



**National Trust for
Historic Preservation**
Save the past. Enrich the future.

Via Email

October 4, 2016

Honorable Jo-Ellen Darcy
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Re: Notice of Possible Anticipatory Demolition Regarding Dakota Access Pipeline

Dear Ms. Darcy:

The National Trust for Historic Preservation has been following with concern the controversy regarding the construction of the Dakota Access Pipeline, and in particular widespread reports about the destruction of culturally significant sites in and adjacent to the project right-of-way that had been identified by the Standing Rock Sioux Tribe. We recently had the opportunity to review the federal court filings in the pending lawsuit, *Standing Rock Sioux Tribe, et al. v. U.S. Army Corps of Engineers*, No. 16-1534 (D.D.C. Sept. 9, 2016), *appeal pending*, No. 16-5259 (D.C. Cir., filed Sept. 12, 2016), and we are writing to urge you to take action to ensure that the Army Corps of Engineers complies with the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA).

Interests of the National Trust

The National Trust for Historic Preservation was chartered by Congress in 1949 as a private nonprofit organization for the purpose of furthering the historic preservation policies of the United States and facilitating public participation in the preservation of our nation's heritage. 54 U.S.C. §§ 312102(a), 320101. With 750,000 members and supporters nationwide, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government.

The National Trust has a particular interest in enforcing agency compliance with Section 106 of the National Historic Preservation Act, since the Chairman of the National Trust has been designated by Congress as a member of the federal Advisory Council on Historic Preservation (ACHP), *id.* § 304101(a)(8), which is responsible for overseeing agency compliance with Section 106. We have extensive experience in reviewing undertakings subject to permits from the Army Corps of Engineers, not only as a consulting party, but also by enforcing compliance with the NHPA through litigation against the Army Corps, either as a plaintiff or a friend of the court.¹

¹ See, e.g., *Preservation Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, 2013 U.S. Dist. LEXIS 175643; 2013 WL 6488282 (D.S.C. Sept. 18, 2013); *National Trust for Historic Preservation v. U.S. Army Corps of Eng'rs*, No. 1:04cv287 (LMB) (N.D. Va., settled Oct. 1, 2004); *Sayler Park Village Council v. U.S. Army Corps of Eng'rs*, No. C-1-02-832, 2002 WL 32191511 (S.D. Ohio Dec. 30, 2002), 2003 WL 22423202 (S.D. Ohio Jan. 13, 2003); *Pye v. U.S. Army Corps of Eng'rs*, 269 F.3d 459, 469, 470 (4th Cir. 2001); *Committee to Save*

The Alleged Destruction of Cultural Resources Within the Dakota Access Pipeline Corridor, if Confirmed, May Constitute Anticipatory Demolition, Which Would Prohibit the Granting of Easements, or Reauthorization of Permits for the Pipeline, Pending Future Consultation With the ACHP and the Tribes.

We understand that the Army Corps is in the process of reviewing the previously authorized nationwide permits within 20 miles on each side of Lake Oahe, and in addition, that the Army Corps has not yet authorized the granting of essential easements needed for the pipeline to cross under the Lake Oahe reservoir itself. Based on our review of the court filings, we believe the Army Corps may be required by Section 110(k) of the NHPA to refrain from granting the easements, or reauthorizing any permits relating to the Dakota Access Pipeline, because it appears that intentional actions may have been taken by the applicant to destroy cultural resources within the pipeline corridor. At the very least, it is imperative that the federal agencies conduct a thorough investigation of the facts alleged by the Tribes in order to determine whether the prohibitions of Section 110(k) have been triggered.

The Anticipatory Demolition Standard.

Section 110(k) of the National Historic Preservation Act, which is known as the “anticipatory demolition” provision, provides as follows:

Each Federal agency shall *ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who*, with intent to avoid the requirements of section [106] of [the NHPA], has *intentionally significantly adversely affected a historic property* to which the grant would relate, or having legal power to prevent it, allowed the significant adverse effect to occur, unless the agency, after consultation with the [Advisory Council on Historic Preservation], determines that circumstances justify granting the assistance despite the adverse effect created or permitted by the applicant.

54 U.S.C. § 306113 (emphasis added); *see also* 36 C.F.R. § 800.9(c). Section 110(k) provides that “a federal agency may not grant a permit to an applicant who has already adversely affected historic property.” *Committee to Save Cleveland’s Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776, 792-93 (N.D. Ohio 2001). “Section [110(k)] works to punish those who would seek to manipulate the § 106 process by denying them access to post-demolition permits.”²

Cleveland’s Huletts v. U.S. Army Corps of Eng’rs, 163 F. Supp. 2d 776 (N.D. Ohio 2001); *Vieux Carré Property Owners, Residents & Assoc’s, Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990), *after remand*, 948 F.2d 1436 (5th Cir. 1991), *after second remand*, 40 F.3d 112 (5th Cir. 1994); *National Trust for Historic Preservation v. U.S. Army Corps of Eng’rs*, 552 F. Supp. 784 (S.D. Ohio 1982).

² The *Huletts* case is worth noting, not only because of the court opinion itself, but because of what happened afterwards. The court held that the U.S. Army Corps of Engineers violated Section 106 of the NHPA by issuing a dredging permit to the Port Authority of Cleveland, without considering the Port Authority’s demolition and dismantling of four historic Hulett iron ore unloaders immediately adjacent to the dredging area (and whose removal was related to the purpose of the dredging). More importantly, six years later, when the Port Authority sought a new dredging permit at the same location, the Army Corps itself concluded that unlawful anticipatory

Guidance issued by the National Park Service provides further background on the agency's responsibilities under Section 110(k):

Full consideration of historic properties includes development of procedures to identify, discourage, and guard against "anticipatory demolition" of a historic property by applicants for Federal assistance or license. Agency procedures should include a system for early warning to applicants and potential applicants that anticipatory demolition of a historic property may result in the loss of Federal assistance, license or permit, or approval for a proposed undertaking. When an historic property is destroyed or irreparably harmed with the express purpose of circumventing or preordaining the outcome of section 106 review (e.g., demolition or removal of all or part of the property) prior to application for Federal funding, a Federal license, permit, or loan guarantee, the agency considering that application is required by section 110(k) to withhold the assistance sought, unless the agency, after consultation with the [Advisory Council on Historic Preservation], determines and documents that "circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant."

63 Fed. Reg. 20,503 (Apr. 24, 1998) (Standard 4, Guideline (g)).

The Facts as Alleged by the Tribes Should be Investigated to Determine Whether They Constitute Anticipatory Demolition.

In particular, the Declarations filed by Tim Mentz, Sr.³ suggest that the applicant may have intentionally destroyed cultural sites in order to avoid federal review. In the Supplemental Declaration filed on September 2, 2016, Mr. Mentz stated that he had conducted a cultural resource survey on a privately owned strip of land two miles long and 150 feet wide, immediately adjacent to the pipeline corridor, located 1.75 miles west of Lake Oahe. This survey was conducted on August 30 through September 1, 2016.

- During the three-day survey, Mr. Mentz states that he personally observed up to 82 culturally significant stone features, and at least 27 burial sites.
- The Declaration included detailed drawings, photographs, and maps of a number of the most significant sites.

demolition had occurred, back in 1999-2000, and initiated consultation with the ACHP in an effort to redress that anticipatory demolition. The permit has still not been issued.

³ Tim Mentz, Sr. worked for the Standing Rock Sioux Tribe for 39 years, including five years on the Tribal Council and 12 years as Tribal Historic Preservation Officer (THPO). In 1996, the Standing Rock Sioux Tribe was the first Tribe to be certified under the NHPA to assume the responsibilities of the State Historic Preservation Officers of both North and South Dakota within its tribal lands, and Mentz was appointed and certified as the first THPO in the entire country. Because of this extensive experience, Mentz's firm has recently been certified as the preferred contractor for identifying cultural resources within the Tribe's aboriginal homelands.

- In his September 2 Declaration, Mr. Mentz states that five of the sites were especially significant, and he described them in detail, including:
 - “one of the most significant archeological finds in North Dakota in many years,” located 75 feet from the edge of the pipeline corridor;
 - a stone effigy of a bear, associated with the presence of a medicine healer, located “immediately adjacent to the DAPL corridor,” and so rare that Mr. Mentz has “only found one other location of this type of site in the Great Plains in my 35 years of cultural resource study;”
 - a “unique” site with circles of stones and a grave, connected to an “elite warrior society,” portions of which “are directly in the pipeline corridor and would be destroyed by pipeline construction;” and
 - other sites that “unquestionably meet[] the criteria for inclusion in the National Register,” located both within and immediately adjacent to the pipeline corridor.

On Saturday morning September 3 (the morning after Mr. Mentz filed his Declaration with the court), the applicant’s construction crews allegedly bulldozed the area that was described in the previous day’s Declaration. In an additional Declaration filed by Mr. Mentz the following day (on Sunday, September 4), he made a number of factual allegations that suggest a specific intent to damage or destroy cultural resources. Specifically, he stated that:

- The bulldozers had not been located nearby, but were driven “approximately 20 miles” from the place where construction had been underway the previous day, and graded the specific area described in the September 2 Declaration.
- The bulldozing took place early on a Saturday morning of a holiday weekend (though the “construction crews don’t normally work on weekends”), and was “accompanied by private security with dogs and with a helicopter overhead.”
- The bulldozers apparently “dug substantially deeper than normal,” leaving “berms of 8 to 10 feet on both sides of the right of way,” which is approximately four to five times higher than usual.
- As a result of this action, Mr. Mentz concluded that “any [cultural] site that was in the pipeline corridor has been destroyed,” and any site “immediately adjacent” to the pipeline corridor “is damaged if not destroyed” because of the eight-to-ten-foot-high berms.
- The berms themselves are likely to contain human remains, “given the high concentration of gravesites in this area.”

Although Dakota Access company officials deny that cultural resources existed in the project area or that cultural resources were intentionally destroyed,⁴ given Mr. Mentz’s credentials as a cultural resource specialist with particular expertise regarding the cultural traditions of the Standing Rock Sioux Tribe and

⁴ A September 14, 2016, Declaration filed by Joey Mahoud, Vice President of Engineering for Dakota Access, LLC, disputes Mr. Mentz’s allegations that cultural resources existed in the path of the area bulldozed for the pipeline project, and states that the area had been cleared for work by multiple archaeologists, the State Historic Preservation Office, and trained Dakota Access employees. Mr. Mahoud also states that that the decision to bulldoze the area in question was unrelated to Mr. Mentz’s declaration.

the specificity of his observations about cultural resources impacted by the project, his allegations deserve to be fully investigated on-site by the Army Corps, as do the circumstances of the Applicant's decision to move bulldozers to the area immediately after the filing of Mr. Mentz's initial declaration identifying the resources in question.

Any Destroyed Cultural Sites in the Pipeline Corridor Would "Relate" to the Grant of the Easements and the Nationwide Permits Being Reviewed by the Army Corps.

The Army Corps cannot avoid compliance with Section 110(k) by suggesting that any destroyed cultural sites would not "relate" to the nationwide permits currently being reviewed, or to the proposed easements that would allow the pipeline to cross Lake Oahe. The location of cultural sites alleged to have been bulldozed is within the geographical area of the stop work order issued by the federal government on September 9 in response to the pending lawsuit. Although the court's September 9 ruling on the Tribe's Preliminary Injunction motion concluded that the Army Corps is not required to take into account adverse effects located outside the areas of the Corps' direct jurisdiction, we believe the district court's decision is wrong as a matter of law, and may well be reversed. The correspondence and long-standing legal interpretation by the ACHP, whose regulations are to "govern the implementation of [Section 106] in its entirety," 54 U.S.C. § 304108(a), contradicts the court's interpretation. Among other things, the Army Corps improperly defines the "undertaking" as limited to the authorization of the permit, rather than the construction of the pipeline itself, which is inconsistent with the ACHP's regulations. In addition, as discussed in more detail below, impacts along the entire pipeline corridor are "relate[d]" to the Army Corps permits, regardless of the court's ruling, because the entire pipeline is a reasonably foreseeable cumulative impact of the Army Corps permits, and therefore must be evaluated in any event, under both NEPA and Section 106. 40 C.F.R. § 1508.7; 36 C.F.R. § 800.5(a)(1).

The Army Corps' Responsibility for Compliance with Section 110(k).

Under the requirements of Section 110(k), the Army Corps should ensure that it will not authorize the easements to cross Lake Oahe, or reauthorize the prior permits, *unless and until* the agency has completed the following steps:

- investigate and evaluate the circumstances and make specific determinations as to whether the applicant engaged in anticipatory demolition, in close consultation with the Advisory Council on Historic Preservation and the Tribes;
- if anticipatory demolition has been determined to have occurred, formally notify the ACHP, and "provide documentation specifying the circumstances under which the adverse effects to the historic property occurred," 36 C.F.R. § 800.9(c)(2);
- seek the views of the State Historic Preservation Office ("SHPO"), the Tribes, and "other parties known to be interested in the undertaking," *id.*; and
- in consultation with the ACHP and the Tribes, determine whether special circumstances may justify granting the easements, or reauthorizing the permits, notwithstanding the applicant's destruction of cultural resources. *Id.*

Adverse Impacts to Cultural Resources Within the Pipeline Corridor Should be Considered as a Cumulative Impact Under Both NEPA and Section 106.

In addition to considering the alleged destruction of cultural sites pursuant to its obligations under Section 110(k) of the NHPA, the Army Corps is also required to consider adverse impacts on cultural sites throughout the pipeline corridor, even in places without direct Army Corps jurisdiction, as a “cumulative” impact of the potential granting of the easements, and a cumulative impact of the nationwide permits. The National Environmental Policy Act and Section 106 of the NHPA both require federal agencies to assess the “cumulative” impacts of their actions and undertakings. NEPA instructs federal agencies to take a “hard look” at cumulative impacts, which include “the incremental impact of the action when added to other *past*, present, and *reasonably foreseeable* future actions *regardless of what agency or person undertakes such other actions . . .*” 40 C.F.R. § 1508.7 (emphasis added). The Section 106 regulations state that adverse effects “may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be *cumulative*.” 36 C.F.R. § 800.5(a)(1) (emphasis added).

Construction of the pipeline *as a whole* is a “reasonably foreseeable” past and future action, whose *impacts* must be evaluated by the Corps, regardless of whether the Corps has direct “jurisdiction” over those impacts – just as other federal agencies use NEPA and Section 106 to evaluate the cumulative impacts of their undertakings combined with reasonably foreseeable actions over which they have no direct control or jurisdiction. Similarly, if confirmed, the alleged destruction of cultural sites, as described in the declarations filed by Mr. Mentz, would constitute a “past” action that must be included in the cumulative impact analysis, regardless of whether or not it was “reasonably foreseeable,” and that cumulative impact analysis must be completed prior to approving any easements or reauthorizing any permits to this applicant under both NEPA and Section 106.

In conclusion, we urge the Army Corps to defer any action on the easements, or the review and potential reauthorization of permits, until the Corps has fully investigated this matter and ensured the agency’s full compliance with the NHPA and NEPA.

Sincerely,



Paul W. Edmondson
Chief Legal Officer & General Counsel

cc: Lowry Crook, Principal Deputy Assistant Secretary of the Army (Civil Works)
Wayne Donaldson, Chairman, Advisory Council on Historic Preservation
Sam Hirsch, Esq., Principal Deputy Assistant Attorney General, Department of Justice