



The Act obligates the State Department, not Keystone, to consult with the tribes.

In carrying out its responsibilities under Section 106, *a Federal agency* shall consult with any Indian tribe that attaches religious and cultural significance to properties described in subparagraph (A). 16 U.S.C. § 470a(d)(6)(b).

The federal regulations implementing the NHPA also state this proposition explicitly:

It is the statutory obligation of *the Federal agency* to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. 36 CFR § 800.2(a).

The Act and its associated regulations place no obligation on Keystone. The Act and regulations require *federal agencies*, not Keystone, consult with the tribes on historic preservation matters. If compliance with Section 106 of the NHPA is to become an issue in this docket, the Commission will be reviewing whether the Department of State has satisfied its obligations under NHPA. That is clearly not within the Commission's jurisdiction and not an issue for the Commission to consider in this proceeding.

**2. Climate change is not an issue in this proceeding.**

Dorr argues that climate change is at issue in this docket because the Amended Final Decision and Order requires that Keystone obtain and comply with the Presidential Permit, once issued. Dorr argues the President has said that as part of the decision on whether to issue the permit, he must consider whether the project would significantly

increase atmospheric CO<sup>2</sup>. Dorr reasons that 350.org's involvement is necessary to "refut[e] that this pipeline will receive a presidential permit, or more importantly why it will not have received a presidential permit in accordance with the Commission's Amended Permit Conditions."

The Commission is not obligated to predict whether the President will issue a permit for the border crossing. Nothing in SDCL § 49-41B-27 requires Keystone to prove that it will obtain a Presidential Permit before in this proceeding, just as Keystone was not required to prove it would receive a permit in the underlying case, Docket HP09-001. Nothing in SDCL § 49-41B-27 requires the Commission, having previously granted a permit for the Project, to determine whether the Presidential Permit will or should be granted.

Even if Dorr's argument were based on statute, which it is not, it would be illogical. It is the role of the President, as counseled by the Department of State, to determine whether the project is in the national interest. Chapter 49-41B does not require the Commission predict what the President and Department of State will decide, or second-guess their decision. Climate change is therefore not an issue in this docket.

Because climate change is not an issue before the Commission, Dorr's argument that the Keystone XL Pipeline will promote climate change by creating new markets for the development of the oil sands is irrelevant. Dorr's argument is also incorrect based on

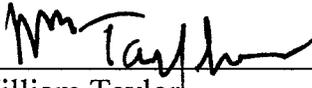
the Supplemental Final Environmental Impact Statement prepared by the Department of State. As noted in Appendix C to Keystone's certification, the Final SEIS makes clear that in the absence of new pipelines, crude oil will continue to be transported via rail at an increasing rate. (Appendix C, Update to Finding No. 27.) The Final SEIS concludes that transportation of crude oil by pipeline is safer and less greenhouse gas intensive than crude oil transportation by rail. (*Id.*) As an issue directly addressed by the Department of State as part of its process, climate change is not relevant to the Commission's narrow inquiry under SDCL § 49-41B-27.

### **Conclusion**

The scope of this proceeding is limited and narrow. Dorr's arguments that climate change and whether or not a Presidential Permit will issue are outside of the scope of the inquiry the Commission is statutorily obligated to make, and accordingly the Commission has no jurisdiction to consider them.

Dated this 6<sup>th</sup> day of November, 2014.

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### CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of November, 2014, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Keystone's Response to Gary Dorr, to the following:

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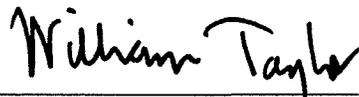
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