

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STANDING ROCK SIOUX TRIBE

Plaintiff,

v.

U.S. ARMY CORPS OF ENGINEERS

Defendant.

§
§
§
§
§
§
§
§
§
§
§

Case No. 1:16-CV-01534

**DECLARATION OF MONICA HOWARD
IN SUPPORT OF DAKOTA ACCESS, LLC’S OPPOSITION TO
PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION
PURSUANT TO 28 U.S.C. § 1746**

1. My name is Monica Howard. I am over 21 years of age, of sound mind, and duly qualified to make this declaration. I make this declaration based upon my personal knowledge, including without limitation, (i) my position as the Director of Environmental Sciences at Dakota Access, LLC (“Dakota Access”), (ii) my personal involvement in the application, authorization, verification, and other permitting procedures that the Dakota Access Pipeline (“DAPL”) was subject to and that are subject of this litigation, (iii) my personal involvement in the coordination and oversight of the environmental and cultural surveys that were conducted for DAPL, and (iv) my personal involvement in Dakota Access’s public awareness programs and other efforts to communicate with and address the concerns of the general public and Native American tribes.

SURVEYING

2. I started working on DAPL in June 2014. At that time, DAPL was in the pre-construction planning stages, primarily securing right-of-way (“ROW”) permissions from private and public landowners to conduct environmental and cultural surveys.

3. Dakota Access devised a preliminary survey route by late June 2014. In July 2014, Dakota Access began securing survey rights-of-way for a 400-foot corridor. If Dakota Access hit a stop point (environmental or otherwise) that presented an obstacle to construction or operation along this route, it would seek reroutes or modified route segments to avoid the obstacle.

4. The preliminary route was devised considering already surveyed, identified, and cataloged cultural resources. The preliminary route took into account and avoided sites eligible for or listed on the National Register of Historic Places (“National Register”) that could potentially be impacted by construction.

5. The cultural resource surveys performed along the route in North Dakota revealed 149 potentially eligible sites, of which 91 had stone features. The route and/or workspace was modified to avoid every single potentially eligible site with stone features, and modified to avoid all other potentially eligible sites but nine. For the nine sites that were not avoided, Dakota Access conducted mitigation in coordination with North Dakota’s State Historic Preservation Officer (“SHPO”).

6. Thus, in North Dakota, the DAPL project was modified 140 times due to cultural resources.

7. Additionally, a portion of DAPL’s route in North Dakota has been or will be constructed using Horizontal Directional Drilling (“HDD”). The HDD method allows for construction across

a sensitive area without excavation of a trench by installing the pipeline through a drilled hole significantly below the conventional depth of a pipeline. Dakota Access uses HDD across all portions of DAPL that cross Corps fee-owned property and over all portions of DAPL that required authorization under Section 10 of the Rivers and Harbors Act.

8. Over the course of 2014 and 2015, Dakota Access retained professional archeologists from Merjent, Inc., HRA Gray & Pape, Inc., and Alpine Archeological Consultants, Inc. to conduct Class II and/or Class III Cultural Surveys for 100% of DAPL's entire route through North Dakota and South Dakota. All archeologists retained by Dakota Access met or exceeded the professional qualifications set by the Secretary of the Interior for cultural surveyors.

9. A Class II Cultural survey is a pedestrian survey that focuses on visual reconnaissance of the ground surface in settings with high ground surface visibility. A Class III Cultural Survey is an intensive inventory consisting of a comprehensive archaeological survey program that is coordinated with and approved by the SHPO. The program includes both a surface visual inspection and excavation of shovel test probes on fixed transects/grid in order to inventory, delineate, and assess archaeological sites or historic structures within the study area.

10. Surveying in North Dakota commenced in August 2014; no surveys were performed in Spring of 2014. The initial survey was conducted around buffers of all jurisdictional waters of the United States within the pipeline route corridor, in order to determine which waters of the United States, if any, warranted a Preconstruction Notice ("PCN") under General Condition 20 of the Nationwide Permit program. The entire North Dakota and South Dakota route were then surveyed by Class II and/or III methods pursuant to respective state regulations. Substantial portions of the

Iowa and Illinois route were also surveyed pursuant to or in exceedance of respective state law requirements.

11. Dakota Access surveyed a 400 ft. corridor of the entire route (200 ft. to each side of the planned pipeline route) in North Dakota and South Dakota.

12. Though the pipeline is expected to run approximately 357 miles in North Dakota, Dakota Access surveyed nearly twice that many miles in North Dakota to account for all necessary deviations from the preliminary pipeline path.

13. For the nine mitigated sites in North Dakota (see *supra*, ¶ 5), Dakota Access worked in coordination with and with approval of the North Dakota SHPO to perform data recovery mitigation. Data recovery efforts consisted of the systematic and controlled excavation of multiple block units placed at select locations within the proposed workspace areas to recover significant data to address pertinent region-specific research issues and for preservation purposes.

14. In order to ensure no accidental impact to eligible or unevaluated sites that were fifty feet or less from the proposed construction workspace, Dakota Access erected exclusionary fencing that protected each site (and the immediate twenty-five feet upstream and downstream from the site). All other sites along the route in North Dakota were either (a) far enough away from the pipeline to be entirely avoided, or (b) not eligible for listing on the National Register and therefore did not warrant protection.

15. If not enough information was available to determine whether a location is eligible for inclusion on the National Register, it is considered an unevaluated site. Out of an abundance of

caution, Dakota Access treated all unevaluated sites as potentially eligible sites and did not disturb them.

16. Any eligible or unevaluated sites at the Lake Oahe crossing were avoided by DAPL construction workspace by designing the workspace around them as discussed above, and thus are not impacted by DAPL. Both the U.S. Army Corps of Engineers (“Corps”) and the North Dakota SHPO agreed that there is no effect to cultural resources at the Lake Oahe crossing. This determination is based on DAPL’s avoidance of sensitive resources by using the Horizontal Directional Drill technique to drill 90-115 feet below the bed of Lake Oahe.

17. As an additional safeguard to cultural resources, Dakota Access implemented an Unanticipated Discovery Plan (the “Plan”) to manage any potential occurrence of a cultural resource during the course of construction. Under the plan, if any foreign object is observed by any construction personnel that appears to be cultural, paleontological, or human remains, the Environmental Inspector is to be notified immediately and construction is to be halted and the site secured until the object is evaluated. If the object is cultural in nature, a qualified archeologist is brought to the site to further investigate. Notification and coordination with SHPOs and other appropriate agencies, including Tribal Historic Preservation Officer(s) (“THPO”), would continue until evaluation, treatment, avoidance, and/or mitigation of the site is complete and authorized by the respective jurisdictional agency and company official. A copy of the North Dakota Unanticipated Discovery Plan is attached as Exhibit B1.

18. As a testament to Dakota Access’s proactive planning, to this date, while approximately 45% of construction of DAPL has already been completed, the plan has been implemented a total

of 6 times regarding cultural resources, none of which were in North Dakota and none of which resulted in discovery of a site potentially eligible for inclusion on the National Register.

OUTREACH

19. Dakota Access's public awareness programs meet or exceed industry standards and federal requirements pursuant to 49 C.F.R. § 195.440. A copy of American Petroleum Institute Recommended Practice 1162, the relevant industry standard, can be found on the American Petroleum Institute's website.¹

20. On September 23-26, 29, 30, October 1, 2, 6-9, and December 1-4, 14, and 15 and pursuant to its public awareness programs, Dakota Access held several public meetings and open houses in Illinois, North Dakota, South Dakota, and Iowa in order to disseminate information about DAPL and address any concerns raised by individuals or organizations.

21. The meetings in North Dakota occurred on September 29 and 30, and October 1 and 2, and were held in New Salem, Killdeer, New Town, and Watford, North Dakota. In North Dakota, meeting notice was provided to the public via newspapers (the New Salem Journal, Dunn County Extra, new Town News, Williston Herald, and McKenzie County Farmer), and posting on the Public Service Commission website, www.psc.nd.gov. To the best of my knowledge, no representative of the Standing Rock Sioux Tribe attended these meetings.

22. Simultaneous with the North Dakota Open House on September 30, Joe Malucci (the then-DAPL North Dakota Project Manager) and Chuck Fry (Vice President of Engineering at Energy Transfer Partners) attended a tribal council meeting with the Standing Rock Sioux Tribe. Joe and

¹ <http://mycommittees.api.org/standards/pipeline/1162%20Links/1162nonprintable.pdf>.

Chuck made a DAPL project presentation to the tribe. Instead of raising issues related to the project itself, the tribe discussed historical treaties and other historical issues between the tribe and non-native people.

23. In October of 2014, after the conclusion of the DAPL public meetings and open houses, I received a phone call from Waste Win Young, the then-Tribal Historic Preservation Officer of the Standing Rock Sioux Tribe. Waste Win Young asked me questions about tribal consultations, and I explained to her that the Corps is lead federal agency on the DAPL project and that it is responsible for formal tribal consultation. I further described and explained the cultural resource surveys that Dakota Access was already conducting throughout North Dakota.

24. Having apparently reviewed DAPL maps made publicly available by Dakota Access, Waste expressed concern regarding potential impacts at the Lake Oahe crossing. I offered to meet with her and to bring the DAPL North Dakota principal investigator to discuss her concerns. We set up a meeting in her office for the last week of October.

25. On October 28, 2014, our North Dakota Principle Investigator from Merjent, Dean Sather, and I met with Waste and Terry Clouthier, a former Standing Rock Sioux Tribe Tribal Historic Preservation Officer who now runs a consulting firm that performs Tribal Cultural Preservation survey work.

26. At the meeting, Waste, Terry, Dean, and I reviewed the general North Dakota map of the project, the project schedule, the federal permits that Dakota Access sought, and the draft plan/profile of the Lake Oahe HDD work space and drill site.

27. Waste voiced relief that Dakota Access was planning on conducting an HDD under the lake to install the pipe, as opposed to other, techniques such as by an open cut trench excavation. Waste also expressed that she was glad that DAPL's route did not affect a nearby traditional cultural tribal property, the Sundance site located west of the Lake Oahe crossing.

28. Terry explained his former role as THPO and that he had started a consulting firm performing surveys for various infrastructure projects and offered his services to Dakota Access. I informed him that the cultural and archeological surveys were already underway, and asked him to please let me know if the tribe had any areas of concern that DAPL appeared to be in or near so we could work through them. Waste and Terry requested the centerline file for the project's route in North Dakota and South Dakota to review for areas of tribal concern. I sent them the files via e-mail on November 13, 2014. *See* Exhibit B2, November 13 E-mail to Waste Win Young. Neither I nor (to the best of my knowledge) anyone at Dakota Access or the project consultants received any response regarding these project files or any areas of tribal concern.

29. Dakota Access completed its surveys in 2015 and sent the Cultural Resource Inventory Reports to the Corps. On February 17, 2016, the Corps sent a letter to all federally recognized tribes along or near the DAPL route in compliance with Section 106 of the National Historic Preservation Act to determine if any tribes were interested in tribal consultation. The Corps requested a response by March 30, 2015. A copy of this letter is attached as Exhibit B3.

30. Before the Corps even sent out the February 17 letter, the Corps had been providing the Standing Rock Sioux Tribe with information regarding DAPL since at least December 2014, and soliciting information about the tribe's concerns with proposed DAPL crossings. For instance, in a February 12 e-mail, the Corps informed Waste of the Lake Oahe project crossing. Rick Harnois

of the Corps wrote, “Since [the crossing location] is right outside the SRST boundary, I do not want to assume anything.” *See* Exhibit B4, February 12, 2015 Corps E-mail to Waste Win Young.

31. On September 3, 2015, the Corps sent another letter to 61 tribes convening Section 106 consultation and review regarding areas subject to preconstruction notification under Clean Water Act § 404 Nationwide Permit 12 (“NWP”). A copy of the letter sent to the Standing Rock Sioux Tribe is attached as Exhibit B5.

32. Separate and aside from this September 3 consultation notification concerning the NWPs, several months earlier in July 2015, the Corps had begun consulting with tribal entities on the 33 U.S.C. § 408 properties located on Corps project lands. By September 3, the Corps had already introduced the Missouri River Programmatic Agreement signatory tribes, and other tribes including the Standing Rock Sioux Tribe, to the DAPL crossings subject to § 408 review and permits (including the flowage easements upstream of Lake Sakakawea [part of the Garrison project] and the HDD under Lake Oahe), the Environmental Assessment that was being prepared, and the cultural resource finds in proximity to the crossings.

33. The Corps’ September 3 letter detailed background information regarding DAPL, and the jurisdictional scope of the Corps’ regulatory authority and responsibility over the project. The Corps explained that it had been granted regulatory authority and responsibility over the portions of DAPL that required authorization under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act. *Id.* The Corps further explained that DAPL was a linear project, and that it was currently evaluating 209 single and complete crossings requiring preconstruction notices (“PCN”) under its regulatory authority. The Corps enclosed the locations of the PCN areas,

a DAPL fact sheet, points of contact, and maps to the letter. Additionally, the Corps provided access to the Cultural Resource Inventory Reports for review by the tribes.

34. The Corps asked the tribes, including the Standing Rock Sioux Tribe, if they would like to consult on the undertaking. Specifically, the Corps wrote,

Please let the Corps know if you would like to consult on this undertaking. In addition, the Corps requests information that will assist us in identifying historic properties. The Corps would like to know if you have any knowledge or concerns regarding historic properties, including sites of religious importance, at the project locations you would like the Corps to consider. If there are any known Traditional Cultural Properties within these areas, please notify us by September 30, 2015.

Ex. B5 at 1.

35. I understand that the Standing Rock Sioux Tribe requested formal consultation and a site visit to Lake Oahe in response to the Corps September 3, 2015, letter to all tribes. I am aware that at least one and possibly additional meetings were set with Colonel Henderson (Omaha Corps District Engineer) and cancelled by the Standing Rock Sioux Tribe. Dakota Access arranged another consultation meeting for October 28, 2015 and a potential site visit for November 9, 2015. The Standing Rock Sioux Tribe, other interested tribes, and the North Dakota State Historic Preservation Officer were invited. Only the Corps and the North Dakota State Historic Preservation Officer attended the site visit.

36. As a follow up to the September 3 letter, the Corps issued a letter on November 20, 2015, inviting various tribes, including the Standing Rock Sioux Tribe, to another consultation meeting on December 8 and 9, 2015 in Sioux Falls, South Dakota. A copy of this letter is attached as Exhibit B6.² The letter states,

² Though Exhibit B6 was addressed to Chariman Rhodd of the Iowa Tribe of Kansas and Nebraska, the contents of that letter were also sent to the Standing Rock Sioux Tribe.

Your assistance in identification of all historic properties, including sites of religious and cultural significance, or traditional cultural properties (TCP) in the PCN areas is critical to determining the effect of this project. My staff is anxious to hear from your Tribe of any culturally significant concerns that may affect these areas. The Corps will treat historic property information as sensitive and will not disseminate to the public.

Id. at 1-2.

37. Dakota Access attended the meeting, covered the costs of the meeting location, lodging, travel, and breakfast and lunch for any Tribal representatives who attended the December meeting. A conference number was provided for tribal representatives who could not physically attend but wanted to participate. The Standing Rock Sioux Tribe did not attend this meeting in person or via teleconference.

38. During the meeting, certain tribes expressed an interest in surveying undisturbed areas regardless of federal jurisdiction, and Dakota Access agreed to facilitate these surveys. Dakota Access delineated the undisturbed areas along the route in its entirety and sent it to all of the tribes on the Corps' distribution list along with the centerline in its entirety in multiple electronic formats. Additionally, at this meeting it was mentioned that some of the tribes were having difficulty accessing the FTP site that housed the electronic cultural resource reports referenced in the September 3 Corps letter. Dakota Access offered to provide the posted reports in hard copy along with all cultural resource reports along the route, regardless of federal jurisdiction, in both electronic format on a jump drive as well as in hard copy. These packages were sent via Federal Express the week of December 20. At the end of the meeting, it was agreed that after approximately 2 weeks to review the information sent another meeting would be held in Sioux Falls at the paid expense of Dakota Access.

MISCELLANEOUS

39. Separate and aside from Dakota Access's attempts to reach out and consult with the Standing Rock Sioux Tribe, I am also aware that the Corps set up several consultation meetings specifically with the Standing Rock Sioux Tribe in 2016. At least one meeting occurred in January 2016, *see* Ex. B7, and one meeting occurred between at the end of February 2016. I am aware that the Corps issued several letter responses to the tribe to address its concerns, and I am aware that the Corps conducted more than one site visit to Lake Oahe with the tribe later in 2016.

40. Jon Eagle's testimony regarding Site 32WI1744, *see* Eagle Decl. at ¶¶ 17-18, is inaccurate because it was based on an error in the survey that he read. The stone site that Eagle refers to is actually not in the DAPL right of way, and therefore is not affected by DAPL. Dakota Access still considers the site ineligible for inclusion on the National Register—but the site will not be impacted at all. Instead, DAPL crosses a former homestead at that site (that is also ineligible for inclusion on the National Register). I notified the North Dakota SHPO of this error after reading Jon Eagle's declaration and attempting to verify his testimony and corrected information has been formally submitted to be incorporated into the final reports.

41. I do not find Tim Mentz, Sr.'s testimony regarding cultural survey requirements credible, and do not believe he can credibly evaluate whether—based on watching from “200 feet” to “a mile or so” away—DAPL's archeological surveys were “completely deficient for identifying culturally significant sites.” Mentz Decl. at ¶ 32-33. While Mentz testifies that he witnessed this purported survey in the Spring of 2014, *id.* at ¶ 32, surveying for the DAPL project did not begin until the Summer of 2014, and surveying in North Dakota did not begin until August. Mentz also fails to identify why he believed the purported DAPL surveyors were archeological surveyors, as opposed to biological surveyors. DAPL conducted biological surveys on the route in the same area. To me, this calls Mentz's entire narrative on DAPL's surveying efforts into doubt.

42. Even assuming that Mentz witnessed a DAPL archeological surveying team in the field, Mentz's allegations regarding how people "would go far in distance and stop, do a shovel probe, and continue walking" do not speak to the quality of the DAPL survey. *Id.* at ¶ 33. Cultural Resource survey methodology is designed to be flexible, and can vary at the discretion of the Principal Investigator or Field Lead based on a variety of factors, including but not limited to setting, archeological probability modeling, modern disturbances, locations of previously recorded sites or surveys, and ground surface visibility. While the relevant SHPO provides minimum survey standards, these standards can be modified in the field so long as adequate description or reasoning is provided in the subsequent technical reports detailing the findings. If ground surface visibility is high (e.g., in recently plowed agricultural settings), archaeologists may walk along further spaced transects to ensure adequate visual inspection of survey corridors. Closer-spaced transects (spaced 5 to 10 meters apart) are also often used at archeological sites to define site boundaries based on the distribution of artifacts on the contemporary ground surface.

43. If Mentz indeed witnessed a survey in 2014, it would have occurred in the late Summer or Fall of 2014. At that time, Dakota Access was largely only surveying buffers at U.S. jurisdictional waters or revisiting previously recorded sites. Mentz most likely saw DAPL's survey team between survey areas and casually walking close together until they reached the next survey area. The survey team could have possibly thought they saw something and conducted a quick shovel probe, dismissed it, and moved on.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 2016.



Monica Howard