IN THE SUPREME COURT OF SOUTH DAKOTA

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

Case No. 28333

APPELLANT'S BRIEF

FOR DAKOTA RURAL ACTION

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

Robin S. Martinez, *admitted pro hac vice*
The Martinez Law Firm, LLC
1150 Grand Blvd., Suite 240
Kansas City, Missouri 64106
816.979.1620
robin.martinez@martinezlaw.net

ATTORNEYS FOR DAKOTA RURAL ACTION

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Jurisdictional Statement

Dakota Rural Action ("**DRA**") appeals the Order and Memorandum Decision ("**Order**") entered by the Circuit Court for the Sixth Judicial District of the State of South Dakota on June 19, 2017 in Case No. 16-33. The Order resulted from an appeal to the Circuit Court of the Final Decision and Order Finding Certification Valid and Accepting Certification (the "**PUC Order**") entered by the South Dakota Public Utilities Commission (the "**Commission**") on January 21, 2016 in favor of TransCanada Keystone Pipeline, LP ("**TransCanada**") in Commission Docket No. HP14-001. DRA filed its Notice of Appeal on July 19, 2017. The Order constitutes a judgment or final order by the Circuit Court from which appeal is allowed under SDCL § 15-26A-3.

Statement of Legal Issues

A. Whether the Circuit Court erred in affirming the Commission's decision that TransCanada was not required to present substantial evidence in support of its petition for certification under SDCL § 49-41B-27.

SDCL § 49-41B-27 requires that TransCanada certify to the Commission that it continues to meet the conditions of the Original Permit.[1] How this statute is implemented is a core question in this case. The Original Permit contained 50 basic conditions, which combined with various sub-conditions, included 107 separate conditions. In the hearing before the Commission, TransCanada only presented evidence concerning compliance with six conditions, and the Commission staff presented evidence relating to only four

[1] "Original Permit" references the Commission's Amended Final Decision and Order of June 29, 2010 in Docket HP09-001.

conditions. TransCanada and the Commission staff take the remarkable position that the statute only requires notice to the Commission in order to obtain certification. DRA and other intervenors argue to the contrary. If the statute is to have any meaning, companies seeking to certify continued compliance with a permit must present evidence of compliance. TransCanada's failure to present evidence demonstrating compliance with the conditions of the Original Permit, and the Commission blindly accepting the company's speculative assurances that it might comply at some point in the future resulted in a decision by both the Commission and the trial court that was clearly erroneous and against the weight of the evidence. In its decision, the trial court improperly inverted the burden of proof by holding that DRA and other intervenors must affirmatively prove TransCanada could not comply with the conditions of the Original Permit.

Relevant cases and statutory authority:
Sopko v. C & R Transfer Co., 1998 S.D. 8, 575 N.W.2d 225 (S.D. 1998).
Tripp State Bank of Tripp v. Jerke, 45 S.D. 580, 189 N.W. 514 (S.D. 1922).
Frank Stinson Chevrolet, Inc. v. Connelly, 356 N.W.2d 480 (S.D. 1984).
SDCL § 49-41B-27.
SDCL § 1-26-36.

B. Whether the Circuit Court erred in affirming the Commission's decision that evidence on the administrative record warranted granting certification under SDCL § 49-41B-27.

Testimony before the Commission established serious credibility problems with respect to TransCanada's witnesses. When the evidence is viewed as a whole, TransCanada failed to meet its burden of proof.

Relevant cases and statutory authority:

Sopko v. C & R Transfer Co., 1998 S.D. 8, 575 N.W.2d 225 (S.D. 1998).

C. Whether the Circuit Court erred in affirming the Commission's decision that communications between Commission staff and TransCanada constituted confidential attorney communications not subject to discovery by DRA.

While this question appears rather narrow, it has significant implications that go directly to the role of the Commission and its staff as a regulatory agency for the State of South Dakota. During the Commission's proceedings, DRA sought discovery of communications between the Commission staff and TransCanada. Following objections and a motion to compel, the Commission refused to permit discovery of those communications on the basis that they constituted privileged attorney work product. The trial court upheld the Commission's determination on the basis that the Commission staff was a separate party to the proceedings and that a Chinese wall existed between the Commission and its staff with respect to the proceedings. This misses the mark. The Commission's staff are government employees of a regulatory agency. The public is entitled to access communications between a regulatory agency and the companies it purports to regulate regardless of an alleged separation between staff and the Commissioners. This is a critical issue because if communications between a regulatory agency and regulated industries are not open and transparent, the public has no way of determining whether the agency has been subjected to regulatory capture.

Relevant cases and statutory authority:

Voorhees Cattle Company, LLP v. Dakota Feeding Company, LLC, 2015 S.D. 68, 868 N.W.2d 399 (S.D. 2015).

D. Whether the Circuit Court erred by affirming the Commission's decision granting certification notwithstanding numerous procedural defects in the proceedings before the Commission.

The Commission's proceedings were plagued with procedural defects that resulted in a process that erroneously limited discovery and excluded both witnesses and exhibits. The most significant errors were the Commission's limitation on the scope of discovery, its exclusion of witness testimony, and its exclusion of a significant number of DRA's exhibits. Early in the proceedings, the Commission granted TransCanada's request to limit the scope of discovery to the conditions of the Original Permit. This restriction resulted in a denial of DRA's and other intervenors' due process rights.

Relevant cases and statutory authority:
Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N.W.2d 17, 19 (S.D. 1989).
SDCL § 15-6-26(b).

Statement of the Case and Facts

A. Introduction.

This is a case of first impression and one of national significance. To say that proposed construction of the Keystone XL Pipeline ("**KXL**" or the "**Project**") is controversial would be an understatement. The proceedings in South Dakota are one piece of a larger national argument about KXL and other oil pipelines. That debate encompasses the role the fossil fuel industry plays in global climate change, to the desirability of continuing to sink costs into fossil fuel infrastructure as our economy increasing shifts towards an emphasis on development of clean renewable energy, to the legitimate environmental risks posed by an industry whose prime directive appears to be

putting pipe in the ground as fast and cheap as possible – while worrying about the consequences later.

More specific to South Dakota, this case raises serious questions of first impression concerning the role of the Commission in permitting hydrocarbon pipelines, interpretation of the South Dakota statutes governing certification of compliance with permits for pipelines, the relationship between the Commission, its staff, and the industries it purports to regulate, and the threshold standards a company such as TransCanada must meet when seeking to route an environmentally-destructive project through private property in South Dakota. Beyond these questions, this case is characterized by the hubris of a large multinational corporation displaying a sense of entitlement with respect to taking land from farmers and ranchers for its own private purposes, the apparent unwillingness of a state regulatory agency to do much other than shield that corporation from the legitimate concerns raised by landowners and citizens about a project with significant implications for the state's land and water resources, and significantly, the effect of the Commission's actions in creating a virtually unlimited encumbrance on the property rights of individuals whose farms and ranches are within the proposed path of the KXL pipeline.

This struggle played itself out via an underlying challenge made by DRA and other intervenors to TransCanada's petition for certification under SDCL § 49-41B-27 of the Commission's Amended Final Decision and Order of June 29, 2010 (the "**Original Permit**"), for construction of the proposed Keystone XL Pipeline through South Dakota. The Original Permit was subject to fifty separate conditions, many with multiple sub-conditions. The statute provides in pertinent part that:

> "Utilities which have acquired a permit in accordance with the provisions of this chapter may … **if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued**." SDCL § 49-41B-27 (*emphasis added*).

Because construction of the Project had not commenced within four years of obtaining the Original Permit, TransCanada was required to certify to the Commission that "such facility continues to meet the conditions upon which the permit was issued." The Commission proceedings culminated in a nine-day evidentiary hearing held on July 27 through August 1, and August 3 through August 5, 2015 (AR 031683)[2].

The proposed KXL Pipeline would primarily be used to transport tar sands crude oil extracted from the Western Canadian Sedimentary Basin from a hub near Hardisty, Alberta, Canada to delivery points in Oklahoma and Texas (AR 009173, referencing *U.S. State Dept. Final Supplemental Environmental Impact Statement* ("**FSEIS**"), pp. ES-6-7). In South Dakota, the proposed KXL Pipeline would cross portions of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman and Tripp counties (AR 031684-031685).

Should the Court desire a detailed procedural history of the proceedings before the Commission, a comprehensive history is set forth in the PUC Order. The transcripts of hearing held before the Commission, along with the parties' exhibits, as well as the transcript of the hearing before the Circuit Court, are filed with the Court as part of the record on appeal. Because of the breadth of information presented in these proceedings, this statement of facts will focus on items relevant to the issues raised by DRA on appeal.

[2] "AR" references the Administrative Record as filed by the Commission in the proceedings before the Circuit Court.

B. The Original PUC Permit.

The Original Permit was issued on June 29, 2010 (AR 031684) and contained fifty separate conditions and multiple sub-conditions, each of which TransCanada had to certify that it could continue to meet. Some of the more significant conditions relevant to matters raised by DRA on appeal include (by condition number): (***1***) Compliance with all applicable laws and regulations with respect to construction and operation of the Project (Original Permit, p. 25); (***2***) Obtain and thereafter comply with all applicable federal, state and local permits – including the Presidential Permit (Original Permit, p. 25); (***3***) Comply with and implement the recommendations set forth in the US State Department's final Environmental Impact Statement (Original Permit, p. 25); (***13***) Comply with all mitigation measures set forth in TransCanada's Construction Mitigation and Reclamation Plan ("**CMR Plan**") (Original Permit, p. 27); (***16***) Repair and restore property damaged by construction to their preconstruction condition (Original Permit, p. 28); (***25***) Suspend construction when weather conditions are such that construction activities will cause irreparable damage (Original Permit, p. 33); (***26***) Reclamation and clean-up along right-of-ways must be continuous and coordinated with ongoing construction (Original Permit, p. 33); and (***31***) Construct and operate the Project in the manner described in TC's application and in accordance with the conditions of the Original Permit and a Special Permit, if issued, by the U.S. Pipeline and Hazardous Materials Safety Administration ("**PHMSA**") (Original Permit, p. 34).

During the proceedings before the Commission, DRA explored a number of conditions of the Original Permit to determine whether TransCanada could continue to comply with them. The Commission made several findings in the PUC Order which were challenged in the Circuit Court by DRA and other intervenors. While some of the

findings are mere statements of fact (Findings No. 1-7 identify parties and witnesses, among other things) others are clearly erroneous based upon evidence on the record. Unfortunately, the Circuit Court compounded the Commission's error by failing to take into account the evidence on the record.

C. Significant Erroneous Findings; Clear Error by the Commission and the Circuit Court.

Because of the voluminous record in this case, a detailed discussion of each and every clearly erroneous finding made by the Commission and adopted by the Circuit Court is impossible given page limitations. However, there are several key findings that serve to illustrate that the Commission clearly erred in finding that TransCanada was in compliance with the conditions of the Original Permit. To illustrate the Commission's error (and the Circuit Court's acquiescence in upholding clearly erroneous findings) we will focus on five key areas of testimony: (1) TransCanada's admissions that it does not deem federal pipeline safety conditions imposed by the U.S. Pipeline and Hazardous Materials Safety Administration ("PHMSA") as binding on the company, (2) serious flaws in TransCanada's risk analysis, (3) TransCanada's history of construction and safety issues with respect to pipelines, as illustrated by the failure of cathodic protection and issues with the use of fusion-bonded epoxy necessary to prevent pipeline corrosion, (4) TransCanada's failure to appropriately reclaim farmland as required by permit conditions, and (5) TransCanada's failure to appropriately consider geological risks threatening the integrity of its proposed Project.

1. Special Conditions imposed by PHMSA are deemed "voluntary" by TransCanada.

Findings No. 18 and 20 of the PUC Order state that TransCanada both adopted and promised to meet special conditions developed by PHMSA as set forth in Appendix Z of the FSEIS (AR 031685). The Commission's findings are interesting when viewed in the context of the record. TransCanada's employee Meera Kothari[3] testified before the Commission that Appendix Z of the FSEIS contains fifty-nine special conditions PHMSA (the "**PHMSA Conditions**") required with respect to the proposed KXL Pipeline (AR 025544-025545). Condition No. 2 of the Original Permit mandates TransCanada's compliance with any conditions imposed by any permitting agency, including PHMSA, and Condition No. 2 requires that TransCanada comply with and implement the recommendations set forth in the FSEIS. Contrary to this regulatory requirement, Kothari testified that TransCanada would only need to comply with the PHMSA Conditions if it chose to do so. Her explicit testimony was that TransCanada has "voluntarily adopted to apply those Permit Conditions …" (AR 025583-025594), despite her admission that PHMSA had not notified TransCanada that the PHMSA Conditions were voluntary in nature (AR 025585), and despite the fact compliance was required by Condition No. 3 of the Original Permit. A promise to comply is not a showing of continued compliance.

2. TransCanada's risk analysis concerning the likelihood of spills and leaks was fatally flawed; facts ignored by the Commission and Circuit Court.

A second significant factor that constituted clear and manifest error by the Circuit Court and the Commission relates to the risk analysis TransCanada performed on the KXL project. The question of risk analysis is a significant issue with respect to pipeline

[3] Meera Kothari was TransCanada's lead project engineer for the KXL Pipeline project. She is not licensed as an engineer in the United States (AR 025603, 025681).

construction and permitting, as it goes to the heart of the problem with crude oil pipelines – making an honest assessment of the likelihood of a pipeline leak or spill. Finding 25 of the PUC Order states that a spill from the proposed KXL Pipeline in a High Consequence Area ("**HCA**") would occur no more than once every 420 years (AR 031685). This claim is clearly erroneous. TransCanada's risk analysis was performed by Heidi Tillquist, an environmental toxicologist with no formal training in risk analysis whose testimony demonstrated a lack of knowledge of basic principles of risk analysis. (TR: 850)[4]. Tillquist's testimony revealed that TransCanada's risk analysis was seriously flawed, and that the company had not even completed its engineering analysis for the Project (TR: 825-826).

Testimony before the Commission revealed significant flaws in TransCanada's purported ability to comply with the Original Permit. This was demonstrated by an admission that the company's choice of statistical methodologies used to calculate the risks posed by the KXL Pipeline were, in part, designed for public relations purposes (TR: 844-847). Testimony before the Commission revealed that TransCanada's risk analysis was based largely on analysis of the PHMSA database (TR: 825-828), that it excluded risk of spills at tanks and terminals (TR: 832), that geographical variances were not taken into account (TR: 861-863), that differences in construction and operation standards between pipeline companies reporting in the PHMSA database (TR: 834-835) were not factored into the risk analysis, and that TransCanada failed to account for an increased likelihood of adverse weather events (TR: 867). These factors were ignored by

[4] The designation "TR" references the transcript of the evidentiary hearing held before the South Dakota Public Utilities Commission in Docket No. HP14-001, which is part of the Record on Appeal in these proceedings.

both the Commission and the Circuit Court and are significant to the point where both the PUC Order and the Circuit Court's Order were clearly erroneous.

Further undercutting the Commission's findings (and the Circuit Court's Order) concerning the likelihood of spills, testimony before the Commission revealed there were 14 spills during the first year TransCanada operated its base Keystone pipeline (TR: 1005-1006). In testimony that defied credibility, a TransCanada witness claimed a pipeline that spills 14 times in its first year of operation is "safe" (TR: 1007).

Illustrating the risks posed, testimony was presented to the Commission concerning a 400-barrel crude oil spill on the base Keystone pipeline at the Ludden Pump Station in May 2001. This spill was the largest in that pipeline's first year of operation (*see*, DRA Hearing Exhibit 172). TransCanada's lead project engineer testified about the Ludden spill, indicating that it involved failure of an "above-ground component, such as a fitting" (ROA 025533). TransCanada was unwilling to guarantee that a larger spill would not happen if the KXL Pipeline were constructed (ROA 025677-025678).

This prior point was of significant concern because TransCanada's witness was unaware of calculations performed by a third-party consultant that under the latest detection equipment plan provided to the US State Department by TransCanada, a spill of approximately 1,400 barrels of crude oil could occur for two hours before being detected electronically by TransCanada's systems (ROA 025679-025680) (*see, also,* FSEIS, Appendix B, 3.0(1)(g), p. 28). 1,400 barrels of crude oil consists of 58,800 gallons.

These facts are significant because they demonstrate that the Commision's Findings 18 and 20 in the PUC Order concerning the likelihood of a spill were not based on credible, substantial evidence and were clearly erroneous in light of the entirety of the

evidence. The fact that the Circuit Court chose to ignore these significant issues likewise compounds the Commission's error. TransCanada's witness testified that calculation of a risk of a KXL spill was conservative (2.2 spills over 10 years of pipeline operation), yet the actual number of spills on the base Keystone pipeline greatly exceeded these "conservative" estimates (TR: 855-856, 860).

A critical factor ignored by the Commission and the Circuit Court is that risk assessments are required by PHMSA for HCAs (Original Permit, Condition 14; 49 CFR 195.452; FSEIS 3.0(14), p. 33). In the FSEIS, State Department analysts noted the "large differences" between "system components and facilities that comprise the discrete elements [which] cast uncertainty on the use of aggregated metrics for risk" and equally on the use of aggregated "professional engineering judgment." (FSEIS 3.0(26), p. 38). For example, the FSEIS observed that seals and seats have a "higher potential for spills than (on equipment & pumps)" (FSEIS, Appendix B, 3.0(11)(a), p. 32). The FSEIS indicated that due to "dominance" of risks "associated with mainline pipe and other system components (other than mainline valves or tanks)" the risk assessment required by 49 CFR § 195.452 should address both "to effectively reduce risk" (FSEIS 3.0(20a), p. 35). Contrary to the Commission's findings, TransCanada provided no evidence to demonstrate compliance with these requirements. On this basis alone, the PUC Order confirmed by the Circuit Court's Order was clearly erroneous in that TransCanada failed to demonstrate compliance with the conditions of the Original Permit.

3. Evidence concerning flaws in TransCanada's pipeline construction relating to the use of cathodic protection and fusion-bonded epoxy were ignored by the Commission and the Circuit Court.

Both the Commission and the Circuit Court ignored evidence concerning flaws in TransCanada's pipeline construction. This resulted in both the PUC Order and the Circuit Court's Order being clearly erroneous. Significant testimony before the Commission concerned the use of fusion-bonded epoxy ("**FBE**") coatings used on pipelines. Finding 28 of the PUC Order states that TransCanada has thousands of miles of the same grade of pipeline steel coated FBE already produced for the KXL Pipeline, and references only one instance of corrosion found to have occurred at a location in Missouri (AR 031686). The proclivity of steel pipe to corrode when buried is critical to assessing pipeline safety and the risk posed to land and water resources from a potential leak or spill. Because this was a significant issue, the role of cathodic protection and FBE in construction of the proposed KXL Pipeline was explored in testimony before the Commission. Cathodic protection is a technique used to control the corrosion of a metal surface near another metal surface by making it the cathode of an electrochemical cell. FBE is a coating applied to the outer surface of the metal pipe in order to protect it from corrosion from contact with the earth after burying it.

Development of the facts of the case involved exploration of a serious incident involving TransCanada's base Keystone pipeline in Missouri (TR: 1027). The incident, described as a "near miss," involved discovery of corroded areas on the walls of buried and in-service pipe, including areas where the pipeline wall nearly corroded through within two years of the being installed (TR: 1026).

Key evidence presented to the Commission included the *Study of Root Cause and Contributing Factors to the Keystone Pipeline Corrosion Anomaly - Final Report of TransCanada 2-13-13* (AR 024360-024361, 024371) (the "**Root Cause Study**"). The

Root Cause Study indicated that at one area the peak depth of an anomaly (corroded area of pipe) was "96.8%," there were 6 anomalies caused by external corrosion (AR 024369-024370). Testimony from TransCanada before the Commission was that the "root cause" of the "corrosion anomaly was related to cathodic protection interference" (TR: 1026, 1029). Critically, TransCanada admitted that "under the regulations, the cathodic protection system doesn't have to be operational when a pipeline goes into service" (AR 024180). This testimony raised serious concerns about the safety of TransCanada's pipeline construction methods – concerns that were ignored by the Commission and subsequently the Circuit Court.

In testimony before the Commission, TransCanada's witness acknowledged that the impact of corroded areas of pipe of the depth and size shown in the Root Cause Study was such that if the corrosion went through the remaining outer wall of the pipeline, then "obviously it would create a leak" (AR 024360). This "near miss" in Missouri caused an emergency shutdown of the base Keystone pipeline for four days (AR 024372). A potential cause of this incident was the existence of a shared utility corridor with another pipeline, which risks acceleration of corrosion, hence underscoring the need for robust cathodic protection to prevent such an eventuality. TransCanada's witness claimed "no similar situation could exist in South Dakota because there are no shared utility corridors" (TR: 1025). This testimony was patently false, as another TransCanada witness testified the proposed KXL Pipeline route crosses a metal pipeline of Mni Wiconi water transportation system (AR 024181-024182; also AR 024763-024764), as well as a 50-year old cast iron water pipe for the City of Colome's water system (AR 024257-024257).

In addition to testimony concerning the failure of cathodic protection, TransCanada's quality control problems with the use of FBE were ignored by the Commission (and the Circuit Court, with its affirmation of the PUC Order), resulting in findings that were clearly erroneous.

A TransCanada witness testified that FBE is applied to pipe at pipe coating mills and is subject to degradation by ultraviolet light (AR 25895-25896); yet that witness, who was the company's lead project engineer on the KXL project was unaware of any inspections performed on the FBE prior to the KXL pipe being moved to open yard storage (AR 25896), and that equipment used to check the thickness of FBE did not detect instances where FBE disbonds from the pipe (AR 25897).

Other witnesses provided information concerning degradation of FBE. A Commission staff witness, David Schramm,[5] testified that concerning the effect of UV light and weather on exposed pipe, underscoring the need for effective FBE coating (AR 025982-025983). Cross examination of witnesses revealed that for safety purposes, FBE should be applied within six months of a pipe being manufactured (AR 026011-026012), yet a TransCanada witness indicated that the company did not act for at least one year to one-and-a-half years before applying FBE to pipe (AR 25655).

Evidence before the Commission revealed that TransCanada's practices with respect to quality assurance and maintaining the integrity of the pipe it places in the ground are, at best, suspect. Testimony concerning both the failures of cathodic protection and inadequate protection of pipeline coatings shows that findings in the PUC

[5] David Schramm of EN Engineering was hired at the taxpayers' expense to provide independent analysis and testimony in the KXL Pipeline proceedings on behalf of the Commission's staff. At the time of the hearing, EN Engineering listed TransCanada among its clients. (AR 026498-026499).

Order were clearly erroneous, and the Circuit Court erred in accepting the Commission's findings.

4. TransCanada's history of failure to comply with required land reclamation efforts.

A key issue for South Dakota's farmers and ranchers is the requirement that pipeline companies effectively reclaim and restore land damaged during construction. Finding 41 of the PUC Order concerned land reclamation. Condition 16(m) of the Original Permit requires TransCanada to re-seed all land affected by pipeline construction with comparable grasses and native species. The Commission went to great lengths in its finding to attempt to contradict testimony by a DRA witness concerning TransCanada's ongoing failure, over a six-year period, to reclaim portions of land damaged during construction of the base Keystone pipeline (AR 031687). In making its findings, the Commission clearly erred as TransCanada was unable to controvert this critical evidence.

DRA's witness testified that even though the Commission required TransCanada to take into account weather conditions, the company's contractors used heavy machinery in wetlands area during heavy rains, causing tremendous damage (AR 026761-026762), and that efforts to re-seed property were haphazard, resulting in nothing but noxious weeds growing on the pipeline easement area (AR 026762-026763). Furthermore, in areas of the easement where crops are grown, heat from the pipeline affects the root structure of crops resulting in significantly reduced yields (AR 026793).

The PUC Order merely recites TransCanada's testimony that very few landowners remain who have reclamation issues, ignoring DRA's testimony that neighboring properties in the pipeline easement area were in the same poor condition

post-construction, yet those landowners simply chose not to follow up with TransCanada's obligations to them (AR 026798). Land reclamation is critical for South Dakota's farming and ranching families, yet the Commission clearly erred in making this key factual finding.

5. The Commission and Circuit Court clearly erred when they ignored critical evidence presented concerning geological risks affecting the integrity of the proposed KXL Pipeline.

The Commission heard extensive testimony concerning geological risks affecting the safety of the KXL project. This testimony was significant because it highlighted the fact that the proposed pipeline route traversed landslide-prone areas of South Dakota. Simply put, landslides and oil pipelines don't mix.

Findings 44-48 of the PUC Order specifically related to testimony presented by DRA's expert witness, a professor emeritus of geology at the South Dakota School of Mines (AR 031687-031688). Testimony included references to mapping from the US Geological Survey ("**USGS**") contained in the FSEIS, showing that the KXL Pipeline was routed through over 150 miles of Pierre Shale (AR 026403), areas characterized by the USGS as a "high landslide Hazard Area" (*see*, FSEIS, Volume 2, Chapter 3, 3.1 Geology, Figure 3.1.2-3, p. 3.1-29) due to its bentonite content. This was clearly contrary to TransCanada's witnesses – who were not expert geologists – who stated insisted that their Project would go through only 1.6 miles of areas prone to landslide risk (AR 025573-025574). Frankly, TransCanada's testimony was not credible and the Commission's blind acceptance of the company's account in the face of reality constituted clear error.

The importance of this testimony cannot be discounted. One of TransCanada's own witnesses admitted that landslide risk is an important safety consideration in routing a pipeline (AR 024709), and that the bentonite soils of the Pierre Shale posed risks (AR 024713). The risk of slope instability related to bentonite layers in South Dakota was further amplified by DRA's expert geologist (AR 026396), and one of TransCanada's witnesses finally admitted on cross examination that the company's routing maps did "obviously not" remove the pipeline from high landslide hazard areas (AR 024715).

The Commission clearly erred when it dismissed credible geological evidence presented by DRA's witness on direct examination and even admitted to by one of TransCanada's own witnesses on cross-examination. Instead, the Commission chose to rely entirely on conclusory statements from the flawed risk analysis presented by another TransCanada expert (an environmental toxicologist, not a geologist or geophysicist) to arrive at its findings that the risks posed by the Project were "highly unlikely." Findings 44-48 in the PUC Order are clearly erroneous and defy credibility. The Commission's findings in this regard constitute a willingness to turn a blind eye to facts in order to achieve a pre-ordained result. That constitutes reversible error.

Argument

A. Standard of Review

The Court has the power to reverse or modify agency decisions if "… substantial rights of the appellant[s] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are ... (3) [m]ade upon unlawful procedure; (4) [a]ffected by other error of law; (5) [c]learly erroneous in light of the entire evidence in the record; or (6) [a]rbitrary or capricious or characterized by abuse of discretion or

clearly unwarranted exercise of discretion." SDCL § 1-26-36. Additionally, the Court has the authority to fully review all decisions made by an administrative agency such as the Commission. *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc*. 2014 S.D. 64, ¶ 7, 853 N.W.2d 878, 881 (S.D. 2014).

In the underlying proceedings, the parties and Circuit Court devoted significant time discussing the concept of substantial evidence. DRA and other intervenors argued that TransCanada failed to present substantial evidence supporting its petition for certification. However, as correctly articulated by the Circuit Court, the core question is whether the PUC Order was clearly erroneous. *Sopko v. C & R Transfer Co.*, 1998 S.D. 8, ¶¶ 6-7, 575 N.W.2d 225, 228-229 (S.D. 1998). The critical point, however, is that the Court can still determine that the Commission's findings are clearly erroneous even if the Commission and the Circuit Court believe they are supported by substantial evidence. *Id*., citing 1 S. Childress & M. Davis, *Federal Standards of Review* § 2.07 at 2-44 (2nd ed. 1992). This Court articulated the principle clearly in *Sopko*, when it held that "[e]ven when substantial evidence supports a finding, reviewing courts must consider the evidence as a while and set it aside if they are definitely and firmly convinced a mistake has been made." *Id*., citing *W.R.B Corp. v. Geer*, 313 F.2d 750, 753 (5th Cir. 1963), *cert. denied* 379 U.S. 841 (1964).

With respect to review of the underlying record, the Court reviews the administrative decision essentially in the same manner as did the circuit court, reviewing the agency's findings "unaided by any presumption that the circuit court's decision was correct." *Kermmoade v. Quality Inn*, 2000 S.D. 81, ¶10, 612 N.W.2d 583, 586 (S.D. 2000).

The final issue DRA asks this Court to consider is novel and of first impression. The Circuit Court's Order summarily declined to consider it as a framework for decision making, but DRA suggests that this Court should give it due consideration. In effect, DRA argues the Commission is held to a higher standard with respect to its decision-making process under the principles of the public trust doctrine. The public trust doctrine holds that certain natural resources belong to all and cannot be privately owned or controlled because of their intrinsic value to each individual and society. Public governmental bodies such as the Commission are, in effect, held to be trustees, with a fiduciary duty owed to the public to safeguard those resources. "[T]he Public Trust Doctrine is a critically important reminder of the duty of government to preserve wildlife, to protect the public's right to enjoy and benefit from a diverse ecosystem, and the duty of courts to carefully scrutinize any attempts to abandon the public trust in those resources." *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal. App. 4th 1349 (2008) (quoting Carstens, *The Public Trust Doctrine: Could a Public Trust Declaration for Wildlife Be Next?* (2006) vol. 2006, No. 9, Cal.Envtl. L.Rptr. 1).

South Dakota explicitly recognized the public trust doctrine. In *Parks v. Cooper*, 2004 S.D. 27 ¶ 46, 676 N.W.2d 823, 848 (S.D. 2004), the Court held that "as matter of first impression, all water in South Dakota belongs to the people in accord with the public trust doctrine …" This principle in South Dakota extends back to the earlier part of last century, when in *Filsrand v. Madson,* 35 S.D. 457 (1915), the Court held that a riparian owner of water cannot interfere with "navigating, boating, fishing, fowling and like public uses" by the public. Interestingly, while not directly addressing the public trust

doctrine, the Court, in *State v. Schwartz*, 2004 S.D. 123 ¶ 52, 689 N.W.2d 430, 443 (S.D. 2004), stated:

> "[O]ur decision in *Parks v. Cooper* exhibits the type of deeply rooted regional issue—preservation of precious water resources through the public trust doctrine—that a court might take into account in examining a disputed provision of our constitution." *Id*.

DRA urges the Court to adopt the public trust doctrine to impose a heightened fiduciary standard on the Commission to protect South Dakota's environment and resources from potential damage from a pipeline leak or spill. The public trust doctrine has explicitly been extended to protection of the State's water resources – which would include its surface and groundwater. The same principle applies to protection of the State's land, including its soil, native grasses, and crops. DRA suggests that the application of the public trust doctrine means that the Commission should have set a higher bar for companies such as TransCanada, whose activities risk damaging the State's land and water resources. This Court should review the Commission's Order through the lens of the public trust doctrine in addition to the base-line statutory standard set under SDCL § 1-26-36.

B. The PUC Order and the Circuit Court's Decision Affirming that Order are Clearly Erroneous.

The PUC Order and the Circuit Court's Order should be reversed for a number of reasons – purely as a matter of law in light of the statutory requirements of SDCL § 1-26-36 – not even taking into account the heightened standard of review urged by DRA. The PUC Order was clearly erroneous in light of the entire evidence in the record, was based on unlawful procedure, violates the statutory provisions of South Dakota's Energy

Conversion and Transmission Facilities law, SDCL Chapter 49-41B, and contains numerous legal and factual errors warranting reversal.

1. TransCanada failed to meet its burden of proof in the proceedings before the Commission.

TransCanada's burden of proof is a key issue in this case. It is important because the parties have widely diverging views this Court needs to resolve as a matter of first impression.

The evidentiary record is clear. Under SDCL § 49-41B-27 TransCanada had to demonstrate that it could comply with all of the conditions imposed by Commission in the Original Permit. In a monumental act of hubris, TransCanada chose to only present evidence of compliance with six of the 50 conditions (107, including sub-conditions), and in its support of TransCanada, the Commission staff only presented evidence as to four conditions. Instead of meeting its burden of proof, TransCanada abandoned the playing field. In its effort to save TransCanada, the Commission then improperly shifted the burden of proof onto the intervenors. This inversion of a key legal principle underpins numerous findings set forth in the PUC Order and the Circuit Court's Order.

TransCanada unequivocally bears the burden of proof in advancing its petition for certification under SDCL § 49-41B-27. This principle is long-standing under South Dakota law, which has affirmed "the well-established rule that, "He who asserts an affirmative has the burden of proving the same."" *Tripp State Bank of Tripp v. Jerke*, 45 S.D. 580, 189 N.W. 514 (S.D. 1922). Further, the Commission's own rules state that "[i]n any contested case proceeding … petitioner has the burden of proof as to factual allegations which form the basis of the … application, or petition …" S.D. Admin. R. 20:10:01:15.01 (2006).

TransCanada is the petitioner and submitted a petition to the Commission pursuant to SDCL § 49-41B-27 alleging that it continues to meet the conditions upon which the Original Permit was issued. The petition asks the Commission to make a factual determination that it can continue to meet the conditions upon which the Original Permit was issued. That petition was opposed by the intervenors, including DRA. Hence, TransCanada has the burden of proving that its proposed KXL project continues to meet the conditions upon which the Original Permit was granted.

Upon conclusion of evidence presented to the Commission, counsel for Intervenor Standing Rock Sioux Tribe, joined by DRA and other intervenors, moved for immediate dismissal of TransCanada's petition for certification (AR 027338). As a visual aid to assist the Commission, counsel provided a "tracking table of non-evidence" which tracked each and every permit condition which had been the subject of testimony by TransCanada or Commission staff witnesses during the course of the proceedings (AR 027339). The import being that of the fifty conditions of the Original Permit (which contained 107 separate and distinct requirements), during the entire course of the proceedings, TransCanada presented limited and insufficient evidence only as to its purported ability to continue to comply with six conditions (specifically, Conditions Nos. 1, 2, 6A, 13, 15, and 31). Commission staff witnesses presented evidence as to four conditions (Conditions Nos. 1, 13, 15 and 31). (AR 27340).

In what appears to be an attempt to save TransCanada from a fatal self-inflicted wound, the Commission came to the company's rescue by first improperly inverting the burden of proof, and second, by accepting (in Conclusion of Law No. 8 of the PUC Order

(AR 031694)) the premise that a conclusory statement by TransCanada that it "certified" that it could continue to meet the conditions of the Original Permit was sufficient.

The Commission went even further. In arguments before the Circuit Court, the Commission's counsel took the position that the requirements of SDCL § 49-41B-27 were such that TransCanada had to merely tell the Commission that it was in compliance with the Original Permit – without having to present any evidence of compliance at all. Commission counsel went so far as to say that the "statute lets the fox guard the henhouse." (Transcript of 3-8-17 Circuit Court Hearing, p. 122). If that is the low bar the Commission has set for itself, it might as well not exist.

The PUC Order, as affirmed by the Circuit Court, erroneously shifted the burden of proof to the intervenors. For example, Finding No. 31, which relates to approximately 41 separate requirements within the 50 conditions of the Original Permit, recites that "[n]o evidence was presented that Keystone cannot satisfy any of these conditions in the future". (AR 031686). Likewise, Findings Nos. 32, 33, 34, 37, 42 and 68 also recite, in somewhat similar language, that "no evidence was presented that Keystone cannot continue to comply with this condition." (AR 031686-031687, 031691).

The Commission and Circuit Court attempted to justify this improper burden shifting by drawing a distinction between the burden of proof and the burden of production. This misses the mark. TransCanada failed to present any evidence as the vast majority of the Original Permit conditions. Even if DRA accepts the Commission's and Circuit Court's position (which it does not), the fact that TransCanada presented no evidence provides ample grounds to conclude that the company failed to meet its burden of proof. The Commission and Circuit Court clearly erred in attempting to shift the

burden of proof to the intervenors given "… the general rule that the burden of proof falls on the party alleging the affirmative of an issue." *Frank Stinson Chevrolet, Inc. v. Connelly*, 356 N.W.2d 480, 482 (S.D. 1984).

This Court has noted that the test for determining which party has the burden of proof, "is found in the result of an inquiry as to which party would be successful if no evidence were given, the burden being on the adverse party." *Frank Stinson Chevrolet, supra*; (citing *Bishop Buffets, Inc. v. Westroads, Inc.*, 202 Neb. 171, 274 N.W.2d 530 (1979); *Fortgang Bros., Inc. v. Cowles*, 249 Iowa 73, 85 N.W.2d 916 (1957)). TransCanada had the burden of demonstrating that it could continue to comply with the conditions of the Original Permit. In the absence of any evidence, certification could not have been granted. SDCL § 49-41B-27 is clear that it is up to the applicant to meet the burden. TransCanada failed to do so and the PUC Order and Circuit Court's Order should be reversed.

2. The PUC Order and its affirmation by the Circuit Court Order were clearly erroneous in that the underlying findings are not supported by evidence on the record.

In the preceding section of this brief setting forth the facts of the case, DRA described five key areas where the Commission clearly erred in finding that TransCanada was in compliance with the conditions of the Original Permit. In each of these instances, the evidentiary record clearly demonstrates TransCanada's unwillingness or inability to comply with the Original Permit conditions, or simply sets forth an instance where TransCanada chose to present no evidence of compliance.

The five key areas of evidence in the hearing before the Commission included (1) TransCanada's admissions that it does not deem federal pipeline safety conditions

imposed by PHMSA as binding on the company, (2) serious flaws in TransCanada's risk analysis, (3) TransCanada's history of construction and safety issues with respect to pipelines, as illustrated by the failure of cathodic protection and issues with the use of fusion-bonded epoxy necessary to prevent pipeline corrosion, (4) TransCanada's failure to appropriately reclaim farmland as required by permit conditions, and (5) TransCanada's failure to appropriately consider geological risks threatening the integrity of its proposed Project.

The standard articulated by this Court in the *Sopko* case warrants an examination of the evidence, with the clear direction that the Court should consider the evidence as a while, and set aside the Commission's and Circuit Court's findings if it is convinced a mistake has been made. *Sopko v. C & R Transfer Co.*, supra, at 228-229. The standard in *Sopko* has been met. The weight of the evidence is firmly against TransCanada in two respects – first, for those Original Permit conditions where no evidence was presented by the company (the vast majority) there is simply no evidence to satisfy TransCanada's burden of proof. Hence, any findings relating to those conditions are, by default, clearly erroneous as the Commission and Circuit Court had nothing in the record to enable any type of a determination other than to tell TransCanada that it had not met its burden and that certification should be denied.

Second, with respect to the subject matter areas explored in cross examination of TransCanada's witnesses and in direct examination of the various intervenors' witnesses, it is clear that the weight of the evidence was not in TransCanada's favor – either with respect to its approach to special conditions imposed by PHMSA, its flawed approach to risk analysis, its history of poor quality control and construction defects on pipelines, its

failure to reclaim land owned by farming and ranching families post-pipeline construction, and even with respect to its approach to pipeline routing and failure to take the unique geology and soil composition of South Dakota into account, thereby amplifying risks of a pipeline leak or spill.

Quite frankly, the combination of TransCanada's failure to support its petition for certification with evidence, along with credible testimony to the contrary from DRA's witnesses, followed by inadequate responses by the company, lead to no conclusion other than the proposed KXL pipeline poses significant risks to the State of South Dakota and that the Commission and Circuit Court's Orders were clearly erroneous in that they ignored both the lack of evidence as well as the evidence forwarded by DRA and other intervenors in order to grant certification. Reversal is clearly warranted.

3. The Commission abandoned its role in protecting South Dakota's water resources and the health and safety of its residents, resulting in a clearly erroneous decision.

Finding 43 in the PUC Order took the position that testimony from a number of intervenors regarding the potential impact of the proposed KXL project on South Dakota's water resources does not apply to TransCanada's ability to demonstrate continued compliance with conditions of the Original Permit, but instead, relates to its burden of proof under SDCL § 49-41B-22 (AR 031687), which the Commission does not believe is applicable. The Commission's position is incorrect. SDCL § 49-41B-22 states that:

> The applicant has the burden of proof to establish that:
>
> (1) The proposed facility will comply with all applicable laws and rules;
> (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;

(3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
(4) 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.

TransCanada was required to establish that it met the requirements of SDCL § 49-41B-22 to obtain the Original Permit. SDCL § 49-41B-27 requires the company to demonstrate that it continues to comply with the Original Permit conditions. Those conditions, by necessity, include the relevant portions of SDCL § 49-41B-22 and particularly Original Permit condition number 1, which requires TransCanada to "comply with all applicable laws and regulations in its construction and operation of the Project." By dismissing the intervenors' concerns about the Project's potential effects on South Dakota's water resources, the Commission seriously erred. TransCanada had the burden to demonstrate that its proposed Project could continue to meet all these conditions, including that it neither "pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area" and that it "will not substantially impair the health, safety or welfare of the inhabitants." SDCL § 49-41B-22.

It is unfortunate that the Commission chose to abrogate its responsibilities and not hold TransCanada accountable under the statute. For example, evidence at the hearing before Commission revealed that TransCanada failed to prepare a health impact statement, and that its Emergency Response Plan set forth in the FSEIS failed to indicate a specific medical emergency response plan (AR 026266). Testimony at the hearing highlighted that emergency responders were not adequately prepared to deal with either testing or handling potential spills of tar sands crude oil, a component of which consisted

of a highly toxic chemical, benzene (AR 026266-026268). This is a serious concern because "benzene is the dominant toxin to be concerned about" and because "of benzene's solubility and its allowable limit of only 5 parts per billion in drinking water, a pipeline leak could contaminate a large volume of surface water and groundwater" (AR 026268-026269). Furthermore, testimony revealed there was no evidence demonstrating that TransCanada had interfaced in any way with the Indian Health Service in regard to developing emergency medical responses (AR 026268).

The Commission's failure to consider the effect of a potential KXL tar sands crude oil spill on South Dakota's water resources was a manifest legal error and, in light of the facts elicited at the hearing, resulted in a decision by the Commission that was clearly erroneous with respect to Finding 43 of the PUC Order and TransCanada's ability to continue to meet the conditions of the Original Permit.

C. Commission Staff Role in Proceedings Gives Rise to Procedural Due Process Issues and Regulatory Capture.

One of the more interesting questions arising in this case comes from an order entered by the Commission denying DRA's motion to compel discovery from Commission staff (AR 004798-004799). DRA sought copies of communications between TransCanada, the Commission and its staff. This information was sought because of perceptions on the part of DRA and other intervenors that the interests of a regulatory agency and a company within the industry it purports to regulate were improperly aligned. The discovery sought was crucial to determining the level of regulatory capture in the relationship between the Commission and oil pipeline operators. Regulatory capture is a form of government failure that occurs when a regulatory agency, created to act in the public interest, instead advances the commercial or political concerns of special

interest groups that dominate the industry or sector it is charged with regulating. It is a recognition that "as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit." George Stigler, "*The Theory of Economic Regulation,*" Bell Journal of Economics and Management Science (Spring 1971).

In denying DRA's motion to compel discovery, the Commission erroneously determined that the records sought constituted attorney work product (AR 004798-004799). The attorney work product doctrine exists for the purpose of protecting the attorney/client privilege. There is no attorney/client privilege between a regulatory agency and the industries it regulates. A privilege exists only where there is (1) a client; (2) a confidential communication; (3) the communication was made for the purpose of facilitating the rendition of professional legal services to the client; and (4) the communication was made in one of the five relationships enumerated in SDCL § 19–19–502(b). *Voorhees Cattle Company, LLP v. Dakota Feeding Company, LLC*, 2015 S.D. 68, ¶10, 868 N.W.2d 399, 405 (S.D. 2015).

The Circuit Court side-stepped this issue by stating that the Commission staff was a separate party to the proceedings and did not advise the Commission concerning the proceedings. That misses the point. The Commission staff are employees of a regulatory agency charged with serving the public interest, and DRA and the general public are entitled to know if the Commission staff is serving the interests of the public or the companies they are supposed to oversee and regulate. This is a crucial point given the Commission's counsel's statement that the certification statute, SDCL §49-41B-27, is a case of the fox guarding the henhouse. (Transcript of 3-8-17 Circuit Court Hearing, p. 122).

D. The Commission's Rulings Resulted in a Denial of Procedural Due Process to DRA and Other Intervenors.

The Commission made numerous procedural errors that provide a basis for reversal. These errors started with the Commission's order on December 17, 2014, granting TransCanada's motion to limit the scope of discovery to the fifty conditions of the Original Permit and proposed changes to the findings of fact in the Original Permit that were identified in the company's "Tracking Table of Changes" attached as Appendix C to its petition for certification (AR 001528-001529), which adopted an erroneously narrow reading of SDCL § 49-41B-27 in that it failed to review the statute in context.

Statutes addressing the same subject matter are taken into consideration and read, or *in pari materia*. *Onnen v. Sioux Falls Indep. Sch. Dist. No. 49–5*, 2011 S.D. 45, ¶ 16, 801 N.W.2d 752, 756 (S.D. 2011). "Statutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." *Goetz v. State*, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683 (S.D. 2001). Certification of continued compliance under SDCL § 49-41B-27 must be read in the context of SDCL §§ 49-41B-22 and 49-41B-33 which permit revocation of a permit and which require consideration of factors including whether the proposed project will comply with all applicable laws and rules, pose a threat of serious injury to the environment or to the social and economic condition of inhabitants or expected inhabitants in the siting area, substantially impair the health, safety or welfare of inhabitants, or unduly interfere with the orderly development of the region.

The order limited discovery also ran afoul of established law concerning the scope of discovery in contested proceedings, which is broadly construed. *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989), citing *Bean v. Best*, 76 S.D.

462, 80 N.W.2d 565 (S.D. 1957). SDCL 15–6–26(b) provides, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ..." A 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.*, *supra*. The limitations placed on DRA and other intervenors by the Commission constituted reversible error.

Compounding its error, the Commission also excluded numerous DRA exhibits. While a small number of excluded exhibits were permitted on reconsideration (AR 021070- 021071), the Commission's order was erroneous in that it was largely based on TransCanada's complaint that the proposed exhibits were not timely disclosed in discovery. In making this ruling, the Commission abused its discretion and acted arbitrarily and capriciously because the bulk of the excluded exhibits constituted documents actually disclosed by TransCanada to DRA during discovery. TransCanada was on notice that its own documents could be used as exhibits. The Commission's exclusion of those documents was in error and denied DRA procedural due process rights to which it was entitled.

Conclusion

The Commission made numerous fatal errors warranting reversal of its and the Circuit Court's orders. The ultimate question, though, is whether TransCanada met its burden of proof demonstrating continued compliance with the conditions of the Original Permit as required under SDCL § 49-41B-27. TransCanada failed to meet its burden. It only presented evidence on six of the fifty conditions, and the evidence it presented was

inadequate when viewed in the entirety of the record. The PUC Order and the Circuit Court's Order should be reversed as they were clearly erroneous.

Respectfully submitted this 18th day of September, 2017.

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

and

THE MARTINEZ LAW FIRM, LLC

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

Attorneys for Dakota Rural Action

CERTIFICATE OF 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 appendix, contains 9,191 words as determined by reliance on Microsoft Word.

/s/ Robin S. Martinez
Robin S. Martinez
Attorney for Dakota Rural Action