Preservation Leadership Forum Webinar Series

The Legal Landscape of the Dakota Access Pipeline in *Standing Rock Sioux Tribe vs. U.S. Army Corps of Engineers*  

Resource Document Packet  

October 25, 2016
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*Shared by request of the North Dakota State Historic Preservation Office.
Figure 1
Project Location
Federal Lands and Flowage Easements

Proposed DAPL Centerline
Dakota Access Pipeline Project
Figure 12
Route Alternative
Missouri River Crossing
Williams County, North Dakota

Preferred Alternative
Route Alternative
USACE Garrison Flowage Easements
Other Government Lands

North Dakota

Path: PNG\Client\ETC_EnergyTransfer\DakotaAccess\Data\Maps\ND\ND_Missouri_R_Xing.mxd

1:400,000
NAD 1983 UTM Zone 14N
Date: July, 2013
FIGURE 14

CROSS-SECTION DIAGRAM OF LAKE OAHE HDD CROSSING
FIGURE 15

CROSS-SECTION DIAGRAM OF MISSOURI RIVER HDD CROSSING

Note: This diagram is conceptual and not drawn to scale. Dimensions shown are approximate.

Total Length of Directional Drill = 2,715'
May 19, 2016

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

Ref: Dakota Access Pipeline Project

Dear General Bostick:

The Advisory Council on Historic Preservation (ACHP) objects to the effect determinations made by the Corps of Engineers (Corps) for the referenced undertaking. In a letter dated April 22, 2016, and received on April 26, 2016, the Oahe Project Office of the Omaha District (Lake Oahe) made determinations of eligibility and a finding of “No Historic Properties Affected” for the Lake Oahe Project crossing location. In a letter dated May 13, 2016, the Omaha District made a finding of “No Historic Properties Affected” for ten of eleven crossings of waters of the U. S. (WOUS) subject to Department of the Army (DA) authorization under the Regulatory Program and requiring Pre-Construction Notifications (PCNs) in South Dakota. It is the ACHP’s opinion that the Corps has not delineated the undertaking and Area of Potential Effects (APE) correctly and has not carried out the steps of the Section 106 process as set forth in 36 C.F.R. Part 800, “Protection of Historic Properties”, the regulations implementing Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.). Given the history of procedural problems in the way the Corps has handled Section 106 consultation for this undertaking and the decision by the Corps not to designate a single lead on behalf of the Corps, we are providing this opinion to you as the head of the agency in accordance with 36 C.F.R. § 800.4(d)(1)(iv)(A).

Accordingly, we believe that the effect findings made by the Corps are premature, based on an incomplete identification effort, which was not sufficiently informed by the knowledge and perspective of consulting parties, including federally recognized Indian tribes who ascribe religious and cultural significance to properties in the APE that may be affected. In our letters to the Corps dated February 3, March 15, and May 6, 2016, the ACHP addressed flaws in the Corps compliance with Section 106 for the Dakota Access Pipeline Project (DAPL). In the following, we reference those flaws in order to clarify the reasons for our objection to the effect findings.
**Undertaking and Area of Potential Effects**

As we noted in our previous letters, the Section 106 regulations define the undertaking as the larger project, portions of which may require federal authorization or assistance. The Area of Potential Effects (APE) is the area within which the larger undertaking may affect historic properties, if any may be present.

In this case, the undertaking consists of construction of a 1,168-mile crude oil pipeline that will originate in the Bakken and Three Forks production areas of North Dakota, extend through South Dakota and Iowa, and terminate near Patoka, Illinois. The APE for the undertaking should include all areas where historic properties may be affected by the undertaking, directly and indirectly, if any are present.

Corps Regulatory in three districts (Omaha, Rock Island, and St. Louis) and a Corps Civil Works facility (Lake Oahe) have actions related to the undertaking. The pipeline crosses navigable waters at the Missouri, James, Big Sioux, Des Moines, Mississippi, and Illinois Rivers. It crosses the Missouri River twice. The pipeline right-of-way (ROW) includes 209 crossings of Waters of the United States (WOUS) that trigger PCNs and unnumbered crossings of the WOUS that do not. These are spread throughout the undertaking, and subject to the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act (33 U.S.C. 401 et seq.) and Section 404 of the Clean Water Act (33 U.S.C. 1344). The Corps also must carry out a review under Section 408 for the West Levee portion of the Illinois River.

The Corps is treating the reviews of each of the water crossings and each of its other actions as separate undertakings. The Corps is not differentiating appropriately between federal action and the undertaking, as defined in the Section 106 regulations. Further, its minimization of its responsibility to take into account the effects of the larger undertaking on historic properties has resulted in a failure to carry out appropriately the four-step Section 106 process for this undertaking in a consistent and proper sequence, and in consultation with the consulting parties. The ACHP has acknowledged that at times, a federal agency may have limited jurisdiction over a small portion of a larger undertaking. However, in such a case, the federal agency remains responsible for considering effects of the larger undertaking on historic properties beyond areas of its specific jurisdiction. Given the sheer number of water crossings and the unlikelihood that the pipeline could be constructed “but for” the issuance of these numerous permits, we cannot agree with the Corps that its responsibilities to assess effects to historic properties from the broader undertaking are limited only to the 209 PCN crossings.

The Corps should also consider the overall level of federal involvement in and relationship to this undertaking. The Fish and Wildlife Service (FWS) is considering Special Use Permits (SUPs) to allow DAPL to cross five FWS wetland easements and one grassland easement in North Dakota and 109 wetland and three grassland easements in South Dakota. The Farm Service Agency (FSA) may also be considering actions related to the undertaking. Together, the involvement of the Corps, FWS, and the FSA provides the basis for the federal agencies to consider further their obligation to take into account the affects of the larger undertaking on historic properties. Further, the coordination of the federal agencies should result in a more comprehensive approach to complying with the requirements of Section 106.

**Tribal Consultation and Incomplete Identification Effort**

As we noted in our letter of May 6, 2016, the ACHP is concerned that the Corps’ focus on individual PCN crossings as separate undertakings, and the segmented oversight by three Corps districts and a Corps Civil Works facility has resulted in disjointed and inadequate consultation with Indian tribes who may ascribe religious and cultural significance to historic properties that may be affected by the undertaking. The Corps does not appear to have consulted with tribes in the development of the scope of the effort to identify and evaluate historic properties that may be affected by the undertaking. Based on the
documentation available to us, the Corps does not appear to have adequately consulted with the tribes regarding the identification and assessment of eligibility and effects on properties of religious and cultural significance to them that may be affected by the undertaking in PCN areas, in the vicinity of water crossings within the project ROW that the applicant assumes will not require PCNs under General Conditions 20 and 31 of the Nationwide Permit protocols, and in the larger undertaking between water crossings. Only very late in the Section 106 review did the Corps move to provide tribes with access to PCN permit areas in order that they could assist in the identification of such properties. Further, the Corps appears to have focused only on archaeological sites in PCN areas and consideration of their eligibility for inclusion on the National Register of Historic Places under Criterion D.

In a letter from the Tribal Historic Preservation Officer (THPO) of the Standing Rock Sioux Tribe (SRST) to the ACHP, dated May 2, 2016, the tribe asserts that the location of the water crossing at Lake Oahe is a ceremonial and sacred site of the Tribe. It is not clear how the Corps has considered or responded to this information. According to the tribe, the Corps has not engaged appropriately with the tribes in order to identify Traditional Cultural Properties (TCPs) such as this and other properties of religious and cultural significance to tribes and properly assessed the eligibility of and effects to such properties. The SRST letter also indicates that the Corps has suggested that it has carried out appropriate consultation as specified in the Programmatic Agreement for The Operation And Management Of The Missouri River Main Stem System. We remind the Corps that a federal agency is obligated to consult with federally recognized tribes regarding the potential presence of and effects to properties of religious and cultural significance to them regardless of whether they are signatories or concurring parties on or have participated in the development of a Section 106 agreement that may, in part, relate to a portion of the APE covered in the agreement.

**Procedural Issues**

In reviewing the documentation available to us, there appear to have been multiple findings regarding the presence or absence of eligible properties and findings of effect for various portions of the larger undertaking. There have been multiple sets of eligibility and effect determinations sent out by different districts, to different sets of consulting parties, that collapse steps 2 and 3 of the Section 106 review process, confuse the effect findings under 36 C.F.R. § 800.4(d) and under 36 C.F.R. § 800.5, and do not clearly trigger the consulting party review and response periods as specified in the Section 106 regulations. The Rock Island District appears to have issued partial findings regarding eligibility of properties and effects for various PCN locations under its review in Iowa and Illinois, including one in December 2015 and four in March 2016. These communications included determinations of eligibility and findings of No Historic Properties Affected, No Adverse Effect, and No Adverse Effect due to Avoidance. In a letter dated April 22, 2016, the Lake Oahe Project made a determination of No Historic Properties Affected for the crossing associated with that Civil Works facility due to reliance on horizontal directional drilling. In a letter dated May 13, 2016, the Omaha District made a determination of No Historic Properties Affected for ten of the eleven PCN crossing areas in South Dakota, noting it would use permit conditions to ensure that tribes could monitor during construction for PCN areas where they have previously been denied access.

These mixed notifications are extremely confusing to consulting parties, including us, as they segment consultation on one single undertaking into pieces that fail to adequately account for the potential effects of the broader undertaking to historic properties. A federal agency should make one effect finding under 36 C.F.R. § 800.4(d) for the entire undertaking, which communicates one of the following conclusions: 1) there are no historic properties in the APE; 2) there are historic properties in the APE but the undertaking will not affect them; or 3) the undertaking will have effects on historic properties in the APE. This determination triggers a review and response period for SHPO/THPO and consulting parties. If the federal agency determines that historic properties may be affected by the undertaking, it proceeds to
assess whether any effects will be adverse pursuant to 36 C.F.R. § 800.5, in consultation with consulting parties. At the end of that review process, the federal agency makes a single determination as to whether the undertaking will adversely affect historic properties or not. As context for that determination, the federal agency should specify how/why the undertaking does, or does not, adversely effect specific historic properties so that the consulting parties can make an informed evaluation of the finding. These findings and determinations should be provided to all consulting parties who are participating in the Section 106 consultation for the larger undertaking, and they should be afforded an opportunity to express their concerns about the determinations and raise objections. Based on the documentation we have received, we are uncertain whether the Corps has received any objections to the varied findings and determinations that it has issued, and, if necessary, at what point it intends to comply with the dispute procedures set forth in the Section 106 regulations. The Corps focus on each water crossing as a separate undertaking essentially results in an artificial segmentation of the undertaking which is prohibited in the NHPA, which limits the ability of the agency and consulting parties to consider alternatives to the undertaking that may avoid or minimize effects to historic properties.

Summary of ACHP Objections to Findings of Effect

Based on the inadequacies of the tribal consultation and the limited scope for identification of historic properties that may be affected, the ACHP questions the sufficiency of the Corps’ identification effort, its determinations of eligibility, and assessments of effect. The Corps’ effect determinations, thus far, fail to consider the potential for effects from the larger undertaking on historic properties, including those of religious and cultural significance to Indian tribes. The Corps’ identification effort did not adequately facilitate the use of tribal expertise to assist in the identification of historic properties and assessment of effects. The tribes have had extremely limited access to some PCN areas, thwarting their ability to provide input to the Corps. There does not appear to have been any coordination with tribes regarding non-PCN crossings under Corps jurisdiction, and no coordination has occurred regarding historic properties in upland areas outside Corps PCN crossing permit areas. Finally, there does not appear to have been adequate consultation with tribes about the presence of TCPs and other properties of religious and cultural significance to tribes located in or beyond the Corps’ jurisdictional areas, that may be affected by the undertaking. The Corps’ effect determinations also fail to adequately consider long term and cumulative effects, including reasonably foreseeable effects from oil spills.

Next Steps

Pursuant to 36 C.F.R. § 800.4(d)(1)(iv)(B) and (C) and 36 C.F.R. § 800.5(c)(3)(ii) the Corps must take into account the ACHP’s comments in reaching a final decision on the findings discussed in this letter. Per our regulations, as the head of the agency, you or the agency’s Senior Policy Official if you so delegate, must prepare a summary of the decision that contains the rationale for the Corps’ decision and evidence of consideration of the Council’s opinion, and provide it to the Council, the SHPO/THPO, and the other consulting parties, including Indian tribes.

It is our recommendation that the Corps and the FWS coordinate with consulting parties to develop a comprehensive PA to address varying federal jurisdiction and authority over components of the DAPL Project, expansion and completion of an appropriate identification effort, phasing of the steps of the Section 106 process that will facilitate tribal assistance in identification of properties of concern to the tribes, and responsibility for effects to historic properties in portions of the undertaking outside FWS easements and in uplands between crossings of the WOUS under Corps jurisdiction.
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.

Sincerely,

[Signature]

Reid J. Nelson
Director
Office of Federal Agency Programs
North Dakota state review
Since only 3% of the Dakota Access pipeline (DAPL) project area involves federal review, webinar participants might mistakenly assume that only a tiny percentage of the pipeline project area was reviewed for cultural resources. However, in North Dakota that is not the case.

The federal Section 106 cultural resource review process and the state review process for the North Dakota Public Service Commission (ND PSC) occurred simultaneously for the DAPL project. The ND PSC permitting process requires consultation with ND SHPO and state environmental agencies.¹ In North Dakota we required a pedestrian survey for cultural resources for the length of the project, which is approximately 357 miles of the total pipeline route of 1,172 miles. 149 potentially eligible sites were identified and all but 9 were avoided in North Dakota. The remaining 9 were mitigated. The cultural resource surveys for North Dakota state review include familiar elements found in federal review such as unanticipated discovery plans and records search prior to the pedestrian survey. Location of sites is kept confidential under NDCC 55-02-07. The ND PSC permitting process includes public hearings. There is no specific tribal consultation process because that is a federal function and the ND PSC review process is a state function, under North Dakota state laws and regulations. Under state law tribes are treated as interested parties. Tribes are notified through the Indian Affairs Commission with respect to project of interest to them. The ND PSC maintains transparency in its permit process, and the Dakota Access permit documents can be found at: http://www.psc.nd.gov/public/casesearch/index.php

North Dakota burial law and the sacred stone site
North Dakota’s burial law provides a legal process to address disturbance of suspected human remains and burial goods on private lands:

Any person who knows or has reasonable grounds to believe that a human burial site, human remains, or burial goods, found in or on any land, are being disturbed or may be disturbed, by human activity without authority of law or by natural forces, shall immediately notify the local law enforcement agency with jurisdiction in the area in which the burial, remains, or goods are located.²

With respect to addressing the area of concern involving possible human remains highlighted in news and other media, the State Historical Society of North Dakota (SHSND) at the request of Joint Law Enforcement Task Force undertook an investigation. On September 21, 2016, archaeological staff from the SHSND conducted a pedestrian survey of the area. We concluded that no human remains, burial goods or significant archaeological sites were impacted or destroyed by Dakota Access Pipeline construction in the 1.36 mile segment of the pipeline corridor.

¹ ND Century Code (NDCC) 49.22-09 and ND Administrative Code (NDAC) 69-06.
² NDCC 23-06-27
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  

STANDING ROCK SIOUX TRIBE,  

Plaintiff,  

v.  

U.S. ARMY CORPS OF ENGINEERS,  

Defendant.  

Case No. 1:16-cv-1534-JEB  

DECLARATION OF JON EAGLE, SR. IN SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION  

I. QUALIFICATIONS AND RELEVANT EXPERTISE  

1. My name is Jon Eagle Sr. I am the Tribal Historic Preservation Officer  
(“THPO”) for the Standing Rock Sioux Tribe (“SRST”), and an enrolled member of the Tribe.  
The Standing Rock Sioux Tribe is located in both the States of North Dakota and South Dakota  
and is home to the Hunkpapa and Sihasapa bands of Lakota Oyate and the Ihunktuwona and  
Pabaksa bands of the Dakota Oyate. We are a member tribe of the Oceti Sakonwin, also known  
as the Great Sioux Nation. I was appointed by the SRST Council to serve in this capacity on  
February 8th, 2016.  

2. The SRST/THPO office is authorized by the National Historic Preservation Act,
1992 amendments, to include the Native American Graves Protection And Repatriation Act, Archaeological Resources Protection Act, Antiquities Act of 1906 and the Standing Rock Sioux Tribes Cultural Resource Code, Title XXXII. The SRST/THPO is a regulatory office that manages and protects cultural resources, sacred areas, and sites within the exterior boundaries of the Standing Rock Sioux Tribe to include the original boundaries of the Fort Laramie Treaties of 1851 and 1868, and the aboriginal homelands of the Oceti Sakowin.

3. I have twenty-six years of experience working with children, families and communities and seventeen years of experience consulting with tribal, state and federal agencies. After studying Sociology at Fort Lewis College, in Durango, Colorado, I returned home to Sitting Bull College where I finished a Bachelor of Science Degree in General Studies. I have two years of experience working with the SRST/Elders Preservation Council to identify and evaluate Stone Features, stone cairns, and stone effigies. Since my appointment I have attended the Advisory Council on Historic Preservation, National Historic Preservation Act, Section 106 Essentials and Advanced training in Denver, Colorado.

4. I am a descendant of the Oceti Sakowin and come from the Hunkpapa Oyate. I speak the Lakota language and am considered to be knowledgeable of our cultural and spiritual laws, oral history, and sacred knowledge and have been asked by my people to serve in the traditional leadership of our people.

5. I was born in Minneapolis, MN and returned to Standing Rock with my parents at the age of 2 and have lived here since then, only leaving to serve in the United States Army and to attend college. I have dedicated over twenty six years of my life to helping my people.

6. In 2014, the Cheyenne River Sioux Tribe honored our relationship with the Buffalo Nation. It was at this traditional gathering that I heard Tim Mentz of Makoce Wowapi,
LLC., talk of stone features. During his presentation he showed a drawing of a site in North Dakota that his company found while conducting Class III Cultural Surveys near Williston, North Dakota. The site was of religious and cultural significance to the Oceti Sakowin. He told us that the day after his company had identified and evaluated the site, an official from a federal agency told the land owner what was found. The next day, the land owner went through the site with a bulldozer and destroyed the site.

7. It’s hard to put into words how this news made me feel. The only way I can describe it is by saying it hurt. A deep, spiritual hurt that someone would have a total disregard for who my ancestors were and the connection to who we are as a people today. We will never have the opportunity to go back there and see what our ancestors left for us. It is gone forever. It was at this point in my life that I became aware of not only what my ancestors left on the land for their grandchildren, I also became aware of the destruction of sites of religious and cultural significance to the Oceti Sakowin in the name of development. This incident is what motivated me to apply for the position of the Standing Rock Sioux Tribe, Tribal Historic Preservation Officer.

8. Upon assuming the duties of SRST/THPO, I immediately became immersed in Historic Preservation and have since consulted with several State and Federal Agencies, all of which were fulfilling their responsibilities to the Section 106 Process. I have read and became familiar with correspondence to the United States Army Corps of Engineers by my predecessor, Ms. Waste Win Young., and the Chairman of the SRST, Dave Archambault II. It was after reading those letters that it became clear that the Section 106 Process being implemented by the Corps was fundamentally flawed. I have also reviewed and am familiar with the draft and final Environmental Assessment and the cultural surveys prepared by DAPL.
9. As keepers of sacred knowledge, we have a responsibility to the next seven generations to ensure that they have good land, clean water, and clean air. The Draft EA made no mention of the people of Standing Rock who would be directly affected should the pipeline leak. Energy Transfer like any other pipeline assures that they are safe and yet we hear almost weekly of a pipeline that has leaked. The recent leak of Keystone 1 near Freeman, South Dakota clearly demonstrates the potential for a manmade disaster. Like the proposed Dakota Access Pipeline, Keystone 1 had safety measure in place to alert pipeline officials of a leak, and yet over 16,000 gallons of oil leaked without their knowledge. It was a farmer who noticed the sheen from the oil in a ditch.

10. It’s not a matter of if; it’s a matter of when that pipeline will leak. It won’t be my generation that will have to deal with the manmade disaster when it occurs, it will be my children or my grandchildren. They are the future of our people and as such are not expendable.

II. THE LAKE OAHE SITE

11. The confluence of the Cannon Ball River and the Missouri River is a site of religious and cultural significance to the Oceti Sakonwin. The Cannon Ball River was known to my ancestors as Inyan Wakan Kagapi Wakpa (River Where the Sacred Stones Are Made), and the Missouri River was known as Mni Sose (Turbulent Water). The force of those two rivers coming together formed perfectly round stones once considered sacred to the Mandan, Arikara, Cheyenne and the member tribes of the Oceti Sakonwin. When the Corps dredged and altered the course of the Cannon Ball River the river, that undertaking had an adverse effect at the confluence and the rivers quit making the sacred stones. We will never again see this phenomenon again.

12. The area within and around the horizontal directional drilling site, where the pipeline is going to cross the Missouri River, is considered sacred by many tribes to include the
Mandan, Arikara, Cheyenne and Dakota. At this site, traditional enemy tribes camped within sight of each other and never fought because of the reverence they had for this Traditional Cultural Landscape. Over the years, several Sun dances have occurred in the area because of the sacred nature of the rivers and the land. The member tribes of the Oceti Sakowin have seven sacred rites given to us by the creator and the Sundance is held to be one of the most sacred.

13. Three site visits occurred at the Historic Cannon Ball Ranch in connection with the DAPL proposal, which currently owns the land where the horizontal directional drilling (“HDD”) on the west side of Lake Oahe would take place. The first visit was attended by my staff and I only, the second visit the Standing Rock Sioux Tribal Chairman escorted Colonel John Henderson, Commander of the Omaha District Army Corps to the ranch, and the third visit was with archeologists from the Corps and my office. During the visit with the USACE archeologist, the SRST/THPO Section 106 Coordinator, LaDonna Brave Bull Allard, shared the rich history of this area by pointing out village sites of the Mandan, Arikara, Cheyenne and Ihunktuwana. We described how these tribes who camped peacefully within view of one another were traditional enemies, but because of their reverence for this sacred place there were no wars fought or blood spilt on the land. This site was also a historic place of commerce where the tribes would gather during times of peace to trade with one another.

14. Evidence of their existence is still on the ground. While walking through an Arikara Village site, Dr. Kelly Morgan, SRST/THPO Archeologist, pointed out places where moles had pushed the dirt to the surface. In this mole dirt, we found pottery shards, pieces of bone, flint and tools used for scraping hides and cutting. Both Dr. Morgan and Ms. Allard pointed out that many of the sites we were witnessing had not previously been recorded. During our visit I asked the opinion of Rick Harnois, USACE Archeologist if the sites that were pointed
out to his staff were previously known at which point he told me no, they were not recorded. I also asked if they should be recorded, and he said yes. I then asked him his opinion on what was happening with DAPL and he said what was going on is wrong. However, none of what was spoken about at the site made it into his determination of, “No Historic Properties Subject to Affect.”

15. Also in the area is a sacred stone where our ancestors went to pray and ask for guidance. As a Lakota, I have been fortunate enough to have traveled to this area with elders who are no longer with us, to pray and leave offerings, asking for good direction, strength and protection on behalf of our people. In an interview conducted in the late 1800’s by Colonel A.B. Welch, a warrior spoke of the sacredness of the area, “It was there when we came across the Missouri. I think it had been an Arikara stone. I think they found it first. They put things there, too. No one would strike an enemy around that place. Everyone was safe there. There were always many presents there. There were weapons and things to eat and valuable cloth on sticks. There were buffalo heads there, too, for meat to come around. It is very holy. It is there yet. I do not want to talk much about it.” A.B. Welch Collection. The site of this stone is confidential and protected by this office. It must be noted that this is a place of prayer that is still in use today. A place where people indigenous of this continent continue to go for good direction, strength, and protection for the coming year. The HDD drilling, staging of equipment and construction will have an adverse effect on the audio, visual, and atmospheric elements of a Traditional Cultural Landscape and a site of religious and cultural significance to the Oceti Sakowin.

16. During our visit to the site, we noticed several undocumented stone features and rock cairns that need further study. The knowledge required to identify and evaluate stone
features, stone cairns, effigies, etc., lies within the cultural and spiritual protocols of the Oceti Sakowin. It relates to our creation stories and star knowledge which has been passed down from generation to generation. As a Lakota who has been taught by my elders, I can tell when the first day of winter, spring, summer and fall are just by looking at the stars. I can also tell when my ancestors visited the sacred places by the orientation of the stone features in relationship to star constellations. We have a belief that what happens above happens below and what happens below happens above. Archeologists lack the cultural awareness and sensitivities to identify sites of religious and cultural significance to tribes. Only the tribes themselves have that ability.

17. We believe that along the entire 1,100 route of the pipeline, there is great potential for eligible sites. After reading the surveys prepared by DAPL, it is apparent to me that the archeologist involved do not have the knowledge or cultural sensitivity to be identifying and or evaluating sites that are significant to the tribes. For example, in Williams County in North Dakota, survey crews identified a cairn and an associated rock feature on the top of a narrowing, rolling ridge above Beaver Creek in the Missouri River drainage system. Site 32WI1744 was declared, “Not Eligible,” and recommended that no further work be done. The archeological report stated: “The proposed Dakota Access centerline crosses the site from west to east and passes roughly 30 ft. (9 m) south of the deflated cairn (F1) and 130 ft. (40 m) north of the rock feature. ROW blading and pipeline installation have the potential to impact the site by destroying F1. Because site 32WI1744 is recommended not eligible for listing in the [National Register,] no further work is required.”

18. We disagree with this assessment. It is clear that the archeologists involved aren’t aware of what they are looking at because if they knew that the deflated cairn was potentially a
burial and the associated rock feature is a site of religious and cultural significance to the tribes, they’d know that by allowing the pipeline to go through this site this action will have an adverse effect on this site. The Standing Rock Sioux Tribe, Tribal Historic Preservation Office maintains our belief that there is a strong potential for adverse effects to site of religious and cultural significance to the tribes along the entire pipeline route.

19. In DAPL’s cultural surveys, in many places the consultants identify a stone circle, or cairn, that they propose to “mitigate” pipeline construction impacts by fencing, signage and a 50 foot buffer. The assumption is that through this mitigation adverse effects to the site are avoided. The assumption is wrong. These are sacred sites. The attributes which make them sacred include the environment around them, and the context in which these sit. The regulations defining adverse effects include “Change of the character of the property’s use or of physical features within the property’s setting that contribute to its historic significance” and “introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.” A chain link fence and major industrial construction just 50 feet way—15 paces for a person of my size—would cause adverse effects to sacred sites. That’s why it is important to include Tribes in not just the determination of the historic significance of sites, but a determination of adverse effects. Due to the Corps flawed process we have never been gotten pass the first step of the 106 process, much less had the opportunity to identify sites of religious and cultural significance to the tribes, not to mention never being invited to the table to assess or resolve adverse effects.

20. My elders have taught me to have a deep reverence for the land. We have a saying in our language, “Le makoce kin teunkilapi sni ki, hehan un Lakotapi kte sni.” When translated this means, “When we no longer cherish the land, we will no longer be Lakota.” We
refer to the earth as Unci Maka, or grandmother earth, and are taught that she nourishes and
nurtures everything that we need to thrive as a people. We are taught that everything has a nagi,
or spirit. Nagi can also be translated to mean the spiritual essence of everything in creation as
we believe that everything has a spirit.

21. On the land are cultural and spiritual laws that acknowledge the spiritual essence
of everything in creation. At one time we only took what we needed. Whether it was wild
turnips, choke cherries, deer, buffalo or traditional medicines, we always acknowledge the life
and the sacrifice. These cultural and spiritual laws hold true to sacred sites, stone features,
cairns, effigies, as there are laws that govern how we enter these sites.

22. The construction of the pipeline at the crossing of the Missouri River will have an
adverse effect on the Traditional Cultural Landscape of the area. This is a site of religious and
cultural significance to the people of Standing Rock that is still in use. Our people still travel to
these sacred areas for prayer. Pipeline construction at this site will adversely affect culturally
significant and sacred sites, either by destroying them outright, or by fencing them off in the
immediate vicinity of industrial operations. This harms the Tribe, and harms me personally.

23. DAPL has a plan for dealing with “inadvertent discoveries” during pipeline
construction. But if pipeline archaeologists can’t recognize important cultural sites, how can
pipeline construction workers recognize them? It is not a substitute for proper consultation and
identification. Similarly, the Army Corps has included a provision for including Tribal monitors
at PCN sites. Of course, the Army Corps only imposes this requirement on a tiny area around
HDD entry and exist sites, and not the pipeline to and from such sites. This requirement is of
limited value. Full cultural surveys take time. We cannot walk in front of the bulldozers, on the
company’s rushed schedule, and be expected to ensure the protection of these sites.
III. SACRED AND HISTORIC SITES ELSEWHERE ON THE PIPELINE ROUTE

24. Wherever the buffalo roamed, my ancestors left evidence of their existence on the land. Mainstream society refers to them as nomadic but I don’t believe this to be true, because to say a people were nomadic is to say that they wandered around aimlessly. My ancestors followed the buffalo and the buffalo followed the stars. They traveled as far west as Wyoming and Montana, as far north as the Canadian bush country, as far east as the Great Lakes, and as far south as Kansas. This territory was the aboriginal homelands of the Oceti Sakonwin.

25. Water is considered to be sacred. In our language we say, Mni Wiconi, or Water of Life, because without water there can be no life. For nine months our mothers carry us in water. We are primarily made up of water. Water is sacred to our people. We still have people who go to the water to pray and make offerings so that all life that is sustained by our rivers may live. People, deer, cattle, fish, birds, all life is considered to be sacred and is dependent upon the water from the Missouri River. The water ways of this nation were highways of their times as my ancestors traveled from lake to lake, river to river, stream to stream. Stone features, burial cairns and effigies can be found near water on the hill tops, along ridges, hills sides and drainages. In my experience, it is likely to find such features near water.

26. Protection of stone features is very important to the Standing Rock Sioux Tribe. On July 2, 2014 the Standing Rock Sioux Tribe passed resolution number 378-14, which reads as follows:

NOW THEREFORE BE IT RESOLVED, the four (4) bands on the Standing Rock Reservation who are members of the original structure of Oceti Sakonwin claim all stone feature sites, our identified burial/places, stone alignments and effigies, our sacred landscapes and drainages that are connected to these sacred areas and sites, regardless of location, within our original homelands of Oceti Sakonwin: and

BE IT FURTHER RESOLVED, that wherever the buffalo roam and left its evidence of occupation, use and bone material is considered Oceti Sakonwin
homelands as we are considered the Buffalo Nation or people and that is where you will find our sacred areas, burials, stone effigies and stone alignments of our star knowledge and sacred stone feature sites that only member band so the original Oceti Sakonwin can claim.

27. We have prophesies that one day man was going to go too far and when that happened the animals were going to show their sacred color. This would be a signal for the grandchildren to go back to these sacred places of prayer and ask for guidance. We believe we are in this time of prophesy with the birth of a white buffalo calf in Jamestown, North Dakota and sighting of white deer, elk, moose within the aboriginal homelands of the Oceti Sakonwin.

28. Within our way of life, there are people who have the responsibility of keeping the oral histories and sacred knowledge of our people. This knowledge comes with strict laws on who, when, where and why these teachings are shared. The creation stories and star knowledge can only be told after the first day of winter and can no longer be told after the first day of spring. The fact that as a THPO, I will be asked to share cultural and spiritual laws out of context in an attempt to protect what is sacred to me will cause me, my children, grandchildren and those not yet born irreparable harm as these stories are not written down but have been passed down generation to generation. It is the keeping of this knowledge that helps us to protect sacred sites.

29. As a member of the Oceti Sakonwin it is imperative that we control our own narrative. My greatest concern is that non-Tribal archeologists are going to write down our stories, and cultural and spiritual laws, and assume they now have the abilities to identify and evaluate sites of religious and cultural significance to the tribes. They do not have that ability. I am in no way giving anyone the right to tell our stories or share our sacred knowledge.

30. Water was considered sacred by my ancestors, they referred to water as Mni Wiconi, or Water of Life, because without water there can be no life. The water ways of this country were the highways of the past. My ancestors traveled from lake to lake, river to river,
steam to stream. It was at these sacred bodies of water that men stood in stone circles for four
days, with no food or water, crying for a vision to guide their people. It wasn’t the exposure to
the elements or the hunger that was life threatening, it was the lack of water that was the greatest
sacrifice and test for these men. These stone features can be found on ridges and drainages
around water ways.

31. A large portion of the pipeline will cross private lands that our office do not have
access to. This office was never afforded the opportunity to consult with the Corps or DAPL in
the development of the draft EA, nor were we afforded the opportunity to assist in identifying
sites of religious and cultural significance to our people.

32. In Iowa, a tribal cultural surveyor, Makoce Wowapi, LLC., was conducting Class
III Cultural Surveys on behalf of the Upper Sioux THPO from Minnesota and found a site of
religious and cultural significance to our tribe in the pipeline route. At the request of the Upper
Sioux THPO, we traveled to Iowa to assist in identifying and evaluating the find. We were met
by the Flandreau Sioux Tribe THPO, Upper Sioux THPO, elders, spiritual leaders, as well as
archeologists from the State of Iowa, USACE, Iowa Division of Natural Resources and the Iowa
SHPO.

33. Much to their credit, the non-Tribal archeologists waited while we took our elders
and spiritual leaders to the site. After identifying and evaluating the site, a ceremony was held
and a long discussion was held by our elders and spiritual leaders. In the end it was decided that
I as the Standing Rock THPO was to share with the archeologist what was found and to escort
them to the site so they could see for themselves.

34. After introductions, I told the archeologist that I was aware of the practice in the
field to discredit stone features as glacial uplift. I told them that I was going to share cultural and
spiritual teachings with them in an attempt to help them to see the error of their ways. I began by asking them where in their life do they see cycles. They spoke of sunrise to sunset, the changing of the seasons, birth to death, at which point I told them if all you see with are your eyes you will always be limited in what you perceive in this world, but, if you learn to see with your heart you will be able to acknowledge your relationship to everything in creation, going all the way out to the universe.

35. We were standing in a stand of trees and I pointed out that we were inhaling oxygen and exhaling carbon dioxide. I told them that the trees were exhaling oxygen and inhaling carbon dioxide. As we were standing there a light rain began to fall. I reminded them that water evaporates into the atmosphere and comes back as rain. I told them that this same sacred motion goes all the way out into the universe. The earth and planets revolve around the sun and the stars move in a circle as is evident by the known spiral galaxies. I told them this is just a glimpse into what we call, Cangleska Wakan, or the Sacred Hoop of Life, and then I showed them the site drawings at which point both the Iowa State Archeologist and Iowa SHPO both declared the site eligible for the National Registry as a site of religious and cultural significance to the tribes.

36. The site drawing showed a stone circle with rock cairns set in the four directions. I explained to them that this was a place where a warrior stood and fasted in prayer. It was also one of the hardest places to fast because it was set on a hill side as opposed to a flat surface, which would have caused this man great discomfort as he stood there in prayer for four days with no food or water. The rock cairns marked burials where men who were associated with this walk of life were buried.

37. We then escorted them to the site itself at which point the archeologist pointed out ...
that they were aware of previous surveys and this site was never recorded. We pointed out that while conducting the surveys, the archeologist would have had to have literally walked right over the site. We told them this is why it was so important to identify tribes as consulting parties to the section 106 process as only the tribes had the ability to identify sites of religious and cultural significance.

38. Sara Childers, Upper Sioux THPO shared with this office a site map of a site identified by DAPL as 30BE0029. The site map clearly shows that the Dakota Access Pipeline will go straight through burial mounds and stone features without any consideration to how the tribes view sites such as this, which again, are sites of religious and cultural significance to the tribes. This site is a Traditional Cultural Landscape and must be avoided. It’s not just the individual sites; it’s the entire landscape that is considered sacred. 

39. Of great concern to our office is the number of sites that are recorded as ineligible or unevaluated in the 2015 Cultural Resource Report prepared by DAPL’s consultants. It is imperative that federal agencies when initiating section 106 consultations identify tribes as consulting parties to assist with identifying the Areas of Potential Affect and to identify sites of religious and cultural significance to the tribes. Non-tribal archeologists do not have the ability to properly assess sites they list as ineligible and/or unevaluated. By doing so, important sites lack federal protection, and development is allowed to cause irreparable harm to these sites. Without tribal participation in consultation we will continue to see adverse effects on sites.

40. Based on the above, it is my personal and professional opinion that DAPL will very likely destroy sites that are of great religious cultural significance to the Tribe. Some of the sites are identified but deemed ineligible for protection by people who are not competent to make that decision. Other sites remain undiscovered because there’s never been any Tribal survey.
DAPL is a linear, 1,100 mile pipeline that will cross waters of U.S. Corps and Civil Works projects in North Dakota, South Dakota, Iowa and Illinois. The landscape it crosses is rich in historic significance. Wherever we look for closely for these sites, we find them in abundance, especially near water. We have already seen the inadequacies of DAPL’s private cultural surveys. We have already seen examples of important religious sites that were completely ignored by DAPL in the pipeline’s path.

IV. THE TRIBE AND TRIBAL MEMBERS WILL BE IRREPARABLY HARMED BY PIPELINE CONSTRUCTION

41. As a veteran of the United States Army, it had long been a wish of mine to visit Arlington National Cemetery. In 1998, my wish came true. One of first things I noticed while entering this hallowed ground were the hushed tones of the people as they walked through the cemetery. I knew it was because here lay the men and women who fell in defense of this nation. It is with this same reverence that we, the descendants of the Oceti Sakowin enter the sites where our ancestors fell in defense of our country. An elder once told me that our ancestors knew four hardships in life; to hear an orphan cry, to lose a child, to lose your mother, and to not know where a warrior fell. All across the aboriginal homelands of the Oceti Sakowin are stone cairns that mark such places, and are considered to be sites of religious and cultural significance to our tribe. To me, and to members of the Tribe, destruction of or disrespect to these sites feels just like it would feel to me if a pipeline was dug through the middle of Arlington National Cemetery, turning over gravestones and displacing graves. Mainstream society would not tolerate the desecration of Arlington National Cemetery. But this is what DAPL is doing in the traditional lands of the Oceti Sankowin.

42. By way of comparison, recent events in the world show a total lack of appreciation and respect by ISIS for ancient sites in the Middle East. Every time they destroy an
ancient site we lose a part of our collective history, that once destroyed is gone forever. It’s not just happening in the Middle East, it’s happening right here in America in the name of development, or in the name of the national interest. Every time a site of religious and cultural significance to the tribes is destroyed, this causes irreparable harm to me, my children, grandchildren and those not yet born. Once it is gone, it is gone forever.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on August 3, 2016, at Fort Yates, North Dakota.

Jon Eagle, Sr.
CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2016, I electronically filed the foregoing Declaration of Jon Eagle, Sr. In Support of Motion For Preliminary Injunction with the Clerk of the Court using the CM/ECF system.

I further certify that on August 4, 2016, true and correct copies were served on the following, via the method indicated:

Via Federal Express overnight delivery:

Office of the Attorney for the District of Columbia
441 Fourth Street NW
Washington, DC 20001

U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

U.S. Attorney’s Office
Attn: Civil Process Clerk
555 Fourth Street NW
Washington, DC 20530

Office of the Attorney General
1350 Pennsylvania Avenue NW, Suite 409
Washington, DC 20004

Courtesy copies via email to counsel Dakota Access Pipeline and U.S. Department of Justice Environment and Natural Resources Division.

/s/ Jan E. Hasselman
Jan E. Hasselman
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, 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

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 Hulett’s 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.”


The Hulett’s 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. 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:
  o “one of the most significant archeological finds in North Dakota in many years,” located 75 feet from the edge of the pipeline corridor;
  o 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;”
  o 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
  o 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, given Mr. Mentz’s credentials as a cultural resource specialist with particular expertise regarding the cultural traditions of the Standing Rock Sioux Tribe and

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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
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE
P.O. Box D
Building No. 1, North Standing Rock Avenue
Fort Yates, ND 58538,

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS
441 G Street NW
Washington, DC 20314-1000,

Defendant.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is a complaint for declaratory and injunctive relief. The Standing Rock Sioux Tribe ("Tribe") brings this action in connection with federal actions relating to the Dakota Access Pipeline ("DAPL"), a 1,168-mile-long crude oil pipeline running from North Dakota to Illinois. The Tribe, a federally recognized American Indian Tribe with a reservation in North Dakota and South Dakota, brings this case because defendant U.S. Army Corps of Engineers ("Corps") has taken actions in violation of multiple federal statutes that authorize the pipeline’s construction and operation. The construction and operation of the pipeline, as authorized by the
Corps, threatens the Tribe’s environmental and economic well-being, and would damage and destroy sites of great historic, religious, and cultural significance to the Tribe.

2. This complaint involves two kinds of claims. First, the Tribe brings an as-applied challenge to Nationwide Permit 12 (“NWP 12”), issued by the Corps in 2012 pursuant to the federal Clean Water Act (“CWA”) and Rivers and Harbors Act (“RHA”). DAPL crosses hundreds if not thousands of federally regulated rivers, streams, and wetlands along its route. The discharge of any fill material in such waters is prohibited absent authorization from the Corps. Federal authorization under these statutes, in turn, triggers requirements under the National Historic Preservation Act (“NHPA”), intended to protect sites of historic and cultural significance to Tribes like Standing Rock. In issuing NWP 12, however, the Corps authorized discharges into federal waters without ensuring compliance with the NHPA. In essence, in enacting NWP 12, the Corps pre-authorized construction of DAPL in all but a handful places requiring federal authorization without any oversight from the Corps. In so doing, the Corps abdicated its statutory responsibility to ensure that such undertakings do not harm historically and culturally significant sites.

3. Second, on July 25, 2016, the Corps issued multiple federal authorizations needed to construct the pipeline in certain designated areas along the pipeline route. One such authorization allows DAPL to construct the pipeline underneath Lake Oahe, approximately half a mile upstream of the Tribe’s reservation. Others authorize the DAPL to discharge into waters of the United States at multiple locations in the Tribe’s ancestral lands. The Tribe brings this challenge because these authorizations were made in violation of the CWA and its governing regulations and without compliance with NHPA, and the National Environmental Policy Act (“NEPA”).
4. The Tribe seeks a declaration that the Corps violated the NHPA in issuing NWP 12, and an injunction preventing the Corps from using NWP 12 as applied to DAPL and directing the Corps to ensure full compliance with § 106 at all sites involving discharges into waters of the United States. The Tribe further seeks a declaration that the July 25, 2016 authorizations were made in violation of the CWA, NEPA, and NHPA, and an order vacating all existing authorizations and verifications pending full compliance with the CWA, NEPA, and NHPA.

JURISDICTION AND VENUE

5. This case states a claim under the Administrative Procedures Act, 5 U.S.C. § 701 et seq. (“APA”), which authorizes a federal court to find unlawful and set aside any final agency action that is “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.” Id. § 706. Jurisdiction arises under 28 U.S.C. § 1362 (“district courts shall have original jurisdiction all civil actions, brought by any Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States”); § 2201 (declaratory relief); § 2202 (injunctive relief).

6. Venue in this district is appropriate under 28 U.S.C. § 1391(e) because it is the district in which the defendant resides and in which “a substantial part of the events or omissions giving rise to the claim occurred.”

PARTIES

7. The Standing Rock Sioux Tribe is a federally-recognized Indian tribe with a governing body recognized by the Secretary of the Interior. The Tribe is a successor to the Great Sioux Nation, a party to the two Treaties of Fort Laramie in 1851 and 1868. In those Treaties, the Sioux ceded a large portion of their aboriginal territory in the northern Great Plains, but
reserved land rights “set apart for the absolute and undisturbed use and occupation” of the Indians.

8. The reservation established in the 1851 Treaty of Fort Laramie included extensive lands that would be crossed by the proposed pipeline. The Tribe has a strong historical and cultural connection to such land. Despite the promises made in the two Fort Laramie treaties, in 1877 and again in 1889, Congress betrayed the treaty parties by passing statutes that took major portions of this land away from the Sioux. In 1889, Congress stripped large portions of the Great Sioux Reservation that had been promised to the Tribe forever, leaving nine much smaller Sioux reservations, including Standing Rock. In the modern area, the Tribe suffered yet another loss of lands, this time in connection with the same Oahe dam and Reservoir. In 1958, the Corps took 56,000 acres of bottomlands on the Standing Rock reservation for the Oahe project without the Tribe’s consent or agreement.

9. Since time immemorial, the Tribe’s ancestors lived on the landscape to be crossed by the DAPL. The pipeline crosses areas of great historical and cultural significance to the Tribe, the potential damage or destruction of which greatly injures the Tribe and its members. The pipeline also crosses waters of utmost cultural, spiritual, ecological, and economic significance to the Tribe and its members. The Tribe and its members have been, are being, and unless the relief sought herein is granted, harmed by the Corps’ failure to comply with environmental and historic preservation laws.

10. The U.S. Army Corps of Engineers is an agency of the United States government, and a division of the U.S. Army, part of the U.S. Department of Defense. It is charged with regulating any dredging and filling of the waters of the United States under § 404 of the CWA and § 10 of the RHA.
11. By filing this action, the Tribe does not waive its sovereign immunity and does not consent to suit as to any claim, demand, offset, or cause of action of the United States, its agencies, officers, agents, or any other person or entity in this or any other court.

STATUTORY AND REGULATORY BACKGROUND

I. THE CLEAN WATER ACT

12. Congress enacted the CWA in order to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To accomplish this goal, the CWA prohibits the discharge of any pollutant, including dredged spoil or other fill material, into waters of the United States unless authorized by a permit. Id., § 1311(a). Unless statutorily exempt, all discharges of dredged or fill material into waters of the United States must be authorized under a permit issued by the Corps. Id., §§ 1344(a)–(e).

13. The Corps is authorized to issue two types of permits under § 404: individual permits and general permits. Id. The Corps issues individual permits under § 404(a) on a case-by-case basis. Id., § 1344(a). Such permits are issued after a review involving, among other things, site specific documentation and analysis, public notice and opportunity for a hearing, public interest analysis, and formal determination. 33 C.F.R. § 322.3; Parts 323, 325.

14. The CWA also authorizes the Corps to issue “general” permits on a state, regional or nationwide basis. 33 U.S.C. § 1344(e). Such general permits may be issued for any category of similar activities that “will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” Id. “No general permit … shall be for a period of more than five years after the date of its issuance.” 33 U.S.C. § 1344(e)(2). The purpose of this approach to permitting is to “regulate with little, if any, delay or paperwork certain activities that have minimal impacts.” 33 C.F.R. § 330.1(b).
15. The Corps issued the current set of 48 nationwide permits ("NWPs") in February of 2012. 77 Fed. Reg. 10184 (Feb. 21, 2012). The 2012 NWPs in “most cases” authorize discharge into regulated waters without any further process involving the Corps. In effect, the NWP pre-authorizes certain categories of discharge, without any additional approval from, or even notification to, the Corps. 33 C.F.R. § 330.1(e)(1). In other instances, discharges cannot occur until the proponent of the action files a “pre-construction notification” (“PCN”) to the Corps, and receives verification that the proposed action is consistent with the terms of the NWP. Id. § 330.6(a). The specifics of whether or not a PCN is required are spelled out in each individual NWP as well as a series of “general conditions” accompanying the NWP. 77 Fed. Reg. at 10282 (listing 31 general conditions).

II. THE RIVERS AND HARBORS ACT

16. The Rivers and Harbors Act of 1899 is the nation’s oldest environmental law. The statute prohibits a number of activities that impair ports, channels and other navigable waters. Unlike the CWA, which applies in all waters of the United States, the RHA applies only in “navigable” waters, defined as waters subject to the ebb and flow of the tides, or waters that are “presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.” 33 C.F.R. § 329.4.

17. Section 10 of the RHA, 33 U.S.C. § 403, among other things, makes it unlawful “to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of” any navigable water without a permit from the Corps. Like § 404 permits, § 10 permits may be issued as individual permits or pursuant to the NWP program and are generally subject to many of the same regulations.

18. Tunneling under a navigable water requires a section 10 permit from the Corps, even without any discharge into navigable waters. 33 C.F.R. § 322.3(a) (“For purposes of a
section 10 permit, a tunnel or other structure or work under or over a navigable water of the United States is considered to have an impact on the navigable capacity of the waterbody.

19. A separate provision of the RHA, known as “Section 408,” makes it unlawful to “build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States” without a permit from the Corps. 33 U.S.C. § 408. Unlike Section 10 permits, § 408 permits cannot be issued pursuant to the NWP program but are only issued as individual permits. Prior to issuance of a § 408 permit, the Corps must determine whether the use or occupation will be injurious to the public interest or impair the usefulness of the project.

III. THE NATIONAL HISTORIC PRESERVATION ACT

20. Section 106 of the National Historic Preservation Act (“NHPA”) requires that, prior to issuance of a federal permit or license, federal agencies shall take into consideration the effects of that “undertaking” on historic properties. 54 U.S.C. § 306108. Agencies “must complete the section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” 36 C.F.R. § 800.1.

21. The NHPA defines undertaking as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including— (1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y).

22. Early in the NHPA process, an agency must determine the area of potential effects (“APE”) of a federal undertaking. 36 C.F.R. § 800.4(1)(1). The APE is defined by regulation to
include the area “within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties…. The [APE] is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” *Id.* § 800.16(d).

23. The Section 106 process requires consultation with Indian Tribes on federal undertakings that potentially affect sites that are culturally significant to Indian Tribes. 36 C.F.R. § 800.2(c)(2); 54 U.S.C. § 302707 (properties “of traditional religious and cultural importance to” a Tribe may be included on the National Register, and federal agencies “shall consult with any Indian Tribe…that attaches religious or cultural significance” to such properties). Consultation must occur regarding sites with “religious and cultural significance” even if they occur on ancestral or ceded land. *Id.* § 800.2(c)(2)(II)(D).

24. Under the consultation regulations, an agency official must “ensure” that the process provides Tribes with “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties….articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” *Id.* § 800.2(c)(ii)(A). This requirement imposes on agencies a “reasonable and good faith effort” by agencies to consult with Tribes in a “manner respectful of tribal sovereignty.” *Id.* § 800.2(c)(2)(II)(B).

25. Acting “in consultation with … any Indian tribe … that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take steps necessary to identify historic properties within the area of potential effects.” *Id.* §800.4(b). The agency must evaluate the historic significance of such sites, and determine whether they are potentially eligible for listing under the National Register. *Id.* § 800.4(c).
26. If the agency determines that no historic properties will be affected by the undertaking, it must provide notice of such finding to the state and tribal historic preservation offices, and the Advisory Council on Historic Preservation (“ACHP”), which administers the NHPA. Id. § 800.4(d). The regulations give those parties the opportunity to object to such a finding, which elevates the consultation process further. Id.

27. If the agency finds that historic properties are affected, it must provide notification to all consulting parties, and invite their views to assess adverse effects. Id. Any adverse effects to historic properties must be resolved, involving all consulting parties and the public. Id. § 800.6. If adverse effects cannot be resolved, the process is elevated again to the ACHP and the head of the agency undertaking the action. Id. §800.7. Until this process is complete, the action in question cannot go forward.

28. The ACHP authorizes agencies to adopt their own regulations for implementing its § 106 obligations. Such regulations must be reviewed and approved by the ACHP in order to be valid. Id. § 800.14.

29. The Corps has adopted procedures intended to satisfy its § 106 obligations. See App. C to 33 C.F.R. Part 325. Those procedures, which predate amendments to the NHPA that significantly broaden the role of Tribes in the § 106 process, have never been approved by the ACHP. Several courts have concluded that the Corps’ NHPA procedures are legally invalid. However, the Corps continues to follow these procedures for purposes of § 106 consultation, including in the process surrounding DAPL.

30. Section 106 regulations also provide an alternative compliance mechanism under which agencies can negotiate a “programmatic agreement” with the ACHP to resolve “complex project situations or multiple undertakings.” 36 C.F.R. § 800.14(b). Such agreements are
suitable for “when effects on historic properties are similar and repetitive or are multi-State or regional in scope;” “when effects on historic properties cannot be fully determined prior to approval of an undertaking;” or when “nonfederal parties are delegated major decisionmaking responsibilities,” among other situations. *Id.* § 800.14(b)(1). Programmatic agreements require consultation with Tribes, among others, as well as public participation.

31. The Corps has never adopted a programmatic agreement with the ACHP regarding its CWA/RHA permits or any other activity.

IV. THE NATIONAL ENVIRONMENTAL POLICY ACT

32. NEPA, 42 U.S.C. §§ 4321–4370f, is our “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). It makes environmental protection a part of the mandate of every federal agency. 42 U.S.C. § 4332(1).

33. NEPA seeks to ensure that federal agencies take a “hard look” at environmental concerns. One of NEPA’s primary purposes is to ensure that an agency, “in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA also “guarantees that the relevant information [concerning environmental impacts] will be made available to the larger audience,” including the public, “that may also play a role in the decisionmaking process and the implementation of the decision.” *Id.*

34. NEPA requires agencies to fully disclose all of the potential adverse environmental impacts of its decisions before deciding to proceed. 42 U.S.C. § 4332(C). NEPA also requires agencies to use high quality, accurate scientific information and to ensure the scientific integrity of the analysis. 40 C.F.R. §§ 1500.1(b), 1502.24.
35. If an agency action has adverse effects that are “significant,” they need to be analyzed in an environmental impact statement (“EIS”). 40 C.F.R. § 1501.4. If it is unclear whether impacts are significant enough to warrant an EIS, it may prepare an “environmental assessment” (“EA”) to assist in making that determination. Id. If the agency determines that no EIS is required, it must document that finding in a “finding of no significant impact” (“FONSI”).

36. NEPA’s governing regulations define what “range of actions, alternatives, and impacts [must] be considered in an environmental impact statement.” 40 C.F.R. § 1508.25. This is in part what is known as the “scope” of the EIS. The EIS must consider direct and indirect effects. The direct effects of an action are those effects “which are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). The indirect effects of an action are those effects “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b).

37. An agency must also analyze and address the cumulative impacts of a proposed project. 40 C.F.R. § 1508.25(c)(3). Cumulative impacts are the result of any past, present, or future actions that are reasonably certain to occur. Such effects “can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

FACTUAL ALLEGATIONS

I. INTERESTS OF THE STANDING ROCK SIOUX TRIBE

38. Since time immemorial, the Tribe’s ancestors—the Oceti Sakowin, also known as the Great Sioux Nation—used and occupied a broad area throughout the northern Great Plains, including much of the area that DAPL proposes to traverse with its pipeline. Within this broad region, tribal members followed migrating buffalo herds and traversed a landscape filled with cultural and historical significance central to the Tribe’s identity.
39. The Tribe’s traditional and ancestral territory extends well beyond the current Reservation’s exterior boundaries, encompassing lands that are the subject of this action. The Corps and other federal agencies have repeatedly acknowledged the traditional use of lands within and around the DAPL route by the Tribe’s ancestors.

40. The Tribe’s cultural resources are historically and culturally interrelated over the entirety of the land within the Tribe’s traditional territory, within and outside of the exterior boundaries of the Reservation. Protection of the Tribe’s cultural heritage is of significant importance to the Tribe. Destruction or damage to any one cultural resource, site, or landscape contributes to destruction of the Tribe’s culture, history, and religion. Injury to the Tribe’s cultural resources causes injury to the Tribe and its people.

41. Cultural resources of significance to the Tribe are located on the lands that are the subject of this action and adjacent lands. In addition to specific archaeological sites that have been identified to date, there are numerous significant culturally important sites that have not been identified. The lands within the pipeline route are culturally and spiritually significant.

42. The Tribe and its members also have a cultural interest in preserving the quality of the land, water, air, fauna, and flora within the Tribe’s traditional territory, within and outside the Reservation. For example, the Tribe is concerned with impacts to the habitat of wildlife species such as piping plovers, least tern, Dakota skipper, and pallid sturgeon, among others. The Tribe has a particular concern for bald eagles, which remain federally protected and play a significant role in the Tribe’s culture, and which would be adversely affected by the proposed pipeline. The Tribe is greatly concerned with the possibility of oil spills and leaks from the pipeline should it be constructed and operated, particularly into waters that are of considerable economic, religious, and cultural importance to the Tribe.
II. THE CORPS’ ISSUANCE OF NWP 12

43. The Corps issued the current suite of 48 NWPs, covering a wide array of potential activities involving discharges into regulated waters, in February of 2012. 77 Fed. Reg. 10184 (Feb. 21, 2012). Of relevance here, NWP 12 governs “utility line activities.” Id. at 10271. NWP 12 authorizes the “construction, maintenance, repair and removal of utility lines and associated facilities” in waters of the United States, providing that the activity does not result in the loss of greater than a ½ acre of waters “for each single and complete project.” Counterintuitively, a “single and complete project” in the case of linear projects like utility lines is any crossing of a separate waterbody. 33 C.F.R. § 330.2(i). Under this definition, a pipeline like DAPL is made up of hundreds if not thousands of “single and complete projects.”

44. The NWP defines “utility line” to include “any pipe or pipeline for the transportation of any gaseous, liquid, liqueient, or slurry substance, for any purpose.” 77 Fed. Reg. at 10271. The Corps considers pipelines carrying crude oil to be covered by NWP 12.

45. Under NWP 12, preconstruction notification (“PCN”) to the Corps by a non-federal project proponent, and a verification from the Corps, is required if any one of several criteria is met. Id. at 10272. If none of the criteria are met, the proponent is authorized by NWP 12 to proceed with the work in regulated waters without additional notification to, or approval from, the Corps. None of the NWP 12-specific criteria relates to historic or cultural preservation.

46. The NWP program also includes a set of general conditions that are applicable to all NWPs, include NWP 12. General Condition 20 (“GC 20”) addresses historic properties. Under GC 20, a non-federal permittee must submit a PCN “if the authorized activity may have the potential to cause effects to any historic priorities listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties.” Id. at 10284. If a PCN is provided, the Corps purports to
comply with § 106 of the NHPA prior to verifying that the NWP is applicable, and work may not commence until such verification is provided. 33 C.F.R. § 330.5(g)(2). Conversely, if no PCN is provided, no § 106 process occurs.

47. GC 20 puts the responsibility on the proponent, not the Corps, to determine whether historic or culturally significant properties are present, and requires Corps’ verification only if the proponent finds such sites and reports them to the Corps via a PCN.

48. NWP 12 was formally adopted by the Corps in a “Decision Document” signed by Major General Michael J. Walsh on Feb. 13, 2012. In responding to public comment regarding potential impacts to tribal sites, the Decision Document states that compliance with NHPA on NWP implementation is carried out via GC 20.

III. FACTS RELEVANT TO CHALLENGE TO NWP 12

49. The proponent of DAPL proposes to construct a major crude oil pipeline across 1,168 miles through North Dakota, South Dakota, Iowa, and Illinois. The pipeline will have a capacity of 570,000 barrels of crude oil per day, making it one of the largest crude oil pipelines in the nation, carrying over half of the current capacity of North Dakota’s oil production.

50. DAPL is one of several pipelines that have been proposed for the North Dakota oil production area, some of which have been moving on a slower timeline due to environmental review requirements. DAPL has moved aggressively to get the pipeline constructed as quickly as possible.

51. The pipeline’s route passes through the Tribe’s ancestral lands, and areas of great cultural, religious and spiritual significance to the Tribe. Construction of the pipeline includes clearing and grading a 100-150 foot access pathway nearly 1200 miles long, digging a trench as deep as 10 feet, and building and burying the pipeline. Such work would destroy burial grounds,
sacred sites, and historically significant areas in its path. These sites carry enormous cultural importance to the Tribe and its members.

52. DAPL claims to have completed cultural resource surveys along the entire pipeline length. However, the out-of-state, non-Tribal consultants hired by DAPL to do cultural surveys are unable to assess the potential cultural significance of sites in this area to the Tribes. Only Tribally trained and approved consultants have the ability to assess such sites. The Tribe has never had the opportunity to discuss protocols for cultural surveys, or participate in the surveys that were conducted. Instead, it was provided copies of partial surveys after they were completed.

53. Compared to other pipelines, DAPL has taken a highly unusual approach to Corps permitting for activities involving discharges into regulated waters. Rather than seek Corps’ verifications on all waters of the U.S. in which pipeline construction would cause a discharge, as has been typical, DAPL has only sought Corps’ verification for a tiny minority of the impacts to federally regulated waters.

54. For example, DAPL’s route through North Dakota is 359 miles. A 2015 “Wetlands and Waterbodies Delineation Report” provided to the state Public Service Commission identifies 263 waterbodies and 509 wetlands that would be impacted by the pipeline. However, this information was never provided to the Corps. Instead, DAPL submitted PCNs for only two of these sites, at crossings of the Missouri River. Neither of these PCNs was submitted based on potential impacts to historic sites.

55. In South Dakota, DAPL would cross 273 miles. DAPL’s state Public Utilities Commission filings reveal 288 waterbody crossings and 102 acres of wetlands impacts.
However, DAPL only provided the Corps with PCNs for 10 of these sites. None of the PCNs in South Dakota was triggered by impacts to historic sites.

56. In both states, this delineation of waterbody impacts was only partially complete, as DAPL did not have landowner access to all sites along the pipeline route. Accordingly, some of the features were estimated through desktop analysis. The ultimate number of waterbody and wetland impacts remains unknown.

57. One of the two places in North Dakota where Corps authorization is required is at Lake Oahe, where the pipeline would cross underneath the Lake (a dammed section of the Missouri River) immediately upstream of the Tribe’s reservation.

58. Due to its concerns about the configuration of the pipeline and inadequacies in the regulatory process, the Tribe has participated extensively in the public process associated with the permits, including filing numerous formal technical comments on the Lake Oahe crossing, meeting with Corps’ leadership and staff, and communicating with elected representatives and agency officials to express concerns. The Tribe has repeatedly conveyed to the Corps and other government officials the significance of its concerns and the risks to the Tribe about moving ahead with the pipeline in its current configuration. The Tribe has in particular highlighted the inadequacies of the Corps’ § 106 consultation process with regard to historic and cultural impacts at the Lake Oahe site.

59. On July 25, 2016, the Corps issued the NWP 12 verification and other authorizations required at the roughly 204 sites in the four states for which verification has been requested along the pipeline’s entire length. However, prior to that time, construction started along the remainder of the route, including construction involving discharges into the hundreds if
not thousands of sites where pipeline construction involves discharges into waters of the United States, but for which no PCN is required.

60. The Tribe has repeatedly expressed concerns to the Corps regarding construction in waters of the United States pursuant to NWP 12 without any section 106 consultation on historic impacts. On June 30, 2016, the Standing Rock Tribal Historic Preservation Officer, Jon Eagle Sr., wrote to the Corps District Commander regarding the extensive work proceeding without any § 106 consultation under NWP 12. This letter explained that non-Tribal archaeologists were unable to appreciate the cultural significance of Tribal historic sites, and that his office had found the DAPL cultural surveys, conducted by out-of-state archaeologists with no training in the cultural practices of the Oceti Sakowin to be “gravely deficient.”

61. The letter requested that the Corps declare that all impacts to waters of the United States had potential historic impacts and requested that the Corps require PCNs from all such crossings, so that full § 106 consultation could occur.

62. In response, the regulatory branch chief of the Corps’ Omaha district invited Mr. Eagle’s office to participate in “monitoring” for “post construction discoveries of cultural resources and/or burials” at six sites subject to PCNs in North and South Dakota. The Corps did not respond to the issue to which Mr. Eagle’s letter was actually addressed, specifically, cultural impacts at sites that are not subject to a PCN.

63. The Tribe’s concerns were highlighted in June of 2016 when archaeologists working on behalf of Upper Sioux Tribe discovered a site of great religious and cultural significance to Oceti Sakowin in the pipeline’s route in Iowa. The site was not discovered by DAPL during its cultural resource surveys, even though it lay directly in the pipeline’s route.
64. The pipeline will also impact historic and culturally significant sites in uplands along the pipeline’s route in between areas of Corps’ jurisdiction. The Corps views any impacts to such uplands sites as outside of its responsibility under § 106, as the Corps interprets §106 to apply only within the immediate area of CWA jurisdiction.

65. The ACHP regulations take a different approach. In a May 6, 2016 letter to the Corps regarding DAPL, the ACHP explained that its regulations “define the undertaking as the entire project, portions of which may require federal authorization or assistance.” Even where the jurisdiction is limited to particular portions of a project, the ACHP explained, “the federal agency remains responsible for taking into account the effects of the undertaking on historic properties.” The letter concluded that given the close relationship between the project and multiple federal approvals, “a greater effort to identify and evaluate historic properties” was required.

66. In a May 19, 2016, letter, the ACHP formally objected to the Corps’ finding of “no effect” at the site of the Lake Oahe crossing, one of only two sites in the entire state of North Dakota for which the Corps even purported to engage in § 106 consultation. The ACHP asserted that the Corps misapplied § 106 by considering only historic properties within its areas of jurisdiction, when it should consider indirect impacts to historic sites in uplands that could not occur but for the Corps’ authorization to discharge into waters of the United States.

67. At the time of filing this complaint, DAPL has not executed agreements with all landowners, and eminent domain proceedings are underway in several states. Additionally, several lawsuits have been filed against DAPL and state regulatory agencies which challenge the legality of DAPL approvals, and seeking the remedy of vacating such approvals, which would
require DAPL to stop work. However, DAPL has chosen to move ahead with construction in places where regulatory approval is secured and where landowner consent has been obtained.

68. DAPL has been repeatedly told by state regulatory agencies that any construction prior to the completion of the regulatory and eminent domain process is at its own risk. DAPL has repeatedly acknowledged that it bears the risk of starting construction prior to the completion of the regulatory and legal process.

IV. GENERAL FACTS REGARDING THE CORPS’ ISSUANCE OF THE § 408 PERMITS AND CWA VERIFICATIONS

69. On July 25, 2016, the Corps’ issued authorizations pursuant to § 408 of the RHA for DAPL to cross federally managed or owned lands on the Missouri River in two places, at Lake Sakakawea and Lake Oahe, roughly 230 miles apart. Accompanying this authorization, the Corps released a final environmental assessment (“EA”) and “finding of no significant impact” (“FONSI”) with respect to two components of the DAPL in North Dakota. The EA and FONSI concluded that these two small segments of the pipeline did not have sufficient adverse environmental impact to warrant preparation of an environmental impact statement (“EIS”), which would have triggered substantially broader environmental review, a closer comparison of alternatives, and greater public engagement.

70. This decision authorizes DAPL proponents to begin drilling a pipeline path underneath each of the two reservoirs, install the pipeline, and begin operating it to transport crude oil in the Tribe’s culturally significant ancestral lands, and adjacent its reservation. DAPL has notified Tribes that construction at the site is scheduled to begin on July 30, 2016.

71. Also on that date, the Corps issued verifications pursuant to the CWA and RHA finding that 204 crossings of jurisdictional waters of the United States, for which PCNs had been filed, met the terms of NWP 12. The verifications include federally protected waters in four
states: North Dakota (2 verifications), South Dakota (10 verifications), Iowa (61 verifications),
and Illinois (45 verifications). The verifications authorize DAPL proponents to begin
construction of the pipeline through federally regulated streams, rivers, and wetlands, and
operate the pipeline to transport crude oil in the Tribe’s culturally significant ancestral lands, and
adjacent its reservation. DAPL has notified Tribes that construction is set to begin at such many
of these sites on or before August 1, 2016.

72. On January 5, 2016, the St. Louis District of the Corps released a public notice
announcing that it intended to authorize another segment of the pipeline under § 408 of the RHA.
That segment crossed federal flowage easements and federally managed levees on the Illinois
River. To date, no permit or even draft environmental review document has been issued for this
segment of the pipeline.

73. On or about December 17, 2015, the U.S. Fish and Wildlife Service (“FWS”)
released a draft EA for yet another segment of the pipeline. That EA reviewed potential impacts
of the pipeline over grassland easements held by FWS and managed for wildlife values. A final
EA and FONSI were issued by the FWS on June 22, 2016.

74. The current proposed route crosses Lake Oahe a half of a mile upstream of the
Tribe’s reservation boundary, where any leak or spill from the pipeline would flow into the
reservation. The Tribe and its members have been deeply concerned about the potential impacts
of the Lake Oahe crossing since its inception, for two primary reasons. First, the Tribe relies on
the waters of Lake Oahe for drinking water, irrigation, fishing, and recreation, and to carry out
cultural and religious practices. The public water supply for the Tribe, which provides drinking
water for thousands of people, is located a few miles downstream of the proposed pipeline
crossing route. Additionally, the cultural and religious significance of these waters cannot be
overstated. An oil spill from the pipeline into Lake Oahe would cause an economic, public health and welfare, and cultural crisis of the greatest magnitude.

75. Pipeline leaks and spills are routine in both new and old pipelines. A segment of the Keystone pipeline built in 2010 recorded 35 leaks in its first year of operations. A study of North Dakota’s pipelines revealed over 300 leaks in two years, most of which were unreported to the public. Major spills from crude oil pipelines have occurred recently on the Kalamazoo and Yellowstone Rivers, with devastating economic and environmental impacts. The Corps does not require, and DAPL does not propose, any technology or mitigation approaches that reduce risk relative to other recent pipelines that have been the source of major and minor spills and leaks in recent years.

76. Second, the Lake Oahe crossing will take place in an area of great cultural, religious and spiritual significance to the Tribe. Construction of the pipeline, which includes clearing and grading a 100-150 foot access pathway nearly 1200 miles long, digging a trench as deep as 10 feet, and building and burying the pipeline, would destroy burial grounds, sacred sites, and historically significant areas on either side of Lake Oahe. These sites carry enormous cultural importance to the Tribe and its members.

77. Construction of pipelines involves other significant environmental impacts, including massive amounts of water required for hydrostatic testing and permanent maintenance of a 50-foot right of way above the pipeline.

78. The confluence of the Cannonball and Missouri Rivers, where the crossing would take place, is a sacred place to the Tribe. It is a place of great historical significance, serving as a place of peace, prayer, and trade where traditional enemies could meet without risk of violence.
There are numerous sacred stones and historically important sites in the immediate landscape of the Lake Oahe Crossing, few of which have been fully evaluated by Tribal archaeologists.

79. The Corps operates Oahe dam, downstream of the Lake Oahe crossing, for flood control and other purposes. The result of its management is that water levels fluctuate greatly in the reservoir, with attendant erosion, scouring, and deposition of sediments. The geomorphology of the segment of Lake Oahe to be crossed by the pipeline is highly dynamic.

80. Due to its concerns about the configuration of the pipeline and inadequacies in the regulatory process, the Tribe has participated extensively in the public process associated with the permits, including filing numerous formal technical and legal comments on the Lake Oahe crossing, meeting with Corps’ leadership and staff, and communicating with agency officials to express concerns. The Tribe has repeatedly conveyed to the Corps and other government officials the significance of its concerns and the risks to the Tribe about moving ahead with the pipeline in its current configuration.

V. SPECIFIC FACTS RELATED TO NHPA COMPLIANCE FOR JULY 25, 2016

AUTHORIZATIONS

81. The confluence of the Cannonball and Missouri Rivers is sacred ground to the Standing Rock Sioux people. It is rich in history, and it is rich in cultural and religious significance. Industrial development of that site for the crude oil pipeline has a high potential to destroy sites eligible for listing in the National Register.

82. The Corps undertook a process to consider the impacts of the Missouri River crossing on historic and culturally significant sites that was flawed in multiple respects. It defined the “area of potential effects” (“APE”) for the Lake Oahe crossing exceptionally narrowly to include only a tiny parcel immediately surrounding the horizontal directional drilling (“HDD”) pits on each side of the river and a narrow strip for an access road and “stringing area”
on the west side of the crossing. On the east side of the river, the APE is difficult to determine because in some of the Corps’ figures, the “project workspace” includes both the access road and stringing area, while in others only the HDD pit is included.

83. The Corps’ attempts at § 106 consultation omit the actual pipeline route that will be entering and existing the HDD borehole. The pipeline itself will involve 100-150 yard swath of industrial development—clearing, grading, excavation of a 6 to 10 foot trench, and construction work to shape and place the pipeline.

84. It is likely that such development would destroy any historic or culturally significant sites in its path. There are already known but unevaluated historic sites—in other words, sites that may be eligible for protection under the National Historic Preservation Act (“NHPA”—in the direct path of the pipeline immediately in the area of the HDD crossing. For example, according to the draft EA, several sites are directly in the pipeline’s path in the first mile outside of the HDD site.

85. Consultation with the Tribal Historic Preservation Office (“THPO”) on the DAPL, which would be routed just outside the reservation boundary, on ancestral land with great cultural and religious importance to the Standing Rock Sioux Tribe, has been profoundly inadequate. The Tribe has never been able to participate meaningfully in assessing the significance of sites that are potentially affected by the project.

86. The non-Tribal consultants hired by DAPL to do cultural surveys are not equipped to suitably assess the potential cultural significance of sites in this area. The Tribe has never had the opportunity to discuss protocols for cultural surveys or participate in the surveys that were conducted.
87. The Tribe’s first record of correspondence from the Corps related to the DAPL is dated February 12, 2015, when a Corps representative emailed the THPO asking if there were concerns related to preliminary bore hole testing to be conducted at the HDD site.

88. The THPO, Ms. Waste’Win Young, wrote back immediately objecting to the Corps’ conclusion that no historic properties would be affected by the bore hole drilling, documenting numerous specific important sites that could be affected as well as the cultural significance of the area generally, and requesting a full Class III survey with tribal archaeologists before any work was done.

89. No response to this urgent correspondence was ever provided, despite several follow up requests from the THPO, and the work was done without any additional tribal consultation or process. Many months later, in a September 16, 2015 letter, a Corps official stated that the § 106 process had ended on January 18, 2015—nearly a month prior to the Corps’ initial email about the project.

90. On February 17, 2015, the Corps sent the THPO a generic form letter seeking to initiate consultation under § 106 on the DAPL. The THPO wrote back immediately, committing the SRST to participation in the § 106 process, highlighting the significance of the site, and recommending full Class III surveys with tribal involvement.

91. In the months that followed, both the THPO and the Chairman of the SRST followed up with numerous additional letters to the Corps outlining concerns about cultural impacts, and seeking to engage the Corps in a good-faith consultation process as required by § 106 regulations.

92. However, no response was received from the Corps to this correspondence until September of 2015, when another letter was sent to the Tribal Chairman that again inquired “if
you would like to consult” on the pipeline project. The letter asked for any “knowledge or
corns regarding historic properties” that the Tribe wanted the Corps to consider. A deadline
of less than a month later was provided.

93. The THPO responded promptly, outlining the Tribe’s significant concerns with
properties on the site, and its ongoing exclusion from the § 106 process. The THPO observed
that “it has become clear that the Corps is attempting to circumvent the Section 106 process” and
urged it to broaden its review to include affected areas outside the Corps’ jurisdiction, as
required by governing regulations. The Corps did not respond to this letter.

94. Instead, the Corps’ next action was to publish a draft environmental assessment
(“EA”) that included not a single mention of the potential impacts of the pipeline project on the
SRST or areas of historic and cultural significance to the Tribe. The draft EA also stated
incorrectly that the SRST THPO had indicated to DAPL that the Lake Oahe site avoided impacts
to tribally significant sites.

95. SRST submitted extensive comments on the EA, on three occasions, highlighting
both the flaws in the § 106 consultation process as well as the significant cultural resources that
could be harmed by the project.

96. Additionally, the Corps received critical letters from the U.S. Environmental
Protection Agency, the U.S. Department of Interior, and the ACHP, all of whom questioned the
Corps’ approach to consultation with the SRST. The ACHP observed that it had “not been
provided evidence that the Corps has met” the requirements of § 106, observing that “there is
likely to be significant tribal interest” and that “[t]he Corps’ approach to meeting its government-
to-government consultation is extremely important.” It later asked to be formally made a party
to consultation on the project.
97. Around the time of the draft EA, the Tribe also learned that the proponent had conducted cultural surveys at the Lake Oahe site and along the pipeline route during 2014 and 2015. Neither the proponent nor the Corps ever consulted with the Tribe about the protocols for those assessments or the area of potential affects, or had invited their participation as the Tribe had repeatedly requested. Instead, the proponent provided the Tribe with a massive quantity of its survey data, after it was complete, and provided an opportunity to comment.

98. During this same time frame, i.e., late 2015 and early 2016, the proponent stated repeatedly in public and private meetings that construction was slated to start in mid-May of 2016, regardless of any additional process requirements or needs.

99. In February of 2016, the Tribe and the commander of the Omaha District, Col. John Henderson, entered discussions about a visit to the reservation and the Lake Oahe crossing site. SRST Chairman Archambault emphasized in a letter to the Colonel that “there can be no meaningful consultation with respect to decisions that have already been made,” and urged a reopening of the NEPA process to assess route alternatives.

100. The meeting with the Colonel took place on Feb. 29, 2016, at which time the Colonel and Corps archaeologists toured the site with the Chairman, THPO, and tribal archaeologists. Tribal participants in this meeting emphasized the cultural importance of the site, and demonstrated it with specific evidence.

101. In a follow up letter, the Chairman expressed hope that the visit would constitute a “turning point” in what had been to that point a flawed process, and that the Corps could pursue greater consideration of the Tribe’s interests through a full EIS.

102. A follow up visit between Corps and Tribal archaeologists occurred on March 7, 2016, during which SRST staff pointed out places where moles had pushed dirt to the surface,
carrying prehistoric pottery shards, pieces of bone, flint, and tools. The sites shown to the Corps staff had never been previously assessed or recorded, consistent with the Tribe’s repeatedly expressed belief that the site generally was rich in unassessed sites of historic and cultural significance.

103. During this visit Corps archaeologists stated that they were unaware of many of the sites that they were witnessing and agreed with Tribal staff that additional study was required.

104. On March 15, 2016 the ACHP wrote to the Corps again, noting that the agency “remained perplexed” by the Corps’ difficulties in consulting with the SRST, pointing out that there was no tribal participation in identification surveys and urging the Corps to look at alternative pipeline alignments as required by ACHP regulations.

105. In later March 2016, Chairman Archambault invited Col. Henderson back to the reservation to continue the dialogue about impacts to historic properties. However, on April 22, 2016, the Corps’ next action was to make a formal finding that no historic properties were affected by the Lake Oahe decision.

106. The Tribal THPO requested that the ACHP review the April 22 decision by letter on May 2, 2016.

107. On May 6, 2016, the ACHP sent another letter responding to previous correspondence between the Corps and ACHP. The letter laid out a number of significant criticisms of the Corps’ compliance with § 106 and made recommendations for additional steps that Corps should take.

108. The Chairman of the SRST sent a letter to the Corps formally objecting to the “no historic properties effected” on May 18, 2015. The THPO also sent an objection letter on May
17, 2016. Neither the Chairman nor the THPO received any response to these formal objections besides additional general information from the Corps on their permitting process.

109. On May 19, 2016, the ACHP formally objected to the effects determinations made by the Corps for DAPL. The ACHP outlined several fundamental flaws with the Corps § 106 compliance, including a failure to properly define the undertaking and area of potential effects; inadequate Tribal consultation and incomplete identification efforts; and numerous procedural flaws.

110. The April 22, 2016 finding pertains only to the Lake Oahe crossing site. It does not apply to any the other hundreds of NWP 12 verifications along the pipeline’s route.

111. Section 106 consultation is required for the Corps’ verifications as well. But the Corps has not consulted with the Tribe to evaluate the impacts of PCN verifications on historic sites within its ancestral lands, including sites in South Dakota and Iowa. Instead, in issuing the verifications, it provided for tribal monitoring during construction.

VI. SPECIFIC FACTS RELATED TO NEPA COMPLIANCE FOR JULY 25, 2016 AUTHORIZATIONS

112. The Corps is evaluating different components of DAPL in multiple separate segments, each following an independent process and on its own timeline. The Corps’ documents for each segment fail to acknowledge the existence or impacts of the other segments.

113. One segment is made up of two crossings of Corps-managed or Corps-owned lands in North Dakota, at Lake Sakakawea and at Lake Oahe, roughly 230 miles apart from one another. Another segment is the crossing of Corps-managed and operated land and levees towards the other end of the pipeline, on the Illinois River. Finally, the Corps issued 204 verifications in four states that DAPL can proceed under NWP 12 where they cross jurisdictional waters.
114. In yet another NEPA process, the FWS reviewed the impacts of providing authorization to cross easements on private land intended to protect wildlife. In June of 2016, FWS released a final EA covering authorization to cross miles of grasslands and wetlands easements in North and South Dakota.

115. The Corps and FWS have pursued a NEPA process for each of these components independently of the other components. For the North Dakota crossings, the Omaha District of the Corps released a draft EA in December 2015 and a final EA and FONSI on July 25, 2016. For the Illinois River crossings, the St. Louis District of the Corps released an EA and FONSI on July 25, 2016, but without having provided a draft EA and any opportunity for public comment. For the FWS easements, an EA was issued in June of 2016. For the CWA NWP 12 verifications, the Corps has not taken any action to comply with NEPA, asserting that verifications are not federal actions subject to NEPA.

116. The North Dakota EA looks narrowly at the impacts of pipeline construction at the HDD crossing site only. It does not look at the indirect effect of facilitating pipeline construction to, from, and through the two HDD crossings. Accordingly, the EA is silent on the impacts to the environment associated with pipeline construction outside the immediate confines of the HDD crossing site, including oil spill risks to waters or lands of cultural significance to the Tribe.

117. The North Dakota EA also does not analyze the environmental impacts of the North Dakota crossings in the context of either the CWA verifications for the pipeline, the Illinois River § 408 permit, or the FWS easement crossings, all of which are integrally related to a single pipeline project.
118. In multiple sets of legal comments, the Tribe expressed its concerns regarding these and many other issues associated with the NEPA process.

119. On January 8, 2016, the U.S. Environmental Protection Agency ("EPA") sent comments to the Corps on the draft EA saying that the document lacked “sufficient analysis of direct and indirect impacts to water resources,” lacks information related to the operation of the pipeline, and that the document is “limited to small portions of the complete project and does not identify the related effects of the entire project segment.”

120. EPA sent additional comments on March 11, 2016, highlighting the proximity of the Tribe’s drinking water intake to the pipeline crossing. The letter highlighted multiple risks to water resources from the project, recommended additional analysis of emergency preparedness measures, and urged consideration of additional alternatives that reduced potential conflicts with drinking water supplies.

121. On March 29, 2016, the U.S. Department of the Interior sent a comment letter to the Corps urging preparation of a full Environmental Impact Statement ("EIS"). DOI highlighted the risks to the Tribe’s reservation and drinking water resources. The letter also observed that the Corps’ NEPA analysis should consider more of the pipeline route as a connected action under NEPA.

VII. SPECIFIC FACTS RELATED TO CWA/RHA COMPLIANCE FOR JULY 25, 2016 AUTHORIZATIONS

122. Construction of the DAPL will involve dredge and/or fill in waters of the United States in hundreds if not thousands of locations. Construction of DAPL will also involve obstructions to the capacity of navigable waters of the United States.

123. The Corps is only issuing individual permits at three locations on the entire length of the pipeline: at the two North Dakota reservoir crossings, and at the Illinois River crossing.
Those components of the pipeline require a permit under § 408 of the Rivers and Harbors Act and real estate actions because the pipeline will cross federally owned or managed land.

124. The remainder of the pipeline’s impacts on jurisdictional waters is being processed under NWP 12, which authorizes certain actions without an individual permit.

125. With respect to PCNs and verifications, the final verifications identify 2 locations in North Dakota, 10 locations in South Dakota, 61 locations in Iowa, and 45 locations in Illinois, for a total of 204 crossings in 1,168 miles of pipeline.

126. Since the purpose of the pipeline is to carry crude oil developed in western North Dakota to sites in Illinois, no component of the pipeline is useful without all of the other components of the pipeline in place

127. The Lake Oahe pipeline crossing will take place in close proximity to the Tribe’s public water supply, as well as a number of private water supplies, and irrigation intakes. The crossing will also impair tribal treaty rights on the Standing Rock reservation, including reserved water rights.

CLAIMS FOR RELIEF

I. FIRST CLAIM FOR RELIEF – FAILURE TO CONSULT UNDER § 106 OF THE NHPA

128. Plaintiff reincorporates the allegations in all preceding paragraphs.

129. Issuance of an individual or general § 404 permit is an “undertaking” as defined in the NHPA. As such, § 106 consultation is required to determine the effect of such undertaking on historic properties.

130. The Corps failed to consider the impacts of NWP 12 on historic or culturally significant properties, or otherwise engage in the § 106 process, prior to issuance of NWP 12 in 2012.
131. The Corps has never developed a programmatic agreement with the ACHP with respect to the NWP program.

132. Issuance of NWP 12 is a “final agency action” within the meaning of the APA.

133. The Corps’ failure to comply with the requirements of the NHPA and its implementing regulations is arbitrary, capricious, and contrary to law in violation of the APA, 5 U.S.C. § 706.

II. SECOND CLAIM FOR RELIEF – UNLAWFUL ABDICATION OF § 106 RESPONSIBILITIES

134. Plaintiff reincorporates the allegations in all preceding paragraphs.

135. Section 106 of the NHPA directs federal agency heads to take into account the effect of any undertaking on historic properties, and provide the ACHP and affected parties a reasonable opportunity to comment on such undertaking.

136. Under ACHP regulations, “it is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance….” 36 C.F.R. § 800.2(a).

137. In issuing NWP 12, however, the Corps does not fulfill the requirements of § 106 or “take legal and financial responsibility” for compliance. Rather, it provided up-front CWA/RHA authorization to discharge fill into waters of the United States, effectively ending its involvement in most situations. In so doing, it improperly abdicated its § 106 responsibility, and delegated to the proponent its NHPA duty to determine whether there would be any potential impact to historic properties. If the proponent determines for itself that no historic properties are affected, the Corps is not notified of the action and provides no verification of NWP 12 authorization. In such circumstances, the Corps does not consider, and does not give the ACHP
or interested parties a reasonable opportunity to comment on, the potential impacts to historic sites. In so doing, the Corps abdicated its § 106 duties and/or improperly delegated them to private parties.

138. ACHP regulations direct that agencies “shall involve” consulting parties in findings and determinations made during the § 106 process. 36 C.F.R. § 800.2(a)(4). Consulting parties must include Indian Tribes “that attach religious and cultural significance to historic properties that may be affected by an undertaking.” Id. § 800.2(c)(2). The agency “shall ensure” that the § 106 process provides such Tribe “a reasonable opportunity” to “identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” Id. §800.2(c)(2)(ii)(A). Further, it is the “responsibility of the agency official to make a reasonable and good faith effort to identify Indian Tribes” to be consulted in the § 106 process. Id. § 800.2(c)(4)

139. Applicants for federal permits are “entitled to participate” as consulting parties in § 106 consultation, and the responsible official may “authorize an applicant … to initiate consultation with” consulting parties, but “remains legally responsible for all findings and determinations charged to the agency official.” Id. Such authorization requires notice to all state and tribal historic preservation offices, and federal agencies “remain responsible for their government-to-government relationships with Indian Tribes.” Id. Moreover “the views of the public are essential” to the § 106 process and agencies “shall seek and consider the views of the public” in carrying out its responsibilities. Id. § 800.2(d).
140. Additionally, ACHP regulations require Federal agencies to “ensure” that all actions taken by employees or contractors “shall meet professional standards under regulations developed by” the ACHP. However, in issuing NWP 12 and GC 20, the Corps did not “ensure” that any standards at all would be used by private parties delegated to make their own § 106 threshold determinations.

141. In enacting NWP 12 and GC 20, the Corps authorized discharges into waters of the United States in a way that sidesteps virtually all of the requirements of the ACHP § 106 regulations. Under NWP 12 and GC 20, private project proponents can make their own determinations as to the effects on tribally significant sites without any involvement of the Tribes. Under NWP 12 and GC 20, Tribes are not provided any opportunity, let alone a reasonable one, to identify their concerns or assist in the identification of historic sites. Under NWP 12 and GC 20, the Corps is not responsible for the findings and determinations regarding adverse effects. Under NWP 12 and GC 20, private project proponents can be made in a vacuum, with no input, no notice, no accountability, and no oversight. Moreover NWP 12 and GC 20 do not establish definitions or standards to be used by private project proponents on how to make determinations of historic impacts, leaving it up to the proponents’ unfettered discretion to determine whether a PCN is required or not.

142. NWP 12 and GC 20 are being applied to DAPL to authorize discharges into waters of the United States with no verification or oversight by the Corps, and no accompanying § 106 process. Through NWP 12 and GC 20, the Corps is violating non-delegable duties: there is no consultation process, there are no standards governing determinations made by private parties, and the Corps has no mechanism to “ensure” compliance with its legal responsibilities.
143. The Tribe is harmed by NWP 12 and GC 20 because they have led and will continue to lead to the destruction of culturally significant sites. Following NWP 12 and GC 20, DAPL proponents have conducted gravely deficient cultural surveys, with no involvement by the Tribes. DAPL proponents have not found historic properties that would be affected by pipeline construction in Corps’ jurisdictional areas. Accordingly, they have not filed PCNs and sought verification at the vast majority of sites at which they will be discharging into waters of the United States.

144. The ACHP wrote to the Corps on May 6, 2016 to share the concern that Tribes like Standing Rock Sioux Tribe have not had the opportunity to share relevant information “in the vicinity of water crossings and within the project [right of way] that the applicant assumes will not require PCNs under General Conditions 20 and 31 [standards for PCNs] of the NWP protocols.”

145. Issuance of NWP 12 is a “final agency action” within the meaning of the APA.

146. The Corps’ delegation of its § 106 responsibilities to private parties in NWP 12 and GC 20 is arbitrary, capricious, and contrary to law in violation of the APA, 5 U.S.C. § 706.

III. THIRD CLAIM FOR RELIEF – FAILURE TO REQUIRE CONSIDERATION OF INDIRECT EFFECTS UNDER § 106

147. Plaintiff reincorporates the allegations in all preceding paragraphs.

148. Under NHPA, federal agencies must consult on the effects of “undertakings” to historic properties. An undertaking is defined by rule to mean “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a federal agency, those carried out with Federal financial assistance, and those requiring a federal permit, license or approval.” 36 C.F.R. § 800.16(y) (emphasis added).
149. The entirety of a private pipeline project that requires Corps’ authorization for hundreds if not thousands of discharges into waters of the United States is an “undertaking” for purposes of § 106 because it requires federal approval in order to occur and because it is under the “indirect jurisdiction” of the Corps.

150. GC 20 directs permittees to file a PCN with the Corps if the authorized activity will have the potential to cause effects to historic properties. However, the Corps directs permittees to only consider the direct effects of activities in jurisdictional waters, and not indirect impacts such as construction impacts in uplands.

151. ACHP regulations require consideration of indirect effects of agency undertakings, including areas in uplands outside of Corps jurisdiction. With respect to DAPL, in a May 19, 2016 letter, the ACHP confirmed that the entire 1,168-mile crude oil pipeline is the “undertaking” for purposes of § 106 consultation, and accused the Corps of “not differentiating appropriately between federal action and the undertaking…. The ACHP concluded that “the Corps’ effects determinations, thus far, fail to consider the potential for effects from the larger undertaking on historic properties including those of cultural and religious significance to Indian Tribes.”

152. Issuance of NWP 12 is a “final agency action” within the meaning of the APA.

153. As applied to DAPL, the authorization to discharge into waters of the United States, without consideration of indirect impacts on historic sites as required by § 106, is arbitrary, capricious, and contrary to law in violation of the APA, 5 U.S.C. § 706.

IV. FOURTH CLAIM FOR RELIEF – VIOLATIONS OF NATIONAL HISTORIC PRESERVATION ACT WITH RESPECT TO JULY 25, 2016 VERIFICATIONS AND § 408 PERMITS

154. Plaintiff reincorporates the allegations in all preceding paragraphs.
A. **Incorrect Definition of “Area of Potential Effects”**

155. Section 106 of the National Historic Preservation Act (“NHPA”) requires that, prior to issuance of a federal permit or license, that federal agencies shall take into consideration the effects of that “undertaking” on historic properties. 54 U.S.C. § 306108. Issuance of § 408 permits and CWA/RHA verifications under NWP 12 are federal undertakings within the meaning the NHPA.

156. Early in the NHPA process, an agency, in consultation with the THPO, must determine the area of potential effects (“APE”) of a federal undertaking. 36 C.F.R. § 800.4(1)(1). The APE is defined by regulation to include the area “within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties…. The [APE] is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” *Id.* § 800.16(d).

157. The Corps defined the APE for the Lake Oahe crossing unlawfully narrowly, and inconsistently with both the ACHP regulations and its own guidance.

158. The APE for the crossing includes only a tiny parcel immediately surrounding the HDD pits on each side of the river and a narrow strip for an access road and “stringing area” on the west side of the crossing. On the east side of the river, the APE is difficult to determine because in some of the Corps’ figures, the “project workspace” includes both the access road and stringing area, while in others only the HDD pit is included.

159. The Corps unlawfully omits the actual pipeline route that will be entering and exiting the HDD borehole from the APE. Pipeline construction would involve 100-150 yard swath of industrial development—clearing, grading, excavation of a 6 to 10 foot trench, and construction work to shape and place the pipeline. Such development would destroy any historic...
or culturally significant sites in its path. But because these sites are outside the APE, the Corps’ conclusion does not consider them.

160. The pipeline path should be in the APE because, even where the Corps lacks direct permitting jurisdiction over segments in between regulatory areas, pipeline construction in such areas is an indirect effect of the HDD process. *Id.* § 800.16(d).

161. The Corps’ failure to consider the impacts to historic and sacred sites outside of the immediate and narrow confines of the HDD drilling sites was arbitrary, capricious, and not in accordance with law in violation of the APA and the NHPA.

B. Inadequate § 106 Consultation

162. The Section 106 process requires consultation with Indian Tribes on federal undertakings that potentially affect sites that are sacred or culturally significant to Indian Tribes. 36 C.F.R. § 800.2(c)(2). Consultation must occur regarding sites with “religious and cultural significance” even if they occur on ancestral or ceded land. *Id.* § 800.2(c)(2)(II)(D); 54 U.S.C. § 302707.

163. Under the consultation regulations, an agency official must “ensure” that the process provides Tribes with “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties….articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” *Id.* § 800.2(c)(ii)(A). This requirement imposes a “reasonable and good faith effort” by agencies to consult with Tribes in a “manner respectful of tribal sovereignty.” *Id.* § 800.2(c)(2)(II)(B).

164. The Corps’ final permit decision is the product of a fundamentally flawed consultation process that does not meet the requirements of the ACHP regulations.
165. Consultation never occurred at all on the bore hole testing. The Tribe was notified and the work was done before the Tribe’s serious concerns were even received by the Corps.

166. Consultation did not start at the earliest phases of the process. Consultation did not occur on the “area of potential affects.” Consultation did not occur on participation in the surveys or protocols for how they should be conducted. 36 C.F.R. § 800(c)(2)(II)(A).

167. Instead, the THPO was given a brief window to “comment” on the proponents’ deeply flawed and completed surveys long after the route had been selected and construction scheduled.

168. The Corps’ April 22, 2016 “no effect” determination contains citations to documents, like “Landt & McCord, 2016,” that have never been provided to the Tribe.

169. The Tribe acted promptly and repeatedly to draw the Corps’ attention to its serious concerns. It immediately responded to all correspondence from the Corps.

170. Information was not sought from the Tribe in determining the scope of its identification efforts, as required by 36 C.F.R. § 800.4(a), nor was the Tribe given a meaningful opportunity to assist the Corps in the identification of this culturally rich but largely unassessed site. Id. § 800.4(b).

171. The Standing Rock THPO formally objected to the Corps’ finding of no historic properties affected on May 17, 2016. Although the regulations required the Corps to either consult with the objecting party to resolve the disagreement, or request action by the ACHP, neither of those things have ever happened. 36 C.F.R. § 800.4(d)(1)(ii).

172. The ACHP formally objected to the Corps’ findings of no historic properties affected on May 19, 2016. Under ACHP regulations, such an objection must be taken into
account by the Corps prior to reaching a final decision, and the Corps must prepare a summary of
the decision and its rationale, along with evidence of consideration of the ACHP’s objection. 36
C.F.R. § 800.4(d)(1)(iv).

173. There are significant unevaluated properties in and near the Lake Oahe crossing
work site, as well as the broader pipeline route. Some sites deemed “ineligible” by DAPL’s
private surveys may in fact be eligible. Some sites deemed unevaluated have in fact been
evaluated and are potentially eligible.

174. The Corps’ decision on the Lake Oahe crossing was arbitrary, capricious, and not
in accordance with law in violation of the APA and the NHPA.

C. No § 106 Consultation for Verifications

175. The Corps’ NWP general conditions require completion of the § 106 process for
NWP permit verifications and before work can begin. The proponent must present a PCN to the
Corps wherever an activity “may have the potential to cause effects to any historic properties
listed on, determined to be eligible for listing on, or potentially eligible for listing” on the

176. The Corps has never consulted with the Tribe on issuance of verifications in its
ancestral lands, which span the length of the pipeline. The Tribe is unaware of any formal § 106
findings for verifications outside of the two sites in North Dakota.

177. The Corps’ decision that § 106 consultation had been completed on the 204 CWA
verifications was arbitrary, capricious, and not in accordance with law in violation of the APA
and the NHPA.
V. FIFTH CLAIM FOR RELIEF – VIOLATIONS OF NEPA WITH RESPECT TO JULY 25, 2016 VERIFICATIONS AND § 408 PERMITS

178. Plaintiff hereby alleges and incorporates and restates all previous paragraphs of this complaint.

A. Failure to Consider Indirect Effects of Missouri River Crossings

179. NEPA requires consideration of indirect effects of agency decision. The Corps misapplied these legal standards in the final North Dakota EA. It looked narrowly at the impacts of the river crossings themselves, and did not disclose or consider the impacts of other components of the pipeline, either related to its construction or its operation to transport 570,000 barrels a day of crude oil over nearly 1200 miles.

180. Pipeline construction is an indirect impact of the Corps § 408 permits because it is proximately caused by the Corps’ decision. Without the ability to cross the Missouri River, the pipeline could not be built. Pipeline construction is a reasonably foreseeable outcome of the Corps’ decision.

181. Alternatively, pipeline construction could be considered an indirect effect of the Corps’ § 408 permit because it is a future action that is reasonably certain to occur as long as DAPL receives Corps’ authorization at the Missouri River crossings.

182. The Corps failure to consider and disclose the impacts of the pipeline’s construction and operation is arbitrary and capricious and not in accordance with law in violation of the APA and NEPA.

B. Unlawful Segmentation of Project Components

183. NEPA requires consideration of separate components of a single project in a single NEPA review. 40 C.F.R. § 1508.25. NEPA regulations state that connected actions should be considered in a single EIS, defining them as action that “cannot or will not proceed
unless other actions are taken previously or simultaneously," and “are interdependent parts of a larger action and depend on the larger action for their justification.”  

184. The Corps’ permitting regulations also require it to reject applications that seek to segment a single project into multiple permits. 33 C.F.R. § 325.1(c)(2) (“All activities which the applicant plans to undertake which are reasonable related to the same project and for which a DA permit would be required should be included in the same permit application.”).

185. The Corps has not adhered to these requirements, despite having them pointed out to them by the Tribe, multiple federal agencies, and others. Rather, it unlawfully segmented its NEPA review into separate components in North Dakota and in Illinois, each of which is proceeding independent of the other.

186. Moreover, the FWS issued its own EA and FONSI for a component of this pipeline project. That EA and FONSI did not evaluate the impacts of the FWS decision in the context of the Corps permits or the larger project which it was a part of.

187. The Illinois § 408 permit, the North Dakota § 408 permit, and the FWS grassland easements, are connected actions because they meet the criteria in 40 C.F.R. § 1508.25. NEPA requires them to be considered in a single NEPA document. They were not.

188. By unlawfully segmenting multiple components of the same pipeline project, the Corps has acted in a manner that is arbitrary, capricious, and not in accordance with law, in violation of NEPA and the APA.

C. Arbitrary Economic Analysis

189. NEPA and its implementing regulations require the Corps to produce environmental review documents that are factually accurate, well supported, and that fully discloses the impacts of an action to the public. 40 C.F.R. § 1502.

190. These standards apply equally to an agency’s treatment of economic data. 40
C.F.R. §§ 1502.23 (cost benefit analysis), 1508.8 (EIS must evaluate economic effects). An agency’s failure to include and analyze information that is important, significant, or essential renders an EA and FONSI inadequate. 40 C.F.R. § 1500.1. These fundamental NEPA principles apply to both economic and environmental analyses in an EIS. 40 C.F.R. §§ 1502.24, 1508.8 (“effects” in an EIS must evaluate include economic impacts).

191. In reaching its decision on the North Dakota crossings, the Corps looked very narrowly at only two tiny segments of the pipeline, ignoring the environmental and economic risks and harms of the pipeline as a whole.

192. However, it balanced these narrow risks and harms against the full economic benefit of the pipeline as a whole. For example, the EA cites the full $3.78 billion investment “directly impacting the local, regional, and national labor force by creating nearly 12,000 construction jobs.” Final EA, at 80. It repeats DAPL’s public talking points about providing “considerable labor income and state income tax revenue – including the generation of more than $13.4 million in ad valorem taxes.” Id.

193. The Corps’ decision to balance the full economic benefits of building and operating the entire pipeline against the economic risks of constructing tiny segments of that pipeline is arbitrary and capricious and not in accordance with law, in violation of NEPA and the APA.

VI. SIXTH CLAIM FOR RELIEF: VIOLATIONS OF THE CLEAN WATER ACT AND RIVERS AND HARBORS ACT WITH RESPECT TO JULY 25, 2016 VERIFICATIONS AND § 408 PERMITS

194. Plaintiff incorporates by reference all preceding paragraphs.
A. Arbitrary and Inadequate Public Interest Review for North Dakota Permits

195. Prior to issuance of a § 408 permit, or any other CWA/RHA permit, the Corps is required to conduct a “public interest” review consistent with its governing regulations, 33 C.F.R. § 320.4(a).

196. In conducting a public interest review, the Corps must consider the probable impacts of the proposed action, and weigh “all those factors which become relevant.” Id. The Corps must balance the benefits “which reasonably may be expected to accrue” from the action against the “reasonably foreseeable detriments.” Id. “All factors” which may be relevant to the proposal must be considered, including the extent of the public and private need for the proposal, and the existence of unresolved conflicts around resource use. The District Engineer is authorized to make an “independent review of the need for the project from the perspective of the overall public interest.” Id. § 320.4(q)

197. The Corps’ did not conduct a valid public interest review of the § 408 authorizations in North Dakota. To the extent it conducted any public interest review at all, it suffered from all of the same flaws as the NEPA review identified above. Specifically, the Corps conducted an arbitrary and segmented approach that ignored virtually all of the indirect effects of its decision, specifically, the construction and operation of the pipeline itself; and it conducted an arbitrary and one-sided economic balance in which the benefits of the entire $4 billion pipeline were weighed against the impacts of tiny segments of the pipeline.

198. By failing to undertake a lawful and adequate public interest review of the actions proposed in its § 408 decision, the Corps has acted in a manner that is arbitrary, capricious, and not in accordance with law, in violation of the CWA and the APA.
B. Unlawful Verification For Lake Oahe Crossing

199. In addition to a § 408 permit, the portion of the pipeline that crosses under Lake Oahe requires a Rivers and Harbors Act § 10 permit. 33 C.F.R. § 322.3(a)

200. On July 25, 2016, the Corps issued verification that the Lake Oahe pipeline crossing complied with the conditions of NWP 12, and hence was authorized under § 10 of the Rivers and Harbors Act.

201. In order to “qualify” for NWP authorization, proposals must meet a number of general conditions. 77 Fed. Reg. 10184, 10282 (Feb. 21, 2012).

202. The Lake Oahe crossing does not comply with these conditions and, accordingly, does not “qualify” for NWP 12. See also 33 C.F.R. § 330.6(a)(2) (“If the [Army Corps] decides that an activity does not comply with the terms or conditions of an NWP, he will notify the person desiring to do the work and instruct him on the procedures to seek authorization under a regional general permit or individual permit.”).

203. General Condition 7 states that no activity may be authorized under a NWP that is in “proximity” to public water supplies. 77 Fed. Reg. at 10283. The Lake Oahe crossing is in close proximity to the Tribe’s source of drinking water for a significant portion of the reservation community.

204. The potential impact on drinking water for the Standing Rock and many other Tribes and communities has also been emphasized by the Environmental Protection Agency and the U.S. Department of Interior, as well as the Tribal government and many of its members.

205. Further, General Condition 17 states that no activity authorized by a NWP may “impair tribal rights” including “reserved water rights.” 77 Fed. Reg. at 10283. DAPL is routed just upstream of the Tribe’s reservation boundary, where any oil spill would have devastating effects within the reservation. The Reservation necessarily includes the protection of adequate...
water quality. The Lake Oahe crossing does not “qualify” for a NWP 12 because of the risks to Tribal resources protected by treaty.

206. The Corps decision to verify that the Lake Oahe crossing was consistent with NWP 12 was arbitrary, capricious and not in accordance with law, in violation of the APA.

C. Issuance of Verifications for 204 Jurisdictional Waters

207. Under the Corps’ regulations, a single project can only proceed under both an NWP and an individual permit where the “portions qualifying for NWP authorization would have independent utility and are able to function or meet their purpose independent of the total project.” 33 C.F.R. § 330.6(d).

208. For the reasons discussed immediately above, the Lake Oahe crossing requires an individual permit. Moreover, Section 408 authorizations are individual “permits” within the meaning of this regulation. See id., § 320.2(e); § 320.4 (general policies applicable to “all” Army permits).

209. No component of DAPL has “independent utility” or the “ability to function” without the other components of the pipeline. As a result of this, the Corps cannot authorize some portions of DAPL under NWP 12, and other portions as individual permits.

210. Because the Lake Oahe crossing requires an individual permit, no other component of the pipeline can be authorized under NWP 12.

211. Issuance of a verification by the Corps constitutes a final agency action within the meaning of the APA.

212. The Corps’ verification of 204 additional crossings of jurisdictional waters was arbitrary and capricious and not in accordance with law, in violation of the APA and the CWA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:
1. Declare that NWP 12 is invalid as applied to DAPL because the Corps failed to comply with § 106 at the time of its issuance, in violation of the NHPA.

2. Declare that NWP 12 is invalid as applied to DAPL because the Corps unlawfully delegated its responsibility to comply with § 106 to private parties, effectively allowing discharge into waters of the United States without any consideration of impacts to historic properties, in violation of the NHPA.

3. Declare that NWP 12 is invalid as applied to DAPL because the Corps authorized discharge into waters of the United States without consideration of indirect impacts on historic sites, in violation of the NHPA.

4. Declare that the July 25, 2016 authorizations and verifications are arbitrary, capricious, and in violation of the NHPA, NEPA, CWA and RHA, and implementing regulations.

5. Vacate NWP 12 as applied to DAPL.

6. Enjoin the Corps to direct DAPL to seek either an individual permit covering all discharges along the entire pipeline route, or submit PCNs for all impacts to waters of the U.S., and fully comply with § 106 prior to finalizing such permit or verifications.

7. Vacate all authorizations and verifications related to DAPL pending full compliance with law.

8. Vacate the final EA and FONSI.

9. Retain jurisdiction over this matter to ensure that the Corps complies with the law.

10. Award Plaintiff its reasonable fees, costs, expenses, and disbursements, including attorneys’ fees, associated with this litigation; and
11. Grant Plaintiff such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 27th day of July, 2016.

/s/ Patti A. Goldman  
Patti A. Goldman, DCBA # 398565  
Jan E. Hasselman, WSBA # 29107  
(Pro Hac Vice Application Pending)  
Stephanie Tsosie, WSBA # 49840  
(Pro Hac Vice Application Pending)  
Earthjustice  
705 Second Avenue, Suite 203  
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Attorneys for Plaintiff
# CIVIL COVER SHEET

## I. PLAINTIFFS

STANDING ROCK SIOUX TRIBE

## II. BASIS OF JURISDICTION

### (PLACE AN X IN ONE BOX ONLY)

- **1 U.S. Government Plaintiff**
- **2 U.S. Government Defendant**
- **Federal Question**
  - (U.S. Government Not a Party)
- **4 Diversity**
  - (Indicate Citizenship of Parties in item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES

### (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- **Citizen of this State**
- **Citizen of Another State**
- **Citizen or Subject of a Foreign Country**
- **Incorporated or Principal Place of Business in this State**
- **Incorporated or Principal Place of Business in Another State**
- **Foreign Nation**

## IV. CASE ASSIGNMENT AND NATURE OF SUIT

### A. Antitrust

- **410 Antitrust**

### B. Personal Injury/ Malpractice

- **310 Airplane**
- **315 Airplane Product Liability**
- **320 Assault, Libel & Slander**
- **330 Federal Employers Liability**
- **340 Marine**
- **345 Marine Product Liability**
- **350 Motor Vehicle**
- **355 Motor Vehicle Product Liability**
- **360 Other Personal Injury**
- **362 Medical Malpractice**
- **365 Product Liability**
- **367 Health Care/Pharmaceutical**
- **368 Asbestos Product Liability**

### C. Administrative Agency Review

- **151 Medicare Act**
- **Social Security**
  - 861 HIA (1935f)
  - 862 Black Lung (923)
  - 863 DIWC/DIWV (405(g))
  - 864 SSID Title XVI
  - 865 RSI (405(g))
- **Other Statutes**
  - 891 Agricultural Acts
  - 893 Environmental Matters
  - 890 Other Statutory Actions (If Administrative Agency is Involved)

### D. Temporary Restraining Order/Preliminary Injunction

Any nature of suit from any category may be selected for this category of case assignment.

*(If Antitrust, then A governs)*

### E. General Civil (Other)

- **210 Land Condemnation**
- **220 Foreclosure**
- **230 Rent, Lease & Ejectment**
- **240 Torts to Land**
- **245 Tort Product Liability**
- **290 All Other Real Property**
- **370 Other Fraud**
- **371 Truth in Lending**
- **380 Other Personal Property Damage**
- **385 Property Damage - Product Liability**

### F. Pro Se General Civil

- **470 Racketeer Influenced & Corrupt Organization**
- **480 Consumer Credit**
- **490 Cable/Satellite TV**
- **850 Securities/Commodities/ Exchange**
- **896 Arbitration**
- **899 Administrative Procedure Act/Review or Appeal of Agency Decision**
- **950 Constitutionality of State Statutes**
- **890 Other Statutory Actions (if not administrative agency review or Privacy Act)**
<table>
<thead>
<tr>
<th>G. Habeas Corpus/2255</th>
<th>H. Employment Discrimination</th>
<th>I. FOIA/Privacy Act</th>
<th>J. Student Loan</th>
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<tbody>
<tr>
<td>510 Motion/Vacate Sentence</td>
<td><em>(If pro se, select this deck)</em></td>
<td>890 Other Statutory Actions (if Privacy Act)</td>
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<tr>
<td>463 Habeas Corpus – Alien Detainee</td>
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<th>K. Labor/ERISA (non-employment)</th>
<th>L. Other Civil Rights (non-employment)</th>
<th>M. Contract</th>
<th>N. Three-Judge Court</th>
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<td>710 Fair Labor Standards Act</td>
<td>441 Voting (if not Voting Rights Act)</td>
<td>110 Insurance</td>
<td>441 Civil Rights – Voting (if Voting Rights Act)</td>
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<td>720 Labor/Mgmt. Relations</td>
<td>443 Housing/Accommodations</td>
<td>120 Marine</td>
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<td>740 Labor Railway Act</td>
<td>440 Other Civil Rights</td>
<td>130 Miller Act</td>
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<td>751 Family and Medical Leave Act</td>
<td>445 Americans w/Disabilities – Employment</td>
<td>140 Negotiable Instrument</td>
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<td>790 Other Labor Litigation</td>
<td>446 Americans w/Disabilities – Other</td>
<td>150 Recovery of Overpayment &amp; Enforcement of Judgment</td>
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<th>VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)</th>
<th>VII. REQUESTED IN COMPLAINT</th>
<th>VIII. RELATED CASE(S), IF ANY</th>
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<tr>
<td>O 1 Original Proceeding</td>
<td>5 USC §706 - Plaintiff seeks review of multiple fed’l agency actions which effectively authorize construction of crude oil pip</td>
<td>CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23</td>
<td>(See instruction)</td>
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<td>O 2 Removed from State Court</td>
<td>DEMAND</td>
<td>YES ☑ NO ☒</td>
<td>YES ☑ NO ☒</td>
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<td>O 3 Remanded from Appellate Court</td>
<td>JURY DEMAND:</td>
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<td>If yes, please complete related case form</td>
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<td>O 4 Reinstated or Reopened</td>
<td>Check YES only if demanded in complaint</td>
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<td>O 8 Multi-district Litigation – Direct File</td>
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DATE: July 27, 2016
SIGNATURE OF ATTORNEY OF RECORD

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT: (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk’s Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.
UNITED STATES DISTRICT COURT
for the
District of Columbia

STANDING ROCK SIOUX TRIBE

v.

UNITED STATES ARMY CORPS OF ENGINEERS

SUMMONS IN A CIVIL ACTION

To: (Defendant’s name and address) UNITED STATES ARMY CORPS OF ENGINEERS
441 G Street NW
Washington, DC 20314-1000

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you
are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ.
P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of
the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff’s attorney,
whose name and address are:  Patti Goldman
Jan Hasselman
Stephanie Tsosie
Earthjustice
705 Second Avenue, Suite 203
Seattle, Washington 98104

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.

CLERK OF COURT

Date: __________________________

Signature of Clerk or Deputy Clerk
PROOF OF SERVICE
(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for (name of individual and title, if any) was received by me on (date) ________________________.

☐ I personally served the summons on the individual at (place) ________________________________ on (date) ________________________; or

☐ I left the summons at the individual’s residence or usual place of abode with (name) ________________________, a person of suitable age and discretion who resides there, on (date) ________________________ , and mailed a copy to the individual’s last known address; or

☐ I served the summons on (name of individual) ________________________________ , who is designated by law to accept service of process on behalf of (name of organization) ________________________________ on (date) ________________________ ; or

☐ I returned the summons unexecuted because _____________________________________________ ; or

☐ Other (specify):

My fees are $ __________ for travel and $ __________ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: ___________________________

Server’s signature

Printed name and title

Server’s address

Additional information regarding attempted service, etc:
“Since the founding of this nation, the United States’ relationship with the Indian tribes has been contentious and tragic. America’s expansionist impulse in its formative years led to the removal and relocation of many tribes, often by treaty but also by force.” Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001). This case also features what an American Indian tribe believes is an unlawful encroachment on its heritage. More specifically, the Standing Rock Sioux Tribe has sued the United States Army Corps of Engineers to block the operation of Corps permitting for the Dakota Access Pipeline (DAPL). The Tribe fears that construction of the pipeline, which runs within half a mile of its reservation in North and South Dakota, will destroy sites of cultural and historical significance. It has now filed a Motion for Preliminary Injunction, asserting principally that the Corps flouted its duty to engage in tribal consultations under the National Historic Preservation Act (NHPA) and that irreparable harm will ensue. After digging through a substantial record on an expedited basis, the Court cannot concur. It concludes that the Corps has likely complied with the NHPA and that the Tribe has not shown it will suffer injury
that would be prevented by any injunction the Court could issue. The Motion will thus be denied.

I. **Background**

DAPL is a domestic oil pipeline designed to move over a half-billion gallons of crude oil across four states daily. The oil enters the pipeline in North Dakota, crosses South Dakota and Iowa, and winds up in Patoka, Illinois, nearly 1,200 miles later. Although the route does not actually cross the Standing Rock reservation, it runs within a half-mile of it.

A project of this magnitude often necessitates an extensive federal appraisal and permitting process. Not so here. Domestic oil pipelines, unlike natural-gas pipelines, require no general approval from the federal government. In fact, DAPL needs almost no federal permitting of any kind because 99% of its route traverses private land.

One significant exception, however, concerns construction activities in federally regulated waters at hundreds of discrete places along the pipeline route. The Corps needed to permit this activity under the Clean Water Act or the Rivers and Harbors Act – and sometimes both. For DAPL, accordingly, it permitted these activities under a general permit known as Nationwide Permit 12. The Tribe alleges that the Corps violated multiple federal statutes in doing so, including the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). In its Complaint, the Tribe asserts that this DAPL permitting threatens its environmental and economic well-being, as well as its cultural resources.

Despite this broad lawsuit, however, the Standing Rock Sioux now seek a preliminary injunction only on the alleged violation of the NHPA. That statute encompasses sites of cultural or religious significance to Indian tribes and requires that federal agencies consult with tribes prior to issuing permits that might affect these historic resources. The Tribe claims that the
Corps did not fulfill this obligation before permitting the DAPL activities. It bears noting that the Tribe does not press its environmental claims under NEPA here. Nor does it seek a preliminary injunction to protect itself from the potential environmental harms that might arise from having the pipeline on its doorstep. Instead, it asserts only that pipeline-construction activities – specifically, the grading and clearing of land – will cause irreparable injury to historic or cultural properties of great significance.

The statutes and permitting scheme involved in this Motion are undeniably complex. The Court first sets forth the operation of the NHPA, which the Tribe asserts was violated. It next explains the Clean Water Act and the Rivers and Harbors Act, under which the Corps permitted the DAPL activities. Subsequent sections lay out the factual and legal proceedings that have taken place thus far.

A. National Historic Preservation Act

Congress enacted the NHPA in 1966 to “foster conditions under which our modern society and our historic property can exist in productive harmony.” 54 U.S.C. § 300101(1). To this end, Section 106 of the Act requires a federal agency to consider the effect of its “undertakings” on property of historical significance, which includes property of cultural or religious significance to Indian tribes. Id. §§ 306108, 302706(b). An undertaking is defined broadly to include any “project, activity, or program” that requires a federal permit. Id. § 300320. Section 106, like the National Environmental Policy Act, is often described as a “stop, look, and listen” provision. See Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 166 (1st Cir. 2003) (quoting Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999) (per curiam)). The agency must also give the Advisory Council on Historic Protection, which is charged with passing regulations to govern the implementation of
Section 106, “a reasonable opportunity to comment on the undertaking.” 54 U.S.C. § 306108. The agency must further consult with, *inter alia*, tribes “that attach religious or cultural significance to [affected] property.”  54 U.S.C. § 302706(b). Once this is done, Section 106 is satisfied. In other words, the provision does not mandate that the permitting agency take any particular preservation measures to protect these resources. See *CTIA-Wireless Ass’n v. FCC*, 466 F.3d 105, 106-07 (D.C. Cir. 2006) (citing *Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000)).

The Advisory Council also promulgates the regulations necessary to implement Section 106, see 54 U.S.C. § 304108(a), and these regulations “command substantial judicial deference.” *McMillan Park Comm. v. Nat’l Capital Planning Comm’n*, 968 F.2d 1283, 1288 (D.C. Cir. 1992). Under them, the permitting agency – here, the Corps – first determines “whether the proposed Federal action is an undertaking . . . and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.” 36 C.F.R. § 800.3(a). Where the agency decides either that there is no undertaking or that the undertaking is not the “type of activity” that has the “potential to cause effects on historic properties, assuming such . . . properties were present,” the Section 106 process is complete. Id. § 800.3(a)(1). No consultation happens and the permit may issue. Id.

Things get more complicated where the agency cannot make this determination. In such a situation, the agency must complete a multi-step “consultation” process before it permits the undertaking. Id. § 800.16(f). Indian tribes that “attach religious and cultural significance to historic properties” that may be affected by the “undertaking” are a consulting party in this process even when the properties are located outside reservation lands. Id. § 800.2(a)(4), (c)(2)(ii). The regulations in fact instruct agencies to recognize that property of importance to Indian tribes is “frequently” located on “ancestral, aboriginal, or ceded lands.” Id.
§ 800.2(c)(2)(ii)(D). Once its interests are implicated, the affected tribe must be given a reasonable opportunity: “to identify its concerns about [these] properties”; to “advise on the identification and evaluation of” them; to “articulate its views on the undertaking’s effects”; and to “participate in the resolution of adverse effects.” Id. § 800.2(c)(2)(ii)(A). The agency is further directed to conduct these consultations “early in the planning process,” id., in a “sensitive manner respectful of tribal sovereignty,” and recognizing “the government-to-government relationship between the Federal Government and Indian tribes.” Id. § 800.2(c)(2)(ii)(B)-(C).

The regulations then put meat on these aspirational bones by laying out the step-by-step consultative process that must occur. The process begins with initial planning, where the agency “determine[s] the appropriate SHPO . . . to be involved.” Id. § 800.3(c). The State Historic Preservation Officer – viz., SHPO – is designated by the governor of the state to, inter alia, administer this national historic-preservation program at the state level. In consultation with this Officer, an agency official then “identif[ies] any other parties entitled to be consulting parties and invite[s] them to participate.” Id. § 800.3(f).

Such parties then assist the agency to identify potential historic properties in the first phase. The permitting official, along with the SHPO, initially “[d]etermine[s] and document[s] the area of potential effects,” “[r]eview[s] existing information on historic properties within the area of potential effects,” “[s]eek[s] information, as appropriate, from consulting parties,” and “[g]ather[s] information from any [consulting] tribe . . . to assist in identifying properties” of potential significance to them. Id. § 800.4(a). Based on this information, the agency then “shall take the steps necessary to identify historic properties within the area of potential effects.” Id. § 800.4(b). This identification effort extends to the “geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic
properties, if any such properties exist.”  *Id.* § 800.16(d) (defining “area[s] of potential effects”). The scope of this area is also “influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.”  *Id.* In this area, the official, through consultations, must “make a reasonable and good faith effort,” “which may include background research, consultation, oral history interviews, sample field investigation, and field survey” to identify potential historic properties.  *Id.* § 800.4(b)(1) (emphasis added). In deciding on the “[l]evel of effort” required, the official “take[s] into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.”  *Id.*

Once the potentially relevant historic sites are identified, the official moves on to evaluating the historical significance of these sites in consultation with the SHPO and tribes.  *Id.* § 800.4(c). This step must be taken in a manner that recognizes that the tribes “possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.”  *Id.* § 800.4(c)(1). Nevertheless, where the agency official and SHPO agree that an identified property should not be considered eligible for listing on the National Register of Historic Places, “the property shall be considered not eligible.”  *Id.* § 800.4(c)(2). The permitting agency may then decide at this stage “that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them,” document this finding, and notify all consulting parties.  *Id.* § 800.4(d)(1). If neither the SHPO nor the Advisory Council (if it has entered the consultation) “object within 30 days of receipt of an adequately documented finding, the agency official’s responsibilities under Section 106 are fulfilled.”  *Id.* § 800.4(d)(1)(i).
The agency otherwise proceeds to a third stage: assessment of the adverse effects on the identified historic properties. Id. § 800.5(a). An effect is considered adverse when the undertaking may “alter, directly or indirectly, any of the characteristics of a historic property that qualify it for inclusion in the National Register,” including via the “introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.” Id. § 800.5(a)(1), (2)(v). At this point, the agency may determine in consultation with the other parties that there is no qualifying adverse effect or impose modifications or conditions that lead to the same result. Id. § 800.5(b). Alternatively, the Section 106 process may proceed to a fourth and final stage involving resolution of the adverse effects in consultation with the other parties. Id. § 800.6. The agency may, however, terminate this final consultation if it becomes unproductive and then proceed to permit the undertaking despite the effects. Id. § 800.7(a).

A few important global rules also apply to each stage of this process. The permitting agency is empowered to “coordinate the steps of the Section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under” other statutes. Id. § 800.3(b). The agency may also “use the services of applicants [or] consultants” to prepare required “information, analyses, and recommendations” in making any of the various determinations. Id. § 800.2(a)(3). Finally, the regulations allow agencies to “develop procedures to implement Section 106 and substitute them” for its procedures where the Advisory Council determines “they are consistent with the Council’s regulations.” Id. § 800.14(a).

B. Clean Water Act

The CWA makes it unlawful to discharge dredged or fill material into navigable waters without a permit issued by the Corps. See 33 U.S.C. §§ 1311(a), 1342(a). The Corps grants this
approval in one of two ways: It issues individual permits for a specific action, id. § 1344(a), or it promulgates general permits that preauthorize a certain type of activity within a defined area. Id. § 1344(e)(1); see Sierra Club v. U.S. Army Corps of Eng’rs, 803 F.3d 31, 38-40 (D.C. Cir. 2015).

General permitting has obvious advantages over individual permitting. Most notably, general permits provide standing authority for an entire category of activities where those activities, alone and together, have minimal impact on regulated waters. See Sierra Club, 803 F.3d at 38-40; see also 33 U.S.C. § 1344(e)(1). They consequently eliminate the need for an arduous permit process for each minor action affecting a U.S. waterway. Indeed, a permittee may typically rely on the general permit without even notifying the Corps of its covered activity. See 33 C.F.R. § 330.1(e)(1). To keep things rolling, the Corps need only issue the permit through public notice and comment every five years. See 33 U.S.C. § 1344(e)(2).

But not every activity covered by a general permit receives this hands-off treatment. Actions proceeding under nationwide general permits also must comply with what are known as General Conditions. These GCs sometimes require that a particular covered action be subject to pre-construction notice and verification (PCN) by the Corps before the work begins. Where a discrete action requires a PCN, a Corps district engineer must confirm that the activity will comply with the general permit, cause no more than minimal adverse effects to the environment, and serve the public interest. See 33 C.F.R. §§ 330.1(e)(2)-(3), 330.6(a)(3)(i). In so doing, the district engineer may supplement the permit’s basic rules with more project-specific ones or even
compel a more rigorous individual permitting process for that particular work. Id. § 330.6(a)(2), (d).

The Corps here relies on one such general permit – Nationwide Permit 12 – to authorize “the construction, maintenance, repair, and removal” of pipelines throughout the nation, where the activity will affect no more than a half-acre of regulated waters at any single water crossing. See Reissuance of Nationwide Permits (NWP 12), 77 Fed Reg. 10,184, 10,271 (Feb. 12, 2012); see also Sierra Club, Inc. v. Bostick, 787 F.3d 1043, 1056 (10th Cir. 2015). Each stand-alone crossing of a waterway is considered to be a “single and complete project” for these purposes. See 33 C.F.R. § 330.2(i). Most pipeline work that involves minor activities in U.S. waters – i.e., affecting no more than half an acre – can thus proceed without any advance notice to the Corps.

Work that implicates tribal interests, however, cannot receive this laissez-faire handling. For example, GC 17 – not at issue here – prohibits the sanctioning of any activity under NWP 12 that will impair reserved tribal rights, including reserved water rights. See NWP 12 at 10,283. Of more relevance, GC 20 mandates a PCN for any permitted activity that “may have the potential to cause effects to any historic properties . . . including previously unidentified properties” of cultural or religious importance to a tribe. Id. at 10,284. This includes activities that may cause only “visual or noise” effects to historic properties outside the project area or reserved tribal lands. Id. at 10,251. Before such an activity can proceed, a district engineer must verify either (1) that it will not actually affect any identified historic site or (2) that the tribal consultations required by the NHPA are complete. Id. at 10,284. And, should a sanctioned activity nevertheless stumble upon tribal artifacts or remains, GC 21 mandates that the permittee “immediately notify” the Corps and, to the maximum extent possible, halt “construction
activities that may affect” these objects until coordination with state, tribal, and federal authorities is complete. \textit{Id.}

NWP 12 also allows a district engineer to impose additional Regional Conditions where the district engineer deems the General Conditions insufficient to protect tribal interests. \textit{See} ECF No. 6, Exh. 1 (Decision Document for NWP 12) at 10; \textit{see also} 33 C.F.R. § 330.5(b)(2)(ii). Many of these Regional Conditions restrict the scope of the Permit or expand the types of activities requiring a PCN process before an activity may proceed under it. \textit{See, e.g.,} ECF No. 21, Exh. 3 (2012 NWP Regional Conditions for North Dakota). Of particular relevance to this Motion, North Dakota’s Regional Conditions require a PCN “prior to initiating any regulated activity in the Missouri River.” \textit{Id.} at 1. Permittees also must notify the Corps of “the location of any borrow site that will be used in conjunction with the construction of the authorized activity so that the Corps may evaluate the site for potential impacts to . . . historic properties.” \textit{Id.} at 2.

The Corps’ more general permitting regulations further purport to assure that, in the “processing and evaluating of [any] permit,” a district engineer give “maximum consideration [to] historic properties within the time and jurisdictional constraints of the Corps regulatory program.” 33 C.F.R. pt. 325, app. C, § 2(f). Appendix C of these regulations addresses the Corps’ NHPA obligations and requires a district engineer to “take into account the effects, if any, of proposed undertakings on historic properties both within and beyond the waters of the U.S.” \textit{Id.} § 2(a). The Corps considers each permitted water crossing of a linear pipeline, however, to be its own individual undertaking because the rest of the project – \textit{i.e.}, the entire line – “almost alway[s] can be undertaken without Corps authorization” of such individual crossing by a feasible reroute. \textit{Id.} § 1(g)(4)(i). In other words, the Corps does not consider each crossing to be
the “but for” cause of the entire pipeline and thus does not consider the entire pipeline to be an undertaking. Instead, the permitted undertaking, according to the Corps, “extend[s] in either direction from the crossing to that point at which alternative alignments leading to reasonable alternative locations for the crossing can be considered and evaluated.” Id. § 1(g)(4)(ii). For these permitted actions, the district engineer must “encourage the consideration of historic properties at the earliest practical time in [a] planning process” and engage in consultations with tribal leaders, the Advisory Council on Historic Preservation, and State Historic Preservation Officers. Id. § 2(e). The regulations also specify when additional conditions should be placed on a permit to “avoid or reduce” effects to these properties. Id. § 10(a).

C. Rivers and Harbors Act

The RHA forbids certain construction activities within the “navigable water of the United States” without prior permission from the Corps. See 33 U.S.C. § 403. The Corps often relies on NWP 12 to discharge this duty for pipeline construction having only a minimal impact on regulated waters, 33 C.F.R. § 322.3(a), and the same general CWA conditions apply here. Lake Oahe is one of the waterways that falls under the jurisdiction of this Act.

* * *

To sum up, the NHPA requires that the Corps, prior to issuing a permit under the CWA or the RHA, consider the potential effect of that permitted activity on places of cultural or religious significance to Indian tribes.

D. Factual History

The Standing Rock Sioux Tribe is a federally recognized American Indian Tribe with a reservation spanning the border between North and South Dakota. See ECF No. 1 (Complaint), ¶ 1. The sweep of the Tribe’s historic and cultural connection to the Great Plains, however,
extends beyond these modern reservation boundaries.  Id., ¶¶ 7-8.  A successor to the Great Sioux Nation, the Tribe’s ancestors once lived, loved, worshipped, and mourned “[w]herever the buffalo roamed.” ECF No. 6-2 (Declaration of Jon Eagle, Sr.), ¶ 24.  These people created stone alignments, burial cairns, and other rock features throughout the area to conduct important spiritual rituals related to the rhythms of their daily life.  See ECF No. 14-1 (Declaration of Tim Mentz, Sr.), ¶ 3; Eagle Decl., ¶¶ 20, 25.  Along the region’s waterways in particular, the prevalence of these artifacts reflects water’s sacred role in their deeply held spiritual beliefs.  See Eagle Decl., ¶ 25.  Today, the Standing Rock Sioux continue to honor these practices and cherish the connection they have to their ancestors through these sites.  Id.

One place of particular significance to the Tribe lies at the traditional confluence of the Missouri and Cannonball Rivers.  Id., ¶¶ 11-12; ECF No. 6-1 (Declaration of Dave Archambault II), ¶ 12.  The ancestors to the Standing Rock Sioux gathered in this location to peacefully trade with other tribes.  See Mentz Decl., ¶ 36.  They also considered the perfectly round stones shaped by the meeting of these two great rivers to be sacred.  See Eagle Decl., ¶ 11.  Mighty natural forces, however, no longer hone these stones.  Id.  In 1958, the Corps dredged and altered the course of the Cannonball River to construct a dam.  Id.  As a result, a large man-made lake known as Lake Oahe now covers the confluence.  Id.

The Tribe nevertheless continues to use the banks of the Missouri River for spiritual ceremonies, and the River, as well as Lake Oahe, plays an integral role in the life and recreation of those living on the reservation.  Id.  Naturally, then, the Tribe was troubled to learn in late 2014 that a new pipeline was being planned that would cross the Missouri River under Lake Oahe about a half-mile north of the reservation.  See Archambault Decl., ¶¶ 8-12.  This was, of
course, DAPL – a 1,172-mile crude-oil pipeline poised to wind its way from the Bakken oil fields near Stanley, North Dakota, to refineries and terminals in Patoka, Illinois.

The conflict that has arisen since this revelation is, to say the least, factually complex. To ease digestion of the relevant information, the Court first describes how Dakota Access chose the pipeline route. It then lays out the facts surrounding the Corps’ permitting and concurrent Section 106 process for the project. These following summaries admittedly contain significant detail and may try the reader’s patience. The Court nonetheless believes such a narrative is necessary because a key question here is whether the Corps engaged in sufficient consultation with the Tribe under Section 106.

1. **DAPL**

   In the summer of 2014, Dakota Access crafted the route that brought DAPL to Standing Rock’s doorstep. See ECF No. 22, Exh. B (Declaration of Monica Howard), ¶¶ 2-3. The plotted course almost exclusively tracked privately held lands and, in sensitive places like Lake Oahe, already-existing utility lines. As only 3% of the work needed to build the pipeline would ever require federal approval of any kind and only 1% of the pipeline was set to affect U.S. waterways, the pipeline could proceed largely on the company’s timeline.

   Dakota Access nevertheless also prominently considered another factor in crafting its route: the potential presence of historic properties. Id. Using past cultural surveys, the company devised DAPL’s route to account for and avoid sites that had already been identified as potentially eligible for or listed on the National Register of Historic Places. Id., ¶¶ 2-4. With that path in hand, in July 2014, the company purchased rights to a 400-foot corridor along its preliminary route to conduct extensive new cultural surveys of its own. Id., ¶ 3. These surveys eventually covered the entire length of the pipeline in North and South Dakota, and much of
Iowa and Illinois. Id., ¶ 8. Professionally licensed archaeologists conducted Class II cultural surveys, which are “focused on visual reconnaissance of the ground surface in settings with high ground visibility.” Id. In some places, however, the same archaeologists carried out more intensive Class III cultural surveys, which involve a “comprehensive archaeological survey program” requiring both surface visual inspection and shovel-test probes of fixed grids to “inventory, delineate, and assess” historic sites. Id. These latter surveys required coordination with and approval by State Historic Preservation Officers. Id.

Where this surveying revealed previously unidentified historic or cultural resources that might be affected, the company mostly chose to reroute. Id., ¶¶ 4-6. In North Dakota, for example, the cultural surveys found 149 potentially eligible sites, 91 of which had stone features. Id., ¶ 5. The pipeline workspace and route was modified to avoid all 91 of these stone features and all but 9 of the other potentially eligible sites. Id. By the time the company finally settled on a construction path, then, the pipeline route had been modified 140 times in North Dakota alone to avoid potential cultural resources. Id., ¶ 6. Plans had also been put in place to mitigate any effects on the other 9 sites through coordination with the North Dakota SHPO. Id., ¶ 13. All told, the company surveyed nearly twice as many miles in North Dakota as the 357 miles that would eventually be used for the pipeline. Id., ¶ 12.

The company also opted to build its new pipeline along well-trodden ground wherever feasible. See ECF No. 22-1 (Declaration of Joey Mahmoud), ¶¶ 18, 24, 40. Around Lake Oahe, for example, the pipeline will track both the Northern Border Gas Pipeline, which was placed into service in 1982, and an existing overhead utility line. Id., ¶ 18. In fact, where it crosses Lake Oahe, DAPL is 100% adjacent to, and within 22 to 300 feet from, the existing pipeline. Id. Dakota Access chose this route because these locations had “been disturbed in the past – both
above and below ground level – making it a “brownfield crossing location.”” Id., ¶ 19. This made it less likely, then, that new ground disturbances would harm intact cultural or tribal features. Id.

Around the time the cultural survey work began, Dakota Access took its plan public. See Howard Decl., ¶ 12. On September 30, 2014, it met with the Standing Rock Sioux Tribal Council to present the pipeline project as part of a larger community-outreach effort. Id., ¶ 22. Personnel from Dakota Access also spoke with the Tribe’s Historic Preservation Officer (THPO), Waste’ Win Young, several times over the course of the next month. Id., ¶¶ 23-27. At one related meeting, a DAPL archaeologist answered questions about the proposed survey work and invited input from Young on any areas that might be of particular tribal interest. Id., ¶¶ 25-28. The company agreed as well to send the centerline files from its cultural survey to her for review, and did so on November 13. Id., ¶ 28. It never received any response from Young. Id.

2. Entry of Corps

Based on the current record, the Corps appears to have had little involvement in Dakota Access’s early planning. The one exception is a June 2014 meeting between the two parties to discuss the company’s plan to build a pipeline through the region. See ECF No. 21-18 (Declaration of Martha Chieply), ¶ 8. At this meeting, the Corps informed the company about its permitting requirements and explained the importance of tribal coordination for any actions taken under its jurisdiction. Id. There is no indication that the company sought to secure any permitting or that it presented the Corps with a specific proposed route for DAPL at this time. Id. This conclusion is consistent with the record evidence that Dakota Access was still buying up the necessary right-of-ways for the pipeline surveys in July 2014. See Howard Decl., ¶ 3; Mahmoud Decl., ¶ 40.
The writing was on the wall, however, that many DAPL permitting requests would eventually land in the Corps inbox. The Corps’ Tribal Liaison, Joel Ames, accordingly, tried to set up a meeting with THPO Young beginning around September 17, 2014, without success. See ECF No. 21-17 (Declaration of Joel Ames), ¶¶ 5-6; see also ECF No. 21, Exh. 9 (Corps Tribal Consultation Spreadsheet) at 1 (documenting five attempts by Ames to coordinate a meeting with Young in September 2014). On October 2, other Corps personnel also sought to hold an arranged meeting with the Tribal Council and Dakota Access on the Standing Rock reservation. See Chieply Decl., ¶ 9. But when the Corps timely arrived for the meeting, Tribal Chairman David Archambault told them that the conclave had started earlier than planned and had already ended. Id. Ames nevertheless continued to reach out to Young to try to schedule another meeting throughout the month of October. See Ames Decl., ¶¶ 5-6. When the new meeting was finally held at the reservation on November 6, though, DAPL was taken off the agenda because Young did not attend. Id., ¶ 7.

3. **Soil-Bore Testing at Lake Oahe**

The Corps’ North Dakota office also received the first request for DAPL permitting around this time and launched a formal NHPA Section 106 consultation as a result. See ECF No. 21-19 (Declaration of Richard Harnois), ¶ 5. This solitary preconstruction request from Dakota Access sought permitting only to conduct preliminary soil-bore testing at the Lake Oahe site, not to actually begin any construction. Id., ¶ 12. Dakota Access needed to conduct these tests to determine whether it could subsequently use its preferred method of Horizontal Directional Drilling at the crossing. Id. HDD – which the company plans to use on all land subject to the RHA or owned by the Corps – allows for “construction across a sensitive area without excavation of a trench by installing the pipeline through a drilled hole significantly
below the conventional depth of a pipeline.” Howard Decl., ¶ 7. This particular test involved drilling just seven holes of 4-inch diameter with an estimated 10 feet of impact on areas around the holes. See Harnois Decl., Exhs. 1-2. Access to and from the sites, moreover, would take place on existing roads. Id.

As a first cut, the Corps reviewed extensive existing cultural surveys both within and outside the Lake Oahe project area to determine whether the work might affect cultural resources. Id. Then, on October 24, the Corps sent out a letter to tribes, including the Standing Rock Sioux, with information about the proposed work and maps documenting the known cultural sites that the Corps had already identified. Id., ¶ 6; see id., Exh. 1. These included sites that the Corps considered to be outside the projected area of effect. Id., ¶ 6. In addition, the letter requested that any party interested in consulting on the matter reply within thirty days. Id. No response was received from the Tribe. Id. The Corps did receive responses from other tribes and the North Dakota SHPO, which it considered. Id., ¶ 7. After granting an extra three weeks for additional responses, on December 18 the Corps made an initial determination of “No Historic Properties Affected” for the soil-bore testing. Id., ¶¶ 7-11.

The Corps mailed out this decision in a Determination of Effect letter to the North Dakota SHPO and all affected tribes on the same day. Id., ¶ 11. The letter explained that the Corps had concluded that no historic properties would be affected by the tests and clarified that a previous “not eligible” determination had already been made for a nearby site that would also not be affected by the work. Id. The Corps also emailed Young again the next day to seek possible dates for a January 2015 meeting with the Tribe to discuss DAPL. See Tribal Consultation Sheet at 1 (documenting email on December 19, 2014). No response is in the record.
On February 12, 2015, having still heard nothing from the Tribe, Corps Senior Field Archaeologist Richard Harnois emailed Young again to solicit comments on the narrow issue of the soil-bore testing. See Harnois Decl., ¶¶ 13-14. Again, no reply. Id. Around this same time, Young informed the Corps’ Tribal Liaison, Ames, at an unrelated regulatory meeting that she did not need to consult with the Corps at the moment as she was currently working directly with Dakota Access. See Ames Decl., ¶ 8; see also Tribal Consultation Sheet at 1 (documenting contact). As a result, on February 18, the Corps granted the PCN authorization under NWP 12 for the limited exploratory soil-bore testing requested by Dakota Access. See Harnois Decl., ¶¶ 13-14.

At this point, the Court should note that the Tribe has not provided a declaration from Young about any of these early consultations (or lack thereof). This omission is problematic for its cause because many of the facts relevant to the Tribe’s NHPA claim involve her. As a result, the rendition of the facts in the record is largely told through documentation and affidavits provided by the Corps, with the exception of letters from Young provided by the Tribe.

In any event, several weeks later, on March 2, 2015, the Corps finally received a letter from Young expressing concerns over sites that might be affected by the bore testing. Id., ¶ 15. The letter was dated on the same day that the Corps had green-lighted the work. Id. In particular, Young mentioned the North Cannonball Village Site, which was almost a half-mile from the closest “area of potential effect” boundary set by the Corps. Id. The letter further requested Class III and other cultural surveys under tribal monitoring before the testing, and tribal monitoring during both the testing and any later pipeline construction. Id. Young also sent a similar letter on February 25 to the Corps’ Regulatory Branch Chief, Martha Chieply. See ECF No. 6, Exh. 6 (Letter from Young to Chieply on Feb. 25, 2015).
Neither of these letters, contrary to representations made in the Tribe’s Motion, appears to be an “immediate[]” response to a February invitation by the Corps to consult on PCNs related to the actual pipeline construction. See Mot. at 10; see also Letter from Young to Chieply (Feb. 25, 2015). Indeed, the letters make no mention of that February offer, focusing instead on the more narrow issue of the soil-bore testing. See Letter from Young to Chieply on Feb. 25, 2015. Of course, as the Court has explained, the Corps had already permitted that limited testing under NWP 12 by the time Young sent the letters. Ames nevertheless renewed his efforts to schedule a meeting between Chairman Archambault and the Corps’ North Dakota District Commander, Colonel Henderson, in response to Young’s letters, but the parties could not find a date when both men were available to consult. See Ames Decl., ¶ 9.

4. PCN Authorizations

In the meantime, Dakota Access initiated efforts on December 29, 2014, to secure five additional PCN authorizations under NWP 12 for pipeline-construction work in North Dakota. See Chieply Decl., ¶ 10. (Out of these, three were later withdrawn for various reasons. Id.) In the application, the company provided a project description, a water- and wetland-delineation report, and a cultural-survey report for areas around the PCN sites. Id., Exh. 4 at 1, 8. Dakota Access also requested a jurisdictional determination from the Corps for the work. Id., Exh. 4 at 1. On February 5, 2015, the Corps deemed the application incomplete and informed the company that it would require additional information before considering it. Id., ¶ 11. At this time, the Corps also informed Dakota Access that one of the listed sites, PCN # 1, would not require Corps permitting because the involved waterway had previously been determined to be an isolated waterway not subject to the CWA or RHA. Id., ¶¶ 10-11. Dakota Access responded with a complete application for the remaining PCNs on March 25. See id., ¶ 13. The Corps,
accordingly, sent a letter in relation to an environmental assessment (EA) for the project to the Tribe and other parties on March 30. See ECF No. 21-20 (Declaration of Jonathan Shelman), ¶ 7. This letter described the two proposed crossings at Lake Sakakawea and the proposed crossing at Lake Oahe – *i.e.*, the three North Dakota sites still thought to require PCNs at the time – and solicited comments from the Tribe to be considered as part of the EA. *Id.*

While discussions between Dakota Access and the Corps were ongoing, the Corps also sent a form letter to Young on February 17, informing her that it was now considering 55 PCN requests across its offices for DAPL. See ECF No. 6, Exh. 5. The letter went on to explain that the majority of the pipeline work would occur in uplands that were not subject to Corps jurisdiction, but the Corps would need to permit crossings at the Missouri, James, Big Sioux, Des Moines, Mississippi, and Illinois Rivers. *Id.* The letter, moreover, noted that Dakota Access was conducting cultural surveys along the entire route. *Id.* Finally, the Corps requested that the Tribe let it “know if you have any knowledge or concerns regarding cultural resources . . . you would like the Corps to consider” and asked whether it wanted to consult on the project. *Id.* A response was requested prior to March 30 “to help facilitate a timely Section 106 review.” *Id.* The Corps also attached the current proposed alignment provided by Dakota Access for the pipeline and contact information for various Corps staff involved in facilitating tribal consultations. *Id.*

On the date of the deadline to respond, Ames and Young exchanged emails, but the content of this exchange is not in the record. See Tribal Consultation Sheet at 8. Young did, however, formally respond on April 8. See ECF No. 6, Exh. 7. In her response this time, she acknowledged receipt of the Corps’ February 17 letter about the 55 construction-related PCNs. *Id.* at 1. But the thrust of her letter focused again on the Corps’ failure to respond, prior to
permitting the soil-bore testing, to the concerns she had raised about that work. See id. at 1-2. She further expressed her belief that the Corps’ inaction violated the Section 106 process. Id. at 2. She demanded that the Corps “clarify the proper sequencing of the Section 106 NHPA process” before proceeding with the EA, asserted that she had not yet been contacted by Ames, and described the placement of bore pits on private lands as an attempt to avoid federal jurisdiction. Id. at 2-3. In conclusion, Young informed the Corps that the Tribe opposed “any kind of oil pipeline construction through our ancestral lands,” in part because the potential dredging would take place where “human remains of relatives of current . . . tribal members” were present. Id. at 3. Young ultimately closed, though, by reiterating that the Tribe “look[ed] forward to participation in a full tribal consultation process” once it commenced. Id. On the same day, Corps personnel and Standing Rock Archaeologist Dr. Kelly Morgan discussed future pipeline realignments over the phone. See Tribal Consultation Sheet at 7.

5. Summer of 2015

Relations between the Tribe and Corps did not improve in the summer of 2015. Ames attempted to speak with Young about the project in June, but she informed him via email that she was on an extended leave of absence until July 27. Id. at 8; see Ames Decl., ¶ 9. Ames was unable to determine whether anyone was empowered to act on the Tribe’s behalf in her absence. See Ames Decl., ¶ 9. On July 22, Corps Operations Manager Eric Stasch also sent a letter to Standing Rock describing the planned use of HDD for the Oahe crossing. See Harnois Decl., ¶ 16; see also id., Exh. 3. In his letter, Stasch provided details about the areas of potential effects and explained that the Corps would consider the work a federal undertaking despite its location on private land. See id., Exh. 3 at 1-2. The letter went on to say that Dakota Access’s cultural surveys had identified an additional cultural site within the proposed preparation and staging area
for this work. Id. at 2. Finally, the letter requested a response within thirty days if the Tribe wished to consult on this particular crossing and indicated that consultations about other pipeline crossings would happen separately. Id. at 2-3. Attached to the letter were current and previous survey information, as well as general and detailed project maps illustrating the location and nature of the Lake Oahe crossing and recorded cultural resources. See Harnois Decl., ¶ 16.

In August, the Tribe responded with two letters of its own. See ECF No. 6, Exhs. 8 (Letter from Archambault to Cross on Aug. 19, 2015), 9 (Letter from Young to Stasch on Aug. 21, 2015). The first, sent on August 19 from Chairman Archambault to Colonel Cross – the Corps’ Commander and District Engineer for the Omaha District – described the Chairman’s frustration in not being contacted earlier in regard to DAPL. See Letter from Archambault to Cross (Aug. 19, 2015). Archambault invited Cross to the reservation to discuss the matter and provided contact information for his administrative assistant to arrange the visit. Id. The very same day, Ames emailed Archambault’s assistant in an attempt to schedule a meeting, but without success. See Ames Decl., ¶ 10; see also Tribal Consultation Sheet at 8. The second letter responded directly to Stasch’s offer to consult on the Lake Oahe crossing. See Letter from Young to Stasch (Aug. 21, 2015). In it, Young again reiterated that the Section 106 consultation run by the Corps had failed to respond to concerns raised by the Tribe in their February letters about the soil-bore testing prior to the completion of that work. Id. She further expressed her frustration in being excluded from the Dakota Access surveying despite company promises to include tribal monitors, and she reiterated her concern that sites might be overlooked or damaged unless the Standing Rock Sioux participated in surveying. Id. In closing, Young again said the Tribe looked forward to participating in “future consultation prior to any work being completed. . . [and] to playing a primary role in any and all survey work and monitoring.” Id. at 2.
The Corps responded in at least three ways to the Tribe over the next month. First, on August 27, a Corps staff archaeologist started planning an onsite visit for the Corps, the Tribe, and the North Dakota SHPO to Lake Oahe. See Harnois Decl., ¶ 18. Second, the Corps’ District Commander, Colonel Henderson, wrote back to Chairman Archambault. See ECF No. 6, Exh. 10 (Letter from Henderson to Archambault on Sept. 3, 2015). Most of Henderson’s letter reiterated the form offer to consult and other general project information, but the letter also acknowledged receipt of the Tribe’s recent letters and provided additional information about the requested PCN locations. Id. at 2. Third, Stasch sent a letter on September 16, expressing his willingness and desire to address the Tribe’s questions and concerns during the upcoming onsite visit to Lake Oahe planned by the Corps. See Harnois Decl., ¶ 22.

On the same day as Stasch’s letter, Harnois also emailed Standing Rock Archaeologist Morgan to invite her to participate in the “working level, on-the-ground site visit of the proposed DAPL Oahe Crossing.” Id., ¶ 23. This sparked an email exchange between the two on logistics and dates. Id. The very next day, however, Morgan emailed the Corps to back out of the visit. Id., Exh. 4. In an attached letter, she explained that “after careful consideration the [Standing Rock] THPO has determined that it is in the best interest of the THPO to decline participation in the site visits and walking the project corridor’s [area of projected effects] at this time until government-to-government consultation has occurred for this project per Section 106 requirements as requested by the Standing Rock Sioux Tribe.” Id. By this she seemed to mean that the Corps needed to first hold the previously requested meeting between Chairman Archambault and Colonel Henderson. Id. Despite the Tribe’s withdrawal, the Corps ultimately proceeded to hold the onsite visit with the North Dakota SHPO. See Harnois Decl., ¶ 26.
About a week later, the Tribe sent another letter, this time from Young to Colonel Henderson. See ECF No. 6, Exh. 11 (Letter from Young to Henderson on Sept. 28, 2015). In this letter, Young noted her concern “about the lack of consultation prior to the start of archaeological surveys.” Id. at 1. She further indicated that the Tribe had “received no correspondence prior to the soil bore hole testing,” which she then characterized as evidence that “the Corps is attempting to circumvent the Section 106 process.” Id. Citing the potential for “irreparable damage to . . . known sites,” she complained about the Tribe’s “exclusion of tribal participation up to this point” from the identification efforts and Section 106 process. Id. In addition, she indicated that the Tribe believed “the entire length of the DAPL [is] one project under the . . . [RHA], as well as” the CWA, and that the Corps was trying to avoid “federalization.” Id. at 2.

6. Fall of 2015

In the fall, the Corps responded by redoubling its efforts to meet with the Tribe. On September 29, 2015, Ames, in a phone conversation with Chairman Archambault, scheduled a meeting between the Corps and the Tribe’s Vice Chair for October 28. See Ames Decl., ¶ 13. But two days before that meeting, the Tribe canceled “because nobody from the tribe was available to attend.” Id. On the same day, the Tribe also canceled a meeting scheduled for November with Colonel Henderson, promising to meet with him instead “in a few months.” Id., ¶ 14. The Corps, moreover, documented ten different attempts to contact the Tribe over the course of the October to speak about the project. See Tribal Consultation Sheet at 14.

Then, in November, the Corps twice invited the Tribe to a general tribal meeting in Sioux Falls, South Dakota, scheduled for December 8 to 9. See Chieply Decl., ¶ 17; see also id., Exh. 10. This invitation contained a link to the cultural surveys provided by Dakota Access. Id. Five
tribes attended this meeting.  Id., ¶ 18.  Standing Rock did not.  Id.  At the meeting, the Corps made sure that the tribes had copies of the cultural surveys, and the group agreed to reconvene on January 25, 2016, to discuss any issues they found with those surveys.  Id.  Around the time of this meeting, the Corps also independently looked through these cultural surveys and other route maps to determine whether any additional DAPL crossings might have the potential to affect historic properties.  See ECF No. 21-18, Exh. 16.  The Corps concluded that only the James River crossing (PCN #4) raised any concerns; no others triggered the need for a PCN under General Condition 20.  Id.

During this tribal gathering, Morgan sent a letter to the Corps, indicating that the Tribe was “still interested in formal consultation on the proposed” pipeline despite its decision not to attend.  See ECF No. 6, Exh. 12 (Letter from Morgan to Chieply on Dec. 8, 2015) at 1.  The Tribe yet again noted that it had not received a response from the Corps about the concerns it had raised in regard to the bore testing.  Id.  Morgan also protested that the testing should not proceed prior to mitigation efforts and indicated that the Tribe did not concur in the “no effects” determination for this work.  Id. at 2.  This, of course, makes little sense given that Young had already acknowledged in previous letters from the Tribe that they were aware the soil-bore testing had already taken place back in the spring.  See, e.g., Letter from Young to Henderson on Sept. 28, 2015 (recognizing “soil bore testing has already occurred despite our initial correspondence”).  In any event, Morgan further indicated that the Tribe looked forward to playing a primary role in any surveying or monitoring and explained that it would refuse to participate in tribal meetings until Colonel Henderson came to their reservation to meet with them first.  Letter from Morgan to Chieply (Dec. 8, 2015) at 1.  Finally, she informed the Corps
that the Tribe thought the draft EA could not be issued prior to a full cultural-resources survey. See id. at 2.

Again, the Corps appears to have taken action in response to the Tribe’s demands. Henderson ordered Omaha District Deputy Commander, Lieutenant Colonel Michael D. Sexton to attempt to schedule a meeting with Plaintiff for him. See id., ¶ 17. He did so in response to the setbacks experienced by Ames in attempting to secure the same over the previous months. Id. The Tribe, however, never returned Sexton’s calls about scheduling a meeting either, and Young subsequently left her position with the Standing Rock Sioux. Id.

On December 8, the Corps released a draft EA for the project, which contained a request for comment by January 8, 2016. See id., ¶ 8. In the portion of the EA describing the Section 106 process, the draft explained that consultations began in November 2014 for initial geotechnical explorations, which then closed in January 2015. See id., Exh. 13 (Draft EA, Nov. 2015) at 58. The draft next described the ongoing process, starting in July 2015, for consultation related to the actual pipeline construction. Id. In so doing, it acknowledged the Corps’ failure to secure onsite visits or government-to-government meetings to date. Id. at 58-59. In the very next section, the EA indicated that Young had said in the October 2014 meeting with Dakota Access that the Lake Oahe HDD process “appeared to avoid impacts to known sites of tribal significance.” Id. at 59.

7. 2016

The Tribe provided timely and extensive comments to the draft EA in letters on January 8 and March 24, 2016. See id., Exh. 14 (Standing Rock Comments on Draft EA); id., Exh. 15 (Standing Rock Supplemental Comments). In these comments, Archambault asserted that the Corps had failed to consult on the identification of cultural sites important to the Tribe. See
Standing Rock Comments on Draft EA at 2-3; see also id. at 4 (asserting Corps violated its own policy to hold “an active and respectful dialogue. . . before decisions are made and actions are taken”); id. (claiming bore testing violated NHPA because Corps did not include Tribe in decisionmaking process); id. at 6 (noting Corps reliance on old surveys conducted before 1992 Amendments to NHPA). He explained the importance of such consultations by, in part, describing tribal “oral traditions and historical records” that recorded the presence of known sites and burials in the direct path of the pipeline. Id. (counting “at least 350 known sites within the project corridor in North Dakota alone”); see also id. at 4 (indicating that Draft EA misrepresented Tribe’s position in October 2014 meeting thanks to false impression from Dakota Access). As a result, he concluded that those outside the Tribe could not properly identify these sites. Id. He additionally criticized the 400-foot corridor used for the Dakota Access surveys as too narrow and described the “no effects” determination by the Corps for sites within the corridor as lacking “scientific or engineering support.” Id. at 7-8. Archambault, in his later supplemental comments, again stressed the importance of tribal participation in the identification of historic properties and, accordingly, decisions about potential alternative routes for the pipeline. See Standing Rock Supplemental Comments at 23-24. He also cited the Advisory Council’s Section 106 regulations and case law to support his assertion that form letters and public meetings could not meet the Corps’ obligations under the NHPA to consult with the tribes. Id. In conclusion, he implored the Corps to assure that full cultural surveys would be done, with tribal input, on the entire pipeline. Id. at 28-29. Two other tribes also indicated at this time that they thought they had not yet been fully consulted on the potential effects of the pipeline. See ECF No. 6, Exhs. 22-24.
The Section 106 process between the Corps and Tribe finally picked up steam in the spring of 2016. From January to May, there were no fewer than seven meetings between the two entities. On January 22, Corps Senior Archaeologist Harnois met at the reservation with Chairman Archambault; the Tribe’s new THPO Ron His Horse is Thunder; Morgan; and the Tribe’s Section 106 Coordinator, LaDonna Brave Bull Allard. See Harnois Decl., ¶ 27. Three days later, on January 25, the Tribe participated in the follow-on tribal meeting to discuss the Dakota Access cultural surveys. See Chieply Decl., ¶ 21. Next, on March 3, Corps staff held a meeting with the Tribe at Corps headquarters. See Ames Decl., ¶ 29. Perhaps most significantly, Morgan met with the Corps to express specific concerns about tribal burial sites at the James River crossing (PCN # 4). See Harnois Decl., ¶ 24. Based on the information she provided, the Corps verified the presence of cultural resources at the site and successfully instructed Dakota Access to move the pipeline alignment to avoid them. Id.

Colonel Henderson also attended several meetings with the Tribe. He first officiated at a third tribal summit on February 18-19, again with Standing Rock participation. See Chieply Decl., ¶ 22. Then, he attended meetings with Standing Rock on February 26, April 29, and May 14. See Ames Decl., ¶¶ 26, 33, 36. Through these conversations, Henderson committed the Corps to imposing several additional conditions on DAPL, such as double-walled piping, in response to tribal concerns about environmental safety. Id., ¶ 27. One of these summits also included an onsite visit to the Lake Oahe crossing. See Harnois Decl., ¶ 28; see also Archambault Decl., ¶ 19. During that visit, Chairman Archambault “pointed out areas of concern and explained the tribe’s issues with the pipeline project.” Harnois Decl., ¶ 28. Indeed, in March, Archambault acknowledged that the Corps had recently made strides toward righting the Section 106 ship and indicated he felt this particular onsite visit was productive at identifying
new stones, graves, burial sites, and earthen lodges that needed to be considered by the Corps. See Supplemental Comments on Draft EA at 26-27. Henderson and Archambault exchanged letters about the project throughout the spring as well. Id., ¶ 30.

The improved relationship, however, had its limits. In the spring, the Corps worked with Dakota Access to offer consulting tribes an opportunity to conduct cultural surveys at PCN locations where the private landowner would permit them. See Chieply Decl., ¶ 28. This included 7 of the 11 sites in North and South Dakota. Id. Three tribes took the opportunity, and it paid off. See ECF No. 22, Exh. C (Declaration of Michelle Dippel) ¶ 28. The Upper Sioux Community identified areas of tribal concern at three PCN sites, and Dakota Access agreed to additional avoidance measures at all of them. Id. At one of these sites, the tribal surveyors and the Iowa SHPO declared a site eligible for listing on the National Registry that had not previously been identified on Dakota Access’s surveys. See Eagle Decl., ¶¶ 32-36; see also Mentz Decl., ¶¶ 38-39 (describing his hiring to conduct surveys for the Upper Sioux). Dakota Access agreed in response to this discovery to bury the pipeline 111 feet below the site to avoid disturbing it. See Mot. Hearing Trans. at 36. Similarly, the Osage Tribe identified areas through their surveys that they wished to monitor during construction, and the company granted that request too. Id.

Standing Rock took a different tack. The Tribe declined to participate in the surveys because of their limited scope. See Chieply Decl., ¶ 29. Instead, it urged the Corps to redefine the area of potential effect to include the entire pipeline and asserted that it would send no experts to help identify cultural resources until this occurred. Id. In a responsive email, the Corps expressed its regret that the Tribe would not participate and welcomed any knowledge or information regarding historic properties that it was still willing to provide. Id. The Corps went
on to explain that it did not “regulate or oversee the construction of pipelines, and [its] regulatory control is limited to only a small portion of the land and waterways that the pipeline traverses.”

Id., Exh. 14. While the Corps’ regulations allowed it to consider uplands outside “waters of the United States,” the email asserted that work in these areas had to be “directly associated [with], integrally related [to],” and caused by the “in-water authorized activity” before the Corps could claim authority over it. Id.

The Tribe did engage in two more visits to Lake Oahe with the Corps around this time. See Eagle Decl., ¶¶ 13-14; Harnois Decl., ¶ 29. First, on March 8, Morgan and the Tribe’s latest THPO, Jon Eagle, identified areas of potential cultural significance to the Corps and described the area’s sacred importance to the Standing Rock people. See Harnois Decl., ¶ 29. Several of the sites they identified were in areas that the Corps had determined were well outside the area of potential impact for the project, such as a cemetery approximately 1.2 miles from the nearest bore pit and .6 miles from the HDD preparation and construction area. Id. The group also toured the Cannonball Village site. Id. At this site, Morgan and Eagle pointed out places in the mole dirt where “pottery shards, pieces of bone, flint and tools used for scraping hides and cutting” were visible. See Eagle Decl., ¶ 14. Eagle, in addition, pointed out a sacred stone in the area that is still used for prayer. Id., ¶ 15. During the visit, Corps staff acknowledged that they had been previously unaware of some of these cultural resources and committed to further study of them. Id., ¶ 14. Morgan and Harnois thereafter exchanged several follow-up emails to discuss the Tribe’s “concerns and questions” generated by the onsite visit. See Harnois Decl., ¶¶ 30-31. The Corps nevertheless ultimately determined that the Cannonball Village site was not in the area that would be affected by DAPL-related construction work. Id., ¶ 29.
The second onsite visit occurred on March 22 and went much the same as the first. Id., ¶ 32. This time, however, Morgan asked questions about the surveying that had been done on the area as part of the Northern Borderline Pipeline project – a pre-existing natural-gas pipeline installed under Lake Oahe that runs parallel to DAPL’s proposed course. Id. Harnois continued discussions with her about the adequacy of the mapping and considered requiring additional testing on the site. Id. Ultimately, however, Harnois determined that additional testing would not be necessary based on his later review of the site documentation and research. Id.

The Corps then sought to end the Section 106 process for the Lake Oahe crossing. On April 22, Harnois made a Determination of Effect for the site and emailed it to the consulting parties. Id., ¶ 33; see also ECF No. 6, Exh. 43. In it, Harnois described the project, explained the location, and discussed data on 41 potential historic sites in detail. Id. He concluded that one of the sites identified, 32MOx0570, was “not eligible” for listing and that the project overall had “no historic properties subject to effect.” Id. Four days later, the North Dakota SHPO concurred with his determination via email. See Harnois Decl., ¶ 34. Harnois then notified the Tribe of this concurrence. Id., ¶ 35. Both Chairman Archambault and Eagle formally objected to the determination. See ECF No. 6, Exh. 30 at 2 (“To date, none of our request for consultation or Class III Cultural Surveys has been honored.”); id., Exh. 31. As a result, the Tribe and Corps continued their dialogue on these issues. See Ames Decl., ¶ 36; Chieply Decl., ¶¶ 32, 35 (describing Corps response to these objections).

The Advisory Council – the agency responsible for commenting on NHPA compliance for federal undertakings – also sent the Corps a series of letters about the adequacy of the Section 106 process around this time. After the Corps published the draft EA, the Advisory Council requested verification from the Corps of its consultation efforts and relayed concerns expressed
to them by Archambault about the consultations (or lack thereof) that had occurred to date with Standing Rock. See ECF No. 6, Exh. 20 (Advisory Council Comment on Draft EA) at 2. The Advisory Council formally entered the Section 106 consultation process for DAPL soon thereafter. See Chieply Decl., ¶ 27. Then, in March, the Advisory Council wrote to express its skepticism about the Corps’ determination that the entire pipeline was not subject to its jurisdiction. See ECF No. 6, Exh. 25 (Letter from Advisory Council to Henderson on Mar. 15, 2016). In particular, the Advisory Council felt that the PCNs required for various portions of the pipeline transformed the entire pipeline into an undertaking. Id. In addition, the Advisory Council described itself as “perplexed by the Corps’ apparent difficulties in consulting” with Standing Rock. Id. Again, on May 6, the Advisory Council wrote with additional questions relating to the DAPL permit area, tribal consultations, and federal-agency coordination. See ECF No. 6, Exh. 26. The Advisory Council also formally objected to the Corps determination of “no effects,” citing numerous deficiencies in the Section 106 process, including the failure of the Corps to properly define the scope of its responsibilities. See ECF No. 6, Exh. 32. Finally, on June 2, the Advisory Council requested that the Assistant Secretary of the Army for Civil Works, Jo-Ellen Darcy, review that “no effects” determination. See Chieply Decl., ¶ 32.

The Corps responded to these letters with several of its own. On May 13, Henderson wrote to reiterate that the Corps could not exercise control over portions of the project not subject to its jurisdiction. See id.; see also id., Exh. 15. In his letter, Henderson contested the Advisory Council’s conclusion that the permitted activity determined the entire right-of-way for the pipeline, instead contending that the crossing of jurisdictional waters did not ultimately control project alignment elsewhere. Id. He further explained that the use of HDD in many places would avoid Corps jurisdiction altogether by eliminating any discharge of dredge or fill
materials into regulated waters. Id. On June 30, the Assistant Secretary of the Army also replied. See Chieply Decl, ¶ 38; see also ECF No. 6, Exh. 39. In her letter, she reiterated the Corps’ position on its own jurisdiction, asserted tribes were notified and invited to participate and provide information, and contested the Advisory Council’s claim that field visits had identified the presence of new areas within the APE for the project. Id.

The Corps then moved to close the book on the matter. On July 25, 2016, it issued an EA finding of “no significant impact” and verified all 204 PCN locations under NWP 12. See ECF No. 6, Exhs. 33-36; Ames Decl., ¶ 36. The PCNs, however, contained additional restrictions. See ECF No. 6, Exhs. 33-36. Most importantly, they instituted a “Tribal Monitoring Plan” that requires Dakota Access to allow tribal monitors at all PCN sites when construction is occurring. Id. Dakota Access immediately notified the tribes of its intent to begin construction at the PCN sites within five to seven days. See ECF No. 6, Exh. 49 (Letter from Dippel to Upper Sioux).

* * *  

In summary, the Corps has documented dozens of attempts it made to consult with the Standing Rock Sioux from the fall of 2014 through the spring of 2016 on the permitted DAPL activities. These included at least three site visits to the Lake Oahe crossing to assess any potential effects on historic properties and four meetings with Colonel Henderson.

E. Procedural History and Recent Activities

Two days after the Corps issued the PCN authorizations, Standing Rock filed this suit against it under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., asserting in part that the Corps had violated its obligation under the NHPCA prior to issuing the permitting for DAPL-related construction along the entire pipeline route. The Tribe then filed, on August 4, 2016, this Motion for Preliminary Injunction to mandate a withdrawal of this permitting. The next day,
Dakota Access intervened in the action in support of the Corps. See ECF No. 7 (Dakota Access Motion to Intervene). The Court subsequently permitted intervention by the Cheyenne River Sioux Tribe on Plaintiff’s side, though it did not participate in this Motion. After a scheduling conference on August 8, the Court ordered an expedited briefing schedule and set a hearing on the Motion for August 24.

At the Motion hearing, Dakota Access revealed that most of the construction associated with DAPL is, in fact, already complete. Because only 3% of the pipeline is subject to federal permitting, Dakota Access has always been free to proceed with the vast majority of the construction, which will occur on private land. In fact, 48% of the pipeline had already been cleared, graded, trenched, piped, backfilled, and reclaimed. See Mot. Hearing Trans. at 24. The company also moved fast elsewhere; this figure included all but 11 of the 204 sites that the Corps had subjected to PCN authorization. Id. at 25. All of the necessary clearing and grading has also been done in South Dakota, and 90% of it is complete in North Dakota. Id. at 24. One of the few exceptions is the crossing leading up to the west side of Lake Oahe, which has not yet been cleared or graded.

The tribal monitoring and GC 21 unexpected-discovery protocols also appeared to be in place for the activity that was permitted by the Corps. Id. at 37-39. When construction is ongoing for such activities, Dakota Access allows archaeological and tribal monitors onsite to look for evidence of cultural or historic resources. Id. As of the hearing, construction had triggered the unexpected-discovery protocol six times. Id. at 39. In each case, construction stopped until the state, federal, and tribal representatives confirmed that the resources were not being damaged. Id. Each one turned out to be a false alarm. Id. At the conclusion of the hearing, the Court informed the parties that it would issue its decision on September 9, two
weeks being necessary to adequately review the voluminous record and draft this lengthy Opinion.

Nine days after the hearing, on Friday, September 2, the Tribe filed a supplemental declaration by Tim Mentz, the Tribe’s former Tribal Historic Preservation Officer and a member of the Standing Rock Sioux Tribe. See ECF No. 29-1 (Supplemental Declaration of Tim Mentz, Sr.). In the declaration, Mentz explained that he had been invited by a landowner to conduct cultural surveys on private land along the DAPL route that had already been cleared for pipeline construction. See id., ¶ 2-3; see also id., Exh. 1. This land was about 1.75 miles from the construction activity that the Corps has actually permitted at Lake Oahe. Id., ¶ 3. In other words, the area in question was entirely outside the Corps’ jurisdiction. The construction activity on it, as a result, never required a federal permit, and neither the Corps nor any other federal agency had any control over it. Because these activities do not require a federal permit, they are also not necessarily subject to the attendant restrictions to protect historic properties – i.e., GC 21 and tribal monitoring – placed by the Corps on the activities that it did permit.

Mentz, over the course of several days beginning on August 30, avers that he surveyed this private land around the pipeline right-of-way. Id., ¶ 6. During these surveys, he observed several rock cairns and other sites of cultural significance inside the 150-foot corridor staked for DAPL construction. Id., ¶¶ 7-11. He was, however, confined in his actual surveying to those areas immediately adjacent to the pipeline right-of-way and did not enter the corridor itself. Id. Mentz documented the presence of several sites that he believed to be of great cultural note nearby, including a stone constellation used to mark the burial site of a very important tribal leader about 75 feet from the pipeline corridor. Id., ¶ 10. Mentz did not observe any fencing or other protective measures around these sites. Id., ¶ 9. He also observed what he believed to be
important stone features within the pipeline corridor.  Id., ¶ 11.  According to Mentz, none of these sites was documented on the earlier cultural surveys of the area commissioned by Dakota Access.  Id., ¶ 17.

The next day, on Saturday, September 3, Dakota Access graded this area.  See ECF No. 30 (Emergency Motion for Temporary Restraining Order).  On September 4, both the Tribe and the Cheyenne River Sioux Tribe filed for a Temporary Restraining Order on any additional construction work at the site described by Mentz – i.e., the length of the pipeline route for approximately two miles west of Highway 1806 in North Dakota – and for any additional construction work on the pipeline within 20 miles on either side of Lake Oahe, until the Court ruled on this Motion for Preliminary Injunction.  Id.  The Corps responded that it would not oppose the restraining order while awaiting this decision.

Dakota Access, not surprisingly, hotly contested Mentz’s version of events in its opposition to the TRO motion.  In a map of the area, the company sought to demonstrate that many of the sites documented by Mentz were in fact well outside the pipeline route.  See ECF No. 34 (Response to TRO) at 6-8.  The rest, according to Dakota Access, were directly over the existing Northern Border Natural Gas Pipeline that runs through the area and thus could not have been historic artifacts.  Id. at 6.  The company instead alleges that the route of the pipeline in this area proves its point: it twists and turns to avoid the finds that Mentz documented adjacent to the pipeline and thus demonstrates that Dakota Access did purposefully shift the route to avoid any sites of cultural significance in its planning phase.  Id.  The Court acknowledges that the map provided by the company does seem to indicate that the pipeline curves to accommodate the cultural sites.  Id. at 7.
This Court held a TRO hearing on September 6, the first business day after that motion was filed. Without making factual determinations about the truth of Mentz’s observations, the Court was able to obtain Dakota Access’s agreement not to perform any construction activities within 20 miles east of Lake Oahe and within about two miles west of the Lake, as it had already ceased such operations while awaiting the Court’s preliminary-injunction ruling. The Court otherwise denied the TRO. This current Opinion now issues on a highly expedited basis.

II. Legal Standard

“[I]njunctive relief” is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter v. Nat. Res. Def. Advisory Council, Inc., 555 U.S. 7, 22 (2008). “A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” Id. at 20. Before the Supreme Court’s decision in Winter, courts weighed the preliminary-injunction factors on a sliding scale, allowing a weak showing on one factor to be overcome by a strong showing on another factor. See, e.g., Davenport v. Int’l Bhd. of Teamsters, 166 F.3d 356, 360-61 (D.C. Cir. 1999). This Circuit, however, has suggested, without deciding, that Winter should be read to abandon the sliding-scale analysis in favor of a “more demanding burden” requiring plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm. See Sherley v. Sebelius, 644 F.3d 388, 392-93 (D.C. Cir. 2011); Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1292 (D.C. Cir. 2009).

Whether a sliding-scale analysis still exists or not, courts in our Circuit have held that “if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors.” Dodd v. Fleming, 223 F. Supp. 2d 15, 20 (D.D.C. 6-31).
2002) (citing CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995)). Likewise, a failure to show a likelihood of success on the merits alone is sufficient to defeat a preliminary-injunction motion. Ark. Dairy Co-op Ass’n, Inc. v. USDA, 573 F.3d 815, 832 (D.C. Cir. 2009) (citing Apotex, Inc. v. FDA, 449 F.3d 1249, 1253 (D.C. Cir. 2006)). It follows, then, that the Court may deny a motion for preliminary injunction, without further inquiry, upon finding that a plaintiff is unable to show either irreparable injury or a likelihood of success on the merits. Here, Standing Rock fails on both grounds.

III. Analysis

The Corps gave the go-ahead, under NWP 12, for DAPL’s construction activities in federally regulated waters at hundreds of discrete places along its nearly 1,200-mile route. In seeking a preliminary injunction, the Tribe contends that the Corps, in doing so, shirked its responsibility to first engage in the tribal consultations required by the NHPA. Because DAPL construction is ongoing, the Tribe further asserts that sites of great significance will likely be damaged or destroyed unless this Court pumps the brakes now. It also contends that the balance of harms and the public interest favor its position.

Defendants rejoin that preliminary-injunctive relief is inappropriate both because the Corps has satisfied its obligations under the NHPA – in other words, the Tribe is unlikely to succeed on the merits of its NHPA claim – and because the Tribe has failed to show that any harm will befall it in the absence of an injunction. As the Court agrees on both points, it need not consider the final two factors – balance of harms and the public interest – to deny the Motion. It now discusses the merits and the harm separately.
A. Likelihood of Success on the Merits

Although the Tribe’s legal theory is not entirely clear, the Court believes it can infer four separate arguments that the Corps’ permitting of DAPL was unlawful. First, the Standing Rock Sioux assert that the Corps violated the NHPA when it promulgated NWP 12 without a Section 106 process. Next, they contend that, even if the Corps could defer site-specific Section 106 consultations when promulgating NWP 12, it violated the NHPA by permitting DAPL-related activities at some federally regulated waters without a Section 106 determination. Third, the Tribe maintains that, even where the Corps did conduct a Section 106 process, it unlawfully narrowed the scope of its review to only those areas around the permitted activity, as opposed to the entire pipeline. Finally, the Tribe urges that the Section 106 process at the PCN sites was inadequate because the quality of the consultations was deficient. None of these claims appears likely to succeed on the merits at this stage.

1. NWP 12

Although many DAPL-related construction activities in federally regulated waters occurred or will occur at places where the Corps did not require a PCN verification, such activities nevertheless required approval from the Corps under the CWA or RHA. That approval was provided on a general level when the Corps re-promulgated NWP 12 in 2012. Because these activities thus were “permitted” by a federal agency, they fall within the NHPA’s definition of a federal “undertaking.” See 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y). As federal undertakings, they triggered the Corps’ NHPA duty to consider, prior to the issuance of the permit, their effects on properties of cultural or historic significance. See 54 U.S.C. § 306108 (“[P]rior to the issuance of any license, [the federal agency] shall take into account the effect of
the undertaking on any historic property.”). According to the Tribe, the Corps did not fulfill this obligation because NWP 12 was issued without any tribal consultations.

As an initial matter, the Tribe’s assertion that the Corps did not engage in any NHPA consultations prior to promulgating NWP 12 is false. Before issuing NWP 12, the Corps, in November 2009, sent an early notification to tribes, including Standing Rock, containing information pertaining to its proposed NWPs. See ECF No. 21, Exh. 14 (Letter from Ruchs to Brings Plenty on Nov. 9, 2009). The letter contained a graphic depiction of the types of activities that were most often authorized by nationwide permits in the Omaha District. Id. In addition, in 2010, the Corps proceeded to hold “listening sessions and workshops” with tribes to discuss their concerns related to the proposed nationwide permits. See ECF No. 21, Exh. 13 (Tribal Information Fact Sheet). In March 2010, the Corps contacted Standing Rock personally to discuss the permits and any additional regional conditions that the Tribe thought might need to be included to protect their cultural resources. See Chieply Decl., ¶ 5.

Then, on February 10, 2011, the Corps sent a letter to the Standing Rock Sioux Tribal Chairman and THPO Young, notifying them of its plan to publish a proposal in the Federal Register to reissue NWP 12. See ECF No. 21, Exh. 13 (Letter from Ruchs to Murphy on Feb. 10, 2011). Attached to the letter, the Corps provided a description of the proposed NWP 12, as well as a draft of the current Omaha District regional conditions that would apply to the permit. Id. The Corps requested that the Tribe “consider this letter our invitation to begin consultation on the proposal to reissue the NWPs.” Id. It went on to say that the Corps “look[s] forward to consulting with you on a government-to-government basis on this issue” and requested that the Tribe notify the Corps if it was “interested in consulting.” Id. The Corps further committed to provide a “Corps representative at consultation and fact-finding meetings” and to “fully consider
any information you wish to provide.” Id. In an email on March 9, 2011, the Corps followed up on the offer. See Chieply Decl., ¶ 7. The Corps also seems to have conducted district-level tribal listening sessions and workshops. See Tribal Information Fact Sheet at 1. There is no indication in the record that the Tribe responded to the Corps’ invitation to consult, but was ignored. The Tribe, in fact, concedes that it did not participate in the notice-and-comment for NWP 12 at all. See Reply at 2. When it actually promulgated NWP 12, moreover, the Corps included a section on its compliance with the NHPA, noting that GC 20 “requires consultation for activities that have the potential to cause effects to historic properties” prior to those activities’ proceeding under the general permit. See ECF No 6, Exh. 1 (Nationwide Permit 12 Decision Document) at 10 (emphasis added).

To the extent that the Tribe now seeks in this Motion to launch a belated facial attack against NWP 12, then, it is unlikely to succeed. The Corps made a reasonable effort to discharge its duties under the NHPA prior to promulgating NWP 12, given the nature of the general permit. Cf. Sierra Club v. Bostick, 787 F.3d 1043, 1047, 1057 (10th Cir. 2015) (holding Corps permissibly interpreted CWA “to allow partial deferral of minimal-impacts analysis” because of “the difficulty of predicting the impact of activities allowed under nationwide permits”). Without definite knowledge of the specific locations that would require permitting in the future, it is hard to ascertain what else the Corps might have done, before issuing a general permit, to discharge its NHPA duties. In other words, the Corps, when it promulgated NWP 12, had no knowledge of DAPL or its proposed route. The CWA and RHA plainly allow the Corps to do just what it did here: preauthorize a group of similar activities that, alone and combined, have minimal impact on navigable waterways. This Court cannot conclude that the Corps does not
have the ability to promulgate these general permits at all. As a result, the Corps’ effort to speak with those it thought might be concerned was sufficient to discharge its NHPA obligations.

This conclusion is reinforced by the limited scale and scope of the federally sanctioned activities at issue. The Advisory Council’s regulations provide that the “agency official should plan consultations appropriate to the scale of the undertaking and the scope of the Federal involvement.” 36 C.F.R. § 800.4(a). Here, the scope of the Corps’ involvement was limited. It never had the ability, after all, to regulate the entire construction of a pipeline. Congress has decided that no general federal regulation applies to domestic oil pipelines. In addition, the scale of the federally permitted undertaking here is narrow. The CWA and RHA regulate, as relevant here, only certain limited construction activities in waterways. The CWA, moreover, restricts the use of general permits to an even narrower subset of these already limited activities in waterways. The Corps can only authorize discharges that have a minimal impact on the jurisdictional waterway through a general permit. See 33 U.S.C. § 1344(e). In other words, NWP 12, by definition, can authorize only that regulated conduct that will have little effect on the regulated waterway in the first place. Given these restrictions, the Corps’ decision to promulgate NWP 12 after the effort to consult that it made here was reasonable.

The Tribe responds that the Corps was instead required to work out a “programmatic agreement” with any tribe that might one day be affected by the activities permitted under NWP 12. See Mot. at 22-23. A programmatic agreement is an “agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings” that is negotiated by the Advisory Council and the permitting agency. See 36 C.F.R. § 800.14(b). On this score, Standing Rock is certainly right that the Corps could have pursued a programmatic agreement to fulfill its NHPA duties, as it did
in 2004 with several tribes in regard to the Missouri Basin. See ECF No. 6, Exh. 4 (Programmatic Agreement). But the Advisory Council does not make the pursuit of a programmatic agreement mandatory. See 36 C.F.R. § 800.14(b) (“The Advisory Council and the agency official may negotiate a programmatic agreement.”) (emphasis added). The Court thus cannot conclude that a PA was the only avenue available to the Corps to fulfill its duties under the NHPA. There is, indeed, no indication that such a requirement would even be feasible for a nationwide permitting scheme given the sheer number of possible consulting parties. Nor could the Corps have complied with the full Advisory Council process, which is clearly designed for project-specific determinations. As a result, it was reasonable for the Corps to engage in a general process at the time it promulgated NWP 12 and to defer site-specific NHPA determinations to a later time.

2. NWP 12 Applied at Non-PCN Sites

The Tribe next argues that NWP 12’s operation is unlawful because the Corps makes no site-specific Section 106 determination for numerous generally permitted activities – i.e., non-PCN sites. In particular, it claims that GC 20 improperly delegates authority to the permittee to assess whether its activities will have a potential effect on historic properties. To refresh the reader, GC 20 requires that “[i]n cases where the district engineer determines that the activity may affect [NHPA] properties . . . , the activity is not authorized, until the requirements of Section 106 of the [NHPA] have been satisfied.” 77 Fed. Reg at 10,284. The Advisory Council, too, seems to concur that, in individual cases of permitting under NWP 12, Section 106 is not satisfied where the Corps itself does not make a site-specific determination about whether a permitted activity has the potential to affect historic properties. See ECF No. 6, Exh. 50 at 1-2. As the Tribe and the Advisory Council read GC 20, the Corps never considers whether an
individual activity will have the potential to affect historic sites unless the permittee decides that it might and, accordingly, seeks a PCN. The Corps, in turn, responds that it does consider itself to retain the authority and responsibility under GC 20 to determine whether permitted activity has the potential to damage historic properties. See Corps Opp. at 13-14.

Standing Rock and the Advisory Council make a good argument. It is possible that the Corps’ permitting under NWP 12 would be arbitrary and capricious where it relies completely on the unilateral determination of a permittee that there is no potential cultural resource that will be injured by its permitted activity. Fortunately, this Court need not decide that issue because that is not how the Corps interpreted and applied GC 20 to DAPL. In this case, the Corps looked at reports and maps of the pipeline to determine which jurisdictional crossings had the potential to affect historic properties. See Chieply Decl., Exh. 16 at 1; see also id., Exh. 15 at 1. These extensive maps reflected cultural surveys conducted by licensed archaeologists (sometimes with SHPO participation). See Howard Decl., ¶¶ 4-10; see, e.g., ECF No. 6, Exh. 44. The Corps ultimately concluded that only 204 of the jurisdictional crossings triggered either GC 20 or some other concern that would require a PCN verification. See Chieply Decl., Exh. 16 at 1.

The Court must review that determination under the Administrative Procedure Act’s deferential standard. See 5 U.S.C. § 706(2)(a). Under this standard, the Tribe bears the burden to demonstrate that the agency action was unlawful, arbitrary or capricious, or not in accordance with the law. See Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976). Plaintiff has not done so here. At no point has the Tribe clearly pointed this Court to a specific non-PCN activity – i.e., crossings the Corps permitted – where there is evidence that might indicate that cultural resources would be damaged. The Tribe instead focuses on the potential impact to cultural resources elsewhere along the pipeline. But to show the Corps’ determination was unreasonable,
Standing Rock needs to offer more than vague assertions that some places in the Midwest around some bodies of water may contain some sacred sites that could be affected. For example, if the Corps had not required a PCN verification for a site like Lake Oahe (assuming it was not subject to the RHA), to which the Tribe has shown it has important historic and cultural connections, this Court might well find unreasonable the Corps’ determination that construction at the site would have no potential to cause negative effects to these resources. Without such a specific showing involving a site within the Corps’ jurisdiction, however, the Court can find no ground at this juncture to hold that the Corps’ considered judgment – based as it was on its expertise, the activity involved, extensive cultural surveys, and additional research – was unreasonable. The Tribe has had more than a year to come up with evidence that the Corps acted unreasonably in permitting even a single jurisdictional activity without a PCN, and it has not done so. As a result, it has not met its burden here.

3. **Scope of Section 106 Process at PCN Sites**

The Tribe next asserts that the Corps’ Section 106 process was deficient even at those places where it did in fact require a PCN notification. Here, again, Standing Rock largely focuses its efforts on a sweeping claim that the Corps was obligated in permitting this narrow activity – *i.e.*, certain construction activities in U.S. waterways – to consider the impact on potential cultural resources from the construction of the entire pipeline. In particular, the Tribe contends that the NHPA requires such an analysis because the statute defines the potential effect of an undertaking to include the indirect effects of the permitted activity on historic properties.

This argument, however, misses the mark. In its regulations concerning compliance with the adverse-effects analysis required by the NHPA, the Corps determined that entire pipelines need not be considered part of the analyzed areas. Rather, only construction activity in the
federally regulated waterways – the direct effect of the undertaking – and in uplands around the federally regulated waterways – the indirect effect of the undertaking – requires analysis. See 33 C.F.R. pt. 325, app. C, § 1(g)(i). This Circuit has held just such an approach to be reasonable in the context of a challenge brought under a similar “stop, look, and listen” provision in NEPA, and these two statutes are often treated similarly. See, e.g., Karst Envtl. Educ. & Prot., Inc. v. EPA, 475 F.3d 1291, 1294-95 (D.C. Cir. 2007) (“Because of the ‘operational similarity’ between NEPA and NHPA, both of which impose procedural obligations on federal agencies after a certain threshold of federal involvement, courts treat ‘major federal actions’ under NEPA similarly to ‘federal undertakings’ under NHPA.”). Specifically, this Circuit held that where a federal easement and CWA permitting encompassed only five percent of the length of a pipeline, “the federal government was not required to conduct NEPA analysis of the entirety of the . . . pipeline, including portions not subject to federal control or permitting.” Sierra Club v. U.S. Army Corps of Eng’rs, 803 F.3d 31, 34-35 (D.C. Cir. 2015). Other Circuits have held the same. See Bostick, 787 F.3d at 1051-54 (holding Corps was not required to prepare NEPA analysis of entire pipeline when verifying NWPs for 485-mile oil pipeline crossing over 2,000 waterways); Winnebago Tribe of Neb. v. Ray, 621 F.2d 269, 272-73 (8th Cir. 1980) (concluding same for electric utility line). The Tribe offers no persuasive argument as to why the facts here demand a different conclusion. As a result, this Court cannot conclude here that a federal agency with limited jurisdiction over specific activities related to a pipeline is required to consider all the effects of the entire pipeline to be the indirectly or directly foreseeable effects of the narrower permitted activity.

The Corps’ decision in this regard is also entitled to deference under the APA as it falls squarely within the expertise of the Corps, not the Advisory Council, to determine the scope of
the effects of construction activities at U.S. waterways. See Bldg. & Constr. Trades Dep’t v.
Brock, 838 F.2d 1258, 1266 (D.C. Cir. 1988) (holding courts must be especially deferential to an
agency’s determination within an area in which it has “special expertise”). The Tribe, moreover,
fails to provide any evidence that would call the Corps’ technical judgment in this regard into
question. See 33 C.F.R. pt. 325, app. C, § 1(g)(i) (explaining that for linear crossings, the
“permit area shall extend in either direction from the crossing to that point at which alternative
alignments leading to a reasonable alternative locations for the crossing can be considered and
evaluated”). The Tribe contends instead, without evidence, that the entire pipeline must be the
indirect effect of the permitted activity because the pipeline cannot feasibly avoid all federally
regulated water crossings. In other words, no permitting means no pipeline. The Court cannot
say on this record, however, that the Tribe is right. In fact, as DAPL’s own construction
demonstrates, the use of technology such as HDD can at least sometimes avoid the Corps’
jurisdiction at federally regulated waters by eliminating the need for the discharge of dredge or
fill material.

The limited nature of the Corps’ jurisdiction, in fact, reinforces the reasonableness of the
its decision not to consider the effects of the entire pipeline on historic properties before issuing
the DAPL permitting. “[W]here an agency has no ability to prevent a certain effect due to its
limited statutory authority over the relevant actions, the agency[‘s action] cannot be considered a
legally relevant ‘cause’ of the effect.” Dep’t of Transp. v. Public Citizen, 541 U.S. 752, 770
(2004). Section 106 analysis is designed only to “discourage[e] federal agencies from ignoring
preservation values in projects they initiate, approve funds for or otherwise control.” Lee v.
Thornburgh, 877 F.2d 1053, 1056 (D.C. Cir. 1989). That section does not require that the Corps
consider the effects of actions over which it has no control and which are far removed from its
permitting activity. The Corps here ultimately determined that the route taken by the pipeline through private lands, up to a certain point approaching a federally regulated waterway, is driven by factors that have little to do with the discrete activities that the Corps needs to permit. The Court cannot conclude otherwise on this record. As such, it cannot hold the Corps’ decision arbitrary, capricious, or otherwise unlawful.

4. Sufficiency of Consultations

Plaintiff’s last point on the merits is that the Corps failed to offer it a reasonable opportunity to participate in the Section 106 process as to the narrow scope of the construction activity that the Corps did consider to be an effect of the permitted waterway activities. The factual proceedings recited in exhaustive detail in Section I.D., supra, tell a different story. The Corps has documented dozens of attempts to engage Standing Rock in consultations to identify historical resources at Lake Oahe and other PCN crossings. To the reader’s relief, the Court need not repeat them here. Suffice it to say that the Tribe largely refused to engage in consultations. It chose instead to hold out for more – namely, the chance to conduct its own cultural surveys over the entire length of the pipeline.

In fact, on this record, it appears that the Corps exceeded its NHPA obligations at many of the PCN sites. For example, in response to the Tribe’s concerns about burial sites at the James River crossing, the Corps verified that cultural resources indeed were present and instructed Dakota Access to move the pipeline to avoid them. Dakota Access did so. See Ames Decl., ¶ 24. Furthermore, the Corps took numerous trips to Lake Oahe with members of the Tribe to identify sites of cultural significance. See Summit Lake Paiute Tribe of Nevada v. U.S. Bureau of Land Mgmt., 496 F. App’x 712, 715 (9th Cir. 2012) (not reported) (holding four visits with a tribe to site constituted sufficient consultation for resolution of adverse effects). Colonel
Henderson also met with the Tribe no fewer than four times in the spring of 2016 to discuss their concerns with the pipeline. Ultimately, the Corps concluded that no sites would be affected by the DAPL construction at Lake Oahe, and the State Historic Preservation Officer who had visited that site concurred. The Corps’ effort to consult the Tribe on this site – the place that most clearly implicated the Standing Rock Sioux’s cultural interests – sufficed under the NHPA.

Contact, of course, is not consultation, and “consultation with one tribe doesn’t relieve the [agency] of its obligation to consult with any other tribe.” Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of Interior, 755 F. Supp. 2d 1104, 1112, 1118 (S.D. Cal. 2010).

But this is not a case about empty gestures. As noted in Section I.D., supra, and the examples just above, the Corps and the Tribe engaged in meaningful exchanges that in some cases resulted in concrete changes to the pipeline’s route. “This is not a case like Quechan Tribe, where a tribe entitled to consultation actively sought to consult with an agency and was not afforded the opportunity.” Wilderness Soc’y. v. Bureau of Land Mgmt., 526 F. App’x 790, 793 (9th Cir. May 28, 2013) (not reported).

The Tribe nevertheless asserts that the Corps’ failure to include it in the early cultural surveys rendered the permitting unlawful for at least some of the PCN sites. These surveys, however, were not conducted by the Corps or under its direction. Even setting this fact aside, neither the NHPA nor the Advisory Council regulations require that any cultural surveys be conducted for a federal undertaking. The regulations instead demand only that the Corps make a “reasonable and good faith effort” to consult on identifying cultural properties, which “may include background research, consultation, oral history interviews, sample field investigations, and field survey.” 36 C.F.R. § 800.4(b)(1). It goes without saying that “‘may’ means may.” McCreary v. Offner, 172 F.3d 76, 83 (D.C. Cir. 1999). These regulations contain “no
requirement that a good faith effort include all of these things.” Summit Lake Paiute, 496 F. App’x at 715. The Tribe, then, did not have an absolute right to participate in cultural surveying at every permitted undertaking, as it seems to argue. The Advisory Council regulations direct the agency to “take into account past planning, research, and studies” in making these types of determinations, see 36 C.F.R. § 800.4(b)(1), and that is just what the Corps did here. It gave the Tribe a reasonable and good-faith opportunity to identify sites of importance to it. As a result, the Court must conclude that the Tribe has not shown that it is likely to succeed on the merits of its NHPA claim at this stage.

B. Irreparable Injury

In seeking preliminary-injunctive relief here, the Standing Rock Sioux do not claim that a potential future rupture in the pipeline could damage their reserved land or water. Instead, they point to an entirely separate injury: the likelihood that DAPL’s ongoing construction activities – specifically, grading and clearing of land – might damage or destroy sites of great cultural or historical significance to the Tribe. The risk that harm might befall such sites is a matter of unquestionable importance to the Standing Rock people. In the eloquent words of their Tribal Chairman:

History connects the dots of our identity, and our identity was all but obliterated. Our land was taken, our language was forbidden. Our stories, our history, were almost forgotten. What land, language, and identity remains is derived from our cultural and historic sites. . . . Sites of cultural and historic significance are important to us because they are a spiritual connection to our ancestors. Even if we do not have access to all such sites, their existence perpetuates the connection. When such a site is destroyed, the connection is lost.

Archambault Decl., ¶¶ 6, 15. The tragic history of the Great Sioux Nation’s repeated disposessions at the hands of a hungry and expanding early America is well known. See, e.g., Dee Brown, Bury My Heart at Wounded Knee (1970); United States v. Sioux Nation, 448 U.S.
371 (1980). The threat that new injury will compound old necessarily compels great caution and respect from this Court in considering the Tribe’s plea for intervention.

Although the potential injury may be significant, the Tribe must show that it is probable to occur in the absence of the preliminary injunction it now seeks. See Winter, 555 U.S. at 22 (“Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the Court’s] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”) (emphasis added).

This is the burden the law imposes for this form of relief. The Court must faithfully and fairly apply that standard in all cases, regardless of how high the stakes or how worthy the cause. After a careful review of the current record, the Court cannot conclude that the Tribe has met it.

To understand Standing Rock’s deficit in this regard, it is necessary to first consider the nature of the relief it seeks. The Tribe has not sued Dakota Access here for any transgressions; instead, this Motion seeks to enjoin Corps permitting of construction activities in discrete U.S. waterways along the pipeline route. Such relief sought cannot stop the construction of DAPL on private lands, which are not subject to any federal law. Indeed, Standing Rock does not point the Court to any law violated by the private contracts that allow for this construction or any federal regulation or oversight of these activities. From the outset, consequently, no federal agency had the ability to prevent DAPL’s construction from proceeding on these private lands. At most, the Corps could only have stopped these activities at the banks of a navigable U.S. waterway. An injunction of any unlawful permitting now can, at most, do the same.

The facts previously recited bear this simple conclusion out. Dakota Access, as has been explained, began its construction work on private lands long before it had even secured the Corps permitting that the Tribe now seeks to enjoin. See Mahmoud Decl., ¶ 47. Standing Rock
concedes as much. See Mot. at 35; see also Mot. Hearing Tran. at 46 (“They started construction months ago, months before the permits were issued.”). In many places, this work is already complete. See Mot. Hearing Trans. at 24. There is, moreover, no sign that Dakota Access will pull back from this construction on private land if this Court enjoins the NWP 12 permitting necessary for the 3% of DAPL’s route subject to federal jurisdiction. Quite the contrary; the company has indicated that it has little choice but to push ahead in the hopes of meeting contract obligations to deliver oil by January 2017. See, e.g., id. at 40-41; see also Mahmoud Decl., ¶ 51.

The Tribe thus cannot demonstrate that the temporary relief it seeks here – i.e., a preliminary injunction to withdraw permitting by the Corps for dredge or fill activities in federally regulated waters along the DAPL route – can prevent the harm to cultural sites that might occur from this construction on private lands. In other words, Standing Rock cannot show that any harm taking place on private lands removed from the Corps’ permitting jurisdiction “will directly result from the action which [it now] seeks to enjoin.” Hunter v. FERC, 527 F. Supp. 2d 9, 14-15 (D.D.C. 2007) (explaining that to obtain preliminary relief, “the movant must . . . show that ‘the alleged harm will directly result from the action which the movant seeks to enjoin’”) (quoting Wisc. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis added)); see also Buckingham Corp. v. Karp, 762 F.2d 257, 261 (2d Cir. 1985) (“The purpose of a preliminary injunction is to protect the moving party from irreparable injury during the pendency of the action.”). Powerless to prevent these harms given the current posture of the case, the Court cannot consider them likely to occur in the absence of the relief sought here. Put simply, any such harms are destined to ensue whether or not the Court grants the injunction the Tribe desires. As Standing Rock acknowledges, Dakota Access has demonstrated that it is determined to build its pipeline right up to the water’s edge regardless of whether it has secured a
permit to then build across. See Mot. Hearing Trans. at 46. Like the Corps, this Court is unable to stop it from doing so.

There is a second related problem with the Tribe’s claim to irreparable injury, both on the private land and elsewhere along the pipeline. The risk that construction may damage or destroy cultural resources is now moot for the 48% of the pipeline that has already been completed. Id. at 24. As the clearing and grading are the “clearest and most obvious” cause of the harm to cultural sites from pipeline construction, id. at 18-19, 47 (recognizing that injunction is necessary anywhere not yet cleared “to prevent additional harm or construction until [cultural] surveys can take place”), moreover, the damage has already occurred for the vast majority of the pipeline, with the notable exception of 10% of the route in North Dakota, including at Lake Oahe. Here again, then, the Tribe has not shown for this substantial segment of the pipeline that any additional harm is likely to occur to cultural sites absent the preliminary injunction that it now seeks.

Yet a third problem bedevils the Tribe’s efforts to enjoin permitting along the entire pipeline route. Plaintiff never defined the boundaries of its ancestral lands vis-à-vis DAPL. Instead, Standing Rock asserts that these lands extend “wherever the buffalo roamed.” Even accepting this is true, to find that there is a likelihood that construction might run afoul of a site of cultural significance to the Tribe, this Court must ultimately decide where those culturally significant lands lie. There is at least some evidence in the record that they do not traverse the entirety of DAPL. For example, Jon Eagle, the Tribe’s current THPO, indicated prior to this litigation that at least some of the pipeline did not fall within the scope of what he considered ancestral tribal lands. See Chieply Decl., Exh. 14 (Letter from Jon Eagle to Martha Chieply on Mar. 22, 2016) (“Most of the DAPL pipeline route crosses Lakota/Dakota aboriginal land.”); see
also ECF No. 11-7 (Declaration of H. Frazier). This Court may not enjoin an action that the
Corps has authorized by guessing at whether an interest of the Tribe might be affected. Instead,
Plaintiff bears the burden to demonstrate that the permitting it seeks to have withdrawn would, in
the absence of such relief, likely cause it harm. This it did not do for much of the pipeline.

So what activity remains subject to this Court’s injunctive powers? Any permitted DAPL
activity that the Tribe has shown will likely injure a nearby site of cultural or historic
significance to the Standing Rock people. As previously explained, 204 sites were subject to
PCN authorizations and thus were clearly permitted by the Corps. Those sites are in play. Other
discharges into jurisdictional waters at hypothetical locations along the route, however, may also
have been permitted under NWP 12 without a PCN process. But it would be pure speculation
based on the current record to determine where such permitting occurred. The Tribe points the
Court to no specific crossing of cultural significance that the Corps permitted under NWP 12
without a PCN verification. In fact, many of the pipeline crossings were not permitted by the
Corps, sometimes because Dakota Access’s use of HDD did not give rise to the dredge or fill
activities that trigger federal jurisdiction under the CWA. For example, out of the five places in
North Dakota that Dakota Access thought might require a PCN authorization, only three actually
needed permitting at all. See Chieply Decl., ¶ 10. Of course, there may be many sites that the
Corps permitted under NWP 12 that the Court has missed. But the burden is on the Tribe to
indicate why this permitting must be enjoined to prevent an injury likely to occur to it. The
Court, again, cannot guess that at some undefined locations there might be harm to the Tribe. It
was Standing Rock’s burden to point to the specific NWP 12 permitting that was likely to cause
it injury. Standing Rock did not do so with regard to the permitting that has occurred outside of the PCN verified locations.

Returning to the 204 PCN sites, the vast majority must be excluded right off the bat. As previously noted, construction at 193 of the 204 PCN has already been completed. See Mot. Hearing Trans. at 24. For those sites, the die is cast. Whatever harms may have occurred from DAPL construction, the Court’s intervention to enjoin the permitting now can no longer avoid them. As a result, the Court must deny the Tribe’s request for an injunction as to permitting at those sites.

As to the other 11 PCN sites, the Tribe largely neglects to point the Court to any resources that may be affected by permitted activity. Plaintiff seeks to avoid its responsibility to identify a likely injury at these locations by claiming that this failure stems from the Corps’ refusal to properly consult in the first place and thus should be excused. See Mot. at 37 n.17. At least with regard to some of these sites, however, the Corps did offer the Tribe the opportunity to visit the sites or even conduct its own surveys, and the Tribe declined to do so. See Chieply Decl., ¶¶ 28-29. The record contains abundant evidence that the Corps also repeatedly sought other input on known cultural sites at these locations, and, in many cases, other tribes conducted site visits to search for any resources likely to be affected by the DAPL work. Id. The Tribe cannot now ask the Court to speculate that there would be a likely injury at these places by claiming that it was prevented from assessing these sites.

These sites are also subject to several additional restrictions that make it unlikely that construction will damage or destroy sites of cultural significance to the Tribe. First, the Corps attached restrictions to its PCN authorizations. These restrictions mandate that tribal monitors and archaeologists be allowed at these sites to look for any evidence of previously overlooked
resources whenever construction is happening. See ECF No. 6, Exhs. 33-36 (PCN authorizations). GC 21 will also require that Dakota Access stop work until any unanticipated discovery can be evaluated for its historic and cultural significance by the Corps and the SHPO. See NWP 12 at 10,184. Standing Rock, too, will have the right to be involved in that verification process. Id. Given all these precautions, and the Tribe’s failure to point the Court toward any evidence that a particular resource will be injured by this work, the Court must conclude that Plaintiff has not met its burden to show that irreparable injury is likely to occur without an injunction against this permitting.

And then there was one: Lake Oahe. This is the sole permitting that the Tribe might arguably show is likely to cause harm to cultural or historic sites of significance to it. As previously discussed, Lake Oahe is of undeniable importance to the Tribe, and the general area is demonstrably home to important cultural resources. Even here, though, the Tribe has not met its burden to show that DAPL-related work is likely to cause damage. The Corps and the Tribe conducted multiple visits to the area earlier this year in an effort to identify sites that might be harmed by DAPL’s construction. See Eagle Decl., ¶¶ 13-14; Harnois Decl., ¶ 29. While the Tribe identified several previously undiscovered resources during those visits, these sites are located away from the activity required for the DAPL construction. See Harnois Decl., ¶ 29. Ultimately, the Corps considered these findings and determined that they would not be affected by the permitted activity. Id., ¶ 33. Most importantly, the North Dakota SHPO concurred in this opinion after having toured the site as well. See Harnois Decl., ¶ 34.

Several factors unique to the site also support this conclusion. The area around the permitted activity has been subject to previous surveying for other utility projects. See Mahmoud Decl., ¶¶ 18-19. DAPL likewise will run parallel, at a distance of 22 to 300 feet, to an
already-existing natural-gas pipeline under the lake.  Id.; see also Mot. Hearing Tran. at 25. Dakota Access will also use the less-invasive HDD method to run the pipeline, which will require less disturbance to the land around the drilling and bury the pipeline at a depth that is unlikely to damage cultural resources.  See Howard Decl., ¶ 7; see also Mahmoud Decl., ¶ 19. Indeed, the Corps concluded that this method would not cause structural impacts at sites away from the direct drilling, and the Tribe presents no evidence to the contrary.  See ECF No. 6, Exh. 51 (Omaha District Envtl. Assessment) at 78-79.  Any temporary disturbance to the atmospherics around the site, moreover, will not be irreparable as they will be removed once the construction is complete.  Finally, like the other PCN sites, there are several protective measures in place to assure that the Tribe and others will be able to monitor the construction activity to protect any previously unidentified resources.

For all of the above reasons, the Tribe has not carried its burden to demonstrate that the Court could prevent damage to important cultural resources by enjoining the Corps’ DAPL-related permitting.
IV. Conclusion

As it has previously mentioned, this Court does not lightly countenance any depredation of lands that hold significance to the Standing Rock Sioux. Aware of the indignities visited upon the Tribe over the last centuries, the Court scrutinizes the permitting process here with particular care. Having done so, the Court must nonetheless conclude that the Tribe has not demonstrated that an injunction is warranted here. The Court, therefore, will issue a contemporaneous Order denying the Plaintiffs’ Motion for Preliminary Injunction.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: September 9, 2016
Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers

The Department of Justice, the Department of the Army and the Department of the Interior issued the following statement regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers:

“We appreciate the District Court’s opinion on the U.S. Army Corps of Engineers’ compliance with the National Historic Preservation Act. However, important issues raised by the Standing Rock Sioux Tribe and other tribal nations and their members regarding the Dakota Access pipeline specifically, and pipeline-related decision-making generally, remain. Therefore, the Department of the Army, the Department of Justice, and the Department of the Interior will take the following steps.

The Army will not authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws. Therefore, construction of the pipeline on Army Corps land bordering or under Lake Oahe will not go forward at this time. The Army will move expeditiously to make this determination, as everyone involved — including the pipeline company and its workers — deserves a clear and timely resolution. In the interim, we request that the pipeline company voluntarily pause all construction activity within 20 miles east or west of Lake Oahe.

“Furthermore, this case has highlighted the need for a serious discussion on whether there should be nationwide reform with respect to considering tribes’ views on these types of infrastructure projects. Therefore, this fall, we will invite tribes to formal, government-to-government consultations on two questions: (1) within the existing statutory framework, what should the federal government do to better ensure meaningful tribal input into infrastructure-related reviews and decisions and the protection of tribal lands, resources, and treaty rights; and (2) should new legislation be proposed to Congress to alter that statutory framework and promote those goals.

“Finally, we fully support the rights of all Americans to assemble and speak freely. We urge everyone involved in protest or pipeline activities to adhere to the principles of nonviolence. Of course, anyone who commits violent or destructive acts may face criminal sanctions from federal, tribal, state, or local authorities. The Departments of Justice and the Interior will continue to deploy resources to North Dakota to help state, local, and tribal authorities, and the communities they serve, better communicate, defuse tensions, support peaceful protest, and maintain public safety.

“In recent days, we have seen thousands of demonstrators come together peacefully, with support from scores of sovereign tribal governments, to exercise their First Amendment rights and to voice heartfelt concerns about the environment and historic, sacred sites. It is now incumbent on all of us to develop a path forward that serves the broadest public interest.”

16-1034
Upon consideration of the emergency motion of appellant Standing Rock Sioux Tribe for injunction pending appeal, the oppositions thereto, the reply, the administrative injunction entered September 16, 2016, and the oral argument of the parties, it is

ORDERED that the administrative injunction be dissolved. It is

FURTHER ORDERED that the motion be denied. Our precedent requires the party seeking an injunction to clearly show (1) a substantial likelihood of success on the merits; (2) the existence of irreparable harm absent injunction; (3) the equities favor injunctive relief; and (4) injunctive relief will not negatively impact the public interest. See Davis v. Pension Ben. Guar. Corp., 571 F.3d 1288, 1291 (D.C. Cir. 2009); Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2009). We find the Tribe has not carried its burden of persuasion on these factors, and so we deny the motion.

Although the Tribe has not met the narrow and stringent standard governing this extraordinary form of relief, we recognize Section 106 of the National Historic Preservation Act
was intended to mediate precisely the disparate perspectives involved in a case such as this one. Its consultative process—designed to be inclusive and facilitate consensus—ensures competing interests are appropriately considered and adequately addressed. But ours is not the final word. A necessary easement still awaits government approval—a decision Corps’ counsel predicts is likely weeks away; meanwhile, Intervenor DAPL has rights of access to the limited portion of pipeline corridor not yet cleared—where the Tribe alleges additional historic sites are at risk. We can only hope the spirit of Section 106 may yet prevail.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Laura Chipley
Deputy Clerk