BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF DAKOTA ACCESS, LLC FOR AN ENERGY FACILITY PERMIT TO CONSTRUCT THE DAKOTA ACCESS PIPELINE PROJECT	))))))	HP14-002 APPLICANT'S REPLY BRIEF

Pursuant to the briefing schedule established by the South Dakota Public Utilities Commission ("Commission") at the close of the evidentiary hearing in this proceeding, Dakota Access, LLC ("Dakota Access") hereby submits its reply brief in support of its application for a permit under the South Dakota energy conversion and transmission facility act, with respect to the Dakota Access Pipeline Project ("the Project").

Dakota Access asserted that the Commission should grant its permit application, with conditions. Various other parties to the proceeding also filed initial briefs. In this reply brief, Dakota Access responds to certain positions taken by other parties in their initial briefs.

In addition, since the close of the hearings, Dakota Access and the Commission Staff ("Staff") engaged in discussions to incorporate Staff's independent concerns into the permit conditions proposed by Dakota Access with its initial brief. As a result of those discussions, Staff and Dakota Access were able to stipulate to proposed permit conditions. Dakota Access requests the Commission consider the stipulated proposed permit conditions submitted with this brief as Exhibit A.

In its initial brief, Dakota Access demonstrated that it satisfied its burden of proof under the South Dakota Energy Conversion and Transmission Facilities Act, as established at SDCL 49-41B-22. Specifically, Dakota Access demonstrated that:

(i) The proposed facility will comply with all applicable laws and rules;

(ii) The facility will not pose a threat of serious injury to the environment, nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;

(iii) The facility will not substantially impair the health, safety or welfare of the inhabitants; and

(iv) The facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of governing bodies of affected local units of government.

Nothing in the arguments or briefs of the intervenors should be read to persuade otherwise.

I. THE PROPOSED FACILITY WILL COMPLY WITH ALL APPLICABLE LAWS AND RULES: Intervenors failed to prove otherwise.

A siting permit in this matter should be conditioned on its compliance with all applicable laws and rules. See Stipulated Condition 1, Exhibit A. Dakota Access has a process in place to not only identify applicable laws, but to assure compliance with the law. Intervenors did not identify a current failure by Dakota Access to follow the law, nor did they identify any flaws in Dakota Access's process to assure future compliance.

In their post-hearing brief, the landowner intervenors argue a position reminiscent of what the Commission heard from intervenors in a 2007 hydrocarbon pipeline siting docket. Specifically, landowner intervenors argue the Commission must analyze "direct evidence of actual compliance." Glenn Boomsma Brief at page 2. In 2007, the Commission rejected this argument. This Commission should view the matter in the same way.

Dakota Access's burden of proof is phrased in future terms, which makes sense given that a facility not yet permitted or constructed cannot be in compliance with all applicable laws and rules. Dakota Access therefore must and did prove, that the proposed facility "will comply with all applicable laws and rules." SDCL 49-41B-22. As Staff wrote, "the Applicant's ability to comply with all applicable laws and rules is demonstrated through the Applicant's awareness of the laws and rules it is subject to, and through the Applicant's compliance with the applicable laws and rules to date." Commission Staff Brief at page 5. Dakota Access agrees with Staff. Intervenors did not positively identify a flaw in the company's method of identifying its obligations or its plans for meeting its obligations.

Also reminiscent of a Commission hydrocarbon pipeline siting docket in 2007, the landowner intervenors relied heavily upon perceived wrongs in the land acquisition process as a basis for their opposition to the Dakota Access Pipeline. As the law contemplates and as the Commission is well aware, land acquisition activities occur before and during the siting process. However, when negotiations are unsuccessful, the law directs parties to the South Dakota Circuit Court.

South Dakota law found at SDCL 49-7 grants pipeline companies the use of eminent domain:

> *All pipelines holding themselves out to the general public as engaged in the business of transporting commodities for hire by pipeline are common carriers and are not subject to the provisions of Title 49 except as provided by this chapter and chapter 49-41B. SDCL 49-7-11.*

> *Any pipeline companies owning a pipeline which is a common carrier as defined by § 49-7-11 may exercise the right of eminent domain in acquiring right-of-way as prescribed by statute. However, in the case of school and public lands, no right-of-way for the purpose of carriage of property by pipeline shall exceed ten feet in width but the pipeline company shall have the right to secure such land as may be reasonably required for pumps, stations, substations, tanks, or buildings*

necessary for the carriage of the type or kinds of property the pipeline company intends its pipeline to carry. SDCL 49-7-13.

Dakota Access is a common carrier under the facts of the matter, and also under a case on similar facts decided by Judge VonWald. Dakota Access holds itself out, through the Open Seasons and the execution of binding contracts, as engaged in the business of transporting commodities for hire. Dakota Access is a common carrier holding itself out and seeking to construct to deliver the products of third parties. Doing so squarely meets the letter of the statute which grants the use of eminent domain to Dakota Access. SDCL 21-35 is the chapter of law that directs the Circuit Courts in the application of eminent domain process.

It seems the landowner intervenors and Dakota Access interpret language contained in these chapters of laws differently. Arguments pertaining to the condemnation process have been, are and will continue to be made to the Circuit Court and the Supreme Court. However, it is not appropriate to ask the Commission to enter an order or decision which interprets any of the statutes in SDCL 21-35. Nothing in Title 49 (or any other Title of the Code) requires or allows the Commission to make any determinations with respect to the grant or usage of eminent domain. The Commission is without responsibility, jurisdiction or authority to determine whether Dakota Access has properly sought Court orders. Those determinations are for the Courts.

The Indigenous Environmental Network ("IEN") and Dakota Rural Action ("DRA") continue to argue, as their witness Waste'Win Young testified at hearing, that the Section 106[1] process applies to every mile and acre of affected land along the route. That position is incorrect. As a result of EIN and DRA's mistaken belief, the organizations continue to argue that Dakota

[1] See 16 USC §470 *et seq.* and 36 CFR 800 *et seq.*

Access violated the law. Dakota Access expresses surprise that an organization like Dakota Rural Access, which began as a landowner organization and ostensibly still is, would promote a position seeking Federal control over private property. The organizations apply Section 106 incorrectly and try to expand its application to support its argument that Dakota Access has a legal obligation to consult with Native American Tribes regarding cultural resources along the entire proposed route. IEN and DRA are simply not correct.

With that said, Dakota Access understands cultural resources are of great importance to the tribes and demonstrated the efforts it will take to avoid impacting those resources. For example, at a crossing point near the James River, where significant cultural resources are located, Dakota will utilize the Horizontal Directional Drill construction method to avoid impacts. The decision to use that crossing method comes at financial cost to Dakota Access. However, upon discovery of the cultural resources in the area, the company did not consider any other way to address the crossing. See Ex. DAPL 53.

The Section 106 process is part of a federal Act known as the National Historic Preservation Act ("NHPA"). Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the affects of their undertakings on historic properties and afford ... a reasonable opportunity to comment on such undertakings. 36 CFR §800.1(a). In carrying out its responsibilities under this section, a federal agency shall consult with any Native American tribe, "... that attaches religious and cultural significance to properties that may be affected by an undertaking..." 36 CFR §800.2.

As a matter of law, there are limited areas of "federal undertaking" along the proposed Project route. Federal law defines "an undertaking." Pursuant to law, an undertaking means "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of

a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license or approval." 36 CFR §800.16 (y). The Section 106 process is not initiated unless an action meeting the definition of an "undertaking" occurs. In this case, the US Army Corps of Engineers is the federal agency with jurisdiction over waters of the US which includes rivers, lakes and wetlands. That federal agency must issue permits as the Project impacts those areas, and as part of that process causes an "undertaking" to occur which then triggers the Section 106 process. Tr. at 2168. The federal government does not have any jurisdiction to conduct a "Section 106" consultation process on private property. The intervenors cannot rely on the Section 106 consultation process as the basis for their request that consultation occur on private property along the route and Dakota Access is not in violation of the Section 106 process.

IEN and DRA next attempt to broaden the application of the Section 106 process by arguing that the entirety of the Project crosses tribal aboriginal land and as a result the previously sited federal code applies. The Commission does not have the responsibility, authority or jurisdiction to consider legal claims to land in South Dakota whether that be private property, state or federal land. As such, the Commission is bound by settled law, which very clearly states the Section 106 process applies to federal "undertakings" only. As such, IEN and DRA's arguments in an attempt to change settled law are outside the Commission's jurisdiction and the scope of this proceeding. Their arguments must be disregarded.

IEN and DRA's reliance on *Montana Wilderness Association v. Fry*[2], *Hough v. March*[3] *and Colorado River Indian Tribes v. March*[4] as the basis for its argument is also flawed. In all

[2] 310 F. Supp.2d 1127 (D. Mont. 2004)

[3] 557 F. Supp. 74 (1982 U.S. Dist)

[4] 605 F. Supp. 1425 (D. Cal. 1985)

three cases, a federal agency was held accountable for NHPA compliance. The sited cases do not pertain to an enforcement action against a non-government entity. The sited cases do not indicate that a private, non-government entity must take action under NHPA or stand for the proposition that IEN and DRA propose. To the contrary, the cited cases make it clear the Section 106 process pertains to federal agency undertakings only. With that said, DAPL is aware that the Section 106 consultation process has been initiated by the US Army Corps of Engineers in applicable limited "federal undertaking" areas along the proposed Project route. Tr. at 2167.

Other intervenor criticisms or arguments that applicable law or rules were not followed are generally non-substantive and pertain more to application completeness than legal compliance. The "application process" in the case of a siting docket is ongoing from the initial submission through evidentiary hearing. All information required per South Dakota law is in evidence. The Commission Staff conducted a completeness review and finds Dakota Access complied with the applicable South Dakota statutes and submitted all information as required by law. Ex. Staff-1. Commission Staff, in conducting its completeness review made multiple, detailed inquiries of the Applicant, as it does in all dockets, siting or otherwise. All requests for information were answered and made part of the docket and evidence. As with all evidentiary proceedings, the finder of fact must base its decision on the totality of the evidence. In doing so, the Commission must review all evidence on record. Evidence on record includes the information submitted as Staff's Exhibit 1 and testimony from all parties.

Finally, the tribes allege tribal participation is required to accurately determine community impacts. However, their arguments lack credibility due to the sheer distance in miles between the reservations and the proposed pipeline route. Indian tribes in South Dakota will not

experience direct impacts as a result of construction or operation because the proposed Project does not pass through or adjacent to Indian Reservations.

II. 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 OF THE SITING AREA: Intervenors failed to prove otherwise.

Landowner intervenors who testified all clearly articulated their preference that someone else in some other place be directly affected by the proposed pipeline. However, they did not provide any evidence to contradict the Applicant and Staff expert witnesses who concluded that the facility will not pose a threat of serious injury to the social and economic condition of inhabitants or expected inhabitants. Experienced experts were in agreement at the hearing as to this critical point.

Aaron Dejoia on behalf of Dakota Access provided credible evidence and history to prove that drain tiles can be repaired and that the Dakota Access plan for drain tiles will be successful. Tr. 1878 – 1881. Despite the information, testimony, evidence and history provided, landowner intervenors seem convinced that affected drain tile will forever be destroyed, can't be fixed and that the only method of repairing or mitigating effects is to use a tile bridge. The evidence is that tile damage can be fixed, and is fixed frequently. The evidence also is that the use of tile bridges is a relatively new construction method without sufficient historical results to determine its success. Tr. at 1880.

The landowners' refusal to hear even their own voices in the facts and evidence is confusing. The evidence simply does not support the position landowner intervenors take.

Despite Applicant's hearing testimony and the documents provided to landowners, landowner intervenors argued that Dakota Access will provide only one-time compensation to

landowners and then "landowners are on their own." This is simply not true. Dakota Access is already obligated by its own easement documents to completely and fully remediate any and all damage that results from their facility construction. In an effort to make landowner negotiations and transactions as easy as possible, Dakota Access pays landowners upfront, preconstruction, for crop losses for three (3) years, whether or not crop loss is experienced. Beyond those three (3) years, Dakota Access pays for damages on an individual case by case basis. Dakota Access is committed to full reclamation and expects crop production to be as it was prior to construction, by the end of the third year. However, Dakota Access will reimburse landowners for actual damages past the three years. As evidence of its commitment, Dakota Access stipulates to the imposition of conditions. See conditions 44 through 50, Exhibit A.

IEN and DRA argue that the Project's proposed crossing of the Missouri River in North Dakota poses a threat of serious injury to the environment. The construction techniques utilized for such crossings, combined with the hydrostatic testing and the integrity management plan show otherwise. It is important to note that the pipeline route in other states is not subject to the Commission's review. The South Dakota Public Utilities Commission has responsibility and jurisdiction to examine and review the proposed project route in the state of South Dakota only.

IEN and DRA, in support of their argument, state that downstream jurisdictions may impose rules on upstream polluters. However, no pollution has occurred. In the event of a spill, if oil enters the Missouri River north of South Dakota's border and makes its way down stream prior to containment, South Dakota authorities may indeed have some jurisdiction regarding the matter. More likely it would be a matter of federal involvement. However, neither IEN nor DRA offered any authority by which South Dakota can involve itself in the proposed project siting outside the border of South Dakota.

III. THE FACILITY WILL NOT SUBSTANTIALLY IMPAIR THE HEALTH, SAFETY OR WELFARE OF THE INHABITANTS: Intervenors did not prove otherwise.

It was argued that the Project will cause an increase in sexual violence against Native American women. It was also argued that the Project will cause an increase of crime within Indian reservation borders. However, the witnesses could not connect facts to their fears and no credible evidence was introduced to support their claims. When Mr. Cooke, an elected member of the Business and Claims Committee of the Yankton Sioux Tribe was asked about the impact of the Keystone pipeline on the crime within the Yankton Sioux Tribe Reservation, he stated that he "did not know." Tr. 1069. The tribal intervenors whose fears drove these arguments had a full opportunity to provide the Commission with real facts and figures, and did not or possibly could not do so. Either way, no credible evidence was provided in support of the argument.

IV. THE FACILITY WILL NOT UNDULY INTERFERE WITH THE ORDERLY DEVELOPMENT OF THE REGION: The record is completely void of any evidence to the contrary.

The only City or County intervenor to provide written testimony and appear at the hearing was the City of Sioux Falls. The City of Sioux Falls explicitly wrote in its brief that it "does not object to the route along its landfill." Sioux Falls Brief page 1. Dakota Access acknowledges the proximity of its route to the City of Sioux Falls and Minnehaha and Lincoln Counties. However, the evidence shows its routing location and proximity to those communities does not cause an "undue interference with orderly development of the region." Of note, the statute does not require the Commission to examine the orderly development of particular communities with close proximity to the project. Rather, the statutory burden of proof directs the Commission to examine the orderly development of the region. SDCL 49-41B-22.

All regions throughout the United States have incorporated pipeline infrastructure into their development plans and are some of the United States' largest individual communities, despite the presence of the underground infrastructure. It was not and cannot be shown that the presence of pipelines, by their very existence, interferes with the development of a region. Tr. at 399-400, 486-487. The evidence showed that communities, including Sioux Falls, both for this and previous pipelines, incorporate pipelines into their planning, including green space and other considerations. Id. No party to this proceeding provided the Commission with any evidence that the Dakota Access pipeline or South Dakota is unique or different than any other pipeline located anywhere else in the United States, and thus must be sited in an unpopulated or under-populated area of our state.

Furthermore, by statute, the Commission does not have jurisdiction to do what intervenors would seem to prefer, that is, move the pipeline. The Commission is not vested with authority or jurisdiction to dictate pipeline route.

V. ADDITIONAL ARGUMENTS OUTSIDE THE BURDEN OF PROOF

Intervenor parties made other arguments or points outside of the statutory burden of proof. Some deserve a reply, and they are as follows:

Dakota Access did not ask and does not expect the Commission to "rubber stamp" its plan. See Glenn Boomsma Brief, page 22. That term in that argument seems to somehow wish that Dakota Access had offered an irresponsible plan for its project. To the contrary, it should surprise no one that Dakota Access put significant time, resources and planning into the Project engineering, its Commission application and the proposed route. Nor should it surprise or offend that the Dakota Access project meets the letter of the law. Rather it should be expected that it does. The proposed route does not threaten the safety of South Dakota's residents. Whether in a

highly populated area or a slightly populated area, Dakota Access is responsible for all impacts and effects of the Project. As such, Dakota Access made a great effort to choose a responsible route and mitigate impacts to others, yet fulfill its business goals of meeting the nation's growing energy demand.

Part of Dakota Access' responsibility and commitment to landowners and owners of other facilities is to negotiate easements and crossing agreements openly and honestly. Dakota Access is committed and required to follow all the laws of every state it traverses. Dakota Access is also permitted to follow and utilize the laws of every state it traverses when acquiring land. Dakota Access cannot be punished for using the laws of the state of South Dakota. If that law changes, either legislatively or through Supreme Court rulings, Dakota Access is obligated to follow the same. However, it is unfair to accuse the company of proceeding in bad faith or with malicious intent simply because legal theories upon which intervenors rely are yet to be heard by a Court with proper jurisdiction.

In its brief, the Yankton Sioux Tribe requested several conditions. The Tribe requests a condition that Dakota Access will survey 100% of the land affected by the proposed project prior to construction. Dakota Access already had plans to do so. As such, the company agrees and furthermore, it is bound to do so per the law. However, tribal consultation as requested by the Yankton Sioux Tribe is not possible. Absent landowner consent or direction, Dakota Access cannot conduct tribal consultations on private property. The Commission does not have jurisdiction to Order private property landowners to permit such a consultation. If landowners along the route desire to initiate such a process, they can reach out to tribal offices independent of this proceeding. However, if the Commission were to order it, it would infringe upon their private property rights inherent in the ownership of land.

VI. CONCLUSION

The burden of proof the Commission must examine is codified at SDCL 49-41B-22. The law does not permit the Commission to weigh "harm" to individual South Dakota intervenors against the benefit to South Dakota residents or the state as a whole. Rather, the Commission must determine whether Dakota Access met the statutory burden of proof by a preponderance of the evidence. Dakota Access respectfully requests the Commission grant the requested permit and consider imposing all conditions stipulated by Dakota Access and Staff.

Dated this 20 day of November, 2015.

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