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South Dakota

PUBLIC UTILITIES COMMISSION

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April 9, 2015

Patricia Van Gerpen, Executive Director
South Dakota Public Utilities Commission
500 East Capitol Ave.
Pierre, SD 57501

RE: HP14-001

Ms. Van Gerpen,

Attached for filing, please find Staff's Response to Dakota Rural Action's Motion to Compel Discovery from Staff, Affidavit of Kristen Edwards, and Staff's Exhibit 1. In addition, Staff is including as an attachment to this filing letter, for the convenience of all parties and the Commission, a copy of the case upon which Staff relies in its response.

By copy of this correspondence, Staff is serving the same on all persons listed in the service list on today's date. Please do not hesitate to contact me should you have any questions or concerns.

Sincerely,

Kristen N. Edwards
Staff Attorney

Enc.

Cc: All Parties

003807

Westlaw

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436 N.W.2d 17
(Cite as: 436 N.W.2d 17)

H

Supreme Court of South Dakota.
Carol A. KAARUP and Darrell R. Kaarup, Plaintiff
and Appellant,
v.
ST. PAUL FIRE AND MARINE INSURANCE
COMPANY, Home Federal Savings and Loan, a
corporation, and Curt Hepner, individually, Defend-
ants and Appellees.

No. 15948.

Considered on Briefs Oct. 14, 1988.

Decided Feb. 8, 1989.

Mortgagor sued mortgagee, who had been assigned the note and mortgage, in connection with mortgagee's attempted foreclosure of the mortgage. Mortgagors' motion to compel discovery was denied by the Circuit Court, Second Judicial Circuit, Minnehaha County, William H. Heuermann, J., and mortgagors appealed. The Supreme Court, Amundson, Circuit Judge, held that: (1) the court erred by denying mortgagors' discovery request on the basis that the material sought by them could not legally become a part of their action against mortgagee; (2) mortgagors failed to show that information sought in an insurance claim file from a previous malpractice action was relevant to the subject matter of the present action or would lead to discovery of admissible evidence; and (3) mortgagee waived the attorney/client privilege as it related to the advice given by its attorney to foreclose on the mortgage.

Affirmed in part, and reversed and remanded in part.

[1] Pretrial Procedure 307A ↪ 27.1

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(A) Discovery in General

307Ak27 Scope of Discovery

307Ak27.1 k. In general. Most Cited

Cases

(Formerly 307Ak27)

Scope of pretrial discovery is, for most part, broadly construed. SDCL 15-6-26(b),(b)(1).

[2] Pretrial Procedure 307A ↪ 27.1

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(A) Discovery in General

307Ak27 Scope of Discovery

307Ak27.1 k. In general. Most Cited

Cases

(Formerly 307Ak27)

Discovery could not be denied on ground that materials sought could not legally become part of action. SDCL 15-6-26(b),(b)(1).

[3] Pretrial Procedure 307A ↪ 381

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(E) Production of Documents and
Things and Entry on Land

307AII(E)3 Particular Documents or Things

307Ak381 k. Insurance policies and
related documents. Most Cited Cases

West Headnotes

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Information in insurance claim file from earlier malpractice action arising out of attorney's advice concerning mortgage, which resulted in settlement pursuant to which mortgage was assigned to attorney's liability carrier, was not relevant to subject matter of mortgagor's subsequent action against liability carrier based on carrier's attempts to enforce mortgage, and moreover would not lead to discovery of admissible evidence; accordingly, discovery was properly denied in this regard. SDCL 15-6-26(b),(b)(1).

[4] Pretrial Procedure 307A ⚡337

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(E) Production of Documents and Things and Entry on Land

307AII(E)1 In General

307Ak337 k. Grounds for refusal in general. Most Cited Cases

Defendant, which had produced various documents in response to plaintiff's discovery request in defendant's earlier action against plaintiffs, was not required to once again produce same information in response to plaintiff's discovery request in plaintiff's subsequent action, especially where same attorney had represented plaintiffs in both actions. SDCL 15-6-26(b)(1).

[5] Privileged Communications and Confidentiality 311H ⚡168

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk168 k. Waiver of privilege. Most Cited Cases

(Formerly 410k219(3))

Notwithstanding attorney/client privilege, if party asserts reliance upon advice of counsel as essential element of his defense, that party cannot refuse to

disclose such advice. SDCL 19-13-3.

[6] Privileged Communications and Confidentiality 311H ⚡168

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk168 k. Waiver of privilege. Most Cited Cases

(Formerly 410k219(3))

Defense of advice of counsel does not waive attorney/client privilege with respect to all communication between client and counsel concerning transaction for which counsel's advice was sought; privilege is waived only to extent necessary to reveal advice given by attorney that is placed in issue by defense of advice of counsel. SDCL 19-13-3.

[7] Privileged Communications and Confidentiality 311H ⚡168

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk168 k. Waiver of privilege. Most Cited Cases

(Formerly 307Ak34)

For purposes of mortgagor's motion to compel discovery in action against mortgagee arising out of mortgagee's attempts to foreclose on mortgage, in which action mortgagee raised defense of good faith reliance on advice of counsel and in which mortgagor sought discovery of information pertaining to advice of counsel, mortgagor's attorney/client privilege was waived as to advice given by its attorney to foreclose on mortgage, but not as to advice given by its attorney to seek collection on promissory note in case involving that action. SDCL 19-13-3.

[8] Pretrial Procedure 307A ⚡35

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307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak35 k. Work-product privilege. Most
Cited Cases

Attorney's advice regarding foreclosure of mortgage was "work product" because his advice was given in prospect of possible litigation to foreclose mortgage. SDCL 15-6-26(b)(3).

[9] Pretrial Procedure 307A 35

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak35 k. Work-product privilege. Most
Cited Cases
(Formerly 307Ak34)

**Privileged Communications and Confidentiality
311H 103**

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk103 k. Distinguished from work product. Most Cited Cases
(Formerly 307Ak34)

Protection afforded by work product doctrine is broader than that created by attorney/client privilege. SDCL 15-6-26(b)(3), 19-13-3.

***18** Michael J. McGill, Beresford, for appellant.

Edwin E. Evans of Davenport, Evans, Hurwitz & Smith, Sioux Falls, for appellee, St. Paul Fire and Marine Ins. Co.

G.J. Danforth, Jr. of Danforth, Danforth & Johnson, Sioux Falls, for appellee, Home Federal Sav. and Loan

Ass'n.

Blaine O. Rudolph, Canton, for appellee, Curt Hepner.

AMUNDSON, Circuit Judge.

This appeal stems from an intermediate order that denied Carol and Darrell Kaarup's motion to compel discovery. We affirm in part, reverse in part and remand.

In 1979 Carol Kaarup purchased a home that she and her husband Darrell occupied at all material times. On July 24, 1980, First Federal Savings and Loan Association of Canton (First Federal) loaned Kaarups \$50,000. Both Carol and Darrell signed the promissory note, and the note was secured by a mortgage on the home. Prior to making the loan, First Federal consulted with an attorney regarding the validity of taking a mortgage without Darrell's signature. The attorney advised First Federal that such a mortgage would be valid, and provided First Federal with a title opinion to that effect. First Federal relied upon the attorney's advice, issued the loan, and recorded the mortgage signed only by Carol Kaarup.

Kaarups defaulted on the note and, in April 1983, filed a Chapter 11 bankruptcy. In July 1983 First Federal brought a malpractice action against the attorney and his law firm who provided the title opinion. St. Paul Fire and Marine, (St. Paul) the attorney's liability carrier, settled with First Federal, and the note and mortgage were assigned to St. Paul.

In June 1984 First Federal and St. Paul filed a mortgage foreclosure action in Lincoln County. On January 9, 1986, Kaarups obtained summary judgment in that action. Following the trial court's decision, the complaint was amended to seek recovery on the promissory note only.

The trial court's decision in the mortgage foreclosure action was appealed to this court. On March 9,

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1988, we affirmed the invalidity of the mortgage in *St. Paul Fire and Marine Ins. v. Kaarup*, 420 N.W.2d 364 (S.D.1988). During the pendency of that appeal, Darrell and Carol Kaarup filed a lawsuit in Minnehaha County alleging various causes of action against St. Paul and Home Federal, the successor in interest to First Federal, because of their attempts to enforce the mortgage.

In their suit against St. Paul and Home Federal, Kaarups requested the production of various documents, including:

5. All correspondence of St. Paul to and from its attorney and law firm, Robert E. Hayes and Davenport, Evans, Hurwitz & Smith relating to the incident alleged in or on the subject matter referred to in St. Paul's complaint, the assignment of the mortgage, the defense of the malpractice claim ..., the modification of the automatic stay, and the foreclosure of the invalid mortgage.

St. Paul responded:

St. Paul objects to production of any communication between itself and its attorney on the grounds of attorney/client privilege. SDCL 19-13-3.

Kaarups also requested production of copies of all legal bills that First Federal and St. Paul paid due to the motion to *19 modify the automatic stay of bankruptcy and to foreclose the mortgage. In addition, Kaarups requested all files relating to the incidents alleged in their complaint. When St. Paul refused to produce some information, Kaarups brought a motion to compel discovery of all relevant documents and files relating to the incidents, acts and occurrences alleged in their complaint. Kaarups specifically alleged that St. Paul failed to produce the insurance claim file arising from the malpractice lawsuit that First Federal filed against the attorney who provided the title opinion. The trial court denied Kaarups' motion. In a subsequent motion for reconsideration, the

trial court again denied Kaarups' motion for discovery. This appeal followed.

After Kaarups requested production of documents in *Kaarup v. St. Paul Fire and Marine*, they served a request for production of documents in First Federal and St. Paul's lawsuit to recover on the promissory note in Lincoln County. This request for production of documents mirrored in many respects the request served by Kaarups in their lawsuit against St. Paul and First Federal. Kaarups sought production, among other things, of all legal bills from Davenport, Evans, Hurwitz & Smith to St. Paul since October 1, 1982, and all correspondence between First Federal and St. Paul relating to the legal malpractice action, the assignment of the note and mortgage to St. Paul, and all other acts and occurrences alleged to and referred in their complaint.

In response to Kaarups' request for production of documents in the Lincoln County action, St. Paul produced for inspection and copying: (1) the legal bills paid by St. Paul in connection with the malpractice and mortgage foreclosure actions; (2) all correspondence between St. Paul and First Federal; (3) St. Paul's claim file from the legal malpractice action; (4) all inter-office memorandums relating to the malpractice and foreclosure actions; and (5) all correspondence between Davenport, Evans, Hurwitz & Smith and St. Paul and First Federal regarding the validity of the mortgage.

St. Paul claims it has produced all of the information Kaarups requested except for the correspondence between attorney Robert Hayes and St. Paul. According to St. Paul, this correspondence is barred by the attorney/client privilege and the work product doctrine. Kaarups claim that St. Paul has failed to produce other information in its request for production of documents and that the information received in the Lincoln County action is not admissible in the Minnehaha County action.

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For purposes of this appeal, the issues before this court are:

(1) Did the trial court properly deny Kaarup's motion to compel discovery?

(2) Is discovery of the correspondence between attorney Hayes and St. Paul barred by the attorney/client privilege or work product doctrine?

**DID THE TRIAL COURT PROPERLY DENY
KAARUPS' MOTION TO COMPEL DISCOVERY?**

[1] The scope of pretrial discovery is, for the most part, broadly construed. *Bean v. Best*, 76 S.D. 462, 80 N.W.2d 565 (1957). SDCL 15-6-26(b) provides, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...." A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial. 8 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2001 (1970).

We previously concurred with the United States Supreme Court's construction of the discovery rules set forth in the seminal case of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). *State By and Through Dept. of Transp. v. Grudnik* 90 S.D. 571, 243 N.W.2d 796 (1976). The Supreme Court stated in *Hickman*, *supra*:

... the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the *20 facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever

facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries.

329 U.S. at 507, 67 S.Ct. at 392, 91 L.Ed. at 460.

[2] Our position on the scope of discovery has not changed. All relevant matters are discoverable unless privileged. In this regard, the trial court erred by denying Kaarups' discovery request on the basis that the materials sought by them could not legally become a part of the Kaarups' action against St. Paul and Home Federal.

The proper standard for ruling on a discovery motion is whether the information sought is "relevant to the subject matter involved in the pending action...." SDCL 15-6-26(b)(1). This phraseology implies a broad construction of "relevancy" at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial. 8 C. Wright and A. Miller, *supra*, § 2008.

[3][4] Apparently some of the information Kaarups requested in their suit against St. Paul and Home Federal was produced by St. Paul in the Lincoln County action. We find it unnecessary for St. Paul to once again produce this same information in response to Kaarups' discovery request in *Kaarup v. St. Paul Fire and Marine and Home Federal*. To hold otherwise would result in the unnecessary duplication of discovery, especially when the same attorney has represented Kaarups in both actions. We also find that Kaarups have failed to show the information sought in the insurance claim file from the malpractice action is relevant to the subject matter of this action or will lead to the discovery of admissible evidence. We affirm the

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trial court's denial of discovery in this regard.

IS DISCOVERY OF CORRESPONDENCE BETWEEN ATTORNEY AND CLIENT BARRED BY THE ATTORNEY CLIENT PRIVILEGE OR WORK PRODUCT DOCTRINE?

Kaarups alleged various causes of action against St. Paul and Home Federal because of their attempts to foreclose on the mortgage. In response, St. Paul raised as one of its affirmative defenses that it acted in good faith and upon the advice of counsel. Kaarups attempted to determine the nature of counsel's advice by requesting copies of correspondence between the attorney and St. Paul and Home Federal. St. Paul refused to produce the correspondence, claiming it was protected by both the work product and attorney/client privileges.

ATTORNEY/CLIENT PRIVILEGE

SDCL 19-13-3 states the attorney/client privilege:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client

(1) between himself or his representative and his lawyer or his lawyer's representative[.]

To invoke the attorney/client privilege, four elements must exist: (1) a client; (2) a confidential communication; (3) the communication was made for the purpose of facilitating the rendition of professional legal services to the client; and (4) the communication was made in one of the five relationships enumerated in SDCL 19-13-3. *State v. Catch the Bear*, 352 N.W.2d 640 (S.D.1984). Each of these elements is present in the relationship between St. Paul and its attorney.

The purpose of the attorney/client privilege is well established. Protecting communications between attorney and client supposedly encourages clients to make full disclosures to their attorneys, in turn enabling*21 the attorney to act more effectively, justly and expeditiously. 2 J. Weinstein and M. Berger, *Weinstein's Evidence* § 503[02] (1988). The assumption underlying this privilege is unverifiable, but was ingrained in the common law at an early date. It is now codified by statute in South Dakota.

[5][6][7] Some well established exceptions to the attorney/client privilege exist. One of these is the advice of counsel exception. When a party asserts reliance upon the advice of counsel as an essential element of his defense, that party cannot refuse to disclose such advice. *Haymes v. Smith*, 73 F.R.D. 572 (W.D.N.Y.1976); *Garfinkle v. Arcata National Corp.*, 64 F.R.D. 688 (S.D.N.Y.1974); *Sedco International, S.A. v. Cory*, 683 F.2d 1201 (8th Cir.1982); *Bird v. Penn Central Co.*, 61 F.R.D. 43 (E.D.Pa.1973). We do not believe, as some courts have held, that the defense of advice of counsel waives the attorney/client privilege with respect to all communication between client and counsel concerning the transaction for which counsel's advice was sought. *Panter v. Marshall Field and Co.*, 80 F.R.D. 718 (N.D.Ill.1978). We find that the attorney/client privilege is waived only to the extent necessary to reveal the advice given by an attorney that is placed in issue by the defense of advice of counsel. St. Paul, therefore, waived the attorney/client privilege as it relates to the advice given by St. Paul's attorney to foreclose on the mortgage, but the waiver does not extend to the advice given by St. Paul's attorney to seek collection on the promissory note in the case involving that action.

WORK PRODUCT DOCTRINE

[8] An attorney's work product is defined by SDCL 15-6-26(b)(3) as "documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, con-

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sultant, surety, indemnitor, insurer or agent)....” The test we apply for determining whether a document or tangible thing is attorney work product is whether “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” 8 C. Wright and A. Miller, *supra*, § 2024 at 198. Attorney Hayes’ advice regarding foreclosure of the mortgage is properly denominated work product because his advice was given in prospect of possible litigation to foreclose the mortgage.

A separate and related question is whether attorney Hayes’ correspondence, containing his advice on foreclosure, is afforded protection under the work product doctrine in Kaarups’ suit against St. Paul and Home Federal. Some courts have expressed the view that to extend protection to previously prepared documents in prior litigation, the issues in the present litigation must be closely related to those of the prior case. *E.g. Midland Investment Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134 (S.D.N.Y.1973); *Gagne v. Ralph Pill Electric Supply Co.*, 114 F.R.D. 22 (D.Me.1987); 8 C. Wright and A. Miller, *supra*, § 2024 at 200–01. Other courts, however, have refused to allow the work product privilege to rest on the “technical touchstone” of relatedness. *Duplan Corp. v. Moulinage et Retorderie de Chavnoz*, 487 F.2d 480 (4th Cir.1973); *In Re Murphy*, 560 F.2d 326 (8th Cir.1977). In this case, Attorney Hayes’ correspondence to and from St. Paul and Home Federal regarding the decision to foreclose on the mortgage is closely related to the present action. We defer deciding the related/unrelated distinction until another day when that issue is properly before us.

[9] The protection afforded by the work product doctrine is broader than that created by the attorney/client privilege. *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975); *Hickman v. Taylor*, *supra*. As codified in SDCL 15–6–26(b)(3), the work-product doctrine provides two levels of

protection for an attorney’s work product. An attorney’s ordinary work product is discoverable “... only upon a showing that the party seeking discovery has substantial need of the materials in preparation of his case and that he *22 is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” SDCL 15–6–26(b)(3). An attorney’s opinions and mental impressions receive a greater level of protection. SDCL 15–6–25(b)(3) further provides, “In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”

In giving effect to the phrase “the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney....”, SDCL 15–6–26(b)(3), Federal Rule of Civil Procedure 26(b)(3) (emphasis added), courts have imposed a nearly absolute protection upon an attorney’s opinion work product. *Duplan Corp. v. Moulinage et Retorderie de Chavnoz*, 509 F.2d 730 (4th Cir.1974); *In Re Murphy*, 560 F.2d 326 (8th Cir.1977). A recognized exception to the protection afforded opinion work product is the established rule that a party cannot affirmatively assert reliance upon an attorney’s advice and then refuse to disclose such advice. *Duplan Corp. supra*, 509 F.2d at 735; 8 Wigmore, Evidence, § 2327 (McNaughten ed. 1961).

In *Handgards, Inc. v. Johnson & Johnson*, 413 F.Supp. 926 (N.D.Cal.1976), plaintiff brought an antitrust action alleging defendant had filed a series of patent infringement suits in bad faith. The court held that the principal issue in the case was the defendant’s good faith in instituting and maintaining the actions and that the defendant’s attorneys’ internal files were relevant as to their advice on the merits of the prior patent infringement litigation. *See also, Bird v. Penn Central Co.*, 61 F.R.D. 43 (E.D.Pa.1973); *Am Inter., Inc. v. Eastman-Kodak Co.*, 100 F.R.D. 255

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(N.D.Ill.1981); *Panter v. Marshall Field and Co.*, 80 F.R.D. 718 (N.D.Ill.1978); cf. *Board of Trustees v. Coulter Corp.*, 118 F.R.D. 532 (S.D.Fla.1987).

In our view, St. Paul's reliance upon the defense of advice of counsel waives the nearly absolute protection afforded an attorney's opinion work product. St. Paul's waiver of the attorney opinion work product privilege applies only to the advice given by St. Paul's attorney to foreclose on the mortgage, and does not apply to the attorney's underlying legal theories, mental impressions, conclusions or opinions in arriving at the advice given to St. Paul and Home Federal. The waiver, furthermore, does not extend to any other attorney opinion work product. Even though St. Paul has waived the protection afforded work product as it relates to the advice given by St. Paul's attorney regarding the mortgage foreclosure, the substantial need test still applies. We find that the Kaarups have shown a substantial need to discover the advice of St. Paul's attorney and an inability to obtain the substantial equivalent of the materials by other means without undue hardship. We remand for an in camera review of the information not disclosed for the redacting from these documents of the mental impressions, conclusions, opinions, or legal theories of St. Paul's attorney by the trial court. This will allow the trial court to determine what information should be disclosed rather than the selective disclosure which has occurred in this case.

TIMELINESS

Finally, St. Paul contests the timeliness of Kaarup's appeal. Kaarups appealed from an intermediate trial court order. SDCL 15-26A-3. When we granted permission to appeal we obviously found that Kaarups presented their request for an intermediate appeal in a timely manner. Rather than contesting the timeliness of the appeal at this juncture, St. Paul should have filed a response to Kaarups' petition under SDCL 15-26A-16.

compel is affirmed in part, reversed in part and remanded in accordance with this decision.

All the Justices concur.

AMUNDSON, Circuit Judge, for SABERS, J., disqualified.

S.D., 1989.

Kaarup v. St. Paul Fire and Marine Ins. Co.
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END OF DOCUMENT

The order of the trial court denying the motion to

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

**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**

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**STAFF'S RESPONSE TO DAKOTA
RURAL ACTION'S MOTION TO
COMPEL DISCOVERY FROM STAFF**

HP14-001

COMES NOW, Staff ("Staff") of the South Dakota Public Utilities Commission ("Commission") and hereby files this response to the motion to compel ("motion") filed by Dakota Rural Action ("DRA"). DRA filed its motion requesting an order from the Commission compelling Staff to provide documents requested by DRA in its First Request for Production of Documents. The request at issue is a request for all correspondence between the Commission or Commission Staff and TransCanada Keystone Pipeline, LP ("Keystone") and its affiliates. Staff respectfully requests that the motion be denied.

1. Dakota Rural Action failed to make an attempt to resolve this matter in good faith.

In its Motion, DRA claims that, in compliance with SDCL § 15-6-37(a)(2), counsel for DRA made an attempt in good faith to "confer with counsel for PUC Staff in an effort to secure the information or material sought through discovery requests prior to filing this motion."

(Motion at ¶ 2) That is patently false. Even though DRA received Staff's answers, which include the objection at issue, on February 6, 2015, it was April 7, 2015, two hours before the Motion was filed, that Staff first heard of any interest DRA still had in obtaining the requested documents. This in no way satisfies the requirements of SDCL § 15-6-37(a)(2), which provides:

If a deponent fails to answer a question propounded or submitted under § 15-6-30 or 15-6-31, or a corporation or other entity fails to make a designation under subdivision 15-6-30(b)(6) or § 15-6-31(a), or, a party fails to answer an interrogatory submitted under § 15-6-33, or if a party in response to a request for inspection submitted under § 15-6-34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

Because, per Commission order, all motions to compel were due by the end of the day on April 7, 2015, there was absolutely no way in which Staff could have meaningfully participated in a good faith effort to resolve this issue prior to a motion to compel being filed.

2. Staff's objections should not be overruled.

Staff's first objection was that Staff could not produce any communications between the Commission and Keystone. This object remains true. As Staff stated in its objection, Staff operates as a party, separate from the Commission and does not have access to or knowledge of Commission communications. This remains true. This data request is akin to asking the State's Attorney in a criminal proceeding to produce the emails between the judge and defendant.

Staff's second objection was that all communications were the subject of attorney work product. Following receipt of this Motion, Staff again made a diligent search of all communications to confirm that all communications between Keystone and Staff were conducted exclusively between attorneys for the parties. Staff is a party to this docket and, therefore, has just as much right to work with another party to formulate its positions as any other party. To not allow Staff the privilege of communicating with parties to work toward understanding,

narrowing, or, in some cases, settlement of the issues undermines the task of attorneys and the judicial process as a whole.

In its Motion, DRA claims that Staff did merely asserted that the basis for its objection was that the communication was between attorneys, but did not claim that the communications were work product. (Motion at ¶ 9) This statement is false, as shown in Exhibit 1, attached to Affidavit of Kristen Edwards. Staff objected on the “grounds of attorney work product. All communications between Staff and [Keystone] have been conducted by attorneys and are, therefore, the subject of attorney work product.” (See Exhibit 1) DRA cites *Kaarup v. St. Paul Fire and Marine Insurance Co.*, 436 N.W.2d 17 (S.D. 1989), as authority for its argument. DRA claims that this case stands for the proposition that communications between an attorney and a company are discoverable. (Motion at ¶ 9) DRA’s statement is a misreading and misapplication of *Kaarup*. *Kaarup* was a distinguishable case in that the defense raised in the case was that the client had relied in good faith on advice from counsel. Thus, advice and communications of counsel became material to that case. The Court, therefore, held that “the defense of advice of counsel waives the nearly absolute protection afforded an attorney’s opinion work product.” *Id.* at 22. “A recognized exception to the protection afforded opinion work product is the established rule that a party cannot affirmatively assert reliance upon an attorney’s advice and then refuse to disclose such advice.” *Id.* (citing, *Duplan Corp. v. Moulinage et Retorderie de Chavnoz*, 509 F.2d 730, 735 (4th Cir.1974)). This is absolutely not the circumstance in the current proceeding. In fact, the *Kaarup* case included a malpractice action brought against the attorney. *Id.* at 18. St. Paul Fire and Marine was the attorney’s liability carrier. *Id.* The relevancy in discovery of the correspondence in *Kaarup* was to “determine the nature of counsel’s advice” because of the affirmative defense of acting upon the advice of counsel. *Id.* at

20 (Court holding that “St. Paul’s reliance upon the defense of advice of counsel waives the nearly absolute protection afforded an attorney’s opinion work product.”). Furthermore, *Kaarup* is distinguishable from this case because there was never any indication that the communications involved in *Kaarup* between the attorney and the company were from an attorney to an attorney, nor was there any indication that those communications were made during a pending proceeding, thus making them communications conducted while the attorney was establishing his case or formulating his position.

SDCL 15-6-26(b)(3) provides, in relevant part:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney...) **only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.** In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

DRA has made no such showing that they have a substantial need, or any need at all, for the requested correspondence.

The test for determining whether a document is work product is whether “in light of the nature of the document and the factual situation of the particular case, the document can fairly be said to have been prepared or obtain because of the prospect of litigation.” *Id.* at 21 (quoting, 8 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2024 at 198 (1970)). The legislature and Court intended for the work product protection to be very broad. “The protection afforded by the work product doctrine is broader than that created by attorney/client privilege.” *Id.*

The Court has stated that “in giving effect to the phrase ‘the court *shall* protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney...’ courts have imposed a nearly absolute protection upon an attorney’s opinion work product.” *Id.* at 22 (internal citations omitted).

3. Access to Staff communications would not advance the ability of any party to engage in meaningful and complete discovery.

DRA argues as support for its Motion that they should be allowed to engage in meaningful and complete discovery. (Motion at ¶ 4) Staff is in complete agreement with the statement the DRA, and all other parties have this right. However, Staff cannot fathom how access to Staff’s communications in any way advances the ability to accomplish that task. DRA has failed to provide any argument whatsoever to establish what they intend to accomplish by gaining access to Staff communications or how that would assist in the discovery process.

4. The information sought is not relevant.

DRA also argues that the proper standard for ruling on a discovery motion is “whether the information sought is relevant to the subject matter involved in the pending action.” (Motion at ¶ 6) DRA goes on to state that “relevancy” is defined as information that may lead to admissible evidence at trial. (Motion at ¶ 6) Again, Staff is in agreement with this statement. However, nothing in Staff’s communications could possibly lead to anything that is admissible in the evidentiary hearing. DRA makes no claim of what they believe would be found by viewing these emails and how any of this information could lead to the discovery of admissible evidence.

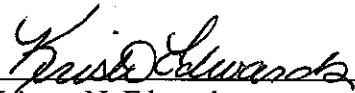
Conclusion

For the above-mentioned reasons, Staff respectfully requests the Commission deny

DRA’s motion to compel. Should the Commission decide, as DRA requests, to do an *in-camera*

review of the correspondence, a request to which Staff objects, Staff requests that the *in camera* review be conducted, and then the correspondence be returned to Staff, rather than having all correspondence sealed and maintained in the record, as DRA suggests.

Dated this 9th day of April, 2015.



Kristen N. Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501

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


**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**

**STAFF'S RESPONSE TO DAKOTA
RURAL ACTION'S FIRST SET OF
INTERROGATORIES AND DATA
REQUESTS**

HP14-001

COMES NOW, Commission Staff by and through its attorney of record, Kristen N. Edwards, and hereby provides the following Response to Dakota Rural Action's First Set of Interrogatories and Data Requests ("Response"). For the purpose of this response any reference to "dockets" refers to HP09-001 and HP14-001, unless otherwise stated.

Dated this 06th day of February, 2015.


Kristen N. Edwards, Staff Attorney
PUC Staff
500 East Capitol Avenue
Pierre, SD 57501

INTERROGATORIES

INTERROGATORY NO. 1. Please identify the person or persons providing each answer to an Interrogatory or portion thereof, giving the full name, address of present residence, date of birth, business address and occupation. [*Applicable Finding or Condition No.: all*]

RESPONSE: OBJECTION. Staff objects as to the relevance of the address of present residence and date of birth for each person providing each answer. Subject to and without waiving its objection, Staff will provide the name, occupation, and business address of the persons providing each answer to the Interrogatories.

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INTERROGATORY NO. 2. Prior to answering these interrogatories, have you made due and diligent search of all books, records, and papers of the Applicant with the view of eliciting all information available in this action? *[Applicable Finding or Condition No.: all]*

RESPONSE: Staff has exercised due diligence, however, we will continue to review the evidence throughout the certification processes and as new information becomes available.

INTERROGATORY NO. 3. Describe the current status of the following permits and plans required prior to the start of construction of the KXL Pipeline:

- A. Permits from US Army Corps of Engineers, S.D. Regulatory Office, including under:
 - 1) §§404/401 of Clean Water Act, for authorization of discharge of fill material into waters of the United States including wetlands or other action;
 - 2) §10 Rivers and Harbors Act, for authorization of pipeline crossings of navigable waters of the United States or other action;
 - 3) Section 106 of the Natural Historic Preservation Act (NHPA), including consultation with potentially impacted Tribes and/or other action;
- B. Permits from U.S. Fish and Wildlife Service, S.D. Ecological Services Field Office, including under the Endangered Species Act, Section 7 Consultation, to consider lead agency findings of impacts on federal-listed species, to provide a Biological Opinion if the Project is likely to adversely affect federally-listed or proposed species or their habitats, or other action;
- C. Permits from Farm Service Agency of the Natural Resources Conservation Service, including the Crop Reserve Program, for authorization of crossing areas enrolled in the Crop Reserve Program, or other action;
- D. Permits from the Pipeline and Hazardous Materials Safety Administration (PHMSA), including under 49 CFR Parts 194 and 195, for development of an Integrity Management Plan (IMP) and Emergency Response Plan (ERP), or other action;
- E. Permit(s) from or Plan(s) Required to the South Dakota Department of Environment and Natural Resources (DENR), including under:
 - 1) National Pollutant Discharge Elimination System General Permit for Discharges of Hydrostatic Test Water, regarding proposed discharge into waters of the United States and construction dewatering of waters of the State, or other action;
 - 2) Surface Water Withdrawal Permit, for temporary surface water withdrawal, or other action;
 - 3) SDCL Chapter §34A-18, required submission of an Oil Spill Response Plan or Updated Plan to DENR, or other action;
- F. Consultation with SD Game Fish and Parks Department, under State Listed Threatened and Endangered Species;

- G. Any Updated Review and Comment from South Dakota State Historical Society, State Preservation Office, under §106 of the NHPA, on activities regarding jurisdictional cultural resources;
- H. Crossing Permits from South Dakota Department of Transportation for crossing State highways;
- I. Crossing Permits from County Road Departments for crossing of county roads;
- J. Flood plain, Conditional Use, and building permits where required from County and Local Authorities.

[Applicable Finding or Condition No.: Conditions 1, 2; Findings 12(1)-(3), 60, 88, 90, 97-99]

RESPONSE: OBJECTION. This question improperly attempts to shift the burden to produce permits from the Company to Staff. Subject to and without waiving the objection, Staff provides the following answer.

Staff does not have this information, nor is it readily obtainable. The PUC is neither the issuer nor the issuee of the permits listed in Interrogatory No. 3. The only information Staff has regarding the status of permits is the information provided by Keystone in its Quarterly Report. This most recent information can be found in Section 5.0 of the December 31, 2014 Quarterly Report, filed in docket HP09-001.

As for consultation with SD Game Fish and Parks Department (GF&P), as described in subpart F of the interrogatory, Staff does not have this information, but does intend to call a witness from GF&P and will continue to work with that witness to gather information. Therefore, no additional information, beyond what is available in Docket No. HP09-001 is available at present. Staff will supplement this response if necessary in the future.

In response to subparts H and I, this information is included in Keystone's Quarterly Report, which the PUC has made available online. For current information, see the most recent quarterly report filed in HP09-001

INTERROGATORY NO. 4. Do you agree that diluted bitumen spills require different spill response techniques and different equipment types and amounts as compared to (a) a spill of conventional crude oil and (b) a spill of Williston Basin light crude oil? Please explain your answer and list any scientific study(ies) providing the basis for your answer. *[Applicable Finding or Condition No.: Amended Condition 31-42]*

RESPONSE: OBJECTION. The question calls for a legal conclusion. Subject to and without waiving the objection, Staff provides the following answer.

Staff does not have an opinion at this time but will continue to work with its experts to investigate this issue.

INTERROGATORY NO. 5. Do you agree that diluted bitumen is heavier than conventional crude and results in greater expenses to remediate leaks or spills? Please explain your answer and identify any known scientific study(ies) providing the basis for your answer.
[Applicable Finding or Condition No.: Amended Condition 31-42/]

RESPONSE: OBJECTION. This question improperly attempts to shift the burden concerning whether the project continues to meet the conditions upon which the permit was granted from the Company to Staff. Subject to and without waiving the objection, Staff provides the following answer.

Staff does not have an opinion at this time but will continue to work with its experts to investigate this issue.

INTERROGATORY NO. 6. Do you agree that soil and rocks that are contaminated by oil spills cannot be cleaned but instead must be removed and disposed of in hazardous waste facilities? Please explain your answer and list any scientific study(ies) providing the basis for your answer.

- A. If so, do you agree that reclamation efforts for oil spills of the magnitude of the worst case discharge amount for the Keystone XL Pipeline fail to recover 100% of the oil contaminating the ground?
- B. Identify the Documents created by or on your behalf which would show the basis for your answer to this Interrogatory.

[Applicable Finding or Condition No.: Amended Condition 32-38]

RESPONSE: OBJECTION. This question improperly attempts to shift the burden concerning whether the project continues to meet the conditions upon which the permit was granted from the Company to Staff. Subject to and without waiving the objection, Staff provides the following answer.

Staff does not have an opinion at this time but will continue to work with its experts to review this issue.

INTERROGATORY NO. 7. Describe how the PUC Staff plans to monitor compliance of TransCanada with all conditions imposed by the PUC, together with all applicable laws, and regulations:

- A. During construction;
- B. During proposed operation;

[Applicable Finding or Condition No.: Amended Condition 1; Finding 73]

RESPONSE: As per the Amended Final Decision and Order in HP09-001, Keystone must provide quarterly reports to the Commission. In addition, the Commission has a formal complaint process available to any person who has a grievance against the company. Staff will also be reviewing compliance filings and following up with any issues we find.

INTERROGATORY NO. 8. Does the PUC Staff have inspectors who will monitor on-site construction of the KXL pipeline?

- A. State the number of inspectors;
- B. Describe the expertise of each of these inspectors in relevant fields regarding crude oil pipeline construction and operation;
- C. Describe how often and what type of inspectors will be on-site:
 - i. During construction of the KXL Pipeline;
 - ii. During operation of the KXL Pipeline.

[Applicable Finding or Condition No.: Amended Condition 1; Finding 73]

RESPONSE: No. Keystone XL would operate as an interstate pipeline and would, therefore, be under federal jurisdiction for purposes of inspection. The authority to grant siting permits is the sole authority of the PUC with respect to interstate pipelines. Please refer to page 4 of the prefiled testimony of William Walsh in HP09-001.

INTERROGATORY NO. 9. State whether or not the PUC Staff monitors or tracks spill/leak incidents involving operations of TransCanada and its Affiliates:

A. Within South Dakota?

B. Outside South Dakota?

- i. Within the United States;
- ii. Within Canada;

C. To the extent PUC Staff monitors or tracks any of the foregoing, describe the monitoring and tracking procedures engaged in and identify any documents regarding monitoring or tracking procedures, processes or instructions.

[Applicable Finding or Condition No.: Amended Condition 1; Finding 73]

RESPONSE: The PUC does not monitor or track spill/leak incidents involving operations of TransCanada and its Affiliates within or outside of South Dakota. This task is within the jurisdiction of the federal government. Staff suggests contacting either the company itself or the South Dakota Department of Environment and Natural Resources.

INTERROGATORY NO. 10. For each incident since January 1, 2010 in which any pipeline transporting crude oil constructed by TransCanada and its Affiliates in South Dakota leaked or spilled pipeline contents, the:

- A. Date;
- B. Location:
- C. Amount of materials leaked or spilled;
- D. Actions taken by the PUC to prevent re-occurrence which did not involve design or construction procedure changes in pipeline material composition or dimensions, or construction procedures for use in the pipeline which suffered the incident.
- E. Actions taken to prevent re-occurrence which involved design or construction procedure changes in pipeline material composition or dimensions, or construction procedures for use in construction of the proposed KXL Pipeline;
- F. Identify and produce the documents which support your answers, above, including any incident reports.

[Applicable Finding or Condition No.: Findings 12(2)-(3), 41-45, 47, 103; Amended Condition 32-38]

RESPONSE: OBJECTION. This question attempts to shift the regulatory burden from the federal government and the South Dakota Department of Environment Natural Resources (DENR) to the PUC. Subject to and without waiving the objection, Staff provides the following answer.

Because TransCanada reports to the federal government, specifically to agencies such as the Pipeline and Hazardous Materials Safety Administration, Staff does not have this information. Staff suggests contacting either the company itself or DENR. This information may also be accessible through DENR's website (<http://arcgis.sd.gov/server/denr/spillsviewer/>). However, PUC Staff cannot vouch for the accuracy of the information on DENR's website.

INTERROGATORY NO. 11: Identify all other crude oil pipeline operations of TransCanada and its Affiliates in South Dakota which, since 2009, have or are operating at a maximum operating pressure (MOP) of equal to or greater than 1,440 psig generally and/or 1,600 psig MOP for specific low elevation segments of pipeline with the same design factor and pipe wall thickness as described in Finding 19, close to the discharge of pump stations:

A. For each such pipeline which subsequently developed a leak or spill, regardless of the psig MOP the pipeline was operating at the time, giving date, location, amount spilled/leaked, psig MOP at which pipeline was operating at the time, and describe the amount and nature of damage caused by such a leak or spill;

B. Identify any documents upon which your answers to these Interrogatories were based;

[Applicable Finding or Condition No.: Findings 19, 28]

RESPONSE: The Keystone Pipeline in eastern South Dakota is the only crude oil pipeline operated by TransCanada and its Affiliates in South Dakota of which Staff has knowledge. The PUC sited this pipeline in Docket HP07-001. For information on leaks and spills on this pipeline, see Staff's answer to Interrogatory No. 10.

INTERROGATORY NO. 12: For each spill/leak incident which has occurred from a pipeline transporting Western Canadian Sedimentary Basin (WCSB) crude oil operated by TransCanada and its Affiliates since 2009 in South Dakota, state the dates on which transportation of the crude oil through that pipeline was disrupted by planned maintenance, unplanned maintenance, power outages, spills, leaks, or any other causes. Identify any documents upon which your answers to this Interrogatory was based. *[Applicable Finding or Condition No.: Finding 28]*

RESPONSE: OBJECTION. This question attempts to shift the regulatory burden from the federal government to the state. Subject to and without waiving the objection, Staff provides the following answer.

Because this information is not reported to the PUC, Staff does not have this information.

INTERROGATORY NO. 13: Explain why TransCanada has reduced the maximum operating pressure of the KXL pipeline at most locations to 1,307 psig;

- A. State whether the PUC Staff has received information or a commitment from TransCanada about any future plans to subsequently increase this general operating pressure;
- B. If your answer to subpart A of this interrogatory is yes, what is the subsequent maximum operating pressure being contemplated for general use during pipeline operations?
- C. Explain the PUC Staff's understanding of why TransCanada wants to construct the KXL pipeline pump stations with pumps of sufficient capacity to meet the maximum design flow rate of 830,000 bpd.

[Applicable Finding or Condition No.: Conditions 31-38; Findings 19, 20]

RESPONSE: OBJECTION. This question improperly attempts to shift the burden concerning whether the project continues to meet the conditions upon which the permit was granted from the Company to Staff. Subject to and without waiving the objection, Staff provides the following answer.

This is information that Staff has requested of TransCanada in the discovery process. If necessary, Staff will supplement its response to this interrogatory as more information becomes available.

INTERROGATORY NO. 14: With regard to the plan for mainline valves to be remotely controlled, what guarantee has been received from TransCanada that it is capable of preventing any cyber-security attack on the control system?

- A. Describe the worst case scenario which could occur in the event of a computer systems security breach on the control system for the KXL Pipeline.
- B. Describe the data security systems TransCanada has indicated to the PUC Staff that it has or plans to be put in place to prevent any such system breach, identify any third-party vendor(s) providing system security software, hardware or monitoring, and identify the particular components or scopes of services such vendors will provide.
- C. Identify any documents used to support your answer to this Interrogatory.

[Applicable Finding or Condition No.: Conditions 31-38; Finding 20]

RESPONSE: At this time, Staff does not have the information to answer this question but will continue to investigate this issue throughout the discovery process.

INTERROGATORY NO. 15: Provide the dates on which pipe segments to be used in South Dakota were delivered to storage location in South Dakota or adjacent states and state whether the PUC Staff has or plans to independently inspect the integrity of the stockpiled pipe lengths. If PUC Staff is planning to conduct inspections, describe how those inspections would occur and what factors or information would be reviewed during the course of such inspections.

A. Identify any documents which would support your answers.

[Applicable Finding or Condition No.: Finding 18]

RESPONSE: OBJECTION. The question is argumentative, as it requires the adoption of the assumption that pipe segments have, in fact, been delivered to South Dakota. Subject to and without waiving its objection, Staff provides the following answer.

Staff has no knowledge of pipeline segments being delivered to South Dakota for use on the Keystone XL Pipeline. However, federal regulations do provide for how pipe must be stored, and TransCanada must comply with those regulations.

INTERROGATORY NO. 16: State whether any power lines have been permitted and constructed to provide power to pump stations by local power providers;

- A. Identify each such power line;
- B. If any State or Tribal permit or other authorization is required for any planned construction of power lines to pump stations:
 - i. Identify the permits which have been obtained, together with date permit granted;
 - ii. Identify permits which have not yet been obtained;
 - iii. Identify which permits have been applied for and are pending.
- C. Identify any documents which would support your answers to this interrogatory.

[Applicable Finding or Condition No.: Finding 20; Amended Condition 1]

RESPONSE: No permits have been sought from the PUC for power lines in connection with the Keystone XL pipeline at this time. It is Staff's understanding that Basin Electric Power Cooperative will need to file for a permit to construct a proposed 230-kV transmission line from Big Bend substation to Witten substation. This project is discussed in the Department of State's Final Supplemental Environmental Impact Statement and the Environmental Assessment prepared specifically for the transmission line project.

INTERROGATORY NO. 17: List the changes in the KXL Project route since 2010 and identify any documents which would support your answers. [*Applicable Finding or Condition No.: Finding 33*]

RESPONSE: Staff has sought this information from TransCanada in a discovery request. We do not have this information at this time.

INTERROGATORY NO. 18: Identify paleontological studies within the Upper Cretaceous or Tertiary strata of which you have knowledge were conducted after 2009 in the proximate location of the currently proposed KXL pipeline route and identify any documents which would support your answers. *[Applicable Finding or Condition No.: Findings 34, 36; Conditions 43, 44]*

RESPONSE: OBJECTION. The interrogatory attempts to illicit an answer that would incorrectly have the burden of proof concerning environmental issues to Staff. It is the Company's burden to provide this information.

At this time Staff only has knowledge of certain paleontological studies conducted after 2009 that were completed in order to prepare the Department of State's Final Supplemental Environmental Impact Statement (FSEIS). Descriptions of the studies performed are included in section 3.1.2.3 of the FSEIS.

INTERROGATORY NO. 19: Identify Section 106 type “cultural resource” studies of which you have knowledge that were conducted after 2009 in the proximate location of the currently proposed KXL pipeline route and identify any documents which would support your answers. *[Applicable Finding or Condition No.: Conditions 43, 44]*

RESPONSE: At this time, Staff has knowledge of certain cultural resource studies conducted after 2009 that were completed in order to prepare the Department of State’s Final Supplemental Environmental Impact Statement (FSEIS). Descriptions of the studies performed are included in section 3.11.3.3 of FSEIS.

INTERROGATORY NO. 20: TransCanada is to identify the exact locations of active, shut-in, and abandoned wells and any associated underground pipelines in the construction ROW. What is the status of such identification procedures?

- A. How long does TransCanada expect such an identification process will take before the Company would be willing to assure the PUC that all such wells and pipelines have been identified;
- B. Has TransCanada communicated to the PUC Staff how long it expects such an identification process will take before TransCanada would be willing to assure the PUC that all such wells and pipelines have been identified;
- C. How does the PUC Staff intend to ensure compliance by TransCanada with regulations, laws and PUC conditions, in order to protect water resources from contamination?
- D. Identify any documents which would support your answers.

[Applicable Finding or Condition No.: Conditions 15, 16, 21, 22, 42]

RESPONSE: OBJECTION. The interrogatory attempts to illicit an answer that would incorrectly have the burden of proof concerning environmental issues to Staff. It is the Company's burden to provide this information.

INTERROGATORY NO. 21. Describe the worst case scenario for landowners of a spill from the proposed pipeline onto only land, as well as other risks deemed "low" by the PUC. Identify any documents which would support your respective answer. [*Applicable Finding or Condition No.: Findings 57; Conditions 16, 31-38*]

RESPONSE: OBJECTION. This question improperly attempts to shift the burden concerning whether the project continues to meet the conditions upon which the permit was granted from the Company to Staff. Subject to and without waiving the objection, Staff provides the following answer.

Staff has requested that TransCanada update that information.

INTERROGATORY NO. 22. Provide a list of claims or complaints (of any kind) made to the Commission by landowners along the existing Keystone I pipeline corridor since 2008. Identify any documents which would support your respective answer. *[Applicable Finding or Condition No.: Finding 57; Conditions 49-50]*

RESPONSE: There have been no formal complaints to the PUC, however, landowner concerns were included in the Liaison Annual Report filed in Docket No. HP09-001. See Section 5 of the most recent Liaison Annual Report.

INTERROGATORY NO. 23. What is the understanding of PUC Staff as to why TransCanada has sought a special permit from the PHMSA for authorization “to design, construct, and operate the Project up to 80% of the steel pipe specified minimum yield strength at most locations.”

- A. Identify and describe all spills/leaks from TransCanada (or its Affiliates) pipeline operations since 2009 in South Dakota which have involved a “0.8 design factor” and therefore involving use of steel pipe up to 80% of the specified minimum yield strength.
- B. Identify documents upon which your answers are based.

[Applicable Finding or Condition No.: Findings 60-61]

RESPONSE: TransCanada is no longer seeking a special permit. TransCanada now seeks to operate at 70% of SMYS.

INTERROGATORY NO. 24. Explain the PUC's understanding of how application of the "0.8 design factor and API 5L PSL2 X70 high-strength steel pipe" with thinner walls would "provide a level of safety equal to or greater than that which would be provided if the pipeline were operated under the otherwise applicable regulations." [*Applicable Finding or Condition No.: Finding 63*]

RESPONSE: This is no longer relevant, as TransCanada is no longer seeking a special permit.

INTERROGATORY NO. 25. Describe how the PUC Staff plans to ensure that TransCanada will thoroughly implement procedures in the CMR to minimize impacts on cultivated lands, grasslands, wetlands, streams, and waterways? Identify documents upon which your answers are based. [*Applicable Finding or Condition No.: Finding 73*]

RESPONSE: There are three methods identified in the Amended Final Decision and Order; Notice of Entry that will ensure TransCanada fully and thoroughly implements the CMR. These methods include self-monitoring by TransCanada, self-reporting by TransCanada, and the Commission's formal complaint process.

First, TransCanada will self-monitor the implementation of the CMR through the use of Environmental Inspectors on each construction spread. (Condition 14 and Section 2.2 of the CMR). The Environmental Inspector has the authority, subject to approval from the Chief Environmental Inspector, to stop work and order corrective action if activities violate the CMR. (Section 2.2 of CMR).

Second, TransCanada is required to submit quarterly reports to the Commission until reclamation is complete. According to Condition 8 of the Amended Final Decision and Order; Notice of Entry, the quarterly reports must summarize "the status of land acquisition and route finalization, the status of construction, *the status of environmental control activities*, including permitting status and Emergency Response Plan and Integrity Management Plan development, *the implementation of the other measures required by these conditions*, and the overall percent of physical completion of the project and design changes of a substantive nature." [*emphasis added*]. PUC Staff expects TransCanada to self-report its implementation of the CMR, or any deviations in the implementation of the CMR, in the quarterly reports in accordance with Condition 8. Should TransCanada self-report any deviations from the CMR, PUC Staff can follow-up with the company in order to ensure proper corrective actions were taken. If issues with CMR implementation remain unresolved, PUC Staff can file a formal complaint against TransCanada as discussed in the following paragraph.

Third, Condition 50 of the Amended Final Decision and Order; Notice of Entry identifies that "the Commission's complaint process as set forth in ARSD 20:10:01 shall be available to landowners, other persons sustaining or threatened with damage or the consequences of Keystone's failure to abide by the conditions of the permit or otherwise having standing to obtain enforcement of the conditions of the Order and Permit." Should a landowner or other affected person report to the PUC Staff that TransCanada failed to properly implement the CMR, PUC Staff can either bring a formal complaint against TransCanada or instruct the affected person on how to file a formal complaint. If a complaint is brought before the Commission, the Commission will make its decision on how to resolve the matter based on the specific facts presented during the complaint proceeding.

INTERROGATORY NO. 26. Since 49 CFR Part 195 would require TransCanada Keystone to conduct an “internal inspection” of any pipe section(s) potentially moved by abnormal ground movement, describe the PUC’s understanding of the timeframe within which an inspection would take place considering the time required to transport personnel and equipment from their staging area to the most distant segment of the KXL Pipeline in South Dakota, and the time required to notify and mobilize inspectors to their staging area. Identify documents upon which your answers are based.

[Applicable Finding or Condition No.: Finding 101; Conditions 31-38]

RESPONSE: OBJECTION. This question attempts to shift the regulatory burden from the federal government to the state. Subject to and without waiving the objection, Staff provides the following answer.

South Dakota does not have jurisdiction of hazardous liquid lines. Enforcement of 49 CFR is under federal jurisdiction of PHMSA.

INTERROGATORY NO. 27. Identify and produce the most recent IMP submitted to the Commission by TransCanada, including but not limited to section in it related to HCAs. *[Applicable Finding or Condition No.: Finding 102; Conditions 1-2]*

RESPONSE: OBJECTION. This question attempts to shift the regulatory burden from the federal government to the state. Subject to and without waiving the objection, Staff provides the following answer.

South Dakota does not have jurisdiction of hazardous liquid lines. Enforcement of the IMP and related HCAs is under federal jurisdiction of PHMSA.

INTERROGATORY NO. 28. Itemize the property tax payments paid by TransCanada and its Affiliates to respective South Dakota towns, cities, and counties each year since 2010 for the existing Keystone I pipeline and identify the documents upon which you relied to answer these questions;

[Applicable Finding or Condition No.: Finding 23, 102, 108; Conditions]

RESPONSE: The PUC does not have access to this information. It is Staff's belief that this information is held by the Dept. of Revenue.

INTERROGATORY NO. 29. With respect to the jobs TransCanada has alleged it will bring to South Dakota by its proposed pipeline project, describe the most current information provided by TransCanada:

- A. As to the number, job title, and expected duration of the temporary construction related jobs provided, and:
 - i. The percentage of South Dakota citizens are expected to be hired for each job title.
 - ii. Is there any preference for South Dakota citizens to obtain any or all of these temporary jobs?
 - iii. State the number and percentage of the total construction jobs expected to be already be filled by out-of-state workers.
- B. Describe the most recent information provided by TransCanada as to the number, type, and expected duration of the permanent jobs expected, and;
 - i. State the number of permanent jobs it expects to be held by current South Dakota citizens, as opposed to someone who moves from out of state to South Dakota to take the job, and;
 - ii. Will there any preference for South Dakota citizens to obtain any or all of the permanent jobs in South Dakota?

C. Identify the documents upon which you relied to answer these questions;

[Applicable Finding or Condition No.: Finding 23, 102, 108; Conditions 1-2]

RESPONSE: All information the PUC has relevant to this question is posted in Docket No. HP09-001 and is available to the public.

INTERROGATORY NO. 30. Should there be a worst case discharge or even a substantial release of crude oil into farmland and/or water resources and/or an explosion of the pipeline near homes or towns with people, would the PUC Staff still have confidence the proposed KXL Pipeline Project would have only a “minimal” effect on the health, safety, or welfare of its inhabitants. Identify the documents upon which you relied to answer these questions.

[Applicable Finding or Condition No.: Finding 23, 102, 108; Conditions 1,2, 31-36]

RESPONSE: OBJECTION. Staff objects to this interrogatory as it calls for a legal conclusion. Subject to and without waiving its objection, Staff provides the following answer.

SDCL 49-41B-22 does not require the Commission to conclude that the project would have a “minimal” effect on the health, safety, or welfare of the inhabitants. The statute identifies that the company must prove the facility will not “substantially” impair the health, safety, or welfare of the inhabitants.

REQUESTS FOR PRODUCTION

1. All documents identified or referred to in your Answers to DRA's First Interrogatories to you. [Applicable Finding or Condition No.: all]

- a. The December 31, 2014 Quarterly Report can be accessed at <http://www.puc.sd.gov/commission/dockets/hydrocarbonpipeline/2009/hp09-001/quarterlyreport123114.pdf>. All Quarterly Reports submitted by Keystone are available in Docket HP09-001.
- b. The Department of State's Final Supplemental Environmental Impact Statement, which can be accessed at: <http://keystonepipeline-xl.state.gov/finaiseis/>
- c. The Liaison Annual report, referenced in Staff's answer to Interrogatory No. 22 is also available in Docket HP09-001, and can be accessed at <http://www.puc.sd.gov/commission/dockets/HydrocarbonPipeline/2009/HP09-001/liasonreport2014.pdf>.
- d. U.S. Department of Agriculture Rural Utilities Service's Big Bend to Witten 230-kv Transmission Project Environmental Assessment, which can be accessed at: http://www.wapa.gov/ugp/Environment/documents/BigBendtoWitten_EA_Nov_2014_Final.pdf

2. All documents and correspondence presented to any expert in connection with the above-captioned proceedings, or received from any expert, including but not limited to emails, letters, engagement documents, resumes, curriculum vitae, reports, analysis, spreadsheets, schedules, and any drafts thereof. [Applicable Finding or Condition No.: all]

- a. OBJECTION. Staff objects to the request for all correspondence presented to

any expert or received from any expert. All correspondence was conducted by Staff's attorney of record and is, therefore, attorney work product.

- b. OBJECTION. Staff objects to the request for production of engagement documents as not relevant to the proceedings. Subject to and without waiving its objection, staff provides the following subpoenas:

- i. Attachment 9, Subpoena of Brian Walsh
- ii. Attachment 10, Subpoena of Derric Iles
- iii. Attachment 11, Subpoena of Kimberly McIntosh
- iv. Attachment 12, Subpoena of Paige Olson
- v. Attachment 13, Subpoena of Tom Kirschenmann

- c. Staff provides the following resumes and curriculum vitae, and will provide the same for its other witnesses as they are received:

- i. Attachment 1, Resume of Darren Kearney
- ii. Attachment 2, Resume of Kimberly McIntosh (not attached, as not been received by Staff)
- iii. Attachment 3, Resume of Brian Walsh
- iv. Attachment 4, Resume of Paige Olson
- v. Attachment 5, Resume of Tom Kirschenmann
- vi. Attachment 3, Resume of Daniel Flo
- vii. Attachment 7, Resume of Jenny Hudson (not attached, has not been received by Staff)
- viii. Attachment 8, Resume of Derric Iles

- d. At this time, Staff has not received any reports, analysis, spreadsheets, schedules,

or drafts at this time.

3. The most recent resume or curriculum vitae of each expert whom you expect to call as an expert witness at the hearing before the Commission. [Applicable Finding or Condition No.: all]

See previous answer.

4. The written reports of experts who are expected to testify on behalf of the PUC. [Applicable Finding or Condition No.: all]

Staff has not received any reports at this time.

5. All correspondence between TransCanada or its Affiliates and the Commission or Commission Staff concerning the Project. [Applicable Finding or Condition No.: all]

OBJECTION. Staff objects to this request on the grounds of attorney work product. All communications between Staff and TransCanada have been conducted by attorneys and are, therefore, the subject of attorney work product. Furthermore, Staff operates as a party, separate from the Commission and does not have access to or knowledge of Commission communications.

6. All documents concerning a change in routing of the Project between 2010 and the present date, including but not limited to, any parcel maps showing the precise location of the proposed Project through South Dakota. [Applicable Finding or Condition No.: Finding 16]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff asserts that it does not have this information and this time, but has requested updated maps and information from the Company.

7. All documents setting forth TransCanada's proposed construction schedule for the Project, and all contracts for construction of the proposed Project. [Applicable Finding or Condition No.: Finding 17]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff.

8. All documents showing location of power lines for pumping stations proposed for the Project, the location of proposed pumping stations and mainline valves for the Project in South Dakota, and including, but not limited to all communications between TransCanada's or its Affiliates' staff, consultants, advisors, or other parties and the PUC concerning location and operation of pumping stations, mainline valves, and the proposed conversion of valves to remote control operations. [Applicable Finding or Condition No.: Finding 20]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff submits that it does not have any relevant information.

9. All documents describing soil types and conditions along the currently-proposed Project route through South Dakota. [Applicable Finding or Condition No.: Finding 33]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

10. All documents describing, discussing, or setting forth plans for the Project to cross perennial streams and rivers, intermittent streams, and ephemeral streams in

South Dakota, including but not limited to all documents concerning the methodology used by TransCanada (and its Affiliates) or its agents in determining construction plans for the Project across such waterways. [Applicable Finding or Condition No.: Finding 41]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

11. All documents concerning the reduction in the length of the proposed Project potentially affecting High Consequence Areas. [Applicable Finding or Condition No.: Finding 50]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

12. All documents concerning TransCanada's (or its Affiliates') decision to withdraw its request to the PHMSA for a special permit referenced in Finding 60. [Applicable Finding or Condition No.: Finding 60]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

13. All documents containing information concerning construction/reclamation unit mapping referenced in Finding 80, including but not limited to the construction/reclamation unit mapping. [Applicable Finding or Condition No.: Finding 80]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not

have any information supplementary to what has been made publicly available in the dockets.

14. All documents, including but not limited to forecasts and projections of tax revenue accruing to the State of South Dakota should construction and operation of the Project commence, together with all documents reflecting payments to towns, cities, counties in South Dakota since 2008 along the operating portions of the original Keystone I pipeline. [Applicable Finding or Condition No.: Finding 107]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

15. All documents submitted to the PUC by TransCanada evidencing TransCanada's or its Affiliates' compliance efforts with applicable laws and regulations related to construction and operation of the Project. [Applicable Finding or Condition No.: Condition 1]

See Quarterly Reports available in HP09-001. Staff has no additional documentation. Every document submitted by TransCanada is made publicly available in the appropriate docket.

16. All documents submitted to the PUC by TransCanada concerning TransCanada's or its Affiliates' efforts to obtain and comply with applicable permitting referenced in Condition 2, including but not limited to copies of any permits obtained. [Applicable Finding or Condition No.: Condition 2]

See Quarterly Reports available in HP09-001. Staff has no additional documentation. Every document submitted by TransCanada is made publicly available in the appropriate docket.

17. All documents submitted by TransCanada to the PUC concerning TransCanada's or its Affiliates' compliance with the recommendations set forth the DOS's Final Environmental Impact Statement, including but not limited to documents discussing or concerning compliance with Section 106 of the National Historic Preservation Act. [Applicable Finding or Condition No.: Condition 3]

See Quarterly Reports available in HP09-001. Staff has no additional documentation. Every document submitted by TransCanada is made publicly available in the appropriate docket.

18. All documents submitted by TransCanada to the PUC concerning or discussing proposed adjustments or deviations in the route of the Project, including but not limited to copies of notices to affected land owners. [Applicable Finding or Condition No.: Condition 6]

See Quarterly Reports available in HP09-001. Staff has no additional documentation. Every document submitted by TransCanada is made publicly available in the appropriate docket.

19. All documents submitted by TransCanada to the PUC concerning the appointment of a public liaison officer by TransCanada for the Project, and all documents containing information regarding communications between the public liaison officer and landowners affected by the Project. [Applicable Finding or Condition No.: Condition 7]

See Motion for Approval of Public Liaison Officer in docket HP09-001,
<http://www.puc.sd.gov/commission/dockets/hydrocarbonpipeline/2009/hp09-001/042710.pdf>;
Letter from Jerry Roitsch regarding the Liaison's Role,

<http://www.puc.sd.gov/commission/dockets/hydrocarbonpipeline/2009/hp09-001/050410.pdf>;

and all Liaison Annual Reports submitted in docket HP09-001.

20. All documents containing information with respect to contacts or communications with state, county and municipal emergency response, law enforcement and highway, road and other infrastructure management agencies regarding the Project.

[Applicable Finding or Condition No.: Condition 10]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets, see Quarterly Reports available in Docket HP09-001.

21. All documents containing information concerning TransCanada's or its Affiliates' efforts to comply with mitigation measures set forth in the Construction Mitigation and Reclamation Plan submitted to the Commission, regarding the KXL Pipeline and the existing Keystone I pipeline. [Applicable Finding or Condition No.: Condition 13]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

22. All documents containing information regarding consultations, including but not limited to communications, with Natural Resources Conservation Services ("NRCS") regarding development of construction/reclamation units ("Con/Rec Units").

[Applicable Finding or Condition No.: Condition 15]

OBJECTION. The request attempts to shift the burden for production from the

Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets, see Quarterly Reports available in Docket HP09-001.

23. All documents containing information regarding consultations between TransCanada (or its Affiliates) and South Dakota Game, Fish and Parks. [Applicable Finding or Condition No.: Condition 20(c)]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

24. All documents submitted by TransCanada to the PUC describing the development of frac-out plans in areas where horizontal directional drilling will occur in connection with the Project, including but not limited to any frac-out plans developed. [Applicable Finding or Condition No.: Condition 21]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

25. All documents describing or containing information regarding TransCanada's or its Affiliates' efforts to comply with conditions regarding construction of the Project near wetlands, water bodies, and riparian areas, such documents including but not limited to compliance plans, construction plans, mitigation plans, and communications with any regulatory agency in such regard. [Applicable Finding or Condition No.: Condition 22]

OBJECTION. The request attempts to shift the burden for production from the

Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets, see Quarterly Reports available in Docket HP09-001.

26. All documents containing or referencing adverse weather land protection plans developed in connection with the Project. [Applicable Finding or Condition No.: Condition 25]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

27. All documents that reference or identify private and new access roads to be used or required during construction of the Project. [Applicable Finding or Condition No.: Condition 28]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

28. All documents referencing agreements reached with landowners, including but not limited to any agreements reached with landowners modifying any requirements or conditions established by the Commission in connection with the Project. [Applicable Finding or Condition No.: Condition 30]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

29. All documents containing information regarding assessments performed in

connection with TransCanada's activities in "high consequence areas", including but not limited to documents referencing efforts by you to comply with 49 C.F.R. Part 195, and any communications or consultations with the South Dakota Geological Survey, the Department of Game Fish and Parks ("SDGFP"), affected landowners and government officials. *[Applicable Finding or Condition No.: Condition 34]*

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets, see Quarterly Reports available in Docket HP09-001.

30. All documents where TransCanada has identified hydrologically sensitive areas as required by Condition Number 35. *[Applicable Finding or Condition No.: Condition 35]*

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets, see Quarterly Reports available in Docket HP09-001.

31. All documents containing information regarding noise-producing facilities in connection with the Project, including but not limited to any studies conducted regarding noise levels, and any noise mitigation measures. *[Applicable Finding or Condition No.: Condition 39]*

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets,

see Quarterly Reports available in Docket HP09-001.

32. All documents containing information regarding TransCanada's or its Affiliates' efforts to comply with protection and mitigation requirements of the US Fish and Wildlife Service ("USFWS") and SDGFP with respect to any endangered species. [Applicable Finding or Condition No.: Condition 41]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets, see Quarterly Reports available in Docket HP09-001.

33. All documents containing information or details regarding location of drain tiles, including but not limited to all documents containing information regarding the potential for drain tiles to operate as conduits for contaminants in connection with construction or operation of the Project. [Applicable Finding or Condition No.: Condition 42]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets.

34. All documents referencing or containing information concerning cultural or paleontological resources along the Project route, including but not limited to all documents identifying cultural and paleontological resources, consultations and communications with the Bureau of Land Management and Museum of Geology at the South Dakota School of Mines and Technology. [Applicable Finding or Condition No.: Condition 44]

OBJECTION. The request attempts to shift the burden for production from the Company to Staff. Subject to and without waiving its objection, Staff informs that it does not have any information supplementary to what has been made publicly available in the dockets, see Quarterly Reports available in Docket HP09-001.

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

**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**

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AFFIDAVIT OF KRISTEN EDWARDS

HP14-001


STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF HUGHES)

Kristen N. Edwards, being first duly sworn, states as follows:

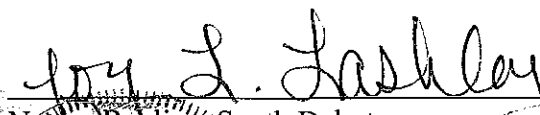
1. I am an attorney for the Staff ("Staff") of the South Dakota Public Utilities Commission ("Commission").
2. I am currently the Staff attorney assigned to the Keystone XL dockets, both HP09-001 and HP14-001.
3. I have been with the Commission since September of 2012.
4. Prior to my becoming employed as Staff attorney, this position was held by Kara Semmler, who was previously assigned to HP09-001.
5. All communications between Keystone and Staff since I became employed as a Staff attorney have been conducted exclusively between myself in my official position as Staff attorney and the attorneys for Keystone.
6. I have never contacted or attempted to contact any person from Keystone other than Keystone's attorneys.

7. I have contacted my predecessor, Kara Semmler, and confirmed that all communications went through her while she was Staff attorney, as well.
8. I have reviewed all of my communications which were saved in my email files.
9. In an attempt to make a good faith effort to confirm the existence or lack thereof of any emails sent by persons other than those Staff members still employed with the Commission, whom I was able to easily contact, I contacted the Attorney General's Office and was informed that they do not keep emails beyond sixty days after they are deleted or the employee leaves their employment with the State of South Dakota.
10. I have thoroughly reviewed every email correspondence to which I have access between myself and Keystone.
11. Staff submitted its answers to the request for production of documents on February 6, 2015. See Exhibit 1, attached hereto.
12. The first contact I had with anyone from Dakota Rural Action regarding this motion to compel was a phone call at approximately 3:00 p.m., Tuesday, April 7, 2015.

Dated this 9th day of April, 2015.


Kristen N. Edwards

Subscribed and sworn to before me this
9th day of April, 2015.


Notary Public, South Dakota
My commission expires:
Joy L. Lashley
My Commission Expires
July 24, 2019

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

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)

CERTIFICATE OF SERVICE

HP14-001

I hereby certify that true and correct copies of Staff's Response to Dakota Rural Action's Motion to Compel Discovery from Staff and Exhibit 1, Affidavit of Kristen Edwards, and Certificate of Service were served electronically to the Parties listed below, on the 9th day of April, 2015, addressed to:

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And on April 9, 2015, a true and accurate copy of the foregoing was mailed via U.S. Mail, first class postage prepaid, to the following:

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Midland SD 57552

Ms. Elizabeth Lone Eagle
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Howes, SD 57748

Mr. Ronald Fees
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