

Section III:

4-25-2005:

**Michael B. White,
former Chief Operations Officer for the Army Corps of Engineers,
Issued a MEMORANDUM to Commanding Officers
that Affected Armed Forces
& *Illegally Subverted United States Law:***

Tribal members contend they were “not adequately consulted” during the review process (page 4). Former North Dakota Governor Jack Dalrymple & Chair of the North Dakota Public Service Commission, which regulates pipelines in the state, Julie Fedorchak, said the tribe “did not respond to requests for input”. “The Sioux had chances to consult and have their issues addressed, and they chose not to,” Fedorchak said. The Army Corps made similar statements in its legal filings.⁸

The Question Demands An Answer:

“How were government officials able to say they '*consulted*' with Tribes' & that 'Tribes chose not to respond', while *within the EA*, the Corps confirms Tribes *objected* to the location of DAPL in that they had *not been adequately consulted?*”

**Answer: An illegal Policy issued by Michael B. White
Subverted Treaty & Tribal Rights, and the Section 106 Consultation process:**

Evidence indicates that the federal *consultation process* was *subverted* via an illegal “American Indian and Alaska Native Policy” assigned to Department of Defense Commanding Officers, *as evidenced throughout pages 36-40.*

Subversion: “A systematic attempt to overthrow or undermine a government or political system by persons working from within; also : the crime of committing acts in furtherance of such an attempt”⁹

⁸ Reuters, “North Dakota governor hopes for quick pipeline resolution” by Ernest Scheyder, Sep 16, 2016: www.reuters.com/article/us-usa-pipeline-native-americans-dalrymp-idUSKCN11M005

⁹ Merriam-Webster Dictionary Online, “Subversion”: www.merriam-webster.com/dictionary/subversion

On April 25, 2005 Michael B. White, then acting as Chief Operations Officer for the Army Corps of Engineers, issued a 7 page document entitled "MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMANDS, DISTRICT COMMANDS", located HERE:

www.usace.army.mil/Portals/2/docs/civilworks/regulatory/techbio/InterimGuidance_25apr05.pdf

On page two of the document (next page), **Mr. White directs Commanding Officers to use the "1998 Department of Defense American Indian & Alaska Native Policy" for use in "Government-to-Government Consultation With Tribes" in regards to "consultation with Tribes in accordance with Section 106"**. "Section 106 consultation..." is *also* referenced on page 3 of the EA (*shown on page 4 of this document*) by Colonel Henderson.

Excerpts from page 1:



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

Directorate of Civil Works/Regulatory

APR 25 2005

MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMANDS, DISTRICT
COMMANDS

SUBJECT: Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with
the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800

1. The Headquarters Regulatory Community of Practice of the U.S. Army Corps of Engineers has begun the process of revising its procedures for compliance with Section 106 of the National Historic Preservation Act (NHPA) and other cultural resource laws and Executive Orders. Since Appendix C was issued in 1990, the NHPA was amended in 1992 and the Advisory Council on Historic Preservation (ACHP) revised its regulations at 36 CFR part 800 in 2000.

4. The purpose of this memorandum is to provide revised interim guidance concerning the consideration of historic properties during the Corps permit process, until the new permit processing procedures are finalized and become effective. This interim guidance supercedes the interim guidance issued on June 24, 2002. District engineers will continue to use 33 CFR part 325, Appendix C, with the interim guidance provided in the Enclosure.

Encl

A handwritten signature in black ink, appearing to read "Michael B. White".

Michael B. White
Chief, Operations
Directorate of Civil Works

Excerpt from page 2:

2. *Consultation with Native Americans.* The ACHP regulations contain provisions requiring consultation with Indian Tribes, Alaska Native village or regional corporations, and Native Hawaiian organizations. When an Indian Tribe has assumed the functions of the SHPO on tribal lands, the THPO is the official representative for the purposes of section 106. If an Indian Tribe has not assumed the responsibilities of the SHPO on tribal lands, the district engineer will consult with a representative designated by the Indian Tribe, in addition to consulting with the SHPO. The ACHP regulations also require consultation with any Indian Tribe, Alaska Native village or regional corporation, or Native Hawaiian organization that places historic and cultural significance to historic properties, including traditional cultural properties, that may be affected by an undertaking, even if those historic properties are located on private lands. Government-to-government consultation with Indian Tribes requires meaningful communications between tribal governments and district engineers. If a proposed activity may affect historic properties to which Indian Tribes attach religious and cultural significance, the district engineer will contact the Indian Tribe(s) in a manner appropriate for government-to-government consultation. Public notices alone are insufficient means to initiate government-to-government consultation. Effective government-to-government consultation requires active communication with Native Americans and considering their interests during the decision-making process. Guidance for consultation with Native Americans is found in Policy Guidance Letter 57 and the 1998 Department of Defense American Indian and Alaska Native Policy (which are available at: <http://www.usace.army.mil/inet/functions/cw/cecwp/tribal/>). Once consultation is complete, the district engineer remains the final decision authority.

Photo of Michael B. White:



Sources of Photos: “Outdoor Recreation in America Brought to you by the American Recreation Coalition”: www.funoutdoors.com/node/view/68

The URL link to the “Department of Defense American Indian and Alaska Native Policy” (“Policy”) as shown on the previous page does not work, *however* the policy is located HERE:

<http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/techbio/DoDPolicy.pdf>

Highlighted sections regard the *purpose* of the Policy, & *sections which are circled in red* are *illegal* sections of the Policy in that they *subvert* the consultation process itself via *undermining* the Rights of Indian Tribes & Alaska Natives – *sections (d) and (e)* – & also via reducing the consultation process to “a simple notice of a pending action” – *section (m)*.

Excerpts from page 1:

Department of Defense American Indian and Alaska Native Policy

PREAMBLE

These principles establish the Department of Defense’s (DoD) American Indian and Alaska Native Policy for interacting and working with federally-recognized American Indian and Alaska Native governments (hereinafter referred to as “tribes”¹)(a). These principles are based on tribal input, federal policy, treaties, and federal statutes. The DoD policy supports tribal self-governance and government-to-government relations between the federal government and tribes. Although these principles are intended to provide general guidance to DoD Components on issues affecting tribes² (b), DoD personnel must consider the unique qualities of individual tribes when applying these principles, particularly at the installation level. These principles recognize the importance of increasing understanding and addressing tribal concerns, past, present, and future. These concerns should be addressed prior to reaching decisions on matters that may have the potential to significantly affect (c&d) protected tribal resources, tribal rights, or Indian lands³ (e).

(c) The phrase “may have the potential to significantly affect,” which appears throughout the policy, establishes the general threshold or “trigger” for consultation to be used unless a statute or other legal obligation specifically establishes a lower threshold for consultation. It is expected that DoD personnel will informally contact interested tribes whenever there is any real possibility that tribal interests may be affected by proposed DoD actions, but that continued, more formal consultation will be necessary only when it appears, from initial discussions with a tribe, that tribal interests will be *significantly* affected by the proposed action. In other words, the policy anticipates a two-step process designed first, to overcome the fact that, as non-Indians, we may not always recognize the effect our actions may have on tribal interests unless we ask; and second, to permit DoD to proceed without the need for further consultation unless potentially *significant* consequences are identified during this initial discussion. [Note: The word “significantly” is used in this policy in its ordinary dictionary sense; i.e., as a synonym for “material” or “important.” It should not be interpreted in the NEPA or Council on Environmental Quality NEPA Regulations sense, as that would set a higher threshold for consultation than is intended.]

(d) There is no obligation to consult with tribes in advance of a proposal that “may have the potential to significantly affect” tribal interests. In other words, the obligation to consult with tribes under this policy is event- or proposal-driven. Nonetheless, as a matter of discretion, general consultation may be desirable where an installation expects to have frequent interaction with a tribe and wishes to establish a stand-by protocol for consultation absent the pressures associated with a particular proposal.

Excerpt from page 2:

(e) The phrase "protected tribal resources, tribal rights, or Indian lands," which appears throughout the policy, works in conjunction with the "may have the potential to significantly affect" trigger to determine when DoD must consult with tribes. Generally speaking, DoD must consult with tribes only when its proposed actions may have the potential to significantly affect Indian lands, treaty rights, or other tribal interests protected by statute, regulation, or executive order. [Note: Some statutes may establish a lower threshold for consultation than the default threshold established in this policy (see, e.g., 16 U.S.C. 470a(d)(6)(B)); in such cases, the Department must consult with tribes in accordance with the statutory requirements.] [Note also, that individual rural residents of Alaska, including both Natives and non-Natives, generally have a right to engage in nonwasteful subsistence uses of fish, wildlife, and other wild, renewable resources on public lands in Alaska. While this right is not a *tribal* right *per se*, installations nonetheless may find it both convenient and beneficial to consult with the appropriate Alaska Native entity whenever a proposed DoD action may have the potential to adversely affect the subsistence activities of several members of the same village or tribe.]

(f) With respect to Alaska, the term "Indian Lands" does not include lands held by Alaska Native Corporations or lands conveyed in fee to an Indian Reorganization Act entity or traditional village council; the term may include village-owned townsite lands (depending on the particular status of the village itself and upon a fact-specific inquiry into whether the area at issue qualifies as a dependent Indian community), and individual Native townsite lots and Native allotments (so long as these properties remain in either restricted fee or trust allotment form).

Excerpts from page 4:

- Assessing, through consultation, the effect of proposed DoD actions that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands before decisions are made (k);
- Taking appropriate steps to remove any procedural or regulatory impediments to DoD working directly and effectively with tribes on activities that may have the potential to significantly affect protected tribal resources, tribal rights, and Indian lands; and
- Working with other federal agencies, in consultation with tribes, to minimize duplicative requests (l) for information from tribes.

(k) The single most important element of consultation is to initiate the dialogue with potentially affected tribes *before* decisions affecting tribal interests are made. Meaningful consultation demands that the information obtained from tribes be given particular, though not necessarily dispositive, consideration; this can happen only if tribal input is solicited early enough in the planning process that it may actually influence the decision to be made. Consultation is worth very little if decisions have already been made.

(l) Keep in mind that many tribes have relatively few enrolled members and only a limited staff to respond to your requests. This being the case, coordinate your requests for information with other federal agencies whenever doing so may reduce the administrative burden on the affected tribe.

Excerpt from page 5:

(m) What constitutes "due consideration...consistent with tribal sovereignty" depends, in part, on the underlying law that dictates that consultation take place. "Consultation" can vary from simple notice of a pending action to negotiation to obtain the tribe's formal consent to a proposed action (the absence of which may be enough to stop that action from proceeding). The attached table summarizes the specific legal obligations owed tribes under the

The Illegal DoD Policy is Arbitrary & Capricious:

Although we're not sure yet exactly who actually wrote the 1998 DoD American Indian & Alaska Native Policy, we do know that the wholly illegal policy is Arbitrary & Capricious¹⁰ according to the Administrative Procedures Act.¹¹

Arbitrary: 1. Depending on individual discretion of, relating to, or involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures.
2. (Of a judicial system) founded on prejudice or preference rather than on reason or fact.¹²

Capricious: 1. (Of a person) characterized by or guided by unpredictable or impulsive behavior; likely to change one's mind suddenly or to behave in unexpected ways.
2. (Of a decree) contrary to the evidence or established rules of law.¹³

United States Code Title 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

Part I – THE AGENCIES GENERALLY

Chapter 7 – JUDICIAL REVIEW

§ 706 - Scope of review

To the extent necessary to decision & when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional & statutory provisions, & determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful & set aside agency action, findings, & conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.¹⁴

¹⁰ United States Courts, Standard of Review, “IV. REVIEW OF AGENCY DECISIONS”:

http://cdn.ca9.uscourts.gov/datastore/uploads/guides/stand_of_review/IV_Review_AD.pdf

¹¹ National Archives: www.archives.gov/federal-register/laws/administrative-procedure

¹² *Black's Law Dictionary Deluxe Tenth Edition*. Compiled by Henry Campbell Black. Editor in Chief Bryan A. Garner. ISBN: 978-0-314-61300-4, page 125.

¹³ “ “, page 254.

¹⁴ US House of Representatives, Office of Law Revision Counsel, U.S. Code Title 5 – Part I – Chapter 7 – § 706: <http://uscode.house.gov/view.xhtml?path=/prelim@title5/part1/chapter7&edition=prelim>

The Illegal DoD Policy is Subversive and Seditious:

United States Code Title 18 - CRIMES AND CRIMINAL PROCEDURE

PART I - CRIMES

CHAPTER 115 - TREASON, SEDITION, AND SUBVERSIVE ACTIVITIES

Sec. 2387 - Activities affecting armed forces generally

- (a) Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:
- (1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or
 - (2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States

Shall be fined under this title or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

- (b) For the purposes of this section, the term "military or naval forces of the United States" includes the Army of the United States, the Navy, Air Force, Marine Corps, Coast Guard, Navy Reserve, Marine Corps Reserve, & Coast Guard Reserve of the U.S.; and, when any merchant vessel is commissioned in the Navy or is in the service of the Army or the Navy, includes the master, officers, & crew of such vessel.¹⁵

United States Code Title 5 - GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I - THE AGENCIES GENERALLY

CHAPTER 7 - JUDICIAL REVIEW

§702. Right of review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the U.S. seeking relief other than money damages & stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the U.S. or that the U.S. is an indispensable party. The U.S. may be named as a defendant in any such action, & a judgment or decree may be entered against the U.S.: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), & their successors in office, personally responsible for compliance..."

1976 Amendment "removed the defense of sovereign immunity": an "Arbitrary and Capricious" defense.¹⁶

¹⁵ **U.S. Government Printing Office:** www.gpo.gov/fdsys/pkg/USCODE-2011-title18/html/USCODE-2011-title18-partI-chap115-sec2387.htm

¹⁶ **US House of Representatives, Office of Law Revision Counsel:** uscode.house.gov/view.xhtml?req=5+usc+right+of+review&f=treesort&fq=true&num=31&hl=true&edition=prelim&granuleId=USC-prelim-title5-section702