STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET NO. HP14-002, DAKOTA ACCESS PIPELINE LLC	)	**CIV. 16-20**
	)	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Dakota Access, LLC, by and through its undersigned counsel, hereby submits its Reply Memorandum in Support of Motion to Dismiss.

BACKGROUND

The relevant background is not disputed. The South Dakota Public Utilities Commission ("PUC") entered a Final Decision and Order granting Dakota Access, LLC, ("Dakota Access") a permit to construct the South Dakota portion of the proposed Dakota Access Pipeline on December 14, 2015 and served said Final Decision on December 14, 2015. According to the Certificate of Service on the Notice of Appeal, Yankton Sioux Tribe placed a Notice of Appeal in US Mail on January 13, 2016 and such was only sent to the attorneys for Dakota Access, the PUC, and the Hearing Examiner. The Certificate of Service also states that the Notice of Appeal was faxed to the Hughes County Clerk of Courts on January 13, 2016. Eventually, an original was received by the Clerk of Courts. No Case Filing Statement was included in the fax or the original mailing. The Notice of Appeal was not filed until an original was sent to the Hughes County Clerk of Courts and payment of filing fees was received on January 25, 2016. [1]

[1] Although Dakota Access would submit that such is not necessary to the outcome of this Motion, to the extent the Court determines that any factual evidence regarding statements made by employees of the Clerk of Court's office is relevant to the outcome of this matter, Dakota Access would submit that discovery regarding those matters and a factual hearing is required.

LEGAL STANDARD

"SDCL 1-26-31 clearly delineates who must be served with a notice of appeal and when and where it must be filed in order to transfer jurisdiction from the executive to the judicial branch." *Schreifels v. Kottke Trucking*, 2001 SD 90, ¶ 12, 631 N.W.2d 186, 189. "Failure to follow the plain language of the statute deprives the circuit court of subject matter jurisdiction over the appeal and requires its dismissal." *Slama v. Landmann Jungman Hosp*., 2002 S.D. 151, ¶ 4, 654 N.W.2d 826. The burden of proving subject matter jurisdiction falls on the party seeking to exercise jurisdiction. *V S Ltd. P'ship v. HUD*, 235 F.3d 1109 (8th Cir. 2000) (*citing Nucor Corp. v. Nebraska Pub. Power Dist*., 891 F.2d 1343, 1346 (8th Cir. 1989)).

ARGUMENT

1. Yankton Sioux Tribe did not perfect its appeal by faxing a Notice of Appeal to the Clerk of Courts

Yankton Sioux Tribe's first argument is that the fax sent on January 13, 2016, perfected their appeal. That argument is without merit for several reasons. First, and foremost, the Yankton Sioux Tribe agrees that the ability to file by fax was amended out of statue effective July 1, 2014. *See* Supreme Court Rule 13-12. Although prior to July 1, 2014, a party could file a document by faxing it to the court along with a transmission fee of ten dollars or one dollar per page, whichever was greater,[2] that ability was specifically revoked in statute.

Yankton Sioux Tribe contends that the Court used its discretion under SDCL 16-21A-2(2) allow Yankton Sioux Tribe to file via facsimile. However, SDCL 16-21A-2(2) does not authorize filing via facsimile. Instead, it allows for an exception to mandatory electronic filing. This allows for attorneys to file original paper documents upon a showing of good cause by leave

[2] The FAQ page that Yankton Sioux Tribe submitted as proof that they can fax things is copyright 2012, before efiling became mandatory. A simple failure to update on an administrative level cannot defeat statute.

of court. Although not applicable to filing via facsimile, if it did, no such order finding good cause has been ordered by the Court.

To the extent Yankton Sioux Tribe relies on allegations of what it was told by the Clerk of Courts office, such is not sufficient to prevent dismissal of this appeal. A similar situation arose in *Fed. Land Bank v. Le Mars Mut. Ins. Co*., 65 S.D. 143, 272 N.W. 285 (1937). There, the clerk told an attorney that a notice of appeal was timely filed if mailed on the date that it was required to be filed. The South Dakota Supreme Court disagreed, and held: "Clearly, any agreement between the clerk and counsel for appellant with regard to the filing of this notice of appeal did not extend the statutory time within which the notice of appeal must be filed." *Id.* at 145.

However, maybe most importantly, even if filing by facsimile was authorized under statute, which is not the case, Yankton Sioux Tribe still failed to timely file the Notice of Appeal because, by its own admission, did not include the required Civil Case Filing Statement. SDCL 15-6-5(h) statutorily requires that a Civil Case Filing Statement be sent along with the Notice of Appeal to open a file. In this case, that was not done until at least after January 19, 2016. *See* Kinglesmith Affidavit Exh. C. Accordingly, even if filing was allowed by facsimile, the Notice of Appeal could not be filed until a file was opened, and a file was not opened because the case filing statement was not received.

In addition, the filing fee was not timely received. Yankton Sioux Tribe submits that the $48 fee sent after the Notice of Appeal was faxed is a sufficient filing fee. However, that argument is mistaken. The $48, if anything, would be a transmission fee as was the case prior to SDCL 16-21A-2(2) being amended on July 1, 2014. That would still require a filing fee be sent in addition to the transmission fee. The fees required to open a file, including the base filing fee,

court automation surcharge and law library fee, are plainly found in statue as totaling $70. Thus, even if mailing such was timely, which it clearly is not, the fee was insufficient to open a file.

Yankton Sioux tribe relies on *Watertown Coop. Elevator Ass'n v. S.D. Dep't of Revevue*, 2001 SD 56. That case allows only a narrow exception for firms that have set up a charge account with the Clerk of Courts prior to the appeal. The Court found that a charge to a charge account is equivalent to receiving a check. There is no evidence or allegation that a charge account has been set up with the Clerk of Courts in this case. The rationale would not apply to the case at hand. Since payment was not included with the Notice of Appeal that was faxed or mailed, the faxed or mailed notice of appeal was not complete and would not be timely even if mailing or faxing was proper filing.

2. Yankton Sioux Tribe did not serve all adverse parties

Dakota Access does not dispute that statute requires service only on adverse parties. However, Yankton Sioux Tribe fails to give any analysis as to why none of the intervening parties are adverse parties. In the case at hand, it is undisputed that "[t]he term 'adverse party' includes every party whose interest in the subject matter is adverse to or will be adversely affected by a reversal or modification of the judgment appealed from." *Morrell Livestock Co. v. Stockman's Comm'n Co*., 77 S.D. 114, 115, 86 N.W.2d 533, 534 (1957) (*quoting Millard v. Baker,* 76 S.D. 529 81 N.W.2d 892). The requirement to serve notice to an "adverse party" has been broadly construed, including the requirement to serve non-appearing co-defendants, such as was the case in *Morrell*. *Id.*

Yankton Sioux Tribe does not dispute that many of the intervening parties did not oppose a permit being granted to Dakota Access, but, rather, sought certain conditions be included in the permit to construct the South Dakota portion of the proposed Dakota Access Pipeline. Yankton

Sioux Tribe does not even attempt to explain how those parties would not "be adversely affected by a reversal or modification of the judgment appealed from." *Id.* For example, the City of Sioux Falls sought several conditions regarding the permit which are specifically included within pages 15-17 of the Permit Conditions found in Exhibit 1. Certainly modification or reversal of those conditions would adversely affect the City of Sioux Falls. The potential for such to adversely affect a party is enough to require notice of an appeal. *See Morrell,* 86 N.W.2d at 536 ("reversal or modification of the judgment appealed from *could* adversely affect the defendant Keith Levy. He is, therefore, an adverse party" (emphasis added)). In accordance, service of the Notice of Appeal was required under SDCL 1-26-31. Since service was not timely accomplished, the appeal must be dismissed. *In re Eunice Thomas Reese Tr. v. Cortrust Bank, N.A.*, 2009 S.D. 111, ¶ 5, 776 N.W.2d 832 ("Failure to serve a notice of appeal on a party before the time for taking an appeal has expired is fatal to the appeal and requires its dismissal.").

3. Yankton Sioux Tribe's time to file a notice of appeal should not be extended by Rule 6(b)

Yankton Sioux Tribe states that SDCL 15-6-6(b) can be used to extend the timeframe required to file a notice of appeal. Such an argument is without merit. As a starting point, Yankton Sioux Tribe cites no cases in which Rule 6(b) was applied to extend a deadline found outside the Rules of Civil Procedure or a case management scheduling order. Indeed, the only case cited by Yankton Sioux Tribe stands for the proposition that one may use the Rule 6(a) computation rules, but does not state that Rule 6(b) can be used to extend deadlines found elsewhere in code.

The plain language of SDCL 15-6-6(b) states that it can only serve to extend deadlines found in SDCL ch. 15-6 ("When by this chapter or by a notice given thereunder or by an order of court an act is required or allowed to be done at or within a specified time, the court may . . . ").

To counsel's knowledge, no Court in South Dakota has extended SDCL 15-6-6(b) to apply to timeframes set in code elsewhere, specifically SDCL 1-26-31, and courts have consistently held that failure to file an appeal in a timely fashion under SDCL 1-26-31 is a jurisdictional defect. *Slama v. Landmann Jungman Hosp*., 2002 S.D. 151, ¶ 4, 654 N.W.2d 826. In fact, the South Dakota Supreme Court has held that Rule 6 cannot expand agency deadlines, reasoning:

> Proceedings for appeal or review must be instituted within the period of time prescribed by statute, since such statutory provision is mandatory and jurisdictional. A failure to comply with the statutory requirements subjects an appeal to dismissal. In the absence of specified conditions, the requirement may not be waived by the administrative appellate tribunal, or by the opposing parties by agreement or failure to object, and an assumption of jurisdiction by the appellate tribunal on its own motion must comply with the statutory time limitations.

Perrine v. S.D. Dep't of Labor, 431 N.W.2d 156, 158-59 (S.D. 1988). The basic reason for that is a separation of powers issue, as "SDCL 1-26-31 clearly delineates who must be served with a notice of appeal and when and where it must be filed in order to transfer jurisdiction from the executive to the judicial branch." *Schreifels v. Kottke Trucking*, 2001 SD 90, ¶ 12, 631 N.W.2d 186, 189.

For example, the Supreme Court of Maine reasoned that "Rule 6(b), which governs generally the enlargement of time prescribed by the *Maine Rules of Court Procedure or an order of court*, clearly does not by itself contain language that would allow an enlargement of a period prescribed expressly by statute." *Reed v. Halperin*, 393 A.2d 160, 162 (Me. 1978); *see also Brown v. State, Dep't of Manpower Affair*s, 426 A.2d 880, 887-888 (Me. 1981) ("judicial enlargement of a statutorily provided period of appeal is not possible"). Nearly identical limiting language is found in SDCL 15-6-6(b). Unlike Rule 6(a), which specifically applies to "any period of time prescribed . . . by any applicable statute", Rule 6(b) specifically limits application to deadlines set forth within the Rules of Civil Procedure or court orders. Counsel for Dakota

Access is unaware of any case law which would authorize use of Rule 6(b) in an administrative appeal. In accordance with settled law, the Judiciary does not have jurisdiction to extend a deadline set by the Legislature to extend its jurisdiction over functions of the Executive branch, and as such the dictates of SDCL 1-26-31 must be strictly complied with. Accordingly, Rule 6(b) is not applicable.

CONCLUSION

Accordingly, Dakota Access, LLC, respectfully requests that that the Court dismiss the appeal pursuant to SDCL 15-6-12(b)(1).

Dated this 5th day of April, 2016.

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CERTIFICATE OF SERVICE

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 5th day of April, 2016, he either gave notice by electronically filing or mailing by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

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