

Young is also critical of the Programmatic Agreement as “too general.” (*Id.* at 5.) She proposes that “an alternative process of resolving disputes over adverse effects and undiscovered historic properties must be put in place.” (*Id.*)

As Paige Olson explained in her direct testimony, Section 106 of the Act imposes an obligation on federal agencies, in this case the United States Department of State. “The U.S. Department of State is required to comply with Section 106 of the National Historic Preservation Act.” (Olson Direct Testimony at 7.) The text of the statute is as follows:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

54 U.S.C. § 306108. This section does not impose any obligations on Keystone. Rather, it imposes an obligation on the Department of State, which has worked with the State Historic Preservation Office. The results of the consultation are described in Section 1.6 of the Final Supplemental Environmental Impact Statement (“FSEIS), and include the Programmatic Agreement, which is binding on Keystone. A copy of Section 1.6 from the FSEIS is attached, as is a copy of the Programmatic Agreement, which is Appendix E to the FSEIS.

In other words, Section 106 requires government-to-government consultation. The Programmatic Agreement is the result of Section 106 consultation and the statute does not require anything of Keystone other than compliance with the Programmatic Agreement. Keystone will comply with the terms of the Programmatic Agreement, but it is not a document that is within the scope of the Commission’s jurisdiction.

The proposed testimony is irrelevant to whether Keystone can continue to meet the conditions on which the permit was granted because Section 106 of the NHPA does not impose any obligations on Keystone. Condition 3 of the Amended Final Permit and Order states that Keystone must implement recommendations resulting from Section 106 consultation. The testimony of Galindo and Win Young challenges the Section 106 process and the Programmatic Agreement, but not Keystone's ability to comply with the terms of the Programmatic Agreement. It is therefore irrelevant and should be excluded. Condition 43 of the Amended Final Permit and Order requires that Keystone follow the Unanticipated Discoveries Plan as reviewed by the SHPO and approved by the DOS, but that condition is not implicated by the testimony of Win Young and Galindo.

Keystone respectfully requests that its motion be granted.

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