



STATEMENT ON THE DAKOTA ACCESS PIPELINE CONTROVERSY September 28, 2016

SUMMARY

The Dakota Access Pipeline controversy and subsequent media attention reveal a broad lack of understanding of the purpose of the [National Historic Preservation Act](#) (NHPA) and the Section 106 process it established for the federal government to consider how its undertakings impact historic properties. The American Cultural Resources Association (ACRA) provides this statement to help resolve confusion and to further understanding of the value of the Section 106 process.

The U.S. Army Corps of Engineers' (USACE) application of Section 106 review is at the heart of the current dispute regarding the Dakota Access Pipeline. The USACE conducts Section 106 review in profoundly different ways than other federal agencies. The Advisory Council on Historic Preservation (ACHP), the independent federal agency charged by Congress with overseeing implementation of the NHPA, has for decades repeatedly expressed its view that the USACE's application of Section 106 review on projects does not fulfill the agency's responsibilities under the NHPA.

ACRA observes that consistent application of the Section 106 regulations across agencies is necessary to maintain the integrity of the Section 106 process. All stakeholders, including developers of federally permitted projects, Indian tribes, and local communities, must be able to make informed predictions as to how an agency will define the undertaking, how it will identify historic properties within the area affected by the undertaking, and how it will fulfill its responsibility to consult with Indian tribes and other consulting parties in each step of the Section 106 process. The USACE's use of its own regulations that have not been approved by the ACHP creates needless uncertainty in the Section 106 process and heightens the potential for conflict, resulting in potentially costly project delays and expensive litigation—as the Dakota Access Pipeline situation illustrates.

ACRA welcomes efforts to clarify the USACE's Section 106 requirements and to enhance consistency and predictability in Section 106 implementation across agencies and throughout the federal government. A more consistent and predictable process will result in greater efficiencies and better outcomes for our clients and the public. Bringing consistency and predictability to this process also fulfills one of the objectives of the NHPA: to establish a better means of identifying and administering historic properties. We provide the following background about Section 106 and the USACE regulations to further public understanding of these issues.

THE SECTION 106 PROCESS

President Lyndon Johnson signed the NHPA into law 50 years ago this October. The Act states that it is in the public interest to preserve our nation's heritage, and that "the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development" (*Section 1[b][6]*).

Section 106 of the NHPA requires federal agencies to consider the effects of their "undertakings" on properties already listed in or eligible for listing in the National Register of Historic Places (NRHP). Federal undertakings include projects that use federal dollars and projects that require a federal permit, license, or approval. The Section 106 process requires agencies to: (1) identify properties already listed in, or eligible for listing in the NRHP that are located in a project's "area of potential effects"; (2) assess whether their undertaking will adversely affect these properties; (3) identify and implement measures to resolve the adverse effect; and (4) provide the ACHP an opportunity to comment.

Resolution of adverse effects might include, but is not limited to, avoiding historic properties, redesigning the undertaking to reduce impacts to properties, or recording the properties before they are impacted by the undertaking. The federal agency carries out the Section 106 process in consultation with State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs), and other consulting parties, including local governments, non-recognized tribes, and the applicant for federal funds, permits, or licenses. The public plays an important role in the success of the Section 106 review process by informing the agencies about places that are important to them and suggesting approaches to address adverse effects. Federally recognized Indian tribes play a critical role as required consulting parties under the Section 106 process.

When undertakings may affect places that are important to federally recognized Indian tribes, federal agencies must consult with these tribes on a government-to-government basis. In 1992, Congress amended the NHPA to codify this requirement and to emphasize that agencies must identify and assess impacts to properties of traditional religious and cultural significance to Indian tribes as part of the Section 106 process.

The NHPA gave the ACHP authority to promulgate rules and regulations to govern the implementation of Section 106. The ACHP's regulations are located at 36 CFR 800. The NHPA allows each federal agency to determine how it will implement Section 106 as long as the agency's procedures are consistent with 36 CFR 800. Agencies that wish to substitute their own procedures for the ACHP's regulations must first seek and receive approval from the ACHP, because the ACHP is the only agency with Congressional authority to issue regulations implementing Section 106 (*see 36 CFR 800.14*).

Approximately 125,000 federal undertakings are reviewed each year with little controversy. Occasionally, however, there are disagreements among the consulting parties and the federal agency on the agency's findings and decisions. In a few cases, the agency

and consulting parties cannot agree on the measures to resolve adverse effects on historic properties. In these rare instances, the agency must allow the ACHP an opportunity to comment on the project and the agency's findings and decisions. ACHP comments are advisory, and the agency has the authority to proceed with its original findings and decisions after fully considering the ACHP's comments.

Agencies, therefore, can still decide to permit controversial projects that adversely impact historic places. The Section 106 process does not mandate any particular outcome and does not require the government to preserve any historic properties. It is important to understand that federal agencies fulfill their legal obligations by completing the Section 106 process, even if it does not result in an agreement among the agency, the consulting parties, SHPO/THPO, and the ACHP if participating or commenting on the project.

ARMY CORPS OF ENGINEERS' PROCESS IN DAKOTA ACCESS PIPELINE

In the 1980s, the USACE issued its own Section 106 regulations at 33 CFR Part 325, Appendix C, which contradict the ACHP's regulations at 36 CFR 800 in several ways. Congress gave the ACHP, not the USACE, the authority to govern the Section 106 process. The ACHP has never approved Appendix C, and for decades the ACHP has repeatedly expressed its view that Appendix C is not in compliance with Section 106 of the NHPA and that following the Appendix C process does not fulfill the USACE's responsibilities under Section 106.

The USACE's application of Appendix C is at the heart of the current dispute regarding the Dakota Access Pipeline. Energy Transfer, the builder of the Dakota Access Pipeline, has applied to the USACE for permits for several hundred crossings of the Waters of the United States, as required under the Rivers and Harbors Act and the Clean Water Act. These permit applications trigger the USACE's obligations under Section 106. Since crude oil pipelines, unlike natural gas pipelines, do not require a general permit for construction, the USACE is the federal agency involved most closely in permitting the pipeline.

Following its Appendix C regulations, the USACE argues that it can consider each of those individual water crossings as a separate federal undertaking requiring Section 106 review, and that the "jurisdictional" narrow permit areas at each of those crossings are the only areas where effects to historic properties must be considered. That is, the USACE applying Appendix C does not require identification and assessment of impacts to historic properties along the entire 1,168-mile pipeline route.

The Standing Rock Sioux have sued the USACE alleging that it issued permits to Energy Transfer without fulfilling the agency's obligations under Section 106. The Sioux allege that the USACE fell short in a number of respects, including inappropriately segmenting the Section 106 process, refusing to define the entire 1,168-mile pipeline as the federal undertaking, and declining to engage in adequate and meaningful tribal consultation. The ACHP informed the USACE on several occasions that it objected to the way the USACE conducted the Section 106 process for the Dakota Access pipeline, that the USACE failed to consider the entire pipeline route as one undertaking, and that the USACE's tribal

consultation efforts were insufficient. The USACE decided to issue the permits to Energy Transfer over the ACHP’s objections, contributing to the current controversy.

In addition to alleging that the USACE’s Section 106 process was inadequate, the Standing Rock Sioux have alleged that the USACE also fell short in fulfilling its review responsibilities under the National Environmental Policy Act (NEPA), which requires broader review of the environmental impacts of federal undertakings. The Council on Environmental Quality, the federal agency charged with implementation of NEPA, has approved the USACE’s regulations under NEPA—whereas the USACE’s regulations implementing Section 106 have never been approved by ACHP. It is important to understand that federal agencies have independent legal obligations with respect to NEPA and NHPA, and the NHPA Section 106 process is distinct and separate from NEPA review.

CONSISTENCY AND PREDICTABILITY

Consistent application of the Section 106 regulations across agencies is necessary to maintain the integrity of the Section 106 process. All stakeholders, including developers of federally permitted projects, Indian tribes, and local communities, must be able to make informed predictions as to how an agency will define the undertaking, how it will identify historic properties within the area affected by the undertaking, and how it will fulfill its responsibility to consult with Indian tribes and other consulting parties. The USACE’s use of its own regulations that have not been approved by the ACHP creates needless uncertainty in the process and heightens the potential for conflict, resulting in potentially costly project delays and expensive litigation—as the Dakota Access Pipeline situation illustrates.

ACRA welcomes efforts to clarify the USACE’s Section 106 requirements and to enhance consistency and predictability in Section 106 implementation throughout the federal government. A more consistent and predictable process will result in greater budget efficiencies, better outcomes, and more predictable schedules. In addition, bringing consistency and predictability to the Section 106 process fulfills one of the objectives of the NHPA, which as noted above, is to establish a better means of identifying and administering historic properties.

ACRA is pleased to share our expertise with policymakers and others interested in the Section 106 process. Questions? Need more information? Please contact Marion Werkheiser at marion@acra-crm.org or 202-367-9094.



ACRA is the national trade association supporting and promoting the common interests of cultural resource management (CRM) firms. Our member firms have a vital role in the Section 106 process, helping clients by identifying and assessing historic and cultural resources prior to development, and by recommending responsible solutions that appropriately balance preservation values with development goals. Our member firms work throughout the United

States for and with a wide variety of federal, state, and local agencies, developers, Indian tribes, and community organizations. As a result, ACRA's collective expertise and decades of experience with Section 106 make us a particularly valuable resource for policymakers, regulators, the media, and the general public. Learn more about ACRA at www.acra-crm.org.