IN THE SUPREME COURT OF SOUTH DAKOTA

In the Matter of PUC Docket HP 14-0001, Order Accepting Certificate of Permit issued in Docket HP 09-001 to Construct the Keystone XL Pipeline

Case No. 28331, 28332, 28333

APPELLANTS' JOINT RESPONSE TO THE COURT'S QUESTION REGARDING ITS JURISIDCTION TO HEAR THE APPEALS

The undersigned parties hereby submit the following in response to the Court's letter dated April 6, 2018. In that letter the Court raised a query about its jurisdiction to hear this case, stating, "it does not affirmatively appear there is appellate jurisdiction to consider this appeal under SDCL 49-41B-30." The Court asked the parties to be prepared to address this question at oral argument:

> **Whether the circuit court and the Supreme Court are without appellate jurisdiction to consider these appeals.**

I. This is a case of first impression.

The case before the Court is a case of first impression that requires and desperately needs judicial resolution. The statute dealing with certification of a permit issued by the Public Utilities Commission ("PUC")—SDCL 49-41B-27—has never been reviewed or adequately addressed by a South Dakota court. As a result, "[t]here are no precedents to construe; no principles previously expounded to apply." *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 467 (1952) (dissent of Justice Douglas). Clearly, there is ambiguity relating to the interpretation and construction of 49-41B-27 otherwise the Court would not have asked the parties to address the question of whether the statute gave the courts the necessary jurisdiction to preside over and consider these appeals. Due to the ambiguity regarding the statute and the lack of guidance from

the judiciary, the Court needs to address this issue in the interests of justice and, if for nothing else, to provide future certainty and uniformity of the statute's application and reach.

II. The Administrative Procedures Act, SDCL Ch. 1-26, Allows a Broad Right of Review of Administrative Decisions.

A. SDCL 49-41B-30 is only one avenue to judicial review.

In its April 6 letter the Court cited SDCL 49-41B-30 as the source of authority to hear this appeal. That statute provides that a party to a permit issuance proceeding who is aggrieved by the issuance of a final permit to an applicant may appeal such decision to circuit court. SDCL 49-41B-30.

It is undisputed that SDCL 49-41B-30 provides an avenue of redress for a party to challenge the issuance of a permit. It is also undisputed that Appellants in this case, other than Dakota Rural Action ("DRA"), were not a party to the 2010 PUC proceedings wherein a permit to construct the Keystone XL pipeline was issued.

However, SD Ch. 49-41B is not the only path to seek judicial review of an administrative decision.

B. Review may also be had under the South Dakota Administrative Procedures Act.

The South Dakota Administrative Procedures Act, SDCL Ch. 1-26, (hereinafter "APA") also grants certain parties a right of review of an agency decision in certain situations. The APA provides a right of judicial review to "[a] person who has exhausted all administrative remedies available within any agency" or to "a party who is aggrieved by a final decision in a contested case." SDCL 1-26-30. More specifically, SDCL 1-26-30.2 allows an appeal to circuit court "to any party in a contested case from a final decision, ruling, or action of an agency." Once the circuit court has issued a final judgment, SDCL 1-26-37 authorizes a final review of such judgment by this Court. "An aggrieved party or the agency may obtain a review of any final

judgment of the circuit court under this chapter by appeal to the Supreme Court." These statutes create a mechanism for judicial review of a "contested case" independent of any other specific statutory right of review that may exist, such as the SDCL 49-41B-30 authorization cited by the Court.

The APA defines a "contested case" as "a proceeding...in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing..." SDCL 1-26-1(2). In *Valley State Bank of Canton v. Farmers State Bank of Canton*, 213 N.W.2d 459 (1973), this Court considered what the term "contested case" means in the context of the APA. There, a party filed an application with the State Banking Commission to open a new bank, and a competing bank appealed. In an analysis of the then-newly created APA, the Court held that a "contested case" is one in which an agency, by its own procedure establishing the rules that required an adjudicative hearing, sought to determine some of the legal rights, duties, or privileges of the competing bank.

As in *Valley State Bank*, the enabling statutory scheme that created and empowered the PUC recognizes that the PUC is also bound to the rules and protections afforded by the APA. The enabling statutes of the PUC, SDCL Ch. 49-1, provide in pertinent part:

> "The Public Utilities Commission may promulgate rules *pursuant to chapter 1-26* concerning:
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> (4) Regulation of proceedings before the commission, including forms, notices, applications, pleadings, orders to show cause and the service thereof, all of which shall conform to those used in South Dakota courts..." (emphasis added) SDCL 49-1-11; and "*All appeals from any determination, decision, or order of the Public Utilities Commission shall be conducted in the manner prescribed by chapter 1-26.*" (emphasis added) SDCL 49-1-19.

In accordance with the PUC's own laws and regulations, Appellants petitioned and were granted intervenor status in the certification proceedings that are the subject of this appeal. Once granted intervenor status, they became parties to the proceeding. SDCL 1-26-30. In its Prehearing Scheduling Conference Order entered November 4, 2014, the PUC itself admitted that one of the sources of its jurisdiction over the proceeding was SDCL Chapter 1-26, the APA. Additionally, the PUC's Order for and Notice of Evidentiary Hearing provided a judicial right and remedy:

> The hearing will be an adversary proceeding conducted pursuant to SDCL Chapter 1-26. All parties have the right to be present and to be represented by an attorney. These rights and other due process rights may be forfeited if not exercised at the hearing. All persons testifying will be subject to cross-examination. The Commission's final decision will be based solely on testimony and evidence provided at the hearing. If a party or its representative fails to appear at the time and place set for the hearing, a decision may be issued by default pursuant to SDCL 1- 26-20. After the hearing, the Commission will consider all evidence and testimony that was presented at the hearing. The Commission will then enter Findings of Fact, Conclusions of Law, and a Final Decision regarding this matter. As a result of this hearing, the Commission will make a decision, including findings of fact and conclusions of law, on the issue set forth above. The Commission's Final Decision may be appealed by the parties to the Circuit Court and the Supreme Court as provided by law.

Order for and Notice of Evidentiary Hearing, SD Public Utilities Commission, April 17, 2015.

The PUC's determination that the APA applies to the proceeding constitutes the "law" of the agency. Moreover, the agency's determination of its own jurisdiction is entitled to agency deference. In accordance with its own rules, ARSD Ch. 20:10:01, the PUC conducted a lengthy adjudicative adversary process in deciding whether to certify the Keystone XL permit. When the PUC issued its decision certifying the permit, the Appellants became aggrieved parties and were entitled to appeal the decision to circuit court pursuant to SDCL 1-26-30.2. When the circuit

court affirmed the PUC's decision, that decision was subject to the right of review by this Court pursuant to SDCL 1-26-37.

The Court in *Valley State Bank* opined that

> [i]t is illogical to say that the [new] competing respondent bank has an interest of such importance [that] it should be presented at a quasi-judicial, adjudicative hearing but that there was no possibility the respondent bank could be adversely affected or aggrieved by the decision and/ thus, not entitled to appeal. Such incongruous reasoning spawns arbitrary and capricious governmental activity."

Id. at 463. Applying that reasoning here, it is incongruous for the PUC to grant Appellants party status in a proceeding that has such significant impact on their interests, without also giving them the right to judicial review of any decisions that are borne out of the proceeding.

III. South Dakota Circuit Courts are Courts of General Jurisdiction.

In its correspondence of April 6, 2018, the Supreme Court expressed its concern that its jurisdiction and the jurisdiction of the Circuit Court may be missing. The Court bases its concerns on the text of two statutes: SDCL 49-41B-30 and 49-41B-27. While we agree with the Court that the distinction between an original permit issuance proceeding and a certification proceeding is noteworthy, the remainder of the Court's analysis is flawed. The basic premise of the Court's concern relies upon the fact that 49-41B-30 expressly allows for judicial review, while 49-41B-27 is silent on the issue. From this, the Court concludes that "it does not affirmatively appear there is appellate jurisdiction to consider this appeal under SDCL 49-41B-30." While that may be true, the Court cannot look at this issue in a vacuum and must instead look to other sources that clearly allow appellate review in this instance, primarily South Dakota's APA and case law on review of agency actions.

Pursuant to Article V, § 1 of the South Dakota Constitution, "[t]he judicial power of the state is vested in a unified judicial system consisting of a Supreme Court, ***circuit courts of general jurisdiction*** and courts of limited original jurisdiction as established by the Legislature." (Emphasis added.) Furthermore, in accordance with Article V, § 5, the Supreme Court has appellate jurisdiction as provided by the State Legislature, while the circuit courts have original jurisdiction in all cases except as to any limited original jurisdiction granted to other courts by the Legislature. Clearly, by the plain language of South Dakota's Constitution, circuit courts are courts of general jurisdiction.

It is a well-established general rule that courts of general jurisdiction may hear any and all types of cases unless prohibited from doing so by law. *See, e.g.,* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 41, 265 (Vicki Been et al. eds., 5th ed. 2007) ("State judiciaries have general jurisdiction and may therefore hear all causes of action unless there is a statute denying them subject matter jurisdiction."); *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838) ("It is a necessary presumption that [a] court of general jurisdiction can act upon [a] given case, when nothing to the contrary appears."); *Highway Commission v. Fortune*, 91 N.W.2d 675, 679 (S.D. 1958) ("Where the record is silent as to jurisdiction the presumption is in favor of the jurisdiction of a court of general jurisdiction to render a judgment."). Although the statute the Court reviewed—49-41B-27—is silent on the issue of judicial review, that does not mean that the circuit court is without any such jurisdiction. Furthermore, there is no statute denying the Circuit Court jurisdiction over the PUC decision at issue. In such a situation, it should be presumed that the circuit court has jurisdiction. However, this is not a situation where the record is silent as to the jurisdiction of the circuit courts over review of agency actions/decisions. As noted above and throughout, the APA clearly gives the circuit courts said jurisdiction.

A circuit court's jurisdiction to hear appeals from and review agency actions or decisions is discussed throughout South Dakota's APA. *See* SDCL 1-26-30.2, 1-26-30.4, 1-26-30.5, 1-26-31.1, 1-26-36.1. Furthermore, in regard to the jurisdiction of the South Dakota Supreme Court, SDCL 1-26-37 allows for an aggrieved party or an agency to obtain "review of any final judgment of the circuit court...by appeal to the Supreme Court" and provides that the "appeal shall be taken as in other civil cases." Additionally, there is no shortage of South Dakota case law that proves a circuit court is the appropriate forum for appealing a state agency action. *See Fair v. Nash Finch Co.*, 728 N.W.2d 623, 625-26 (S.D. 2007) (decision of the South Dakota Department of Labor was appropriately appealed to a circuit court); *In re Petition for Declaratory Ruling*, 877 N.W.2d 340, 347-48 (S.D. 2016) ("...the Legislature authorized parties in agency proceedings to appeal to circuit court if they had either exhausted their remedies within the agency or if they were aggrieved by the agency's decision in a contested case."); *Brown v. Douglas Sch. Dist.*, 650 N.W.2d 264 (S.D. 2002) (noting that, per statute, a person or entity "may obtain review of a final decision, ruling or action of any agency which may adversely affect [it] by filing a notice of review with the clerk of circuit court *within twenty days* after service of the notice of appeal."). This even applies to appeals from actions or decisions of the PUC. *In re Dakota Transp.*, Inc., 291 N.W. 589 (S.D. 1940); *Willrodt v. Northwestern Pub. Serv. Co.*, 281 N.W.2d 65 (S.D. 1979); *Cheyenne River Sioux Tribe Tel. Auth. v. PUC*, 595 N.W.2d 604 (S.D. 1999).

The Court's reliance on two specific statutes as the basis for its contention that it may not have the necessary jurisdiction to review the PUC's decision is incorrect and very narrowly tailored. The Court needs to look to other sources that allow for this appellate jurisdiction, the primary one being the APA.

IV. Appellants are Entitled to Judicial Review of the PUC Decision as a Matter of Due Process.

Denial of Appellants' ability to appeal the PUC's decision to the South Dakota state courts would constitute a violation of Appellants' constitutionally protected due process rights, specifically procedural due process rights.

In South Dakota, procedural due process rights apply to contested cases before administrative agencies. *Application of Union Carbide Corp.,* 308 N.W.2d 753 (SD 1981) ("The requirements of the law then are that where there are adversary parties they are accorded procedural rights that are consonant with due process.").

According to the South Dakota Supreme Court,

> determining what process is due in a particular case requires consideration of three factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Daily v. City of Sioux Falls, 802 N.W.2d 905, 912 (SD 2011) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Based on the factors above, to prevail on a procedural due process claim, Appellants must establish protected property or liberty interests to which the due process protections found in U.S. Constitution's Fourteenth Amendment and Article VI of the South Dakota Constitution apply. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."). "Liberty" and "property" are broadly defined

by courts. *Id.* at 571. Property interests extend far beyond ownership of tangible property interests such as real estate, money, or chattels. *Id.* at 572. Similarly, liberty interests are much broader than those guaranteed by the criminal process and can only be infringed upon according to a proper governmental objective. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Here, Appellants' property and liberty interests are threatened by TransCanada Keystone Pipeline, LP's ("TransCanada") proposed pipeline. The absence of a right to appeal the decision of the PUC to South Dakota courts would entail a significant risk of erroneous deprivation of Appellants' interests, while the related burdens would be minimal.

A. Appellants' Property Interests

Procedural due process attaches to a property interest if a party has "a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. Dakota Rural Actions ("DRA") members directly own land through which the proposed pipeline would pass. Land ownership is a primary form of property interest, and DRA's members have a legitimate claim of entitlement to use their land via their title conferred by the State. Clearly DRA has a property interest at issue in this matter.

The Yankton Sioux Tribe and the Cheyenne River Sioux Tribe ("Tribes") possess usufructuary rights to hunt, fish, gather, and use water on lands through which the proposed pipeline is routed. *YST Resp. to Applicant's Mot. to Preclude Consideration of Aboriginal Title and Usufructuary Rights*, AR Two of these rights are expressly recognized in the 1851 Fort Laramie Treaty, to which the Tribes are parties, and which stated that the Tribes did "not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described . . . ." Treaty of Fort Laramie with Sioux, Etc. art. 5, Sept. 17, 1851, 11 Stat. 749, II KAPP. 594, IV KAPP 1065. Furthermore, the Cheyenne River Sioux also have similar treaty rights under the 1868 Fort Laramie Treaty, which reserves to them the "right to hunt on any

lands north of North Platte, and on the Republican Fork of the Smoky Hill river" among other rights. Treaty with the Sioux art. XI, Apr. 29, 1868, 15 Stat. 635. While the Tribes no longer hold title to the land over which the pipeline would pass, a tribe does not need to hold title to land in order to possess usufructuary rights on it. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983). Further, a treaty does not need to expressly reserve usufructuary rights for those rights to be retained. *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

The 1851 and 1868 Fort Laramie Treaties clearly created a "legitimate claim of entitlement" for the Tribes' usufructuary rights, which are therefore property interests within the meaning of the Fourteenth Amendment and Article VI of the U.S. and South Dakota Constitutions, respectively. These rights have never been extinguished and it would require an express act of Congress to do so. *United States v. Dion,* 476 U.S. 734, 738–740 (1986). It is clear that Appellants have a legitimate claim of entitlement over property that is threatened with irreparable harm or extinguishment by TransCanada and its proposed pipeline. To allow this potential for harm or extinguishment without a judicial forum to challenge TransCanada's certification would be a most grievous deprivation of due process rights.

In addition to the Tribe's usufructuary rights to hunt, fish, gather, and use water, the 1851 and 1868 Fort Laramie Treaties should be interpreted to include the right of tribal members to worship at sacred sites and visit gravesites. The Indian Law canons of construction compel courts to read treaties as the Indians themselves would have understood them during negotiation. *United States v. Winans,* 198 U.S. 371, 380–381 (1905); *Washington v. Wash. State Commercial Passenger Fishing Vessel Assn.,* 443 U.S. 658, 675–676 (1979). Many tribes did not separate the practice of off-reservation hunting, fishing, gathering, and water use from worshipping at sacred

sites or visiting ancestors. These activities were inexplicably intertwined for most tribes, including Appellant Tribes. TransCanada's proposed pipeline now threatens to disrupt ceremonial sites and burials, many of which have not yet been identified or catalogued, which would destroy property interests reserved through the 1851 and 1868 Fort Laramie Treaties.

The property interest in accessing burial sites is also recognized outside the Native American treaty context. For example, after burial, relatives of the deceased acquire certain rights that permit them to go to the grave of the deceased and give it attention, care for it, and beautify it. 14 Am. Jur. 2d Cemeteries § 38. In the context of cemeteries, this right of access is governed by the law of easements, and such a right cannot be extinguished by a subservient fee owner's conveyance to another. *Id.* This same framework should be applied in the present case, where tribal members have an interest in ensuring that all their ancestors' graves are discovered before they are irreparably destroyed by Keystone.

The Tribes also have a property interest in the countless cultural resources located along the pipeline's path. Tr., AR 026085, ln. 1-8; AR 026086, ln. 2-16; AR 026096, ln. 027031. While some of these resources have been identified, many (if not most) have not been identified due to the inadequacy of cultural resource surveys, most of which did not include members of the Tribes, and due to the fact that portions of the pipeline route have never even been surveyed. Tr., AR 024140 ln. 11-24; AR 024732 ln. 7-12; AR 024768 ln. 22-24. In addition to being a tribal usufructuary right, water, which is also threatened by the proposed pipeline, is also a cultural resource in which the Tribes have a property interest. Tr., AR 026088, ln. 10.

In addition to the property interest articulated by the Tribes, DRA argued to the Circuit Court that PUC's Order granting certification under SDCL § 49-41B-27 effectively told South Dakota landowners that title to their property is clouded in perpetuity. A perpetual cloud on

landowners' title, with a corresponding impairment of marketability of property, violates due process of law and constitutes a deprivation of the property rights of South Dakota's farming and ranching families whose interests are being advanced by DRA in this case.

B. Appellants' Liberty Interests

In addition to Appellants' recognized property interests that lie, perilously, in the pipeline's path, the Tribes also have liberty interests tied to those ancestral lands. For example, the Tribes have a liberty interest in worshipping at traditional sacred sites which are integrally connected to, and often overlap with, items and places considered "cultural resources." As discussed above, these resources which facilitate prayer, ceremony, and the preservation of culture would be placed in grave jeopardy if the pipeline is constructed. To deprive tribal members of the ability to worship at traditional/cultural sites by disclaiming jurisdiction over this matter would be a violation of the Tribes' due process rights. Access to these resources is "vital to [the Tribes'] cultural, spiritual, and physical survival." *Prefiled Test. of Faith Spotted Eagle*, AR 002959.

In its liberty interest due process jurisprudence, the U.S. Supreme Court frequently emphasizes the importance of family. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). For tribal members, family is a much broader concept, which includes venerating ancestors where they are buried. The ability to continue those practices constitutes a liberty interest that rests within the protections, and is entitled to the trappings, of due process. Denial of Appellants' right to judicial review would violate their procedural due process rights and the State and U.S. Constitutions.

V. Public Trust Doctrine Provides Additional Basis for Jurisdiction

In its brief, DRA suggested the Court consider application of the public trust doctrine to the overall decision-making framework for this case. The argument advanced was that the public trust doctrine, explicitly recognized by this court in *Parks v. Cooper*, 2004 S.D. 27 ¶ 46, 676 N.W.2d 823 (S.D. 2004), should be implemented by holding the PUC to a heightened fiduciary standard with respect to its obligation to protect South Dakota's land and water resources from the prospective environmental impact of pipeline ruptures, leaks, and spills.

We suggest the same approach applies to questions of jurisdiction. This Court noted that "our decision in *Parks v. Cooper* exhibits the type of deeply rooted regional issue—preservation of precious water resources through the public trust doctrine—that a court might take into account in examining a disputed provision of our constitution." *State v. Schwartz*, 2004 S.D. 123 ¶ 52, 689 N.W.2d 430, 443 (S.D. 2004). In effect, in the absence of an explicit bar to jurisdiction, where water resources are potentially threatened – as they are in this case – exercising jurisdiction to hear disputes should be the default.

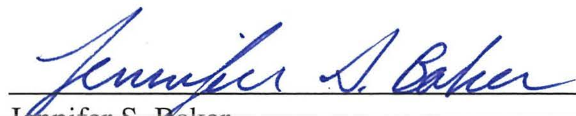
In this instance, the Court's letter to counsel highlighted the language of SDCL 49-41B-30, which permits parties aggrieved by issuance of a final permit to appeal to the circuit court. As argued above, the fact that the APA permits appeal in contested cases, combined with the reality that the circuit courts of this State are courts of general jurisdiction, not to mention the due process rights of the Appellants, all compel jurisdiction. Yet, to the extent this Court holds any doubt, the public trust doctrine should tip the balance in favor of jurisdiction if its adoption of the doctrine in *Parks v. Cooper*, *supra*, is to have any meaning.

VI. Conclusion.

This Court has the ability to review decisions of the PUC, including permit certification decisions. The Court has mistakenly limited its right to review to SDCL 49-41B-30 and 49-41B-

27 when the Court should have looked to South Dakota's APA as the source of its judicial review authority. The APA bestows the right of judicial review of agency actions to circuit courts in spades and review of those decisions rest in this Court. Even if the Court inexplicably finds that the APA does not supply the necessary review jurisdiction, then the public trust doctrine provides an even further and additional basis for this Court to exercise jurisdiction. Similarly, the fact that South Dakota's circuit courts are courts of general jurisdiction offers further support for the courts power of judicial review. If the Court does not allow for judicial review in this instance, it will be a grave deprivation of Appellants' procedural due process rights. For all the reasons set forth above, this Court has jurisdiction over the appeals the PUC's decision at issue and should exercise that jurisdiction accordingly.

Dated this 13th day of April, 2018.



Jennifer S. Baker
Admitted Pro Hac Vice
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jbaker@ndnlaw.com

and

/s/ Thomasina Real Bird
Thomasina Real Bird, SD Bar No. 4415
Fredericks Peebles & Morgan LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: trealbird@ndnlaw.com

Attorneys for Yankton Sioux Tribe

/s/ Tracey A. Zephier
Tracey A. Zephier
Fredericks, Peebles & Morgan, LLP
520 Kansas City Street, Suite 101
Rapid City, SD 57701
Phone: 605-791-1515
Email: tzephier@ndnlaw.com

Attorney for Cheyenne River Sioux Tribe

/s/ Bruce Ellison
Bruce Ellison, SD #462
P.O. Box 2508
Rapid City, South Dakota 57709
605.348.1117 phone
Email: belli4law@aol.com

and

THE MARTINEZ LAW FIRM, LLC

/s/ Robin S. Martinez
Robin S. Martinez, MO #36557/KS #23816
Admitted Pro Hac Vice
1150 Grand Blvd., Suite 240
Kansas City, Missouri 64106
816.979.1620 phone
816.398.7102 fax
Email: robin.martinez@martinezlaw.net

Attorneys for Dakota Rural Action

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April 2018, I filed and served electronically via email a true and correct copy of the foregoing on the following:

Shirley A. Jameson-Fergel
Supreme Court Clerk
Email:
Shirley.Jameson-Fergel@ujs.state.sd.us

Adam de Hueck
Special Assistant Attorney General
South Dakota Public Utilities commission
500 E. Capitol Ave.
Pierre, SD 57501
Adam.deHueck@state.sd.us
Attorneys for South Dakota Public Utilities Commission

James E. Moore
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone: (605) 336-3890
Fax: (605) 339-3357
Email: James.Moore@woodsfuller.com
Attorneys for TransCanada Keystone Pipeline, LP

William G. Taylor
TAYLOR LAW OFFICE
4820 E. 57th Street, Suite B
Sioux Falls, SD 57108
Phone: (605) 782-5304
Email: bill.taylor@taylorlawsd.com
Attorneys for TransCanada Keystone Pipeline, LP

Sarah M. Harrington
Sarah M. Harrington