

Keystone respectfully submits that it has proven that the project can still be constructed in compliance with the conditions imposed in 2010 and that the Intervenors have failed to submit any evidence based on which the Commission could deny Keystone's petition.

Argument and Authorities

1. This proceeding is not a retrial of the 2010 permit.

On June 29, 2010, in docket HP09-001, the Commission granted a permit for the Keystone XL Pipeline. Per SDCL § 49-41B-22, Keystone was required to prove:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic conditions of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

At the conclusion of a ten-month process, the Commission concluded that Keystone had met its burden of proof and issued an Amended Final Decision and Order dated June 29, 2010 ("Decision") granting a permit and authorizing construction in South Dakota. The permit has not lapsed or expired. It remains in effect today.

Early in this certification process the Commission correctly ruled that the issue is not whether Keystone can still meet its 2010 burden of proof under SDCL § 49-41B-22. (Order Granting Motion to Define Issues and Setting Procedural Schedule, December 17, 2014, at 2.) Rather, the issue, as Commissioner Hanson correctly said at the conclusion of the hearing, is whether Keystone can still meet the original permit conditions. (Tr. at 2476.) This is not a new permit proceeding and Keystone is not required to re-prove what it proved in 2010.

2. Keystone’s burden under SDCL § 49-41B-27

Because construction did not start within four years of the permit being granted, SDCL § 49-41B-27 requires that Keystone “certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.” The Commission construed the statute to refer to the fifty conditions imposed on Keystone by the 2010 Amended Final Decision and Order. It so advised the parties, before, during, and at the conclusion of the evidentiary hearing. (Order Granting Motion to Define Issues and Setting Procedural Schedule, December 17, 2014, at 2; Tr. at 2478-79.) Thus, under the Commission’s construction of the statute, Keystone has the initial burden to show that it can continue to meet the fifty permit conditions imposed in 2010.

3. Keystone met its burden through its certification, shifting the burden to the Intervenors.

On September 15, 2014, Keystone filed a Petition asking the Commission to accept its certification in compliance with SDCL § 49-41B-27. The Petition outlined the status of the Presidential Permit, explaining that two segments of the 2010 version of the project had been constructed after the President recognized that the Gulf Coast and Houston Lateral segments were stand-alone projects not dependent on a border-crossing permit. The Petition further explained that after the 2010 permit issued, the Bakken Marketlink was added to the project, allowing Williston Basin oil to be loaded on the pipeline and shipped to destinations in the United States. The Petition concluded that all other aspects of the project remained unchanged.

The Petition included three important supporting documents. First, Appendix A, the certification instrument, signed by Corey Goulet, the President of Keystone Projects, is a statement under oath that Keystone can and will meet and comply with all applicable permit conditions during construction, operation, and maintenance of the project.

Second, Appendix B, TransCanada's June 30, 2014 Quarterly Report to the Commission, was submitted as required by permit condition 8. The report contains a table, marked as Table 2, in which Keystone addressed the status of implementation of each of the fifty permit conditions. The table in Appendix B has been unchallenged throughout the course of this proceeding.

Third, Appendix C is a tracking table outlining circumstances that had changed since the 2010 Order issued. Keystone identified in the tracking table what relevant, factual circumstances have changed since 2010, and then noted that none of those changes affected its ability to meet the fifty permit conditions. The logic of Appendix C is straightforward and indisputable: unless there has been some factual change that affects Keystone's ability to meet a permit condition, Keystone is logically and necessarily as able to meet the conditions today as it was in 2010.

Keystone submitted its certification, accompanied by the appendices, under the oath of its president, Corey Goulet. Goulet certified that the project could still be constructed per the 2010 conditions imposed by the Commission. By so doing, Keystone met its burden of proof under SDCL § 49-41B-22, subject to some other party proving otherwise.

4. Preclusive effect of the 2010 Order

The 2010 Amended Final Decision and Order is a final and binding Commission order. It was not appealed. Under South Dakota law, an unappealed order is final and entitled to preclusive effect. *Jundt v. Fuller*, 2007 S.D. 52, ¶ 12, 736 N.W.2d 508, 513.

SDCL § 49-13-16 presumes that the Amended Final Decision and Order is final and valid. It can only be challenged if a party claiming the order to be invalid "plead[s] and prove[s] the facts establishing the invalidity." Consistent with SDCL § 49-13-16, the Intervenors' burden under SDCL § 49-41B-27 is to prove that Keystone, having certified that it can continue to meet the permit conditions in the Amended Final Decision and Order, in fact cannot. Such a showing

could be made with evidence that there has been some change in either fact or law since June 30, 2010 that would make it impossible for Keystone to comply with the permit conditions.

Keystone respectfully submits that the Intervenor failed to make any such showing.

5. The Intervenor failed to meet their burden of proof.

a. Most of the conditions are prospective; Keystone's compliance with others was undisputed.

Of the 50 permit conditions, most are prospective in nature and cannot be met until construction begins or the pipeline is placed into operation. As is evident from Appendix B to the Certification Petition, the following conditions are clearly prospective in nature: 1-3, 5, 6.a – 6.f, 11- 14, 16.1 – 16.0, 17, 18, 19.a, 20-34.a, 35- 40, 41.b, 42- 48. Keystone could not logically have presented evidence of compliance with these conditions because of their prospective nature. Instead, Goulet certified in Appendix A, and each of Keystone's witnesses testified, that it will comply with them during construction or operations. No testimony demonstrating that Keystone could not comply was offered.

Two of the twelve remaining non-prospective conditions are inapplicable to certification.

- Condition 4 provides that the permit is not transferable without approval of the Commission.
- Conditions 7-9 require that Keystone appoint a public liaison officer and submit quarterly reports to the Commission, which has been done and is ongoing.

The Intervenor presented no evidence that Keystone has not complied or cannot comply with the remaining non-prospective conditions.

- Condition 10 requires that not later than six months before construction, Keystone must commence a program of contacts with local emergency responders. Keystone presented evidence that it has already started making those contacts and will continue. (Tr. at 317.) Compliance is unchallenged.
- Condition 15 requires consultation with the NRCS to develop the con/rec units, which Keystone established has been done. (Tr. at 617.) The con/rec units were offered in

evidence as Appendix R to the Final Supplemental Environmental Impact Statement. Compliance is unchallenged.

- Condition 19 requires that landowners be compensated for tree removal. Keystone indicated compensation for trees was done as part of the process of acquiring easements. (Certification Petition, App. B, Condition 19.) There is no evidence that Keystone has failed to comply with this condition.
- Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding high consequence areas. Keystone's witnesses testified that this process is ongoing. (Tr. at 662.) Compliance is unchallenged.
- Condition 41 requires that Keystone follow all protection and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks. Keystone presented evidence that this process is ongoing. (Certification Petition, App. B, Condition 19; Tr. at 630, 637.) There was no evidence to the contrary.
- Condition 41.a requires that Keystone consult with SDGFP to identify the presence of greater prairie chicken and greater sage and sharp-tailed grouse leks. Keystone submitted evidence that this process is ongoing. (*Id.*) There was no evidence to the contrary.
- Condition 49 requires Keystone to pay commercially reasonable costs and indemnify and hold landowners harmless for any loss or damage resulting from Keystone's use of the easement. There was no evidence that Keystone has not complied or cannot comply with this condition.
- Condition 50 requires that the Commission's complaint process be available to landowners threatened or affected by the consequences of Keystone's failure to comply with any of the conditions. There was no evidence that Keystone has not complied or cannot comply with this condition.

b. The Intervenors' testimony and evidence did not establish that Keystone is unable to comply with any permit conditions.

The Intervenors collectively called 14 witnesses to testify. Their testimony and exhibits focused on impacts to groundwater and other water resources, tribal consultation, landowner concerns, socio-economic impacts, tribal safety and cultural resources, and pipeline safety and integrity issues. The testimony failed to establish that Keystone cannot comply with any permit conditions.

1. Impacts to groundwater and other water resources

Dakota Rural Action (“DRA”) called Dr. Arden Davis, a South Dakota geologist and professor at the South Dakota School of Mines. (Davis Direct Testimony, Ex. 1003.) Dr. Davis did not address the specifics of any permit condition in his testimony. Instead, Dr. Davis testified that he had concerns about the potential impacts of the Keystone XL Pipeline on groundwater resources and shallow aquifers. (*Id.* at page 1.) Dr. Davis noted that the Project right of way would cross the Little Missouri River, the Grand River and its tributaries, the Moreau River, the Cheyenne River, the Bad River, and the White River, and speculated that dissolved hydrocarbon contaminants could be transported down-gradient by surface or ground water. (*Id.* at page 2.) Dr. Davis also testified that the Cheyenne River has exposed Pierre Shale along its banks that is prone to slope failures. (*Id.*) Dr. Davis did not testify in HP09-001, the underlying permit proceedings. He did testify in opposition to the Keystone Pipeline in eastern South Dakota in Docket HP07-001, offering essentially the same concerns. His testimony, although fully rebutted by Heidi Tillquist, suggests an argument (like the one that the Commission rejected in HP07-001) related to Keystone’s burden of proof under SDCL § 49-41B-22, but it does not establish that Keystone cannot meet any permit conditions.

Keystone witness Heidi Tillquist testified that adverse impacts to groundwater resources, shallow aquifers, and rivers and streams are unlikely. (Tillquist Amended Rebuttal Testimony, Ex. 2017, ¶¶ 4-8.) Dr. Davis did not respond to Tillquist, address the likelihood of adverse impacts, or conduct an independent risk assessment related to the Project. (Tr. at 1808-09.) Rather, his testimony was general in nature. The Commission addressed the likelihood of such adverse impacts in its Findings of Fact in Docket HP09-001, Findings 43-45 and 52, and

concluded that they were not likely. Dr. Davis's testimony is insufficient to warrant any change to those findings.

Dr. Davis testified about the Ogallala aquifer in Tripp County and the wind-blown Sand Hills-type areas crossed by the project right of way. In its 2010 Order, the Commission required Keystone to treat that area as hydrologically sensitive. (Decision, Finding 53, Condition 35; Tillquist Amended Rebuttal Testimony, Ex. 2017, ¶ 9.) Dr. Davis did not testify that such treatment was inappropriate, inadequate or insufficient, nor did he contend that Keystone cannot comply with the conditions relating to those areas.

Dr. Davis testified to his concern about possible benzene exposures from a leak or spill, given that benzene is soluble in water and can be transported downstream, potentially affecting water intakes. (Davis Direct Testimony, Ex. 1003, at pages 3-4.) Tillquist testified, however, that benzene exposures at a level that would cause health concerns would not be expected following a crude oil spill due to the low persistence of benzene and expected emergency response measures. (Tillquist Amended Rebuttal Testimony, Ex. 2017, ¶ 11; Tr. at 2372, 2376-77, 2385-87.) She also testified that a potential release would likely not threaten groundwater sources or public water intakes. (Tillquist Amended Rebuttal, Ex. 2017, ¶¶ 11-12.) The Commission previously found that the risk of a leak affecting public or private water wells is low, and that the risk of a release that would irretrievably impair a water supply is very low. (Decision, Findings 49 and 52.)

Finally, Dr. Davis said he relied on the 2011 Stansbury report that was considered by the Department of State in connection with the Final Supplemental Environmental Impact Statement ("FSEIS"). (Davis Direct Testimony, Ex. 1003, at page 5.) Tillquist addressed Stansbury's analysis in her rebuttal testimony, but was not cross-examined about it. (Tillquist Amended

Rebuttal Testimony, Ex. 2017, ¶¶ 13-14.) Dr. Davis did not address the Stansbury report in his hearing testimony. Accordingly, Tillquist's testimony on the Stansbury report is unrefuted.

DRA also called John Harter, a Tripp County landowner, who testified to his concern about the proximity of the route to the City of Colome's water wells. (Tr. at 2209-10.) In HP09-001, the Commission found that Colome and the Tripp County Water User District is upgradient from the Pipeline and, therefore, would not be affected by a spill. (Decision, Finding 48.) In this proceeding, DENR hydrologist Brian Walsh testified that the route was moved to a location 175 feet from the border of the Colome wellhead protection area and 1,000 feet from the actual wellheads, at the request of the DENR. The route adjustment was made *before* the hearing in HP09-001 and before entry of the Amended Final Decision and Order. (Tr. at 2155-56.) As part of the rerouting process, Keystone met with Colome's mayor and city engineer. Mr. Harter attended the meeting. (Tr. at 1384). Thus, the current route with respect to the City of Colome's wells was determined in consultation with the DENR and Colome, and with their approval. (*Id.*)

Doug Crow Ghost, the Director of the Department of Water Resources for the Standing Rock Sioux Tribe, testified about unquantified Winters Doctrine tribal water rights, and his concern that the Keystone XL Pipeline presented a threat to tribal water supplies in a long-term drought. (Crow Ghost Direct Testimony, Ex. 8010, at pages 3-6; Tr. at 2015-20.) Keystone's only water use is a single appropriation to fill discrete segments of the line for hydrostatic testing before the line is put in service. Crow Ghost concluded by testifying that the Tribe is working with the State towards quantification of the Tribe's water rights. (Tr. at 2016-17.) His testimony was rebutted by Dr. Jon Schmidt, who testified that under state law Keystone cannot use water for hydrostatic testing, or any other purpose, if the use would adversely affect prior rights. Dr. Schmidt noted that ARSD 46:5:40:1, which governs temporary water use permits, protects the

Tribe, even in cases of long-term drought. (Schmidt Rebuttal Testimony, Ex. 2009, ¶¶ 4, 5, 7; Tr. at 1880-82.) Crow Ghost's testimony did not establish that Keystone is unable to meet any permit conditions.

The Cheyenne River Sioux Tribe also called Carlyle Ducheneaux as a witness. (Ducheneaux Direct Testimony, Ex. 7001.) Ducheneaux is the Section 106 Coordinator for the Tribe, and works for the Environmental Protection Department. (Tr. at 990.) In his prefiled testimony, he stated that construction of the pipeline would disturb contaminated sediments in the Cheyenne River and its tributaries, and that pipeline failure was likely due to river bank sloughing and the movement of highly erodible soils. (Ducheneaux Direct Testimony, Ex. 7001, ¶¶ 8-9.) Dr. Schmidt addressed both issues in his rebuttal testimony. Dr. Schmidt noted that there will not be any disturbance of contaminated sediments because the Cheyenne River will be crossed using the horizontal directional drilling method. (Schmidt Rebuttal Testimony, Ex. 2009, ¶¶ 8-9.) Sloughing of the Cheyenne River banks is not an issue for the same reason. (*Id.*) As for tributaries, Keystone's CMR Plan contains a number of mitigation techniques that can be used when appropriate for an open-cut crossing that would avoid Ducheneaux's concerns. (*Id.* ¶ 9.) The Commission previously found that Keystone has committed to mitigate water crossing impacts through implementation of procedures outlined in the CMR Plan. (Decision, Finding 41.) Ducheneaux's testimony did not establish that Keystone is unable to meet any permit condition.

Cindy Myers testified to her concerns about the possible effects of the Keystone XL Pipeline on water quality. Much of her testimony was based on hearsay and is subject to a pending motion to strike, which has not yet been decided. Notwithstanding the motion, Myers testified about: (1) her concerns that emergency responders have adequate information about the

chemical composition of the crude oil (Tr. at 1658-60); (2) the dangers of exposure to benzene (Tr. at 1661-62); (3) her concern that benzene can permeate polyethylene water pipe (Tr. at 1663-64); (4) the asserted fact that 62% of South Dakotans get their drinking water from the Missouri River, which she asserts is at risk from a spill (Tr. at 1666-67); and (5) because of the threat to drinking water resources, the project “could substantially impair the health, safety, and welfare of South Dakotans.” (Tr. at 1673.) Heidi Tillquist established that the risks posed by possible benzene exposure due to a spill are low. (Tillquist Amended Rebuttal Testimony, Ex. 2017, ¶¶ 4, 6, 7, 8, 11, 12.). The Commission previously determined that the risk of any significant pipeline release was low. (Decision, Findings 43-45 and 52). Tillquist testified that studies have established that the amount of benzene present in crude oil is not a threat to PVC pipe. (Tr. at 950-51.) Meyers’ testimony would have been relevant to Keystone’s application for a permit under SDCL § 49-41B-22, but is not relevant to Keystone’s ability to meet any permit condition at issue in this certification proceeding.

Faith Spotted Eagle also testified on behalf of the Yankton Sioux Tribe to concerns about safe drinking water and the availability of water from the Missouri River for spiritual ceremonies. (Spotted Eagle Direct Testimony, Ex. 9011, ¶¶ 21-23; Tr. at 1855-57.) Spotted Eagle’s testimony does not contain any factual basis for the Commission to find either that the Project poses a threat to the Tribe’s drinking water or that water will not be available from the Missouri River for the Tribe’s spiritual ceremonies. Spotted Eagle’s testimony does not establish that Keystone cannot meet any permit condition.

2. Tribal Consultation

The Standing Rock Sioux Tribe called Phyllis Young as a witness. (Young Direct Testimony, Ex. 8001.) Young testified that Keystone did not consult with the Standing Rock

Sioux Tribe and, similarly, that the Department of State failed to consult with the Standing Rock Sioux Tribe in preparing the FSEIS. (Ex. 8001, last page; Tr. at 1722, 1732-33.) She also testified that the Standing Rock Sioux Tribe had passed two or three resolutions opposing the Keystone or Keystone XL Pipelines. (Tr. at 1745-46.)

First, with respect to the FSEIS and consultation by the Department of State, as Keystone established and the Commission acknowledged in pre-hearing motions in limine, it is the responsibility of the lead federal agency, the Department of State, not Keystone, to consult with the tribes under Section 106 of the National Historic Preservation Act. 16 U.S.C. § 470f; 36 C.F.R. Part 800.

Second, Young's testimony that the Department of State failed to consult with the Tribe is contradicted by the record of consultation that is included as Appendix E to the FSEIS. In Table 1 of Attachment G to the FSEIS, the Standing Rock Sioux Tribe is shown as a consulting party under Section 106. (A copy of Table 1 is attached as Exhibit A.) On page 11 of the Record of Consultation, which is the last part of Appendix E, all of the many meetings, e-mails, telephone calls, and letters between the Department of State and the Standing Rock Sioux Tribe are listed. (A copy of page 11 is attached as Exhibit B.)

Third, Keystone attempted to contact tribes in South Dakota with respect to the project, but was rebuffed. Multiple witnesses testified that the Tribes in South Dakota passed resolutions opposing the Project, and that Keystone representatives were not welcome on Tribal land. (Tr. at 1745-46, 1873, 2084, 1096-97, 2104-05.) As noted above, Young testified that the Standing Rock Sioux Tribe passed two or three resolutions opposing the Keystone Pipelines. (Tr. at 1745-46.)

Fourth, no permit condition requires that Keystone conduct a general consultation with the tribes in South Dakota. Three conditions, 6, 10, and 34, arguably require local government interaction, but all three are limited. Condition 6 provides that Keystone should notify “local governmental units” of material route deviations, but Keystone does not understand a Tribe, which is a sovereign nation, to be a “local governmental unit.” It is clearly not an agency of the state, which is the common understanding of local government. *See, e.g., Pennington County v. State*, 2002 S.D. 31, ¶ 10, 641 N.W.2d 127, 130 (“The states have created local government entities, such as counties, townships and cities to do the states’ work at the local level. These subordinate arms of the state have only the authority specifically given by the state legislature.”). Keystone has applied “any material route deviation” as a route change involving a new landowner. There have been no such route changes. Condition 10 requires that Keystone contact local emergency responders not later than six months before construction. Since the obligation is not yet ripe, Keystone cannot have violated that condition with respect to the tribal intervenors. Condition 34 provides that Keystone must “consider local knowledge” in assessing and evaluating environmentally sensitive and high consequence areas. Keystone has done this, notwithstanding the refusal of the Tribes to talk to Keystone. (Certification Petition, App. B., Condition 34(b).) Ms. Young’s testimony does not establish that Keystone cannot continue to meet any permit conditions.

The Rosebud Sioux Tribe called The Honorable Wayne Frederick to testify. (Tr. at 2082.) He is a rancher and a Rosebud Sioux Tribe Council representative. (Tr. at 2082-83.) He testified that the Rosebud Sioux Tribe passed 13 different resolutions in opposition to the proposed Keystone XL Pipeline. (Tr. at 2084.) He also testified that the Rosebud Sioux Tribe Historic Preservation Office had not been consulted about the unanticipated discoveries plan.

(Tr. at 2088.) His testimony offers no basis for the Commission to conclude that Keystone cannot meet any of the Permit conditions.

3. Landowner Concerns

DRA called Sue Sibson as a witness. (Sibson Direct Testimony, Ex. 1003-C.) She testified about ongoing reclamation issues on 8-9 acres of the 17 acres of her property in Miner County crossed by the Keystone Pipeline. Sibson testified that Keystone's contractor was in a hurry to do the initial reclamation on her property in 2010, and initially planted seed in high winds. (Tr. at 1958.) The easement area was mostly weeds after the first seeding, so at the Sibsons' request, Keystone sprayed the area in 2010, replanted it in 2011, and removed rocks from the right of way. (Tr. at 1960-61.) Keystone developed a new, wholesale reclamation plan for the property in 2011. (Tr. at 1974.) Sibson complained that Keystone planted thickspike wheatgrass on the right of way. It was supposed to die out, but has not and has populated approximately 30-40% of the right of way. (Tr. at 1961-63.) The cattle reportedly will not eat it. (Tr. at 1961-62.) Keystone sprayed for weeds in 2013 and twice in 2014. (Tr. at 1963.) It is undisputed that reclamation on the Sibsons' 8-9 acres of pasture is not satisfactory. (Tr. at 1975, 1976-77.)

It is also undisputed that Keystone has taken steps every year since construction to address reclamation at the Sibsons' request (Tr. at 1978) and that Keystone is committed to continue working with the Sibsons until they are satisfied with reclamation (Tr. at 306). The Sibsons have found Keystone-PUC liaison Sarah Metcalf to be helpful and responsive. (Tr. at 1979). It is also undisputed that out of 535 South Dakota tracts on the Keystone Pipeline, all but 9 have been reclaimed to the satisfaction of the landowners. (Tr. at 306.) Notably, Sibson did not testify that Keystone has failed to do anything required by a permit condition or that

Keystone has done anything prohibited by a permit condition. Sibson's testimony, while a concern to Keystone, does not establish that Keystone cannot meet any of the permit conditions.¹

John Harter also testified that Keystone had acquired an easement on his property through the use of eminent domain. (Tr. at 2199.) This testimony is not relevant to any Permit condition. In response, Keystone requested at the hearing (Tr. at 2214) that the Commission take judicial notice of the court file in *TransCanada v. Harter*, Civ. 11-62, in Tripp County. The court entered a judgment dated August 5, 2014, granting Keystone an easement over Harter's property. (A copy of the judgment is attached as Exhibit C.) The judgment was based on a settlement agreement that Harter, then represented by lawyer Matt McGovern, signed with TransCanada on November 27, 2012, a few days before a condemnation trial was set to begin. Over the next 16 months, Harter refused to honor his commitment in the settlement agreement and would not sign the easement he agreed to sign. Keystone ultimately filed a motion to enforce the settlement agreement, which Judge John Brown granted. (A copy of the order dated August 5, 2014, is attached as Exhibit D.) Keystone acquired the easement pursuant to and within the bounds of South Dakota law. That Keystone ultimately had to obtain the easement through legal process does not establish that it cannot meet any of the permit conditions.

4. Socio-Economic Impacts

The Standing Rock Sioux Tribe called Dr. Kevin Cahill, an economist who testified that in his opinion the FSEIS socio-economic analysis was flawed.² He asserted that it was supposed to be a risk-benefit analysis but it failed to consider any risks of the project. (Cahill Rebuttal

¹ Diana Steskal testified as an individual intervenor. She is a resident of Stuart, Nebraska. (Tr.at 975.) Her testimony was about reclamation on the Sibsons' property and, other than establishing a timeline for reclamation on the property, did not add anything to Sue Sibson's testimony. (Tr. at 975-8; Exs. 5005, 5007.)

² Dr. Cahill also testified in rebuttal to Staff witness Brian Walsh's economic testimony. Ultimately, Staff did not call Walsh to testify so there was nothing for Cahill to rebut.
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Testimony, Ex. 8029; Tr. at 1685-88.) He testified that the benefits from the Project had not been measured against its costs as part of the analysis done in the FSEIS. (*Id.* at 1690.) Dr. Cahill's testimony is irrelevant to any permit condition because it is the legal obligation of the Department of State, not Keystone, to prepare the FSEIS. Dr. Cahill was asked whether the issues that he addressed related to Keystone's inability to meet any permit condition. He responded: "I'm not sure I can answer that." (Tr. at 1693-94.) Any asserted deficiency in the FSEIS is unrelated to Keystone's ability to meet the permit conditions.

Paula Antoine, director of the Sicangu Oyate Land Office at Rosebud, testified in rebuttal on behalf of the Rosebud Sioux Tribe. (Antoine Rebuttal Testimony, Ex. 11000.) Over Keystone's objection, she testified that in her opinion Keystone failed to present sufficient evidence related to Findings of Fact 107, 108, 109, and 110 to meet its burden of proof under SDCL § 49-41B-22. (Antoine Rebuttal Testimony at pages 2-4; Tr. at 2133.) Antoine also testified that in her opinion Keystone did not submit sufficient evidence to prove that it could comply with the 59 special conditions imposed by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA"). (Tr. at 2133.) Antoine's testimony was not based on any particular personal knowledge or technical expertise that she has, and was primarily aimed at impeaching the 2010 findings, which is beyond the scope of this proceeding. Compliance with the 59 special conditions is a matter to be determined by PHMSA in the future. Moreover, the sufficiency of Keystone's evidence is an issue for the Commission, not her opinion testimony. Ultimately, her testimony offered no evidence that Keystone could not meet the permit conditions.

5. Tribal Safety/Cultural Resource Concerns

The Yankton Sioux Tribe offered the testimony of Faith Spotted Eagle, who is a counselor and PTSD therapist. (Spotted Eagle Direct Testimony, Ex. 9011; Tr. at 1848-49.) She testified that she was concerned about the proposed work camps in South Dakota and the effect that they might have on the safety of native communities and tribal members. (Ex. 9011, at ¶¶ 14, 18, 19; Tr. at 1850-52.) In her prefiled testimony, Spotted Eagle said that the workers would be young and single with the financial means to use illicit drugs, and that the result would be increased violent crime, sex crimes, and drug-related crimes. (Ex. 9011, at ¶¶ 14, 18.)

None of the permit conditions addresses the work camps. Spotted Eagle offered no evidence beyond her unsupported speculation that the proposed work camps in South Dakota presented a threat to the safety of members of the Yankton Sioux Tribe. Keystone witness Rick Perkins testified that the experience of Keystone's work-camp contractor, Target Logistics, in operating similar camps is nothing like what Spotted Eagle fears, and that increased crime is not a significant problem for the camps. (Perkins Rebuttal Testimony, Ex. 2007, ¶¶ 5-6, 12-13; Tr. at 2400.) Workers who live in the camps must sign a code of conduct and are expelled if they violate the code. (Tr. at 2413.) Perkins also testified that the camps have been permitted where required, and that Keystone has worked and will continue to work closely with law enforcement in addressing the safety of those living near the camps. (Ex. 2007, ¶ 14; Tr. at 2406.)

The Cheyenne River Sioux Tribe called Steve Vance as a witness. (Vance Direct Testimony, Ex. 7002.) He is the Tribal Historic Preservation Officer for the Cheyenne River Sioux Tribe. (Tr. at 1524.) He testified that the construction of the Keystone XL Pipeline would affect access to cultural and religious sites, operation and maintenance of the pipeline could disrupt spiritual practitioners requiring solitude, and that the project would have long-term

emotional and spiritual negative effects on tribal members. (Vance Direct Testimony, Ex. 7002, ¶¶ 7-10.)

Vance's testimony did not address Keystone's ability to meet any permit conditions. Permit condition 43 addresses the protection of cultural resources and provides that Keystone must follow the Unanticipated Discoveries Plan as approved by the Department of State. If Keystone finds any cultural resources during construction, Keystone must notify the Department of State and the State Historic Preservation Office, and, if appropriate, develop a plan to address the resource. Vance offered no testimony that Keystone cannot or will not comply with this condition.

6. Pipeline Safety and Integrity Issues

DRA called Evan Vokes, a former TransCanada employee, to testify about welding and other safety issues that he perceived from his tenure at TransCanada. Vokes, who is no longer a licensed professional engineer, was actively employed by TransCanada from 2007 until October 2011 and on non-working leave until terminated in May 2012. (Tr. at 1550-52.) He started in TransCanada's welding group as an engineer in training, and became a professional engineer in 2009. (*Id.* at 1550-51.) His rank from 2009 until October, 2011 was junior engineer. (*Id.* at 1551-52.) When he started at TransCanada, he had no previous experience with pipeline welding. (*Id.* at 1572.)

Vokes testified to a number of pipeline safety problems that he perceived. Vokes testified that he thought that TransCanada had problems with automated ultrasonic testing (AUT) of welds on the Cutbank Project in Canada. Vokes testified that he found defects in welding procedures used by TransCanada and that he notified his superiors. (Tr. at 1594-96.) He testified that the National Energy Board in Canada ("NEB") sent a letter related to nine welding

procedures that did not meet minimum qualifications. (Tr. at 1594.) Vokes testified that he thought that a pipeline rupture that occurred near Otterburne, Manitoba was an example of an incident caused by a defective weld. (Tr. at 1598-99.)

Dan King, TransCanada's Chief Engineer and Vice President for Asset Reliability, responded to each of Vokes's allegations. King testified that the concerns the NEB raised about AUT on the Cutbank Project were clerical and administrative in nature, not technical or substantive. (Tr. at 2264-65.) He testified that they did not affect the safety of any welds. (*Id.* at 2265.) He testified that the rupture on a natural gas pipeline near Otterburne was caused by a failure on a weld that was completed in 1960 employing procedures different from modern standards. (Tr. at 2265-66.) In addition, TransCanada worked with the NEB to look at the other welds on the same pipeline, and found no issues. (Tr. at 2266-67.)

Vokes testified that he was aware of pipe intended for the Keystone Pipeline that had manufacturing defects. (Tr. at 1602-03.) King testified that although some pipe manufactured for the Canadian portion of the project did not meet Keystone's specifications, it was immediately identified and rejected by TransCanada and was never shipped or installed. (Tr. at 2267-68.)

Vokes testified that he was involved in testing the integrity of the welds along a segment of the Keystone Pipeline. (Tr. at 1600-01.) He stated that there were inspection-related issues with "peaked" pipe, as a result of a manufacturing problem. (Tr. at 1610-11.) Vokes thought that the pipe should not have been used because it could fatigue over time. (Tr. at 1611-14.) He believed, however, that "[w]e did a very good job, actually very good pipe, other than the fact of the peaking." (Tr. at 1613.) Mr. King testified that no pipe installed on the Keystone Pipeline

failed to meet the tolerances permitted by code, and that the pipe met TransCanada's tolerances, which are stricter than code. (Tr. at 2269-70.)

Vokes testified that he thought there were problems with gas metal arc welding causing lack-of-fusion defects. (Tr. at 1603-05.) Dan King testified that lack-of-fusion defects can occur with gas metal arc welding, which is typically used with larger diameter pipe, but that the defects are generally found during the inspection process, and then removed or repaired. (Tr. at 2271-72.)

Vokes testified that he worked on the Bison Project, that there were problems with the welding, and that while TransCanada wanted to use AUT for the welds, it was technically a problem. (Tr. at 1614-19.) As a result of the problems, Vokes testified that there were 1,200 or 1,300 welds on the project that went into the ground that never had a code inspection. (Tr. at 1621.) Vokes also testified that there were dents associated with welds on the Bison project. (Tr. at 1623-24.)

King testified that there was an in-service failure on the Bison Pipeline, a natural gas line. The failure was caused by an external force, but the source of the external force, which appeared to be some sort of heavy equipment strike, could not be determined. (Tr. at 2273-74.) PHMSA was involved in the investigation, and, after investigation and a corrective action order, allowed the pipeline to resume operations and closed the corrective action order. (Tr. at 2274.) As a result of the failure, TransCanada increased the number of inspectors on projects and improved inspector training. (Tr. at 2274-75.) King disagreed with Vokes's testimony that there could be 1,200 to 1,300 defective welds in the ground on the Bison project. (Tr. at 2276-76.) He testified that with PHMSA's involvement and TransCanada's inspection of 100% of the welds, it was not possible. (*Id.*)

Vokes testified that he worked on design and specification of one section in Canada and maybe the Gulf Coast Project in the United States. (Tr. at 1754.) He testified that he was concerned that TransCanada was using Weldsonix, a nondestructive examination company to inspect welds on those projects. He said there had been issues with Weldsonix in the past. (Tr. at 1574-56.) He testified that he was told to qualify Weldsonix. (Tr. at 1756.) Chief Engineer King testified that TransCanada was dissatisfied with the performance of Weldsonix on a project in 2004, but that Weldsonix U.S.A., which did work on the Keystone Pipeline, passed the qualification process and performed very well on that project. (Tr. at 2276-77.) After an anonymous person raised issues about inspection on the Keystone Pipeline, TransCanada audited 100% of Weldsonix' work and found no issues with the work that Weldsonix had done. (Tr. at 2277.)

Vokes's testimony is insufficient to establish that Keystone cannot meet any permit condition. His testimony did not directly relate to any permit condition. While he testified to what he believed were violations of the Pipeline Safety Act and PHMSA regulations regarding welding and inspection procedures, it is undisputed that based on his time with TransCanada: (1) he has no firsthand knowledge of any such issues on the Keystone Pipeline; (2) he has no firsthand knowledge of any such issues on the Gulf Coast Project or the Houston Lateral project, both of which were placed into service after extensive review by PHMSA; and (3) he has no firsthand knowledge of any such issues in South Dakota. (Tr. at 1773, 1775, 1777-78.) Vokes's testimony, which was general and conclusive in nature and difficult to follow, was not directed at any specific condition and was more in the nature of a challenge to his former employer's culture. His testimony made no conclusive proof that Keystone is incapable of complying with the permit conditions.

Conclusion

Keystone has met its burden of proof under SDCL § 45-41B-27: (1) by establishing through the tracking table what changes have occurred relevant to the conditions since 2010; (2) by establishing through the testimony of its witnesses that the changes do not affect Keystone's ability to meet any of the permit conditions; and (3) by establishing through the certification that it can and will continue to meet all of the conditions on which the permit was issued. The Intervenor has failed to prove otherwise.

In addition to this brief, Keystone has submitted proposed findings of fact and conclusions of law consistent with the evidence presented at the hearing. Keystone respectfully requests that the Commission accept its Certification and adopt its proposed findings of fact and conclusions of law.

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