



1                   TRANSCRIPT OF PROCEEDINGS, held in the  
2 above-entitled matter, at the South Dakota State Capitol  
3 Building, Room 413, 500 East Capitol Avenue, Pierre,  
4 South Dakota, on the 12th day of May, 2015.

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1           CHAIRMAN NELSON: This is Docket HP14-002, In  
2 the Matter of the Application of Dakota Access, LLC for  
3 an Energy Facility Permit to Construct the Dakota Access  
4 Pipeline.

5           The question we're going to deal with today is  
6 shall the Commission grant Yankton Sioux Tribe's Motion  
7 to Compel? And if so, shall the Commission award  
8 reasonable attorneys fees and expenses associated with  
9 the Motion to Compel?

10           The first thing I want to deal with is we do  
11 have our court reporter with us so I need to slow down.

12           There was a request from Mr. Koenecke with  
13 Dakota Access that we prohibit telephonic presentations  
14 from attorneys representing the various Intervenors and  
15 parties.

16           That is not something that we have done. I  
17 don't intend to limit telephonic participation unless I  
18 see otherwise from my fellow Commissioners.

19           Commissioner Hanson.

20           COMMISSIONER HANSON: I would represent the same  
21 remarks that you just made. However, I would like to  
22 hear why, and if there is a good reason for it, then I  
23 could find myself supporting it. However, I come from  
24 the same footings that you do, Mr. Chairman.

25           CHAIRMAN NELSON: Fair enough.

1           Before I turn it over to Mr. Koenecke, I'm just  
2 going to say again to the folks on the phone line please  
3 put your phones on mute if you're not talking. We're  
4 still getting some clicking coming across.

5           Mr. Koenecke, would you tell us why you asked  
6 for this limitation.

7           MR. KOENECKE: Certainly, Commissioner. Good  
8 morning and happy birthday.

9           It is my feeling that the process so far has  
10 been characterized by e-mails, a lack of telephone calls,  
11 a lack of personal interaction. I don't see that  
12 changing going forward. And I think that it's something  
13 to -- it would aid the process considerably if people  
14 would act in person and see the nonverbal reactions to  
15 the things that they say, the things that they ask for,  
16 the responses that are given. I think it would add a lot  
17 of genuine character to the entire proceeding.

18           So I said that in order to bring that up, and  
19 I'm thankful that Commissioner Hanson asked me this  
20 morning. I think the discourse would be helped  
21 immeasurably if people would act in person and not in  
22 writing. Limit the impersonal conversations and start  
23 interacting as individuals in a public open setting face  
24 to face would act. So that's why I said that.

25           Thank you.

1           CHAIRMAN NELSON: Thank you. Anything else from  
2 either of the fellow Commissioners?

3           Commissioner Hanson.

4           COMMISSIONER HANSON: I could entertain  
5 discussion from the other parties as well. But,  
6 Mr. Koenecke, it would seem that it would be more  
7 beneficial to the individuals who are not here to be  
8 here. I think it's an advantage for someone to be here  
9 present if there is an advantage to be had. So it  
10 surprises me that you'd ask for it.

11           Has there been some -- has there been some  
12 activity that you would consider egregious to the process  
13 by not being able to -- the phone calls work both ways.  
14 The e-mails work both ways. I'm just curious what --  
15 your argument this morning doesn't sway me, but I'm just  
16 curious if there's something you're not telling us.

17           Are you trying to be diplomatic here, or what's  
18 going on?

19           MR. KOENECKE: No, Commissioner. I'm not. I  
20 didn't expect to be swayed -- to sway the Commission at  
21 all, and I didn't expect the Commission would grant such  
22 a request. But I did want to make the point that there's  
23 been a tremendous amount of I would call it posturing,  
24 from my standpoint, in writing, and I'd like to get to  
25 the meat of the matter.

1           We sent out discovery to everybody simply asking  
2           them what are your issues? We'd like to know what your  
3           issues are. I got back a lot of discovery from a lot of  
4           the Intervenors. Some I didn't hear back from at all.  
5           Some I heard from late. Mostly it was very polite and  
6           very courteous and told me what I wanted to know; what  
7           are your issues so we can speak to them.

8           In some cases that hasn't been the case.  
9           There's been nothing impolite. It's just been very --  
10          not what I'm used to in front of the Commission so that's  
11          why I brought it up.

12          I don't want to impugn or malign anybody here  
13          this morning. I just think we'd be better off if we were  
14          acting personally.

15                 COMMISSIONER HANSON: Thank you, Mr. Chairman.  
16                 I don't see the need to hear from other persons on this  
17                 matter.

18                 CHAIRMAN NELSON: Thank you. I think if there's  
19                 nothing further, we will proceed as is. And thank you  
20                 for your comments, Mr. Koenecke.

21                 With that, Ms. Real Bird has brought this Motion  
22                 so, Thomasina, I'm going to turn it over to you.

23                 MS. REAL BIRD: Thank you, Mr. Chairman and  
24                 members of the Commission. Thomasina Real Bird for the  
25                 Yankton Sioux Tribe.

1           The Yankton Sioux Tribe brought the Motion to  
2 Compel. And I do want to reiterate a couple of the items  
3 in the events section and also apprise the Commission of  
4 a couple new events following the filing of the Motion.

5           So on April 1 the Tribe did serve Dakota Access  
6 with our First Set of Interrogatories and Requests for  
7 Production. Those were due April 1, and so they were  
8 timely.

9           On May 1, the date that the Answers were due, I  
10 along with a few other parties received an e-mail from  
11 Dakota Access's counsel indicating that they would not be  
12 serving responses by the May 1 deadline, that they're  
13 working on them, and asked us for our thoughts.

14           So that was an e-mail format. That wasn't a  
15 telephone call. So I responded in writing that, you  
16 know, the Tribe would be happy to stipulate to Dakota  
17 Access providing late responses as late as May 8, which  
18 is a week, if Dakota Access would be amenable to amending  
19 the schedule because obviously that would cut into our  
20 time to review the discovery. And we asked Dakota Access  
21 to let us know. In the absence of any Stipulation we  
22 would have to file a Motion to Compel.

23           And so I did not hear back from that letter. On  
24 May 2, however, I did receive what I would describe as  
25 draft responses from Dakota Access's counsel and they

1 were attached to the Motion, for the Commission's  
2 benefit. And then along with the draft responses was a  
3 note that the complete discovery answers would be  
4 provided early the next week.

5 And so we received those. We didn't respond  
6 either way. We reviewed them.

7 So early next week -- I would consider Monday or  
8 Tuesday. However, Monday and Tuesday came and passed.  
9 Wednesday it was in the afternoon, and it looked like,  
10 you know, Wednesday was going to come and go without the  
11 complete discovery responses that Dakota Access had  
12 indicated were forthcoming.

13 So I went ahead and sent a letter. Since all  
14 communication to date has been in writing, I sent a  
15 letter saying, you know, are you going to provide them?  
16 You know, they're still late. We haven't received a  
17 complete set. We did take the opportunity to go over  
18 what we thought were insufficient and deficient responses  
19 as far as substance as opposed to the timing in the same  
20 letter and said let us know your intentions. If you're  
21 going to provide them, please provide them by the  
22 morning, or we're going to -- we're going to file a  
23 Motion to Compel.

24 And so on Thursday morning there were still  
25 no -- we had no phone call, no e-mail, no letter back.



1 So we prepared a Motion to Compel and filed it on  
2 Thursday. And then Friday we did get the discovery  
3 responses.

4 And so it seems like Dakota Access has resolved  
5 some of the reasons for the Motion to Compel. You know,  
6 the answers were a week late so in another pending Motion  
7 that will be taken up later by the Commission we have  
8 asked for the schedule to be amended.

9 But I can go ahead and go over the  
10 Interrogatories and Requests for Production that we still  
11 believe are deficient so we can cover those today in the  
12 Motion to Compel.

13 CHAIRMAN NELSON: This is Chairman Nelson, and I  
14 think it would be good for you to, yeah, go through each  
15 one and tell us which ones have been resolved and then  
16 which ones have not. That would be helpful to us.

17 MS. REAL BIRD: Okay. Sorry. I had it handy,  
18 and then I didn't. Okay.

19 So Interrogatory No. 10 -- I'm sorry. If you'll  
20 just give me a moment. Thank you to the Commission for  
21 bearing with me.

22 We'll start with Interrogatory No. 10. We asked  
23 for the address, phone number, and e-mails and names for  
24 persons responsible for conducting surveys, addressing  
25 property-specific issues, and civil survey information.

1 So that would have been pending in the first draft.

2 In the actual responses that was received on  
3 May 8 the objection was the question is vague, overbroad,  
4 and outside the scope. And without waiving that  
5 objection, Dakota Access states that surveys were  
6 conducted starting in 2014 and numerous individuals  
7 participated and if the Tribe had questions about  
8 specific tracts, we may be able to provide specific  
9 information.

10 And the Tribe would submit that it's entitled to  
11 an answer to our questions, including the date,  
12 addresses, phone numbers, e-mails, and names responsible  
13 for the surveys, not just specific tracts.

14 And so Dakota Access says that surveys were  
15 conducted starting last year, and so we would like that  
16 information. So that's Interrogatory No. 10. And we  
17 feel we're entitled to that information.

18 Interrogatory No. 20 is similar. And we feel  
19 it's still not completely answered. And the name,  
20 address, phone number, and e-mails of all persons  
21 involved in any cultural or historic surveys. In  
22 addition, please provide a detailed description of all  
23 pertinent professional training that qualifies the  
24 surveyor as a professional who meets the standards of the  
25 Secretary of Interior Historic Preservation Professional

1 Qualification Standards.

2 And the answer was an objection that the  
3 question was vague, overbroad, and outside the scope.  
4 However, without waiving objection, the Applicant states  
5 that, again, surveys were started in 2014. And so the  
6 Tribe would submit that's a partial answer, and we are  
7 entitled to an answer to our Interrogatory.

8 Interrogatory No. 25 and 26 we're okay with the  
9 Applicant in its answer on May 8 answered those, and so  
10 we're no longer asking the Commission to compel those.  
11 They've been resolved since the filing of the Motion.

12 Interrogatory No. 11 we asked if the Applicant  
13 recognizes the Tribe as a local government unit, and we  
14 still didn't get an answer to that. We got an answer  
15 that they recognize the Tribe as a federally recognized  
16 Tribe but not whether it's a local government unit as the  
17 South Dakota Codified Laws define that. So that's still  
18 pending in our mind.

19 Interrogatory 19 we asked whether Dakota Access  
20 uncovered any cultural or historic sites by the surveys  
21 and please provide a detailed description of those sites  
22 including locations of the same. And the Applicant  
23 stated that -- they referred us to the section of the  
24 Application, and the descriptions and locations are  
25 privileged and confidential citing South Dakota Codified

1 Law 1-20-21.2 and that the Applicant recommends the Tribe  
2 contact the South Dakota State Historic Preservation  
3 Office.

4 And this was also brought up in Staff's  
5 response to the Motion to Compel. And I do want to take  
6 a couple of minutes to discuss these provisions of the  
7 South Dakota Codified Laws.

8 1-20-21, a plain reading of it applies to the  
9 state archeologist surveys. It says "The state  
10 archeologists on behalf of the State Historic Society  
11 Board of Trustees shall conduct, as part of that Board's  
12 statewide surveys of historical properties, a survey of  
13 archaeological sites located within the state and  
14 obtained records of such sites."

15 So 1-20-21 applies to the State employee. It  
16 doesn't provide for the surveys that are conducted by an  
17 Applicant or its contractors in this case. So the  
18 surveys that the Applicant described as starting in 2014,  
19 we believe we're entitled to those as well as the  
20 information requested in our Interrogatories. And we  
21 don't believe it's covered by 1-20-21 or 21.2 as that in  
22 plain terms applies to the State party.

23 So the State thinks Interrogatory 19 is still  
24 pending, and we are entitled to that information.

25 Interrogatory No. 40 and 18 -- so it looks like

1 the answers that were provided on May 8 resolved the --  
2 we thought there was a conflict in the draft answers, the  
3 way the draft was submitted to us on May 2. However,  
4 when it was submitted on May 8 it appears that the final  
5 answer resolved our concern with those draft answers.

6 And Request For Production No. 4, the Tribe  
7 requested all documents relating to required permit, both  
8 in South Dakota and outside of South Dakota, including  
9 permit applications which were denied, revoked, or  
10 suspended for the Dakota Access Pipeline Project or any  
11 other project constructed by Dakota Access since 2007 --  
12 or 2010. Excuse me.

13 And the answer stated -- it was an objection,  
14 and they said the request seeks irrelevant information,  
15 overly broad and burdensome, such matters occurred out of  
16 state, are irrelevant, overly burdensome to produce, and  
17 if any exists would be located on other state regulatory  
18 body websites. Without waiving objections, no permits  
19 have been denied or revoked relating to Dakota Access,  
20 and there are websites provided to the other states.

21 And we still think that the document request is  
22 incomplete. We asked for all documents relating to  
23 required permits both in South Dakota. So we'd like that  
24 answered, and the outside South Dakota we have those  
25 links.

1           And then we also didn't receive an answer  
2 regarding suspended -- documents relating to suspended  
3 permits. So that portion of the document request is  
4 still unanswered. And the Applicant states that the  
5 request for all information presumably includes e-mails,  
6 letters, applications, correspondence, notes, and other  
7 internal communications. And so, yes, that's what the  
8 request is for all documents related to.

9           And so if they exist and they're not, for  
10 example, attorney-client privilege or work product, we  
11 believe we're entitled to them through this discovery  
12 process.

13           The Request For Production No. 7 is still  
14 pending and unanswered in our mind. And it's very  
15 similar. We asked for all documents, and the objection  
16 was that the Request for Production is overbroad and  
17 outside the scope of discovery.

18           And we believe it's not. We believe it's  
19 important to the case to have the breeding time of the  
20 South Dakota species and have a map showing migration of  
21 those South Dakota species.

22           So those are sort of a summary of what we still  
23 feel is pending in our mind. It looks like about four  
24 Interrogatories were resolved when we received the May 8  
25 discovery responses to us, and we would like the

1 Applicant to provide the other outstanding items so that  
2 we can, you know, finish our review and get prepared for  
3 the next round of discovery.

4 Thank you.

5 CHAIRMAN NELSON: Thank you. That was helpful  
6 to us. I'm going to go to each of the Intervenors now.  
7 And realize this is not your Motion. So if you have  
8 anything to add that is pertinent, you're able to do  
9 that, but if not, let's see if we can keep this moving  
10 along.

11 Mr. Boomsma.

12 MR. BOOMSMA: I have nothing to add.

13 CHAIRMAN NELSON: Thank you.

14 Mr. Rappold.

15 MR. RAPPOLD: I have nothing substantively to  
16 add. I would just support Yankton Sioux Tribe's Motion  
17 to resolve this discovery issue.

18 CHAIRMAN NELSON: Thank you. One Intervenor  
19 lawyer in the room.

20 Anything to add? No.

21 Staff.

22 MS. EDWARDS: Thank you.

23 Staff filed a Brief in this matter stating what  
24 our motion is on the law. We stand by that Brief and  
25 have nothing to add, but if there are any questions, we

1 will answer those.

2 Thank you.

3 CHAIRMAN NELSON: With that, we will turn to  
4 Dakota Access for your response.

5 MR. KOENECKE: Thanks, Commissioners and  
6 Intervenors. I'll take them in order going down through  
7 the document.

8 Interrogatory No. 10 asks us to identify the  
9 dates, addresses, phone numbers, and e-mails and names of  
10 persons responsible for conducting surveys.

11 I point out initially that I don't think it's  
12 proper or appropriate under the rules for these witnesses  
13 to be personally contacted by the Intervenors anyways. I  
14 would have -- I don't intend to contact their witnesses  
15 personally at their own homes, at their own phone numbers  
16 and e-mail addresses without going through counsel so I  
17 don't think it's appropriate any other way.

18 We've had a number of surveys done on hundreds  
19 of tracts of properties, and this answer would run into  
20 numerous individuals. Property-specific issues in civil  
21 survey information is vague to me and overbroad. We  
22 offered to -- if there were specific tracts that they had  
23 questions on, we'd do consultations with those. But we  
24 think to provide the names, e-mails, and personal contact  
25 information of people in the public setting --



1           CHAIRMAN NELSON: Mr. Koenecke, I'm going to  
2 stop you for a moment.

3           Folks that are on the phone, please put your  
4 phones on mute. We're getting a lot of background  
5 noise.

6           Thank you.

7           Brett, I'm sorry. Go ahead.

8           MR. KOENECKE: No problem, Commissioner.

9           So we answered the question as we did. If the  
10 Commission orders us to do otherwise, then so be it. But  
11 I don't think people by virtue of acting as a surveyor on  
12 this project should be subject to having their personal  
13 contact information made public. Especially not in light  
14 of any perceived deficiency in how they went about their  
15 job.

16           I should have probably objected that this is  
17 vexatious and harassing. I don't know that that's the  
18 case, but I have suspicions. I could be wrong, and I  
19 hope to be wrong.

20           But we've acted very assiduously in keeping the  
21 contact information of the landowners involved in this  
22 project confidential. I don't think that's on the  
23 website available for anybody to see for good reasons,  
24 and I don't think the contractors working on the project  
25 should be subjected to the same thing.

1           We'd be glad to consult on individual tracts,  
2 but we don't see the purpose of this question. So that's  
3 our position, Commissioner.

4           Would you like me to go through all of them at  
5 one time?

6           CHAIRMAN NELSON: Yeah. Go ahead.

7           MR. KOENECKE: Okay.

8           Interrogatory No. 11, I don't understand the  
9 quotation remarks around local governmental unit. It  
10 appears to be a legal question to me and not a fact  
11 question.

12           We consider them to be a federally recognized  
13 Tribe, which I believe them to be. I don't know the  
14 significance of me doing the research to find out whether  
15 they're a local governmental unit or not. And so we  
16 answered the question as best we could.

17           I don't mean to be argumentative about it, but I  
18 certainly don't understand the point of the question.  
19 And so I would -- if we said yes, no, or whatever the  
20 case may be, it's a legal question and not a fact  
21 question, to my way of thinking. And so --

22           Interrogatory 19, this is not my first project  
23 in front of the Commission. We're dealing with historic,  
24 cultural, and archaeological sites. And it's been my  
25 practice that has been forced on me by the Commission and

1 others in the past to keep such things as this  
2 confidential.

3           It's been told to me by the SHPO office, among  
4 others, that we don't want locations of sites out in the  
5 public domain. And I would leave it to them to do that.  
6 I don't mean to withhold this information from the  
7 Intervenor for my own purposes. I understand that to be  
8 the way the society or the group of people involved with  
9 that seek to have that information be treated.

10           And I cited to the law on that, both federal and  
11 state. We don't have any particular reason ourselves not  
12 to give that information out, but I've simply understood  
13 that to be the way that the practice is, that those sites  
14 are not to be made public.

15           Again, with Interrogatory No. 20 we're seeking  
16 the name, address, phone number, and e-mail of all  
17 persons involved in any cultural historic survey. That's  
18 a number of people. And, again, I don't want to  
19 reiterate further. Their public -- or their contact  
20 information, to my way of thinking, need not be made  
21 either public or given out to anybody.

22           Document Request No. 4, on page 11 of my answer,  
23 I should say, there are a number of documents related to  
24 any filing. They are in some cases relevant to the  
25 proceeding and a lot of cases not.

1           To bring in and make such a broad request would  
2 require us, I think, to devote a substantial amount of  
3 resources to answering a request which would be  
4 voluminous and unlikely to be useful to anyone. That's  
5 my own personal opinion.

6           I think that it's worth pointing out to the  
7 Commission that we answered hundreds of questions both  
8 from Staff and the Intervenors in the 30 days in April  
9 leading into May. We didn't try to withhold anything  
10 from anybody untowardly. We tried to be open and give  
11 the information that was useful to people.

12           To ask us to produce volumes and boxes of  
13 documents or perhaps CDs or what have you is to my way of  
14 thinking incredibly burdensome to the project to  
15 provide -- it's a herculean task and would require a lot  
16 of devotion that I don't see the -- I don't see the  
17 point. And perhaps it's not for me to make. A lot of it  
18 would be irrelevant to the proceeding.

19           I can state that to my knowledge none of the  
20 permits have been suspended relating to Dakota Access.

21           Finally, I would state that a number of the  
22 documents which were requested are available publicly  
23 with the click of a mouse.

24           CHAIRMAN NELSON: Thank you.

25           Ms. Real Bird, any brief rebuttal? Oh, just a

1 moment.

2 MR. KOENECKE: I failed to address No. 7. I'm  
3 sorry. A table to show breeding times of sensitive  
4 species and a map to show migration pathways. I don't  
5 think discovery requires me to produce that at the  
6 request of a party. If we have it, I think we can  
7 certainly produce it, but to require me to have one  
8 produced I think is going too far.

9 CHAIRMAN NELSON: Thank you.

10 Ms. Real Bird.

11 MS. REAL BIRD: Thank you, Mr. Chairman. I  
12 would just say that, you know, the Yankton Sioux Tribe  
13 has no vexatious intent. We're certainly seeking  
14 information we believe we're entitled to under the  
15 statutes within the scope of discovery. And to the  
16 extend the Applicant hasn't answered those, we'd like the  
17 Commission to compel those answers and those document  
18 requests.

19 Thank you.

20 CHAIRMAN NELSON: Thank you.

21 Questions from the Commission. Seeing none --

22 Just a moment.

23 Let me just -- Commissioner Hanson first.

24 COMMISSIONER HANSON: Thank you, Mr. Chairman.

25 Mr. Koenecke, on Interrogatory 10 and 20 in the

1 request for information on different persons conducting  
2 different activities, will any of those persons be  
3 appearing as witnesses for you?

4 MR. KOENECKE: Thank you, Commissioner. I don't  
5 know at this time. I suspect not. But I don't know at  
6 this time.

7 COMMISSIONER HANSON: Okay. And on Document  
8 Request No. 7 you intimated that it appears that you  
9 don't know whether you have that information or not?

10 MR. KOENECKE: I don't know as I sit here  
11 whether there is existing a table or a map to show those  
12 specific requests. I don't know that we have those  
13 things. I don't think we do.

14 COMMISSIONER HANSON: I guess that surprises me  
15 a bit. I would think that since it was a document  
16 request you would have checked that out to see.

17 Do you know if there's an agency that you've  
18 worked with to try to find out that information, or is it  
19 germane to the project in your mind?

20 MR. KOENECKE: I think that --

21 COMMISSIONER HANSON: Excuse me for asking two  
22 questions.

23 MR. KOENECKE: Is it germane to the project? It  
24 certainly is germane to the project to know what the  
25 sensitive species are. Breeding times, I have less

1 confidence in the germaneness. And the map of  
2 migrations, I have even less confidence in that. I'm not  
3 certain sensitive species even migrate. The only  
4 sensitive species I've heard discussed is the Topeka  
5 Shiner. I don't think that it does. I think it's  
6 resident.

7 Breeding times no one's said yes, I have a table  
8 or a map. That's where I'm at with that one.

9 I hope I'm being responsive, Commissioner. I'm  
10 not trying to be coy.

11 COMMISSIONER HANSON: Certainly. Document  
12 Request No. 4, would you be able to -- you argued that it  
13 would be a significant challenge. Would it be a  
14 significant challenge to provide just the crude oil  
15 pipeline permits?

16 And you've basically testified before us that no  
17 permits have been declined or revoked so it would just be  
18 permits that have been granted.

19 Forgive me. I assume there are a lot of permits  
20 from my experience on a pipeline, but for just crude oil  
21 pipelines, would that be such a challenge?

22 MR. KOENECKE: Thank you for the question,  
23 Commissioner. It would be in some respects. All  
24 documents related to those permits reaches down -- to my  
25 way of thinking, into the employment records of the

1 people who worked on the project, the bills that were  
2 involved, the payments back and forth.

3 All documents related is what I think is  
4 overbroad. I think that the permit applications for  
5 crude oil pipelines is probably not overbroad. And, as I  
6 said, they're available with the click of a mouse.

7 But I think to go in the direction of the crude  
8 oil permits is a good step, but the all documents  
9 related, to my way of thinking, needs to be limited.  
10 Where do we start and stop with all documents related?

11 Because to me that means every scrap of paper  
12 that you kept. And I don't think they want that. I  
13 certainly wouldn't. I would want only things that are  
14 really critical to whatever case they intend to make.

15 I don't know what the thrust of the Intervenor  
16 is going to be at the hearing with respect to this  
17 matter, but I would guess that there's only really a few  
18 pieces of information that they really want. But to ask  
19 me to produce all documents related is essentially -- my  
20 first blush reaction is duplicate everything you've got  
21 and ship it here. We can't do that.

22 COMMISSIONER HANSON: Thank you. I fully  
23 understand that, having participated -- the Commissioners  
24 all and the Staff understand the challenge there.

25 Thank you, Mr. Chair.



1           CHAIRMAN NELSON: I'm going to need to follow up  
2 on Commissioner Hanson's question regarding Request For  
3 Production No. 7.

4           I thought I understood this, but perhaps not.  
5 I'm reading from Mr. Koenecke from your response to this  
6 Motion to Compel, and you say and I quote "The discovery  
7 process is used to obtain information or documents which  
8 exist. It is not intended to cause parties to create  
9 documents. It seems the Yankton Sioux Tribe would like  
10 Dakota Access to create documents which do not exist."

11           So you've made a statement to us that they don't  
12 exist. But now today you're telling us you're not sure.  
13 Help us out there.

14           MR. KOENECKE: I don't -- the project does not  
15 have a table or a map as has been requested. To whether  
16 somebody else, a third party, a graduate student perhaps  
17 who might have made a map or a table, those probably do  
18 exist. I don't have them. They're not in my possession.  
19 I hope that's helpful.

20           CHAIRMAN NELSON: It is. Thank you.

21           Any other questions? Mr. Smith?

22           Any further questions?

23           Seeing none, is there a Motion?

24           Commissioner Hanson.

25           COMMISSIONER HANSON: Thank you, Mr. Chairman.

1           I move that the Commission deny Yankton Sioux  
2 Tribe's Motion to Compel.

3           CHAIRMAN NELSON: Discussion on the Motion.  
4           Commissioner Hanson.

5           COMMISSIONER HANSON: Mr. Chairman, in examining  
6 and reading into the requests both for Interrogatories  
7 and for the Document Requests I can see that -- I'm  
8 vacillating a little bit on one of them, on Document  
9 Request No. 4, and for that reason I guess I'm leaning  
10 even against that. I don't see the value in obtaining  
11 those -- that -- those permits.

12           Certainly I cannot see requesting all of the  
13 documents that relate to those permits. As we know from  
14 our own experience in these type of dockets, there are  
15 just truckloads of information. And to have -- to place  
16 that on the shoulders of the Applicant is just truly  
17 burdensome. I can't imagine the amount of information  
18 that they would have to provide to them.

19           I think that if the Yankton Sioux Tribe were  
20 asking for specific information such as just the permits  
21 that exist for crude oil, not all of the documents that  
22 relate to those permits but just asking for what permits  
23 have you received for what other crude oil pipelines, I  
24 could certainly see going for that. But I think it goes  
25 way too far.

1           It appears to me that Interrogatory No. 11 has  
2           been answered. And 10 and 20 I fully agree with the  
3           Applicant. And 19, we have always been extremely careful  
4           to protect information of this nature. It is  
5           confidential. I don't see why a specific location is  
6           necessary.

7           What is necessary is to know that the Applicant  
8           is going to follow the law, they're going to do  
9           everything they can to protect these areas.

10          I really think that what we have to do is be  
11          especially careful to make certain that that information  
12          is limited to as few people as possible.

13          As a Commissioner I've had the opportunity to  
14          know where a considerable amount of this information is  
15          on previous dockets. I have chosen not to. And we have  
16          historically been opposed to spreading out anymore  
17          information on those locations. It's possible simply  
18          from the standpoint of being able to protect them.

19          No. 7 I think has been answered from the  
20          standpoint of the Applicant, and if there's an agency  
21          that has that information, it may come to fruition later  
22          on. The Applicant doesn't have it. So I can't see that  
23          they would be even able to share it at this juncture.

24          Thank you, Mr. Chairman.

25          CHAIRMAN NELSON: Additional discussion on the

1 Motion.

2 I'm not going to support the Motion. I believe  
3 there are certain of these items that should, in fact, be  
4 compelled.

5 Do I share Commissioner Hanson's concern that  
6 some of this goes too far? Yeah. I do.

7 So far as the confidential information, as we  
8 have done in other dockets, I think that can be  
9 adequately protected with the appropriate protective  
10 orders. And so based on that, I'm not going to support  
11 the broad Motion to Deny in its entirety.

12 Additional discussion.

13 Seeing none, all those in favor will vote aye.  
14 Those opposed, nay.

15 Commissioner Sattgast.

16 ACTING COMMISSIONER SATTGAST: Nay.

17 CHAIRMAN NELSON: Commissioner Hanson.

18 COMMISSIONER HANSON: Aye.

19 CHAIRMAN NELSON: And Nelson votes nay. Motion  
20 fails.

21 Additional motions.

22 I move that we grant the Motion to Compel for  
23 Interrogatory No. 10, 19, 20, and Request For Production  
24 No. 3 and 4, with an any information which is  
25 confidential or should remain confidential be covered

1 with a protective order identical to what was recently  
2 issued by this Commission in another Docket. As amended,  
3 yes.

4 ACTING COMMISSIONER SATTGAST: Mr. Chairman,  
5 could you restate those?

6 CHAIRMAN NELSON: Yes. I'd move to grant Motion  
7 to Compel for Interrogatory No. 10, 19, and 20, and  
8 Request For Production No. 3 and 4.

9 Discussion on the Motion.

10 Let me just say a number of these the Applicant  
11 has expressed concerns about confidentiality, and those  
12 concerns are absolutely accurate. But I believe that  
13 that concern can be adequately covered with the  
14 appropriate protective order that will accompany this.

15 Am I concerned that Request For Production No. 4  
16 is too broad? I am concerned about that. And I'm simply  
17 going to say to Ms. Real Bird, I think you need to get  
18 together with the Applicant's attorneys and come to an  
19 agreement as to what is really necessary there. I mean,  
20 it does not need to be as broad as what, you know,  
21 Mr. Koenecke fears that it is.

22 But beyond that, I think the items that I have  
23 enunciated are appropriate for discovery and would move  
24 to compel those.

25 Additional discussion.

1           ACTING COMMISSIONER SATTGAST: Mr. Chairman,  
2 this is Acting Commissioner Sattgast. I do have a  
3 question, I guess, for Staff on Interrogatory No. 10. I  
4 have not been involved in what type of protection orders  
5 that would entail.

6           If there could be some explanation of what type  
7 of information would be blocked and who would it be  
8 blocked from.

9           MS. EDWARDS: Thank you. This is Kristen  
10 Edwards from Staff.

11           The Protection Order drafted and ordered by the  
12 Commission in HP14-001 made all information which was  
13 submitted as confidential viewable only by attorneys,  
14 expert witnesses, and experts relied upon by the parties  
15 for the purposes of examining that information. And all  
16 parties -- or all persons viewing that information were  
17 required to sign the nondisclosure agreement provided as  
18 an attachment before being granted access to that  
19 information.

20           ACTING COMMISSIONER SATTGAST: Thank you.

21           CHAIRMAN NELSON: Additional discussion.  
22 Commissioner Hanson.

23           COMMISSIONER HANSON: Mr. Chairman, obviously I  
24 cannot support the Motion for a number of reasons. In  
25 Document Request No. 4 we all agree or at least you and I

1 agree that it's too broad. But the Motion will require  
2 all documents relating -- and as much as we may request  
3 the parties to come to some agreement, it nevertheless  
4 places a hammer in the hands of one party because the  
5 Motion requires all documents.

6 And as we are well-aware from our previous --  
7 well, from our other existing pipeline dockets, there is  
8 just a huge amount of information from every one of  
9 those. And I can't imagine -- well, in another Docket  
10 before us the party complained that they received too  
11 much information. And that's just one.

12 And so I just -- I just don't think this is  
13 workable to give that power to them.

14 We have really done everything we can to protect  
15 the confidential -- confidentiality of sites. And  
16 marking things confidential is one thing; protecting the  
17 site is another.

18 The information exists long after the Docket is  
19 even completed. Confidential information is leaked all  
20 of the time, and as much as that confidentiality is  
21 placed on papers, it has to be shared to other people.  
22 And that information then is usually asked for by other  
23 Applicants -- excuse me. By other parties to the Docket,  
24 and it spreads rapidly and regardless of who it's being  
25 shared with.

1           I see years ago within our own PUC that  
2 confidential information was placed in the garbage, and  
3 that then is available to whoever accesses the garbage.  
4 And we have taken measures from that standpoint. I can't  
5 be assured that this information is being destroyed from  
6 every party that receives it. And this will spread  
7 considerably.

8           Again, I do not understand why a party needs to  
9 know where the site is. They need to know that it's  
10 being protected. They need to know that the law is being  
11 followed in every case.

12           And, frankly, if I were Yankton Sioux Tribe, I  
13 would want to be assured that the information is not  
14 shared anywhere further. And by asking for it, other  
15 parties to this hearing are going to be able to ask for  
16 that information as well. And historically we've shared  
17 information when one party receives it.

18           So I'm very, very concerned about the  
19 confidentiality. And I can certainly go along with 10  
20 and 20. That was a challenge for me. But 19 and 4 I  
21 just cannot support at all.

22           Thank you, Mr. Chairman.

23           CHAIRMAN NELSON: Thank you. I appreciate your  
24 comments, particularly on Request No. 4.

25           So I'm going to ask Ms. Real Bird, as we are



1 speaking here now there's part of me that maybe wants to  
2 remove that from my Motion.

3 Can you limit that? Can you tell me how we  
4 might limit that to still allow you to accomplish what  
5 you believe you have a right to access but not as  
6 expansive as what you've asked for.

7 MS. REAL BIRD: Thank you, Mr. Chairman.

8 So as we sit here now we understand even in our  
9 definition "all documents" can include a lot of  
10 information. So what we are really after is for the  
11 applications themselves, the correspondence to and from  
12 whatever entity the applications were submitted to, the  
13 correspondence -- the applications themselves, including  
14 any parts, attachments, et cetera, any memorandums that  
15 are not confidential, meaning like attorney-client work  
16 product, for example, or attorney-client communication to  
17 the Applicant and its attorneys.

18 But we really do want the correspondence to and  
19 from the agencies related to the Application. And so,  
20 yeah, we'd be happy to limit it to that, as long as the  
21 correspondence includes both written and electronic form.  
22 All forms of correspondence.

23 So as we sit here, I'd say we'd be happy with  
24 that. We're really interested in the company's  
25 interaction with whomever is receiving these permit

1 applications.

2 CHAIRMAN NELSON: Thank you. I am going to,  
3 with the permission of my two fellow Commissioners, amend  
4 my Motion to peel it back to -- for Request No. 4 to what  
5 has just been enunciated to limit the scope.

6 Additional discussion.

7 Seeing none, all those in favor will vote aye.

8 Those opposed, nay.

9 Commissioner Sattgast.

10 ACTING COMMISSIONER SATTGAST: Aye.

11 CHAIRMAN NELSON: Commissioner Hanson.

12 COMMISSIONER HANSON: No.

13 CHAIRMAN NELSON: Commissioner Nelson votes aye.

14 Motion carries.

15 Is there anything else for the good of the  
16 order?

17 I think as far as announcements are concerned --

18 COMMISSIONER HANSON: Mr. Chairman, I would move  
19 that the Commission do not award reasonable attorney fees  
20 and expenses associated with the Motion to Compel.

21 CHAIRMAN NELSON: Thank you.

22 Discussion on the Motion.

23 COMMISSIONER HANSON: Well, obviously the reason  
24 for that is that there was -- it was not a simple up and  
25 down, yes or no obvious situation to provide these items,

1 and it was a divided Commission on them. And we did not  
2 grant some of the requests. So it doesn't comply with  
3 what we would have for providing those funds.

4 CHAIRMAN NELSON: Additional discussion.

5 Seeing none, all those in favor of the Motion  
6 will vote aye. Those opposed, nay.

7 Commissioner Sattgast.

8 ACTING COMMISSIONER SATTGAST: Aye.

9 CHAIRMAN NELSON: Commissioner Hanson.

10 COMMISSIONER HANSON: Aye.

11 CHAIRMAN NELSON: Nelson votes aye.

12 Motion carries. The fees are denied.

13 (The proceeding concludes at 10:43 a.m.)

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1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF SULLY )

4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter, Certified Realtime Reporter and  
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I took in shorthand the proceedings  
10 had in the above-entitled matter on the 12th day of May,  
11 2015, and that the attached is a true and correct  
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 16th day of  
14 June, 2015.

15

16

17

18 \_\_\_\_\_  
19 Cheri McComsey Wittler,  
20 Notary Public and  
21 Registered Professional Reporter  
22 Certified Realtime Reporter

23

24

25

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