BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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)	HP 14-001

STANDING ROCK SIOUX TRIBE
BRIEF IN SUPPORT OF MOTION FOR DISCOVERY SANCTIONS

I. Background

Under section 1 of the Energy Conversion and Transmission Facilities Act, "it is necessary to ensure that the location, construction and operation of facilities will produce minimal adverse effects upon the environment and upon the citizens of this state by (requiring)… a permit from the Commission. SDCL §49-41B-1. The Commission issued a permit to TransCanada for the Keystone XL Pipeline. *Amended Final Decision and Order*, HP 09-001 (June 30, 2010). The Amended Permit Conditions include:

- "Keystone shall comply with ***all applicable laws and regulations*** in its construction and operation of the project. These laws and regulations include… pipeline safety statutes currently codified at 49 U.S.C. §60101 *et seq*. (collectively the "PSA"); the regulations… implementing the PSA, particularly 49 CFR Parts 194 and 195, temporary permits for the use of public water for construction, testing or drilling purposes, SDCL 46-5-40.1… and temporary discharges to the waters of the state, SDCL 34A-2-36." *Id.* at 25 (condition #1) (emphasis added).

- "Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement…" *Id.* (condition #3).

- "Keystone shall comply with all mitigation measures set forth in the Construction, Mitigation and Reclamation Plan (CMR Plan)..." *Id.* at 27 (condition #13).

- "Keystone shall follow all protection and mitigation efforts as identified by the US Fish and Wildlife Service ("USFWS") and SDGFP." *Id.* at 35 (condition #41).

- "Keystone shall follow the 'Unanticipated Discoveries Plan," as reviewed by the State Historic Preservation Office ("SHPO")." *Id*. at 36 (condition #43).

Thus, the 2010 Amended Permit Conditions involve pipeline safety and environmental compliance (#1), and project impacts on water quality (#1 & #2), terrestrial vegetation and wildlife (#13 and #41) and cultural resources (#43). *Id*. at 25-27, 35-36. Under section 27 of the act, "… 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. On September 15, 2014, TransCanada filed its petition for certification under section 27.

With respect to discovery in this certification proceeding, the Commission entered an *Order Granting Motion to Define Issues and Setting Procedural Schedule* (December 17, 2014). The order permits discovery to "any matter, not privileged, which is relevant to whether the proposed Keystone XL Pipeline continues to meet the fifty permit conditions set forth in Exhibit A to the Amended Final Decision and Order." *See* SDCL §15-6-26(b) ("Parties may obtain discovery on any matter, not privileged, which is relevant to the subject matter involved in the pending action."). Accordingly, the Standing Rock Sioux Tribe propounded interrogatories and requests for production of documents relating to compliance with the applicable laws, per paragraphs 1, 3, 13 and 41 of the Amended Conditions. *See Motion for Sanctions*, Exhibits A-D.

TransCanada violated South Dakota's discovery rules by failing to properly respond to the Tribe's requests. *See* SDCL §§15-6-33(a) (obligation to "fully" answer interrogatories); 15-6-34 (inspection of documents). Full and complete answers, as required by law, were provided for few, if any, of the Tribe's 54 interrogatories and 16 requests for the production of documents. SDCL §15-6-37(a)(3) ("an evasive or incomplete disclosure, answer or response is to be treated as a failure to disclose, answer or respond."). *See* Exhibits A-D. TransCanada's cavalier responses to the Tribe's reasonable and standard discovery requests constitute willful noncompliance with South Dakota law. TransCanada should be sanctioned accordingly. *See Haberer v. Radio Shack*, 555 N.W.2d 606, 611 (S.D. 1996) ("Imposing a sanction such as the exclusion of

the testimony should result when 'failure to comply has been due to… willfulness, bad faith, or… fault.'" *citation omitted*).

II. The Motion for Discovery Sanctions Should be Granted

Virtually none of TransCanada's responses to the Tribe's discovery requests comply with the requirement of South Dakota law for "full" and non-evasive answers. SDCL §15-6-37(a)(3). In its motion, the Tribe focuses on three areas:

(A) emergency response and remediation planning (Exhibit A, Requests for Production 3-4; Exhibit B, Interrogatories 15-20 – which relate to Amended Condition #1);

(B) documents relating to compliance with state and federal laws governing Clean Water; water diversion and use; cultural resources; pipeline safety and spill remediation (Exhibit A, Requests for Production 3-9; Exhibit C, Request for Production 16; Exhibit D, Interrogatory 51 – which relate to Amended Condition #1, 3, 13 and 41);

(C) pipeline safety, per the incident described in item 68 in the Tracking Table of Changes (Exhibits B & D, Interrogatories 30, 52 – which relate to TransCanada's *Petition for Certification*, App. C).

As described more fully below, the Commission should issue an order sanctioning TransCanada by excluding testimony and evidence related to compliance with applicable law, or compelling TransCanada to fully answer the interrogatories and request for documents.

A. Emergency Response and Remediation Planning

There have been numerous catastrophic oil spills, some involving tar sands, since the Commission issued TransCanada its June 30, 2010 permit for Keystone XL. *See e.g.* Rafael Martinez-Palou et al., *Transportation of Heavy Crude Oil by Pipeline: A Review*, JOURNAL OF PETROLEUM SCIENCE AND ENGINEERING, Vol. 75 274 (2011); Daniel J. Graeber, *Are Pipeline Spills a Foregone Conclusion*, May 21, 2013, posted at http://oilprice.com/TheEnvironment/Oil-Spills/Are-Pipeline-Spills-a-Foregone-Conclusion. Accordingly, the Tribe requested copies of documents prepared for compliance with the Clean Water Act and Oil Pollution Act – the Facility Response Plan for Keystone XL, and the Integrity Management Plan required under the Pipeline Safety Act. (Exhibit A, Requests 3-4). TransCanada objected to these requests, arguing:

> This request seeks information that is outside of the scope of the PUC's jurisdiction and Keystone's burden under SDCL 49-41B-27… The PUC's jurisdiction over the emergency response plan is preempted by federal law. *See* 49 CFR Part 194; 49 U.S.C. 60104(c). This request further seeks information that is confidential and proprietary. Public disclosure of the emergency response plan could commercially disadvantage Keystone.

Exhibit A, p. 2.

In its objection to disclosure of an emergency response plan, Keystone cites the Pipeline Safety Act, 49 U.S.C. §60104(c). That is the wrong law. The emergency response plan (or facility response plan) is required under section 311 of the Clean Water Act. 33 U.S.C. §1321(j)(5). Under 33 U.S.C. §2718, "Nothing in this Act… shall be interpreted as preempting the authority of any State… from imposing any additional liability or requirements with respect to – the discharge of oil or pollution by oil within such State." Thus, the Clean Water Act requires the emergency response plan for Keystone XL and does not pre-empt state law.

TransCanada also argues that disclosure of the Emergency Response Plan would place it at a commercial disadvantage. (Motion for Discovery Sanctions, Exhibit A, p. 2). If that were the case, then TransCanada's only remedy under South Dakota law is to obtain a protective order under SDCL §15-6-26(c)(7). TransCanada has neither requested nor obtained an order pursuant to SDCL §15-6-26(c)(7).

"[T]he burden rests on the party opposing discovery to show that the information is a trade secret." *Bertelsen v. Allstate Ins. Co*., 796 N.W.2d 685, 705 (S.D. 2011). Indeed, an Emergency Response Plan for an oil pipeline is not a trade secret in any event. The posting on the Washington State Department of Ecology web site of the Kinder Morgan Canada, Inc. *Emergency Response Plan for the Puget Sound Pipeline System*, wholly unredacted, demonstrates that this information poses no commercial injury. (ecy.wa.gov/programs/spills/preparedness/cplan/Kinder_Morgan_Plan_Review_4_7_08. pdf&keyword=kinder). The Washington State Department of Ecology also makes public and posts on-line a HazMat Spill Contractors List and Approved Primary Response Contractors list – information that TransCanada has refused to disclose for the Keystone XL Pipeline.

TransCanada's objection to the disclosure of the Emergency Response Plan is specious. It failed to follow the procedure under SDCL §15-6-26(c)(7) for a protective order for trade secrets. Consequently, evidence regarding compliance with the Clean Water Act, 33 U.S.C. §1321(j)(5), must be excluded, or TransCanada should be compelled to produce an Emergency Response Plan for the Keystone XL Pipeline.

B. Documents Relating to Continuing Compliance with Applicable Laws

TransCanada's petition certifies that Keystone XL continues to comply with Amended Condition 1 in the 2010 permit, which incorporates by reference numerous applicable state and federal laws. Standing Rock requested documents possessed by TransCanada relating to compliance with the federal and South Dakota Clean Water Acts, 33 U.S.C. §§1251-1387, SDCL Chapter 34A-02; the South Dakota Water Use Code; Endangered Species Act, 16 U.S.C. §§1531-1544; the National Environmental Policy Act, 42 U.S.C. §§4231-4370f; National Historic Preservation Act, 16 U.S.C. §§470-470x-6 and Native American Graves Protection Act, 25 U.S.C. §§3001-3013. *Motion to Compel*, Exhibit A, Requests for Production 5-9. TransCanada's responded as follows:

> This request is vague, unclear, overlybroad (sic), unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. This issue is addressed in the Final Environmental Impact Statement….

Exhibit A, pp. 3-6.

As certified in the Motion to Compel, counsel for the Tribe consulted with counsel for TransCanada on February 24, 2015. Subsequently, the Tribe served its Second Set of Interrogatories, including Interrogatory No. 51 requesting that TransCanada identify the relevant documents in its possession. *See* Exhibit D. This interrogatory was propounded for the purpose of enabling the Tribe to be more selective and pare down its document requests. *See e.g.* Fed. R. Civ. Pro. 26(a)(1) (*requiring* identification and disclosure of all relevant documents and witnesses in a party's possession). Nevertheless, TransCanada refused to even identify the documents in its possession, much less produce them. Exhibit D.

TransCanada advanced three arguments to justify its noncompliance with South Dakota discovery rules: (1) burdensome and overly broad; (2) not calculated to lead to admissible evidence; and (3) the information may be uncovered elsewhere. Exhibit A, pp. 3-6. As described above, the Tribe made affirmative efforts to reduce TransCanada's burden and cost, and it still refused to comply.

Discovery is permitted for all relevant material, whether or lead to admissible evidence at trial. SDCL §15-6-26(b). It must merely be relevant. *Kaarup v. St. Paul Fire and Marine Ins. Co*., 436 N.W.2d 17, 19 (S.D. 1999). Compliance by TransCanada with the above-cited acts is required in Condition #1 of the Amended Conditions, so it is clearly relevant.

With respect to TransCanada's reference to the State Department EIS to uncover the information requested of TransCanada in discovery, "it is not usually a ground for objection that the information… is a matter of public record." *Petruska v. Johns Manville*, 83 F.R.D. 32, 35 (E.D. Pa. 1979).

Ultimately, "[t]he scope of discovery is broadly construed." *Kaarup v. St. Paul Fire and Marine Ins. Co*., 436 N.W.2d at 19. Under South Dakota law, the fact-finding process is deemed to be enhanced by liberal discovery. *Id.* at 20. The courts utilize "a broad construction of 'relevancy' at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial." *Id.*

A party "cannot bring this action and then refuse to supply defendant with information known only to plaintiff's witnesses which impacts upon plaintiff's ability to prove its case." *Avionic Co. v. General Dynamics Corp.*, 957 F.2d 555, 558 (8th Cir. 1992) TransCanada's contention that records regarding impacts on plants, wildlife, water and cultural sites are not relevant to the proceeding to certify that Keystone XL remains in compliance with applicable law is patently unmeritorious.

C. Pipeline Corrosion as Evidenced in "Tracking Table of Changes"

Paragraph 68 of TransCanada's "Tracking Table of Changes," *Petition for Certification*, App. C, *on file herein*, includes the following caveat to prior claims regarding pipeline corrosion, "except for one instance where an adjacent foreign utility interfered with the cathodic protection system" Accordingly, the Tribe inquired about this incident in Interrogatory No. 30. *Motion for Discovery Sanctions*, Exhibit B.

Keystone provided an incomplete answer, *id.*, so the Tribe posed Interrogatory No. 52, requesting the identity of the foreign utility blamed by TransCanada for the corrosion in its pipeline. Exhibit D.

Keystone neither objected nor answered the question, in violation of South Dakota law. SDCL §15-6-33(a) provides that "Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to." South Dakota law does not permit a party to unilaterally pronounce the relevance or information sought in discovery, *id*., as TransCanada has done here.

Nevertheless, "[di]iscovery is commonly allowed in which the discovering party seeks information with which to impeach witnesses for the opposition." 8A Wright, Miller and Marcus, Federal Practice and Procedure §2014. The interrogatory clearly must be answered under the applicable rules. The *Motion for Discovery Sanctions* should be granted.

III. The Tribe is Entitled to an Order Excluding Evidence or Compelling Discovery

Significantly, TransCanada's noncompliance with South Dakota's discovery rules was willful, intentional and prejudicial to the Tribe's ability to pursue its claim. Under these circumstances, the Tribe is entitled to an order prohibiting TransCanada from introducing evidence that Keystone XL complies with state and federal law. For "[p]rohibition of evidence offered by a party who has not complied with the discovery rules 'is designed to compel production of evidence and to promote, rather than stifle, the truth finding process.' " *Haberer v. Radio Shack*, 555 N.W.2d 606, 611 (S.D. 1996) *cites omitted*. Indeed, "[i]mposing a sanction such as the exclusion of testimony should result when 'failure to comply has been due to… willfulness, bad faith, or… fault." *Id. cites omitted*.

That is the case here. The right of discovery and the resulting benefit to the fact-finding process are the main reasons to intervene in a proceeding before the Commission. TransCanada's unresponsiveness in discovery was intentional, unwarranted and should result in the exclusion of testimony regarding compliance by Keystone XL with applicable state and federal law. *Id*. As a result of TransCanada's own conduct in this proceeding, its *Petition for Certification* should be dismissed. *National Hockey League*

v. Metropolitan Hockey Club, 427 U.S. 639, 640-641 (1976) (upholding dismissal of complaint for willful disregard of discovery order); *Avionic Co. v. General Dynamics Corp.*, 957 F.2d at 558 (upholding dismissal of complaint for discovery violation). Alternatively, the time-period for discovery should be extended, the hearing continued, and TransCanada compelled to answer the interrogatories and produce the documents requested by the Standing Rock Sioux Tribe. *Motion for Discovery Sanctions*, Exhibits A-D.

DATED this 25th day of March, 2015

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