IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
STATE OF SOUTH DAKOTA
COUNTY OF HUGHES

* * * *

IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET HP14-001, IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR AN ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP 09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE

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CIV16-33 (32CIV16-000033)

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REPLY BRIEF TO YANKTON SIOUX TRIBE'S BRIEF APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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PRELIMINARY STATEMENT

Appellant Yankton Sioux Tribe will be referred to as "YST," or "Appellant." Appellee, the South Dakota Public Utilities Commission, will be referred to as the "Commission." Appellee, TransCanada Keystone Pipeline, LP, will be referred to as "Keystone." The 39 persons who were granted intervention in the case and did not withdraw as parties will be referred to collectively as "Intervenors." The Petition for Order Accepting Certification under SDCL §49-41B-27 filed by Keystone on September 15, 2014, will be referred to as the "Petition." The Keystone XL Pipeline project will be referred to as the "Project" or "Keystone XL." The Appendix to this brief will be referred to as "Apx" with reference to the appropriate page number(s). Cites to the chronological Administrative Record will be referred to as "AR" followed by the appropriate page number(s). The transcript of the administrative hearing held before the Commission on July 27-31, 2015, and continuing August 1 and 3-4, 2015, will be referred to as "TR" followed by the page number(s). Exhibits offered into evidence at the evidentiary hearing will be referred to as "Ex" followed by the exhibit number and page and/or paragraph number(s)where appropriate. The Final Decision and Order; Notice of Entry issued by the Commission in Docket HP14-001 on January 21, 2016, will be referred to as the "Decision." The Amended Final Decision and Order; Notice of Entry issued by the Commission in Docket HP09-001on June 29, 2010, will be referred to as the "KXL Decision." The 50 conditions set forth by the Commission in Exhibit A to the KXL Decision will be referred to as the "KXL Conditions" followed by the Condition number(s) when a specific condition or conditions are referenced. References to the United States Department of State's Final Supplemental Environmental Impact Statement will be referred to as "FSEIS" followed by the appropriate Volume and Chapter number or Appendix letter followed by the section and/or page number where appropriate. The entirety of the

administrative record for Docket CIV16-33, except for confidential documents, may be accessed electronically on the Commission's website at www.puc.sd.gov under Commission Actions, Commission Dockets, Civil Dockets, 2016 Civil Dockets, CIV16-33 at the following link: http://puc.sd.gov/Dockets/Civil/2016/civ16-33.aspx. The entirety of the administrative record for Docket HP14-001, except for confidential documents and certain transcripts, may be accessed electronically on the Commission's website at www.puc.sd.gov under Commission Actions, Commission Dockets, Hydrocarbon Pipeline Dockets, 2014 Hydrocarbon Pipeline Dockets, Docket HP14-001 at the following link: http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-001.aspx . The entirety of the administrative record for Docket HP09-001, except for confidential documents, may be accessed electronically on the Commission's website at www.puc.sd.gov under Commission Actions, Commission Dockets, Hydrocarbon Pipeline Dockets, 2009 Hydrocarbon Pipeline Dockets, Docket HP09-001 at the following link: http://puc.sd.gov/Dockets/HydrocarbonPipeline/2009/hp09-001.aspx. The entirety of the FSEIS may be accessed electronically on the U.S. Department of State's website at: https://keystonepipeline-xl.state.gov/documents/organization/221244.pdf. The Appendix to this brief includes the following documents: (1) HP09-001 Amended Final Decision and Order; Notice of Entry, Apx A2-A40, (2) HP14-001 Final Decision and Order Finding Certification Valid and Accepting Certification; Notice of Entry, Apx A41-A68, (3) SDCL 1-26-36, SDCL 49-41B-24, and SDCL 49-41B-27.

JURISDICTIONAL STATEMENT

Intervenor, the Yankton Sioux Tribe, appealed to this Court from the Commission's Final Decision and Order; Notice of Entry in Docket HP14-001 issued on January 21, 2016. This

appeal is taken pursuant to SDCL 1-26-30 and 1-26-30.2. The Circuit Court has jurisdiction over this case pursuant to SDCL 1-26-30.2 and 1-26-30.4. The venue of this action properly lies in Hughes County pursuant to SDCL 1-26-31.1.

STATEMENT OF ISSUES

YST's brief does not contain a statement of issues as required by SDCL 1-26-33.3, so the Commission will attempt to state the issues based on our reading and construction of them.

III.A. Whether the Commission was justified in issuing its Order Granting Motions to Join and Denying Motions to Dismiss on January 8, 2015?

The Commission correctly concluded that the Petition does not on its face demonstrate that the Project no longer meets the permit conditions set forth in the Decision and that a decision on the merits should only be made after discovery and thorough opportunity to investigate the facts and proceed to an evidentiary hearing, and such rulings did not constitute an arbitrary and capricious exercise of authority or an abuse of discretion because there is no evidence whatsoever in the record of conduct demonstrating arbitrary and capricious motives and discretion isn't involved in the Commission's decision making under SDCL 49-41B-27.

III.B. Whether the Commission was justified in issuing its Order Granting Motion to Define Issues and Setting Procedural Schedule on December 17, 2014, requiring prefiled testimony to be filed on or before April 2, 2015, when final discovery responses were due on or before March 10, 2015, and whether this order resulted in substantial prejudice to any party given subsequent developments in the case?

Prefiled testimony was properly required, and in the order setting the original date for prefiled testimony, final discovery responses were due by March 10, 2015, approximately three weeks before prefiled direct testimony was due. The Commission does not believe the rights of any Intervenor were prejudiced. A very significant process of discovery and pre-hearing motions and a nine day hearing with a large number of both individual and organizational Intervenor participants make it highly unlikely that meaningful evidence was omitted from the record in this case.

III.C. Whether the Commission committed reversible error by precluding certain witnesses from testifying at the hearing who did not file prefiled testimony?

The Commission does not believe it committed reversible error by precluding certain witnesses from testifying at the hearing for not filing prefiled testimony. The Commission also would assert that YST has no standing to raise this issue since it did file prefiled testimony for its witness.

III.D. Whether the Commission's Evidentiary and Discovery Procedural Rulings were Justified and Lawful and Did Not Result in Substantial Prejudice to YST or Intervenors Collectively?

The Commission does not believe that limiting discovery to the matter at issue in the case was reversible error and the order explicitly stated that "it shall not be grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

IV.A. Whether the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification correctly concluded that Keystone's burden of proof under SDCL 49-41B-27 is distinct from its burden of proof under SDCL 49-41B-22?

The Commission correctly applied the burden of proof. The instant proceeding is not, and cannot be, a re-adjudication of the permit issuance proceeding which resulted in the KXL Decision in Docket HP09-001. SDCL 49-41B-27, which governs this matter, requires the applicant to "certify . . . that such facility continues to meet the conditions upon which the permit was issued." Keystone did not, however, rest on its certification, and the Decision was based on evidence admitted in a very lengthy hearing and judicially noticed information.

IV.B. Whether the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification correctly concluded that Keystone's burden of proof under SDCL 49-41B-27 is distinct from its burden of proof under SDCL 49-41B-22?

The Commission correctly applied the burden of proof. The instant proceeding is not, and cannot be, a re-adjudication of the permit issuance proceeding which resulted in the KXL Decision in Docket HP09-001. SDCL 49-41B-27, which governs this matter, requires the applicant to "certify . . . that such facility continues to meet the conditions upon which the permit was issued." Keystone did not however rest on its certification, and the Decision was based on evidence admitted in a very lengthy hearing and judicially noticed information.

IV.C. Whether the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification correctly concluded that Keystone's burden of proof under SDCL 49-41B-27 is distinct from its burden of proof under SDCL 49-41B-22?

The Commission correctly applied the burden of proof. The instant proceeding is not, and cannot be, a re-adjudication of the permit issuance proceeding which resulted in the KXL Decision in Docket HP09-001. SDCL 49-41B-27, which governs this matter, requires the applicant to "certify . . . that such facility continues to meet the conditions upon which the permit was issued." Keystone did not however rest on its certification, and the

Decision was based on evidence admitted in a very lengthy hearing and judicially noticed information.

V.A. Whether the Commission abused its discretion by accepting Keystone's certification that it continues to comply with all permit conditions, or in the case of prospective conditions, has the capability to comply with such conditions, although the federal Presidential Permit was denied by the U.S. Department of State?

KXL Condition 2 is a prospective condition, and the Commission's Decision that Keystone would have the capability to comply with KXL Condition 2 by making another application for a Presidential Permit in the future as it has already done once previously is a proper construction of KXL Condition 2.

VI.A. Whether the Commission correctly took judicial notice of Appendix E to the FSEIS which contains the record of consultation between the U.S. Department of State and various tribes?

On July 21, 2015, without objection from any party, the Commission correctly took judicial notice of Appendix E to the FSEIS, which is a matter of public record and indicates that the Standing Rock Sioux Tribe was consulted by the U.S. Department of State. The fact that the tribe rejected the consultation does not constitute evidence that the consultation did not occur. Furthermore, the federal FSEIS process is not under the authority of the Commission, and the consultation is not at issue in this proceeding.

VI.B. Whether the Commission should have considered aboriginal title or usufructuary rights?

The Commission does not have jurisdiction or legal authority to decide issues pertaining to treaty rights, aboriginal title, or usufructuary rights, no court case recognizes such rights outside the current boundaries of reservations, and the Commission correctly issued its June 15, 2015, Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights.

VI.C. Whether the Commission committed reversible error by determining that tribes are not local units of government?

As stated previously, this proceeding is not a re-adjudication of the permit issuance in Docket HP0-001. The KXL Decision was not appealed by any party, none of whom were tribes, and is therefore a final and binding decision. The Commission correctly concluded that tribes are not specifically mentioned in the KXL Decision as local units of government, because they are not under the jurisdiction of state law regarding the establishment and regulation of local units of government but rather are sovereign entities. Furthermore, the evidence admitted at the hearing in this matter indicated that Keystone attempted to communicate with the Cheyenne River Sioux Tribe, which is the only tribe in the vicinity of the Project, and was rebuffed.

STATEMENT OF THE CASE AND FACTS

This case is an appeal brought by Intervenor YST on February 29, 2016, from the Decision of the South Dakota Public Utilities Commission issued on January 21, 2016, in Docket HP14-001 titled "In the Matter of the Petition of TransCanada Keystone Pipeline, LP for Order Accepting Certification of Permit Issued in Docket HP09-001 to Construct the Keystone XL Pipeline." The Commission granted intervention to all forty-two persons and organizations that applied for intervention. The Commission heard and issued decision orders on a very large number of motions filed by the parties. The evidentiary hearing was held by the Commission on July 27-31, 2015, and August 1 and 3-4, 2015. The record in this case on file with the Court contains over 31,000 pages. In its Decision, the Commission determined Keystone's Certification to be valid and accepted the Certification as meeting the standard set forth in SDCL 49-41B-27. The Findings of Fact, including the Procedural History incorporated by reference therein, provide a detailed statement of the procedural and evidentiary facts in this case, which the Commission will not reiterate here.

ARGUMENT

STANDARD OF REVIEW

This court's review of a decision from an administrative agency is governed by SDCL 1-26-36:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;

(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

"[Q]uestions of law, including statutory interpretation, are reviewed de novo." *Pesall v. Montana Dakota Util. Co., et al.*, 2015 S.D. 81, ¶ 6, 871 N.W.2d 649.

The Commission's "findings of fact are reviewed under the clearly erroneous standard . . . [a] reviewing court must consider the evidence in its totality and set the [Commission's] findings aside if the court is definitely and firmly convinced a mistake has been made." *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 S.D. 5, ¶ 26, 744 N.W.2d 594, 602 (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225, 228-29). The Court is to give great weight to findings and inferences of an agency on fact issues. *Sopko v. C & R Transfer Co., Inc.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225, 228-229. A court must sustain any findings supported by substantial evidence. *Abild v. Gateway 2000, Inc.*, 1996 S.D. 50, ¶ 6, 547 N.W.2d 556, 558. ("The question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them.") On factual issues, courts "give great weight to the findings and inferences" made by the Commission. *Woodcock v. City of Lake Preston*, 2005 SD 95, ¶ 8, 704 N.W.2d 32, 34. This Court cannot substitute its view of the evidence for the Commission's view. *City of Brookings v. Department of Environmental Protection*, 274 N.W.2d 887, 890 (S.D. 1979).

III.A.

THE COMMISSION WAS JUSTIFIED IN ISSUING ITS ORDER GRANTING MOTIONS TO JOIN AND DENYING MOTIONS TO DISMISS ON JANUARY 8, 2015.

On December 2, 2014, YST filed a Motion to Dismiss pursuant to SDCL 15-6-12(b)(5), arguing that Keystone failed to state a claim upon which relief can be granted. In its Motion, YST alleged that the thirty differences described in Keystone's Appendix C to the Petition render the subject of this proceeding a different project than was permitted in HP09-001 and, therefore, ineligible for certification. The Commission took the position that while the individual updates described in Keystone's Appendix C might possibly constitute a change in conditions, it would not be appropriate to grant the Motion to Dismiss.

The certification proceeding in question was brought pursuant to SDCL 49-41B-27, which requires the Applicant who has received a permit to certify that the project continues to meet the conditions upon which the permit was granted if construction has not commenced within four years of issuance of the permit. To dispose of the issue of whether the project continues to meet those conditions on a Motion to Dismiss would render meaningless the entire process of certification by establishing a precedent that any minor changes to the facts surrounding a project would prevent an Applicant from reaching the point of an evidentiary hearing. The Commission concluded that the appropriate time in which to address whether there have been material changes which would prevent the project from meeting the conditions of its permit is following an evidentiary hearing, after an opportunity for discovery.

A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. *Guthmiller v. Deloitte & Touche, LLP* 2005 SD 77, ¶ 4, 699 N.W.2d 493, 496. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader. The standard of review of a trial court's grant or denial of a motion to dismiss is whether or not the pleader is entitled to judgment as a matter of law. Thus, all reasonable inferences of fact must be drawn in favor of the non-

moving party, and no deference is given to the trial court's conclusions of law. *Vitek v. Bon Homme County Bd. of Com'rs,* 2002 SD 100, ¶ 7, 650 N.W.2d 513, 516 (internal citations omitted). "The motion is viewed with disfavor and is rarely granted." *Thompson v. Summers,* 1997 SD 103, ¶ 5, 567 N.W.2d 387, 390. "Pleadings should not be dismissed merely because the court entertains doubts as to whether the pleader will prevail in the action." *Id.* ¶ 7. The rules of procedure favor the resolution of cases upon the merits by trial or summary judgment rather than on failed or inartful accusations. *Id.* The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom. *Id.* ¶ 5. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

At this early stage, the Commission simply chose not to consider whether any of the updates identified in Exhibit C constituted grounds for dismissal. The Commission was not willing to take the position that every change constitutes an inability to meet the conditions upon which the permit was issued. Depending on the facts presented throughout the course of discovery and the evidentiary hearing, changes may be deemed immaterial. Changes may not have any bearing as to whether or not the project will comply with the conditions of the permit. If that proves to be the case, a different project would not exist, as YST asserts. It is expected that changes will occur over a period of four years, and the Legislature must have known that at the time SDCL 49-41B-27 was passed. Surely the Legislature did not intend to create a complete bar to certification simply by establishing a standard that no project could satisfy.

For example, one such change that was noted by Keystone and would likely apply to any project that was dormant for four years was an increase in cost. The Commission determined that it would consider this and other changes at the evidentiary hearing to determine whether the

increase in cost or other changes constitute an inability to meet the conditions upon which the permit was issued. In many cases, such as a case of increased cost, to interpret the statute so narrowly would lead to an absurd result by nullifying the statute, as likely no project could ever satisfy the requirement that absolutely nothing has changed at all, such as cost increase. "It is presumed that the Legislature [does] not intend for an absurd or unreasonable result." *Krukow v. S.D. Bd. of Pardons*, 2006 SD 46, ¶ 12, 716 N.W.2d 121, 124.

Furthermore, it is noteworthy that in past certification dockets, some project updates were present. In Docket EL12-063, the Commission granted certification of an electric transmission line that was granted a construction permit in 2007. In the time between the granting of the permit and application for certification in that docket, certain aspects of the project and circumstances surrounding the project, such as the size and the presence of a federal nexus, had changed. However, the Commission found that the project nonetheless continued to meet the conditions upon which the permit was granted, and certification was approved.

III.B. and III.C.

THE COMMISSION WAS JUSTIFIED IN ISSUING ITS ORDER GRANTING MOTION TO DEFINE ISSUES AND SETTING PROCEDURAL SCHEDULE ON DECEMBER 17, 2014, REQUIRING PREFILED TESTIMONY TO BE FILED ON OR BEFORE APRIL 2, 2015, WHEN FINAL DISCOVERY RESPONSES WERE DUE ON OR BEFORE MARCH 10, 2015, AND THIS ORDER DID NOT RESULT IN SUBSTANTIAL PREJUDICE TO ANY PARTY GIVEN SUBSEQUENT DEVELOPMENTS IN THE CASE.

The Commission's Order Granting Motion to Define Issues and Setting Procedural Schedule issued on December 17, 2014, set forth a procedural schedule for the parties to follow in the case. The order set March 10, 2015, as the date for all parties to serve their final discovery responses; April 2, 2015, as the date for all parties to file and serve pre-filed direct testimony; April 23, 2015, as the date for all parties to file and serve pre-filed rebuttal testimony; and May

5-8, 2015, as the dates for the evidentiary hearing. This original schedule provided a full three weeks for preparation of pre-filed direct testimony following the service of final discovery responses. The Commission's rule ARSD 20:10:01:22.06 provides the Commission with authority to require the preparation, filing, and service of prefiled testimony:

> When ordered by the commission in a particular proceeding, testimony and exhibits shall be prepared in written form, filed with the commission, and served on all parties prior to the commencement of hearing on such dates as the commission prescribes by order. The front page of all prefiled testimony shall show the docket number, docket name, and name of the witness.

On April 23, 2015, the Commission issued an Order Granting Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefiled Testimony. It is important to note, however, that this order contained a significant exception to the preclusion as follows:

> . . . subject to the condition that prefiled rebuttal testimony would be allowed to be filed by all parties until the April 27, 2015, deadline, including testimony and exhibits addressing information obtained as a result of any order to compel discovery granted by the Commission.

Following the issuance of the December 17, 2014, scheduling order, a very significant number of motions and responses were filed by Keystone, numerous Intervenors, and Staff, many of which dealt with discovery issues. Due to the time consumed by such motions, parties' responses thereto, and the Commission's hearings and decisions thereon and on the delay in parties achieving adequate discovery, on April 3, 2015, the Commission issued an Order Granting in Part Motion to Amend Procedural Schedule extending the deadline for the filing of rebuttal testimony to April 27, 2015. Due to continuing discovery related delays, on April 27, 2015, the Commission issued an Order Granting Joint Motion for Continuance and Relief from Scheduling Order in response to a motion filed jointly by a number of Intervenors, and on May 5, 2015, the Commission issued an Order Amending Procedural Schedule extending the date for

the filing of pre-filed rebuttal testimony to June 26, 2015, and the dates for the evidentiary hearing to July 27-31 and August 3-4, 2015.

The party alleging error on appeal must show such error affirmatively by the record and not only must the error be demonstrated but it must also be shown to be prejudicial error. *Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251 (S.D. 1976). "Prejudicial error" is error which in all probability must have produced some effect upon the final result of the trial. *State Highway Commission v. Beets*, 88 S.D. 536, 224 N.W.2d 567 (1974). The Court has previously said:

> The rulings of the trial court are presumptively correct; we have no duty to seek reasons to reverse. The party alleging error must show prejudicial error.... To show such prejudicial error[,] an appellant must establish affirmatively from the record that under the evidence the jury might and probably would have returned a different verdict if the alleged error had not occurred.

Supreme Pork, Inc., 2009 S.D. 20, ¶ 58, 764 N.W.2d 491. (quoting *Sander v. Geib, Elston, Frost Prof'l Ass'n*, 506 N.W.2d 107, 113 (S.D. 1993)).

The record in this matter does not demonstrate error by the Commission in its conduct of a very protracted and inclusive set of proceedings. YST participated fully in these proceedings. YST, along with the other active Intervenors in the case, participated in the hearing, presented oral testimony, introduced exhibits, including their prefiled testimony, and conducted cross-examination.

Given this active evidentiary hearing participation, the multitude of motions and responses to motions filed by Intervenors, and Intervenors' active participation in the numerous Commission motion hearings conducted during this proceeding that lasted more than fifteen months, neither YST nor any other Intervenor's due process rights or procedural rights under SDCL Chap. 1-26 were violated by the original order requiring prefiled testimony. Ample due process was certainly afforded to Intervenors in this docket, based on the voluminous record

before this Court. YST has failed to demonstrate prejudicial error resulting from the Commission's orders requiring the filing of prefiled testimony.

III.D.

THE COMMISSION'S EVIDENTIARY AND DISCOVERY PROCEDURAL RULINGS WERE JUSTIFIED AND LAWFUL AND DID NOT RESULT IN SUBSTANTIAL PREJUDICE TO YST OR INTERVENORS COLLECTIVELY

The Commission's issuance of the December 17, 2014, Order Granting Motion to Define Issues and Setting Procedural Schedule that limited discovery to 1) whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issued on June 29, 2010, in Docket HP09-001, or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C was justified based on the statute at issue and did not result in prejudice to any Intervenor given the very significant number of motion filings and decisions pertaining to discovery rendered after the order and the participation by all Intervenors who elected to participate in such proceedings and at hearing and post-hearing briefing and argument, such order did not result in prejudice to any Intervenor. Furthermore, it is important to note that the order further provided "that it shall not be grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

With respect to statutory construction of the statute at issue in this proceeding, SDCL 49-41B-27, the Commission's construction of such statute and corresponding limitation on discovery was in accord with South Dakota statutes and case law precedent. It is crystal clear which statute is the statute with which SDCL 49-41B-27 must be read *in pari materia*. That statute is SDCL 49-41B-24 which states as follows:

> Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate. (emphasis supplied)

Three sections later SDCL 49-41B-27 states:

> Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis supplied)

As the South Dakota Supreme Court has stated: "Statutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." *Goetz v. State*, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683. In this case the same "purpose or object" would clearly seem to be "the conditions upon which the permit was issued" as expressly authorized in SDCL 49-41B-24. Nothing in SDCL 49-41B-27 references a revocation of the permit or indicates that the permit holder must relitigate the original permit proceeding under SDCL 49-41B-22. In this case, the statute at issue, SDCL 49-41B-27, states simply that the permit holder must "certify" that "the facility continues to meet the conditions upon which the permit was issued." Therefore, limiting discovery to 1) whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issued on June 29, 2010, in Docket HP09-001, or 2) the identified minor factual changes from the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C was appropriate.

Furthermore, the proceedings in this case following the Commission's issuance on December 17, 2014, of its Order Granting Motion to Define Issues and Setting Procedural Schedule involved a very large number of motions filed by numerous parties, including motions to compel discovery filed by YST and other Intervenors, several of which were granted, at least in part, by the Commission. In response to such motions to compel, Keystone produced 42.54 GB of electronic data, consisting of 6,214 total files, plus numerous additional documents that it had already produced. AR 002475, 005072, 005240, 005247-005250, 005256-006303, 021109.

Again, as stated previously, the issue in this case is a narrow one, i.e., whether Keystone XL continues to meet the conditions upon which the permit was granted. The massive amount of documents and discovery responses produced by Keystone went far beyond what should have been required for making such a determination. Despite limiting discovery to 1) whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issued on June 29, 2010, in Docket HP09-001, or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C, the Commission's proceedings in this docket resulted in a record consisting of over 31,000 pages, including a hearing lasting nine days. YST's argument that the Commission abused its discretion and committed prejudicial error in that portion of its December 17, 2014, Order Granting Motion to Define Issues and Setting Procedural Schedule concerning discovery limitations has no merit. "'[T]he extent of discovery permitted by either side rests in the discretion of the court" ' *State v. Erickson*, 525 N.W.2d 703, 711 (S.D.1994). The Commission did not abuse its discretion in its oversight of discovery conducted by the parties over a period of many months.

IV.A., IV.B., and IV.C.

WHETHER THE COMMISSION'S FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION CORRECTLY CONCLUDED THAT KEYSTONE'S BURDEN OF PROOF UNDER SDCL 49-41B-27 IS DISTINCT FROM ITS BURDEN UNDER SDCL 49-41B-22 AND THAT KEYSTONE MET ITS BURDEN OF PROOF?

The Commission correctly applied the burden of proof. The instant proceeding is not, and cannot be, a re-adjudication of the permit issuance proceeding which resulted in the KXL Decision in Docket HP09-001. SDCL 49-41B-27, which governs this matter, requires the applicant to "certify" that it continues to meet the permit conditions. The language is mandatory and leaves no discretion with the Commission. The statute simply directs the applicant to certify. The statute is clear on this point: "the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued."

The Chairman of the Commission, Chris Nelson, who presided over the hearing, stated at the outset of the hearing that the initial burden of proof falls on Keystone. TR 10 (AR 023968). So what is that burden of proof in a case under SDCL 49-41B-27? A central issue in this proceeding boils down to what is meant by the term "certify" in the statute and what effect does the use of that term have on issues such as the certifying party's *prima facie* case and burden of proof. In terms of statutory construction, it seems clear to the Commission that the language of SDCL 49-41B-27 does not say that Keystone has the burden of proof to establish that:

(1) The proposed facility will comply with all applicable laws and rules;
(2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
(3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
(4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

SDCL 49-41B-22. The statute at issue in this proceeding, SDCL 49-41B-27, does not contain the word "establish," the word "prove," or the word "demonstrate." The language of SDCL 49-41B-22 clearly demonstrates that the Legislature knew how to craft language requiring the proposed facility to prove with evidence that it satisfies the four factors set forth in that statute. This proceeding is not, however, a retrial of the permit proceeding conducted in 2009 and 2010 in Docket HP09-001. The Commission's Amended Final Decision and Order in Docket HP09-001 is a final and binding Commission order which was not appealed. Apx A2-A40.

> An unappealed administrative decision becomes final and should be accorded res judicata effect. See *Joelson v. City of Casper, Wyo.*, 676 P.2d 570, 572 (Wy 1984) (if judicial review is granted by statute and no appeal is taken, the decision of an administrative board is final and conclusive); *Pinkerton v. Jeld-Wen, Inc.*, 588 N.W.2d 679, 680 (Iowa 1998) (final adjudicatory decision of administrative agency is regarded as res judicata).

Jundt v. Fuller, 2007 S.D. 52, ¶ 12, 736 N.W.2d 508. The instant proceeding is not, and cannot be, a re-adjudication of the permit issuance proceeding which resulted in the KXL Decision in Docket HP09-001. Apx A2-A39.

Instead, the statute at issue, SDCL 49-41B-27 states simply that the permit holder must "certify" that "the facility continues to meet the conditions upon which the permit was issued." The South Dakota Supreme Court has set forth the standard for statutory construction as follows:

> The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.

City of Rapid City v. Estes, 2011 S.D. 75, ¶ 12, 805 N.W.2d 714, 718 (quoting *State ex rel. Dep't of Transp. v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162). "Further, the Legislature has commanded that '[w]ords used [in the South Dakota Codified Laws] are to be understood in their

ordinary sense [.]'" SDCL 2-14-1. *Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621.

The word "certify" is a precise and narrow verb. "Certify" means "to authenticate or verify in writing," or "to attest as being true or as meeting certain criteria." Black's Law Dictionary (10th ed. 2014). To "attest" means "to affirm to be true or genuine; to authenticate by signing as a witness." *Id.*; *Deadwood Stage Run, LLC v. South Dakota Department of Revenue*, 857 N.W.2d 606 (2014). See also *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480 ("Words and phrases in a statute must be given their plain meaning and effect."). Thus, under the plain meaning of the language of the statute, Keystone's obligation under SDCL 49-41B-27 in this case was to verify in writing or to attest as true that it continues to meet the 50 KXL Conditions to which the facility is subject, which are set forth in Exhibit A to the KXL Decision. Apx A26-A39. Keystone's obligation to "certify" could certainly be construed to mean that Keystone met its burden under the statute by filing with the Commission the Certification signed under oath by Corey Goulet, President, Keystone Projects, the corporate entity in charge of implementation and development of the Keystone Pipeline system, including the Keystone XL Project. Ex 2001, p. 1, (AR 020502).

Although the Certification standing alone would seem to have met the "must certify" requirement set forth in SDCL 49-41B-27, Keystone also filed in support of the Certification a Petition for Order Accepting Certification under SDCL § 49-41B-27, with a Quarterly Report of the status of Keystone's activities in complying with the KXL Conditions set forth in the KXL Decision as required by Condition 8 and a tracking table of minor factual changes that had occurred since the Commission's issuance of the KXL Decision attached as Appendices B and C respectively. Apx 27-28, #8. SDCL 49-41B-27 does not even explicitly require the Commission

to open a docket proceeding to consider whether to "accept" the certification as compliant with the statute. Due to Keystone's simultaneous filing of the Petition for Order Accepting Certification under SDCL §49-41B-27 and the Commission's prior history of handling the receipt of certifications, however, the Commission opened a docket to consider Keystone's Petition and Certification.

Since the statute governing this proceeding, SDCL 49-41B-27, clearly and unequivocally states that the person holding the permit must "certify," it can certainly be argued that Keystone met its initial burden of production and proof by submitting its Certification that it continues to meet the conditions set forth in the KXL Decision. Apx A2-A39. As the Federal Communications Commission stated in a certification proceeding before it:

> Thus, we find that, in this context, the ordinary meaning of the certification signifies an assertion or representation by the certifying party, not, as Defendants assert, a demonstration of proof of the facts being asserted. . . . The Commission did not institute a separate additional requirement that LECs prove in advance to the Commission, IXC, or any other entity that the prerequisites had been met.

In the Matter of Bell Atlantic-Delaware, et al v. Frontier Communications Services, Inc., et al and Bell Atlantic-Delaware, et al., v. MCI Telecommunications Corporation, 17 Communications Reg. (P&F) 955, ¶ 17, 1999 WL 754402 (1999). The language of SDCL 49-41B-27 would certainly seem to imply that, if the Commission or a third party wishes to challenge the authenticity or accuracy of the certification, the burden of proof and persuasion in a case involving the validity or accuracy of the certification lies with the parties challenging the certification.

Even if the Court determines that the Certification standing on its own is insufficient to shift the burden of production to Intervenors, however, the Commission believes that sufficient

evidence was produced at the hearing and judicially noticed by the Commission to support upholding Keystone's Certification and the Commission's Decision. Keystone did not rest on its Certification standing alone. Along with its Certification, Keystone submitted the Petition and the accompanying three informational appendices at the time of initial filing, fourteen sets of pre-filed direct, rebuttal, and surrebuttal testimony for eight witnesses, nine of which were admitted into evidence as exhibits, and the evidentiary hearing testimony of seven witnesses lasting nearly six days.

As the references to the hearing transcript and exhibits and the Certification in the Decision demonstrate, substantial evidence exists in the record to support the Findings of Fact set forth in the Decision entered by the Commission. As set forth in SDCL 1-26-1(9), substantial evidence is "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." Substantial evidence "'does not mean a large or considerable amount of evidence ...,' *Pierce*, 487 U.S. at 564-65, 108 S.Ct.at 2549, 101 L.Ed.2d at 504, but means 'more than a mere scintilla' of evidence, *Consolidated Edison*, 305 U.S. at 229, 59 S.Ct. at 217, 83 L.Ed. at 140 (1938)." *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-65, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490, 504 (1988)).

Corey Goulet, the certifying officer for Keystone, spent approximately eight hours on the witness stand and testified that Keystone continues to meet, or with respect to prospective conditions will be able to meet, and has made a commitment to meet, the 50 KXL Conditions. Apx A26-A39. Since the vast majority of the KXL Conditions are prospective and cannot be performed until the construction and operational phases of the Project, Mr. Goulet testified that Keystone intended to fully comply and "meet" such prospective conditions at the appropriate

time. TR 151 (AR 024109); TR 512-514 (AR 024643-024645); Ex 2001, #15 (AR 020505). With respect to conditions that don't come into action until the future, there is really no more that the permit holder can produce to demonstrate that its intention is to fully comply with all such permit conditions at the time they come into being as active conditions. As to Intervenors' argument that the Decision should be overturned because Keystone did not produce substantial evidence specific to each prospective condition that it will be able to meet such prospective conditions in the future at the appropriate time for each such condition, such an argument is tantamount to an interpretation that a certification is essentially a retrial of the original permit proceeding. If the Legislature had intended such a construction, it would not have employed in SDCL 49-41B-27 the phrase "certify that it continues to meet the conditions upon which the permit was issued," but would rather have stated that Keystone must reapply for a permit under SDCL 49-41B-22.

With respect to the KXL Conditions that are not fully prospective, Keystone presented evidence concerning the status of compliance with such conditions. Condition 4 is not at issue because there is no evidence in the record, or knowledge of the Commission, of a proposed transfer of the permit. Apx A26, #4. Conditions 7 through 9 require the appointment of a public liaison officer who must submit quarterly and annual reports to the Commission. Apx 27-28, #7, 8, and 9. Keystone XL appointed Sarah Metcalf who served as public liaison officer on the Keystone Pipeline. TR 171 (AR 024129). On June 2, 2010, the Commission issued an Order Approving Public Liaison Officer approving Keystone's appointment of Sarah J. Metcalf as the Keystone XL Public Liaison Officer. Since her appointment, Ms. Metcalf has filed five annual reports and twenty-three quarterly reports with the Commission, one of which was attached to the Certification as Appendix B.

With respect to the remaining conditions that are not prospective, or at least not fully prospective, the record demonstrates that Keystone has taken steps to comply with such conditions to the extent feasible at this stage of the process. Condition 10, Apx A28, #10, requires that not later than six months before construction, Keystone must commence a program of contacts with local emergency responders. Keystone presented evidence that, despite the fact that it is likely significantly more than six months before construction will commence, it has already started making some of those contacts and will continue. TR 662 (AR 024793), 827 (AR 025248), 1292 (AR 025771), 2395 (AR 027282), 2405 (AR 027292), 2409 (AR 027296), 2447 (AR 027334), Petition, Appendix B, Condition 10. Apx A28, #10. Intervenors presented no evidence indicating this wasn't the case.

Condition 15 requires consultation with the Natural Resources Conservation Service to develop specific construction/reclamation units (con/rec units) that are applicable to particular soil and subsoil classifications, land uses, and environmental settings, which Keystone established has been done. TR 617 (AR 024748); FSEIS Appendix R. In its Order Granting Motion for Judicial Notice, the Commission took judicial notice of the Department of State's Final Supplemental Environmental Impact Statement (FSEIS). Intervenors produced no evidence that Keystone has not complied with Condition 15 as of this time or will not continue to comply with Condition 15 leading up to and during construction. Apx A28-29, #15.

Condition 19 requires that landowners be compensated for tree removal. Keystone indicated compensation for trees will be done as part of the process of acquiring easements. TR 151 (AR 024109); Petition, Appendix B, Condition 19; Apx A31, #19. There is no evidence that Keystone has failed to comply with this condition or is unable or unwilling to comply with this condition.

Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding high consequence areas. Keystone presented evidence that this process is ongoing. TR 662 (AR 024793), 670 (AR 024801), 699 (AR 024830), 718 (AR 024849); Apx A35, #34. Intervenors produced no evidence that this process is not ongoing or will not continue to be so, but rather focused on whether Keystone had sought out local knowledge from tribes, particularly the Cheyenne River Sioux Tribe.

Condition 41 requires that Keystone follow all protection and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks (SDGFP). Keystone presented evidence that this process is ongoing. TR 630 (AR 024761), 637 (AR 024768); Petition, Appendix B, Condition 41; Apx A36-37, #41. There was no evidence to the contrary.

Condition 41 also requires that Keystone consult with SDGFP to identify the presence of greater prairie chicken and greater sage and sharp-tailed grouse leks. The record contains evidence that this process is ongoing. FSEIS, Vol.3, Ch. 4, Subchapter 4.6; Petition, Appendix B, Condition 41; Apx A36-37, #41. No evidence was presented to the contrary.

Condition 49 requires Keystone to pay commercially reasonable costs and indemnify and hold landowners harmless for any loss or damage resulting from Keystone's use of the easement. The evidence related to this condition was primarily the testimony of Susan Sibson and Corey Goulet. Ms. Sibson testified that reclamation on her property after construction of the Keystone Pipeline has not been satisfactory. TR 1965 (AR 026769); Ex 1003 (AR 002918-002920). Ms. Sibson also testified, however, that it takes "quite a while" for native grasses to re-establish, and that her property has been reseeded at her request five times since 2009. TR 1977-1978 (AR 026781-026782). She also testified that she has been paid compensation for loss of use of the

easement area, and she did not state that Keystone has failed to pay reasonable compensation. The process of reclaiming her property is ongoing, and it is undisputed that Keystone has continued to work with Sibson. TR 1975, 1978, 306-307 (AR 026779, 026782, 024304-024305). Corey Goulet testified that Keystone was committed to continue reclamation efforts on the Sibson property until the Sibsons are satisfied. He also testified that out of 535 tracts on the Keystone Pipeline in South Dakota, all but nine had been reclaimed to the satisfaction of the landowner. TR 306-307, 1975-1976 (AR 024304-024305, 026779-026780). There was no evidence that Keystone has not complied or cannot comply with Condition 49. Apx A39, #49.

Condition 50 requires that the Commission's complaint process be available to landowners threatened or affected by the consequences of Keystone's failure to comply with any of the Conditions. The Commission's complaint process is under the jurisdiction and responsibility of the Commission, not Keystone. ARSD 20:10:01. Obviously, no evidence was introduced that Keystone has not complied, or cannot comply, with this condition because the complaints would be filed by landowners. Although not specifically addressed in Condition 50, a complaint or petition could also be filed by Staff or a docket opened by the Commission itself, if either of them had knowledge of facts which indicate to them that Keystone has violated or is violating a permit condition. Apx A39, #50.

Sufficient evidence was presented in the very lengthy hearing conducted in this case to support the Decision and the Commission's Findings of Fact. As set forth above, it is the Commission, as the adjudicatory fact finder under SDCL 1-26-36, who is to determine what credibility and weight to give the evidence in this case. It is obvious from the voluminous record in this case, and particularly from the Commissioners' statements at the January 5, 2016, Commission meeting at which the Commission voted on its Decision, that the Commission took

this matter seriously. Intervenors simply did not provide any evidence indicating that Keystone does not currently comply with Conditions in process at this time or will be unable to comply with Conditions that must be complied with before the Project can be undertaken under the permit or do not come into effect until the immediate pre-construction and construction processes commence.

SDCL 49-41B-27 does not even explicitly require the Commission to make a factual determination as to whether Keystone is able to construct the proposed project in 2016 given present conditions. Rather, the statute requires Keystone to "certify . . . that such facility continues to meet the conditions upon which the permit was issued." The only rational construction of this statute under the *in pari materia* principle of statutory construction is that the term "conditions" means the "conditions" to which the Commission made the permit subject under SDCL 49-41B-24.

V.A.

WHETHER THE COMMISSION ABUSED ITS DISCRETION BY ACCEPTING KEYSTONE'S CERTIFICATION THAT IT CONTINUES TO COMPLY WITH ALL PERMIT CONDITIONS, OR IN THE CASE OF PROSPECTIVE CONDITIONS, HAS THE CAPABILITY TO COMPLY WITH SUCH CONDITIONS, ALTHOUGH THE FEDERAL PRESIDENTIAL PERMIT WAS DENIED BY THE U.S. DEPARTMENT OF STATE?

The Commission does not believe its responsibilities under SDCL 49-41B-27 involve an exercise of discretion but rather a factual and legal determination of whether the applicant has met the standard set forth in SDCL 49-41B-27 which states:

> Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public

Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis supplied)

This is a case of first impression regarding this statute. No previous filing under this statute has been contested before the Commission or appealed to the Circuit Court. The term "discretion" is typically characterized by specific language conferring discretion, see e.g. SDCL 49-41B-20, or by the use of the word "may" in terms of the decision-making authority delegated to the agency. *In re Application of Benton*, 691 N.W. 2d 598, ¶ 20, (2005 S.D. 2) (citing *Farmland Ins. Companies of Des Moines, Iowa v. Heitmann*, 498 N.W.2d 620, 625 (S.D. 1993)). There is nothing in the language of SDCL 49-41B-27 indicating that the Commission has discretionary authority to disallow or reject a certification submitted by an existing facility permit holder[1]; rather, the Commission's role is to determine, based on the certification itself and other evidence presented in a case where the certification is contested, whether the certification should be accepted as valid and accurate.

Keystone submitted a Certification to the Commission signed by Corey Goulet, the president of Keystone Projects, the corporate entity in charge of constructing the Keystone XL Pipeline project under the permit issued in Docket HP09-001 for which the Certification was made. Keystone also submitted a Petition for Order Accepting Certification under SDCL § 49-41B-27 in support of the Certification and supporting Appendices. Based on the language of SDCL 49-41B-27 it is certainly arguable that nothing more needed to be done, absent the

[1] The Legislature has specifically delegated discretion to the Commission in several of the statutes found within SDCL Chapter 49-41B. See e.g. 49-41B-3(4): "Any other relevant information as may be requested by the commission."; 49-41B-12: "If the commission determines that an environmental impact statement should be prepared"; 49-41B-13: "at the discretion of the Public Utilities Commission"; 49-41B-14; "The Public Utilities Commission may require" and "The commission . . . may also request"; 49-41B-20: "at the discretion of the commission"; 49-41B-22.2: "the Public Utilities Commission may in its discretion decide"; 49-41B-23: "The Public Utilities Commission may waive"; 49-41B-24: "as the commission may deem appropriate"; 49-41B-25: "as the commission may deem appropriate"; 49-41B-33; "A permit may be revoked or suspended by the Public Utilities Commission"; and 49-41B-35: "Rules may be adopted by the commission."

initiation of a proceeding by action of the Commission or the complaint of another person. The Commission, however, opened a docket for consideration of the certification, and ultimately, after the Certification was contested by Intervenors, Keystone presented testimony from seven witnesses and introduced a number of exhibits at the evidentiary hearing in support of the validity of the Certification.

With respect to the denial of Keystone's outstanding Presidential Permit application by the Department of State, the Commission determined that this does not demonstrate that the Project fails to continue to meet Condition 2 of the KXL Decision. Apx A26, #2. Condition 2 states that "Keystone shall obtain . . . all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State . . ." It does not state that Keystone "has obtained" a Presidential Permit. It is a prospective condition, and there is no evidence in the record demonstrating that Keystone will be unable to apply for and obtain a Presidential Permit in the future.

All major siting projects permitted by the Commission have required additional permits beyond those issued by the Commission, and the Commission has approved permits to construct for all recent siting dockets before all other jurisdictional permits/approvals were obtained. See e.g. Dockets HP09-001, HP07-001, EL13-020, EL13-028, EL14-061, and EL15-020. Permit applicants must be afforded the opportunity to seek permits and approvals from multiple jurisdictions and governmental agencies sequentially in order to avoid the impractical reality of having the dozens of permits and approvals required to construct and operate a linear project such as Keystone XL conducted simultaneously or in some form of multi-jurisdictional proceeding. Prospective conditions make sense. An absurd result would inevitably occur otherwise.

Keystone has previously had an application for a Presidential Permit denied, and this did not prevent Keystone from reapplying, which it did. If Keystone does not apply for and obtain a Presidential Permit in the future, it will not be able to construct the Project under the permit issued in Docket HP09-001, provided the Executive Orders cited in Condition 2 remain in force.

Furthermore, the South Dakota Legislature considered Senate Bill 134 in the 2016 Legislative Session which would have amended SDCL 49-41B-24 to require that an applicant seeking a facility permit that requires a Presidential Permit must obtain such Presidential Permit before the Commission could grant such facility a permit to construct. The bill was defeated before the Senate Commerce and Energy Committee.[2]

The Commission's Decision, Apx. A41-A68, in this matter did not involve an exercise of discretion, but rather a decision based on the Certification filed by Keystone and the evidence introduced into the record by Keystone and the other parties. If the Court determines that an exercise of discretion was involved, the Commission did not abuse such exercise of discretion. The Commission's Decision validating and accepting Keystone's Certification should not be overturned because Keystone has not yet obtained a governmental permit that Condition 2 requires it to obtain in the future before commencing construction. Apx A26, #2.

As stated in the Decision, Keystone has previously had its Presidential Permit denied and it reapplied. The fact that it was once again denied does not mean that it cannot reapply and obtain such a permit in the future. Does this mean the permit remains intact in perpetuity? It does not. SDCL 49-41B-33 allows the Commission to revoke Keystone's permit for "failure to comply with the terms or conditions of the permit." At a point where Staff or the Commission determines that KXL Condition 2, Apx A-26, #2, cannot be complied with by Keystone, Staff or

[2] See: http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?Bill=134&Session=2016

the Commission can commence an action to revoke the permit. At this point, the Commission has not determined that such time has yet arrived.

VI.A.

WHETHER THE COMMISSION CORRECTLY TOOK JUDICIAL NOTICE OF APPENDIX E TO THE FSEIS WHICH CONTAINS THE RECORD OF CONSULTATION BETWEEN THE DEPARTMENT OF STATE AND VARIOUS TRIBES?

Appendix E to the FSEIS, which is a matter of public record of which the Commission took judicial notice on July 21, 2015, without objection from any party, contains the Record of Consultation: Indian Tribes and Nations setting forth the consultations between the Department of State and various Tribes under Section 106 of the National Historic Preservation Act. AR 020144. On page 11 of the Record of Consultation, all of the meetings, e-mails, telephone calls, and letters between the Department of State and the Standing Rock Sioux Tribe are listed. The record of consultation establishes that the Standing Rock Sioux Tribe was consulted by the Department of State.

Furthermore, multiple witnesses testified that the Tribes in South Dakota passed resolutions opposing the Project and that Keystone's representatives were not welcome on Tribal land. TR 1745-1746, 1873, 2084, 2096-2097, 2104-2105 (AR 026353-026353, 026481, 026888, 026900-0269001, 026908-026909).

VI.B.

WHETHER THE COMMISSION SHOULD HAVE CONSIDERED ABORIGINAL AND TRIBAL RIGHTS

The Commission excluded specific types of evidence such as usufructuary and aboriginal rights (see June 15, 2015, Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights), and the grounds for such exclusion were based on sound evidentiary

legal principles, such as relevancy or lack of jurisdiction. For example, the Commission determined that it has no jurisdiction to adjudicate tribal rights. Such determinations are properly litigated in the courts of this state or in federal court. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). The Project will not cross any tribally owned property, land owned by the United States and held in trust for Indians, or any Indian reservation lands. TR 394 (AR 024392); Petition App. C, ¶ 54. No court has held that Native American Tribes have aboriginal title or usufructuary rights with respect to any of the real property crossed by the proposed KXL route in South Dakota. Lastly, the issue of usufructuary and aboriginal rights does not address whether Keystone's continues to meet any of the KXL Conditions since no condition addresses this subject. Apx A26-A39.

VI.C.

THE COMMISSION CORRECTLY APPLIED CONDITION 6, WHICH REFERS TO LOCAL GOVERNMENTAL UNITS

Again, this proceeding is not a re-adjudication of the permit issuance proceeding in Docket HP09-001. Two Intervenors testified about their concerns that Keystone had not consulted with Tribal officials about the Project. The Honorable Phyllis Young testified on behalf of the Standing Rock Sioux Tribe as an at-large Tribal Council Member that Keystone did not consult with the Tribe and, similarly, that the Department of State failed to consult with the Tribe in preparing the FSEIS. Ex. 8001, last page (029121); TR 1722, 1732-1733 (AR 026330, 026340- 026341). The Honorable Wayne Frederick testified on behalf of the Rosebud Sioux Tribe as a member of the Council that the Rosebud Sioux Tribe was not consulted by TransCanada. TR 2088 (AR 026892). Keystone witness Corey Goulet testified that Keystone has tried to reach out to Tribes in the vicinity of the Project and employs a manager of tribal

relations, but that such consultations have not been achievable in cases such as Cheyenne River Sioux Tribe because the Tribe was not willing to speak with Keystone's representatives and has passed legislation that forbids Keystone or any of its contractors from entering the reservation boundaries. TR 178-183, 273-280, 301 (AR 024136-024141, 024271- 024278, 024299).

Multiple witnesses testified that the Tribes in South Dakota passed resolutions opposing the Project and that Keystone's representatives were not welcome on Tribal land. TR 1745-1746, 1873, 2084, 2096-2097, 2104-2105 (AR 026353-026354, 026481, 026888, 026900-026901, 026908-026909). That being said, no permit condition requires that Keystone consult with the Tribes about the Project. Condition 6, Apx 27, #6, refers to "local governmental units," but does not specify Tribes. Condition 34, Apx 35, #34, requires that Keystone must "consider local knowledge" in assessing and evaluating environmentally sensitive and high consequence areas. In support of its Certification, Keystone submitted its Quarterly Report in which Keystone's public liaison officer stated that Keystone has sought out local knowledge. Petition, App. B, Condition 34(b).

VI. CONCLUSION

Based on the foregoing, the Commission respectfully requests the Court to affirm the Decision and adopt the Commission's findings of fact and conclusions of law as this Court's findings of fact and conclusions of law.

Dated this 19th day of July, 2016

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