

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

0-0

HP 14-001

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 PROJECT	:  :  :  :  :  :	KEYSTONE’S OPPOSITION TO JOINT MOTION TO PRECLUDE IMPROPER RELIEF
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The Yankton Sioux Tribe and Indigenous Environmental Network (“Movants”) have filed a Motion to Preclude Improper Relief or, In the Alternative, to Amend Findings of Fact. For the following reasons, Applicant TransCanada Keystone Pipeline, LP (“Keystone”) respectfully requests that the motion be denied.

1. The motion argues that the Commission cannot amend its findings of fact to conform to the changes contained in Keystone’s tracking table of changes attached to its Certification Petition as Appendix C. (Motion at 3.) Keystone has not asked the Commission to amend its findings and does not expect that any amendments are necessary. The motion argues a non-issue.
  
2. The logic of the motion is flawed. By statute, Keystone must certify that it can continue to meet the conditions on which the permit was granted, not that none of the underlying facts have changed. SDCL § 49-41B-27. For the logic of the motion to be correct, the certification statute would have to read like Minnesota’s statute. In Minnesota, if construction

and improvement or a route or site has not commenced within four years after the permit was issued, then the commission “shall suspend the permit,” and the permittee “shall certify to the commission that there have been no significant changes in any material aspects of the conditions *or circumstances when the permit was issued.*” Minn. R. Stat. 7850.4700 (emphasis added). South Dakota’s certification statute is materially different and does not require that there have been no significant changes in the circumstances since the permit was issued. Rather, Keystone must prove that any changes in circumstances do not affect its ability to meet the conditions on which the permit was granted.

3. Although Keystone has not asked that the Commission amend any of the conditions, it would be reasonable for the Commission to conclude that it has the inherent authority to amend the conditions of the permit. For instance, Condition No. 2 requires that Keystone comply with any conditions of the Final Environmental Impact Statement that might conflict with the permit conditions. It would be reasonable for the Commission to amend that condition to refer to the Final Supplemental Environmental Impact Statement given its issuance after the Amended Final Decision and Order, dated June 29, 2010. It would not be reasonable for the Commission to conclude, for the reasons argued in the motion, that instead of amending a condition like Condition No. 2, it would be required to deny Keystone’s certification even though Keystone is able to meet the conditions contained in the permit, which is what the Certification statute requires.

4. The Movants’ request that the Commission alternatively amend Finding of Fact No. 113 because Keystone failed to fulfill its statutory obligation to give due consideration to the views of governing bodies of all affected local units of government is without merit. First, as explained in discovery, Keystone considers the Yankton Sioux Tribe and the other tribes that

have intervened to be sovereign nations, not “local units of government” within the meaning of SDCL § 49-41B-22. The Yankton Sioux Tribe did not intervene as a “local unit of government,” but as an interested party under SDCL § 49-41B-17. The Tribe described itself in its application for party status as a “sovereign government.” (Yankton Sioux Tribe Application for Party Status.) IEN does not claim to be a “local unit of government,” so the requested relief cannot apply to it.

5. Second, the Tribe’s unsupported contention that Keystone failed to consult with the Yankton Sioux Tribe is not true. Tribal “consultation” with respect to the Keystone XL project is the responsibility of the federal government, to be conducted on a government-to-government basis. Notwithstanding this, as explained in the affidavit of Lou Thompson, while not required, Keystone did engage with the Yankton Sioux Tribe. Even the Tribe’s application for party status acknowledges this by stating that tribal input is necessary “[a]fter the initial flawed tribal consultation.” (Yankton Sioux Tribe Application for Party Status.) If the Tribe has an issue with the adequacy of consultation, it should take that up with the State Department, not raise it here.

6. The contention that the Yankton Sioux Tribe’s “treaty territory and aboriginal lands would be directly crossed by the proposed route” (Motion at 4) is inaccurate. The Yankton Sioux Tribe filed claims with the Indian Claims Commission in 1951, pursuant to Section 2 of the Indian Claims Commission Act, 25 U.S.C. 70 *et seq.* In the course of extensive litigation between the Yankton Sioux Tribe and the United States, the Indian Claims Commission established the boundary of the Yankton Sioux’s claimed aboriginal lands. See *The Yankton Sioux Tribe v The United States*, 24 Ind. Cl. Comm. 208 (1970). The boundaries of the Tribe’s aboriginal land claims are legally described in an interlocutory order of the Indian Claims

Commission in Docket No. 332-c. A copy is attached as Exhibit A. The starting point for the description is the point in the Missouri River where Hughes, Hyde, and Lyman Counties meet. The described territory is all east of that point; none of the aboriginal lands were located west of the Missouri River. A map showing the aboriginal lands is attached to an Opinion of the Commission, reported at 24 Ind. Cl. Comm. 208 (Dec. 14, 1970), and is attached here as Exhibit B. “In 1858, the Yankton Sioux entered into a treaty with the United States renouncing their claim to more than 11 million acres of their aboriginal lands in the north central plains.” *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998). The retained Tribal land is located in the southeastern part of Charles Mix County, and encompasses approximately 430,000 acres. *Id.* at 334.

7. Finally, the Yankton Sioux Tribe could have intervened in docket HP09-001 if it wanted to contend that Keystone could not meet its burden of proof under SDCL § 49-41B-22. It did not. It cannot now belatedly attempt to inject that issue into the instant Certification proceeding. The adequacy of Keystone’s tribal consultation is not properly an issue before the Commission under SDCL § 49-41B-22.

8. The argument that Finding of Fact Number 114 should be amended because the Amended Final Decision & Order dated June 29, 2010, is not fully consistent with Keystone’s tracking table of changes is illogical for the same reasons identified in paragraph 2. It makes no sense to say that the Commission’s decision in 2010 was based on incomplete information due to facts known four years later. The Movants’ argument that the tracking table is an admission that “key bases for the Commission’s decision have been altered,” (Motion at 5), is entirely unsupported. As demonstrated by the certification petition and tracking table, Keystone remains able to meet the conditions on which the permit was granted despite the changes in fact. To the

extent that the Movants disagree, their disagreement presents an issue for hearing, not a basis for the Commission to grant the motion.

Keystone respectfully requests that the motion be denied.

Dated this 2<sup>nd</sup> day of June, 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

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### CERTIFICATE OF SERVICE

I hereby certify that on the 2<sup>nd</sup> day of June, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Keystone's Opposition to Joint Motion to Preclude Improper Relief, to the following:

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/s/ James E. Moore  
One of the attorneys for Applicant

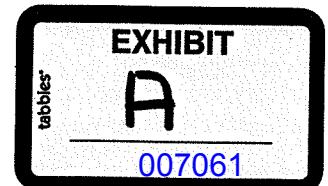
BEFORE THE INDIAN CLAIMS COMMISSION

THE YANKTON SIOUX TRIBE,	)	
	)	
Plaintiff,	)	
	)	
THE SIOUX NATION, ET AL.,	)	
	)	
Intervenors,	)	
v.	)	Docket No. 332-C
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

INTERLOCUTORY ORDER

Upon the findings of fact and opinion this day filed herein and which are hereby made a part of this order, the Commission concludes as a matter of law that:

- (a) The plaintiff in Docket No. 332-C is entitled to maintain this action under the Indian Claims Commission Act.
- (b) The Yankton Sioux had aboriginal title to lands bound as follows:
  - (1) Beginning at a point in the Missouri River where Hughs, Hyde, and Lyman Counties, South Dakota meet, northeasterly in a direct line through the easternmost point in the Town of Highmore, South Dakota, to a point on South Fork Snake Creek;
  - (2) Then easterly down South Fork Snake Creek and Snake Creek to its mouth on the James River;
  - (3) Then southerly down the James River to the mouth of Timber Creek;
  - (4) Then east-southeasterly in a direct line to the mouth of Stray Horse Creek on the Big Sioux River;
  - (5) Then southerly down the Big Sioux River to its mouth on the Missouri River;



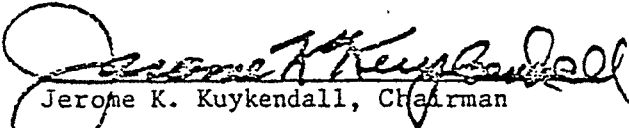
(6) Then westerly and northerly up the middle of the Missouri River to the point of beginning.

(All of the above-described locations are as depicted on the latest editions of the U. S. Geological Survey Maps, Western United States 1:250,000 series).

- (c) The land belonging to the Yankton Sioux Tribe, including its interest in the land reserved for the Sioux by the Treaty of Fort Laramie of September 17, 1851, was taken by the Treaty of April 19, 1858 (11 Stat. 743), which treaty was ratified by the President on February 26, 1859. The valuation date for the lands taken is February 26, 1859.
- (d) The Yankton Sioux did not have aboriginal title to any other land within the boundaries set forth in Plaintiff's Proposed Findings of Fact No. 18, filed July 29, 1968.
- (e) Neither the Teton Sioux nor the Yanktonais Sioux had any interest in the subject lands, and therefore, their intervention herein should be and is hereby dismissed.

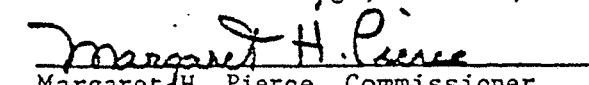
Docket 332-C will proceed to the remaining issues of acreage value and consideration.

Dated at Washington, D. C., this 14<sup>th</sup> day of December, 1970.

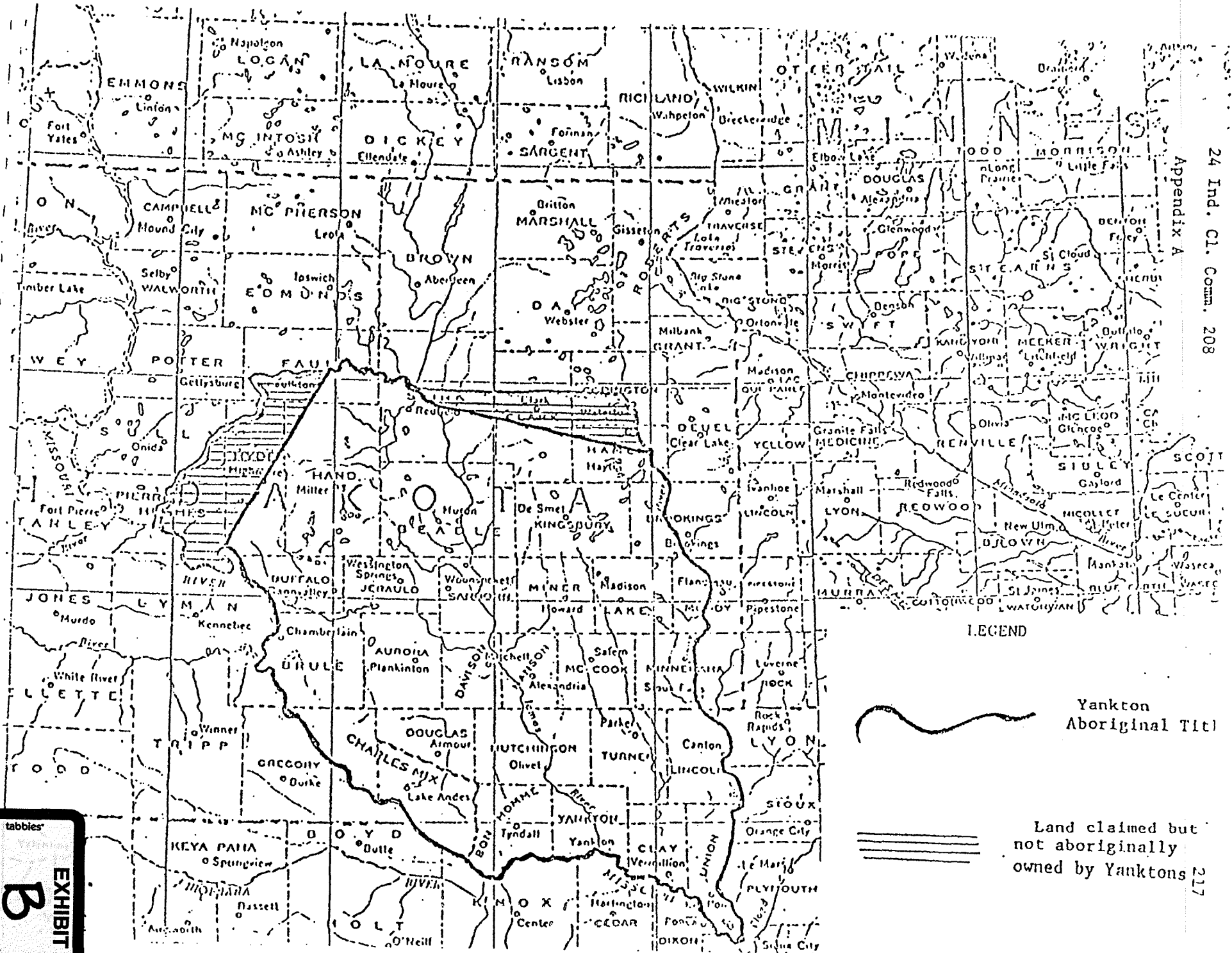
  
Jerome K. Kuykendall, Chairman

  
John T. Vance, Commissioner

  
Richard W. Yarborough, Commissioner

  
Margaret H. Pierce, Commissioner

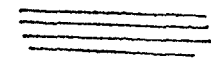
  
Brantley Blue, Commissioner



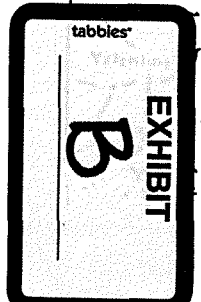
LEGEND



Yankton  
Aboriginal Title



Land claimed but  
not aboriginally  
owned by Yanktons





4. Pam Halvorson and Elliot Christensen attended the meeting on behalf of the Lower Brule Sioux Indian Community. Other interested persons attending representing a variety of tribes in the region.

5. In part the October 29, 2008, meeting was to encourage tribal historic preservation officers to identify culturally sensitive areas along the pipeline route and to encourage tribal participation in cultural surveys of the areas so identified.

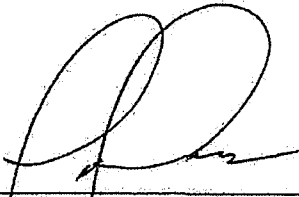
6. In April of 2009, following up on contacts made in 2008, Josh Chase of AECOM, an environmental consultant for Keystone, contacted Ms. Spotted Eagle to inquire about her views on culturally sensitive areas along the route. At the time, she had not identified any specific areas of cultural sensitivity.

7. In 2010 Keystone began conducting cultural surveys along the proposed XL route, using tribal monitors and observers as participants. In the summer of 2010 Yankton Sioux representatives attended and participated in various surveys relating to the route. Seven Yankton Sioux monitors were appointed for the purpose. Then Yankton Sioux Tribal Historic Preservation Officer Lana Gravatt attended some of the surveys and route studies.

8. All expenses incurred by Yankton Sioux members were paid by Keystone.


9. On August 4, 2010 the Yankton Sioux Tribe adopted a resolution opposing the construction of the Keystone XL project. A copy of the resolution is attached hereto, marked Exhibit A for reference. After the adoption of the resolution, Keystone, out of respect for the Yankton Sioux Tribe's decision, ended its efforts to work with the Tribe.

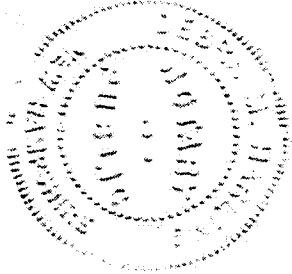
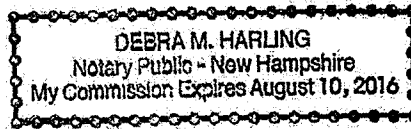
Dated this 2 day of June, 2015.

  
\_\_\_\_\_  
Lou Thompson

Subscribed and sworn to before me

this 2 day of June, 2015.

  
Notary Public—New Hampshire  
My commission expires:



Appendix: Yankton Sioux Tribe Resolution No. 2010-102

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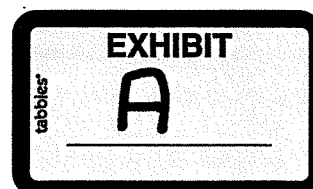
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KAREN ARCHAMBEAU, VICE CHAIRMAN  
RACHEL E. BERNIE, SECRETARY  
LEO O'CONNOR, TREASURER



**COUNCIL:**  
JODY ALLEN ZEPHIEF  
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DENNIS RUCKER  
BAPTISTE A. COURNOYE  
GREG ZEPHIEF JR

**YANKTON SIOUX TRIBE**  
**RESOLUTION No. 2010-102**

- WHEREAS:** The Yankton Sioux Tribe is an unincorporated Tribe of Indians not subject to the Indian Reorganization Act of 1934; and
- WHEREAS:** The Yankton Sioux Tribe is an unincorporated Tribe of Indians operating under an amended Constitution and By Laws approved on April 24, 1963; June 16, 1975 and March 23, 1990; and
- WHEREAS:** The Yankton Sioux Tribe's Business and Claims Committee is an elected body constituted for the purpose of conducting the business of and serving the best interest of the Yankton Sioux Tribe; and
- WHEREAS:** The Yankton Sioux Tribe's Business and Claims Committee has contributed throughout the years to improving the standard and quality of life on the Yankton Sioux reservation; and
- WHEREAS:** The United States Department of State has recently notified the Tribes of the Great Plains Region through Section 106 of the National Historic Preservation Act that TransCanada Keystone Pipeline, L.P., is proposing to build an oil pipeline, named the "Keystone XL", from Canada traversing Montana, South Dakota, Nebraska, Kansas, Oklahoma, and Texas; and
- WHEREAS:** the United States has obligated itself through Treaties entered into with the Sovereign Tribes, to protect the legal rights of tribal Nation; and
- WHEREAS:** the Yankton Sioux Tribe has a traditional obligation to think of the Seventh Generation, for which the tribe must plan for the health, safety, sovereignty of future generations; and
- WHEREAS:** the proposed 36-inch "Keystone XL" pipeline will carry Canadian Tar Sands which are destroying the air, water, and lands of Canadian First Nations; and
- WHEREAS:** the Keystone XL pipeline is proposed to go through the Ogallala Aquifer which the Great Plains Region Tribes obtain their water; and





B&CCR 2010-102

WHEREAS: the proposed route and area of construction for the TransCanada Keystone Pipeline Project crosses Federal Bureau of Land Management (BLM) lands and is within the areas within the treaty boundaries of the Great Sioux Nation, and the Yankton Sioux Tribe is among the signatory bands to the 1868 Treaty of Fort Laramie, a treaty between the Great Sioux Nation and the United States; now

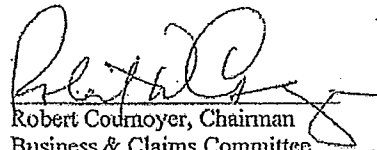
THEREFORE BE IT RESOLVED, that the Yankton Sioux Tribe's Business and Claims Committee hereby opposes TransCanada Keystone Pipeline, L.P., to construct the "Keystone XL" pipeline as it will create safety and health hazards to current and future generations by way of leaks and spills, and pipeline abandonment AND to construct the Keystone XL Pipeline as it will adversely affect the water quality of the Yankton Sioux Tribe; and

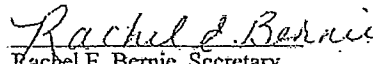
BE IT FURTHER RESOLVED, that Robert Cournoyer, CHAIRMAN and Rachel E. Bernie, SECRETARY of the Yankton Sioux Tribe's Business and Claims Committee is hereby authorized to execute documents on behalf of the Yankton Sioux Tribe.

CERTIFICATION

THIS IS TO CERTIFY AND AFFIRM, the above and foregoing resolution was duly authorized and passed by the Yankton Sioux Tribe's Business and Claims Committee on the 4th day of August, 2010 at a Regular meeting held at Bureau of Indian Affairs, Wagner, South Dakota on the Yankton Sioux reservation, by a vote of 7 in favor, 0 opposed, 0 not voting, 1 abstain, 1 absent, MOTION CARRIED.

ATTEST

  
Robert Cournoyer, Chairman  
Business & Claims Committee  
Yankton Sioux Tribe

  
Rachel E. Bernie, Secretary  
Business & Claims Committee  
Yankton Sioux Tribe

### CERTIFICATE OF SERVICE

I hereby certify that on the 2<sup>nd</sup> day of June, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Affidavit of Lou Thompson, to the following:

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