

Court denied that motion by order dated December 29, 2016. Argument on the merits of the pending appeal is set for March 8, 2017.

Since the briefing was completed, the President has issued a Presidential Memorandum inviting Keystone to “promptly re-submit its application to the Department of State for a Presidential permit,” and directing the Secretary of State to receive an application and “take all actions necessary and appropriate to facilitate its expeditious review.” The President has directed the Secretary of State to reach a final permitting determination within 60 days of the application. On January 26, 2017, Keystone submitted its application for a Presidential permit to the Department of State. Both documents are a matter of public record and can be found at <https://keystonepipeline-xl.state.gov>.

2. The documents are relevant to the appeal.

Under SDCL § 19-10-2, a judicially-noticed fact is one not subject to reasonable dispute because it is “[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” South Dakota law requires that a court take judicial notice if requested by a party and supplied with the necessary information. SDCL § 19-10-4.

On appeal, all of the Appellants have argued that the Commission erred in dismissing their joint motion to dismiss the certification proceeding because Keystone’s Presidential Permit application was denied by the Department of State on November 6, 2015, thereby establishing that Keystone could not comply with Condition 2 of the Commission’s Amended Final Decision and Order, which required that Keystone obtain a Presidential Permit from the Department of State. The Commission concluded that Condition 2 was prospective in nature and that no evidence established that Keystone would be unable to obtain a Presidential Permit in the future. (App. at 0070, ¶ 9.)

The Presidential Memorandum and Keystone's new permit application are relevant to this argument. They establish not only that Keystone is again actively seeking a Presidential Permit, at the invitation of the President, but also that the Department of State has been directed to act on the application within 60 days of its filing and to consider the Final Supplemental Environmental Impact Statement issued in January 2014 as satisfying all applicable requirements of the National Environmental Policy Act of 1969 and the Endangered Species Act of 1973. In other words, no further environmental review is necessary, and the Department of State must rely on its determination that the Keystone XL Pipeline project would not have significant adverse impacts to the environment.

This Court can affirm the Commission's decision for any reason that supports it, so a remand is not necessary for the Commission to consider the new evidence. *See, e.g., BAC Home Loans Servicing v. Tranczynger*, 2014 S.D. 22, ¶ 18, 847 N.W.2d 137, 142. The Presidential Memorandum and Keystone's new Presidential Permit application are consistent with and support the Commission's determination.

Conclusion

The documents attached to Keystone's motion are relevant to one of the arguments on appeal. Keystone respectfully requests that its motion be granted.

Dated this 6th day of March, 2017.

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Certificate of Service

I hereby certify that on the 6th day of March, 2017, I electronically served a true and correct copy of the foregoing Brief in Support of Motion to Take Judicial Notice using the Odyssey File & Serve System, , which will automatically send e-mail notification of such service to the following:

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