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

RE: Reply dated November 30, 2007 by the Department of State to the ACHP
 concerning the Keystone Oil Pipeline Project

Dear Dr. Vaughn,

The Standing Rock THPO received an email letter dated November 30, 2007 from Ms. Elizabeth Orlando of the Department of State (DOS). The DOS letter is a reply to issues raised by the ACHP concerning Section 106 compliance of the Keystone Oil Pipeline Project Draft. The THPO's comments on the DOS letter are as follows:

(1) While the letter is signed by Ms. Orlando on behalf of the DOS, the letter was emailed to the Standing Rock Sioux Tribe by SMiller@entrix.com, the applicant's consultant. Was the letter composed by Entrix, Inc. or by DOS? Does DOS have the in-house expertise to evaluate compliance with the National Historic Preservation Act independent of Entrix? Since Entrix, Inc. is paid by the applicant, they have a vested interest to protect their client's interests. Their perspective cannot be considered to be impartial. What steps is DOS taking to ensure a fair, unbiased perspective?

(2) The chronology provided in Section A is ambiguous and evasive. The DOS states, "This [DOS notification] was largely accomplished through a series of meetings, mailings, e-mails and follow up phone calls that occurred prior to publishing of the Notice of Intent in August and September 2006" (p. 1). Exhibit A (NOI) and Exhibit B (Sample Consultation Letter and Distribution) are cited as supporting evidence. The NOI is dated October 4, 2006. The Sample Consultation Letter is undated and the Tribal distribution list is dated "Revised November 30, 2007" (Exhibit B). Exhibit C (Section 106 Record and Status of Calls to Tribes) does not provide any dates. The DOS must document who was contacted by what means on what date concerning what specific topic(s).

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(3) The research designs for the cultural resource inventories in North and South Dakota were developed by the applicant "prior to the onset of official consultation" (p. 9), presumably prior to August 23, 2006 since that is the date given for the reply by the North Dakota SHPO. "Prior to the onset of official consultation" means that the applicant contacted the SHPOs and developed the research designs prior to the involvement of the DOS. Neither the DOS nor any other federal agency authorized the Applicant to begin consultation by contacting the SHPOs (p. 7). This is a critical point. When the applicant submitted research designs to the SHPOs, the project was not a federal project and did not require Section 106 compliance. Lacking federal involvement the SHPOs have little independent authority to require cultural resource inventories. Advance contact made by the Applicant created a confusing situation. To reiterate a comment made in our letter of October 30, 2007 to the ACHP, Ms. Page Hokinson, review and compliance officer for the SD SHPO, indicated in statements made at the Prairie Knights Casino meeting on October 23, 2007, 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 first approached the SHPO, she would have recommended more extensive inventories of the pipeline corridor in South Dakota. It was apparent that the SD SHPO gave their approval without knowledge that the project would be a federal undertaking requiring Section 106 compliance.

DOS gives the impression that the scopes of work approved prior to DOS involvement could be modified: "Studies based upon 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 process began under DOS direction" (p. 2). It is not clear that any preliminary studies had to be submitted to support the application (this merits explanation), but it is clear that the DOS has subsequently refused to make any modifications to the scopes of work. The "Section 106 process ... under DOS direction" is a euphemism: to the best of our knowledge the DOS has no in-house Section 106 expertise and is simply following the direction of the applicant's consultant. In doing so, it is legitimate to question whether the DOS is acting independently and impartially.

After approval by the SHPOs, the research designs "were shared with the consulting parties by the DOS in an effort to garner comment" (p. 9). No date is provided for when or how the DOS shared the research designs. The Standing Rock THPO office first learned that only 23% of the pipeline corridor in North and South Dakota was going to be inventoried for cultural resources in the Tribal meeting held at Flandreau, SD in 2007. We immediately objected to the lack of a complete inventory and submitted a detailed letter dated September 12, 2007 to Ms. Elizabeth Orlando. Although the DOS states that, "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," (p. 9) when the Standing Rock Sioux Tribe requested a 100% survey of the project's corridor in North and South Dakota, that request was denied by the DOS. The DOS has not cast as broad a net as possible. If that was a sincere statement rather than bureaucratic cover words, they would have required a cultural resources survey of the entire corridor. That is assuredly the most certain method of identifying all historic properties.

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The DOS asserts that the limited cultural resource inventories conducted in North and South Dakota meet the standard of a reasonable and good faith effort. The crux of DOS's position is given in the statements:

"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" (p. 9).

"Metcalf utilized basic sampling techniques that extrapolated the number, classes, and frequencies in unsurveyed areas based on those found in surveyed areas" (p. 9).

We assert that Metcalf could not have utilized basic sampling techniques because there is simply not an adequate data base to support such techniques. Our assessment is based upon actual data compiled from the files searches conducted by Metcalf Archaeological Associates. These searches indicate that there are only 18 previously recorded, pre-contact sites in the 388 square mile area in North Dakota and only 10 such sites in the 736 square mile area in South Dakota. In files searches covering more than a thousand square miles only 28 archaeological sites have been recorded. Much of eastern North and South Dakota is an archaeological unknown. Moreover, even the limited site record is inherently biased because it includes sites that were not recorded as the result of cultural resource inventories. These must be excluded from a statistical analysis because they were not recorded as part of a sampling strategy. A valid sampling strategy for the Keystone Pipeline corridor cannot be extrapolated from the extant data base.

We recommend that the DOS submit Metcalf's files searches to an independent analysis by professional archaeologists at the University of North Dakota to determine whether frequencies of sites in unsurveyed areas can be extrapolated from those found in surveyed areas.

(4) Concerning the project's impacts in Canada, "The DOS does not contest the extraterritorial application of Section 402 of the NHPA on federal undertakings outside the United States" (p. 6). However, DOS raises the issue of "whether the issuance of a Presidential Permit can be construed a federal undertaking that extends beyond the boundaries of the United States" (p. 6) because the permit is issued for construction at the borders of the United States. The geographic area of the Presidential Permit "at the border" is a spurious issue. The project is clearly a federal undertaking requiring compliance with Section 106. In 36 CFR 800.16(d) the area of potential effects of a project is defined as:

Area of potential effects means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties.

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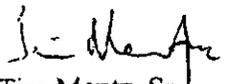
Potential alterations of historic properties in Canada due to construction of the Canadian segment are an indirect effect of the project within the U.S. because the Canadian segment would not be constructed if the pipeline did not extend into the United States. The Canadian segment is not an independent entity. The indirect effects in Canada must be addressed as part of Section 106 compliance in the Keystone Project's DEIS.

(5) A Traditional Cultural Property (TCP) inventory of the Keystone Pipeline has not been conducted. In a letter dated November 8, 2007 the DOS made an offer of \$10,000/tribe for funding a TCP study but required that the TCP study be completed by February 1, 2008. In a reply dated November 15, 2007 that was sent to the DOS, we recommended that the Tribes in North and South Dakota jointly conduct a TCP survey of the entire corridor in North and South Dakota. We rejected the DOS's offer because the February 1, 2008 deadline is unrealistic. It is winter on the Northern Plains with much of the ground now covered by snow and maximum daytime temperatures often well below freezing. TCP assessments have to be made by elders. We will not jeopardize the health and safety of our elders to meet an artificial deadline.

The DOS seems far more concerned with adhering to an extraordinarily fast review process – hence the February 1, 2008 deadline – than with making a full assessment of the pipeline corridor. The Department of State failed to initiate the TCP process in a timely fashion and now seeks to pressure the Tribes into making a hasty assessment under adverse conditions. The DOS has allowed over a year for the archaeological surveys to be completed. We request that the DOS provide at least a twelve month extension of the February deadline so that an adequate TCP survey can be completed.

In summary, we do not believe that the DOS has adequately responded to the issues raised by the ACHP or by the Standing Rock THPO. Thank you for your time and consideration.

Sincerely,
STANDING ROCK SIOUX TRIBE


Tim Mentz, Sr.
Preservation Officer

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