BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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| IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PROJECT | : | HP 14-001<br><br>APPLICANT'S MOTION TO PRECLUDE CONSIDERATION OF ABORIGINAL TITLE OR USUFRUCTUARY RIGHTS |

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In the course of discovery, Interveners have raised the issue of application of Indian aboriginal land title and usufructuary rights to property crossed by the proposed Keystone XL pipeline. Applicant respectfully moves the Public Utilities Commission to preclude testimony concerning or consideration of alleged aboriginal title or usufructuary rights on three grounds:

1. Determination whether or not such rights exist is beyond the Commission's jurisdiction, authority, and the scope of this Certification proceeding;

2. If such rights exist they are asserted as part of a challenge to the pipeline route, over which the Commission has no authority;

3. No such rights exist with respect to the proposed Keystone XL route.

## A. Background

Tribal interveners appear to contend the Keystone XL route crosses territory in South Dakota subject to aboriginal Indian title and usufructuary rights. Aboriginal title is grounded in the idea that western South Dakota was occupied by Indian tribes before the United States asserted its dominion in the 1800s, and that occupancy created aboriginal title rights in favor of the tribes.

Usufructuary rights arguably are remnants of the abrogated Fort Laramie Treaties of 1851 and 1868.

**B. The PUC does not have authority to decide aboriginal title or treaty rights**

The South Dakota Public Utility Commission is a quasi-judicial agency with limited jurisdiction. The South Dakota Supreme Court has said the PUC has no authority to define or interpret South Dakota's real property law. In *Petition of West River Electric*, 675 N.W.2d 222, 230 (S.D. 2004), the Court held "The PUC is not a court, and cannot exercise purely judicial functions. Defining and interpreting the law is a judicial function."

The proposed Keystone XL route does not cross tribal property, land owned by the United States and held in trust for Indians, or any Indian reservation. All land crossed by the proposed route is in state/private ownership. No court has held that Native Americans and/or tribal Interveners have aboriginal title or usufructuary rights with respect to any of the real property crossed by the proposed KXL route.

The Public Utilities Commission is not a court and does not have the authority to address and decide real property title questions. The proper forum for determination of Indian land interests is the state or federal courts. The PUC simply does not have jurisdiction to hear and decide questions regarding claimed aboriginal title to or usufructuary rights on the land that hosts the pipeline.

**C. The essence of the tribal Intervener's assertion is a challenge to the pipeline route**

The tribal Interveners apparently contend the Applicant's permit should not be certified because the route crosses land subject to either Indian title and/or usufructuary rights, requiring tribal consent. The contention is nothing more than an objection to the pipeline route.

SDCL 49-41B-36 directs that the provisions of SDCL Chapter 49-41B "shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility." The Commission recognized this in the 2010 Amended Final Decision and Order, holding at Conclusion of Law 13 that it ". . . lacks the authority (i) to compel the Applicant to select an alternative route or (ii) to base its decision . . . on whether the selected route is the route the Commission might itself select."

Accordingly, objections to the proposed route based on aboriginal title or usufructuary rights are inappropriate and should not be heard by the Commission.

**D. There is no aboriginal title to or usufructuary rights applicable to the proposed route**

In *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), the Supreme Court considered so-called Indian or aboriginal title to lands over which the United States had taken dominion and control. Noting that aboriginal title is a concept grounded in Indian occupancy of land prior the United States asserting its dominion over the territory, the Court held that aboriginal title ". . . is not a property right, but amounts to a right of occupancy which the sovereign grants . . . but which right . . . may be terminated and such lands fully disposed of by the sovereign itself . . ." *Tee-Hit-Ton Indians, supra. 279,* citing *Johnson v McIntosh,* 21 U.S. 543 (1823) and *Beecher v Weatherby*, 95 U.S. 17 (1941). Extinguishment of Indian title based on aboriginal possession is subject to the will of the United States. "The power of Congress in that regard is supreme." *supra. 281*. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 344 (7th Circ. 1983) the court held "The United States could . . . extinguish aboriginal title at any time and by any means."

Usufructuary rights are defined in *Black's Law Dictionary*, 1544 (6th Edition 1990) as "A real right of limited duration on the property of another." The Tribes appear to contend they hold usufructuary rights granted by the Fort Laramie treaties of 1851 and 1868.

The Fort Laramie Treaty of September 17, 1851, 11 Stat. 252, and the Treaty of April 29, 1868, 15 Stat. 635, defined the boundaries of the Sioux Nation's territory. The Fort Laramie Treaty of 1851 affirmed the signatory tribes the right to occupy considerable territory, including all of South Dakota, but did not create a reservation. The Fort Laramie Treaty of 1868 shrank the lands considered in the 1851 treaty territory in South Dakota to area west of the Missouri River and created the Great Sioux Reservation.

The Act of March 2, 1889, ch. 405, 25 Stat. 888, divided the Great Sioux Reservation into individual tribal reservations. Per the Congressional act, each tribe gave up its interest in lands formerly part of the Great Sioux Reservation. The statute provides, at section 21, "That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain." See also *Oglala Sioux Tribe v United States*, 21 Cl. Ct. 176 (1990). Subsequent acts of Congress reduced the South Dakota reservations to today's boundaries[1].

In *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) the Supreme Court held

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it

[1]The various treaties and Congressional Acts resulting in modern reservation boundaries are described in *USA v. Sioux Nation of Indians, supra*. and *Montana v. United States*, 450 U.S. 544 (1981). See also *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *South Dakota v. Bourland*, 508 U.S. 679 (1993), and *Oglala Sioux Tribe v. United States, supra.*

> should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians, it was never doubted that the power to abrogate existed in Congress.

Per the teaching of *Tee-Hit-Ton, La Courte* and *Lone Wolf, supra*, Congress had the legal right to enact statutes modifying the reservations and extinguishing tribal interests in ceded lands, whether the interests were aboriginal or usufructuary. Congress terminated aboriginal and usufructuary interests with respect to the lands outside the boundaries of the current South Dakota reservations in the Act of March 2, 1889, in subsequent statutes. When Congress restored the lands outside of the reservations to the public domain, it obviously intended all tribal interests, including aboriginal title and usufructuary rights be extinguished. See *Oregon Fish and Wildlife Dept. v Klamath Tribe*, 473 U.S. 753 (1983). Accordingly, aboriginal and usufructuary rights that may have once existed in favor of the tribes are extinguished and have no application to the land crossed by the proposed KXL pipeline.

**E. Conclusion**

For all the forgoing reasons, testimony regarding aboriginal and/or usufructuary rights on land crossed by the proposed Keystone KXL pipeline should be excluded from the hearing on the pending Certification Application. Keystone respectfully requests the Commission enter an order to that end.

Dated this 26th day of May 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

By ___/s/ William Taylor_____

William Taylor
James E. Moore
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Bill.Taylor@woodsfuller.com
James.Moore@woodsfuller.com
Attorneys for Applicant TransCanada

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of May 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of the Applicant's Motion to Preclude Consideration of Aboriginal or Usufructuary Rights on the Proposed Keystone KXL Pipeline Route, to the following:

Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
patty.vangerpen@state.sd.us

Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
kristen.edwards@state.sd.us

Brian Rounds
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
brian.rounds@state.sd.us

Darren Kearney
Staff Analyst South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
darren.kearney@state.sd.us

Tony Rogers, Director
Rosebud Sioux Tribe - Tribal Utility Commission
153 South Main Street
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Cindy Myers, R.N.
PO Box 104
Stuart, NE 68780
csmyers77@hotmail.com

Jane Kleeb
1010 North Denver Avenue
Hastings, NE 68901
jane@boldnebraska.org

Byron T. Steskal
Diana L. Steskal
707 E. 2nd Street
Stuart, NE 68780
prairierose@nntc.net

Terry Frisch
Cheryl Frisch
47591 875th Road
Atkinson, NE 68713
tcfrisch@q.com

Arthur R. Tanderup
52343 857th Road
Neligh, NE 68756
atanderu@gmail.com

Lewis GrassRope
PO Box 61
Lower Brule, SD 57548
wisestar8@msn.com

Carolyn P. Smith
305 N. 3rd Street
Plainview, NE 68769
peachie_1234@yahoo.com

Robert G. Allpress
46165 Badger Road
Naper, NE 68755
bobandnan2008@hotmail.com

Amy Schaffer
PO Box 114
Louisville, NE 68037
amyannschaffer@gmail.com

Louis T. (Tom) Genung
902 E. 7th Street
Hastings, NE 68901
tg64152@windstream.net

Benjamin D. Gotschall
6505 W. Davey Road
Raymond, NE 68428
ben@boldnebraska.org

Nancy Hilding
6300 West Elm
Black Hawk, SD 57718
nhilshat@rapidnet.com

Elizabeth Lone Eagle
PO Box 160
Howes, SD 57748
bethcbest@gmail.com

Paul F. Seamans
27893 249th Street
Draper, SD 57531
jacknife@goldenwest.net

John H. Harter
28125 307th Avenue
Winner, SD 57580
johnharter11@yahoo.com

Peter Capossela
Peter Capossela, P.C.
Representing Standing Rock Sioux Tribe
PO Box 10643
Eugene, OR 97440
pcapossela@nu-world.com

Viola Waln
PO Box 937
Rosebud, SD 57570
walnranch@goldenwest.net

Wrexie Lainson Bardaglio
9748 Arden Road
Trumansburg, NY 14886
wrexie.bardaglio@gmail.com

Harold C. Frazier
Chairman, Cheyenne River Sioux Tribe
PO Box 590
Eagle Butte, SD 57625
haroldcfrazier@yahoo.com
mailto:kevinckeckler@yahoo.com

Jerry P. Jones
22584 US Hwy 14
Midland, SD 57552

Debbie J. Trapp
24952 US Hwy 14
Midland, SD 57552
mtdt@goldenwest.net

Jennifer S. Baker
Representing Yankton Sioux Tribe
Fredericks Peebles & Morgan LLP
1900 Plaza Dr.
Louisville, CO 80027
jbaker@ndnlaw.com

Duncan Meisel
350.org
20 Jay St., #1010
Brooklyn, NY 11201
duncan@350.org

Cody Jones
21648 US Hwy 14/63
Midland, SD 57552

Gena M. Parkhurst
2825 Minnewsta Place
Rapid City, SD 57702
GMP66@hotmail.com

Joye Braun
PO Box 484
Eagle Butte, SD 57625
jmbraun57625@gmail.com

The Yankton Sioux Tribe
Robert Flying Hawk, Chairman
PO Box 1153
Wagner, SD 57380
robertflyinghawk@gmail.com
Thomasina Real Bird
Attorney for Yankton Sioux Tribe
trealbird@ndnlaw.com

Bruce Ellison
Attorney for Dakota Rural Action
518 6th Street #6
Rapid City, SD 57701
belli4law@aol.com

Chastity Jewett
1321 Woodridge Drive
Rapid City, SD 57701
chasjewett@gmail.com

RoxAnn Boettcher
Boettcher Organics
86061 Edgewater Avenue
Bassett, NE 68714
boettcherann@abbnebraska.com

Bruce Boettcher
Boettcher Organics
86061 Edgewater Avenue
Bassett, NE 68714
boettcherann@abbnebraska.com

Bonny Kilmurry
47798 888 Road
Atkinson, NE 68713
bjkilmurry@gmail.com

Ronald Fees
17401 Fox Ridge Road
Opal, SD 57758

Robert P. Gough, Secretary
Intertribal Council on Utility Policy
PO Box 25
Rosebud, SD 57570
bobgough@intertribalCOUP.org

Tom BK Goldtooth
Indigenous Environmental Network (IEN)
PO Box 485
Bemidji, MN 56619
ien@igc.org

Dallas Goldtooth
38731 Res Hwy 1
Morton, MN 56270
goldtoothdallas@gmail.com

Gary F. Dorr
27853 292nd
Winner, SD 57580
gfdorr@gmail.com

Cyril Scott, President
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
cscott@gwtc.net
ejantoine@hotmail.com

Paula Antoine
Sicangu Oyate Land Office Coordinator
Rosebud Sioux Tribe
PO Box 658
Rosebud, SD 57570
wopila@gwtc.net
paula.antoine@rosebudsiouxtribe-nsn.gov

Thomasina Real Bird
Representing Yankton Sioux Tribe
Fredericks Peebles & Morgan LLP
1900 Plaza Dr.
Louisville, CO 80027
trealbird@ndnlaw.com

Sabrina King
Dakota Rural Action
518 Sixth Street, #6
Rapid City, SD 57701
sabinra@dakotarural.org

Frank James
Dakota Rural Action
PO Box 549
Brookings, SD 57006
fejames@dakotarural.org

Robin S. Martinez
Dakota Rural Action
Martinez Madrigal & Machicao, LLC
616 West 26th Street
Kansas City, MO 64108
robin.martinez@martinezlaw.net

Tracey A. Zephier
Attorney for Cheyenne River Sioux Tribe
Fredericks Peebles & Morgan LLP
910 5th Street, Suite 104
Rapid City, SD 57701
tzephier@ndnlaw.com

Paul C. Blackburn
4145 20th Avenue South
Minneapolis, MN 55407
paul@paulblackburn.net

Matthew Rappold
Rappold Law Office
on behalf of Rosebud Sioux Tribe
PO Box 873
Rapid City, SD 57709
matt.rappold01@gmail.com

April D. McCart
Representing Dakota Rural Action
Certified Paralegal
Martinez Madrigal & Machicao, LLC
616 W. 26th Street
Kansas City, MO 64108
april.mccart@martinezlaw.net

Kimberly E. Craven
3560 Catalpa Way
Boulder, CO 80304
kimecraven@gmail.com

Joy Lashley
Administrative Assistant
SD Public Utilities Commission
joy.lashley@state.sd.us

Mary Turgeon Wynne
Rosebud Sioux Tribe - Tribal Utility Commission
153 S. Main Street
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Eric Antoine
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
ejantoine@hotmail.com

/s/ William Taylor
One of the attorneys for TransCanada