

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION OF	:	HP 14-001
TRANSCANADA KEYSTONE PIPELINE, LP	:	
FOR ORDER ACCEPTING CERTIFICATION	:	APPLICANT’S MOTION TO
OF PERMIT ISSUED IN DOCKET HP09-001 TO	:	PRECLUDE CONSIDERATION OF
CONSTRUCT THE KEYSTONE XL PROJECT	:	ABORIGINAL TITLE OR
	:	USUFRUCTUARY RIGHTS

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In the course of discovery, Interveners have raised the issue of application of Indian aboriginal land title and usufructuary rights to property crossed by the proposed Keystone XL pipeline. Applicant respectfully moves the Public Utilities Commission to preclude testimony concerning or consideration of alleged aboriginal title or usufructuary rights on three grounds:

1. Determination whether or not such rights exist is beyond the Commission’s jurisdiction, authority, and the scope of this Certification proceeding;
2. If such rights exist they are asserted as part of a challenge to the pipeline route, over which the Commission has no authority;
3. No such rights exist with respect to the proposed Keystone XL route.

A. Background

Tribal interveners appear to contend the Keystone XL route crosses territory in South Dakota subject to aboriginal Indian title and usufructuary rights. Aboriginal title is grounded in the idea that western South Dakota was occupied by Indian tribes before the United States asserted its dominion in the 1800s, and that occupancy created aboriginal title rights in favor of the tribes.

Usufructuary rights arguably are remnants of the abrogated Fort Laramie Treaties of 1851 and 1868.

B. The PUC does not have authority to decide aboriginal title or treaty rights

The South Dakota Public Utility Commission is a quasi-judicial agency with limited jurisdiction. The South Dakota Supreme Court has said the PUC has no authority to define or interpret South Dakota's real property law. In *Petition of West River Electric*, 675 N.W.2d 222, 230 (S.D. 2004), the Court held "The PUC is not a court, and cannot exercise purely judicial functions. Defining and interpreting the law is a judicial function."

The proposed Keystone XL route does not cross tribal property, land owned by the United States and held in trust for Indians, or any Indian reservation. All land crossed by the proposed route is in state/private ownership. No court has held that Native Americans and/or tribal Interveners have aboriginal title or usufructuary rights with respect to any of the real property crossed by the proposed KXL route.

The Public Utilities Commission is not a court and does not have the authority to address and decide real property title questions. The proper forum for determination of Indian land interests is the state or federal courts. The PUC simply does not have jurisdiction to hear and decide questions regarding claimed aboriginal title to or usufructuary rights on the land that hosts the pipeline.

C. The essence of the tribal Intervener's assertion is a challenge to the pipeline route

The tribal Interveners apparently contend the Applicant's permit should not be certified because the route crosses land subject to either Indian title and/or usufructuary rights, requiring tribal consent. The contention is nothing more than an objection to the pipeline route.

SDCL 49-41B-36 directs that the provisions of SDCL Chapter 49-41B “shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility.” The Commission recognized this in the 2010 Amended Final Decision and Order, holding at Conclusion of Law 13 that it “. . . lacks the authority (i) to compel the Applicant to select an alternative route or (ii) to base its decision . . . on whether the selected route is the route the Commission might itself select.”

Accordingly, objections to the proposed route based on aboriginal title or usufructuary rights are inappropriate and should not be heard by the Commission.

D. There is no aboriginal title to or usufructuary rights applicable to the proposed route

In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the Supreme Court considered so-called Indian or aboriginal title to lands over which the United States had taken dominion and control. Noting that aboriginal title is a concept grounded in Indian occupancy of land prior the United States asserting its dominion over the territory, the Court held that aboriginal title “. . . is not a property right, but amounts to a right of occupancy which the sovereign grants . . . but which right . . . may be terminated and such lands fully disposed of by the sovereign itself . . .” *Tee-Hit-Ton Indians, supra*. 279, citing *Johnson v McIntosh*, 21 U.S. 543 (1823) and *Beecher v Weatherby*, 95 U.S. 17 (1941). Extinguishment of Indian title based on aboriginal possession is subject to the will of the United States. “The power of Congress in that regard is supreme.” *supra*. 281. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 344 (7th Circ. 1983) the court held “The United States could . . . extinguish aboriginal title at any time and by any means.”

Usufructuary rights are defined in *Black's Law Dictionary*, 1544 (6th Edition 1990) as “A real right of limited duration on the property of another.” The Tribes appear to contend they hold usufructuary rights granted by the Fort Laramie treaties of 1851 and 1868.

The Fort Laramie Treaty of September 17, 1851, 11 Stat. 252, and the Treaty of April 29, 1868, 15 Stat. 635, defined the boundaries of the Sioux Nation's territory. The Fort Laramie Treaty of 1851 affirmed the signatory tribes the right to occupy considerable territory, including all of South Dakota, but did not create a reservation. The Fort Laramie Treaty of 1868 shrank the lands considered in the 1851 treaty territory in South Dakota to area west of the Missouri River and created the Great Sioux Reservation.

The Act of March 2, 1889, ch. 405, 25 Stat. 888, divided the Great Sioux Reservation into individual tribal reservations. Per the Congressional act, each tribe gave up its interest in lands formerly part of the Great Sioux Reservation. The statute provides, at section 21, “That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain.” See also *Oglala Sioux Tribe v United States*, 21 Cl. Ct. 176 (1990). Subsequent acts of Congress reduced the South Dakota reservations to today's boundaries¹.

In *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) the Supreme Court held

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it

¹The various treaties and Congressional Acts resulting in modern reservation boundaries are described in *USA v. Sioux Nation of Indians*, *supra.* and *Montana v. United States*, 450 U.S. 544 (1981). See also *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *South Dakota v. Bourland*, 508 U.S. 679 (1993), and *Oglala Sioux Tribe v. United States*, *supra.*

should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians, it was never doubted that the power to abrogate existed in Congress.

Per the teaching of *Tee-Hit-Ton*, *La Courte* and *Lone Wolf*, *supra*, Congress had the legal right to enact statutes modifying the reservations and extinguishing tribal interests in ceded lands, whether the interests were aboriginal or usufructuary. Congress terminated aboriginal and usufructuary interests with respect to the lands outside the boundaries of the current South Dakota reservations in the Act of March 2, 1889, in subsequent statutes. When Congress restored the lands outside of the reservations to the public domain, it obviously intended all tribal interests, including aboriginal title and usufructuary rights be extinguished. See *Oregon Fish and Wildlife Dept. v Klamath Tribe*, 473 U.S. 753 (1983). Accordingly, aboriginal and usufructuary rights that may have once existed in favor of the tribes are extinguished and have no application to the land crossed by the proposed KXL pipeline.

E. Conclusion

For all the forgoing reasons, testimony regarding aboriginal and/or usufructuary rights on land crossed by the proposed Keystone KXL pipeline should be excluded from the hearing on the pending Certification Application. Keystone respectfully requests the Commission enter an order to that end.

Dated this 26th day of May 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th 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 Applicant's Motion to Preclude Consideration of Aboriginal or Usufructuary Rights on the Proposed Keystone KXL Pipeline Route, to the following:

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