the use of the OST's water rights in the river, or in the ground waters that feed the river, or 1851 Treaty fishing rights that depend on such water right, under 25 U.S.C. § 1332 (b), and

**Trust status of OST water rights**

WHEREAS, the OST's aboriginal waters rights, Winters Doctrine water rights and unextinguished 1851 Treaty fishing rights, are held in trust by the United States for the OST and other 1851 Treaty tribes and are vested property rights that are protected by the Fifth Amendment to the United States Constitution, See generally, Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 Nat. Resources J. 399 (2006) ("Indian reserved water rights are trust property with legal title held by the United States"); 55 Fed. Reg. 9223 (Mar. 12, 1990) ("Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians"), and

**OST claim to burial sites, human remains, ownership of cultural resources, and access to Sacred Sites in Converse County Wyoming**

WHEREAS, the OST has rights (along with other 1851 Treaty signatory Sioux tribes) to human remains and ownership rights to all Native American cultural resources excavated or discovered on:

1. Federal lands (recognized by a final judgment of the Indian Claims Commission or Court of Claims) in Converse County, Wyoming, under the Native American Graves Protection and Repatriation Act of November 16, 1990 (25 U.S.C. §§ 3001 et seq.) ("NAGPRA"); that the OST's ownership rights to the said cultural resources is supported by a final judgment of the Indian Claims Commission. See *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577 (1965) (the 1851 treaty recognized title in the "Sioux or Dahcotah Nation" to approximately 60 million acres of territory situated east of the Missouri River in what is now the states of North Dakota, South Dakota, Nebraska, Wyoming, and Montana) and *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147 (1970) (the "Sioux or Dahcotah Nation" with which the United



States negotiated at Fort Laramie and in which title was recognized by the Treaty of September 17, 1851, included the Teton and Yankton divisions of Sioux); and

2. Private lands under the legal principles recognized in *Charrier v. Bell*, 496 So. 2(d) 601 (La. App. 1 Cir. 1986) cert. denied, 498 So. 2d 753 (La. 1986) (Tunica-Biloxi Tribe retained ownership of cultural items discovered on privately held lands) and *Black Hills Inst. of Geological Research v. South Dakota Sch. of Mines*, 12 F.3d 737, 742-744 (8<sup>th</sup> Cir. 1993) (Black Hills III) (Because the [dinosaur] fossil was trust property that was removed from the Indian trust land without the knowledge or consent of the United States, it remained the property of the United States and the attempted sale of the fossil was void and the Institute had no legal right, title, or interest in the fossil as severed from the land), cert. denied, 513 U.S. 810 (1994); that cultural items found on private lands in Converse County remain the trust property of the OST and other 1851 Treaty Sioux Tribes, and were not conveyed to the present non-Indian occupants under the Homestead Act or otherwise, and the United States and its agencies, i.e., BLM and F&WLS, continue to have a fiduciary duty to protect them to the same extent as they had a duty to protect the fossil in the *Black Hills Inst. Of Geological Research v. South Dakota School of Mines* case cited above, and

WHEREAS, the U.S. Department of Interior and its agencies, including the BLM and F&WLS are hereby put on notice that the OST claims (along with other 1851 Treaty signatory Sioux tribes) all Native American burial sites and human remains, and an ownership interest in all cultural items, associated funerary objects, unassociated funerary objects, sacred objects, cultural patrimony, including stone features, i.e., stone rings, stone effigies, stone alignments, and rock cairns located on federally held lands in Converse County under NAGPRA, and a right of access to sacred sites located on federally held lands within Converse County, under the American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. § 1996, and

WHEREAS, the U.S. Department of Interior and its agencies are further put on notice that the OST claims (along with other 1851 Treaty signatory Sioux tribes) all Native American burial sites and human remains, and an ownership interest in all cultural items, associated funerary objects, unassociated funerary objects, sacred objects, cultural patrimony, including stone features, i.e., stone rings, stone effigies, stone alignments, and rock cairns located on privately held lands in Converse County under the legal principles recognized in the *Charrier v. Bell* and *Black Hills Inst. of Geological Research v. South Dakota School of Mines* cases cited above, and that the OST regards such

items located on privately held lands to be its trust property for which the United States and its agencies have a fiduciary duty to protect, and

**Necessity for water quality to protect OST  
off-reservation and on-reservation water and fishing rights**

WHEREAS, the Draft EIS indicates that five oil and gas developers, i.e., Anadarko Petroleum Company, Chesapeake Energy Corporation, Devon Energy, EOG Resources, Inc., and SM Energy, have proposed (under Preferred Alternative "B") to develop 5,000 oil wells on 1,500 new well pads, plus an additional 455 pads for production, for water source wells and for water disposal wells on 1.5 million acres in Converse County, all of which will directly and negatively impact the air quality, water quality, cultural resources, and tribal off-reservation and on-reservation water rights and fishing rights; that water quantity and quality (free from hydraulic fracking) is essential to maintain the Tribe's 1851 Treaty fishing rights in rivers and streams in the 1851 Treaty territory as well as fishing rights, irrigation rights, and other beneficial uses, in the Cheyenne River which originates in Converse County and abuts the Pine Ridge Indian Reservation downstream. See, e.g., *Hopi Tribe v. U.S.*, 782 F.3d 662, 669 (Fed. Cir. 2015) (In some circumstances, [the Winters Doctrine] may also give the United States the power to enjoin others from practices that reduce the quality of water feeding the reservation); Judith V. Royster, *Water Quality And The Winters Doctrine*, 107 *Water Resources Update* 50 (1997), <http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1291&context=jcwre> (A tribe may receive the quantity of water called for under its Winters rights, but the quality of the water may make it unusable for the purposes for which it was intended . . . \* \* \* If the water provided at the reservation border is so degraded that it cannot be used for irrigation, then the water right is essentially meaningless), and

**Rights to Government-to-Government and  
NHPA Section 106 consultations under federal and tribal law**

WHEREAS, neither the BLM nor the F&WLS have engaged in government-to-government consultations with the Oglala Sioux Tribe on the Draft EIS in the manner required by federal and tribal law as follows:

1. Congress, through the 1992 amendments to the National Historic Preservation Act of 1966 ("NHPA"), passed Section 101 (d) (2) (A) that established *Tribal Historic Preservation Officers* (THPOs) on reservations to assume State Historic Preservation Officers (SHPOs) responsibilities within federally recognized reservation boundaries; and to provide THPOs authority to "regulate" Federal undertakings through consultation on any Section 106 activity within their respective reservation boundaries on tribal lands.

2. The main purpose of the 1992 amendments to NHPA was lobbied by the leadership of tribal governments to allow *Indian Tribes* to identify areas and places, cultural resources and sacred areas significant to the Indian Tribe's heritage and cultural identity with Congress; this process was the foundation to require government-to-government consultation with said Indian Tribes outside reservation boundaries.

3. Because of these lobbying efforts, Congress also amended the NHPA in 1992 creating a new section in the act (referenced in 36 CFR 800.2 (c) (ii) which stated in part that:

*"Section 101 (d) (6) (B) of the act requires the agency official to consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property."*

4. 36 CFR 800.2 (c) (ii) (C) of the NHPA created the government-to-government consultation requirement with Indian tribes as follows:

*Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government . . . . Consultation with Indian tribes ...should be conducted in a manner sensitive to the concerns and needs of the Indian tribe. The Indian tribe has to designate or identify by resolution the official tribal governmental leader(s) to consult with Federal and non-federal agencies, individuals or private industry outside reservation boundaries when that respective tribal government attaches religious and cultural significance to historic properties to areas or resources significant to them.*

5. On November 6, 2000, President Clinton issued Executive Order 13175, which required federal departments and agencies to consult with Indian tribal governments when considering policies that would impact tribal communities and reiterated the federal government's previously acknowledged commitment to tribal self-government and limited autonomy; that President Osama thereafter issued a Memorandum issued on November 5, 2009 to fully implement Executive Order 13175; and that Executive Order No. 13175 is applicable to the OST's request for the government-to-government consultations on the Draft EIS for the Converse County Oil and Gas Project.

6. In 2011, the Oglala Sioux Tribal Council passed Ordinance No. 11-10 which defined the procedures that federal agencies must comply with to constitute a NHPA Section 106 consultation or a government-to-government consultation with the OST; that Section 7.a. of Ordinance No. 11-10 provides that all consultations between the OST and federal agencies must "*occur through a formal meeting with the Oglala Sioux Tribal Council,*" and

WHEREAS, the Oglala Sioux Tribal Council has never been consulted with by BLM or F&WLS on the Draft EIS under NHPA Section 106, or under Executive Order No. 13175 as implemented by President Obama's November 5, 2009 memorandum, or under Oglala Sioux Tribal Council Ordinance No. 11-10, and

WHEREAS, the BLM and F&WLS are hereby put on notice that the meeting between the BLM and THPOs that was held at the BLM office at Casper, Wyoming on February 20-21, 2018, did not constitute a NHPA Section 106 consultation, an Executive Order 13175 government-to-government consultation or a OST Tribal Council Ordinance No. 11-10 consultation, between the BLM and the OST on the Draft EIS, and

WHEREAS, official consultations on the Draft EIS must still be held between BLM, the F&WLS and the Oglala Sioux Tribal Council to comply with NHPA Section 106 and Oglala Sioux Tribal Council Ordinance No. 11-10.

**Lack of NEPA Public Scoping Meetings on  
Pine Ridge Indian Reservation on Draft EIS**

WHEREAS, neither BLM or F&WLS have held any NEPA scoping meetings on the Pine Ridge Indian Reservation and surrounding non-Indian communities that will be impacted by the Draft EIS for the Converse County Oil and Gas Project, as required by 43 CFR §§ 46.235 (a) and 46.235 (b), and

**Protection of tribal water right, fishing rights,  
cultural resources and Sacred Sites under UNDRIP**

WHEREAS, the also OST also notes, and brings to BLM's attention, the following articles contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly on Thursday, 13 September 2007, and supported by the December 6, 2010, declaration of President Obama:

Article 11: Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites . . . .



Article 12: Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing . . . administrative measures that may affect them.

Article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters . . . and other resources and to uphold their responsibilities to future generations in this regard.

Article 29: Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.

Article 32: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources; now

THEREFORE BE IT RESOLVED, that the OST hereby petitions and requests BLM (through Mike Robinson, Planning and Environmental Coordinator/Project Manager of the Casper Field Office) and the F&WLS to enter into NHPA Section 106, Executive Order No. 13175 and Oglala Sioux Tribal Ordinance No. 11-10 consultations with the Oglala Sioux Tribal Council on the Draft EIS for the Converse County Oil and Gas Project for the aforesaid reasons, and for other reasons to be brought up and discussed and resolved during the consultations, and

BE IT FURTHER RESOLVED, the consultations with the BLM and F&WLS requested in this resolution (on the Draft EIS for the Converse County Oil and Gas Project) shall be held at Prairie Wind Casino/Hotel

RESOLUTION NO. 18-55XB

Page Twelve

Conference Room on the Pine Ridge Indian Reservation on April 17-18, 2018, and

BE IT FURTHER RESOLVED, that Mike Robinson is hereby directed (as trustee of the OST) to personally participate in the consultations, and to notify the appropriate officials of the F&WLS of the Tribe's request for them to participate in the consultations requested in this resolution, and

BE IT FURTHER RESOLVED, that because of concerns among tribal members about the adverse impacts caused, or will be caused, from natural gas flaring and hydraulic fracking from the Converse County, Wyoming Oil and Gas Project (which is located approximately 100 miles due west of the Pine Ridge Indian Reservation) on tribal water rights, fishing rights, NAGPRA rights, and on the health, economy and general welfare of the OST and its members, the Tribal President and all Council and Executive Committee members are requested to attend the consultations on the Draft EIS for the Project, and

BE IT FURTHER RESOLVED, that the Tribal President shall send a copy of this Resolution and a copy of Oglala Sioux Tribal Council Ordinance No. 11-10 to Mike Robinson by certified mail, return receipt request, and by fax, as required by Section 7. a. of Ordinance No. 11-10, and

BE IT FURTHER RESOLVED, that the Tribal President shall invite the following Tribes to attend the consultations: (a) Cheyenne River Sioux Tribe, (b) Crow Creek Sioux Tribe, (c) Flandreau Sioux Tribe, (d) Fort Peck Sioux Tribe, (e) Lower Brule Sioux Tribe, (f) Rosebud Sioux Tribe, (g) Santee Sioux Tribe, (h) Sisseton-Wahpeton Oyate, (i) Standing Rock Sioux Tribe, (j) Yankton Sioux Tribe, and (k) the Eastern Shoshone and Arapahoe Tribes of Wyoming, and

BE IT FURTHER RESOLVED, that the Tribal President shall request that the Standing Rock Sioux Tribe authorize cultural resources expert Tim Mentz to make a presentation on the Draft EIS for the Converse County Oil and Gas Project at the consultations meeting., and

BE IT FURTHER RESOLVED, that the Tribal President shall direct the OST THPO to attend the consultations and make a report on the status of the THPO's involvement on the Draft EIS for the Converse County Oil and Gas Project, and

BE IT FURTHER RESOLVED, that the Tribal President shall invite Mary Hopkins, the Wyoming State Historic Preservation Officer (SHPO), to attend the consultations and make a report on the status of the State's involvement in the Draft EIS for the Converse County Oil and Gas Project and to Lisa Lindemann, Wyoming State Engineer's Office, to report on the number of state ground water permits that have been issued for the Oil


and Gas Project, and to which oil and gas companies they were issued,  
and

BE IT FURTHER RESOLVED, that the Tribal Secretary and Fifth Member  
shall be responsible for:

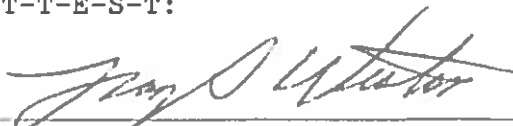
1. Arranging for a meeting room at the Prairie Wind Casino for the consultations between the BLM, F&WLS, and the Tribal Council;
2. Establishing an agenda for the consultations;
3. Arranging for a moderator to chair the consultations;
4. Arranging for discounts at the Prairie Wind Casino Hotel for tribal representatives attending the consultations;
5. Arranging for refreshments for participants attending the consultations, and
6. Arranging for a Power Point/overhead projectors and a PA System for speakers for the consultations.

C-E-R-T-I-F-I-C-A-T-I-O-N

I, as the undersigned Secretary of the Executive Committee of the Oglala Sioux Tribe, do hereby certify that this Resolution was adopted by a vote of: 4 For; 0 Against; 0 Abstaining; 0 Not Voting during a REGULAR SESSION held on the 21ST day of MARCH, 2018.

  
DONNA M. SALOMON  
Secretary  
Oglala Sioux Tribe

A-T-T-E-S-T:

  
TROY S. WESTON  
President  
Oglala Sioux Tribe

RECEIVED  
MAR 26 2018  
OGLALA SIOUX TRIBE  
HHS-100-1000-AGENCY

# **PRESS RELEASE**

**For Immediate Release  
March 27, 2018**

## **OGLALA SIOUX TRIBE DEMANDS GOVERNMENT-TO-GOVERNMENT CONSULTATIONS WITH U.S. BUREAU OF LAND MANAGEMENT (BLM) ON HUGE WYOMING OIL AND GAS PROJECT**

(Pine Ridge, S.D.) The U.S. Bureau of Land Management (BLM) developed and released a draft Environmental Impact Statement (EIS) on the Converse County Oil and Gas Project (CCOGP), a huge project located within Sioux 1851 Treaty territory in Wyoming. Release of the EIS set in motion a 45-day comment period that closed on March 12, 2018.

The BLM website states that the oil and gas companies ("Operator Group") that will develop the CCOGP include Anadarko Petroleum Company, Chesapeake Energy Corporation, Devon Energy, EOG Resources, and SM Energy.

The Operator Group proposes to develop approximately 5,000 oil and natural gas wells on 1,500 new multi-well pads over a 10 year period within a 1.5 million acre project area. Mineral ownership in the project area consists of 54% held by the Federal Government and 46% being held by the State Government and private owners.

The Operator Group will use "directional, vertical, horizontal and other drilling techniques . . . to develop infrastructure to support oil and gas production in the project area including: well pads, roads, pipelines, power lines, compressor stations, electrical substations, and ancillary facilities such as water supply wells and water disposal facilities . . . have requested year-round drilling to protect wildlife species in the project area."

According to BLM, the project "could unlock 1.37 billion barrels of oil and 5.79 trillion cubic feet of natural gas and create about 8,000 jobs over the 40-year life of the project."

The Oglala Sioux Tribe responded to the draft EIS prior to the March 12<sup>th</sup> deadline, and voiced its concerns about air and water pollution that will directly impact the Pine Ridge Indian Reservation from flaring natural gas and from hydraulic fracking that will directly impact tribal water rights and fishing rights in the Cheyenne River. The Cheyenne River originates in Converse County, Wyoming upstream and borders the northwest portion of the Pine Ridge Indian Reservation downstream, where the reservation boundary also extends to the middle channel of the river.

Tribal President Troy Scott Weston stated that "the Pine Ridge Reservation is located approximately 100 miles due west of the Converse County project area. The



Tribe is greatly concerned about natural gas flaring that will drift over the reservation and directly impact the health of reservation residents. These energy companies promise jobs in exchange for poisoning not only the air that we breathe, but also poisoning the water that we drink and depend on for agriculture, irrigation, fishing and hunting, and other uses with toxic contaminants used in hydraulic fracking.. It appears we have another DAPL type of project in the making that must be stopped."

On March 21, 2018, James Red Willow, who serves as Fifth Member of the Tribal Executive Committee, got the Executive Committee to pass Executive Committee Resolution No. 18-55XB that requested "government-to-government consultations" with BLM and the U.S. Fish & Wildlife Service on the draft EIS. The consultations are scheduled for April 17-18, 2018, at the Prairie Winds Casino Hotel Conference Room.

Red Willow stated "all the Sioux tribes must unite and voice our concerns on the draft EIS. We have an obligation to protect the next Seven Generation of our people from environmental harm to their persons and lives."

Red Willow also stated that "we also have to protect our Sacred sites from desecration by energy companies. We have invited cultural resources expert Tim Mentz to make a power point presentation on how BLM is addressing Sioux sacred sites and cultural resources in the draft EIS."

Arrangements are being made for discounted rates for tribal representatives that plan to attend the consultations with BLM.

For more information contact:

Troy Scott Weston, Tribal President  
Phone: Cell # 605-441-4949 or Office # 605-867-5821

James Red Willow, Tribal Fifth Member  
Phone: Cell # 605-454-4466 or Office # 605-867-5821

For copy of Executive Committee Resolution No. 18-55XB contact:

Donna Salomon, Tribal Secretary  
Phone: Cell # 605-209-0011 or Office # 605-867-5821  
Email: [donnas@oglala.org](mailto:donnas@oglala.org)

**AGENDA FOR GOVERNMENT-TO-GOVERNMENT CONSULTATIONS  
ON DRAFT EIS FOR CONVERSE COUNTY (WYOMING) OIL & GAS PROJECT**

Prairie Wind Casino Hotel Conference Room

April 17-18, 2018

**TUESDAY, APRIL, 17, 2018**

8:00 – 9:00 Reception

9:00 – 9:10 Opening Prayer by OST Spiritual Leader Richard Broken Nose

9:20 – 9:30 Welcoming address by President Weston.

9:30 – 9:15 Introductions

1. OST Council members (and other Tribal Chairman) by OST President Troy Scott Weston.
2. BLM officials by Mike Robinson, Converse County Oil and Gas Project (“Project”) Director

9:15 – 9:45 Comments on Resolution No. 18-55XB on draft EIS for the Project and Ordinance No. 11-10 on government-to-government consultations with federal agencies by OST Attorney Mario Gonzalez

9:45-12:00 Government-to-government consultative discussions on Draft EIS between BLM and OST (and other Tribal Chairmen). Tribal participants will sit around tables facing each other during the consultative discussions. President Weston will chair the meeting.

BLM will make presentations and respond to questions by OST council members (and other Tribal Chairmen) on the following:

1. Programmatic Agreement (PA) to address adverse effects on cultural areas (and landscapes) or historical properties of religious and cultural significance;
2. Traditional Cultural Properties (TCP) Surveys and Archaeological Class III surveys within the Project area (completed or to be completed);
3. Inadvertent Discovery Plan for Human Remains;
4. Treatment Plan for disposition of any artifacts or cultural items not included as a funerary object;

5. Effects of hydraulic fracking on ground and surface waters in the Project area and surrounding areas, including such effects on Cheyenne River;
6. Effects of flaring natural gas within the Project area and surrounding areas including the Pine Ridge Indian Reservation; and
7. Concerns on why BLM did not hold NEPA scoping meetings on any of the Sioux reservations, and surrounding non-Indian communities on the draft EIS

12:00 – 12:30 **LUNCH** (provided by OST)

12:30 – 2:30 Continuation of discussions on Draft EIS between BLM and OST (and other Sioux Chairman) . . . .

OST will make presentations and respond to questions by BLM officials on the following:

8. Tribal perspectives and concerns on draft EIS and the role of THPOs in both on-reservation and off-reservation federal undertakings by Tim Mentz; and
9. Recapitulation of the consultative discussions on the Project from BLM's perspective by Mike Robinson

2:30 – 3:30 **Reports from THPOs on responses to draft EIS for the Project**

1. Cheyenne River Sioux Tribe
2. Standing Rock Sioux Tribe
3. Rosebud Sioux Tribe
4. Oglala Sioux Tribe

3:30 – 5:00 (Executive session of OST Tribal Council (and other tribal chairman) on development of strategies to protect tribal lands, water rights, fishing and hunting rights, and other rights from adverse impacts from the Project, and finding better ways to coordinate the roles and activities of THPOs so tribal governments can keep better informed on federal undertakings).

**WEDNESDAY, APRIL 18, 2018**

9:00 – 9:10 Opening Prayer by Richard Broken Nose

9:10 – 9:30 Opening comments by William Means (Moderator)

9:30 – 11:00 Reports from the Wyoming SHPO and Wyoming State Engineer

1. Wyoming SHPO's Report on protection of Native American cultural resources, historic properties and human remains (on federal, state and private lands) within Project area by Mary Hopkins
2. Wyoming Engineer's Report on ground and surface water permits issued (for federal, state and private lands) and efforts made to protect Winters Doctrine upstream and downstream water rights on the Cheyenne River within the Project area by Lisa Lindemann

11:00 – 12:00 U.S. Fish & Wildlife Service Report

1. On impacts of hydraulic fracking and flaring natural gas on fish and wildlife and endangered species within the Project area: and
2. On impacts of hydraulic fracking on OST's Winters Doctrine water rights and fishing rights in the Cheyenne River (and ground waters and streams that feed the river) -- both upstream within the Project area and downstream to the Pine Ridge Indian Reservation

12:00 – 1:00 LUNCH (provided by OST)

1:00 – 2:30 Panel discussion on Winters Doctrine water rights within the Upper Missouri River Basin (including the 1851 Fort Laramie Treaty area)

1. Peter Capasella, SRST Attorney
2. Doug Crow Ghost, Chairman, Great Plains Water Alliance
3. Reno Red Cloud, Member, MRRIC

2:30 – 3:00 Violation of UNDRIP by issuance of a Record of Decision (ROD) by BLM based on draft EIS by Williams Means

3:00 – 5:00 Open forum on Project



## **EXHIBIT “C”**

**(July 10, 2018 BLM minutes from Pierre, S.D.  
government-to-government Consultations)**

# Notes: Government-to-Government Consultation for the Converse County EIS

Pierre Chamber of Commerce, Community Room-800 W Dakota Ave, Pierre, South Dakota

**Tuesday, July 10, 2018**

## **Attendees:**

Melissa Benner, BLM  
Ben Bigalke, BLM  
Mike Robinson, BLM  
Lonny Bagley, BLM field manager  
Reno Red Cloud, OST NRRRA  
Barb Yellow Hair, OST  
Stephanie Yellow Hawk, OST Pine Ridge  
Kyle White, OST NRRRA/THPO  
Ben Rhodd, RST-THPO  
Allyson Two Bears, SRST DER/EPA  
Darla Black, Vice President of Oglala Sioux Tribe  
Ben Rhodd, Rosebud Sioux THPO  
Tim Mentz, Sr., SRST OST  
John Eagle, SRST THPO  
Steve Vance, CRST – THPO  
Peter Caposella, Attorney for Standing Rock Sioux  
Bonnie St. John, Crow Creek Sioux  
Mario Gonzales, Attorney  
Devin Oldman, Northern Arapahoe THPO  
Bill Means, Council Member  
John Williams, PaleoWest

**8-9:00am: Coffee and informal welcome**

**9:00am: Opening Prayer, greeting from all officials, and introductions**

- Lonny B. opened, Melissa B. began introductions
- Mike R. (Project Manager for Converse County EIS) presented basics of NEPA and NRHP.
  - In this EIS, water rights and mineral rights are very important

- It has taken four years to get to a draft. Peter C. asked how tribes were involved. Mike replied that BLM has tried to engage with tribes.
- Peter C. asked why we are here, at the Chamber of Commerce, for this meeting. He thinks there are more appropriate forums for tribal consultation. He says it's the wrong chamber (commerce, not tribal).
  - Lonny B. replied that they chose this location because it is central for most tribes
  - Jon E., stated that the full moon in June to full moon in August is a time for ceremonies for many tribes, so many are preoccupied and could not attend this meeting.
  - Lonny B. replied that they sent letters in early May, but did not receive any feedback that this time about whether or not this location was appropriate.
  - Mario G.: commented that we should stop arguing and making excuses about whether tribes were or not engaged, but since everyone is here now, he wants to get down to business. He stated that there is drilling already taking place on private land in Converse County.
  - Peter C. replied that we should get down to business, but there is a process that needs to take place. He suggested more collaboration to improve consultation. He claims that there was no collaboration to set up this particular meeting, but it was done unilaterally by the agency. He wants to see a collaborative process from the beginning.
  - Q (Peter C.): Will tribal comments be published in EIS?
  - A: (Lonny) – yes, tribal comments will be included in EIS as an appendix.
  - Peter C. asked if comments submitted by tribes will after March 12 will be included?
  - A (Lonny): Yes, BLM publishes tribe's comments after March 12 in EIS. So tribal consultation is ongoing. Peter C. asked (again) if tribes send comments after March 12 deadline, will they be included in EIS? Lonny

clarified again that yes, they will be included, because this deadline is for the public, not the tribes. Tribal consultation is ongoing, and the March deadline does not apply to tribes.

- Jon E. commented that BLM is experiencing growing pains with regard to tribal consultation, given his experience so far. Jon disagreed with Mario regarding his desire to move forward. Jon claimed that Mario has not been present at prior meetings. Devon commented that Mario cannot speak for all tribes present because he does not know everyone's traditions. Devon claimed that we should focus on the shortcomings of the consultation process so far.
- After a few interruptions between tribal members, Ben R. stated that everyone has a right to speak here, and that tensions should be calmed.
- Steve Vance: spoke about how he has been involved since close to the beginning. One of his original requests was a no action alternative. He stated, for the record, that the Cheyenne River Sioux tribe does not want this project to go forward. He stated that, nevertheless, here we are, near the end, and the project is moving forward. He said that if they just say "no" and go home, then BLM won't understand their concerns. So he is staying engaged. His question is this: according to Government-to-Government process, the BLM should be sitting here face to face. He (Steve) is the THPO, but when it comes to government-to-government consultation, that would mean BLM visiting the council of Cheyenne River Sioux. He says it would be easy for BLM to just go to their reservation and consult. He goes on to say that BLM has divided the tribes, in a way that just because we are sitting in the meeting today, it doesn't mean that there is a proper government-to-government process. For one, not all representatives are here. Also, the tribal members here can't speak for their tribes alone. Also, he spoke about the interpretation of the word "treaty". He doesn't indulge the U.S. government's concept of a treaty. E.g., if it's private land but federal resources, then why can't tribes get onto land? Tribal councils are in session. He claims that

the BLM should have tried to consult with the councils, not just THPOs. He pointed out a double standard: tribes can't just show up in Washington D.C. and try to consult with U.S. government without planning.

- Devin Oldman: We're all here to protect our earth. He wanted to state for the record that the Northern Arapahoe tribe opposes any and all actions and permits by BLM related to resource extraction surrounding Pumpkin Buttes. He was raised traditionally, so he understands the importance of things others don't. He stated that this land was taken from them by theft, by legislation from people who don't understand their way of life. Sacred sites are important to the tribes. Tribes cannot expect to make decisions on sites they cannot visit.
- Darla Black commented that there are elected officials within tribal councils, who the BLM should be consulting with to make this officially government-to-government. Pine Ridge has 20 council members. This consultation should be with these members in session, because individually, they cannot act. She stated that what we're dealing with here is the future of their children, and the future of waters, and air quality, and the land itself. The Lakota are seven bands: how can they come together as one? She feels there is a process for Section 106, and those 20 council members need to be consulted. She described a concern: if a Native American goes to Sioux City, they are not treated well. She mentioned that she was treated poorly by someone this morning here in Pierre. She claims that indigenous people should fight for who they are. Sioux consider all people their brothers and sisters. They live a respectful way. The Pine Ridge reservation is 100 miles across, and yet there are people there who don't have electricity or running water. She requests that she cannot represent her entire tribe; she is only here to listen and then bring back the news to her tribe. She reiterated that the only way to have a consultation with tribes is with the tribal council.
- Jon Eagle: Stated that he holds a resolution from his tribe (274-18), which adamantly opposes Converse County EIS. He also brought a letter from the



chairman inviting government to government consultation with council, but claimed that the BLM has failed to respond.

- Ben R. stated that the Rosebud tribe also submitted an official letter stating they oppose the project.
- Darla requests that BLM set up a meeting with Donna Sullivan of Oglala Sioux to set up meeting when all council members are present.
- Bonnie St. John stated that she wants to go on record stating that Crow Creek Sioux officially oppose this project.
- Ben R. – got up to point out the map (Wyoming, Converse County EIS boundary). He asked us to contemplate taking out the boundary lines, which he states is hard for us to do. The reason people from Rosebud have not stepped up to a large extent is because there are tribes closer to the action, e.g., the Oglala. He stated that the rivers shown on the map are like veins with lifeblood. So the effects of this project travel far and wide. We should be viewing this project from a larger scope, a broader perspective. Ancient and modern Native Americans used the rivers as highways. Look at where the project sits: headwaters and watersheds. This land is extremely important. Ben is here to protect the sites themselves, which are very sacred at headwaters. He mentioned that the U.S. government claims they own the mineral rights. But humans are also made out of minerals. He asked rhetorically, who owns another human being? How deep are the stones that are a few thousand years old at archaeological sites? Does the BLM own those sites also? Those are ancestral sites to the tribes. Tribes are trying to deal with this on a bureaucratic, political level, but that's not the right way. We need to figure out what we're trying to do in this room. Using the law, Section 106 says that he (Ben) has the right to be out there, but landowners are denying access. He would also like to see treaties recognized. Ancestral homeland/landscapes are what he's here to protect. The Rosebud Sioux's main concern is the Cheyenne River, whose headwaters are located right in the project area. This life source cannot be polluted, for the sake of the tribes and

for the sake of all future generations. This watershed is critical, and even though the Rosebud tribe are hundreds of miles away, the effects of the project spread far. Politically, there are two councilmen who are supposed to be here from Rosebud; Ben is not sure where they are. But Rosebud are supportive of their relatives to the west, who are closer to the project area.

- Mario noted that tribes themselves should get together, irrespective of BLM, to discuss these issues, especially the private land part of the equation.
- Ben acknowledged that he recognizes that the BLM has a sense of self-preservation, and that they could lose their jobs if they raise too much stink about what the tribes think.
  - Darla replied that, however, there are other nations here, and what they say is important, and they need to acknowledge that. She has seen oppression in many forms, and she doesn't want to oppress anyone else. Whichever way it goes, all tribal members came here to be heard.
- Ben replied that when Rosebud tribe decided to hold back, they were wanting to see how they could better support tribes closer to the project area. He wants opposition to this project to be united from all tribes, as one voice.
- Ben wants to be on record to say that he does not see this as government to government consultation. He is only here to try to protect the ancient ones the best he can, and cannot speak on behalf of his council members.

**Break: 10:30-11:00am**

**11:00am**

- Peter C. discussed how consultation could be improved. Two different types of consultation: one with tribal council, the other regarding Section 106 and protecting archaeological sites. There are two separate tracks that are required by law and treaty. When the treaty is affected, there should be government to government consultation.

When archaeological sites are considered, Section 106 and THPOs are involved. He stated that to mix these results is a half-baked consultation. He feels like the BLM is telling the tribes: "here's the meeting, here's the agenda...show up or don't", and that the tribes feel like it's not a proper government to government consultation. He wants to find ways for BLM to take steps to meet tribes half-way.

- Lonny B. stated that the BLM's frustration is this: they made a conscious effort to reach out to tribes, and made an effort to find a central location to make it easier for all tribes to attend. They only heard back from a couple of individuals. BLM didn't invite THPO's, but invited Tribal Councils to be here. Some council members came, but not many. So it makes it very difficult for BLM to have government to government consultation if so few tribes respond whether or not this is a good meeting/location. BLM Casper FO takes this process very seriously, so they're trying to figure out how they can do this more effectively.
  - Darla B. responded that, this week, Oglala council members and BIA members are in a meeting. The next council meeting is July 24. Her recommendation is to get in touch with the Secretary, and then get on the agenda of the tribal council so that BLM is on the agenda.
  - Lonny replied that they've tried to meet with councils before, but not everyone showed up, making the meetings unproductive.
  - Peter C., Standing Rock sent a letter to BLM with phone number, contact, etc., requesting BLM set up a meeting, and they never did. He recommends that if BLM reaches out sincerely to tribes, and shows the effort to meet in the middle, rather than setting an agenda and if tribes can't make it, moving on.
  - Darla stated that if BLM extends the courtesy, it will be reciprocated.
  - Jon Eagle: Standing Rock chairman re-invites BLM back to Standing Rock. He sent a letter of invitation back in September to the BLM, which was never replied to. Under their code, the THPO can represent tribe, but he can't make decisions. The council members need to make these decisions.

- **Tim M.**, recalls being in meetings in 1991, and consultation was discussed at that time. They discussed the process, and he recalls that the House Resources Committee had a dialogue with a relative testifying, talking about how they can accomplish tribal consultation effectively. At the time, the discussion centered around who meets with whom. Section 800.2c is a part of that, which says consultation with tribes must involve elected tribal representatives and government-to-government consultations. So THPOs can't fulfill this process alone; tribal elders and council members must be involved. The U.S. government gives the tribes the ability to appoint leaders with whom U.S. government can consult with. But he says BLM doesn't have a list of tribal representatives with whom they are able to consult with to fulfill the government to government consultation. Part of the amendment - 101D2 – allowed tribes to take acreage within reservations away from SHPO regulatory control, so that THPO could control their own Section 106 process. So 101D2 enacted THPOs, so that they could make determinations on historic properties within reservation. The main processes are: identify, evaluate, nominate; avoid, minimize, mitigate. THPOs asked to make determinations outside of reservation boundaries, but were denied. But 800.8 enacts coordination between NEPA and Section 106. So THPOs have to be consulted inside and outside reservations. THPOs should have the ability to make this bridge (commenting on resources outside the reservation boundaries, and these comments being considered in the EIS). And how do tribes, short of government to government consultations, fulfill this process? Government-to-government should not be enacted unless Section 106 cannot be resolved. He's frustrated that the history of the mechanics of Section 106 related to 800.8, that he sat through in 1991, never got transferred to modern times. His concern is that, if tribes walk out of here today, that they'll lose the ability to make comments and express their concerns about the project (it will just go on). His main point is that the EIS will list so many archaeological sites that are eligible and not eligible. These determinations are made by the SHPO, not the

THPO. Why aren't the THPO's comments included in the EIS? What's stopping the BLM from extending the comment period another 30-60 days to include in the EIS?

- **Lonny replied that BLM has not closed the door on tribal consultation.** Maybe BLM has the same concern as tribes about getting access on private surface with federal mineral. They are struggling with this, because if a landowner says no access, then right now, BLM can't access. There's also the issue of landlocked parcels of BLM land, because in some cases, the landowners won't let them through.
- Darla B. commented that the Oglala Sioux tribe has never been militarily conquered by U.S., and has existed peacefully with U.S. government since 1868. So the Oglala Sioux are not owned by U.S. The initiation of government to government should start with request with Secretary of tribe. The tribal Secretary will notify the council when consultation is requested. Tribal council will then request consultations. Then the consultations follow, based on the recommendations of its staff and attorneys. Then a resolution is passed. So as Vice President of Oglala Sioux tribe, she is requesting that the BLM follow this ordinance, and that they formally request a meeting with the Secretary of the Oglala tribe.
- Jon Eagle thanked Tim for laying out the history as he did. He also reiterated that they don't consider this appropriate government to government process. He also agrees with Tim, that it's not right that Tribes weren't involved in the original Class III surveys. All of these sites were identified, recommended, and determined without tribes. He asked why have the tribal comments not made it into the EIS? He stated that archaeologists are drawing from their training from universities, using the scientific method, etc. Tribes are using language, oral history, and sacred knowledge. He has cultural affiliation to ancestral lands outside of his reservation. This is not appropriate government to government consultation because none of the Standing Rock tribe with this authority are here, despite the chairman of the tribe sending a letter to BLM requesting a



meeting, which he claims the BLM never responded to. He said there should be an extended comment period for tribal councils to respond to this EIS.

- Lonny replied that BLM has not closed door to tribal consultation, and only the public period is closed.
- Mike R. stated that the tribal comments are not yet included in EIS because this is not a public conversation.
- Jon E. stated that when he and Devon participated in public meetings, they changed the minds of private landowners. So it might be good for tribal members and public to interact.
- Peter C. says it would be helpful to present a revised EIS draft with tribal comments, so that they are in the NEPA record. And then re-opening a comment period to make sure that tribal concerns with this revised draft are included in the record. Also, the environmental data included in the document now are from the operator group rather than the tribes, so if the BLM releases a revised draft EIS, it would provide another opportunity for the tribes to ensure their concerns are incorporated into the NEPA record.
- Steve V. commented that he wants to defend the THPOs. He reminds us that the eligibility recommendations and determinations on all of the sites plotted on BLM's map were based on NRHP Criteria A through D, and tribes say that all of the stone circle sites are eligible under all of these criteria. So why aren't these comments in the EIS? So all of the unevaluated sites should be considered and treated as eligible until proved otherwise.
- Mario reminded everyone that BLM is only involved in Federal scope of project and Federal land. The problem is that the surface owners are putting pressure on the process to finish, so the landowners have already negotiated oil and gas leases.

#### Noon: Lunch

- During lunch, Ben R. spoke about how the tribes are the determinants of their own history, not archaeologists, doctoral students, historians, academics, etc. So much of

their knowledge has been taken repeatedly over the past 500 years. He claimed that 65% of the medicines used today came from Native Americans, but then were appropriated. It comes down to a matter of trust. The reason why tribes are hesitant to provide information is because once they give it away, it is no longer theirs. It is put into a report or a book, and then sits on a shelf somewhere. It's a matter of intellectual property. E.g., billion-dollar companies are profiting from the knowledge of tribes. Meanwhile, he still has to spend a few dollars on a bottle of aspirin that they used to give away freely. He stated that this is a problem: the tribes don't trust western people any more. They want to determine their own history; this is their right, not someone else's. The sites in Converse County are who they are (the tribes), not just who they were. The bloodlines are still in this room of the people who laid down those stone features.

#### **1:30 PM: Meetings Resume**

- Melissa B. discussed split estate situation. BLM still has some capacity to guide the location of the well pad, etc. These are also the situations where landowners split into two groups: cooperative landowners and defiant ones.
  - Q (Tim): what percentage of landowners are cooperative vs. defiant?
  - A (Lonny): about 30% are cooperative right now.
  - Q (Tim): what is the situation with state lands?
  - A (Lonny): BLM treats state lands as if they are
  - Q (Tim): What about fee to fee permitting?
  - A (Lonny): if multiple wells are proposed on one pad, then BLM only has control of federal well.
- Peter C., In the draft EIS, he requests taking out a statement to effect that there are other appropriated waters in the Cheyenne River (unadjudicated water rights). He stated that the BLM is almost encouraging the operator group to withdraw water from the river. Cheyenne River shouldn't be subjugated to appropriation upstream from tribes.

- Q (unknown): water quality monitoring, how does this work?
  - A (Mike R.): Still discussing that
  - Q (Steve V.): How did BLM coordinate with EPA?
  - A (Mike R.): BLM is working with EPA
  - Steve V. commented that land, air, and water are all affected by this project. He hasn't seen any EPA in these meetings, but they should be here. What happens upstream affects tribes living downstream.
  - Peter C. claimed that the EPA underestimates methane emission by 50%. He said that in the draft EIS, it estimates a zero percent methane emission. He doubts this and asked this to be reassessed.
  - Jon Eagle commented that, regarding the NEPA process, they're only looking at the cumulative effect. But the cumulative effect of oil & gas industries in the U.S. is global.
  - Mike R. explained near-field versus far-field. Near-field is air quality right around the project area. Far-field is a five or six state region surrounding Wyoming.
  - Jon E. – tribes are aware of the direction coming out of Washington D.C. regarding EIS and EAs, that they want to streamline it to a maximum of 100 pages and 50 pages, respectively.
  - Peter C. stated that it seems like there might be conflict of interest issues with permitting operators.
    - Mike R. explained that he manages how the operators communicate to prevent conflict of interest issues. Only financial topics are allowed in communications between operators. E.g., in 2014, operators had a first-party consultant to help them. Later, BLM hired AECOM as third-party consultant. AECOM works for BLM, so they cut the cord between the company and the consultant to ensure quality data.
- Benn R. asked about a map overlay in GIS of the maps so they can turn on layers for land ownership and site locations, etc.
  - Lonny said that BLM can provide that

- Mike R. projected map of project area, with many overlays, including existing pipelines.
- Q (Peter): Are leaks from existing pipelines considered in EIS? And are leaks from proposed wells considered?
  - Mike R. stated that he is checking on the first question, and the BLM are actively working on the second question.
- Melissa B. stated that the PA is not written yet, but the goal is to figure out the effects of the projects, as something of this magnitude will almost definitely have effects. It's a collaborative process, so that everyone must give and take. BLM wants to do things like tribal identification in areas where BLM has more authority (e.g., federal surface). BLM is trying to work with county commissioners in local governments to come up with a committee of landowners to represent landowners in the process.
  - Q (unknown): Even if they (landowners) participated, are they bound by it?
  - A (Melissa): You are only bound by a PA if there's a responsibility to that document. E.g., if a landowner denies access to access a landlocked BLM parcel, then he gives up whatever agreements that are in the PA. Generally on a PA, it requires the signature of an Advisory Council. Melissa confirmed that Advisory Council will play a role. This is a slightly modified PA in the sense that it is expedited.
    - Peter commented that he thinks the quick schedule imposed by the BLM is not fair to the tribes. The best way to avoid litigation is to slow down this whole project. He stated that hopefully the BLM folks here will convey to others at the BLM that this whole process needs to slow down to allow tribes to provide input.
    - Tim mentioned that several parties need to be signatories on the PA. If just the BLM and SHPO sign off on it, it's just a prototype. He wants BLM to be honest and straightforward and let the tribes know if this is just a prototype rather than a full PA. He stated that under 800.7, to resolve adverse effects, the PA needs to be very specific.

- **Q (Peter): Why are we not following the traditional PA process?**
- **A (Melissa): When the process was started, the proponents asked if they had to pursue a PA. At that time they chose not to pursue a PA. But as BLM dove into the complexities of the project, land ownership, etc., things have changed and it became very evident that there are many concerns. So it's late in the game, but a PA is clearly needed. So that's the reason why the PA is not going through the traditional process.**
- **Q (Benn): What has SHPO's response been?**
- **A (Melissa): they requested a PA in response to the DEIS.**
- **Ben R. asked: what if tribes come back and say that every one of these sites is eligible?**
- **Melissa: the federal agency has the final determination. If BLM and tribes can't come to a resolution about sites, then BLM does have the right to make the determination by themselves.**
- **Jon E. commented that the same landowners who refused tribes on their property are now also refusing BLM access.**
- **Devon commented that there have been some back door political dealings in Wyoming, passing a House Bill stating the NHPA process doesn't have to consult with tribes on state and federal lands. So he stated that Wyoming is currently trying to exclude Native Americans, and also to ignore federal law.**
- **Peter commented that trends such as this house bill in WY complicate the process, and justify slowing-down the process so that it's not pushed through rapidly by next year.**
- **Devon agreed, and said that we cannot move forward until the tribes' concerns are addressed. This is unprecedented in terms of scope and scale, so he feels it's important to get this right.**
- **Darla commented that native peoples read body language, and not just listen with their ears, but also with their hearts. She thinks the BLM folks here are**



genuine and want to help. She thinks that change is necessary and possible with this sort of coordination. All of these concerns that the tribes are raising (water, air, etc.), will affect us all and our subsequent generations. There are still some non-natives that still respect and help the native people. The THPO agencies have taught the BLM things like the significance of rock formations. It is ceremony time for the tribes. And these ceremonies deal with not just tribes, but also westerners. She wants to cooperate to help build trust. If BLM just follows the laws in the books, then this would build trust, because somewhere down the line we have to change how we do things. Her position as Vice President will end soon; she came into it with honesty and integrity. She's concerned about the cancer rates on her reservation being the result of tainted water. She asks to delay that January 2019 deadline, to send a message to the tribes that BLM is committed to the government to government process.

- Mario stated that the U.S. is a trustee, which is supposed to protect the resources from being spoiled.
- Lonny replied that it is their job (BLM folks) to listen to the tribes and report it back to their superiors. They will try to resolve the concerns raised by the tribes. He added that in their letters, they asked the councils for government to government consultation, and they will keep working at this. They thought one large meeting such as this would allow them to get the most information possible. The PA would serve to get everyone to the table and to understand what their roles and responsibilities are. He thinks it would be a much better process to be more transparent, get the landowners involved, and to educate the defiant landowners why these regulations exist and why these sites are important to the tribes. The question he wants to ask the tribes is: where do we go from here? The tribes have stated that BLM is talking to the wrong people, so how do we get them involved?
  - Mario asked about human remains being protected – in some cases human remains on private land are considered part of the property, and thus owned by landowner.

- Lonny stated that this issue is out of his realm.
- Jim thanked Lonny for stating that he is interested in this process and it is important to him. He reiterated that educating landowners is very important. Wants the PA to include a lot of this information that we have been discussing here. He stated that the Oglala Sioux are going to ask for an extension on finalizing the EIS.
- Darla added that there's a turnover issue – since 2014 when BLM contacted tribes, there are tribal representatives who moved on and new ones in the mix.
- Jim added that the timeline for the EIS is unrealistic. There's a history of the U.S. government ignoring tribes and breaking treaties. He respects that the BLM is here discussing difficult issues with the tribes. But still, things need to change. If BLM tries to keep this deadline, he thinks it will end up in court. BLM is not dealing with just the tribes here in attendance, but with the whole Indian nation. To be realistic, in a decision this big, tribes need time to express their concerns. He feels like these white ranchers are becoming the new Indians – they are being faced with all of these rules and regulations. Indians have been subjected to U.S. government regulations from Custer to Trump. So if they see each other in federal court, don't feel bad. He appreciates the BLM's work, and will continue trying to work with them. Time is on their side – Natives have been here much longer. They will communicate these ideas to their family and friends.

**3:30 – Adjourned for Tribal Caucus.**

## **EXHIBIT “D”**

**(July 11, 2018 BLM minutes from Pierre, S.D.  
government-to-government Consultations)**

# Notes: Government-to-Government Consultation for the Converse County EIS

Pierre Chamber of Commerce, Community Room-800 W Dakota Ave, Pierre, South Dakota

## **Wednesday, July 11, 2018**

### **Attendees:**

Melissa Benner, BLM  
Ben Bigalke, BLM  
Mike Robinson, BLM  
Lonny Bagley, BLM field manager  
Reno Red Cloud, OST NRRRA  
Barb Yellow Hair, OST  
Stephanie Yellow Hawk, OST Pine Ridge  
Kyle White, OST NRRRA/THPO  
Ben Rhodd, RST-THPO  
Allyson Two Bears, SRST DER/EPA  
Darla Black, Vice President of Oglala Sioux Tribe  
Jim Red Willow, OST 5<sup>th</sup> Council Member  
Ben Rhodd, Rosebud Sioux THPO  
Tim Mentz, SR., SRST enrolled, representing OST  
John Eagle, SRST THPO  
Wayne Looking Back-SRST council member  
Steve Vance, CRST – THPO  
Peter Caposella, Attorney for Standing Rock Sioux  
Bonnie St. John, Crow Creek Sioux  
Mario Gonzales, Attorney, Oglala Sioux  
Devin Oldman, Northern Arapahoe THPO  
Bill Means, Treaty Council Member, Oglala Sioux  
Bryce In The Woods, Council member Cheyenne River Sioux  
John Williams, PaleoWest

**9:00am: Coffee and informal welcome**

**9:00am: Opening Prayer, greeting from all officials, and introductions**

- Opening prayer by Kyle White

- Words of encouragement by Steve Vance. Spoke of 17 years of law enforcement on the reservation, and balance between peace and enforcement. Being complete means keeping his responsibility as THPO, to preserve and respect cultural resources. Tribal history goes way back, so there is a lot of responsibility for THPOs. Tribal culture was intertwined with the earth, so preservation is a part of tribal culture. Natural “LAW” (Land, Air, Water). Steve stated that he is here because of commitment. He hopes all of the tribal members are here for the same reason, rather than for a paycheck, or stepping up the ladder. Recalled a story by an elder about how life is like carrying a backpack. As you go through life, you pick up stones (knowledge), but eventually your pack becomes full and heavy, so you must share with others, share the knowledge, offload.
- Requested discussions: water injection wells (Devon), fracking effects (Darla), PA (Lonny), tribal caucus summary (Bill).
- Steve V. commented that THPO had requested government to government consultation, but because tribal council members are not here, he reiterated that this meeting is not official. He requested yesterday that BLM set up this real meeting, but feels like BLM did not respond. He would like to see more commitment from BLM: he asked if they will meet with Cheyenne River Sioux Nation, government to government? Also, will BLM update the water studies (the old 35-year old study in DEIS). Also, will BLM have EPA sitting at the table at next meeting? They are a cooperating agency, so they should be here, given the importance of water studies.
- Peter C. noted that letters have been sent by Standing Rock Sioux, and to follow-up from Steve, he feels like the tribes should withhold any decisions until BLM commits to earnestly and meaningfully consult with tribes at the reservation level, and to do this before the project/ EIS/ PA gets approved.
- Jim Red Willow – mentioned that tribes can arrange meetings between council members and BLM right now. There are members here who can arrange that.



- Darla also requested that BLM refrain from moving forward on project until tribal council members are consulted. She said that they are accommodating BLM by having their secretary here to make arrangements.
- Lonny said that they can't make solid dates right now, because everyone's schedule is very busy.
  - Peter C. mentioned that, while it is respectable that the BLM is here today, that there is still a problem. They feel like the decision-makers aren't here for the BLM, and that saying things like "let me check with the boss to see if we can make those decisions" is not productive.
  - Lonny pointed out that the decision makers for the tribes are also not present, so he is seeking solutions for moving forward.
- Bill M. mentioned that, from prior experience with tribal consultation, if the authorized people aren't at the meetings, then each person here is only acting as an individual. The presence of tribal members here does not count as government to government consultation. It still goes back to the tribal council to make those decisions. Darla and Wayne reiterated this is the case (this meeting is not official government to government consultation).
- Comment (Oglala Sioux Tribe Member) – requested an extension of the process to ensure consultation with all the tribes.
- Lonny – commented that when they planned this event (BLM), their expectation was that this would be official government to government consultation. They only heard back from one tribe, and nobody from the tribes contacted said anything about how this meeting would be unacceptable. So it's important to know that BLM is doing their best to get all the right people together. Lonny is not the decision maker on this EIS. That will be the District Manager. She could not be here today, but she will commit to meeting with the tribes. Given BLM's schedule, they sometimes won't be able to meet with each council member individually, so they were hoping a group meeting could take place.
- Darla feels like the process to the Oglala Sioux ordinance was not followed. It spells-out in the ordinance exactly what needs to be done. BLM did not notify the Secretary about

this meeting. She pointed out that BLM has rules and ordinances that need to be followed. In the same way, Oglala Sioux have rules, and Darla or any other Oglala Sioux cannot break those rules. She believes that, in order to satisfy the tribes, as well as BLM supervisors, that government to government consultation still needs to take place.

- Lonny: so then where do we go from here?
- Mario – schedule with the Secretaries of each tribe meetings with council members.
- Darla mentioned that President Weston (Oglala) sent a letter to BLM raising issue that Pine Ridge reservation is located 80–100 miles east of project area, presenting concerns for pollution of reservation by the proposed project. She wants to know where are the documents that were sent to the BLM by the tribes, and who is reading them?
  - Lonny said BLM will put these letters in the document.
- Lonny asked again, how specifically do we proceed?
- Comment from Allyson Two Bears – regarding PA, once it is complete, there should be an opportunity for the council members to be consulted specifically about that document, because they will be the actual signatories on it.
- Steve agrees, saying that the issues need to be brought forth before consultation. He commented that he has traveled hundreds of miles, meeting after meeting. He asks BLM to reciprocate – will BLM come to consult? He noted that nobody here is giving him an answer.
  - Lonny replied that what's confusing is that the tribes are telling him that this is not the right audience. So if it's not the right audience, then what can we do?
  - Steve replied that all of this information is being recorded during these meetings – it needs to be presented to the people at the BLM who can make the real decisions. BLM needs to follow the regulations of the tribes.
- Bryce – reiterated that the BLM needs to set up a session with Cheyenne River Sioux. He feels like clean drinking water is a crucial issue. There is good, clean spring water on the reservation right now. But this is in danger of being polluted. He is skeptical that this project will have no effects downstream. Consultation is not only communication, but also accountability. He feels that the tribes are the real landowners, but they are treated

like second-class citizens. He feels like there is an element of USA that is out of touch with mankind, out of touch with nature. He feels like we should be beyond this.

- Darla spoke in Sioux, Jon responded in Sioux. Jon continued in English that he wanted to get something off his chest. His responsibilities as THPO officer, as well as his responsibilities to his tribe, compel him to say that this is the first day in all of these meetings that he feels like the BLM is just checking off boxes. The Lakota watch with more than just their eyes. He was struggling with something he was forced to do at Pumpkin Buttes, where he and Steve V. were communicating nonverbally. He feels like it has been two years, and here we are in the same spot. He mentioned that BLM said the decision-makers from BLM could not be here because of scheduling issues. They are telling BLM the same thing – their decision makers could not be here because of scheduling issues. He is wondering if the BLM decision-makers have read the notes from previous meetings? When he stood with Steve on Pumpkin Buttes, he sensed things that non-tribal members did not. He is frustrated because the tribes have put all of this effort into building relationships, but it's going nowhere. He reiterated that his tribal council sent him here to tell the BLM that this is not an official government to government consultation. There is a concept of being a good relative. It involves going to your neighbor and offering yourself, not dictating to them. He said that, for the project, the BLM's concept of cumulative effect is too narrow. The effect is global. Future generations depend upon us. That's what he and the tribes are thinking about.
- Devon – he stated that the tribes came here to dialogue. He wants to give the BLM enough information and take away enough information to take back to his people, and for BLM to take back to the decision makers. He wants to know what the BLM will do to address the issues of split estate? So far, he hasn't heard much progress or ideas. Also, what is BLM going to do about effects to water, and to monitor the water? Will it be a passive study, ongoing, laboratory-based, visual only, surface and subsurface water? Also, regarding air, there is a five-state study, what will the study look like? Will it be ground-based, higher elevations? What will the study be composed of? Also, the effect to

wildlife, how will this be monitored? Active or passive? How intensive will the study be? The entire habitat?

- Devon gets asked by others, what makes a sacred site? He responded that sacred sites were areas of life, where the creator gave things of survival to the tribes. There are areas like this all around us, everywhere. They are so much more to tribes than historic resources. He is asking BLM to tell their decision-makers this idea – these are sacred places, not just archaeological sites. Devon wants to be able to take his grandchildren to these sacred places and tell them that they are still here because they (the tribes) fought for them.
- Devon, cont'd – feels that this is meaningful consultation, but not official consultation. Each time we meet, we make progress. He requests that:
  - Each tribe receives a draft PA in the next 30 days so they can read and make comments.
  - He also requests that when BLM conducts government to government consultation with tribal councils, that the BLM State Director and Regional Office Director are there.
  - Also requests that when BLM makes record of decision, they provide a 30-day period to tribes for comments.
  - He also requests that the studies in the EIS are updated, rather than the 30-year-old water study, and anything else that is outdated (cultural resource survey, vegetation, etc.).
  - He also asks that, when BLM comes to tribal governments, that they keep an open heart and open mind.
- Mario commented that private ownership hasn't been addressed, but that there are already 1,300 oil wells on private land that are already operating. The state and individuals are currently getting royalties. There's also the issue of human remains on private land. According to Wyoming state law, the human remains, ancestors of tribal members, belong to the private land owners. He feels like this issue needs to be addressed. BLM is only 10% of the project area. The effects from private land are

already occurring, and they are more significant than all of the BLM land combined. He also brought up the issue of a real PA versus prototype PA. Which one will be presented to tribes? He understands that the local BLM folks present at these meetings are under pressure from Federal BLM, and from oil companies, to get this done. But he wants to communicate that this is not going to be finished by January 2019. This should be communicated to the decision makers at the BLM.

- Kyle mentioned that if BLM is just 10% of project area, then tribes would like all of that 10% to be intensively surveyed for cultural resources at the Class III level. He recommends that if things are done right from the beginning, then we won't have to later clean up the mess. He also wants the issue of inadvertent discovery of human remains to be addressed – there needs to be a comprehensive plan for that. There also needs to be a comprehensive cultural resources management plan in the PA.
  - Mike confirmed that total BLM land in project area is 88,000 acres
  - Devon asked about land-locked BLM parcels – how much of this 88,000 acres will BLM have trouble accessing because of private landowners denying access?
    - Mike answered that much of this BLM land is landlocked.
  - Peter asked Lonny to confirm that, if a TCP study cannot be done because of landowner access issues, then no permits would be issued?
    - This brought up the issue of what is a TCP survey – is it included in Class III intensive surveys? Ben explained that there's a lot of gray area in the TCP process. The cultural resource inventory process, in his mind, is illegitimate. When tribes recognize something, it is legitimate, but it is often not recognized as legitimate. It's a problem of taking control of their own history.
- 5<sup>th</sup> Member asked Lonny how much time BLM can give the tribes to respond to what we have discussed?
  - Lonnie can get back to tribes within 30–45 days with answers to the main questions.
    - Devon – what about the unevaluated sites on BLM lands?



- A (Lonnie): given that this is a programmatic document, they won't decide what to do for them for now. If a project is scheduled in areas with unevaluated sites, then they will make those determinations at that time.
- Melissa B. discussed the PA. There are a lot of unevaluated sites on BLM land. She stated that if a project is scheduled to break ground in these areas, then BLM will request tribes on the ground before that project is approved.
  - **Ben mentioned that on the map, there are several pads shown. What tribes are asking BLM to do is allow tribes to broaden survey around the actual pads.**
  - Melissa responded that the APE can be defined and will be broader than the well pad.
  - Lonny clarified that BLM has new regulations for well proposals in BLM jurisdiction. Fee surface/mineral approach falls into three different situations:
    - **Situation 1: New well on existing pad, and they want a federal well with other private wells – BLM has no other jurisdiction on this scenario except the well bore itself.**
    - Situation 2: private surface over private minerals, new disturbance to expand well into federal mineral. BLM jurisdiction here is expansion into federal only. Would ask for cultural survey (only a request, not a requirement), otherwise they would look at their own information from previous inventories. If they know there is a site, they will not approve permit.
    - **Situation 3: new disturbance, if only related to drilling federal well, then BLM has more jurisdiction because it intersects federal land. Would require cultural surveys, and operator would have to comply.**
- **Ben asked about Situation 2: what happens when survey can't be done?**
  - Melissa answered that if there is not sufficient information to make determination of effect, then permit will not be granted.

- Peter thinks there are legitimate grounds for pushing back the January 2019 deadline. He appreciates the earnestness of the BLM in fulfilling the government to government consultation, but this should not be new to the BLM. He claimed the government to government consultation really hasn't been initiated yet, even though the DEIS was already published. It shouldn't be news to the BLM that they need to meet with authorized officials (council members). Everything that is being requested by tribes here today is already required. The tribes shouldn't have to ask over and over. Also, he brought up the issue of outdated data about water. And there are many references in the DEIS about cultural resources surveys that are out of date. He also brought up the issues of raptors, which are very important to many of the tribes here today. They are very important species spiritually and culturally for the Lakota people, for example. The DEIS references a 1987 report on raptors, which he feels is too old. TDS (total dissolved solids) in produced water – concerns here regarding the information in DEIS is from the Produced Water Society 2010, just at the early stages of fracking. He requests better and more recent information for cultural, wildlife, and water. In order to derive conclusions on the environmental impacts on this project, better information is needed for the tribes.
  - Peter asked about whether AECOM prepared the DEIS? Mike answered that they re-wrote it. Peter responded that there's nobody listed as author who have expertise about the issues being discussed in this meeting.
  - Peter wants to take a step back, slow things down, involve the tribal councils, update many of the studies of effects. He feels the existing studies do not provide a good basis to move forward with FEIS.
- Mario asked about EAs already finished in Converse County – does BLM refer to that to see how some of these issues have been resolved?
  - Mike answered that yes, for the cumulative effects section.
- Lonny asked Peter to clarify what he means by the authors of the DEIS not having expertise?

- Peter clarified that, if the DEIS were finalized today in its current form, then it would be a violation of trust for the tribes. The entire project area is Sioux Nation treaty land. There is specific guidance for tribal treaty rights, particularly if these rights are violated in a NEPA study. He feels that the DEIS violates CEQ guidance. When Peter asked yesterday about the contractors, he wanted to know if the BLM was requesting contractors with tribal expertise. He feels it is a requirement that a firm with extensive tribal experience should be used, preferably a tribal-owned company. NEPA is a disclosure document, but the tribal issues just aren't in the DEIS. He feels like these issues were ignored because AECOM lacks the expertise. (He said that the only thing he could find about AECOM's tribal experience on their website last night was something in New Jersey, and thinks this is their only experience). He thinks it would have been helpful for BLM to have retained a Native-owned firm who has these expertise. He thinks there was a legal violation with the Executive Order on Environmental Justice.
  - Lonny replied that he will review the DEIS for CEQ guidance compliance.
- Mario wants to make sure that all of these issues are addressed: hunting rights, fishing rights, and water rights.
- Kyle requests that tribes are involved in new surveys and resurveys, considering even sites previously determined not eligible.

**12:00 - Lunch**

**1:00 – Meetings Resume**

- Lonny presented slides about groundwater protection. Well water integrity is BLMs number one priority when approving wells. Design and construction of the well to ensure isolation in wellbore. Surface casing set below useable groundwater and cemented to surface. Intermediate and Production casing is cemented to isolate hydrocarbon zones, providing further protection to groundwater. Multiple layers of

protective steel casing surrounded by cement. Cement Bond Logs verify quality of cement job and centralizers.

- Scenarios that could lead to failure are things like: water migrating out of the back side of the casing. Also, insufficient cement coverage. Also leaks through casing.
- Peter commented that BLM estimates of failures are too low. He claims that actual real-world failures in casing is higher than estimates in DEIS.
- Lonny continued that BLM actively monitors wells to ensure good mechanical integrity.
- Reno Red Cloud asked about casing material? A (Lonny): metal. Q: what about horizontal pipe? A: they run solid casing through, then perforate pipe, then frack. Q: what about aquifers? A: cementing pipe protects them. Q: unconfined and confined aquifers are not mixed? A: No there aren't. Q: What about monitoring? A: Baseline data will be collected of surrounding aquifers Q: What is done with waste water? A: It is put underground in wastewater wells.
- Peter commented about the Pavilion case (fracking fluid spoiled groundwater): how does it instruct BLM for this project. A: The method of their casing program is monitored and evaluated so that the casing maintains integrity around groundwater. Also, the oil companies, in the Pavilion case, escaped blame by saying that there was no baseline data on wells, so maybe they were already contaminated.
  - Mike answered that WOGCC requires baseline monitoring of existing wells prior to drilling. There is data on that online.
  - Peter looked up the website, and found that there can be variances to this, so the variances are something to be wary of.
- Bryce commented that BLM should be educating oil & gas companies about renewable energy alternatives. E.g., growing industrial hemp on the thousands of acres they own in North Dakota after the oil boom. He asked what BLM's response to Pavilion? A (Lonny): there were no federal wells for that project, so

they weren't involved. Bryce wants the BLM to nonetheless use the Pavilion case as a cautionary tale. Lonny commented that BLM has done this – as a result of Pavilion, they require setting the cases deeper, past those zones of hazard.

- Conference call: Tyler Abbott – Fish & Wildlife Wyoming Field Supervisor
  - Question from tribes: what about water quality on Cheyenne River?
    - Answer (Tyler): BLM does not have jurisdictional authority on water quality, this is a state issue. BLM will look at downstream effects quantity-wise on wildlife.
    - Mario – Oglala Sioux have federal rights (fishing) to the Cheyenne River water. It seems like Fish & Wildlife should have some authority.
    - Tyler – There really is no federal jurisdictional authority, including with Fish & Wildlife, for water quality. This is up to the Department of Environmental Quality (state-level).
    - Mario – as a federal trustee, the BLM has a responsibility to protect tribal water fishing rights, which are federal.
    - Tyler – he's happy to explore relationships and see what can be done.
    - Peter C. – is there any palate surgeon habitat in Powder River or Cheyenne River? A (Tyler): not to his knowledge, no.
    - Peter C. – The operator group requested an exception to drill year-round. This could affect Red Tail Hawk habitat. On behalf of the Lakota, Peter requests that this exception be denied, due to the impacts on raptors.
    - Q (Allyson): Are there any specific requirements for waste water reserve pits? A (Tyler): He does not have those specifics at his disposal, but he's happy to work with BLM to get those data for her.
    - Q (Allyson): if there are any potential effects to endangered species or migratory birds, will BLM and USFWS review and provide opportunity for tribes to review? A (Tyler and Lonny): Yes, BLM and USFWS will review, and will put into FEIS for review.



- Q (Reno): if the project is finished, and then they want to reclaim land to natural standards, how does this work? A (Lonny): USFWS will be involved if fish or birds are involved, but BLM will monitor restoration of natural land. Reclamation require that local plant species only are used. Peter – clarified that there are special plant species (e.g., upland sweetgrass) which are of special significance to tribes. Will these be protected? Lonnie answered that they would do a site-specific study, and if those species are there, they would be returned. There are also requirements for invasive species to make sure they are not in the rehabilitated areas.
- Wayne commented that it's frustrating to hear the BLM and USFWS speak as if neither agency knows what the other is doing.
- Ben R. – what does Tyler know about Canadian thistle? Intrusive, noxious? Ben commented that right now the Canadian thistle is blooming. When the plant first entered the U.S., one of the tribal elders asked about it. You can take that center flower, put it in your mouth, and let it soak. They say it cleans the synapses in your brain. His point is that there are plants that are significant to tribes, yet are defined as invasive and noxious by U.S. government.
- Lonny asked if tribes would provide a list of plant species that are important to them? Tribes responded yes.
- Allyson – how many injection wells are proposed? Lonny answered he doesn't know, will check. Allyson – about water use, she would appreciate data on current wells, and any more surface waters that will be used. She thinks it may be an underestimation, and the amount of water use greatly varies within the alternatives. Lonny commented that one of the wells is recycling the waters, so it uses less. Allyson asked about new groundwater wells – any estimate of the total number? A: no, don't know. Allyson: air quality data should take into consideration the full cumulative effects on air quality. She has been through the area, and has seen increased haze already. She wants to see

cumulative data on air quality. In the report, there's no information on greenhouse gases, ozone. Also, there are cases in the report where the current measurements meet the standard, but just barely (e.g., ozone), but slight changes could change this. Also, fixed facilities (e.g., compressor and pumping stations). Clean Air Act – what sort of permits? BLM requested that Allyson compile and submit her questions.

- Peter: the EPA rating of the DEIS document is “Insufficient”. The EPA’s comments actually mirror a lot of the discussion here. Peter listed some of the comments. Peter said that slowing down the process will help address and fix some of these insufficiencies. The issue of cancer was brought up yesterday by Ms. Black, and Peter mentioned that the DEIS identified increased levels of carcinogens. The assumption that there will be no methane emissions from 500 wells (as claimed in the DEIS), he feels is not realistic. Thus, the air quality will be worse than expected. He thinks the Impacts on Air Quality section is biased, and seems to reflect a political stance regarding climate change. He wants a better estimate of the amount of water that will be used? The range is too broad in the DEIS to get any sense of this.
- Peter, asked: is there any possibility of BLM selecting the No Action Alternative?
  - Lonny – highly unlikely, not with the current level of production ongoing.
  - Has the agency already decided on the preferred alternative?
  - Lonny – no decision has been made on that.
- Steve restated that the Cheyenne River Sioux will request the no action alternative. If this is the case, what will happen with split estates (private surface, federal mineral)?
  - Lonny: they will also be affected by the No Action Alternative (i.e., no drilling)
  - Steve commented that the U.S. president will change, eventually. So the credibility of the BLM will depend on whether they remain consistent, and use a principled approach. He wonders if the BLM is appeasing the current administration, but will change later when there is a new administration? He’s saying the that perception of the BLM by the tribes will depend on this.
    - Lonny says they will uphold the federal law regardless of who is in the administration.

- Steve – when ACHP gives advice and it's not followed, there needs to be a consequence. The more times an agency (BLM) fails to follow the federal guidelines, the worse their reputation becomes with the tribes.
- Tim asked: Is someone appointed as Federal Preservation Officer? Melissa, yes, Ranel Capron (former WY BLM State Archaeologist) is now in D.C. as Federal Preservation Officer. Regarding Class III methodology, he asked Melissa what is the minimal transect width? A: 100-foot transects (30-m), but only under certain circumstances (e.g., open ground). This spacing can be changed in the fieldwork authorization phase. Tim responded that this spacing is too large for tribes, so all of these reports using these standards are unacceptable to tribes. He wants to know why tribal comments are not included in EIS documents. This was being discussed in the early 1990s, and the tribal governments wanted these transects tightened-up. But here we are still discussing it.
- Steve asked how we can get WY BLM to reduce transect intervals? Tim further clarified that they want to know if tribes will be consulted with Class III methodology moving forward? Melissa answered that this is the goal of the PA – to get people to come together.
- Right now the WY-BLM uses state standard of 30-meters. Tim asked what Melissa's recommendation is? She said that the PA will address tribal concerns, so that would be the place to tighten the transect intervals.
- Tim wants to clarify cairns versus burials, as identified previously in Class III reports and listed in the DEIS. How they buried their people were with scaffolds, and then under a cairn of rocks. He's concerned that many archaeologists write-off cairns and not eligible, no further work. In the future, if the tribes go out there, and they identify cairn burials, how will BLM handle this? Also, he wants to know if there is a current inventory estimate of how many burials, how many burials?
  - Melissa, in answer to first question, BLM will call cairns eligible as burials if tribes identify them as such.

- Second question: these totals are summarized briefly in the DEIS. There has been no inventory specifically for this EIS. There have been previous surveys, unrelated to current project, that BLM is drawing from for Class I report.
- Split estate issue: will NAGPRA apply in these cases?
  - Lonny answered that this issue is being explored, and what will happen if any burials are found. Right now, the landowners supposedly own the burials on their land also.
  - Melissa: the goal in the PA with the landowners is to create a mechanism when there is an inadvertent discovery of human remains to allow the BLM to act as a liaison, hopefully with tribal representatives, using the regulations laid-out in NAGPRA. They cannot force landowners to comply, but they can provide the mechanisms by which the landowners can appropriately act in this event.
  - Devon: will there be an area dedicated entirely to NAGPRA repatriations? Melissa replied that BLM will have to be careful in the event that human remains are found on private property, because we need to find out if they can be repatriated on BLM land.
  - Tim commented that in his experience on the Missouri River, that the tribes were allowed to repatriate on a 1-acre plot on USACE federal property. But he cautioned that all of these graves were looted, because they buried them with traditional cultural objects.
  - Lonny replied that the BLM could get creative with this issue of repatriation, and Melissa commented that they could explore this as an option.
  - Mario asked about leases. Lonny replied that whatever conditions are applied to a lease, stay with the lease.
  - Tim asked about timeline for PA. Melissa will work on compiling a list of concerns raised and will have that ready when BLM meets with the PA

parties to work on a draft. BLM invites all 18 tribes that they consult with to participate in the PA.

- Ben asked when and where will BLM try to have a meeting for the PA? Melissa agreed that Late August or September at the earliest. Ben mentioned that most tribes are in ceremonies through the summer, so late summer at earliest.
- Kyle brought up confidentiality agreements regarding TCPs in Class III reports. It's something that tribes will be requesting – that more interviews are conducted to collect more accurate information, but that it also has to be protected and restricted from public access and use.
  - Melissa replied that she does not want to provide information to site forms that end up at the SHPO's office, for these confidentiality agreements. Consultation is not about providing this sort of information to consultants so that they can identify these resources, but rather to properly identify the resources and make the justification for eligibility.
- Steve stated that cairns are often like the monuments left on the side of the road for car deaths. There are no bones in these, but they're sacred. Cairns are a marker to commemorate the dead. But there are no remains in them. Placentas were buried. But they don't survive. Steve wants to know who writes the narrative in the reports regarding TCPs?
  - Melissa replied that she writes the narratives for TCP concerns.
  - Steve said that essentially, BLM is asking tribes to write these sections for forms, but there's a time issue. Steve requested that he wants to see how the BLM handles comments from the tribes regarding TCPs, how it goes into the forms. He said the windfarm projects are a good example of how archaeologists and tribes can work side by side.

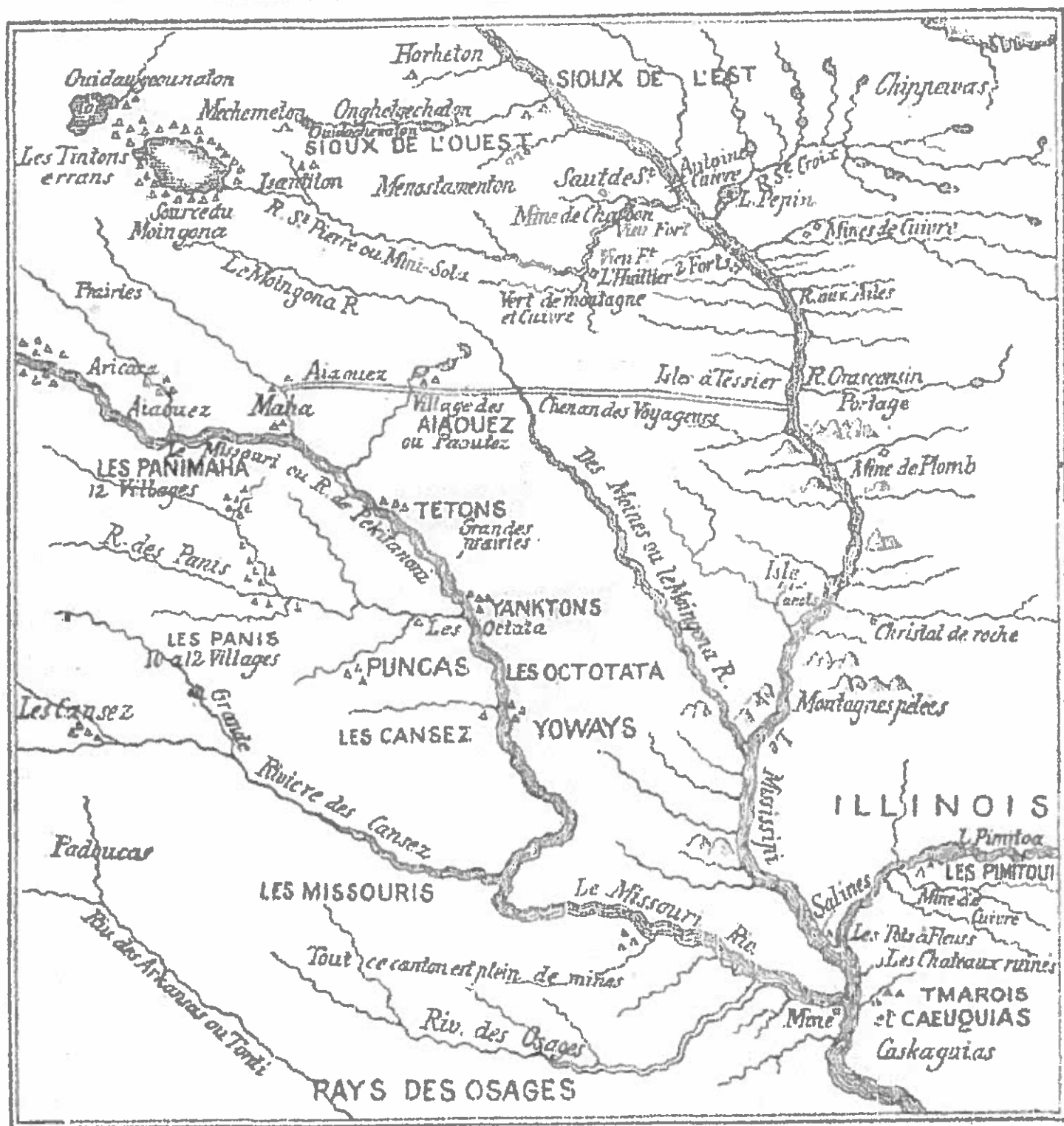


- Kyle commented about the Culture History section in the DEIS, regarding the Sun Dance starting in 1800s. He wants that removed from the document for inaccuracy. He feels it's important to get tribes involved in the background sections to be conveyed in the appropriate manner. So all of these reports should be reviewed by THPOs as well.

**3:15 – Meeting Adjourned**

## **EXHIBIT “E”**

**(1699 De l’Isle Map showing Teton and Yankton on Missouri River in S.D.)**



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*LET. 11/11/14 RGA  
P. 3-2-14*

Director (210)  
Attention: Protest Coordinator  
P.O. Box 261117  
Lakewood, Colorado 80226