

October 11, 2007

Elizabeth Orlando
NEPA Coordinator, Keystone EIS Project Manager
US Department of State
OES/ENV Room 2657A
Washington, DC 20520

Re: Draft Programmatic Agreement comments

Dear Ms. Orlando:

The Standing Rock Tribal Historic Preservation Office has several concerns regarding the second draft of the Programmatic Agreement for the TransCanada Keystone Pipeline Project. The agreement does not include adequate provisions for notification and consultation with Indian tribes as surveys are completed and construction begins. The timeline embedded in the Draft PA does not allow for the sufficient consultation and incorporation of tribal concerns necessary to comply with Section 106 of the NHPA. Our specific concerns with the Draft PA stipulations are as follows:

Whereas clauses:

- “WHEREAS, in accordance with 36 CFR §§ 800.4(b)(2) and 800.5(a)(3), the DOS has elected to phase identification and evaluation of historic properties and the application of the criteria of adverse effect, ...” This clause reaches the heart of Standing Rock’s concern with this entire process. If identification and evaluation are phased, then tribal participation and review becomes impossible. Tribal input must be made a priority in this process if DOS intends to comply with Section 106 of NHPA, as amended.
- “WHEREAS, pursuant to 36 CFR § 800.14(b), the DOS has elected to execute a Programmatic Agreement (PA) because effects on historic properties cannot be fully determined prior to the approval of the Keystone Project...” Standing Rock argues that effects can and must be determined before approval is issued. Though it will require a good deal of effort from all parties, such survey and evaluation with tribal input must be taken into consideration before DOS issues any kind of decision.
- The list of tribes invited to consult should include all tribes invited, contrary to the comments suggesting otherwise. Whether or not they respond to correspondence

from DOS regarding Section 106 is irrelevant. All should be notified of human remains found in the corridor because all have a cultural tie to the area.

- “WHEREAS, the Applicant has participated in consultation, maintains a major responsibility to implement the terms of this agreement and, therefore, has been invited to sign this agreement...” The Applicant’s role in this process is to follow the stipulations set forth by the DOS, not to aid in establishing them. To allow the Applicant such influence undermines the integrity of the entire consultation process.

Stipulations:

- I – Standards, D – This stipulation explains the development of Unanticipated Discovery Plans for each state. Though apparently the concerns of Indian tribes have already been incorporated, these plans have already been approved by the respective SHPO. This approval indicates that these plans are finalized and no further comment will be accepted. The Standing Rock THPO has concerns regarding these plans, as can be seen below, which we would like incorporated into the final draft of the PA and the Unanticipated Discovery Plans. This stipulation also indicates that the Unanticipated Discovery Plans were developed in accordance with applicable state laws and NAGPRA. Because recent events indicate that NAGPRA may soon be changed, we’d like clarification on what will happen to this PA and the Unanticipated Discovery Plans should that change occur.
- II – Standards, F – “The scope of this agreement is confined to the Area of Potential Effects (APE of this Project)...” This stipulation ignores the possible existence of Traditional Cultural Properties or areas of religious and cultural significance (Section 101(d)(6)(B)).
- II – Identification of Historic Properties, A – “Any resources located completely outside the APE do not require evaluation under this Agreement.” The APE is defined as a 300-foot wide corridor in both North and South Dakota (page 3, paragraph #1). This APE does not incorporate the possibility of disturbance of Traditional Cultural Properties, cultural landscapes and viewsheds that extend beyond the 300-foot corridor. The evaluation should be amended to include these areas, as this is inconsistent with the PA.
- II – Identification of Historic Properties, C – “All interested tribes with TCP concerns shall be consulted and TCP surveys shall be conducted in areas of tribal concern based on consultation.” This statement assumes that TCP surveys will be conducted *after* tribal consultation. On the contrary, TCP surveys should be conducted with full tribal input and consultation both during and after the surveys. If tribal concerns are to be adequately addressed, tribes should be fully involved in both the survey and evaluation process. Please explain the process used to identify these areas and address how tribes will be included.
- II – Identification of Historic Properties, G – The DOS, who retains the responsibility to identify and evaluate historic properties, is doing so “assisted by the Applicant.” This shows the same conflict of interest apparent in the Draft EIS prepared for the project. The Applicant should have no part in determining the significance of historic properties.

- III – Treatment of Historic Properties, A (Avoidance) - This section includes no provisions for tribal consultation in terms of avoiding historic properties. Also, the evaluation and avoidance of properties contained within reroute areas is not addressed.
- III – Treatment of Historic Properties, B – Treatment Plans and Post-Review Discoveries, 3 – “Since most of this work will take place after the FEIS has been published, the Applicant will serve as the agent to the DOS for purposes of completing Section 106 compliance.” Placing the responsibility of fulfilling Section 106 obligations with the Applicant is a gross oversight on the part of DOS. Also, the proposed timeline, with the Final EIS expected in early December of this year and construction set for April 2008, makes adequate consultation and the completion of Section 106 impossible.
- III – Treatment of Historic Properties, B – Treatment Plans and Post-Review Discoveries, 7 – “If Native American human remains are discovered on the ____ acres of Federal land involved in this Project, the Applicant shall notify the DOS, the appropriate SHPO, and the appropriate Federal land managing agency.” The discovery of Native American human remains requires the notification of associated Native American tribes. The lack of a requirement for such notification in the event of an inadvertent discovery is an unacceptable omission.
- VII – Construction Clearance – “For those segments of the Project where surveys have been completed, reports provided and approved, and eligible sites avoided, the DOS after consultation with the appropriate SHPO will provide the Applicant with notice to proceed with construction.” This statement assumes that the federal permit required from the DOS is forthcoming. Such an assumption, by either the Applicant or the DOS, shows an alarming bias.

Unanticipated Discovery Plans

- The North and South Dakota Unanticipated Discovery Plans fail to adequately address tribal involvement in dealing with human remains. As the SDSHPO comments indicated, the Unanticipated Discovery Plan is inconsistent with NAGPRA. The DOS needs to address this, whether through developing completely new plans or amending the existing ones. Also of concern is the uncertainty surrounding exactly what state law was used to develop these plans and where that law applies as opposed to NAGPRA. How does DOS plan to resolve this split-estate issue?

It has also been brought to our attention that the drafting of the Programmatic Agreement for this project was to be the responsibility of the Advisory Council on Historic Preservation. The Department of State and Entrix have clearly taken over that task, showing a lack of concern for the involvement and responsibilities of the ACHP.

We would like these concerns to be addressed in the draft that is prepared for the October 23rd consultation meeting, and additional time will be needed for review, comments, and consultation on the final draft. October 23rd cannot be meant to complete the obligations of Section 106, so we would like to be kept informed of additional consultation meetings as the process continues.

Thank you for your time and consideration of these matters.

Sincerely,
Standing Rock Sioux Tribe

Tim Mentz, Sr.
Tribal Historic Preservation Officer

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