BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PROJECT	: : :	HP 14-001 APPLICANT'S POST-HEARING REPLY BRIEF

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Applicant TransCanada Keystone Pipeline, LP ("Keystone") offers this reply brief in support of its certification petition. None of the collective issues raised by the Intervenors warrant denial of Keystone's certification petition. Because most of the Intervenors addressed the burden of proof, Keystone starts there, and then addresses the diverse evidentiary issues raised in many of the briefs.

1. Keystone met its statutory burden to "certify" under SDCL § 49-41B-27.

Many of the Intervenors argue that under SDCL § 49-41B-27, Keystone has the burden to prove with substantial evidence that it can continue to meet the conditions on which the permit was issued. (Cheyenne River Br. at 2-4;Yankton Br. at 2-3; Standing Rock Joint Br. at 1-3; Rosebud Sioux Br. at 3-4; Dakota Rural Action Br. at 4-6.) Citing ARSD 20:10:01:15.01, they contend that the burden of going forward with the presentation of evidence in a contested case is on the applicant, and that the applicant has the burden of proof as to factual allegations that form the basis of the petition. (*Id.*) The Intervenors also contend that an agency's findings of fact must be supported by substantial evidence, defined by SDCL § 1-26-1(9) as "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support

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a conclusion." (Dakota Rural Action Br. at 6-7; Rosebud Sioux Br. at 5-6; Standing Rock Joint Br. at 2-3; Yankton Sioux Br. at 4-5; Cheyenne River Br. at 4-8.)

In an administrative hearing, the burden of proof is a preponderance of the evidence, as it is in most civil cases. *In Re Setliff*, 2002 S.D. 58, ¶ 13, 645 N.W.2d 601, 605. A party's ultimate burden is determined by an application of the facts to the law, which is different than the requirement that findings of fact be based on substantial evidence. Nonetheless, Keystone's proposed findings are based on substantial evidence and it has met its burden of proof, which requires the Commission to reach a legal conclusion under SDCL § 49-41B-27 based on a preponderance of the evidence.

As cited in Keystone's initial post-hearing brief and many of the Intervenors' briefs, Keystone has acknowledged its burden as the applicant. This is not disputed. At issue, however, is what proof Keystone must offer under SDCL § 49-41B-27. Significantly, none of the Intervenors discuss the language of the statute, which does not say that Keystone must prove by substantial evidence that it can continue to meet the conditions on which the permit was issued. Rather, the statute says that Keystone must "certify" that it can continue to meet the conditions. The Commission must give the language of the statute its ordinary and plain meaning. *See*, *e.g.*, *Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621. "Certify" means "to authenticate or verify in writing," or "to attest as being true or as meeting certain criteria." BLACK'S LAW DICTIONARY at 275 (10th ed. 2014). To "attest" means "to affirm to be true or genuine; to authenticate by signing as a witness." (*Id*. at 153.) Thus, Keystone's burden in this case was to verify in writing or to affirm as true that it can continue to meet the conditions on which the permit was granted.

This is necessarily a different burden than what the Intervenors argue. The Legislature said "certify," a precise and narrow verb, in SDCL § 49-41B-27. The Legislature did not require that the Commission either accept the certification or open a new docket, allow intervention, and treat the proceeding as a contested case. Keystone does not argue that the Commission erred in its handling of the proceedings in Docket HP14-001, but Keystone's obligation to "certify" means that Keystone met its burden by filing with the Commission a certification signed under oath by Corey Goulet, supported by a discussion of the status of each condition and by the tracking table of those changes that have occurred since entry of the Commission's Amended Final Decision and Order dated June 29, 2010. Keystone admittedly chose not to rest on its certification and instead presented testimony and evidence at the hearing. But the way in which Keystone presented its case is no more dispositive of the legal issue than is the fact that the Intervenors also offered testimony and exhibits at the hearing.

Keystone's certification, testimony, and evidence were sufficient to meet its burden to "certify" under SDCL 49-41B-27. With respect to most of the conditions, which are prospective in nature, the relevant question is whether there is any reason Keystone cannot meet the permit conditions in the future. Keystone established this through its certification, the status table included in Appendix B to the certification petition, and the tracking table of changes, Appendix C, establishing that none of the changed circumstances affect its ability to meet the permit conditions. With respect to the Permit conditions that are not prospective, Keystone established through its certification that it has either satisfied them, or is in the process of doing so. Keystone, therefore, correctly argued in its initial brief that having met its burden to "certify," the burden shifted to the Intervenors to establish otherwise.

The Intervenors contest the idea that they had a burden to prove anything, arguing that the issue in determining the sufficiency of evidence to support agency findings is not "whether there is substantial evidence contrary to the agency finding." *See*, *e.g.*, *Therkildsen v. Fisher Beverage*, 1996 S.D. 39, ¶ 8, 545 N.W.2d 834, 836. (Yankton Br. at 4; Standing Rock Joint Br. at 2; Cheyenne River Br. at 4-5.) This argument, however, is misplaced. It is not responsive to the issue about Keystone's ultimate burden of persuasion and the Intervenors' burden to contest Keystone's sworn certification.

"Burden of proof" is, according to the South Dakota Supreme Court, a challenging term because it encompasses two distinct burdens: "'the burden of persuasion,' i.e., which party loses if the evidence is closely balanced, and the 'burden of production,' i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding." *In re Estate of Duebendorfer*, 2006 S.D. 79, ¶ 42, 721 N.W.2d 438, 448 (Zinter, J., concurring). The burden of persuasion rests with the party having the affirmative of an issue and does not change, but the burden of going forward with the evidence may shift. *Id*. Keystone does not challenge the idea that it has the burden of proof, meaning the burden of persuasion under SDCL § 49-41B-27. That, however, does not mean that the Intervenors did not have any burden in the proceeding. Their burden was to go forward with evidence establishing that Keystone's certification was false, i.e., that Keystone could in fact not meet some of the permit conditions.

The idea that a party without the burden of persuasion nevertheless has the burden of going forward with the evidence is well established in South Dakota law. It exists in all cases in which a presumption arises. *See* SDCL § 19-11-1 ("a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion,

which remains throughout the trial upon the party on whom it was originally cast"). It exists in cases involving allegations of a confidential relationship and undue influence. *See*, *e.g.*, *In re Estate of Duebendorfer*, ¶ 32, 721 N.W.2d at 446-47. It exists in employment cases involving allegations of retaliatory discharge. *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 227-28 (S.D. 1988) (when employee makes prima facie case of retaliatory discharge, burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the employment action). It exists in family-law cases involving a defense of inability to pay alimony, which shifts the burden of proof to establish inability to pay. *Rousseau v. Gesinger*, 330 N.W.2d 522, 524 (S.D. 1983). It exists in workers compensation cases involving the odd-lot doctrine. *McClaflin v. John Morrell & Co.*, 2001 S.D. 86, ¶ 7, 631 N.W.2d 180, 183 (burden of persuasion remains with claimant, but when claimant makes prima facie case, burden shift to employer to show availability of regular work). And it exists in every civil case when a party seeking summary judgment has met its initial burden so that the burden shifts to the non-moving party to identify facts disputing the moving party's allegations. *Dakota Indus. v. Cabela's.com, Inc.*, 2009 S.D. 39, ¶ 14, 766 N.W.2d 510, 514 (under SDCL § 15-6-56(e), "once the moving party meets its initial burden of proof, the burden shifts to the non-moving party to identify facts disputing the moving party's allegations").

After Keystone filed a sworn certification and supported it with a status table and tracking table of changes, as well as prefiled direct testimony, the Intervenors had an opportunity, and an obligation if they are to prevail, to present contrary evidence. This is precisely what Commissioner Hanson stated at the conclusion of the hearing: "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." (Tr. at 2478.) As Keystone argued in its initial brief, the Intervenors failed to submit any persuasive evidence that its certification was false and therefore failed to meet their burden of going forward with the evidence. Keystone, by contrast, met its burden of proof, i.e., its burden of persuasion, to certify under SDCL § 49-41B-27 that it can continue to meet the permit conditions.

With respect to the issue of substantial evidence, Keystone submitted proposed findings of fact and conclusions of law with its initial post-hearing brief. As the citations to the record in Keystone's proposed findings of fact make clear, substantial evidence exists in the record to support the proposed findings. Substantial evidence is evidence that a reasonable person might accept as sufficiently adequate to support a conclusion. SDCL § 1-21-1(9). Substantial evidence is not, as some of the Intervenors imply, '"a large or considerable amount of evidence.'" *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988)). Rather, it is enough evidence "'to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'" *Id*. (quoting *NLRV v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939)). At the close of the hearing, the Intervenors moved that the Commission dismiss Keystone's petition, which motion was denied. (Tr. at 2474-80.) In making that decision, the Commission essentially said that there was sufficient evidence presented that the Commission, as the factfinder, could find for Keystone. The decision was no different than denying a motion for a directed verdict. (Tr. at 2464.) Thus, the Commission's ruling on the Intervenors' motion establishes that Keystone met its burden of producing substantial evidence in support of its certification.

2. The evidence does not prove that Keystone cannot meet the permit conditions.

a. Dakota Rural Action

In a broad-ranging discussion, DRA argues that Keystone failed to make its case. (DRA Br. at 9-32.) In doing so, DRA fails to demonstrate that Keystone cannot meet any of the permit conditions. Keystone will address DRA's contentions in turn.

DRA argues that the Commission "is held to a higher standard under the principles of the public trust doctrine." (DRA Br. at 8.) If this novel argument were to prevail, the Commission would be bound to some heightened standard, independent of SDCL § 49-41B-27, based on the public trust doctrine. The South Dakota Supreme Court recognized that doctrine, which concerns the ownership of water and land under navigable waters, in *Parks v. Cooper*, a case concerning several water bodies in Day and Clark counties. 2004 S.D. 27, ¶ 1, 676 N.W.2d 823, 824. The doctrine originated in the late nineteenth century with the United States Supreme Court decision in *Illinois Central R. Co. v. State of Illinois*, 13 S.Ct. 110 (1892), in which the Court held that the ownership of submerged lands "is held by the state, by virtue of its sovereignty, in trust for the public." *Id.* at 119. The doctrine was the basis for the South Dakota Supreme Court's conclusion in *Parks* that "the State of South Dakota retains the right to use, control, and develop the water in these lakes as a separate asset in trust for the public." *Id.* ¶ 46, 676 N.W.2d at 838.

The South Dakota Supreme Court has considered the doctrine only in connection with issues related to the ownership of water and the rights of riparian landowners. *Id.* ¶ 46, 676 N.W.2d at 838-39. The Court concluded in *Parks* that "the public trust doctrine imposes an obligation on the State to preserve water for public use. It provides that the people of the State own the waters themselves, and that the State, not as a proprietor, but as a trustee, controls the water for the benefit of the public." *Id.* ¶ 53, 676 N.W.2d at 841. The South Dakota Supreme

Court has never held that the doctrine converts state administrative agencies into trustees or imposes a fiduciary duty on them to apply some undefined but heightened standard of scrutiny to issues involving natural resources. DRA does not explain how the doctrine could be used to establish that Keystone cannot continue to meet any of the permit conditions. The doctrine has no application whatsoever to this docket.

DRA challenges Meera Kothari's testimony for multiple reasons. First, DRA contends that many Keystone witnesses deferred questions to Kothari. (DRA Br. at 10-12.) This, of course, proves nothing beyond the fact that not every witness had the same expertise or knowledge. Moreover, a review of the list of questions that were deferred by other Keystone witnesses to Kothari and the record of her testimony establishes that she was not asked many of the same questions, even though another witness had deferred to her. (*Id.* (i.e., the length of the pipeline above ground versus below; consultation with tribes about routing; whether the Yankton Sioux Tribe was consulted about route changes; whether Keystone gave contact information for Sarah Metcalf to landowners; whether KXL planning addressed earthquakes; and a website depicting a "voluntary evacuation zone" along the KXL route.)

If the questions were not worth being repeated to Kothari, they can hardly be the basis for a Commission finding on Keystone's ability to meet the permit conditions. Moreover, the fact that they were not asked of her in no way diminishes her testimony or credibility. As for the other deferred questions, Kothari answered them, and DRA does not explain how her testimony on these subjects proves that Keystone cannot meet any permit condition. (Tr. at 1317-18 (the criteria and process for using horizontal directional drilling; *id.* at 1139, 1262, 1318 (Kothari's inspection of the Bridger Creek crossing and methods for construction there); *id.* at 1272-73 (the

kinds of pipe involved in the Mni Waconi crossing); *id.* at 1097-98, 1268-69 (consideration of landslide potential in routing) *id*. at 1247-51 (routing across Harter's property)).

DRA argues that Kothari is not a licensed engineer in the United States and is not qualified. (DRA Br. at 12.) Kothari, who was also the Project Engineer for the Keystone Pipeline in eastern South Dakota, explained that as the Project Engineer for KXL, she works with outside engineers who are licensed in the United States, and that her position did not require licensure in the United States. (Tr. at 1123-24, 1202-03, 1279-80.) DRA's argument is not relevant to the certification proceeding and, even if it were, this testimony does not establish that Keystone is unable to meet any permit conditions.

DRA argues that Kothari avoided answering a number of relevant questions, namely: details of the spills during startup on the Keystone Pipeline; questions about organic chemistry and fusion bonded epoxy; cathodic protection; electrical and corrosion engineering issues; the chemistry of crude oil; root causes of the low-yield pipe materials that resulted in a PHMSA advisory in 2009; the type or location of the threaded fittings involved in the start-up leaks on the Keystone Pipeline; why the first Presidential Permit application was denied; and whether PHMSA alleged that TransCanada failed to adequately monitor pipelines by air patrol. (DRA Br. at 13-14.) Questions related to this diverse litany of subjects fail to prove, or even relate to, whether Keystone can meet any of the permit conditions. Kothari was on the stand and subject to cross examination for over eleven hours; the transcript of her testimony starts on page 993 and ends on page 1414. Counsel no doubt could have formulated even more questions that might not have been within her expertise or the scope of her direct examination. In context, the questions asked of Kothari and the answers that she gave on these subjects do not prove either that Kothari "was found lacking" (DRA Br. at 14), or that Keystone is unable to meet any permit conditions.

DRA raises a number of concerns about Heidi Tillquist's testimony. First, DRA claims that Tillquist revealed that Keystone has not completed its engineering analysis for the KXL Pipeline. (DRA Br. at 15 (citing Tr. at 825-26).) This issue was addressed in Keystone's motion to exclude the testimony of Richard Kuprewicz before the hearing. Tillquist testified that the risk assessment that she did is based on historical data and is a high-level analysis sufficient to facilitate environmental review under NEPA and for use in the permitting process. (Tr. at 821, 861.) It is followed by an engineering analysis required by PHMSA regulations that must be completed within the first year after the pipeline is placed in service. (49 CFR §195.452(a)(3)(b)(i); *id.* at 195.452(c); *id.* at 195.452(e)(i); *id.* at 195.452 App. C; Tr. at 822, 826, 845, 851, 862.) Tillquist testified, however, that Keystone has proactively started the engineering analysis and that it is "underway right now." (Tr. at 826.) Her testimony was unchallenged and Keystone's status with respect to the engineering analysis is compliant with industry regulation. It does not establish that Keystone cannot meet any permit conditions.

Second, DRA claims that Tillquist revealed that her risk assessment is designed, in part, for public relations purposes. (DRA Br. at 15.) Tillquist did not agree that it was a public-relations document; she testified that a risk assessment is done as part of a permitting process and is intended to communicate risk to the public and to regulatory agencies. (Tr. at 846.) It is required by regulation. Nothing about this testimony establishes that Keystone cannot meet any permit conditions.

Third, DRA argues that because Tillquist was unfamiliar with a "black swan event," somehow her risk assessment and testimony are in question. (DRA Br. at 15-16.) Tillquist was asked a single question, whether she was familiar with the term "black swan event," to which she answered no. (Tr. at 850.) There is no other testimony in the record about it. DRA's discussion

in its brief that it is “one of the more widely-known principles of risk analysis” is therefore inappropriate because it is not based on any evidence in the record. What a black swan event is and its role in risk assessment, if any, is not a matter on which the Commission can take judicial notice. Rather, judicial notice under South Dakota law can only be taken of facts not subject to reasonable dispute because they are “generally known within the territorial jurisdiction of the trial court,” or “capable or accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” SDCL § 19-10-2. A court may not otherwise consider matters outside the record. *Guthmiller v. Deloitte & Touche, LLP*, 2005 S.D. 77, ¶ 7, 699 N.W.2d 493, 497. DRA’s assertions about a black swan event and its application to Tillquist’s testimony concern an issue outside the record and not capable of determination by resort to a resource whose accuracy cannot reasonably be questioned. The issue is, therefore, inappropriate for judicial notice, not based on evidence, and irrelevant.

Fourth, DRA argues that the start-up spills at some pump stations on the Keystone Pipeline disprove Tillquist’s risk assessment. (DRA Br. at 16.) DRA’s argument is without merit. DRA is comparing Tillquist’s risk assessment for the Keystone XL Pipeline to operations on the Keystone Pipeline. Moreover, as several witnesses testified, the start-up spills were all associated with small above-ground fittings, were limited to the pump stations, and did not involve any release from the pipeline itself. (Tr. at 355, 2285, 2294.) The fact that the spills occurred is not inconsistent with Tillquist’s risk assessment. As Tillquist testified, the Keystone Pipeline has safely transported over one billion barrels of oil without a pipeline release. (Tr. at 1240.) This testimony does not prove that Keystone cannot meet any permit condition.

With respect to Keystone’s compliance with recommendations in the Final Supplemental Environmental Impact Statement (FSEIS), DRA argues that Keystone submitted no evidence that

"it was addressing issues noted by US State Department analysts in the 2014 FSEIS." (DRA Br. at 17-18.) The issues listed in DRA's brief were lifted from recommendations made by Battelle and Exponet as part of an independent review conducted for the Department of State. Keystone has agreed to implement the recommendations. (FSEIS, App. B, at section 3.0, page 27.) DRA's counsel did not ask questions of any witness about the recommendations or how Keystone would implement them. As previously discussed, Keystone does not have any burden to offer evidence as to how it will meet prospective conditions unless some change in circumstance calls its ability to meet them into question. Having offered no evidence or testimony on these issues, DRA is in no position to question Keystone's ability to comply. Moreover, specifically with respect to the recommendations concerning additional analysis related to water bodies and sensitive tributaries, Meera Kothari testified that Keystone is currently conducting its analysis necessary to implement the recommendations. (Tr. at 1120.)

DRA argues that the Commission should take judicial notice of Kothari's prefiled testimony from the 2007 Keystone docket about reported spills. (DRA Br. at 18.) Kothari testified that the information was related to reporting criteria that TransCanada provides on its website. (Tr. at 1148-49.) There was no demonstration at the hearing that this testimony was relevant (Tr. at 1150) and it remains irrelevant today. Kothari's 2007 testimony in support of its permit for the first Keystone Pipeline does not establish that Keystone cannot meet any condition of its 2010 permit for the Keystone XL Pipeline.

DRA argues that Dr. Jon Schmidt admitted that Keystone cannot meet Permit Condition 3. (DRA Br. at 21.) DRA cites a question Matt Rappold asked on cross-examination whether the Presidential Permit application filed in 2012 "did not exist in 2010" when the Commission issued the Amended Final Decision & Order. (Tr. at 542.) Dr. Schmidt agreed that the current

Presidential Permit application was filed after the 2010 decision. (*Id.*) This testimony fails to prove that Keystone cannot meet Permit Condition 3, which requires that Keystone comply with recommendations set forth in the Final Environmental Impact Statement when issued. Keystone has committed to meeting the recommendations in the FEIS and the FSEIS. The FEIS is not invalidated by the subsequent FSEIS. As the FSEIS states, it "builds on the work done in the 2011 Final EIS, including references to that document throughout the text where appropriate." (FSEIS, Section 1.1.1, at 1.1-7.) Significantly, the FSEIS notes that it "also relies, where appropriate, on the data presented and the analyses done in the Final EIS for the previously proposed project because much of the pipeline route remains unchanged from its August 2011 publication." (*Id.*) DRA's one-sentence argument on this issue makes no sense.

DRA argues that Kothari's statements regarding the nature of her responsibility for design and construction prove that Keystone's certification petition should be denied. (DRA Br. at 21.) A review of the cited testimony reveals no basis for DRA's argument. Kothari was asked whether she designed the Keystone Pipeline and the Gulf Coast Project. (Tr. at 1090.) She answered: "I was not the designer. I was the TransCanada engineer oversight on those projects." (*Id.*). She explained that "[f]rom a TransCanada perspective procedurally, my job was to ensure that those requirements met the TransCanada project requirements, the corporate requirements." (*Id.* at 1090-91.) She testified that her job was to "provide validation and verification oversight," and that her responsibility included pipeline integrity. (*Id.* at 1091.) By distinguishing her responsibilities from an authenticating design engineer, Kothari neither passed the buck, denied responsibility for pipeline integrity, nor provided any basis for the Commission to conclude that Keystone cannot meet any permit conditions.

DRA argues that Kothari's testimony was just "rose-tinted sugar-coated promises" and "assuring words," and that based on the evidence Keystone has a questionable ability to comply with all applicable design and construction regulations. (DRA Br. at 21-22.) DRA's argument on this issue offers no citations to the transcript or to the hearing record to establish which permit conditions Keystone is unable to meet. DRA points to evidence that the Keystone XL Pipeline will transport a hazardous material and that pipelines can fail. (DRA Br. at 21.) This is not evidence that Keystone cannot meet the permit conditions. Keystone admits that it cannot guarantee that its pipelines will never leak (Tr. at 354), but no permit condition requires that. Rather, the standard is whether Keystone can continue to meet the permit conditions.

DRA argues that Keystone's voluntary agreement to comply with PHMSA's 59 special conditions proves that Keystone does not intend and is not able to comply with the permit conditions. (DRA Br. at 22.) The 59 special conditions, included in Appendix Z to the FSEIS, were established in connection with Keystone's application to PHMSA for a Special Permit to operate the Keystone XL Pipeline at a higher operating pressure. (Tr. at 215, 1079-80, 1105.) Keystone later withdrew its application for a special permit. Nevertheless, Keystone committed to PHMSA that it would comply with the 59 special conditions, even though it no longer seeks authorization to operate at the higher pressure. (Tr. at 1105.) There is no evidence in the record that Keystone will not or cannot comply with the 59 special conditions. To the contrary, Keystone has committed to both PHMSA and the Commission – as reflected in the sworn Certification of Corey Goulet – that it will.

DRA argues that Keystone has failed to recognize the magnitude and risk of routing the pipeline through areas of high landslide potential. (DRA Br. at 22-25.) First, this issue was the subject of proposed testimony by Richard Kuprewicz, an expert retained by the Rosebud Sioux

Tribe. On June 15, 2015, the Commission issued an order granting Keystone's motion to strike Kuprewicz's testimony related to routing. The Rosebud Sioux Tribe later withdrew Kuprewicz's testimony altogether and he did not testify at the hearing. Second, the suggestion that the Keystone XL Pipeline route is through a high landslide hazard area is based on a USGS map of South Dakota that is not intended for pipeline routing. The map is "an extremely high level map" based on a scale of 1 to 7 million. (Tr. at 1097, 1101.) The legend expressly states that the map is not intended for site-specific decisions, like routing. (*See* http://landslides.usgs.gov/hazards/ nationalmap/ ("because the map is highly generalized, owing to the small scale and the scarcity of precise landslide information for much of the country, it is unsuitable for local planning or actual site selection").)

Instead, Keystone used the map "at the very initial onset of the project," and then progressed through detailed engineering, field visits, and other site-specific work to refine the design and determine the route and suitability of particular locations. (*Id.* at 1097-98.) On this basis, Kothari testified that only 1.6 miles of the pipeline route were actually in areas of high landslide potential. (*Id.* at 1098, 1100.) Her testimony is unrefuted. Dr. Davis testified that he would be surprised to hear that 1.6 miles of the route are in areas of high landslide potential (*id.* at 1796), but he also admitted that he did not hear Kothari's testimony on the issue and he did not offer an opinion to the contrary. (*Id.* at 1810-11.) The issue of landslides was discussed in the FSEIS in Section 3.1. The FSEIS states that the potential for landslides is increased in areas of steep slopes, that only four miles of terrain crossed by the Project route contain steep slopes, and that most of those are at water crossings. (FSEIS, Section 3.1.2, at page 3.1-27.) Nothing in the hearing record establishes that Keystone cannot meet any permit conditions because of landslide potential along the route in South Dakota.

DRA argues that PHMSA issued an advisory bulletin in late 2009 related to low-yield materials incorporated into the project and that Keystone acted on the bulletin by inspecting the pipeline in locations identified through high-resolution in-line inspection. (Tr. at 1055.) Kothari testified that Keystone followed the bulletin by verifying the integrity of the pipeline in which the pipe at issue was involved. (*Id.* at 1055-56.) DRA does not explain how her testimony on this issue establishes that Keystone cannot meet any of the permit conditions. To the contrary, her testimony established that Keystone implemented the PHMSA advisory. Dan King, TransCanada's Chief Engineer and Vice President for Asset Reliability, the logical witness to examine on pipeline integrity matters, was not asked about the issue.

DRA argues that 14 spills occurred during start-up on the Keystone Pipeline, one, at the Ludden pump station, involving 400 barrels of crude oil. (DRA Br. at 26-27.) DRA mentions details Kothari did not know about the Ludden spill, but ignores Dan King's testimony about the spill. (Tr. at 2293-97, 2336-37.) DRA does not explain how the facts of these spills during startup on the Keystone Pipeline establish that Keystone cannot meet any permit conditions.

DRA argues that TransCanada had welding problems on the Gulf Coast Project, and relies on two excluded exhibits to support its argument. (DRA Br. at 27-28; DRA Exs. 69 and 70.) DRA's reliance on the excluded exhibits is improper. The exhibits were excluded by the Commission's order dated July 17, 2015. They are not part of the evidence before the Commission and they are not part of the record. Keystone does not have an opportunity to respond to them. Therefore, they must be disregarded. As for DRA's argument about welding issues on the Gulf Coast Project, Dan King testified that the initial high rate of weld failures at the commencement of construction represented a productivity issue, not a safety issue, because every weld is inspected and those that do not pass inspection are either repaired or replaced. (Tr.

at 2304.) The testimony admitted on this issue does not establish that Keystone cannot meet any permit conditions.

DRA argues that the corrosion incident caused by cathodic protection interference in a shared pipeline corridor is evidence of problems with Keystone's quality-assurance processes. (DRA Br. at 28-31.) DRA ignores the fact that Keystone discovered the defect during an inline inspection. (Tr. at 1154-54.) DRA incorrectly argues that there was no evidence offered that Keystone changed any procedures as a result of the incident. (DRA Br. at 29.) To the contrary, Meera Kothari and Corey Goulet testified that Keystone added a passive cathodic protection system supplementing the active system on the Keystone Pipeline. (Tr. at 265, 309-10, 1152-54.) DRA also argues that the existence of the Mni Waconi crossing refutes Kothari's testimony that there are no shared pipeline corridors in South Dakota where a similar incident could occur. (DRA Br. at 31.) Kothari testified, however, that in working with the Bureau of Reclamation to develop a crossing design for the Mni Waconi, Keystone addressed cathodic protection. (Tr. at 1187.) There is no evidence in the record that a corrosion problem due to cathodic protection interference could occur at the Mni Waconi crossing. Evidence on this issue does not establish that Keystone cannot meet any permit conditions.

DRA argues that reclamation on the Sibson property is evidence that Keystone cannot comply with the permit conditions due to a pattern of regulatory noncompliance. (DRA Br. at 31-32.) Keystone previously addressed these issues in detail in its initial post-hearing brief and Keystone has committed to continue its ongoing reclamation efforts on the Sibson property. Keystone further notes here that the Commission can take judicial notice that thickspike wheatgrass, about which Sibson complained because cattle would not eat it, is listed in the Natural Resources Conservation Service Plant Guide. (*See*

Http://www.nrcs.usda.gov/Internet/FSE_PLANTMATERIALS/publications/idpmspg04849.pdf.)
According to the NRCS, "thickspike and streambank wheatgrass are palatable to all classes of livestock and wildlife." *Id*. The wheatgrasses "are a preferred feed for cattle." *Id*. They are "well adapted to the stabilization of disturbed soils." *Id*. Thickspike wheatgrass is a native species, and "common to the northern Great Plains." *Id.*

DRA concludes with a single paragraph related to the testimony of its star witness, Evan Vokes, claiming that his testimony about the Bison Project established a "pattern of regulatory noncompliance." (DRA Br. at 31-32.) Vokes testified to his observation that 1,200 to 1,300 uninspected welds went into the ground on the Bison Project (Tr. at 1621-23), and that he was asked many times by senior management at TransCanada to ignore regulatory violations. (Tr. at 1627.) Dan King, TransCanada's Chief Engineer and Vice President for Asset Reliability, testified to the contrary. He testified that with respect to the Bison Project, Vokes' testimony could not be accurate. "I mean, this particular project with the huge scrutiny by PHMSA, the signoff at multiple levels, 100 percent audit of the welds, numerous reviews, that just is not the case." (Tr. at 2276.)

King's testimony highlights an important distinction between the role of the Commission and the role of other regulators, like PHMSA. While the Commission has required in permit condition 1 that Keystone comply with all applicable laws and regulations, it is not the role of the Commission in this proceeding to determine in the first instance whether Keystone is compliant with regulations that are within the jurisdiction of some other agency, like PHMSA. Rather, if PHMSA, for example, were to find that Keystone was not compliant with a federal regulation, the Commission could act on that. Ultimately, the Commission has the authority to revoke a permit under SDCL § 49-41B-33(2) for "[f]ailure to comply with the terms or conditions of the

permit." The Intervenors also forget that Keystone has an ongoing relationship with the Commission and that the proposed Keystone XL Pipeline is not the first crude oil pipeline that Keystone will construct and operate in South Dakota. Keystone has already demonstrated to the Commission a pattern of regulatory compliance. The testimony of Vokes about the Bison Project does not establish that Keystone cannot meet any permit condition.

b. Rosebud Sioux Tribe

The Rosebud Sioux Tribe argues that under Permit Condition 1, Keystone must comply with the Endangered Species Act and SDCL § 34A-8-3, and that it has presented no evidence demonstrating compliance. (RST Br. at 8-11.) Counsel for the Rosebud Sioux Tribe asked no questions about the Endangered Species Act or South Dakota law protecting endangered species at the hearing, but Dr. Jon Schmidt testified that required surveys had been conducted and are addressed in the Biological Opinion that is part of the FSEIS. (Tr. at 543, 550-51, 636-37.) There is no evidence in the record that Keystone has not conducted surveys required by either state or federal law to protect endangered species, or that it cannot and will not act in compliance with state and federal law.

The Rosebud Sioux Tribe argues that Keystone had to present evidence under Permit Condition 1 that it can comply with SDCL § 49-41B-22, which governed Keystone's application for a permit in HP09-001. The Commission has already observed that this certification proceeding is narrower in scope than was the proceeding governed by SDCL § 49-41B-22, and that Keystone does not need to prove again its compliance with those factors. (Tr. at 2476, 2478.)

The Rosebud Sioux Tribe also contends that Keystone failed to demonstrate compliance with the 59 special conditions contained in Appendix Z to the FSEIS. (RST Br. at 12-13.) The

Tribe argues that because these PHMSA conditions came after the Amended Final Decision & Order, the Commission has no basis to say that Keystone can comply with them. (*Id.*) But Keystone is not required to provide evidence on how it will comply with the 59 special conditions recommended by PHMSA and the Commission is not required to undertake a technical assessment of whether Keystone can comply. It is within PHMSA's jurisdiction to determine whether Keystone complies with the conditions. Here, Keystone certified that it can meet the permit conditions, which is sufficient absent evidence that it cannot. The Intervenors failed to offer any evidence that Keystone cannot or will not comply with the 59 special conditions.

c. Standing Rock Sioux Tribe

The Standing Rock Sioux Tribe argues that Keystone has not submitted affirmative evidence that it can comply with certain non-prospective conditions, like Permit Condition 15.c, which requires the development of con/rec units in consultation with the NRCS. (SRST Br. at 4.) In fact, Keystone presented evidence that it had consulted with the NRCS (Tr. at 617-18), and the con/rec unit specifications, which have been developed, are included in the FSEIS in Appendix R. The Tribe similarly argues that Keystone has not yet produced an emergency response plan, an integrity management plan, or a paleontology mitigation plan. (SRST Br. at 4.) Based on the clear language of Condition 36, the emergency response plan does not need to be submitted to PHMSA until "[p]rior to putting the Keystone Pipeline into operation." The condition is clearly prospective. The paleontological resource mitigation plan does not need to be filed with the Commission until after field surveys have been completed. (Permit Condition 44.c.) There is no evidentiary basis to find that Keystone cannot meet this condition. Dr. Schmidt was asked no questions about paleontological surveys. Under 49 CFR § 195.452,

Keystone must prepare and implement an integrity management plan with PHMSA within one year after the pipeline begins operation. This requirement is also clearly prospective.

Standing Rock argues that Heidi Tillquist admitted that Keystone has only started its efforts to address worst case discharge volumes under 49 CFR Part 194. (SRST Br. at 4.) The testimony the Tribe cites pertains to Tillquist's work in preparing the risk assessment. She was asked, "Is estimating the probability of a release of oil from any one mile of a pipeline in South Dakota an accurate methodology to assess the risk throughout South Dakota?" (Tr. at 686.) She answered: "It is a start." (*Id.*) Thus, the Tribe has taken testimony about the process of preparing a risk assessment and used it as support for its argument that, chronologically, Keystone "has just 'started' to address important non-prospective conditions." (SRST Br. at 4.) The citation is out of context and inapposite, and the argument is baseless.

Standing Rock argues that Keystone cannot comply with Condition 1 because "the environmental impacts of Keystone XL have not been evaluated in compliance with NEPA." (SRST Br. at 6.) In support of its argument, the Tribe cites several comments or letters from the Environmental Protection Agency that were made in the context of the Department of State's review. (*Id.* at 6-7.) Whatever the EPA thinks of the Keystone Pipeline, however, is not evidence that Keystone cannot comply with any permit conditions. As stated many times in this docket, under the National Environmental Policy Act, it is the responsibility of the U.S. Department of State to conduct an environmental review of the proposed Keystone XL Pipeline. (*See, e.g.,* FSEIS, Section 1.0, Introduction.) The EPA's comments on the FEIS or the FSEIS are irrelevant to Keystone's compliance with any permit conditions.

Similarly, Standing Rock argues that there was insufficient or improper consultation between the U.S. Department of State and the Tribes under Section 106 of the National Historic

Preservation Act (NHPA). (SRST Br. at 8.) As stated many times before and during the hearing, it is the Department of State, not Keystone, that is obligated under the NHPA to consult with the Tribes. 16 U.S.C. § 470f; 36 C.F.R. Part 800. Moreover, as argued in Keystone's initial brief, the record establishes that the Tribes were consulted by the Department of State. (Keystone's Post-Hearing Br. at 12.)

Standing Rock further argues that the impacts to tribal water rights should be considered. (SRST Br. at 9-10.) The Tribe concludes that if the Commission accepts Keystone's certification, Keystone would be permitted to withdraw water from streams subject to Tribal claims, and that construction of the Keystone XL Pipeline would jeopardize tribal water quality. (*Id.* at 10.) This argument has no foundation in the record. As Dr. Schmidt testified, Keystone's temporary water use during construction will not interfere with tribal water rights because of the State's permitting process. (Ex. 2009, ¶¶ 4, 5, 7.) Moreover, the use of horizontal directional drilling and other construction mitigation techniques eliminates or minimizes the risk of affecting water quality during construction. (*Id.* ¶¶ 6, 8, 9.) His testimony was not refuted. Thus, this argument provides no basis to conclude that Keystone cannot meet any permit conditions.

d. Yankton Sioux Tribe

1. The FEIS versus the FSEIS

The Yankton Sioux Tribe argues that Keystone must comply with federal law, but that it cannot comply with the Amended Programmatic Agreement contained in the FSEIS because Condition 2 in the Amended Final Decision & Order requires that Keystone comply with the FEIS. (YST Br. at 6.) This argument, which is unsupported by any authority, presumes that the FSEIS entirely displaces the FEIS and that the Amended Programmatic Agreement inherently conflicts with the Programmatic Agreement as they related to the proposed Keystone XL

Pipeline in South Dakota. As already discussed, the FSEIS builds on the FEIS and reflects changes to the route outside South Dakota. (Supra at 13.) Moreover, the Amended Programmatic Agreement was the result of changes to the route and the scope of the project outside South Dakota, as well as subsequent consultation. (FSEIS, App. E, at page 2.) It would be hypertechnical for the Commission to conclude that, because Condition 2 refers to the EIS, Keystone cannot comply with the Amended Programmatic Agreement, or that if Keystone complies with the Amended Programmatic Agreement, it is violating Condition 2. As established in Keystone's Tracking Table of Changes, the Keystone XL Pipeline in South Dakota is not a new project from what the Commission permitted in 2010. The Tribe's argument is without merit.

2. The protective order did not violate due process

Yankton also argues that it was denied due process in Docket HP14-001. The Tribe contends that the Protective Order dated April 17, 2015, was entered in a manner that violates its right to due process. The Protective Order was entered in connection with the Commission's orders in favor of DRA, the Standing Rock Sioux Tribe, and the Yankton Sioux Tribe, compelling Keystone to produce documents in discovery. The written orders followed the Commission's decision at a hearing on April 14, 2015. Some of the documents that were ordered produced were confidential and proprietary, and the Commission stated at the hearing at which the motions were granted that confidential documents would be protected, and directed General Counsel for the Commission to prepare an order. (Tr., Apr. 14, 2015, at 271-79.) Because of the short time for production (three days), the Commission entered a protective order on April 17, 2015, without further motion by Keystone. On April 24, 2015, one week after Keystone's document production and issuance of the protective order, DRA, BOLD Nebraska,

and the Rosebud, Yankton, Cheyenne River, and Standing Rock Sioux Tribes moved that the Commission vacate or amend the Protective Order. The Commission denied the motion to vacate, but amended the Protective Order, with Keystone's consent, to allow Intervenors who signed non-disclosure agreements access to confidential documents.

Yankton argues that the entry of the Protective Order violated its due-process rights. The Tribe's argument, which is unsupported by any citation to legal authority discussing due process in this context, is frivolous. Due process applies to administrative proceedings, but it is the Tribe's burden to show that it was deprived of a property interest without due process of law. *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶ 14, 802 N.W.2d 905, 911. The Tribe cannot meet this burden.

First, there was good cause for entry of the Protective Order. The documents that Keystone designated as confidential were proprietary, commercially sensitive, or protected by statute. They included biological and cultural survey reports that disclosed the identity of statutorily-protected cultural and archaeological sites; confidential internal documents like an integrity management plan, an O&M manual, Keystone's SCADA specification, and other internal documents having substantial commercial value; and worst-case discharge calculations that had previously been treated as confidential by the Department of State. The Tribe makes no argument that these documents were not entitled to confidential protection.

Second, Yankton had an opportunity to be heard. The Commission entered the Protective Order after a hearing at which confidentiality was discussed, Keystone designated certain documents as confidential, and the Tribe had the opportunity both to challenge the designations and to challenge the Protective Order, both of which it did. The Tribe objects that the Commission did not follow the provisions of ARSD 20:10:01:39-44 by requiring that Keystone

first file a motion related to confidentiality. The Tribe's argument ignores the timing involved in the discovery orders that resulted in the Commission issuing a protective order. The Commission recognized that Keystone had objected to the production of many documents based on confidentiality and therefore determined that Keystone's legitimate confidentiality concerns had to be addressed, and quickly given the three-day production window. The issues were debated at length in an all-day hearing that ran well into the evening on April 14, 2015. It is entirely disingenuous for the Tribe to contend that it did not have an opportunity to be heard.

Third, Yankton does not explain how it was prejudiced by this alleged due-process violation. The Tribe cites no example of how its hearing preparation or the presentation of its case at the hearing were altered by entry of the Protective Order. Given that the hearing was continued from May until late July at the Intervenors' request and that there were no further motions addressing the Protective Order after the Commission's order dated May 4, 2015, the Tribe has made no showing whatsoever of injury based on which the Commission could grant any relief. The Tribe's suggestion that the petition for certification be denied based on entry of the Protective Order is groundless.

e. The exclusion of certain witness testimony

Yankton argues that its due-process rights were violated because the Commission granted Keystone's motions in limine to exclude the testimony of Jason Cooke, Faith Spotted Eagle, and Chris Sauncosi. (YST Br. at 8.) The exclusion of relevant evidence potentially may be prejudicial evidentiary error in some cases, but it was not error here, nor is it an issue of due process. The Tribe had an opportunity to be heard on the issue and it has a post-deprivation remedy, namely an appeal in which it can argue that the Commission erred in excluding the testimony. *See Hudson v. Palmer*, 468 U.S. 517, 533, 534-36 (1984) (availability of tort action

constituted adequate post-conviction remedy for purposes of due process). The Tribe has a right to appeal to circuit court from the Commission's final order in this proceeding. *See* SDCL § 1-26-30. Moreover, there is no procedural basis for the Tribe's motion at this stage of the proceedings. The Commission has not yet entered an order on Keystone's certification petition. This issue is irrelevant to the Commission's post-hearing consideration of Keystone's petition. This is an issue for appeal.

The Rosebud Sioux Tribe similarly challenges the exclusion of the testimony of Jennifer Galindo (RST Br. at 13-15), and the Standing Rock Sioux Tribe challenges the exclusion of the testimony of Wasté Win Young. (SRST Joint Br. at 10-12.) Aside from the procedural deficiencies mentioned above, the challenges are without merit. Both Galindo and Win Young proposed to testify about compliance with the National Historic Preservation Act and their opinions that there had been inadequate consultation under Section 106 of the National Historic Preservation Act. As already established in the proceeding and as previously argued in this brief, it is the responsibility of the Department of State to consult with tribes under Section 106 of the NHPA. Section 106 does not impose any obligations on Keystone, which is not responsible for government-to-government consultation. Neither the Rosebud Sioux Tribe nor the Standing Rock Sioux Tribe acknowledges that this was the basis for the Commission's ruling. They therefore offer no reason that the exclusion was incorrect, and no explanation how their arguments can be a basis for the Commission to deny Keystone's certification petition.

The Rosebud Sioux Tribe also argues that the Commission erred in excluding that portion of the rebuttal testimony of Paula Antoine related to the Spirit Camp located on the Rosebud Reservation. (RST Br. at 15.) Antoine was allowed to testify. (Ex. 11000; Tr. at 2130-34.) By order dated July 22, 2015, however, the Commission excluded that part of her proposed rebuttal

testimony related to the Spirit Camp because it was irrelevant to Keystone's ability to meet any permit conditions. Antoine proposed to testify that the spirit camp was the idea of Russell Eagle Bear and Wayne Frederick; that it was formed by a group of concerned tribal members; that it has hosted visitors from all over the world; that it hosts cultural and educational activities for tribal and non-tribal members; and that the camp is located in a place "that tribal members share a very close connection with." (Ex. 11000 at 2.) The Tribe now argues that the proposed testimony "related to the Tribe's activities at the camp in opposition to the pipeline" (RST Br. at 15), but there are no specifics in Antoine's proposed rebuttal testimony about activities specifically in opposition to the pipeline. Even if there were, they would not be relevant to whether Keystone can continue to meet the permit conditions. The Tribe argues that the proposed testimony was relevant to the "socioeconomic factors that the commission should have considered." (RST Br. at 15.) Socioeconomic factors, however, were an issue in Docket HP09-001 under SDCL § 49-41B-22(2), which established Keystone's burden to obtain a permit for the Keystone XL Pipeline. Antoine's proposed rebuttal testimony about the spirit camp was not responsive to the testimony of any Keystone witness, and was not relevant to Keystone's ability to meet the conditions on which the permit was issued.

f. The Winters Doctrine

Standing Rock, BOLD Nebraska, and IEN jointly argue that the "impacts on Indian water rights should be considered" in this proceeding. (Standing Rock Joint Br. at 9.) Citing the so-called Winters Doctrine, they argue that certification of the Keystone XL Pipeline turns western water law and the Winters Doctrine "on its head." *Id.* at 10.

Standing Rock, BOLD Nebraska and IEN are simply off the mark in their arguments. First, the Commission has no jurisdiction to consider who has what water rights. South Dakota

law delegates that authority to the Chief Engineer of the Water Rights Division of the Department of Environment and Natural Resources and the South Dakota Water Management Board. Second, Keystone's use is non-consumptive and temporary. Third, the appropriation must be permitted by the Chief Engineer. Fourth, the statutes and regulations allow any affected person or entity to protest the appropriation and the Chief Engineer to summarily rescind the permit.

The Winters Doctrine, a product of a 1908 U.S. Supreme Court case, declares that the federal government reserved the right to water on the land devoted to the South Dakota reservations. As Mr. Capossela, Standing Rock's lawyer, noted in his article, "Indian Reserved Water Rights in the Missouri River Basin," 6 GREAT PLAINS NATURAL RESOURCES JOURNAL 131 (2002), while the right to water was reserved to the various reservations, most of those water rights have never been quantified. In other words, exactly what water is subject to tribal Winters Doctrine rights has never been determined. As Mr. Capossela elicited in the hearing, South Dakota and Standing Rock are engaged in discussions to define what water is subject to Winters Doctrine rights. (Tr. at 1882, 2015-18.)

This certification hearing is not the forum in which to decide tribal water rights. Water right determinations are beyond the scope of the Commission's jurisdiction. No statute vests the Commission with authority to decide what rights South Dakota tribes have to water within the political boundaries of the state. Regulation of water and water rights is not mentioned anywhere in SDCL Title 49, the statutes that govern the jurisdiction of the Commission.

Keystone made it clear, both in the 2009 proceedings and in these proceedings, that the water it intends to use is not consumed. It is a temporary use. (Ex. 2009 ¶¶ 4, 5, 7.) Keystone will use water to pressure test segments of the pipeline as they are completed. A total of

approximately three million gallons of water will be drawn from streams and rivers and used to fill South Dakota segments of the pipe. Pressure will be induced and held on the pipe for a period, to check for leaks. When the testing is complete, the water will be returned to the water sheds from which it was taken. (*Id.*, ¶ 5.)

Further, as Dr. Schmidt testified, South Dakota law has a mechanism for protecting *all* water users, including the tribes. A comprehensive scheme of water management and competing claims for water, including quantification of water rights and limitations on use in times of scarcity, is codified in South Dakota law, commencing at SDCL Ch. 46-1. The mechanism for protecting the waters within the state is straightforward. SDCL § 46-1-15 requires appropriators to obtain a permit from the Chief Engineer of the Water Rights Division. SDCL § 46-1-16 directs that the Chief Engineer takes application for and issues permits.

SDCL § 46-5-40.1 addresses temporary permits "for construction, [and] testing," which is applicable to Keystone's situation. The statute provides, in part

> No temporary permit may be issued if the permit interferes with or adversely affects prior appropriations or vested rights. A temporary permit shall contain qualifications and limitation necessary *to protect the public interest.* The issuance of a temporary permit is permission to use public water on a temporary basis and does not grant any water rights. (italics added for emphasis).

ARSD 74:02:01:34.01 gives the Chief Engineer the authority to rescind a temporary permit "at any time . . . for one or more of the following reasons: (1) Water is not available to satisfy existing water permits or domestic uses; (2) Water use under a temporary permit adversely affects existing water permits or rights of the public interest."

If the Standing Rock Sioux Tribe, or any other citizen for that matter, believes its water rights are impaired by the temporary permit and concomitant use of water, all it need do is so advise the Chief Engineer and the use can be suspended if insufficient water is available or if

existing uses are impaired. If the use presents an emergency, SDCL § 1-26-29 provides a remedy: "If the agency finds that public health safety, or welfare imperatively require emergency action . . . summary suspension of a license may be ordered pending proceedings for revocation . . . ."

The Intervenors want the Commission to consider "impacts on Indian water rights," but the place for that consideration is the Chief Engineer of the Water Rights Division, not the Commission. The Commission should rule accordingly, and reject this argument.

f. Intertribal COUP

Intertribal COUP argues that the Commission should deny certification, contending that certain engineering drawings submitted to the Commission in the 2009-2010 proceedings were deficient because they were not signed and sealed by a South Dakota licensed engineer. (COUP Br. at 10-11.) COUP contends that the 2010 permit should not have been granted. The argument is obliquely aimed at project engineer Meera Kothari, who acknowledged that she is licensed as a professional engineer in Canada but not in South Dakota – nor need she be for her role in the Project.

COUP ignores that fact that this proceeding is not a challenge to the 2010 permit or a retrial of the 2009 hearing. COUP offers no explanation how the efficacy of the 2010 permit is now in issue. COUP also cites no authority for the proposition that the Commission's duties include assuring that all engineering drawings are stamped. COUP nonetheless contends that certification should be denied because the 2009 drawings were not signed and sealed.

COUP cites SDCL § 36-18A-45 as the anchor for its argument. The statute is contained in the South Dakota code chapter that deals with licensing professional engineers, SDCL Ch. 36-18A. The statute COUP cites as supporting its contention says that a licensee's signature and

seal is certification that the work was done by the licensee and directs that the seal be attached before *final* plans are submitted to a client or government agency.

Subdivision 2 of SDCL § 36-18A-45, the statute COUP relies on, requires that *preliminary* drawings be marked with an explanation that the plan is not final, as was exactly the case with the subject drawings. Nothing in the code requires that preliminary drawings be signed over seal, and nothing in code requires that evidentiary submissions before the Commission be final drawings.

As to Kothari's work and the work of Keystone-employed engineers, SDCL § 36-18A-9 provides

> This chapter *does not apply to*:
>
> (5) Any full-time employee of a corporation while exclusively doing work for . . . the corporation . . . if the work performed is in connection with the property . . . utilized by the employer.

Simply stated, SDCL Ch. 36-18A does not apply to Keystone employee Meera Kothari's work, or the work of Keystone's staff engineers. There is nothing in South Dakota law that requires plans prepared by Keystone's staff for Keystone's use to be signed and sealed by a South Dakota licensed engineer for any purpose.

Preliminary drawings prepared for Keystone by outside engineers contracted to work on the pipeline project need not be signed and sealed as long as they note they are preliminary. Drawings prepared by Keystone employees need not ever be signed and sealed. Nothing prohibits use of preliminary drawings as demonstrative exhibits in the Commission certification process. COUP fails to explain how the Commission can deny certification on drawings that comport with the very statute it cites. COUP's argument is not well founded, and the Commission should so rule.

g. Gary Dorr's arguments on the Treaty of 1868

Intervenor Gary Dorr argues that the 1868 Treaty of Ft. Laramie requires that Keystone obtain tribal consent before it can construct its project in South Dakota. Dorr argues that treaty language forbids white persons to occupy any portion of the land reserved to the tribes by the 1868 Treaty without consent of the Indians. This argument ignores key facts.

The 1868 Treaty of Ft. Laramie set aside all of what is now South Dakota west of the Missouri River as the Great Sioux Reservation. The Treaty contains a stipulation forbidding white persons' occupation of the reserved territory without consent of the Indians. What Dorr omits to say is that in 1877, again in 1889, and finally in 1910, Congressional acts reduced the Great Sioux Reservation to the reservation boundaries extant today. The Act of March 2, 1889, ch. 405, 25 Stat. 888, divided the Great Sioux Reservation into individual tribal reservations. Per the Congressional act, each tribe gave up its interest in lands formerly part of the Great Sioux Reservation. The statute provides, at section 21, "[t]hat all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain." When Congress restored the lands outside of the reservations to the public domain, it obviously intended that all tribal interests be extinguished. *See Oregon Fish and Wildlife Dept. v. Klamath Tribe,* 473 U.S. 753 (1983). The various treaties and Congressional acts resulting in modern reservation boundaries are described in *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980) and *Montana v. United States,* 450 U.S. 544 (1981). *See also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *South Dakota v. Bourland,* 508 U.S. 679 (1993), and *Oglala Sioux Tribe v. United States,* 21 Cl. Ct. 176 (1990). *See also* Applicant's Motion To Preclude Consideration Of Aboriginal Title Or Usufructuary Rights of May 26, 2015

for a complete discussion of the impact of the various Congressional acts and the Supreme Court's analysis.

The evidence in this certification proceeding and in the proceedings leading to the 2010 permit conclusively proves that the Keystone XL pipeline route does not cross any reservation land, land held in trust for the Indians, or tribally-owned property. Dorr argues that nonetheless, Keystone is obligated to obtain tribal permission to cross non-Indian Country in South Dakota. The argument flies in the face of more than a century of treaty amendments, Congressional acts, and United States Supreme Court decisions. It simply is not the law and not within the jurisdiction of the Commission. Dorr's contentions are legally unsupported and the Commission should so rule.

Conclusion

Despite exhaustive proceedings that the Intervenors tried to stretch far beyond the scope of SDCL § 49-41B-27, their collective briefing offers no reason that the Commission should deny Keystone's certification petition. Keystone respectfully requests that the Commission accept its certification and enter its proposed findings of fact and conclusions of law.

Dated this 30th day of October, 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore
James E. Moore
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email James.Moore@woodsfuller.com

- and -

William Taylor
2921 E. 57th Street, Box 10
Sioux Falls, SD 57108
Phone 605-212-1750
Bill.Taylor@williamgtaylor.com

Attorneys for Applicant TransCanada

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Applicant's Post-Hearing Reply Brief, to the following:

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

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

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

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

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

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

Jane Kleeb
1010 North Denver Avenue
Hastings, NE 68901
jane@boldnebraska.org

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

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

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

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

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

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

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

Louis T. (Tom) Genung
902 E. 7th Street
Hastings, NE 68901
tg64152@windstream.net

Benjamin D. Gotschall
6505 W. Davey Road
Raymond, NE 68428
ben@boldnebraska.org

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

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

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

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

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

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

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

Travis Clark
Fredericks Peebles & Morgan LLP
Suite 104, 910 5th St.
Rapid City, SD 57701
tclark@ndnlaw.com

Harold C. Frazier
Chairman, Cheyenne River Sioux Tribe
PO Box 590
Eagle Butte, SD 57625
haroldcfrazier@yahoo.com
mailto:kevinckeckler@yahoo.com

Jerry P. Jones
22584 US Hwy 14
Midland, SD 57552

Cody Jones
21648 US Hwy 14/63
Midland, SD 57552

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

Gena M. Parkhurst
2825 Minnewsta Place
Rapid City, SD 57702
GMP66@hotmail.com

Jennifer S. Baker
Representing Yankton Sioux Tribe
Fredericks Peebles & Morgan LLP
1900 Plaza Dr.
Louisville, CO 80027
jbaker@ndnlaw.com

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

Duncan Meisel
350.org
20 Jay St., #1010
Brooklyn, NY 11201
duncan@350.org

The Yankton Sioux Tribe
Robert Flying Hawk, Chairman
PO Box 1153
Wagner, SD 57380
robertflyinghawk@gmail.com
Thomasina Real Bird
Attorney for Yankton Sioux Tribe
trealbird@ndnlaw.com

Bruce Ellison
Attorney for Dakota Rural Action
518 6th Street #6
Rapid City, SD 57701
belli4law@aol.com

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

RoxAnn Boettcher
Boettcher Organics
86061 Edgewater Avenue
Bassett, NE 68714
boettcherann@abbnebraska.com

Bruce Boettcher
Boettcher Organics
86061 Edgewater Avenue
Bassett, NE 68714
boettcherann@abbnebraska.com

Bonny Kilmurry
47798 888 Road
Atkinson, NE 68713
bjkilmurry@gmail.com

Ronald Fees
17401 Fox Ridge Road
Opal, SD 57758

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

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

Dallas Goldtooth
38731 Res Hwy 1
Morton, MN 56270
goldtoothdallas@gmail.com

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

William Kindle, President
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 575
William.Kindle@rst-nsn.gov
ejantoine@hotmail.com

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

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

Sabrina King
Dakota Rural Action
518 Sixth Street, #6
Rapid City, SD 57701
sabinra@dakotarural.org

Frank James
Dakota Rural Action
PO Box 549
Brookings, SD 57006
fejames@dakotarural.org

Robin S. Martinez
Dakota Rural Action
The Martinez Law Firm, LLC
616 W. 26th Street
Kansas City, MO 64108
robin.martinez@martinezlaw.net

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

Paul C. Blackburn
4145 20th Avenue South
Minneapolis, MN 55407
paul@paulblackburn.net

Matthew Rappold
Rappold Law Office
on behalf of Rosebud Sioux Tribe
PO Box 873
Rapid City, SD 57709
matt.rappold01@gmail.com

Kimberly E. Craven
3560 Catalpa Way
Boulder, CO 80304
kimecraven@gmail.com

Joy Lashley
Administrative Assistant
SD Public Utilities Commission
joy.lashley@state.sd.us

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

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

/s/ James E. Moore
One of the attorneys for TransCanada