IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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No. 28331

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IN THE MATTER OF PUC DOCKET HP-14-001, ORDER ACCEPTING CERTIFICATE OF PERMIT ISSUED IN DOCKET HP 09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE

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**Appeal from the Circuit Court**
**Sixth Judicial Circuit**
**Hughes County, South Dakota**

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**THE HONORABLE JOHN L. BROWN**

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# APPELLANT'S BRIEF

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## PRELIMINARY STATEMENT

References in this reply brief to Appellee TransCanada Keystone Pipeline, LP's ("TransCanada") *Appellee's Brief* are denoted by "TC Br." followed by the cited page number. References to *Appellee South Dakota Public Utilities Commission's Brief* are likewise cited as "PUC Br." References to *Appellant Yankton Sioux Tribe's Opening Brief* are cited as "YST Br." The Yankton Sioux Tribe ("Tribe") relies on the Jurisdictional Statement, Statement of Legal Issues, Statement of the Case, and Statement of Facts presented in its opening brief. YST Br. 1-8.

## ARGUMENT

### I. THE COMMISSION ERRED WHEN IT DENIED THE TRIBE'S *MOTION TO DISMISS* AND WHEN IT DENIED THE TRIBE'S *JOINT MOTION IN LIMINE*.

The Public Utilities Commission ("Commission") committed reversible error when it denied the Tribe's *Motion to Dismiss*, AR 001362-65, and the *Joint Motion in Limine to Exclude Evidence Pertaining to Keystone's Proposed Changes to Findings of Fact* ("*Motion in Limine*"), AR 009481-009620, and in finding that the pipeline facility described in TransCanada's *Petition for Order Accepting Certification Under SDCL 49-41B-27* is the same facility as described in Docket HP09-001. *Cir. Ct. Decision* at 28. TransCanada, the applicant itself, identified no less than 30 differences between the facility permitted in 2010 and the new proposed project for which it sought certification. AR 000079-83. Cumulatively, these differences constitute a changed project – a different facility.

In its response brief, TransCanada argues that SDCL 49-41B-27 "presumes that there can be changes to a project between granting a permit and starting construction." TC Br. 19. This is simply untrue. SDCL 49-41B-27 states that construction pursuant to

an existing permit may proceed more than four years after the permit was issued if the utility certifies to the Commission that the facility continues to meet the conditions upon which the existing permit was issued. The statute also provides for expansion and improvement of previously permitted and constructed facilities to proceed on such terms. *Id.* The statute does not, however, say that a utility may alter an unconstructed project between the time the permit was issued and the time construction commences.

While expansion and improvement to a facility necessarily encompass changes to the original project, construction of a new facility does not. The plain language of the statute says nothing about changes to a to-be-constructed project, thus such an element cannot be read into the statute. The statute only permits construction of a facility more than four years after issuance of a permit *if that facility is the same facility approved by the permit.* Because TransCanada has made changes to the initially permitted facility, the facility for which it now seeks certification is not the same project that was permitted in 2010 and thus it cannot be authorized to proceed pursuant to SDCL 49-41B-27.

TransCanada also claims that the Tribe has taken the position that compliance with the permit conditions creates a new project. TC Br. 20. The Tribe does not argue that compliance with the conditions creates a new project, as it is quite possible for an *unchanged* project to comply with original permit conditions. It is not the conditions that dictate whether the project is the same; rather, it is the attributes of the project itself. Here, because those attributes have clearly changed, the project has changed and cannot be certified pursuant to SDCL 49-41B-27.

The Commission, on the other hand, argues that it "simply chose not to consider whether any of the updates identified in [the Tracking Table of Changes] constituted

grounds for dismissal." PUC Br. 8. Such a decision was not within the realm of the Commission's options for disposing of the motion. The fact that the facility that has now been certified is a different facility from the one permitted in 2010 deprived the Commission of subject matter jurisdiction. Lack of subject matter jurisdiction leaves no discretion for the adjudicator – the matter must be dismissed. The judgment of the Commission is therefore void. *Cable v. Union County Bd. of County Comm'rs*, 769 N.W.2d 817, 825 (S.D. Sup. Ct. 2009).[1]

The Commission's assertion that the State Legislature "did not intend to create a complete bar to certification simply by establishing a standard that no project could satisfy" was made without explanation and is unfounded. PUC Br. 8. Nothing about the Tribe's correct interpretation of the law precludes certification if a project remains the same project. Further, whether or not changes to the proposed facility "have any bearing as to whether or not the project will comply with the conditions of the permit" is irrelevant. *Id.* Even a wholly different project may be able to comply with those conditions, but compliance with the conditions is not the issue. If the new project is different than the original project, the new project has no permit and the Commission had no authority to grant certification.

The Commission draws a comparison between the instant case and Docket EL12-063, in which the Commission granted certification for a project for which "the size and presence of a federal nexus[] had changed." *Id.* at 9. The Commission fails, however, to acknowledge that while those changes relate to the project, they are not changes to the

[1] A reviewing court is "required to consider the issue [of subject matter jurisdiction] even when not raised in order to avoid unwarranted exercise of judicial authority." *State v. Wiese*, 201 N.W.2d 734, 736 (Iowa 1972).

project itself. In Docket EL12-063, the Otter Tail Power Company's *Petition for Order Accepting Certification* made no mention of changes to the proposed facility itself, other than a diminishment in the project's size. The order granting certification in Docket EL12-063 made no mention of any changes to the facility, and the petition for certification went unchallenged. The Commission, in its reliance on Docket EL 12-063, offered no information that the Commission even considered the issue presented before this Court. That case, therefore, provides no support for the Commission's argument, which this Court must reject. Because Docket HP14-001 dealt with a different facility than Docket HP09-001, the Commission committed reversible error and this matter should have been dismissed.

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

The Commission committed further reversible error when it issued the *Order Granting Motion to Define Issues and Setting Procedural Schedule* and unlawfully limited the scope of discovery. AR 001528-29. Contrary to TransCanada's position, the Commission lacked legal authority to restrict the scope of discovery to evidence relevant to the two issues identified in the Commission's order. Pursuant to South Dakota law, a party may only secure an order limiting discovery once discovery has been sought and upon filing a motion for protective order, "a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action," and a showing of good cause. SDCL 15-6-26(c). TransCanada filed no such motion, discovery had not yet been sought, and TransCanada failed to make the requisite certification and showing of good cause – thus the Commission had no authority to limit discovery. *Id.*

TransCanada further argues that a proceeding under SDCL 49-41B-22 is treated differently than a proceeding under SDCL 49-41B-27. TC Br. 23-24. TransCanada provides no support for this argument. Furthermore, neither Chapter 1-26 nor Chapter 49-41B makes a distinction regarding discovery between contested cases brought under these two statutes. As a contested proceeding, Docket HP14-001 was required to entail the same trappings of due process applicable in original permit proceeding. Therefore, due process was not adequate, and the Commission committed reversible error in granting the unlawfully restrictive discovery order.

The Commission suggests that the vast quantity of data produced during the course of discovery proves that the scope of discovery was sufficient and due process was given. There is no quantity of evidence that can justify an unlawful restriction on discovery. The quantity of evidence does not support the substantive limitations on scope. While the extent of discovery rests in the discretion of the court, adjudicative bodies are still bound by the rules of procedure, a violation of which constitutes reversible error. In addition, as discussed above, the Commission lacked authority to issue an order tantamount to a protective order absent a motion and other elements required by SDCL 15-6-26(c).

Finally, the Commission enumerates a number of circumstances that it alleges justify the discovery order. PUC Br. 13. None of these circumstances cures the defect in the discovery limitations imposed on the Tribe.

On April 17, 2015, relying on its unlawful discovery order, the Commission issued an order denying, in part, a motion to compel filed by the Tribe. AR 004712-13.

As a result, the Tribe was unable to explore avenues that were likely to lead to the discovery of admissible evidence.

Interrogatories 10 and 13 requested dates, phone numbers, emails, and names of persons responsible for conducting surveys, addressing property issues, and dealing with civil survey information (interrogatory 10) and of each environmental inspector incorporated into the Construction, Mitigation, and Reclamation Plan ("CMR"). Interrogatories 10 and 13 note that they pertain to Conditions 6 and 13, respectively, and the information sought in both instances relates to individuals who are likely to possess information or records relevant to Conditions 6 and 13. These interrogatories fell squarely within the permissible scope of discovery under SDCL 15-6-26(b) and were likely to lead to the discovery of admissible evidence. Instead, the Tribe was unable to determine whether TransCanada has proposed or made any material deviations to the pipeline route pursuant to Condition 6, or has complied with all mitigation measures set forth in the CMR or made modifications to those measures pursuant to Condition 13.

Similarly, interrogatory 16 requested information pertaining to communication between TransCanada contractors and agencies or regulatory bodies regarding any safety concerns or safety violations of any TransCanada pipeline located in Canada. Interrogatory 16 requested information that was likely to lead to the discovery of admissible evidence because the information requested could have shed light on TransCanada's compliance with applicable laws, regulations, and permits for its pipelines constructed and operated in Canada, an issue that is relevant to Conditions 1 and 2.

Interrogatory 32 sought the location of all construction camps and housing camps in South Dakota that will be used for construction, emergency response, and/or temporary

housing. The interrogatory relates to Conditions 1, 2, and 36. Conditions 1 and 2 address compliance with all applicable laws and permits, while Condition 36 deals specifically with TransCanada's preparation and implementation of an emergency response plan as required by federal regulations. Interrogatory 32 was tailored to lead to the discovery of evidence and information related to TransCanada's compliance with the conditions noted.

Lastly, request for production 6 asked TransCanada to provide all documents constituting the emergency response plan required by federal regulation and by Condition 32. The documentation sought through this request would address potential emergencies that may arise related to the proposed pipeline. Such information should have been of key importance to the Commission and was of vital importance to the Tribe because it has the potential to directly affect the safety of tribal members. As such, the requested documentation would have likely led to the discovery of admissible evidence.

Whether or not the information sought by the Tribe was relevant to the two issues as required by the discovery order, such information was undoubtedly discoverable pursuant to SDCL 15-6-26(b). As described *supra*, the Commission's unlawful discovery order precluded the Tribe's discovery of information likely to lead to the discovery of admissible evidence because that information was not relevant to the two issues enumerated in the discovery order. For the foregoing reasons, the Commission committed reversible error by unlawfully restricting the scope of discovery.

## VII. THE COMMISSION ERRED BY PLACING THE BURDEN OF PROOF ON THE INTERVENORS AND BY FINDING THAT THE INTERVENORS FAILED TO ESTABLISH ANY REASON WHY TRANSCANADA COULD NOT CONTINUE TO MEET THE CONDITIONS ON WHICH THE 2010 PERMIT WAS ISSUED.

The Commission also erred when it placed the burden of proof on the intervenors and when it found that the intervenors failed to establish a reason that TransCanada could not continue to meet the permit conditions. AR 031687, 031689-91, 031694.

The Commission asserts that the language of SDCL 49-41-27 does not charge TransCanada with the four-factor burden of proof contained in SDCL 49-41B-22 and that this proceeding cannot be "a re-adjudication of the permit issuance proceeding." PUC Br. 14-15. The Tribe has never contested these points.

SDCL 49-41B-27 places the burden of proof on TransCanada, requiring that "the utility must certify." ARSD 20:10:01:15.01, which applies to contested proceedings such as Docket HP14-001, similarly asserts that the "Petitioner has the burden of going forward with the presentation of evidence unless otherwise ordered by the commission."

Despite this unambiguous language assigning the burden to TransCanada alone, the Commission departs from these textual authorities in its argument that

> the language of SDCL 49-41B-27 would certainly seem to imply that, if the Commission or a third party wishes to challenge the authenticity or accuracy of the certification, the burden of proof and persuasion in a case involving the validity or accuracy of the certification lies with the parties challenging the certification.

PUC Br. 18. The Commission's improper burden shifting is also found in its final decision granting certification, in which it time and time again ruled in favor of TransCanada on the grounds that the intervenors had failed to produce evidence. AR 031686-87, 031694. The Commission repeats these incorrect burden-shifting assertions here. PUC Br. 21-24.

The Commission acted contrary to the plain language and purpose of SDCL 49-41B-27 and ARSD 20:10:01:15.01 by relieving TransCanada of its duty to prove it

continued to comply with all 50 conditions, and requiring the Tribe and other intervenors to prove that TransCanada *cannot* satisfy the conditions. Moreover, the Commission has not provided any case law, statute, or order of the Commission that supports shifting the burden. However, should this Court find that the burden did shift based on TransCanada's "certification" or otherwise, the intervenors have clearly presented sufficient rebuttal evidence to shift the burden of production back to TransCanada.

For example, if TransCanada met its burden of production through its certification alone as argued, then the contrary certification filed by the Tribe must have shifted the burden back to TransCanada. *YST Certification*, AR 031232-41; *see* YST Br. 20-21. But the Commission baldly asserts that the intervenors "simply did not provide any evidence showing that Keystone does not or cannot comply with the Conditions." PUC Br. 24. This statement demonstrates the Commission's disregard for every piece of evidence presented by the intervenors in 31,000-plus pages of record, including the "certification" filed by the Tribe and significant oral and written testimony. *See* AR 007536-42, 007984-85, 021935, 024563, 024792-95, 024838-39, 026301-02, 026909-10. This testimony must be given equal evidentiary weight, thereby shifting the burden back to TransCanada.

TransCanada argues that the "intervenors could prevail only by proving that Keystone's evidence should not be believed." TC Br. 31. This is the same position the Commission took in Conclusion of Law 9 when it found that TransCanada's certification satisfied its burden of proof because "no evidence was offered demonstrating that Keystone will be unable to meet the conditions in the future." AR 031694. In both of these instances, the Commission and TransCanada purport to impose a higher burden of

proof on the intervenors than the applicant by arguing that TransCanada met its burden by simply *asserting* that it will comply, but requiring intervenors to *offer evidence* showing that it cannot. Because the Commission misplaced the burden of proof contrary to law, the proceedings were fundamentally unjust and the Commission committed reversible error.

TransCanada further asserts that the Tribe's argument must fail because it requires compliance with prospective conditions and that, because some conditions are prospective, it "did not have to prove in Docket HP09-001 that it did or could meet all 50 permit conditions." PUC Br. 19; TC Br. 26-28. These positions improperly constrain the language of the statute to apply to a specific subset of conditions, relieving TransCanada of its duty to show compliance with forty-two of the fifty conditions simply because they are prospective in some aspect. TC Br. 31-32. Nothing in SDCL 49-41B-27 allows for the application of a different standard of compliance for prospective conditions.

While prospective conditions may certainly hinder a complete showing of continued compliance in some instances, the prospective nature of conditions cannot alleviate an applicant of its duty under the statute. At a minimum, a petitioner can certify compliance with prospective conditions by showing it has taken proactive steps toward compliance or developed plans for how it intends to comply with conditions once applicable. For example, Condition 15 requires TransCanada to develop units applicable to particular soil classification. AR 000065. In order to comply with this condition, TransCanada has already completed a consultation and soil analytical probing. *Id.* TransCanada has similarly taken affirmative steps to comply with a number of other

conditions such as Conditions 16.f, 21, 22, and 44 among others. AR 000065, 000067, 000068, 000075.

TransCanada failed to similarly address numerous other prospective conditions. For example, Condition 43 imposes a number of obligations on TransCanada related to discovery of cultural resources. AR 000075. However, nothing in the record shows how TransCanada intends to define cultural artifacts or how it will train construction personnel to properly identify cultural artifacts in the field. TransCanada similarly failed to address Conditions 16.o, 38, 42a, 45, 45.a, 46, 48, and 49

Despite an understanding that proactive measures show compliance with prospective conditions, TransCanada has not produced evidence of such measures with respect to all of the proposed conditions. The plain language of SDCL 49-41B-27 requires continued compliance with all conditions. Because TransCanada has failed to provide substantial evidence that it continued to comply with all 50 conditions, the Commission committed reversible error when it found TransCanada met its burden of proof.

Furthermore, the Tribe does not rely solely on TransCanada's failure to produce evidence of continued compliance with prospective conditions. The shortage of evidence demonstrating compliance with the conditions cannot be understated. TransCanada failed to produce sufficient evidence, or any evidence, to show that it continued to meet Conditions 1-4, 6, 7, 9-11, 14, 17-23, 25, 28, 33-35, 37-40, 45, and 46. TransCanada's evidentiary shortcomings were well documented in the post-hearing briefs submitted by the Tribe as well as by the Cheyenne River Sioux Tribe, the Rosebud Sioux Tribe, and the Standing Rock Sioux Tribe. AR 029538-59, 029560-75, 029703-54. By way of

example, Mr. Cory Goulet, the President of Keystone Projects and the man who "certified" that TransCanada continued to comply with the permit conditions, was unable to recall whether TransCanada had or was complying with Conditions 6, 7, 10, and 34, among others. PUC Tr. 024111, 024113-34, 024128, 024130, 024159, 024162, 024251, 024260-61.

There was blatantly insufficient or no evidence offered to show compliance with a number of additional conditions. For example, TransCanada produced no evidence to show compliance with Condition 1 regarding its compliance with the Endangered Species Act. Likewise, TransCanada produced insufficient evidence to show that it could undertake and complete all actions that it guaranteed it would in its original application pursuant to Condition 5 and that it provided all required information to law enforcement agencies and local governments as required by Condition 7.

In all, TransCanada failed to meet its burden to show that it continued to comply with the conditions of its permit. In fact, TransCanada's evidence was so insufficient in some aspects that the record of the evidentiary hearing is entirely void of any mention of some of the conditions. The Commission therefore committed reversible error when it found that TransCanada met its burden of proof.

## VIII. 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 ITS BURDEN OF PROOF.

The Commission committed reversible error when it found that TransCanada properly certified its continued compliance with the permit conditions and that TransCanada's submission of a signed certification met its burden of proof. AR 031678, 031693, 031695.

In its brief, the Commission notes that because it is a South Dakota agency, its decisions must be based upon substantial evidence to ensure they are reasonable and not arbitrary. PUC Br. 18. This means that TransCanada, as the petitioner and the burden bearer, was required to "certify" through the submission of substantial evidence that it "continues to meet the conditions upon which [the 2010 Permit] was granted." SDCL 49-41B-27.

Glaringly, TransCanada fails to address the substantial evidence standard while the Commission only mentions it briefly outside of its main argument. PUC Br. 18. Instead, the Commission argues that the burden of proof in this case "boils down to what is meant by the term 'certify' in [SDCL 49-41B-27]." PUC Br. 14.

The Commission asserts that under the plain language of SDCL 49-41B-27, TransCanada's one-paragraph document labeled "certification" satisfied its burden of proof to "verify in writing or to attest as true" that it continued to meet the 50 conditions upon which the original permit was granted. PUC Br. 16. TransCanada similarly argues that its burden generally was "to affirm as true that it continues to meet the conditions on which the permit was granted." TC Br. 26.

The Tribe agrees that TransCanada must certify its compliance, but argues that "certify" must mean more than submission of a written promise of compliance by an individual without firsthand knowledge. The Commission and TransCanada base their argument on the meaning of the word "certify" as defined in Black's Law Dictionary; "to authenticate or verify in writing" or "to attest as being true or as meeting certain criteria." TC Br. 26; PUC Br. 16. However, neither party defines "authenticate" or "verify," instead focusing on the word "attest." This is because the central element of both

"authenticate" and "verify" is an element of proof. "Verify" is defined as "to *prove* to be true; to *confirm or establish* the truth or truthfulness of," while "authenticate" is defined as "to *show* (something) to be true or real." *Black's Law Dictionary* (10th ed. 2014) (emphasis added).

TransCanada's and the Commission's restricted interpretation of "certify" in SDCL 49-41B-27 enables the Commission to abdicate its responsibility under the statute and common law by claiming that it did not even have the authority to "disallow or reject" TransCanada's certification. PUC Br. 25. However, the Commission's decision to open a contested proceeding in Docket HP09-001 and a full reading of the definition of "certify" run counter to this argument and support a determination that certification under SDCL 49-41B-27 requires evidence or proof related to TransCanada's continued compliance.

## IX. 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 Commission committed reversible error when it issued the *Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* and precluded testimony from the intervenors regarding, and consideration of, tribal treaty rights. AR 007383. TransCanada and the Commission assert that the Commission did not need to consider the Tribe's aboriginal and usufructuary rights for four reasons: 1) Docket HP14-001 was only a proceeding to determine whether TransCanada could still construct the pipeline in compliance with the 2010 permit conditions; 2) the Commission lacks jurisdiction to route the proposed pipeline; 3) the Commission lacks jurisdiction to

adjudicate aboriginal and usufructuary interests; and 4) the Tribe lacks usufructuary rights in the relevant region. TC Br. 32-36; PUC Br. 28. Each of these arguments fails.

The Tribe agrees that Docket HP14-001 was a proceeding to determine TransCanada's compliance with the 2010 permit conditions. Crucially, the Commission and TransCanada needed to consider how the route of the pipeline would affect the Tribe's usufructuary rights in order to comply with the permit conditions. For example, under Condition 6.a, TransCanada will continue to develop route adjustments to "accommodate environmental features identified during surveys, *property-specific issues*, and civil survey information." AR 000060 (emphasis added). The Tribe's usufructuary rights, such as the rights to hunt, fish, and capture on certain lands the proposed pipeline would run through, are *property* rights. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 700 F.2d 341, 352 (7th Cir. 1983) ("[T]reaty-recognized rights of use depend neither on title nor right of permanent occupancy; rather, they are similar to profit à prendre."). By refusing to consider these property rights, the Commission could not confirm that TransCanada continued to meet the permit conditions.

Although the Commission lacked authority to route the pipeline, it "ha[d] the authority to approve or to disapprove permit applications, including the proposed route." *Application of Nebraska Public Power Dist.*, 354 N.W.2d 713 (S.D. 1984). TransCanada asserts that *Application of Nebraska Public Power District* is inapplicable because that case concerned a trans-state transmission facility, not a transmission facility like the Keystone XL pipeline.[2] However, the statutes applicable in the South Dakota Supreme

[2] TransCanada also asserts that the Commission is authorized to route power lines, but not pipelines. However, neither SDCL 49-41B-20 nor SDCL 49-41B-36 treats pipelines

Court's analysis in the relevant portion of *Application of Nebraska Public Power Dist.* (namely, SDCL 49-41B-11(2), 49-41B-20, 49-41B-22.1, and 49-41B-22.2) apply to all "facilities" as defined in SDCL 49-41B-2(7), including transmission facilities and trans-state transmission facilities.[3] Although other parts of the South Dakota Codified Laws differentiate between transmission facilities and trans-state transmission facilities, the relevant statutes here apply equally to all facilities. Thus, even though *Application of Nebraska Public Power Dist.* concerned a trans-state transmission facility, the Supreme Court's conclusion that the Commission has the authority to "disapprove permit applications, including the proposed route" applies here. 354 N.W.2d at 721. For the foregoing reasons, while the Commission cannot propose a reroute itself, it is within the Commission's authority to deny permit certification for factors tied to the location of a proposed project when those factors are relevant to the project's certification. To hold otherwise would constitute an unauthorized judicial re-writing on SDCL 49-41B-1.

While the Commission does not have the authority to adjudicate the Tribe's usufructuary rights, the Commission cannot accept TransCanada's certification without considering these rights. Condition 1 requires TransCanada to comply with all applicable

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different from power lines. Pipelines and power lines are both transmission facilities as used in both SDCL 49-41B-20 and SDCL 49-41B-36.

[3] Pursuant to SDCL 49-41B-2(7), a "facility" includes all transmission facilities, including electric transmission facilities. SDCL 49-41B-2(7); SDCL 49-41B2.1(a). A trans-state transmission facility is a type of electric transmission facility. SDCL 49-41B-2(11) ("A trans-state transmission facility is simply 'an electric transmission line . . . which originates outside the State of South Dakota, crosses this state and terminates outside the State of South Dakota'"). Thus, the term "facility" encompasses trans-state transmission facilities and transmission facilities.

laws, including federal law,[4] and, as explained *supra*, Condition 6.a requires it to develop route adjustments for property-specific issues. The Commission must consider the Tribe's usufructuary rights to determine whether TransCanada continues to comply with the original permit conditions. *In re West River Electric Association*, 675 N.W.2d 222 (S.D. 2004), relied upon by TransCanada, is inapplicable because that case only held that the Commission lacked authority to give new interpretations to statutory language. Importantly, the Tribe has not asked the Commission to adjudicate its usufructuary rights, but rather, desires to submit testimony and evidence related to such rights in order to aid the Commission in its review of TransCanada's certification.

For the foregoing reasons, 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*. The Commission had the authority, and was required, to consider the Tribe's usufructuary rights in the region in order to comply with the permit conditions. This Court should so rule.

Finally, the TransCanada's implication that all the Tribe's usufructuary rights along the route have been extinguished is plainly incorrect.[5] TC Br. 35-36. If this Court

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[4] The Tribe has usufructuary rights in the territory ("1851 Treaty Territory") recognized by the Treaty of Fort Laramie with the Sioux, Etc. ("1851 Treaty") pursuant to federal law. Treaty of Fort Laramie with Sioux, Etc., Sept. 17, 1851, art. 5, 11 Stat. 749, II KAPP 1065.

[5] For example, TransCanada's conclusion that the Tribe cannot assert claims to the west of the Missouri River under *Yankton Sioux Tribe v. United States*, 24 Ind. Cl. Comm. 208 (1970), is patently incorrect. For one, the Tribe's usufructuary rights stem from the 1851 Treaty, which recognized Indian title to lands west of the Missouri River. Additionally, TransCanada and the Commission have consistently alleged that the Tribe claims aboriginal rights to lands along the proposed pipeline's route. Throughout this litigation, however, the Tribe has only discussed its usufructuary rights in the 1851 Treaty Territory. *Yankton Sioux Tribe's Response to Applicant's Mot. to Preclude Consideration of Aboriginal Title or Usufructuary Rights*, AR 007095-007111; *Yankton Sioux Tribe's Opening Brief, In the Matter of Public Utilities Comm'n Docket No. HP14-001, Civ. No.*

decides to address the usufructuary rights the Tribe retains in the 1851 Treaty Territory,[6] this Court should hold that the Tribe's usufructuary rights in the area exist today.[7] Usufructuary rights are a tribe's and its members' treaty-recognized rights to use land for traditional subsistence activities such as hunting, fishing, and gathering. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 700 F.2d at 352. A tribe does not need to hold title to land to possess usufructuary rights on that land. *Id.* Further, a treaty does not need to expressly reserve usufructuary rights for those rights to be retained. *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

The Tribe derives a number of usufructuary rights from the 1851 Treaty. The 1851 Treaty specifically stated that the Tribe did "not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described," which encompassed the 1851 Treaty territory. Treaty of Fort Laramie with Sioux, Etc. art. 5, Sept. 17, 1851, 11 Stat. 749, II KAPP 594, IV KAPP 1065. Additionally, "[w]hen a treaty reserves or grants lands to a tribe, tribal ownership necessarily includes full

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*16-33, 16-34, 16-36, 16-37, 16-38, 16-39* at 23-25; YST Br. 30-34. Once again, here, the Tribe discusses its usufructuary rights, not its aboriginal rights, along the pipeline route.

[6] Throughout the appeal stages of this litigation, the Tribe refrained from fully arguing the merits of its usufructuary rights claims because the Commission refused to hear those arguments. The Tribe has maintained its position that the Commission, as the agency charged with certification under SDCL 49-41B-27, is the body to which the Tribe would "demonstrate these interests and their relevance to the Commission's certification determination at the evidentiary hearing and through post-hearing briefing." *Yankton Sioux Tribe's Response to Applicant's Mot. to Preclude Consideration of Aboriginal Title or Usufructuary Rights*, AR 007099. The Tribe reiterates its position that its usufructuary rights arguments should be heard by the Commission upon remand.

[7] TransCanada's and the Commission's argument that no court has ever declared that usufructuary rights exist is irrelevant. Private rights clearly do not require adjudication to exist. *See Block v. North Dakota*, 461 U.S. 273, 291 (1983) ("If a claimant has title to a disputed tract of land, he retains title even if his suit to quiet his title is deemed time-barred under 2409a(f).").

hunting, fishing, and gathering rights on those lands." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 18.02, 1156 (Nell Newton ed. 2012 ed.) (hereinafter, COHEN'S HANDBOOK) (*citing Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968)). Thus, the 1851 Treaty expressly recognized the Tribe's right to continue hunting and fishing within the 1851 Treaty Territory.

Moreover, the 1851 Treaty was intended to create a homeland for the Tribe. Letter from Orlando Brown, Commissioner of Indian Affairs, to Thomas Fitzpatrick, Superintendent of Indian Affairs (Aug. 16, 1849) ("There should also be a clear and definite understanding as to the general boundaries of the sections of country respectively claimed by [the signatory tribes], *as their residence and hunting grounds.*" (emphasis added)); *Crow Tribe of Indians v. United States,* 151 Ct. Cl. 281, 286 (1960) (The 1851 Treaty served as "a recognition by the United States of the Indians' title to the areas for which they are to be held responsible, and which are described as 'their respective territories.'"); *Assiniboine Indian Tribe v. United States*, 77 Ct. Cl. 347 (1933) ("one of [the 1851 Treaty's] purposes was to give each tribe some fixed boundaries within which they should *stipulate generally to reside.*" (emphasis added)).

Congress has never abrogated the Tribe's usufructuary rights in the 1851 Treaty. Although the "plenary power of Congress" purports to enable Congress to abrogate treaty rights, courts have repeatedly held that Congress must clearly express its intent to do so. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians*, 700 F.2d at 354 ("termination of treaty-recognized rights by subsequent legislation must be by *explicit* statement or

must be *clear* from the surrounding circumstances or legislative history" (emphasis in original)).

For example, in *Mille Lacs Band of Chippewa Indians*, the U.S. Supreme Court reviewed whether the Chippewa Indians relinquished usufructuary rights derived from their 1837 Treaty when they entered into their 1855 Treaty. 526 U.S. at 175. Although the 1837 Treaty had guaranteed the Chippewa the privilege of hunting and fishing within all ceded lands, in 1855 the United States and the Chippewa entered into a new treaty whereby "the said Indians do further *fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be*, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." Treaty with the Chippewas, Feb. 22, 1855, 10 Stat. 1165, II KAPP 685 (emphasis added). Looking at the historical context of the 1855 Treaty, the court found that, despite the foregoing relinquishment language, the "1855 Treaty was a land purchase treaty and *not a treaty that also terminated usufructuary rights*." *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 199 (emphasis added). Most importantly, the Court noted that "[t]he entire 1855 Treaty, in fact, is devoid of any language expressly mentioning—much less abrogating—usufructuary rights." *Id.* at 195.

The case at hand is similar to *Mille Lacs Band of Chippewa Indians*. As described *supra,* the Tribe entered into the Treaty of Fort Laramie with the United States in 1851. In 1858, the Tribe entered into a treaty with the United States in which the Tribe ceded and relinquished "all the lands now owned, possessed, or claimed by them, wherever situated, except four hundred thousand acres thereof." Treaty with the Yankton Sioux art. 1, Apr. 19, 1858, 11 Stat. 743, II KAPP 776 ("1858 Treaty"). Like the 1855

Treaty with the Chippewas, the 1858 Treaty ceded and conveyed land to the United States, but was silent as to usufructuary rights.

Additionally, the surrounding circumstances and legislative history of the 1858 Treaty do not show the clear intent necessary to abrogate the Tribe's usufructuary rights in the 1851 Treaty territory. Although events surrounding the 1858 Treaty indicate that the amount of available wild game was decreasing, and the 1858 Treaty itself indicates that Tribal members were to cultivate land within the new treaty territory, there is no evidence indicating that Tribal members were to cease hunting and fishing and rely solely on agriculture. Tribal members likely intended to continue supporting themselves in part through their usufructuary rights in the 1851 Treaty Territory. Because "doubts concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the tribe," the 1858 Treaty cannot be read to extinguish the Tribe's usufructuary rights in the 1851 Treaty Territory. *Or. Dep't of Fish and Wildlife v. Klamath Indian Tribes*, 473 U.S. 753, 766 (1985); *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 194 n.5, 196, 200.

Thus, the 1858 Treaty language ceding and relinquishing the Tribe's possessory interest in the 1851 Treaty territory and the circumstances surrounding the 1858 Treaty were insufficient to terminate the Tribe's usufructuary rights in the 1851 Treaty Territory. This holds true even for the usufructuary rights not expressly reserved by the 1851 Treaty. *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (holding that even though the 1854 Treaty did not discuss hunting and fishing rights, these rights were not abrogated by the Termination Act of 1954).

Finally, the Treaty of April 29, 1868, 15 Stat. 635, II KAPP 998 ("1868 Treaty"), and the Act of March 2, 1889, ch. 405, 25 Stat. 635 ("1889 Act"), do not affect this

analysis. First, the Tribe was not a signatory to either. Additionally, neither the 1868 Treaty nor the 1889 Act even mentions the Tribe because by this time, the Tribe already had a separate reservation. Thus, the negotiations did not include the Tribe, and the Tribe was unaffected by the 1868 Treaty or 1889 Act. Moreover, even if it could be held that these laws somehow did involve the Tribe, these laws would be insufficient to strip the Tribe of its usufructuary rights in the 1851 Treaty Territory because they contain no express language to that effect. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) ("termination of treaty-recognized rights by subsequent legislation must be by *explicit* statement or must be *clear* from the surrounding circumstances or legislative history").

While the Tribe ceded and conveyed to the United States its title to and possession of the 1851 Treaty Territory, the Tribe maintained and continues to maintain its usufructuary rights in those lands. These property rights exist regardless of whether they have been specifically adjudicated, therefore the Commission committed reversible error in failing to consider them.

## X. THE COMMISSION ERRED WHEN IT DECIDED THAT TRIBES SHOULD NOT BE TREATED AS LOCAL GOVERNMENTAL UNITS, AND THAT NO PERMIT CONDITION REQUIRED TRANSCANADA TO CONSULT WITH TRIBES.

Finally, the Commission erred when it decided that tribes should not be treated as local governmental units and when it found that no permit condition required TransCanada to consult with tribes about the proposed pipeline. AR 031690. In considering whether the Commission erred when it concluded that the Tribe is not a "local governmental unit" under Condition 6, the Circuit Court erroneously affirmed the Commission, noting in its Order that while the Tribe is a sovereign nation within the

bounds of the United States, it is not a local unit of government within the State of South Dakota's government structure. Regardless of the Tribe's relation to South Dakota's government structure, the Tribe remains a local governmental unit under Condition 6, and the decision of the Circuit Court should be reversed.

TransCanada mischaracterizes the Tribe's arguments, stating that the Tribe contends that TransCanada had an obligation to consult with the Tribe as part of the certification proceedings. TC Br. 37-38. The Tribe's actual position is that it qualifies as a local governmental unit under Condition 6,[8] and has meaningful local knowledge under Condition 34,[9] requiring TransCanada to consider the Tribe's views and local knowledge.

The Commission argues in its brief and in its decision granting certification that because Condition 6 "does not specify Tribes," they are not local governmental units. PUC Br. 29-30. TransCanada argues that because the Tribe is a sovereign government[10] and not a political subdivision of the state, it cannot be a local governmental unit. TC Br. 38. These arguments are fatally flawed, reading restrictions into Condition 6 that do not exist and that contravene proper statutory interpretation.

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[8] Condition 6 requires TransCanada to "advise the Commission and all affected...local governmental units prior to implementing" changes to the route. *Amended Final Decision and Order; Notice of Entry, In the Matter of the Application by TransCanada Keystone Pipeline, LP for a Permit Under the South Dakota Energy Conversion and Transmission facilities Act to Construct the Keystone XL Project*, HP09-001, at 26.

[9] Condition 34 requires TransCanada to "seek out and consider local knowledge, including the knowledge of...local landowners and government officials" in "its continuing assessment and evaluation of environmentally sensitive and high consequence areas." *Id.* at 34-35.

[10] TransCanada also cites case law describing tribes as domestic dependent nations subject to the purported plenary power of Congress. These characterizations of tribes are irrelevant to the questions posed in this appeal, and if anything, support the fact that, as a "sovereign pre-existing the Constitution," a tribe can surely be a local unit of government.

Condition 6 stems from the requirements in SDCL 49-41B-22(4),[11] which obligates TransCanada to prove that the facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government. Nowhere in the language of Condition 6 or the statute is there support for a determination that a "local unit of government" must be part of the state of South Dakota's government structure. Tribes are, among other things, units of government. Where the legislature wanted to require that a local unit of government be limited to subdivisions the State of South Dakota, language was included to make this distinction. Therefore, here, where there is no distinction, local units of government include tribes.

In other places in the South Dakota Codified Laws, general references to local units of government are defined broadly to include units of government outside of the state of South Dakota's government structure. SDCL 34A-6-61(3) ("'Local unit of government,' a county, municipality, school district, special district or other political subdivision of the State of South Dakota *or a similar unit of government of another state or nation*") (emphasis added); 59A-9-102(45) ("'Governmental unit' means a subdivision, agency, department, county, parish, municipality, *or other unit of the government of the United States, a state, or a foreign country*") (emphasis added); 38-7-2(6) ("'Government' or 'governmental,' the government of this state, the government of the United States, and any subdivision, agency, or instrumentality, corporate or

[11] Again, the Tribe is not attempting to relitigate TransCanada's permit, but arguing that it fails to continue to comply with the permit conditions, specifically Condition 6.

otherwise, of either of them") (emphasis added). Clearly, TransCanada's claim that a political subdivision of the State is the common understanding of local government fails.

Where the legislature intended to limit application of statutes to only governments that are political subdivisions of the State, express language was used to make this distinction.[12] SDCL 38-7-2(1) ("'Agency of this state,' the government *of this state* and any subdivision, agency, or instrumentality, corporate or otherwise, of the government *of this state*" (emphasis added)); 59-11-2(3) ("'Domestic entity,' an entity whose internal affairs are governed by the law *of this state*" (emphasis added)); 57A-9-102(2) ("'Account'...means...operated or sponsored by a state, governmental unit *of a state*, or person licensed or authorized to operate the game by a state or governmental unit *of a state*" (emphasis added)). Because SDCL 49-41B-44(4) fails to specify that it is limited to subdivisions of the State, it includes tribes in its application. This informs the proper interpretation and application of Condition 6, which also necessarily includes tribes.

TransCanada also argues that whether the Tribe is "affected" is questionable. The Tribe (headquartered in Wagner, South Dakota, not Marty) is 45 miles from the path of the proposed pipeline, but this is a tiny distance relative to its remoteness and the impacts of the man camps. The man camps will be located in remote areas and the entertainment, services, and negative impacts from the camps will not be limited to the path of the pipeline; they will expand and harm the Tribe. Interestingly, TransCanada and the

[12] SDCL 23A-45-9 is the Criminal Procedure chapter, defining unit of local government as a chartered governmental unit, county, township, municipality, and any other subdivision of the state which may enforce its ordinances, bylaws, or regulations by bringing a court action which may result in a fine or imprisonment being imposed on the defendant thereof. Criminal procedure and jurisdiction are uniquely state-specific, whereas impacts of projects are not, therefore the statute at issue in this appeal should be interpreted broadly.

Commission did not oppose the Tribe's *Application for Party Status* in which it asserts it is a sovereign government whose ancestral and treaty lands include the proposed pipeline corridor. AR 000321. The pipeline route crosses the traditional homeland of the Tribe since time immemorial; to argue the Tribe is not affected and does not have meaningful local knowledge is ignorant and incorrect. The Commission therefore committed reversible error in its findings and decision.

## 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 2nd day of January, 2018.

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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 7,473 words as determined by reliance on Microsoft Word.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of January 2018, I served electronically via email a true and correct copy of the foregoing on the following:

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