

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

IN THE MATTER OF THE APPLICATION BY)
TRANSCANADA KEYSTONE PIPELINE, LP)
FOR A PERMIT UNDER THE SOUTH DAKOTA)
ENERGY CONVERSION AND TRANSMISSION)
FACILITIES ACT TO CONSTRUCT THE)
KEYSTONE XL PROJECT)

Docket No. HP 14-001

**STANDING ROCK SIOUX TRIBE
MOTION TO RECONSIDER AND MODIFY ORDER GRANTING MOTION IN
LIMINE TO PRECLUDE REBUTTAL TESTIMONY OF JENNIFER GALINDO
AND WASTE'WIN YOUNG**

COMES NOW, intervenor, Standing Rock Sioux Tribe, by and through counsel, and respectfully moves the Public Utilities Commission for reconsideration of its Order dated July 23, 2015 granting the Motion in Limine to Preclude the Rebuttal Testimony of Jennifer Galindo and Waste Win Young. By this motion, the Tribe requests an order reconsidering and vacating the portion of the Order precluding Ms. Young's testimony.

This motion is based upon Amended Conditions 1, 43 and 44 incorporated in the South Dakota permit issued to TransCanada for the Keystone XL Pipeline Project (Amended Final Order, HP 09-001 June 29, 2010); SDCL §§ 19-12-01 (admissibility of relevant evidence); 1-26-18 (right to present evidence in administrative hearing); the Memorandum of Points and Authorities below; and the papers and pleadings on file herein

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF RECONSIDERATION**

“ ‘Administrative agencies have the inherent authority to correct adjudications which appear to be erroneous.’ ” *Jundt v. Fuller*, 736 N.W.2d 508, 512 (2007) *citations omitted*. Of course, all state agencies must follow South Dakota law. SDCL §1-26-36(1). The Order Granting Motion in Limine does not comport with the South Dakota

law governing admissibility of relevant evidence. *St. John v. Peterson*, 804 N.W.2d 71, 75 (S.D. 2011) (“Rule 401 uses a lenient standard for relevance”). The *Order Granting Motion in Limine* to exclude Ms. Young should be reconsidered and vacated.

Ms. Young’s pre-filed testimony addresses the Amended Conditions covering historic properties. She stated in her pre-filed testimony:

Yet the proper procedures to make the requisite determinations have not been followed. The Keystone XL Pipeline is unable to comply with Amended Condition number 43 in the Amended Conditions to the Final Order in HP 09-001.

Pre-filed Testimony of Waste ’Win Young, April 2, 2015, Exhibit A hereto.

From the standpoint of admissibility on the grounds of relevance, Ms. Young’s pre-filed testimony resembles the testimony of Paige Olson of the S.D. Historic Preservation Office, pre-filed on behalf of Staff. Ms. Olson stated in part:

The agency determines if the federal undertaking has the potential to affect historic properties... This term includes properties of religious and cultural significance to Indian Tribes... [T]he agency identifies historic properties within the project area... To the best of my knowledge Keystone XL is in the process of complying with Section 106 of the National Historic Preservation Act through the Programmatic Agreement.

Pre-filed Testimony of Paige Olson, April 2, 2015, 5-7.

With respect to the Programmatic Agreement, Ms. Young’s pre-filed testimony provided a different perspective:

There are no specific mitigation provisions. The provisions of the Programmatic Agreement (“PA”) are too general... an alternative process for resolving disputes over adverse effects and undiscovered historic properties must be put in place...

Exhibit A.

The subject matters of the testimony of Paige Olson on behalf of Staff and Waste’Win Young on behalf of the Standing Rock Sioux Tribe are the same – the process required for compliance with section 106 of the National Historic Preservation Act, and the extent that the Programmatic Agreement complies with the applicable law, as required in Amended Conditions 1 and 43. Ms. Young specifically identifies these

conditions in her pre-filed testimony. *Id.* Nevertheless, if Ms. Olson’s testimony is admitted, then Ms. Young’s must be, also.

South Dakota law gives parties the right to put forward competent evidence in contested administrative hearings. SDCL §1-26-18 provides that “Opportunity shall be afforded *all* parties to... present evidence on issues of fact.” *Emphasis added.* If Ms. Olson may testify on whether Keystone XL may proceed in light of the cultural surveys that have been performed and the PA that has been developed, Ms. Young must be permitted to as well. Section 18 of the South Dakota Administrative Procedures Act, *id.*, as well as fairness, dictate that the Order Granting the Motion in Limine Precluding the Rebuttal Testimony of Jennifer Galindo and Waste Win Young be modified, and that Ms. Young be permitted to testify.

RESPECTFULLY SUMITTED this 24th day of July, 2015

By: *Peter Capossela*
Peter Capossela, P.C.
Attorney at Law
Post Office Box 10643
Eugene, Oregon 97440
(541) 505-4883
pcapossela@nu-world.com

Chase Iron Eyes
Chase Iron Eyes
Iron Eyes Law Office, PLLC
Post Office Box 888
Fort Yates, North Dakota 58538
(701) 455-3702
chaseironeyes@gmail.com
S.D. Bar No. 3981

Attorneys for Standing Rock Sioux Tribe

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

**IN RE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP
FOR A PERMIT TO CONSTRUCT KEYSTONE XL PIPELINE**

DOCKET NO. HP 001

**PREFILED TESTIMONY BY WASTE' WIN YOUNG
TRIBAL HISTORIC PRESERVATION OFFICER
STANDING ROCK SIOUX TRIBE**

APRIL 2, 2015

**Motion for Reconsideration - Young
Exhibit A**

Q. State your name and address for the record.

A. My name is Waste' Win Young. I reside at 950 Meadowlark Street in Fort Yates, North Dakota.

Q. What is your occupation?

A. I am the Tribal Historic Preservation Officer for the Standing Rock Sioux Tribe.

Q. Summarize your education and professional background.

A. I graduated from the University of North Dakota in 2001. I have a Bachelor's of Arts in English Language and Literature. I have a Bachelor's of Arts in American Indian Studies as well as a minor in psychology. I have worked in the Tribal Historic Preservation Office for the Standing Rock Sioux Tribe since 2003.

Q. Describe your duties as Director of the Tribal Historic Preservation Officer?

A. As the Tribal Historic Preservation Officer I review archeological and cultural resource surveys for projects within the exterior boundaries of the SRST. After reviewing the report I base my decision on the "determination of effect", whether a project will have an adverse effect or not on the resources. I also consult with agencies on projects off the reservation.

The National Historic Preservation Act ("NHPA") was passed in 1966, was an act to "Establish a Program for the Preservation of Additional Historic Properties throughout the Nation." In 1992 it was amended to include Tribal Nations. Subsequently it recognized the authority of tribes to establish "tribal historic preservation offices" and make determinations on projects that would impact their land, as well as cultural resources which may be located off reservation lands pursuant to section 101(d)(6)(B) of the National Historic Preservation Act.

Q. Is it challenging to protect cultural resources on and near the Standing Rock Reservation? Explain.

A. Yes. The National Historic Preservation Act and its implementing regulations require all agencies involved with federal approvals of projects to “gather information from any Indian tribe... to assist in identifying properties, including those located off tribal lands which may be of religious and cultural significance.” 36 CFR §800.4(a)(4). The regulations provide a process for resolving conflicts over the evaluation of identified sites and for resolving adverse impacts to them. 36 CFR §800.4(d); 800.5(c)(2); 800.6(b). The resolution to these issues, especially when they involve off-Reservation development projects sponsored by large corporations such as TransCanada, is complicated by the inordinate amount of political influence that the project beneficiaries exercise with federal and state agencies. Our cultural sites are vulnerable to impacts caused by development projects that promise jobs and profits for non-Indians. This is precisely the situation with the Keystone XL Pipeline.

Q. Describe the process that agencies normally follow under section 106 of the National Historic Preservation Act?

A. Agencies are required to initiate the consultation process early on, and to fully include all eligible parties in the identification and evaluation of historic properties, as well as the determination of effects and proposed mitigation. The process should be straightforward and transparent.

Q. Describe the process that State Department used under section 106 of the National Historic Preservation Act for the Keystone XL Pipeline?

A. The State Department sent a boilerplate letter to our office that did not establish a meaningful process for the participation of my office in the NHPA Section 106 process. The agency attempted to combine historic preservation consultation (SHPO’s and THPO’s) required under Section 106 of the NHPA with Tribal government consultation required under Executive Order 13175 and SDCL §1-54-5. Consequently, my office was not given the opportunity to participate in a well-defined process for identifying and evaluating historic properties. The

process established for the requisite consultation was akin to getting one's flu shots at the DMV – different functions were combined and as a result neither consultation process was properly conducted. The consultation process has been exaggerated and mischaracterized by the State Department and by TransCanada – in violation of both federal and state law.

The SRST was not afforded a meaningful opportunity to participate in identification efforts for historic properties along the Keystone XL Pipeline route. Keystone XL and other pipelines have the potential to damage (through construction or failure of equipment) and destroy cultural resources that have not been identified through pedestrian surveys.

This has real world consequences. The limited number of historic properties identified in current surveys illustrates the failure of TransCanada's archaeologists to conduct proper identification in accordance with the NHPA. The State Department Final Supplemental Environmental Impact Statement was not available when the Final Order was entered granting TransCanada a permit on June 29, 2010. Now that this information has been released, it is apparent that there have not been adequate surveys with proper Tribal involvement.

In fact, my office requested additional information on sites 24MC0480; 24VL1900; 24VL1905; 24VL1911 and VL1928 – the status of which remains unresolved at this late date.

Many historic properties of Lakota and Dakota origin are difficult for untrained persons to evaluate – the location of rocks, certain striations in rocks or rock formations – may point to ceremonial uses of sites that non-Lakotas and non-Dakotas may not understand. Moreover, TransCanada's role in the consultation and identification process has been unclear from the beginning. The level of expertise invoked in the 106 process has not been established even now.

There are no specific mitigation provisions. The provisions of the Programmatic Agreement ("PA") are too general. I have not signed it on behalf of the Standing Rock Sioux Tribe. Accordingly, an alternative process of resolving disputes over adverse effects and undiscovered historic properties must be put in place. But it has not been. In the absence of a process involving my office as an alternative to the PA, the project remains out of compliance with the NHPA.

For these reasons, the required processes for consultation and evaluation under NHPA Section 106 have not been followed by the State Department or TransCanada. As a result, the 2014 Final Supplemental Impact Statement fails to provide a sufficient basis for approval of a Presidential Permit for the Keystone XL Pipeline.

Q. Did TransCanada cooperate with your office on cultural resources issues related to the Keystone XL Pipeline?

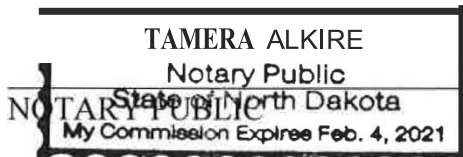
A. No.

Q. Is there anything else you would like to say to the Public Utilities Commission?

A. The Keystone XL pipeline (and other pipelines) will cross aboriginal and treaty territory that was exclusively set aside by the U S government for the Sioux Nation (Ft Laramie Treaties of 1851 and 1868). The Sioux people were nomadic people and followed the buffalo. Our valuable cultural resources are located throughout the path of the Keystone XL Pipeline. Yet the proper procedures to make the requisite determinations have not been followed. The Keystone XL Pipeline is unable to continue to comply with Amended Condition number 43 in the Amended Conditions to the Final Order in HP 09-001. The petition to certify should be denied.

Waste'Wir Young

SUBSCRIBED and SWORN
to before me this ___ day of
April, 2015.



Certificate of Service

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

William G. Taylor
bill.taylor@woodsfuller.com

James E. Moore
james.moore@woodsfuller.com

James P. White
jim_p_white@transcanada.com

Attorneys for TransCanada Keystone Pipeline, LP

Patty Van Gerpen
Patty.Vangerpen@state.sd.us

Darren Kearney
Darren.Kearney@state.sd.us

Kristen Edwards
Kristen.Edwards@state.sd.us

Brian Rounds
Brian.Rounds@state.sd.us

Tina Douglas
Tina.douglas@state.sd.us

Kristie Fiegen
Kristie.fiegen@state.sd.us

Gary Hanson
Gary.hanson@state.sd.us

Chris Nelson
Chris.nelson@state.sd.us

Greg Rislov
Greg.rislov@state.sd.us

John Smith
John.smith3@state.sd.us

Rolayne Wiest
Rolayne.wiest@state.sd.us

Amy Schaffer
amyannschafter@gmail.com

April D. McCant
April.mccant@martinezlaw.net

Arthur Tanderup
atanderu@gmail.com

Benjamin D. Gotschall
ben@boldnebraska.org

Bruce & RoxAnn Boettcher
boettcherann@abbnebraska.com

Bruce Ellison
Belli4law@aol.com
Attorney for Dakota Rural Action

Byron & Diana Steskal
prairierose@nntc.net

Carolyn Smith
Peachie_1234@yahoo.com

Chastity Jewett
chasjewett@gmail.com

Chris Hesla
sdwf@mncomm.com

Cindy Myers, RN
csmyers77@hotmail.com

Dallas Goldtooth
goldtoothdallas@gmail.com

Debbie J. Trapp
mtdt@goldenwest.net

Duncan Meisel
Duncan@350.org

Elizabeth Lone Eagle
bethcbest@gmail.com

Eric Antoine
ejantoine@hotmail.com
Attorney for Rosebud Sioux Tribe

Frank James
fejames@dakotarural.org

Gary Dorr
gfdorr@gmail.com

Gena Parkhurst
Gmp66@hotmail.com

Honorable Harold Frazier
haroldcfrazier@yahoo.com

Jane Kleeb
jane@boldnebraska.org

John H. Harter
johnharter11@yahoo.com

Joye Braun
jmbraun57625@gmail.com

Kimberly Craven
kimecraven@gmail.com
Attorney for Indigenous Environmental Network

Lewis GrassRope
Wisestar8@msn.com

Louis Genung
Tg64152@windsream.net

Mary Turgeon Wynne
tuc@Rosebudsiouxtribe-nsn.gov
Attorney for Rosebud Tribal Utility Commission

Matthew Rappold
Matt.rappold01@gmail.com
Attorney for Rosebud Sioux Tribe

Nancy Hilding
nhilshat@rapidnet.com

Paul F. Seamans
jackknife@goldenwest.net

Robert Allpress
bobandnan2008@hotmail.com

Honorable Robert Flying Hawk
Robertflyinghawk@gmail.com

Robert P. Gough
bobgough@intertribalcoup.org
Attorney for ICOUP

Robin Martinez
Robin.martinez@martinezlaw.com
Attorney for Dakota Rural Action

Paula Antoine
wopila@gwtc.net

Sabrina King
Sabrina@dakotarural.org

Terry & Cheryl Frisch
tcfrisch@q.com

Thomasina Real Bird
trealbird@ndnlaw.com
Attorney for Yankton Sioux Tribe

Tom BK Goldtooth
ien.igc.org

Tony Rogers
tuc@rosebudsiouxtribe-nsn.gov

Tracey Zephier
Tzephier@ndnlaw.com
Attorney for Cheyenne River Sioux Tribe

Viola Waln
walnranch@goldenwest.net

Wrexie Lainson Bardaglio
Wrexie.bardaglio@gmail.com

The undersigned further certifies that, on this day, I served the afore via U.S. mail with adequate postage affixed to –

Bonnie Kilmurry
47798 888 Road
Atkinson, Nebraska 68713

Cody C. Jones
21648 U.S. Highways 14 & 63
Midland, South Dakota 57752

Elizabeth Lone Eagle
Post Office Box 160
Howes, South Dakota 57748

Jerry Jones
22584 U.S. Highway 14
Midland, South Dakota 57552

Ronald Fees
17401 Fox Ridge Road
Opal, South Dakota 57758

Dated this 24th day of July, 2015

By: *Peter Capossela*
Peter Capossela