

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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IN THE MATTER OF TRANSCANADA	)	RESPONSE TO
KEYSTONE PIPELINE, LP	)	KEYSTONE'S
FOR ORDER ACCEPTING CERTIFICATION	)	MOTION TO DEFINE THE
OF PERMIT ISSUED IN DOCKET HP09-001	)	SCOPE OF DISCOVERY
TO CONSTRUCT THE KEYSTONE XL	)	
PIPELINE	)	HP14-001

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COMES NOW, the Indigenous Environmental Network (IEN), by and through counsel, Kimberly Craven and submits their response to TransCanada's Keystone (TransCanada) Pipeline LP's Motion to Define the Scope of Discovery. The IEN, whose membership is comprised of members of federally recognized Indian Tribes whose aboriginal homelands encompass the 1851 and 1868 Fort Laramie Treaty lands in South Dakota, were previously not intervenors in the South Dakota Public Utility Commission's (Commission) docket HP09-001. In Docket HP09-001, there was no official notice regarding the permit proceedings published in any Tribal newspapers and there were no Commission hearings for that docket held on Tribal land or for the benefit of Tribal governments or their citizens.

Commission Has a Duty to Protect the 14<sup>th</sup> Amendment Rights of  
Procedural Due Process and Equal Protection

The 14<sup>th</sup> Amendment to the United States Constitution provides in Section One that: "... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"

Many Tribal people possess important liberty interests, including cultural and religious, as well as property interests, in the area where TransCanada has proposed the Keystone XL pipeline route pass through. On behalf of those Tribal Peoples who are IEN members, IEN vigorously objects to TransCanada's attempts to limit the protection of these rights by initially attempting to exclude IEN from participating in these present proceedings, HP14-001, and by this renewed attack by TransCanada Motion to Limit Discovery which limits IEN's ability to fully exercise our Constitutionally protected 14<sup>th</sup> Amendment rights to Procedural Due Process and Equal Protection as exercised by all previous intervenors in the HP09-001 permit docket proceedings.

Last month, the United States District Court District of South Dakota Southern Division in *Rosenbrahn v. Daugaard* (4:14-CV-04081-KES) emphasized the importance of protecting these rights: "[A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846-47 (1992) (quotation omitted). The Due Process Clause "forbids the government to infringe certain fundamental liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993) (emphasis in original) (internal quotations omitted). A fundamental right is a right that is "objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)."

American Indians are considered a suspect classification and are entitled to strict scrutiny judicial review for a State government action that would limit these fundamental rights or harm their liberty interests.

Commission has the Duty to Comply with South Dakota Statutes regarding the Department of Tribal Affairs and Consult with the Tribes

Moreover, since the culmination of the first Keystone XL pipeline permit docket proceedings, HP09-001, in 2010, the South Dakota Legislature enacted a statute the next year creating a Department of Tribal Affairs which provides certain new duties for the Commission and the Department of Tribal Affairs which they must now fulfill.

Under SDCL §1-54-3, which details the Department of Tribal Relations functions, it states, “The Department of Tribal Relations shall aid in securing and coordinating federal, state, and local resources to help solve problems and to serve as an advocate for Native American people.”

Further, SDCL §1-54-5 discusses the required consultation which must take place: “Consultation with tribal government regarding state programs. *It is the policy of the state to consult with a tribal government regarding the conduct of state government programs which have the potential of affecting tribal members on the reservation.* This section may not be construed to confer any *substantive* rights on any party in any litigation or otherwise.”

Finally, SDCL §1-54-6 provides “Advice to Department of Tribal Relations. The Governor shall invite and solicit the officials of the Bureau of Indian Affairs and officials of the Division of Indian Health of the United States Public Health Service, the United States Departments of Housing and Urban Development, Labor, Justice, Agriculture, and

Transportation, and the United States Department of Health and Human Services, the United States Attorney's Office for the district of South Dakota and the United States Economic Development Administration, to participate and act in an advisory capacity to the Department of Tribal Relations.

*Any state agency, **commission**, board, department, or institution shall render such advice and assistance to the Department of Tribal Relations as the office may deem necessary in fulfillment of the provisions of this chapter.”*

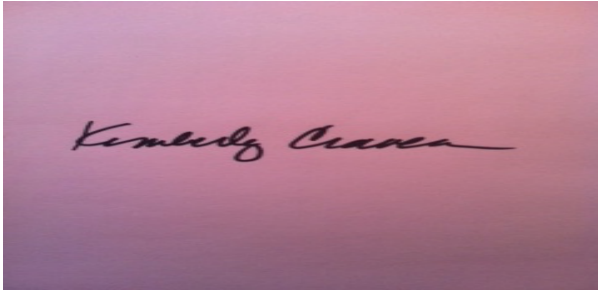
Additionally, there now exists a duty for the State, including its Department of Tribal Affairs and the South Dakota Public Utilities Commission, to consult with the Tribes that did not previously exist before. While the statute points out that this law provides no additional substantive rights, there is no mention of limiting or excluding procedural rights from the statute's application.

#### Conclusion

For these reasons, as well as all the other reasons noted by other intervenors, which are incorporated within this objection, IEN urges the Commission to dismiss TransCanada's Motion to Limit Discovery. TransCanada is seeking to limit the scope of inquiry and restrict the recertification to only 50 Special Conditions as opposed to the conditions under which permit was issued thus depriving the intervenors their Due Process and Equal Protection and denying the Commission its rightful statutory role as a protector of South Dakota lands and resources. Based on the above and foregoing the Commission should deny Keystone's Motion on its entirety.

Dated this 1<sup>st</sup> day of December 2014.

RESPECTFULLY SUBMITTED:

A rectangular image showing a handwritten signature in black ink on a light-colored background. The signature appears to read "Kimberly Craven".

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Kimberly Craven (pending *pro hac vice*)  
Indigenous Environmental Network

### **Certificate of Service**

The undersigned hereby certifies that, on this day, I served the Response via electronic mail to –

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Dated this 1st day of December, 2014

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