



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #KAN-18-009

TITLE: Support for Meaningful Tribal Consultation in Accordance with Applicable Laws to Identify and Mitigate the Adverse Impacts of the Atlantic Coast Pipeline on Affected Indian Tribes

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WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, all American Indian, Alaska Native, and Native Hawaiians (collectively, "Indigenous Peoples") retain inherent rights to self-government and have occupied what is now the United States of America since time immemorial; and

WHEREAS, Indigenous Peoples existed as independent sovereigns retaining their right to self-government prior to the formation of the United States and through treaties and other agreements, federal laws, and executive orders; and

WHEREAS, the government-to-government relationship necessitates that Indian tribes, as a matter of inherent right and under federal law, be consulted on activities that have tribal impacts or the potential to impact tribal interests in order to seek tribal consent to mutually agreed upon courses of action whenever possible; and

WHEREAS, in 2000, President Clinton issued Executive Order 13175, setting forth a policy mandating executive agency consultation with Indian tribes; and

WHEREAS, President Obama reaffirmed the Federal commitment to this policy in his 2009 memorandum while also directing each agency to submit a detailed plan for implementation of Executive Order 13175, which was elevated to executive order status by Executive Order 13604; and

WHEREAS, the federal courts have routinely recognized the requirement for meaningful consultation in federal decision making; and

WHEREAS, numerous federal laws, rules and regulations require meaningful consultation with Indian tribes whenever an action impacts cultural or historic resources such as, but not limited to, the National Environmental Protection Act (NEPA), the Native American Graves Protection and Repatriation Act (NAGPRA) and Section 106 of the National Historic Preservation Act (NHPA); and

WHEREAS, the Advisory Council on Historic Preservation's regulations at 36 C.F.R. 800.2(c)(5) allow for the inclusion of state recognized Indian tribes in the Section 106 process as well; and

WHEREAS, the consultations that occur in accordance with Section 106 of the National Historic Preservation Act are standardly memorialized in documents or agreements such as Memorandums of Agreements (MOA's), Memorandums of Understanding (MOU's) or Programmatic Agreements (PA's) between the consulting Indian tribes, proponents and federal agencies; and

WHEREAS, Article 18 of the United Declaration on the Rights of Indigenous Peoples acknowledges that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights;" and

WHEREAS, Article 19 of UNDRIP provides that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them;" and

WHEREAS, Article 26(3) of UNDRIP acknowledges that "States shall give legal recognition and protection to [indigenous peoples'] lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned; and

WHEREAS, Article 32(2) of UNDRIP acknowledges that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources;" and

WHEREAS, the Atlantic Coast Pipeline (ACP) project being proposed by Dominion Energy, Duke Energy and its partners, is a project subject to review under the requirements of NEPA, Section 106 of the NHPA; and

WHEREAS, on January 12, 2018, the representatives of the ACP and Advisory Council on Historic Preservation (ACHP) executed a PA on the project without any Indian tribe affected by the ACP being an invited or concurring signatory to the PA; and

WHEREAS, there are at least twelve (12) Indian tribes headquartered within the states of North Carolina and Virginia that will be negatively impacted by the ACP's construction and operation, and at least a dozen more that have the potential to be negatively impacted, and the responsible federal agency(ies) failed to consult with even one (1) Indian tribe as an invited or concurring party to the PA; and

WHEREAS, the Rappahannock Tribe, Haliwa-Sapon Indian Tribe, and Monacan Indian Nation have all expressed deep concern about the potential impacts of the ACP on sites of critical significance to their Tribes, and yet still they have not been consulted on the PA that formulates the mitigation plan for this project; and

WHEREAS, the United States has an obligation and trust responsibility to consult in good faith with Indian tribes, and the responsible federal agency(ies) have not consulted with these Indian tribes in a manner compliant with NEPA or Section 106 of the NHPA; and

WHEREAS, in order to correct this gross neglect of the trust relationship by the responsible federal agency(ies), the aforementioned Indian tribes call upon all of Indian Country to demand the re-opening of the PA by the ACHP to require that the responsible federal agency(ies) develop a new PA in consultation with affected Indian tribes as invited signatories that incorporates terms developed through meaningful government-to-government consultation in good faith.

NOW THEREFORE BE IT RESOLVED, that the National Congress of American Indians (NCAI) calls upon the Advisory Council on Historic Preservation to re-open the Programmatic Agreement process concerning the Atlantic Coast Pipeline project; and

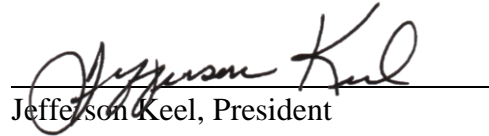
BE IT FURTHER RESOLVED, that the NCAI calls upon the Advisory Council on Historic Preservation to require that the responsible federal agency(ies) include the Rappahannock Tribe, Haliwa-Saponi Indian Tribe, Monacan Indian Nation and other Indian tribes with cultural or religious interest in the project areas of the Atlantic Coast Pipeline, as invited signatories to negotiate a new Programmatic Agreement that incorporates terms developed through meaningful government-to-government consultation in good faith; and

BE IT FURTHER RESOLVED, that if other parties to the current Programmatic Agreement refuse to concur with the re-opening of the PA and inclusion of Indian tribes as aforementioned, the National Congress of American Indians calls upon the Advisory Council on Historic Preservation to terminate the current Programmatic Agreement and proceed with Section 106 consultation as mandated by the ACHP's regulations; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2018 Midyear Session of the National Congress of American Indians, held at the Marriott Kansas City Downtown, June 3-6, 2018, with a quorum present.



Jefferson Keel, President

ATTEST:



Juana Majel Dixon, Recording Secretary