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**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 PIPELINE

**YANKTON SIOUX TRIBE'S  
BRIEF IN RESPONSE TO  
KEYSTONE'S AMENDED MOTION  
TO PRECLUDE CERTAIN  
INTERVENORS FROM OFFERING  
EVIDENCE OR WITNESSES AT  
HEARING AND TO  
COMPEL DISCOVERY**

**HP14-001**

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COMES NOW Yankton Sioux Tribe, by and through Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and for its *Brief in Response to Keystone's Amended Motion to Preclude Certain Intervenors from Offering Evidence or Witnesses at Hearing and to Compel Discovery* ("Amended Motion to Preclude") asserts the following.

**I. BACKGROUND**

TransCanada Keystone Pipeline, LP ("Keystone") initiated this action by filing a *Petition* on September 15, 2014. Following the *Petition*, Yankton Sioux Tribe ("Tribe") as well as several other individuals and entities submitted applications for party status. At its regularly scheduled meeting on October 28, 2014, the Public Utilities Commission ("Commission") granted intervention to all such applicants. On October 30, 2014, Keystone filed a *Motion to Define the Scope of Discovery Under SDCL 49-41B-27*. Following a hearing on said *Motion*, the Commission issued an *Order Granting Motion to Define Issues and Setting Procedural Schedule* (attached hereto as "Exhibit A") on December 17, 2014. In addition to limiting discovery to matters relevant to "1) whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions

set forth in Exhibit A to the Amended Final Decision and Order; or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C," that *Order* mandated that, in all discovery requests, "parties shall identify by number and letter the specific Condition or Finding of Fact addressed." *Order Granting Motion to Define Issues and Setting Procedural Schedule* at p. 2 (*emphasis added*).

On December 18, 2014, Keystone submitted its Interrogatories and Requests for Production of Documents ("Requests") to the Tribe, attached hereto as "Exhibit B." Keystone's Requests, however, failed to identify a single Condition or Finding of Fact. As Keystone admitted to the Commission at the hearing of March 31, 2015, the reason for this omission is that Keystone's Requests do not address whether the proposed project continues to meet the fifty Conditions or the proposed changes to the Findings of Fact, but rather, they were "contention interrogatories... It's impossible to tie those to a condition in the permit" (*emphasis added*).

On February 6, 2015, in accordance with the procedural schedule, the Tribe submitted its Answers and Objections to Keystone's First Interrogatories and Requests for Production of Documents to Keystone ("Objections") (attached hereto as "Exhibit C"). In its Objections, the Tribe objected to each of Keystone's Requests in good faith on the grounds that they failed to comply with the Commission's *Order* of December 17, 2014.

On February 12, 2015, Keystone issued the Tribe a letter (attached hereto as "Exhibit D") alleging that the Tribe's Responses did not comply with the South Dakota Rules of Civil Procedure and requesting that the Tribe fully and completely respond to its Requests by March 10, 2015. Despite being placed on notice that its Requests failed to comply with the Commission's *Order*, Keystone did not remedy the deficiencies as the Tribe set forth in its letter. Keystone threatened that if the Tribe did not make a good faith effort to respond, it would seek protections including

dismissal of the Tribe's petition to intervene.

On March 23, 2015, Keystone filed a *Motion to Preclude Certain Intervenors John Harter, BOLD Nebraska, Carolyn Smith, Gary Dorr, and Yankton Sioux Tribe) from Offering Evidence or Witnesses at Hearing and to Compel Discovery*. On March 25, 2015, Keystone filed the *Amended Motion to Preclude*, through which it requests that the Commission overrule all of the Tribe's objections and limit the Tribe's participation in the hearing.

On April 2, 2015, the Commission issued an *Order Amending Procedural Schedule* (Witness and Exhibit Lists), establishing April 21, 2015 as the deadline for parties to file and serve their witness lists and exhibit lists.

## **II. APPLICABLE LAW**

Pursuant to ARSD 20:10:01:01.02, the rules of civil procedure as used in the South Dakota circuit courts shall apply to proceedings before the Commission. The Rules of Procedure in Circuit Courts are found in SDCL Chapter 15-6, and include rules governing discovery. *See* SDCL 15-6(V). SDCL 15-6-33(a) provides that a party may object to an interrogatory provided that all grounds for the objection are stated with specificity. It further authorizes the party submitting the interrogatories to move for an order under SDCL 15-6-37(a) with respect to any objection to or other failure to answer an interrogatory. SDCL 15-6-37(a) sets forth requirements and relief available if a party contests another party's discovery objections. The relief available under SDCL 15-6-37(a) if the moving party prevails includes an order compelling an answer and reasonable expenses. The Rules of Procedure do not include the preclusion of a party from offering evidence or witnesses at a hearing unless that party acted without substantial justification. SDCL 15-6-37(c).

## **III. ARGUMENT**

**A. YANKTON SIOUX TRIBE'S RESPONSE TO KEYSTONE'S DISCOVERY REQUESTS WAS PROCEDURALLY PROPER PURSUANT TO THE RULES OF EVIDENCE**

As explained above, the Rules of Evidence permit a party to object to an interrogatory provided that all grounds for the objection are stated with specificity. With respect to each of Keystone's requests, the Tribe objected and specifically cited the Commission's *Order* of December 17, 2015 as grounds for the objection. Moreover, the Tribe had substantial justification for not disclosing information sought by Keystone as stated in the Tribe's objections. The Tribe was fully within its rights and acting within the Rules of Procedure by asserting its objections to Keystone's Requests. If Keystone wished to challenge the Tribe's objections, it should have filed a motion to compel the Tribe to respond and produce the requested information as provided by the Rules of Procedure. Because the Tribe's actions are permissible under the Rules of Procedure in Circuit Courts, no grounds exist to preclude the Tribe from offering any testimony or evidence at the hearing or otherwise limiting its participation in the hearing.

**B. YANKTON SIOUX TRIBE WAS UNDER NO DUTY TO PROVIDE INFORMATION OR DOCUMENTS AS KEYSTONE'S REQUESTS FAILED TO COMPLY WITH THE COMMISSION'S ORDER OF DECEMBER 17, 2014.**

Because Keystone's Requests were in clear violation of the Commission's *Order* of December 17, 2014, said requests are improper and invalid. A party is not required to comply with discovery requests if those requests are contrary to an order issued in the pending proceeding. Even after being placed on notice that its requests were contrary to the Commission's *Order*, Keystone failed to take steps to address its noncompliance. The Tribe was therefore fully justified in objecting to Keystone's Requests. The Commission issued an *Order* that specifically outlined the scope of discovery and the requirements with which parties must comply when seeking discovery. Because Keystone failed to act in accordance with the Commission's *Order*, the Tribe

was under no duty to respond and cannot be held accountable for Keystone's failures to follow the Commission's instructions.

**C. YANKTON SIOUX TRIBE WAS UNDER NO DUTY TO PROVIDE INFORMATION OR DOCUMENTS AS KEYSTONE'S REQUESTS WERE OUTSIDE THE SCOPE OF DISCOVERY AS LIMITED BY THE COMMISSION'S ORDER OF DECEMBER 17, 2014.**

Keystone's Requests were invalid not only because they failed to identify the relevant information as required by the Commission's *Order*, but because they plainly exceeded the scope of discovery pursuant to that *Order*. The Commission issued the December 17, 2014 *Order* limiting discovery at Keystone's own request. The fact that Keystone now wishes to curtail the rights of the Tribe because it sought discovery outside of the limitations Keystone itself requested is perplexing. Discovery in this matter has been limited to "1) whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions set forth in Exhibit A to the Amended Final Decision and Order; or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C..." *Order Granting Motion to Define Issues and Setting Procedural Schedule* at p. 2. Keystone's discovery requests, however, do not fall within this scope as Keystone has itself admitted. Because the Requests fall outside the scope of discovery as established by the Commission, the Tribe had substantial justification for its refusal to comply with said Requests and Keystone's *Motion* must be denied.

**D. THE RELIEF SOUGHT BY KEYSTONE IS PREMATURE AND WOULD RESULT IN UNNECESSARY SUBSTANTIAL INJUSTICE.**

As stated above, Keystone has asked the Commission to enter an order overruling the Tribe's objections and limiting its hearing participation. However, Keystone has failed to cite any justification for limiting the Tribe's participation rather than requesting an Order to Compel as provided by the Rules of Procedure. If Keystone's concern is that the Tribe has not yet provided

it with a list of the witnesses and exhibits the Tribe intends to use at the hearing, Keystone's concern is invalid because, like Keystone, the Tribe will supply its exhibit and witness lists in accordance with the deadline set by the Commission. Keystone, therefore, has not been prejudiced by the Tribe's refusal to provide this information prior to the deadline. In fact, in response to the Tribe's discovery requests, Keystone itself refused to provide exhibits prior to the deadline and stated that "Keystone will disclose its exhibits as required by order of the Commission." See "Exhibit E," Keystone's Responses to Yankton Sioux Tribe's Second Interrogatories and Request for Production of Documents at p. 5, Request for Production No. 10.

In the event that the Commission overrules the Tribe's objections, it would be premature at this stage, and therefore unjust, to limit the Tribe's participation in the hearing before the Tribe has had any opportunity to cure its responses once a ruling has been made. This is precisely why the Rules of Procedure provide for the issuance of an Order to Compel that provides an opportunity for the non-moving party to comply with an order once the Court or Commission has resolved the dispute. As stated above, the Tribe was fully justified in refusing to answer Keystone's Requests absent a ruling on its objections. The remedy Keystone has requested, limiting the use of evidence at trial under SDCL 15-6-37(c), is therefore unavailable and Keystone has failed to seek the procedurally proper form of relief. The Tribe has a right to object to requests it, in good faith, deems improper. To deny the Tribe its ability to participate in the hearing because the Tribe exercised that right would result in a miscarriage of justice. The *Amended Motion to Preclude* must be denied.

#### **IV. CONCLUSION**

Because Keystone failed to comply with requirements imposed on discovery by South Dakota law and by this Commission, Keystone's *Amended Motion to Preclude* must be denied.

The Tribe has at all times operated within the scope of the Commission's *Orders* and the Rules of Procedure. To grant Keystone the requested relief would be a violation of the Tribe's rights and would jeopardize the integrity of these proceedings. The *Amended Motion to Preclude* must, therefore, be denied.

Respectfully submitted this 8th day of April, 2015.



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Thomasina Real Bird, SD Bar No. 4415  
FREDERICKS PEEBLES & MORGAN LLP  
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Louisville, Colorado 80027  
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Email: [trealbird@ndnlaw.com](mailto:trealbird@ndnlaw.com)  
*Attorney for Yankton Sioux Tribe*

# **EXHIBIT A**



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

|   |   |
|---|---|
| <b>IN THE MATTER OF THE PETITION OF )<br/>TRANSCANADA KEYSTONE PIPELINE, LP )<br/>FOR ORDER ACCEPTING CERTIFICATION )<br/>OF PERMIT ISSUED IN DOCKET HP09-001 )<br/>TO CONSTRUCT THE KEYSTONE XL )<br/>PIPELINE )</b> | <b>ORDER GRANTING MOTION TO<br/>DEFINE ISSUES AND SETTING<br/>PROCEDURAL SCHEDULE<br/><br/>HP14-001</b> |
|---|---|

On September 15, 2014, TransCanada Keystone Pipeline, LP (Keystone) filed with the South Dakota Public Utilities Commission (Commission) a Petition for Order Accepting Certification under SDCL §49-41B-27 (Petition) seeking an order accepting certification of the energy facility permit issued in Docket HP09-001 for construction of the Keystone XL Pipeline. On June 29, 2010, the Commission issued an Amended Final Decision and Order; Notice of Entry granting a permit to Keystone for construction of the Keystone XL Pipeline. Because it has been more than four years since the permit was issued and construction has not commenced, Keystone now seeks an order accepting certification pursuant to SDCL 49-41B-27. On October 1, 2014, the Commission issued an Order Assessing Filing Fee assessing a fee to cover actual expenses up to the remaining balance of the statutory maximum fee of \$660,700. On November 4, 2014, the Commission issued a Prehearing Scheduling Conference Order and an Order Granting Intervention and Party Status granting intervention to forty-two intervenors. On November 5, 2014, the Commission issued an Order for and Notice of Motion Hearing setting Keystone's Motion to Define the Scope of Discovery under SDCL § 49-41B-27 (Motion) for hearing on November 25, 2014. On November 14, 2014, the Commission issued an Order Changing Motion Hearing Date and Order for and Notice of Scheduling Hearing setting the Motion for hearing on December 9, 2014, and giving notice that on December 9, 2014, the Commission would hear from the parties regarding scheduling and take action on a procedural schedule for the docket.

The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-41B, specifically 49-41B-27, and ARSD Chapter 20:10:22.

At its regularly scheduled meeting on December 9, 2014, the Commission considered the Motion and the procedural schedule that should be adopted for this proceeding. After hearing from the parties, a majority of the Commission, with Commissioner Fiegen dissenting, voted: to grant the Motion to the extent that discovery be limited to only discovery regarding any matter, not privileged, which is relevant to 1) whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice Of Entry issued on June 29, 2010, in Docket HP09-001 (Decision), or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C; that it shall not be grounds for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; and that parties shall identify by number and letter the specific Condition or Finding of Fact addressed. The Commission then unanimously voted to adopt the following schedule of proceedings in this docket:

|  |                   |
|--|-------------------|
| Yankton Sioux Tribe's Motion to Dismiss heard<br>at Commission's regular meeting | January 6, 2015   |
| Initial round of discovery served  | January 6, 2015   |
| Initial discovery responses served   | February 6, 2015  |
| Final discovery served   | February 20, 2015 |
| Responses to final discovery served  | March 10, 2015    |
| Pre-filed direct testimony filed and served                                      | April 2, 2015     |
| Pre-filed rebuttal testimony filed and served                                    | April 23, 2015    |
| Evidentiary hearing  | May 5-8, 2015     |

It is therefore

ORDERED, that discovery shall be limited to only discovery regarding any matter, not privileged, which is relevant to 1) whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice Of Entry issued on June 29, 2010, in Docket HP09-001 , or 2) the proposed changes to the Findings of Fact in the Decision identified in Keystone's Tracking Table of Changes attached to the Petition as Appendix C, that it shall not be grounds for objection that the Information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence, and that parties shall identify by number and letter the specific Condition or Finding of Fact addressed. It is further

ORDERED, that the parties shall follow the procedural schedule as set forth above.

Dated at Pierre, South Dakota, this 17th day of December, 2014.

|  |                    |
|--|--------------------|
| <b>CERTIFICATE OF SERVICE</b>  |                    |
| The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically. |                    |
| By:  | <u>[Signature]</u> |
| Date:  | <u>12-17-14</u>    |
| (OFFICIAL SEAL)  |                    |

BY ORDER OF THE COMMISSION:

[Signature]  
GARY HANSON, Chairman

[Signature]  
CHRIS NELSON, Commissioner

[Signature]  
KRISTIE FIEGEN, Commissioner,  
dissenting in part

# **EXHIBIT B**

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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|                                |   |                         |
|--------------------------------|---|-------------------------|
| IN THE MATTER OF THE           | : | HP 14-001               |
| APPLICATION BY TRANSCANADA     | : |                         |
| KEYSTONE PIPELINE, LP FOR A    | : | KEYSTONE'S              |
| PERMIT UNDER THE SOUTH DAKOTA  | : | INTERROGATORIES AND     |
| ENERGY CONVERSION AND          | : | REQUESTS FOR PRODUCTION |
| TRANSMISSION FACILITIES ACT TO | : | OF DOCUMENTS            |
| CONSTRUCT THE KEYSTONE XL      | : |                         |
| PROJECT                        | : |                         |
|                                | : |                         |

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TO: YANKTON SIOUX TRIBE

You are requested to answer the following written Interrogatories and Requests for Production of Documents, which are to be answered by you within the time and in the manner required by SDCL 15-6-33 and 15-6-34.

These Interrogatories and Requests for Production are directed to you, but are likewise intended to obtain any pertinent information and documents possessed by your attorneys of record and any other agents or representatives you may have in this matter. These Interrogatories and Requests for Production are to be deemed continuing and if you or your attorneys and agents obtain any information with respect to them after making the original answers, it is requested that supplemental answers be made.

## INTERROGATORIES

1. State the name, current address, and telephone number of the person answering these interrogatories.
2. State the name, current address, and telephone number of any person, other than your legal counsel, who you talked with about answering these interrogatories, who assisted you in answering these interrogatories, or who provided information that you relied on in answering these interrogatories.
3. State the name, current address, and telephone number of each fact witness you intend to call to offer testimony at the evidentiary hearing in this case set for May 2015.
4. State the name, current address, and telephone number of each witness whom you intend to call at the evidentiary hearing as an expert witness under SDCL Ch. 19-15, and for each expert, state:
  - a. the subject matter on which the expert is expected to testify;
  - b. the substance of each opinion to which the expert is expected to testify;
  - c. the facts supporting each opinion to which the expert is expected to testify;

d. the expert's profession or occupation, educational background, specialized training, and employment history relevant to the expert's proposed testimony;

e. the expert's previous publications within the preceding 10 years; and

f. all other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

5. Identify by number each condition in Exhibit A to the Amended Final Decision and Order dated June 29, 2010, entered in HP09-001, that you contend Applicant TransCanada Keystone Pipeline, LP, cannot now or in the future meet, and for each condition that you identify, state:

a. the facts on which your contention is based; and

b. the name, current address, and telephone number of each witness who will testify that Applicant is unable to meet the condition.

6. Identify by number each finding of fact in the Amended Final Decision and Order dated June 29, 2010, entered in HP09-001, that you contend is no longer accurate because of a change in facts or circumstances related to the proposed construction and operation of the Keystone XL Pipeline in South Dakota, and for each finding that you identify, state:

a. the facts on which your contention is based; and

b. the name, current address, and telephone number of each witness who will testify that the finding of fact is no longer accurate.

7. In addition to the facts identified in your responses to interrogatory numbers 5 and 6, identify any other reasons that you contend Applicant cannot continue to meet the conditions on which the Permit granted, and for each reason that you identify, state:

a. the condition in the Amended Final Decision and Order dated June 29, 2010 entered in HP09-001, identified by number;

b. the facts on which your contention is based; and

c. the name, current address, and telephone number of each witness who will testify in support of your contention.

8. In addition to the facts identified in your responses to the preceding interrogatories, identify any other reason why the Public Utilities Commission should not accept Applicant's certification filed September 15, 2014 in HP14-001, and for each reason that you identify, state:

a. the facts on which your contention is based; and

b. the name, current address, and telephone number of each witness who will testify in support of your contention.

## **REQUESTS FOR PRODUCTION OF DOCUMENTS**

1. All documents that you intend to offer as exhibits at the evidentiary hearing in this matter.
2. All documents on which you rely in support of your answer to Interrogatory No. 5.
3. All documents on which you rely in support of your answer to Interrogatory No. 6.
4. All documents on which you rely in support of your answer to Interrogatory No. 7.
5. All documents on which you rely in support of your answer to Interrogatory No. 8.
6. All documents relied on by any expert whose testimony you intend to offer at the evidentiary hearing in this matter.
7. All documents that you have sent to or received from any expert whose testimony you intend to offer at the evidentiary hearing in this matter.
8. A current resume for each expert whose testimony you intend to offer at the evidentiary hearing in this matter.



Dated this 18<sup>th</sup> day of December, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

William Taylor  
James E. Moore  
PO Box 5027  
300 South Phillips Avenue, Suite 300  
Sioux Falls, SD 57117-5027  
Phone (605) 336-3890  
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[bill.taylor@woodsfuller.com](mailto:bill.taylor@woodsfuller.com)  
Attorneys for Applicant TransCanada

#### CERTIFICATE OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of December, 2014, I sent by e-mail transmission, a true and correct copy of Keystone's Interrogatories and Requests for Production of Documents, to the following:

The Yankton Sioux Tribe  
Robert Flying Hawk, Chairman  
PO Box 1153  
Wagner, SD 57380  
[robertflyinghawk@gmail.com](mailto:robertflyinghawk@gmail.com)

Thomasina Real Bird  
Attorney for Yankton Sioux Tribe  
[trealbird@ndnlaw.com](mailto:trealbird@ndnlaw.com)

/s/ James E. Moore

One of the attorneys for TransCanada

December 18, 2014

James E. Moore  
[James.Moore@woodsfuller.com](mailto:James.Moore@woodsfuller.com)  
Extension 613

**Via e-mail or U.S. mail**

John H. Harter  
Rosebud Sioux Tribe – Tribal  
Utility Commission  
Elizabeth Lone Eagle  
Paul F. Seamans  
Viola Waln  
Wrexie Lainson Bardaglio  
South Dakota Wildlife  
Federation  
Cheyenne River Sioux Tribe  
Jerry D. Jones  
Cody Jones  
Debbie J. Trapp  
Gena M. Parkhurst  
Sierra Club

Byron T. Steskal  
Arthur R. Tanderup  
Lewis GrassRope  
Carolyn P. Smith  
Robert G. Allpress  
Jeff Jensen  
Dakota Rural Action  
Chastity Jewett  
Indigenous Environmental Network  
Dallas Goldtooth  
RoxAnn Boettcher  
Bonny Kilmurry  
Ronald Fees  
Intertribal Council on Utility Policy  
Standing Rock Sioux Indian Tribe

Cindy Myers, R.N.  
Bold Nebraska  
Diana L. Steskal  
Cheryl Frisch  
Terry Frisch  
Yankton Sioux Tribe  
Amy Schaffer  
Louis T. Genung  
Nancy Hilding  
Gary F. Dorr  
Bruce Boettcher  
Rosebud Sioux Tribe  
Joye Braun  
350.org  
PUC staff

**Re:** In the Matter of the Application by TransCanada Keystone Pipeline, LP for a Permit Under the South Dakota Energy Conversion and Transmission Facilities Act to Construct the Keystone XL Project- HP 14-001

Ladies and Gentlemen:

Enclosed are Keystone's Interrogatories and Requests for Production of Documents addressed to each of you. This is intended as service by e-mail or U.S. mail. The same set of discovery is being served on each of you.

**WOODS, FULLER, SHULTZ & SMITH P.C.**

Ladies and Gentlemen  
December 18, 2014  
Page 2

Please note that under SDCL §§ 15-6-33(a) and 15-6-34(b), you have 30 days from the date of service to answer the discovery.

Very truly yours,

WOODS, FULLER, SHULTZ & SMITH P.C.



James E. Moore

Enclosure

cc: Patricia Van Gerpen (w/o enc)

# **EXHIBIT C**

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**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 PIPELINE

**YANKTON SIOUX TRIBE'S ANSWERS  
AND OBJECTIONS TO KEYSTONE'S  
FIRST INTERROGATORIES AND  
REQUESTS FOR PRODUCTION OF  
DOCUMENTS**

**HP14-001**

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**TO: TransCanada Keystone XL Pipeline, LP**

Pursuant to SDCL §§ 1-26-19, 15-6-33, and 15-6-34, and ARSD 20:10:01:1.02, the Yankton Sioux Tribe (hereinafter "Yankton") hereby submits its responses and objections to Keystone's Interrogatories and Requests for Production of Documents dated December 18, 2014. The responses that follow shall be supplemented if and when supplementation is required by SDCL § 15-6-26(e) and only as required by that statute.

**INTERROGATORIES**

1. State the name, current address, and telephone number of the person answering these interrogatories.

**OBJECTION:** Yankton objects to this interrogatory on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the Public Utilities Commission (hereinafter "PUC") on December 17, 2014. This interrogatory fails to "identify by number and letter the specific Condition or Finding of Fact addressed" as required by that Order. The entirety of this interrogatory is therefore objectionable, and Yankton is under no duty to answer pursuant to SDCL 15-6-33(a).

Without waiving the objection above, as a matter of standard procedure and protocol and because the nature of this interrogatory is not substantive relative to the contested issues in this case, Yankton hereby provides notice that these interrogatories have been answered by Thomasina Real Bird, Esq., and Jennifer S. Baker, Esq., counsel for the Yankton Sioux Tribe, 1900 Plaza Drive, Louisville, CO, 80027, 303-673-9600.

2. State the name, current address, and telephone number of any person, other than your legal counsel, who you talked with about answering these interrogatories, who assisted you in answering

these interrogatories, or who provided information that you relied on in answering these interrogatories.

**OBJECTION:** Yankton objects to this interrogatory on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This interrogatory fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order.

Without waiving the objection above, as a matter of standard procedure and protocol, and because the nature of this interrogatory is not substantive relative to the contested issues in this case, Yankton hereby provides notice that no person other than Yankton’s legal counsel assisted or provided information in the preparation of these answers and objections.

3. State the name, current address, and telephone number of each fact witness you intend to call to offer testimony at the evidentiary hearing in this case set for May 2015.

**OBJECTION:** Yankton objects to this interrogatory on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This interrogatory fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order. The entirety of this interrogatory is therefore objectionable, and Yankton is under no duty to answer pursuant to SDCL 15-6-33(a).

Yankton further objects to this interrogatory on the grounds that it is vague and overly broad, as the only parameter setting the scope of the request is Yankton’s intentions. At this early stage in the proceedings before discovery has been completed, it would be frivolous and unduly burdensome to require a party to speculate as to whom it will call to testify as a fact witness at the evidentiary hearing.

4. State the name, current address, and telephone number of each witness whom you intend to call at the evidentiary hearing as an expert witness under SDCL Ch. 19-15, and for each expert, state:

- a. the subject matter on which the expert is expected to testify;
- b. the substance of each opinion to which the expert is expected to testify;
- c. the facts supporting each opinion to which the expert is expected to testify;
- d. the expert’s profession or occupation, educational background, specialized training, and employment history relevant to the expert’s proposed testimony;

e. the expert's previous publications within the preceding 10 years; and

f. all other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

**OBJECTION:** Yankton objects to this interrogatory on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This interrogatory fails to "identify by number and letter the specific Condition or Finding of Fact addressed" as required by that Order. The entirety of this interrogatory is therefore objectionable, and Yankton is under no duty to answer pursuant to SDCL 15-6-33(a).

Yankton further objects to this interrogatory on the grounds that it is vague and overly broad, as the only parameter setting the scope of the request is Yankton's intentions. At this early stage in the proceedings before discovery has been completed, it would be frivolous and unduly burdensome to require a party to speculate as to whom it will call to testify as an expert witness at the evidentiary hearing and to acquire and produce the information requested in this interrogatory.

5. Identify by number each condition in Exhibit A to the Amended Final Decision and Order dated June 29, 2010, entered in HP09-001, that you contend Applicant TransCanada Keystone Pipeline, LP, cannot now or in the future meet, and for each condition that you identify, state:

a. the facts on which your contention is based; and

b. the name, current address, and telephone number of each witness who will testify that Applicant is unable to meet the condition.

**OBJECTION:** Yankton objects to this interrogatory on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This interrogatory fails to "identify by number and letter the specific Condition or Finding of Fact addressed" as required by that Order. The entirety of this interrogatory is therefore objectionable, and Yankton is under no duty to answer pursuant to SDCL 15-6-33(a).

Yankton further objects to this interrogatory on the grounds that it seeks "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation," which are protected under SDCL 15-6-26(b)(3). Moreover, you have failed to show substantial need of the requested information and that you are unable to obtain it by other means without undue hardship as required by SDCL 15-6-26(b)(3).

In addition, it would be unduly burdensome for Yankton to compile a list of each and every fact on which each and every contention is based.

6. Identify by number each finding of fact in the Amended Final Decision and Order dated June 29, 2010, entered in HP09-001, that you contend is no longer accurate because of a change in facts or circumstances related to the proposed construction and operation of the Keystone XL Pipeline in South Dakota, and for each finding that you identify, state:

a. the facts on which your contention is based; and

b. the name, current address, and telephone number of each witness who will testify that the finding of fact is no longer accurate.

**OBJECTION:** Yankton objects to this interrogatory on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This interrogatory fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order. The entirety of this interrogatory is therefore objectionable, and Yankton is under no duty to answer pursuant to SDCL 15-6-33(a).

Yankton further objects to this interrogatory on the grounds that it seeks “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,” which are protected under SDCL 15-6-26(b)(3). Moreover, you have failed to show substantial need of the requested information and that you are unable to obtain it by other means without undue hardship as required by SDCL 15-6-26(b)(3).

In addition, it would be unduly burdensome for Yankton to compile a list of each and every fact on which each and every contention is based.

7. In addition to the facts identified in your responses to interrogatory numbers 5 and 6, identify any other reasons that you contend Applicant cannot continue to meet the conditions on which the Permit granted, and for each reason that you identify, state:

a. the condition in the Amended Final Decision and Order dated June 29, 2010 entered in HP09-001, identified by number;

b. the facts on which your contention is based; and

c. the name, current address, and telephone number of each witness who will testify in support of your contention.

**OBJECTION:** Yankton objects to this interrogatory on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This interrogatory fails to “identify by number and letter the specific



Condition or Finding of Fact addressed” as required by that Order. The entirety of this interrogatory is therefore objectionable, and Yankton is under no duty to answer pursuant to SDCL 15-6-33(a).

Yankton further objects to this interrogatory on the grounds that it seeks “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,” which are protected under SDCL 15-6-26(b)(3). Moreover, you have failed to show substantial need of the requested information and that you are unable to obtain it by other means without undue hardship as required by SDCL 15-6-26(b)(3).

In addition, this request for “*any other reasons*” is vague and overly broad and it reaches far beyond the scope of discovery as set forth in the Order dated December 17, 2014. Furthermore, it would be unduly burdensome for Yankton to compile a list of each and every fact on which each and every contention is based.

8. In addition to the facts identified in your responses to the preceding interrogatories, identify any other reason why the Public Utilities Commission should not accept Applicant’s certification filed September 15, 2014 in HP14-001, and for each reason that you identify, state:

a. the facts on which your contention is based; and

b. the name, current address, and telephone number of each witness who will testify in support of your contention.

**OBJECTION:** Yankton objects to this interrogatory on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This interrogatory fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order. The entirety of this interrogatory is therefore objectionable, and Yankton is under no duty to answer pursuant to SDCL 15-6-33(a).

Yankton further objects to this interrogatory on the grounds that it seeks “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,” which are protected under SDCL 15-6-26(b)(3). Moreover, you have failed to show substantial need of the requested information and that you are unable to obtain it by other means without undue hardship as required by SDCL 15-6-26(b)(3).

In addition, this request for “*any other reasons*” is vague and overly broad and it reaches far beyond the scope of discovery as set forth in the Order dated December 17, 2014. Furthermore, it would be unduly burdensome for Yankton to compile a list of each and every fact on which each and every contention is based.

## REQUESTS FOR PRODUCTION OF DOCUMENTS

1. All documents that you intend to offer as exhibits at the evidentiary hearing in this matter.

**OBJECTION:** Pursuant to SDCL 15-6-34(b), Yankton objects to this request on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This request fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order.

Yankton further objects to this request to the extent that it would produce “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,” which are protected under SDCL 15-6-26(b)(3). Moreover, all documents sought by this request constitute trial preparation materials and you have failed to show substantial need of the requested documents and that you are unable to obtain them by other means without undue hardship as required by SDCL 15-6-26(b)(3).

In addition, Yankton objects to this request on the grounds that it is vague and overly broad, as the only parameter setting the scope of the request is Yankton’s intentions. Yankton has not yet received Keystone’s responses to Yankton’s first discovery requests, and the second set of discovery requests have not even been submitted yet. As we are still in the early discovery stages of this matter, Yankton cannot possibly know what it might ultimately decide to offer as exhibits once we reach the hearing stage of this matter, and it would be frivolous and unduly burdensome to require a party to speculate about future exhibits before the party has had an opportunity to review the information and materials obtained through discovery.

2. All documents on which you rely in support of your answer to Interrogatory No. 5.

**OBJECTION:** Pursuant to SDCL 15-6-34(b), Yankton objects to this request on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This request fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order.

3. All documents on which you rely in support of your answer to Interrogatory No. 6.

**OBJECTION:** Pursuant to SDCL 15-6-34(b), Yankton objects to this request on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule

issued by the PUC on December 17, 2014. This request fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order.

4. All documents on which you rely in support of your answer to Interrogatory No. 7.

**OBJECTION:** Pursuant to SDCL 15-6-34(b), Yankton objects to this request on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This request fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order.

5. All documents on which you rely in support of your answer to Interrogatory No. 8.

**OBJECTION:** Pursuant to SDCL 15-6-34(b), Yankton objects to this request on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This request fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order.

6. All documents relied on by any expert whose testimony you intend to offer at the evidentiary hearing in this matter.

**OBJECTION:** Pursuant to SDCL 15-6-34(b), Yankton objects to this request on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This request fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order.

Yankton further objects to this request to the extent that it would produce “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,” which are protected under SDCL 15-6-26(b)(3). Moreover, all documents sought by this request constitute trial preparation materials and you have failed to show substantial need of the requested documents and that you are unable to obtain them by other means without undue hardship as required by SDCL 15-6-26(b)(3).

In addition, Yankton objects to this request on the grounds that it is vague and overly broad, as the only parameter setting the scope of the request is Yankton’s intentions. Yankton has not yet received Keystone’s responses to Yankton’s first discovery requests, and the second set of discovery requests have not even been submitted yet. As we are still in the early discovery stages of this matter, Yankton cannot possibly know what documents might ultimately be relied on by experts once we reach the hearing stage of this matter, and it would be frivolous and unduly

burdensome to require a party to speculate about such documents before the party has had an opportunity to review the information and materials obtained through discovery.

7. All documents that you have sent to or received from any expert whose testimony you intend to offer at the evidentiary hearing in this matter.

**OBJECTION:** Pursuant to SDCL 15-6-34(b), Yankton objects to this request on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This request fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order.

Yankton further objects to this request to the extent that it would produce “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation,” which are protected under SDCL 15-6-26(b)(3). Moreover, all documents sought by this request constitute trial preparation materials and you have failed to show substantial need of the requested documents and that you are unable to obtain them by other means without undue hardship as required by SDCL 15-6-26(b)(3).

In addition, Yankton objects to this request on the grounds that it is vague and overly broad, as the only parameter setting the scope of the request is Yankton’s intentions. At this early stage in the proceedings before discovery has been completed, it would be frivolous and unduly burdensome to require a party to speculate as to whom it will call to testify as an expert at the evidentiary hearing.

8. A current resume for each expert whose testimony you intend to offer at the evidentiary hearing in this matter.

**OBJECTION:** Pursuant to SDCL 15-6-34(b), Yankton objects to this request on the grounds that it fails to comply with the Order Granting Motion to Define Issues and Setting Procedural Schedule issued by the PUC on December 17, 2014. This request fails to “identify by number and letter the specific Condition or Finding of Fact addressed” as required by that Order.

In addition, Yankton objects to this request on the grounds that it is vague and overly broad, as the only parameter setting the scope of the request is Yankton’s intentions. At this early stage in the proceedings before discovery has been completed, it would be frivolous and unduly burdensome to require a party to speculate as to whom it will call to testify as an expert at the evidentiary hearing.

Dated this 6th day of February 2015.

*Thiri Real Bird*

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**CERTIFICATE OF SERVICE**

I certify that on this 6<sup>th</sup> day of February, 2015 I sent by email a true and correct copy of **YANKTON SIOUX TRIBE'S ANSWERS AND OBJECTIONS TO KEYSTONE'S FIRST INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS** to the following:

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*Patricia Krakowski*

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**CERTIFICATE OF SERVICE**

I certify that on this 8th day of April 2015, a true and correct copy of the **YANKTON SIOUX TRIBE’S BRIEF IN RESPONSE TO KEYSTONE’S AMENDED MOTION TO PRECLUDE CERTAIN INTERVENORS FROM OFFERING EVIDENCE OR WITNESSES AT HEARING AND TO COMPEL DISCOVERY** on behalf of Yankton Sioux Tribe was filed on the Public Utilities Commission of the State of South Dakota e-filing website. And also on this day, a true and accurate copy was sent via email to the following:

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*/s/Jessica Wagner*  
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