

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

IN THE MATTER OF THE APPLICATION BY)
TRANSCANADA KEYSTONE PIPELINE, LP)
FOR A PERMIT UNDER THE SOUTH DAKOTA) HP 14-001
ENERGY CONVERSION AND TRANSMISSION)
FACILITIES ACT TO CONSTRUCT THE)
KEYSTONE XL PROJECT)

**STANDING ROCK, CHEYENNE RIVER, ROSEBUD AND YANKTON SIOUX
TRIBES, DAKOTA RURAL ACTION, INDIGENOUS ENVIRONMENTAL
NETWORK, INTERTRIBAL COUP AND BOLD NEBRASKA
MOTION TO EXCLUDE EVIDENCE AND TESTIMONY BY TRANSCANADA**

COMES NOW, intervenors, the Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, Dakota Rural Action, Indigenous Environmental Network, Intertribal Council on Utility Policy and Bold Nebraska, by and through undersigned counsel, and move for an order excluding the introduction of evidence and testimony by TransCanada, and striking its pre-filed testimony from the record in this docket.

On April 17, 2015, the Commission entered an *Order Granting in Part Keystone’s Motion for Discovery Sanctions*, precluding 17 intervenors from presenting evidence for failure to comply with discovery orders of the Commission. On April 17, 2015, the Commission entered *Order(s) Granting in Part and Denying in Part Motion(s) to Compel Discovery* by the Standing Rock and Yankton Sioux Tribes and Dakota Rural Action. The order required TransCanada to fully answer identified discovery requests.

TransCanada has failed to comply with those orders, as affirmed in the Affidavit of James White, general counsel for TransCanada. Exhibit A attached hereto. The White affidavit acknowledges that TransCanada’s due diligence and production of emails was incomplete. *Id.* at ¶¶4-5. TransCanada’s limited production of documents further violated the discovery orders by failing to provide existing background and support data for reports that were produced. *See also* Affidavit of Peter Capossela, ¶7, Exhibit B; and


Letter of Thomasina Real Bird to James E. Moore and William Taylor, dated April 23, 2015, Exhibit C.

Accordingly, consistent with the precedent in this docket established by the Commission in the *Order Granting in Part Keystone's Motion for Discovery Sanction*, the intervenors are entitled to an order excluding testimony and the introduction of evidence by TransCanada, and striking its pre-filed testimony from the record.

The undersigned represent that it consulted with counsel for TransCanada in an attempt to avoid the need to file this motion. It is requested that this motion be heard by the Commission immediately prior to the commencement of the evidentiary hearing scheduled to begin on May 5, 2015. *Order For and Notice of Evidentiary Hearing* (April 17, 2015).

This motion is based upon SDCL §§15-6-34, 15-6-37; the *Order Granting in Part and Denying in Part Motion to Compel Discovery of the Standing Rock Sioux Tribe*; the *Order Granting in Part and Denying in Part Motion to Compel Discovery of the Yankton Sioux Tribe*; the *Order Granting in Part and Denying in Part Motion to Compel Discovery of Dakota Rural Action*; the *Order Granting in Part Keystone's Motion for Discovery Sanctions*; Exhibits A-C attached hereto and the papers and pleadings herein.

DATED this 24th day of April, 2015

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


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

Attorneys for Standing Rock Sioux Tribe

/s/ Tracey Zephier
Tracey A. Zephier
FREDERICKS PEEBLES & MORGAN LLP
910 5th Street Suite 104
Rapid City, South Dakota 57701
Telephone: (605) 791-1515
Facsimile: (605) 791-1915
Email: tzephier@ndnlaw.com

Attorney for Cheyenne River Sioux Tribe

/s/ Matthew L. Rappold
Matthew L. Rappold
RAPPOLD LAW OFFICE
816 Sixth Street
P.O. Box 873
Rapid City, South Dakota 57709
(605) 828-1680
Matt.rappold01@gmail.com

Attorney for Rosebud Sioux Tribe

/s/ Thomasina Real Bird
Thomasina Real Bird
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: trealbird@ndnlaw.com

Attorney for Yankton Sioux Tribe

/s/ Bruce Ellison

Bruce Ellison
518 6th Street #6
Rapid City, South Dakota 57701
Telephone: (605) 348-1117
Email: billi4law@aol.com

/s/ Robin S. Martinez

Robin S. Martinez, MO #36557/ KS #23816
MARTINEZ MADRIGAL & MACHICAO LLP
616 West 26th Street
Kansas City, Missouri 64108
816.979.1620 phone
888.398.7665 fax
Email: robin.martinez@martinezlawnet

Attorneys for Dakota Rural Action

/s/ Kimberly Craven

Kimberly Craven, AZ BAR #23163
3560 Catalpa Way
Boulder, CO 80304
Telephone: (303) 494-1974
Fax: 720.328.9411
Email: kimecraven@gmail.com

Attorney for Indigenous Environmental Network

/s/ Robert P. Gough

Robert P. Gough, SD SB#620
Secretary of, and Attorney for,
Intertribal Council on Utility Policy
P.O. Box 25, Rosebud SD 57570
605-441-8316
Bobgough@intertribalCOUP.org
Gough.bob@gmail.com

Attorney for the Intertribal COUP

/s/ Paul C. Blackburn

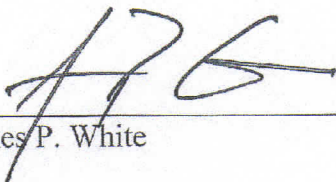
Paul C. Blackburn
South Dakota Bar No. 4071
4145 20th Avenue South
Minneapolis, MN 55407
612-599-5568
paul@paulblackburn.net

Attorney for BOLD Nebraska

the location of e-mails, including stored and archived e-mails, could not reasonably be completed in a few days.

5. Before any responsive e-mails could be produced, they would have to be reviewed for privileged or confidential information. It would be ethically inappropriate and legal malpractice for counsel to allow e-mail of that volume to be produced without review. It is not reasonably possible, even if the e-mails could be assembled, for counsel to review the e-mails for privileged or confidential information in a few days.

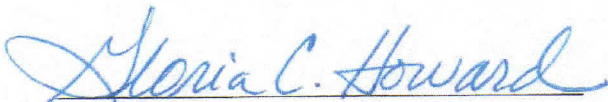
Dated this 17th day of April, 2015.



James P. White

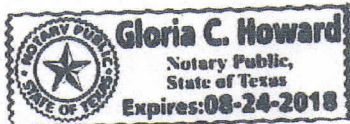
Subscribed and sworn to before me

this 17th day of April, 2015.



Notary Public – Texas

My commission expires:



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

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TRANSCANADA KEYSTONE PIPELINE, LP)
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FACILITIES ACT TO CONSTRUCT THE)
KEYSTONE XL PROJECT)

HP 14-001

AFFIDAVIT OF PETER CAPOSSELA

I, Peter Capossela, under penalty of perjury, hereby state and affirm:

1. That I am counsel of record for the Standing Rock Sioux Tribe in the above-captioned matter.

2. I am informed and have personal information of the affirmations contained herein, except the affirmations that are stated upon information and belief.

3. On April 17, 2015, the Public Utilities Commission issued an order in the above-captioned docket compelling TransCanada to answer the Standing Rock Sioux Tribe Request for the Production of Documents, paragraphs 3-9 and 11-13.

4. I received an electronic mail message from TransCanada's counsel on April 16, informing me that on April 17, I would receive a user name and password for a cloud-based File Transfer Program (FTP), in which I would be able to access the documents.

5. On April 17, at 4:37 pm central time, I received an electronic mail message from TransCanada's counsel with an internet link to the site, and the user name and password to access the site.

Joint Motion to Exclude
Exhibit B

005182

6. I accessed the site in the early morning on Saturday, April 18. The site contained an incomplete response to the Requests for Production of Documents prescribed in paragraphs 3-9 and 11-13. With respect to cultural resources, paragraph 8 requests “All documents prepared or obtained for the purpose of demonstrating compliance with the National Historic Preservation Act.” The link in TransCanada’s FTP site captioned *Standing Rock Document Request_8* was TransCanada’s response to this request.

7. TransCanada possesses documents on National Historic Preservation Act compliance that were not produced in *Standing Rock Document Request_8*. For example, the Standing Rock Sioux Tribe is in possession of “Pipeline Route Variation Form” dated March 19, 2012 (attached). This TransCanada document, which was not produced to Standing Rock per request 8, states that, “site is currently ineligible but SD SHPO wants more work and consultation which could change the status and prolong the 106 process.” The reference to “106 process” means section 106 of the National Historic Preservation Act. But TransCanada did not produce it to the Standing Rock Sioux Tribe, as required in the Commission’s April 14, 2015 *Order Denying in Part and Granting in Part Motion to Compel*. It is reasonable to postulate that TransCanada possesses very many documents covered by the discovery requests, such as emails, and background and support data to documents that were produced, but which have not been made available.

8. Accessing and navigating TransCanada’s site has been very difficult and time-consuming. There are layers of folders and documents buried in the folders. It took 1-2 minutes to open most folders, and 1-2 minutes to open most files, although some files took up to 5 minutes to open. If, for example, one had to enter several folders to find a

document, with 1-2 minutes to open each folder, it could take 10 minutes to open the folders and then the document file. It could take 10 minutes to access one document.

9. Many of the documents listed on the menu for each folder were unavailable. In some instances, a window appeared which read “This page can’t be opened.” In others, a message appeared “file damaged.” Thus, I have been unable to access many of the documents purported to have been produced.

10. Some documents contained a file for every page. Upon my information and belief, the Class III Cultural Resources Survey, Addendum 4, Appendix C was comprised of 189 different files – for one document. Each file takes approximately one minute to download. For that document, it took approximately three hours to download.

11. Upon my information and belief, TransCanada’s FTP program made the users’ computers vulnerable to security breach. The data may also have been vulnerable to security breach.

12. On April 22, 2015, TransCanada took down the FTP site, and uploaded a new site, and provided new user names and passwords. Upon my information and belief, no new documents were produced.

13. The Standing Rock Sioux Tribe’s pre-filed testimony in the above referenced matter was filed on April 2, 2015. Access to the FTP program was first made available on April 17, two weeks after testimony was due. The documents have been produced too late to be used in developing rebuttal testimony, or to be of any use at any stage of this proceeding.

14. Counsel for several intervenors consulted with counsel for TransCanada via teleconference on April 20, in an effort to avoid the filing of the Motion to Exclude.

Dated this 24th day of April, 2015

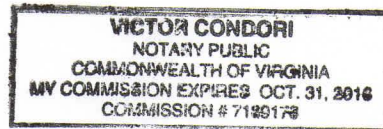
By: Peter Capossela
Peter Capossela

COMMONWEALTH OF VIRGINIA)
)
COUNTY OF FAIRFAX)

SUBSCRIBED and SWORN to before me
this 24th day of April, 2015

[Signature]
NOTARY PUBLIC

My Commission Expires 10/31/2016



KEYSTONE XL PIPELINE PROJECT PIPELINE ROUTE VARIATION FORM			
1	VARIATION TYPE: Refinement: _____ Centerline: <u> X </u>	Reroute: <u> X </u> Pump Station: _____	Footprint: _____ Design: _____ Valve Site: _____ CAR: _____
2	LOCATION: State: <u> SD </u> Township: <u> 20N </u> Section: <u> 28 </u>	County: <u> Harding </u> Range: <u> 04E </u> Centerline: <u> 3/14/2012 </u>	Pictures: <u> N/A </u> Quad Map: <u> N/A </u> Aerial Map: <u> See attached map sheet </u> MP: <u> 311.27 </u> to <u> 311.53 </u>
3	REASON FOR ROUTE VARIATION (Please include reason for route variation): The primary reason for this reroute is to avoid Cultural Site (CBRAVOHA001). Smith #36HN1133. Site is currently ineligible but SD SHPO wants more work and consultation which could change the status and prolong the 106 process in the state. The reroute has been proposed based on a combination of Flyover video of Centerline, LIDAR data, Pictometry and other aerals.		
DETAIL ROUTE VARIATION (Please describe route variation in detail): Route variation starts near MP 311.3 and deviates ~25.5° east of current C/L. It extends in this direction for ~277 ft. Then it turns further east and continues in this direction for ~111 ft and thus avoids the cultural site and allows for all temporary workspaces to avoid it as well. Lastly, the reroute turns south for ~1,019 ft. to rejoin the C/L near MP 311.5.			
ADDITIONAL IMPACTS (Please include any additional impacts which may affect cost; crossings, induction bends, etc.): No New Landowners are impacted by this route variation. Reroute Impacts 2 tracts: ML-SD-HA-01310.000 (Niemi Ranch Limited Partnership A SD Domestic Limited Partnership) ML-SD-HA-01330.000 (State of South Dakota) The reroute increases pipe length by ~ 60 ft. Miscellaneous Cost savings include: ~\$15,000-\$20,000 to test the site, ~20,000 - 25,000 for treatment/mitigation.			
Is there an increase/decrease in the number of crossings? Yes <u> X </u> No _____ If yes, please list: _____			
COST ANALYSIS (costs incurred or saved from the route variation)			
Additional length of route realignment:	60	ft.	\$ 21,729.22 \$ 360/ft
Additional length of side-hill construction:		ft.	\$ - \$ 19/ft
Additional length of wetland construction:		ft.	\$ - \$ 195/ft
Additional bore length (Road, RR):		ft.	\$ - \$ 540/ft
Additional foreign line/pipeline crossings:		EA	\$ - \$ 30,000/EA
Additional water body crossing (streams, ponds, etc.):			
35 - 65' +	0	EA	\$ - \$ 185,000/EA
10' - 19'	0	EA	\$ - \$ 77,250/EA
Less than 10'	0	EA	\$ - \$ 32,500/EA
Additional survey required:			
Civil:	0.27	mile	\$ 1,330.31 \$ 5,000/mile
Cultural:	0.18	mile	\$ 440.34 \$ 2,500/mile
Biological:	0.18	mile	\$ 493.18 \$ 2,800/mile
Miscellaneous costs saved or added due to route variation from ADDITIONAL IMPACTS listed above:			\$ (40,000)
Overall estimated costs of the route variation:		\$ (16,006.95)	(See "Additional Impacts" above)

4 **LAND / TransCanada** *Tina Hall*

a) Is a new landowner affected by the proposed variation? Yes No

b) Is the affected landowner/tract a possible condemnation? Yes No

c) Does proposed route variation impact Tribal Lands? Yes No

d) Does proposed route variation impact any Federal/State Lands? Yes No
 -If yes, name type (i.e. USFWS, BLM, etc.): State of South Dakota

e) Is proposed realignment outside the easement/workspace? Yes No

f) Is realignment proposed to satisfy landowner request? Yes No
 -If yes, name of landowner(s)/track number(s): _____

g) Has all the evaluation criteria been examined/provided for this specific discipline? Yes No
 If no, please explain why: _____

5 **ENGINEERING/CONSTRUCTION - TransCanada** *Meera Kothari*

a) Maximum deviation perpendicular to proposed alignment: 145 ft.

b) Does variation (CL) (including workspaces) falls within 500 ft. MDEQ Corridor? Yes N/A No

c) Has the centerline been staked for construction? Yes No

d) Does route variation affect HDD crossing alignment? Yes No

e) Is realignment proposed for engineering/construction reasons? Yes No

f) Will the route variation require the relocation of a pump station? Yes No

g) Has all the evaluation criteria been examined/provided for this specific discipline? Yes No
 If no, please explain why: _____

6 **ENVIRONMENTAL / exp** *Jonathan Minton*

a) Has the corridor been environmentally surveyed? Yes No

b) Has the proposed variation been environmentally surveyed? Yes No

c) Does proposed route variation impact Sage Grouse areas? Yes No

d) Does route variation impact ABB areas? Yes No

e) Was variation proposed to satisfy environmental issues? Yes No

f) Was realignment proposed to satisfy agency request? Yes No
 -If yes, name of agency(s): _____

g) Environmental features:
 Added (+): Subtracted (-):
 Wetland ID # for newly impacted wetlands: _____

h) Has all the evaluation criteria been examined/provided for this specific discipline? Yes No
 If no, please explain why: _____

7 **ENGINEERING / FACILITIES AND HYDRAULICS (if applicable)** *Sandra Gigovic*

a) Will the route variation require the relocation of a pump station? Yes No

b) Will route variation impact hydraulics? Yes No

c) Are additional valves required at HCA's or water crossing? Yes No

d) Has all the evaluation criteria been examined/provided for this specific discipline? Yes No
 If no, please explain why: _____

8 **STAKEHOLDER RELATIONS / TCPL (if applicable)** *Bud Andersen*

a) Does the variation result in any new stakeholders? Yes No

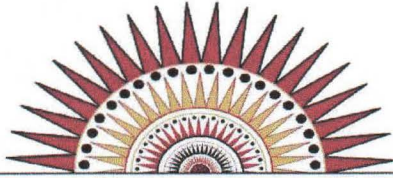
b) Does the variation require follow-up with specific stakeholder groups? Yes No

c) Was the variation proposed to satisfy stakeholder request? Yes No
 -If yes, please specify issue type (as it aligns to stakeholder database): _____

d) Has all the evaluation criteria been examined/provided for this specific discipline? Yes No
 If no, please explain why: _____

<p>9</p> <p>Originator: <u>Environmental</u></p> <p>Date: <u>3/19/2012</u></p>	<p>10</p> <p>Received by: _____</p> <p>Date: <u>3/19/2012</u></p> <p>Fax to: ?</p>
<p>11</p> <p>Assigned Tracking Number: <u>0269-SD-P4-311.3-311.5-I</u></p>	<p>12</p> <p>Filed by: _____</p> <p>Date: _____</p> <p>Fax to: ?</p>

0269-SD-P4-311.3-311.5-I



FREDERICKS PEEBLES & MORGAN LLP
ATTORNEYS AT LAW

THOMASINA REAL BIRD

1900 Plaza Drive
Louisville, CO 80027
Telephone: (303) 673-9600
Fax: (303) 673-9155
E-Mail: trealbird@ndnlaw.com
www.ndnlaw.com

April 23, 2015

SENT VIA EMAIL

James E. Moore
William Taylor
P.O. Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117
Email: james.moore@woodsfuller.com
Email: bill.taylor@woodsfuller.com

RE: TransCanada's Deficient Production Compelled by the Order Granting in Party and Denying in Part Yankton Sioux Tribe's Motion to Compel Discovery; Deadlines; Documents Designated as Confidential

Messrs. Taylor and Moore:

We are writing to notify you that your production in response to the *Order Granting in Part and Denying in Part Yankton Sioux Tribe's Motion to Compel Discovery* is deficient and we intend to file a motion requesting the Public Utilities Commission exclude you from using documents compelled but not produced; from presenting witnesses and evidence based upon the compelled but not produced documents; or other relief including dismissal of your application.

In the *Order Granting in Part and Denying in Part Yankton Sioux Tribe's Motion to Compel Discovery from TransCanada*, the Commission recounted that it "voted unanimously to overrule TransCanada's objections and grant the Motion with respect to interrogatories 15 and 21 and requests for production of documents numbers 2, 3, 4, 7, and 8." The Commission then ordered that "TransCanada must provide answers to Yankton's interrogatories 15 and 21... [and] all documents with respect to Yankton's requests for production numbers 2, 3, 4, 7, and 8 by Friday, April 17, 2015."

With respect to the documents you were compelled to produce, you provided us access to a number of documents classified as either confidential or non-confidential.

Request for Production No. 2

Request no. 2 states: “All documents relating to environmental and hydrological surveys. Changed Finding of Fact Number Forty-One.” The documents produced in response to our request no. 2 include biological survey reports provided in the confidential documents and hydrological surveys provided in the non-confidential documents. We were only provided with copies of the biological and hydrological reports when the request asks for “all documents relating to the environmental and hydrological surveys”. (Compare to our RFP No. 6 wherein we requested all documents *constituting* the emergency response plan.) Your response to request no. 2 appears incomplete and deficient.

Request for Production No. 3

Request no. 3 states: “All documents relating to cultural and historic surveys, training, and response plans. Condition Forty-Four.” The documents provided in response to our request no. 3 include cultural survey reports provided in the confidential documents. We were only provided with copies of the cultural survey reports when the request asks for “all documents relating to cultural and historic surveys”. (Compare to our RFP No. 6 wherein we requested all documents *constituting* the emergency response plan.) Your response to request no. 3 appears incomplete and deficient.

Request for Production No. 4

Request no. 4 states: “All documents relating to required permits, both in South Dakota and outside South Dakota, including permit applications which were denied, revoked, or suspended.” It appears that your response to this request is deficient on multiple levels:

1. Our request sought documents pertaining to permit applications including those which were denied. Due to security safeguards necessarily employed for the protection of our clients’ confidentiality, we are unable to open one of the documents provided, titled “Presidential Permit Application from TransCanada Keystone Pipeline LP.url.” However, based on the title of this document, you appear to have provided only one Presidential Permit application, despite the fact that a previous Presidential Permit application had been submitted in 2008 and denied in 2012. This then begs the question, what other permit applications in addition to the 2008 Presidential Permit application have been denied for which you have failed to produce discovery?
2. Your response states that it includes all non-environmental permits *obtained* in South Dakota. Does this mean every application for a permit in South Dakota has been approved because the request is not limited to those which were denied, revoked, or suspended? Furthermore, does the distinction “non-environmental” indicate that TransCanada has also applied for environmental permits in South Dakota? If so, it appears your response is deficient for failure to include documents pertaining to such permit applications.
3. Our request sought documents pertaining to permit applications both within and outside of South Dakota. However, your response states that you included “all non-environmental permits obtained in South Dakota.” Does this mean TransCanada has not

applied for non-environmental permits outside of South Dakota? Moreover, does it mean TransCanada has not applied for *any* permits outside of South Dakota? If TransCanada has applied for permits other than the Presidential Permit outside of South Dakota, this response is incomplete and deficient.

We also would like to take this opportunity to reiterate our concern with the timing and mechanics of the production of the documents that were produced. Although access to the ftp website hosted by TransCanada's IT company was provided on Friday, April 17, 2015, we experienced technological problems associated with firewalls that our firm utilizes to address its concerns with unsecure ftp sites. We continued to experience significant delay once the firewall issue was resolved. It seems as though the size of the document files you chose to upload resulted in significant download delays that could have been eliminated by breaking them down into smaller file sized or producing the documents on an external hard drive. While we agree that an extension to April 28, 2015, for the filing of witness and exhibit lists is appropriate given the circumstances and we appreciate you agreeing to that extension, we believe a longer extension is in order considering these documents should have been produced on February 6, 2015. We believe a longer extension as well as a continuance of the May trial dates is appropriate.

Finally, we would like to take this opportunity to notify you that we intend to challenge the Commission's confidential treatment of the materials you produced to Yankton that you designated as confidential. The administrative regulations were not followed in that TransCanada was not required to request confidential treatment of information nor follow the other requirements of ARSD 20:10:01:41. Instead, the Commission, upon your insistence, has shifted the burden to intervenors and others who wish to challenge the "confidentiality determination" and request access by seeking such relief from the Commission pursuant to the Protective Order and ARSD 20:10:01:42 without first requiring you to meet your burden of ARSD 20:10:01:41. This shortcut together with your liberal designation of documents as confidential may result in the expenditure of more resources in order for the Commission to hear and decide any challenges and requests for access. Without knowing what, if any, basis exists to consider the documents confidential, we are uncertain at this point whether we are asking for the Tribe, all parties, or the public should have access to the documents you designated as confidential.

Please contact me if you would like to discuss any of these matters further.

Sincerely,



Thomasina Real Bird
Attorney

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TRANSCANADA KEYSTONE PIPELINE, LP)
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TRIBES, DAKOTA RURAL ACTION, INDIGENOUS ENVIRONMENTAL
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BRIEF IN SUPPORT OF MOTION TO EXCLUDE
EVIDENCE AND TESTIMONY BY TRANSCANADA**

I. TransCanada Violated the Orders to Compel Discovery

The *Order Granting in Part Keystone’s Motion for Discovery Sanctions* (April 17, 2015), precluding 17 intervenors from presenting evidence for failure to comply with discovery orders of the Commission, established that violating discovery orders results in the exclusion of evidence and testimony in this docket. The Commission issued three orders compelling TransCanada to answer the discovery requests previously submitted by the Yankton Sioux Tribe, Dakota Rural Action and the Standing Rock Sioux Tribe. *Order(s) Granting in Part and Denying in Part Motion(s) to Compel Discovery* (April 17, 2015). TransCanada violated all three orders. Accordingly, the Commission should grant the joint motion to exclude TransCanada from introducing testimony and evidence in this matter.

TransCanada filed and served the Affidavit of James White, its associate general counsel, which acknowledged the failure to comply. *Motion to Exclude*, Exhibit A, ¶¶4-5. White attempted to justify the failure as follows: “It is not reasonably possible to conduct in a few days an email search...” as he deemed necessary to comply with the discovery orders. *Id.* at ¶4. However, the Commission established the timetable for the production of discovery documents at its hearing on March 26, 2015. On that date, the

Commission admonished all parties to be prepared to promptly respond to discovery by April 17.

White is wrong: TransCanada had more than a few days – it had several weeks. TransCanada chose not to utilize that time to prepare for compliance with orders to compel. It must live with the consequences of that choice – loss of the right to present evidence and testimony in this matter. *Haberer v. Radio Shack*, 555 N.W.2d 606, 611 (S.D. 1996).

With respect to the Standing Rock Sioux Tribe, the affidavit of counsel also establishes that TransCanada violated the order compelling discovery. *Affidavit of Peter Capossela*, ¶7. The affidavit contains a TransCanada document addressing National Historic Preservation Act compliance, which TransCanada failed to produce for the Tribe – proof of noncompliance with the order. *Id.*

Moreover, the manner in which TransCanada made the limited number of documents available did not comply with the applicable rule. SDCL §15-6-34(b) requires that “[A] party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.” As affirmed in the affidavit of counsel for Standing Rock, many of the documents produced in TransCanada’s FTP site were scattered in different folders that were difficult to open, with single documents distributed in scores of different computer files. *Affidavit of Peter Capossela*, ¶¶8-10. A haphazard production of documents does not comply with the rule, and is not countenanced by the courts. *Wagner v. Dryvit Systems, Inc.*, 208 F.R.D. 606, 610 (D. Neb. 2001) (“producing large amounts of documents in no apparent order does not comply with a party’s obligation under Rule 34.”).

II. Exclusion of Evidence and Testimony is the Appropriate Sanction

TransCanada possesses an “affirmative duty to make a reasonable inquiry (and) respond in a manner which was both complete and correct.” *Hershberger v. Ethicon Endo-Surgery, Inc.*, 277 F.R.D. 299, 305 (S.D. W.Va. 2011). As described above, it intentionally failed to do so – the White affidavit acknowledges that TransCanada made no effort to comply with the discovery requests until “a few days” before the documents were due. *Affidavit of James White*, ¶4.

Consequently, TransCanada failed to fully comply with the discovery orders. *Id.*, see also SDCL §1-6-33(a) requiring discovery to be “answered separately and **fully**” (emphasis added). “Providing... incomplete discovery responses violates the Federal Rules of Civil Procedure and subjects the offending party... to sanctions.” *Hogue v. Fruehauf Corp.*, 151 F.R.D. 635, 637 (N.D. Ill. 1993).

When a plaintiff or petitioner deliberately withholds documents and violates an order compelling discovery, as TransCanada did here, the general rule is that its complaint or petition is dismissed. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976) (dismissal for “callous disregard of responsibilities”); *Lindstedt v. City of Gramby*, 238 F.3d 933, 937 (8th Cir. 2000) (“intentional disregard of requirements and he fashioned his own rule of defense to discovery”); *Serra-Lugo v. Consortium-Las Marias*, 271 F.3d 5 (1st Cir. 2001) (dismissal after “having warned plaintiff” to comply); *Charter House Insurance Brokers Ltd. V. New Hampshire Ins. Co.*, 667 F.2d 600, 605 (7th Cir. 1982) ([The noncompliant party] “cannot be heard to justify its conduct on the basis of self inflicted misunderstanding”). The South Dakota courts follow the general rule. *Haberer v. Radio Shack*, 555 N.W.2d at 611; see also *State By and Through Dept. of Transp. v. Grudnik*, 243 N.W.2d 796, 797 (S.D. 1976) (“Our pretrial discovery rules have been modeled on the Federal Rules”).

Imposing a sanction such as the exclusion of testimony should result when ‘failure to comply has been due to... willfulness, bad faith, or... fault.’” *Haberer v. Radio Shack*, 555 N.W.2d at 611, citing *Schrader v. Tjarks*, 522 N.W.2d 205, 210 (S.D. 1994) (quoting *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316 (S.D. 1979)). Litigants such as TransCanada are sanctioned with the exclusion of evidence, where, as here, “the activities of the Companies ‘made it impossible... to prepare for trial.’” *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 787 (9th Cir. 2011).

Indeed, the Commission established that the violation of discovery orders by a party results in the exclusion of their evidence and testimony. *Order Granting in Part Keystone’s Motion for Discovery Sanctions* (April 17, 2015). Many of the excluded parties are everyday South Dakotans – ranchers and landowners, Indian and non-Indian – intervenors concerned with Keystone XL’s potential impact on their land and way of life.

Many of them are unrepresented by counsel. *See e.g. Petition to Intervene by John Harter* (September 30, 2014); *Petition to Intervene of Viola Waln* (October 8, 2014).

For its part, TransCanada is one of the world's largest corporations, with offices from Calgary, Alberta to Houston Texas, and Washington D.C. It has vast resources with which to participate in this proceeding. It would be manifestly unjust for this Commission to penalize ordinary South Dakotans, unrepresented by counsel, by excluding their evidence and testimony for discovery violations, while permitting TransCanada to commit worse infractions and yet continue to pursue its petition. For, "To no one will we sell, to no one will we refuse or delay, right or justice." *Griffin v. Illinois*, 351 U.S. 12, 16 (1956) citing the Magna Carta (Engl. 1215).

TransCanada has admitted it violated the discovery orders. *Affidavit of James White*, ¶4. The Commission has excluded the introduction of testimony and evidence by intervenors deemed non-compliant. *Order(s) Granting in Part and Denying in Part Motion(s) to Compel Discovery* (April 17, 2015). As a result of TransCanada's violations, the Motion to Exclude must be granted.

RESPECTFULLY SUBMITTED this 24th day of April, 2015

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

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

Attorneys for Standing Rock Sioux Tribe

/s/ Tracey Zephier

Tracey A. Zephier
FREDERICKS PEEBLES & MORGAN LLP
910 5th Street Suite 104
Rapid City, South Dakota 57701
Telephone: (605) 791-1515
Facsimile: (605) 791-1915
Email: tzephier@ndnlaw.com

Attorney for Cheyenne River Sioux Tribe

/s/ Matthew L. Rappold

Matthew L. Rappold
RAPPOLD LAW OFFICE
816 Sixth Street
P.O. Box 873
Rapid City, South Dakota 57709
(605) 828-1680
Matt.rappold01@gmail.com

Attorney for Rosebud Sioux Tribe

/s/ Thomasina Real Bird

Thomasina Real Bird
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: trealbird@ndnlaw.com

Attorney for Yankton Sioux Tribe

/s/ Bruce Ellison

Bruce Ellison
518 6th Street #6
Rapid City, South Dakota 57701
Telephone: (605) 348-1117
Email: billi4law@aol.com

/s/ Robin S. Martinez

Robin S. Martinez, MO #36557/ KS #23816
MARTINEZ MADRIGAL & MACHICAO LLP
616 West 26th Street
Kansas City, Missouri 64108
816.979.1620 phone
888.398.7665 fax
Email: robin.martinez@martinezlzaw.net

Attorneys for Dakota Rural Action

/s/ Kimberly Craven

Kimberly Craven, AZ BAR #23163
3560 Catalpa Way
Boulder, CO 80304
Telephone: (303) 494-1974
Fax: 720.328.9411
Email: kimecraven@gmail.com

Attorney for Indigenous Environmental Network

/s/ Robert P. Gough

Robert P. Gough, SD SB#620
Secretary of, and Attorney for,
Intertribal Council on Utility Policy
P.O. Box 25, Rosebud SD 57570
605-441-8316
Bobgough@intertribalCOUP.org
Gough.bob@gmail.com

Attorney for the Intertribal COUP

/s/ Paul C. Blackburn

Paul C. Blackburn
South Dakota Bar No. 4071
4145 20th Avenue South
Minneapolis, MN 55407
612-599-5568
paul@paulblackburn.net

Attorney for BOLD Nebraska

Certificate of Service

The undersigned hereby certifies that, on this day, I served the afore Joint Motion to Exclude and Brief in Support of Joint Motion to Exclude via electronic mail to –

William G. Taylor
bill.taylor@woodsfuller.com

James E. Moore
james.moore@woodsfuller.com

Attorneys for TransCanada Keystone Pipeline, LP

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

Darren Kearney
Darren.Kearney@state.sd.us

Kristen Edwards
Kristen.Edwards@state.sd.us

Brian Rounds
Brian.Rounds@state.sd.us

Tina Douglas
Tina.douglas@state.sd.us

Kristie Fiegen
Kristie.fiegen@state.sd.us

Gary Hanson
Gary.hanson@state.sd.us

Chris Nelson
Chris.nelson@state.sd.us

Greg Rislov
Greg.rislov@state.sd.us

John Smith
John.smith3@state.sd.us

Rolayne Wiest
Rolayne.wiest@state.sd.us

Amy Schaffer
amyannschaffer@gmail.com

April D. McCant
April.mccant@martinezlaw.net

Arthur Tanderup
atanderu@gmail.com

Benjamin D. Gotschall
ben@boldnebraska.org

Bruce & RoxAnn Boettcher
boettcherann@abbnebraska.com

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

Byron & Diana Steskal
prairierose@nntc.net

Carolyn Smith
Peachie_1234@yahoo.com

Chastity Jewett
chasjewett@gmail.com

Chris Hesla
sdwf@mncomm.com

Cindy Myers, RN
csmyers77@hotmail.com

Honorable Cyril Scott
cscott@gwtc.net
paula.antoine@rosebudsiouxtribe-net

Dallas Goldtooth
goldtoothdallas@gmail.com

Debbie J. Trapp
mtdt@goldenwest.net

Duncan Meisel
Duncan@350.org

Elizabeth Lone Eagle
bethcbest@gmail.com

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

Frank James
fejames@dakotarural.org

Gary Dorr
gfdorr@gmail.com

Gena Parkhurst
Gmp66@hotmail.com

Honorable Harold Frazier
haroldcfrazier@yahoo.com

Jane Kleeb
jane@boldnebraska.org

John H. Harter
johnharter11@yahoo.com

Joye Braun
jmbraun57625@gmail.com

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

Lewis GrassRope
Wisestar8@msn.com

Louis Genung
Tg64152@windsream.net

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

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

Nancy Hilding
nhilshat@rapidnet.com

Paul F. Seamans
jackknife@goldenwest.net

Robert Allpress
bobandnan2008@hotmail.com

Honorable Robert Flying Hawk
Robertflyinghawk@gmail.com

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

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

Paula Antoine
wopila@gwtc.net

Sabrina King
Sabrina@dakotarural.org

Terry & Cheryl Frisch
tcfrisch@q.com

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

Tom BK Goldtooth
ien.igc.org

Tony Rogers
tuc@rosebudsiouxtribe-nsn.gov

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

Viola Waln
walnranch@goldenwest.net

Wrexie Lainson Bardaglio
Wrexie.bardaglio@gmail.com

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

Bonnie Kilmurry
47798 888 Road
Atkinson, Nebraska 68713

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

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

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

Ronald Fees
17401 Fox Ridge Road
Opal, South Dakota 57758

Dated this 24th day of April, 2015

By: *Peter Capossela*
Peter Capossela