



September 13, 2016

Lieutenant General Todd Semonite
Commanding General and Chief of Engineers
Headquarters
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Dear General Semonite:

On behalf of the Society for American Archaeology (SAA), I write to you urgently regarding the process by which the U.S. Army Corps of Engineers (USACE) has handled its National Historic Preservation Act (NHPA) Section 106 responsibilities in relation to Dakota Access Pipeline (DAPL). SAA is an international organization that since its founding in 1934 has been dedicated to the research on, and interpretation and protection of, the archaeological heritage of the Americas. With more than 7800 members, SAA represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 states as well as many other nations around the world.

After review of many documents associated with DAPL (see below), we conclude that there are unresolved questions regarding whether the USACE has fulfilled their Section 106 responsibilities in relation to the NHPA. SAA believes an integrated and thorough plan for Section 106 consultation for the entire DAPL, as one undertaking, may be appropriate. SAA also wonders if the USACE may have inappropriately used its Nationwide Permit 12 (NWP 12) to avoid fully complying with NHPA's Section 106.

SAA has reviewed the data presented in USACE documents, letters of concern (e.g., April 22, 2016 and May 19, 2016) from the Advisory Council for Historic Preservation (ACHP), letters of concern from the Bureau of Indian Affairs (March 29, 2016), from the Environmental Protection Agency (March 11, 2016), and from others, as well as the deposition of the former Tribal Historic Preservation Officer for the Standing Rock Sioux Tribe on recent grading of previously surveyed land, and a number of other documents.

Our concerns with the USACE's handling of Section 106 consultation are on two levels. First and most immediate is an apparent clear conflict between the USACE's finding of "No Historic Properties Affected" for ten of eleven crossings of waters of the U.S. (WOUS) subject to Department of the Army authorization under its Regulatory Program and requiring Pre-Construction Notifications (PCNs) and the now much-publicized survey and tribal documentation of the existence of burial cairns and other traditional cultural properties (TCPs) in the DAPL right-of-way (ROW) in the Lake Oahe area.

These rare traditional cultural properties of singular spiritual value have been, according to the September 4, 2016 court deposition of cultural resource manager Tim Mentz, Sr., completely graded by Dakota Access as of September 3, 2016. The deposition, as well as tribal sources cited

in the Standing Rock Sioux Tribe's request for a preliminary injunction, note that these stone formations may not be apparent to archaeological surveyors who lack *the benefit of complete tribal consultations*. The USACE may not have taken the consultative requirements of Section 106 sufficiently so as to avoid such events as have been documented over the last two weeks.

Second, and related to this, is our assessment of the USACE's Section 106 process for the DAPL project as a whole. We agree with the May 19, 2016 letter of the ACHP that the USACE handling of the project may be in error because:

- The USACE may have incorrectly delineated the Area of Potential Effect (APE), restricting much Section 106 compliance to the WOUS crossings rather than the entire ROW.
- Despite requests and specific information from various tribes, the USACE did not conduct TCP surveys along the entire ROW.
- Overall tribal consultation appears to have been piecemeal and inadequate (see ACHP letter March 15, 2016).

SAA feels strongly that the USACE should find that the entire pipeline project be considered a federal undertaking, because, without USACE permits, it could not be constructed. Furthermore, SAA supports the ACHP's request for a Programmatic Agreement for the project as a whole.

Finally, although DAPL is SAA's immediate concern, we believe that a broader and deeper issue stems from the USACE operating under its own set of Section 106 rules (Appendix C to 33 CFR Part 325), which has never been approved by the ACHP, a federal panel of experts on archaeological and historic preservation. USACE implementation of Appendix C renders any undertaking liable to the same issues as DAPL, particularly with regard to inadequate APE and undertaking definitions.

Moreover, given the events of the last two weeks, SAA has concerns that it is possible that there may have been violations of the Archaeological Resources Protection Act, as well as North Dakota State Law 23-06-27 (the "Protection of Human Burial Sites, Human Remains, and Burial Goods" section of "Care and Custody of the Dead"). It behooves USACE to investigate whether development activities have violated these laws.

As should we all, the USACE hopefully does learn from past errors in dealing with cultural heritage, human remains, and sacred traditional cultural properties. The SAA reminds the USACE that early missteps in following legally mandated procedures with regard to the Kennewick Man discovery continue to resonate to the detriment of the USACE decades afterwards. We therefore sincerely urge the USACE to consider how best to comply with *all* aspects of Section 106, as well as how to design large-scale projects such as DAPL so as to minimize the problems, delays, and unresolved concerns of descent communities so amply in evidence at Lake Oahe today.

Sincerely,



Diane Gifford-Gonzalez
President

cc:

Hon. Barack Obama, President

Standing Rock Sioux Tribe

Advisory Council on Historic Preservation

U.S. Department of the Interior

U.S. Department of Justice

Hon. Jack Dalrymple, Governor, North Dakota

Hon. Dennis Daugaard, Governor, South Dakota

Hon. Terry Branstad, Governor, Iowa

Hon. Bruce Rauner, Governor, Illinois

Mr. Kelcy L. Warren, CEO, Energy Transfer Partners

Ms. Claudia Berg, SHPO, North Dakota

Mr. Jay Vogt, SHPO, South Dakota

Ms. Susan Kloewer, SHPO, Iowa

Ms. Heidi Brown-McCreery, SHPO, Illinois