

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

**IN RE APPLICATION BY DAKOTA ACCESS, LLC FOR AN
ENERGY FACILITY PERMIT TO CONSTRUCT THE DAKOTA ACCESS PIPELINE**

DOCKET NO. HP 14-002

**PREFILED EXPERT REBUTTAL TESTIMONY
BY PETER CAPOSSELA, ATTORNEY AT LAW
ON BEHALF OF THE INDIGENOUS ENVIRONMENTAL NETWORK
AND DAKOTA RURAL ACTION**

August 14, 2015

Q. State your name and occupation for the record.

A. My name is Peter Capossela, and I am a private practice attorney from Oregon. My business address is Post Office Box 10643 Eugene, Oregon 97440. My practice exclusively involves Tribal representation in disputes involving water and natural resources. For 20 years, I conducted Tribal general counsel work, but in recent years I have focused on water and natural resources. In addition to my work as a lawyer, I have written and taught at the college level on these issues.

Q. On whose behalf are you testifying?

A. I am testifying on behalf of the Indigenous Environmental Network, a nationwide non-profit organization which serves as a clearinghouse of information for the Indian Nations on important environmental issues affecting the Tribes, and Dakota Rural Action, a non-profit citizens group addressing quality of life issues in rural South Dakota. My testimony is presented as expert rebuttal testimony to the pre-filed testimony of Darren Kearney, Monica Howard and John H. Edwards.

Q. What is the basis of your expertise?

A. I received a B.A. in history from the University of Oregon in 1983, and a J.D. from the University of Oregon School of Law in 1988. Since that time, I have worked extensively on Tribal water claims in South Dakota and involving the Missouri River. My 2002 article entitled "Indian Reserved Water Rights in the Missouri River Basin," published by the *Great Plains Natural Resources Journal* (now called the *Sustainable Development Journal*) of the University of South Dakota School of Law, has been considered a seminal work on Tribal water claims in South Dakota. 6 *Great Plains Natural Res. J.* 131 (2002). My recent article "Impacts of the Army Corps of Engineers' Pick-Sloan Program on the Indian Tribes of the Missouri Basin," published by the *University of Oregon Journal of Environmental Law and Litigation*, includes an analysis of the impact that energy development has had on Indian water rights, on the Lakota and Dakota Reservations along the Missouri River in South Dakota. 30 *J.*

of *Env't Law and Lit.* 143 (2015). My forthcoming book entitled *The Land Along the River* is to be published by Mariah Press, Sioux Falls, S.D. It describes disputes over the title and management of Missouri River shoreline land in South Dakota, and how Tribal Treaty rights come into play.

I have served as a graduate advisor in the Environmental Studies Department at the Oglala Lakota College in Kyle, South Dakota, responsible for approving masters' theses. I have spoken as a presenter on Indian water rights and the Missouri River at numerous conferences, including events sponsored by the American Bar Association Natural Resources Section, U.S. Environmental Protection Agency, National Congress of American Indians and Native American Rights Fund.

I have also been invited by and testified to congressional and state legislative committees on these issues. I assisted with the drafting and enactment of two federal laws addressing the damage claims of Tribes arising from the Pick-Sloan Program dams on the Missouri River main stem. *See* Crow Creek Infrastructure Development Trust Fund of 1996 (110 Stat. 3026); Three Affiliated Tribes and Standing Rock Sioux Tribe Equitable Compensation Act of 1992 (106 Stat. 4731). I have also been consulted on other bills that were introduced or co-sponsored in Congress by the South Dakota Congressional delegation, but which were not ultimately enacted. *E.g.* Pick-Sloan Tribal Commission Act, S. 3648, 111th Cong. (2010); Oglala Sioux Tribe and Angostura Irrigation District Compensation and Rehabilitation Act, S. 2489, 110th Cong. (2008).

My resume is attached.

Q. What documents have you reviewed in this docket?

A. I have reviewed the Executive Summary and Chapters 12-21 of the revised application and exhibits, and the pre-filed testimony of John H. Edwards and Monica Howard for Dakota Access, and Darren Kearney and Ryan Lidin on behalf of the Staff of the PUC. I have also reviewed the *Draft Sunoco Pipeline LP Facility Response Plan – Dakota Access Northern Response Zone*, most of the other pre-filed testimony, as well as informational materials on the Dakota Access Pipeline published by Dakota Access LLC. I re-read portions of the Army Corps of Engineers' *Missouri River Mainstem Reservoir System Master Water Control Manual* (2006), and the *Final Environmental Impact Statement, Missouri River Master Water Control Manual Review and Update* (2004).

Q. What is your purpose in testifying?

A. Native Americans have been referred to as the “invisible minority.” That is certainly the case with respect to the application and testimonies for the Dakota Access Pipeline. The lack of consideration of the proximity of the pipeline to the Standing Rock and Cheyenne River Indian Reservations and on their water supplies and fisheries, as well as the lack of consultation with Tribal cultural officers in the identification and protection of Native American cultural resources along the pipeline route in South Dakota, are significant omissions.

I testify on behalf of the Indigenous Environmental Network and Dakota Rural Action to urge the PUC to give thoughtful consideration to the risks posed by the Dakota Access Pipeline to the waters of the Missouri River that are subject to the water rights claims of the South Dakota Tribes. Tribal communities immediately downstream from the Missouri River crossing of the Dakota Access Pipeline rely on the Missouri as their source of drinking water supplies, fisheries, water use in ceremonies, irrigation and economic development. The potential risk to current water uses and potential liabilities for impairing the valuable Tribal water rights from a release of oil into Oahe Reservoir must be given due consideration by the PUC under its statutory mandate to consider “the health, safety and welfare of the inhabitants (and) the orderly development of the region.” SDCL §§49-41B-22(3) & (4). This has not been done. It is a serious omission in the permitting process.

On pages 4-5 of his pre-filed testimony on behalf of the PUC staff, Darren Kearney states that that the revised application for the Dakota Access Pipeline, as supplemented by additional information that was requested, is complete. But there is minimal information or technical analysis about the spill risk in the Missouri River, which is crossed by Dakota Access approximately 15 miles upstream from the Standing Rock Reservation and approximately 30 river miles upstream from the South Dakota border. The information in the application is incomplete, because potential impacts of an oil spill to South Dakota communities downstream from the Dakota Access Pipeline Missouri River crossing have not been fully considered and evaluated. Many of these communities are located on the Standing Rock and Cheyenne River Reservations.

On pages 20-21 of her pre-filed testimony on behalf of Dakota Access LLC, Monica Howard tabulates significant waters in South Dakota affected by the Dakota Access Pipeline, and

omits the Missouri River. Similarly, on page 6 of his pre-filed testimony John Edwards omits reference to the Missouri River in his assessment of “impacts on hydrology.” Chapter 17 of the revised application is captioned “Effect on Aquatic Ecosystems” yet entirely ignores these important considerations.

These omissions render the record incomplete. Without a more thorough analysis of the threat to the Missouri River in South Dakota – on both non-Indian and Indian communities whose livelihood depends on the Missouri – the record in this docket is insufficient for approval of the permit request.

Q. But the proposed Missouri River crossing is in North Dakota, approximately 25 river miles upstream from the South Dakota border. Can it really affect South Dakota waters?

A. We don’t know – the risk analysis and worst case scenarios have not been performed. The problem is not that the risk to the Missouri River in South Dakota is too high; the problem is the risk has not been considered.

These issues must be evaluated by the PUC in determining the level of threat to the South Dakota environment and to public health and welfare. There must be spill estimates and risk analysis on potential harm to the Missouri River, in order to determine the risk. The potential environmental harm from a spill and the potential liabilities for impairing waters to which the Tribes have water rights have been ignored.

Under the Energy Conversion and Transmission Facilities Act, the criteria for approval of a permit by the PUC focuses on “*the threat* of serious injury to the environment (or) the social and economic condition of the inhabitants... in the siting area.” SDCL §49-41B-22(2) (emphasis added). The statutory obligation is to evaluate the threat from an oil and gas pipeline seeking a permit to cross South Dakota, without regard to the location of a potential release. If the most significant threat to the South Dakota environment and public health posed by an interstate pipeline is an upstream river crossing in North Dakota, that threat should reasonably be addressed in the permit proceeding for the South Dakota segment. The statute requires this.

The applicant has failed to present adequate information to enable the PUC to consider this threat. Mr. Kearney’s opinion on the completeness of the revised application is undermined by this significant omission. The suggestion in Ms. Howard and Mr. Edwards’ testimonies that

impacts on major surface waters are properly accounted for is erroneous. The record before the Commission is not sufficient to approve the Dakota Access Pipeline.

Q. What is your opinion on the magnitude of Tribal reserved water rights to the Missouri River?

A. A significant portion of the waters of the Missouri River are claimed by the Tribes. At the present time, the precise quantity of water to which the Tribes possess property rights is unknown.

Under the Winters Doctrine, when the Tribes reserved their Reservation lands in treaties and other agreements with the United States, they also reserved water for all reasonable beneficial uses on their Reservation lands. *Winters v. United States*, 207 U.S. 564, 576-577 (1908). Water was reserved by the Tribes for present and future needs. *Arizona v. California*, 373 U.S. 546, 600 (1963). For Tribes whose treaties indicate an intention for the Indians to take up agriculture, such as the Fort Laramie Treaty with the Sioux, one measure of the reserved right secures water for all “practicably irrigable acres” on the Reservation. *Id.*

Until there is an adjudication or water rights compact for any water basin, the precise measure of a Tribe’s reserved water rights remains uncertain. Since “certainty” is an important objective underlying water law, in many states there has been longstanding litigation or negotiations to quantify Indian reserved water rights. For example, in Montana, the Northern Cheyenne and Crow Tribes have quantified their water rights to tributaries to the Missouri River through compacts with the state, which have been approved and funded by Congress. Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, 106 Stat. 1186, as amended 108 Stat. 707; Crow Tribe Water Rights Settlement Act of 2010, 124 Stat. 3097. Alternatively, in Wyoming the state and Shoshone and Arapahoe Tribes of the Wind River Reservation engaged in decades-long litigation to define the Tribes’ water rights. *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988).

In South Dakota, the state initiated a general stream adjudication in Hughes County Circuit Court for a determination of Indian reserved water rights and confirmation of state water rights in the Missouri Basin within the state. The case was dismissed without prejudice in 1980, due to challenges to state court jurisdiction and the prohibitive cost to the litigation. *In re the General Adjudication to all Rights to Use Water and Water Rights in the Missouri River System*,

294 N.W.2d 784 (S.D. 1980). So the precise amount of the Indian reserved water right to the Missouri River and its tributaries in South Dakota remains undefined.

The Energy Conversion and Transmission Facilities Act requires the PUC to ensure that “the proposed 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.” SDCL §49-41B-23(4). The approval of Dakota Access Pipeline prior to the resolution of Tribal water rights claims to the Missouri River in South Dakota does not constitute “orderly development” from the perspective of many Tribes.

Ultimately, the Tribal water claims to the Missouri River are significant. According to a 1979 study by the United Sioux Tribes of South Dakota, the irrigation water rights of 11 Sioux Tribes totals 13.5 million acre-feet to irrigate 2.9 million acres. United Sioux Tribes 1979, p. 3-2. That study is dated; however, there is little published data on future water plans for Tribes in the Missouri Basin, and the UST Study remains one of the few available sources.

USGS data indicates that the unregulated flow of the Missouri River is approximately 1 million acre-feet per month at Pierre, or approximately 12 million acre-feet annually. Thus, Tribal water claims may exceed the remaining natural flow of the Missouri River. When Tribal claims are perfected, all other water use to the Missouri River main stem may depend upon storage, or water marketing from the Tribes. This means that any impact on the Missouri River by a release from Dakota Access Pipeline would affect Tribal property rights and invoke liability in favor of the Tribes.

Q. What is your opinion on potential impact of the construction and operation of Dakota Access Pipeline on the waters of the South Dakota Tribes?

A. It is not possible to answer that question with the record before the PUC. That is why the permit for the Dakota Access Pipeline should be denied.

Q. Upon your information, what is the potential impact on Tribal waters?

A. The biggest concern is a release of oil into the Missouri River. Under normal circumstances, the Oahe Reservoir has significant capacity to disperse pollutants. It stores 19 million acre-feet when the multi-purpose pool is full. However, the manner in which the Army Corps of Engineers operates the Missouri River main stem dams causes significant water level

fluctuations in Oahe Reservoir. Under its *Master Manual*, the Corps operates the Oahe Dam exclusively for lower Missouri River navigation, intakes and flood control. Army Corps of Engineers 2006, p. VII-1. The amount of water released at the dam fluctuates significantly, with daily releases of 17,000 cfs between November 15-March 15, and daily releases of up to 35,000 cfs during the March 15-November 15 navigation season. *Id.* at pp. VII-10, 12.

Thus, the amount of stored water and reservoir elevations at Oahe Reservoir likewise experience huge fluctuations. The maximum pool level of the Oahe Reservoir is 1620 msl, and the base flood pool is 1607 msl. *Id.* at Plate II-41 (Exhibit B). The amount of water stored in the reservoir – and the capacity to disperse pollutants – likewise fluctuates dramatically. Attached as Exhibit C are the daily bulletins of the Corps of Engineers for the Oahe Reservoir. Today, on August 14, 2015, the level of Oahe Reservoir is 1613.1 msl (Exhibit C p. 1). Five months ago, on March 1, 2015, Oahe was at 1608 msl (Exhibit C p.2). Two years ago, on August 1, 2013, the reservoir level at Oahe was 1602.3, more than ten feet lower than today, and storing 2 million acre-feet less water in the reservoir. (Exhibit C, p.3).

The dispersal capacity of the reservoir varies significantly, so the risk from a major release will likewise vary. This requires more study.

Moreover, upon a release from Dakota Access Pipeline into the Missouri River, toxic constituents in the crude could settle in the sediments on the riverbed. The management of Missouri River water flows by the Corps of Engineers has significantly and permanently disrupted the patterns of erosion and sedimentation. The Missouri River crossing of the Dakota Access Pipeline is immediately upstream from the mouth of the Cannon Ball River. During periods of low water, the sediment at the confluence of the Cannon Ball and Missouri is scoured and deposited downstream.

On November 23, 2003, the deposition of such sediment downstream from the confluence silted over the Fort Yates water treatment plant on the Standing Rock Indian Reservation. The EPA issued a public health advisory and boil water order for three Standing Rock Reservation communities. The water system was inoperative for 10 days. Dialysis patients at the Fort Yates Public Health clinic were forced to travel to Bismarck for treatment during this time. *See Water Problems on the Standing Rock Indian Reservation, Hearing Before the S. Comm. on Indian Affairs, 108th Cong. (2004).*

The development of the Missouri River main stem dams by the Corps of Engineers under the Pick-Sloan program has already harmed the environment and public health on the Indian Reservations along the Missouri River. The Dakota Access Pipeline will exacerbate this. A release of oil could result in toxic constituents in the sediments and in fish tissue at Oahe Reservoir. This could impact drinking water intakes, public health, and the trophy walleye fishery on the Standing Rock and Cheyenne River Indian Reservations and in non-Indian communities along Lake Oahe.

Even without a release of oil, the Dakota Access Pipeline affects all communities in South Dakota, because the pace the oil development in the Williston Basin has put tremendous demand on the region's water resources. In order to secure water for the development of oil and gas, the Corps of Engineers is attempting to impose strict limits on future municipal and industrial (M & I) water depletions from the Missouri River main stem reservoirs. In August 2012, the Corps released Draft Environmental Assessments for "Surplus Water" for each of the main stem reservoirs in South Dakota. The reports identify limits to future municipal water uses from the Missouri River, totaling 172,917 acre-feet for all of South Dakota, including the Indian Reservations.<http://www.nwo.usace.army.mil/missions/civilworks/planning/planningprojects.aspx> (See Exhibit D). The draft reports give no consideration to Tribal reserved water rights, nor to the authority of the South Dakota Department of Environment and Natural Resources to implement South Dakota law to the Missouri River outside of the Reservations. For these reasons, the Tribes oppose the Surplus Water Reports, and Attorney General Jackley has publicly threatened to initiate legal action against the Corps of Engineers.

In any event, the pace of oil and gas development in the Bakken imposes demands on the waters of the Missouri Basin in a manner that jeopardizes the future water uses of all communities along the Missouri River in South Dakota. This testimony is presented on behalf of the Indigenous Environmental Network and Dakota Rural Action to highlight the risk to South Dakota communities and their water from the Dakota Access Pipeline. These risks may be significant, they fluctuate depending on conditions, and they have not been adequately evaluated. Accordingly, the permit should be denied.

Peter Capossela

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