

BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

**IN THE MATTER OF THE APPLICATION OF DAKOTA ACCESS, LLC FOR AN
ENERGY FACILITY PERMIT TO CONSTRUCT THE DAKOTA ACCESS PIPELINE**

DOCKET HP14-002

PREFILED TESTIMONY OF PAIGE OLSON
ON BEHALF OF THE COMMISSION STAFF
July 6, 2015

Q. State your name.

A. Paige Olson.

Q. By who are you employed?

A. State of South Dakota.

Q. For what department or program do you work?

A. State Historic Preservation Office (SHPO)

Q. Please explain the program goals and your role and duties within SHPO.

A. The National Historic Preservation Act of 1966 is the foundation for the preservation work of the South Dakota State Historical Society (SDSHS). The State Historic Preservation Office (SHPO), a program under the SDSHS is charged to survey historic properties and maintain an inventory; identify and nominate properties to the National Register of Historic Places; advise and assist federal, state, and local government agencies in fulfilling their preservation responsibilities; provide education and technical assistance in historic preservation; develop local historic preservation programs, consult with federal and state agencies on their projects affecting historic properties; and advise and assist with rehabilitation projects involving federal assistance. My specific role is to

monitor federally funded, licensed or permitted projects and to ensure historic properties are taken into consideration. I provide technical analyses, reviews and assistance to government agencies to ensure compliance with state and federal guidelines. I am also responsible to ensure that archaeological resources are taken into consideration under South Dakota Codified Law 1-19A-11.1. I serve as the lead over the review and compliance function of SHPO.

From Class Specifications

Functions: (These are examples only; any one position may not include all of the listed examples nor do the listed examples include all functions which may be found in positions of this class.)

1. Reviews construction work plans for federally funded projects to determine if they are in compliance with state and federal preservation laws.
 - a. Assesses impact of the project on historic properties and ensures those properties are given due consideration during the planning and implementation of projects.
 - b. Concurs or disagrees with determinations of eligibility for historic properties and the effect of proposed project on those properties within legally mandated timelines.
 - c. Reviews archaeological survey reports and documentation submitted by principal investigators and Senior Archaeologists to determine if proper methodology and standards established by state and federal government are met.
 - d. Works with agency officials to determine appropriate mitigation techniques when resources cannot be avoided.

- e. Negotiates with and assists agencies in developing legal agreements to mitigate effects to historic properties and agreements to provide for alternative review and compliance procedures.
- 2. Provides technical assistance to government officials, contractors, lending institutions and agencies, and the general public to help them understand federal and state laws and to suggest compliance requirements.
 - a. Reviews survey reports developed for construction projects to determine if findings are in compliance with appropriate federal and state rules and regulations.
 - b. Monitors additions, deletions, or changes in interpretation of federal rules and regulations.
 - c. Writes and recommends guidelines for government agencies or federal fund recipients.
 - d. Compiles and analyzes data from a variety of sources to determine if agencies are having difficulty complying with requirements.
 - e. Maintains a record of all determinations about construction projects to be used as the basis of reports and future federal funding requests.
- 3. Prepares and writes comprehensive plans to manage cultural resources in South Dakota and establish guidelines to ensure that cultural resources are identified and protected.
 - a. Determines eligibility of archaeological sites and makes recommendations for their inclusion in the National Register of Historic Places and contributes research to a statewide comprehensive historic preservation plan.
 - b. Responds to requests from property owners, government agencies, and others to provide technical information about significance of sites.

4. Develops effective public information programs to inform South Dakota citizens about archaeology, pre-history, and the need to preserve South Dakota's cultural heritage.
 - a. Develops and manages public education programs to inform amateur archaeology groups, students, and the general public.
 - b. Designs and develops educational handouts, brochures and presentations.
 - c. Manages and participates in archaeological excavation projects to maintain a working knowledge of South Dakota pre-history and to mitigate the impact of development on significant sites.
5. Oversees the maintenance of a computerized system that tracks information relating to archaeological sites in order to provide an accurate and effective data base for research projects.
6. Provides work direction and training for review and compliance program staff to ensure projects are reviewed in an accurate, consistent and timely manner.
 - a. Establishes program priorities.
 - b. Assigns and reviews work.
 - c. Sets goals and recommends changes in work plans.
 - d. Develops office procedures.
 - e. Recommends the hiring of new staff.
 - f. Makes budget recommendations.
7. Performs other work as assigned.

Q. On whose behalf was this testimony prepared?

A. This testimony was prepared on behalf of the Staff of the South Dakota Public Utilities Commission.

Q. State and explain the South Dakota laws and federal regulations that protect archaeological and historic resources in this state.

A. Section 106 of the National Historic Preservation Act requires federal agencies to take into account the effects of their project on historic properties. The federal regulations 36 CFR part 800 – Protection of Historic Properties explain how federal agencies take into consideration historic properties. In general, Section 106 is a four step process.

Step 1: Initiate Section 106 Process – the federal agency establishes if it has a federal undertaking. (A federal undertaking in general is any project, activity, or program funded, permitted or licensed by a federal agency. This also includes federal approval.) The agency determines if the federal undertaking has the potential to affect historic properties. (Historic properties are prehistoric or historic district, site building, structure, or object listed on the National Register of Historic Places or eligible for listing on the National Register. This term includes properties of religious and cultural significance to Indian tribes.) If the federal undertaking does not have the potential to affect historic properties the agency is done. If the agency determines the undertaking does have the potential to affect historic properties they go to step 2.

Step 2: Identify Historic Properties – the federal agency identifies historic properties within the project area or area of potential effect (APE). If after conducting the appropriate level of research the agency determines that no historic properties are located within the APE, the agency documents their findings and exits the process. If however, historic properties are identified the agency moves to the next step.

Step 3: Assess Adverse Effect – if historic properties are identified in the APE, the federal agency determines how the project will impact the identified properties. If the project can be modified or conditions are imposed as to minimize the impact of the project on historic properties the federal agency may determine the project will have a “No Adverse Effect”. If this is the case, the agency consults with the consulting parties, documents their decision, and exits the process. However, if the agency determines the project will have an “Adverse Effect” on historic properties the agency moves to the final step.

Step 4: Resolution of Adverse Effect – the federal agency, in consultation with other consulting parties, develops a memorandum of agree to mitigate the adverse effects. Throughout this process the federal agency should be consulting with various parties as described in the regulations.

South Dakota Codified Law 1-19A-11.1 - Preservation of historic property – Procedures. The state or any political subdivision of the state may not undertake any project which will encroach upon, damage or destroy any property included in the State or National Register of Historic Places.

The National Historic Preservation Act supersedes SDCL 1-19A-11.1. However, the overall project has been segmented so there is no overarching lead federal agency for the

project. As a result, portions of the project will be reviewed under Section 106 of the National Historic Preservation Act and portions will be reviewed under SDCL 1-19A-11.1.

The difference between Section 106 of the National Historic Preservation Act and SDCL 1-19A-11.1 is that Section 106 requires the identification of properties listed in or eligible for listing in the National Register of Historic Places. SDCL 1-19A-11.1 requires only the identification of properties listed in the State or National Register of Historic Places.

Another key difference between the two laws is consultation. Section 106 of the National Historic Preservation Act outlines who the consulting parties are and specifically speaks to the participation of American Indian tribes. SDCL 1-19A-11.1 does not provide for this type of interaction.

Q. Has DAPL, to the best of your knowledge, complied with the state and federal rules and regulations you described previously?

A. To the best of my knowledge DAPL has complied with SDCL 1-19A-11.1 for the centerline portions of the project. Compliance with Section 106 of the National Historic Preservation Act is the responsibility of a federal agency and will apply only on portions of the project for which there is a federal connection.

Q. Are there any archaeological and or historically sensitive areas crossed by DAPL?

A. It is unclear. On June 15, 2015, my office received the reports entitled “Level III Intensive Cultural Resource Survey for Dakota Access Pipeline Project for Campbell, McPherson, Edmunds, Faulk, Spink, beadle, Kingsbury, Miner, Lake, McCook, Minnehaha, Turner and Lincoln Counties, South Dakota, Volume I – V,” prepared by Gray & Pape, Inc. The reports detail the results of the archaeological survey for portions of the proposed centerline. No information concerning ancillary facilities such as access roads, staging areas or utility corridors has been provided.

Consultation with American Indian tribes regarding the identification of historic properties is the responsibility of the federal agency under Section 106 of the National Historic Preservation Act. It is unclear if any efforts were made by DAPL to identify the concerns of American Indian tribes who have aboriginal lands along the pipeline route.

Q. Can the Applicant mitigate the risks associated with crossing those sensitive areas?

A. It is unclear as the identification of historic properties is not complete.

Q. Please provide any additional information that may be helpful or necessary for us to investigate further.

A. The full extent of federal involvement in this project has not been established. If the project is federalized, then Section 106 will apply to entire pipeline and all ancillary facility locations.

Q Do you have any outstanding questions about the survey reports?

A. The document entitled “Unanticipated Discoveries Plan Cultural Resources, Human Remains, Paleontological Resources & Contaminated Media,” does not clearly address the unanticipated discovery of cultural resources or human remains.

B. “Procedures for the Discovery of Cultural Resources”

1. The plan delineates between private, state and federal lands. In order to avoid confusion, the discovery plan should be consistent for the entire state regardless of land ownership.

2. I assume Bullet 3. applies to state and private lands. The procedure directs the archaeologist to the “State’s Historic Preservation Plan” (HPP). The HPP does not address the inadvertent discovery of cultural resources. Please explain this reference.

3. The discovery plan places the responsibility of identifying cultural resources on the members of the construction work force and Environmental Inspector (EI). Please clarify if the construction work force and EI will receive training in the identification of cultural resources.

4. Please clarify if the Secretary of the Interior’s Qualification Standards apply to all professionals working in South Dakota or just in areas for which there is a federal connection.

C. “Procedures for the Discovery of Human Remains”

The current plan for the discovery of human remains does not provide adequate detail to ensure the protection of human remains and funerary objects pursuant to SDCL 34-27-25,

34-27-28, 34-27-31. I recommend using the discovery plan specific to South Dakota, attached below.

In the event of an inadvertent discovery of human remains or funerary objects the following steps shall be taken pursuant to South Dakota Codified Law Chapter 34-27-25, 34-27-28, 34-27-31:

1. The On-site manager/ Contractor shall immediately halt construction activities within a 150 foot radius from the point of discovery and implement measures to protect the discovery from looting and vandalism. No digging, collecting or moving human remains or other items shall occur after the initial discovery. Protection measures may include the following.

- a) Flag the buffer zone around the find spot.
- b) Keep workers, press, and curiosity seekers, away from the find spot.
- c) Tarp the find spot.
- d) Prohibit photography of the find unless requested by an agency official.
- e) Have an individual stay at the location to prevent further disturbance until a law enforcement officer arrives.

2. The On-site manager/ Contractor shall notify local law enforcement, the Federal/ State Agency responsible for the project, and the South Dakota State Archaeologist (State Archaeologist) within forty-eight (48) hours of the discovery.

3. The Federal/ State Agency responsible for the project shall notify the South Dakota State Historic Preservation Office (SHPO), Indian tribes, and other consulting parties within forty-eight (48) hours of the discovery.

4. If local law enforcement determines that the remains are not associated with a crime, the Federal/ State Agency responsible for the project shall determine if it is prudent and feasible to avoid disturbing the remains. If the Federal/ State Agency in consultation with the Project Proponent/Applicant/Contractor determine that disturbance cannot be avoided, the Federal/ State Agency shall consult with the State Archaeologist, SHPO, Indian tribes and other consulting parties to determine acceptable procedures for the removal, treatment and disposition of the burial or remains. The Federal/ State Agency shall ensure that the Project Proponent/Applicant/Contractor implements the plan for removal, treatment and disposition of the burial or remains as authorized by the South Dakota State Archaeologist.

5. The Federal/ State Agency shall notify the Project Proponent/Applicant/Contractor that they may resume construction activities in the area of the discovery upon completion of the plan authorize by the State Archaeologist.

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No map was provided delineating the locations of where Section 106 of the National Historic Preservation Act or SDCL 11.1 applies. Without this information it is difficult

to formulate specific questions. With that stated, the following information should be clarified as appropriate.

1. Given that number of cultural resources located near the centerline, please explain how these resources will be avoided by construction activity.
2. On page 133 of the report volume 1, site 39BE175 is identified as a foundation, but in Appendix D, figure D45 a stone alignment is identified. Please provide the site number for the stone alignment.
3. The report identifies Deep Testing Location (DTL) Lake 1 and DTL Lincoln 3 as having the potential for deeply buried cultural deposits. Without knowing the depth of the potential deposits, please explain how deeply buried cultural deposits can be avoided through horizontal directional drilling (HDD).