

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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HP 14-001

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 :
: REPLY BRIEF IN SUPPORT OF
TRANSCANADA’S MOTION TO
PRECLUDE TESTIMONY
REGARDING MNI WICONI
PIPELINE EASEMENTS

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Applicant moved to preclude testimony on the question of whether the Keystone KXL pipeline is required to obtain tribal approval to cross the Mni Wiconi pipelines.

Intervener Gary Dorr responded to Applicant’s motion, arguing that presenting evidence regarding the proposed crossings is important to assuring that water supplies to the reservations served by the Mni Wiconi pipeline are protected. Mr. Dorr’s arguments are a departure from his earlier contention that the Applicant must have permission of the Oglala Sioux Rural Water Supply System before it effectuates the crossings, and are generally not responsive to Applicant’s motion.

In its motion, Applicant asked the Commission to preclude testimony “. . . pertaining to tribal consent to the Proposed Keystone XL pipeline’s crossing of the Mni Wiconi pipeline(s), for the reason and on the grounds that no consent is required.” (Applicant’s Motion to Preclude, p.1.) Applicant continues to make that contention, and observes that Mr. Dorr offers neither evidence nor legal authority in his brief to the contrary.

Applicant’s brief and supporting papers indicate that the Mni Wiconi core pipelines are held in trust by the United States for the Oglala Sioux Tribe, per the statute that created the project, Public Law 100-516, section 3(e). As demonstrated by the easements the federal government obtained to construct the core pipelines, the Bureau of Reclamation is the

government agency that manages the United States trust responsibility for the system. The federal easements are not exclusive, and allow other utilities to make use of the easement corridor, provided the underlying land owner agrees. Applicant obtained permission from the underlying land owners, as demonstrated by the supporting papers filed with the motion.

South Dakota law recognizes that easements are by nature non-exclusive, and that competing utilities may make use of easement premises, provided the use is compatible with the senior easement. *See Stanga v. Husman*, 694 N.W.2d 716 (S.D. 2005). Mr. Dorr does not refute those contentions.

Although it is beyond the scope of the Applicant's motion, Mr. Dorr argues in his brief that the BOR must approve specifications for the crossing. That has already been accomplished. After consulting with the Oglala Sioux Rural Water System and its engineers and Applicant's engineering staff, the BOR developed criteria for the crossings. Exhibit 1 attached to the Taylor Supplemental Affidavit filed herewith contains the crossing criteria. The BOR has requested the criteria be incorporated into the Department of State's Record of Decision relative to the project, as demonstrated by Exhibit 2 to the supplemental affidavit.¹

There is no question that Applicant need not have tribal permission to cross the Mni Wiconi core pipelines, that the BOR owns the Mni Wiconi easements and has authority to grant Applicant permission to cross, and that the BOR has developed adequate crossing criteria. Accordingly, it is appropriate to grant Applicant's motion pertaining to tribal consent to the proposed Keystone XL pipeline's crossing the Mni Wiconi pipelines. The matter is simply not an issue for consideration in this limited scope certification proceeding.

¹ Note the letter to the Department of State refers to seven crossings. Of the seven, two are the Mni Wiconi core pipelines. The balance are primarily irrigation projects in Montana operated by the BOR.

Dated this 9th day of June 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ William Taylor

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Reply Brief in Support of TransCanada's Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements, to the following:

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