BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT	))))))	DOCKET NUMBER HP09-001

ANSWER OF DAKOTA RURAL ACTION IN OPPOSITION TO APPLICANT'S MOTION FOR LIMITED RECONSIDERATION OF CERTAIN PERMIT CONDITIONS

Dakota Rural Action ("DRA") hereby submits this Answer, pursuant to S.D.A.R. § 20:10:01:30.02, in opposition to Transcanada Keystone Pipeline, LP's ("Applicant") Motion for Limited Reconsideration of Certain Permit Conditions ("Motion for Reconsideration") in the South Dakota Public Service Commission's ("Commission") March 12 Final Decision and Order ("Final Order") in this proceeding. Applicant has requested reconsideration of matters outside the Commission's legal authority to hear on reconsideration. Further, where Applicant has raised cognizable issues, its proposed changes are based on misstatements of fact and/or do not provide sufficient protections for the interests of landowners and therefore should not be adopted. S.D.A.R. § 20:10:01:30.02 provides that answers to petitions for reconsideration must be filed within 20 days of service of a petition for reconsideration. Here, TransCanada served its Motion for Reconsideration on April, 9, 2010, such that this Answer is timely.

I. STANDARD OF REVIEW

The Commission may hear petitions for reconsideration pursuant to S.D.A.R. § 10:1:01:29 and § 20:10:01:30.01:

> **20:10:01:29. Rehearing or reconsideration.** A party to a proceeding before the commission may apply for a rehearing or reconsideration as to

> any matter determined by the commission and specified in the application for the rehearing or reconsideration. The commission may grant reconsideration or rehearing on its own motion or pursuant to a written petition if there appears to be sufficient reason for rehearing or reconsideration.
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> **20:10:01:30.01. Application for rehearing or reconsideration.** An application for a rehearing or reconsideration shall be made only by written petition by a party to the proceeding. The application shall be filed with the commission within 30 days from the issuance of the commission decision or order. An application for rehearing or reconsideration based upon claim of error shall specify all findings of fact and conclusions of law claimed to be erroneous with a brief statement of the ground of error. An application for rehearing or reconsideration based upon newly discovered evidence, upon facts and circumstances arising subsequent to the hearing, or upon consequences resulting from compliance with the decision or order, shall set forth fully the matters relied upon. The application shall show service on each party to the proceeding.

The Commission's jurisdiction to reconsider its orders is limited by S.D.A.R. § 20:10:01:30:01 to:

1. claims that a final order's findings of fact or conclusions of law are in error;
2. newly discovered evidence;
3. facts and circumstances arising subsequent to the hearing; and
4. consequences resulting from compliance with its order.

Accordingly, the Commission's power to reconsider matters once a final order is issued is not without limit. If this were otherwise, any party could force reconsideration of a final order merely because it dislikes the outcome of a hearing. Such process would mean that other parties would have no certainty that a final order is in fact final, allow parties to force rehearing of matters just because a party did not like the outcome, allow parties to nitpick Commission language to address hypothetical concerns that could arise in the future that should be addressed if and when such concerns come into being, allow unnecessary extension of hearing process, and permit a party to force other parties to expend additional resources re-litigating matters already

resolved by the Commission. Parties do not have a right to take additional bites at the apple just because their first bites did not seem sweet enough.

II. TRANSCANADA'S MOTION FOR LIMITED RECONSIDERATION IS IMPROPER AS TO FORM AND INCLUDES MATTERS THAT MAY NOT BE RAISED IN A PETITION FOR RECONSIDERATION

Applicant filed a motion seeking "limited reconsideration" of the following seven issues:

1. Changes in notification of landowners in the event of a spill of hazardous materials on their lands;
2. Limitations of use of floating sediment curtains;
3. Modifications to wetland protection standards;
4. Modifications to protections for endangered species;
5. Modifications to cultural resource protections standards;
6. Modification to paleontological resource protection standards; and
7. Omission of compensation for loss of value to paleontological resources.

As an initial observation, the Commission's regulations require the filing of a petition, not a motion, such that Applicant's filing, as a motion, is incorrect as to form. Further, Applicant's description of its action as one for "limited" reconsideration is superfluous and should be seen as an attempt to influence perception that its proposed action will have minimal consequences. Regardless of what Applicant calls its pleading, S.D.A.R. §§ 10:1:01:29, 20:10:01:30.01, and 20:10:01:30.02 control Applicant's action, including limitations on the Commission's authority to hear petitions for reconsideration and time in which to file answers.

Applicant generally asserts that reconsideration should be granted "[b]ecause a few of the conditions are either unclear, impractical to implement, or likely to create conflict . . . ." Such vague reasons are not sufficient under law to allow reconsideration. With limited exception,

Applicant's motion does not raise issues that fall within the Commission's authority on reconsideration. The Commission's legal authority to hear the specific issues raised by Applicant is discussed below for each issue separately.

III. THE COMMISSION MUST REFUSE TO RECONSIDER SOME OF THE MATTERS RAISED BY APPLICANT AND REJECT OR MODIFY OTHERS

In its response to other intervenors and commenter's, Applicant argues that their interpretations of its proposed language are incorrect. It then offers interpretations of its language. DRA disagrees with Applicant "interpretations" of its own written words and suggests that the plain meaning of these words is the best indication of their meaning. Rather than argue language in the abstract, for the Commission's convenience DRA has attached a redlined version of the Final Order language at issue here that shows clearly how Applicant proposes to change the Commission's existing language ("Redline Document") (Exhibit A). Since Applicant has not proposed specific language changes for all of the Final Order conditions at issue, the Redline Document does not include language for each condition discussed below.

A. Final Order Condition 16(j) – Notification of Spills of Hazardous Materials

Applicant proposes to modify this condition to make only spills of five gallons or more of any hazardous material reportable to landowners, rather than a spill of "any" size. DRA notes that this proposed change is not based on a claim of error of law or fact, is not based on newly discovered evidence, is not based on facts or circumstances arising subsequent to the hearing, and has not arisen from Applicant's compliance with the Commission's Order, as required by S.D.A.R. § 20:10:01:30.01.

Applicant appears to be nervous about its obligation to report "any" spill of hazardous material without discussing the practical consequences of its failure to report small spills. It

states that it wishes to avoid unnamed "logistical and practical problems" without describing these alleged problems in the least, apparently assuming that the Commission and intervenors should of necessity understand the nature of the burden and risks that would accrue to it if this provision is not numerically defined. Applicant's failure to provide any practical information on this issue indicates that it believes that any uncertainty whatsoever, rather than uncertainty that could result in likely and substantial burdens, should require clarifying Commission action on reconsideration. Applicant's vague description of the burdens and risks it faces is not sufficient evidence to merit reconsideration of this issue under S.D.A.R. § 20:10:01:30.01.

By focusing on the term "any" Applicant implies that it should not have to report *de minimis* spill volumes. However, it does not describe the "logistical or practical problems" it might face if it failed to report *de minimis* spills of hazardous materials. Since enforcement of this permit is primarily within the Commission's jurisdiction, it is the Commission that initially would determine the results of failing to report a *de minimis* spill. Moreover, if a spill were *de minimis*, the damages also would be *de minimis* making it unlikely that a landowner would suffer any practical damage sufficient to justify taking a regulatory or court action. Whereas TransCanada has vast legal and technical resources, landowners do not and would be highly unlikely to pursue an action for a *de minimis* spill knowing that recovery of damages would be impossible. It seems highly likely that the Commission would use common sense in the prompt resolution of such claims, as unlikely as they are to occur. TransCanada does not seek relief to address a meaningful risk to its interests, but instead seems to want to nitpick language that hypothetically might result in the possibility of a citizen complaint based on a technical violation of the permit, which complaints would be for practical purposes unlikely and could be disposed of expeditiously if they arose.

TransCanada also does not discuss why its proposed five gallon limit is appropriate, other than to note that this is the reporting limit for spills of product from crude oil pipelines. It does not discuss the reporting requirements for spills of other types of hazardous materials, nor does it explain why the federal pipeline five gallon product spill reporting volume should apply to spills of all types of hazardous materials. Therefore, the Commission has too little information before it to make an informed decision on specific reportable spill volumes for all types of hazardous materials.

Applicant has proposed a one-size-fits-all five gallon spill limitation based on reportable quantities of spills of crude oil from pipelines. This standard is not appropriate because during construction and operations Applicant may spill materials other than crude oil, including possibly pesticides, herbicides, solvents, gasoline, diesel fuel, hydraulic fluid, etc. Spills of such materials may require reporting in amounts of less than five gallons. Also, the location of a spill may impact reporting requirements. For example, spills into water may trigger different reporting requirements than spills onto land.

Practically speaking, should the Commission believe that Applicant needs absolute certainty about the scope of its responsibility for small spills, DRA proposes that Applicant be required to notify landowners about a spill of a particular hazardous material on that landowner's property to the same extent that Applicant is required to report such spill to appropriate government agencies. It is reasonable to require that if Applicant must report a spill of a hazardous material to a government agency that it must also send such report to the impacted landowners. Since Applicant would already have a reporting obligation and would already have prepared a report, this requirement would not impose any particular burden on Applicant beyond

mailing a preexisting report to an impacted landowner. To accomplish this standard, the last sentence of Condition 16(j) could be changed to read:

> Keystone shall notify landowners prior discharge of any saline water on their lands. Keystone shall notify landowners after a spill of hazardous material on their lands if Keystone is required to report such spill pursuant to any federal, state or local law, by mailing notice of such spill, including a copy of any report required to be filed by law, to the landowner.

Applicant might complain that such standard is unclear and insist that DRA identify all of the specific hazardous materials standards with which Applicant must comply. Yet, Applicant has claimed that it will comply with all state and federal hazardous materials laws such that its personnel should know when it must report spills to appropriate agencies. The Commission should assume that Applicant knows the hazardous materials spill reporting laws and can handle the logistics of mailing any report it must file with a government agency to the landowner whose land is impacted by the spill at issue.

Staff's proposed compromise is inadequate because it proposes an overly subjective standard, namely the judgment of Applicant's on-site environmental inspector. Further, the Staff's proposed standard, impact to land use or productivity, could easily be interpreted to not require reporting except in serious spills that would have impact on long-term land productivity and land use. Under this standard it seems likely that Applicant would not need to report spills of more than five gallons of pipeline product because it is hard to see how this size spill would impact "land use or productivity." Staff also suggests that the environmental monitor could set standards for spill reporting. Given that federal and state spill reporting laws already exist, such effort would seem to be redundant. Given the subjective and vague standard proposed by Staff, its proposal is not a compromise but a near complete abdication of any meaningful spill reporting standard.

B. Final Order Condition 20(a) – Sediment Control Practices

Applicant proposes to eliminate the use of floating sediment curtains in non-flowing waters because it states: "Sediment curtains are used only in flowing streams and would not be installed in the construction right of way." Essentially Applicant argues that the Commission has made an error of fact. It attempts to reargue testimonial evidence presented by its experts and a staff witness.

Applicant's request on this matter should not be heard by the Commission because this proposed change is not in fact based on a claim of error of fact, is not based on newly discovered evidence, is not based on facts or circumstances arising subsequent to the hearing, and has not arisen from Applicant's compliance with the Commission's Order, such that this issue may not be reconsidered. Instead, this issue is based on an interpretation of fact made by the Commission and may not be reopened.

To the extent that Applicant seeks to paint this issue as an error of fact based on an alleged impossibility of using floating sediment curtains in stock ponds and reservoirs, Applicant is simply incorrect about the use of such devices. There is no error in the Commission's finding of fact. It is in fact entirely possible to use a floating sediment curtain in non-flowing water. The evidence before the Commission may be conflicting as to the use of floating sediment curtains, but the staff witness in fact indicated that such devises can be used in ponds, lakes, and reservoirs. While Applicant might want to reargue these facts, the Commission should not allow it to do so because Applicant has not demonstrated a clear error of fact, only that the witnesses disagreed and the Commission made a judgment on this disagreement. Therefore, this issue may not be reconsidered pursuant to S.D.A.R. § 20:10:01:30.01.

If the Commission decides to reconsider its factual basis for imposing this condition, it should allow the introduction of additional evidence to clear up this matter rather than base a change in the Final Order on Applicant's bald-faced assertions. If the Commission reconsiders this condition, DRA requests that the Commission accept the best management practice ("BMP") evidence contained in Exhibit B, which contains examples of the many BMPs related to floating sediment or silt curtains adopted by jurisdictions throughout the country that allow for their use in non-flowing waters. These example BMPs state:

> Applications – To provide sedimentation protection for in-stream, bank, or upslope ground disturbance or from dredging or filling within a waterway. Practice applies within a flowing watercourse, lake, or other area of water impoundment or flow that has aquatic resources needing protection. Also applies when runoff occurs close to rivers, streams, lakes, reservoirs, or when construction projects take place on or under water.

Idaho Department of Environmental Quality BMP 45. (Emphasis added.)

> Description – A floating sediment curtain is used within a stream, river, or lake as a last line of defense to capture sediment and silt. It can also be used in a sediment basin or a settling pond to ensure adequate capture of sediment and silt. A floating sediment curtain will significantly reduce sediment in critical areas such as streams, rivers, and aquatic habitats.

City of Memphis, TN, BMP ES-27. (Emphasis added.)

> Description: A flotation silt curtain is a silt barrier for use within a lake or pond. The flotation silt curtain consists of a filter fabric curtain weighted at the bottom and attached to a flotation device at the top. This structure is used to isolate an active construction area within a lake or pond to prevent silt-laden water from migrating out of the construction zone.

Salt Lake County, UT, Engineering Division BMP, Floating Silt Curtain. (Emphasis added.)

DRA also requests that the Commission consider Exhibit C, which contains copies of webpages from www.siltbarrier.com, a commercial floating sediment barrier vendor, that show a variety of applications for floating sediment curtains, including in non-flowing water.

It is clear from these Exhibits that floating sediment curtains are not used only in flowing streams. It may be that Applicant's expert witness has experience using floating sediment curtains only to control runoff from disturbed land areas into streams, as opposed to, for example, controlling sediment pollution from dredging, pile driving, or other activities that disturb the bottoms of lakes, ponds, and reservoirs. It seems apparent that it is entirely possible to attach a weighted fabric sediment barrier to buoyant material and suspend it into still water for the purpose of preventing the spread of sediments caused by construction activities.

Applicant also argues that floating sediment curtains cannot be used within the construction right of way: "There is no evidence in the record that floating sediment curtains could or should be used in the construction right of way." This argument misreads Condition 20(a) which requires that sediment curtains be used to keep sediments within the right of way, not that the curtains themselves must be in the right of way. It is entirely possible to place floating sediment curtains immediately outside of construction rights of way to prevent sediment from circulating throughout a pond or reservoir.

Given Applicant's lack of understanding in the use of floating sediment curtains, its proposed language is inappropriate. Further, its proposed Condition 20(a) language is even inconsistent with the argument it makes in its pleading that that sediment curtains may be used only in "flowing streams." In contrast, Applicant's proposed Condition 20(a) language states that sediment curtains may be used in "non-flowing streams where appropriate."

It is difficult to understand how Applicant cannot imagine how floating sediment curtains could be used in lakes, ponds, and reservoirs. Where the pipeline would cross under the middle of a lake, pond or reservoir then floating sediment curtains could be installed on either side of the construction right of way to limit the flow of sediment into the rest of the body of water. Where

the pipeline would cross under a lake or reservoir near the shore, a floating sediment curtain could be installed so as to keep sediment between the curtain and the shore rather than allowing it to pollute the entire water body. Where the pipeline would disturb land up to the edge of a lake, pond, or reservoir, a floating sediment current could be installed immediately along the shore to prevent sediment laden runoff from flowing off the land and into the entire pond or reservoir.

The clear intent of Condition 20(a) is to limit sedimentation damage to ponds, lakes, and reservoirs by restricting sediment flows to only that portion of ponds, lakes, and reservoirs that must be disturbed. In cattle country, such bodies of water are vital to cattle production such that water quality must be maintained by isolating sediment to the smallest area possible rather than allowing it to contaminate an entire body of water. Applicant has obviously not used its considerable resources to make a meaningful effort to understand this condition, but instead has attempted to limit its obligation and costs to protect pond, lake, and reservoir water quality and burdened the Commission and intervenors with an unnecessary request for reconsideration.

Staff's recommended language for Condition 20(a) is an improvement, but it may lead to problems where a floating sediment curtain is needed to trap silt between the shore and a point in the water, because in this situation a floating sediment curtain would only be need on one side of the right of way as the other side would be on dry land. The second sentence of Staff's proposed language could be modified to state: "In such situations, the floating sediment curtains shall be installed as a substitute for straw bales or silt fence, along the edges or edges of the construction right-of-way that are under water at a depth greater than the top of a straw bale or silt fence . . . ."

But it would also be entirely appropriate for the Commission to just leave the existing language alone.

C. Final Order Condition 43 – Cultural Resources

Applicant proposes to change the cultural resource condition to clarify that the Department of State ("DOS") has the ultimate burden to determine what is a protectable resource. As far as the proposed change relates to the requirements of federal law, it does not much matter what the Commission requires because federal law would preempt incorrect interpretation by the Commission.

What concerns DRA about the proposed language change is that Applicant proposes and Staff supports a change in landowner rights without even alerting the Commission of such changes. Specifically, the second sentence in Condition 43 of the Final Order requires Applicant to notify landowners if a possible protectable resource is found. Applicant's proposal strikes the words "affected landowners" from the end of this sentence and eliminates this right. *See* Redlined Document. Applicant's proposed language brings landowners into the picture only if a route change is required.

To the extent that Applicant seeks to conform the Final Order to federal law, DRA does not object but notes that the Commission cannot impose conditions that conflict with federal requirements as such conditions would be preempted. As regards the responsibilities of the State Historic Preservation Officer and the DOS, Applicant's proposed changes to the Final Order may not make a practical difference.

DRA objects to the proposed change that eliminates landowner right to notification of discovery of possible cultural resources, because this proposed change is not based on an error of law or fact, newly discovered evidence, facts or circumstances arising subsequent to the hearing, or consequences resulting from compliance with the Final Order, such that it is may not be heard

pursuant to S.D.A.R. § 20:10:01:30.01. The Commission's decision to require TransCanada to notify landowners is not impacted in the least by the technical legal correction proposed by TransCanada, such that this correction cannot serve as the basis under S.D.A.R. § 20:10:01:30.01 for a change in landowner rights. Applicant can comply with federal law and also notify landowners of discovery of cultural resources on their lands. Applicant has made no argument that the decision to require notification of landowners was made in error, there is no new evidence related to whether landowners should or should not be notified, and the Applicant has not argued any adverse consequences from complying with this simple requirement. The Commission granted this right and Applicant has failed to provide any notice or explanation related to its burden of proof under S.D.A.R. § 20:10:01:30.01 to justify this change. Therefore, the Commission may not eliminate this landowner right from this condition.

Should the Commission believe that it may reconsider landowner rights here, DRA argues that it is to everyone's advantage that all potentially affected parties, including landowners, be notified as early as possible of the discovery of cultural resources. There is no downside to notifying landowners of possible discovery. Further, it would not be appropriate for government agencies to resolve matters related to private property without notifying the affected landowner, until such time as the agencies determine that a route change is necessary.

DRA does not object to the proposed clarification that landowners must approve a change in route required by discovery of cultural resources, because such change merely restates landowner rights granted by Conditions 6 and 30. As such, this change does not eliminate, increase, or change the respective rights of interested parties.

D. Final Order Conditions 44 and 45 – Paleontological Resources

Applicant proposes to substantially change the rights and responsibilities granted by the Commission with regard to paleontological resources. Applicant argues that because certain Bureau of Land Management ("BLM") paleontological standards are the only government standards that exist, that therefore they should be applied throughout the route, including on private lands. It argues that the standard in the Final Order that protects fossils "of scientific or economic significance" is too vague such that it would "invite conflict, unnecessary expense, and delay" without further clarifying the types of conflicts, expense, and delay that might hypothetically result.

Applicant proposes to use a few selected parts of the BLM paleontological guidance to both narrow its survey responsibilities and limit the types of fossils that must be mitigated. More importantly, Applicant's proposed changes go far beyond mere clarification of survey responsibilities and the types of fossils that require mitigation. The language proposed by TransCanada would fundamentally change landowner rights to protect their paleontological resources. Such changes are not supported by the evidence presented by Applicant, because the BLM documents presented by Applicant contain substantial evidence <u>that landowner rights should be increased</u> – not decreased.

1. Description of Applicant's Proposed Language Changes

DRA refers the Commission to the Redline Document. Applicant mischaracterizes the scope of its proposed changes as relating only to identification of areas in which significant fossils may be found and classification of fossils, when in fact it proposes to change the substantive rights of landowners in ways that are completely unrelated to mere identification of fossil-rich areas and classification of fossil types. Specifically, Applicant proposes to re-write

almost all of Condition 44 and to strike all mention of paleontological resources from Condition 45. The full list of proposed changes include:

- Limit literature review assessment to discovery of surface exposures of rock formations (Condition 44(a));
- Use of the BLM's Potential Fossil Yield Classification System ("PFYCS") to identify and rank areas of paleontological concern (Conditions 44(a) and (b));
- Specify that only PFYCS Class 4 and 5 areas be subject to pedestrian surveys and that Class 3 areas need only be spot-checked (Condition 44(b));
- Specify that only "scientifically significant" surface fossils be avoided or mitigated through collection – strikes or omits economically valuable fossils from description of assessments (Condition 44(a)(b)(c));
- Define "scientifically significant" as "as rare vertebrate fossils that are identifiable to taxon and element, and common vertebrate fossils that are identifiable to taxon and element and that have scientific research value; and scientifically noteworthy occurrences of invertebrate, plant and trace fossils. Fossil localities are defined as the geographic and stratigraphic locations at which fossils are found" (Condition 44(b)).
- Remove the requirement that Applicant's paleontological monitors be trained and be on-site, leaving construction monitoring in the hands of unknown Applicant employees and contractors who receive uncertain and limited training (Condition 44(c));
- Restricts paleontological monitoring by Applicant's employees and contractors to Class 4 and 5 locations and only Class 3 locations where significant fossils are previously detected by spot-check field surveys (Condition 44(c));
- Eliminate the right of landowners to request a trained on-site paleontological monitor in the Hell Creek location (Condition 44(c));
- Specify that in the first instance only Applicant's paleontological monitor has the right to determine if a fossil is of "scientific significance," which determination would trigger initial landowner notification (Condition 44(d));
- Require that landowners, the BLM, and South Dakota School of Mines ("SDSM") must consult with only a BLM-permitted paleontologist to determine whether a find is "scientifically significant," even though Applicant itself is not required by Condition 44(c) to retain a BLM-permitted paleontologist to protect fossils on private lands (Condition 44(d));
- Specify that only Applicant may develop a plan to mitigate paleontological damage and that the plan must be only "reasonably acceptable" to landowners, the BLM, or SDSM

indicating that landowners may not reject a plan if it is reasonable but could be improved (Condition 44(d));

- Clarifies that landowners, the BLM, and SDSM must implement the plan developed by Applicant at the landowner's, BLM's, or SDSM's expense (Condition 44(d)); and

- Elimination of landowner right to recover for damage to paleontological resources (Condition 45).

Thus Applicant does far more than impose a survey classification system and fossil ranking system. In essence it puts its own construction personnel, after some undefined amount of training by a "monitor" with unknown professional qualifications, in complete control of on-site identification and mitigation of fossils and requires that the full expense of recovery, collection, and curation of fossils on private lands be borne by the landowners. This condition is puts too much power in Applicant's hands, and for the reasons described below is not fair.

2. Applicant Has Stricken Its Obligation to Use Trained On-Site Monitors, Which Obligation Must Be Retained

Applicant refers to the qualifications of paleontological monitors in only two locations in Condition 44. In the first of these, Applicant proposes the following changes to Condition 44(c):

> The mitigation plan shall specify monitoring locations, and include ~~a trained on-site monitor in high probability areas~~ monitors and proper employee and contractor training to identify any paleontological resources discovered during construction and the procedures to be followed following such discovery.

Thus it strikes out the language "trained on-site monitor" and replaces it only with the word "monitors." Next, Applicant strikes the language, "Keystone shall, if requested by the landowner, utilize a trained on-site paleontological monitor." Finally, Applicant includes the following language in Condition 44(d): "If a qualified and BLM-permitted paleontologist, in consultation with the landowner, BLM, or SDSM determines that a scientifically significant

paleontological resource is present, Keystone shall develop a plan that is reasonably acceptable to the landowner, BLM, or SDSM . . . ."

It is clear from these language changes that Applicant would be no where required to employ trained on-site paleontological monitors. The only mention of a BLM-qualified monitor relates to landowner consultation requirements and does not state that Applicant must employ a BLM-qualified paleontologist. Further, there is no requirement that a trained and BLM-qualified monitor develop a mitigation plan for landowners.

In its Reply Brief, Applicant states that Paul Seamans misinterprets Applicants language with regard to Applicant's requirement to use trained paleontological monitors, stating that "it does not support such interpretation." Similarly, in its response to Peter Larson's request that landowners be allowed to have their own paleontological monitors be present, Applicant side-steps Larson's primary point about access during construction and instead argues that he does not require the use of a BLM-qualified paleontologist as does the Applicant. Applicant states, "If the landowners or the State want to hire separate paleontologists to monitor construction, they should be required to have the same credentials as Keystone's paleontologist."

DRA is at a loss to understand how Applicant can interpret its language to require that it employ a BLM-qualified paleontologist, because the language proposed by Applicant simply does not state this. This really is a simple requirement, such that if this requirement must be "interpreted" into Applicant's language, then this language is bad. Since Applicant has stated that it is willing to allow landowners to monitor construction if they employ a BLM-qualified paleontological monitor, the Commission should include this as a condition. It would be much simpler if the Commission included language that stated:

> Applicant shall employ a BLM-qualified paleontologist to be responsible for Applicant's paleontological mitigation activities. A BLM-qualified

paleontological monitor employed by a landowner may participate in pre-construction field surveys and on-site monitoring during construction and mitigation activities on that landowner's land.

3. Applicant's Proposed Language Does Not Protect Economically Valuable Paleontological Resources as Recognized by the Commission in Its Findings of Fact

The Commission has found that fossils on private lands may have a high monetary value (Final Order Para. 59). Yet Applicant proposes to use the BLM's paleontological guidance which identifies fossils based only on their "scientific, educational and recreational values." BLM Manual H-8270-1 General Procedural Guidance for Paleontological Resource Management, Chapter II Section A ("BLM Manual") (Applicant's Exhibit A). Applicant fails to state that the federal government typically does not sell valuable fossils and therefore has not developed standards to protect economic interests in fossils. None of the Exhibits provided by Applicant discuss the economic value of fossils such that this value is not considered as a factor when the BLM determines appropriate surveying, monitoring, and mitigation requirements. While the BLM materials provided by Applicant provide some utility in determining how to identify and protect paleontological resources, they were not intended to protect economically valuable fossils on private land and so are incomplete as regards this project and the Commission's finding of fact.

Regardless of this limitation in the BLM materials, Applicant proposes to change Condition 44(d) to require that landowners be notified only of the discovery of fossils of scientific significance. It also proposes to remove reference to economic recovery for damage to fossils contained in Condition 45. Applicant seems to believe that because the federal government's guidance focuses on scientific value and not economic value, that therefore fossils should be valued <u>only</u> for their scientific value.

The Commission has already spoken on the importance of protecting landowner property rights in fossils and may not revisit this issue under S.D.A.R. § 20:10:01:30.01 unless Applicant presents: (1) evidence of an error in this finding; (2) new evidence refuting the economic value of fossils; or (3) evidence that valuing fossils according to their economic value would result in substantial practical difficulty in implementation of the Final Order. Applicant has failed to meet this standard. Instead Applicant baldly alleges that it desires to avoid "conflict, unnecessary expense, and delay." No doubt all valuation of private property can lead to conflict, expense, and delay," but such process is necessary to protect private property rights.

Since the Commission has already required Applicant to assess the economic value of a variety of types of personal and real property, there is no practical reason that it cannot implement the Final Order to protect and compensate landowners for loss of value of fossils.

4. Mere Use of Federal Survey and Fossil Significance Standards Will Not by Themselves Reduce Conflict, Expense, and Delay if Procedural Safeguards Are Not Effective

With regard to its proposed new standards for survey and fossil mitigation, Applicant fails to note that the more detailed standards it suggests are also subject to interpretation and may result in just as much conflict, expense, and delay. It appears that Applicant's primary intent is not to clarify the definition of sensitive resources or valuable fossils, but to limit landowner participation in the process of identifying and protecting fossils while offloading the cost of protection of individual fossils completely onto landowners.

Applicant cherry picks various BLM requirements to its advantage without discussing the full procedural and property rights retained by the federal government to protect publicly owned fossils. DRA notes that the BLM material provided by Applicant describes a meaningful and comprehensive approach to protection of paleontological resources. These rights go beyond the

limited protections offered by the Commission in its Final Order. The federal guidelines specify, among other things, that the BLM:

- May require a search of data, library, and specimen resources that goes far beyond the literature review and records research proposed by Applicant in Condition 44(a); see BLM Manual III.A.1; BLM Guidelines for Assessment and Mitigation of Potential Impacts to Paleontological Resources Section I.B. ("BLM Mitigation Guidelines").

- Shall require that all significant fossils that may be damaged or destroyed be collected along with all relevant contextual and locational data. BLM Mitigation Guidelines Section II.B.3.a.

- Shall require that the project proponent bear all costs associated with mitigation activities. BLM Manual Section III.A.3, Section III.B, Section IIIB.1.d, and Sample Terms and Conditions No. 7; BLM Mitigation Guidelines Section II.A.b.

- Shall require that applicants receive a permit only if the applicant retains a professional experienced paleontologist with experience collecting, analyzing, and reporting paleontological data and similar specimens who will be responsible for conducting all activities intended to mitigate damage to paleontological resources. BLM Manual IV.C.2. BLM Mitigation Guidelines Section II.B

- Shall have the right to attach needed terms and conditions to a permit. BLM Manual IV.C.3-4.

- Shall require written certification from a repository willing to accept collections resulting from the work prior to the start of construction. BLM Manual IV.C.6; BLM Mitigation Guidance Section VII.

- Shall require detailed annual reporting and a detailed final report of paleontological discoveries and collections. BLM Manual IV.C.9. BLM Mitigation Guidelines Section II.C.

- Should monitor very high (Class 5) potential areas for adverse impacts at all times when surface-disturbing activities are occurring. Guidance for implementing the Potential Fossil Yield Classification (PFYC) System p. 5. ("BLM PFYC Guidance"); BLM Mitigation Guidelines Section IV.B.1.

- May require on-site monitoring, spot-checking, or testing in areas with a high probability of fossils below the surface. BLM Mitigation Guidelines Section II.B.4.

- Shall require that the exact locations of fossils contained in reports be considered sensitive information and not disclosed to the public. BLM Mitigation Guidelines Section II.C.2.

If the Commission decides to incorporate BLM standards related to surveying and identification of scientifically significant important fossils, it should also adopt the balance of the BLM guidance to the extent appropriate and applicable. Otherwise, the Commission would use federal standards to narrow which fossils are important without adopting the related federal requirements for landowner participation in surveying, monitoring, and mitigation.

5. BLM Mitigation Standards Make Abundantly Clear that the BLM Requires that Project Proponents Excavate and Collect Fossils at the Proponent's Expense During Surveying and Construction Activities

Applicant disagrees with Peter Larson that the BLM requirements do not require that project proponents pay for recovery of fossils. In its Reply Brief Applicant states:

> Exhibit D [BLM Mitigation Guidelines] states only that the project proponent is responsible for the costs associated with survey, monitoring, and mitigation, all of which Keystone accepts and agrees with. Thus, Keystone proposes that a landowner pays to recover a fossil discovered during construction that the landowner owns and from which the landowner may profit, while Keystone bears all the expense of surveying, monitoring, mitigation, and avoidance if the route is changed because of a fossil discovered during construction.

In a slight of hand, Applicant attempts to distinguish "recovery" from "mitigation," essentially arguing that the BLM does not require project proponents to pay for recovery of fossils. Nothing could be further from the truth. The following are examples of statements peppered throughout the BLM guidance that mitigation includes collection and removal of fossils, and that project proponents must pay for all mitigation activities, including but not limited to collection and removal of fossils:

> Mitigation may be accomplished, for example, by (1) collection of data and fossil material, (2) by obtaining representative samples of the fossils, (3) by avoidance, or (4) in some cases by no action.

BLM Manual Section III.B. (Emphasis added.)

> A mitigation and monitoring plan must address at least the following:

> a. The extent of specimen collection, e.g., total or partial recovery, no action, or avoidance;
> b. The specific intensity of monitoring recommended for each geologic unit/area impacted. Monitoring intensity is determined based on findings of the formal analysis of existing data and/or field survey;
> c. An agreed upon process for specimen recovery that will have the least impact on the project;
> d. An agreement with a repository that will curate specimens collected during the field survey, and during mitigation and/or monitoring. Any costs associated with curation[1] of specimens and associated records will be borne by the project proponent.

BLM Manual Section III.B.1. (Emphasis added.)

> Field surveys and collections performed as a mitigation measure are not intended to be scientific research studies, but are meant to identify, avoid, or recover paleontological resources to prevent damage or destruction from project activities.

BLM Mitigation Manual Section II.B. (Emphasis added.)

> Where significant paleontological resources are at risk, data collection alone does not constitute mitigation of damage. All significant fossils that may be damaged or destroyed during project activities must be collected, along with all relevant contextual and locational data. Specimens must be collected during the survey or prior to commencement of any surface-disturbing activities.

BLM Mitigation Manual Section II.B.3.a. (Emphasis added.)

> When avoidance is not possible, appropriate mitigation may include excavation or collection (data recovery), stabilization, monitoring, protective barriers and signs, or other physical and administrative protection measures.

BLM Mitigation Manual III.A. (Emphasis added.)

> Deferred Fossil Collection. In some cases, fossil material may have been identified, but not completely collected during the initial field survey, such as a partial dinosaur or other large fossil assemblage. It may be possible to complete the recovery of this material and all related data prior to beginning construction activities, and thus mitigate the adverse impact.

[1] "Curation" is the professional care of monuments, objects or other archaeological materials on behalf of a general or specific public or organization. The Concise Oxford Dictionary of Archaeology. Thus, it is not possible to curate paleontological objects unless they have been collected.

> This may require a shift in the project schedule and must be coordinated with the project proponent. Approval by the Authorized Officer for the project to proceed will only be granted when recovery of the fossil material and field data is completed. A report to the file and the project proponent documenting the recovery and indicating that no further mitigation is required must be completed, and the report signed by the Authorized Officer. If the discovery cannot be fully collected within the available time frame, it may have to be avoided by relocating or redesigning the project.

BLM Mitigation Manual III.B. (Emphasis added.)

> The purpose of on-site monitoring is to assess and collect any previously unknown fossil material uncovered during the project activities or soon after surface-disturbing actions. Based on the initial scoping, the field survey and recommendations, and the plan of operations, it may be necessary to require monitoring of surface-disturbing activities. Monitoring may be required as part of an overall mitigation for a project which was developed during the NEPA process, or upon the discovery of paleontological resources during project activities.

BLM Mitigation Manual Section IV. (Emphasis added.)

> Fossil specimens and related data collected from public lands during field surveys and mitigation remain the property of the Federal government.

BLM Mitigation Manual Section VII. (Emphasis added.)

Further, the BLM is quite specific about how to treat large specimens and concentrations of significant fossils:

> (d) If a large specimen or a concentration of significant fossils is located during the field survey, the available time and/or personnel may not allow for full recovery during the survey. The specimen(s) and locality(ies) should be stabilized as needed, and a determination made as to whether avoidance is necessary or whether full recovery of the specimen is required at a later time prior to disturbance activities. The Authorized Officer and project proponent must be notified, the mitigation alternatives discussed including funding for recovery, and a decision reached as soon as possible. If avoidance or later recovery is selected for mitigation, the find should be stabilized, buried if needed to protect the fossils and context, and appropriate measures implemented to reduce adverse effects from natural or human causes.

BLM Mitigation Guidelines Section II.B.3.d. (Emphasis added.) The BLM is also clear about the types of costs to be borne by project applicants:

> The project proponent is also responsible for all costs associated with the survey, including the consulting paleontologist's fees and charges, all survey costs, fossil preparation to the basic identification stage, analyses, reports, and curation costs directly related to mitigation of the project's anticipated impacts. Any required monitoring and mitigation costs are also the responsibility of the project proponent.

BLM Mitigation Guidelines Section II.A.b. (Emphasis added.) It is abundantly clear that the BLM can and does require applicants to pay for all costs of mitigation, including literature and collection review, surveys and initial collections, on-site monitoring during construction activities, collection during construction activities, curation of collected specimens, and final reporting of all mitigation activities. If the Commission were to grant landowners the same rights that the federal government reserves to itself, then the Commission would, among other things, require that Applicant pay for all collection, excavation, removal, and recovery of fossils.[2] DRA requests that the Commission grant private landowners the same general paleontological rights and protections as those retained by the federal government.

5. Applicant's Proposed Language Requires that Landowners Pay for Avoidance/Relocation to Avoid Paleontological Resources

In its Reply Brief, Applicant responded to Peter Larson's concern that landowners would bear the cost of "salvage, construction shutdown, or rerouting" by stating: "Keystone has not proposed that the landowner bear the cost of construction shutdown or avoidance if the pipeline is rerouted to avoid a fossil discovered during construction. Nothing in Keystone's proposed language would suggest that." In fact Applicant's language makes clear that landowners would

[2] Applicant's proposed language for Condition 44(d) that purports to require the BLM to pay for salvage of fossils must be struck because the Commission is without power to controvert federal mitigation requirements on federal lands.

be responsible for costs related to "avoidance," and that the language is unclear with regard to the cost of project shutdown. Parsed, Applicant's language states:

> Keystone shall develop a plan . . . to accommodate the landowner's . . . salvage or avoidance of the paleontological resource at the expense of the landowner . . . .

Only Applicant can avoid fossils and the only way to avoid a fossil is to re-route around it. Thus, contrary to Applicant's arguments, its language would require that landowners pay for re-routing. If this language is adopted it seems unlikely that landowners could arrange for avoidance without risking liability for the cost of re-routing the pipeline, which could amount to millions of dollars in planning, engineering, and construction costs. Further, to the degree that "salvage" requires delay, this language could also be interpreted to mean that landowners must pay for all costs of salvage, including Applicant's delay costs. As such, the potential liability imposed by this language is not minor and should not be adopted by the Commission. Since Applicant has agreed that landowners are not responsible for costs related to avoidance or delay, any change by the Commission should make this concession clear.

6. Applicant Should Pay for All Mitigation Activities, Including Recover, Because Its Profit-Making Actions Will Force Landowners to Collect Valuable Fossils Not in the Time, Place, or Manner of Their Choosing, or Risk Losing These Resources

DRA and its impacted landowner members believe that their private property rights should be protected to the same degree as public property. Therefore, DRA proposes that the Commission accept the federal guidance evidence offered by Applicant for the purpose of developing adequate protections for landowner private property rights in fossils. Specifically the Commission should require that Applicant:

- recognize fossils for their economic and scientific value;
- hire qualified paleontological experts according to BLM standards;

- allow landowners a reasonable right to participate in the protection process similar to that retained by the BLM;
- pay for mitigation of fossils threatened by construction activities to the same degree as required by the BLM;
- certify that it has indentified willing institutional recipients of recovered fossils on private lands to the same degree that it must do this on federal lands; and
- treat the locations of sensitive and valuable resources as confidential and limit public access to this information while requiring that Applicant report paleontological information to impacted landowners to the same degree that it must report such information to the BLM.

If the Commission seeks to model protection of paleontological resources on federal requirements, it only makes sense to adopt a scheme that approximates the full range of rights reserved by the federal government, rather than just those standards that define and limit Applicant's obligations to protect only particular areas and particular types of fossils.

Applicant's primary argument for making landowners pay for recovery of fossils in the right of way is that landowners may profit from such recovery.[3] The fact that landowners may make money from fossils does not mean that they will. It is also possible for landowners to allow public and private educational institutions to study and collect paleontological resources on their lands. The practical result of Applicant's proposed condition is that only very valuable fossils would be recovered because landowners have no financial incentive to recover "scientifically significant" fossils, especially in the accelerated context of mitigation for a

[3] It is inconsistent that Applicant simultaneously strikes language related to economic value from Condition 44 while noting that due to the economic value landowners should pay for recovery. Applicant proposes a paleontological standard, "scientific significance," that is at odds with its proposed standard about whether a fossil would be saved, namely its economic value.

pipeline project. Another result would be that Applicant would be able to take fossils from landowners unless they are able to pay for their recover, regardless of the resource's "scientific significance" and without taking account of a landowner's personal wealth.

DRA asks that the Commission remember that the landowners are not choosing the time or place of this paleontological work, nor can they predict how much it will cost to mitigate the potential damage caused by Applicant nor (if Applicant's language is approved) would they control the terms of the mitigation plans that would be developed by Applicant. Applicant's proposed language lets Applicant control when, where, and how much mitigation will cost, but then makes landowners responsible for these costs. While Staff's point that a resource might not be discovered except for the project is true, it is also true that except for the project a landowner could determine the time, place, and manner or collection of fossils, whether for economic, scientific, or charitable reasons. If a number of major finds are discovered on a single landowner's property, that landowner would be solely responsible for footing the bill for all recovery. If a landowner could not afford recovery, then Applicant could bulldoze the sites. This is not fair and would take private property without just compensation.

DRA would also like to remind the Commission that Applicant will earn billions of dollars of revenue from the proposed pipeline. It is this purpose that is forcing landowners to protect their paleontological resources. The federal government has found that it is reasonable for a company that will profit from use of federal land to pay for all costs of protecting paleontological resources. Presumably Applicant will do so on federal land. Given the burdens imposed on landowners and the potential costs of paleontological mitigation, the Commission should grant landowners the same rights to protect paleontological resources as found reasonable by the federal government.

Finally, some fossils are valuable and Applicant is liable for damage to valuable private property that is not taken pursuant to Applicant's condemnation rights. Applicant's easements will not grant it a right to waste or damage private paleontological resources unnecessarily. Further, utility easement holders are liable for damages to private property of all types that result from the use of easements. A failure by the Commission to adequately protect private property rights in paleontological resources could amount to a taking of private property without just compensation. With regard to the right to compensation, fossils should be treated no differently than fences, drain pipes, water pipes, utilities, roads, wells, and other private property. The fact that they are removed rather than being replaced is not cause to treat paleontological resources differently.

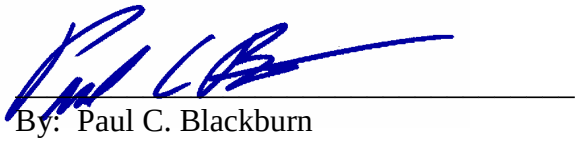
CONCLUSION

For the foregoing reasons, DRA requests that the Commission deny Applicants request for reconsideration or modify the request to protect landowner interests in their properties.

Dated April 29, 2010.

Respectfully submitted,

PLAINS JUSTICE



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CERTIFICATE OF SERVICE

I hereby certify that the above **ANSWER OF DAKOTA RURAL ACTION IN OPPOSITION TO APPLICANT'S MOTION FOR LIMITED RECONSIDERATION OF CERTAIN PERMIT CONDITIONS** were served upon all of the parties listed on the attached Service List on the 29th day of April, either electronically or by mailing a true and correct copy thereof to them by first Class mail, postage prepaid, at their last known address.

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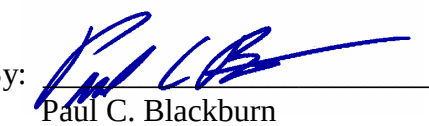
By: 

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