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June 19, 2017

**VIA FEDERAL EXPRESS AND EMAIL**

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**Re: *Cheyenne River Sioux Tribe Comments in Response to EPA's Proposal to Rescind and Revise the Definition of "Waters of the United States"***

Dear Administrator Pruitt, Mr. Lamont, and Ms. Gude:

As the Chairman of the Cheyenne River Sioux Tribe ("Tribe"), I am contacting the U.S. Environmental Protection Agency ("EPA") to submit the Tribe's official comments on the EPA's forthcoming proposal to rescind and revise the definition of "waters of the United States," ("Proposed Rule Change") as discussed in your April 20, 2017 "Dear Tribal Leader" letter. Your

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

letter also has advised that the EPA has invited the Department of Army to participate in consultation and coordination.

The Cheyenne River Sioux Reservation is located wholly within the exterior boundaries of the State of South Dakota. (A map showing the location of the Tribe's Reservation is enclosed herewith.) However, our rights and trust resources extend beyond our Reservation borders as a matter of federal law, and they are rights for which the United States owes us a fiduciary duty. Therefore, the purpose of these comments is to insist that the EPA must act as a fiduciary by both consulting with the Tribe on any impact to those rights and by protecting those rights from harm.

Please note that these comments do not satisfy the EPA's consultation obligation to the Tribe. Moreover, they should be considered a *preliminary* statement of some of the Tribe's concerns regarding the Proposed Rule Change. The Tribe cannot fully assess its concerns until it has had an opportunity to engage in meaningful government-to-government consultation on these issues as described more fully herein.

### ***The Tribe's Rights and Trust Resources Related to the Proposed Rule Change***

- Reserved water rights: The Tribe enjoys reserved water rights in the Missouri River Basin as well as related groundwater in an amount sufficient to fulfill the purposes of the Reservation. See *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 600 (1963). These reserved water rights are a trust resource for which the United States owes a fiduciary duty. These rights are a function of the Tribe's extant treaty rights. See *Treaty of Fort Laramie with the Sioux, Etc.*, 11 Stat. 749 (Sep. 17, 1851); *Treaty with the Sioux – Brule, Oglala, Mniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee*, 15 Stat. 635 (Apr. 29, 1868). The Tribe retains reserved water rights in off-Reservation waterways in the Missouri River Basin as well as groundwater and aquifers outside its Reservation.
- Hunting and fishing rights: The Tribe enjoys hunting and fishing rights in Lake Oahe, the reservoir of the Missouri River. The rights are subject to the United States' trust duty and constitute a function of the Tribe's extant treaty rights and have been preserved by Congress. See *Treaty of Fort Laramie with the Sioux, Etc.*, 11 Stat. 749 (Sep. 17, 1851); *Treaty with the Sioux – Brule, Oglala, Mniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee*, 15 Stat. 635 (Apr. 29, 1868); Act of Sep. 3, 1954, Pub. L. 83-776, 68 Stat. 1191. Numerous off-reservation tributaries, aquifers, wetlands, streams, and other bodies of water belong to the Lake Oahe hydrologic system and consequently will impact the Tribe's retained hunting and fishing rights in Lake Oahe.
- Historic, spiritual, and cultural resources: There are numerous sites of historic, spiritual, and cultural significance to the Tribe throughout the Tribe's large aboriginal territory, but especially within the boundaries of the lands reserved to

the Tribe in the *Treaty of Fort Laramie with the Sioux, Etc.*, 11 Stat. 749 (Sep. 17, 1851). Furthermore, the Tribe's reserved water rights themselves constitute a spiritual and cultural resource in light of the primary role that water plays in Lakota religious sacraments, which require environmentally and ritually pure water. (A map showing the Tribe's 1851 territory is enclosed herewith.)

### ***United States Trust Duty***

The United States has a two-fold trust duty to the Tribe. Courts have long recognized the "existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The courts are clear that "any Federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes." *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) (emphasis in original) (citing *Seminole Nation v. United States*, 316 U.S. 268, 297 (1942)).

Secondly, the federal government has a specific trust duty to protect the rights reserved in the 1851 and 1868 Fort Laramie Treaties. The Tribe was a party to the 1851 and 1868 Fort Laramie Treaties, which reserved land and water to the Tribe in order to fulfill the purpose of the Reservation to provide for self-sufficiency. See *Winters v. United States*, 207 U.S. 564 (1908). The reserved water right recognized in the *Winters* doctrine, and reserved for the Tribe, includes the right to clean, safe water. See, e.g., *United States v. Gila River Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996). Likewise, the Tribe has retained its right to hunt, fish, and gather on the Reservation and in Lake Oahe. Act of September 3, 1954, Pub. L. 83-766, 68 Stat. 1191; *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993) (noting that Congress explicitly has reserved the Cheyenne River Sioux Tribe's original treaty rights, including the right to hunt and fish, on Lake Oahe); see also *United States v. Dion*, 476 U.S. 734, 738 (1986) ("Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them . . ."). The Tribe's water rights include a right to water that is sufficient in amount and quality to support hunting and fishing rights. *United States v. Adair*, 723 F.2d 1394, 1409, 1411 (9th Cir. 1983). As a result of the federal government's trust responsibilities to the Tribe, the EPA must ensure that such trust resources are preserved in any activity that may impact the Tribe's rights, including regulations such as the Clean Water Rule that govern discharges into waters that affect the Tribe's reserved water rights, their Treaty Rights, and their religious exercise.

### ***The United States Must Consult on the Tribe's Rights and Has a Duty to Protect Them***

The United States and the EPA's trust relationship does not only extend to the affirmative obligations to protect tribal rights and trust resources, but the United States must also engage in meaningful pre-decisional consultation on projects that will affect the Tribe's treaty rights and trust resources. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000); EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984); EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights (Feb. 2016).

“In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party.” *Seminole Nation v. United States*, 316 U.S. 286, 296-67 (1942). Instead, “it has charged itself with moral obligations of the highest responsibility and trust.” *Id.* Pursuant to its trust duty, agencies are required to “consult with Indian tribes in the decision-making process to avoid adverse effects on treaty resources.” *Klamath Tribes v. United States*, No. 10-2130, 1996 WL 924509 (D. Or. Oct. 2, 1996) (quoting *Lac Courte Oreille Band of Indians v. Wisconsin*, 668 F. Supp. 133, 140 (W.D. Wis. 1987); *Ctr. for Biological Diversity v. Salazar*, No. 10-2130, 2011 WL 60000497, at \*11 (D. Ariz. Nov. 30, 2011). It is not a discretionary duty. *Ctr. for Biological Diversity*, at \*11.

The duty to consult is binding on an agency when the agency has announced a consultation policy, and the Tribes have come to rely on that policy. *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 784 (D. S.D. 2006); *see also Oglala Sioux Tribe v. Andrus*, 603 F.2d 707 (8th Cir. 1979); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D. S.D. 1995); *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 58 (D.C. Cir. 1991); *Indian Educators Fed’n Local 4524 of Am. Fed’n of Teachers, AFL-CIO v. Kempthorne*, 541 F. Supp. 2d 257, 264-65 (D. D.C. 2008). At a minimum, this requires that the agency give fair notice of its intentions, which requires, “telling the truth and keeping promises.” *Yankton Sioux Tribe*, 442 F. Supp. 2d at 784 (citing *Lower Brule Tribe*, 911 F. Supp. at 399). An agency’s failure to provide tribes with accurate information necessary to meaningfully consult before a decision is made is agency failure to meet its consultation obligation. *Id.* at 785; *see also Cheyenne River Sioux Tribe v. Jewell*, No. 3:15-03072, 2016 WL 4625672 (D. S.D. Sep. 6, 2016). ***Reviewing a Tribe’s comments submitted in conjunction with an agency’s general invitation for public comments is not sufficient to meet this obligation.***

The EPA has explicitly adopted and expounded on a consultation policy consistent with federal law recited herein as set forth in the following: (1) the EPA Policy on Consultation and Coordination with Indian Tribes, dated May 4, 2011; (2) the EPA policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights, dated February 2016; and (3) the EPA Responses to Comments on EPA Policy for Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights. The Department of Army and the U.S. Army Corps of Engineers (“Corps”) also have adopted a consultation policies as set forth in the following: (1) Department of Defense Instruction 4710.02; and (2) Corps’ Tribal Consultation Policy, dated November 1, 2012.

Importantly, these consultation policies commit the EPA and the Corps to provide further information to the Tribe concerning the specific effect of the Proposed Rule Change on our resources, to consult pre-decisionally, to honor the Tribe’s requests concerning substantive and logistical details of consultation, to involve EPA decision-makers in the consultation process, to provide written consultation feedback, and to seek to fully understand and reach a consensus with the Tribe.

The federal government has further obligations to tribes under the National Historic Preservation Act (“NHPA”) and the Religious Freedom Restoration Act (“RFRA”). The NHPA was enacted to preserve historic resources in the midst of modern projects and requires agencies to fully consider the effects of its actions on historic, cultural, and sacred sites. Section 106 of the NHPA requires that prior to issuance of any federal funding, permit, or license, agencies must take into consideration the effects of that “undertaking” on historic properties. 54 U.S.C. § 306108; 36 C.F.R. § 800.1. The Section 106 process also requires consultation between agencies and Indian Tribes on federally funded or authorized “undertakings” that could affect sites that are on, or could be eligible for, listing in the National Register, including sites that are culturally significant to Indian Tribes. 54 U.S.C. § 302706. An agency official must “ensure” that the process provides Tribes with “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” 36 C.F.R. § 800.2(c)(ii)(A). This requirement imposes on agencies a “reasonable and good faith effort” by agencies to consult with Tribes in a “manner respectful of tribal sovereignty.” *Id.* 36 C.F.R. § 800.2(c)(2)(ii)(B); *see also id.* § 800.3(f) (any Tribe that “requests in writing to be a consulting party shall be one”).

Under RFRA, the “Government shall not substantially burden a person’s exercise of religion” unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b). Tribal religious practices are significantly tied to oral tradition, ancestral lands, and natural resources.

Significantly, the EPA and the Corps, along with several other departments of the United States federal government, entered into a Memorandum of Understanding on Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites on September 23, 2016. The Memorandum acknowledges that federal agencies hold in trust many culturally important sites held sacred by Indian tribes, and federal agencies are responsible for analyzing the potential effects of agency projects carried out, funded, or permitted on historic properties of traditional cultural and religious importance to Indian tribes including sacred sites. Additionally, international law, treaties, and jurisprudence has repeatedly affirmed the right of Free Prior Informed Consent. *See Declaration on the Rights of Indigenous People*, art. 10, United Nations (Mar. 2008). The purpose of Free Prior Informed Consent (“FPIC”) is to establish bottom up participation and consultation of an Indigenous population prior to the beginning of a development on ancestral land or using resources within the Indigenous population’s territory. *Id.*

### ***Tribe’s Requests Concerning the Proposed Rule Change***

#### **1. The Proposed Rule Change Poses a Serious Threat to Tribal Rights that the EPA Must Thoroughly Evaluate**

The EPA has indicated that that it will revise the existing Clean Water Rule to be consistent with Justice Scalia’s plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), which

narrowly defines “waters of the United States.” Such a rule has the potential to permit an increase in discharge of pollutants into wetlands, streams, and waterways in the Missouri River Basin. This is a critical concern for the Tribe in light of the fact that the Tribe has a single source of clean, safe drinking water: its water intake at the confluence of the Cheyenne River and Missouri River at Lake Oahe. As with any degradation of water quality, such pollution will implicate rights of the Tribe that are protected by federal law, including (a) the Tribe’s reserved water rights and Treaty-based hunting and fishing rights; and (b) the Tribe’s religious rights, including its religious exercise.

**a. The Proposed Rule Change Poses a Serious Threat to the Tribe’s Treaty Rights and Reserved Water Rights**

The Proposed Rule Change will necessarily affect aquifers, wetlands, waterways, and tributaries that are hydrologically connected to the waters that impact Cheyenne River Sioux Reservation lands and waters. These lands and waters have been guaranteed to us by Treaty, and the United States must act as our fiduciary in protecting them as a matter of federal law as set forth above.

In 2005, when a drought threatened the Tribe’s only source of drinking water, which is drawn from an intake project at the confluence of the Cheyenne River and the Missouri River at Lake Oahe, the U.S. Army Corps of Engineers determined that a loss of this water source would devastate our Tribe. As a consequence, we are vigilant in our monitoring and stewardship of our waters.

Before the United States created the EPA and enacted legislation that protected waters of the United States, corporations and individuals were permitted to dispose of mining, industrial, and agricultural waste into streams, wetlands, and other waterways off the Cheyenne River Sioux Reservation that ultimately flowed into the rivers and streams that constitute our reserved water rights. This pollution infiltrated our drinking water and has impaired the health, safety, and welfare of our members. With the assistance of this very agency, the EPA, pursuant to federal laws enacted to protect waters and the environment, the Tribe has worked diligently to prevent further pollution that would affect our waters and to assist with efforts to clean pollution from these waters.

The Tribe’s reserved water rights will be impaired if the EPA’s definition of “waters of the United States” fails to take into account the proven potential of off-Reservation streams, wetlands, and other waterways to carry dangerous pollutants to the Cheyenne River Sioux Reservation. Justice Scalia’s formulation of “waters of the United States” in *Rapanos* has the potential to exclude a great many of those important bodies of water that are so crucial to the health of the Tribe. Such a result could undo the important work that the EPA has done in conjunction with the Tribe over the past several decades. More importantly, it would violate the Tribe’s rights under Treaty and federal law, and it would violate United States’ fiduciary duty to the Cheyenne River Sioux Tribe.

Consequently, any revised definition of “waters of the United States” must thoroughly evaluate impacts to the Tribe in conjunction with government-to-government consultation with the Tribe. Failure to do so would be arbitrary and capricious and risks violating the United States’ and the EPA’s trust responsibility to the Cheyenne River Sioux Tribe.

**b. The Proposed Rule Change Poses a Serious Threat to the Tribe’s Religious Exercise**

Water is an essential aspect of the Lakota religion. It figures prominently in our theology and represents a key component of our religious ceremonies. Specifically, many of our religious sacraments require either water or ritual deprivation thereof, and crucially water is an essential component of one of our most important religious sacraments, the *inipi* ceremony or sweat lodge. This sacrament requires that we use only water that is both environmentally and ritually pure. As noted above, the Tribe has very limited access to water on the Reservation and relies solely on water drawn from the confluence of the Cheyenne River and the Missouri River at Lake Oahe for its drinking water and which represents reserved water rights of the Tribe. Upstream contamination of these waters in which the Tribe owns reserved water rights has the very serious potential to affect the Tribe’s and its members’ religious exercise in violation of the Religious Freedom Restoration Act.

**2. The EPA must engage in meaningful government-to-government consultation with the Tribe**

As described herein, the Proposed Rule Change poses serious threats to the Tribe’s reserved water rights, hunting and fishing rights, and religious exercise in ways that implicate federal statutes and treaty rights. As further described herein, as a function of its fiduciary duty to the Tribe and as a matter of federal law, the EPA must engage in meaningful government-to-government consultation with the Tribe on the issues discussed herein and other issues that may arise.

The Tribe looks forward to consultation and believes that such consultation must, *at a minimum*, encompass the following components, required both by the laws cited above and by the EPA’s policies and guidance:

- Provide the Tribe with and explain all pertinent information concerning the impact on the Tribe’s rights before consultation in a timely manner.
- Coordinate with the Tribe before consultation begins, especially with development of an agreement on consultation timelines.
- Consult only with Tribal representatives who have been authorized to engage in government-to-government consultation by the Tribal government.

- Make every effort to conduct Tribal consultation at the seat of Tribal government, Eagle Butte, South Dakota or elsewhere on the Cheyenne River Sioux Reservation.
- Ensure that federal participants in Tribal consultation have actual decision-making authority.
- Provide written confirmation that the agency has considered tribal comments and concerns and the agency's response, whether positive or negative.
- Obtain resolution of approval from the Tribe that the agency has satisfactorily consulted with the Tribe and the Tribe agrees with the agency's response to Tribal concerns in each instance.

Finally, the EPA must be aware that consultation required under the National Historic Preservation Act concerning cultural and spiritual resources is not sufficient to meet the United States' obligation to consult about reserved water rights, treaty rights, or other religious freedom issues.

I appreciate the EPA's request for comments on this important issue. As noted above, these comments are *preliminary*. The Tribe reserves the right to submit supplementary comments after engaging in government-to-government consultation with the EPA and, if appropriate, the Corps. Further, in addition to these comments, a formal request for consultation has been sent to you under separate cover.

Please do not hesitate to contact me if you should have any questions.

Very Truly Yours,

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

Harold Frazier  
Chairman, Cheyenne River Sioux Tribe



