



Preserving America's Heritage

March 15, 2016

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

Ref: Dakota Access Pipeline Project

Dear Colonel Henderson:

The Advisory Council on Historic Preservation (ACHP) appreciates receiving your response, dated February 26, 2016, to our letter of February 3, 2016, conveying concerns raised by the Honorable David Archambault, Chairman of the Standing Rock Sioux Tribe. We have completed our review of your responses, and would like to follow up with the Omaha District of the Corps of Engineers (Corps) to clarify several issues.

Your letter indicated that the majority of the 1,100 mile pipeline will not be located on Corps managed lands, but rather on uplands. We understand that the project proponent, Dakota Access, has submitted 209 pre-construction notifications that are subject to Corps Section 404 permits. Given the sheer number of individual permits and the unlikelihood that the pipeline could be constructed but for the issuance of these numerous permits, it is unclear how the Omaha District concluded that its jurisdiction and responsibilities to assess environmental impacts from the broader undertaking are limited only to the 209 crossings. We urge the Corps to consider expanding its review of this undertaking by redefining the area of potential effects (APE) consistent with 36 CFR Section 800.16(d) of our regulations, "Protection of Historic Properties" (36 CFR Part 800). Furthermore, to ensure that the Corps fully meets its Section 106 compliance responsibilities, we recommend that you consider developing a programmatic agreement to address this complex undertaking in accordance with 36 CFR Section 800.14(b).

You have explained that the Section 106 programmatic agreement (PA) regarding the operation and maintenance of the Missouri River main stem sets forth a consultation process that the Corps is using to address its Section 106 compliance for the subject pipeline. Given that the PA only pertains to the operation and maintenance of the Missouri River main stem, it is unclear how it is serving as a framework, particularly when there are multiple Indian tribes who either did not sign the PA, or who were not included in the PA at all because their ancestral homelands do not include the Missouri River basin. Nevertheless, these Indian tribes have interests in areas that lie along the remainder of the pipeline and should be consulted in accordance with the Section 106 regulations.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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Additionally, we remain perplexed by the Corps' apparent difficulties in consulting with the Standing Rock Sioux Tribe. We are in receipt of letters from both the THPO and the Chairman sent to the Corps throughout 2015, informing you of the tribe's interests and concerns regarding this project, and requesting Section 106 consultation meetings. The THPO clearly objected to the Corps' determinations, which should have triggered further review and consultation pursuant to the Section 106 regulations. The THPO also pointed out the fact that there was no tribal participation in the identification efforts, and suggested that an inventory of traditional cultural properties (in statutory terms, historic properties of religious and cultural significance) be conducted given the location of burials and other types of historic properties in the project vicinity. It is troubling to note that the THPO's letters indicate the Corps took more than 7 months to address the tribe's specific concerns.

On March 4, the ACHP met with Chairman Archambault and attorneys from Sonosky, Chambers, Sachse, Endreson, and Perry to discuss the tribe's numerous concerns about this project. Based on our meeting, we have the following additional questions to help the tribe and other consulting parties, including the ACHP, better understand the impacts of this project:

1. How will the comments received on the draft EA address tribal and cultural issues since they were never fully addressed?
2. How will this project address emergencies and disaster management issues given the recent pattern of emergency incidents in the Northern Plains region?
3. How does the draft EA address cumulative effects that may occur on tribal and cultural properties in proximity to the pipeline?
4. What will be the role of the applicant in addressing tribal concerns that are listed above?

We were pleased to see that the letter of March 2, 2016 from Ms. Chieply of the Corps to Indian tribes recognizes their special expertise in assessing the presence of, and potential eligibility of, historic properties that may possess religious and cultural significance and, inviting them to conduct tribal surveys along the Preconstruction Notification permit areas. We assume that since the ACHP's regulations require the consideration of alternatives to avoid or minimize impacts to historic properties, the Corps will consider alternatives to the pipeline's currently proposed alignment should historic properties of religious and cultural significance to a tribe be found in the APE. Nonetheless, we request that the Corps clarify our interpretation of this matter since it is not specifically addressed in your March 2, 2016, letter.

We look forward to receiving the Corps' response so that these outstanding issues can be resolved, and the Corps' review of this undertaking completed. Further, we remind you that the ACHP has formally entered the Section 106 consultation process to assist the Corps in complying with its Section 106 responsibilities. Should another Section 106 consultation meeting be scheduled soon, it is important that we be notified in advance so that we can consider attending in-person. Finally, prior to the Corps making any final decisions regarding its environmental review for the Dakota Access Pipeline Project, we encourage you to notify the ACHP, since NEPA and NHPA reviews are often coordinated by Federal agencies.

We appreciate the ongoing cooperation of the Corps in this matter. Should you have any questions regarding our request for additional information, please do not hesitate to contact Charlene Dwin Vaughn by telephone at 202-517-0207, or via e-mail at cvaughn@achp.gov.

Sincerely,



Reid J. Nelson
Director
Office of Federal Agency Programs