

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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**IN THE MATTER OF:**

)  
) **Docket HP 14-001**

**PETITION OF TRANSCANADA  
KEYSTONE PIPELINE, LP FOR ORDER  
ACCEPTING CERTIFICATION OF  
PERMIT ISSUED IN DOCKET HP09-001  
TO CONSTRUCT THE KEYSTONE XL  
PIPELINE**

)  
) **INTERTRIBAL COUP'S MOTION  
FOR RECONSIDERATION OF MAY  
28, 2015 ORDER TO PRECLUDE  
REBUTTAL WITNESSES AND  
OBJECTION TO KEYSTONE'S  
JULY 10TH MOTION TO  
PRECLUDE.**

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Comes now the Intertribal Council On Utility Policy (COUP), by and through counsel, Robert Gough, pursuant to SDCL 1-26-18 the Administrative Procedure Act, ARSD 20:10:01:29, to request the Public Utilities Commission to reconsider its order dated MAY 28, 2015 to Preclude Rebuttal Witnesses offered by the Intertribal COUP, and in Objection to Keystone's July 10, 2015 Motion in Limine to Preclude Testimony of Drs. Hansen and Oglesby.

The Commission's Order of May 28, 2015 states that:

*On April 27, 2015, COUP filed a Request for a Time Certain for an Expert Rebuttal Witness. Included in this Request was a description of the scope of testimony for Dr. James Hansen. On April 27, 2015, TransCanada filed an Objection to COUP's Request for a Time Certain and Motion to Preclude Witnesses (Motion to Preclude Witnesses). In its Motion to Preclude Witnesses, TransCanada sought to preclude COUP's three proffered witnesses, namely Dr. James Hansen, Dr. George Seielstad, and Dr. Robert Oglesby, from testifying as rebuttal witnesses, arguing that the witnesses will not be offering testimony within the meaning of rebuttal testimony and did not file pre-filed direct testimony.*

Intertribal COUP had NOT filed "pre-filed direct testimony" for Direct Witnesses, but sought to have its three witnesses serve instead as Rebuttal

Witnesses. The date for the pre-filing of Rebuttal Witnesses had been set for June 26, 2015, and therefore Intertribal COUP was not obliged to “pre-file rebuttal testimony” before that date. Intertribal COUP had only filed a “scope of testimony” from its potential witnesses.

The Order of May 28, 2015 further states that:

*At its regularly scheduled meeting on May 26, 2015, the Commission found the Request for a Time Certain for an Expert Rebuttal Witness to be moot given the Commission's Order Granting Joint Motion for Continuance and Relief from Scheduling Order, dated April 27, 2015. The Commission also considered the Motion to Preclude Witnesses. Finding that the testimony of the proffered witnesses was beyond the scope of the certification proceeding, the Commission voted unanimously to grant the Motion to Preclude Witnesses.*

Intertribal COUP pre-filed Rebuttal Testimony on June 26<sup>th</sup> with the Commission for Drs. James Hansen and Robert Oglesby, and on July 10, 2015, Transcanada filed Keystone’s Motion In Limine To Preclude Testimony Of Dr. Hansen And Dr. Oglesby.

Intertribal COUP objects to Keystone’s Motion in Limine to Preclude and respectfully requests the PUC reconsider its findings and order of May 28, 2015, that the testimony of the proffered witnesses was irrelevant and beyond the scope of the certification proceeding, in light of the following:

1. That until the Commission’s set deadline of June 26, 2015, and until that time no testimony, neither direct or in rebuttal, had yet been offered or filed by Intertribal COUP or its witnesses.
2. That in light of the Commission’s ruling in the preclusion was based upon a brief scope of testimony offer by counsel. The testimony pre-filed on June 26<sup>th</sup> should be considered as statements

qualifying the expertise of two named witnesses in aggregate adverse weather conditions, since “climate” is merely the 30 year aggregated weather conditions one is to expect in a given place, and “impacts of climate change” are likely to reveal themselves in the variable frequency and intensity of “adverse weather” events.

3. That in its brief of May 18, 2015, Staff concluded as follows:

“Should Dr. Hansen offer testimony on any matter relevant to this proceeding, within the purview of SDCL § 49-418-27, and in a manner that is truly rebuttal testimony, Staff has no objection to his being a witness at this time, but reserves the right to make objections as necessary at the time of the hearing.”

4. That in the Applicant Keystone’s Reply In Support Of Motion To Limit Testimony Of Richard Kuprewicz, Keystone clearly states that:

“It is presumed that some facts may have changed in four years. At issue is whether Keystone can continue to meet the permit conditions based on the facts today.

5. That in light of the Commission’s Order regarding Keystone’s Motion to Exclude the Testimony of Richard Kuprewicz, was granted, in part, for relevant testimony.

6. That there are a number of “Findings and Conditions” in the 2010 Permit subject to this Recertification process that deal with potential climatic conditions as expressed through “adverse weather”. Under Condition 25, for example, Keystone has an obligation to suspended construction when:

“(W)eather conditions are such that construction activities will cause irreparable damage, unless adequate protection measures approved by the Commission are taken.”

And to:

“(F)ile with the Commission an adverse weather land protection plan containing appropriate adverse weather land protection

measures, the conditions in which such measures may be appropriately used, and conditions in which no construction is appropriate, for approval of or modification by the Commission prior to the start of construction.”

7. That since questions regarding Keystone’s understandings, obligations and reporting requirements about the nature, type, intensity and frequency of “adverse weather” conditions along the pipeline route and environs, and any changes with regard to those conditions, our understanding of, and preparation for, such changing conditions, which may have occurred over the past four years, may be a fair inquiry for cross-examination, Intertribal COUP respectfully asserts the right to have its witness be allowed to rebut potential testimony when relevant.

### **CONCLUSION**

Based upon the foregoing, the treatment of other witnesses, and the recommendations of staff, Intertribal COUP seeks the Commission’s reconsideration of its Order to Preclude, so as to allow Intertribal COUP’s witnesses to be able to offer relevant rebuttal testimony within their area of expertise.

Submitted this 17th day of July 2015

Respectfully submitted,



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Robert P. Gough, SD SB# 620  
Secretary of, and Attorney for,  
Intertribal Council On Utility Policy (COUP)  
P.O. 25, Rosebud, SD 57570  
605-441-8316  
Gough.bob@gmail.com

## CERTIFICATION OF SERVICE

I, Robert Gough, hereby certify that on the 17th day of July 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of the **INTERTRIBAL COUP'S MOTION FOR RECONSIDERATION OF MAY 28, 2015 ORDER TO PRECLUDE REBUTTAL WITNESSES AND OBJECTION TO KEYSTONE'S JULY 10TH MOTION TO PRECLUDE**, to the following:

Patricia Van Gerpen  
Executive Director  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[patty.vangerpen@state.sd.us](mailto:patty.vangerpen@state.sd.us)

Brian Rounds  
Staff Analyst  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[brian.rounds@state.sd.us](mailto:brian.rounds@state.sd.us)

James E. Moore  
Woods, Fuller, Shultz and Smith P.C.  
PO Box 5027  
Sioux Falls, SD 57117  
[james.moore@woodsfuller.com](mailto:james.moore@woodsfuller.com)  
Attorney for TransCanada Keystone Pipeline, LP

Paul F. Seamans  
27893 249th St.  
Draper, SD 57531  
[jackknife@goldenwest.net](mailto:jackknife@goldenwest.net)

Elizabeth Lone Eagle PO Box 160  
Howes, SD 57748  
[bethcbest@gmail.com](mailto:bethcbest@gmail.com)

Viola Waln  
PO Box 937  
Rosebud, SD 57570  
[walnranch@goldenwest.net](mailto:walnranch@goldenwest.net)

Kristen Edwards  
Staff Attorney  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501

[Kristen.edwards@state.sd.us](mailto:Kristen.edwards@state.sd.us)

Darren Kearney  
Staff Analyst  
South Dakota Public Utilities Commission  
500 E. Capitol Ave.  
Pierre, SD 57501  
[darren.kearney@state.sd.us](mailto:darren.kearney@state.sd.us)

Bill G. Taylor  
Woods, Fuller, Shultz and Smith P.C.  
PO Box 5027  
Sioux Falls, SD 57117  
[bill.taylor@woodsfuller.com](mailto:bill.taylor@woodsfuller.com)  
Attorney for TransCanada Keystone Pipeline, LP

John H. Harter  
28125 307th Ave. Winner, SD 57580  
[johnharter11@yahoo.com](mailto:johnharter11@yahoo.com)

Tony Rogers  
Rosebud Sioux Tribe - Tribal Utility Commission  
153 S. Main St.  
Mission, SD 57555  
[tuc@rosebudsiouxtribe-nsn.gov](mailto:tuc@rosebudsiouxtribe-nsn.gov)

Jane Kleeb  
Bold Nebraska  
1010 N. Denver Ave.  
Hastings, NE 68901  
[jane@boldnebraska.org](mailto:jane@boldnebraska.org)

Benjamin D. Gotschall Bold Nebraska  
6505 W. Davey Rd.  
Raymond, NE 68428  
[ben@boldnebraska.org](mailto:ben@boldnebraska.org)

Cindy Myers, R.N.  
PO Box 104  
Stuart, NE 68780  
[csmyers77@hotmail.com](mailto:csmyers77@hotmail.com)

Lewis GrassRope  
PO Box 61  
Lower Brule, SD 57548  
[wisestar8@msn.com](mailto:wisestar8@msn.com)

Bruce Ellison  
518 6<sup>th</sup> Street #6  
Rapid City, South Dakota 57701

[belli4law@aol.com](mailto:belli4law@aol.com)

and

Robin S. Martinez, MO #36557/KS  
#23816 616 West 26th Street  
Kansas City, Missouri 64108  
[robin.martinez@martinezlaw.net](mailto:robin.martinez@martinezlaw.net)  
Attorneys for Dakota Rural Action

Robert G. Allpress  
46165 Badger Rd.  
Naper, NE 68755  
[bobandnan2008@hotmail.com](mailto:bobandnan2008@hotmail.com)

Louis T. Genung  
902 E. 7th St.  
Hastings, NE 68901  
[tg64152@windstream.net](mailto:tg64152@windstream.net)

Nancy Hilding  
6300 W. Elm  
Black Hawk, SD 57718  
[nhilshat@rapidnet.com](mailto:nhilshat@rapidnet.com)

Bruce & RoxAnn Boettcher  
Boettcher Organics  
86061 Edgewater Ave.  
Bassett, NE 68714  
[boettcherann@abbnebraska.com](mailto:boettcherann@abbnebraska.com)

Willie Kindle President  
Rosebud Sioux Tribe  
PO Box 430 Rosebud, SD 57570  
[cscott@gwtc.net](mailto:cscott@gwtc.net)

Byron T. Steskal & Diana L. Steskal  
707 E. 2nd St.  
Stuart NE 68780  
[prairierose@nntc.net](mailto:prairierose@nntc.net)

Arthur R. Tanderup 52343 857th Rd.  
Neligh, NE 68756  
[atanderu@gmail.com](mailto:atanderu@gmail.com)

Carolyn P. Smith  
305 N. 3rd St.  
Plainview, NE 68769  
[peachie\\_1234@yahoo.com](mailto:peachie_1234@yahoo.com)

Jeff Jensen  
14376 Laflin Rd.  
Newell, SD 57760  
[jensen@sdplains.com](mailto:jensen@sdplains.com)

Peter Capossela, P.C.  
Attorney at Law  
PO Box 10643  
Eugene, OR 97440 [pcapossela@nu-world.com](mailto:pcapossela@nu-world.com)  
Attorney for Standing Rock Sioux Tribe

Gary F. Dorr 27853 292nd  
Winner, SD 57580  
[gfdorr@gmail.com](mailto:gfdorr@gmail.com)

Wrexie Lainson Bardaglio 9748 Arden Rd.  
Trumansburg, NY 14886  
[wrexie.bardaglio@gmail.com](mailto:wrexie.bardaglio@gmail.com)

Eric Antoine, Attorney  
Rosebud Sioux Tribe PO Box 430  
Rosebud, SD 57570  
[ejantoine@hotmail.com](mailto:ejantoine@hotmail.com)

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

Kevin C. Keckler, Chairman  
Cheyenne River Sioux Tribe  
PO Box 590  
Eagle Butte, SD 57625  
[kevinckeckler@yahoo.com](mailto:kevinckeckler@yahoo.com)

Debbie J. Trapp 24952 US HWY 14  
Midland, SD 57552  
[mtdt@goldenwest.net](mailto:mtdt@goldenwest.net)

Joye Braun  
PO Box 484  
Eagle Butte, SD 57625  
[jmbraun57625@gmail.com](mailto:jmbraun57625@gmail.com)

Thomasina Real Bird  
Fredericks Peebles & Morgan LLP 1900 Plaza Dr.  
Louisville, CO 80027 [trealbird@ndnlaw.com](mailto:trealbird@ndnlaw.com)  
Attorney for Yankton Sioux Tribe



Douglas Hayes  
Sierra Club  
Ste. 102W  
1650 38th St.  
Boulder, CO 80301 [doug.hayes@sierraclub.org](mailto:doug.hayes@sierraclub.org)

Tom BK Goldtooth  
Indigenous Environmental Network (IEN)  
PO Box 485  
Bemidji, MN 56619  
[ien@igc.org](mailto:ien@igc.org)  
[ien@igc.org](mailto:ien@igc.org)  
Kimberly Craven, Attorney  
[kimecraven@gmail.com](mailto:kimecraven@gmail.com)

Chris Hesla  
South Dakota Wildlife Federation PO Box 7075  
Pierre, SD 57501  
[sdwf@mncomm.com](mailto:sdwf@mncomm.com)

Amy Schaffer  
PO Box 114  
Louisville, NE 68037  
[amyannschafter@gmail.com](mailto:amyannschafter@gmail.com)

Gena M. Parkhurst  
2825 Minnewasta Place  
Rapid City, SD 57702  
[gmp66@hotmail.com](mailto:gmp66@hotmail.com)

Robert Flying Hawk, Chairman  
Yankton Sioux Tribe  
PO Box 1153  
Wagner, SD 57380  
[Robertflyinghawk@gmail.com](mailto:Robertflyinghawk@gmail.com)

Chastity Jewett  
1321 Woodridge Dr. Rapid City, SD 57701  
[chasjewett@gmail.com](mailto:chasjewett@gmail.com)

Duncan Meisel 350.org  
20 Jay St. #1010  
Brooklyn, NY 11201  
[duncan@350.org](mailto:duncan@350.org)

Dallas Goldtooth  
38371 Res. HWY 1  
Morton, MN 56270  
[goldtoothdallas@gmail.com](mailto:goldtoothdallas@gmail.com)

Terry & Cheryl Frisch 47591 875th Rd.  
Atkinson, NE 68713  
[tcfrisch@q.com](mailto:tcfrisch@q.com)

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

Ms. Mary Turgeon Wynne, Esq.  
Rosebud Sioux Tribe - Tribal Utility Commission  
153 S. Main St  
Mission, SD 57555  
[tuc@rosebudsiouxtribe-nsn.gov](mailto:tuc@rosebudsiouxtribe-nsn.gov)

Matthew L. Rappold  
Rappold Law Office 816 Sixth Street  
PO Box 873  
Rapid City, SD 57709  
[Matt.rappold01@gmail.com](mailto:Matt.rappold01@gmail.com)  
Attorney for Rosebud Sioux Tribe, Intervenor

And on or about May 20, 2015, a true and accurate copy of the foregoing was mailed via U.S. Mail, first class postage prepaid, to the following:

Jerry Jones  
22584 US HWY 14  
Midland SD 57552

Ronald Fees  
17401 Fox Ridge Rd.  
Opal, SD 57758

Bonny Kilmurry  
47798 888 Rd.  
Atkinson, NE 68713

Elizabeth Lone Eagle  
PO Box 160  
Howes, SD 57748

Dated this 17th Day of July 2015.

Respectfully submitted,



---

Robert P. Gough, SD SB# 620  
Secretary of, and Attorney for,  
Intertribal Council On Utility Policy  
P.O. 25, Rosebud, SD 57570  
605-441-8316

[BobGough@IntertribalCOUP.org](mailto:BobGough@IntertribalCOUP.org)