

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION	:	
BY TRANSCANADA KEYSTONE	:	HP 14-001
PIPELINE, LP FOR A PERMIT UNDER	:	
THE SOUTH DAKOTA ENERGY	:	
CONVERSION AND TRANSMISSION	:	KEYSTONE’S RESPONSE TO
FACILITIES ACT TO CONSTRUCT THE	:	APPLICATIONS OF PARTY
KEYSTONE XL PROJECT	:	STATUS OF TOM BK
	:	GOLDTOOTH AND DALLAS
	:	GOLDTOOTH
	:	

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Tom BK Goldtooth and Dallas Goldtooth of Bemidji and Morton, Minnesota, respectively, have filed applications under SDCL § 49-41B-17 for party status.¹ Both state that they are interested in “consultation with” the Indian tribes in South Dakota. Tom Goldtooth’s application states in particular that his organization has been retained to provide advocacy concerning consultation with the tribes as required by Section 106 of the National Historic Preservation Act. (16 U.S.C. § 470 et seq.)² Because such consultation is outside the scope of the Commission’s jurisdiction and is not within the

¹ Both are identified as Dakota or Lower Sioux on the internet. The Lower Sioux tribal community, the home of the Mdewakanton Band of Dakota, is located near Morton, Minnesota, at least 200 miles distant from areas transited by the Keystone XL Pipeline.

² The National Historic Preservation Act requires agencies of the federal government to be attentive to matters of cultural heritage and to take certain actions when undertaking projects, including consulting in a government-to-government manner with Indian tribes.

issues presented by the certification request under SDCL § 49-41B-27, TransCanada Keystone Pipeline, LP ("Keystone") respectfully requests that the applications of Tom and Dallas Goldtooth be denied.

It is not clear from the application what organization Tom Goldtooth is associated with, but he states that "our organization" (presumably the Indigenous Environmental Network) has enrolled members of South Dakota tribes who are directly impacted by the proposed pipeline, and that "our organization" has been retained to provide advocacy concerning inadequate consultation under Section 106 of the NHPA. Tribal consultation under Section 106 is a federal issue administered by the Department of State in connection with Keystone's application for a Presidential border-crossing permit.³ It is not an issue before the Commission. While the Commission's Amended Permit Conditions require, in paragraph 3, that Keystone comply with the recommendations set forth in the Final Environmental Impact Statement issued by the DOS, including those relating to consultation under Section 106 of the NHPA, compliance with Section 106 is a matter under the jurisdiction of the federal government and the responsibility of the Department of State. The Commission has no role in or jurisdiction over the process.

³ Regulations issued under Section 106 of the NHPA direct that federal agencies consult with Indian Tribes on a government-to-government basis regarding the protection of historic properties that are affected by the federal undertaking that prompts NHPA review.

The only other permit condition concerning cultural resources is found in paragraph 43 of the Amended Permit Conditions, which requires that Keystone follow the Unanticipated Discoveries Plan as reviewed by the State Historic Preservation Office and approved by the Department of State. Again, the permit conditions require that Keystone must comply with the dictates of some other agency. That does not mean that establishing such dictates is within the Commission's jurisdiction.

Any organization with which Messrs. Goldtooth are associated that advocates concerning tribal consultation under Section 106 of the NHPA is not an entity within the scope of SDCL § 49-41B-17(3). The statute allows intervention by entities that are formed to preserve historical sites, but tribal consultation under Section 106 is outside the Commission's jurisdiction.

Tom and Dallas Goldtooth, who live in Minnesota, are not residents of the siting area, and they do not represent an entity within the definition of SDCL § 49-41B-17(3). Accordingly, Keystone respectfully requests that their application for party status be denied.

Dated this 22nd day of October, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 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 Applications of Party Status of Tom BK Goldtooth and Dallas Goldtooth, to the following:

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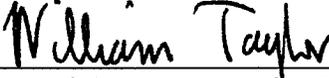
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Case Number: HP 14-001

Name of Document: Keystone's Response to Applications of Party Status of Tom BK Goldtooth and Dallas Goldtooth

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