

Purpose

The purpose of this document is to provide a summary of compliance and a review of adequacy with Section 106 of the National Historic Preservation Act (NHPA, 1966, as amended through 2016) and its implementing regulations under 36 Code of Federal Regulations (CFR) Part 800 (Public Law 89-665, 54 U.S.C. 300101 et seq.) (summary provided as Attachment B). The protection of traditional cultural properties of interest to Tribes is also provided for under Section 106 of the NHPA. This document review is pertinent to proposed pipelines located in the State of Nebraska.

This document review identifies data gaps in existing available documentation, document and process deficiencies, and reasons driving the need to fill data gaps and/or resolve deficiencies. Also identified are steps for identifying and disposition of human remains.

Documents Reviewed

2014 Final Supplemental Environmental Impact Statement (FSEIS) and Record of Decision (ROD)

The Department of State (DOS) assumed lead federal agency status for Section 106 compliance, but the methodology for identifying historic properties and the process for conducting Native American consultation used Federal Energy Regulatory Commission guidelines. The process for identifying historic properties used pedestrian survey for all areas proposed for ground disturbance, including the pipeline alignment, pumping stations, staging areas, access roads, and man camps. The area of potential effect (APE) was defined as an area 300 feet wide on centerline; the new pipeline route in Nebraska that avoids the Sand Hills used a 500-foot corridor. Historic property identification was conducted by third-party contractors and included 30-meter-wide survey transects. The criteria used to establish cultural resource significance is codified under 36 CFR 60.4 of the NHPA.

In the three states crossed by the pipeline alignment, a total of 397 cultural resources have been documented, of which 194 may be directly affected by construction. Of these 194 cultural resources, 59 are either eligible for the National Register of Historic Places (NRHP), are protected, or remain potentially eligible for the NRHP. Of the 59 historic or potential historic properties, only four would be adversely affected by construction of the project.

In Nebraska, surveys included 393 miles of proposed pipeline corridor, 17 miles of access roads, and 987 acres of associated facilities. As of October 2013, 178 cultural resources had been identified within the project APE in Nebraska (reported in 14 different survey reports submitted to DOS); of those, 74 are located within areas of direct effect. Of the 178 cultural

resources, 22 are pre-contact Native American archaeological sites and of these, only 5 were determined to be eligible for listing on the NRHP.

As of October 2013, none of the 12 historic properties or potential historic properties located in Nebraska would be directly affected by the project. Efforts to identify historic properties through pedestrian survey were still on-going as of this date. As of December 2013, 1,015 acres remained to be surveyed for historic properties in Nebraska. Additional historic properties may be identified while completing survey.

The FSEIS discloses potential effects to historic properties as codified under 36 CFR 800.4. The DOS has implemented a programmatic agreement (PA) that continues the Section 106 process for the life of the project. Because effects to historic properties may occur after the NEPA process has concluded, the PA provides for continued Section 106 compliance through on-going consultation, historic property identification efforts, and resolution of potential adverse effects to historic properties.

Revised 2013 Programmatic Agreement

The revised 2013 Programmatic Agreement (PA) executed between the proponent, DOS, the Nebraska State Historic Preservation Office (SHPO), consulting Tribes, and other federal and state agencies, provides for the continued identification and evaluation of historic properties, including traditional cultural properties (TCPs). The PA also provides for continued TCP studies, an unanticipated discovery plan, and a tribal monitoring plan by state. The tribal monitoring plan requires tribal monitors must be present along defined spreads (or specific sections of the pipeline) intended, in part, to protect TCPs identified by the Tribes. Execution of the PA effectively concludes the Section 106 process.

Neither the Yankton Sioux, nor the Ponca of Nebraska are signatories to the PA, but remain consulting parties.

Petitions to Intervene filed by the Ponca of Nebraska and the Yankton Sioux

Yankton Sioux

The Yankton Sioux are one of 45 consulting Tribes that the DOS continues to consult following the record of decision. The Yankton Sioux filed a petition to intervene noting that the proposed pipeline would cross ancestral lands in Nebraska and would affect sites of cultural, spiritual, and historic sites of significance (collectively, TCPs). The Yankton Sioux participated in two in-person meetings hosted by the DOS (October 22 and October 24, 2012), were seated at a third meeting that was subsequently cancelled due to a demonstration, and participated in a teleconference (July 31, 2013). The Yankton Sioux participated in the TCP study, accepting the report dated April 18, 2011.

Because the many Sioux Tribes were nomadic bison hunters their traditional territory is immense, extending from the Red River on the east to the eastern plains of Montana on the west, as far south as Wyoming and Nebraska and north into Canada. The Yankton Sioux's traditional territory was also large, extending from the Missouri River on the west to about the Minnesota state line on the east, or about the entirety of eastern South Dakota with the Missouri River their southern extent (deMallie 2001).

The Yankton Sioux were once part of the larger Great Sioux Reservation (1868-1889) in western South Dakota. The Yankton Sioux Reservation was one of the earliest established

(1859) and is located north of the Missouri River, in southeastern South Dakota. Traditionally, the Yankton Sioux and Ponca of Nebraska enjoyed close relations both politically and economically.

The proposed pipeline does not cross the Yankton Sioux Reservation (Charles Mix County), but does cross lands traditionally affiliated with the Tribe.

Ponca of Nebraska

The Ponca of Nebraska (Ponca) remain one of 45 consulting parties. The Tribe filed a petition to intervene, noting that, as a federally recognized Tribe, the Ponca have direct interest in the project since the proposed routes cross aboriginal, traditional, and jurisdictional lands. However, when offered funding to participate in a TCP study, the Ponca chose not to participate. Although a reservation was not established in 1990 when Congress again recognized the Ponca as a Tribe, Congress designated 15 counties in Nebraska, Iowa, and South Dakota as service areas where the Ponca exercise jurisdiction and sovereignty.

The Northern Ponca (of Nebraska) [as distinguished from the Southern Ponca of Oklahoma] have been a distinct Tribe since at least the early 1700s when they are believed to have split from the Omaha (Brown and Irwin 2001). After their split from the Omaha, the Ponca became a plains-based bison hunting society whose traditional range was centered on the modern Nebraska-South Dakota state line between the White River in South Dakota and the Niobrara River in Nebraska, and as far west as the Black Hills (Brown and Irwin 2001). For most of the 19th century the Ponca practiced a mixed subsistence strategy of horticulture and bison hunting.

In 1858, the Ponca signed a peace treaty with the United States ceding their traditional territory for a reservation on the Niobrara River in Nebraska. The Sioux treaty of 1868 mistakenly ceded Ponca lands to the Sioux. The United States' solution to the problem was to remove the Ponca to Indian Territory (Oklahoma). Under protest by the Ponca, the United States military escorted most of the Ponca in 1877 to Oklahoma along a route that became known as the Ponca Trail of Tears. In 1879, members of the Ponca tried to return to their former reservation in northeast Nebraska, but were intercepted by the military and sent to Omaha for trial. The return route was also generally along the original Trail of Tears. The trail generally followed a route along the eastern edge of Nebraska and Kansas before ending in the extreme northeastern corner of Oklahoma.

Based on the current pipeline alignment in Nebraska, the pipeline alignment does not appear to cross the Trail of Tears. However, this assessment is coarse grained based on the small-scale project map in the FSEIS and the similarly small-scale maps of the trail route.

Regulatory Setting

Section 106 Implementing Regulations

The NHPA's implementing regulations are codified under 36 CFR 800. The NHPA is a procedural statute that outlines the steps required to evaluate potential effects to historic properties that may occur because of a federal undertaking. An undertaking is an action with the potential to affect historic properties on federal lands, and/or requires a federal permit, and/or will receive federal funding, or subject to state or local regulation administered to a delegation or approval by a federal agency. The "action" generally must involve ground

disturbance for there to be a potential to cause effects to historic properties (see 800.3, Attachment B). In the matter of the proposed pipeline, the project crosses federal lands and requires approval by the DOS since the pipeline crosses an international border.

Section 106 imposes only two requirements on federal agencies as outlined under 800.1. Those requirements are to consider the undertaking's potential effects on historic properties and to provide the Advisory Council on Historic Preservation an opportunity to comment on those potential effects (typically through the SHPO, but also directly in complex undertakings such as the proposed pipeline). The remaining steps codified under Part 800 (see Attachment A) only provide a framework for carrying out compliance under Section 106 and were intentionally written broadly to allow flexibility during the compliance process. Ultimately, the process to comply with Section 106 is determined by the DOS as the lead federal agency.

Of relevance in this matter is a federal agency's responsibility to conduct government-to-government consultation with Native American tribes with a demonstrated cultural-historical affiliation with the APE [defined as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties"]. Specifically, Section 101(d)(6)(A) of the NHPA, which clarifies that historic properties of religious and cultural significance to Indian tribes may be eligible for listing in the National Register, and Section 101(d)(6)(B) of the NHPA, which requires federal agencies, in carrying out their Section 106 responsibilities, to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking. Executive Order No. 13007, Indian Sacred Sites (1996), requires that federal agencies consider the effects of an undertaking on sacred sites and whether the undertaking may have an adverse effect on the physical integrity or restrict access to sacred sites (similar to the American Indian Religious Freedom Act or AIRFA). Executive Order No. 13175, Consultation and Coordination with Indian Tribal Governments (2000), and Executive Memorandums, Government-to-Government Relationship with Tribal Government (2004) and Tribal Consultation (2009), also reaffirm the federal government's commitment to meaningful consultation. Lastly, AIRFA (1978) also provides regulatory authority to consider the effect of an undertaking on places of religious or cultural significance. Furthermore, a federal agency cannot abdicate their responsibility to conduct government-to-government consultation without first notifying and receiving concurrence from the affected tribes before delegating responsibility to a third-party contractor or project proponent.

DOS initially contacted 95 Tribes to determine interest in the project. Ultimately, formal consultation occurred with 84 Tribes, including the Yankton Sioux and the Ponca Tribe of Nebraska, and 67 Tribes notified the DOS to be party to on-going consultation. Consultation consisted of formal letters, telephone calls, electronic mail, and four in-person meetings. Forty-five Tribes notified DOS to become consulting parties under the PA. The DOS also undertook consultation with all associated federal agencies, each state SHPO, and the Advisory Council on Historic Preservation. Consultation with all interested parties remains on-going.

The Native American Graves Protection and Repatriation Act (NAGPRA) is applicable to those portions of the proposed pipeline that crosses federal lands. NAGPRA provides provisions for the protection of Native American burials and associated funerary items. The disposition of human remains discovered on federal lands must undergo consultation with consulting

Tribes. Because much of the project is located on private or state lands, Nebraska's unmarked burial statute will be enforced (12-1201 through 12-1212, et seq. and 28-1301). The steps to comply with state unmarked human burial statutes are outlined in the Unanticipated Discovery Plans developed for each affected state.

Human Remains

As part of its Section 106 obligations and as stipulated for under the revised PA, the DOS has implemented an Unanticipated Discovery Plan that includes stipulations for considering effects to inadvertent discoveries of human remains. The project also intends to comply with state statutes that protect discoveries of human remains on private, county, municipal or state lands within Nebraska.

References Cited

Brown, Donald N., and Lee Irwin (2001). *Handbook of North American Indians, Plains, Ponca*, edited by Raymond J. DeMallie, pgs. 416-431. Volume 13 Part 1 of 2. Smithsonian Institution, Washington D.C.

DeMallie, Raymond J. (2001). *Handbook of North American Indians, Plains, Yankton and Yanktonai*, edited by Raymond J. DeMallie, pgs. 777-793. Volume 13 Part 2 of 2. Smithsonian Institution, Washington D.C.

Attachment A: Section 106 Implementing Regulations

The NHPA's implementing regulations are codified under 36 CFR 800. The NHPA is a procedural statute that outlines steps required to evaluate potential effects to historic properties that may occur because of a federal undertaking. An undertaking is an action with the potential to affect historic properties on federal lands, and/or that requires a federal permit, would receive federal funding, or is subject to state or local regulation administered to a delegation or approval by a federal agency. The undertaking generally must involve ground disturbance for there to be a potential to affect historic properties (see 800.3, below).

Section 106 imposes only two requirements on federal agencies as outlined under 800.1, below. The remaining steps codified under Part 800 only provide a framework for carrying out compliance under Section 106 and were intentionally written broadly to allow flexibility during the compliance process. Ultimately, the process to comply with Section 106 is the responsibility of the lead federal agency.

800.1 – Purpose: Section 106 requires federal agencies to 1) “take into account the effects of their undertakings on historic properties” [defined as those cultural resources listed on or eligible for listing on the National Register of Historic Places] and 2) “afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment on such undertakings.” The agency official 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.”

800.2 – Participants: States that the provisions of Section 106 are the statutory responsibility of the federal agency with jurisdiction over the undertaking; requires the federal agency or contractors to meet Secretary of the Interior Standards; designates a lead federal agency when more than one federal agency is involved; allows for the use of contractors to meet requirements under Section 106; and provides for a consultation process between the lead federal agency and the Council, State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), Native American tribes without a designated THPO, certified local governments, and any other interested party with a demonstrated interest in the undertaking. Consultation should be commensurate with the scale of the undertaking and involvement of the federal agency, and should be coordinated with other statutes such as the National Environmental Policy Act.

Of relevance in this matter is a federal agency's responsibility to conduct government-to-government consultation with Native American tribes with a demonstrated cultural-historical affiliation with the area of potential effect (APE) [defined as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character of use of historic properties”]. Specifically, Section 101(d)(6)(A) of the NHPA, which clarifies that historic properties of religious and cultural significance to Indian tribes may be eligible for listing in the National Register, and Section 101(d)(6)(B) of the NHPA, which requires federal agencies, in carrying out their Section 106 responsibilities, to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking. Executive Order No. 13007, Indian Sacred Sites (1996), requires that federal agencies consider the effects of an undertaking on sacred sites and whether the undertaking may have an adverse effect on the physical integrity or restrict access to sacred sites. Executive Order No. 13175, Consultation and Coordination with Indian Tribal

Governments (2000), and Executive Memorandums, Government-to-Government Relationship with Tribal Government (2004) and Tribal Consultation (2009), also reaffirm the federal government's commitment to meaningful consultation. Lastly, the American Indian Religious Freedom Act (1978) also provides regulatory authority to consider the effect of an undertaking on places of religious or cultural significance. Furthermore, a federal agency cannot absolve itself of the responsibility to conduct government-to-government consultation without first notifying and receiving concurrence from the affected tribes before delegating responsibility to a third-party contractor or project proponent.

Provisions under the Native American Graves Protection and Repatriation Act (NAGPRA) were applied to the limited portions of the KXL project that crossed federal lands.

800.3 – Initiation of the Section 106 process: Determines whether the proposed action constitutes an undertaking and whether that undertaking has the potential to cause effects on historic properties. Once the agency has determined that the project constitutes an undertaking with the potential to cause effects to historic properties, the consultation process outlined under 800.2 is initiated.

800.4 – Identification of historic properties: Determines the level of effort required to identify historic properties within the APE using methods appropriate to the size and complexity of the undertaking; evaluate historic significance of each identified cultural resource against criteria established under 36 CFR 60.4; and determine the undertaking's effects on historic properties (either "no historic properties affected" or "historic properties affected").

800.5 – Assessment of adverse effects: The process by which the federal agency evaluates project effects to historic properties in consultation with the SHPO *and Native American tribe(s) that attach religious or cultural significance to the identified historic properties* (emphasis added); an adverse effect occurs when the undertaking "may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." The finding by the responsible agency may be "no adverse effect" or "adverse effect."

800.6 – Resolution of adverse effects: If the federal agency determines that the undertaking would have an adverse effect on historic properties, the agency must continue consultation with SHPO and interested Native American tribes, and invite the Council to participate in the resolution of adverse effects. The Council may decide to either participate in the resolution of adverse effects or decline participation and rely on the responsible federal agency and consulting parties for resolution. A memorandum of agreement is executed between the consulting parties that evidences and concludes the agency's compliance with Section 106.

At this point, the Section 106 process is completed; the remainder of Part 800 deals with nuances of the process, including:

800.7 – Failure to resolve adverse effects: Provides a procedure for resolving disputes among consulting parties.

800.8 – Coordination with the National Environmental Policy Act: An environmental impact statement (EIS), pursuant to NEPA, was prepared for the Keystone XL Pipeline. The Section 106 process was used to disclose potential effects to historic properties for the EIS.

800.9 – Council review of Section 106 compliance: Provides an opportunity for the Council to provide an advisory opinion on any procedures or findings of the process.

800.10 – National Historic Landmarks: N/A

800.11 – Documentation standards: Provides documentation standards for the agency finding of effect; provides for the confidentiality of historic property locations; and provides formatting standards for findings of effect.

800.12 – Emergency situations: N/A

800.13 – Post-review discoveries: Requires the responsible agency to plan for unanticipated discoveries during implementation of the undertaking through an agreement document. This provision is usually stipulated for under a memorandum of agreement (MOA) or programmatic agreement (PA).

800.14 – Federal agency program alternatives: Describes the process of implementing a programmatic agreement (PA) when:

- Effects on historic properties are similar and repetitive or multi-state or regional in scope;
- Effects on historic properties cannot be fully determined prior to the approval of an undertaking;
- Nonfederal parties are delegated major decision making responsibilities; and
- Other circumstances warrant a departure from the normal Section 106 process.