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

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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

**YANKTON SIOUX TRIBE'S  
RESPONSE TO  
APPLICANT'S MOTION TO  
PRECLUDE CONSIDERATION OF  
ABORIGINAL TITLE OR  
USUFRUCTUARY RIGHTS**

**HP14-001**

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COMES NOW Yankton Sioux Tribe ("Yankton"), by and through Thomasina Real Bird and Jennifer Baker with Fredericks Peebles & Morgan LLP, and for its *Response to Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* asserts the following. Because *Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* is without merit and because the relief requested by the Applicant would frustrate the purposes of SDCL Chapter 49-41B, Yankton requests that the Public Utilities Commission ("Commission") deny the Applicant's motion.

**I. INTRODUCTION**

TransCanada Keystone Pipeline, LP ("Keystone") filed a motion seeking to preclude the Commission from considering aboriginal title or usufructuary rights in its certification determination based on three allegations: 1) that the Commission lacks authority to determine whether such rights exist; 2) that assertion of such rights is a challenge to the proposed route, over which the Commission lacks authority; and 3) that such rights do not exist with respect to the proposed project's route. All three of these allegations are made in error and must be rejected. While the Commission certainly lacks jurisdiction to adjudicate land use rights in this matter for

purposes other than its own determination on permit certification, the Commission just as clearly *does* have authority to take those claims and rights into account when it makes the certification determination. Tribes' assertion of those rights in these proceedings does pertain to the route of the proposed pipeline, but the impact on those rights is a permissible consideration for the Commission under Chapter 49-41B. While the Commission is restricted from selecting or altering the route, it is both relevant and necessary that the Commission consider factors tied to the location of a proposed project when it makes a decision pursuant to SDCL § 49-41B-27. Finally, Keystone's allegation that Yankton and other tribes do not have usufructuary rights to the land along the proposed project route is not only false but absurd given that Keystone claims the Commission lacks authority to make that determination. Because Keystone has provided no valid basis for its motion, Keystone's requested relief must be denied.

## **II. BACKGROUND**

Keystone initiated this action by filing a petition on September 15, 2014, seeking to certify that its proposed Keystone XL pipeline project (the "proposed project") continues to meet the conditions upon which a permit was granted pursuant to SDCL 49-41B-27 in 2010. The proposed project is a tar sands pipeline that would cross through land in South Dakota that was reserved for occupancy and various other uses for the Yankton Sioux Tribe and several other Indian tribes pursuant to the Treaty of 1851 at Fort Laramie between the United States and said tribes.

## **III. ARGUMENT**

### **A. The Commission Has Authority to Consider Intervenors' Usufructuary Rights.**

The Commission is entitled to hear all arguments regarding the proposed project so that it has all the facts to make its decision. Moreover, all parties to this case are entitled to present their

concerns to the Commission as a matter of due process. This includes concerns pertaining to usufructuary rights.

Yankton's usufructuary rights in the land at issue have existed since the Treaty at Fort Laramie was signed in 1851. The Commission is authorized to consider Yankton's concerns with respect to its usufructuary rights regardless of whether those rights have been identified as such in court. While the South Dakota Supreme Court has made clear that the Commission cannot exercise *purely* judicial functions, it does not and cannot prohibit the Commission from interpreting the law. To do so would preclude the Commission from functioning as an administrative tribunal.

The case Keystone relies on to support its position, *In re West River Electric Association*, 675 N.W.2d 222 (S.D. 2004) ("*West River*"), only addressed the Commission's authority within the narrow scope of altering the meaning of a statute by changing its interpretation of the statute. The issue in that case was how the term "location" should be interpreted using rules of statutory construction. The scope of the Commission's authority was discussed only to address the Commission's argument that its authority to "redefine its views to reflect its current view of public policy regarding the utility industry" includes authority to give new interpretations to statutory language. *Id.* at 229-230. The Supreme Court of South Dakota held that because the "PUC is not a court, and cannot exercise purely judicial functions...it cannot read into a statute a new definition of 'location' that never previously existed." *Id.* at 230. The Commission therefore is precluded from interpreting a statute in such a way that it gives new meaning to the language of the statute.

Yankton does not seek to have the Commission alter the meaning of a statute in this matter, as was the issue in *West River*. Yankton simply wishes to present to the Commission facts that are relevant to the Commission's determination pursuant to SDCL § 49-41B-27. Nothing in *West River* precludes the Commission from considering such information, and the limitation to the

Commission's authority discussed in that case is irrelevant to the pending matter. The fact that a court has not yet expressly identified Yankton's usufructuary rights as such makes them no less valid and of concern to Yankton and to the Commission's decision in this case. The Commission has the authority to consider usufructuary rights concerns that pertain to the permit certification process, and it must do so in order to fully carry out its functions under SDCL § 49-41B-27.

**B. The Commission Has Authority to Consider Arguments that are Specific to the Proposed Route.**

Although Keystone correctly asserts that the Commission lacks authority to reroute the proposed pipeline, Keystone incorrectly concludes that this precludes the Commission from hearing objections based on the route. Under Keystone's logic, the Commission would be unable to hear all relevant facts about the disadvantages of a proposed project because many of those are directly related to the route. The Commission would be restricted to considering only broad concerns about the project as a whole, unable to consider potential impacts to specific locations such as rivers, residential areas, or specific hazards. Fortunately, this is not the case. The Commission has the authority and discretion to hear all relevant facts to decide whether to deny, grant, or amend a permit. Likewise, the Commission has the authority and discretion to hear all relevant facts to decide whether to grant certification for a permit under SDCL § 49-41B-27.

The legislature enacted SDCL Chapter 49-41B in order to balance the welfare of the people and the environmental quality of the state with the necessity of expanding industry. SDCL § 49-41B-1. To ensure that new facilities will produce minimal adverse effects on the environment and upon the citizens, the legislature requires that a "facility may not be constructed or operated in this state without first obtaining a permit from the commission." *Id.* This cannot be done without giving consideration to the environment and citizens in the vicinity of a proposed project's route.

Though the Commission cannot route a facility, it can deny a permit. SDCL 49-41B-36 directs that “[n]othing in this chapter is a delegation to the commission of the authority to route a transmission facility.” However, “SDCL 49-41B-20 grants the PUC the authority to approve or to disapprove permit applications, including the proposed route.” *In re Nebraska Pub. Power Dist. Etc.*, 354 N.W.2d 713, 721 (S.D. 1984) (emphasis added). Furthermore, if an application is disapproved based on the route, “the applicant can revise the route and seek PUC approval. SDCL 49-41B-22.1 through 49-41B-22.2.” *Id.* Thus, while Commission cannot accept a proposed reroute submitted by another party or propose a reroute itself, it is clearly within the Commission’s authority to deny a permit – and therefore to deny permit certification - for reasons relating to the proposed route.

**C. The Yankton Sioux Tribe and Other Intervenors Retain Usufructuary Rights to Lands Along the Proposed Pipeline Route.**

Yankton and other tribes, some of which have intervened in this action, retain usufructuary rights in lands in South Dakota that would be crossed by the proposed project. These rights do not require adjudication or formal recognition to exist; they exist by virtue of the Fort Laramie Treaty. For an act of the United States to extinguish these rights, the act would require express language to that effect. Keystone has not identified an act that would support its assertion as to these rights. For purposes of responding to Keystone’s motion, Yankton asserts that such rights do exist by virtue of the government-to-government Treaty. Yankton will refrain at this time from arguing the merits of its usufructuary rights claims; however, Yankton appreciates the opportunity to demonstrate these interests and their relevance to the Commission’s certification determination at the evidentiary hearing and through post-hearing briefing. Because Keystone has alleged the Commission cannot determine whether usufructuary rights exist, it cannot at the same time ask the Commission to find that such rights do not exist. Furthermore, Keystone had the opportunity early

in these proceedings to raise any challenges it might have to the inclusion of treaty rights issues in the Commission's determination. Yankton's *Application for Party Status* expressly identifies its ancestral and treaty lands on which the proposed pipeline corridor is located and the risks to those lands as part of its interest in the permit proceedings. Keystone failed to object at that time, when it was first placed on notice of Yankton's interests and intentions. Keystone sat on its rights to challenge the scope of Yankton's participation, thereby waiving this argument. Because Keystone has waived its right to object to the scope of Yankton's participation, Keystone's motion must be denied.

#### IV. CONCLUSION

Applicant's *Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights* is without merit and must be denied. The allegations on which this motion is based are not grounded in law. Because the relief requested would severely impair the Commission's ability to fulfill its duties under SDCL Chapter 49-41B and would violate Yankton's rights to participate as a party to these proceedings, Keystone's motion must be denied.

Dated this 2 day of June, 2015.



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