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June 19, 2017

VIA FEDERAL EXPRESS AND EMAIL
Tracking No: 779436263542

United States Environmental Protection Agency
Ms. Valois Shea
U.S. EPA Region 8
Mail Code: 8WP-SUI
1595 Wynkoop Street
Denver, Colorado 80202-1129

Re: *Cheyenne River Sioux Tribe Comments in Response to* ***U.S. Environmental Protection Agency Region 8 Underground Injection Control Draft Area Permit and Proposed Aquifer Exemption decision for Dewey-Burdock Uranium In-Situ Recovery Site***

Dear Ms. Shea:

As the Chairman of the Cheyenne River Sioux Tribe ("Tribe"), I am contacting the U.S. Environmental Protection Agency ("EPA") to submit the Tribe's official comments on the EPA's Region 8 Underground Injection Control Draft Area Permit and Proposed Aquifer Exemption decision for Dewey-Burdock Uranium In-Situ Recovery Site.

The Cheyenne River Sioux Reservation is located wholly within the exterior boundaries of the State of South Dakota. (A map showing the location of the Tribe's Reservation is enclosed herewith.) However, our rights and trust resources extend beyond our Reservation borders as a

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

matter of federal law, and they are rights for which the United States owes us a fiduciary duty. Therefore, the purpose of these comments is to insist that the EPA must act as a fiduciary by both consulting with the Tribe on any impact to those rights and by protecting those rights from harm.

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

The Tribe's Rights and Trust Resources in the vicinity of the Dewey-Burdock Uranium Mine

- Reserved water rights: The Tribe enjoys reserved water rights in the Missouri River Basin as well as related groundwater in an amount sufficient to fulfill the purposes of the Reservation. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 600 (1963). These reserved water rights are a trust resource for which the United States owes a fiduciary duty. These rights are a function of the Tribe's extant treaty rights. *See Treaty of Fort Laramie with the Sioux, Etc.*, 11 Stat. 749 (Sep. 17, 1851); *Treaty with the Sioux – Brule, Oglala, Mniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee*, 15 Stat. 635 (Apr. 29, 1868). The Tribe retains reserved water rights in off-Reservation waterways in the Missouri River Basin as well as groundwater and aquifers outside its Reservation.

- Hunting and fishing rights: The Tribe enjoys hunting and fishing rights in Lake Oahe, the reservoir of the Missouri River that are subject to the United States' trust duty. The rights are a function of the Tribe's extant treaty rights and have been preserved by Congress. *See Treaty of Fort Laramie with the Sioux, Etc.*, 11 Stat. 749 (Sep. 17, 1851); *Treaty with the Sioux – Brule, Oglala, Mniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arc, and Santee*, 15 Stat. 635 (Apr. 29, 1868); Act of Sep. 3, 1954, Pub. L. 83-776, 68 Stat. 1191. Numerous off-Reservation tributaries, aquifers, and other bodies of water belong to the Lake Oahe hydrologic system and consequently will impact the Tribe's retained hunting and fishing rights in Lake Oahe.

- Historic, spiritual, and cultural resources: There are numerous sites of historic, spiritual, and cultural significance to the Tribe throughout the Tribe's large aboriginal territory, but especially within the boundaries of the lands reserved to the Tribe in the *Treaty of Fort Laramie with the Sioux, Etc.*, 11 Stat. 749 (Sep. 17, 1851). The Black Hills of South Dakota constitute among the most sacred lands to the Lakota people from time immemorial. We call the Black Hills *Wamaka Og'naka I'Cante* or "the heart of everything that is." It is called this because the Black Hills contain the most important religious sites of the Lakota people, including the site where Lakota people believe that our people emerged onto this

earth, and sites where the Lakota people have performed annual religious ceremonies and pilgrimages since before recorded history and through today. In addition, the Lakota people lived, hunted, buried our dead, and performed our religious sacraments, including *inipi* (sweatlodge), *hanbleca* (vision questing), and other rites throughout our long history in the region. We still use the Black Hills in this way. In light of our long and rich history in this region, as well as our use and occupation of this area through the present day, there are untold sites of historical, cultural, and spiritual significance throughout the Black Hills that require careful consideration. Furthermore, the Tribe's reserved water rights themselves constitute a spiritual and cultural resource in light of the primary role that water plays in Lakota religious sacraments, which require environmentally and ritually pure water. (A map showing the Tribe's 1851 territory is enclosed herewith.)

United States Trust Duty

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

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

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

The United States and the EPA's trust relationship does not only extend to the affirmative obligations to protect tribal rights and trust resources, but the United States must also engage in

meaningful pre-decisional consultation on projects that will affect the Tribe's treaty rights and trust resources. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000); EPA Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984); EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights (Feb. 2016).

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

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

The EPA has explicitly adopted and expounded on a consultation policy consistent with federal law recited herein as set forth in the following: (1) the EPA Policy on Consultation and Coordination with Indian Tribes, dated May 4, 2011; (2) the EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights, dated February 2016; and (3) the EPA Responses to Comments on EPA Policy for Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights. In addition, the EPA has communicated both orally and in writing with officials of the Cheyenne River Sioux Tribe, including myself, to advise that the EPA intends to conduct proper, in-person government-to-government consultation on the Dewey-Burdock Uranium Mine.

Importantly, the EPA's consultation policies commit the EPA to provide further information to the Tribe concerning the effect of the Dewey-Burdock Uranium Mine on our resources, to consult pre-decisionally, to honor the Tribe's requests concerning substantive and logistical details of consultation, to involve EPA decision makers in the consultation process, to

provide written consultation feedback, and to seek to fully understand and reach a consensus with the Tribe.

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

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

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

Tribe's Requests Concerning the Underground Injection Control Draft Area Permit and Proposed Aquifer Exemption decision for Dewey-Burdock Uranium In-Situ Recovery Site

1. The Dewey-Burdock Uranium In Situ Recovery Site Poses a Serious Threat to Tribal Rights that the EPA Must Thoroughly Evaluate

The Dewey-Burdock Uranium Mine is proposed to be sited within the Tribe's 1851 territory and in areas that impact aquifers and tributaries that affect Cheyenne River Sioux Reservation lands and waters. As such, the Dewey-Burdock Uranium Mine will have serious impacts on (a) the Tribe's treaty rights and reserved water rights, (b) the Tribe's cultural resources; and (c) the Tribe's religious exercise, as set forth in further detail below.

a. The Dewey-Burdock Uranium Mine Poses a Serious Threat to the Tribe's Treaty Rights and Reserved Water Rights

The proposed Dewey-Burdock Uranium Mine is proposed to be sited in areas that affect aquifers, watersheds, and tributaries that are hydrologically connected to the waters that affect Cheyenne River Sioux Reservation lands and waters. These lands and waters have been guaranteed to us by Treaty, and the United States must act as our fiduciary in protecting them as a matter of federal law as set forth above.

In 2005, when a drought threatened the Tribe's only source of drinking water, which is drawn from an intake project at the confluence of the Cheyenne River and the Missouri River at Lake Oahe, the U.S. Army Corps of Engineers determined that a loss of this water source would devastate our Tribe. As a consequence, we are vigilant in our monitoring and stewardship of our waters. The Cheyenne River, the waterway that gives our Reservation its name, constitutes the southern border of our Reservation and flows into the Missouri River (Lake Oahe) at precisely the place where the United States has built the water intake that serves our entire Reservation. The Cheyenne River also flows through the Black Hills very close to the site of the proposed Dewey-Burdock Uranium Mine. Other historical uranium mines and other metal mines have been sited near the Cheyenne River in the Black Hills.

The Tribe has collected water samples over many years from the Cheyenne River in an effort to protect the health, safety, and welfare of our people. These samples show levels of 16-32 pCiPl (Pico liter series per liter) in the Cheyenne River. This demonstrates that past uranium mining has, and future uranium mining will, migrate out of the resources and will not be contained. We have also seen high levels of radiation on the Moreau River, another tributary of the Missouri River, caused from past uranium mining upstream. In light of these facts, the Cheyenne River Sioux Tribe strongly opposes any and all current, new, or ongoing uranium mining projects in lands and waters that affect our Reservation.

The current analyses of the Dewey-Burdock Uranium Mine specifically identifies the Cheyenne River and its tributaries as an area that will be affected by the Dewey-Burdock Uranium Mine. Significantly, however, the current analyses conspicuously do not address the impacts of the mining activity on the Cheyenne River Sioux Tribe. There is no risk data concerning human

health impact of the Dewey-Burdock Uranium Mine on the Cheyenne River Sioux people as it relates to the aquifers, watersheds, or tributaries that feed our Reservation. There is no analysis of impacts to fish and wildlife on our Reservation and in Lake Oahe, to which we have rights embodied in both Treaty and federal statute. There is also no analysis of impacts upon plants that we rely upon for food and medicine.

Furthermore, the Preliminary Economic Assessment related to this project notes uncertainty in whether the Dewey-Burdock Mine is even economically viable. This is a grave concern to the Tribe for two reasons. First, it raises the concern that the project proponents will not have the financial resources to provide contingency funds for future remediation or if the project proponent will even maintain responsibility for such activities.

In light of its fiduciary duty to the Cheyenne River Sioux Tribe, until the EPA has thoroughly evaluated the above impacts to the Tribe, any authorizations of the instant uranium mine violates federal law and would be arbitrary and capricious.

b. The Dewey-Burdock Uranium Mine Poses a Serious Threat to the Tribe's Cultural Resources

The site of the proposed Dewey-Burdock Uranium Mine is within the Tribe's 1851 territory. Specifically it is in the vicinity of the Black Hills, among the most sacred sites to the Lakota people. Our people lived in this area, hunted in this area, and made religious pilgrimages in this area from time immemorial. Our Tribal Historic Preservation Officer advises that the site of the proposed mine has the potential to contain numerous sites of cultural and spiritual significance. While it is our understanding that some efforts have been made to identify cultural resources in the project area, the EPA has not consulted with the Tribe pursuant to the National Historic Preservation Act.

c. The Dewey Burdock Uranium Mine Poses a Serious Threat to the Tribe's Religious Exercise

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

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

As described herein, the Underground Injection Control Draft Area Permit and Proposed Aquifer Exemption decision for the Dewey-Burdock Uranium In-Situ Recovery Site poses serious threats to the Tribe's reserved water rights, hunting and fishing rights, cultural and spiritual sites, and religious exercise in ways that implicate federal statutes and treaty rights. As further described herein, as a function of its fiduciary duty to the Tribe and as a matter of federal law, the EPA must engage in meaningful government-to-government consultation with the Tribe on the issues discussed herein and other issues that may arise.

On May 12, 2017, officials of the Cheyenne River Sioux Tribe, including myself, attended the public hearing on the Dewey-Burdock Uranium Mine in Rapid City, South Dakota. At that hearing, our representatives and other representatives of the *Oceti Sakowin* (the Great Sioux Nation) provided testimony consistent with the comments herein. Furthermore, at that hearing, the EPA's representative confirmed explicitly that the EPA does not consider any public hearing or written public comments such as these to constitute meaningful government-to-government consultation with the Tribe and that we can expect to have further contact with the EPA. In addition, Cheyenne River Sioux Tribal Historic Preservation Officer Steve Vance received an email from you on May 18, 2017 advising that "the public comment period is different from our Tribal consultation process," and further advising that "[t]he EPA Tribal consultation process is currently in progress for Dewey-Burdock."

The Tribe looks forward to such consultation. Your email instructed the Tribe to contact you or EPA Region 8 Tribal Advisor, Patrick Rogers. As such, we have submitted a formal letter under separate cover requesting government-to-government consultation with the EPA on the Dewey-Burdock Mine to both you and Mr. Rogers. As set forth in that letter, the Tribe believes that such consultation must encompass the following ***at a minimum***:

- Provide the Tribe with all pertinent information concerning the impact on the Tribe's rights before consultation in a timely manner.
- Coordinate with the Tribe before consultation begins, especially with development of an agreement on consultation timelines.
- Consult only with Tribal representatives who have been authorized to engage in government-to-government consultation by the Tribal government.
- Make every effort to conduct Tribal consultation at the seat of Tribal government, Eagle Butte, South Dakota or elsewhere on the Cheyenne River Sioux Reservation.
- Ensure that federal participants in Tribal consultation have actual decision-making authority.

- Provide written confirmation that the agency has considered tribal comments and concerns and the agency's response, whether positive or negative.

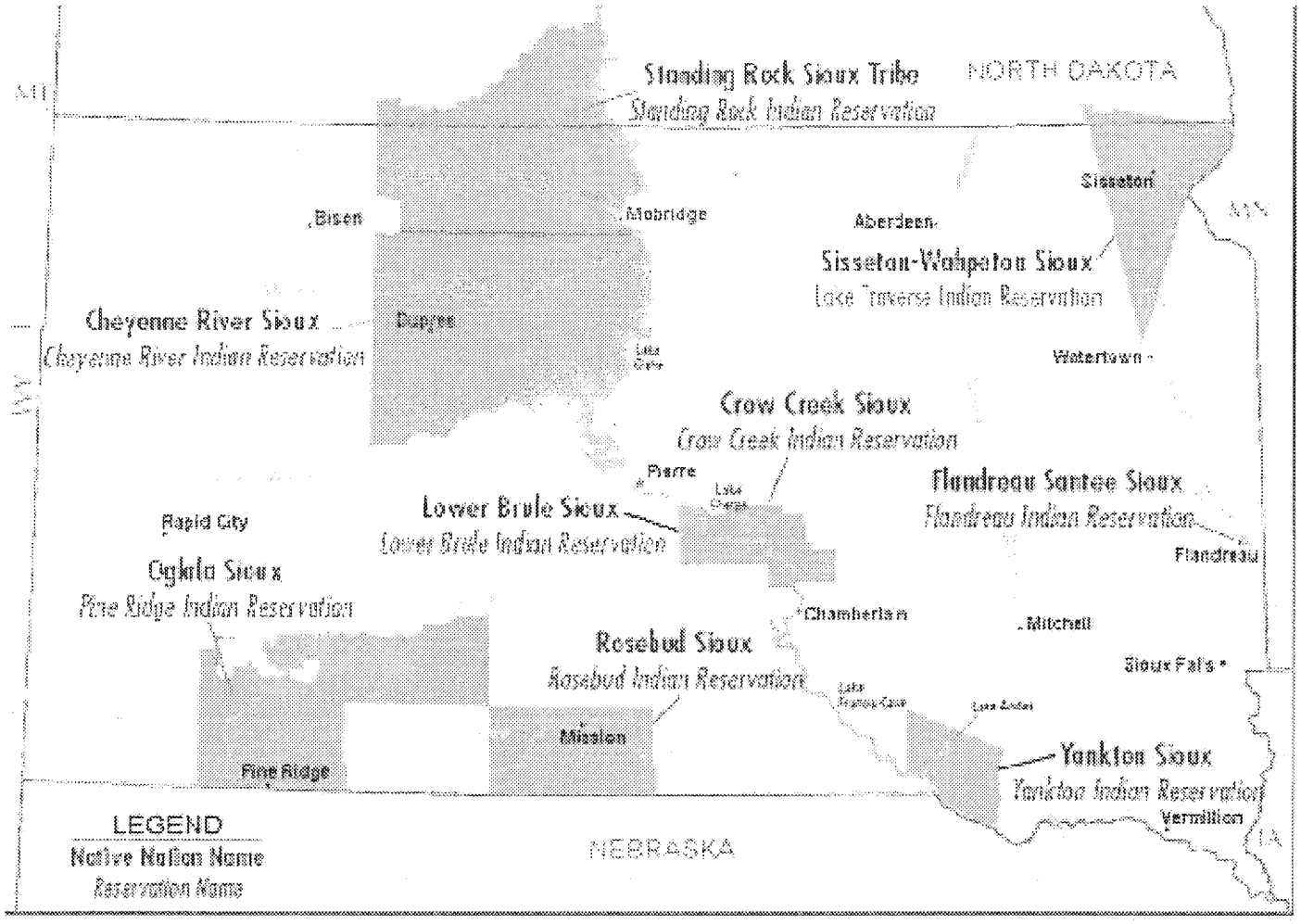
- Obtain resolution of approval from the Tribe that the agency has satisfactorily consulted with the Tribe and the Tribe agrees with the agency's response to Tribal concerns in each instance.

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

I appreciate the EPA's request for comments on this important issue. As noted above, these comments are ***preliminary***. The Tribe reserves the right to submit supplementary comments after engaging in government-to-government consultation with the EPA. Further, in addition to these comments, a formal request for consultation has been sent to you under separate cover. Please do not hesitate to contact me if you should have any questions.

Very Truly Yours,

Harold Frazier
Chairman, Cheyenne River Sioux Tribe


Standing Rock Sioux Tribe
Standing Rock Indian Reservation
NORTH DAKOTA
Bison
Mobridge
Aberdeen
Sisseton
Sisseton-Wahpeton Sioux
Lake Traverse Indian Reservation
Cheyenne River Sioux
Cheyenne River Indian Reservation
Dupree
Watertown
Crow Creek Sioux
Crow Creek Indian Reservation
Pierre
Flandreau Santee Sioux
Flandreau Indian Reservation
Lower Brule Sioux
Lower Brule Indian Reservation
Rapid City
Flandreau
Oglala Sioux
Pine Ridge Indian Reservation
Chamberlain
Mitchell
Rosebud Sioux
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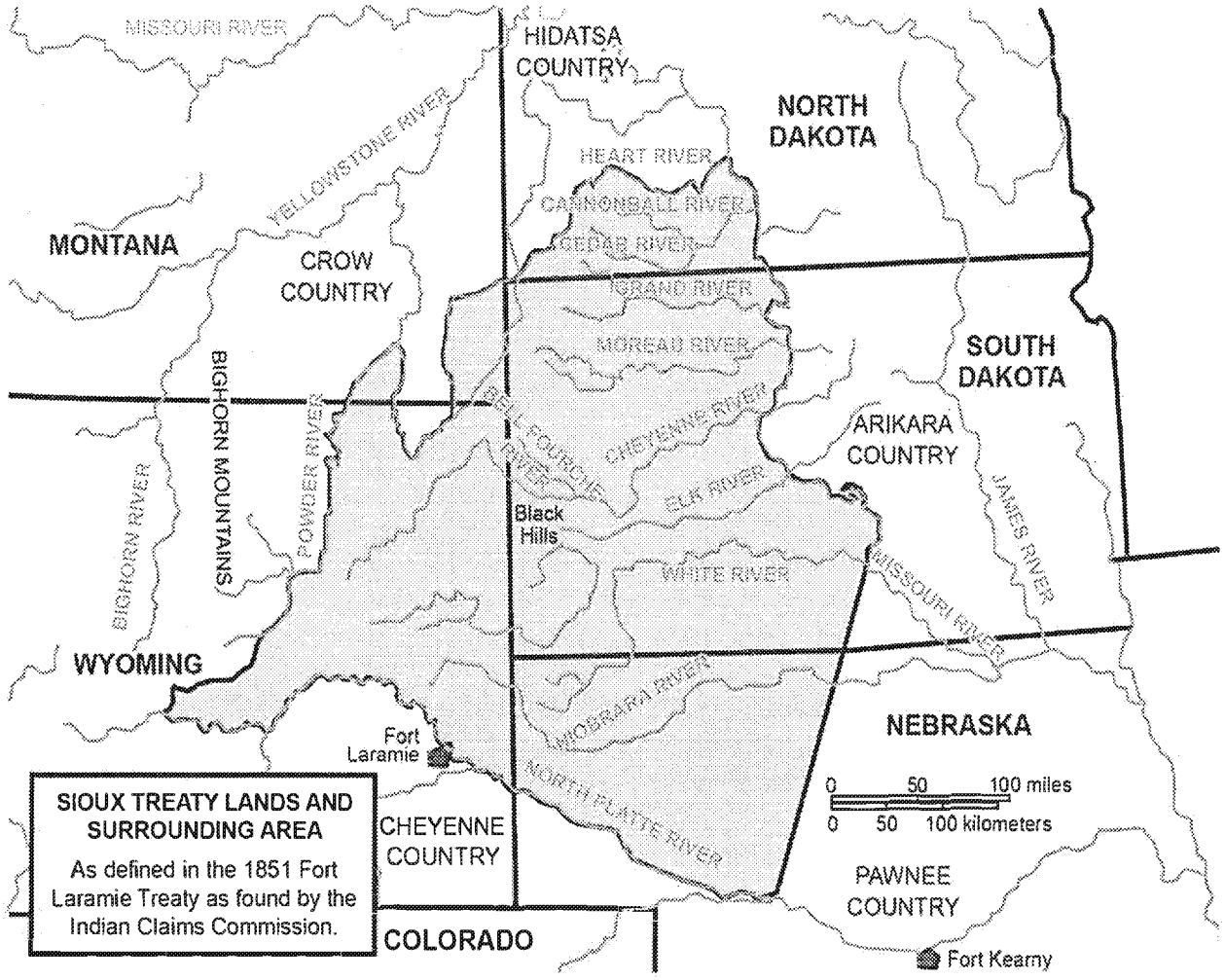
Pine Ridge
Vermillion
LEGEND
Native Nation Name
Reservation Name
NEBRASKA


MISSOURI RIVER
HIDATSA COUNTRY
NORTH DAKOTA
YELLOWSTONE RIVER
HEART RIVER
CANNONBALL RIVER
CEDAR RIVER
MONTANA
CROW COUNTRY
GRAND RIVER
MOREAU RIVER
SOUTH DAKOTA
BIGHORN MOUNTAINS
POWDER RIVER
BELL FOURCHE RIVER
CHEYENNE RIVER
ARIKARA COUNTRY
ELK RIVER
Black Hills
JAMES RIVER
BIGHORN RIVER
WHITE RIVER
MISSOURI RIVER
WYOMING
NIOBRARA RIVER
NEBRASKA
Fort Laramie
0 50 100 miles
0 50 100 kilometers
SIOUX TREATY LANDS AND SURROUNDING AREA
As defined in the 1851 Fort Laramie Treaty as found by the Indian Claims Commission.
CHEYENNE COUNTRY
NORTH PLATTE RIVER
PAWNEE COUNTRY
COLORADO
Fort Kearny