

MEMORANDUM OF UNDERSTANDING  
between the  
UNITED SOUTH AND EASTERN TRIBES, INC.,  
and the  
FEDERAL ENERGY REGULATORY COMMISSION  
Regarding  
Meaningful Tribal Consultation with Regard to Pipeline Permitting and Development

Whereas, Section 106 of the National Historic Preservation Act of 1966 (“NHPA”) (16 U.S.C. § 470f), requires federal agencies to take into account the effects of their undertakings on historic properties, included in or eligible for inclusion in the National Register of Historic Places (“National Register”), which may include properties of “traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization” (16 U.S.C. § 470a(6)(A)); and

Whereas, Section 101 of the NHPA also requires Federal agencies to consult with Indian Tribes with regard to historic properties to which an Indian Tribe or Native Hawaiian organization attaches religious and cultural significance (16 U.S.C. § 470a(d)(6)(B)); and

Whereas, the Federal Energy Regulatory Commission (“FERC”) was created by the Department of Energy Organization Act of 1977 (42 U.S.C. § 7171(a)); and

Whereas, FERC is authorized to perform, among other functions, “the establishment, review, and enforcement of rates and charges for the transportation and sale of natural gas by a producer or gatherer or by a natural gas pipeline or natural gas company” (42 U.S.C. § 7172(a)(1)(C)); and

Whereas, FERC is authorized to issue a “certificate of public convenience and necessity...and the establishment of physical connections under section 7 of the Natural Gas Act [.]” (42 U.S.C. § 7172(a)(1)(D)); and

Whereas, FERC has indicated its strong commitment to tribal consultation through the FERC Policy Statement on Consultation with Indian Tribes in Commission Proceedings (Docket No. PL03-4-000, July 23, 2003), as well as FERC’s practice of following Executive Orders, including Executive Order 13175 regarding tribal consultation; and

Whereas, a MOU was signed in 2012 by the U.S Department of Defense, U.S. Department of the Interior, U.S. Department of Agriculture, U.S. Department of Energy, and the Advisory Council on Historic Preservation regarding interagency coordination and collaboration for the protection of Indian Sacred sites, in which the participating agencies agreed to work together to accomplish and consult with Indian Tribes in developing and implementing specific sacred sites protection actions (Interagency MOU attached); and

Whereas, the specific actions of participating agencies of the Interagency MOU include (1) Creating a training program to educate Federal staff on the legal protections and limitations

regarding the accommodation of, access to, and protection of sacred sites; consulting and collaborating effectively with Indian Tribes, Tribal leaders, and Tribal spiritual leaders to address sacred sites; (2) Developing guidance for the management and treatment of sacred sites, including best practices and sample tribal-agency agreements; and (3) Developing outreach to non-Federal partners to provide information about (a) the political and legal relationship between the United States and Indian Tribes; (b) Federal agency requirements to consult with Indian Tribes; and, (c) the importance of maintaining the integrity of sacred sites; and

Whereas, by letter dated January 26, 2015, Chairman Cheryl LaFleur reaffirmed that FERC does not delegate government-to-government tribal consultation to regulated companies or their representatives, but companies can assist the Commission in completing the process of complying with Section 106 by gathering information, but the responsibility for tribal consultation remains with the Commission; and

Whereas, FERC commits, in accordance with the federal government's trust responsibility and as provided in the NHPA, and the Interagency MOU on Protection of Indian Sacred Sites, to take account of, and where possible, avoid adversely affecting historic properties of religious and cultural significance to a Tribe when Commission actions may have an impact upon historic properties listed in or eligible for the National Register; and

Whereas, several pipeline companies are at various stages in the process of planning, permitting, constructing, installing, modifying and expanding pipeline projects throughout the aboriginal territory of USET-member tribes, with some asking for expedited consideration; and

Whereas, the Advisory Council on Historic Preservation (ACHP) has specifically required in its regulations that "agency official[s] shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them" (36 C.F.R. § 800.4(c)(1); and

Whereas, USET and its Member Tribes have raised concerns regarding the identification and avoidance planning of these proposed pipelines and related infrastructure and their potential adverse effect on historic properties of religious and cultural significance to a Tribe; and

Whereas, USET respects the needs of pipeline companies for certainty regarding potential impacts within reasonable timeframes, but strongly believes that those needs can be met without compromising the integrity of historic properties of religious and cultural significance to a Tribe, most notably ceremonial stone landscapes ("CSLs"), when tribes are involved from the earliest planning stages; and

Whereas, FERC and USET agree that each Tribe should be afforded all reasonable opportunities to provide guidance on the level of effort to identify historic properties and make the determination as to the religious and cultural significance of any identified historic properties to the Tribe; and

Whereas, FERC and USET agree that it is essential that all parties work together in a manner that protects historic properties of religious and cultural significance to a Tribe that are eligible for listing in the National Register; and

Whereas, the existing FERC Guidelines for Reporting on Cultural Resources Investigations for Pipeline Projects (Dec 2002) must be strengthened to ensure greater Agency oversight and earlier communication with project sponsors to enforce timely involvement of Tribes in order to avoid destruction of properties of religious and cultural significance to a Tribe in all pre-filing or subsequent activities of project sponsors; and

Now therefore, in consideration of the above provisions and agreements contained herein, FERC and USET agree to the following:

- I. **Amending FERC Cultural Resource Guidelines and Environmental Guidelines** FERC and USET, in coordination with USET member Tribal Nation THPO's, will work in partnership to complete the appropriate amendments to FERC's Cultural Resources Guidelines and Environmental Guidelines with the intent of improving efficiencies in the pipeline certification process while protecting historic properties of religious and cultural significance to a Tribe.
- II. **Confidentiality of Historic Properties of Religious and Cultural Significance to a Tribe.** FERC will maintain, as confidential, records, maps, photographs, and other information about historic properties of religious and cultural significance to a Tribe. The confidentiality of these places is assured through exemption Number 3 to the Freedom of Information Act, the Archeological Resource Protection Act, and the 1992 Amendments to the National Historic Preservation Act. This information shall not be made available to the general public without the prior approval of the affected Tribes. USET will assist FERC to establish an agreement with the USET Member Tribes on guidelines to ensure confidentiality of this information.
- III. **Seminars and Workshops.** The Commission and USET will cooperate in the development of seminars and workshops intended to advance understanding among all stakeholders regarding their obligations under the National Historic Preservation Act, to better identify and avoid the historic properties that are culturally and religiously significant to the Tribes and ways to address the practical needs of pipeline companies.
- IV. **Outreach to Companies and to USET Member Tribes.** FERC will facilitate communications with the pipeline companies, particularly to identify and avoid historic properties of religious and cultural significance to Tribes; requiring pipeline companies to follow FERC guidelines regarding such properties, and to facilitate Tribal participation as early as possible in the planning process in pipeline activities, including the incorporation of pre-established Tribal protocol and procedure in studies, survey work, mapping, reporting, and avoidance planning for areas of potential effects. USET will facilitate communications with Member Tribes when requested, to ensure the

continuity of participation, in meetings and decision-making, of the appropriate levels of representation from FERC, the pipeline companies and the USET Member Tribes.

**III. Term and Amendments**

A. This Memorandum of Understanding will continue in effect until terminated in writing by either party.

B. This Memorandum of Understanding may be amended only in writing by the Commission and USET.

FEDERAL ENERGY REGULATORY  
COMMISSION

UNITED SOUTH AND EASTERN  
TRIBES, INC.

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Cheryl A. LaFleur  
Chairman

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Brian Patterson  
President

Dated:

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