

BEFORE THE
PUBLIC UTILITIES COMMISSION
STATE OF SOUTH DAKOTA

**IN THE MATTER OF THE APPLICATION OF NAVIGATOR HEARTLAND
GREENWAY, LLC FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY
CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE
HEARTLAND GREENWAY PIPELINE IN SOUTH DAKOTA**

DOCKET HP22-002

PREFILED TESTIMONY OF JENNA CARLSON DIETMEIER, PhD
ON BEHALF OF THE COMMISSION STAFF
May 25, 2023

1 **Q. State your name.**

2
3 A. Jenna Carlson Dietmeier

4
5 **Q. By whom are you employed?**

6
7 A. State of South Dakota

8
9 **Q. For what department or program do you work?**

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11 A. Department of Education, South Dakota State Historical Society, South Dakota State
12 Historic Preservation Office (SHPO)

13
14 **Q. Please explain the program goals and your role and duties within the State Historic
15 Preservation Office.**

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17 A. The National Historic Preservation Act (NHPA) of 1966 created a State Historic
18 Preservation Officer in each state and territory to administer each state's and territory's
19 historic preservation program. Each State Historic Preservation Officer, with the support
20 of qualified staff, is charged with:

- 21 • Conducting a comprehensive survey of historic properties
- 22 • Maintaining an inventory of historic properties
- 23 • Administering state programs of Federal assistance
- 24 • Identifying and nominating eligible properties to the National Register of Historic
25 Places
- 26 • Advising and assisting Federal, State, and local governments in matters of historic
27 preservation
- 28 • Preparing and implementing a statewide historic preservation plan
- 29 • Providing public information, education, training, and technical assistance
- 30 • Working with local governments in the development of local historic preservation
31 programs and helping them become "certified local governments"
- 32 • Providing consultation for Federal undertakings under Section 106 of NHPA

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34 In South Dakota, the State Historic Preservation Office (SHPO) is a program of the South
35 Dakota State Historical Society.

36 As Review and Compliance Coordinator, my role within SHPO is to oversee our office's
37 review of over 1,400 projects annually within South Dakota for compliance with federal
38 and state preservation laws. I consult with agencies on federally funded, licensed,
39 permitted, or approved projects to ensure that the agency has taken the effect of the
40 project on historic properties into account. I also comment on state and local projects to
41 ensure that archaeological resources are taken into consideration under state law. Other
42 duties I regularly perform within SHPO include providing training on and resources

1 pertaining to compliance with preservation laws, preparing or assisting in the preparation
2 of nominations to the National Register of Historic Places, managing contracts, and
3 providing technical and general assistance to agencies and the public in archaeological
4 matters and matters of preservation law.

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6 **Q. On whose behalf was this testimony prepared?**

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

10
11 **Q. State and explain the laws and regulations that protect archaeological and historic**
12 **resources in South Dakota.**

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14 A. Section 106 of the National Historic Preservation Act of 1966, as amended, requires
15 federal agencies to take into account the effects of their undertakings on historic
16 properties. The implementing regulations of Section 106, found at 36 C.F.R. § 800,
17 delineate the process federal agencies follow to comply with Section 106. At its most
18 basic, Section 106 compliance is a four-step process:

19
20 Step 1. Initiate the Process – The federal agency determines whether the proposed
21 project is a federal undertaking. The implementing regulations of Section 106 define an
22 undertaking as “a project, activity, or program funded in whole or in part under the direct
23 or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of
24 a Federal agency; those carried out with Federal financial assistance; and those requiring
25 a Federal permit, license, or approval.” The agency then must decide if their undertaking
26 has the potential to affect historic properties. A historic property is a prehistoric or
27 historic district, site, building, structure, or object included in, or eligible for inclusion in,
28 the National Register of Historic Places. If the agency determines that their undertaking
29 does not have the potential to affect historic properties given the nature of the proposed
30 undertaking, they document this and exit the Section 106 process. If the agency
31 determines that the undertaking has the potential to affect historic properties, they
32 identify appropriate consulting parties and move on to the second step.

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34 Step 2. Identify Historic Properties – The federal agency is required to make a
35 “reasonable and good faith effort” to identify historic properties which may be affected
36 by the undertaking. The specific identification efforts employed depend upon the
37 individual undertaking and the type(s) of properties which may be affected.
38 Identification efforts may include background research such as a search of the National
39 Register of Historic Places database or research at a local historical society, consultation
40 with our Tribal Partners and members of the general public, oral history interviews,
41 sample field investigations, and field survey. Agencies are specifically required to
42 consult with Indian tribes to assist in identifying properties which may be of religious and
43 cultural significance to them and may be eligible for listing in the National Register. If

1 no historic properties are identified within the undertaking’s Area of Potential Effects
2 (APE), the agency consults with SHPO on that finding, and, if SHPO concurs, documents
3 the results of consultation and exits the Section 106 process. If historic properties are
4 identified within the APE, the agency moves on to the third step.

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6 Step 3. Assess Adverse Effects – If historic properties are identified within the APE, the
7 agency must determine how the undertaking will affect those properties. An adverse
8 effect occurs when the undertaking may alter, either directly or indirectly, any of the
9 characteristics of a historic property that qualify it for inclusion in the National Register
10 of Historic Places. If the undertaking can be modified or conditions imposed to avoid
11 adversely affecting a historic property, the agency consults with SHPO on that finding,
12 and if SHPO concurs, documents the results of consultation and exits the Section 106
13 process. If it is found that the undertaking will have an adverse effect on one or more
14 historic properties, the agency moves on to the fourth step.

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16 Step 4. Resolve Adverse Effects – If one or more historic properties will be adversely
17 affected by the undertaking, the agency continues to consult with the appropriate parties
18 and develops an agreement document, usually a Memorandum of Agreement, which
19 defines the agreed upon stipulations to minimize or mitigate the adverse effect.
20 Throughout the entire Section 106 process, the agency is required to consult with the
21 appropriate consulting parties, as described throughout the regulations.

22
23 South Dakota Codified Law (SDCL) 1-19A-11.1 requires the State, or any political
24 subdivision of the state (cities, counties, etc.) to notify SHPO of any project that has the
25 potential to encroach upon, damage, or destroy properties listed in the National or State
26 Registers of Historic Places and allow SHPO the opportunity to investigate and comment
27 on such projects. Unlike Section 106, SDCL 1-19A-11.1 does not require agencies to
28 consider properties that may be eligible for listing in the National Register of Historic
29 Places; SDCL 1-19A-11.1 only requires consideration of properties which are already
30 listed. Additionally, Section 106 defines who are consulting parties in the Section 106
31 process and specifically requires the agency to consult with American Indian Tribes;
32 SDCL 1-19A-11.1 only requires comment from SHPO.

33
34 Section 106 of the National Historic Preservation Act supersedes SDCL 1-19A-11.1.
35 However, the Heartland Greenway has been segmented with only certain areas of the
36 project requiring permits from a federal agency. As such, certain segments of the project
37 will be reviewed under Section 106 and the remaining segments will be reviewed under
38 SDCL 1-19A-11.1. Additionally, as the project is subject to the permitting requirements
39 of the Public Utilities Commission, ARSD 20:10:22:23 requires the applicant to include
40 “an identification and analysis of the effects the construction, operation, and maintenance
41 of the proposed facility will have on the anticipated affected area including... a forecast
42 of the impact on landmarks and cultural resources of historic, religious, archaeological,
43 scenic, natural, or other cultural significance.”

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Q. Describe the documents you have reviewed and commented upon pertaining to Navigator Heartland Greenway, LLC’s efforts to identify cultural resources.

A. On March 21, 2022, SHPO received a letter and a scope of work describing the proposed cultural resources survey of high probability areas and potential United States Army Corps of Engineers permit areas within the Heartland Greenway System from Jennifer Cochran of Perennial Environmental Services. In a response dated March 28, 2022, SHPO acknowledged that a sample survey may be applicable for large-scale, linear undertakings to allow the agency to focus intensive survey efforts on areas that contain known properties or that have a high potential for containing previously unrecorded properties. SHPO also recommended additional methodologies for defining high probability areas and for identifying properties which could be affected by the project, including a specific recommendation to engage with Tribal Partners in the identification of cultural resources.

On February 10, 2023, SHPO received digital access to the report titled “A Level III Cultural Resources Survey of the Areas within the Heartland Greenway Pipeline System, South Dakota” by staff with Perennial Environmental Services, LLC. The report indicated that 1184.1 acres of land were surveyed, but additional areas still required survey. The report indicated the additional area requiring survey would be surveyed in 2023, and the results would be presented in an addendum report. SHPO responded to the information in the February 2023 report in a letter dated March 7, 2023 (see Exhibit_JCD-2).

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

A. To the best of my knowledge, Navigator Heartland Greenway has complied with SDCL 1-19A-11.1, as there are no properties listed in the State or National Registers of Historic Places within one mile of the Heartland Greenway Pipeline System.

To the best of my knowledge, Navigator Heartland Greenway is in the process of identifying cultural resources and how they will be impacted by the project, pursuant to ARSD 20:10:22:23.

Compliance with Section 106 of the National Historic Preservation Act is the responsibility of the federal agency and will apply to those segments of the project with a federal nexus.

1 **Q. Are there any archaeological and/or historically sensitive areas which will be**
2 **affected by Navigator Heartland Greenway, LLC?**

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4 A. It is unclear. The report SHPO received on February 10, 2023, indicates that ten
5 archaeological sites were newly recorded and one archaeological site was updated during
6 the survey efforts. However, the report also indicates that additional areas still required
7 survey, and the results of the additional survey will be presented in a forthcoming
8 addendum report. Additionally, the report indicates that Tribes have been afforded an
9 opportunity to review the current route corridor and provide requests, comments, and/or
10 concerns regarding the project, but there is no other information regarding Navigator
11 Heartland Greenway's efforts to engage with our Tribal Partners regarding the
12 identification of cultural resources. Under Section 106 of the National Historic
13 Preservation Act, the federal agency is still responsible for government-to-government
14 consultation with American Indian tribes regarding the identification of historic
15 properties.

16
17 **Q. Please describe the properties discussed in the February 2023 report.**

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19 A. 39MH0193 – prehistoric lithic scatter and historic artifact scatter
20 39MH0194 – prehistoric lithic scatter
21 39MH0195 – prehistoric lithic scatter and historic artifact scatter
22 39MH0196 – prehistoric lithic scatter
23 39MH0197 – historic artifact scatter
24 39MH2013 – historic railroad grade
25 39MO0033 – historic artifact scatter and prehistoric isolated find
26 39MO0034 – historic artifact scatter and prehistoric isolated find
27 39MO0035 – prehistoric lithic scatter
28 39MO0036 – historic artifact scatter
29 39MO0037 – historic artifact scatter

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31 The February 2023 report indicates that all of the above listed sites were identified in
32 areas that will not require permitting from the United States Army Corps of Engineers.
33 In a letter dated March 7, 2023, SHPO agreed that 39MH0193, 39MH0194, 39MH0195,
34 39MH0197, 39MO0033, 39MO0034, 39MO0036, and 39MO0037 should be considered
35 Not Eligible for listing in the National Register of Historic Places. In the same letter,
36 SHPO agreed that 39MH2013 remains Eligible for listing in the National Register of
37 Historic Places, and 39MH0196 and 39MO0035 have not been fully evaluated for
38 eligibility to the National Register of Historic Places.

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

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3 A. As the identification of historic properties and other cultural resources is still ongoing, it
4 is unclear if or how Navigator Heartland Greenway can mitigate the risks associated with
5 crossing all sensitive areas affected by Navigator Heartland Greenway, LLC.

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7 However, the February 2023 report indicated that 39MH2013 and 39MO0035 will be
8 avoided entirely by the project due to workspace modifications. The report also indicated
9 that Navigator plans to bore under 39MH0196. SHPO recommended that Navigator
10 include adequate horizontal and vertical buffers around 39MH0196 when choosing bore
11 pit locations and bore depths to ensure that impacts to 39MH0196 are avoided.

12
13 **Q. Has Navigator adequately addressed SHPO’s comments or concerns on the**
14 **information submitted to date?**

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16 A. It is unclear. SHPO provided comments on the proposed scope of work for cultural
17 resources survey in a letter dated March 28, 2022, and Jennifer Cochran of Perennial
18 Environmental Services, LLC indicated that the comments would be incorporated into the
19 survey plan and reporting efforts. However, as survey efforts are still ongoing, it is
20 unclear at this time if all comments have been taken into consideration.

21
22 SHPO provided comments on the February 2023 survey report in a letter dated March 7,
23 2023. In the letter, SHPO recommended that Navigator include adequate buffers around
24 39MH0196, recommended edits to the Unanticipated Discovery Plan for Cultural
25 Resources and Human Remains included as Appendix K of the February 2023 report, and
26 continued to encourage the applicant to meaningfully engage with American Indian Tribes
27 in the identification of cultural resources and impacts to those resources to assist in
28 fulfilling the requirements of the PUC permitting application. In an April 2023 revision
29 of the February 2023 report, no changes had been made to the report to reflect SHPO’s
30 comments and recommendations, though Amy Butler with Perennial Environmental
31 Services, LLC., indicated in email correspondence dated April 18, 2023, that the
32 unanticipated discovery plan would be edited to incorporate SHPO comments.

33
34 Additionally, SHPO has twice requested for information pertaining to the project,
35 including the survey report, be submitted in hard copy to align with our tracking and
36 retention requirements for the project. SHPO has not yet received a hard copy of the
37 February 2023 survey report or the April 2023 revision to the February 2023 survey
38 report.

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

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4 A. SHPO is aware that certain portions of the proposed Heartland Greenway Pipeline
5 System will require permits from the United States Army Corps of Engineers but has not
6 yet received information clearly delineating the exact locations of the United States Army
7 Corps of Engineers permit areas. The United States Army Corps of Engineers will be
8 required to consult with SHPO on the undertaking pursuant to Section 106 of the
9 National Historic Preservation Act. At this time, the United States Army Corps of
10 Engineers has not consulted with SHPO on any portion of the undertaking.

11
12 **Q. Does this conclude your testimony?**

13
14 A. Yes

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