



October 19, 2020

Michael Loesevitz, Senior Attorney
Legislative Research Council
State-Tribal Relations Committee
500 East Capital
Pierre, SD 57501

Chairman Representative Shawn Bordeaux and members of the committee:

During the public comment period of the State-Tribal Relations Committee's September 24, 2020, meeting, two members of the public raised concern over the level of "consultation" between the State Historic Preservation Officer and the tribal governments and Tribal Historic Preservation Officers.

The National Historic Preservation Act (NHPA) authorizes State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs). The Governor designates and appoints the SHPO to administer a state historic preservation program. Tribal Historic Preservation Officers (THPOs) are officially designated by a federally-recognized Indian tribe to direct a program approved by the National Park Service and assumes some or all of the functions of State Historic Preservation Officers within the exterior boundaries of the reservation. THPOs are also afforded the opportunity to comment on federal projects on aboriginal lands.

Consultation is required under Section 106 of the NHPA, and the Act grants legal status to historic preservation in federal planning, decision-making, and project execution. Section 106 applies when two thresholds are met: there is a federal or federally licensed action, including grants, licenses, and permits; and that action has the potential to affect properties listed in or eligible for listing in the National Register of Historic Places. Section 106 requires all federal agencies to take into account the effects of their actions on cultural and historic properties. The responsible federal agency must consult with appropriate state and local officials, Indian tribes, applicants for federal assistance, and members of the public and consider their views and concerns about historic preservation issues when making final project decisions. Effects are resolved by mutual agreement, usually among the affected state's SHPO or THPO, the federal agency, and any other involved parties. The Advisory Council on Historic Preservation (ACHP) may participate in controversial or precedent-setting situations. SHPOs and THPOs have 30 days to review and concur or not concur with the federal agency on projects under their jurisdiction.

Because tribal governments are considered sovereign nations, the government-to-government relationship exists between the federal government and tribal governments. The state does not have

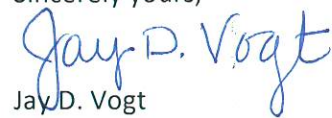
the same status. The SHPO advises federal agencies of their responsibility to consult with tribal governments and cooperates with federal, state, tribal, and local government agencies in the compliance with Section 106 of the NHPA. The SHPO maintains good communication with the THPOs and participates in many consultation meetings with the THPOs and federal agencies. In addition, the SHPO organizes a face-to-face meeting with the THPOs every other year. Occasionally, the SHPO has been invited to joint THPO meetings.

As Representative Tamara St. John (District 1) stated during the committee meeting, it is often a misperception that THPOs are not consulted during project reviews. She is a member of the Sisseton-Wahpeton Oyate and a member of the THPO office, she detailed that THPOs are informed early and often on projects and asked to comment. Depending on the project, its location, and/or the results of archaeological surveys, the SHPO frequently recommends to the federal agency to engage in further consultation with tribal governments concerning the effects of the project on the identified historic properties. Since the Keystone XL Pipeline project was used as an example, I have included a summary timeline of the project and early correspondence in which SHPO advised the federal agency to consult with the Indian tribes in South Dakota.

The National Historic Preservation Act and Section 106 govern federal activity and projects. SDCL Chapter 1-19A was also referenced in the public comments, and it directs state and local historic preservation issues and project reviews. The proposed legislation in 2018 and 2019 sought to amend SDCL Chapter 1-19A, redefine "historic property," and add definitions for "traditional cultural property" and "Tribal Historic Preservation Officer." Further, it wanted to involve tribal governments in state and local project reviews. Since SDCL Chapter 1-19A is state law and not applicable to the NHPA and federal projects, it is most troubling that the legislation would restrict the SHPO from concurring with the federal agency's project determination if any THPO objects to the finding.

The South Dakota SHPO complies with the National Historic Preservation Act and works regularly with THPOs. The SHPO also follows SDCL Chapter 1-19A relating to the preservation of historic sites in the state. Consultation is the responsibility of federal agencies in seeking concurrence of their determinations from the SHPO and the THPOs as applicable.

Sincerely yours,



Jay D. Vogt

Director

State Historic Preservation Officer

Summary Timeline for the Keystone XL Pipeline Project

The State Historic Preservation Officer does not maintain a meeting/consultation log. However, the office has extensive files on the project. The SHPO is now working from Addendum 14 of the survey report. Below is a basic list of key dates.

January 30, 2009 – U.S. Department of State invited SD SHPO to consult in Keystone XL Pipeline EIS.

February 9, 2009 – SHPO responds saying the SHPO fully anticipates participating in Section 106 process for the project and points out that SHPO is not the only consulting party. A copy of “Consultation with Indian Tribes in the Section 106 Review Process: A Handbook” was enclosed. See attached.

April 23, 2009 – Keystone XL SHPO kick-off meeting in Pierre between the South Dakota SHPO, Betsy Orlando of Department of State, and Kimberly Demuth of ENTRIX. All South Dakota tribes indicate they have interest in Traditional Cultural Properties (TCP) studies, and all nine South Dakota tribes be included in consultation.

May 12, 2009 – Original government-to-government consultation meeting in Rapid City, SD, in which mileage, lodging, and meals were reimbursed for up to two members per tribe (also, Oklahoma City, OK, May 14).

July 14, 2009 – Second government-to-government consultation meeting in Rapid City, SD, in which mileage, lodging, and meals were reimbursed for up to two members per tribe (also, Oklahoma City, OK, July 28).

August 13, 2009, November 5, 2009, and January 14, 2010 – CRST, Fort Peck, LBST, RST, SWO, and SRST were copied on the SHPO’s comments to the Department of State on the second and third drafts of the Programmatic Agreement (basic comments and not related to anything specific to tribal concerns).

September 2009 – Paige Hoskinson Olson pre-files testimony with the Public Utilities Commission for the Keystone XL project. The pre-file testimony indicates that the survey report does not include the identification of places of religious and cultural significance.

October 20 and 21, 2009—government-to-government consultation meeting held in Billings, MT, in which South Dakota THPOs were represented (transcripts available) (also, Dallas, TX, November 12 and 13).

November 24, 2009 – SHPO consultation letter for Addendum 1 and 2 of Keystone XL Survey states that identification efforts are ongoing, and Department of State is working with tribes to identify places of religious and cultural significance. The SHPO strongly encourages the federal agency to continue the identification efforts, and SHPO will comment on determinations of effect once all information has been submitted, six tribes copied on the letter. (The SHPO copied tribes on all consultation letters until the online portal for the project was put in place.)

June 22 and 23, 2010 – government-to-government consultation meeting held in Billings, MT, in which South Dakota THPOs were represented (transcripts available) (also, Tulsa, OK, June 24 and 25).

December 7, 2010—government-to-government consultation meeting held in Washington, DC, in which South Dakota tribes were represented (transcript available).

July 9, 2012 – U.S. Department of State notified SHPO that they had revised the route of the pipeline through Nebraska and were re-applying for a Presidential Permit for project.

July 12, 2012 – SHPO response letter says “Since the pipeline route through South Dakota will remain the same, we do not believe it is necessary to reinstate formal consultation. However, given the proposed changes to the pipeline route through Nebraska, we encourage your agency to contact Indian tribes to ensure that places of religious and cultural significance are identified and taken into consideration.” See attached.

October 22, 2012 – government-to-government consultation meeting held in Billings, MT, in which South Dakota THPOs were represented (transcripts available).

October 24, 2012—government-to-government consultation meeting held in Fort Pierre, SD, in which South Dakota tribes were represented (transcript available) (also, Lincoln, NE, October 26).

December 17, 2013, the SHPO signed the Programmatic Agreement for the Keystone XL pipeline project, and it became effective on December 23, 2013. A programmatic agreement is a document that records the terms and conditions agreed upon to resolve the potential adverse effects of a federal agency program, complex project, or other situations.

April 2015 – Paige Hoskinson Olson’s pre-file testimony with the Public Utilities Commission for Keystone XL – testimony indicates that SHPO still believes Keystone XL is in the process of complying with 106 through the Programmatic Agreement, but expresses concerns about impacts to Slim Buttes area (Waste-Win Young of SRST and Steve Vance of CRST also submitted testimony).

June 2015 – Rosebud Sioux Tribe archaeologist Jennifer Galindo provided rebuttal testimony to the Public Utilities Commission for Keystone XL providing concerns with the Programmatic Agreement, the lack of adequate Traditional Cultural Properties surveys, and critical of Olson’s previous testimony. At the request of the THPO, the SHPO provided copies of survey reports for the RST.

The SHPO continues to receive and review addendum reports for the project and has completed its involvement in the project, except for the addendum reports as received.

February 9, 2009

Ms. Elizabeth Orlando
U.S. Department of State
Bureau of Oceans and International
Environmental and Scientific Affairs
OES/ENV Room 2657
Washington DC 20520

SECTION 106 PROJECT CONSULTATION – IDENTIFICATION/EVALUATION

Project: 090206001F (1) Invitation to Section 106 Consultation for the Keystone XL
Pipeline EIS
Location: Multiple Counties
(DOS)

Dear Ms. Orlando:

On February 6, 2009, we received your letter regarding the Keystone XL Pipeline EIS and your invitation to participate in the Section 106 process. 36 CFR part 800.2, the implementing regulations for Section 106 of the National Historic Preservation Act, identifies the State Historic Preservation Officer (SHPO) as a consulting party in the Section 106 process. The regulations describe the role of the SHPO as follows:

“...SHPO reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101 (b)(3) of the act, the SHPO advise and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development.”

Given the above, my office fully anticipates participating in the Section 106 process for this undertaking.

We would also like to take this opportunity to point out that the regulations identify additional parties as having a consultative role in the Section 106 process. Those parties include: Indian tribes/Tribal Historic Preservation Officer, representative of local governments, applicants for Federal assistance, and additional consulting parties.

The regulations define consultations as,

“the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary’s “Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic preservation Act” provide further guidance on consultation.”

In addition, for your convenience, I have enclosed the document entitled “Consultation with Indian Tribes in the Section 106 Review Process: A Handbook,” prepared by the Advisory Council on Historic Preservation.

Should you require any additional information, please do not hesitate to contact Paige Hoskinson Olson at (605) 773-6004. Your concern for the non-renewable cultural heritage of our state is appreciated.

Sincerely,

Jay D. Vogt
State Historic Preservation Officer

Paige Hoskinson Olson
Review and Compliance Coordinator

July 12, 2012

Ms. Genevieve Walker
Office of Environmental Policy
U.S. Department of State
OES/ENV – Room 2657
2201 C Street, N.W.
Washington, D.C. 20520

SECTION 106 PROJECT CONSULTATION

Project: 090206001F – TransCanada Revised Presidential Permit Application of Keystone XL
Location: Multiple Counties
(DOS)

Dear Ms. Walker:

Thank you for the opportunity to comment on the above referenced undertaking pursuant to Section 106 of the National Historic Preservation Act of 1966 (as amended). Since the pipeline route through South Dakota will remain the same, we do not believe it is necessary to reinitiate formal consultation.

However, given the proposed changes to the pipeline route through Nebraska, we encourage your agency to contact Indian tribes to ensure that places of religious and cultural significance are identified and taken into consideration.

Should you require additional information, please contact Paige Olson at (605) 773-6004. We appreciate your concern for the non-renewable cultural heritage of South Dakota.

Sincerely,

Jay D. Vogt
State Historic Preservation Officer

Paige Olson
Review and Compliance Coordinator