BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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 PIPELINE	**DOCKET HP 14-001** **CHEYENNE RIVER SIOUX TRIBE'S RESPONSE TO KEYSTONE'S MOTION TO PRECLUDE CONSIDERTION OF ABORIGINAL TITLE OR USUFRUCTUARY RIGHTS**

COMES NOW, the Cheyenne River Sioux Tribe, by and through counsel, responding to Keystone XL Pipeline's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights. The Cheyenne River Sioux Tribe asks the Public Utilities Commission to dismiss TransCanada Keystone Pipeline's Motion for the reasons detailed herein.

I. The PUC May Hear Testimony and Consider Evidence Regarding Tribal Aboriginal Rights.

Keystone argues that issues related to aboriginal and usufructuary rights are beyond the scope of the PUC. Keystone bases its argument on the holding in *Petition of West River Electric*, 675 N.W.2d 222, 230 (S.D. 2004). Specifically, Keystone argues that "[t]he 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." Keystone's Motion to Preclude, pg. 2, ¶ 3. In essence, Keystone alleges that Intervenors have asked the PUC to adjudicate their legal claims regarding aboriginal and usufructuary rights. However, not a single Intervenor makes such a request to the PUC.

The issue in *Petition of West River Electric* was materially different from the instant issue. The issue in that case involved two utilities which submitted competing motions to the

PUC asking for declaratory rulings adjudicating their respective legal rights. No such request for declaratory ruling has been made by any Intervenor asking the PUC to adjudicate their aboriginal and/or usufructuary rights. Intervenors may, however, desire to submit testimony and evidence related to such rights in order to aid the PUC in its consideration of Keystone's petition for certification.

Keystone is correct in stating that the PUC is not a court and cannot exercise **purely** judicial functions. *See Petition of West River Electric*, 675 N.W.2d 222, 230 (S.D. 2004). Nonetheless, by Keystone's own admission the PUC is "…a quasi-judicial agency…" Keystone's Motion to Preclude, pg. 2, ¶ 1. Under South Dakota law, such agencies are "…administrative tribunal[s] with expertise" that are entitled to "…appropriate deference…" *Northern States Power Co*., 489 N.W.2d at 370 (citing In re Jack Rabbit Lines, Inc., 283 N.W.2d 402 (S.D.1979)).

Contrary to Keystone's vague and generalized allegation that tribal Intervenors are asking the PUC to dispositively adjudicate their aboriginal and/or usufructuary rights, in fact tribal Intervenors wish to simply bring such issues to the PUC's attention so that the Commission can make a fully informed final certification decision. Nothing in the law or the PUC's rules prohibits such evidence and or testimony. Indeed, SDCL 49-41B-1 directs the PUC to ensure that projects such as the Keystone XL Pipeline have "minimum effects" on the citizens of South Dakota. By choosing to approve Keystone's petition for certification, the PUC may subject the State of South Dakota to significant, expensive, and time consuming litigation with regard to issues of aboriginal and/or usufructuary rights. Arguing that the PUC cannot take into consideration such consequences is nonsensical and certainly does not minimize the effects of such projects on the citizens of South Dakota. Moreover, Keystone carries the burden of

showing that such evidence and/or testimony is disallowed by the law and/or PUC rules: which it has not.

Moreover, Keystone is the only party that has asked the PUC to dispositively adjudicate the merits of such claims. Though never specifically requested, Keystone makes it clear that it would like the PUC to adjudicate potential aboriginal and/or usufructuary claims by devoting the bulk of its Motion arguing the merits of such claims. In other words, Keystone has committed the same error that it baselessly accuses the Intervenors of committing.

II. Intervenors Have Not asked the PUC to Route the Applicant's Proposed Pipeline.

Keystone also argues that allowing testimony and evidence related to aboriginal and/or usufructuary rights amounts to a request to route the project. This argument is groundless. Keystone correctly states that SDCL 49-41B-36 prohibits the PUC from routing a project. However, not a single Intervenor has asked the PUC to direct the route of the project, nor does the submission of testimony and evidence regarding aboriginal and/or usufructuary rights necessarily require the PUC make such prohibited route direction.

The matter before the PUC involves certification of Keystone's permit to build the Keystone XL Pipeline. Any and all evidence, including testimony and evidence related to aboriginal and/or usufructuary rights, submitted on the part of the Intervenors is not made as part of a request to route the pipeline, but rather is submitted in opposition of certification of Keystone's petition. As such, Keystone's argument on this issue is groundless and defies logic.

III. Tribes in Western South Dakota Have a Valid Legal Basis to Claim Aboriginal and/or Usufructory Rights.

Finally, Keystone argues that tribal Intervenors do not have aboriginal and/or usufructuary rights in Western South Dakota. As stated previously, by submitting such an argument Keystone commits the same error that it accuses tribal Intervenors of making. Nonetheless, Keystone's erroneous, superficial, and inaccurate argument must be rebutted here.

The legal claims outlined below are in no way exhaustive, rather, they are meant only to illustrate the fact that a valid grounds for litigation exists and that the PUC is within its power to consider such potential issues when deciding Keystone's Petition for Certification.

The gist of Keystone's argument is that the Fort Laramie Treaty has been abrogated, along with any potential aboriginal and/or usufructuary rights. Specifically, Keystone argues that the Act of March 2, 1889, ch. 405, 25 Stat. 888 abrogated all aboriginal and/or usufructuary rights in non-reservation lands in Western South Dakota. Keystone's claim is overly sweeping and misapplies federal case law.

Keystone correctly states that Congress has the power to abrogate treaty rights. *See, e.g., Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 594 (1977). However, Keystone failed to state that Congress must **clearly and unequivocally** express its intent to abrogate a treaty right. *See Menominee Tribe v. United States*, 391 U.S. 404, 412–413, (1968); *United States v. Dion*, 476 U.S. 734, 738, (1986). *See also County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269, 112 S.Ct. 683, 693, (1992) ("'[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit'") (citations omitted). Indeed, the land at issue here, Western Sit is well established law that the land in Western South Dakota identified in the Fort Laramie Treaty is tribal aboriginal area. *See Sioux Tribe v. United States*, 21 Ind. Cl. Comm. 371, 382 (1969) *aff'd United States v. Sioux Nation of Indians*, 428 U.S. 371, 424 (1980). This legal recognition by the federal judiciary makes Keystone's assertion of abrogation all the more untenable.

Keystone makes a vague and conclusory statement that the Act of March 2, 1889 abrogated all tribal rights on non-reservation lands. Such vague, generalized, and conclusory statements are legally insufficient to find that Congress has clearly and unequivocally abrogated a treaty right. The Fort Laramie Treaty guaranteed a multitude of rights, including numerous

aboriginal and usufuctuary rights, and the Act of March 2, 1889 does not clearly and unequivocally abrogate such rights. If it did, Keystone would have undoubtedly seized on such language in its argument. If Keystone wishes to claim that all tribal aboriginal and/or usufructuary rights have been abrogated, then it must carry the burden of showing that Congress clearly and unequivocally intended such abrogation. Moreover, *and more importantly,* as Keystone correctly points out, it would need to carry this burden in federal court, not before the PUC.

Also, The entire pipeline route in South Dakota has been adjudicated by the U.S. Court of Claims to be Sioux aboriginal area. Sioux Tribe v. United States, 21 Ind. Cl. Comm. 371, 382 (1969) aff'd United States v. Sioux Nation of Indians, 428 U.S. 371, 424 (1980).

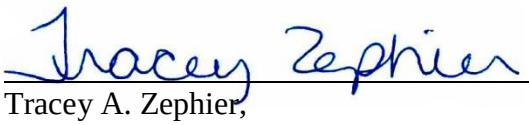
Tribal Intervenors merely desire to present testimony and evidence related to potential aboriginal and usufructuary issues for the PUC's consideration. It is the contention of the Cheyenne River Sioux Tribe that such information will better equip the PUC in determining Keystone's Petition for Certification. The purpose of such evidence and/or testimony would be to inform the PUC that aboriginal and/or usufructuary claims such as those successfully brought in U.S. v. Adair, 723 F.2d 1394 (9th Cir. 1983) and *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979) exist in Western South Dakota, and that infringement of those right may subject the State of South Dakota to costly and time consuming federal litigation.

IV. Conclusion

For all the forgoing reasons, testimony and evidence regarding aboriginal and/or usfructuary rights on land crossed by the proposed Keystone XL Pipeline should be allowed and Keystone's Motion to Preclude should be dismissed. The Cheyenne River Sioux Tribe respectfully requests the Commission to enter an order to that end.

Dated this 2nd day of June, 2015.

Respectfully Submitted,



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