

authority of the PUC to exclude evidence when not disclosed “seasonably,” without citation to our Supreme Court’s interpretation and determination of when such an extreme sanction is warranted.

DRA respectfully submits that the South Dakota Supreme Court has never affirmed, as unduly prejudicial, the exclusion of a party’s documentary evidence disclosed to the opposing party three weeks prior to the trial or final hearing. The Supreme Court has similarly never found such disclosure as unduly prejudicial when the overwhelming majority of the documents the Commission has currently excluded, were documents already in the possession of, if not created by TransCanada, the opposing party, and including communications between a regulatory agency and the opposing party about the very issues involved in the proceedings. These would include DRA Exhibits 29-37, 39-65, 67-128, incorporated herein by this reference.

Similarly, the South Dakota Supreme Court has never found disclosure of limited photographs,² scientific studies,³ and a previously issued FSEIS,⁴ noticed and disclosed three weeks prior to trial or final hearing, as being unduly prejudicial to an opposing party. However, as the materiality and relevance of the contents of the documents reveal, together with testimonial and other evidence likely presented at trial, the exclusion of these documents will be unduly prejudicial to DRA, denying this Intervenor due process and a fair proceeding.

What our Supreme Court has held, is that where a party fails to disclose proposed evidence requested by an opposing party until the start of or well into trial, it is unduly prejudicial. For example, in *Kaiser v. University Physicians Clinic*, 724 N.W.2d 186 (S.D. 2006), the Court reversed a Circuit Court’s admission of several slides used by a party’s expert, where the documents, requested in discovery, were not provided to opposing counsel until the expert testified on the sixth day trial. *Id.*, ¶¶20-24, 49. See, also, *Papke v. Harbert*, 738 N.W.2d 510, 529-530 (S.D. 2007). Unlike the instant case, neither the notice nor a copy of exhibits were disclosed to the opposing party until after the start of the respective trials.

² DRA Exhibits 397-409, incorporated herein.

³ DRA Exhibits 1058-1061, incorporated herein.

⁴ DRA Exhibit 1062, incorporated herein.

The Supreme Court has similarly upheld a Circuit Court's refusal to admit previously undisclosed evidence when the offending party knew the name of its expert witnesses and of the existence of the evidence at least twenty-four (24) days prior to trial, yet failed to disclose the information until three (3) days before trial. *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522 N.W.2d 752, 762 (S.D. 1994). However, the Supreme Court reversed a Circuit Court's exclusion of testimony from a plaintiff's rebuttal expert witnesses, disclosed ten (10) days before the start of trial, but eighteen (18) days after plaintiffs deposed one expert witness for the defense and eleven days after plaintiffs deposed two additional expert witnesses that challenged the heart of plaintiff's case. *Schrader v. Tjarks*, 522 N.W.2d 205, 208-212, (S.D. 1994).

DRA respectfully submits that in granting a significant part of TransCanada's Motion in Limine, the Commission completely ignored or considered the pronouncement of the South Dakota Supreme Court in *Schrader*: "The severity of the sanction must be tempered with consideration of the equities. *Id.* at 316-17. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and thus defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts." *Id.* citing, *Chittenden v. Eastman Co. v. Smith*, 286 N.W.2d 314, 316-317 (S.D. 1979).

DRA further respectfully submits that due to the materiality of the currently excluded exhibits, the reasonable supplementation of discovery of mainly TransCanada documents, together with a limited number of photographs, scientific theses, and involved agency correspondence, that the Commission may well be ultimately inviting judicial reversal if this Motion for Reconsideration is not granted and the exclusion of the referenced exhibits is not remedied.

Dated: July 20, 2015

Respectfully submitted,

/s/ Bruce Ellison

Bruce Ellison
518 6th Street #6
Rapid City, South Dakota 57701
Telephone: (605) 348-1117
Email: belli4law@aol.com

and

MARTINEZ MADRIGAL & MACHICAO, LLC

By: /s/ Robin S. Martinez

Robin S. Martinez, MO #36557/KS #23816
616 West 26th Street
Kansas City, Missouri 64108
816.979.1620 phone
888.398.7665 fax
Email: robin.martinez@martinezlaw.net

Attorneys for Dakota Rural Action

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2015, Dakota Rural Action filed the foregoing on the Public Utilities Commission of the State of South Dakota e-filing website. Also on this day, a true and accurate copy of the foregoing was transmitted via email to the following:

Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us

Brian Rounds
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
brian.rounds@state.sd.us

James E. Moore
Woods, Fuller, Shultz and Smith P.C.
PO Box 5027
Sioux Falls, SD 57117
james.moore@woodsfuller.com
Attorney for TransCanada Keystone Pipeline, LP

Paul F. Seamans
27893 249th St.
Draper, SD 57531
jacknife@goldenwest.net

Elizabeth Lone Eagle
PO Box 160
Howes, SD 57748
bethcbest@gmail.com

Viola Waln
PO Box 937
Rosebud, SD 57570
walnranh@goldenwest.net

Benjamin D. Gotschall
Bold Nebraska
6505 W. Davey Rd.
Raymond, NE 68428
ben@boldnebraska.org

Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Kristen.edwards@state.sd.us

Darren Kearney
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
darren.kearney@state.sd.us

William G. Taylor
Taylor Law Firm
2921 e. 57th St. #10
Sioux Falls, SD 57108
bill.taylor@williamgtaylor.com
Attorney for TransCanada Keystone Pipeline, LP

John H. Harter
28125 307th Ave.
Winner, SD 57580
johnharter11@yahoo.com

Tony Rogers
Rosebud Sioux Tribe - Tribal Utility Commission
153 S. Main St.
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Jane Kleeb
Bold Nebraska
1010 N. Denver Ave.
Hastings, NE 68901
jane@boldnebraska.org

Byron T. Steskal & Diana L. Steskal
707 E. 2nd St.
Stuart NE 68780
prairierose@nntc.net

Cindy Myers, R.N.
PO Box 104
Stuart, NE 68780
csmyers77@hotmail.com

Lewis GrassRope
PO Box 61
Lower Brule, SD 57548
wisestar8@msn.com

Robert G. Allpress
46165 Badger Rd.
Naper, NE 68755
bobandnan2008@hotmail.com

Louis T. Genung
902 E. 7th St.
Hastings, NE 68901
tg64152@windstream.net

Nancy Hilding
6300 W. Elm
Black Hawk, SD 57718
nhilshat@rapidnet.com

Bruce & RoxAnn Boettcher
Boettcher Organics
86061 Edgewater Ave.
Bassett, NE 68714
boettcherann@abbnebraska.com

William Kindle
President
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
William.Kindle@rst-nsn.gov

Paula Antoine
Sicangu Oyate Land Office Coordinator
Rosebud Sioux Tribe
PO Box 658
Rosebud, SD 57570
wopila@gwtc.net
paula.antoine@rosebudsiouxtribe-nsn.gov

Harold C. Frazier
Chairman
Cheyenne River Sioux Tribe
PO Box 590

Arthur R. Tanderup
52343 857th Rd.
Neligh, NE 68756
atanderu@gmail.com

Carolyn P. Smith
305 N. 3rd St.
Plainview, NE 68769
peachie_1234@yahoo.com

Peter Capossela, P.C.
Attorney at Law
PO Box 10643
Eugene, OR 97440
pcapossela@nu-world.com
Attorney for Standing Rock Sioux Tribe

Gary F. Dorr
27853 292nd
Winner, SD 57580
gfdorr@gmail.com

Wrexie Lainson Bardaglio
9748 Arden Rd.
Trumansburg, NY 14886
wrexie.bardaglio@gmail.com

Eric Antoine
Attorney
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
ejantoine@hotmail.com

Chris Hesla
South Dakota Wildlife Federation
PO Box 7075
Pierre, SD 57501
sdwf@mncomm.com

Bonny Kilmurry
47798 888 Rd.
Atkinson, NE 68713
jackiekilmurry@yahoo.com

Amy Schaffer
PO Box 114
Louisville, NE 68037
amyannschaffer@gmail.com

Eagle Butte, SD 57625
haroldcfrazier@yahoo.com

Debbie J. Trapp
24952 US HWY 14
Midland, SD 57552
mtdt@goldenwest.net

Joye Braun
PO Box 484
Eagle Butte, SD 57625
jmbraun57625@gmail.com

Thomasina Real Bird
Fredericks Peebles & Morgan LLP
1900 Plaza Dr.
Louisville, CO 80027
trealbird@ndnlaw.com
Attorney for Yankton Sioux Tribe

Tom BK Goldtooth
Indigenous Environmental Network (IEN)
PO Box 485
Bemidji, MN 56619
ien@igc.org

Robert P. Gough, Secretary
Intertribal Council on Utility Policy
PO Box 25
Rosebud, SD 57570
bobgough@intertribalCOUP.org

Tracey Zephier
Fredericks Peebles & Morgan LLP
910 5th Street, Suite 104
Rapid City, SD 57701
tzephier@ndnlaw.com
Attorney for Cheyenne River Sioux Tribe

Ms. Mary Turgeon Wynne, Esq.
Rosebud Sioux Tribe - Tribal Utility Commission
153 S. Main St
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Gena M. Parkhurst
2825 Minnewasta Place
Rapid City, SD 57702
gmp66@hotmail.com

Robert Flying Hawk, Chairman
Yankton Sioux Tribe
PO Box 1153
Wagner, SD 57380
Robertflyinghawk@gmail.com

Chastity Jewett
1321 Woodridge Dr.
Rapid City, SD 57701
chasjewett@gmail.com

Dallas Goldtooth
38371 Res. HWY 1
Morton, MN 56270
goldtoothdallas@gmail.com

Terry & Cheryl Frisch
47591 875th Rd.
Atkinson, NE 68713
tcfrisch@q.com

Matthew L. Rappold
Rappold Law Office
816 Sixth Street
PO Box 873
Rapid City, SD 57709
Matt.rappold01@gmail.com
Attorney for Rosebud Sioux Tribe, Intervenor

Ms. Kimberly E. Craven
3560 Catalpa Way
Bouleder, CO 80304
kimcraven@gmail.com
Attorney for Indigenous Environmental Network

Mr. James P. White
Attorney
TransCanada Keystone Pipeline, LP
Ste. 225
1250 Eye St., NW
Washington, DC 20005
jim_p_white@transcanada.com

Mr. Travis Clark - Representing:
Fredericks Peebles & Morgan LLP
Ste. 104
910 5th St.
Rapid City, SD 57701
tclark@ndnlaw.com
Attorney for Cheyenne River Sioux Tribe

And on July 20, 2015, a true and accurate copy of the foregoing was mailed via U.S. Mail, first class postage prepaid, to the following:

Jerry Jones
22584 US HWY 14
Midland SD 57552

Elizabeth Lone Eagle
PO Box 160
Howes, SD 57748

Ronald Fees
17401 Fox Ridge Rd.
Opal, SD 57758

/s/ Robin S. Martinez
Attorney for Dakota Rural Action