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

IN THE MATTER OF THE PETITION
OF DAKOTA ACCESS, LLC FOR A
PERMIT TO CONSTRUCT THE
DAKOTA ACCESS PIPELINE

**YANKTON SIOUX TRIBE'S
OBJECTIONS TO DAKOTA ACCESS'
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

HP14-002

COMES NOW Yankton Sioux Tribe (“Yankton”), by and through Jennifer S. Baker and Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and hereby submits its objections to Applicant’s Proposed Findings of Fact and Conclusions of Law.

On October 21, 2015, the Public Utilities Commission (“Commission”) issued an order setting the post-hearing briefing schedule and decision date. In that order, the Commission set November 6, 2015, as the deadline for post-hearing briefs and ordered that proposed findings of fact and conclusions of law may be submitted with initial briefs. The Commission further ordered that response briefs shall be filed no later than November 20, 2015. It should be noted that the November 20, 2015 deadline applied only to the filing of response briefs and that the Commission set no deadline for the submission of responses or objections to proposed findings of fact and conclusions of law.

On November 6, 2015, Dakota Access, LLC (“Dakota Access”) filed its post-hearing brief. On that date Dakota Access also filed Applicant’s Proposed Findings of Fact and Conclusions of Law. In response to Dakota Access’ proposed findings of fact and conclusions of law, Yankton hereby submits the following objections.

Preliminary Matters Addressed

Contrary to the assertion in Dakota Access' proposed findings of fact and conclusions of law, the Public Utilities Commission Staff ("Staff") and Dakota Access did not file Stipulated Proposed Findings of Fact and Conclusions of Law and Permit Conditions as alleged on page 3 of Applicant's Proposed Findings of Fact and Conclusions of Law. However, Staff did stipulate to Dakota Access' proposed permit conditions filed on November 20, 2015.

On page 2 of its proposed findings and facts and conclusions of law, Dakota Access states that, on February 13, 2015, the Commission considered and granted the ARSD 20:10:22:30 waiver, ordering that written testimony be submitted pursuant to a scheduling order. Dakota Access failed to clarify that applications for party status were not considered until after this waiver had been granted, depriving any intervening parties of the opportunity to challenge Dakota Access' request for a waiver.

Dakota Access' Proposed Findings of Fact

Dakota Access' Proposed Finding No. 1: As of the hearing dates, the companies with membership in Dakota Access included Energy Transfer Partners and Phillips 66. Tr. 65 ln 24 – 66 ln 1. They did not include Sunoco Logistics. According to the testimony of Joey Mahmoud, Dakota Access was in the process of reaching an agreement with Sunoco Logistics but no such agreement had been reached as of the date of the hearing. Tr. 66 ln 3-4.

Dakota Access' Proposed Finding No. 11: Contrary to Dakota Access' proposed finding, the Yankton Sioux Tribe offered proposed conditions in the event the permit is granted. Yankton's Post-Hearing Brief at 25-27.

Dakota Access' Proposed Finding No. 16: While Dakota Access offered testimony that that Dakota Access will enter into a contract with "Sunoco Logistics," the testimony did not support a finding that Dakota Access, LLC members currently include Sunoco Logistics. As of

the hearing dates, the companies with membership in Dakota Access included Energy Transfer Partners and Phillips 66. Tr. 65 ln 24 – 66 ln 1. They did not include Sunoco Logistics. According to the testimony of Joey Mahmoud, Dakota Access was in the process of reaching an agreement with Sunoco Logistics but no such agreement had been reached as of the date of the hearing. Tr. 66 ln 3-4.

Dakota Access’ Proposed Finding No. 17: It is not clear from the record whether the record will be operated by Sunoco Logistics or by Sunoco Pipeline L.P. (*see* Sunoco Pipeline L.P. Facility Response Plan (<https://puc.sd.gov/commission/dockets/HydrocarbonPipeline/2014/HP14-002/responseplan.pdf>)), but data from the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) supports a finding that Sunoco Pipeline L.P. would be the operator of the Project, not Sunoco Logistics. *See* Yankton’s Post-Hearing Reply Brief at 2-5.

Dakota Access’ Proposed Finding No. 18: Dakota Access provided no proof or evidence that connecting the Bakken and Three Forks production areas in North Dakota to a crude oil hub in Illinois would replace the United States’ reliance on less stable and less reliable sources of offshore crude oil. Dakota Access also offered no proof or evidence that the Bakken and Three Forks production areas in North Dakota are rapidly expanding.

Dakota Access’ Proposed Finding No. 21: Dakota Access provided no proof or evidence that it has entered into binding contracts for the shipment of crude oil product pursuant to the Project plan.

Dakota Access’ Proposed Finding No. 26: This proposed finding erroneously describes an emergency as an “unlikely event.” As shown by PHMSA’s historical data pertaining to Sunoco Pipeline L.P., a spill is indeed a likely event.

http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Pipeline/PHMSA_Pipeline_Safety_Flagged_Incidents.zip; *See also*, Yankton’s Post-Hearing Reply Brief at 5, 15-16.

Dakota Access’ Proposed Finding No. 27: The use of excessive valves does not demonstrate the company’s commitment to use state-of-the-art safety features, as simply increasing a safety feature does not constitute “state-of-the-art.” In addition, the term “state-of-the-art” is not defined, leaving ambiguity as to the meaning of this finding.

Dakota Access’ Proposed Finding No. 32: Dakota Access provided no proof or evidence that the transport of domestic crude oil to meet domestic refining needs will reduce the United States’ dependence on foreign offshore oil.

Dakota Access’ Proposed Finding No. 33: Dakota Access provided no proof or evidence that it will provide opportunities for refiners in the United States to utilize the crude oil production coming out of the Bakken and Three Forks areas in North Dakota or that the proposed project would be reliable and safe or help ensure that U.S. energy needs are not subject to unstable political events.

Dakota Access’ Proposed Finding No. 34: Dakota Access provided no proof or evidence that it has secured binding long-term transportation and efficiency contracts from multiple committed shippers to support development of the proposed project. Without this evidence, there is no demonstrated endorsement or support for the Project, its economics, proposed route and target market, or the need for additional pipeline capacity and access to domestic refinery markets.

Dakota Access’ Proposed Finding No. 37: This proposed finding contains no citation to evidence or the record and is thus unsupported.

Dakota Access’ Proposed Finding No. 41: This proposed finding contains no citation to evidence or the record and is thus unsupported. In addition, neither Dakota Access nor the

Commission can know with certainty that farmland will be reclaimed and put back to pre-construction condition and use. Pursuant to testimony by Sue Sibson and Kent Moeckly, despite promises that a pipeline company will reclaim land to its pre-construction condition, that does not always happen and the Commission cannot find that it will happen in the future based merely on Dakota Access' promises. Tr. at 1186 ln 6 – 1191 ln 24, 1378 ln 1 – 1385 ln 9.

Dakota Access' Proposed Finding No. 42: This proposed finding contains no citation to evidence or the record and is thus unsupported.

Dakota Access' Proposed Finding No.51: Impacts to water bodies will not be limited to the construction phases as they could also occur through spills during abnormal operations of the pipeline.

Dakota Access' Proposed Finding No. 66: Dakota Access' cultural resource survey was not thorough and complete because it did not include consideration of oral history or the use of tribal cultural resource experts who have unique perspectives and abilities to identify resources that non-tribal surveyors do not possess. Furthermore, the route remains to be 100% surveyed. *See* Dakota Access' proposed finding of fact no. 67; Tr. 468 ln 9-10; Ex. Staff-6 at 9. When asked whether the Applicant can mitigate the risks associated with crossing sensitive cultural areas, Paige Olson responded, “[i]t is unclear as the identification of historic properties is not complete.” Ex. Staff-6 at 9.

Dakota Access' Proposed Finding No. 69: This proposed finding is misleading, as it indicates that all areas of particular cultural sensitivity had been identified by the Rosebud Sioux Tribe and thus that all areas of particular cultural sensitivity would be avoided. It is currently unclear whether all sensitive areas would be avoided because “the identification of historic properties is not complete.” Ex. Staff-6 at 9.

Dakota Access' Proposed Finding No. 70: This proposed finding erroneously describes an emergency as an "unlikely event." As shown by PHMSA's historical data pertaining to Sunoco Pipeline L.P., a spill is indeed a likely event. http://phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Pipeline/PHMSA_Pipeline_Safety_Flagged_Incidents.zip; *See also*, Yankton's Post-Hearing Reply Brief at 5, 15-16.

Dakota Access' Proposed Finding No. 102: Yankton objects to this proposed finding on the grounds that it is not supported by the evidence. For example, Dakota Access indicated that horizontal directional drilling is safer than the open cut method (*see, e.g.*, tr. 944 ln 13-15), yet horizontal directional drilling would only be used at four (tr. 2172 ln 17-18) of the 288 waterbody crossings (ex. DA-1 at 25). In addition, Dakota Access conceded that it would be possible to route the proposed pipeline further away from highly populated areas, but it chose not to do so. Tr. 2112 ln 5 – 2119 ln 23.

Dakota Access' Proposed Finding No. 103: While the Commission lacks authority to route a facility, SDCL 49-41B-36, nothing in the law prohibits the Commission from considering a proposed facility's route in making its decision to grant or deny a permit. This proposed finding is a misinterpretation of South Dakota law.

Dakota Access' Proposed Finding No. 104: Yankton objects to this proposed finding and as its basis therefor incorporates Yankton's Post-Hearing Brief, pages 20-23, and Yankton's Post-Hearing Reply Brief, pages 13-21, by reference.

Dakota Access' Proposed Finding No. 106: Yankton objects to this proposed finding and as its basis therefor incorporates Yankton's Post-Hearing Brief, pages 20-23, and Yankton's Post-Hearing Reply Brief, pages 13-21, by reference.

Dakota Access' Proposed Finding No. 107: Yankton objects to this proposed finding and as its basis therefor incorporates Yankton's Post-Hearing Brief, pages 5-8, and Yankton's Post-Hearing Reply Brief, pages 2-4, by reference.

Dakota Access' Proposed Conclusions of Law

Dakota Access' Proposed Conclusion of Law No. 1: Yankton objects to this conclusion of law on the grounds that it does not indicate that compliance with SDCL Chapter 49-41B, including SDCL 49-41B-1, is mandatory for the Commission to grant a permit for the proposed project.

Dakota Access' Proposed Conclusion of Law No. 3: Yankton objects to this proposed conclusion of law and as its basis therefor incorporates Yankton's Post-Hearing Brief, pages 5-8, and Yankton's Post-Hearing Reply Brief, pages 2-4, by reference.

Dakota Access' Proposed Conclusion of Law No. 4: The project does involve federal agency action by both the Fish and Wildlife Service and the Army Corps of Engineers. Furthermore, "[t]he full extent of federal involvement in this project has not been established." Ex. Staff-6 at 9.

Dakota Access' Proposed Conclusion of Law No. 5: Yankton objects to this proposed conclusion of law and as its basis therefor asserts that it is necessary for a comprehensive understanding of the environmental impacts of the proposed project to conduct an environmental impact statement pursuant to South Dakota law. Yankton further incorporates Yankton's Post-Hearing Brief, pages 14-20, and Yankton's Post-Hearing Reply Brief, pages 13-14, by reference.

Dakota Access' Proposed Conclusion of Law No. 6: Yankton objects to this proposed conclusion of law and as its basis therefor incorporates Yankton's Post-Hearing Brief, pages 11-13, and Yankton's Post-Hearing Reply Brief, pages 5-13, by reference.

Dakota Access' Proposed Conclusion of Law No. 7: Yankton objects to this proposed conclusion of law and as its basis therefor incorporates Yankton's Post-Hearing Brief, pages 13-22, and Yankton's Post-Hearing Reply Brief, pages 13-19, by reference.

Dakota Access' Proposed Conclusion of Law No. 8: Yankton objects to this proposed conclusion of law and as its basis therefor incorporates Yankton's Post-Hearing Brief, pages 22-23, and Yankton's Post-Hearing Reply Brief, pages 19-21, by reference.

Dakota Access' Proposed Conclusion of Law No. 9: Yankton objects to this proposed conclusion of law and as its basis therefor incorporates Yankton's Post-Hearing Brief, pages 23-24, and Yankton's Post-Hearing Reply Brief, pages 22-23, by reference.

Dakota Access' Proposed Conclusion of Law No. 10: Both the Yankton Sioux Tribe and the Rosebud Sioux Tribe are affected local units of government, as explained in Yankton's Post-Hearing Brief at 23-24.

Dakota Access' Proposed Conclusion of Law No. 11: The Yankton Sioux Tribe does have adjudicated land rights to property that would be crossed by the proposed project pursuant to *Yankton Sioux Tribe v. United States*, 24 Ind. Cl. Comm. 208, 215 (1970) and Appendix A thereto. *See also*, Yankton's Post-Hearing Brief at 12; Yankton's Post-Hearing Reply Brief at 7, 22-23.

Dakota Access' Proposed Conclusion of Law No. 12: This proposed conclusion of law is irrelevant, as none of the Native American tribes involved in the proceeding have asked the Commission to adjudicate water rights.

Dakota Access' Proposed Conclusion of Law No. 17: Yankton objects to this proposed conclusion of law on the grounds that nothing in South Dakota law prohibits the Commission from considering the route of a proposed facility in its decision on whether or not to grant a permit. While the Commission cannot route a proposed facility, it can certainly consider a route

proffered by an applicant in making its decision. This proposed conclusion is a misinterpretation of South Dakota law.

Dakota Access' Proposed Conclusion of Law No. 19: Yankton objects to this proposed conclusion of law and as its basis therefor asserts that an environmental impact statement is necessary to fully assess the impact of the proposed project, and incorporates Yankton's Post-Hearing Brief, pages 14-20, and Yankton's Post-Hearing Reply Brief, pages 13-14, by reference.

Dated this 24th day of November, 2015.



Jennifer S. Baker, *Pro Hac Vice*
Thomasina Real Bird, SD Bar No. 4415
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jbak@ndnlaw.com
Email: trealbird@ndnlaw.com

Attorneys for Yankton Sioux Tribe