



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

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**JUL - 7 2017**

M-37047

Memorandum

To: Secretary  
Assistant Secretary, Land and Minerals Management  
Director, Bureau of Land Management

From: Principal Deputy Solicitor appointed as Acting Solicitor

Subject: Withdrawal of M-37038, "Tribal Treaty and Environmental Statutory Implications of the Dakota Access Pipeline"

On December 4, 2016, the Solicitor issued M-37038. The opinion provided advice to the United States Army Corps of Engineers (Corps) on how it should comply with treaty obligations, trust duties, and the requirements of the National Environmental Policy Act (NEPA)<sup>1</sup> and certain other statutes, in determining whether to grant authorizations to Dakota Access LLC for the completion of the Dakota Access Pipeline (DAPL). On February 6, 2017, the Acting Secretary suspended and temporarily withdrew M-37038 pending review by the new Administration and a determination as to whether the opinion should be reinstated, modified, or revoked. For the reasons set forth below, I now revoke and withdraw M-37038.

M-37038 was written to provide advice to the Corps on one matter – the Corps' decision whether to grant Dakota Access LLC the authorizations needed to complete DAPL. In particular, at the time M-37038 was issued, the Corps was considering whether to grant an easement to the company under the Mineral Leasing Act and whether to reconsider its decision to authorize construction under the Rivers and Harbors Act.<sup>2</sup> On February 8, 2017, the Corps made its decision on the matters addressed by M-37038 when it terminated further environmental analysis and issued an easement to the company. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock III)*.<sup>3</sup> The Corps' decision, along with the other authorizations provided by the Corps to the company, became the subject of lawsuits by Tribes and individuals, with the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe serving as the lead plaintiffs.

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<sup>1</sup> 42 USC 4321 *et seq.*

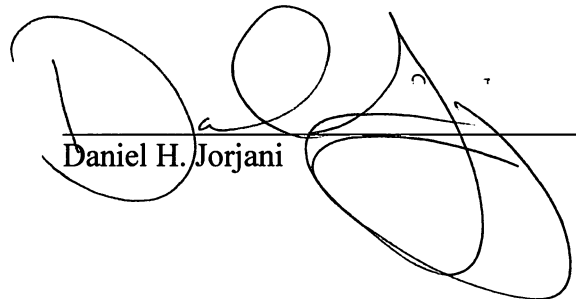
<sup>2</sup> The Company needed three authorizations from the Corps: (1) verification that its activities satisfied the terms and conditions of Nationwide Permit 12; (2) permission under the Rivers and Harbors Act, 33 U.S.C. § 408; and (3) a real-estate easement under the Mineral Leasing Act, 30 U.S.C. § 185. At the time M-37038 was issued, the Corps had previously provided the first two authorizations but had not granted an easement and was reconsidering the permission issued under the Rivers and Harbors Act.

<sup>3</sup> *Standing Rock III*, No. 16-1534, 2017 U.S. Dist. LEXIS 91297, \*27 (D.D.C. June 14, 2017) (describing the background facts).

The Tribes raised claims that were addressed in a series of decisions by the United States District Court for the District of Columbia.<sup>4</sup>

The opinion in *Standing Rock III* addressed the issues that were discussed in M-37038. The decision addressed the Corps' discharge of its treaty obligations and trust responsibilities to the Tribes, and its compliance with NEPA in making its decisions with respect to DAPL.<sup>5</sup> In its decision, the court referenced M-37038 in its background facts and tangentially in its legal conclusions,<sup>6</sup> but the court appropriately did not discuss or rely on the advice provided in M-37038 given that the Opinion had been suspended and temporarily withdrawn. The district court, although rejecting most of the Tribes' claims, ultimately concluded that "the Corps' assessment of the impacts of a spill, although largely adequate, fell short as to fishing rights, hunting rights, and environmental justice," and ordered the Corps to assess those impacts upon remand.<sup>7</sup>

Because the advice provided by M-37038 has now been considered by the Corps in its decision-making, and those decisions are the subject of judicial review, I find that the opinion has no existing or prospective utility. The Opinion was written to provide pre-decisional advice to a non-Interior agency with respect to a particular matter. The Corps made its decision, the record for judicial review has been completed, and any reconsideration or further decision-making by the Corps will be governed by the orders and guidance provided by the courts. The advice provided by M-37038 is thus no longer needed. Accordingly, while expressing no view on the merits of the analysis or conclusions contained therein, I hereby withdraw M-37038. The Corps may contact the Office of the Solicitor if it desires the legal advice of the Department of the Interior in future proceedings.



Daniel H. Jorjani

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<sup>4</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock I)*, 205 F. Supp. 3d 4 (D.D.C. 2016); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs (Standing Rock II)*, 2017 U.S. Dist. LEXIS 93908 (D.D.C. Mar. 14, 2017); *Standing Rock III*, 2017 U.S. Dist. LEXIS 91297 (D.D.C. June 14, 2017).

<sup>5</sup> *See, e.g., Standing Rock III*, 2017 U.S. Dist. LEXIS 91297, \*33-71 (addressing NEPA compliance and analysis of treaty obligations); \*90-96 (discussing discharge of trust obligations in granting easement); \*107-108 (discussing NEPA analysis of oil spill risk); \*110-114 (discussing various aspects of NEPA compliance); \*123-139 (discussing tribal trust obligations and tribal consultation duties).

<sup>6</sup> *Id.*, at \*23, \*24, \*27, \*41-42, and \*90.

<sup>7</sup> *Id.*, at \*110, \*138-39.