

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

IN THE MATTER OF:)	Docket HP 14-001
)	
PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE)	INTERTRIBAL COUP’S AMENDED RESPONSE TO KEYSTONE’S OBJECTION TO COUP’S REQUEST FOR A TIME CERTAIN AND MOTION TO PRECLUDE WITNESSES

Comes now the Intertribal Council On Utility Policy (COUP), by and through counsel, Robert Gough, and hereby submits the following AMENDED RESPONSE TO KEYSTONE’S OBJECTION TO COUP’S REQUEST FOR A TIME CERTAIN AND MOTION TO PRECLUDE WITNESSES. An Amended Response is necessary because the initial response that was inadvertently filed was an earlier, incomplete draft.

Rebuttal Witnesses for Intertribal COUP

This statement is applicable to the following rebuttal witnesses Intertribal COUP has previously disclosed to TransCanada Keystone Pipeline, LP (“TransCanada”), namely: Dr. George Seiestad, Dr. Robert Oglesby and Dr. James Hansen.

TransCanada has moved the Commission to “preclude Dr. Hansen, Dr. Seielstad, and Dr. Oglesby from testifying [as Rebuttal Witnesses] based on COUP’s failure to timely submit pre-filed [Direct Testimony]. TransCanada’s

position with regard to Rebuttal Testimony is untimely and absurd as it relies upon imagined yet unfiled rebuttal testimony.

Intertribal COUP disclosed our witnesses and the scope of their testimony, but in apparently mistaken reliance on SDCL §15-6-43(a), we did not pre-file our direct witness testimony by the date set by the South Dakota Public Utility Commission (“Commission”) based upon our reading of the law in this matter. Intertribal COUP’s reading of the law was overruled by the Commission, which imposed the harsh penalty of precluding our witnesses from offering direct testimony during the Re-Certification Hearing. However, during that preliminary hearing of April 14, 2015, Intertribal COUP expressly raised and reserved the right to have our witnesses remain to appear, though only as rebuttal witnesses. This was agreed to by the Commission. Based upon the Commission’s ruling precluding our witnesses from offering Direct Testimony, COUP will not file any “Direct Testimony” but will file, by leave granted by the Commission, we will pre-file Rebuttal Testimony from our three witnesses, as deemed necessary by the June 26, 2015 deadline, with the understanding that cross-examination may elicit additional rebuttal testimony. TransCanada’s motion now unilaterally attempts to supersede the Commission’s decision of April 14th and expand the penalty the Commission imposed, as TransCanada seeks to preclude the COUP witnesses from being Rebuttal Witnesses based upon the procedural circumstances of their being characterized and subsequently disqualified as Direct Witnesses.

Intertribal COUP recognizes that this is TransCanada’s Petition, but it is

not their regulatory process. According to the transcript of the April 14, 2015 hearing at pages 191-192:

CHAIRMAN NELSON: Yes, Mr. Gough. I thought Mr. Gough who wanted to speak.

MR. GOUGH: Yes, Chairman. Point of clarification on the Motion regarding Dakota Rural Action and InterTribal COUP. Given what was resolved today, do I understand that we are precluded from bringing a written on direct? And that's the only preclusion, that we still have all of our rights for cross-examination and all other rights as parties, including providing rebuttal witnesses?

CHAIRMAN NELSON: That is my understanding. And I'm going to turn to Mr. Smith to make sure that I'm right on that.

MR. SMITH: That's my understanding of what you -- when I asked you the questions. And, again, it's a little unusual because of the weird way we're set up here this year in terms of -- but my understanding is that people have responsive testimony, and they're not -- and they wish to -- they're not -- and they do prefile, that that will not be precluded.

The agreed upon condition for Rebuttal Testimony is “that prefiled rebuttal testimony would be allowed to be filed by all parties until the April 27, 2015, deadline.” (Order, Apr. 23, 2015, at 2.) That deadline has since been extended to June 26, 2015, as per the April 30, 2015 hearing order.

TransCanada’s objection to our characterization of testimony as “direct” is moot, as that characterization of our testimony came *prior* to our witnesses being precluded from providing “direct testimony” by the Commission, while direct testimony was still on the table.

TransCanada’s objections are also untimely on two additional counts. First, TransCanada had no more information at the time of their filing their motion to preclude as to the testimony of COUP’s proposed and disclosed witnesses

and the likely scope of their testimony than they did at the April 14, 2015 hearing. They waited until COUP filed our motion for a “Time Certain” as directed by the Commission staff, and only then did they note their objection and desire to preclude our witnesses. If they had objections to the Commission advising COUP that it could provide ‘Rebuttal Witnesses’ they should have objected then and there at the April 23rd hearing. Secondly, COUP has yet to pre-file our rebuttal testimony, so TransCanada appears to be pre-supposing too much.

Finally, TransCanada contends that COUP’s proposed testimony is “direct testimony” and, not “rebuttal testimony”.

First, TransCanada’s motion appears to claim to divine the nature and content of our rebuttal testimony, without benefit of either our original ‘direct testimony’ which was not filed, as per the Commission ruling against COUP, or our soon to be pre-filed rebuttal testimony, which isn’t due until June 26, 2015. TransCanada has apparently imagined that certain elements of their own direct testimony may be subject to rebuttal and then have further imagined what our rebuttal testimony is going to be, and then have taken it upon themselves to deem it not rebuttal testimony and have so moved to preclude it, sight unseen.

Second, we agree with TransCanada that “rebuttal testimony is testimony responding directly to the testimony of another witness.” See, e.g., State v. Phillips, 489 N.W.2d 613, 618 (S.D. 1992) (stating that witness testimony was “improper rebuttal testimony as it did not rebut the evidence presented by” other witnesses who had offered direct testimony).

At this point, the relevancy of COUP's rebuttal testimony remains to be seen. TransCanada' motion notes that:

“COUP states that the subject matter of the testimony of all three experts is climate change. That is not an issue raised by the direct testimony of any Staff or Keystone witness, nor is it a relevant issue to the proceeding. It is irrelevant to whether Keystone can continue to meet the conditions on which the permit was granted. SDCL § 49-41B-27.”

TransCanada's almost knee-jerk reaction to the appearance of the words 'climate' or 'climate change' as “not relevant” is understandable in their wishful world given the 1700 miles of tar sands hydrocarbon pipeline it is proposing to build across the heartlands of the North American continent. However carefully they may try to prepare their witnesses to not utter those three *particular* syllables, the issues embraced and embedded within the larger abstract concept of “climate change” are clearly at play and can already be found in the Direct Testimony of some of TransCanada's own witnesses and cited references in terms of “green house gas emissions intensity”, notwithstanding what ever else may be raised on cross-examination.

To appreciate what Intertribal COUP means with regard to the terms “climate” and “climate change”, we rely upon the following definitions provided by the Intergovernmental Panel on Climate Change¹:

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

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

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

In short, as John Wallace, an atmospheric scientist at the University of Washington has said: “*Climate is what we expect. Weather is what we get.*”

We come then to see a given characterization of a place’s “climate” as merely the abstract aggregate of 30 years of weather data for that particular place, with “climate change” then being little more than the delta between two consecutive 30 year periods for the same place, along with the potential likelihood of weather extremes outside those averages. Does TransCanada contend that their pipeline will be immune from weather events over the next 50 or 60 years? Does TransCanada contend, and does the Commission agree that the next half-century will be as tranquil as the last half century? Can or does our past century of weather records adequately foretell what we should expect and plan for in the foreseeable future? We have already seen a seven-year drought and a 500-year flood on the South Dakota stretch of the Missouri River in the first decade and a half of this century!

More importantly for South Dakotans, will the impact that breaks, leaks and spills from this pipeline can have on the fragile land and water resources so many South Dakota residents depend upon for our lives and livelihoods! Is TransCanada promising no breaks, no spills and no leaks? Have they made these promises before and elsewhere? Have they lived up to those promises? If

the 2010 permit hearing did not handle climate or climate change in any direct manner, then TransCanada and the Commission have jointly determined to hold climate constant over the next 50 plus year lifetime of the Keystone XL Pipeline, and need to acknowledge that. Is that prudent? Is what was expected at the end of July in 2010, be what we should basically expect to see in 2065? To the extent that it was considered it at all, we are basically being told that a single snapshot in time is more than enough to fairly gauge the intensity, frequency, and kinds of storms, droughts, tornados and other weather related phenomena that can and will impact this infrastructure over the next half century.

Finally, the world has changed considerably over the past 4 years in how we have come to comprehend the potential impacts of a changing climate on scarce water resources through pipeline breaks, spills and leaks. We know that there have been over 150 reported pipeline 'accidents' in the U.S. since the issuance of the 2010 permit². Intertribal COUP is merely asking the question, in the context of changed conditions between the 2010 Permitting and the 2015 Recertification hearings and our growing understanding of the critical need to

² List of pipeline accidents in the United States in the 21st century

From Wikipedia, the free encyclopedia

http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2010 ;

http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2011 ;

http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2012 ;

http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2013 ;

http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2014 ;

http://en.wikipedia.org/wiki/List_of_pipeline_accidents_in_the_United_States_in_the_21st_century#2015 .

address the potential impacts that extreme and accelerating meteorological changes that are already upon us:

Has this Commission's permit process, either in 2010 or now in 2015, adequately considered the range and nature of climate and weather extremes in western and central South Dakota over the next 50 years, the potential for climatic shifts and weather extremes to adversely affect the proposed pipeline routes, infrastructure and operation, and how even limited spills and leaks of dilbit may have far greater impact upon South Dakota's scarce water and fertile lands resources and upon our lives and livelihoods?

Having finally waded through some of limited documentation allowed to be reviewed by COUP under the protective orders obtained by TransCanada to limit discovery, we find that TransCanada, among others, has sufficiently opened the door to rebuttal testimony on the issues of "carbon emissions" and "green house gas intensity" in the direct testimony of Mr. David Diakow and in at least one of the many proposed changes or 'updates' to the original Findings and Conditions set forth in the original permit. For example, in TransCanada's "update" to Finding #27 TransCanada boldly states that:

The DOS Final SEIS indicates that transportation of crude oil by pipeline is safer and less greenhouse gas intensive than crude oil transportation by rail.

TransCanada has repeatedly cited to the FSEIS as its primary source for information in their otherwise rather non-responsive responses to Intertribal COUP's interrogatories:

"The oil forecast information that Keystone relied on in Appendix C to its Certification was derived from the following sources: The Final Supplemental Environmental Impact Statement; the CAPP Crude Oil

Forecast; Markets and Transportation June 2014 Forecast; and the Energy Information Agency Annual Energy Outlook 2014. Keystone will produce these documents, except for the FSEIS, which is available at <http://keystonepipeline-xl.state.gov/finalseis/index.htm>. [TransCanada's Response to Applicable Finding or Condition No.: Findings 14, 24-29]

Lastly, with the FSEIS included as part of the overall record in this matter, EPA's comments on the FSEIS also compel an examination of greenhouse gas emissions intensity and climate change issues and the changes in our understanding and consequences of these emissions today, over the state of understanding in 2010.

CONCLUSION

That, for the reasons cited above, TransCanada should not be allowed to unilaterally override and supersede this Commission's April 14th determination to preclude Intertribal COUP's witnesses from offering direct testimony only.

TransCanada's motion to preclude the Intertribal COUP witnesses from offering "rebuttal testimony" should be roundly dismissed.

Onipiktec'a!

Submitted this 20th day of May 2015

Respectfully submitted,



Robert P. Gough, SD SB# 620
Secretary of, and Attorney for,
Intertribal Council On Utility Policy (COUP)
P.O. 25, Rosebud, SD 57570
605-441-8316
BobGough@IntertribalCOUP.org

CERTIFICATION OF SERVICE

I, Robert Gough, hereby certify that on the 20th day of May 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of the **INTERTRIBAL COUP'S AMENDED RESPONSE TO KEYSTONE'S OBJECTION TO COUP'S REQUEST FOR A TIME CERTAIN AND MOTION TO PRECLUDE WITNESSES**, to the following:

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

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

James E. Moore
Woods, Fuller, Shultz and Smith P.C.
PO Box 5027
Sioux Falls, SD 57117
james.moore@woodsfuller.com
Attorney for TransCanada Keystone Pipeline, LP

Paul F. Seamans
27893 249th St.
Draper, SD 57531
jackknife@goldenwest.net

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

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

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

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

Bill G. Taylor
Woods, Fuller, Shultz and Smith P.C.
PO Box 5027
Sioux Falls, SD 57117
bill.taylor@woodsfuller.com
Attorney for TransCanada Keystone Pipeline, LP

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

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

Jane Kleeb
Bold Nebraska
1010 N. Denver Ave.
Hastings, NE 68901
jane@boldnebraska.org

Benjamin D. Gotschall Bold Nebraska
6505 W. Davey Rd.
Raymond, NE 68428
ben@boldnebraska.org

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

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

Bruce Ellison
518 6th Street #6
Rapid City, South Dakota 57701
belli4law@aol.com

and
Robin S. Martinez, MO #36557/KS
#23816 616 West 26th Street
Kansas City, Missouri 64108
robin.martinez@martinezlaw.net
Attorneys for Dakota Rural Action

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

Louis T. Genung
902 E. 7th St.
Hastings, NE 68901
tg64152@windstream.net

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

Bruce & RoxAnn Boettcher
Boettcher Organics
86061 Edgewater Ave.
Bassett, NE 68714
boettcherann@abbnebraska.com

Cyril Scott, President
Rosebud Sioux Tribe
PO Box 430 Rosebud, SD 57570
cscott@gwtc.net

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

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

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

Jeff Jensen
14376 Laflin Rd.
Newell, SD 57760

jensen@sdplains.com

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

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

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

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

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

Kevin C. Keckler, Chairman
Cheyenne River Sioux Tribe
PO Box 590
Eagle Butte, SD 57625
kevinckeckler@yahoo.com

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

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

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

Douglas Hayes
Sierra Club

Ste. 102W
1650 38th St.
Boulder, CO 80301 doug.hayes@sierraclub.org

Tom BK Goldtooth
Indigenous Environmental Network (IEN)
PO Box 485
Bemidji, MN 56619
ien@igc.org
ien@igc.org
Kimberly Craven, Attorney
kimecraven@gmail.com

Chris Hesla
South Dakota Wildlife Federation PO Box 7075
Pierre, SD 57501
sdwf@mncomm.com

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

Gena M. Parkhurst
2825 Minnewasta Place
Rapid City, SD 57702
gmp66@hotmail.com

Robert Flying Hawk, Chairman
Yankton Sioux Tribe
PO Box 1153
Wagner, SD 57380
Robertflyinghawk@gmail.com

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

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

Dallas Goldtooth
38371 Res. HWY 1
Morton, MN 56270
goldtoothdallas@gmail.com

Terry & Cheryl Frisch 47591 875th Rd.
Atkinson, NE 68713

tcfrisch@q.com

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

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

Matthew L. Rappold
Rappold Law Office 816 Sixth Street
PO Box 873
Rapid City, SD 57709
Matt.rappold01@gmail.com
Attorney for Rosebud Sioux Tribe, Intervenor

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

Jerry Jones
22584 US HWY 14
Midland SD 57552

Ronald Fees
17401 Fox Ridge Rd.
Opal, SD 57758

Bonny Kilmurry
47798 888 Rd.
Atkinson, NE 68713

Elizabeth Lone Eagle
PO Box 160
Howes, SD 57748

Dated this 20th Day of May 2015.

Respectfully submitted,



Robert P. Gough, SD SB# 620
Secretary of, and Attorney for,
Intertribal Council On Utility Policy
P.O. 25, Rosebud, SD 57570
605-441-8316
BobGough@IntertribalCOUP.org

006716