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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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December 4, 2007

South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

RE: The Keystone Oil Pipeline (TransCanada) and protection of cultural resources in South Dakota.

Dear Commissioners:

The Keystone project has failed to taken adequate steps to protect cultural resources in South Dakota. The Keystone project has committed to examining only 23% of the pipeline corridor in North and South Dakota for cultural resources. Over 75% of the corridor will not be examined and whatever cultural resources are present will be destroyed.

The chronology leading to this situation is as follows. In early 2006 Metcalf Archaeological Consultants (MAC), subcontracted by Entrix, Inc., the general consultant for the Keystone project, contacted the North and South Dakota State Historic Preservation Offices (SHPOs) concerning the Keystone Pipeline. MAC presented scopes-of-work to the SHPOs that were approved by the South Dakota SHPO on March 28, 2006 and the North Dakota SHPO on August 23, 2006. These scopes-of-work specified that only a fraction of the total project would be inspected for cultural resources.

It is essential to recognize that when MAC contacted the SHPOs there was no federal involvement in the Keystone project. Federal involvement is critical because the National Historic Preservation Act (NHPA) provides much broader protection for cultural resources than does state law. SHPOs were created by the NHPA and that federal law gives the SHPOs broad authority to comment on projects that will impact cultural resources. Without the NHPA, SHPOs have little statutory authority to protect cultural resources, particularly those on private land. To return to the chronology, in August of 2007 after both the North Dakota and South Dakota SHPOs had approved MAC's scope-of-work, the Keystone project became a federal project with the Department of State (DoS) becoming the lead federal agency. The DoS then retroactively approved the scopes-of-work that were framed prior to federal involvement. The DoS apparently has

little or no expertise concerning the National Historic Preservation Act or Section 106 compliance.

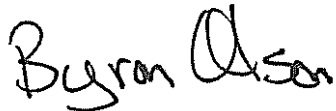
The advance contact made by MAC and the subsequent transformation of the Keystone project into project governed by federal created a confusing situation. Ms. Page Hokinson, review and compliance officer for the SD SHPO, commented on this situation in a DoS meeting held on October 23, 2007 at the Prairie Knights Casino, ND. To paraphrase her comments, she indicated that if she had known that the SD SHPO had standing to object (i.e., known that it would be a federal project) when the applicant's consultant first approached the SHPO, she would have recommended more extensive inventories of the pipeline corridor in South Dakota.

Because TransCanada's initial contacts with the South Dakota SHPO were not authorized by the Department of State or any other federal agency, and because the Keystone project is now governed by federal rather than state law, we urge the South Dakota SHPO to reopen the Keystone case. We urge that all of the pipeline corridor in South Dakota be searched for cultural resources. We hope that the Public Utilities Commission will support reopening the Keystone case.

Documentation of the chronology of contacts and the initial lack of federal involvement is provided by a letter dated November 30, 2007 from the Department of State to the Advisory Council on Historic Preservation (attached).

Thank you for your time and consideration.

Sincerely,
STANDING ROCK SIOUX TRIBE

A handwritten signature in black ink that reads "Byron Olson". The signature is written in a cursive, slightly slanted style.

Byron Olson
Tribal Archaeologist

ATTACHMENT



United States Department of State
*Bureau of Oceans and International
Environmental and Scientific Affairs*
OES/ENV Room 2657
Washington, D.C. 20520

November 30, 2007

Charlene Dwin Vaughn
Assistant Director
Office of Federal Agency Programs
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 809
Washington, DC 20004

Re: Keystone Oil Pipeline Project
Draft Environmental Impact Statement
North Dakota, South Dakota, Nebraska, Kansas, Missouri, Illinois, & Oklahoma

Dear Ms. Vaughn,

Thank you very much for submitting your comments dated November 8, 2007 for the Keystone Oil Pipeline Project (Project) Draft Environmental Impact Statement (DEIS). This letter directly responds to your concerns regarding the DEIS, its concurrent use as a means for complying with Section 106 of the National Historic Preservation Act (NHPA) as codified in 36 CFR 800, and the implementation of a Programmatic Agreement (PA) for this project.

A. Section 106 and NEPA Coordination

Consistent with 36 CFR 800.8, the DOS has coordinated compliance with NEPA and Section 106 (36 CFR 800). Section 106 responsibilities were considered early in the NEPA process and public participation, analysis, and review were conducted in a manner that meets the requirements of both statutes. Consistent with the Standards set forth in 36 CFR 800.8(c), the DOS notified the consulting parties that it intended to use the process and documentation required for the preparation of the DEIS to comply with section 106 in lieu of the procedures set forth in §§800.3 through 800.6. This was largely accomplished through a series of meetings, mailings, e-mails and follow up phone calls that occurred prior to the publishing of the Notice of Intent (NOI) in August and September 2006 (Exhibit A: NOI; Exhibit B: Sample Consultation Letter and Distribution List). This correspondence makes clear that the DOS intended to coordinate Section 106 with NEPA as the NEPA process progressed. The following is a discussion of DOS's efforts to comply with 36 CFR 800.8(c):

Standards for developing environmental documents to comply with Section 106:

36 CFR 800.8(c)(1)(i) Identify consulting parties either pursuant to §800.3(f) or through the NEPA scoping process with results consistent§ 800.3(f);

The DOS began to identify consulting parties during the NEPA scoping process that ended November 30 2006 with results that were consistent with §800.3(f). Since that time, DOS has continued to identify consulting parties through continuing research and outreach to potential stakeholders.

Immediately following the initial identification efforts, the DOS contacted the U.S. Bureau of Indian Affairs (BIA), the Advisory Council on Historic Preservation (ACHP) and the SHPOs of the seven states the proposed pipeline corridor intersected to determine if there were other potential consulting parties. The SHPOs and BIA either directly provided information about Indian tribes who may wish to consult or directed the DOS to other state agencies for additional relevant information. Local governments and members of the general public directly affected by the Project were notified of the project through a variety of methods, including publishing the NOI in the Federal Register, notifying newspapers and local radio stations along the entire corridor, direct mailings, and thirteen individual scoping meetings in the fall of 2006. At publication of the DEIS, the availability of the DEIS was once again noticed in the Federal Register, reported through direct mailings, and copies of the DEIS were made available at public libraries along the corridor and sent to any interested parties who requested it. Public comment meetings on the DEIS were then held at thirteen locations along the pipeline corridor and additional requests for consulting party status have been received as a result of these efforts.

36 CFR 800.8(c)(1)(ii) Identify historic properties and assess the effects of the undertaking on such properties in a manner consistent with the standards and criteria of §§ 800.4 through 800.5 provided that the scope and timing of these steps may be phased to reflect the agency official's consideration of project alternatives in the NEPA process and the effort is commensurate with the assessment of other environmental factors:

As is typical with large scale, multi-state linear projects (e.g. natural gas and oil pipelines, transmission lines), the Applicant (Keystone Pipeline) began environmental and archaeological research along the proposed pipeline corridor in advance of submitting an application for a Presidential Permit to DOS. As a result, discussions with SHPOs were initiated by the Applicant and its consultants prior to formal Section 106 consultation by DOS in order to obtain concurrence with the SHPOs on appropriate research designs. Studies based on these designs were initiated and preliminary results obtained to support the Presidential Permit application, with an understanding that studies would continue as the NEPA and Section 106 processes began under DOS direction. After receipt of the Application and initiation of both NEPA and Section 106 compliance, DOS mandated that all existing research designs and methodology reports and subsequent identification and evaluation studies prepared by the Applicant (TransCanada) be forwarded to the DOS as lead agency under NEPA and Section 106 for analysis and review. Concurrently, DOS notified known consulting parties of its lead agency status. DOS then provided all known and newly

identified consulting parties with relevant project-related research design and methodology reports or draft identification and evaluation reports if they were requested and solicited comments (Exhibit C: Record of Contact with Tribes). DOS has continually updated the consulting parties as new relevant information is developed, and is currently engaged with various consulting parties in an effort to further identify historic properties of religious and cultural significance and/or Traditional Cultural Properties within the Project APE (See Section G below).

The DOS also sought comments from consulting parties in order to identify issues relating to the undertaking's potential effects on historic properties. As part of this process, eighty seven Indian tribes were contacted through e-mail, written correspondence and then by phone to ascertain interest in the project and to request information concerning any potential historic properties (including any properties of cultural or religious significance) within the APE. Thirty-one Indian tribes expressed a desire to become consulting parties. Information was provided to those parties who expressed an interest in the project. Government-to-government meetings (group meetings and individual meetings) were subsequently scheduled with consulting parties who expressed concern regarding the presence of historic properties in the APE and the Project's potential effects upon them. Consultation regarding effects is ongoing.

At this time the DOS is preparing in consultation with the consulting parties and with the assistance of the ACHP a Programmatic Agreement (PA) in an effort to phase future identification and evaluation of historic properties. A PA is deemed necessary due to the length of the Project APE, restricted access to various private properties along the corridor, and project changes in response to the presence of cultural resources within the Project APE, engineering design alterations, or route alterations to meet evolving environmental criteria in the NEPA process. The PA is designed to ensure that Section 106 compliance can be achieved prior to any construction activities in those areas where research and consultation continues due to access restrictions and these other concerns.

Identification and evaluation studies completed to date have been forwarded to all consulting parties. For most sites that were recommended as eligible for the National Register of Historic Places, the Applicant has agreed to reroute the Project or use directional drilling below the historic property. For some sites, subsurface testing was recommended to ascertain site boundaries and National Register eligibility. These reports have been and will continue to be forwarded to consulting parties as they become available and comments will continue to be solicited so that decisions regarding avoidance or mitigation can be accomplished. Additional identification and evaluation reports concerning reroutes and additional work areas and transmission lines are also being prepared.

36 CFR 800.8(c)(1)(iii) Consult regarding the effects of the undertaking on historic properties with the SHPO/THPO, Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to affected historic properties, other consulting parties, and the Council, where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents;

Consultation regarding effects of the undertaking on historic properties has been ongoing and is summarized in Exhibit B. The DOS distributed requests for consultation to all Indian tribes from August through September 2006. Consultation with Indian tribes has continued through the NOI, scoping comment period, environmental analysis, DEIS comment period, and continues at present. The possible effects of the project were identified in the DEIS, but thus far all potential effects to historic properties have been avoided through re-routes and directional drilling. The Standing Rock Sioux tribe and other Indian tribes have noted their concern that the Project may have a potential visual effect upon historic properties and that the APE does not take into account those types of effects. The project has the potential to have a short term effect during the construction phase as trenching occurs. The trench would however be backfilled along its entire length after the pipe is placed in the trench. The pipeline itself would therefore not be visible from ground-level after backfilling. The visual effects from proposed pump stations, aboveground valves, transmission corridors, power stations, and any other ancillary facilities will be addressed prior to construction as part of the ongoing work described in the PA.

36 CFR 800.8(1)(iv) Involve the public in accordance with the agency's published NEPA procedures;

DOS has followed Council on Environmental Quality (CEQ) guidance in its public involvement program. As stated previously, DOS placed notices in the Federal Register (including the NOI and the notice of availability for the DEIS) and provided copies of the NOI to local communities within the Project APE. Thirteen public scoping meetings were held along the pipeline corridor and thirteen public comment meetings on the DEIS were also held along the corridor. DOS provided direct mailings to stakeholders through mailing lists that included approximately 6,000 individuals and organizations. The public comment period for the DEIS ended on September 24, 2007.

36 CFR 800.8(1)(v) Develop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the EA or DEIS;

In an attempt to avoid adverse effects from the undertaking on historic properties, the proposed Project alignment has been adjusted around eligible properties and where rerouting is not practical directional drilling/boring has been required in response to the presence of historic properties and potential historic properties. These methods of avoidance are appropriate for long linear projects and as a result additional surveys have occurred and are occurring to ensure that additional historic properties are not affected along reroute alignments. All consulting parties have been consulted regarding these avoidance measures. The DOS will make final determinations of project effects following the completion of further identification and evaluation studies and in that process will consider comments and concerns of the consulting parties.

B. NAGPRA: Applicability and the issue of “federal lands” and “control”

The DOS interpretation of NAGPRA and its applicability to the issuance of the Presidential Permit for the Keystone Pipeline Project is informed by a host of court decisions that have consistently interpreted the definition of federal lands within the context of NAGPRA. In Abenaki Nation of Mississquoi v. Hughes [805 F.Supp.234 (D.Vt. 1992, aff'd 990 F.2d 729 (2d Cir. 1993)], Castro Romero v. Becken [256 F.3d 349 at 354 (2001)], and Western Mohegan Tribe and Nation v. New York [100 F.Supp.2d 122 (N.D.N.Y 2000)] courts have interpreted that “lands which are controlled or owned by the United States” do not include lands that are merely affected by the issuance of a Federal permit. Indeed, the issuance of a permit does not transform land into federal property or place it under U.S. control. The Secretary of the Interior (SOI) expounded upon this issue in the issuance of the final rule for NAGPRA (1995) 43 CFR Part 10 (Section 10.2 page 62139). The SOI’s response to comments concerning the definition of land under federal “control” stated that

Whether Federal control of programs such as those mentioned above is sufficient to apply these regulations to the lands covered by the program depends on the circumstances of the Federal agency authority and on the nature of state and local jurisdiction. Such determinations must necessarily be made on a case-by-case basis. Generally, however, a Federal agency will only have sufficient legal interest to "control" lands it does not own when it has some other form of property interest in the land such as a lease or easement. The fact that a Federal permit is required to undertake an activity on non-Federal land generally is not sufficient legal interest in and of itself to "control" lands it does not own when it has some other form of property interest in the land such as a lease or easement. The fact that a Federal permit is required to undertake an activity on non-Federal land generally is not sufficient legal interest in and of itself to "control" the land within the meaning of these regulations and the Act.

Federal permitting agencies for the proposed undertaking include DOS, USACE, USEPA, and others. Based on the court cases stated above, the grant of permit by any of these agencies does not by itself constitute federal control of the land. DOS is currently consulting with the NRCS, USFHA, and/or USFWS whether conservation easements on private land administered by these agencies constitute sufficient federal control to require that NAGPRA be invoked within these easements. There are approximately 3 miles of federally-owned land on the proposed Mainline corridor and approximately 3.6 miles of federally-owned land on the proposed Cushing Extension corridor. The federal agencies with these property interests within the Project APE would determine on a case-by-case basis the applicability of NAGPRA on lands that they administer. The DOS is working with these federal agencies (and other federal agencies if it is determined that federal easement land is subject to NAGPRA) and the consulting parties to create the necessary consultation mechanisms to ensure compliance with NAGPRA on federal lands. Those mechanisms will be explained in the PA and will, at a minimum, include the identification of those lands where NAGPRA applies, the applicable federal agency that retains a legal interest over those lands, and the respective administrative process for complying with NAGPRA.

C. Condemnation and the Disposition of Historic Properties

The Applicant proposes to purchase easements (and if necessary pursue state condemnation proceedings) along the Project route in order to gain access and to perform necessary project activities including those required for the conduct of Section 106 review. The Applicant will follow the requisite condemnation proceedings for each state. The Applicant does not propose to purchase rights to historic properties, as defined in 36 CFR 800, situated within the APE. As evidence of this intent, to date, the Applicant has sought to avoid historic properties along the entire Project corridor. Furthermore, during the identification and evaluation stage, any artifacts recovered during any subsurface testing (following the appropriate cataloging of these artifacts) will be returned to the appropriate property owner. The DOS is requesting that Keystone encourage individual property owners to donate any artifacts to an appropriate archaeological curator within the state acceptable to the relevant consulting parties, and has memorialized this request in the draft PA currently under review and revision by ACHP.

D. Extra-Territorial Reach of Section 402 of the NHPA

The extraterritorial application of Section 402 of the NHPA is established in Secretary of the Interior Guidelines for implementation of this provision and by the courts. 63 FR 20,496, 20,504 (April 24, 1998), for instance, advises that “[e]fforts to identify and consider effects on historic properties in other countries should be carried out in consultation with the host country’s historic preservation authorities, with affected communities and groups, and with relevant professional organizations.” This stance was recently reaffirmed in *Okinawa Dugong v. Rumsfeld* (2005 U.S. Dist. LEXIS 3123 at *22 (N.D. Cal. March 1, 2005)). The DOS does not contest the extraterritorial application of Section 402 of the NHPA on federal undertakings outside the United States.

The principal question with the extra-territorial application of the NHPA within the context of the Project is whether the issuance of a Presidential Permit can be construed a federal undertaking that extends beyond the boundaries of the United States. As noted in 36 CFR 800.16(y) an undertaking is defined as

A project activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

The applicable federal undertaking in this case, the issuance of a Presidential Permit under Executive Order (EO) 13337 *as amended* (69 Federal Register [FR] 25299), is issued by the Secretary of State for the “construction, connection, operation, or maintenance, *at the borders* of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country” (emphasis added). The geographic area of the permit therefore relates to a number of activities that occur at the border of the U.S. As noted in the Keystone Pipeline DEIS, the DOS is the lead federal agency for the purposes of NEPA and NHPA. A number of other associated federal activities with the proposed Project, however, are considered undertakings by the respective federal agencies thus requiring

consideration of effects upon historic properties along the entire route of the pipeline within the United States. None of these federal undertakings, however, occur outside the territorial boundaries of the United States.

While the Okinawa Dugong v. Rumsfeld court order required the DOD to comply with Section 402, the federal undertaking in that case occurred entirely *beyond* the territorial boundaries of the United States. The DOS has not financially assisted any aspect of the Keystone Pipeline Project, exercised direct or indirect jurisdiction, allowed another entity to carry out the undertaking on its behalf, or licensed, permitted, or approved any action beyond the boundaries of the United States. Lastly, as noted in the DEIS, the “appropriate regulatory authorities in Canada will conduct an independent environmental review process for the proposed Canadian facilities” (Keystone DEIS, Section 1, Page 2).

The DOS, therefore, requests that the ACHP provide further regulatory or statutory guidance as well as project precedent that describe how the DOS undertaking within the United States or at a shared border is subject to Section 402 of the NHPA. While the DOS does not believe that Section 402 applies to the Project, the agency has endeavored to consider the potential effects of the Project upon historic properties within the United States that could potentially concern Canada’s First Nations (Exhibit D: Meeting Minutes with CNEB, Aug 14, 2006). At the request of the SRST, the DOS has made several attempts to ascertain interest in the Project with members of the First Nations by respectfully requesting consultation through consultation but no response to date has been received.

E. Government-to-Government and Section 106 Consultation

Consistent with the intent of Executive Order 13175 – Consultation and Coordination With Indian Tribal Governments as well as the consultation requirements contained in NEPA, NHPA, NAGPRA, the American Indian Religious Freedom Act, the Archaeological Resources Protection Act, and Executive Order 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, the DOS has undertaken an extensive effort to identify and consult with Indian tribes who have expressed an interest in the DOS’s efforts to identify, evaluate, and assess Project effects upon historic properties within the APE.

The initial efforts of the Applicant and its consultants to garner input from Indian tribes as well as SHPOs did not occur under the aegis of a particular federal agency. While a federal agency may authorize a Permit Applicant to initiate consultation under 36 CFR 800.2(4), the DOS, in this case, made no such authorization. In an effort to clarify the lead role (in NEPA and NHPA), the DOS notified all consulting parties that it was the lead federal agency for the Project in August and September of 2006. During this period, the DOS notified all potentially consulting parties including the ACHP, Indian Tribes, SHPOs, and the Applicant that the DOS would serve as the lead federal agency for the Project and that all communication that could be construed to be consultation would proceed through the DOS. Furthermore, consistent with the Standards set forth in 36 CFR 800.8(c), in August and September of 2006, the DOS notified potential consulting parties that it (the DOS) intended to use the process and documentation required for

the preparation of an EIS to comply with section 106 in lieu of the procedures set forth in §§800.3 through 800.6.

In an effort to initiate consultation with Indian tribes, the DOS sought information regarding tribes that may have interest in the potential APE by requesting information from Indian Tribes, SHPOs, the U.S. Bureau of Indian Affairs, and individual state tribal liaisons. A list of 87 Indian tribes was compiled (Exhibit C). A description of the project, the project location, and the project's potential impact to cultural resources was mailed to each of the tribes identified to date in August and September 2006 in order to ascertain interest in the project and to invite government-to-government and/or Section 106 consultation. Tribal representatives who failed to respond to the mailing were called via telephone and/or emailed. From this initial mailing and telephone campaign, 31 Indian Tribes expressed an interest in the undertaking. Additional information about the project, including scoping information, research design and methodology reports as well as identification and evaluation reports were submitted to those tribes who expressed an interest or concern in the project.

Following an Indian tribe's expression of interest in the undertaking and a confirmation for consultation, the DOS offered to meet with Tribal members at reservations, along sensitive Project areas, or at other convenient locations. Exhibit C shows the dates that DOS invited the Indian tribes to consult, tribal response, date of face-to-face meeting, extent of comments/concerns and whether resolved, necessity for further meetings, date of further meetings, and comments or concern resolution. The DOS formally initiated consultation with the tribes identified to date in writing between August and September 2006. As additional tribes were identified, DOS initiated consultation with them as soon as possible.

F. The "Reasonable and Good Faith Effort Standard" and the Use of Predictive Models for Archaeological Surveys

In order to meet the "reasonable and good faith effort" regulatory standard in its efforts to identify and evaluate historic properties, the DOS is required to meet the various requirements for scoping, identification, evaluation, and reporting as noted in 36 CFR 800.4(a-d). At this point in the Section 106 process, it is the opinion of the DOS, that the agency has satisfied the requirements of 36 CFR 800.4(a-b) and is currently pursuing compliance with 36 CFR 800.4(c-d).

In addressing the concerns of the ACHP and SRST, more specifically, as they pertain to the use of predictive modeling as a tool to guide archaeological field testing, the DOS has determined that the use of predictive modeling and subsequent consultation efforts meet the level of effort standard as noted in 36 CFR 800(b)(1) and as interpreted by the courts (see Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800 (9th Cir. 1999) and Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995)).

36 CFR 800(b)(1) notes that the federal agency must

include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning,

research, and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.

Furthermore, the section then proceeds to explain what should guide the decisions of the federal agency. The guiding documents include the *Secretary's Standards and Guidelines for Identification*, as well as "other applicable professional, State, tribal and local laws, standards, and guidelines." For North Dakota and South Dakota, Metcalf and Associates, on behalf of the Applicant, prepared two research design and methodology reports and two draft historic property survey reports that were deemed by the DOS to be consistent with the *Secretary's Standards* as well as the guidance documents published by the South and North Dakota State Historic Preservation Offices. The reports were modified in response to comments by the respective SHPO offices and the SHPOs concurred with the revised designs (North Dakota on August 23, 2006 and South Dakota on March 28, 2006). Though these designs and methodologies were developed prior to the onset of official consultation, they were shared with the consulting parties by the DOS in an effort to garner comment.

As stated previously, the DOS after receipt of the Presidential Permit Application initiated consultation with identified potential consulting parties in August and September 2006 in order to ascertain interest in the project, understand concerns with identification efforts, assist with the identification of historic properties that could be Traditional Cultural Properties (TCP) and/or sites of religious or cultural importance, and to consult regarding potential Project effects. This was closely followed by the DEIS Notice of Intent (NOI) on October 4, 2006 that solicited comments regarding the scope of environmental and cultural resource analysis. Following thirteen meetings held along the Project APE, the scoping period ended on November 30, 2006. Despite prior SHPO concurrence with the pre-consultation research design and methodology reports, consultation efforts regarding the identification of historic properties are ongoing in order to take into account concerns of all consulting parties. For example, the research design and methodology reports were sent to all consulting Indian tribes who wished to receive a copy. Even though DOS received few comments from consulting Indian tribes concerning the initial scoping process in 2006, the agency has continuously endeavored to consult with tribes in an effort to cast as broad a net as possible in its efforts to identify historic properties. Further efforts to identify historic properties are outlined in Section G of this letter.

In terms of archaeological methods, the DOS feels confident that the predictive modeling utilized by Metcalf and Associates provided an adequate means of anticipating the presence or absence of historic properties and was conducted in a manner consistent with the *Secretary's Standards*, 36 CFR 800, applicable SHPO standards, and professional practice. As noted in 36 CFR 800.4(b)(1), "sample field investigation" is an acceptable means of identifying historic properties for large Projects. This is amplified in the *Secretary's Standards* that sampling can be a useful tool to estimate frequencies of properties and types of properties within a specified area at various confidence levels. Metcalf utilized basic sampling techniques that extrapolated the number, classes, and frequencies of properties in unsurveyed areas based on those found in surveyed areas. Furthermore, the *Standards* note that the accuracy of the model must be verified through field testing and, if necessary, the model should be redesigned and retested if necessary.

As called for in the Standards, in order to establish relative probabilities, Metcalf utilized a “nested” research approach that began with broad literature and file searches in an area one-mile wide centered on the proposed pipeline route. This was followed by a geomorphological/geoarchaeological investigation (reconnaissance field study and map analysis) that identified areas that may need closer investigation, and conversely areas that are not archaeologically sensitive. In order to verify the results of the literature and file searches as well as the geomorphological analyses, Metcalf undertook a sampling strategy that sought to challenge and/or verify established trends in human occupation and site use. Previous studies conducted in the region of the undertaking, for instance, noted that few, if any sites were found on flat to gently sloping expanses located away from drainages. Sites tend to occur near water courses and in upland terrain where hills, buttes, and ridges tended to provide some diversity in the environment as well as views of the surrounding terrain. Thus, the flat, featureless, and dry areas are often eliminated from the inventory.

In order to scientifically test these presumptions, Metcalf used three different “cross-checks.” First, if the files search indicated any information, whether site specific or landform specific that contradicted expectations, the suspect area would be added into the area proposed for inventory. Second, a geoarchaeological reconnaissance was performed to assess landform potential for sensitivity for buried sites and for environments conducive to site preservation. Lastly, an archaeological reconnaissance was performed so that the archaeologists could visually confirm the results of the map-based sample selection.

In addition to the sampling procedures for selecting areas for pedestrian inventory, a program of shovel testing in areas of moderate to high site expectations, but with poor surface visibility was also used. Several areas in each state were subjected to shovel probing.

The established presumptions concerning the relationship between landform and the presence of historic properties in North and South Dakota were substantially tested on several properties that were protected by USFWS easements in both North Dakota (16 corridor miles) and South Dakota (12 corridor miles). Although determined by Metcalf’s sampling methodology to be areas with a low probability to yield historic properties, the USFWS nonetheless required an archaeological survey to be conducted. The subsequent archaeological survey of these areas yielded no historic properties thus “testing” and thus verifying the validity of the sampling strategy that was employed. Within the low probability areas tested by Metcalf, no potential historical resources were identified.

The request for a 100% “walkover” survey of the entire APE is not a prudent means of conducting a historic property survey for this Project. The DOS believes that a sample inventory, as utilized by Metcalf is appropriate in this case provided there is sufficient testing of the overarching archaeological model.

G. Identification of Historic Properties of Religious and Cultural Significance

While Government-to-Government consultation meetings and Section 106 consultation meetings with Indian tribes have already occurred, the DOS has verbally and in writing committed to compensating twenty four consulting Indian tribes for conducting Traditional Cultural Property

Studies or other studies of sites of religious and cultural significance, conducted in compliance with *National Register Bulletin: Guidelines For Evaluating and Documenting Traditional Cultural Properties* and other applicable federal, state, local, and tribal guidelines. The DOS is sensitive to the fact that tribes may not wish to identify these sites, discuss their significance, or plot their precise geographic locations. DOS will continue to work with consulting tribes to take into account their concerns with the Project and to avoid, minimize, or mitigate effects to historic properties. An additional Government-to-Government consultation meeting in Washington, DC on December 18, 2007 is scheduled with the consulting Indian tribes. The current timeline for the completion of the TCP/sites of cultural and religious studies is February 1, 2008.

DOS trusts that the foregoing responses adequately respond to your questions and comments regarding the Keystone Pipeline undertaking. Thank you again for your continued assistance. If you have any questions concerning this letter, please feel free to contact me at the numbers and addresses below.

Sincerely,



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OES/ENV
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Washington, DC 20520
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Email: orlandoea2@state.gov

CC: Consulting Agencies and Tribes

Melanie Pearson, DOE
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Laurie Ristino, USDA
Matthew Judy, USDA, NRCS
Matthew Ponish, USDA, FSA
Dan Cimarosti, USACE
Patsy Crooke, USACE
Joel Ames, Tribal Liaison, USACE
Martha Chieply, USACE
Laura Dean, ACHP
Richard Clark, EPA Region 8
Aimee Hessert, EPA
Carolyn Osbourne, DOE

Mark Plank, USDA-WDC
Richard Fristik, RUS
Susan Quinnell, ND SHPO
Fern Swenson, ND SHPO
David Halpin IL SHPO
Anne Haeker, IL SHPO
Charles Wallis OK SHPO
Melvena Heisch, OK SHPO
Judith Deel, MO SHPO
Patrick Zollner, KS SHPO
Stacey Stupka-Burda, NE SHPO
Terry Steinacher, NE Archeologist
Paige Hoskinson, SD SHPO
Jay Vogt, SD SHPO
Tim Weston, KS SHPO
Curley Youpee, Fort Peck Tribes
Kenneth Jessepe, Kickapoo Tribe of Kansas
John Murray & Joe Rivera, Blackfeet Nation
Jim Whitted, Norma Perko, Sisseton-Wahpeton Oyate
Vine T. Marks, Sr., Sisseton Wahpeton Oyate
Dianne Desrosiers, THPO, Sisseton Wahpeton Oyate
Charlotte Almanza, Sisseton Wahpeton Oyate
Dennis Gill, Sisseton Wahpeton Oyate Wahpekute
Roger Trudell, Chairman, Santee Sioux Nation of NE
Wyatt Thomas, Robert Campbell, Santee Sioux of NE
Butch Denny, Santee Sioux Nation of NE
Perry Brady, Pete Coffey, Jr., MHA Nation
Sam Allen, Flandreau Santee Sioux
Richard Schumacher, Flandreau Santee Sioux
Jo Ann White, Lance Oldman, Northern Arapahoe
Tim Mentz, Byron Olson, Standing Rock Sioux Tribe
Russell Eagle Bear, Syed Huq, Rosebud Sioux
Allen McKay, Spirit Lake Tribe
Ken Graywater, Sr., Spirit Lake Tribe
Elvin Windyboy, Chippewa-Cree Indians
Faith Spotted Eagle, Darrell Drapeau, Yankton Sioux
Patt Murphy, Iowa Tribe of KS & NE
Natalie Weyaus, Mille Lacs Band of Ojibwe
Crystal Douglas, Kaw Tribe
Michael Darrow, Fort Sill Apache
Nancy Keller, Sac and Fox Nation of MO in KS & NE
Dr. Andrea Hunter, David Conrad, Osage Nation of OK
Alice Alexander, Pawnee Nation of OK
Lisa Stopp, United Keetoowahband of Cherokee
Dr. Richard Allen, Cherokee Nation
Pamela Halverson, Lower Sioux Indian Community

Bill Quackenbush, Ho-Chunk Nation of WI
Edgar Bear Runner, Michael Catcher Enemy, Oglala Sioux
Mike Alloway Sr., Forest County Potawatomi
Tamera Francis, Delaware Nation
Kent Collier, Kickapoo Tribe of OK
Julie Olds, Miami Tribe of OK
Jeremy Combrink, Tonkawa Tribe
Elgin Crow's Breast, Three Affiliated Tribes
Joe Gillies, Three Affiliated Tribes
Mark Parrish, Pokagon Band of Potawatomi
Daniel Jones, Ponca Tribes of OK
Joyce Bear, THPO, Muscogee Creek Nation
Gordon Yellowman, Cheyenne-Arapaho Tribe of OK
Conrad Fisher, Northern Cheyenne Tribe