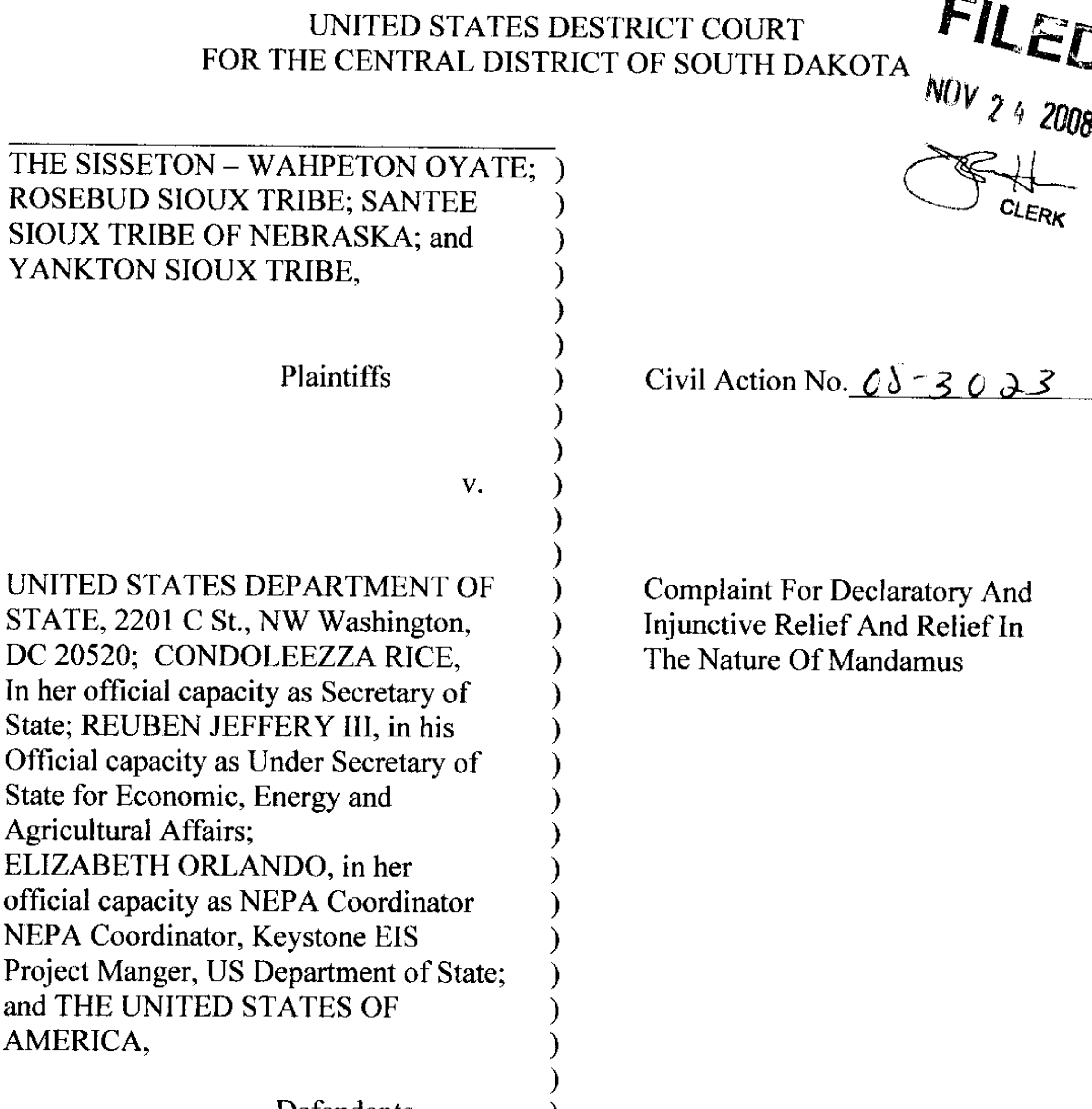

UNITED STATES DESTRICT COURT
FOR THE CENTRAL DISTRICT OF SOUTH DAKOTA

FILED
NOV 24 2008
CLERK

THE SISSETON – WAHPETON OYATE; ROSEBUD SIOUX TRIBE; SANTEE SIOUX TRIBE OF NEBRASKA; and YANKTON SIOUX TRIBE,	)	
Plaintiffs	)	Civil Action No. 08-3023
v.	)	
UNITED STATES DEPARTMENT OF STATE, 2201 C St., NW Washington, DC 20520; CONDOLEEZZA RICE, In her official capacity as Secretary of State; REUBEN JEFFERY III, in his Official capacity as Under Secretary of State for Economic, Energy and Agricultural Affairs; ELIZABETH ORLANDO, in her official capacity as NEPA Coordinator NEPA Coordinator, Keystone EIS Project Manger, US Department of State; and THE UNITED STATES OF AMERICA,	)	Complaint For Declaratory And Injunctive Relief And Relief In The Nature Of Mandamus
Defendants	)	

A. INTRODUCTION.

1. This is an action brought by four federally recognized Indian tribes, for declaratory and injunctive relief and relief in the nature of mandamus brought against the United States of America and one of its agencies, officials and employees. It arises over the planned construction of an oil pipeline by Keystone Pipeline, Inc. through the Tribes' aboriginal and treaty protected territory in eastern North Dakota and South Dakota, to

which, the Tribes still retain legally-protected interests in the historic sites, sacred sites, burial grounds and human remains and associated funerary objects contained therein, and cultural items along the proposed pipeline route, and the right of access to such sites and items.

B. PARTIES

2. Plaintiff, SISSETON-WAHPETON OYATE is a governing body duly recognized by the Secretary of the Interior comprised of approximately 12,600 members occupying 106,000 acres known as Lake Traverse Indian Reservation located northeastern portion of South Dakota. The Tribe is the freely and democratically-elected government of the Sisseton-Wahpeton Sioux people. The Oyate is the successor-in-interest to the Sisseton and Wahpeton Divisions of the Sioux Nation, and is a protectorate nation of Defendant THE UNITED STATES OF AMERICA. The Sisseton and Wahpeton Divisions reorganized in 1936 as the "Sisseton-Wahpeton Sioux Tribe" under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoy all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. The Tribal Office address is P.O. Box 509 Agency Village, South Dakota 57262.

3. Plaintiff, ROSBEBUD SIOUX TRIBE is a body politic comprised of approximately 24,000 members with territory of over 923,000 square miles in the southwestern portion of South Dakota. The Tribe is the freely and democratically-elected government of the Rosebud Sioux people, with a governing body duly recognized by the Secretary of Interior. The Tribe is the successor-in-interest to the Upper Brule Band of the Teton Division of the Sioux Nation, and is a protectorate nation of Defendant THE

UNITED STATES OF AMERICA. The Upper Brule Band reorganized in 1936 as the "Rosebud Sioux Tribe" ("Rosebud Sioux Tribe" or "Tribe") under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. Its address is 11 Legion Avenue P.O. Box 430, Rosebud, South Dakota, 57570.

4. Plaintiff, SANTEE SIOUX TRIBE OF NEBRASKA, is a governing body duly recognized by the Secretary of the Interior comprised of approximately 2500 members occupying 9449 acres known as the Santee Sioux Indian Reservation located in northeastern Nebraska. The Tribe is the freely and democratically-elected government of the Santee Sioux people, with a governing body duly recognized by the Secretary of Interior. The Tribe is the successor-in-interest to the Mdewakanton, Wakpakoota and Yanktonai Divisions of the Sioux Nation, and is a protectorate nation of Defendant THE UNITED STATES OF AMERICA. Members of the Mdewakanton, Wakpakoota and Yanktonai Divisions reorganized in 1936 as the "Santee Sioux Tribe of Nebraska" ("Santee Sioux Tribe") under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. Its address is 425 Frazier Avenue North #2, Niobrara, Nebraska, 68760.

5. Plaintiff, YANKTON SIOUX TRIBE is a governing body duly recognized by the Secretary of the Interior comprised of approximately 7,500 members occupying 36,551.65 acres known as the Yankton Sioux Indian Reservation located in southeastern South Dakota. The Tribe is the freely and democratically-elected government of the

Santee Sioux people, with a governing body duly recognized by the Secretary of Interior. The Tribe adopted the protections of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 461 et seq., but did not adopt Section 16 of the Indian Reorganization Act constitution, and is a protectorate nation of Defendant THE UNITED STATES OF AMERICA and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. Its address is P.O. Box 248, Marty, South Dakota 57361.

6. Plaintiffs Sisseton-Wahpeton Tribe, Rosebud Sioux Tribe, Santee Sioux Tribe of Nebraska, and Yankton Sioux Tribe all have legally protected interests in lands located in eastern North Dakota and South Dakota along the Keystone Pipeline route, as alleged in this complaint, and will are referred to collectively herein as the "Plaintiffs."

7. Defendant, CONDOLEEZZA RICE is the Secretary of State, an executive agency of the United States. She is the trustee of the Plaintiff tribes and is bound to act in the best interest of the tribes. Her trust duties under federal law include acting in the best interest of the tribes and requiring compliance to the policies and laws of the Federal government including tribal Treaties, NHPA, NAGPRA, AIFRA, AHPA, NEPA, APA, ARPA and federal common law, prior to the issuance of a Presidential permit for the construction of the Keystone Pipeline. Her address is 2201 C. Street, NW, Washington, DC 20520.

8. Defendant, REUBEN JEFFERY III, is the Under Secretary of the State for Economic, Energy and Agricultural Affairs for the Secretary of State. He is the trustee of the Plaintiff tribes and is bound to act in the best interest of the tribes. His trust duties under federal law include acting in the best interest of the tribes and requiring compliance

to the policies and laws of the Federal government including tribal Treaties, NHPA, NAGPRA, AIFRA, AHPA, NEPA, APA, ARPA and federal common law, prior to the issuance of a Presidential permit for the construction of the Keystone Pipeline. His address is 2201 C. Street, NW, Washington DC, 20520.

9. Defendant, ELIZABETH ORLANDO is NEPA Coordinator, Keystone EIS Project Manager, for the Secretary of State. She is the trustee of the Plaintiff tribes and is bound to act in the best interest of the tribes. Her trust duties under federal law include acting in the best interest of the tribes and requiring compliance to the policies and laws of the Federal government including tribal Treaties, NHPA, NAGPRA, AIFRA, AHPA, NEPA, APA, ARPA, and federal common law, prior to the issuance of a Presidential permit for the construction of the Keystone Pipeline. Her address is OES/ENV Room 2657A Washington, DC 20520.

10. Defendant, THE UNITED STATES OF AMERICA is a body politic existing pursuant to the Constitution of the United States of America.

11. Defendants Condoleezza Rice, Reuben Jeffery, Elizabeth Orlando, The United States of America, will are referred to collectively herein as the "DOS."

C. JURISDICTION.

12. This action arises under the Constitution and laws of the United States, including U.S. Const. Art. 6 (Supremacy Clause) and Amend. 5 (Due Process and Takings Clauses); the Treaty with the Sioux, June 1, 1816, 7 Stat. 143, United States - Mdewakaton-Wakpakoota Divisions of the Sioux Nation (members of which now comprise the Santee Sioux Tribe of Nebraska); the Treaty with the Teton, Etc., Sioux, July 22, 1825, United States-Brule Band and Yankton Division of Sioux Nation, 7 Stat.

250; the Treaty of September 17, 1851, United States-Teton Division and Yankton Division of Sioux Nation, *et al.*, 11 Stat. 749; the Treaty with the Sioux, May 2, 1867, 15 Stat. 505, United States-Sisseton and Wahpeton Bands; the Treaty of April 19, 1858, United States-Yankton Division of Sioux Nation, 11 Stat. 743; Act of February 28, 1877, ch. 72, 19 Stat. 254; the Act of June 18, 1934, ch. 576, 48 Stat. 987, *as amended*, 25 U.S.C. § 461 *et seq.*; The National Environmental Protection Act of 1969, P.L. 91, 83 Stat. 852, 42 U.S.C. §§ 4321 et. seq.; the National Historic Preservation Act of October 15, 1966, P.L. 89-665, 80 Stat. 915, *as amended*, 16 U.S.C. § 470 *et seq.*; the American Indian Freedom of Religion Act of August 11, 1978, P.L. 95-341, 92 Stat. 469, 42 U.S.C. 1996; the Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-601, 104 Stat. 3048, *as amended*, 25 U.S.C. § 3001 *et seq.*; the Archeological Resources Protection Act of 1974, P.L. 96-95, 16 U.S.C. § 469 et seq.; the Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-601, 104 Stat. 3048, *as amended*, 25 U.S.C. § 3001 *et seq.*; Archaeological Resources Protection Act of October 31, 1979, P.L. 96-95; 16 U.S.C. §470aa-mm; the Administrative Procedures Act, 5 U.S.C. §§ 701-706; and other federal statutory and common law.

13. Jurisdiction over this action is conferred on this Court by 28 U.S.C. § 1331(a), as this is a civil action arising under the Constitution, laws and treaties of the United States; 28 U.S.C. § 1361, as this is an action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to Plaintiff; and 28 U.S.C. § 1362, as this is a civil action brought by an Indian tribe with a governing body duly recognized by the Secretary of the Interior, wherein the matter in

controversy arises under the Constitution, laws and treaties of the United States; 28 U.S.C. §2201, §2201, as this is an action for Declaratory Judgment and further relief.

14. Venue is proper in this Court in accordance with 28 U.S.C. § 1391(b)(2) and (e)(1) and (2), as a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District.

D. HISTORICAL BACKGROUND.

15. The Sioux Nation is comprised of seven divisions: (1) Medawakanton; (2) Sisseton; (3) Wahpakoota; (4) Wahpeton; (5) Yankton; (6) Yantonai; and (7) Teton. *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147, 162 (1970).

16. The Medawakanton, Sisseton, Wahpakoota and Wahpeton Divisions of the Sioux Nation are collectively referred to as "Santee" or "Dakota" Sioux. From time immemorial and up to and through the time of some of the actions which form the basis of this Complaint, the Santee Sioux, jointly and severally, exclusively used and occupied territory in western Wisconsin, all of central and southern Minnesota, northern Iowa, and eastern North Dakota and South Dakota, as delineated on the map attached hereto as Exhibit "A" and incorporated herein. They also occupy the territory that comprises the Santee Indian Reservation in Nebraska.

17. The official relations between the Santee Sioux and the United States began with the Treaty of September 23, 1805, ratified on April 16, 1808, but never proclaimed by the President. Thereafter, the Santee Sioux sided with the British during the War of 1812 and did not recognize the sovereignty of the United States over their territory until the signing of the Treaty of June 1, 1815, 7 Stat. 143, proclaimed, December 30, 1816. Article 4 of the 1816 Treaty provided that the Santee Sioux "do hereby acknowledge

themselves to be under the protection of the United States, and of no other nation, power or sovereign, whatsoever," and brought the Santee Divisions and their members under its protection and the Sioux bands became protectorate nations of the United States.

18. A portion of the Santee Sioux, however, were removed from Minnesota to the Crow Creek reservation in South Dakota in 1863, and were later granted a reservation in Nebraska under Section 5 of the Act of March 2, 1889 (25 Stat. 888). These Santee Sioux are presently known as the Santee Sioux Tribe of Nebraska, and still retain legally protected interests and rights within Santee aboriginal lands in eastern North and South Dakota.

19. The Lake Traverse Reservation was established for the Sisseton and Wahpeton Sioux Divisions of the Sioux Nation within their aboriginal territory recognized by Article 3 of the Lake Traverse Treaty of February 19, 1867, 15 Stat. 505, proclaimed May 2, 1967. Article 3 described the reservation's boundaries as follows:

> For and in consideration of the cession above mentioned, and in consideration of the faithful and important services said to have been rendered by the friendly bands of Sissetons and Wahpetons Sioux here represented, and also in consideration of the confiscation of all their annuities, reservations, and improvements, it is agreed that there shall be set apart for the members of said bands who have heretofore surrendered to the authorities of the Government, and were not sent to the Crow Creek reservation, and for the members of said bands who were released from prison in 1866, the following-described lands as a permanent reservation, viz: Beginning at the head of Lake Travers[e], and thence *along the treaty-line of the treaty of 1851 to Kampeska Lake; thence in a direct* line to Reipan or the northeast point of the Coteau des Prairie[s], and thence passing north of Skunk Lake, on the most direct line to the foot of Lake Traverse, and thence along the treaty-line of 1851 to the place of beginning.

20. Since time immemorial, the Teton Bands and the Yankton Division of the Sioux Nation held title to the following described territories as follows:

a. The Teton Bands and Yankton Division held a joint recognized title interest to a territory consisting of approximately 60,000,000 acres west of the Missouri River described in Article 5 of the Ft. Laramie Treaty of September 17, 1851 (11 Stat. 749). The treaty also recognized the underlying aboriginal title of the Teton and Yankton Sioux to the same territory;

b. The Yankton Division held aboriginal and recognized title in a territory consisting of approximately 13,000,000 acres between the Des Moines and Missouri Rivers;

c. The Teton Division (with the Yanktonai Division) held aboriginal title to 14 million acres of territory east of the Missouri River. This territory was never recognized by treaty.

These territories described above were judicially established as treaty and/or aboriginal territory of the Teton Bands and Yankton Division by the Indian Claims Commission.

21. In Article 4 of the April 19, 1858, 11 Stat. 743, the United States stipulated and agreed that "in consideration" for the ceded 13,000,000 aboriginal title territory east of the Missouri River, United States would "protect the said Yankton in the quiet and peaceable possession of the said tract of four hundred thousand acres of lands to be reserved as their future home" and that, as part of the *quid pro quo* for the ceded territory, the United States would protect "the said Yanctons [sic]in . . . their persons and property." This included a perpetual fiduciary duty on the part of the United States and its agencies to protect *inter alia* the historic sites, sacred sites, burial grounds (and graves), and cultural items located in the Tribe's ceded territories from disturbance, alteration and desecration by third parties, including the Defendants in the instant action.

22. The United States and the Brule and Yankton Sioux entered into a treaty of friendship and protection on June 22, 1825, 7 Stat. 250, which treaty was duly proclaimed on February 6, 1826. By Articles 1 and 2 of the 1825 Treaty, the United States brought the Brule Band and Yankton Division and their members under its protection and the Brule Band and Yankton Division became protectorate nations of the United States.

23. The United States and the seven bands of the Teton Division and the Yankton Division of the Sioux Nation, and others, entered into a treaty on September 17, 1851, 11 Stat. 749 ("1851 Fort Laramie Treaty" or "1851 Treaty"), which treaty was duly ratified by the United States. Article 5 of The Treaty defined the territory of the bands of the Teton Division to a 60 million acre tract of territory delineated on the map attached hereto as Exhibit "A" and incorporated herein. Article 5 of the Treaty also contained the following language: " . . . the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands . . ." This provision of the treaty reserved the right of the Brule Sioux, as a constituent Band of the Sioux Nation, to access to religious sites and/or burial sites, and funerary objects and cultural items located at these sites, on all lands of the Teton Sioux lacated in eastern North Dakotan and South Dakota. These rights remain intact up to the date of the filing of this complaint.

24. By the Act of February 28, 1877, ch. 72, 19 Stat. 254 ("1877 Act"), Congress enacted into law a purported agreement between commissioners on behalf of the United States and the Teton and Nebraska Santee, and other Indian bands. The Agreement, now referred to as the "1877 Act, provided that as part of the "consideration" for Sioux territory and rights confiscated by Article 5 of the Act, that each individual member of the Brule band would be protected in his or her rights of property, person and life in

Article 8 of the Act. The right to be protected in an individual's property and person included protection in their usufructuary right of access to historic sites, religious sites and/or burial sites, and funerary objects and cultural items located at these sites, and access to the sites themselves, on all lands of the Teton (Rosebud Sioux) and Nebraska Santee located in eastern North Dakota and South Dakota along the Keystone Pipeline route. These rights also remain in tact up to the date of the filing of this complaint.

25. From time immemorial, the members of the Santee Sioux Division, the Teton Division, the Yankton Division, and other divisions of the Sioux Nation, maintained intimate ties of kinship, religion, ceremony, and trade with each other. While camped together, they intermarried, had children and buried their dead together within the Territories of the Sioux Nation. Thus, regardless of historic or record ownership, they all have legally-protected interests in the historic sites, sacred sites, burial grounds and human remains and associated funerary objects, and cultural items located along the entire proposed Keystone pipeline route that lies over Sioux territory in eastern North Dakota and south Dakota.

INDIAN TREATY RIGHTS AT ISSUE

Access to Cultural Items is a Necessary Part of Reserved Treaty Rights and a Recognized Property Interest.

26. As alleged in Paragraph 24 above, the Brule and Yankton Sioux reserved rights under Article 5 of the 1851 Treaty to hunt, fish and gather on certain lands, and reserved all their rights and claims to other lands including the right to religious sites and/or burial sites, and funerary objects contained therein, and to cultural items located on all lands of the signatory Teton bands tribes located in eastern North Dakota and South Dakota. Under Art 5 of the 1851 Treaty, it states in part:

> it is, however, understood that in making this recognition and acknowledgment of 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. Article V. paragraph 8, 4 KAPP 1065, (1851).

27. The right of access to historic sites, religious sites and/or burial sites, and to funerary objects and cultural items, like the right to hunt, fish and gather, is a usufructuary right. These usufructuary rights are vested Fifth Amendment property rights that are reserved where they are not expressly relinquished in the treaty.

28. The only usufructuary right of the Brule Sioux can be arguably extinguished to date, is the right to hunt off the Great Sioux Reservation and in the Black Hills portion of the Great Sioux Reservation. See Act of February 28, 1877, Stat. 254.Art 1. All other usufructuary rights remain in tact over the territories in which the Brule have interest, including the aboriginal title area located in eastern South Dakota and North Dakota.

29. The language in Article V. of the 1851 Treaty quoted in paragraph 39 above is applicable to the Rosebud Sioux Tribe's aboriginal title land located east of the Missouri River, a portion of, through which, the Defendants permitted construction of the pipeline. Although the Rosebud Sioux Tribe has been excluded from the use of its aboriginal title lands, it still retains legally protected rights in the lands, including trust title to all cultural items, human remains, and associated funerary objects imbedded in the land, as well as a usufructurary right to access said sites as recognized by Article V. of the 1851 Treaty and federal common law.

30. The Sisseton-Wahpeton Oyate, as an American Indian Tribe, held aboriginal title based on use and occupation "for a long time" , to the northern portion of the Sioux Territory through which Defendants granted a permit to construct the pipeline. A portion

of the territory was set aside as a permanent reservation for the Sisseton-Wahpeton Oyate under the 1867 Treaty. Both Treaties confirmed the Oyate's underlying aboriginal title to this territory. Moreover, the territory has been confirmed as the aboriginal treaty territory of the Oyate's by the Indian Claims Commission.

31. The Santee Sioux Tribe of Nebraska were removed by the United States from Minnesota in 1863. Prior to removal, the members of the Santee Tribe intermarried with the Sisseton-Oyate, and jointly occupied the territory described in Paragraph 24. As a result thereof, the Santee Sioux Tribe have, along with the Sisseton-Wahpeton Oyate, legally protected interests in the territory described in paragraph 24.

STATUTORY AND REGULATORY BACKGROUND

American Indian Freedom of Religion Act of August 11, 1978, (AIRFA) P.L. 95-341, 92 Stat. 469, 42 USCS §1996.

32. It has been a policy of the United States to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian...including but not limited to *access to sites*, use and *possession of sacred objects*, and the freedom to worship through ceremonials and traditional rites."(emphasis added).

Archaeological and Historic Preservation Act of 1974, 16 U.S.C. §469 et. seq. (AHPA).

33. The purpose of the AHPA is to further the policy of the U.S. Government to preserve historical and archeological data (including relics and specimens) which might otherwise be irreparably lost or destroyed as the result of " (2) any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program." §469. And under § 469c-2, the Federal Government can charge the licensee

costs for identification, surveys, evaluation and data recovery with respect to historic properties:

> (2) reasonable costs for identification, surveys, evaluation, and data recovery carried out with respect to historic properties within project areas may be charged to Federal licensees and permittees as a condition to the issuance of such license or permit.

Archaeological Resources Protection Act of October 31, 1979("ARPA"), P.L. 96-95; 16 U.S.C. §470aa-mm.

34. The Purpose of this Act is to:

> Secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data which were obtained before October 31, 1979.

And in the definition section the term "Indian Lands" differentiates land interests as "subsurface" and directly relates to artifacts imbedded in the land. 16 U.S.C. §470bb(4).

The National Environmental Protection Act of 1969("NEPA"), P.L. 91, 83 Stat. 852, 42 U.S.C. §§ 4321 et. seq.

35. The requirements under NEPA implicate the law as it is applied under the NHPA. In order to carry out the national policy outlined under the NEPA, it places into the hands of the U.S. Government, the responsibility "to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may –

> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; 42 USCS §4331 (b)(4).

National Historic Preservation Act (NHPA) P.L. 89-665, 80 Stat. 915, *as amended*, 16 U.S. § 470 *et. seq*.

36. A key purpose of NHPA requires "federal agencies to take into account the effects of their undertaking on historic properties". 36 C.F.R. §800.1(a).

Requirement of Cultural Resource Identification

37. Pursuant to NHPA, federal agencies "having authority to license any undertaking *shall*, prior to the approval of the expenditure of any federal funds on the undertaking or prior to the issuance of any license…take into account the effect of the undertaking on any district, site building, structure, or object that is included in or eligible for inclusion in the National Register." *Southern Utah Wilderness Alliance v. Norton*, 326 F. Supp. 2d 102, 108 (2004)(citing 16 U.S.C. §470*f*) (emphasis added).

38. The agency is required to "make a reasonable and good faith effort" to identify historic properties potentially affected by the proposed project. 36 C. F. R. §800.5. The agency must then assess the likelihood of the undertaking may alter, directly or indirectly, any of the characteristics of a historic property. 36 C.F.R. §800.5(a)(1). Adverse effects may include "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative". *Id.* (citing 36 C.F.R. §800.5(a)(1).

39. Where a report is prepared by a non federal party (as it was in this case) the agency official is responsible for ensuring that its content meets applicable standard and guidelines. 36 C.F.R. 800.2(a)(3).

40. The law unambiguously mandates ("shall ensure") that historic properties under an agency's jurisdiction or control "are identified, evaluated, and nominated to the National Register." 16 U.S. C. §470h-2(a)(2)(A).).

41. In 36 C.F.R. §.800.4(b) , "Identification of Historic Properties", it states in part, "Based on information gathered under paragraph (a) of this section, and in *consultation with SHPO/THPO and any Indian tribe* or Native Hawaiian organization that might attach religious and cultural significance to the 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."(emphasis added).

Consultation Requirement

42. Federal statutes define adequate consultation under section 106 as the "reasonable and good faith effort to identify Indian tribes…that shall be consulted in the section of 106 process. Consultation should commence early in the planning process. 36 C.F.R. §800.2(c)(2)(ii)(A). The agency is also required to make a "reasonable and good faith effort to identify any Indian tribes…that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties…" *Id.* at § 800.3(f)(2).

43. Additionally, the agency is required to:

> Make 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 the potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. Id. at § 800.4(b)(1).

NHPA clarifies consultation with appropriate Native American groups, as to take place in project and *program planning* through the section 106 review process. Sec.110 (d)(6)(A,B). (emphasis added)

44. In the Secretary of the Interior's *Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act*, it defines consultation under section 106:

> Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered and managed. *Federal Register 24 April 1998.*

45. And under § 800.2 (c) (2)(i)(C) consultation must recognize the "government –to–government" relationship between the Federal Government and Indian tribes. The agency official "…shall consult with representative designated or identified by the tribal government …" 36 C.F.R. 800.2.

46. Section 106 of NHPA is tied to the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) and establishes consultation requirement with Tribes regarding Federal and Tribal lands affecting human remains and cultural items. 43 CFR 10. Compliance with section 106 of NHPA, must be consistent with the requirement of section 3(c) of NAGPRA regarding the disposition of human remains and Native American cultural items from Federal or Tribal lands.

47. Recognizing the archeological and cultural expertise unique to Indian Tribes, the requirements of NHPA under section 101(d)(2), provides that Indian tribes may assume State Historic Preservation Officer (SHPO) responsibilities on tribal lands. Where the tribe has assumed this responsibility, the federal agency must consult with the tribe instead of the SHPO, in order to meet the agency responsibility for consultation.

Native American Graves Protection Repatriation Act of November 16, 1990, P.L. 101-601, 104 Stat. 3048, 25 U.S.C. §3002(a) ("NAGPRA").

48. NAGPRA represents the culmination of "decades of struggle by Native American tribal governments and people to protect against grave desecration, to effect the repatriation of thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired cultural property". *Yankton Sioux Tribe v. Army Corps of Engineers*, 209 F. Supp. 2d 1008, 1016 (2002).

49. Under NAGPRA, except in the case of human remains and associate funerary objects where the lineal descendants of the deceased can be ascertained, ownership and control of the Native American cultural items is vested in the Indian tribe which, upon notice, states a claim for such items and:

> 1) is the Indian tribe on whose tribal land such items were discovered, or if there is none, 2) is the Indians tribe with the closest cultural affiliation with such items, or if that cannot reasonably be ascertained, 3) is an Indian tribe able to prove a stronger cultural relationship to such items than the Indian tribe recognized as aboriginally occupying the area in which the objects were discovered by a final judgment of the Indian claims Commission or Court of Federal Claims, or if such stronger relationship cannot be proven, 4) is the Indian tribe so recognized as aboriginally occupying the area. 25 U.S.C. §3002(a).

50. NAGPRA protects "cultural items" of Native American peoples, which are defined as "human remains" and "associated funerary objects," "unassociated funerary objects" , "sacred objects," and "cultural patrimony". 25 U.S. C §3001(3). And the Act establishes detailed criteria and procedures for determining the "ownership and control" of such cultural items, an actual chain of title. *Id.*

51. Thus, NAGPRA outlines a chain of title to a possessory property interest in Native American cultural items. Under 25 U.S.C. §3001(13) definitions, it states:

> "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to

give the right of possession of that object, unless the phrase so defined would, as applied in section 7(c) [25 USCS§3005(c)], result in a fifth Amendment taking by the U.S.C.1491 in which even the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

52. The procedure defined under NAGPRA, for ownership and control of cultural items, gives rights to those tribes who were aborignally occupying the area. 25 U.S.C. §3002(a).

Cemeteries and Burial Records, South Dakota Codified Laws Ann. §43-27-21 et seq

53. It states in part, that any human remains and funerary objects found on private or state lands are subject to evaluation by the State Archeologist to determine if they have a direct relation to a tribal group, and if so, the group can request the remains be returned.

Executive Order 13337

54. This order delegates authority to the Secretary of State the President's authority to receive applications for permits for the construction, connection, operation, or maintenance of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels at the border of the United States and to issue or deny such permits upon a determination that the action to be permitted serves the national interest. Exec. Order No. 13337, 3 C.F.R. 69 (2004).

55. By Department of State Delegation of Authority No. 118-2 of January 26, 2006, the Secretary of State delegated authority to issue Presidential Permits pursuant to Executive Order 13337 to the Under Secretary of State for Economic, Energy and Agricultural Affairs.

Executive Order 12898

56. Under President Clinton, this Order provides that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations…". Exec. Order No. 12898, 3 C.F.R. 59 (1994), amended by Exec. Order 12948, 3 C.F.R. 60 (1995).

Executive Order 13175

57. The fundamental principals in formulating or implementing policies that have tribal implications, agencies shall be guided by : The "unique legal relationship with Indian tribal governments as set forth in the Constitution of the US, treaties, statues, Executive Orders, and court decisions." And in accordance with said law, the U.S. recognizes the "right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other right.". And the U.S. "recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self determination." Exec. Order No. 13175, 3 C.F.R. 218 (2000).

Administrative Procedure Act – 5 U.S. C. §702(2)(A).

58. The APA governs judicial review of an agency's compliance with

NEPA, NHPA, NGPRA. A court shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

D. FACTS

Trust Responsibility

59. The Plaintiffs are federally recognized Tribes, that enjoy all of the rights and privileges under its existing treaties with the United States in accordance with Federal Law.

60. The Plaintiffs did not cede the right to access or possess human remains, funerary objects, sacred objects. Because the Plaintiffs have not released the U.S. Government as trustee of the aboriginal and treaty lands, it remains such trustee for objects found embedded in lands once occupied by these tribes.

Keystone Pipeline

61. The Keystone Pipeline is a "Federal Undertaking" as defined in 36 C.F. R. §800.16, which includes an activity or project funded by a Federal Agency or those requiring Federal approval.

62. The project involves multiple Federal agencies in an official capacity as well as an unofficial capacity, such as, the Army Corp of Engineers, The Department of Energy, Western Power Administration, The Environmental Protection Agency, Natural Resource Conservation Service, the Rural Utility Service, The Farm Service, The U.S. Fish and Wildlife, Department of Transportation Office of Pipeline Safety, the Federal Energy Regulatory Commission, the Department of Homeland Security, Federal

Highway Administration, and The Department of the White House. The Department of State is designated as the "lead agency" for the Keystone Pipeline project.

63. Entrix is a third party contractor hired by DOS, although paid for by TransCanada, to meet the federal law requirements in relationship to the development of the EIS.

64. Keystone Pipeline Inc., a US affiliate of TransCanada, has been permitted to construct a pipeline known as the "mainline" across 1,078 miles north to south from Canada through the Dakotas, Kansas, Missouri, and Illinois.

65. The area of construction cuts through ancestral homelands of the Plaintiffs which are aboriginal and treaty tribal lands. According to the Tribal Historic Preservation Offices of the Plaintiffs and many other tribes, the exact location of many historic properties has been lost over time, and the pipeline corridor may run through pre-historic encampments, burial grounds, sacred places, or other places of cultural or religious significance.

66. Keystone obtained easement agreements from most of the private land owners, and other property was obtained through eminent domain proceedings in State Courts.

67. TransCanada is in the process of obtaining a permit for a sister pipeline, known as Keystone XL, or "Cushing Extension" that will also run through the State of South Dakota, joining Keystone Pipeline, and extend the pipeline from Kansas into Texas ending at the Gulf.

68. The pipeline will be 30 – 34 inches in diameter and buried 48 –

60 inches below the surface. The Area of Potential Effects (APE) , or area surrounding the pipeline that could adversely affect resources, is a 300 foot wide corridor.

Presidential Permit Timeline.

69. The first contact with the Plaintiffs regarding the Keystone Pipeline project was on January 17, 2006. The DOS sent a letter to Sisseton- Wahpeton THPO Frankie Jackson, asking him to coordinate a Section 106, government to government consultation regarding the project. Letter from Elizabeth Orlando to Frankie Jackson (January 17, 2006).

70. On March 28, 2006, preliminary reports and comments on cultural resource evaluation plans for the Keystone pipeline construction corridor were received by the DOS from the SHPO in South Dakota. Concurring opinions and revisions of the plans were received by the DOS from the North Dakota SHPO on August 23, 2006; there was no tribal consultation on the reports submitted by the SHPO's to the DOS.

71. On June 13, 2006, the DOS again wrote a letter to Frankie Jackson, informing him that no cultural resources had been identified within the corridor proper based on the surveys conducted, and the DOS stated if there was any interest in cultural resources affected by the proposed development, then he should contact Betsy Orlando within 30 days.

72. According to Betsy Orlando, Project manager for the DOS, consultation with Tribes occurred beginning in August and September of 2006. (Letter from Betsy Orlando to Advisory Council (November 11, 2007). Several "Scoping" meetings were held along the APE, whose purpose was to gather public comment to be included in the Draft EIS, and the official scoping period closed on November 30, 2006.

73. On October 4, 2006, the DOS filed a Notice of Intent (NOI) to begin the Environmental Impact Statement Process.

74. In December of 2006, the Plaintiffs contacted Billy Prosser at Entrix, and were given the name of Betsy Orlando as the Project Coordinator for the DOS on the TransCanada permit process. Telephone Call from Jim Whitted to Billy Prosser (December 2006).

75. In the beginning of January 2007, the Plaintiffs spoke with Ms. Orlando, regarding concerns for consultation as required under Section 106. Ms. Orlando told the Plaintiff's they could attend public meetings that were being held in the next couple of months. Telephone Call from Diane Desrosiers to Betsy Orlando (January 2007). During that phone call, the Plaintiff's informed Ms. Orlando of her obligations under the law for government-to-government consultation, and concern for cultural assessment including traditional cultural properties over 100% of the pipeline construction corridor.

76. In March 28, 2007, Ms. Almanza, the THPO office manager at Sisseton-Wahpeton Oyate, provided Ms. Orlando with a list of Dakota Tribes within Montana, North Dakota, South Dakota and Nebraska. E-mail from Charlotte Almanza, Tribal Historic Preservation Office Manager, Sisseton-Wahpeton Oyate, to Betsy Orlando, Department of State, (March 28, 2007;10;11 MST).

77. On April 11, 2007, Betsy Orlando responded to a request for consultation from Jim Whitted, THPO of Sisseton- Wahpeton Tribe. Ms. Orlando contacted the Office Manager, Charlotte Alamanza, by email, stating that the DOS had identified 85 tribes that were possible stakeholders. E-mail from Betsy Orlando, Department of State to Charlotte Almanza, Tribal Historic Preservation Office Manager, Sisseton-Wahpeton Oyate, (April

11, 2007:10:27 EST). In that same email Ms. Orlando provided a Preliminary Draft Environmental Impact Statement (PDEIS), requesting comments due back to her in 14 days, by "close of business on Friday, April 27, 2007." *Id.*

78. On May 30, 2007, in what was characterized to the Plaintiffs as an "informational meeting" by Entrix and the DOS, was held between the DOS, Entrix, and people from a few tribes held at Dakota Magic Casino, in North Dakota.

79. On June 12, 2007, Diane Desrosiers, a THPO of one of the Plaintiffs, wrote a letter to Betsy Orlando reiterating 12 tribal requests, reminding her that the tribes were firmly requesting a 100% survey of the construction corridor in addition to the archeological survey to be performed by tribal experts.

80. On June 14, 2007, the DOS announced a teleconference inviting all SHPO's THPOs, tribes, cooperating agencies, and assisting agencies, as being in compliance with Section 106.

81. July, 25, 2007, the Plaintiffs informed Ms. Orlando that the teleconference was inadequate to qualify for government-to-government consultation required under the law, and requested a face to face meeting.

82. The Draft EIS was released to the public for review on August 10, 2007.

83. On August 28, 29, 2007, DOS held a meeting in Flandreau, the purpose was to discuss the EIS and proposed Programmatic Agreement.

84. September 24, 2007 was the closing period for comments on the DEIS.

85. A third meeting was held on October 24, 25, 2007 at Prairie Knights Casino in Fort Yates. It was supposed to be a government-to-government meeting between the DOS and the Standing Rock Sioux Tribe, however, the Standing Rock Sioux Tribal

representative could not attend. The Standing Rock Sioux Tribe, invited other tribes to the meeting.

86. October 30, 2007, Standing Rock Sioux Tribe wrote Condoleezza Rice to ask to have Ms. Orlando removed as Keystone Project Coordinator because of her derogatory behavior at the meeting on October 24, 25, 2007.

87. December 18, 2007 a meeting purporting to be a government to government consultation was held in Washington DC.

88. January 30, 2008, the Programmatic Agreement governing the project was signed, however, many tribes including the Plaintiffs did not sign the agreement.

89. March 11, 2008, the Presidential Permit was signed by the DOS, granting permission to bring Keystone pipeline across the border of Canada into the United States.

90. Shortly after the Presidential Permit was granted, preliminary construction activities began simultaneously in North Dakota and South Dakota.

91. On March 19, 2008 the Plaintiffs contacted the DOS to ask that Betsy Orlando be removed as the project coordinator, because of her conduct at the October 2007 Meeting.

Good Faith Effort at Cultural Resource Identification

92. Cultural resource identification was not completed prior to start of construction as required under NHPA and the phased identification plan, under the Programmatic Agreement, is inadequate to protect cultural resources.

93. The DOS acknowledges the inability of TransCanada to complete the identification of cultural resources prior to the start of the project, hence the use of the Programmatic Agreement. The cultural resource survey found in the EIS was completed

without access to several significant properties. In order to construct the pipeline, TransCanada gained access to the properties in question through easement agreements with private land owners, and through State condemnation proceedings.

94. Despite earlier criticism of the adequacy of property identification, from South Dakota SHPO, Paige Hoskinson, the DOS has not included a remedy for this, in the final EIS nor the Programmatic Agreement. In her comments of the Draft EIS, Ms. Hoskinson stated : "The DEIS fails to adequately explain efforts to identify traditional cultural properties." DEIS Comment No. 497, Pg. 26. Additionally in a letter from Ms. Hoskinson to Ms. Orlando regarding her comments on the second draft of the Programmatic Agreement, she states: "The identification of historic properties should be in consultation with the SHPO/THPO and Indian tribes. Please see 36 CFR part 800.4." Letter from Paige Hoskinson to Betsy Orland (November 14, 2007).

95. In the federally mandated EIS, the cultural resource evaluation was inadequate because it failed to identify cultural properties that are highly probable along the construction corridor. Charlene Dwin Vaughn, Assistant Director of the Federal Agency Programs, raised concerns, early on, over adequate cultural resource identification, as well as reliability of the assessment to Betsy Orlando :

> Please explain why the identification effort for the Keystone Project meets the reasonable and good faith effort regulatory standard. Does the current inventory provide adequate information to ensure that effects on historic properties will be avoided and minimized as well as mitigated? The reliability of the work is a fundamental question since the more reliable the identification effort the less the likelihood that project construction will be disrupted by unanticipated discoveries. Letter from Charlene Dwin Vaughn to Betsy Orlando (November 8, 2007).

96. Despite multiple requests by the plaintiff for a survey of 100% of the

construction corridor, the DOS approved a survey for 23% of the area, leaving close to 77% not surveyed. FEIS (pages 5 – 14). The states of Illinois and Missouri have been granted 100% survey of the construction corridor by the DOS.

97. At the meeting in August 2007 at Flandreau, when Ms. Orlando was asked to explain why different states had different percentages of the construction corridor slated for survey, she did not provide an explanation for the differences.

98. TransCanada obtained easements by private agreement for much of the pipeline. According to DOS and TransCanada, access to the property for cultural resource assessment has been hampered by owners of the property refusing to cooperate. However, the DOS has not required TransCanada to specify which particular property owners have refused access, and what attempts, if any, were made to gain access for assessment purposes. Also the DOS has not required TransCanada to obtain cultural preservation easements along the construction corridor.

99. The DOS has never considered a workable plan for access to private properties for adequate cultural resource assessment, instead, the Programmatic Agreement relies on the Inadvertent Discovery Plan to satisfy requirements under federal law and the NHPA. At the meeting in August 2007 in Flandreau, Mr. Joel Ames, the Tribal Liaison for the Army Corp of Engineers identified a way in which properties could be assessed prior to actual ground disturbance:

> At some point you have to be able to start laying down the line of where that pipeline is going to be. All of it has to be cleared. I mean, they're going to have to be marking out where that area of potential effect is going to be. That you would like to be involved in the process as you start moving forward. Yes, I understand right now you have some land owners that are saying no, but eventually the route is either going to be changed or they're going to get some clearance from the land owner. As they're doing that and they're starting to mark off the routing whether it's knocking in stakes, surveying, whatever to lay the

> pipeline, you know, the tribes can be involved in the process then so they can look at it up front and identify whether there's a potential for effect. So maybe we don't have the answer on that and the timeline for it, but certainly we could come to an agreement. It appears we could come to some sort of answer as to how to get the tribes' concurrence on that route. Transcripts of Meeting in Flandreau, South Dakota, Pages 84, 85, lines 19 – 22, lines 1 – 17 respectively (August 28, 2007).

100. Even though it is a requirement under NHPA, identification of cultural properties was done without the assistance and consultation with any THPOs. By DOS' own admission, it told TransCanada not to contact the tribes directly, thereby thwarting any efforts to involve them in the identification process. Letter from Betsy Orlando to the Advisory Council (November 11, 2007). By controlling the flow of information from TransCanada to the tribes early in the permit process, the DOS has effectively created a barrier to tribal involvement with identification of cultural resources, leading to an inadequate survey by TransCanada.

101. Reports filed by TransCanada indicate that the combined Keystone Mainline Project, Keystone Cushing Extension, and REX cultural resources field inventory studies identified 347 cultural resources within the Keystone project's area of potential effect (APE) as of November 2007. The DOS, including the State Historical Preservation Officers, determined that 95 of the identified cultural resources within the APE listed in Section 3.11.2 (Potential Impacts and Mitigation) of the EIS have been designated as "unevaluated", meaning that insufficient data are available to determine whether these properties meet the criteria listed under NHPA. They are thus considered potential historic properties. FEIS 5.11 Cultural Resources, pages 5 – 14 .

102. Identification of cultural resources has been inadequate because it is based on a survey that was physically limited due to access, and the time of year. The Plaintiff's Tribal Historic Preservation Officer, Diane Desrosiers, commented on the Draft EIS:

> The inconsistencies with the archeological survey; (lack of access to project corridors, poor visibility due to mature crops in the field and tall grassy areas) the timing of the survey was less than ideal, as visibility through out the majority of the project corridor was less than adequate for a thorough survey. DEIS Comment No. 359, page 18.

103. While the DOS asked for comments on the DEIS, including the cultural survey results, the THPO's found the survey inadequate in order to give constructive feedback. Again in comment on the Draft EIS, Ms. Desrosiers stated: "I am reiterating our position on the DEIS, and that as the Tribal Historic Preservation Office of the Sisseton Wahpeton Oyate rejects the Draft EIS. Due to the amount of area which was not surveyed, we cannot in good conscience make a comment of the draft". DEIS Comment no. 357, page 18.

104. At the meeting in Flandreau on August 28, 29, 2007, the Plaintiff's and other tribes provided Ms. Orlando with 12 tribal requests: 1) an integrated cultural resource management plan; 2) a tribal advisory committee; 3) a 100% on the ground pedestrian Traditional Cultural Property (TCP) survey; 4) State Department funding for evaluation; 5) a revised inadvertent discovery plan; 6) clarification of mitigation plan regarding burial laws state by state; 7) NEPA consultation and tribal involvement with excavations, TCP's and inadvertent discoveries; 8) attention to private land owner concerns; 9) a tribal liaison in the DOS; 10) future section 106 consultations; 11) a meeting to hear the concerns of the Canadian tribes in relationship to their experience with TransCanada and the construction of the pipeline; 12) Tribal agreement on what

100% survey means. As required under NHPA for adequate consultation with THPOs, these concerns were not integrated into the Final Programmatic Agreement. Unfortunately, even before the Plaintiffs learned of the project, the survey was already completed with the cultural identification already in place.

105. The Plaintiff's do not have the resources to perform their own survey of the construction corridor. The DOS, in what is described by Betsy Orlando, as the "good faith effort" offered tribes $10,000.00 in November of 2007 to cover the costs of obtaining a TCP survey. Letter from Betsy Orlando to the Advisory Council (November 11, 2007). The actual cost of this type of survey is many times more than the DOS offered. The Final EIS estimates the cost of a survey of the construction corridor to be around $1 million dollars.

106. Even if the Plaintiffs had the financial resources to accomplish a traditional cultural properties assessment (TCP), the DOS gave the Plaintiffs an impossible time frame for completion. Attached to the $10,000.00 offer, the DOS expected a final report of the TCP by February of 2008, making the survey impossible because it was the winter months on the plains; the Plaintiffs and many other tribes rejected this offer.

Good Faith Effort by DOS for Government-to-Government Consultation

107. Consultation requirements under Section 106 of NHPA and the Programmatic Agreement were not met.

108. A total of 4 meetings between the DOS and Plaintiffs occurred from the time they first learned of the Keystone project in 2006 until construction began in March of 2008.

109. From the earliest communication with Ms. Orlando regarding the Keystone Pipeline project, the DOS caused confusion with the Plaintiffs regarding the nature of the meetings it conducted between the DOS, Entrix, and the Plaintiff's.

110. The first meeting held on May 30, 2007 with the Plaintiffs and other tribes, was said to be an "informational" meeting, many official tribal representatives were not in attendance. Despite being told that the meeting was informational only, the top of the sign in sheet labeled the meeting as "Consultation Keystone Pipeline Project Department of State and Sioux Nations". The DOS and Entrix, when communicating with the Plaintiffs, freely interchanged terms referring to meetings, as either scoping meetings, or informational meetings. The Plaintiffs were never clear that any of the meetings held up to the December 2007 meeting in Washington DC, were official Section 106 government-to-government consultation.

111. There were two teleconferences held, first in June of 2007, and then early August of 2007, these meetings were referred to by Billy Prosser at Entrix, as Section 106 consultation meetings. Again the Plaintiffs were confused as to the how Entrix could conduct a government-to-government consultation over the phone, as a third party contractor for the DOS.

112. Confusion regarding the nature of the meeting held by DOS with the Plaintiff continued into the second meeting, held in August of 2007 in Flandreau. The Plaintiffs were told was to be a information meeting, and yet when the transcripts of the meeting were published to the tribes, they were entitled "consultation." After referring multiple times during the meeting as being a "consultation" with the tribes, Ms. Demuth, an Entrix employee was asked to clarify the nature of the meeting and she stated:

> "Just to clarify, these meetings are DEIS public meetings just like the public scoping meetings that were held for the EIS. However, we would like to today, for the end of the day, come up with some action items for everyone here to perform some of the key elements of what was brought up yesterday. And if you take a look at this and you see that there are opportunities for us to meeting with you in terms of additional section 106 consultation, either in a group or on an individual basis, please let us know because we want to make sure you know we're in the area and that we are able to meeting with you if you want while we're going through these meetings." Transcripts page 4 lines 12 – 22. (Second day of meeting).

113. The meeting was referred to as a consultation, and yet the purpose of the meeting seemed to focus on information gathering only. At this second meeting, Ms. Orlando focused on the tribe providing the DOS with information to "fill in the gaps", and states:

> I'm hoping this is a discussion about 106, but it's a discussion about issues related to if there are traditional cultural properties that we do not know of that we need to be aware of so we can say to the applicant, avoid these areas that that [sic]information comes back to us. If there are no sites that we are not aware of we would like to know that information." Transcripts from the meeting in Flandreau between DOS, Entrix, and several tribes, Page 29 lines 16 – 22, Page 30 line 1 (August 28, 2007).

It was clear Ms. Orlando came to the meeting in Flandreau to only gather information, not to consult.

114. Additionally, if government-to-government consultation was intended by the DOS at this meeting, it would have been conducted by Betsy Orlando, instead of an employee of Entrix. The meeting in August of 2007, was primarily conducted by Ms. Demuth, an employee of Entrix, and said to be relevant to the "EIS and the development of the Programmatic Agreement". When Ms. Orlando did speak, she focused on what information the tribe could provide about properties in the area, in effort to identify any additional properties that were not listed in the survey within the DEIS. The Plaintiffs registered their complaints again about inadequacy of the survey, and requested 100%

survey of the construction corridor and an ethnographic evaluation and more involvement of the tribes in the identification of resources in the area.

115. At the meeting in August 2007, Ms. Orlando did not consult with the Plaintiffs regarding possible solutions to their request of 100% survey of the construction corridor, instead other parties in attendance at the meeting offered solutions and information regarding the use of a Programmatic Agreement. Mr. Joe Phillipe, the Illinois State Historic Preservation Officer, informed the Plaintiffs that the tribes, as participants in the process could contract whatever terms under the Programmatic Agreement they wish that if they wanted 100% survey, it could be written that way under the contract. Transcripts of Meeting in Flandreau between DOS, Entrix, and multiple tribes, Pages 57 – 58 lines 12 – 22, and lines 1- 8 respectively (August 28, 2007).

116. The third meeting in October 2007, was understood to be a consultation meeting of government-to-government with Standing Rock Sioux Tribe and DOS, however the tribal representatives from Standing Rock could not attend. Once again there was confusion as to the nature of the meeting between DOS and Plaintiffs. Standing Rock Sioux Tribe invited several other tribes to come to this third meeting. Despite Ms. Orlando being aware that Standing Rock has invited many other tribes to the meeting, she did not attempt to contact the tribes to make sure appropriate tribal representatives would be in attendance. If she had done this, it would have indicated to the Plaintiffs and others in attendance that this third meeting was in fact to be a government-to-government consultation.

117. In addition to the confusion as to the nature of the meeting in October 2007, Ms. Orlando displayed derogatory behavior when she barred the attendance of two

members of Three Affiliated Tribes based on the color of their skin. She said they could not attend the meeting because they did not "look Indian", stating that "everyone that's not Indian has to leave." Ms. Orlando seemed to lack education on the terms of ethnicity of American Indian, and the political term of "Indian". In either case, there was no cause to bar attendance of what appeared to be a public meeting, of any interested party. On October 31, 2007, The Secretary of State was informed of Ms. Orlando's discriminatory behavior, and Standing Rock Sioux Tribe requested that she be removed as a Project Manager and replaced with another person who may be more culturally sensitive. Ms. Orlando's discriminatory and derogatory behavior effectively eliminated any hope of good faith effort by the DOS at government-to-government consultation with the Plaintiffs.

118. At this third meeting Ms. Orlando gave incorrect information to those in attendance. Ms. Orlando indicated that the tribes only needed to be concerned regarding consultation and preservation within the geographic boundaries of reservation land. Ms. Orlando stated: "One thing I would like to mention, the proposed routing does not have maybe a total of three miles of federal land that would impact you in the St. Louis area. The proposed routing does not cross any reservation land." Transcripts of Meeting in Flandreau between DOS, Entrix, and other tribes, page 26 line 22, page 27 lines 1 – 4 (August 29, 2007). By her comments, Ms. Orlando shows that she does not recognize the implications of the permit along the entire length of the corridor as "affected" by the permit. She also fails to understand the Plaintiffs aboriginal and treaty land territories outside reservation boundaries affected by the government undertaking. Inconsistent

with what she said at the meeting in October, 2007, Ms. Orlando, acknowledged to the Advisory Council, the affected land to be the entire length of the construction corridor:

> A number of other associated federal activities with the proposed Project, however, are considered undertakings by the respective federal agencies thus requiring consideration of the effects upon historic properties along the entire route of the pipeline within the United States. Letter from Ms. Orlando to the Advisory Council, Page 6-7 paragraphs 4, 1 respectively (November 11, 2007).

119. The fourth meeting with DOS and Plaintiffs was said to be a government-to-government consultation held in Washing DC on December 18, 2007. The invitation gave only a two week notice to the Plaintiffs. In arranging for the meeting, Ms. Orlando showed a lack of understanding of the workings within Indian Nation Governments, and a showed a lack of understanding of the limited resources available to the tribes for attendance at a meeting some 1500 miles from the reservation.

120. The Plaintiffs requested the meeting to be postponed because of recent tribal elections and the short timeframe from new leaders taking office on November 5, 2007 and the time they would need to get up to speed on the project reviewing all the relevant laws and facts surrounding the pipeline construction, including reports and multiple informational mailings. The Plaintiffs requested additional time in which to confer with other tribes on the pipeline issues prior to the meeting in Washington, and asked for the meeting to be rescheduled in mid January, and preferably in the plains area; they were denied that request by Ms. Orlando. The Plaintiffs complained to Ms. Orlando regarding the terms of the government-to-government consultation outlined to them in the letter of invitation to the meeting. Dictating terms of consultation by the U.S. Government to a

sovereign nation, is disrespectful and shows a lack of understanding for the status of Indian Nations within the United States.

121. Given the enormous size of the Keystone project and the number of states and people affected, the time line set forth by the DOS was unreasonable to accomplish all that is required under the law. The pipeline runs along a corridor affecting at least 87 tribes, and 6 states. Just over two years lapsed from the time the tribes first learned of the Keystone Pipeline project in 2006, until the Presidential Permit was issued in 2008.

122. Echoing the concern for the short timeline and confusion of the details of such a huge undertaking, Charlene Dwin Vaughn wrote a letter expressing this concern early on to Betsy Orlando. Ms. Vaughn stated: "Since DOS has established a very ambitious schedule for section 106 review, we also request that you describe the opportunities that have been made available to consult with the tribes". Letter from Charlene Dwin Vaughn to Betsy Orlando (November 8, 2007). Also in the letter , Ms. Vaughn, commenting on the draft of the Programmatic Agreement:

> Overall we found the process for taking into account effects presented in the PA to be incomplete and confusing. Critical decision points sometimes have not been established nor the decision maker or possible outcomes identified. In other instances, roles and responsibilities are not clearly or correctly articulated. Finally, the timing and coordination of the post-agreement reviews is ambiguous. Letter from Charlene Dwin Vaughn to Betsy Orlando (November 8, 2007).

CLAIMS FOR RELIEF

123. Plaintiffs reallege the allegations contained in paragraphs 1 – 122 above.

124. Defendants failed to make a "good faith effort" to identify and protect Plaintiffs' property interests, of access to, and possession of, cultural resources along the Keystone Pipeline construction corridor, prior to issuing a Presidential Permit, in

violation of their trust responsibility, tribal treaties, NHPA, NAGPRA, AIRFA, AHPA, APA,ARPA and other federal statutory common law, and not in compliance with NEPA.

125. Defendants failed to protect Plaintiffs' property interests, of access to, and possession of, cultural resources along the Keystone Pipeline construction corridor when they did not consult and consider the views of the Tribes, government to government, prior to issuing a Presidential Permit, in violation of their trust responsibility, tribal treaties, NHPA, NAGPRA, AIRFA, AHPA, APA, ARPA, and other federal statutory common law, and not in compliance with NEPA

126. Defendants owe a duty to the Plaintiffs to comply with the federal treaties and laws as provided herein, and has breached its duty by the issuance of the Presidential Permit in violation of said treaties and laws.

127. Defendants approved a Presidential Permit for the Keystone Pipeline based on an inadequate survey of cultural resources, and without considering the views of the tribal governments. Therefore, the approval is arbitrary and capricious, and abuse of discretion, contrary to the law, and in violation of the APA.

128. As a direct result of the aforesaid actions of Defendants, the Plaintiffs have suffered an irreparable injury in fact to its legally-protected interests in its lands that are the subject of this action to which there is no adequate remedy under the law, and is likely to continue to further suffer such injury, as a direct result of the aforesaid likely further actions of Defendants, unless declaratory and injunctive relief is granted by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter a judgment:

(1) declaring the DOS's failure to provide protection of the Plaintiffs' trust assets and cultural resources by not identifying cultural resources within the pipeline construction corridor, before it issuing a Presidential Permit in violation of their trust responsibility, tribal treaties, NHPA, NAGPRA, AIRFA, AHPA, APA, ARPA, and other federal statutory common law, and not in compliance with NEPA.

(2) declaring the DOS's failure to provide protection of the Plaintiffs' trust assets and cultural resources by not consulting, government to government and considering the views of the tribes, prior to issuing a Presidential Permit in violation of their trust responsibility, tribal treaties, NHPA, NAGPRA, AIRFA, AHPA, APA , ARPA, and other federal statutory common law, and not in compliance with NEPA.

(3) enjoining, temporarily, preliminarily and permanently, the defendants, and each of them, and their officers, directors, successors in interest, controlling persons, agents, employees, attorneys in fact, and all other persons acting in concert or participated with them, from directly or indirectly authorizing construction activities to the Keystone Pipeline.

(4) directing the DOS to suspend and/or revoke the Presidential Permit, to ensure no further construction is undertaken unless and until the DOS complies fully with the law under their trust responsibility, tribal treaties, NHPA, NAGPRA, AIRFA, AHPA, APA , ARPA, and other federal statutory common law, and in compliance with NEPA

(5) awarding Plaintiff's their costs and reasonable attorneys' fees incurred in prosecuting this action under the Equal Access to Justice Act, 28 U.S.C.§2412.

(6) ordering such other relief as the Court may been just and proper.

Respectfully submitted this 24th day of November, 2008,

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Exhibit A