BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF:	)	**Docket HP 14-001**
	)	
PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	)	**CLOSING ARGUMENT OF THE INTERTRIBAL COUNCIL ON UTILITY POLICY IN THE HEARING ON THE PETITION FOR RECERTIFICATION OF THE KEYSTONE XL PIPELINE PERMIT**

Once upon a time … there was an Intertribal Council On Utility Policy, which humbly served the Indian Tribes who remained in their trusted traditional homelands, cherishing the waters flowing upon and below the Earth. These Tribes were surrounded by the Kingdoms of Dakotas, Nebraska and Wyoming on how to best prepare for the Days, Years, Decades, and, if the truth be told, Centuries ahead when the alchemy of transforming millennia-old decaying plant and animal matter back into atmospheric Carbon-Dioxide, along with a long list of other toxic pollutants, like Benzene and Methane, would be strictly avoided at all costs. But some of the People who settled these Kingdoms of the Great Plains and beyond over the past wet century and a half have amassed vast fortunes from extracting Carbon in its solid form as coal, in the liquid form as oil and in the gaseous form of the so-called 'natural gas', because almost everyone uses the concentrated energy contained therein which is released upon combustion, the intentional mixing of these materials with almost twice as much clean oxygen into the air. Once upon another, much more distant time, that Carbon Dioxide filled the air to the Heavens, and these Kingdoms were little more than shallow seas with dinosaurs roaming the tropical jungles. At that time, forests of fern and conifers towered over the lands, absorbing Carbon until they fell to the Earth to be covered with the rich carbon-sequestered soils from which many of the Good People of the region today grow healthy foods and raise quality livestock to feed a great deal of the world. Today the mighty Plants of Power consume these pressured, fossilized carbon formations creating critical wired lightning, and fire breathing machines fill the roads and skies, returning combusted, heat-trapping Carbon Dioxide heavenward to again cloud the Firmament. People at the riverside South Dakota Capitol so love the Power of Carbon that the castle is surrounded with paved Carbon to daily stable their carriages, and next to a small lake they honor the perpetual flame burning from the Earth. But underground far to the North there is a dark and very toxic substance, neither solid nor liquid, known as Bitumen, which now seeks the Sea to the distant South, longing to travel through the Kingdom of South Dakota, in the diluted guise of Dilbit, threatening the lands, waters, air and People of the Kingdom.

This brief argument opens as if a particularly grim Fairy Tale given both: 1) the surreal nature of the process of 'recertification' with ad hoc procedures, multiple state and federal applications, unsigned engineering exhibits, changed conditions, shifting standards, contradictory burdens, and overall lack of compliance by the Petitioner with the Commission's orders drafted at the Petitioner's behest from the onset of discovery, even to the point of failing to tie their interrogatories to particular conditions and yet suffering no consequence, to their abject failure in offering any evidence and shifting the burden of proof in their case; and 2) because the destructive potential of this dreadful pipedream for privatized profit all the while externalizing the socialized costs while ignoring the devastating consequence of purpose, to deliver Tar Sands to Texas refineries in a supply chain to overseas markets.

Admittedly, it is easier to pretend that the disastrous consequences of elevated levels of carbon emissions will not occur, if we preclude any and all discussion of this potential. Such a position simplifies the process but does a profound disservice to the People of South Dakota.

Procedural Issues:

> On Tuesday, January 6, 2015 Commissioner Gary Hanson said that:
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> "The entire purpose of the certification process is to examine evidence and determine whether the applicant complies with the conditions that were set in place by the PUC."

Yet, by the close of the nine-day hearing, the Petitioner, -- in response to the Standing Rock Sioux Tribe's motion (which is incorporated and renewed here by this reference) which was joined by all of the interveners present for dismissal of the recertification application because the Petitioner had, in fact and in law, failed to meet its burden to provide substantial evidence of its ability to comply with the only six of the amended conditions it addressed by mention in testimony, much less present any evidence for most of the full 107 evidentiary requirements, including those it sought to change --

claimed that Keystone satisfied its burden of proof at the time they filed the certification when Mr. Taylor, attorney for TransCanada stated:

> "Final Point. The merits of what's gone on over the last nine days. The applicant met its burden of proof for certification in the written submission's that were filed nearly one year ago."

It is difficult to comprehend how the understandings of these two gentlemen of the "certification process" could both be correct. If Mr. Taylor is correct, then there is no purpose to the examination of evidence and determination of compliance other than to receive TransCanada's written submission. If Mr. Taylor is incorrect, then TransCanada, failing to even put on any evidence for most of the required conditions, there was virtually nothing to examine for any determination of compliance. However, Commissioner Hanson completely pivots on his original position, noting that "when you contend the substantial evidence needs to be presented, in my view substantial evidence was originally presented, a permit was granted and it was approved." And then further states, wrongly adopting the TransCanada position: "So clearly the discretion there is given to the Commission, and clearly the Applicant has met their certification requirement, unless proof to this commission is shown that they do not meet one or more of the Conditions that were set forth in our original order granting the permit."

Apparently, by this logic for the 'certification process', it is enough for TransCanada compliance to merely place the original permit conditions, by reference, into the recertification hearing record, despite changes necessitated by their second federal application and new conditions in the FSEIS, and then again simply promise that it will have met them. Intervener Intertribal COUP asserts that this is contrary to both logic and the law, and is an abuse of discretion with regard to the burden on the Petitioner as Commissioner originally described. So once again Intertribal COUP renews the Standing Rock Sioux Tribe and other Interveners' Motion to Dismiss.

Assuming that the Commissioners stand by their original decision to overrule this Motion, we shall continue.

The original permit conditions were set in place in 2010. Since then things have changed.

According to the Final Supplemental Environmental Impact Statement for Keystone XL Project, TransCanada filed a separate federal Presidential application, different from the one they filed in South Dakota in 2009, upon which a new Final Supplemental Environmental Impact Statement (FSEIS):

> On January 18, 2012, the President determined, based upon the Department's recommendation, that the proposed Project as presented and analyzed at that time would not serve the national interest. On February 3, 2012, a notice was published in the Federal Register informing the public that the Department had denied the application. … Keystone also indicated its intention to file a new Presidential Permit application for the former Steele City Segment through Montana, South Dakota, and Nebraska. On May 4, 2012, Keystone filed a new application for a Presidential Permit for authorization to construct, connect, operate, and maintain the border crossing facility requested in connection with a modified, more limited Keystone XL Project (i.e., a modified Steele City Segment, the currently proposed Project). (Underline added)

The PUC has taken judicial notice of both the FEIS and FSEIS. These two documents pertain to two separately proposed project applications. The FEIS is based upon the project permitted in 2010, and the FSEIS was based upon a new application submitted to the federal government on May 4, 2012. We have also seen, according to Appendix C, South Dakota PUC Amended Final Decision and Order Tracking Table of Changes, a request from the applicant in changes to 30 or the 50 conditions imposed in 2010.

As we noted in opening statements, it appears to be a case of "George Washington's Axe" where TransCanada and the Commission maintain that the 2010 Keystone axe hanging over TransCanada's mantle is the same as the 2014 Keystone axe although the handle and blade have each been replaced or at least reconditioned 30 times!

TransCanada's lack of clarity and sleight of hand may be the only way to work the magic of meeting the PUC's permit condition # 3, which is to "comply with recommendations in FEIS", while also meeting permit condition # 2 (comply with federal law) and presumably the FSEIS on the second application.

> *2. Keystone shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State, Executive Order 11423 of August 16, 1968 (33 Fed. Reg. 11741) and Executive Order 13337 of April 30, 2004 (69 Fed. Reg. 25229), for the construction, connection, operation, or*

maintenance, at the border of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country; Clean Water Act § 404 and Rivers and Harbors Act Section 10 Permits; Special Permit if issued by the Pipeline and Hazardous Materials Safety Administration; Temporary Water Use Permit, General Permit for Temporary Discharges and federal, state and local highway and road encroachment permits. Any of such permits not previously filed with the Commission shall be filed with the Commission upon their issuance.

3. Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement when issued by the United States Department of State pursuant to its Amended Department of State Notice of Intent To Prepare an Environmental Impact Statement and To Conduct Scoping Meetings and Notice of Floodplain and Wetland Involvement and To Initiate Consultation Under Section 106 of the National Historic Preservation Act for the Proposed TransCanada Keystone XL Pipeline; Notice of Intent--Rescheduled Public Scoping Meetings in South Dakota and extension of comment period (FR vol. 74, no. 54, Mar. 23, 2009). The Amended Notice and other Department of State and Project Documents are available on-line at: http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open.

Intertribal COUP attempted to raise the issue of "climate", "climate change", "weather", "adverse weather" and "extreme weather events", which were slighted in the FEIS, but given more significant attention in the federal process resulting in the FSEIS, which include explicit comments from the U.S. Environmental Protection Agency, through the presentation of our expert witnesses in climatology and meteorology, but our witnesses, Dr. James Hansen, Dr. Robert Oglesby and Dr. George Seielstad, and the entire topic of climate were 'precluded' as irrelevant to the recertification of the Keystone XL permit. It is the ill-considered position of both TransCanada and the Commission that the topic of climate change is irrelevant to the permitting of the single device designed to bring the largest carbon deposit in North America to market, despite the attention given to the topic in the FSEIS and subsequent comments! Where is the exercise of Commission's overriding discretion on this point?

To better appreciate what Intertribal COUP means with regard to the terms "climate" and "climate change", we rely upon the following definitions provided by the Intergovernmental Panel on Climate Change[1]:

[1] http://www.ipcc.ch/publications_and_data/ar4/wg2/en/annexessglossary-a-d.html

Climate in a narrow sense is usually defined as the 'average weather', or more rigorously, as the statistical description in terms of the mean and variability of relevant quantities over a period of time ranging from months to thousands or millions of years. These quantities are most often surface variables such as temperature, precipitation, and wind. Climate in a wider sense is the state, including a statistical description, of the ***climate system***. The classical period of time is 30 years, as defined by the World Meteorological Organization (WMO).

Climate change refers to any change in ***climate*** over time, whether due to natural variability or as a result of human activity. This usage differs from that in the ***United Nations Framework Convention on Climate Change (UNFCCC)***, which defines 'climate change' as: 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global ***atmosphere*** and which is in addition to natural climate variability observed over comparable time periods'.

We come then to see a given characterization of the "climate" of a particular place is merely the abstract aggregate, or short-hand description, of 30 years of accumulated weather data for that place, with "climate change" then being little more that the delta between two consecutive 30 year periods for the same place, along with the potential likelihood of weather extremes outside those averages. TransCanada through its engineering testimony contends that their pipeline will be immune from weather events over not the next 50 or 60 years, but, 'with proper maintenance' over the near perpetual lifetime of the project.

In precluding 'climate' and 'climate change' as irrelevant, TransCanada and the Commission appear to agree that climate will be held constant. But the past century of weather records cannot adequately foretell what we should expect and plan for in the foreseeable future. We have already seen a seven-year drought and a 500-year flood on the South Dakota stretch of the Missouri River in the first decade and a half of this century!

More importantly for South Dakotans, is the impact that breaks, leaks and spills from this pipeline can have on the fragile land and water resources so many South Dakota residents depend upon for our lives and livelihoods! TransCanada is not promising 'no breaks', 'no spills' or 'no leaks', but instead in testimony considers a pipeline with 14 breaks, still to be perfectly "safe".

As the 2010 permit hearing did not handle climate or climate change in any direct manner, then TransCanada and the Commission have jointly determined to hold climate constant over the next 50 to 100 years, or more -- the testified to lifetime of the Keystone XL Pipeline, 'with proper maintenance'. But the world has changed considerably over the past 4 years in how we have come to comprehend the potential impacts of a changing climate on scarce water resources through pipeline breaks, spills and leaks. We know that there have been over 150 reported pipeline 'accidents' in the U.S. since the issuance of the 2010 permit[2]. Intertribal COUP is merely asking the question, in the context of changed conditions between the 2010 Permitting and the 2015 Recertification hearings and our growing understanding of the critical need to address the potential impacts that extreme and accelerating meteorological changes that are already upon us. We ask has this Commission's permit process, either in 2010 or now in 2015, adequately considered the range and nature of climate and weather extremes in western and central South Dakota over the next 50 years, the potential for climatic shifts and weather extremes to adversely affect the proposed pipeline routes, infrastructure and operation, the fragile and weather sensitive environments and how even limited spills and leaks of dilbit may have far greater impact upon South Dakota's scarce water and fertile lands resources and upon our lives and livelihoods today, tomorrow and long into the future? Intertribal COUP maintains that it is the Commission's duty to consider this.

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[2] List of pipeline accidents in the United States in the 21st century, from Wikipedia, the free encyclopedia
http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2010 ;
http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2011 ;
http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2012 ;
http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2013 ;
http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2014 ;
http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2015 .

Duties Of The Public Utility Commission:

Two of the fundamental purposes and guiding principles constituting governance in the South Dakota Kingdom are to **"promote the general welfare and preserve to ourselves and to our posterity the blessings of liberty**." (Preamble to the South Dakota Constitution, emphasis added). In the exercise of their legal duties, those who govern must seek to benefit first and foremost both "ourselves" - the People of South Dakota - "and our posterity" - our children and grandchildren, i.e., Future South Dakotans, the Commission has only secondary responsibility to placate the wants of TransCanada, as a foreign corporation when it comes to the safety of its Project. The Commission has the first moral, ethical and legal responsibility to steward the use of land, water and air resources for both the present and future generations – our posterity – and to look at and listen to what was not considered with regard to climate and weather and the change in conditions that have taken place since your setting of permit conditions in 2010.

While neither foreign corporations nor the occurrences of the past, such as previously acquired permits, are so sacrosanct or expressly identified as to be the primary beneficiaries of government concern, trumping the People and our posterity. Corporations are, however, singled out in the Constitution at being subject to, but not wielders of, the power and right of eminent domain.

> **§4. Corporations subject to eminent domain -- Police power.**
> The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the Legislature from taking the property and franchises of incorporated companies and subjecting them to public use, the same as the property of individuals; **and the exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state.** (emphasis added).

In light of the testimonial evidence provided by several of the intervening ranching and farming families and individuals, the balance of rights has been anything but equal, given the eminent domain

power which TransCanada has wielded and the consequences of the operation and use of the Keystone XL pipeline, including that of the addition of carbon-dioxide to the atmosphere from the Alberta Tar Sands, despite the willful blindness urged upon this Commission by the Petitioner's ongoing, repetitive and continuous standing objections to the very topic of anthropogenic climatic change, or even extended adverse weather, represent a real threat to the general well-being of the state.

The three elected Public Utilities Commissioners have the particular affirmative duty "**to ensure utility companies in South Dakota provide safe, reliable service** at fair and reasonable rates." (emphasis added). During the 9 days of hearings, and countless hours of argument over pre-hearing motions, we heard of no explicit or credible 'public purpose' offered, much less safe operation or, in fact, any kind of direct or indirect service to the interests or benefit of People of South Dakota in allowing this foreign owned and operated pipeline carrying carbon-intensive and unconventionally toxic bitumen to be transported in trespass only through our state, traversing weathered lands and precious waters, our farms and ranches, threatening our Tribal trust properties, infrastructure (Mni Wicone) and reserved Winters waters.

> **Mni Wiconi Rural Project**: Mni Wiconi Rural Project Act of 1988, Public Law 100-516, as amended; Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Title VIII, Mni Wiconi Act Amendments of 1994, Public Law 103-434, wherein, the purpose of which is: "To ensure a safe and adequate municipal, rural, and industrial water supply for the residents of the Pine Ridge Indian, Rosebud Indian, and Lower Brule Indian Reservations in South Dakota; to assist the citizens of Haakon, Jackson, Jones, Lyman, Mellette, Pennington, and Stanley Counties, South Dakota, to develop safe and adequate municipal, rural, and industrial water supplies; to promote the implementation of water conservation programs at these locations; to provide certain benefits to fish, wildlife, and the natural environment of South Dakota; and in consultation with the Oglala, Rosebud, and Lower Brule Sioux Tribes, to conduct feasibility studies on the need to develop water disposal facilities and systems and rehabilitate existing waste water disposal facilities and systems on the Pine Ridge, Rosebud, and Lower Brule Indian Reservations. Department of the Interior Office: Bureau of Reclamation.
>
> Although the federal government has authority to regulate water, it typically defers to the states to allocate water resources within the state. The federal government maintains certain federal water rights, though, which exist separate from state law. In particular, federal reserved water rights often arise in questions of water allocation related to federal lands, including Indian reservations. Indian reserved water rights were first recognized by the U.S. Supreme Court in *Winters v. United States* in 1908. Under the *Winters* doctrine, when Congress reserves land (i.e.,

for an Indian reservation), Congress also reserves water sufficient to fulfill the purpose of the reservation.

As the need for water grows with the development of new industries and growing populations, the tension arising from the allocation of scarce water resources highlights the difficulties that often surround reserved water rights, particularly in the western states. Western states generally follow some form of the prior appropriation system of water allocation. The prior appropriation system allocates water to users based on the order in which water rights were properly acquired. Because Indian reserved water rights date back to the government's reservation of the land for the Indians, these water rights often pre-date other water users' claims. Although the prior appropriation system's reliance on seniority provides a degree of certainty to water allocation, Indian reserved water rights may not have been quantified at the time of reservation. Because *Winters* did not dictate a formula to determine the quantity of water reserved, courts apply different standards to quantify tribal reserved water rights. As a result, other water users may not know whether, or the extent to which, Indian reserved water rights have priority. Because of these uncertainties, Indian reserved water rights are often litigated or negotiated in settlements and related legislation. *Indian Reserved Water Rights Under the Winters Doctrine: An Overview. Congressional Research Service 7-5700 www.crs.gov RL32198. http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32198.pdf*

Responsibly Completing Project Engineering:

Intertribal COUP will finish this closing argument with an observation on the 2010 permit that was brought to our attention by Commissioner Nelson's request to view the unsigned engineering schematic drawings of the tunneling under several rivers which accompanied the 2010 permit. Despite the fact that there was not a single U.S. qualified engineer presented to provide testimony on this monstrous engineering project, we find it unethical, but perhaps not surprising, on the part of TransCanada to apply for, and an inexcusable disservice to the People of South Dakota on the part of the Commission to accept and approve a permit application that based upon clearly marked 'To Be Determined' drafts of still unsigned and unsealed engineering drawings, as contained in HP09-001 TransCanada Exhibit C - Preliminary Site Specific Crossing Plans for Harding County, Meade & Haakon County and Lyman County. These drafts must be signed off or sealed by the individual licensed engineer who actually did the work in order seat legal responsibility.

In guidance prepared by the South Dakota Board Of Technical Professions entitled: *Seals On Professional Work In South Dakota* at: https://dlr.sd.gov/bdcomm/btp/documents/seal_guidelines.pdf , notes in part:

> **36-18A-45. Seal signature and date as certification of work done by licensee -- Documents on which seal is required -- Preliminary work -- Multiple seals -- Electronically transmitted documents**. The application of the licensee's seal and signature and the date constitutes certification that the work on which it was applied was done by the licensee or under the licensee's responsible charge. **The seal, signature, and date shall be placed in such a manner that can be legibly reproduced on the following:**
>
> (1) All originals, copies, tracings, or other reproducibles of all final drawings, specifications, reports, plats, plans, land surveys, design information, and calculations prepared by the licensee or under the licensee's responsible charge when presented to a client or any public or governmental agency. A licensee may not review or check technical submissions of another licensed professional or unlicensed person and seal the documents as the licensee's own work;
>
> (2) Preliminary work shall contain a note that the submittal is Not for Construction, Preliminary, or other such explanation that it is not final;

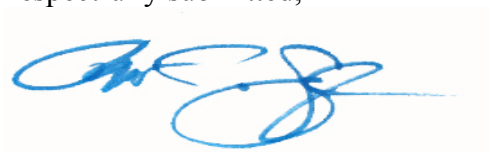
With the clear requirement that "a seal, signature, and date shall be placed in such a manner that can be legibly reproduced on the following: (2) Preliminary work …" TransCanada and the Commission have failed the People of South Dakota with the issuance of the original permit. Perhaps a small thing, but TransCanada has had 5 years and 37 days to update and file finished engineering drawings between their original filing and the close of the 2015 Hearing on their Application for Recertification 1863 days later, and they failed to do so. If they can not get the basic paperwork right, how and why should we expect their compliance with the list evidentiary conditions under the outdated State Permit of 2010 or the yet to be decided federal Permit to be any better?

Conclusion:

For these and the other reasons addressed by our fellow interveners, Intertribal COUP respectfully requests that the South Dakota Public Utility Commission dismiss the Petitioner's application for re-certification and require that TransCanada file a new permit application in accordance with the federal application which is currently pending.

Submitted this 1st day of October 2015,

Respectfully submitted,



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CERTIFICATION OF SERVICE

I, Robert Gough, hereby certify that on the 1st day of October 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of the **CLOSING ARGUMENT OF THE INTERTRIBAL COUNCIL ON UTILITY POLICY IN THE HEARING ON THE PETITION FOR RECERTIFICATION OF THE KEYSTONE XL PIPELINE PERMIT - HP14-001,** to the following:

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Attorney for Rosebud Sioux Tribe, Intervenor

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

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Dated this 1st Day of October 2015.

Respectfully submitted,

Robert P. Gough, SD SB# 620
Secretary of, and Attorney for,
Intertribal Council On Utility Policy
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