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THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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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

HP14-001

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Transcript of Proceedings  
June 11, 2015

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BEFORE THE PUBLIC UTILITIES COMMISSION

CHRIS NELSON, CHAIRMAN  
KRISTIE FIEGEN, VICE CHAIRMAN  
GARY HANSON, COMMISSIONER (telephonically)

COMMISSION STAFF

John Smith  
Kristen Edwards  
Greg Rislov  
Darren Kearney  
Joy Lashley

Reported By Cheri McComsey Wittler, RPR, CRR

1                   TRANSCRIPT OF PROCEEDINGS, held in the  
2 above-entitled matter, at the South Dakota State Capitol  
3 Building, Room 413, 500 East Capitol Avenue, Pierre,  
4 South Dakota, on the 11th day of June, 2015.

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1           CHAIRMAN NELSON:  HP14-001, In the Matter of  
2 the Petition of TransCanada Keystone Pipeline, LP For  
3 Order Accepting Certification of Permit Issued in  
4 Docket HP09-001 to Construct the Keystone XL Pipeline.

5           And we have four different motions that we're  
6 going to deal with today.  And we are going to I think  
7 probably take these in the order in which they are  
8 listed.

9           The first that we have listed is Yankton Sioux  
10 Tribe's and Indigenous Environmental Network's Motion to  
11 Preclude Improper Relief or in the Alternative to Amend  
12 Findings of Fact.

13           Ms. Baker, are you taking this one?

14           MS. BAKER:  Yes, Commissioner, I am.

15           CHAIRMAN NELSON:  Go ahead.

16           MS. BAKER:  Thank you.

17           The basis for this request is really  
18 straightforward.  We're simply asking the Commission to  
19 preclude certain relief, specifically pertaining to the  
20 Findings of Fact because that relief is not available  
21 under the law.

22           I'd like to note that the motion does not  
23 address the conditions, nor does it argue whether  
24 certification is proper.  It's simply asking the PUC to  
25 amend its -- I'm sorry.  I'd ask the PUC not to amend its

1 earlier Findings because that kind of relief is  
2 prohibited by law.

3 In 2010 in Docket HP09-001 the Commission issued  
4 an Amended Final Decision and Order that contained 115  
5 Findings of Fact. The instant proceeding is based on  
6 Keystone's request for certification, that the proposed  
7 project continues to meet those decisions on which the  
8 09-001 permit was granted.

9 So that means that this proceeding is governed  
10 by and limited in scope to 49-41B-27, which does not  
11 authorize the PUC to amend an earlier decision.

12 The Findings of Fact are part of the Amended  
13 Final Decision and Order, and any changes to those  
14 Findings would constitute an amendment to the Order.  
15 South Dakota laws do not permit the PUC to amend a  
16 Decision after a timely application for the rehearing or  
17 reconsideration, which TransCanada has not filed.

18 Despite the lack of statutory authority for this  
19 kind of relief, both Keystone and the PUC have taken  
20 actions that suggest that the Findings are, in fact, up  
21 for consideration, specifically the Findings enumerated  
22 in Keystone's Table of Proposed Changes attached to  
23 Appendix C to the Petition.

24 Amendment of Findings have been raised in the  
25 proceeding by both the Commission and by Keystone. In

1 Keystone's reply in support of its motion to defend its  
2 scope of discovery the relief requested was limitational  
3 discovery that was narrowly tailored to the scope of  
4 proceedings, including the changes that affect Findings  
5 as identified in TransCanada's Petition.

6           There's no reason Keystone would seek to include  
7 Findings of Fact and discovery or include to proposed  
8 changes in its position unless it intended the Commission  
9 to adopt them. So clearly TransCanada came into this  
10 proceeding with the intent of having those Findings  
11 amended, as shown by its Appendix C to this Petition.

12           The Commission agreed with Keystone in its Order  
13 of December 17, 2014, granting Keystone's motion and  
14 limiting discovery to the 50 Permit Conditions and the  
15 proposed changes to the Finding of Facts identified in  
16 Keystone's Tracking Table.

17           The Commission itself used the phrase "proposed  
18 changes" which indicates that the Commission viewed them  
19 as relief sought by Keystone.

20           There's nothing in the statutes or regulations  
21 that prohibits the Commission from issuing the ruling  
22 that's requested by Yankton and Indigenous Environmental  
23 Network in this motion. It's perfectly permissible and  
24 in the interest and efficiency and clarity of the  
25 proceedings that the PUC issue a decision on this

1 matter.

2 Now should the Commission find against that  
3 initial request and should the Commission find that the  
4 Findings are at issue and can be amended, the movants  
5 would request the alternative relief that Findings  
6 No. 113 and 114 be amended as described in the motion.

7 Those requests are explained and support is  
8 provided in detail in that motion, but briefly  
9 Finding 113 should be amended if amendment is permissible  
10 because TransCanada failed to fulfill all four  
11 requirements of its burden of proof under 49-41B-22.

12 Specifically, it failed to provide due  
13 consideration to the views of the Yankton Sioux Tribe,  
14 which is an effective local unit of government pursuant  
15 to 49-41B-22 Subsection 4.

16 Yankton Sioux Tribe is a sovereign nation. It  
17 is also a local unit of government. And it's also an  
18 interested party in this proceeding. These terms are  
19 not mutually exclusive. Yankton qualifies as all three,  
20 and it has rights specific too each of those three  
21 statuses.

22 We're not talking here about the federal  
23 consultation requirement as Keystone discussed in its  
24 reply but the South Dakota State law requirement that due  
25 consideration be given to the views of local units of

1 government under 49-41B-22(4).

2 In addition, with respect to Finding No. 114,  
3 we'd request that that Finding be amended because  
4 Keystone failed to meet its burden of proof.

5 First, as just previously stated, it failed to  
6 meet the burden with respect to 49-41B-22(4) regarding  
7 local units of government.

8 In addition, based on the Tracking Table of  
9 Changes, the PUC's decision was based on incomplete and  
10 inaccurate information. The Findings represent the key  
11 basis for the Commission's Decision. That's the purpose  
12 of having findings. That's why it's statutorily required  
13 that findings be incorporated in a decision and that the  
14 function they serve is to illustrate the reason, the  
15 facts on which the decision was based.

16 So if those facts have changed, then it's very  
17 possible that the Commission would have issued a  
18 different ruling at that time.

19 This is not a suggestion that the Commission  
20 should have somehow known in 2010 what the conditions  
21 would be in 2015. Rather, it's a logical conclusion that  
22 if the conditions -- if the circumstances have changed  
23 such that the Findings of Fact no longer apply, such that  
24 the basis of the Decision no longer applies, then the  
25 basis of the Decision wasn't adequate for the Decision

1 reached, and the burden of proof should be based on the  
2 Findings of Fact as they stand when the pipeline is  
3 constructed rather than four years ago before -- before  
4 they changed and TransCanada proposed these new changes.

5 Again, this is just alternative relief requested  
6 in the event the Commission finds against our initial  
7 request, which is that the relief of amendment of the  
8 permit -- of the permit findings, excuse me, be precluded  
9 because they're not allowed as a matter of law.

10 Thank you.

11 CHAIRMAN NELSON: Thank you.

12 I'm going to go through the Intervenors to see  
13 if any of them have anything that needs to be added.

14 Those on the phone line. Mr. Blackburn?

15 MR. BLACKBURN: Yes. Thank you, Mr. Chairman.

16 BOLD Nebraska supports the motion.

17 Thank you.

18 CHAIRMAN NELSON: Thank you.

19 Ms. Zephier.

20 MS. ZEPHIER: Thank you, Mr. Chairman.

21 Cheyenne Sioux Tribe is also in support of  
22 this motion that Yankton Sioux Tribe and Indigenous  
23 Environmental Network have made.

24 CHAIRMAN NELSON: Thank you.

25 Any Intervenors in the room have anything to



1 add?

2 MR. ELLISON: Briefly, Bruce Ellison for Dakota  
3 Rural Action.

4 We do join in the motion, at least as far as  
5 state law does not allow for the amendments that are  
6 being proposed by TransCanada. We do not join in the  
7 second part of relief requested by the motion because we  
8 don't believe there's authority of this Commission to do  
9 so.

10 Thank you.

11 CHAIRMAN NELSON: Thank you.

12 MR. RAPPOLD: Good morning, Commissioners.  
13 Matt Rappold on behalf of the Rosebud Sioux Tribe.

14 We support Yankton in this motion as well so far  
15 as state law does not permit the Commission to amend  
16 Findings of Fact. We would rest on that.

17 Thank you.

18 CHAIRMAN NELSON: Thank you.

19 MR. CAPOSSELA: Good morning. Peter Capossela  
20 from the Standing Rock Sioux Tribe.

21 No argument other than to express support for  
22 the motion.

23 CHAIRMAN NELSON: Thank you.

24 MR. CAPOSSELA: Thank you.

25 MS. CRAVEN: Good morning. I'm Kimberly Craven

1 with the Indigenous Environmental Network. We are  
2 parties to the motion, and we urge your support of it.

3 Thank you.

4 CHAIRMAN NELSON: Thank you.

5 And let me just say to all of the Intervenors,  
6 thank you for your brevity of your comments.

7 TransCanada.

8 MR. MOORE: Thank you, Commissioner. James  
9 Moore on behalf of Keystone.

10 I don't fundamentally disagree that amendment of  
11 Findings in the underlying docket are not appropriate in  
12 this certification document.

13 As we wrote in our response, I think I question  
14 whether an order on this motion is necessary or  
15 appropriate, just given the fact that Keystone has not  
16 proposed the amendment of any Findings. And the  
17 suggestion that because we offered a Tracking Table of  
18 Changes in connection with the Certification Petition  
19 that we've asked the Commission to amend the Findings is  
20 not accurate.

21 We expect that the Tracking Table forms the  
22 basis for discussion at the evidentiary hearing about  
23 whether Keystone can continue to meet the conditions on  
24 which the permit was granted, which is the statutory  
25 inquiry mandated by 49-41B-27.

1           And to the extent that the motion at all  
2           contravenes that understanding or is in conflict with  
3           that understanding, we opposed it. But we did not oppose  
4           it because we think that the Commission has the authority  
5           or should amend the Findings of Fact in the underlying  
6           docket.

7           We expect that there will be findings and  
8           conclusions entered in this certification docket in  
9           connection with the Petition for Certification.

10          So that's all I have, unless you have questions.

11          CHAIRMAN NELSON: Thank you.

12          Ms. Baker, any rebuttal?

13          MS. BAKER: Just briefly. Based on the conduct  
14          of Keystone and of the Commission, particularly the  
15          characterization of these changes as proposed changes, it  
16          does give the appearance that Keystone and the Commission  
17          are considering amendments, and that's why this relief  
18          has been sought.

19          Thank you.

20          CHAIRMAN NELSON: Thank you.

21          Questions from the Commission.

22          Hearing none, is there a motion?

23          Commissioner Fiegen.

24          COMMISSIONER FIEGEN: Mr. Chairman, in HP14-001  
25          move that the Commission deny the Motion to Preclude or

1 Amend.

2 CHAIRMAN NELSON: Discussion on the motion.

3 COMMISSIONER FIEGEN: You know, when I read this  
4 and listen to the testimony I don't believe this is an  
5 appropriate motion because the Findings of Fact has not  
6 been asked to be changed by the Applicant.

7 CHAIRMAN NELSON: Additional discussion.

8 I would simply say I'm going to support the  
9 motion. As I have listened to folks this morning and my  
10 own view in how this case is playing out, I'm not sure  
11 any of us are that far apart here on this. And so I  
12 think denying the motion at this point is the appropriate  
13 thing to do at this juncture, given the fact that I don't  
14 think we're all that far apart.

15 Other discussion?

16 Hearing none, all those in favor of denying the  
17 motion will vote aye. Those opposed, nay.

18 Commissioner Hanson.

19 COMMISSIONER HANSON: Aye.

20 CHAIRMAN NELSON: Commissioner Fiegen.

21 COMMISSIONER FIEGEN: Fiegen votes aye.

22 CHAIRMAN NELSON: Nelson votes aye.

23 The motion is denied.

24 CHAIRMAN NELSON: That brings us to Keystone's  
25 Motion to Exclude Testimony of Richard Kuprewicz.

1 Did I pronounce that properly?

2 MR. RAPPOLD: Yes.

3 CHAIRMAN NELSON: Thank you, Mr. Rappold.

4 MR. RAPPOLD: You're welcome.

5 CHAIRMAN NELSON: With that, Keystone.

6 MR. MOORE: Thank you, Mr. Chairman. James  
7 Moore on behalf of Keystone.

8 I don't want to repeat the written arguments  
9 that have been made in support of the motion, but  
10 essentially I want to caution the Commission from getting  
11 off track based on some of the written arguments that  
12 have been made with respect to the motion.

13 The basis for the motion is simply federal  
14 preemption and the scope of the Commission's  
15 jurisdiction. And as we read the prefiled testimony of  
16 Mr. Kuprewicz, it addressed three principal issues. One  
17 is routing due to landslide risk, two is the placement  
18 and number of valves on the pipeline, and, thirdly, was  
19 the conduct of a risk assessment that was done.

20 And our position is that all of those issues are  
21 either preempted under federal law by the Pipeline Safety  
22 Act or that the Commission does not have statutory  
23 jurisdiction because of the statutory prohibition on  
24 routing that is contained in SDCL Chapter 49-41B.

25 And I think the important point to make for the

1 purposes of argument today is we're not suggesting that  
2 the Commission cannot require that Keystone comply with  
3 federal law or with provisions of the Pipeline Safety Act  
4 or with regulations imposed by PHMSA or with the  
5 59 Special Conditions imposed by PHMSA as part of its  
6 permit and that it's -- and we're not suggesting that  
7 that can't be considered as part of the certification  
8 proceeding. But it can only be considered to the extent  
9 that the Commission can look at those issues and not  
10 trample on the purview of PHMSA as the federal regulator  
11 with responsibility for enforcing compliance with the  
12 Pipeline Safety Act or the 59 Special Conditions.

13 So I think it's appropriate that in Condition  
14 No. 1 that the Commission has required compliance with  
15 federal law, but at the end of the day I think that it is  
16 the role of PHMSA to determine whether Keystone is in  
17 compliance with the 59 Special Conditions. And I don't  
18 think that the evidentiary hearing that we're going to  
19 have should be about specifically is Keystone in  
20 compliance with one of these conditions.

21 If PHMSA were to determine that Keystone was not  
22 in compliance with one of the conditions at some future  
23 point, the permit allows the Commission to take action  
24 based on that, but that's different from the Commission  
25 sitting as a regulatory body and determining what we

1 think are matters of federal law that are preempted by  
2 statute.

3 So that's the basis for the motion. It's  
4 essentially intended to make sure that we don't spend  
5 time at the evidentiary hearing discussing and presenting  
6 testimony about matters ultimately over which the  
7 Commission lacks jurisdiction.

8 Thank you.

9 CHAIRMAN NELSON: Thank you.

10 Mr. Rappold for Rosebud.

11 MR. RAPPOLD: Yes, sir. Just a moment.

12 Thank you, Commissioners. Matt Rappold on  
13 behalf of the Rosebud Sioux Tribe.

14 We're here again today because Keystone wants to  
15 limit the evidence that the Intervenors present regarding  
16 their ability to certify that they're still able to  
17 maintain the conditions upon which the facility was  
18 granted five years ago.

19 They want to limit that evidence and testimony  
20 while preserving their own right to present testimony and  
21 evidence on the same subjects that they claim are  
22 preempted by federal law under the Pipeline Safety Act.

23 Now there's no question that the Pipeline Safety  
24 Act preempts any state action that would attempt to  
25 implement higher safety standards than what exists under

1 the Pipeline Safety Act and the implementing  
2 regulations.

3           What we are seeking to do is to provide evidence  
4 and testimony that directly relates to Keystone's ability  
5 to meet these conditions. As the Commission is well  
6 aware, compliance with the Pipeline Safety Act and its  
7 regulations is a condition of this permit, without a  
8 doubt. There's no question.

9           There is also no question -- I don't believe  
10 there's any doubt on the record that the Commission has  
11 taken any action to require Keystone to comply with  
12 higher safety standards and regulations for siting of  
13 this pipeline.

14           And a couple of things before we get into the  
15 meat of the argument, so to speak. Procedurally, what  
16 we're looking at here is the admission of expert  
17 testimony. And expert testimony is governed by  
18 South Dakota Codified Law 19-5-2 and Rules of Evidence  
19 702. It deals with the admission of expert testimony.

20           So there's two issues to address. First, is the  
21 evidence relevant, and does it assist the trier of fact  
22 in understanding or deciding the issues before it?

23           Preemption is an argument, a doctrine, that  
24 would be used to say, Commissioners, with all due  
25 respect, you can't do something. You can't require us to



1     comply with higher safety standards than what federal law  
2     requires. Because that action, if that happened on the  
3     part of the Commissioners or the Commission or a local  
4     Government as well through a passing of an ordinance or a  
5     resolution, that would be preempted.

6             But we're not talking about that. We're talking  
7     about a certification proceeding where Keystone has the  
8     burden to show that they still have the ability based on  
9     the conditions of your permit to satisfy the requirements  
10    of the permit. Satisfying the requirements of that  
11    permit requires satisfying that they're still able to  
12    show that they can comply with all applicable laws and  
13    regulations. This isn't about preemption. This is about  
14    their ability to comply.

15            Specifically -- so we would -- because the  
16    motion has not been properly brought, as we have outlined  
17    in our first response, we'd ask the Commission to deny  
18    the motion on those grounds and give us the opportunity  
19    to actually present the testimony properly under the  
20    Rules of Civil Procedure at the trial on this matter.

21            Keystone has not in their motion made any  
22    attempt to attack the credibility of the witness. They  
23    have not made any attempt to challenge his qualifications  
24    as a witness in this particular matter and on this  
25    particular subject matter.

1           They've had ample opportunity to do that. We've  
2 filed with them initially and on the PUC website a  
3 resume, very thorough, and a list of publications and all  
4 other work that Mr. Kuprewicz has engaged in over all of  
5 the years that qualify him as an expert witness.

6           Those are part of the record here today, and our  
7 initial responsive filing we've got RST Exhibit No. 2,  
8 which is Richard Kuprewicz's CV. We've got RST 3, which  
9 is the Report. RST Exhibit 4, which is a letter from  
10 PHMSA, which interestingly enough, kind of clarified a  
11 little bit to TransCanada the role of state and local  
12 governments in the overall process for ensuring that  
13 pipeline safety and routing is done properly throughout  
14 the nation consistent with uniform standards. This isn't  
15 the first time they've presented this argument. It  
16 probably won't be the last.

17           We've also filed in response RST Exhibit 5,  
18 which is a direct testimony of Heidi Tillquist, and RST  
19 Exhibit 6, which is the direct testimony of Meera -- I  
20 don't know how to say the last name -- Kothari. I don't  
21 know if that's how you say it or not.

22           The reason that I bring these last two exhibits  
23 are is that these two exhibits, direct testimony, provide  
24 testimony that's based on the same subject matter that  
25 they don't want us to present testimony on. Their

1 witnesses reach one conclusion about similar subjects  
2 and in this case almost exactly similar subjects, exactly  
3 identical subjects. Our witness reaches a different  
4 conclusion.

5 But yet on the grounds of preemption they don't  
6 want you to hear what our witness has to say about the  
7 safety of this pipeline route. But they'll gladly  
8 introduce their own testimony on the same subject that  
9 they claim are preempted by federal law.

10 Does that make any sense?

11 You're familiar with this docket obviously.  
12 You've considered, you've required the party to show that  
13 they have the ability to comply with all rules and  
14 regulations. Show the ability, demonstrate to us that  
15 you have the ability to comply with all rules and  
16 regulations.

17 No. 3, Amended Permit Condition 3 specifically  
18 requires that Keystone adopt and follow the  
19 recommendations from the Final Environmental Impact  
20 Statement. That includes the 59 additional PHMSA Special  
21 Conditions as it applies to the Final Supplemental  
22 Environmental Impact Statement.

23 So even though those 59 conditions weren't  
24 actually considered and demonstrated in the underlying  
25 hearing, by virtue of operation of law they are now part

1 of Keystone's requirements, and they have the burden to  
2 show that they have the ability to comply with those  
3 requirements.

4 Richard Kuprewicz's testimony specifically  
5 addresses the ability to comply with Condition No. 32.

6 What I'd like to go to is -- I believe it's on  
7 page 5 of Keystone's response to our response to their  
8 motion. And on page 5 I think they stated it pretty  
9 good. "At issue is whether Keystone can continue to meet  
10 the permit conditions today." That's the issue.

11 They said it. We agree with it. Everybody  
12 agrees with it. You're nodding your head up and down,  
13 and it's my understanding that that means you agree with  
14 it too.

15 On the same grounds of preemption they want to  
16 eliminate 95 percent of what is in Richard Kuprewicz's  
17 testimony, and they want to keep the 5 percent that they  
18 like. They want you to hear that on the same grounds  
19 that they're asking you to exclude the rest of this.  
20 Keep this. Even though it's preempted, keep it. We like  
21 it. This other stuff, we don't like it. That's  
22 preempted. You can't hear that.

23 The law doesn't work that way. That's not fair.  
24 That's not due process, and that's not how this system  
25 operates.

1           You guys get to decide whose testimony is more  
2 credible, who you're going to believe. You're the finder  
3 of fact. Not me. Not any other lawyer in this room.  
4 Not Keystone, and certainly not a foreign corporation.  
5 You are the finder of fact. This is your house. These  
6 are your rules, and we all have to follow them.

7           So let's look at Amended Condition No. 1 from  
8 the permit. Must comply with all relevant laws including  
9 the Pipeline Safety Act and its implementing regulations.  
10 We have that. Testimony addresses that.

11           Amended Condition No. 3, comply with and  
12 implement recommendations of the Final Environmental  
13 Impact Statement when issued. The Final Environmental  
14 Impact Statement contains 57 -- I'm sorry. 59 conditions  
15 that weren't a part of this docket, and now they are.

16           Keystone never had to address -- they never had  
17 to put on evidence to address these conditions. Maybe  
18 some of them were addressed in the underlying docket, but  
19 as a whole, they've never had to demonstrate it. Now  
20 they do.

21           So in our supplemental response I took a little  
22 extra time to specifically tell you how the report  
23 addresses those conditions, specifically No. 32.

24           For visual purposes here's the original Order,  
25 Amended Permit Conditions, the requirement that they

1 follow recommendations from PHMSA. And here's what's  
2 Appendix B. Now the actual -- this is 57 conditions.  
3 Two additional conditions were added, and the entire  
4 document is Appendix Z. I didn't print that out.

5 But for visual purposes 57 plus 2 is right here.  
6 59 minus 2 is right here. And now it goes there, and  
7 that's where we are.

8 Our supplemental response we provided three  
9 exhibits, 1, 2, and 3. Exhibit No. 1 is 49 CFR 194.105,  
10 Worst-Case Discharge, compliance with which is a  
11 requirement. Exhibit No. 2, 49 CFR 195.260, Valve  
12 Locations. And Exhibit No. 3 is Condition No. 32, Main  
13 Line and Check Valve Control.

14 Now if you notice on Exhibit No. 3, Keystone  
15 must design and install main line block valves and check  
16 valves on the Keystone XL system based on the worst-case  
17 discharge as calculated by 49 CFR 194.105, which is  
18 this one, and must locate valves in accordance with  
19 49 CFR 195.260, which is this one, and by taking into  
20 consideration elevation, population, and environmentally  
21 sensitive locations to minimize the consequences of a  
22 release from the pipeline. And then it gets into valve  
23 locations, spacing, and that sort of thing.

24 And there's some other requirements in 32, but  
25 I'm going to focus on the things that I already talked

1 about.

2 The report examines Keystone's ability to comply  
3 with PHMSA Special Permit Condition No. 32. And even  
4 though it didn't actually say it, that also addresses  
5 Keystone's ability to comply with Amended Permit  
6 Condition No. 3 for the reasons that I already said.

7 In the Tracking Table of Changes Keystone makes  
8 reference to Appendix Z and understands that they have to  
9 comply with it. They've submitted testimony on it. I  
10 imagine they'll submit more through the direct  
11 examination and cross that's at the hearing. But they  
12 understand that they have to comply, and they understand  
13 that you have the jurisdictional authority to investigate  
14 and receive testimony to determine their ability to  
15 comply with the law.

16 You do it all the time. This isn't anything  
17 new. You had a hearing five days on this issue when you  
18 granted the original permit. And you took testimony of  
19 these very issues that they now claim are preempted.

20 The testimony -- CFR 194.105 requires  
21 TransCanada -- each operator shall determine the  
22 worst-case discharge for each of its response zones and  
23 provide the methodology, including calculations used to  
24 arrive at the volume. The worst-case discharge is the  
25 largest volume in barrels, cubic meters of the following,

1 and then there's four different ways to figure that out.

2 That's what they have to show, that in  
3 calculating their worst-case discharge scenario they've  
4 complied with the requirements of 194.105. Our witness's  
5 testimony talks about that.

6 It requires them to locate those valves. A  
7 valve must be installed at each of the following  
8 locations: On the suction end, the discharge end of a  
9 pump station, in a manner that permits isolation of pump  
10 station equipment in the event of an emergency. Sub B,  
11 on each line entering or leaving a breakout storage tank  
12 area, in a manner that permits isolation of the tank area  
13 from other facilities. Subsection 3 -- or, I mean, C,  
14 rather, on each main line at locations along the pipeline  
15 system that will minimize damage or pollution from  
16 accidental hazardous liquid discharge as appropriate for  
17 the terrain in open country.

18 Now the evidence reflects that over 200 miles of  
19 this pipeline that's routed already in South Dakota, mind  
20 you, at the location they chose -- they chose this  
21 location. You guys didn't tell them to put it there  
22 because you can't. You guys didn't tell them to put it  
23 somewhere else because you can't. We understand that.  
24 They chose this location. Not anyone else.

25 They put -- they decided to put a 36-inch



1 pipeline in over 200 miles of land that's been designated  
2 as high landslide risk area. And you took testimony on  
3 this under the initial document. Now they have an  
4 additional requirement to meet. The testimony examines  
5 their ability to do that.

6 It just happens to reach a different conclusion  
7 than their witnesses reached. Therefore, the evidence is  
8 relevant to helping you make a decision as to whether or  
9 not the conditions can still be satisfied. That's why  
10 it's relevant.

11 I think you need to pay particular attention to  
12 the phrase "as appropriate for the terrain in open  
13 country" when we get to the trial to determine if that's  
14 satisfied.

15 Testimony also attacks the methods chosen by  
16 Keystone to calculate worst-case discharge scenario as is  
17 required by the CFR. We're allowed to do that. We're  
18 allowed to present evidence that challenges what the  
19 other party says. Just like they're allowed to do it to  
20 challenge what we're saying.

21 What the report concludes with an opinion is  
22 that based on the location, the type of this pipeline,  
23 it's not possible to properly valve it, considering the  
24 location of the pipeline.

25 The valving must be adequate to minimize damage

1 or pollution from accidental hazardous liquid discharge  
2 as appropriate for the terrain in open country.

3 The testimony also starts with an assumption.  
4 And I don't know if you guys have looked at the testimony  
5 or not.

6 Assuming -- assuming that pump stations have  
7 bypass arrangements -- this is on page 10 -- with check  
8 valves and remotely operated valving, assuming that all  
9 the conditions are met. It's not stating that  
10 TransCanada has met the burden to establish that all of  
11 the conditions are met through their design in valving  
12 locations. This is just saying assuming. Assuming that  
13 that happens. Because it hasn't happened yet.

14 Assuming that that happens becomes clear that  
15 the proposed TransCanada valving is seriously inadequate  
16 for a high thorough -- large diameter pipeline in a  
17 location of considerable elevation changes.

18 That's relevant to the issue before you, and in  
19 my opinion, I think it helps the finder of fact to  
20 understand the issue before it and to reach a decision.

21 Just some of the Findings of Fact that address  
22 issues that are similar to this that already exist in the  
23 current docket. 101, comply with CFR 195 that requires  
24 Keystone to conduct internal inspection of the pipe if  
25 ground movement takes place. It's already a requirement.

1 You have the ability. You've already exercised that  
2 ability to examine whether or not they can meet that  
3 condition. That was five years ago.

4 You know what the certification statute says.  
5 You have to reexamine that ability. They have to tell  
6 you that we still have the ability, and they have to put  
7 on evidence and prove it.

8 97, requires an emergency response plan to be  
9 prepared as required by federal regulations and submitted  
10 it to the PUC at the exact same time you send it to  
11 PHMSA.

12 No. 102 finding deals with high consequence  
13 areas and Integrity Management Plan. Those are federal  
14 regulations. Those are federal requirements.

15 One of the Staff witnesses, who was Jennifer  
16 Hudson, testified at the original proceeding, testified  
17 that planning and preparation for the Integrity  
18 Management Plan were fully compliant with PHMSA  
19 regulations. There's a Finding of Fact that indicates  
20 that you considered it and you resolved the issue at that  
21 time and you weren't concerned with whether or not you  
22 were preempted by federal law and pipeline safety rules.  
23 You understand that it's an integrated system, and your  
24 role is in assuring that things are carried out  
25 properly.

1           No. 107, you made a Finding that the project  
2 will not pose a serious threat to the socio-economic  
3 conditions, will not substantially impair the health,  
4 safety, or welfare or unduly interfere with the orderly  
5 development of the region.

6           That's a law that they have to comply with.  
7 This permit that they have, it almost creates a  
8 presumption. You've created a presumption for them by  
9 granting the permit that they can comply with everything  
10 and if this pipeline is constructed in a fashion that  
11 complies with the rules, it will satisfy the requirements  
12 of the law, which I just read.

13           That presumption carries forward today, and it  
14 carries forward into the future after a pipeline is  
15 operational. Because you have the jurisdictional  
16 authority to investigate and determine if people are not  
17 complying with the conditions of your permit. You have  
18 the authority to suspend permits for noncompliance. You  
19 have the authority to revoke permits for noncompliance  
20 with your rules.

21           One of your rules say you have to comply with  
22 federal law.

23           Finding 113 is basically the same as 107.

24           Conclusion of Law No. 5 addresses compliance  
25 with SDCL 49-41B-22. So does No. 6. So does No. 7. And

1 No. 8 you've concluded that Keystone met its burden to  
2 comply with 49-41B-22, which they kind of make light of  
3 their continued requirement to comply with that law in  
4 their response to our response.

5 No. 9 you issued a Conclusions of Law that said  
6 you have the authority to revoke or suspend for failure  
7 to comply with terms or conditions of the permit. That  
8 means that you have the ability to investigate whether or  
9 not someone is in compliance or noncompliance with the  
10 terms of your permit, regardless of who is the final  
11 arbitrator on compliance with federal regulations.

12 If a pipeline company does not comply with  
13 federal law, there's two remedies there. One is the  
14 Federal Government can prosecute them civilly for failing  
15 to comply. Number two is the Federal Government can  
16 prosecute them criminally for failing to comply with  
17 federal laws as it relates to the requirements of  
18 pipeline safety.

19 That doesn't in any way hinder your ability to  
20 determine if someone has complied with your permit or to  
21 determine if they have the continued ability to  
22 demonstrate their compliance, which is what we're talking  
23 about here today.

24 To say that you wouldn't have the authority to  
25 investigate and determine compliance on these issues

1 borders on absurd.

2 We're not talking about establishment or  
3 enforcement of pipeline safety regulations. We're not  
4 talking about that. Because you guys haven't done that.  
5 There's nothing in the record that would indicate you  
6 have. We're talking about the ability to determine  
7 compliance.

8 No. 16 you reached a conclusion of law, said you  
9 have the authority -- the Public Utilities Commission has  
10 the authority to impose conditions on the construction,  
11 operation, and maintenance of the project. And that  
12 includes federal law.

13 Some of the Permit Conditions, No. 34 requires  
14 compliance with 49 CFR 195, high consequence areas.  
15 No. 36 requires an emergency response plan to be filed  
16 with PHMSA as required by 49 CFR 194, 195.402, 195.452  
17 and file it with the PUC at the exact same time.

18 No. 3 I've already addressed, Amended Permit  
19 Condition No. 3. They have to comply and implement  
20 recommendations from the Final Environmental Impact  
21 Statement. That includes the Special Conditions.

22 CHAIRMAN NELSON: Mr. Rappold, I'm going to just  
23 interrupt.

24 I think we pretty much get the idea of your  
25 argument. If you've got anything that you haven't

1 covered that we absolutely need to know, go ahead.

2 MR. RAPPOLD: I wanted to get into the rest of  
3 the testimony that they've already offered through the  
4 website just to show how many more witnesses would be  
5 speaking to the very same issues that we want to talk  
6 about.

7 CHAIRMAN NELSON: Can you just click through  
8 those? I mean, I think -- we get the idea. We  
9 understand your argument.

10 Is that fair, Commissioner Fiegen?

11 COMMISSIONER FIEGEN: (Nods head.)

12 MR. RAPPOLD: Corey Goulet would talk about  
13 compliance with the PHMSA recommendations. John Schmidt  
14 would testify about similar requirements.

15 I don't believe this one does.

16 Meera Kothari I already mentioned. "In general  
17 I can testify to design and construction of the Keystone  
18 XL Pipeline and PHMSA compliance." They want to put  
19 evidence on about that. They understand that they have  
20 to. They understand that it's not preempted and you have  
21 the ability to look at it and examine it and you're  
22 required by law to do so.

23 We have those same rights. They just don't want  
24 to hear what we have to say. And we would ask you to  
25 deny their motion.

1           CHAIRMAN NELSON: Thank you.

2           I'm going to go down again the list of  
3 Intervenor's that are on the telephone line. This is not  
4 your motion, but if there's anything you need to add,  
5 I'll give you the opportunity.

6           Ms. Baker.

7           MS. BAKER: Thank you, Commissioners. The  
8 Yankton Sioux Tribe would like to express its support for  
9 the Rosebud Sioux Tribe's position and ask that this  
10 motion be denied. It is in the best interest of all the  
11 parties, of the Commission, and of the State of South  
12 Dakota that the Commission have as much access to  
13 evidence as possible in making its decision. And to deny  
14 this motion will ensure that that relevant evidence comes  
15 in.

16           So, again, we support the position of Rosebud.  
17 Thank you.

18           CHAIRMAN NELSON: Thank you.

19           Mr. Blackburn.

20           MR. BLACKBURN: Thank you, Mr. Chair. I would  
21 like to point out that TransCanada -- I'd like to speak  
22 in support of the motion and point out specifically that  
23 TransCanada seeks to include evidence of its compliance  
24 with PHMSA's regulation. Particularly, the evidence of  
25 the prefiled testimony of Ms. Kothari, question 8. The



1 answer to the question is "As a result of withdrawing the  
2 special permit application, Keystone will build the  
3 Keystone Pipeline as proposed -- (Inaudible)

4 (Discussion off the record)

5 MR. BLACKBURN: The answer to the question is  
6 "As a result of withdrawing the special permit  
7 application, Keystone will build the Keystone XL Pipeline  
8 using the as-proposed high-strength steel API 5L grade  
9 X70M steel with a nominal wall thickness of 0.465 inches,  
10 and will operate the pipeline at a lower pressure of  
11 1,307 psig to comply with the internal pressure and  
12 design requirements in accordance with Federal Code of  
13 Regulation Title 49 CFR 195.106." That's the end of the  
14 quote.

15 And there is additional allegations in there.  
16 I'd point out that the sentence I quoted -- in the  
17 sentence I quoted TransCanada is alleging compliance with  
18 federal law. If you're just able to allege compliance  
19 with federal law in its testimony, then the Commission  
20 should also allow testimony related to the potential  
21 noncompliance of federal law.

22 And we think that what's good for the goose is  
23 good for the gander here. And, in addition, as  
24 Mr. Rappold pointed out, there are other allegations in  
25 this testimony with TransCanada compliance with federal

1 law. So, therefore, if TransCanada is allowed to include  
2 that testimony, then the Intervenors should be allowed to  
3 include testimony showing it is not in compliance with  
4 federal law.

5 So thank you. I'll leave my comments at that.

6 CHAIRMAN NELSON: Thank you.

7 Ms. Zephier.

8 MS. ZEPHIER: Thank you.

9 Cheyenne River would like to go on record  
10 supporting Rosebud's motion simply just for the reason  
11 that the evidence regarding the pipeline possibly being  
12 constructed on movable soils or shale along the Cheyenne  
13 River directly affects or could affect the only source of  
14 potable water for about 20,000 residents who live in  
15 Ziebach and Dewey Counties on the Cheyenne River  
16 Reservation who depend on that drinking source. So for  
17 those reasons we support Rosebud's motion.

18 CHAIRMAN NELSON: Thank you.

19 Bob Gough has joined us on the phone. Anything  
20 to add?

21 MR. GOUGH: Yes. InterTribal COUP also supports  
22 this motion and particularly because we see that some of  
23 that shifting ground issue may actually impinge and  
24 change over the years with a changing climate, which I  
25 know the Commission is not going to be allowing

1 testimony on. However, I think that we support this, and  
2 we would request the Commission to deny the motion of  
3 TransCanada.

4 Thank you.

5 CHAIRMAN NELSON: Thank you.

6 Are there any of the Intervenors in the room  
7 that want to weigh in?

8 And, Mr. Rappold, I'd ask that maybe you move  
9 off to the side.

10 MR. ELLISON: Bruce Ellison on behalf of Dakota  
11 Rural Action. Certainly want to join in the arguments of  
12 the Rosebud Sioux Tribe against TransCanada's motion.

13 Unless this agency is without authority to  
14 exercise its responsibilities to protect South Dakota  
15 from this proposed construction project, then  
16 TransCanada's motion must be denied.

17 There have been a lot of changes since the Final  
18 Order and Amended Conditions were put out by this  
19 Commission. They have been largely discussed. The 59  
20 regulations, PHMSA, the FSEIS, which has a lot of  
21 criticism and discussion about the pipeline proposals, as  
22 were viewed by you, and the Findings of Fact and Amended  
23 Conditions were made.

24 And by withdrawing the Special Permit with PHMSA  
25 it really puts this thing almost back to the beginning.

1 I mean, TransCanada really should be filing a new  
2 petition. But since they haven't done that, we would  
3 submit that it's incumbent upon this Commission to take  
4 a serious and hard look at all of the evidence that may  
5 be available as to whether TransCanada can and is able  
6 and has shown that it is willing to comply with  
7 conditions.

8 And there's a lot of evidence to the contrary to  
9 that. Mr. Kuprewicz adds to that discussion and to that  
10 evidence. And I can't remember if Mr. Rappold mentioned  
11 another witness they had is Ms. Tillquist. Her whole  
12 testimony is about risk assessment, which is in part what  
13 Mr. Kuprewicz is talking about.

14 While this Commission cannot say you should have  
15 this route somewhere else, you can say no. You can say  
16 we are not going to grant this recertification because  
17 the route that has been chosen under the conditions even  
18 as they are set will not properly protect our land and  
19 our water and our future in a way that we feel  
20 comfortable enough to allow.

21 So you can say no. And then they can refile a  
22 new application, perhaps come in with an area that isn't  
23 nearly 200 miles of high slip slope risk. I mean, this  
24 is about one of the worst places that they could have  
25 routed a pipeline. And you can say no.

1           Look at the criticism of the FSEIS, and you'll  
2 see that a lot of those concerns are really there and/or  
3 being raised.

4           That's all we have. Thank you for your time.  
5 We would ask that you deny TransCanada's motions to  
6 exclude.

7           Thank you.

8           CHAIRMAN NELSON: Thank you.

9           Any other Intervenors?

10          Mr. Capossela.

11          MR. CAPOSSELA: Thank you, Mr. Chairman and  
12 Commissioners.

13          I think the Motion to Exclude Kuprewicz, as well  
14 as the motion -- the next motion on the docket, the next  
15 two motions on the docket, take just too narrow of a view  
16 of what the Commission's authority is in this proceeding  
17 and are urging the Commission to pigeonhole issues in a  
18 manner that I think is inappropriate.

19          I think the granting of the motion -- were the  
20 Commission to grant the motion, in some respects it would  
21 be inconsistent with the rulings on some of the discovery  
22 motions earlier in the proceeding where the parties were  
23 seeking discovery on the same issues and the Commission  
24 determined that it was appropriate for there to be  
25 discovery on these very issues.

1           Relevancy for discovery purposes is not the same  
2 thing as relevancy for the evidentiary hearing, but it's  
3 not that different either. There's another link or two  
4 in the chain, but these are the issues that relate to the  
5 construction of the pipeline, the certification that they  
6 continue to meet the conditions.

7           And for those reasons, in addition to those that  
8 have been espoused by Mr. Rappold and the Rosebud Sioux  
9 Tribe, the Standing Rock Sioux Tribe respectfully  
10 requests the denial of TransCanada's Motion to Exclude  
11 Mr. Kuprewicz.

12           CHAIRMAN NELSON: Thank you.

13           Others.

14           MS. CRAVEN: Kimberly Craven here on behalf of  
15 the Indigenous Environmental Network. And we also  
16 support the position of the Rosebud Sioux Tribe, and we  
17 urge the Commission to deny TransCanada's Motion to  
18 Exclude this Expert Witness Testimony.

19           We think it's very important to the proceedings  
20 that the full risk assessment and what dangers the  
21 pipeline might pose in the recertification process be  
22 fully aired. We think it's important to the people of  
23 South Dakota.

24           Thank you.

25           CHAIRMAN NELSON: Thank you.

1 Mr. Dorr, did you want to add something?

2 MR. DORR: Gary Dorr, individual Intervenor.

3 I have a question for the Commission. This is  
4 more to note I guess for the record. What's the time  
5 limit for providing testimony today?

6 CHAIRMAN NELSON: I'm not sure there is a time  
7 limit.

8 MR. DORR: I'm just wondering why you cut  
9 Mr. Rappold off. Because I was interesting in hearing  
10 what he had to say. If there's a time limit, I would  
11 like us all to know what that is.

12 CHAIRMAN NELSON: Mr. Dorr, I'm not going to get  
13 into an argument. There is no time limit. But if you  
14 were listening to what I stated, it's the fact that I  
15 felt he had covered his argument, and I was understanding  
16 his legal argument as it applied to his motion.

17 MR. DORR: So there is no time limit? Is that  
18 yes or no?

19 CHAIRMAN NELSON: There is no time limit but --

20 MR. DORR: There is no argument then. There's  
21 no issue.

22 CHAIRMAN NELSON: -- if anyone is going beyond  
23 where we think they need to go and we understood their  
24 argument, for the sake of all of us and moving this  
25 along, I'm going to respectfully ask that they wrap it

1 up.

2 Now do you have anything to add to this --

3 MR. DORR: The second note, for the record, is  
4 if I come up here and caution the Commission on their  
5 actions, I think you're going to -- you're going to tell  
6 me that's not my place to do it. Is that correct?

7 CHAIRMAN NELSON: Just continue with your  
8 statement, please.

9 MR. DORR: Okay then. Why are you allowing  
10 Mr. Moore to come up here and caution you about actions  
11 you're going to take today? I'm pretty sure if I say  
12 that you're going to tell me, Mr. Dorr, you're out of  
13 line.

14 CHAIRMAN NELSON: Mr. Dorr, do you have anything  
15 to add as it relates to this motion?

16 MR. DORR: Those were for this motion, the  
17 testimony on this motion.

18 CHAIRMAN NELSON: Thank you.

19 MR. DORR: I'd just like it noted for the  
20 record.

21 CHAIRMAN NELSON: Thank you. Thank you.

22 Let's go to staff, who I apologize for missing  
23 last time.

24 MS. EDWARDS: I certainly won't complain. Thank  
25 you. Kristen Edwards for staff.



1           Portions of Kuprewicz's testimony on rerouting  
2 the pipeline are clearly irrelevant and should be  
3 excluded. As we discussed in our Brief, it's not clear  
4 that all of it should be excluded at this time. Any of  
5 the testimony on requiring bad locations to be more  
6 restrictive than what is required by federal law is  
7 irrelevant since the Commission does not have authority  
8 over this matter due to federal preemption.

9           The operative issue would be whether it's more  
10 restrictive so it wouldn't necessarily apply to all  
11 testimony submitted in this docket. It would be  
12 testimony specifically more restrictive than federal law.

13           Staff offers the suggestion that the remainder  
14 of Kuprewicz's testimony could be objected to during the  
15 hearing, at which time all parties would have the ability  
16 to argue their case for either excluding or including the  
17 testimony, and Rosebud would have the opportunity to lay  
18 appropriate foundation, specifically as it relates to  
19 49-41B-27.

20           However, we would maintain that any testimony  
21 only relating to 49-41B-22 would be irrelevant as that  
22 was specifically for the permit hearing and not relevant  
23 in this docket.

24           Thank you.

25           CHAIRMAN NELSON: Thank you.

1           Keystone, your opportunity for rebuttal.

2           And, Mr. Rappold, I'm going to ask that you just  
3 move back.

4           Thank you.

5           MR. MOORE: Thank you, Mr. Chairman. I just  
6 have a couple of points.

7           One is I don't think that the characterization  
8 that we're seeking to admit evidence on the same  
9 subjects that we're asking be excluded by this motion is  
10 accurate.

11           We have not offered any direct testimony with  
12 respect to landslide risk. We have not offered direct  
13 testimony with respect to the issue of the propriety of  
14 conducting a historical risk assessment versus the kind  
15 of risk assessment that Mr. Kuprewicz says should have  
16 been done already with respect to this pipeline. We have  
17 not offered direct testimony with respect to the issue of  
18 valve placement.

19           So I think the argument and the characterization  
20 that we're -- that we're being unfair about those issues  
21 is inaccurate.

22           Secondly, to the extent that Mr. Rappold says  
23 that the issue is our ability to comply with conditions  
24 and that if we're offering testimony about that, they're  
25 entitled to rebut that, I think again you have to look to

1 the specific testimony offered by Mr. Kuprewicz.

2 Mr. Kuprewicz has not said with respect to valve  
3 placement that we're not in compliance with Condition  
4 No. 32. He said that he disagrees with the valve  
5 placement. Those are entirely different matters. And to  
6 the extent that what he has said is he disagrees and he  
7 thinks that as a result the pipeline can't be safely  
8 routed, he's raised issues that are beyond your statutory  
9 jurisdiction with respect to the route and clearly within  
10 the province of PHMSA to the extent that Keystone is  
11 required to comply with Condition 32 as imposed by  
12 PHMSA.

13 So it's very hard to consider this motion in the  
14 abstract, which is why we were very particular about the  
15 precise testimony Mr. Kuprewicz offered and our basis for  
16 objecting to it.

17 And, lastly, as I think you probably understand,  
18 the basis for the motion is simply a legal argument based  
19 on preemption and jurisdiction. We're not here to  
20 challenge Mr. Kuprewicz's qualifications. We're not here  
21 to contend that he could not appropriately be qualified  
22 as an expert witness, but rather that his particular  
23 testimony is improper given the limits of the  
24 Commission's jurisdiction.

25 Thank you.

1           CHAIRMAN NELSON: Thank you.

2           Questions from the Commission.

3           Hearing no questions, it's time for motions.

4           And I'm going to lead off.

5           In HP14-001, in the matter of Keystone's Motion  
6           to Exclude Testimony from Richard Kuprewicz, I move to  
7           grant the motion only to the extent that the testimony  
8           deals with the issue of rerouting and deny the entirety  
9           of the rest of the motion.

10          Discussion on my motion.

11          Let me say to Mr. Rappold, your supplemental  
12          filing yesterday was helpful to me.

13          MR. RAPPOLD: Thank you.

14          CHAIRMAN NELSON: Up to that point, I mean, I  
15          was wrestling with everything that had been presented on  
16          both sides. I had pretty much arrived at the place that  
17          you were at with your supplemental filing yesterday, and  
18          that helped confirm where I've ultimately come down.

19          I believe there may be portions of  
20          Mr. Kuprewicz's testimony that may, in fact, be relevant  
21          to the question that we all agree we have to answer,  
22          whether or not Keystone can continue to comply with the  
23          conditions that have been added to the permit.

24          Are there portions of his written testimony that  
25          are not relevant to that? I think that case has been

1 made also. And so in making this motion I would say to  
2 Mr. Rappold and, frankly, all of the opponents -- well,  
3 and to Keystone also, that when we get to hearing  
4 testimony needs to be focused on and restricted to the  
5 question at hand: Can Keystone continue to meet the  
6 conditions that have been attached to the permit? And if  
7 testimony strays from that, we may entertain questions to  
8 preclude at that time.

9 MR. RAPPOLD: That's understood.

10 CHAIRMAN NELSON: And I think from your filing  
11 yesterday I got that. I got the fact that you were  
12 understanding that.

13 And so but I wanted to state that clearly for  
14 everybody so that we understand this is not going to be a  
15 wide ranging thing when we get to the hearing but that as  
16 of now I think we need to move forward and deny  
17 everything.

18 Now why did I grant the portion on rerouting?  
19 We all understand we don't have the authority to order a  
20 reroute. And so there's no sense wasting our time on  
21 that particular question.

22 Additional discussion on the motion.

23 COMMISSIONER FIEGEN: Mr. Chairman, I appreciate  
24 your motion. I probably would have denied the whole deal  
25 and dealt with it completely at the evidentiary hearing.

1 But you're absolutely right on the rerouting. That will  
2 probably be thrown out at the evidentiary hearing anyway  
3 and objected to, and the Commission probably would rule  
4 that we will not hear that type of evidence. So that's  
5 fine we do that today.

6 I think this gives us an opportunity to listen  
7 to the evidence at the hearing, listen to the objections,  
8 and give everybody the ability to bring testimony that's  
9 going to be relevant. And there may be some evidence  
10 that we do object -- or is objected to, and we will rule  
11 in that favor.

12 CHAIRMAN NELSON: Additional discussion.

13 COMMISSIONER HANSON: Mr. Chairman.

14 CHAIRMAN NELSON: Yes.

15 COMMISSIONER HANSON: This is Commissioner  
16 Hanson. I would echo the statements that were made by  
17 Commissioner Fiegen.

18 I would have moved to grant the motion in its  
19 entirety, but I can certainly see the wisdom in what  
20 you're pursuing here, and I will be supporting the  
21 motion.

22 COMMISSIONER FIEGEN: You meant like deny the  
23 motion in its entirety; correct? Or to grant?

24 COMMISSIONER HANSON: Grant a portion, deny  
25 the --

1           COMMISSIONER FIEGEN: Just so that -- my goal  
2 was to maybe just deny the whole motion today. But I  
3 appreciate what Commissioner Nelson has brought.

4           COMMISSIONER HANSON: Oh, so I misunderstood  
5 what you said then. So I would have granted Keystone's  
6 motion in its entirety.

7           So Commissioner Nelson's motion is a compromise  
8 of the -- of you and I, and it sounds like it's the only  
9 one that's going to pass today.

10          CHAIRMAN NELSON: Thank you. And I appreciate  
11 the clarification where the three of us are at.

12          Any further discussion?

13          I want to make one other point. And I'm going  
14 to stray a little bit from the issue at hand. And I want  
15 to say to Mr. Dorr, you've seen the motion that I've  
16 made. I think the thing that you need to understand is  
17 that when we come in here we've read all of the written  
18 filings, and that helps to inform us as to the legal  
19 positions that the lawyers are going to argue.

20          And so it's not entirely on the oral arguments,  
21 but we've read the written filings and are prepared when  
22 we come into the room.

23          Additional discussion on the motion?

24          Hearing none, all those in favor of the motion,  
25 which is to grant only to the extent that the testimony

1 applies or would relate to rerouting and to deny the  
2 entirety of the rest of the motion -- all those in favor  
3 will vote aye. Those opposed, nay.

4 Commissioner Hanson.

5 COMMISSIONER HANSON: Aye.

6 CHAIRMAN NELSON: Commissioner Fiegen.

7 COMMISSIONER FIEGEN: Fiegen votes aye.

8 CHAIRMAN NELSON: Nelson votes aye. The motion  
9 carries.

10 MR. RAPPOLD: Thank you, Commissioners.

11 MR. ELLISON: Mr. Commissioners and  
12 Ms. Commissioner, can I have a point of clarification?

13 CHAIRMAN NELSON: Certainly.

14 MR. ELLISON: Bruce Ellison, Dakota Rural  
15 Action.

16 I understand what has been said, that evidence  
17 will not be allowed about rerouting the line. Does your  
18 ruling preclude evidence about based upon what has  
19 happened since 2010, evidence as to the inappropriateness  
20 of the route that TransCanada has chosen?

21 Because, again, as in my arguments before I had  
22 mentioned that -- and I understand you can't say we want  
23 you to do this different route, but you can say no.

24 And that's my point of clarification is not that  
25 a better area is better -- another is better, but that



1 this area isn't good based upon things that have happened  
2 since 2010.

3 CHAIRMAN NELSON: I think anything related to  
4 the siting of the route itself is beyond our  
5 jurisdiction.

6 MR. ELLISON: Yeah. I understand that changing  
7 the route would be beyond your jurisdiction. But  
8 approving this route or raising problems with it.

9 CHAIRMAN NELSON: Let me say this. Again, we  
10 are only looking at can the company continue to meet the  
11 conditions upon which the permit was issued?

12 And so if you have testimony that relates to  
13 that question, I think that's open.

14 MR. ELLISON: Even if it's about the route as it  
15 exists as proposed by TransCanada?

16 MR. SMITH: I think so.

17 CHAIRMAN NELSON: Yeah.

18 MR. ELLISON: Thank you for the clarification.

19 CHAIRMAN NELSON: Thank you.

20 I appreciate that. Because this is going to get  
21 sticky as we go forward so if we deal with it now, I  
22 appreciate that.

23 (A short recess is taken)

24 CHAIRMAN NELSON: We are back on-line, and I  
25 believe that we are ready to go.

1           We are dealing now with Keystone's Motion to  
2 Preclude Consideration of aboriginal title or  
3 usufructuary rights.

4           Mr. Taylor.

5           MR. TAYLOR: Usufructuary. It's an English  
6 expression.

7           CHAIRMAN NELSON: I'm going to interrupt. I  
8 looked it up, and I wrote down the actual pronunciation  
9 of it so we must be using different dictionaries. I will  
10 readily admit it's a new word for me. So anything any of  
11 the parties can do to enlighten me, go ahead.

12          MR. TAYLOR: Thank you, Commissioners.

13          Keystone brought this motion having in mind  
14 essentially what you said at the end of the last motion,  
15 and that is that this process is limited in scope. And  
16 there are things to talk about, and there are things that  
17 are beyond the scope of this hearing.

18          In the course of discovery and the exchange of  
19 discovery and some of the papers that have been filed by  
20 the parties, excluding some of the intervention papers,  
21 some of the issues that have been raised are aboriginal  
22 land rights and usufructuary rights, relating primarily  
23 total Indian Tribes' interests in the land across which  
24 the Keystone Pipeline is proposed to be constructed.

25          Aboriginal title is a concept that the U.S.

1 Supreme Court first addressed in 1955. And the concept  
2 of the title is that aboriginal peoples lived within an  
3 area and that a title to the land was created by virtue  
4 of the fact that they lived there.

5 In 1955 in Tee-Hit-Ton case the U.S. Supreme  
6 Court that says the United States exercised its dominion  
7 over tribal properties, in our case in the 1850s and '60s  
8 that the aboriginal title was extinguished as a matter of  
9 law.

10 Usufructuary rights are slightly different. The  
11 concept of usufructuary rights is tied really to the  
12 Magna Carta. The peasant had a usufructuary right to  
13 live in the house on the baron's property and to apply  
14 his trade. The king at the same time had a usufructuary  
15 right on the land that he seated to the baron for his  
16 baronetcy.

17 Usufructuary rights are followed in the civil  
18 law in the United States, and the concept is is that it  
19 is a right created in favor of a person who is not the  
20 owner of the land.

21 Mr. Capossela in his reply briefing describes  
22 the rights created by the National Historic Preservation  
23 Act and the Graves Reparations Act as perhaps  
24 usufructuary rights. Reasonably good examples of what a  
25 usufructuary right can be.

1           The reason we brought this motion is two-fold.  
2       First of all, no court in the United States, no State  
3       Court -- no Federal Court, no State Court has said that  
4       there are usufructuary rights that arose out of the  
5       treaties that were between the Tribes that are parties to  
6       this action and the United States in 1851 and 1868. No  
7       court has ever said that.

8           What the courts have said is that the Treaty of  
9       1851, which created a large tract that basically embodies  
10      all of South Dakota as Indian land, and the Treaty of  
11      1868, which pulled back the boundaries of that 1851  
12      treaty, and the subsequent acts of Congress, which pulled  
13      back the boundaries of the reservations in South Dakota  
14      as we now know them, all were within the rights of  
15      Congress to do.

16          The courts have said that as a consequence of  
17      the actions of Congress, whether or not you agree with  
18      the propriety of the actions, whether it was fair,  
19      whether it was nice, whether it was unreasonable, it was  
20      legal, and that as a consequence when the land outside of  
21      the boundaries of the reservations in South Dakota was  
22      returned to the public domain, typically around the turn  
23      of the last century, that all title rights, whether  
24      they're usufructuary, whether they're aboriginal title,  
25      or whether they are fee simple title as we think of them

1 now, in the Tribes are terminated.

2 The fact is is the proposed Keystone Pipeline  
3 route does not cross any reservation property, does not  
4 cross any land held in trust by the United States for a  
5 Tribe, and does not cross any property owned by a Tribe.  
6 It crosses only land which is in the public domain and  
7 which has been in the public domain for more than  
8 100 years. The vast majority of it was titled through  
9 the Homestead Acts and the predecessors of the private  
10 citizens of the State of South Dakota who own it now.

11 No South Dakota court has said that the Tribes  
12 have any right to exercise any form of dominion or  
13 jurisdiction over that property, save only those two  
14 federal statutes that speak to the issue of the National  
15 Historic Preservation Act and the Graves Reparations Act.  
16 There are a handful of other federal statutes that create  
17 potential involvement.

18 So our purpose in making this motion is for a  
19 determination that those issues are not properly before  
20 this Commission. They're substantive law questions.

21 You know, you should know that there are at  
22 least six U.S. Supreme Court opinions that have been  
23 rendered that have to do with tribal land interests in  
24 South Dakota, dealing with the boundaries of  
25 reservations, dealing with reservation --

1           For example, the Borland case that deals with  
2 whether or not the land that was taken by the  
3 construction of the Oahe Reservoir, who had jurisdiction  
4 over hunting rights. There's been a U.S. Supreme Court  
5 case that deals with the boundaries of the Rosebud  
6 Reservation to determine whether or not the session, when  
7 the Rosebud Reservation shrank by Congressional action,  
8 whether or not the Rosebud Tribe preserved any land  
9 rights outside of the borders of the present boundary.

10           It is our view that if usufructuary and  
11 aboriginal title issues are to be tried, they certainly  
12 are not to be tried in this court.

13           CHAIRMAN NELSON: I'm going to interrupt.  
14 Whoever's on the phone, you might want to put your phone  
15 on mute. We're getting some interesting noises. Shall  
16 we say that the court reporter's having a tough time  
17 transcribing.

18           Go ahead, Mr. Taylor.

19           MR. TAYLOR: If there are usufructuary rights  
20 and aboriginal title rights, those are substantive law  
21 questions.

22           The questions are do those rights exist? If  
23 they exist, to what extent to they survive abrogation of  
24 the treaties. The PUC isn't a court and cannot exercise  
25 jurisdiction to decide those judicial issues. To say

1 nothing of whether or not the State Courts even have  
2 jurisdiction to decide those issues.

3 I think it's very telling that if you look at  
4 the six or seven U.S. Supreme Court cases that deal with  
5 the reservations in South Dakota or if you look at the  
6 dozens of Supreme Court cases that deal with reservations  
7 across the United States, you will not find a single one  
8 that had its genesis in a Public Utilities Commission  
9 proceeding. You'll find many cases where the Tribe sued  
10 the Government, the Government sued the Tribes to resolve  
11 these issues.

12 So it's our view that, first of all, you have no  
13 jurisdiction to hear these things, and even if there is  
14 jurisdiction to hear them, there are no usufructuary  
15 rights that are in application. And we believe that any  
16 testimony or any evidence offered in support of an  
17 argument that you should do something because of  
18 usufructuary rights or because of aboriginal land titles  
19 is wholly and totally inappropriate.

20 Thank you.

21 CHAIRMAN NELSON: Thank you.

22 I'm going to go to Mr. Capossela first. Is it  
23 appropriate for you to lead off on this?

24 MR. CAPOSSELA: Thank you. Yes.

25 CHAIRMAN NELSON: We'll let you lead off, and

1 then we'll go to the other Intervenors.

2 MR. CAPOSSELA: Thank you, Mr. Chairman.

3 In fact, pursuant to prior practice, the tribal  
4 attorneys consulted before the hearing, and fortunately  
5 or unfortunately I was nominated to bat leadoff. So  
6 thank you for that.

7 I would begin by pointing out in the audience  
8 with me is Mr. Doug Provost. He's the director of the  
9 Standing Rock Sioux Tribe Department of Water Resources  
10 responsible for managing water and implementing the water  
11 quality program under Clean Water Act on the reservation.

12 He's also a former Tribal Council representative  
13 from the Bear Soldier District. That's McLaughlin  
14 South Dakota. And he represented on the Tribal Council  
15 about 4,000 South Dakotans on the Standing Rock  
16 Reservation prior to his current position. And now he  
17 manages the water.

18 He's one of the witnesses who has prefiled  
19 testimony expressing concerns in some respects on the  
20 potential impacts of the certification with water rights,  
21 including off-reservation water rights. And so he's one  
22 of the South Dakotans whose voices may be stifled were  
23 the motion to be granted.

24 The Standing Rock Sioux Tribe respectfully  
25 requests that the motion be denied. I'm going to try to



1 cover three points.

2           Firstly, the motion itself contains language  
3 that is misleading, perhaps even inaccurate, definitely  
4 overstating the point that I think that TransCanada is  
5 trying to make. There's a lot of terminology in the  
6 motion and the supporting documents for the motion which  
7 do not accurately portray what they're being used to  
8 portray, and I'll discuss that.

9           The second point that we'd try to make today  
10 is to define the aboriginal territory, which -- of the  
11 Sioux Nation, which is Standing Rock Sioux Tribe is a  
12 constituent Tribe and just to show the Commission what  
13 we're talking about. Because I'm not sure that that has  
14 been done in the motion.

15           And then, thirdly, to describe what rights exist  
16 in that territory and why those rights exist. And so  
17 that's what we're going to try to do in responding to the  
18 motion and ask that it be denied.

19           The rules of procedure require that a motion  
20 state with particularity the grounds therefor and the  
21 relief requested. And the terminology that's used  
22 intermingling both in the motion and briefs as well as in  
23 oral argument this morning does not accurately convey  
24 what things mean.

25           Aboriginal rights, treaty rights, abrogation,

1 termination, these are terms of art in Indian law. They  
2 have meaning. They have different things. And to the  
3 notion that rights in South Dakota of the Tribes have  
4 been "terminated" is just simply wrong as a matter of  
5 federal law.

6           There are rights of Tribes that have -- that  
7 their tribal status was terminated by Congress in the  
8 1950s. When Congress began an experiment to see what  
9 would happen to Indian people -- a feeling that there's  
10 too much community stuff going on, there's too much  
11 tribally owned land, there's too much community owned  
12 micro enterprises, and that folks on the reservations  
13 perhaps would be better off if the Tribes were eliminated  
14 and that they could make a go of it on their own.

15           And that happened to many Tribes in the  
16 United States. And in our Brief we cited a  
17 Congressional Committee Report on the termination of  
18 certain Tribes.

19           Now some of the legislation actually during the  
20 termination era gave the State of South Dakota the  
21 opportunity to expand its authority over the reservations  
22 as a possible first step toward termination. And in a  
23 case that's cited in our Brief, Rosebud Sioux Tribe  
24 versus State of South Dakota, the Eighth Circuit  
25 determined that South Dakota did not accept that first

1 step toward termination by referendum vote actually.

2 There was a referendum vote in the early 1960s.  
3 Nothing in South Dakota with respect to tribal rights has  
4 been "terminated," and the good people of South Dakota  
5 made sure of that by referendum vote.

6 But the jumbling of terminology in the motion is  
7 to the extent that I think the motion fails to comply  
8 with the basic Rule of Civil Procedure that it states  
9 with particularity the grounds therefor, as well as the  
10 request for relief.

11 These terms are just -- they're being thrown  
12 around, I think, to convince the Commission that nothing  
13 off reservation, current present day reservations -- I  
14 think that's really the point of the motion, as best as I  
15 can figure it out. Because these terms are used  
16 interchangeably and erroneously.

17 I think the point of the motion is the Tribes  
18 have no rights outside of the reservation. I think that  
19 would be -- at least if they captioned the motion that  
20 way, it would pass muster for the Rules of Civil  
21 Procedure.

22 But to say you can't consider aboriginal title  
23 or usufructuary rights, it doesn't make it exactly clear  
24 what they're asking for, and then the justification for  
25 that also is unclear.

1           One of the things I think that's worth pointing  
2 out also is there's a certain irony in contending that  
3 evidence cannot be advanced and testimony cannot be  
4 introduced at the evidentiary hearing because the PUC is  
5 not a court and these are big issues and it's not within  
6 the PUC's jurisdiction to decide the issues.

7           By filing the motion and making that request  
8 TransCanada is asking you to decide the issues against  
9 the Tribes. So there's a certain irony underlying the  
10 motion. The Tribes are not asking the Public Utilities  
11 Commission to adjudicate any aboriginal rights or claims  
12 or treaty rights or claims. And those two things are  
13 different, but you wouldn't know by the motion.

14           TransCanada is saying at the same time in the  
15 same breath the PUC cannot adjudicate these issues, but  
16 really they're asking you to do so by taking them off the  
17 table completely. And I think that's a significant right  
18 there demonstration of some of the problems with the  
19 motion itself.

20           Let me try to clarify what some of this  
21 terminology means and how it applies, as I think  
22 TransCanada did accurately in some respects express what  
23 aboriginal rights are. These are the possessory and the  
24 resource rights that native communities had prior to  
25 contact with Westerners.

1           They were here first. They lived here. They  
2 moved around. They used the resources of the land and  
3 the water to live and to prosper. And those are the  
4 aboriginal rights.

5           Now then the treaty era unfolded in the 19th  
6 Century, and some of these rights were reduced to treaty  
7 and were codified by the United States. And some  
8 weren't.

9           But aboriginal rights and treaty rights are  
10 different things. Treaty rights are codified. They're  
11 in documents passed by Congress in treaties.

12           Aboriginal rights were never reduced to writing.  
13 These were the rights that the native people had prior to  
14 contact.

15           Some treaties fully codified some Tribes'  
16 aboriginal rights, and some treaties didn't. So they're  
17 concentric circles that have an overlap but do not  
18 completely overlap. One wouldn't understand any of that  
19 by reading the motion.

20           And it's even more complicated than that. There  
21 are express treaty rights, the words in the treaty, and  
22 then there are implied treaty rights. It doesn't say  
23 anything in the 1868 Fort Laramie Treaty about water  
24 rights, for example. It just doesn't say that. It's not  
25 in there. But there's discussion about the reservations

1 being a permanent homeland.

2           There are many things in the treaty that would  
3 lead one to believe that in order for the Tribe to  
4 survive on the reservation identified in the treaty that  
5 they need water rights and, in fact, the courts have  
6 recognized water rights. And the Standing Rock Sioux  
7 Tribe is actually in a multiyear process of discussing  
8 the precise nature of the Tribe's water rights with the  
9 State of South Dakota and the State of North Dakota and  
10 the Federal Government.

11           And, interestingly, one of the big issues on  
12 water rights in those discussions are changes in the  
13 operation of the Shadehill Dam in Perkins County that is  
14 not located in any reservation. It's a dam that locks  
15 the Grand River just upstream from the Standing Rock  
16 Reservation. It's five miles outside of the reservation  
17 boundary.

18           And the Grand River runs through the  
19 reservation, but because the river is blocked just off  
20 the reservation boundary, that affects the flows in the  
21 river obviously and the Tribe's ability to use the water.  
22 So there may be changes in the operation of a dam outside  
23 of the Standing Rock Reservation per an agreement between  
24 the State and the Tribe and the Feds off reservation  
25 because the Tribe has water rights in a river system that

1 transcends the reservation boundaries.

2           The Tribe's water rights may have points of  
3 diversion outside of the reservation. The Tribe may have  
4 a right under federal law to take water from the Missouri  
5 River or tributaries to the Missouri River outside of the  
6 current reservation boundaries for use inside the  
7 reservation boundaries.

8           That's an example of rights that all Tribes or  
9 many Tribes have under federal law that transcend the  
10 reservation boundaries that exist today.

11           TransCanada cited with respect to aboriginal  
12 rights the Tee-Hit-Ton case as to the power of Congress  
13 or the authority that Congress has assumed to take action  
14 with respect to aboriginal rights.

15           But the Tee-Hit-Ton case is very fact specific.  
16 It's a case in Alaska. And the Alaska Natives -- I won't  
17 go too far on this, but if they have any treaties, it  
18 might be with Russia. It's not with the United States.

19           They have a different history, and that history  
20 is really important as relating to these issues of  
21 aboriginal rights and treaty rights. But they're not the  
22 same.

23           Okay. What happened for the Sioux Nation? The  
24 Tribes entered the 1851 Fort Laramie Treaty. It did not  
25 create an Indian reservation. It did define the

1 aboriginal rights of the Sioux Nation, extending from the  
2 Big Horn Mountains to the west, the Republican River of  
3 Kansas to the south, the Yellowstone and the Missouri to  
4 the north, and for some of the Dakota bands of the  
5 Sioux Nation all the way over past the Big Sioux River in  
6 eastern South Dakota and Minnesota.

7 That was in the 1851 Treaty. As TransCanada  
8 explained this morning, the subsequent 1868 Treaty, that  
9 created a reservation, the Great Sioux Reservation,  
10 comprising all of present day western South Dakota,  
11 including the Missouri River. The east bank of the  
12 Missouri River is the treaty boundary.

13 That was -- that was -- in 1877 the Black Hills  
14 was removed from the reservation. So the western  
15 boundary was moved over. And then in 1889 the  
16 reservations were broken up from what was left of the  
17 Great Sioux Reservation and there were payments made but  
18 those payments were disputed.

19 The thing went to court, the Black Hills Land  
20 Claim. And in 1980 the Supreme Court awarded the  
21 Sioux Nation 108 million, which the Sioux Nation did not  
22 accept and purports that there is a claim on the title to  
23 the Black Hills, to that taking in 1877 of the Black  
24 Hills. That's what happened.

25 Now in the course of 70 years of litigation the



1 Indian Claims Commission, the Commission established by  
2 Congress for the purpose of making recommendations to  
3 address outstanding claims, defined the aboriginal rights  
4 of the Sioux Nation and we cited that and that was  
5 ultimately affirmed by the Supreme Court.

6 Now in a Reply Brief there was a little bit of  
7 argument that I thought could have been presented a  
8 little more tastefully that we somehow misportrayed the  
9 import of the Sioux Nation case and messed up the cites.

10 But actually the version of the Indian Claims  
11 Commission Reporter that I looked at didn't have page  
12 numbers. It had cites for where the -- the cites, but it  
13 didn't have page numbers. So I kind of counted. You  
14 know, if it's supposed to begin on this page, then maybe  
15 the definition of aboriginal rights is on this page.

16 But what's significant is that on that page they  
17 didn't define aboriginal rights. They talked about the  
18 treaty.

19 Well, TransCanada doesn't know aboriginal rights  
20 when they see it because those treaty rights -- those  
21 aboriginal rights that were adjudicated by the Indian  
22 Claims Commission were codified in the 1851 Treaty.  
23 Sometimes the treaty contains the aboriginal rights for  
24 the Tribes, and sometimes it doesn't.

25 So treaty rights and aboriginal rights, they

1 overlap. But you wouldn't know it by the motion because  
2 these terms are just thrown around willy-nilly.

3 But what are the aboriginal boundaries that  
4 we're talking about? Do they even overlap with the  
5 pipeline that was discussed this morning?

6 And, Mr. Chairman, if I may, I would like to  
7 make reference to a map. I was -- for better or worse, I  
8 was in office in the Bureau of Indian Affairs in  
9 Washington, D.C. last week in the realty office, the  
10 realty branch chief for the Bureau of Indian Affairs.  
11 And this map was hanging on her wall. And I looked at it  
12 and I --

13 CHAIRMAN NELSON: Please don't tell me you  
14 swiped the map from the Federal Government.

15 MR. CAPOSSELA: I won't tell you.

16 CHAIRMAN NELSON: And I interrupted for another  
17 reason.

18 Commissioner Hanson, they do have a map that  
19 they're going to hold up, but my understanding is that  
20 they will describe it sufficiently for your benefit.

21 MR. CAPOSSELA: I'll do my best. Thank you.  
22 This is a map --

23 CHAIRMAN NELSON: If you would grab one of those  
24 mics. over there and just pull it up on top over there.

25 MR. CAPOSSELA: Thank you.

1           This is a map of the aboriginal territory  
2 adjudicated by the Indian Claims Commission for every  
3 Tribe in the United States. And there are different  
4 colors.

5           The biggest and the most pronounced is in blue  
6 in the middle of the United States in the Upper Plains.  
7 And it says Sioux. And this is a map of the aboriginal  
8 territory of the Sioux Nation hanging on the walls of the  
9 Federal Government today.

10           Aboriginal rights are not something that existed  
11 a long time ago but no longer exist today. And I  
12 thought -- and I asked why does the Bureau of Indian  
13 Affairs have this map on the wall today? And before I  
14 swiped the map the realty chief of the Bureau of Indian  
15 Affairs responded because the rules for the acquisition  
16 of land by Tribes are different if a Tribe buys land  
17 inside or outside of its aboriginal territory.

18           So we need to know what rules to follow if a  
19 Tribe wants to buy a tract of land. And the rules are  
20 different for the Sioux Nation if they want to buy land  
21 here in Wyoming or if they want to buy land up within  
22 their aboriginal territory.

23           Now in the fine print of the map it reads "This  
24 map has been prepared under the direction of the Indian  
25 Claims Commission as part of its final report. This map

1     portrays the results of cases before the U.S. Indian  
2     Claims Commission or U.S. Court of Claims in which an  
3     Indian Tribe proved its original tribal occupancy of a  
4     tract within the continental United States."

5             So I don't think there's any need to quib over  
6     what page in the Indians Claims Commission Reporter the  
7     rights of the Sioux -- the aboriginal boundaries of the  
8     Sioux Nation were adjudicated because we brought the map  
9     so you can see for yourself. And it's much of  
10    South Dakota, parts of North Dakota, parts of Wyoming,  
11    and into Minnesota for the eastern bands.

12            So those are the boundaries respected by the  
13    Federal Government, put together by the Federal  
14    Government, as adjudicated by the Indian Claims  
15    Commission. And in the case of the Sioux Nation, the  
16    Indian Claims Commission Findings were affirmed by the  
17    Court of Claims and by the U.S. Supreme Court.

18            And so there was kind of a suggestion the  
19    Indian Claims Commission recited and said it was affirmed  
20    by the Supreme Court. Well, it was affirmed by the  
21    Supreme Court. There's no reason to argue slight of hand  
22    about that. First it was affirmed by the Court of  
23    Claims. Then it was affirmed by the Supreme Court.

24            Well, why does it matter? What rights are being  
25    claimed in the blue area for the Sioux Nation that may

1 not exist outside the blue area in the Upper Plains?

2 And, you know, I thought how can I best describe  
3 it so on a human level people might understand? And to  
4 me the best example here in -- is Bear Butte State Park.  
5 And if you've ever visited Bear Butte State Park,  
6 Bear Butte is central to the Creation story for the  
7 Lakotas.

8 And if you go to the top far corner of the  
9 parking area and you hike up a trail, you'll begin to  
10 see -- like they look like little bags. They're very,  
11 very tiny bags. And what they are are tobacco ties.  
12 They're tobacco tied in little bags.

13 And then you follow the trail, and then there's  
14 ribbons. And then there's an area with an alter. And  
15 the Lakota people, because Bear Butte State Park is in  
16 the blue area, have a right that I don't have. And  
17 that's a right to go and engage in religious ceremonies  
18 at that alter area within the boundaries of Bear Butte  
19 State Park.

20 And if a South Dakota Game, Fish & Parks ranger  
21 were to tell me or any non-Lakota person, sorry, you  
22 don't have the right to pray there, we're closed, I would  
23 have to leave or I would get in trouble. That is not  
24 true for a Lakota person. They have the right.

25 And at a certain time of the year many Lakotas

1 go to Bear Butte State Park and exercise their rights  
2 within the aboriginal territory and they go on vision  
3 quests and they stay out there all night or for a few  
4 days with no food or water, and that's a part of their  
5 religious practices. And they have a right under federal  
6 law because it's within their aboriginal boundaries.

7 And that's a right that many South Dakotans  
8 fully get because Bear Butte is such a cool place, and so  
9 many people go and visit.

10 That's an example of an aboriginal -- of a right  
11 that Lakota people have because it's within the  
12 aboriginal boundaries that have been adjudicated and  
13 affirmed by the U.S. Supreme Court.

14 There was discussion this morning on the motion  
15 for the Rosebud Sioux Tribe's expert of there being other  
16 testimony in the record touching on many of the very same  
17 issues. And I think that's the case here also.

18 When Ms. Paige Olson testifies for staff on  
19 behalf of the Historic Preservation Office she references  
20 the National Historic Preservation Act as being the  
21 foundation for historic preservation work by the  
22 South Dakota State Historical Society. That same act  
23 requires consideration of "traditional cultural  
24 properties of Tribes" as being included in the act.

25 Those traditional cultural properties of the

1 Tribes almost by definition are not found outside of the  
2 aboriginal areas of the Tribes, unless there was  
3 something going on with intermarriage or trading horses  
4 or something like that.

5 But the aboriginal rights are written into many  
6 statutes and executive orders. And since the pipeline  
7 route does cut through the aboriginal territory of the  
8 Sioux Nation, of the Standing Rock Sioux Tribe as  
9 adjudicated up and held by the U.S. Supreme Court,  
10 testimony has been filed by Standing Rock expressing  
11 concerns with how certification of the permanent  
12 conditions -- of continued compliance with the permit  
13 conditions may affect those rights.

14 Now these issues -- the Commission may not find  
15 these issues to be determinative, to be the main issue in  
16 this proceeding, but it's competent evidence. It's  
17 relevant evidence because the conditions incorporate  
18 federal law, and these are rights of the Tribes under  
19 federal law.

20 So concerns on the use of water, even were there  
21 to be no release, but if there's water that is being  
22 withdrawn for hydrostatic testing and other construction  
23 from the Grand River or other tributaries of the  
24 Missouri River, that may affect water rights being  
25 negotiated right now with the Standing Rock Sioux Tribe

1 in the State of South Dakota.

2 It doesn't mean it's a determinative issue. The  
3 Commission has discretion to give it whatever weight it  
4 sees fit. But to absolve itself of consideration of  
5 these important issues seems inconsistent with the  
6 regulations and the statute underlying the fact-finding  
7 authority of the Commission.

8 And these rights, they range from historic  
9 preservation, ownership of human remains in the blue  
10 area, literally ownership of remains where Tribes have  
11 rights. If remains are uncovered due to construction in  
12 certain areas, the Tribes actually have the ownership  
13 right. That's their ancestors to repatriate and bring it  
14 back to the reservation.

15 And there's an unanticipated discoveries plan in  
16 the record that TransCanada has agreed to with the State  
17 Department and the SHPO. That wouldn't exist if these  
18 aboriginal rights didn't exist, if this map didn't exist.  
19 Congress would not have recognized those rights of the  
20 Tribes.

21 So the notion that, oh, the courts have torn up  
22 the treaty and created smaller reservations and that's  
23 the way it is, it's much more complicated than that. And  
24 unlike TransCanada, the Standing Rock Sioux Tribe is not  
25 asking the Commission to adjudicate any of it, but



1 instead hear evidence on concerns of South Dakota  
2 community leaders such as Doug Provost [phonetic] and  
3 others with their concerns and the concerns of their  
4 constituents as it relates to these off-reservation  
5 rights or claims.

6 Now a challenge has been made, I guess. No  
7 court has ever found that the Indian Tribes have rights  
8 outside of the current reservation boundaries in  
9 South Dakota.

10 I would like to point out a case called Yankton  
11 Sioux Tribe versus Army Corps of Engineers, which is  
12 reported at 83 F. Supp. 2d 1047. And on page 1,048 of  
13 the case Judge Piersol in Sioux Falls wrote that "The  
14 court failed to affect the removal and burial of all the  
15 bodies in cemetery." I'm referring to White Swan  
16 Cemetery south of Chamberlain, South Dakota. When Corps  
17 of Engineers releases water from Fort Randall Dam  
18 literally excavated a cemetery.

19 Now that cemetery was within the original  
20 boundaries of the Yankton Sioux Tribe, but those  
21 boundaries and some of the litigation that was referenced  
22 by TransCanada -- that cemetery was probably outside of  
23 the boundaries at the time of that court case because of  
24 dispute over the reservation boundaries.

25 In Federal Court a federal judge recognizing the

1 right of Tribes and actually issuing an injunction  
2 against the Federal Government from taking action that  
3 would harm that cemetery and those human remains outside  
4 of the reservation boundary.

5 More recently in a case which is not reported  
6 because it's just a Circuit Court thing in Rapid City,  
7 but on March 26, 2015, the Rapid City Journal reported --  
8 and I'm quoting from the headline, "In symbolic case  
9 Native American man beats fishing without license  
10 charge."

11 This didn't make the Reporter. We're not going  
12 to find it in the law library. But a Native American  
13 back in March went fishing without a license because he  
14 wanted to make a point that's really not that dissimilar  
15 from the point I'm trying to make this morning. And he  
16 got cited by the Game, Fish & Parks, but the judge let  
17 him go.

18 These are not rights that were abrogated or  
19 terminated 100 years ago or last year or last March.  
20 These are rights that exist -- that are recognized by the  
21 Federal Government in a wide variety of federal laws, and  
22 in many respects different rules apply to the  
23 Sioux Nation inside the blue area and outside the blue  
24 area.

25 And what the Standing Rock Sioux Tribe and other

1 Tribes are asking for, I believe, is the right to explain  
2 that, to hear the voice of the Indian people, and the  
3 concerns as it relates to the certification of the  
4 permit, not only within the existing reservation  
5 boundaries but within their aboriginal area, which they  
6 do hold very dear.

7 And so thank you, Commission.

8 CHAIRMAN NELSON: Thank you.

9 I'm going to go down, again, the list of  
10 Intervenor attorneys if anyone has anything to add. My  
11 fear, Mr. Capossela, is I think you've done a good job  
12 representing your fellow tribal attorneys, and they might  
13 call on you again.

14 MR. CAPOSSELA: We'll see. I'll be available.  
15 Thank you.

16 CHAIRMAN NELSON: Ms. Baker.

17 MS. BAKER: Thank you, Commissioners. I would  
18 like to point out just at the outset a couple of  
19 misrepresentations that were made in Keystone's Reply  
20 regarding Yankton's Response just so as to not mislead  
21 the Commission in any way.

22 The Yankton Sioux Tribe did concede that the  
23 Commission lacks jurisdiction to adjudicate land rights,  
24 but the rest of that sentence actually says that for the  
25 purposes other than its own determination on permit

1 certification the Commission just as clearly does have  
2 authority to take those claims and rights into account  
3 when it makes the certification determination. So we're  
4 in no way conceding that the Commission doesn't have  
5 authority to consider these issues.

6 In addition, Keystone alleged that we said there  
7 are no cases that's on aboriginal title to the land where  
8 the pipeline is proposed to be constructed. And, in  
9 fact, I'd like first to speak to the case cited by  
10 TransCanada where they discuss lands that are on the east  
11 side of the Missouri River. And the reason I'd like to  
12 talk to that case is because that case only involved land  
13 on the east side of the Missouri River.

14 The Yankton Sioux Tribe actually had land  
15 rights, property rights and treaty rights, both on the  
16 east and west side of the river. On the east side there  
17 was a subsequent treaty that relinquished those claims,  
18 and the current reservation is on the east side of the  
19 river. But on the west side of the river directly where  
20 the pipeline is going to go, the Yankton Sioux Tribe was  
21 a party to that 1848 Ft. Laramie Treaty that  
22 Mr. Capossela spoke about and I'm sure you'll hear a bit  
23 more about as we go on through this issue.

24 And in a case called Sioux Tribe vs. the  
25 United States, Docket 74 in the Court of Federal Claims,

1 that case addressed the 1851 Fort Laramie Treaty. And it  
2 said -- it was citing a previous decision from 1965 and  
3 saying that the Indian Claims Commission ruled that the  
4 1851 Treaty of Ft. Laramie recognized the title of the  
5 Sioux or Dakota Nation to approximately 50 million acres  
6 of land situated west of the Missouri River in what are  
7 now the State of North and South Dakota, Nebraska,  
8 Wyoming, and Montana.

9           The Court of Federal Claims and the Indian  
10 Claims Commission have actually recognized title to that  
11 1851 Fort Laramie Treaty area. And just for  
12 clarification, because TransCanada has sort of singled  
13 Yankton out due to its unique history, Yankton is  
14 considered part of that 1851 Treaty, and in that same  
15 case I was just citing from they reference a 1970 Opinion  
16 from the Indian Claims Commission which ruled that the  
17 Sioux or Dakota Nation in the Fort Laramie Treaty  
18 included only the Teton and Yankton divisions of the  
19 Sioux.

20           Teton would encompass the other tribal parties  
21 that are involved here and then Yankton as well was a  
22 party to that Treaty. So Yankton very much has an  
23 interest in that 1851 Fort Laramie Treaty and its  
24 territory.

25           Later on in that Court of Claims case from 1974

1 the Court states that "In many decisions dealing with the  
2 Treaty of Ft. Laramie, it has been held that the Treaty  
3 of Ft. Laramie was not a treaty which took any lands from  
4 the Indians but which was instead a treaty which  
5 recognized the title certain signatory Tribes on the  
6 basis of the territory which they used and occupied."

7 So there is language out there, plenty of  
8 language out there, stating that title has been found in  
9 that 1851 Treaty territory, which is where the pipeline  
10 would go, in these Lakota and Dakota Tribes.

11 And if you'll give me just one second, please.

12 As far as usufructuary rights, courts have found  
13 repeatedly that there are both aboriginal and treaty  
14 recognized title and rights, which Mr. Capossela spoke  
15 to. And usufructuary rights do not necessarily require  
16 that the Tribe have title to the land.

17 So here we're talking about different rights  
18 even in that title which the Tribes do have. And those  
19 usufructuary rights exist by virtue of treaty. And they  
20 exist even after executive orders or acts of Congress  
21 might diminish the land base that was reserved by that  
22 treaty, provided that the act of Congress or the  
23 executive order doesn't specifically, expressly divest  
24 the Tribe of its usufructuary rights.

25 So when that '51 Treaty territory was

1 diminished, was taken unilaterally by the United States,  
2 and Tribes were forced onto smaller areas of property  
3 their usufructuary rights weren't diminished. The  
4 usufructuary rights continued in that whole original vast  
5 stretch of land because they were not expressly abrogated  
6 through the subsequent acts.

7           And those are the rights that we're concerned  
8 about here, and those are the rights that we simply would  
9 like the Commission to have an opportunity to hear about.  
10 And the impacts on those rights should certainly be of  
11 interest to the Commission and are relevant to these  
12 proceedings.

13           And I'd also like to make one point about the  
14 route and siting issue that's been brought up. And I  
15 know the Commissioner has spoken about this a little bit  
16 in between, I guess, agenda items. But I'd like to point  
17 out that the case cited by Keystone which was actually  
18 first cited by Yankton does, in fact, very much apply to  
19 transmission facilities like the one at issue.

20           In the Nebraska Public Power District that  
21 involved a trans-state transmission facility, yes, which  
22 is defined as an electric transmission line and its  
23 associated facilities which originates outside the State  
24 of South Dakota, crosses the states and terminates  
25 outside of the date of South Dakota and which

1 transmission line and associated facilities deliver  
2 electric power and energy at 25 percent or less of the  
3 design capacity as such line and facilities for use in  
4 the State of South Dakota.

5 Now that is a very specific definition. And the  
6 reason that this is an issue is because TransCanada was  
7 trying to distinguish that case from our situation here  
8 by saying, well, that was just a trans-state transmission  
9 line, and this is just a regular transmission line.

10 But a trans-state transmission facility is  
11 simply a specific type of transmission facility. It's  
12 just as subject to 49-41B-36 so long as it has a design  
13 of more than 115 kilovolts. And that's based on the  
14 definition of transmission facilities.

15 And in that case, in Nebraska Public Power  
16 District, the facility at issue was a 500-kilovolt  
17 electric transmission line, which means it's well over  
18 the 115 kilovolt level to make it qualify as a  
19 transmission facility.

20 So the language of 49-41B-36 did apply in that  
21 Nebraska Public Power District's case, and it was taken  
22 into consideration when the Commission said that it could  
23 not take the particular action without violating the  
24 route specific requirement and that -- excuse me. And  
25 that the Public Utilities Commission does have rights to



1 deny a permit on the grounds of its route.

2           It does not have the right to reroute or to  
3 suggest or recommend a new route, but it does have the  
4 right within its authority to deny a permit based on the  
5 route.

6           And there's other language in that same case  
7 that actually says It is reasoned that the PUC does not  
8 have authority to grant general variance would violate  
9 the PUC's route-specific requirements, would deny parties  
10 an opportunity to assess the proposed route, and would  
11 place the PUC in a potential dilemma -- and here's the  
12 important language -- of granting a permit that was not  
13 route specific which violates its rules and precedence or  
14 violates SDCL 49-41B-36.

15           So TransCanada claimed that 49-41B-36 did not  
16 apply in that case, and clearly it did, as that was one  
17 of the concerns that was addressed by the South Dakota  
18 Supreme Court in this case.

19           So essentially Nebraska Public Power District  
20 does stand for the fact that the Commission does have  
21 authority to take into consideration factors that relate  
22 to a route specifically and that it can deny a permit  
23 based on the route. It simply cannot reroute or propose  
24 a new route for a facility.

25           And with that I will just say that Yankton

1 strongly opposes the motion and requests that the  
2 Commission deny it in the interest of allowing crucial  
3 testimony about rights of South Dakotans. And the fact  
4 that those rights may not be etched in stone or in a law  
5 book spelled out very specifically somewhere doesn't mean  
6 they don't exist. They've been acknowledged through  
7 courts time and again, and the Commission should take  
8 them into account in its decision.

9 Thank you.

10 CHAIRMAN NELSON: Mr. Blackburn, anything to  
11 add?

12 MR. BLACKBURN: Mr. Chairman, point of  
13 clarification. You had mentioned that you were going to  
14 allow all the tribal representatives to speak first, and  
15 if that's still the case, I would --

16 CHAIRMAN NELSON: Well, that was before I  
17 understood that they had nominated Mr. Capossela to be  
18 their spokesperson. So at this point I'm just going down  
19 the list.

20 MR. BLACKBURN: Okay. I'm sorry about that. I  
21 just have a quick brief statement.

22 Final Permit Condition 1 states that Keystone  
23 shall "Keystone shall comply with all applicable laws and  
24 regulations in its construction and operation of the  
25 project." Such law is not limited to express statutes

1 and regulations.

2 In Minnesota the Millelacs Band,  
3 M-I-L-L-E-L-A-C-S Band, of Chippewa Indians, the U.S.  
4 Supreme Court in 1999 unanimously held that the Chippewa  
5 Tribe's rights to hunt, fish, and gather in Minnesota's  
6 territory severed the right to use the land from formal  
7 title to the land. By so doing the U.S. Government  
8 vested the Chippewa with off-reservation usufructuary  
9 property rights that could not be lawfully taken from  
10 them without Congressional authorization.

11 Depending on the wording of the treaty, Tribes  
12 may have a property right in off-reservation resources  
13 that cannot be taken by Government action, except by due  
14 process of law, as they would be in any other taking  
15 context.

16 Moreover, states have no authority to condemn  
17 these federally granted property rights. Although the  
18 Supreme Court analysis in the Millelacs opinion arose in  
19 the context of treaties related to Tribes in Minnesota  
20 and Wisconsin, the implications of the Supreme Court's  
21 reasoning are much broader. The Supreme Court's analysis  
22 is applicable to any treaty in which U.S. treaty  
23 negotiators induced native people to give up formal title  
24 to land while promising the right to live off the land in  
25 a traditional way.

1           Just one more bit here. These property rights  
2 will vary from state to state, tribe to tribe, and treaty  
3 to treaty. The existence of usufructuary properties  
4 right is now firmly established in law. These rights  
5 must be respected in regulation and management activity  
6 that might diminish them. These off-reservation  
7 usufructuary property rights will have to be accommodated  
8 after the Millelacs decision not only in Minnesota but  
9 also in every state in which usufructuary rights have not  
10 been abrogated by the U.S. Congress. Due process  
11 protections under the U.S. Constitution are applicable to  
12 the usufructuary property rights to the same extent as  
13 any other taking of private property. So, therefore, the  
14 taking of any usufructuary rights in South Dakota must be  
15 done by due process of law, and such takings cannot be  
16 accomplished by the State of South Dakota.

17           Thank you.

18           CHAIRMAN NELSON: Thank you.

19           Ms. Zephier.

20           MS. ZEPHIER: Thank you, Mr. Chairman.

21           You have read all the briefing. Cheyenne River  
22 completely agrees with everything that Standing Rock and  
23 Yankton have said thus far, as well as Dakota Rural  
24 Action.

25           The only thing I guess I would like to say is

1 that, you know, we took a little bit of a different  
2 approach on this, and, you know, we looked at this as,  
3 you know, we're not asking -- Cheyenne River Sioux Tribe  
4 has not asked the PUC to adjudicate any tribal claims  
5 regarding aboriginal usufructuary rights.

6 This is not a case like -- Keystone cited  
7 West River Electric. No one's asking the PUC for any  
8 declaratory ruling as to those rights. We really just  
9 want to be able to submit testimony that will aid you,  
10 Commission members, in your deliberations and allow you  
11 to be as fully informed as possible.

12 Keystone in its Brief jumped right into the  
13 merits of the claim, which I think Standing Rock,  
14 Mr. Capossela, has done a good job of responding to, and  
15 we completely agree with everything he says. You know,  
16 but then Keystone goes into their Brief and says, you  
17 know, that the Commission's consideration or disposition  
18 of these cases is beyond its jurisdiction, you know, we  
19 think they're correct with that. This is beyond -- the  
20 PUC deciding issues of aboriginal rights is beyond the  
21 jurisdiction of the Commission.

22 That's another reason why this motion should be  
23 denied and this evidence should be allowed in. Again, no  
24 one is asking them to do that.

25 Also in Keystone's Brief they had mentioned --

1 or argued that, in effect, these Tribes -- us Tribes are  
2 asking you, Commissioners, to reroute the pipeline.  
3 That's baseless overreaching, as we discussed in the  
4 prior motion, the Kuprewicz motion.

5 So, you know, I don't -- they're arguing that  
6 the PUC doesn't have jurisdiction. Yes. The PUC, we  
7 believe, does not have jurisdiction to decide these kind  
8 of questions and, therefore, the Government should be  
9 allowed in.

10 If there is more of a PUC should not admit this  
11 evidence because it's irrelevant, you know, in general I  
12 think the only way evidence should be excluded is if it's  
13 irrelevant or otherwise inadmissible.

14 If that is what Keystone is really arguing, they  
15 haven't met their burden of proof on that. This evidence  
16 is potentially material, relevant, competent to some of  
17 the positions that Yankton Sioux Tribe may be taking at  
18 the upcoming hearing.

19 So a blanket exclusion of that evidence is  
20 simply inappropriate at this time. And all of this --  
21 you know, any evidence related to this should be allowed  
22 in to be able to more fully inform the Commission on any  
23 of these questions that may come up. And for that reason  
24 the Cheyenne River Sioux Tribe strongly opposes this  
25 motion made by Keystone.

1 CHAIRMAN NELSON: Thank you.

2 Mr. Gough, anything to add?

3 MR. GOUGH: Commissioner, thank you.

4 InterTribal supports the Tribe's position on  
5 this and seeks to have the dismissal of TransCanada's  
6 motion.

7 CHAIRMAN NELSON: Thank you.

8 Any Intervenors in the room?

9 Mr. Rappold.

10 MR. RAPPOLD: Thank you, Commissioners. Matt  
11 Rappold on behalf of the Rosebud Sioux Tribe. I'll keep  
12 this brief.

13 I just want to go on record stating that the  
14 Rosebud Sioux Tribe supports the other parties, the other  
15 tribal Intervenors, and the other parties in their  
16 opposition to Keystone's Motion to Preclude Testimony as  
17 it relates to aboriginal rights and usu -- you know what  
18 I'm trying to say.

19 CHAIRMAN NELSON: We do.

20 MR. RAPPOLD: Thank you.

21 CHAIRMAN NELSON: Thank you.

22 Others?

23 Ms. Craven.

24 MS. CRAVEN: Thank you, Mr. Chairman and other  
25 Commission members. Kimberly Craven from the Indigenous

1 Environmental Network, and I would like to echo what  
2 Mr. Rappold just said.

3 We joined and support the Tribes in their --  
4 sorry. I just lost my whole train of thought. Anyway we  
5 urge you to deny Keystone's motion to keep out the  
6 important tribal testimony that is relevant to this  
7 proceeding.

8 Thank you.

9 CHAIRMAN NELSON: Thank you.

10 Any others?

11 Yes. Mr. Dorr.

12 MR. DORR: Gary Dorr, individual Intervenor.  
13 I'd just like to point out a couple of things here.

14 Under the isolated tract fact, the Rosebud Sioux  
15 Tribe actually can turn Mellette County into reservation  
16 land. That's the special status that this man had talked  
17 about with the realty. So that is still something that's  
18 still on the table. So the Tribes do have consideration  
19 here.

20 Also an affirmation of the treaty rights,  
21 Lavetta Elk v. United States was heard on April 29, 2009,  
22 in Rapid City in the United States Court of Federal  
23 Claims. She was sexually abused by an army recruiter,  
24 and she filed a claim under the -- Federal Court claim  
25 under the Bad Man clause of the 1868 Treaty, and she won.



1           The court affirmed that the treaty rights of the  
2 Tribes under the 1868 Treaty are still in effect, are  
3 still valid. They are not static. They changed. As the  
4 person talked about fishing, the fishing methods have  
5 changed also. So the treaty is not a static document.  
6 It is -- I mean, it grows with the use and expansion of  
7 the relationship between the states and the Tribes.

8           So I think that the treaty rights do need to  
9 be -- and usufructuary rights are still current, and it  
10 does directly apply to the first Amended Condition, which  
11 Keystone shall comply with all applicable laws. Because  
12 the 1868 Treaty is codified under 15 Stat. 635. It's  
13 been made into a law. It's not just a treaty. It's a  
14 law.

15           And the courts -- and we have heard today and  
16 I've just told that you -- have affirmed that treaty  
17 rights and usufructuary rights are still current, are  
18 still valid.

19           CHAIRMAN NELSON: Thank you.

20           Staff.

21           MS. EDWARDS: Thank you. Kristen Edwards for  
22 staff.

23           Staff did not take a position on this motion.  
24 There was some mention about whether or not certain  
25 testimony offered by Staff would be subject to this

1 motion if it were granted.

2 I don't believe that's really on the table at  
3 this time, as specific offerings of testimony aren't to  
4 be decided on today. But if that does come up at a later  
5 time, we'd be prepared to discuss it then.

6 Thank you.

7 CHAIRMAN NELSON: Thank you.

8 Keystone, rebuttal.

9 MR. TAYLOR: Thank you, Commissioner.

10 Rhetorically I'd ask this question: If there  
11 are usufructuary and aboriginal title issues to be  
12 decided, where were the Tribes five years ago when we  
13 first heard this case? And what has changed in the  
14 intervening five years? Nothing.

15 Five years ago this Commission adopted  
16 Finding 1, that Keystone will comply with all laws.  
17 We're not making any contention that somehow there are  
18 laws that we are exempt from complying with in our  
19 certification proceeding.

20 Secondly, this Commission adopted Condition 43.  
21 Condition 43 says that we have to abide by the Graves  
22 Reparation Act, the Repatriation Act. We have to abide  
23 by the National Historic Act. We have to follow the  
24 unanticipated discoveries provisions that are contained  
25 in all of the support documents. None of that has

1 changed.

2 In our Tracking Table we said we will comply  
3 with all of those things. They are all future reaching,  
4 and it is absolutely our intention to comply with all of  
5 those things.

6 So the issue of are there new or different or  
7 are there land rights that the Tribes may advance in this  
8 hearing is well beyond the issue of certification. If  
9 there are legal rights to land interests that TransCanada  
10 has not dealt with, that the Tribes can advance -- this  
11 is not the forum for that. The forum for that is in  
12 Federal or State Court. It's in Federal Court by  
13 statute.

14 Let me give you an example. This is a 2009  
15 federal decision. The caption is Sisseton-Wahpeton Oyate  
16 Rosebud Sioux Tribe, Yankton Sioux Tribe, et cetera, vs.  
17 the United States of America and TransCanada Keystone  
18 Pipeline LP. Decided by Judge Kornmann, U.S. District  
19 Court Judge in Aberdeen over the first Keystone Pipeline.

20 Here's what Judge Kornmann said. "It is  
21 critical to note that the proposed project," that is the  
22 base Keystone Pipeline, "the proposed project at no point  
23 crosses the boundaries of any present-day reservations in  
24 South Dakota. The proposed pipeline, although running in  
25 part through lands previously seated to the

1 United States, will be located exclusively on land that  
2 was restored to the public domain."

3 Then Judge Kornmann cites all the famous U.S.  
4 Supreme Court cases. Then he concludes by saying "When  
5 the Tribes seated the land in question back to the  
6 United States it lost the right of absolute use and  
7 occupation of the lands conveyed and, therefore, the  
8 Tribe no longer has the incidental power to regulate the  
9 use of the lands by non-Indians."

10 And he concludes by citing South Dakota vs.  
11 Borland, U.S. Supreme Court case involving Cheyenne River  
12 and the Oahe Reservoir that I spoke to this morning.

13 The plain facts are if there is a forum for the  
14 Tribes to challenge the right of the Keystone project to  
15 negotiate with a landowner and acquire an easement to  
16 cross his property, if the Tribes claim that they have an  
17 unprotected property right in that property, this is not  
18 the place to assert that. The place to assert that is in  
19 State or Federal Court.

20 Nothing has changed with Condition 1 or  
21 Condition 43. We fully intend to comply with those. So  
22 there's no issue to try here about those.

23 What would the Tribes have? Would the Tribes  
24 come in and offer testimony about funerary issues, about  
25 cultural heritage issues? That's the essence of what

1 they're talking about. And would the Tribes then say  
2 that somehow the Findings made in the 2010 hearing that  
3 they say this morning cannot be amended, would they then  
4 say that those Findings should be amended?

5 Should there be new Findings made, Findings to  
6 the end, that what happened in 2010 in the process that  
7 this Commission followed was not appropriate?

8 Certainly not. That's not their intention.  
9 What is their intention?

10 Plain facts are, these issues are dealt with in  
11 Condition 1 and Condition 43. If there is some violation  
12 going forward, there's a forum for dealing with that  
13 violation going forward. They can come back here, and  
14 they can ask you to suspend the permit. They can go to  
15 court as they did in 2009 and attempt to adjoin the  
16 construction of the project.

17 A couple of points raised by Mr. Capossela in  
18 his interesting and animated explanation. I waited for  
19 you to give him the Miranda Warning with respect to  
20 stealing the map. But I guess he said he appropriated  
21 it.

22 Water rights. Water rights. He speaks about  
23 water rights. There is a federal doctrine that has to do  
24 with tribal water rights called the Winters Doctrine.  
25 The Winters Doctrine, the genesis of it is in a U.S.

1 Supreme Court case in 1909 or '6 called the Winters case,  
2 and it says that the Tribes do have water rights.

3 The Tribe's water rights are different from the  
4 notion of water rights as we know them in South Dakota.  
5 But if the Tribe wants to assert that the taking of water  
6 from one of the tributaries of the Missouri River for  
7 proof testing the integrity of the pipeline is an  
8 invasion of their water rights, they have every right to  
9 do that before the Water Management Board in the State of  
10 South Dakota.

11 Or if they think that their water rights are not  
12 regulated or protected or subject to the jurisdiction of  
13 the Water Management Board, of which I've appeared dozens  
14 of times, then they can go to court and seek to protect  
15 their rights either in the Federal or State Court system,  
16 whichever is their choice.

17 The Millelacs case -- the Millelacs case cited  
18 by Mr. Blackburn makes my point precisely. The Millelacs  
19 case arose out of a long debate over fishing rights on  
20 Millelacs in Minnesota. And the U.S. Supreme Court  
21 carefully studied the treaty that the Chippewa signed  
22 that seated their territory around Millelacs to  
23 determine if in that session they gave up the right to  
24 fish on the lake and if they were subject to regulation  
25 by the state.

1           They examined the treaty. And that's what goes  
2 on in the Federal Court systems. Careful examination is  
3 made of the treaties to determine what they meant.

4           The case that Yankton Sioux doesn't like in the  
5 Indian Claims Commission was a case sued out for that  
6 very purpose, to determine what was the aboriginal  
7 territory of the Yankton Sioux Tribe. And the Indian  
8 Claims Commission determined it was all east of the  
9 Missouri River, that it started at a point down here  
10 that's now called North Bend just south here on  
11 Highway 34 that ran up through Highmore and then down to  
12 Sioux River and back to the Missouri and back up here.

13           I didn't make those decisions. Those decisions  
14 were made by the Indian Court of Claims -- I'm sorry.  
15 The Indian Claims Commission.

16           The Bad Man clause that Mr. Dorr refers to has  
17 absolutely no application. Has absolutely no  
18 application. The Elk case that he talks about is a case  
19 that -- the treaty says that the U.S. Government will  
20 give reparations for the acts of the bad men within the  
21 scope of the reservation.

22           The plain facts are this Commission protected  
23 what Indian tribal rights there are, if there are any, in  
24 Condition 1 and Condition 43. And Keystone makes no  
25 contention that anything has happened in the intervening

1 five years that changed those conditions.

2 If the Tribes felt that the 2010 Decision  
3 somehow was an abrogation of their rights or an invasion  
4 of their rights, the Federal Courthouse is down the  
5 street and it's been there all five years since the 2010  
6 decision was made and no one was taken any action to do  
7 anything.

8 We think it is entirely appropriate that the  
9 issue of tribal land rights whether you characterize them  
10 as aboriginal title, whether you characterize them as  
11 aboriginal territory -- and I know the distinctions  
12 between aboriginal title and aboriginal territory.

13 I've practiced law in the state for 43 years.  
14 When I was a second year law student I was hired by  
15 Professor Lehman in the summer of my second year. A  
16 grant that he received from the Indian Claims -- from the  
17 Department of the Interior to research Indian  
18 jurisdiction. I've been doing this for 43 years. I  
19 understand those distinctions.

20 Those distinctions do not belong here. They  
21 belong in the Federal Court system. If there are any  
22 issues to be taken up, they should not be heard and  
23 should not be argued here.

24 Thank you very much.

25 CHAIRMAN NELSON: Questions from the Commission.



1           Hearing no questions, are there motions?

2           I will move in HP14-001 in the matter of  
3           Keystone's Motion to Preclude Consideration of Aboriginal  
4           Title or Usufructuary Rights that we grant the motion.

5           Discussion on the motion to grant.

6           Let me say first to Mr. Capossela, I greatly  
7           appreciated your presentation. I learned some history  
8           that I probably should have learned a long time ago, and  
9           I appreciate that greatly.

10           But having said that, I think Mr. Taylor is  
11           absolutely right. If there are any of these kind of  
12           issues that linger around what we are doing, Federal  
13           Court is the place for those and not in front of the  
14           Public Utilities Commission and, hence, my motion to  
15           grant.

16           Other discussion on the motion.

17           Hearing none, all those in favor will --

18           COMMISSIONER HANSON: Mr. Chairman.

19           CHAIRMAN NELSON: Yes, Commissioner Hanson.

20           COMMISSIONER HANSON: Mr. Chairman, I fully  
21           agree. I was pausing to see whether or not Commissioner  
22           Fiegen wished to say something.

23           I fully agree that it is totally appropriate  
24           that any concern regarding these issues should be held in  
25           Federal Court.

1 CHAIRMAN NELSON: Thank you.

2 Additional discussion?

3 Hearing none, all those in favor will vote aye.

4 Those opposed, nay.

5 Commissioner Hanson.

6 COMMISSIONER HANSON: Aye.

7 CHAIRMAN NELSON: Commissioner Fiegen.

8 COMMISSIONER FIEGEN: Fiegen votes aye.

9 CHAIRMAN NELSON: Nelson votes aye.

10 Motion carries.

11 That brings us to the last motion of the day.

12 This is Keystone's Motion to Preclude Testimony Regarding  
13 Mni Wiconi Pipeline Easements.

14 Keystone.

15 MR. TAYLOR: Thank you, Commissioners.

16 Early in these proceedings Mr. Dorr advanced the  
17 argument that Keystone needed the permission of the  
18 Oglala Sioux Rural Water Supply System in order to  
19 effectuate crossings of the Mni Wiconi Pipelines. In my  
20 Brief I told you the history of Mni Wiconi enacted by  
21 Congress.

22 The land that underlies the Mni Wiconi where the  
23 easements are for the pipelines is held in trust by the  
24 United States. The statute that created the Mni Wiconi  
25 Pipeline directed that the pipelines be held in trust,

1 the land.

2 The Keystone Pipeline crosses the Mni Wiconi in  
3 two places; once in Haakon County in the Hostutler  
4 property and again in Jones County on the Dahlke-Mann  
5 property.

6 The United States obtained an easement from  
7 Hostutler and obtained an easement from Dahlke-Mann to  
8 construct the pipelines. The easements are  
9 nonexclusive.

10 The law of South Dakota says that a nonexclusive  
11 easement, a junior easement holder or the landowner can  
12 make use of the easement property so long as the use he  
13 makes is not disruptive of the senior easement holder.

14 Keystone acquired easements from both  
15 landowners. Keystone immediately began discussions with  
16 the Bureau of Reclamation. The Bureau of Reclamation is  
17 the designee of the Government of the United States to  
18 manage the trust responsibility for the Mni Wiconi  
19 Pipeline.

20 The Bureau of Reclamation in the course of those  
21 discussions establish criteria that govern the crossing,  
22 engineering criteria, engineering criteria that were  
23 discussed and negotiated at length with Keystone and were  
24 discussed and negotiated at length with the Oglala Sioux  
25 Rural Water Supply System and its consulting engineers.

1           The Oglala Sioux Rural Water Supply System,  
2           which is a political subdivision of the Oglala Sioux  
3           Tribe, refused to meet with and discuss the crossings  
4           with Keystone.

5           The reason they refused is is because in 2010  
6           the Oglala Sioux Tribe adopted a resolution prohibiting  
7           discussions between the water system and the Keystone  
8           Pipeline. So the BOR was the intermediary.

9           The BOR concluded those discussions, arrived at  
10          engineering standards for the crossing, and sent those  
11          engineering standards to the Department of State and said  
12          to the Department of State when you make your record of  
13          decision on the efficacy of the Keystone Pipeline and, in  
14          effect, the record decision on the Presidential Permit we  
15          request that you require that the crossing be  
16          accomplished according to these criteria and engineering  
17          standards.

18          In my eye it is absolutely no different than  
19          Keystone negotiating with a private landowner to  
20          effectuate a crossing of a water line that a private land  
21          owned, a tile line that a private landowner owned, a road  
22          that a private landowner owned.

23          When resolution is made between the landowner  
24          and Keystone and everybody is satisfied it's not your  
25          business. It's the business of the landowner and the

1 business of the pipeline company. And that is exactly  
2 and precisely what happened in this case.

3 The fact that the land -- the fact that the  
4 easements are held in trust for the Tribes does not  
5 change the character of the ownership.

6 The Tribes are not without remedy. If the  
7 Tribes believe that the Bureau of Reclamation abused its  
8 trust responsibility, the laws of the United States, the  
9 Indian Tucker Act and the Administrative Procedures Act  
10 provide a remedy for them.

11 They can sue for damages, sue for injunction,  
12 but they have no voice before the Public Utilities  
13 Commission to regulate those two crossings, and it is not  
14 an issue before the Public Utilities Commission whether  
15 or not Keystone was required to obtain the permission of  
16 the Tribes.

17 Thank you.

18 CHAIRMAN NELSON: Mr. Dorr.

19 MR. DORR: Gary Dorr.

20 Mr. Taylor made reference to the fact that  
21 Keystone was negotiating with Oglala Sioux Rural Water  
22 Supply System. That in itself speaks volumes. That's  
23 what was supposed to be happening.

24 The Tribes asked for TransCanada to do -- say  
25 this is your pipeline going left to right and Keystone's

1 going to come through down the center. The Tribes asked  
2 for a workaround on each side of the water line so that  
3 if there was a break underneath the water line, that the  
4 water could be routed around it to prevent that from  
5 stopping water service.

6 TransCanada politely refused to do that. So  
7 that's not in negotiation. There was no compromise ever  
8 reached. So there are various and multiple reasons for  
9 why negotiations broke down between TransCanada and  
10 Oglala Sioux Rural Water Supply System.

11 Oglala Sioux Rural Water Supply System is a  
12 political entity, but it is also the name of this system  
13 as noted in Public Law 100-516. It's a system.

14 Could I grab something real quick?

15 Public Law 100-516 states that the system  
16 started at Ft. Pierre at the intake from the river behind  
17 the dam and goes to the reservation. It doesn't  
18 magically change into nontribal water and then go back  
19 into tribal water along the way.

20 The system -- if you will look at the part of my  
21 discovery and part of my testimony, I submitted those  
22 easements from the United States. The easement language  
23 states that the Oglala Sioux Rural Water System will  
24 supply water to the West River Lyman Jones system.

25 This is not West River Lyman Jones property.

1 This is the Oglala Sioux Rural Water Supply System. And  
2 we call it the Mni Wiconi. It was called the Mni Wiconi  
3 Water Project, but the lines that go to the reservation  
4 are called the Oglala Sioux Rural Water System. So the  
5 system starts at the intake, and they go all the way to  
6 the reservation.

7 This system serves 90,475 Indians on the four  
8 reservations where this water goes to. Those are  
9 citizens of the State of South Dakota. They deserve to  
10 know that the easement process that's going on here is  
11 within the bounds of legal -- other regulations.

12 Okay. And the system is -- this is a unique  
13 system for this area. It's held in trust. The system is  
14 held in trust. The land isn't necessarily held in trust.  
15 And that's what he's talking about. We don't dispute  
16 that.

17 But it hasn't been studied yet either. In the  
18 Public Law 100-516 they did not dispute the fact that it  
19 could be called non-Indian Country, but they didn't say  
20 that it was going to be called non-Indian country, the  
21 land underneath where the pipeline is at. That question  
22 has never been solved.

23 But we know for now that the system is held in  
24 trust. So the pipe system consists of your PVC or your  
25 steel pipe, your cathode protection system which is

1 underneath the pipe to prevent the pipe from rusting on  
2 the steel pipe. And it also is going to include the  
3 engineering of the bed that is decompacted where the  
4 pipeline lays.

5 And this pipeline lays in clay. That's why it's  
6 important for -- that's why the considerations went into  
7 the negotiations. Because the Tribes did not want the  
8 water line disturbed.

9 If there's a leak, then the clay and the oil and  
10 the liquids that are in the Keystone Pipeline can expand  
11 that clay and can ruin the water line system. That's why  
12 the consideration for the easement and the permission is  
13 key.

14 Now this is part of the FEIS in 2010, and this  
15 is part of the FSEIS in 2013. Mr. Taylor has said that  
16 the -- that Keystone has negotiated with the Bureau of  
17 Reclamation and come to an agreement on what the crossing  
18 will be on the Oglala Sioux Rural Water Supply System.

19 In 2010 the report put out by the Bureau of  
20 Reclamation on the crossing criteria stated you have to  
21 have the permission -- let's see here. 2010.  
22 "TransCanada shall receive Oglala Sioux Rural Water  
23 Supply System and the Reclamation's review and approval  
24 of crossing specifications and drawings prior to starting  
25 work."



1           In 2013 someone got to the documents. Someone  
2 changed it, and that was taken out. But what was left in  
3 here was a paragraph, Interruption of service during  
4 Keystone XL construction. TransCanada shall make  
5 provisions acceptable to Reclamation and Oglala Sioux  
6 Rural Water Supply System for any activity conducted by  
7 TransCanada that causes water service in the OSRWS Core  
8 system pipeline to be interrupted during construction.

9           Whoever changed this still didn't take out the  
10 fact that the permission is needed from the Oglala Sioux  
11 Rural Water Supply System. That system includes four  
12 Tribes: The Cheyenne River Sioux, Lower Brule, Rosebud,  
13 and the Oglala Tribes. They are all part of the Oglala  
14 Sioux Rural Water Supply System.

15           The fact that this is part of this is not a --  
16 this is not yet a Federal Court issue. This is again  
17 making sure that TransCanada follows through with the  
18 conditions that have been set forth. This was never  
19 contested before today. It's a part of the record. This  
20 is what Bureau of Reclamation stated are its standards  
21 for crossing the pipelines, the water pipelines.

22           The fact that we're going to Federal Court or  
23 whatever, that doesn't matter. What happens right now,  
24 this is what's on the record. And TransCanada is saying  
25 they got permission. They have an agreement.

1           It's not an agreement. This is what their  
2 criteria is, and the criteria is they still have to  
3 consult and get permission from the Oglala Sioux Rural  
4 Water Supply System.

5           Another thing that's notable is in this report  
6 they provided maps, the Bureau of Reclamation. And one  
7 of these maps shows that it's Oglala Sioux Tribe. It  
8 labels it as OST. It's not on this. I don't have it  
9 with me. The printer wouldn't print right. But these  
10 are held in trust for the Tribes.

11           Now when you say that we don't own the land on  
12 the reservation, I don't think you would say that. We  
13 own land on the reservations, but it's held in trust. We  
14 are the beneficiary title holders to that land. We are  
15 the beneficiary title holders to the Oglala Sioux Rural  
16 Water Supply System.

17           It's the same thing in this case where we don't  
18 necessarily own it, but it's held in trust for us. We  
19 have a beneficiary interest in that. As a beneficiary  
20 interest holder in this pipeline it is incumbent upon  
21 this Commission to make sure that every avenue is being  
22 pursued to make sure that the easements are being done  
23 properly.

24           There are 90,475 Indians who get their water,  
25 their sole source of clean drinking water, from this

1 pipeline. This easement is extremely important, the  
2 process to make sure the easement was done properly. And  
3 the Bureau of Reclamation has made that case here, that  
4 the permission is needed from the Oglala Sioux Rural  
5 Water Supply System.

6 I don't know how much more simple I can break  
7 this down. And so that's basically what I have to say  
8 about it, and I hope that you will consider the fact that  
9 if this is -- if it's correct, if Keystone has done  
10 everything correct, then that will come out in the  
11 hearings. And I don't think anybody's going to be  
12 prejudiced by having it included as part of the  
13 hearings.

14 If, however, this is not included and there are  
15 going to be people who are prejudiced because, as I have  
16 stated before, when the water lines -- actually the core  
17 pipeline goes through and then you have a distribution or  
18 a branch line, as Mr. Taylor and I were going back and  
19 forth about, where that stops, now you start with a  
20 private line half a mile out to your cattle tank. And  
21 that's why I asked for every single easement agreement  
22 for every crossing of every water line.

23 Mr. Taylor has given me two for the core lines.  
24 He has a -- an agreement with West River Lyman Jones for  
25 crossing their distribution lines. But I know for a fact

1 that he is crossing private lines to cattle tanks. One  
2 of them is an Intervenor in this process. That's why I  
3 asked for that to be part of the discovery. That's what  
4 I'd like to bring out in this process hopefully.

5 So I hope that you'll take this into  
6 consideration. And the fact that all of these issues,  
7 all of these lead to the fact that if we can verify that  
8 it's done in an ethical manner, objective manner, by the  
9 letter of the law, then I think that's what we need to  
10 do.

11 But to deny us the fact to be able to question  
12 that I think would prejudice those 90,475 people who  
13 receive water from these two sources of water pipeline.

14 CHAIRMAN NELSON: Thank you.

15 I'm going to go to the telephones. Are there  
16 any of the Intervenors that need to add anything to this  
17 matter that are on the telephone?

18 Not hearing a response there. We'll go to the  
19 meeting room.

20 Mr. Rappold, do you want to add something?

21 MR. RAPPOLD: Yes, sir.

22 I kind of got used to raising my hand a long  
23 time ago. Matt Rappold on behalf of the Rosebud Sioux  
24 Tribe.

25 We support Mr. Dorr in his opposition to

1 TransCanada's Motion to Exclude any Testimony or Evidence  
2 as it relates to the Mni Wiconi Pipeline and any rights  
3 or obligations that they may have that attaches to that.

4 What I'd like to say at this point is any  
5 federal undertaking that has the possibility to impact  
6 tribal rights requires government-to-government  
7 consultation. As has been discussed and I think is  
8 understood and generally agreed upon by everyone in the  
9 room, the Mni Wiconi system is placed in trust.

10 The Secretary of the Interior is the person  
11 and/or individual and agency that's responsible for  
12 carrying out those duties that attach because of the  
13 trust relationship.

14 On the ground, so to speak, the Bureau of Indian  
15 Affairs handles those activities on a regular basis as  
16 far as the trust responsibilities that the Federal  
17 Government has.

18 So this is an undertaking, as I think we all  
19 agree, that may affect tribal rights. It would trigger  
20 government-to-government consultation.

21 Now we've got Interrogatories that indicate that  
22 Keystone's had absolutely no communication with the  
23 Bureau of Indian Affairs regarding the operation and  
24 construction of the pipeline.

25 We're not saying that Keystone is responsible

1 for government-to-government consultations. Obviously  
2 they're not a government. But government-to-government  
3 consultations have not taken place on whether or not  
4 Keystone can properly cross the Mni Wiconi Pipeline.

5 Interrogatories indicate that there's been no  
6 communication with the BIA about this project. Had the  
7 government-to-government consultations taken place,  
8 Keystone would have been at the very least informed of  
9 those consultations and the discussions that were taking  
10 place regarding what they want to do.

11 And we can draw that conclusion that they would  
12 have at least been informed because they're the ones that  
13 want to build the pipeline. They're the ones that are  
14 taking the action that could affect the tribal rights.  
15 For that purpose we believe that it is relevant -- a  
16 discussion of this issue is relevant evidence to help the  
17 Commission determine whether or not Keystone has complied  
18 and maintains the ability to continue to apply with all  
19 applicable rules and laws in the construction, operation,  
20 and maintenance of the pipeline.

21 Thank you.

22 CHAIRMAN NELSON: Thank you.

23 Any others in the hearing room?

24 Mr. Capossela.

25 MR. CAPOSSELA: Thank you, Mr. Chairman.

1 Briefly.

2           The contention that there's no difference  
3 between the crossing of the Mni Wiconi Pipeline to say an  
4 individual pipeline to a rural home site or a pasture  
5 tap, strange credulity.

6           We have three South Dakota Tribes. And we talk  
7 about property rights as being a bundle of sticks.  
8 Sometimes you own the whole bundle, and it's your home.  
9 And sometimes you just have a couple of sticks, and you  
10 might have an easement -- a driveway across your  
11 neighbor's property or the like.

12           Here we have three South Dakota Tribes that have  
13 sticks in the bundle. We have the United States also  
14 having sticks in the bundle. That's why the BOR criteria  
15 are part of the record in the first place. So this is  
16 considerably a different situation than a garden variety  
17 crossing and easement by a landowner. This is quite  
18 different.

19           The motion seems to be a little superfluous. I  
20 know that TransCanada has the right to file the motion.  
21 But it's really unclear what governmental interest on the  
22 state -- on the part of the State is advanced by  
23 excluding consideration of potential impact of the  
24 recertification on the Mni Wiconi Project. Especially in  
25 the fact that so many Indians are served by the project,

1 as well as non-Indian people.

2 And the background of Mni Wiconi did not include  
3 the Tribes. And residents, communities, and livestock  
4 operators in western South Dakota for years have been  
5 trying to get federal assistance for rural water  
6 development because of the poor ground water quality in  
7 several of those counties.

8 And because of the costs involved and the  
9 comparatively -- these very rural areas, comparatively  
10 small population in the communities, the high cost and  
11 the small number of folks served, Congress refused to  
12 approve it until the idea came up by Senator Daschle to  
13 include the reservations in the project.

14 So the Tribe's participation helped get the  
15 project approved in the first instance. So I think their  
16 role in this should really be respected.

17 And something that happened to the Standing Rock  
18 Sioux Tribe earlier in the week is the Oglala Sioux Tribe  
19 reached out and asked if we would -- if I today would ask  
20 the Commission to briefly hear a statement from a  
21 utilities director from the Oglala Sioux Tribe. And a  
22 gentleman named Robert Pille is here this morning and  
23 with your indulgence would like to make a brief  
24 statement.

25 And so on behalf of the Standing Rock Sioux



1 Tribe, I'm making that request, which was first forwarded  
2 by the Oglalas.

3 CHAIRMAN NELSON: You know, I'm going to grant a  
4 little bit of leeway if you promise me it's a brief  
5 statement.

6 MR. CAPOSSELA: I am going to give him such a  
7 dirty look when he comes up to make sure he's brief,  
8 accordingly.

9 CHAIRMAN NELSON: Thank you. Go ahead.

10 MR. CAPOSSELA: I'll introduce Mr. Robert Pille  
11 of the Oglala Sioux Tribe.

12 MR. TAYLOR: I just want the record to note an  
13 objection --

14 CHAIRMAN NELSON: Let's get it on the recording,  
15 Mr. Taylor.

16 MR. TAYLOR: The Rules of Civil Procedure don't  
17 allow for this. I understand your leniency but I'm  
18 obligated to make an objection and I'll just make an  
19 objection for the record.

20 CHAIRMAN NELSON: Thank you.

21 MR. PILLE: Thank you, Commission, for the  
22 opportunity to speak here. My name is Robert Pille. I'm  
23 a member of the Oglala Sioux Tribe. I'm also a  
24 representative of our utilities. My Tribe is the owner  
25 and operate of the Mni Wiconi Pipeline. The Oglala Sioux

1 Tribe needs our voice of concern added to these matters.

2 Besides what was stated, our election process  
3 was going on during the time of intervention last  
4 October. This is why we're not able to be listed as  
5 Intervenors. Please don't mistake our lack of  
6 participation as a reduced concern for these issues.

7 If I understand correctly, DOR and TransCanada  
8 have yet to get approval from the Oglala Sioux Tribe for  
9 those crossings. The crossings of the Mni Wiconi  
10 specifications or the criteria has not been approved by  
11 the Tribe. Our tribal departments are yet to determine  
12 whether their requirements are acceptable and adequate.

13 This evidence is very relevant as this water  
14 line serves tribal and nontribal members throughout  
15 western South Dakota and the future reaches of the  
16 Mni Wiconi Pipeline as well. We need this information  
17 permitted.

18 Thank you for your time.

19 CHAIRMAN NELSON: Thank you. And I appreciate  
20 your brevity of the statement.

21 Thank you.

22 Any other Intervenors that need to weigh in on  
23 this that are in the room?

24 If not, staff.

25 MS. EDWARDS: Thank you, Kristen Edwards for

1 staff.

2 Staff did not take a position on this motion.  
3 Staff is unsure what relief the Commission could provide  
4 based upon the testimony submitted by Mr. Dorr other than  
5 what Keystone's already really required to do by the  
6 conditions, but beyond that we don't take a position.

7 Thank you.

8 CHAIRMAN NELSON: Mr. Taylor, rebuttal.

9 MR. TAYLOR: You know, Mr. Dorr kind of moves  
10 the ball a little bit in the course of his -- moved the  
11 target a little bit in the course of his discussions and  
12 his briefing.

13 My initial motion was aimed at the idea that  
14 there doesn't need to be any litigation before this  
15 Commission over whether or not the permission of the  
16 Oglala Sioux Tribe is required to make the two crossings  
17 of the Mni Wiconi Pipeline. And that's the argument I've  
18 advanced from the beginning.

19 There is no legal obligation on the part of  
20 TransCanada to obtain the permission of the Oglala Sioux  
21 Tribe or the Oglala Sioux Rural Water Supply System. And  
22 that's what I think this discussion is about, or at least  
23 what I intended it to be about.

24 There's no question that the Mni Wiconi Project  
25 is a fascinating exercise of Congressional discretion led

1 by Senator Tim Johnson who was a year behind me in law  
2 school and been my friend most of my life.

3 Congress established the water system that  
4 serves three Tribes and about one-third of the population  
5 of western South Dakota north of the Interstate and some  
6 piece of the population of western South Dakota south of  
7 the Interstate.

8 In a three-cornered -- I guess a five-cornered  
9 partnership between three Tribes, the Government of the  
10 United States, and the Lyman Jones Rural Water System,  
11 which is a classical independent rural water system just  
12 like every other water system in South Dakota, we,  
13 Keystone, has successfully negotiated an agreement with  
14 the Lyman Jones Rural Water System to cross all of their  
15 distribution lines. The contract is -- can be made of  
16 record if that's necessary.

17 The Department of the Interior in April of 2013  
18 writing to Genevieve Walker in the U.S. Department of  
19 State -- this is an exhibit to my Supplemental  
20 Affidavit -- says Reclamation will issue TransCanada a  
21 letter of acknowledgment of the easement crossing,  
22 including the crossing criteria as terms and conditions.

23 The reason that the Bureau of Reclamation will  
24 do that is because the Bureau of Reclamation for all  
25 practical purposes is the owner of these crossings as the

1 trustee holding the crossings in trust responsibility for  
2 the Tribes.

3 It starts there, and it stops there. Now is  
4 there some distinction that was made between the original  
5 EIS and the FEIS?

6 The distinction is in the EIS it said something  
7 about the Oglala Sioux Tribe must be consulted and  
8 consent. There are the stack of resolutions that the  
9 Oglala Sioux Tribe passed opposed to the Keystone  
10 Pipeline.

11 I know about this stuff. I was the Keystone  
12 representative. Mr. Moore and I and Lou Thompson were  
13 the representatives who met with all the Tribes in 2010  
14 in Rapid City for a lengthy meeting among which water  
15 issues were discussed. I must not have been very  
16 successful in that meeting because shortly afterwards  
17 each one of the Tribes adopted a resolution opposed to  
18 the Keystone Pipeline.

19 Because of the first nations policy of  
20 TransCanada, out of respect for the Tribes when the  
21 resolutions were adopted TransCanada ended the efforts to  
22 negotiate, discuss, meet with, or otherwise accommodate  
23 the Tribes. Not out of spite. Out of respect.

24 So that happens in 2011. 2013 the additional --  
25 the Supplemental EIS is filed, and as Mr. Dorr points

1 out, it no longer contains that line. Obviously it could  
2 not contain that line because the Tribes refused to speak  
3 to Keystone. I could give you these resolutions. Some  
4 of them are relatively vehement.

5 So here we are. We have done everything that's  
6 required to be done. We have spoken to the Bureau of  
7 Reclamation. We've resolved crossing criteria. I know  
8 as a matter of absolute fact that the Bureau of  
9 Reclamation discussed the crossing criteria with the  
10 Oglala Sioux Rural Water System's engineering firm in  
11 Rapid City. I saw some of the correspondence.

12 The proposal that came to the Keystone Pipeline  
13 to build these two workarounds, two additional pipelines  
14 to supplement the Mni Wiconi lines, didn't come from the  
15 Oglala Sioux Tribe. I was the representative of  
16 Keystone. It came to me from the Bureau of Reclamation.  
17 Did not come from the Tribes.

18 I engaged Keystone's appropriate authorities  
19 after that, and we came to the conclusion that it was not  
20 the workable resolution.

21 Now there's no mystery in one utility crossing  
22 another. There is no -- nothing unusual about an oil  
23 pipeline crossing a water line.

24 Commissioner Hanson remembers the discussions in  
25 the 2009 hearing, and those of us who were around in 2007

1 when the base Keystone Pipeline was heard before this  
2 Commission remember Curt Hohn who was at that time the  
3 president and chief operating officer of -- help me,  
4 John. I can't remember.

5 MR. SMITH: WEB.

6 MR. TAYLOR: WEB. We all are aware of the fact  
7 that the South Dakota State University undertook a big  
8 study and extensive study on how crossing should be  
9 effectuated and the influence of plastic pipe. None of  
10 this is mysterious, and this crossing criteria meets all  
11 of its requirements. It's simply not a matter at issue  
12 for the Commission.

13 And the matter that's not in issue is is the  
14 Oglala Sioux Tribe's permission required. That's all  
15 we're interested in.

16 CHAIRMAN NELSON: Thank you.

17 Questions from the Commission.

18 Mr. Taylor, one question for you. I went  
19 through I imagine it was the attachments perhaps to your  
20 Affidavit.

21 Do I understand correctly that where you're  
22 proposing to cross these main water lines that the --  
23 you're going to use more robust pipe where those  
24 crossings are?

25 MR. TAYLOR: I know that the one in Jones County

1 will be an HGD. It goes underneath old Highway 16,  
2 starts on the Iverson property, underneath old 16 into  
3 the Dahlke-Mann property underneath the pipeline,  
4 Mni Wiconi, out on the other side. I can't remember if  
5 it contains the heavier duty pipe or not.

6 CHAIRMAN NELSON: Okay. That's what I thought I  
7 read. And I didn't realize that was going to be part of  
8 it. We'll probably talk about it when we get together in  
9 July.

10 MR. TAYLOR: If that's what you said and it's in  
11 my Affidavit, it's accurate. I just can't simply  
12 confirm.

13 CHAIRMAN NELSON: Any other questions for  
14 Mr. Taylor?

15 If not, I've got a couple of questions for  
16 Mr. Dorr. Gary, if you'd come back up.

17 Am I understanding you correctly that you  
18 believe that the Oglala Sioux Water System has absolute  
19 veto authority over the Keystone project if it's going to  
20 cross their water system? Is that correct?

21 MR. DORR: I don't think -- I'm not prepared to  
22 say whether it's veto authority. Because it's both --  
23 it's Oglala Rural Water Supply System and Bureau of  
24 Reclamation.

25 I talked to the Great Plains Regional Director



1 in North Dakota, and I asked him, I said, have you  
2 provided permission for TransCanada to cross the Mni  
3 Wiconi water line? And he said We can't. That's not our  
4 place. That's up to the Department of State. He said  
5 physically I cannot -- I cannot give permission for them  
6 to do it.

7 I said So it's legal? They can just go through  
8 it? He said No. It's not legal. I'm not saying that.  
9 He said It's up to the Federal Government to make that  
10 decision. From his part. Now for the Tribe's part,  
11 Oglala Sioux Rural Water Supply System and the Bureau of  
12 Reclamation have to provide permission.

13 CHAIRMAN NELSON: So then if Oglala Sioux Water  
14 System does not provide permission, they veto the  
15 project.

16 Is that what you're saying?

17 MR. DORR: I guess for all intents and purposes,  
18 that would probably be it.

19 CHAIRMAN NELSON: Second question I've got, did  
20 I understand correctly that you said it is an open  
21 question as to whether or not the land underneath the  
22 pipeline is or is not now Indian Country?

23 MR. DORR: Yeah. I guess that was a  
24 misstatement on my part.

25 CHAIRMAN NELSON: Do you think that statement

1 would be a surprise to the fee landowners that own that  
2 property?

3 MR. DORR: No. I'm talking about the right of  
4 way, the actual right of way. Not just under the pipe  
5 but --

6 CHAIRMAN NELSON: Yes.

7 MR. DORR: That has not been decided.

8 CHAIRMAN NELSON: Do you think that would be a  
9 surprise to the landowners that own the land?

10 MR. DORR: It would. But the United States  
11 still has not resolved that question. It's still up in  
12 the air. They made a point of saying that in the law,  
13 Public Law 100-516.

14 CHAIRMAN NELSON: No further questions.

15 Any further questions?

16 Gary, thank you.

17 Motions.

18 I will move in HP14-001 that we grant Keystone's  
19 Motion to Preclude Testimony Regarding Mni Wiconi  
20 Pipeline Easements.

21 Discussion on the motion.

22 I guess in my mind it's pretty simple. I mean,  
23 easements are property rights, and if there's an issue  
24 with a property right, I think the court system is where  
25 that needs to be resolved. Not in front of the

1 Commission. To me it's that simple.

2 Other discussion.

3 Hearing none, all those in favor of the motion  
4 to grant will say aye. Those opposed, nay.

5 Commissioner Hanson.

6 COMMISSIONER HANSON: Aye.

7 CHAIRMAN NELSON: Commissioner Fiegen.

8 COMMISSIONER FIEGEN: Fiegen votes aye.

9 CHAIRMAN NELSON: Nelson votes aye.

10 Motion carries.

11 I believe that brings us to the end of the  
12 business we have at hand today.

13 (The proceeding concluded at 1:03 p.m.)

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1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF SULLY )

4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter, Certified Realtime Reporter and  
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I took in shorthand the proceedings  
10 had in the above-entitled matter on the 11th day of June,  
11 2015, and that the attached is a true and correct  
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 26th day of  
14 June, 2015.

15

16

17

18 \_\_\_\_\_  
19 Cheri McComsey Wittler,  
20 Notary Public and  
21 Registered Professional Reporter  
22 Certified Realtime Reporter

23

24

25

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