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Preserving America's Heritage

August 19, 2016

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

Ref: *Dakota Access Pipeline Project*

Dear Secretary Darcy:

The Advisory Council on Historic Preservation (ACHP) has received the Corps of Engineers (Corps) letter dated July 25, 2016, in response to our letter of June 2, 2016, regarding the Corps' effects findings for the Dakota Access Pipeline Project (DAPL). The letter states that the Corps' determinations of eligibility as well as its "No Historic Properties Affected" and "No Adverse Effect" findings for portions of DAPL located in Iowa, Illinois, North Dakota, and South Dakota are appropriate and that its Section 106 review is completed. We were disappointed to learn of this decision and believe it reaffirms the importance of our agencies working to resolve the longstanding disagreement on appropriate measures for the consideration of historic properties for projects like DAPL.

The basis for our disagreement centers on the Corps' adherence to Appendix C - Procedures for the Protection of Historic Properties of 33 C.F.R. Part 325, Processing of Department of the Army Permits (Appendix C), which does not substitute for the Section 106 regulations at 36 C.F.R. Part 800 (Section 106 regulations) or provide equivalent consideration for the protection of historic properties as provided for in those regulations. The differences between the Section 106 regulations and Appendix C are substantial and continue to confuse consulting parties and complicate Section 106 reviews. Chief among these differences includes the Corps decision, on this case and others, to review each Pre-construction Notification crossing as a separate undertaking and thereby dismiss the potential for effects to historic properties that may be located within the broader project area of an undertaking when properly defined under the Section 106 regulations.

While we acknowledge the Corps' view that Appendix C provides appropriate measures for the identification and protection of historic properties, it remains fundamentally inconsistent with the government-wide Section 106 regulations and the standards applied by all other federal agencies in the protection of historic properties. We believe these inconsistencies too often leave the Corps unable to fully meet its legal obligations under Section 106.

For more than a year the ACHP has been engaged with Corps Headquarters staff in discussions about resolving the differences between Appendix C and the Section 106 regulations and developing a program alternative pursuant to 36 C.F.R. § 800.14 that is consistent with the Section 106 regulations. We share

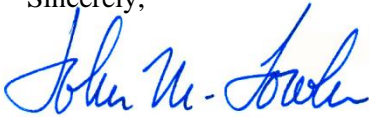
ADVISORY COUNCIL ON HISTORIC PRESERVATION

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the Corps' desire to resolve these differences while ensuring that its permit review process remains efficient, consistent, and transparent for its numerous applicants across the nation. As an outgrowth of those discussions, the ACHP has established a Working Group to discuss Small Federal Handles. The group includes the Corps and other federal agencies as well as non-federal stakeholders that are concerned about many of the same issues as the Corps. We are committed to using the Working Group to resolve long standing differences between the Corps' Appendix C procedures and the Section 106 regulations and appreciate your support of this effort.

In closing, we hope that the Corps will take the opportunity to work with the ACHP to resolve these systemic issues. Should you have any questions or wish to discuss this matter further, please feel free to contact me directly or Reid Nelson at 202-517-0206, or by e-mail at rnelson@achp.gov.

Sincerely,



John M. Fowler
Executive Director