IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF PUC DOCKET HP14-001, ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	FILE NO. 28331 **APPELLANT YANKTON SIOUX TRIBE'S OPENING BRIEF**

APPELLANT YANKTON SIOUX TRIBE'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The Yankton Sioux Tribe ("Tribe") appeals the *Order and Memorandum Decision* ("*Order*") entered June 19, 2017, by the Circuit Court of South Dakota, Sixth Judicial Circuit ("Circuit Court"), in Case No. CIV-16-33. The *Order* affirmed the *Final Decision and Order Finding Certification Valid and Accepting Certification* ("*2016 Final Decision,"* entered by the South Dakota Public Utilities Commission ("Commission") on January 21, 2016, in Docket HP14-001. The *Order* is a final order reviewable by this Court pursuant to SDCL 15-26A-3. The Tribe filed its notice of appeal on July 19, 2017.

STATEMENT OF LEGAL ISSUES

1. Whether the Commission erred when it denied the Tribe's *Motion to Dismiss*, when it denied the Tribe's *Joint Motion in Limine*, and when it took inconsistent positions with regard to the "Tracking Table of Changes," all of which denied the Tribe its substantive right to due process before the Commission.

The Circuit Court found that it was not clearly erroneous for the Commission to find that the pipeline that was the subject of Docket HP14-001 is the same pipeline that was the subject of Docket HP09-001, and affirmed the Commission's admission of the Tracking Table of Changes.

Relevant Constitutional and Statutory Provisions:

a. SDCL 15-6-12(b)(5)

b. SDCL 49-41B-4

c. SDCL 49-41B-27

2. Whether the Commission erred by issuing the *Order Granting Motion to Define Issues and Setting Procedural Schedule*.

The Circuit Court affirmed the Commission's *Order Granting Motion to Define Issues and Setting Procedural Schedule*, finding no clear error or abuse of discretion in the Commission's limitation on the scope of discovery.

Relevant Constitutional and Statutory Provisions:

a. SDCL 15-6-26

b. SDCL 49-41B-24

c. SDCL 49-41B-27

d. ARSD 20:10:01:01.02

3. Whether the Commission erred when it placed the burden of proof on the intervening parties rather than on TransCanada Keystone Pipeline, LP ("TransCanada"), the applicant, and when it found that the intervening parties failed to establish any reason why TransCanada could not continue to meet the conditions on which the Commission issued its permit to construct the proposed Keystone XL pipeline in 2010 ("2010 Permit").

The Circuit Court did not find clear error in the Commission's application of the burden of proof. The Circuit Court did not find that the Commission inappropriately shifted the burden of proof, and that any shift that may have occurred was within the Commission's purview and not clearly erroneous.

Relevant Constitutional and Statutory Provisions:

a. SDCL 49-41B-27

b. ARSD 20:10:01:15.01

4. Whether the Commission erred when it found that TransCanada properly certified that it remains eligible to construct the proposed Keystone XL pipeline and that

TransCanada's submission of a signed "*Certification*" met TransCanada's burden of proof.

The Circuit Court affirmed the Commission's decision, finding that the Commission did not commit clear error when it determined that TransCanada met its burden of proof.

Relevant Constitutional and Statutory Provisions:

a. SDCL 1-26-36

b. SDCL 49-41B-27

c. SDCL 2-14-1

d. ARSD 20:10:01:15.01

e. FRCP Rule 23(c)(1)(A)

5. Whether the Commission erred when it concluded that TransCanada is as *able* today to meet the conditions upon which the 2010 Permit was issued, and based its decision on whether TransCanada continues to be *able* to meet the 2010 conditions.

The Circuit Court did not find clear error in the Commission's application of the burden of proof. The Circuit Court did not find that the Commission inappropriately shifted the burden of proof, and that any shift that may have occurred was within the Commission's purview and not clearly erroneous. The Commission further found that if the Tribe wants to show that it is impossible for TransCanada to comply with the 2010 Permit, it must do so affirmatively.

Relevant Constitutional and Statutory Provisions:

a. SDCL 49-41B-27

6. Whether the Commission erred when issued the *Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* and precluded testimony and consideration of tribal aboriginal and treaty rights.

The Circuit Court affirmed the Commission's decision, finding no clear error was committed when the Commission found no authority that Native American tribes have aboriginal title or usufructuary rights with respect to the proposed route of the Keystone XL pipeline.

Relevant Constitutional and Statutory Provisions:

a. Treaty of Fort Laramie with Sioux, etc., Sept. 17, 1851, 11 Stat. 749

b. SDCL 49-41B-1

c. SDCL 49-41B-20

d. SDCL 49-41B-27

e. SDCL 49-41B-36

7. Whether the Commission erred when decided that tribes are not treated as local units of government and that no permit condition requires that TransCanada consult with tribes about the proposed Keystone XL pipeline.

The Circuit Court found that the Tribe is a sovereign nation within the bounds of the United States, but that it is not a local unit of government *within the State of South Dakota's government structure*.

Relevant Constitutional and Statutory Provisions:

a. SDCL 49-41B-22

STATEMENT OF THE CASE

This matter originally came before the South Dakota Public Utilities Commission, comprised of three members: Kristie Fiegen, Chairperson; Gary Hanson, Vice Chairman; and Chris Nelson, Commissioner. The case before the Commission was to determine whether TransCanada, a Canadian pipeline company, continued to meet the conditions upon which it received the 2010 Permit, such that "certification" could be granted pursuant to SDCL 49-41B-27. The Commission ultimately ruled in TransCanada's favor, accepting certification and authorizing TransCanada to proceed with construction of the proposed pipeline. The Tribe appealed the Commission's order to the Circuit Court for the Sixth Judicial Circuit, before the Honorable John L. Brown, which upheld the Commission's Order. The Tribe appealed the Circuit Court Order.

STATEMENT OF FACTS

On March 12, 2009, TransCanada filed an application with the Commission in Docket HP09-001 requesting a permit to construct a hydrocarbon pipeline through South Dakota. *Pet'n. for Order Accepting Certification ("2014 Petition"),* AR 000205. South Dakota law required TransCanada to provide key information including a description of the nature, location, and purpose of the proposed pipeline to the Commission in its permit application in order for the Commission to make an informed, sound decision on the project. SDCL 49-41B-11. The Commission issued its *Amended Final Decision and Order* ("*2010 Final Decision*") and the 2010 Permit allowing TransCanada to construct the proposed pipeline on June 29, 2010, based on that information. *2014 Petition*, AR 000204-05. As a part of the *2010 Final Decision*, the Commission issued a detailed list of its findings of fact and conclusions of law that led to its decision. *Id*. at 000205.

Through the *2010 Final Decision*, the Commission issued a permit authorizing construction of the project as that project was described and defined in the findings of fact contained in the *2010 Final Decision* ("2010 Project"). The *2010 Project* was accompanied by a list of 50 permit conditions, not inclusive of subconditions, with which TransCanada needed to comply in order to comply with the 2010 Permit. *Id*.

On September 15, 2014, after more than four years had passed since the issuance of the permit for the 2010 Project described in the *2010 Final Decision*, TransCanada filed a new petition ("*2014 Petition*") with the Commission in Docket HP14-001 to construct a pipeline to transport diluted bitumen, or dilbit, a heavy black viscous oil made from tar sands (http://ostseis.anl.gov/guide/tarsands/), mined in Alberta, Canada, through South Dakota. *2014 Petition,* AR 000204-05. The subject of the *2014 Petition* was also a project for a pipeline ("2014 Project") to transport dilbit (Dr. Stansbury Rpt., AR 003312) through South Dakota. *Id*. In conjunction with this new *2014 Petition*, TransCanada submitted the "*Certification*" asserting that the conditions upon which the Commission granted the facility permit in Docket HP09-001 continued to be satisfied. *Certification,* AR 000046-47. The *2014 Petition* requested that the Commission issue an order accepting its *Certification* pursuant to SDCL 49-41B-27. *2014 Petition*, AR 000204. As an appendix to the *2014 Petition,* TransCanada submitted a "Tracking Table of Changes" that identifies thirty findings contained in the *Final Decision* and, for each finding, sets out a new, different finding. *KXL Pipeline Quarterly Rpt.,* AR 000079-83.

On October 15, 2014, the Tribe filed a petition to intervene in Public Utilities Commission Docket HP14-001 and was granted intervenor status on November 4, 2014. *YST Application*, AR 000321; *Order Granting Intervention*, 001012. On October 30,

2014, before any party had even sought discovery, TransCanada filed the *Motion to Define the Scope of Discovery* seeking to restrict discovery to evidence related to just two issues: 1) whether the project continued to meet the conditions on which the 2010 Permit was granted, and 2) the "changes to the Findings of Fact" in the *2010 Final Decision. TC Mtn. to Define Scope*, AR 001000-09. Through that motion, TransCanada purported to unilaterally amend the *2010 Final Decision* and asked the Commission to do the same. *Id*. On December 17, 2014, the Commission granted TransCanada's *Motion to Define the Scope of Discovery. Order Granting Mtn. to Define Scope*, AR 001528-29. On December 2, 2014, the Tribe filed a *Motion to Dismiss* which challenged TransCanada's attempt to couch its *2014 Petition* as applying to the same pipeline that was permitted in 2010 pursuant to the *2010 Final Decision* and the 2010 Permit, despite the thirty findings TransCanada admitted were inapplicable to the *2014 Petition* as demonstrated in the Tracking Table of Changes. *YST Mtn. to Dismiss*, AR 001362-65. Without explanation or rationale, the Commission denied the Tribe's *Motion to Dismiss* on January 8, 2015. *Order Denying Mtns. to Dismiss*, AR 001697-98. Seeking to prevent the Tribe from protecting its treaty interests, TransCanada filed *Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* on May 26, 2015. *TC Mtn. to Preclude*, AR 006813-22. The Commission granted TransCanada's motion on June 15, 2015. *Order Granting TC Mtn. to Preclude*, AR 007383. On July 10, 2015, the Tribe along with other intervenors filed a *Joint Motion in Limine* requesting that the Commission exclude all evidence offered by TransCanada in support of its Tracking Table of Changes. *Jt. Mtn. in Limine*, AR 009481-86. The Commission denied the *Joint Motion in Limine. Order Denying Jt. Mtn. in Limine*, AR 020312-13.

Over the course of approximately eleven months, the Parties filed motions and exchanged discovery in preparation for the final evidentiary hearing, which was held over the course of two weeks. *2016 Final Decision*, AR 031683. At the end of the hearing, the Tribe and other intervenors submitted a *Joint Motion to Deny the Petition for Certification* on the grounds that TransCanada failed to meet its burden of proof. *PUC Tr.*, AR 027338-45. The Commission denied the joint motion. *Id*. at 027361-67. On January 21, 2016, the Commission issued the *2016 Final Decision.* AR 031668-95.

On February 19, 2016, the Tribe filed a *Notice of Appeal* with the Sixth Judicial Circuit Court, challenging the *2016 Final Decision*. The case was assigned to the Honorable John L. Brown. Following a hearing held on March 18, 2017, the Circuit Court issued the *Order* on June 19, 2017, affirming the Commission's *2016 Final Decision*.

ARGUMENT

I. THE COMMISSION ERRED WHEN IT DENIED THE TRIBE'S *MOTION TO DISMISS*, WHEN IT DENIED THE TRIBE'S *JOINT MOTION IN LIMINE*, AND WHEN IT TOOK INCONSISTENT POSITIONS WITH REGARD TO THE TRACKING TABLE OF CHANGES, ALL OF WHICH DENIED THE TRIBE ITS RIGHT TO DUE PROCESS BEFORE THE COMMISSION.

The Circuit Court committed reversible error when it upheld the Commission's decisions to deny the Tribe's *Motion to Dismiss* and *Joint Motion in Limine*, when it upheld the Commission's inconsistent positions with regard to the Tracking Table of Changes, and when it found that it was not clearly erroneous for the Commission to find that the 2014 Project is the same project as described in Docket HP09-001, all of which denied the Tribe its right to due process before the Commission. *Cir. Ct. Decision* at 28. The fundamental requirement of due process is the opportunity to be heard at a

meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Commission violated this right when it took the foregoing actions.

The Tribe filed a *Motion to Dismiss* on December 12, 2014, arguing that TransCanada's *2014 Petition* must be dismissed pursuant to SDCL 15-6-12(b)(5) for failure to state a claim upon which relief can be granted. *YST Mtn. to Dismiss*, AR 001362-65. The Tribe argued that TransCanada never received a permit from the Commission for its 2014 Project because the 2014 Project was materially different from the 2010 Project, which did have a permit. *Id*. Instead of filing a petition for certification pursuant to SDCL 49-41B-27, TransCanada should have applied for a new permit under SDCL 49-41B-4. Accordingly, the Commission should have dismissed the *2014 Petition*. Without a permit, a permit cannot be certified; if there is no permit to certify, there is no cause of action under SDCL 49-41B-27. The *2014 Petition*, therefore, should have been dismissed.

In support of its motion, the Tribe stated that TransCanada asked the Commission to accept a "certification" along with the *2014 Petition* that the 2014 Project described in the *2014 Petition* continued to meet the conditions upon which the 2010 Permit was issued for the 2010 Project in Docket HP09-001. *YST Mtn. to Dismiss*, AR 001362-65. The *2014 Petition*, however, included an appendix, called "Tracking Table of Changes," which identified thirty ways the 2010 Project was different and distinct from the 2014 Project. *KXL Pipeline Quarterly Rpt.*, AR 000079-83. As a result of these deviations, the 2014 Project constitutes a new and separate project, requiring a new 49-41B-4 permit separate from the 2010 Permit. The Commission's denial of the *Motion to Dismiss* constitutes arbitrary and capricious decision-making, abuse of discretion, and

unwarranted exercise of discretion. Accordingly, the Commission's actions concerning the Tracking Table of Changes infringed on the Tribe's due process rights including its opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Circuit Court therefore erred when it affirmed the Commission's ruling on the Tribe's *Motion to Dismiss*.

By upholding the Commission's rulings which unlawfully infringed on the Tribe's due process rights, the Circuit Court committed reversible error and its decision must be overturned.

II. THE COMMISSION ERRED BY ISSUING THE *ORDER GRANTING MOTION TO DEFINE ISSUES AND SETTING PROCEDURAL SCHEDULE*.

The Circuit Court committed reversible error when it affirmed the Commission's *Order Granting Motion to Define Issues and Setting Procedural Schedule* and found no clear error or abuse of discretion in the Commission's limitation on the scope of discovery. *Cir. Ct. Decision* at 23. Pursuant to ARSD 20:10:01:01.02, "the rules of civil procedure as used in the circuit courts of this states shall apply [to administrative proceedings]." The rules of civil procedure provide that the scope of discovery includes any non-privileged matter as long as the subject matter is relevant to the pending action, and that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence. SDCL 15-6-26(b). A court can limit the scope of discovery only by a court order, which can only be issued if the movant meets the statutory requirements to obtain a protective order. TransCanada filed a *Motion to Define the Scope of Discovery* on October 30, 2014. *TC Mtn. to Define Scope,* AR 001000-09. Although TransCanada did not ask explicitly for a protective order, TransCanada's

motion amounted to a request for a protective order because only protective orders allow the Commission to limit the scope of discovery. *Id.*; SDCL § 15-6-26(c)(4).

To qualify for a protective order, TransCanada needed to meet the conditions outlined in SDCL 15-6-26(c), which requires a requesting party to certify to the tribunal that it conferred or attempted to confer in good faith and to show good cause for the protective order. However, TransCanada failed to show good cause for the issuance of the protective order. *TC Mtn. to Define Scope*, AR 001000-09. TransCanada also failed to confer or attempt to confer in good faith with other affected parties, and failed to include in its motion the statutorily required certification to this effect. *Id*. Furthermore, it was improper for TransCanada to seek a protective order before any party had sought discovery because no dispute existed to necessitate such an order: "When discovery efforts go beyond those subjects not 'reasonably calculated to lead to the discovery of admissible evidence,' a court has authority to issue protective orders, quash subpoenas, and grant terms when appropriate." *Public Entity Pool for Liability v. Score*, 658 N.W.2d 64, 72 (S.D. 2003), *citing* SDCL 15-6-26(c), 37(a)(4), 45(b) and 45(d)(1). The Commission therefore does not have authority to enter a protective order or otherwise limit discovery unless and until discovery efforts exceed the lawful scope of discovery. Before discovery has commenced and a dispute has arisen, there can be no grounds for a protective order so TransCanada's motion was premature and the Circuit Court erred by affirming the Commission's order granting that motion.

Additionally, when the Commission issued the order limiting the scope of discovery, it defeated the purposes of discovery. The Supreme Court has explained that "broad construction of the discovery rules is necessary to satisfy the three distinct

purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989), c*iting* 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2001 (1970). Accordingly, the Commission's order jettisoned relevant issues by inappropriately limiting discovery, thereby defeating one of the very purposes of discovery as identified by the Supreme Court.

The Commission argued that SDCL § 49-41B-27 must be read *in pari materia* with SDCL § 49-41B-24, which grants the Commission broad authority to make complete findings regarding whether a permit should be granted, denied, or granted conditionally. *Cir. Ct. Decision* at 22-23. The Circuit Court granted the Commission deference based on the Commission's status as a specialized administrative agency. *Id.* at 23. The Commission was not entitled to such deference, however, because the Commission abused its discretion by acting contrary to law. A court may limit the scope of discovery only with a court order that is consistent with the Rules of Civil Procedure. SDCL 15-6-26(b). Because the Commission limited the scope of discovery in violation of the Rules, it abused its discretion and was not entitled to agency deference.

Although the Commission argued that that SDCL § 49-41B-27 must be read *in pari materia* with SDCL § 49-41B-24, the Commission's interpretation does not control in this case because the latter statute only pertains to initial permit applications, which is not the posture of this case. *See* SDCL§ 49-41B-24 (statute requires Commission to render a decision "within 12 months of receipt of the initial application for a permit…"). Instead, the present case involves the certification of a permit that has been extant for over four years. *YST Cir. Ct. Opening Brief* at 1-2. Accordingly, even if the

Commission's *in pari materia* interpretation is valid, that interpretation does not control the case at hand because SDCL § 49-41B-24 only grants the Commission broad authority over initial permit applications. Furthermore, nothing in SDCL 49-41B-24 authorizes the Commission to diminish the lawful scope of discovery. Thus, as a matter of law, the Commission did not have the authority to grant TransCanada's *Motion to Define Discovery* and limit the scope of discovery. Because the Parties were entitled to seek discovery to the full extent permitted by SDCL 15-6-26(b), the Circuit Court erred in affirming the Commission's *Order Granting Motion to Define Scope* which limited discovery contrary to law.

III. THE COMMISSION ERRED BY PLACING THE BURDEN OF PROOF ON THE INTERVENING PARTIES RATHER THAN ON TRANSCANADA AND BY FINDING THAT THE INTERVENING PARTIES FAILED TO ESTABLISH ANY REASON WHY TRANSCANADA COULD NOT CONTINUE TO MEET THE CONDITIONS ON WHICH THE 2010 PERMIT WAS ISSUED.

The Circuit Court committed reversible error when it failed to find clear error in the Commission's application of the burden of proof and when it found that the Commission did not improperly shift the burden of proof from TransCanada to the intervening parties.

A. TRANSCANADA HAS THE BURDEN TO PRESENT EVIDENCE SHOWING IT CONTINUED TO COMPLY WITH ALL 50 OF THE CONDITIONS AND THE ADDITIONAL BURDEN TO PROVE ALL OF THE FACTUAL ALLEGATIONS WHICH FORMED THE BASIS OF ITS PETITION.

Other than in rare contexts not applicable here, each and every party seeking any sort of order or relief from an adjudicatory body has the burden to produce the evidence which supports its request as well as the additional burden to prove its entitlement to the relief it requests. A plaintiff has the burden of proof in a civil case. *E.g., Mettler v. Williamson*, 424 N.W. 2d 670 (S.D. 1988). A prosecutor has the burden in a criminal

case. *E.g.*, *State v. Wilcox*, 204 N.W. 369, 48 S.D. 289 (1925) ("It is a cardinal rule in criminal prosecutions that the burden of proof rest with the prosecutor."). On nearly every motion, the movant-- whether plaintiff, petitioner, defendant, respondent, or third party-- has the burden of proof on that motion. *E.g.*, *Boylen v. Tyler*, 641 N.W. 2d 134 (S.D. 2002); *Gross v. Conn. Mut. Life Ins. Co*., 361 N.W. 2d 259 (S.D. 1985). This is a cornerstone of adjudication in countries which provide due process. There is absolutely no basis here to relieve TransCanada of the burden of all petitioners—to prove that it is entitled to the relief it seeks from the adjudicatory body.

This legal rule is even more clearly stated in ARSD 20:10:01:15.01. ARSD 20:10:01:15.01 is one of the Commission's General Rules of Practice, and it applies in every contested case proceeding. The rule requires:

> In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant, applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.

ARSD 20:10:01:15.01 (emphasis added). This is the on-point rule, which the Commission is required to enforce, and it defeats the argument TransCanada and Public Utilities Commission Staff ("PUC Staff") make in their post-hearing briefs. As the petitioner, TransCanada had the burden of proof as to factual allegations which formed the basis of the *2014 Petition*. *Id*. A plain reading of the rule required the Commission to place the burden of proof on TransCanada. *Id*. The Commission issued no order to alter this standard. ARSD 20:10:01:15.01 also discusses both components of the burden of proof: the burden to produce evidence, and the ultimate burden to show that the weight of

all evidence produced favors the petitioner. Under this rule, as is also generally the case, both components of the burden of proof lie with the petitioner.

The law imposing upon TransCanada the burden of proof for the factual allegations in its petition is so clear that even TransCanada, when it initiated this contested case, acknowledged its burden. *2014 Petition*, AR 000204-09. In its petition, TransCanada set forth its factual allegations and then concluded with a request that the Commission find that that TransCanada still meets the conditions contained in the 2010 Permit. *Id*. TransCanada petitioned for the following relief:

> The attached Certification, together with this petition and the supporting appendices provides the necessary basis for the Commission to find that the Project continues to meet the conditions upon which the June 2010 permit was issued. Accordingly, Keystone respectfully requests that the Commission accept its certification under SDCL §49-41B-27.

Id. (emphasis added). As is clear from TransCanada's own petition, TransCanada understood that it was "necessary" for TransCanada to provide facts supporting a finding that the project continues to meet all the conditions imposed by its original permit. TransCanada further understood that it could not meet its burden merely by submitting a conclusory "certification." *Id*. TransCanada bore, and has previously acknowledged that it bore, the burdens of production and proof of the core factual assertion in its petition, i.e., its assertion that it continues to meet the 2010 Permit conditions. ARSD 20:10:01:15.01; *2014 Petition*, AR 000209. Like every other petitioner, plaintiff, or movant, TransCanada had the burden to show that it was entitled to the finding that it requested, and it has expressly acknowledged that such a finding is a prerequisite for the relief that it has requested from the Commission—acceptance of its "certification."

The *burden of production* must lie with TransCanada. In order to reach the

correct decision on issues before it and to meet its obligations to the people of South Dakota and the companies that come before the Commission, the Commission must be presented with the relevant facts. Nearly all of those facts are in the possession of the petitioning companies, therefore the burden to produce evidence must be on the companies. *E.g.*, *Davis v. State*, 2011 S.D. 51, 804 N.W.2d 618, 628 (S.D. 2011); *Eite v. Rapid City Area School Dist. 51-4*, 739 N.W.2d 264 (S.D. 2007); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Dubner v City and County of San Francisco*, 266 F3d 959, 965 (9th Cir 2001). Here, TransCanada did not produce any evidence on several key issues, yet it asserted that it should prevail on those issues because, it contends incorrectly, the intervenors also did not produce evidence on those issues.

The *burden of proof* must also lie with TransCanada. Contrary to TransCanada's sole argument, even if the burden of production shifts in a case, the burden of proof always remains with TransCanada. *TC Appeal Br. in Response to Common Arguments* at 9-10. This Court has repeatedly and consistently held that even in the rare situations where the burden of production shifts as a case progresses, the burden of proof does not shift—it always remains with the petitioner.

> For many years the term 'burden of proof' was ambiguous because the term was used to describe two distinct concepts. Burden of proof was frequently used to refer to what we now call the burden of persuasion-the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose. But it was also used to refer to what we now call the burden of production-a party's obligation to come forward with evidence to support its claim.

Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 272, 114 S.Ct. 2251, 2255, 129 L.Ed.2d 221, 228 (1994). "'It is generally said that the burden of production may pass from party to party as the case progresses while the burden of persuasion rests

> throughout on the party asserting the affirmative of an issue.'" *Hayes v. Luckey*, 33 F.Supp.2d 987, 990 (N.D.Ala.1997) (citation omitted).

Davis v. State, 804 N.W.2d at 628 (quoting *Gordon v. St. Mary's Healthcare Ctr.*, 617 N.W.2d 151, 157-58 (S.D. 2000). *See also Eite*, 739 N.W.2d 264.

The Commission's own prior precedent is in accord with all of the authorities discussed above. *In re Northern States Power Co. for Confirmation of Angus C. Anson Combustion Turbine Facility*, 2000 Westlaw 36322410 (S.D.P.U.C. March 20 2000) (hereinafter, "*In re NSP*"). In *In Re NSP*, the Commission had to interpret SDCL §49-41B-27, the same statute that TransCanada claimed imposed the burden of proof on the intervening parties. Like TransCanada, NSP had previously obtained a permit for regulated construction activities but had failed to commence construction within four years of permit issuance. *Id.* NSP submitted a "certification" and other information to the Commission and asked the Commission to accept that certification. *Id*. The Commission accepted the certification based upon a *finding* that the certification was acceptable. Contrary to the Commission's new interpretation of SDCL 49-41B-27, the Commission, in *In re NSP*, based its finding upon the certification "and the information provided to it by NSP." *Id*.

The statute, regulations, common law, and Commission' precedent unanimously establish that the burden of proof rested with TransCanada to certify that the proposed Keystone XL pipeline project continued to meet all 50 conditions upon which the original 2010 Permit was issued. The Circuit Court's affirmation of the Commission's findings to the contrary impermissibly prejudiced proceedings and was in clear error.

B. THE COMMISSION ERRED IN ITS FINAL DECISION BY PLACING THE BURDEN OF PROOF ON INTERVENING PARTIES RATHER THAN TRANSCANADA, AND BY CONCLUDING THE INTERVENING PARTIES

FAILED TO ESTABLISH ANY REASON WHY TRANSCANADA COULD NOT CONTINUE TO MEET THE CONDITIONS ON WHICH THE 2010 PERMIT WAS ISSUED.

As laid out above, ARSD 20:10:01:15.01 is the appropriate rule governing the burden of proof in contested proceedings, such as Docket HP14-001, before the Commission. The rule requires that "[i]n any contested case...petitioner has the burden of proof going forward with presentation of evidence unless otherwise ordered by the commission." ARSD 20:10:01:15.01. The Commission issued no such order in this case, and did not even cite to the applicable rule. *2016 Final Deci*sion, AR 031694. Thus, under the directly applicable statute and administrative rule, the burden in of proof during the proceedings of Docket HP14-001 belonged solely to TransCanada.

These authorities notwithstanding, the Commission time and time again ruled in favor of TransCanada on the grounds that the intervenors had failed to meet some nonexistent burden of proof. *2016 Final Decision,* AR 031686-87, 031964. This is contrary to the plain language and purpose of SDCL 49-41B-27 and ARSD 20:10:01:15.01.

The Commission's unfounded and incorrect belief that the burden of proof should be shifted to the Tribe and other intervenors was clearly displayed in Finding #31 of the *2016 Final Decision* where the Commission stated that "[n]o evidence was presented that [TransCanada] cannot satisfy any of these conditions in the future." *2016 Final Decision,* AR 031694. Similar findings illuminating the Commission's burden shifting onto the intervening parties were made in Paragraphs 32, 33, 34, 37, 38, 39, 40 and 42 of the *2016 Final Decision* and in Paragraphs 9 and 10 of the Conclusions of Law. *Id.* at 031686-67, 031694. These findings run in direct conflict with the burden of proof assigned to Commission proceedings as outlined in ARSD 20:10:01:15.01 by abdicating

TransCanada from its duty to prove it can satisfy the conditions, and requiring the Tribe and other intervenors to prove that TransCanada *cannot* satisfy the conditions.

Furthermore, the Commission committed an obvious legal error when it claimed TransCanada was not required to submit substantial evidence and that it carried its burden of proof by merely submitting an unsupported and conclusory document entitled a "certification," which contained an unfounded assertion that all 50 permit conditions were being met and would continue to be met. *PUC Tr.*, AR 031660. The Commission went on to issue its *2016 Final Decision* based upon the same convoluted argument that TransCanada prevailed in meeting its burden of proof based solely on the "certification." *2016 Final Decision*, AR 031694.

This argument is so plainly unsupportable that not even TransCanada agreed with the Commission's position. Instead, TransCanada provided a slightly more nuanced assertion that by the mere act of labeling a document a "certification" and then filing that document, even if the document is false, TransCanada had created a rebuttable presumption in its favor, shifting both the burden of production and the burden of proof to the intervenors. *TC Post Hr'g. Br.*, AR 029505-06; *TC Appeal Br. in Response to Common Arguments* at 9-10.

As discussed *infra* Section IV, TransCanada unquestionably failed to meet its burden of proof. Now that it has plainly failed to produce evidence or prove the factual allegations set forth in its petition, its only possible argument is its desperate and bald assertion that it does not have the burden which every petitioner, plaintiff, or movant has. As a matter of law, TransCanada is wrong, and the Circuit Court erred in upholding the Commission's erroneous findings and conclusions.

C. EVEN IF THE BURDEN OF PRODUCTION DID SHIFT, THE INTERVENORS MET THEIR BURDEN AND SHIFTED IT BACK AND TRANSCANADA DID NOT THEN MEET THE ULTIMATE BURDEN.

The Tribe reasserts its position stated in Section III B., *supra*, that the Circuit Court committed reversible error when it failed to find clear error in the Commission's application of the burden of proof on intervening parties by considering whether interveners provided sufficient evidence to overcome a shifting of the burden of production based on TransCanada's "certification." However, should this Court find that the burden did shift based on the "certification" or otherwise, the intervenors have clearly presented sufficient rebuttal evidence to shift the burden of production back to TransCanada. If the "certification" statement from Corey Goulet is found sufficient to shift the burden, then comparable statements from the Tribe and other intervenors must hold equal weight and therefore shift the burden back to TransCanada.

On October 30, 2015, the Tribe filed a "certification" much like that filed by TransCanada. *YST Certification*, AR 031232-41. The Tribe's "certification" consists of a sworn statement attested to by Yankton Sioux Tribal Chairman Robert Flying Hawk that TransCanada does <u>not</u> meet all 50 permit conditions. *Id*. at 031232. In addition, at least one of the intervenors' witnesses pointed out while under oath that TransCanada failed to comply with one or more conditions. *PUC Tr.,* AR 026937 (Direct Testimony of Paula Antoine (citing Conditions 2 and 3); *Prefiled Rebuttal Test. of Paula Antoine*, AR 007578-600 (citing Conditions 1 and 3). This testimony must be given equal evidentiary weight to TransCanada's "certification" and would likewise shift the burden back to TransCanada. If merely filing a document labeled "certification" is sufficient to meet the burden of proof intended by SDCL 49-41B-27, then the burden would have

shifted back to TransCanada upon testimony and the Tribe's filing of a certification to the contrary.

Because the Commission misplaced the burden of proof contrary to law, the proceedings were fundamentally unjust and the Circuit Court committed reversible error in finding the Commission properly shifted the burden of proof in this case.

IV. THE COMMISSION ERRED WHEN IT FOUND THAT TRANSCANADA PROPERLY CERTIFIED THAT IT REMAINS ELIGIBLE TO CONSTRUCT THE KEYSTONE XL PIPELINE AND THAT TRANSCANADA'S SUBMISSION OF A SIGNED "CERTIFICATION" MET TRANSCANADA'S BURDEN OF PROOF.

The Circuit Court committed reversible error when it affirmed the Commission's decision to accept certification and found that TransCanada met its burden of proof, despite the fact that the Commission's decision relied solely on a conclusory "certification" submitted by TransCanada, three descriptive Appendices to the "certification," and diminutive testimony at evidentiary hearing. *Cir. Ct. Decision* at 20.

A. THE COMMISSION MUST BASE ITS DECISION ON THE SUBMISSION OF SUBSTANTIAL EVIDENCE.

As discussed above, pursuant to ARSD 20:10:01:15.01, in contested proceedings such as HP14-001, the petitioner carries "the burden of going forward with presentation of evidence." Although the statutes and rules governing the Commission make clear which party bears the burden of proof in contested proceedings, they do not specify what standard of proof must be met. Instead, the standard of proof required in agency decision-making must be determined by looking to the State's common law.

In determining whether an agency decision is "arbitrary or capricious" under SDCL § 1-26-36, this Court has held that a circuit court applied the proper standard of review to the agency decision when it "examined the record to determine 'whether there

was substantial evidence supporting [the City Council's] decision and whether the decision was reasonable and not arbitrary.'" *M.G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816 (S.D. 2011). The circuit court had cited *Olson v. City of Deadwood*, 480 N.W.2d 770, 774-75 (S.D.1992), for its use of the substantial evidence standard. *Id.* In *Olson*, the Supreme Court employed the substantial evidence test to determine whether or not the decision of the agency Deadwood Board of Adjustment should be upheld. As the Court clarified in that case, the standard in assessing an agency decision is "whether an order of the board is supported by substantial evidence *and* is reasonable and not arbitrary." *Id.* (emphasis added). Because the Commission is a South Dakota agency, its decisions must be based upon substantial evidence and must be reasonable and not arbitrary. *Id.* This means that TransCanada, as the petitioner and the burden bearer, was required to prove by substantial evidence that it continued to comply with each and every one of the 50 conditions upon which the 2010 Permit was granted. Because it failed to do so, the Circuit Court erred in upholding the Commission's decision.

B. THE *CERTIFICATION* DOES NOT CONSTITUTE EVIDENCE SUFFICIENT TO PROVE CONTINUED COMPLIANCE WITH THE 50 CONDITIONS.

In conjunction with its *2014 Petition*, TransCanada submitted a filing captioned "certification" with the Commission when it initiated this action. *Certification*, AR 000046-47. This document consists of a sworn statement by Corey Goulet, President of the TransCanada Pipeline business unit, attesting that TransCanada certified that the conditions upon which the 2010 Permit was granted continued to be satisfied. Both the Circuit Court and the Commission erred when they incorrectly assumed that the document TransCanada labeled a "certification" was in fact a certification as that term is used in SDCL §49-41B-27. TransCanada continually argued that the document it labeled

"certification" must be accepted as such under the statute.

"Certify," however, means more than filing a conclusory document. Words "used [in the South Dakota Codified Laws] are to be understood in their ordinary sense." SDCL § 2-14-1. "Certify" means "to authenticate or verify in writing." Black's Law Dictionary (10th ed. 2014). But the Circuit Court, Commission and TransCanada stop short of the next step in the legal analysis: what do "authenticate" or "verify" mean? The central element in the definitions of both "authenticate" and "verify" is that the allegedly authenticating or verifying document must prove the allegations contained therein. *Id.* *Black's Law Dictionary* defines "verify" as "to prove to be true; to confirm or establish the truth or truthfulness of, to authenticate" and defines "authenticate" in the current context as "to show (something) to be true or real." *Id.* Therefore, "to certify" for purposes of SDCL 41-41B-27, understood in its ordinary sense, required TransCanada to prove it met and continued to meet all 50 conditions the Commission set in 2010.

This is the common understanding of the meaning of "to certify." For example, Federal Rules of Civil Procedure Rule 23(c)(1)(A) requires that "the court must determine by order whether to certify the action as a class action." "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-351 (2011), quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). A judge cannot simply issue an order announcing class certification; he must support his decision with the facts of each case. Similarly, TransCanada could not simply file a certification. The Commission was obligated to undergo a rigorous analysis which

would require complete and substantial evidence relating to each condition in order to verify that it continued to meet each and every one of the 50 conditions.

Therefore, TransCanada's and the Commission's arguments circle back to the exact same question: has TransCanada proven that the assertions contained in the *Certification*—that TransCanada is in compliance and will remain in compliance with all 50 conditions—are true.[1] Because TransCanada failed to show the allegations to be true with respect to every condition, the document cannot be accepted as a certification.

Mr. Goulet's statement in the *Certification* is a broad generalization with respect to the conditions and it does not specifically address even one of the 50 conditions or how the project continues to comply with any of those conditions. *Certification*, AR 000046-47. This blanket statement is void of any substance and provides no probative value with respect to whether or not TransCanada actually continued to meet the conditions. Additionally, Mr. Goulet's testimony at the evidentiary hearing showed a lack the personal knowledge necessary to be able to provide a credible opinion regarding whether TransCanada continued to meet each of the 50 conditions. For example, Mr. Goulet was asked questions concerning Condition 1 and he answered that he was not personally familiar. *PUC Tr.*, AR 024111. He was asked about Conditions 6, 7, and 34 and,

[1] As discussed above, TransCanada and PUC Staff rely upon logically flawed "form over substance" arguments. If it were willing to use such arguments, the Tribe could rely upon a logically sound "form over substance" argument that the document labeled a certification must be rejected because, as is undisputable, the document, standing alone, does not prove that TransCanada is in compliance or that it will remain in compliance. But the core purpose of the statutes at issue is to provide that the Commission determines, on the merits, based upon all of the evidence presented in the lengthy hearing in this matter, whether or not TransCanada has met its burden of production and of proof that it is in compliance and will remain in compliance with the 2010 Permit conditions.

similarly, Mr. Goulet stated he was not aware of whether TransCanada did or did not take certain actions concerning those conditions. *PUC Tr.*, AR 024113-14, 024128. With respect to Condition 6, Mr. Goulet stated that he did not even know whether TransCanada considered the Tribe to be a local unit of government – so how could he possibly have known that Condition 6, which requires TransCanada advise local governments prior to implementing deviations from the original route, was met? *PUC Tr.*, AR 024128. For many of these questions Mr. Goulet deferred to someone else. *Id*.; AR 024159, 024162. When asked about Condition 10, Mr. Goulet responded that he "d[id] not have personal knowledge of whether TransCanada has contacted Yankton Law enforcement." AR 024130.

When questions about the process TransCanada undertook for its permitting from the U.S. Army Corps of Engineers concerning high consequence areas, Mr. Goulet could similarly not answer the question and stated that another witness "may" know. *PUC Tr.*, AR 024251. In response to a question concerning Condition 35, Mr. Goulet stated that he did not know what TransCanada was doing to comply with that condition. *PUC Tr.*, AR 024260-61. Mr. Goulet's sworn testimony was inconsistent with his own sworn statements contained in the *Certification*. This alone should preclude TransCanada from relying on the *Certification* as evidence of continued compliance with the 50 conditions. Mr. Goulet's "certification" was a broad, inaccurate legal conclusion for which he admittedly lacks sufficient knowledge. It was neither sufficient to meet TransCanada's burden of proof nor to shift the burden of proof in this case to the Tribe and other intervenors. The Circuit Court therefore erred in issuing the *Order* and upholding the Commission's application of the burden of proof.

C. TRANSCANADA FAILED TO PROFFER SUFFICIENT EVIDENCE THROUGH ITS ATTACHED DOCUMENTS AND TESTIMONY AT THE EVIDENTIARY HEARING TO PROVE COMPLIANCE WITH ALL 50 CONDITIONS.

The Commission and TransCanada assert, and the Circuit Court agreed, that even if the *Certification* alone does not constitute substantial evidence, TransCanada provided substantial evidence to prove continued compliance with all 50 conditions of the 2010 Permit. TransCanada and the Circuit Court similarly claim that it is demonstrably untrue that it failed to produce substantial evidence, as "31,00 plus pages of record, nine days of hearing, and 2,507 pages of evidentiary transcript and dozens of exhibits were 'sufficiently adequate to support a conclusion in this case.'" *Cir. Ct. Decision* at 20; *TC Appeal Br. in Response to Common Arguments* at 16. However, identifying the number of transcript pages and the length of the evidentiary hearing does nothing to indicate what substantive evidence TransCanada actually presented to fulfill its burden. In fact, while the *Order* found that the voluminous nature of the record supported a conclusion, the Court seemingly bypassed any analysis as to whether the documents or testimony provided by TransCanada amounted to substantial evidence supporting the conclusion of the Commission. *Cir. Ct. Decision* at 20.

In addition to its *Certification* discussed *supra*, TransCanada's *2014 Petition* included two appendices which it claimed equated substantial evidence satisfying its burden of proof. *TC Letter re: Certification,* AR 000045. Appendix B is entitled "TransCanada's June 30, 2014 Quarterly Report to the Commission," a report which was otherwise required under Condition 8 of the 2010 Permit, and included a table with the status of TransCanada's implementation of the 50 permit conditions. AR 000049-78. Appendix C, commonly referred to as the "Tracking Table of Changes," outlined 30 findings of fact from the *2010 Final Decision* that had changed since its issuance in 2010.

AR 000079-83. While Appendix B could have provided relevant evidence to the Commission, its probative worth as to TransCanada's continued compliance was limited by definitive statements of future compliance without any accompanying plan or evidence showing how compliance would be - and was being - achieved. Likewise, Appendix C does nothing to prove TransCanada's continued compliance, but rather attests to the fact the 2014 Project TransCanada put forth in its application for certification is a different project from the 2010 Project originally permitted in 2010. Listing the Commission's findings of fact that have changed fell fatally short of TransCanada's burden to affirmatively prove that the project continued to meet the 50 conditions under these changed circumstances.

The evidence proffered by TransCanada at the evidentiary hearing also failed to prove compliance with each of the 50 conditions contained in the 2010 Permit. Despite TransCanada's contentions, none of evidence or testimony submitted during the evidentiary hearing constituted substantive evidence that TransCanada continued to meet the 50 conditions. A cursory review of the hearing transcripts shows that the vast majority of testimony gathered from TransCanada's witnesses was based on the Tribe's and other intervenors' cross examinations, and is composed of recitals of statutory language and general conclusions as to TransCanada's *ability* to meet the 50 permit conditions. *See PUC Tr.,* AR 027456-59 (Direct Testimony of Corey Goulet, 027467-71 (Direct Testimony of Meera Kothari), 027486 (Direct Testimony of Heidi Tilquist); 027508-12 (Direct Testimony of Jon Schmidt).

During the evidentiary hearing, TransCanada also either entirely failed to address Conditions 2-4, 7, 9-11, 14, 17-23, 25, 28, 33, 37-40, 45, and 46, or failed to address

them in their entirety. The record is void of any reference to most of these conditions. Those conditions that were addressed during the hearing were inadequate or refuted by further testimony. *YST Post Hrg. Reply Br.*, AR 041269-70. Conditions such as 1-3, 5, 7, 23, 34, 42, and 43 may have been touched on by TransCanada's witnesses, but their testimony on those conditions was rebutted by intervenor testimony. *Id.*; *PUC Tr.*, AR 007536-42, 007984-85, 021935, 024563, 024792-95, 024838-39, 026301-02, 026909-10.

For example, Condition 1 requires compliance with all applicable laws and regulations in TransCanada's construction and operation of the 2010 Project. Such laws include property laws and laws relating to water rights. Intervenors provided testimony as to "*Winters* rights," which are water rights retained by tribes, and which would be violated if the project is constructed. *PUC Tr.*, AR 026828-29. As testified to by Doug Crow Ghost, no federal or state agency has taken into account potential impacts of the pipeline on tribal water rights. *Id*. Just because it has not yet been determined how these legally protected rights will be violated does not mean they will not be violated. Nor does it mean TransCanada is exempt from the laws that protect them. By failing to acknowledge the existence of or need to comply with the tribes' water rights, TransCanada failed to prove compliance with Condition 1.

For the foregoing reasons, TransCanada has failed to meet its burden of proof to certify that the proposed project continued to meet all 50 conditions on which the 2010 Permit was granted. TransCanada has failed to meet its burden of proof for certification and the Circuit Court thus committed reversible error when it failed to determine that the Commission's findings were arbitrary and capricious, given the lack of substantive evidence submitted in the record.

V. THE COMMISSION ERRED WHEN IT CONCLUDED THAT TRANSCANADA IS AS *ABLE* TODAY TO MEET THE CONDITIONS UPON WHICH THE 2010 PERMIT WAS ISSUED, AND BY BASING ITS DECISION ON WHETHER TRANSCANADA CONTINUES TO BE *ABLE* TO MEET THE 2010 PERMIT CONDITIONS.

The Circuit Court committed reversible error when it upheld the Commission's decision that TransCanada met its burden of proof by submitting evidence of its current *ability* to meet permit conditions, rather than evidence that it continued to actually meet those conditions. *Cir. Ct. Decision* at 15-16, 20. The issue for which TransCanada bore the burden of proof was whether or not the project "*continues to* meet the conditions upon which the permit was issued." SDCL 49-41B-27 (emphasis added). The statute does not say that the applicant can certify that the project *can* meet the conditions upon which the permit was issued. *Id.* The *ability* of a project to comply with permit conditions is not relevant to certification. Notwithstanding the plain statutory language, the Commission concluded that "[TransCanada] is as able today to meet the conditions as it was when the permit was issued… [TransCanada] offered sufficient evidence to show that [TransCanada] can continue to meet the conditions." *2016 Final Decision* at 27 (emphasis added). The Commission applied the wrong standard for certification, and the Circuit Court upheld this incorrect standard. *Id.*; *Cir. Ct. Decision* at 15-17. TransCanada failed to prove that it *continued to* meet the conditions upon which the 2010 Permit was issued, therefore it failed to meet its burden of proof and the Circuit Court should have overturned the Commission's decision. The Circuit Court committed reversible error by upholding the wrong standard for certification, and its decision must be reversed.

VI. THE COMMISSION ERRED WHEN IT ISSUED THE *ORDER GRANTING MOTION TO PRECLUDE CONSIDERATION OF ABORIGINAL TITLE OR USUFRUCTUARY*

***RIGHTS* AND PRECLUDED TESTIMONY AND CONSIDERATION OF TRIBAL TREATY RIGHTS.**

The Circuit Court committed reversible error when it upheld the Commission's issuance of the *Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* and the Commission's preclusion of testimony and consideration of tribal treaty rights. *Cir. Ct. Decision* at 34. Further, the Circuit Court committed reversible error in finding no clear error when the Commission found no authority that Native American tribes have usufructuary rights with respect to the proposed pipeline route. *Id*. Under SDCL 49-41B-27, TransCanada had the burden of proof to show that its certification was valid. *2014 Final Decision* at AR 031694. This means that the Commission had the obligation to consider all evidence relevant to whether or not TransCanada properly certified that the 2014 Project continued to meet the conditions upon which the 2010 Permit was issued. Furthermore, as a matter of due process, the Tribe was entitled to present all relevant evidence, even if such evidence is controversial.

On May 26, 2015, TransCanada filed *Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights*, seeking to preclude the Commission from considering aboriginal title or usufructuary rights in its certification determination. *TC Mtn. to Preclude*, AR 006813-22. TransCanada based its motion on three allegations: 1) that the Commission lacks authority to determine whether such rights exist; 2) that assertion of such rights is a challenge to the proposed route, over which the Commission lacks authority; and 3) that such rights do not exist with respect to the proposed project's route. All three of these allegations were made in error and should have been rejected. However, the Circuit Court affirmed the Commission's decision,

A. COMMISSION'S AUTHORITY OVER LAND USE RIGHTS

While the Commission certainly lacked jurisdiction to adjudicate land use rights in this matter for purposes *other than* its own determination on permit certification, the Commission just as clearly *did* have authority to take those claims and rights into account when it made the certification determination, and the Circuit Court erred in finding otherwise. As stated above, the Commission was required to hear all relevant evidence to make an informed, reasoned decision. To the extent tribal land use rights were relevant, the Commission should have allowed testimony and argument pertaining to those rights. The Tribe's 1851 Fort Laramie Treaty Territory encompasses the full route of the proposed pipeline from the point where it enters South Dakota to the point where it exits South Dakota. *See* Treaty of Fort Laramie with Sioux, etc., Sept. 17, 1851, art. 5, 11 Stat. 749; KXL Pipeline Map, AR 000048. Pursuant to Condition 1 and SDCL 49-41B-27, TransCanada was required to show continued compliance with applicable laws, including federal law, in its construction and operation of the pipeline. *2010 Final Decision* at 25. The Tribe's usufructuary rights are protected by federal law, making those rights relevant to the proceeding. Because the 1851 Fort Laramie Treaty reserved usufructuary rights to the Tribe in the lands that would be impacted by the pipeline, the Commission was required to consider those rights and the impact of the pipeline on those rights. The Circuit Court erred in finding otherwise. *Cir. Ct. Decision* at 34.

B. COMMISSION'S AUTHORITY OVER ROUTE AND RELATED ISSUES

The Circuit Court erroneously upheld TransCanada's and the Commission's position that the Commission is prohibited from considering evidence related to the proposed route. *Cir. Ct. Decision* at 34. While the Commission is restricted from selecting or altering the route (SDCL 49-41B-36), it is necessary that the Commission

consider factors tied to the location of a proposed project when those factors are relevant to its certification decision pursuant to SDCL § 49-41B-27. Although the Tribe's assertion of its usufructuary rights did pertain to the route of the proposed pipeline, the impact on those rights was nonetheless a permissible consideration for the Commission under Chapter 49-41B. Under TransCanada's and the Commission's logic, the Commission would be unable to hear all relevant facts about the disadvantages of a proposed project because many of those are directly related to the route. The Commission would be restricted to considering only broad concerns about the project as a whole, unable to consider potential impacts to specific locations such as rivers, residential areas, or specific hazards. This is clearly not what the legislature intended.

The legislature enacted SDCL Chapter 49-41B in order to balance the welfare of the people and the environmental quality of the state with the necessity of expanding industry. SDCL § 49-41B-1. To ensure that new facilities will produce minimal adverse effects on the environment and upon the citizens, the legislature requires that a "facility may not be constructed or operated in this state without first obtaining a permit from the commission." *Id*. This cannot be done without giving consideration to the environment and citizens in the vicinity of a proposed project's route.

Though the Commission cannot route a facility, it can deny a permit. SDCL 49-41B-36 directs that "[n]othing in this chapter is a delegation to the commission of the authority to route a transmission facility." However, "SDCL 49-41B-20 grants the PUC the authority to approve or to disapprove permit applications, <u>including the proposed route</u>." *In re Nebraska Pub. Power Dist. Etc.,* 354 N.W.2d 713, 721 (S.D. 1984) (emphasis added). Furthermore, if an application is disapproved based on the route, "the

applicant can revise the route and seek PUC approval. SDCL 49-41B-22.1 through 49-41B-22.2." *Id*. Thus, while Commission cannot accept a proposed reroute submitted by another party or propose a reroute itself, it is clearly within the Commission's authority to deny a permit – and therefore to deny permit certification - for reasons relating to the proposed route.

C. EXISTENCE OF TRIBAL USUFRUCTUARY RIGHTS ALONG PROPOSED ROUTE

TransCanada's allegation that the Tribe does not have usufructuary rights to the land along the proposed project route (inherently asking the Commission to make a determination that the tribe does not have such rights) is not only false but also absurd, given that TransCanada claimed the Commission lacked authority to make that determination. TransCanada therefore provided no valid basis for its motion, which the Commission should have denied.

Finally, the Circuit Court erred when it found "no clear error was committed when the [Commission] found no authority that Native American Tribes have aboriginal title or usufructuary rights with respect to the proposed route of the Keystone XL Pipeline." *Cir. Ct. Decision* at 34. The Tribe's usufructuary rights in the land at issue have existed since the Treaty at Fort Laramie was signed in 1851. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 352 (7th Cir. 1983) ("Both aboriginal and treaty-recognized title carry with them a right to *use* the land for the Indians' traditional subsistence activities of hunting, fishing, and gathering." (Emphasis in original.)). The 1851 Fort Laramie Treaty is the authority for the Tribe's usufructuary rights along the pipeline route. Treaty of Fort Laramie with Sioux, etc., Sept. 17, 1851, art. 5, 11 Stat. 749. The Commission is authorized to consider the Tribe's concerns with respect to its usufructuary rights regardless of whether those rights have

been adjudicated as such in court. While the South Dakota Supreme Court has made clear that the Commission cannot exercise *purely* judicial functions, it does not and cannot prohibit the Commission from interpreting the law. To do so would preclude the Commission from functioning as an administrative tribunal.

Because the Commission's decision to preclude relevant testimony and evidence violated the Tribe's due process rights and severely impaired the Commission's ability to fulfill its duties under SDCL Chapter 49-41B, the Circuit Court's order affirming the Commission's decision must be reversed.

VII. THE COMMISSION ERRED WHEN IT DECIDED THAT TRIBES SHOULD NOT BE TREATED AS LOCAL UNITS OF GOVERNMENT, AND THAT NO PERMIT CONDITION REQUIRED TRANSCANADA TO CONSULT WITH TRIBES ABOUT THE KEYSTONE XL PIPELINE.

The Circuit Court committed reversible error when it upheld the Commission's decision that tribes should not be treated as local units of government and that no permit condition required TransCanada to consult with tribes about the Keystone XL pipeline. *Cir. Ct. Decision* at 36. SDCL 49-41B-22(4) requires a permit applicant to consider "the views of governing bodies of affected local units of government." (Emphasis added.) Furthermore, Condition 34,b of the 2010 Permit requires TransCanada to "seek out and consider local knowledge, including the knowledge of…local landowners and government officials." *2014 Petition App. B,* AR 000072 (emphasis added). With respect to the Tribe, TransCanada did neither.

In the *2016 Final Decision,* the Commission pointed out that the statute does not specify that it applies to Tribes, but the Commission left out the fact that the statute does not specify that it applies counties, municipalities, or any other units of government either. *2016 Final Decision,* AR 031690. Rather than following the plain language of

the statute, the Commission essentially read words and requirements into the statute that are simply not there. The Circuit Court found that the Tribe "is not a local unit of government within the State of South Dakota's government structure." *Cir. Ct. Decision* at 36 (emphasis added). The exact language of the statute reads: "The applicant has the burden of proof to establish that … (4) the facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of governing bodies of affected local units of government." SDCL 49-41B-22 (emphasis added). The statute clearly does *not* require that the local unit of government be "within the State of South Dakota's government structure," as the Circuit Court erroneously found. *Cir. Ct. Decision* at 36. Had the South Dakota legislature intended that only the views of local units of government within South Dakota's government structure must be considered, it would have included such language in the statute. The fact that the Tribe is not part of the State's government structure has no bearing on this proceeding.

Several rules of statutory construction and interpretation support this point. One such rule is *expressium facit cessare tacitum*, roughly translating to what is expressed renders what may be implied as silent. *See e.g., Taylor v. Michigan Public Utilities Commission*, 217 Mich. 400, 186 N.W. 485 (1922). In this instance, the Circuit Court implied, from the clear and express language of SDCL 49-41B-22(4), that "local units of government" only refers to local units of government within the governmental structure of South Dakota. Such an interpretation is in conflict with the rule of *expressium facit cessare tacitum* because the interpretation relies on the implication that "local units of government" was only intended to apply to South Dakota units of government, rather

than interpreting the language as it is expressly written to include all types of units of local government without limitation.

Another such rule is the plain meaning rule. The Supreme Court briefly summarized this rule in *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917), noting that "…the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, the sole function of the courts is to enforce it according to its terms." Other courts have also interpreted this rule, stating that "[t]here is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses…" *Swarts v. Siegel*, 117 F. 13, 19 (8th Cir. 1902). Although the language of SDCL 49-41B-22(4) is clear and unambiguous, the Circuit Court went beyond the language to draw out the erroneous conclusion that the intention and purpose of the language was meant to apply only to local units of South Dakota state government. This interpretation disregards the plain language and meaning of the statute, and, in doing so, violates the well-established plain meaning rule of statutory interpretation.

Because SDCL 49-41B-22 required TransCanada to confer with the Tribe, as a local unit of government, and take its views into consideration, the Circuit Court committed reversible error by upholding the Commission's decision to the contrary.

CONCLUSION

Wherefore, the Tribe requests that the Court reverse the decision of the Circuit Court upholding the Commission's *2016 Final Decision* and remand the matter to the Commission with instructions to vacate the certification and dismiss the *2016 Petition*.

Respectfully submitted this 12th day of October, 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the type volume limitation set forth in SDCL § 15-26A-66(b). The text of the brief, excluding the cover page, table of contents, and index to the appendix, contains 9,686 words as determined by reliance on Microsoft Word.

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