



*Preserving America's Heritage*

May 6, 2016

Colonel John W. Henderson  
District Engineer  
Omaha District  
U.S. Army Corps of Engineers  
1616 Capitol Avenue, Suite 9000  
Omaha, NE 68102

Ref: Dakota Access Pipeline Project

Dear Colonel Henderson:

The Advisory Council on Historic Preservation (ACHP) received your letter dated April 11, 2016, responding to our letter of March 15, 2016. In our letter, we expressed concerns about the Corps of Engineers (Corps) compliance with Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.) and its implementing regulations, "Protection of Historic Properties" (36 C.F.R. Part 800) for the Dakota Access Pipeline (DAPL). Your response reiterates that the Corps has determined that it must follow procedures set forth in Appendix C of 33 C.F.R. part 325 (Appendix C) when complying with the requirements of Section 106, thereby limiting its jurisdiction to permit areas associated with activities in the Waters of the United States (WOUSA). We would like to further clarify our observations regarding your coordination of the Section 106 review for this undertaking, and recommend further steps the Corps should take to adequately consider effects to historic properties from this undertaking.

### **Undertaking and Area of Potential Effects**

While the DAPL has a proposed right-of-way (ROW) extending more than 1000 miles from North Dakota, through South Dakota and Iowa, and into Illinois, Corps Regulatory only acknowledges jurisdiction over water crossings. Your review specifically focuses on 209 locations where pre-construction notifications (PCNs) were required from the project proponent according to the terms of the Corps' Nationwide Permit program. The Corps is considering each linear crossing to be a single and discrete undertaking for the purposes of Nationwide Permit (NWP) verification.

As you are aware, the ACHP's Section 106 regulations define the undertaking as the entire project, portions of which may require federal authorization or assistance. The Area of Potential Effects (APE) is the geographic area or areas within which the undertaking may affect historic properties, if any are present. We recognize that federal agencies may have limited jurisdiction over, or involvement in, an undertaking in some circumstances, limiting their ability to identify historic properties and to resolve adverse effects comprehensively throughout the APE for the entire undertaking. However, even in circumstances where such limitations exist, the federal agency remains responsible for taking into account the effects of the undertaking on historic properties.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637  
Phone: 202-517-0200 • Fax: 202-517-6381 • [achp@achp.gov](mailto:achp@achp.gov) • [www.achp.gov](http://www.achp.gov)

Further, with linear undertakings such as oil pipelines, we have previously advised the Corps to consider the number of crossings the Corps has jurisdiction over, and their placement throughout the ROW, in determining its responsibility to actively identify and consider effects on historic properties in the portions of the ROW located outside the water crossings. As noted in our March 15, 2016, letter, given the large number of water crossings and their likely distribution throughout the entire ROW, it may be appropriate to suggest that the water crossings enable or even determine the placement of the ROW. It is inescapable that the pipeline will need to cross WOUA as it passes through four states. As such, the pipeline could not be constructed “but-for” the Corps permits required. Likewise, the procedures for NWP verification do not require that the project proponent submit PCNs for all water crossings. Therefore, there may be other crossings that do not require PCNs under General Conditions 20 and 31 because the project proponent does not know of, or anticipate, the presence of historic properties located at those crossings or requiring compliance with Section 106.

When considering the definition of the undertaking and the APE, the Section 106 regulations reference the level of federal involvement as one issue to consider when characterizing the scope of the identification effort federal agencies must engage in to meet the reasonable and good faith standard for the identification and evaluation of historic properties per our regulations. In the case of DAPL, three Corps regulatory offices, a Corps Civil Works facility, the Farm Service Agency, and the United States Fish and Wildlife Service all have actions related to portions of the larger undertaking. Accordingly, it appears that the level of federal involvement justifies a greater federal effort to identify and evaluate historic properties.

### **Consultation with Federally Recognized Tribes**

As you know, the Section 106 regulations require that a federal agency identify tribes that may ascribe religious and cultural significance to historic properties that may be affected by an undertaking, and invite them to participate in the Section 106 consultation. They are recognized as consulting parties “by-right” if they so request. The federal agency must consult with them in a manner that acknowledges the government-to-government relationships between federally recognized tribes and the federal government. Such consultation must include providing the tribes with sufficient information and documentation, and a reasonable review period that enables them to make informed decisions regarding the sufficiency of the federal agency’s compliance with Section 106, including findings and determinations the agency makes as it moves through the Section 106 review. The Section 106 regulations also require that the federal agency recognize the special expertise of tribes when determining the significance of properties of religious and cultural significance to them.

The ACHP remains concerned that because of the involvement of multiple Corps districts and other federal agencies, consultation with tribes and the information supplied to them in response to their inquiries has been inadequate and fragmented. Tribes should have opportunities to review and comment on the identification and evaluation efforts, assessments of effects, and the other related tribal issues where they have special expertise. Unfortunately, the coordination of the Corps, thus far, has not resulted in productive tribal consultation consistent with the Section 106 regulations. The concerns expressed by the Chairman of the Standing Rock Sioux Tribe (SRST) in his letter to the ACHP dated January 8, 2016, and those expressed by the Tribal Historic Preservation Officer (THPO) of the Iowa Tribe of Kansas and Nebraska in his letter to the ACHP dated March 25, 2016, exemplify our concerns. It is unclear to the ACHP how the Corps has ensured that the tribes had the opportunity to share relevant information about the potential presence of properties of religious and cultural significance to them in the vicinity of water crossings and within the project ROW that the applicant assumes will not require PCNs under General Conditions 20 and 31 of the NWP protocols.

## **Consulting Parties**

The Section 106 regulations require that a federal agency identify other appropriate consulting parties, in addition to the “by-right” consulting parties identified in 36 C.F.R. § 800.2(c). Section 36 C.F.R. § 800.2(c)(5) of our regulations requires the agency official to consider requests from individuals and organizations with a demonstrated interest in the undertaking to participate as consulting parties “... due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.” The ACHP encourages federal agencies to take a broad perspective on the range of stakeholders who may be appropriate to engage as consulting parties. It is the federal agency’s responsibility to share with the consulting parties appropriate, and sufficient, background information and documentation to support its findings and determinations for Section 106 reviews. Further, this information should enable consulting parties, like the tribes, to review projects and prepare informed comments. Unfortunately, the Corps has yet to demonstrate how it has properly identified appropriate consulting parties and invited them to formally participate in the consultation process.

We have been copied on correspondence between Mr. Daniel Higginbottom, an historic preservation professional and affected property owner, and the Corps regarding his request to become a consulting party, as well as his request for information about the identification and evaluation effort for historic properties and other aspects of the Corps’ review. We understand that Mr. Higginbottom has been recognized as a consulting party. Regrettably, he has not received any of the project documentation normally shared with consulting parties. Instead, his efforts to obtain information have been met with requests from the Corps for more specificity and exact locations of the sites he is concerned about. This demonstrates a fundamental lack of understanding about the requirements of the Section 106 process, the consultation process, and the obligations of the federal agency to engage consulting parties in all aspects of Section 106. This would include substantive information about the methods and results of surveys to identify historic properties throughout the undertaking. We, therefore, request the Corps to promptly take appropriate measures to remedy this failure to communicate.

## **Timing in the Section 106 Review**

The Section 106 regulations require that a federal agency complete the Section 106 review prior to approving a project or issuing an authorization or assistance. Further, Section 110(k) of the NHPA prohibits *a Federal agency from granting a loan, loan grantee, permit, license or the assistance to an applicant who, with intent to avoid the requirements of Section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the ACHP, determines that circumstances justify granting such assistance despite the adverse created or permitted by the applicant.* We recently were advised that the Iowa Utility Board has ruled that Dakota Access violated its recent order by engaging in prohibited activities prior to obtaining all its permits and approvals by engaging in activities within the ROW including tree clearing within the Corps’ jurisdictional PCN’s for the purpose of eliminating Indiana Brown bat habitat prior to the start of the April 1 breeding season. Since this activity may have caused harm to, or precluded, the appropriate identification of historic properties in those locations, the Corps should investigate this issue and consult with the ACHP regarding the applicability of Section 110(k) before it proceeds with the Section 106 review.

## **Federal Agency Coordination**

Previously, we mentioned concerns regarding the apparent lack of coordination among the multiple Corps districts and other federal agencies involved in DAPL who have actions related to this undertaking. Consulting parties and stakeholders are unsure to whom they should address their inquiries and concerns.

As noted, the information supplied by different federal agencies to the tribes, other consulting parties, and stakeholders in response to inquiries has often been inadequate. The agencies are making determinations of eligibility and effect findings that are not shared appropriately with consulting parties, limiting their ability to review and comment on time sensitive documents.

Pursuant to 36 C.F.R. § 800.2(a)(2), if more than one federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency who shall act on their behalf, fulfilling their collective responsibilities under Section 106. Although we understood that the Omaha District was specified to act as lead district for the three Corps districts, it is unclear how that has been manifest in the consultation process. Overall, there does not seem to be a lead federal agency that is acting as the main point of contact with consulting parties and stakeholders for the distribution of necessary information about the steps of the Section 106 review.

The federal agencies involved also need to consider the myriad tribal, procedural, and policy issues that may emerge during project implementation. We have previously recommended that the federal agencies consider developing a Programmatic Agreement (PA) that would clarify roles and responsibilities in the consultation process, and during project implementation. The PA also could specify how the project proponent must address issues that emerge, including emergency situations. At the least, findings of “no historic properties affected” or “no adverse effect” should include provisions that clarify how such eventualities have been reached.

### **Next Steps**

We understand that the Corps will be convening a teleconference on May 9, 2016, with the tribes of the Upper Sioux Community. The outcome of the teleconference will likely identify other issues related to Section 106 that should be addressed by the Corps. We appreciate the invitation from the Corps to participate in the teleconference, and will do so. However, we note that there are many other federally recognized tribes who have concerns about this undertaking and also have requested to further consult with the Corps. We look forward to participating in follow-up calls that will provide these parties similar opportunities to share their concerns.

We are hopeful that the Corps will clarify how it intends to address the Section 106 consultation issues, the tribal issues, and the timing issues associated with DAPL. We are eager to see this undertaking get on track with all consulting parties, and for the Corps to comply with the four-step Section 106 process. Most important, we are eager to see the Corps take appropriate steps to meet its government-to-government responsibilities regarding consultation with Indian tribes consistent with the intent and spirit of the National Historic Preservation Act.

Should you have any questions or wish to discuss this matter further, please contact John T. Eddins, PhD at 202-517-0211, or by e-mail at [jeddins@achp.gov](mailto:jeddins@achp.gov).

Sincerely,



Reid J. Nelson  
Director  
Office of Federal Agency Programs