

**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)

Docket No. HP 14-001

**STANDING ROCK SIOUX TRIBE
MOTION TO RECONSIDER AND MODIFY ORDER GRANTING MOTION IN
LIMINE TO PRECLUDE REBUTTAL TESTIMONY OF JENNIFER GALINDO
AND WASTE'WIN YOUNG**

COMES NOW, intervenor, Standing Rock Sioux Tribe, by and through counsel, and respectfully moves the Public Utilities Commission for reconsideration of its Order dated July 23, 2015 granting the Motion in Limine to Preclude the Rebuttal Testimony of Jennifer Galindo and Waste Win Young. By this motion, the Tribe requests an order reconsidering and vacating the portion of the Order precluding Ms. Young's testimony.

This motion is based upon Amended Conditions 1, 43 and 44 incorporated in the South Dakota permit issued to TransCanada for the Keystone XL Pipeline Project (Amended Final Order, HP 09-001 June 29, 2010); SDCL §§ 19-12-01 (admissibility of relevant evidence); 1-26-18 (right to present evidence in administrative hearing); the Memorandum of Points and Authorities below; and the papers and pleadings on file herein

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF RECONSIDERATION**

“ ‘Administrative agencies have the inherent authority to correct adjudications which appear to be erroneous.’ ” *Jundt v. Fuller*, 736 N.W.2d 508, 512 (2007) *citations omitted*. Of course, all state agencies must follow South Dakota law. SDCL §1-26-36(1). The Order Granting Motion in Limine does not comport with the South Dakota

law governing admissibility of relevant evidence. *St. John v. Peterson*, 804 N.W.2d 71, 75 (S.D. 2011) (“Rule 401 uses a lenient standard for relevance”). The *Order Granting Motion in Limine* to exclude Ms. Young should be reconsidered and vacated.

Ms. Young’s pre-filed testimony addresses the Amended Conditions covering historic properties. She stated in her pre-filed testimony:

Yet the proper procedures to make the requisite determinations have not been followed. The Keystone XL Pipeline is unable to comply with Amended Condition number 43 in the Amended Conditions to the Final Order in HP 09-001.

Pre-filed Testimony of Waste ’Win Young, April 2, 2015, Exhibit A hereto.

From the standpoint of admissibility on the grounds of relevance, Ms. Young’s pre-filed testimony resembles the testimony of Paige Olson of the S.D. Historic Preservation Office, pre-filed on behalf of Staff. Ms. Olson stated in part:

The agency determines if the federal undertaking has the potential to affect historic properties... This term includes properties of religious and cultural significance to Indian Tribes... [T]he agency identifies historic properties within the project area... To the best of my knowledge Keystone XL is in the process of complying with Section 106 of the National Historic Preservation Act through the Programmatic Agreement.

Pre-filed Testimony of Paige Olson, April 2, 2015, 5-7.

With respect to the Programmatic Agreement, Ms. Young’s pre-filed testimony provided a different perspective:

There are no specific mitigation provisions. The provisions of the Programmatic Agreement (“PA”) are too general... an alternative process for resolving disputes over adverse effects and undiscovered historic properties must be put in place...

Exhibit A.

The subject matters of the testimony of Paige Olson on behalf of Staff and Waste’Win Young on behalf of the Standing Rock Sioux Tribe are the same – the process required for compliance with section 106 of the National Historic Preservation Act, and the extent that the Programmatic Agreement complies with the applicable law, as required in Amended Conditions 1 and 43. Ms. Young specifically identifies these

conditions in her pre-filed testimony. *Id.* Nevertheless, if Ms. Olson’s testimony is admitted, then Ms. Young’s must be, also.

South Dakota law gives parties the right to put forward competent evidence in contested administrative hearings. SDCL §1-26-18 provides that “Opportunity shall be afforded *all* parties to... present evidence on issues of fact.” *Emphasis added.* If Ms. Olson may testify on whether Keystone XL may proceed in light of the cultural surveys that have been performed and the PA that has been developed, Ms. Young must be permitted to as well. Section 18 of the South Dakota Administrative Procedures Act, *id.*, as well as fairness, dictate that the Order Granting the Motion in Limine Precluding the Rebuttal Testimony of Jennifer Galindo and Waste Win Young be modified, and that Ms. Young be permitted to testify.

RESPECTFULLY SUMITTED this 24th day of July, 2015

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