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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION
OF TRANSCANADA KEYSTONE PIPELINE,
LP FOR ORDER ACCEPTING CERTIFICATION
OF PERMIT ISSUED IN DOCKET HP09-001
TO CONSTRUCT THE KEYSTONE XL
PIPELINE

HP14-001

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Transcript of Hearing
July 27, 2015 through August 5, 2015

Volume III
July 29, 2015
Pages 490-755

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BEFORE THE PUBLIC UTILITIES COMMISSION

CHRIS NELSON, CHAIRMAN
KRISTIE FIEGEN, VICE CHAIRMAN (not present)
GARY HANSON, COMMISSIONER

COMMISSION STAFF

John Smith
Kristen Edwards
Karen Cremer
Greg Rislov
Brian Rounds
Darren Kearney
Tina Douglas
Katlyn Gustafson

Reported By Cheri McComsey Wittler, RPR, CRR

1 TRANSCRIPT OF PROCEEDINGS, held in the
2 above-entitled matter, at the South Dakota State Capitol
3 Building, Room 414, 500 East Capitol Avenue, Pierre,
4 South Dakota, on the 29th day of July, 2015.

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1 MR. SMITH: It's a little after 8:00. 8:02. So
2 our start time was 8 o'clock so I'll call the hearing
3 back to order in Docket HP14-001, In the Matter of the
4 Application of TransCanada Keystone Pipeline, LP for a
5 Certification that it continues to meet the Conditions of
6 the Permit granted in HP09-001.

7 We've got a couple of preliminary matters to
8 deal with this morning. We have a -- we've got Matt
9 Rappold who we'll deal with in just a second. We have
10 one of the Intervenors, an Individual Intervenor, who's
11 going to offer an opening statement. She did not submit
12 prefiled testimony and anything until --

13 So we will let her make her opening statement,
14 and she can submit her document as a comment in the
15 case.

16 So, with that, Ms. Kilmurry, would you please
17 come up to the front here.

18 And we limit these to 10 minutes. You told me
19 it would be far less than that. We've got a timer that
20 we use. When the green light comes on, that means you
21 have four minutes left. The yellow means one minute.
22 And the red means done.

23 MS. KILMURRY: Commissioners, I'm Bonnie
24 Kilmurry, an Individual Intervenor on Docket HP14-001,
25 the hearing scheduled for July 27, through August 4,

1 2015. This is my written formal Intervenor statement.
2 Thank you for allowing me to do this, participate in this
3 process.

4 TransCanada is not the good neighbor it purports
5 to be. Not only does TransCanada exaggerate its jobs
6 numbers, the company also has a long history of spreading
7 half-truths about the efficacy and safety of their
8 existing pipelines and the proposed Keystone XL Pipeline.

9 As a landowner who is affected by the proposed
10 KXL Pipeline, I have a financial and an emotional
11 interest in the fate of the proposed pipeline. However,
12 what began as a gut response is now based on factual
13 research. I can now say TransCanada's actions are not
14 neighborly, and their actions speak to the blatant
15 disregard of the land and water I seek to preserve.

16 TransCanada exaggerates pipeline safety. Let's
17 look at their record for the first Keystone Pipeline.
18 The company boasted that this project would have one leak
19 in a seven-year period. However, its first year of
20 operation 12 were reported. In one such leak a six-story
21 geyser unleashed 21,000 barrels of oils in North Dakota.

22 Furthermore, there are numerous issues with the
23 southern leg of Keystone I. In one such instance a
24 mandatory inspection test revealed a section of the
25 pipeline wall had corroded 95 percent leaving it paper

1 thin in one area, one-third the thickness of a dime.
2 Dangerously thin in other places too, leading TransCanada
3 to immediately shut it down.

4 The public was not notified of these issues.
5 TransCanada claims to have speedily dealt with these
6 issues, but I think this is one more symptom of their
7 lack of neighborliness. If the pipeline was so safe,
8 then why would it leak 12 times in the first year?

9 If the pipeline was so sturdy, why would
10 TransCanada need to replace major portions of the route
11 in the pipeline's first year of operation?

12 I also believe TransCanada has corporate culture
13 that flouts regulation in favor of profit. Evan Vokes, a
14 former engineer of the company made a formal complaint
15 about TransCanada's noncompliance of regulation to
16 Canada's National Energy Board in 2012.

17 From this former complaint the NEB found, and I
18 quote "Many of the allegations of regulatory
19 noncompliance identified by the complainant were verified
20 by TransCanada's internal audit."

21 By 2014 TransCanada had dealt with the welding
22 issues; however, these problems were only solved after
23 the formal complaint was filed with NEB. Prior to
24 contacting the NEB, Vokes voiced his opinion with the
25 internal channels of TransCanada. These complaints were

1 simply ignored. This story is not isolated.

2 In March of this year another individual
3 brought, and I quote, "a dozen allegations that deal with
4 timeliness, quality, and reporting of repairs on
5 Alberta's TransCanada's Pipeline to the Canada's NEB."
6 These allegations are currently under investigation.

7 I am happy to hear that they are -- TransCanada
8 has dealt with its poorly regulated allegations.
9 However, it concerns me that TransCanada only dealt with
10 these issues after they were under investigation by the
11 NEB. These instances are not neighborly.

12 The company knows the regulations, and they have
13 a duty to comply. Since these instances are far from
14 isolated, I am concerned that this trend of ignoring
15 regulations will persist with Keystone XL.

16 I am also concerned with TransCanada's treatment
17 of the landowners. Lori Collins from Paris, Texas
18 welcomed TransCanada when the company wanted to place the
19 southern leg of Keystone I Pipeline across her land.

20 The men in her family are all oil field workers.
21 She strongly supported the pipeline construction. In
22 2012 during the construction of the pipeline on their
23 land a backhoe dug up the Collins's septic system.
24 Collins was not concerned because the TransCanada land
25 agent assured her that the company would promptly fix the

1 problem.

2 This did not happen. Instead their house was
3 filled with raw sewage, and the family had to move. A
4 year and a half later after this incident the company
5 offered the family 40,000 to fix the damage, only to
6 backtrack that offer.

7 Finally, 19 months after the septic destruction
8 TransCanada settled with the Collins family out of court
9 for \$479,000. The former TransCanada supporter was
10 exhausted and in an interview with the Texas observer
11 Collins said They sucked us dry. They took our home, our
12 livelihood and our work from us.

13 From the construction issues of the first
14 Keystone Pipeline to the regulatory issues in Canada, I
15 see a troubling trend. These examples show that
16 TransCanada is far from neighborly. As a lifelong
17 resident of the sand hills and landowner along the
18 Keystone XL Pipeline, I have a vested interest in your
19 Commissioners' decision.

20 As an informed citizen, I am concerned. I see a
21 company that values profits over livelihoods of
22 South Dakota citizens. I ask that you, your Commission,
23 take these facts into consideration, and I thank you,
24 each of you, for the opportunity to present my findings
25 to you.

1 I am Bonnie Kilmurry, Atkinson, Nebraska.

2 Thank you, sir.

3 MR. SMITH: Thank you, Ms. Kilmurry.

4 Mr. Rappold, how are you feeling today?

5 MR. RAPPOLD: Good as new.

6 MR. SMITH: Better?

7 MR. RAPPOLD: Not better.

8 MR. SMITH: That's good. Would you like to have
9 the Applicant -- or Petitioner call -- recall Mr. Goulet
10 and so you can engage in cross-examination of him?

11 MR. RAPPOLD: Yeah. That would be good.

12 MR. SMITH: Mr. Taylor.

13 MR. TAYLOR: Could we cover a couple of
14 procedural matters before we do that?

15 MR. SMITH: Sure.

16 MR. TAYLOR: We're interested -- given
17 yesterday afternoon's ruling on how rebuttal testimony
18 would be offered, we're interested in being sure that we
19 have our rebuttal witnesses available in the correct
20 order.

21 And I've written down what I believe the order
22 will be that the Intervenor will present their cases.
23 If we could have a statement of the order in which they
24 will present their witnesses, that will also be useful.

25 Could we do that this morning and get that

1 resolved so we can get our people organized?

2 The way I see it, it's Cheyenne River, Rosebud
3 Sioux, Standing Rock, Yankton Sioux, Bold Nebraska, DRA,
4 Cindy Myers, Diana Steskal. And those are the people who
5 have filed prefiled testimony.

6 And of that group DRA has several witnesses
7 listed. If we could just know the order of people's
8 witnesses, that would also be useful to us.

9 MR. SMITH: Intervenors, would one of you want
10 to take a stab at the request?

11 Mr. Capossela?

12 MR. CAPOSSELA: Thank you, Mr. Smith.

13 The expectation of the Intervenors is to be
14 courteous with one another with respect to time frames
15 for witnesses coming in. Now there won't be any mixup of
16 direct and rebuttal, hopefully, but the expectation is
17 what I said, that we're not prepared to give a precise
18 order right now, and we're not -- I don't think it would
19 be confusing as long as we do direct and rebuttal in that
20 order, and that's what we intend to do.

21 But I do not believe that the organizational
22 Intervenors that have a case in chief and will be putting
23 on witnesses -- our expectation amongst ourselves is to
24 work with one another for the time frames of the
25 witnesses.

1 And so we're not really prepared to give a
2 precise order, excepting to say the rule of thumb is
3 direct -- the direct cases go and then the rebuttals go.

4 Staff counsel, Staff has a witness that it has
5 moved to have on Monday, and Standing Rock was included
6 in that. So we do have one rebuttal witness. And I
7 would expect the pretrial motions with respect to time
8 frame be honored.

9 But, otherwise, we're trying to cooperate with
10 one another because people are traveling distances
11 throughout the state and from out of state.

12 MR. MARTINEZ: Mr. Smith, Robin Martinez on
13 behalf of DRA. I think we're pretty much in the same
14 boat. We had previously disclosed we needed to have
15 Dr. Arden Davis here to testify on Monday because that's
16 going to be his earliest availability.

17 MR. RAPPOLD: On behalf of Rosebud, we agree
18 with the statements made as far as the Intervenors will
19 be working together to coordinate our witnesses and those
20 sorts of things.

21 I have one witness. She won't be available to
22 testify until next week so I'd ask for Monday or Tuesday
23 as that goes.

24 MR. TAYLOR: Who is that, Matt?

25 MR. RAPPOLD: Paula Antoine.

1 MR. CLARK: Mr. Smith, just to remind you, as I
2 think we discussed yesterday, one of our witnesses
3 unexpectedly traveled out of state, but we arranged to
4 have him here and present on Thursday.

5 So we plan at least to present both of our
6 witnesses at any time on Thursday if that's convenient
7 for the Commission.

8 MS. REAL BIRD: Mr. Smith, Thomasina Real Bird
9 for the Yankton Sioux Tribe. We asked for a time certain
10 for our witness Faith Spotted Eagle and that was granted
11 for Thursday or Monday. So we would be prepared for
12 either day for Faith.

13 MS. EDWARDS: Mr. Smith, could I weigh in just a
14 little for Staff?

15 We're in the same boat as all the other
16 Intervenor, playing the wait and see game to see who's
17 here on what day. But we would be willing to let
18 TransCanada know the day before. At that time we would
19 know who we'd intend to call the next day so they can
20 prepare that night, if would be helpful.

21 MS. MYERS: This is Cindy Myers. I absolutely
22 can't go past next Tuesday.

23 MR. BLACKBURN: Mr. Smith, Bold has no
24 witnesses.

25 MR. SMITH: Okay. Thank you. Any other

1 Intervenors have anything to add?

2 Mr. Taylor, thoughts on that? Is that okay?

3 MR. TAYLOR: I guess if it's not going to be any
4 different than that, that's the way it is.

5 MR. SMITH: Yeah. I mean, some of these are via
6 written orders, as you know, for time certain. And, you
7 know, I guess what I'd like to do myself is do what we
8 can without -- as Mr. Capossela said, if we can, without
9 juggling and upending the basic order of the case here,
10 of the overall proceedings, to accommodate to the best we
11 can the needs of the various witnesses that people have
12 because they're obviously from not only all over the
13 United States but from elsewhere as well.

14 Chairman Nelson.

15 CHAIRMAN NELSON: It appears to me after
16 listening to all the parties the requests and responses,
17 probably the best we can do is maybe before we adjourn
18 each day if we all get on the same page for what we
19 expect tomorrow, I think that's the best that we can
20 accomplish, given the request.

21 MR. SMITH: Is that it, Mr. Taylor, in terms of
22 preliminary?

23 MR. TAYLOR: I guess. So the order of
24 presentation I read in the beginning, is that the order
25 of presentation we're going to follow? Alphabetical

1 order, Tribes first?

2 MR. SMITH: That's what I did for opening
3 statements. And it's just -- to me it worked. So we'll
4 do that with the Tribes going first in alphabetical
5 order, followed by the rest of the Intervenor. Then
6 nontribal Intervenor will follow in alphabetical order,
7 those who actually are qualified, have been qualified to
8 offer actual testimony in the case through compliance
9 with the Commission's Orders.

10 With that, could we have Mr. Goulet then retake
11 the stand to allow for examination by Mr. Rappold.

12 MR. HARTER: Mr. Smith, John Harter.

13 In the docket can you tell me what page the
14 Conditions start on? Because I'm stressing out trying to
15 find it.

16 MR. SMITH: In the docket, you mean the Keystone
17 HP09?

18 MR. HARTER: Yeah. I believe, supplemental.

19 MR. SMITH: Where they're at is in I think it's
20 called Appendix A.

21 MS. EDWARDS: 25.

22 MR. SMITH: Page 25. Yeah.

23 MR. RAPPOLD: Good morning, Commissioners. I
24 appreciate the opportunity. Thank you for working with
25 me in my schedule. Unfortunately, I was in the hospital

1 for two days, a day and a half starting Monday. I
2 appreciate the opportunity to get back into the hearing
3 as it's been moving right along, I understand, and I
4 appreciate the opportunity to have the opportunity to
5 cross-examine the witnesses that I missed in my absence.

6 So with that, I'll go ahead and get started.

7 CROSS-EXAMINATION

8 BY MR. RAPPOLD:

9 Q. Good morning, Mr. Goulet. My name is Matt Rappold.
10 I'm an attorney. I represent the Rosebud Sioux Tribe.

11 Please bear with me as I missed your direct
12 testimony so I don't really -- I'm kind of coming into
13 this flatfooted, so to speak, and I didn't have the
14 opportunity to kind of be in the situation in real time.

15 So it might seem kind of a little sterile, you know,
16 to kind of jump into things in this way, but I appreciate
17 your indulgences to let me work through this.

18 It's my understanding -- what's your current job
19 description?

20 A. I'm the president of Keystone projects, and I'm also
21 the vice president and general manager of major project
22 implementation.

23 Q. When you say you're the president of Keystone
24 projects what projects does that consist of?

25 A. Well, it consists of a number of different projects

1 that have been built or developed over the last few
2 years. And we've talked in these proceedings about the
3 Gulf Coast Project, for example, the Houston Lateral, and
4 Houston Tank Terminal that are currently under
5 construction and the planned Keystone XL Pipeline being a
6 number of the projects associated with the Keystone
7 Project organization.

8 Q. Is the Keystone I a part of something you have
9 authority over?

10 A. It would have been at the time that it was
11 constructed. However, it's now in operations and is not
12 in my area of accountability.

13 Q. Okay. When you say your "area of accountability,"
14 could you describe for the Commission how far -- what the
15 reach of that accountability is?

16 A. It involves the development and implementation of
17 projects from the start of conceptual planning right
18 through to commissioning the facility and placing it in
19 operations.

20 Q. And also would it be fair to say that it extends to
21 proceedings like the one we have today?

22 A. It does.

23 Q. What year did you take over as the -- in your
24 current responsibilities?

25 A. Approximately three years ago on July 1 of 2012.

1 Q. And I'm sure you recall, but what year did
2 TransCanada get the South Dakota Permit?

3 A. In 2010 approximately this time.

4 Q. And they applied for that in 2009?

5 A. That's my understanding.

6 Q. Were you working in any -- professionally speaking,
7 in your employment did you have any connection with the
8 Keystone projects before you took over as the project
9 manager?

10 A. No, I didn't. And I didn't take over as the project
11 manager. I took over as the vice president of the
12 organization.

13 Q. Okay. I'm sorry for that mischaracterization.

14 That is the position that you hold today; correct?

15 A. Yes. That vice president position I think within a
16 year was renamed to the president of Keystone projects.

17 Q. Okay. Since you weren't a part of the project when
18 the initial applications were sought, is it fair to say
19 that there was considerable amount of documents and
20 whatnot that you had to review to get up to speed with
21 the project in 2012?

22 A. I think not only with regard to this Permit but the
23 project as a whole I've had to get up to speed, as you
24 call it, relative to the details of various aspects of
25 various projects.

1 Q. And if I call it getting up to speed, is that an
2 accurate -- I mean, would you agree with that, the way of
3 calling that?

4 A. I suppose that's -- that's a -- a good description
5 for it.

6 Q. Okay what types of documents did you review?

7 A. Well, I mean, the documents I reviewed are too many
8 to count. So, I mean, they have to do with not only
9 permits but technical documents associated with all
10 aspects of the design, construction, commissioning, and
11 turnover of various projects.

12 Q. And would it also be fair to say that you had to
13 review Permit Conditions for existing projects or
14 projects that were still in the works?

15 A. Well, I generally -- I reviewed some documents
16 associated with the ongoing installation of projects and
17 some of those permits. But in general in my capacity as
18 president I don't get into that much detail, and I rely
19 on briefs and updates from Staff in order to update me on
20 the projects and the, you know, compliance with the
21 permits that we've sought or have.

22 Q. It's my understanding that in 2008 Keystone applied
23 for a Presidential Permit to cross an international
24 border. Is that your understanding?

25 A. Well, it's a long story. We've actually reapplied

1 for that same Permit --

2 Q. I'll probably talk about that later, but right now
3 I'm talking about the original Application.

4 A. That's my understanding.

5 Q. So it is correct then in 2008 Keystone applied for a
6 Presidential Permit to cross the border for a project?

7 A. For the Keystone XL Project.

8 Q. Are you able to describe that project? I know it
9 was before you started working there.

10 A. Well, a very brief description would be from
11 Hardisty, Alberta, through to Steele City, Nebraska and
12 another 485-mile leg from Cushing, Oklahoma to Nederland,
13 Texas, a total of some 1,700 miles of 36-inch pipeline.

14 Q. So that original project as designed and conceived
15 was only two sections. Is that what you're stating? Or
16 is it three?

17 A. That's correct. Just two sections.

18 Q. Just two sections?

19 Where does the Houston Lateral fit into that?

20 A. The Houston Lateral -- I don't know if it was in the
21 original Application or not. I can't remember back to
22 that. But subsequent to the Gulf Coast Project being
23 built, we added a 50-mile section between Pump Station 41
24 and east Houston, which is the Gulf -- which is the
25 Houston Lateral, and it connects to the Houston Tank

1 Terminal located in east Houston.

2 Q. Okay. Now you mentioned that there was another
3 Permit that you applied for, Presidential Permit; is that
4 correct?

5 A. Well, we reapplied for that same project again a few
6 years later.

7 Q. That was in 2012?

8 A. That's right.

9 Q. In 2011 the original Presidential Permit Application
10 was denied; is that correct?

11 A. Yeah. I wasn't directly involved that time, but
12 that's my understanding.

13 Q. Well, regardless of whether you were directly
14 involved or not, it was denied; right?

15 A. I understand that, yeah.

16 Q. Okay. And you filed the Certification Petition in
17 this case; correct?

18 A. I did.

19 Q. And did you have any involvement in the drafting of
20 the Petition For Order Accepting Certification?

21 A. Well, I reviewed the draft that was prepared and
22 went through it in detail and proposed any changes that I
23 felt were necessary and reviewed the final copy and have
24 signed the Petition as -- or the Certification as you've
25 indicated.

1 Q. And this was done under oath just as you are under
2 oath today?

3 A. That's correct. Yes.

4 Q. The basis of your certification to the Petition is
5 that Keystone can certify that it is in compliance with
6 the Conditions attached to the 2010 Amended Final
7 Decision and Order in this docket; correct?

8 MR. TAYLOR: Objection. That's a
9 mischaracterization of the Petition. It's sort of an
10 under characterization of the Petition.

11 MR. SMITH: I'm going to overrule.

12 A. Well, we continue to be -- we continue to satisfy
13 the requirements of the Conditions. And, in addition,
14 any preconstruction Conditions, we meet those Conditions
15 today.

16 And the majority of the Conditions are related to
17 construction, operation, and maintenance. And we fully
18 intend to meet those Conditions. Those are prospective
19 looking. But we have full intention to ensure that we
20 meet those Conditions as -- when the project proceeds.

21 Q. And it's my understanding in reviewing the Petition
22 it states that Keystone is in compliance with the
23 Conditions attached to the June 29, 2010, Order to the
24 extent that those Conditions have applicability in the
25 current preconstruction phase of the project.

1 A. I think that's just what I said.

2 Q. So are you saying then that there are other
3 Conditions that don't apply at this time? Or just the
4 preconstruction Conditions?

5 A. Well, there are many Conditions of the 50 Conditions
6 which are prospective in nature and which don't apply at
7 this time. But, as I indicated, we fully intend to
8 comply with them.

9 Q. You testified that you reapplied for the
10 Presidential Permit for the same project a few years
11 later. Is that correct? Just a little while ago?

12 A. In 2012. I think we covered that, yes.

13 Q. And you stated you applied for the same project.

14 A. Well, the project was very similar.

15 MR. RAPPOLD: Excuse me. The witness testified
16 that they applied for the same project. If now he's
17 testifying to something different saying that it's a
18 similar project, if we could have the court reporter go
19 back and review the testimony to clarify for the witness
20 what he testified to, or we can just have him agree that
21 he testified that he applied for the same project. It's
22 up to you.

23 MR. SMITH: Mr. Taylor, do you have a response?

24 MR. TAYLOR: This is cross-examination, and
25 Mr. Rappold can examine the witness on the subject. What

1 he testified to or may now be about to testify to is all
2 part of cross-examination, not appropriate to go back and
3 review the record and examine what testimony may have
4 previously been given.

5 MR. SMITH: Okay.

6 Q. So earlier you testified that you applied for a new
7 Presidential Permit for the same project; correct?

8 A. What I -- when you said same I thought you meant the
9 same name. If you want to get into the details of the
10 scope, we can certainly do that.

11 We reapplied for the Keystone XL Pipeline.

12 Q. And those are two different projects; correct?

13 A. Well, the Keystone XL Pipeline has been modified
14 slightly from the original project which was contemplated
15 back in 2008. And those modifications include the Gulf
16 Coast Project was removed from the scope. It had
17 separate utility. And we received state permits and
18 federal permits to build that project, and it was
19 completed in 2013.

20 In addition, we went through an exhaustive rerouting
21 process with the Nebraska Department of Environmental
22 Quality for the Nebraska portion of the project. And in
23 the reapplication we also included the new route for that
24 part of the project as well.

25 Those are the fundamental changes associated with

1 the reapplication. And there are probably some minor
2 changes as well.

3 Q. So do you not consider the addition of the Bakken
4 Marketlink to be a fundamental change in the project?

5 A. I wasn't aware that the Bakken Marketlink wasn't in
6 the original Application or I had forgotten, but that is
7 another change associated with the project.

8 That doesn't really change the -- the project,
9 per se, in terms of the pipeline part of the project.
10 But it is an aspect which I believe was included in the
11 2012 Application.

12 Q. Right. Which was not in the 2008 Application.

13 A. That's my understanding.

14 Q. As part of your review for the certification,
15 filing, and preparation for this case I'm assuming that
16 you've reviewed the Findings of Fact, Conclusions of Law,
17 and the 50 Amended Permit Conditions?

18 A. I've reviewed, I think, all of those documents, yes,
19 as part of the certification.

20 Q. And would you agree that there are 50 Amended Permit
21 Conditions?

22 A. I would agree with that, yes.

23 Q. And would you also agree that there's 51 Sub
24 Conditions?

25 A. I'm not aware of that detail but --

1 Q. If I told you there were, would you believe me?

2 A. I'll take your word for it.

3 Q. Okay. That will save us the time of counting.

4 Let's take a little bit of time to go through some
5 of the Amended Permit Conditions. Now as we've both
6 agreed and you've testified to, the existing South Dakota
7 Permit is based on the 2008 Presidential Permit
8 Application and the 2009 South Dakota PUC Application; is
9 that correct?

10 A. Well, I think they were referenced in the
11 South Dakota PUC Permit, yes.

12 Q. And one of the Conditions -- at the time TransCanada
13 was applying for the original South Dakota Permit was it
14 your understanding that in connection with that
15 Application TransCanada also applied for a Special Permit
16 from the Pipeline and Hazardous Materials Safety
17 Administration?

18 A. That's correct. Which we subsequently withdrew in
19 2010.

20 Q. Right. Then is it also your understanding that
21 compliance with the requirements of the Special Permit is
22 a Permit Condition?

23 A. A Permit Condition for what?

24 Q. For the South Dakota Permit Condition No. 2.

25 A. I'm just looking at it now.

1 Q. Oh, sure. Take your time.

2 (Witness examines document)

3 A. That's what it says, yeah.

4 Q. Okay. And so it's your testimony that that Special
5 Permit was withdrawn, and it doesn't exist; right?

6 A. That's right. We've reverted back to the standard
7 PHMSA Code 195.

8 Q. You're still waiting for approval of the 2012
9 Presidential Permit Application; correct?

10 A. That's correct.

11 Q. And you were required to apply for that Permit
12 because your original Application was denied; correct?

13 A. Yeah. We've covered that ground.

14 Q. Yes. And so do you believe that it's possible to
15 comply with the requirements of a Presidential Permit
16 that has been denied?

17 MR. TAYLOR: I'd object to the form of the
18 question. It doesn't call for an answer. It's an
19 argument.

20 MR. RAPPOLD: It's not argument.

21 MR. SMITH: Sustained.

22 Q. If there was a Presidential Permit that issued,
23 would it be possible for Keystone to have the opportunity
24 to comply with that Permit?

25 A. If -- yes.

1 Q. Okay. And if a Permit was denied, would it still be
2 possible to demonstrate the opportunity to comply with
3 that Permit?

4 A. Well, we've applied for a new Presidential Permit.

5 Q. I understand that.

6 A. And it is possible to comply with that in the
7 future.

8 Q. It may be possible to comply with that in the
9 future, but I'm not talking about the new Permit. My
10 question was about the old Permit.

11 If a Permit has been denied, is it possible to still
12 show and demonstrate the ability to comply with the
13 requirements of that Permit?

14 MR. TAYLOR: Objection. Argumentative.

15 MR. SMITH: Sustained.

16 MR. RAPPOLD: How is the question
17 argumentative? It's just a hypothetical question.

18 I asked him the question about if a Permit was
19 issued, would it still be possible to demonstrate
20 compliance. And the witness answered that question
21 without drawing objection.

22 I asked the same exact question, just turned it
23 around, and it's an argumentative, objectionable
24 question.

25 MR. SMITH: Well, why don't you give it another

1 shot.

2 Q. Can Keystone demonstrate compliance with a Permit
3 that doesn't exist?

4 A. I don't think anyone can do that.

5 Q. Thank you. Have you reviewed the direct testimony
6 of any other Keystone witnesses?

7 A. I've only had peripheral review of the documents. I
8 haven't reviewed in detail everyone's direct testimony,
9 no.

10 Q. Did you go through each and every Permit Condition
11 and look to see what you could actually do to demonstrate
12 compliance?

13 A. I reviewed Appendix B, which is the status of
14 implementation of our South Dakota PUC Conditions, as
15 well as the Findings of Fact, which talked about the
16 changes in the project and the Application.

17 Q. Is that Appendix C that you're referring to,
18 Tracking Table of Changes?

19 A. That's correct.

20 Q. What else did you review?

21 A. The remainder of the certification which I signed.

22 Q. You would agree that the Appendix C filed with the
23 Application identified 30 changes?

24 A. That's correct.

25 Q. And those are changes to Findings of Fact; isn't

1 that how it's characterized?

2 A. That's correct.

3 Q. What was your intention by calling that table a
4 Tracking Table of Changes?

5 MR. TAYLOR: Objection. There's no foundation
6 for that question. First you've got to establish who
7 authored that.

8 Q. What role did you play in authoring Appendix C?

9 A. I didn't author Appendix C. I reviewed it and
10 ensured that I agreed with the information on it so that
11 I could make my certification.

12 Q. Did you have any role in deciding what it would be
13 called?

14 A. Not at all.

15 Q. Did you review that document as it was being
16 created, or did you wait until the very end when it was
17 ready to be filed?

18 A. I reviewed at least one draft before it was
19 finalized.

20 Q. And then you reviewed the final product?

21 A. Before signing the certification, yes.

22 Q. And you reviewed the Appendix C specifically for the
23 certification proceeding; correct?

24 A. Yes.

25 Q. Are you able to state why the document does not

1 identify any other Findings of Fact?

2 A. No.

3 Q. Did you inquire as to why it only referenced 30
4 Findings of Fact?

5 A. No.

6 Q. Did you think it was unusual that it only referenced
7 30 Findings of Fact?

8 A. No. I trust the people who work for me are going
9 through the details and determining which are relevant.

10 Q. As the president of the project would you consider
11 yourself to be the person where the buck stops?

12 A. Well, I have overall accountability for the
13 Keystone Projects.

14 Q. So if you said I want to know about 50 Findings of
15 Fact and told your people, they would have done it;
16 right?

17 MR. TAYLOR: Object to the form of the question.
18 Calls for speculation.

19 MR. SMITH: Overruled. Are you able to answer?

20 A. Well, if I would have done that, I think people
21 would have consulted with me and provided me
22 recommendations relative to how many Findings of Fact
23 ended up in this Tracking Table of Changes. And I would
24 take their counsel and their input into consideration.

25 Q. Did you go back and perform any type of independent

1 analysis of the information contained in Appendix C?

2 A. I based -- based my analysis of Appendix C, based on
3 my knowledge that I gained over the last few years in my
4 capacity.

5 Q. But you didn't go back and say I'm going to take a
6 look at what they told me, and I'm going to take a look
7 at what I know, and I'm going to compare them. You
8 didn't do that; is that correct?

9 MR. TAYLOR: Objection. That's a
10 mischaracterization of the witness's testimony, and it's
11 argument.

12 MR. SMITH: Sustained.

13 Q. So the information contained in Appendix C is based
14 on a combination of your knowledge regarding the project
15 and what the people you work with told you; is that
16 correct?

17 A. Well, it's based on a myriad of people who are
18 associated with the project putting together a table of
19 information which I reviewed and did not see any issues
20 with.

21 Q. Would it be -- is it your understanding that the
22 Presidential Permit that Keystone applied for in 2012 did
23 not exist in 2010 when you got the South Dakota Permit?

24 A. Well, the Presidential Permit doesn't exist today
25 either.

1 Q. That's correct. It doesn't.

2 Did your Application for a Presidential Permit in
3 2012 exist in 2010?

4 A. Clearly not. We only applied in 2012.

5 Q. And it is also your understanding that the 2012
6 Presidential Permit is a different Presidential Permit
7 Application than the original one in 2009; correct?

8 A. It's been modified as we've described earlier. I'm
9 sure there are many other changes to the Permit
10 Application that we haven't discussed, but we've gone
11 over the substantive changes associated with the scope of
12 the project.

13 Q. So is it your testimony then that if the President
14 approves the 2012 Application for a Presidential Permit,
15 that that Permit will apply and the requirements of that
16 Permit will apply to this docket? Is that your
17 testimony?

18 A. That's my testimony. And that's why we developed
19 the Tracking Table of Changes in the first place, to
20 identify the substantive changes that affect this
21 Application.

22 Q. So you want to take something that didn't exist and
23 apply it to something that does.

24 MR. TAYLOR: Objection. Argumentative.

25 MR. SMITH: Sustained.

1 Q. Do you have an opinion on whether or not the Public
2 Utilities Commission can change any of the Permit
3 Conditions or the Findings of Fact through this
4 proceeding?

5 MR. TAYLOR: That's a yes or no question.

6 A. No. I don't have an opinion. It's up to the
7 Commission.

8 Q. And, presumably, the Commissioners would have to
9 follow the law in making that decision; correct?

10 MR. TAYLOR: Objection. Argumentative.

11 MR. RAPPOLD: He said it's up to the
12 Commissioners. I'm just trying to get to his
13 understanding of what your role is in this process.

14 MR. SMITH: Overruled. I might wonder whether
15 he has the capacity to be able to answer the question.
16 But go ahead.

17 Q. Have you reviewed -- perhaps a little more
18 foundation is necessary. Have you reviewed any of the
19 South Dakota statutes as it relates to certification
20 proceedings?

21 A. I have not.

22 Q. Have you review any of the Commission's orders
23 throughout the course of this proceeding?

24 A. I may have seen a couple of them in passing, but I
25 didn't -- I have not reviewed all the orders associated

1 with this proceeding.

2 Q. If I told you that the Commission issued an Order --
3 and I'll paraphrase -- stating to the effect that the
4 Commission does not have the jurisdiction or authority to
5 amend Findings of Fact or Permit Conditions in this case,
6 would you agree with me?

7 MR. TAYLOR: I'm going to object to this line of
8 questioning as irrelevant. If it was originally intended
9 to test the witness's credibility, that would be one
10 thing. But we're well beyond that, and now we're arguing
11 about what the legal role of the Commission is.

12 It's not a legitimate inquiry designed to
13 establish a factual basis for anything.

14 MR. SMITH: Sustained.

15 MR. RAPPOLD: Earlier the witness testified and
16 we all know that he completed the Certification Petition
17 for this case, and he testified also that he didn't even
18 review the certification statute prior to filing that
19 Petition when I asked him just a couple of minutes ago.

20 I think the line of questioning is relevant and
21 reasonable and permitted under the Rules of Evidence,
22 Administrative Rules where a party may conduct
23 cross-examination required for a full and true disclosure
24 of the facts.

25 And I think it is relevant, his knowledge, as to

1 whether -- his knowledge of your role as the Commission
2 under the law as it applies to the certification statute
3 and what they're trying to do today and what they have to
4 accomplish in order to meet that burden.

5 One of the things that the Commission has ruled
6 on is that it does not have authority to do amended
7 Findings of Fact.

8 MR. SMITH: As we have noted in a couple of
9 Orders, they have not requested that.

10 MR. RAPPOLD: That's true. You have noted that
11 in a couple of Orders.

12 It may be that it has been noted in a couple of
13 Orders, but throughout the way things have been filed,
14 the way that things have been characterized, it
15 appears -- and also in the way TransCanada has answered
16 in response to some of the parties' Interrogatories --
17 that that is an intention that they have is to amend the
18 Findings of Fact.

19 MR. SMITH: I will acknowledge there were a
20 couple of answers to discovery that had that phrase in
21 there, but in terms of the Petition, it does not request
22 that relief, and I have a feeling the people who answered
23 those just were -- that the people who answered those may
24 have just -- I can't answer. I don't know. I don't know
25 who actually prepared those, but let's move along.

1 MR. RAPPOLD: But it would be the witness's
2 understanding that there is no attempt to change the
3 Findings of Fact.

4 Q. Is that correct? Certifying it is what it is.

5 MR. TAYLOR: Is that a question to the witness,
6 or are we still arguing?

7 MR. SMITH: That's a question to the witness.

8 MR. TAYLOR: Well, then that question is
9 argumentative.

10 MR. SMITH: Sustained.

11 MR. TAYLOR: I'd just make a comment, Mr. Smith.
12 Mr. Goulet is represented by counsel in his capacity as
13 president to the Applicant and is perfectly entitled to
14 rely on counsel's interpretation of the law and rules and
15 regulations that govern this proceeding, and inquiry as
16 to his personal knowledge of those is inappropriate.

17 MR. RAPPOLD: I would certainly agree that as
18 president he is entitled to rely on advice of counsel,
19 but we also have a situation where the witness has
20 certified that -- the basis for the certification as set
21 forth in accompanying the Petition for Order Accepting
22 Certification under SDCL 49-41B-27.

23 And when questioned about what he reviewed, his
24 familiarity with any South Dakota statutes relating to
25 certification, he testified that he didn't have any.

1 CHAIRMAN NELSON: So let's move along.

2 MR. RAPPOLD: It gets to his credibility.

3 MR. SMITH: Right.

4 Q. Is it Keystone's position that if approved, the 2012
5 presidential Application applies to this case today? Is
6 that your testimony?

7 A. In so far that it's referenced. And in our Tracking
8 Table of Changes, as well as the Conditions, there's a
9 reference to it, yes.

10 MR. RAPPOLD: I have no further questions.

11 MR. SMITH: Thank you. Do you have any redirect
12 in response, Mr. Taylor?

13 MR. TAYLOR: No. We have no redirect.

14 MR. SMITH: Okay. You may step down,
15 Mr. Goulet.

16 TransCanada, please call your next witness.

17 MR. MOORE: Thank you, Mr. Smith.

18 Dr. Jon Schmidt.

19 (The oath is administered by the court reporter.)

20 DIRECT EXAMINATION

21 BY MR. MOORE:

22 Q. Good morning, Dr. Schmidt. Can you state your name
23 and business address, please.

24 A. Jon Schmidt. I work for exp Energy Services in
25 Tallahassee, Florida.

1 Q. And have you testified before the Public Utilities
2 Commission before?

3 A. Yes.

4 Q. And when was that?

5 A. In the original proceeding.

6 Q. Have you submitted Prefiled Direct Testimony in this
7 proceeding previously marked as Exhibit 2005?

8 A. Yes.

9 Q. And with respect to that testimony, are there any
10 corrections or changes that you want to make to the
11 testimony relative to the prefiled testimony by Staff
12 witness Paige Olson?

13 A. Yes. She mentioned requesting monitoring at the
14 HDDs proposed in South Dakota, and that was not included
15 in the FSEIS. And we had discussed with her that we
16 agreed to do that monitoring.

17 Q. So do I understand correctly that your testimony is
18 that TransCanada is willing to comply with the SHPO's
19 recommendations regarding HDD monitoring even though they
20 were not included in the Programatic Agreement?

21 A. Correct.

22 Q. With that addition and understanding, Dr. Schmidt,
23 if I ask you all of the questions that were contained in
24 your Prefiled Direct Testimony today, would your answers
25 be the same as submitted in your written testimony?

1 A. Yes.

2 Q. And do you adopt that testimony today under oath?

3 A. Yes.

4 MR. MOORE: I would offer Exhibit 2005,
5 Mr. Smith.

6 MR. ELLISON: May I ask some questions for the
7 purposes of an objection?

8 MR. SMITH: Please.

9 MR. ELLISON: It's Dr. Schmidt?

10 THE WITNESS: Yes.

11 MR. ELLISON: Dr. Schmidt, when I look at your
12 Direct Testimony, do you have that in front of you, sir?

13 THE WITNESS: Yes.

14 MR. ELLISON: Would you look on page 1 of that?
15 Would you agree that it has your questions and answers
16 to -- two questions, two answers.

17 THE WITNESS: Correct.

18 MR. ELLISON: Do you reference in either of
19 those answers a particular Amended Condition that that
20 testimony is about?

21 THE WITNESS: No.

22 MR. ELLISON: If you'd look, please, on the next
23 page, 3, 4, and 5 questions and your answers, do you see
24 reference in your written testimony to any Amended
25 Conditions?

1 THE WITNESS: No.

2 MR. ELLISON: In looking on the third page,
3 dealing with questions 6 and 7, question 8 and, of
4 course, your answers, do you see any reference that you
5 made to a particular Amended Condition?

6 THE WITNESS: No. 6 has reference to
7 Condition 6.

8 MR. ELLISON: Okay. So question 6 and your
9 answer to 6 has to do with Condition 6.

10 THE WITNESS: Uh-huh.

11 MR. ELLISON: Okay. But any of the others, 7
12 and 8, there's no reference to any Amended Condition, is
13 there?

14 THE WITNESS: No.

15 MR. ELLISON: If you'd look, please, on page 4,
16 same questions to questions 9, 10, and 11. Do you make
17 any reference to any particular Amended Conditions?

18 THE WITNESS: No.

19 MR. ELLISON: And the same thing then on page 5.
20 Do you make any reference to any particular Amended
21 Condition?

22 THE WITNESS: No.

23 MR. ELLISON: I would object to the admission of
24 this exhibit with the exception of question and answer
25 No. 6 under the determination of this Commission that

1 only matters relevant to Amended Conditions are the
2 subject of proof here.

3 MR. MOORE: May I inquire of the witness,
4 Mr. Smith?

5 MR. SMITH: You may.

6 Q. Dr. Schmidt, with respect to your proposed Direct
7 Testimony, have you reviewed the Conditions in the
8 Amended Final Decision and Order and determined to which
9 Conditions your Direct Testimony is responsive?

10 A. Yes.

11 Q. And which are those?

12 MR. ELLISON: I'm going to object to that.
13 We're talking about --

14 MR. SMITH: Overruled.

15 Q. And which are those, please?

16 A. Amended Condition No. 1, 2, 3, 6, 13, 14, 15, parts
17 of 16, 20, 22, 26, 41, 43, and 44.

18 MR. HARTER: This is John Harter. I would
19 object to this also.

20 MR. MOORE: I would renew the offer of
21 Exhibit 2005.

22 MR. SMITH: Exhibit 2005 is received.

23 MR. ELLISON: I would like a standing objection
24 to this exhibit. We're now changing the rules again. I
25 understand that's been going on throughout these

1 proceedings.

2 I object to it. It is unfair. It's
3 unprincipled. It is contrary to the law. It is contrary
4 to the rulings of this Commission.

5 MR. SMITH: The Commission did not rule that
6 somebody has to mention a Condition in every sentence of
7 everything that goes on here.

8 What we stated is the evidence needs to be
9 pertinent to the issue before the Commission, and that's
10 whether the Permit Conditions continue to be met.

11 MS. REAL BIRD: The Yankton Sioux Tribe joins in
12 that standing objection.

13 MR. ELLISON: The record will speak for itself.

14 MR. HARTER: Mr. Smith, John Harter. I was
15 under the understanding that that's why I was sanctioned
16 from giving the witness testimony, except for rebuttal.

17 MS. CRAVEN: The Indigenous Environmental
18 Network joins that objection as well.

19 MR. GOUGH: As does the InterTribal Counsel On
20 Utility Policy, Bob Gough.

21 MR. CLARK: The Cheyenne River Sioux Tribe also
22 joins the objection.

23 MR. CAPOSSELA: Mr. Smith, the Standing Rock
24 Sioux Tribe joins the objection and points out that
25 Standing Rock direct witness testimony has been excluded,

1 which specifically did reference Conditions in testimony
2 and whose entire testimony revolved around that Condition
3 and related to that Condition.

4 And so there does appear to be a double
5 standard, and we join the objection for that reason.

6 MR. BLACKBURN: And Bold Nebraska joins the
7 objection.

8 Thank you.

9 MR. RAPPOLD: So does Rosebud.

10 MR. MOORE: Mr. Smith, with the objections
11 noted, may I continue?

12 MR. SMITH: You may.

13 MR. MOORE: Thank you.

14 Q. Dr. Schmidt, have you also prepared Prefiled
15 Rebuttal Testimony in this case marked as Exhibit 2009?

16 A. Yes.

17 MR. MOORE: And, Mr. Smith, I would ask for
18 leave since Mr. Schmidt is present today and has
19 submitted both direct and rebuttal testimony that he be
20 allowed to submit his Prefiled Rebuttal Testimony at this
21 time.

22 MR. ELLISON: I would object. It's not proper
23 order. It's rebutting a witness and evidence that's not
24 in evidence.

25 MR. SMITH: Well, it's out there. Everybody has

1 been able to look at it.

2 MR. ELLISON: It is not evidence that is being
3 rebutted. There's a lot of things out there, sir. And,
4 you know, again, every day the rules change. I hope this
5 one doesn't too.

6 MR. SMITH: Do you have a response to that,
7 Mr. Moore? We did go along yesterday with the idea of
8 keeping it in the -- unlike what we've done in the past,
9 that we would keep it in that kind of order.

10 MR. MOORE: We did, sir. And that's why I asked
11 for leave. We started the hearing under the
12 understanding that all testimony was prefiled and we were
13 going to submit condition with longstanding Commission
14 practice.

15 I think it's sufficient since Dr. Schmidt is
16 here that he be cross-examined on all of his prefiled
17 testimony, and that's why I asked for leave.

18 It's up to the Commission how we proceed.

19 MR. SMITH: Commissioners, do you have thoughts
20 on that?

21 CHAIRMAN NELSON: Yeah. I think if there's an
22 objection, I don't see how we can allow for it. I mean,
23 I certainly understand the question, but I don't see how
24 we can allow it.

25 MR. SMITH: Okay. Thank you. No. We'll do

1 these in order of direct.

2 Q. Dr. Schmidt, with respect to your Prefiled Direct
3 Testimony, are you aware of any changes in facts or
4 circumstances since 2010 that would make TransCanada
5 unable to meet any of the Conditions in the Commission's
6 Amended Final Decision and Order?

7 A. No.

8 MR. MOORE: I would tender the witness for
9 cross-examination.

10 MR. SMITH: Cross-examination.

11 Ms. Zephier. Mr. Clark.

12 MR. CLARK: Thank you, Mr. Smith.

13 CROSS-EXAMINATION

14 BY MR. CLARK:

15 Q. Morning, Dr. Schmidt.

16 A. Morning.

17 Q. As I understand it, you were involved with Tracking
18 Table of Changes No. 41; correct?

19 A. From an environmental perspective.

20 Q. Okay. Tracking Table of Changes No. 41 states that
21 TransCanada is going to utilize horizontal directional
22 drilling to cross the Bridger Creek area; is that right?

23 A. Correct.

24 Q. Okay. And basically the Bridger Creek crossing is a
25 newly proposed HDD crossing site that was not part of the

1 original?

2 A. Yeah.

3 Q. It's a change?

4 A. It's a change because there was an open cut
5 crossing. Now it's HDD.

6 Q. Am I also correct in taking from your testimony --
7 from your Prefiled Direct Testimony that you acknowledge
8 that there will be a number -- you list a number of
9 possible affects that certain -- I'm sorry. I need to
10 back up. Missed a question.

11 You also asserted in your direct testimony that
12 other ephemeral streams and intermittent water bodies are
13 going to be crossed using a different method, an open
14 trench cut method; is that correct?

15 A. That was part of the original plan.

16 Q. Okay. Again, I'm correct in my reading that -- am I
17 correct in reading that you have admitted that -- or that
18 you acknowledge, rather, that there will be a number of
19 effects as a result of that -- of those crossings, such
20 as loss of habitat, loss of bank coverage, and some water
21 quality effects?

22 A. That was in the original Application.

23 Q. Are you aware that the Mni Waste Water Company's
24 water tank for potable water is downstream from the
25 proposed Bridger Creek crossing?

1 A. I'm aware of it.

2 Q. Are you aware that the Mni Waste Water Company is a
3 tribally chartered entity of the Cheyenne River Sioux
4 Tribe?

5 A. I was -- I heard that yesterday.

6 Q. Are you aware that the Mni Waste Water Company is
7 the sole provider of potable water for the Cheyenne River
8 Sioux Reservation for both Indian and non-Indian
9 residents?

10 A. I also heard that.

11 Q. I'm sorry. I'm having to readjust some of these
12 questions because of the -- because I had prepared some
13 of them for the rebuttal so give me just one moment.
14 Sorry.

15 A spill at the Bridger Creek crossing is a
16 possibility, is it not?

17 A. Yeah. That's discussed in the Application. The
18 witness actually addresses that.

19 Q. Okay. A spill at the Bridger Creek crossing could
20 potentially affect the Cheyenne River -- the Mni Waste
21 water intake?

22 A. It's a possibility.

23 Q. And such a spill would necessarily affect the
24 Cheyenne River Sioux Tribe?

25 A. If it -- if it could make it to the river from an

1 HDD, yeah.

2 Q. In your opinion and when you were reviewing the
3 proposed change, in your opinion, would such a spill
4 likely result in local emergency agencies responding to
5 the spill in the Bridger Creek area?

6 MR. MOORE: Just object to the insufficient
7 foundation.

8 MR. SMITH: Can you ask him some -- sustained.

9 Q. As part of your review of the HDD crossing and
10 involvement with that, did you contemplate emergency
11 response?

12 A. That's not my responsibility. My responsibility is
13 the cultural surveys, biological surveys, wetlands, water
14 bodies, things of that nature.

15 Q. So you --

16 A. I don't get involved in that.

17 Q. You did not contemplate any kind of emergency
18 response to a potential spill in the Bridger Creek?

19 A. There's other people that looked at that.

20 Q. Okay.

21 While you were -- during your review of the proposed
22 HDD crossing in the Bridger Creek area, to the best of
23 your knowledge did you or any other agent of Keystone
24 notify the Cheyenne River Sioux Tribe of the newly
25 proposed HDD crossing in the Bridger Creek area?

1 A. I did not, and I am not aware if others did.

2 Q. Sort of in the same vein, while you were analyzing
3 the new Bridger Creek crossing did you or are you aware
4 of any other agent of Keystone who sought out the local
5 knowledge and expertise of the Cheyenne River Sioux Tribe
6 or any of its entities?

7 A. I am not aware.

8 MR. CLARK: I have no further questions.

9 MR. SMITH: Thank you. We will go to
10 Mr. Rappold.

11 CROSS-EXAMINATION

12 BY MR. RAPPOLD:

13 Q. Dr. Schmidt, it's correct that you didn't testify in
14 the original proceedings?

15 A. In the first one, no, I did not.

16 Q. Describe the documents that you reviewed in order to
17 prepare yourself for this hearing.

18 A. I re-reviewed the FSEIS, the material that was
19 prepared for the original Permit for South Dakota that
20 related to the environmental work that we managed, and
21 re-reviewed the Amended Permit Conditions.

22 Q. Did you review the Final Environmental Impact
23 Statement referenced in Amended Permit Condition 3?

24 A. The FSEIS?

25 Q. That's not what I asked about.

1 A. The original one? I haven't looked at that, no.

2 Q. Is it your understanding that the current
3 Presidential Permit Application that was filed in 2012
4 would apply to these proceedings today?

5 A. That's my understanding.

6 Q. And is it also your understanding that the
7 Presidential Permit Application from 2012 did not exist
8 in 2010 when this decision was issued?

9 MR. MOORE: I'll object. Irrelevant and
10 argumentative.

11 MR. SMITH: Sustained.

12 MR. RAPPOLD: How is that not relevant?

13 MR. SMITH: Well, for one thing -- is this the
14 appropriate witness for that?

15 MR. RAPPOLD: I think all the witnesses that
16 have testified that there's no condition that Keystone
17 can't continue to meet are appropriate witnesses for this
18 line of questioning.

19 MR. SMITH: Mr. Moore --

20 I'm going to change my ruling and allow him to
21 proceed.

22 MR. RAPPOLD: Would you read the question again.

23 (Reporter reads back the last question.)

24 A. That's correct.

25 MR. RAPPOLD: Thank you. No further questions.

1 MR. SMITH: Okay. Mr. Capossela.

2 CROSS-EXAMINATION

3 BY MR. CAPOSSELA:

4 Q. Mr. Schmidt, are you familiar with the measure of
5 flowing water cubic feet per second or CFS?

6 A. Sure.

7 Q. If I make that reference, you know what I'm talking
8 about?

9 A. Yes.

10 Q. Okay. Would you just describe water resource or
11 wetland surveys that were conducted by TransCanada or its
12 affiliates along the pipeline route, if any, and the time
13 frame in which those surveys might have been conducted?

14 A. Yes. They started in 2008 and continued through
15 2013. Most of the surveys were geared towards
16 identification of environmental resources. So wetland
17 delineations, water body identification,
18 characterization, there were endangered species surveys,
19 raptor surveys, cultural resource surveys. There were
20 some soil work done as well as mapping of different types
21 of land uses and vegetation.

22 Q. Would those surveys have identified "waters of the
23 United States"?

24 A. Yes.

25 Q. And I understand your testimony correctly that the

1 surveys were concluded in a time frame of 2013?

2 A. Yeah. They're still open. As landowners suggest
3 additional reroutes, we'll mobilize crews again and go
4 back out and survey.

5 Q. Like on a case-by-case basis?

6 A. Sure.

7 Q. But not the whole pipeline?

8 A. Not unless we have to.

9 Q. Why might you have to? Or why would you say that,
10 unless we have to?

11 A. If a regulation changes and requires work to be
12 redone before you submit that Application, you'd have to
13 go back and redo it.

14 Q. Has that happened?

15 A. Not on this case, but it's happened to me in my
16 years of work, yes.

17 Q. Would you consider the regulation that was issued in
18 June of 2015 with respect to the definition of the waters
19 of the United States to be a regulation that would
20 require resurveying the entire pipeline route?

21 A. That would be up to the Corps of Engineers.

22 When we designed our surveys we identified every
23 wetland and water body, and we did not seek or dispute
24 jurisdiction. We assumed the core had jurisdiction over
25 everything.

1 Q. Was the definition of waters of the United States
2 that is in effect today the same definition of waters of
3 the United States that was applicable when the surveys
4 were taken for water resources?

5 A. No. They changed slightly.

6 Q. Would you just briefly explain what an HDD crossing
7 involves?

8 A. Well, Meera can give you all the details, but
9 essentially you use a drill rig to drill a hole
10 underneath the river approximately 20, 25 feet below the
11 deepest depth of the river.

12 And when that hole has been reamed out with
13 successive passes, the pipe is welded up already, and
14 it's hooked up to the drill rig and pulled back through
15 so that you are very far below the river bottom, you
16 don't disturb any of the banks, the habitat's left in
17 place. It's used for large river crossings usually.

18 Q. Would you do the same thing for an open cut
19 crossing? Just briefly explain what happens in an open
20 cut crossing.

21 A. Yeah. I mean, there's a lot of variables. It
22 depends on the size, the width, the depth of the water,
23 the flow of the water.

24 But, essentially, you make up the pipe for that
25 crossing separately in an upland area, and you mobilize

1 your equipment, and you try and excavate and install that
2 piece of pipe within 24 to 48 hours is usually what you
3 try and do. Larger ones maybe 72. But you try and get
4 it in, restored, and the banks and the bay as quickly as
5 possible.

6 Q. Why do you do it as quickly as possible?

7 A. Could rain, could -- you know, could be a lot of
8 things that could change the conditions in the streams so
9 you don't want to put your environment at risk or the
10 construction at risk.

11 Q. So that's a potential on an open cut crossing?

12 A. Very slim. I mean, most construction planning is
13 based around the weather so you would make up the pipe
14 but you may not excavate, you know, for days or whenever
15 that weather opportunity exists.

16 Q. Does the Keystone XL cross the South Fork of the
17 Grand River?

18 A. I don't have the list of tables in front of me so --

19 Q. Can you identify the river crossings in South Dakota
20 in which TransCanada has committed to crossing using HDD
21 methods?

22 A. Just a second. Let me see if I have it in my
23 testimony.

24 I believe there's five, but that would be the
25 Bad River, Bridger Creek, Little Missouri, the Cheyenne,

1 and the White River.

2 Q. Thank you. Are you able to identify for the
3 Commission the river crossings in South Dakota that will
4 be crossed using open cut method?

5 A. Well, the ones that aren't HDD would be open cut.

6 Q. But you're not familiar with those?

7 A. There's hundreds of stream crossings.

8 Q. So and you testified that there is some level of
9 jeopardy to waterways subject to open cut crossings?

10 A. Very temporary impact, as described in the FSEIS.

11 And keep in mind when we file our permits with the
12 Corps of Engineers and the State of South Dakota they
13 review that, and they make a determination whether a
14 different method would be more applicable.

15 Q. The Commission has taken judicial notice on the
16 existence of the Final SEIS. And I'm going to read a
17 brief passage from that and ask if you agree or disagree
18 with that.

19 This is on page 4.3-4 of the Final Supplemental
20 Environmental Impact Statement of the Department of
21 State. And on that page it reads "Open cut crossing
22 impacts would include alteration of the stream bed and
23 bank structure, habitat reduction or alteration,
24 increased sedimentation, riparian vegetation loss, and
25 introduction of non-native vegetation."

1 Do you agree with that?

2 A. Those are possible impacts.

3 MR. CAPOSSELA: Mr. Smith, I'd ask the
4 Commission to bear with me for one moment.

5 MR. SMITH: Certainly.

6 MR. CAPOSSELA: Give you a chance to take a
7 breath, Mr. Schmidt.

8 (Pause)

9 Q. On page 4 of your testimony in paragraph 8 --
10 there's a little bit of confusion with respect to high
11 consequence areas and river crossings. And I'll --

12 It reads "The reference to 19.9 miles in the
13 Tracking Table is a typographical error."

14 Whose typographical error is that?

15 A. Whoever typed the Tracking Table.

16 Q. But you don't who?

17 A. No.

18 Q. Would you describe what a high consequence area is
19 with respect to river crossings, with respect to water?

20 What's the criteria for water as it relates to an
21 HCA?

22 A. Heidi Tillquist is probably the best witness to ask
23 that question. My involvement is we manage all the GIS
24 data for the Application so we received the HCA areas
25 from the Applicant who gets them from DOT. We map them

1 and provide them with the information to do their
2 analysis.

3 Q. Well, how do you know that the length of the pipe
4 and HCAs is 14.9 miles rather than 19.9 due to a
5 typographical error? How do you know that, testify to
6 that?

7 A. Yeah. Because when we rechecked the information
8 afterwards, the mapping -- we saw that it didn't match
9 what came out of the GIS. So somebody put a 9 instead of
10 a 4.

11 Q. Are you familiar with the location of the Standing
12 Rock Indian Reservation with respect to the pipeline
13 route?

14 A. Yes.

15 Q. Would you just describe the water resources of the
16 reservation?

17 A. Of the reservation? I don't know the water
18 restrictions [sic] of the reservation.

19 Q. Do you know if the Grand River flows through or --

20 A. Yes. But I don't know the other rivers or streams
21 that are there.

22 Q. Are there any other rivers that you do know that
23 flow onto or over the reservation or border the
24 reservation?

25 A. I don't have the tables or the maps in front of me.

1 Q. Do you know whether in construction whether they
2 would use the HDD method to cross the South Fork of the
3 Grand River or open cut method? Do you know that?

4 A. I think it's open cut since it's not one of the HDD
5 methods listed.

6 Q. You testified that you were responsible for
7 assisting with threatened and endangered species surveys
8 and findings; is that correct?

9 A. That's correct.

10 Q. With respect to terrestrial vegetation, are you
11 familiar with the findings in the biological opinion
12 prepared for compliance with the Endangered Species Act?

13 A. Yes. But it's mostly about endangered species, not
14 vegetation.

15 Q. Why is that?

16 A. It's only one listed plant species along the project
17 route in South Dakota. It's the western prairie fringed
18 orchid. The rest of the species are animals.

19 Q. Are you familiar with the findings and the
20 biological opinion with respect to the sturgeon chub?

21 A. Briefly.

22 Q. Do you know what the status of the sturgeon chub is
23 under the law of South Dakota?

24 A. As a state species?

25 Q. As a state species.

1 A. I don't know what its ranking is.

2 Q. Status is threatened?

3 A. State listed threatened.

4 Q. State listed threatened.

5 Are you familiar with the habitat of the sturgeon
6 chub?

7 A. We hired somebody to do those surveys. I'm not a
8 fisheries guy.

9 But I would assume it's some of the streams that are
10 crossed. So those would have been identified in the
11 bi. op., and that finding of the impact was addressed in
12 the bi. op. Or biological opinion. Sorry.

13 Q. But do you know what those findings were?

14 A. I believe there was no potential for harm to that
15 species based on the construction methodologies
16 proposed.

17 Q. Are you familiar with the status of the Grand River
18 under the Clean Water Act? Is it in compliance with the
19 applicable standards and criteria?

20 A. There's a table of impaired water bodies, but I
21 can't remember all the streams that are on it.

22 MR. CAPOSSELA: Mr. Smith, I've got the
23 provisions in the FSEIS. I'd like to briefly show
24 counsel and then show it to the witness.

25 MR. SMITH: Please.

1 A. Are you referencing Table 3.3-7 of the FSEIS?

2 Q. Yes, sir. And would you read the description of the
3 Grand River?

4 A. "South Fork Grand River salinity and specific
5 conductance."

6 Q. What are you referencing when you reference those
7 environmental parameters?

8 A. That's the State assesses water quality compliance
9 in their 403(b) report that goes to the EPA, and they
10 found that either parts of or all of those streams did
11 not meet certain water quality criteria.

12 MR. CAPOSSELA: Thank you, Mr. Smith. I have no
13 further questions for this witness at this time.

14 MR. SMITH: Thank you. Ms. Real Bird or
15 Ms. Baker.

16 MS. BAKER: Thank you, Commissioner. Jennifer
17 Baker for the Yankton Sioux Tribe.

18 And I believe the Commission has taken
19 judicial notice of the 2009 docket. Would it be possible
20 to have a document from that docket placed on the
21 screens?

22 MR. SMITH: That's something we'll have to ask
23 our technical people. I don't know anything about that
24 kind of stuff.

25 Is that doable, Katlyn?

1 MS. GUSTAFSON: Yeah.

2 MR. SMITH: Ms. Baker, what is it that you're
3 looking for again?

4 MS. BAKER: TransCanada's Exhibit 14, Map Book 1
5 from the 2009 docket.

6 MR. SMITH: Thank you.

7 The geological map? Is that the one? Because
8 there's several sub things in there.

9 MS. BAKER: Yes. Map Book 1. I believe it says
10 land use.

11 MR. SMITH: Oh, Map Book 1.

12 MS. BAKER: Thank you.

13 CROSS-EXAMINATION

14 BY MS. BAKER:

15 Q. Mr. Schmidt, can you explain to us what kind of land
16 uses are depicted in these maps?

17 A. I can't even read the legend so --

18 Q. Okay. I can tell you this is from the 2009 docket.
19 It was TransCanada's exhibit, and it was entitled Land
20 Use. It was part of the Application Exhibit A. Land
21 Use/Land Cover.

22 A. Okay.

23 Q. Can you briefly explain what types of land use are
24 covered by these maps?

25 A. Using a national land use/land cover database, they

1 run a GIS analysis of the project footprint over that
2 database and then just produce these maps.

3 Q. Okay. What sorts of land uses are depicted?

4 A. I can't read the legend, but it's normally, you
5 know, agricultural, residential, commercial.

6 Q. Okay. Can you explain why land use was depicted in
7 these maps? What's the purpose of including this
8 information?

9 A. Just it's a general land use discussion that you
10 usually have an environmental document. All NEPA
11 documents have it.

12 Q. Okay. Would you say that land use is considered
13 important in planning or constructing a pipeline?

14 A. Yeah. You look to avoid residential areas,
15 commercial businesses, and things of that nature.

16 Q. Is there anything else, any other areas that you
17 look to avoid?

18 A. Well, you fold in other -- there's other map books
19 in there and you layer different constraints when you do
20 routing.

21 Q. Okay. Is it safe to say that you're familiar with
22 the FEIS and the FSEIS?

23 A. Mostly the FSEIS.

24 Q. Okay. Can you explain why an FSEIS was needed for
25 the Keystone XL Project?

1 A. They amended the route in Nebraska, and they did
2 some minor changes in Montana and South Dakota.

3 Q. Okay. Why isn't an Environmental Impact Statement
4 generally required for a project of this nature?

5 A. Federal agencies are required to conduct a NEPA
6 analysis before they do a record of decision and make a
7 Permit decision. The NEPA document is one component of
8 their decision-making process.

9 Q. Thank you. Can you tell us which Presidential
10 Permit Application the FEIS was based upon?

11 A. The 2012 Application. Oh, the FEIS? Sorry. That's
12 the original 2008.

13 Q. Yes. Okay. So which EIS now applies? Is it the
14 FEIS or FSEIS?

15 A. Well, if you read the introduction to the FSEIS, it
16 will tell you that components of the original EIS apply
17 and components of the Supplemental apply where the route
18 and project has changed.

19 Q. Okay. So if I understand correctly, the original
20 FEIS applies except where there have been route changes?

21 A. And changes to either the design or the footprint of
22 the project, correct.

23 Q. Okay.

24 A. That's -- a federal agency can do a supplemental and
25 keep the original record as well as supplemented in the

1 supplemental environmental document.

2 Q. Can you explain to us what the differences are --
3 based on what you've just stated, what are the
4 differences between the FEIS and the SEIS?

5 A. Well, I think I said there was a major route change
6 in Nebraska. There were some minor changes to the route
7 in Montana, South Dakota, the Bakken on-ramp. They redid
8 the bi. op., or biological opinion. There are a host of
9 things that are listed in the FSEIS.

10 Q. Okay. Are you familiar with the Programatic
11 Agreement for this project?

12 A. Correct. Yes.

13 Q. Can you explain what that document is?

14 A. It's an agreement between the lead federal agency,
15 in this case Department of State, the State SHPO offices,
16 any federal agency with 106 responsibilities, and tribal
17 consulting parties that have agreed to consult with
18 Department of State.

19 Q. You mentioned 106 responsibility. Could you briefly
20 explain what that is?

21 A. Under the National Historic Preservation Act,
22 federal agencies before the issuance of a federal Permit
23 are required to complete cultural resource and tribal
24 consultation. So the Programatic Agreement was a vehicle
25 the Department of State used to help do that job.

1 Q. You mentioned that there are some differences
2 between the EIS -- I'm sorry. Between the FEIS and the
3 FSEIS that primarily relate to routing.

4 Was there a difference in the Programatic Agreement
5 between those two different documents?

6 A. They amended that Programatic Agreement. I'm not
7 sure of all the changes in this. That was their
8 document. But I know they redid it basically.

9 Q. So you're responsible for the permitting for
10 TransCanada and this Programatic Agreement is a part of
11 that FSEIS as well as the FEIS. You're not actually that
12 familiar with it?

13 A. Department of State is still the lead agency, even
14 after the FSEIS is done for 106. Our responsibility is
15 to do the surveys that provide them the information.

16 Q. Is the Programatic Agreement a binding document?

17 A. I believe so.

18 Q. Is TransCanada a party to that binding document?

19 A. I believe so.

20 Q. Does it place legal responsibilities on TransCanada?

21 A. I don't -- I'm not TransCanada so I don't know what
22 those responsibilities are.

23 Q. Based on your knowledge and understanding of the
24 agreement, does it place responsibilities on TransCanada?

25 A. Sure.

1 Q. Are you aware of which Programatic Agreement
2 TransCanada intends to comply with, the original or the
3 amended?

4 A. The amended.

5 Q. Can you tell us how many Tribes have informally
6 requested to sign on to the agreement as signatory
7 parties?

8 A. I believe it's in the FSEIS. There's a table in
9 there that lists all the Tribes that were contacted,
10 whether they agreed to be consulting, not decided, and I
11 forget what the other category was.

12 Q. Are you aware whether any of those Tribes were asked
13 to be signatory parties?

14 A. I don't know what DOS asked of them.

15 Q. Are you aware of how many Tribes have actually
16 signed on to the amended agreement in any capacity at
17 all?

18 A. No, I'm not aware. I believe it's in the FSEIS,
19 though.

20 Q. Can you tell us how many Tribes are included in the
21 Programatic Agreement process?

22 A. I remember seeing a number in the FSEIS that DOS
23 contacted 84 Tribes, I believe.

24 Q. Okay. Can you explain why those Tribes were
25 contacted?

1 A. That's part of Department of State's responsibility
2 for 106 consultation is to identify and contact Tribes
3 that may be impacted.

4 Q. Okay. Can you explain how they may be impacted?
5 What does that mean?

6 A. I don't know what criteria the Department of State
7 used. If you look at the map that's in the FSEIS,
8 there's Tribes all over the U.S. that they contacted.

9 Q. But it's safe to say, based on the inclusion of
10 certain specific Tribes in this process, that those
11 Tribes do have some recognized interest in the lands that
12 are going to be crossed?

13 A. I would believe so.

14 Q. Okay. Is it fair to say that the Programatic
15 Agreement is intended in part to protect the rights of
16 those Tribes who are included in the Programatic
17 Agreement process?

18 A. If there's language to that effect.

19 Q. Are there any federal agencies -- and I believe you
20 stated the State Department's involvement. Are there a
21 number of federal agencies that are parties to the
22 Programatic Agreement?

23 A. Yes.

24 Q. So it's logical to say that these federal agencies
25 also recognize that Tribes have some interest in the

1 lands that the pipeline will cross?

2 A. I believe so, yes.

3 Q. To your knowledge, did TransCanada give any
4 consideration to the concerns or the wishes of the Tribes
5 when it comes to crossing these lands?

6 MR. MOORE: Well, I'll just object to form,
7 foundation. I think the question's unclear.

8 MR. SMITH: Sustained. Ms. Baker, can you just
9 go at it maybe with a lead in? I can't see you there.

10 MS. BAKER: I apologize.

11 MR. SMITH: Okay. Thanks.

12 Q. To your knowledge, did TransCanada take into account
13 concerns of Tribes in planning the construction of the
14 pipeline?

15 A. I wasn't involved in any of those dialogues so I
16 really can't answer that question. Again, my
17 responsibility was to conduct the surveys required for
18 the 106 process.

19 Q. And conducting those surveys, did that involve any
20 consultation or any kind of interaction with the Tribes?

21 A. I believe Department of State offered cultural
22 resource survey reports to Tribes that were interested in
23 reviewing them. I don't have the names, but they stated
24 that in the FSEIS.

25 Q. Okay. Switching gears a little bit, are there any

1 Special Permit Conditions contained in the FEIS or FSEIS?

2 A. There's a lot of Conditions and mitigation
3 recommendations, yes.

4 Q. What about PHMSA Special Conditions?

5 A. Yeah. Those are part of the FSEIS.

6 Q. Okay. Can you explain why the PHMSA recommended
7 those Special Conditions?

8 A. I'm not an engineer. It's way outside my area.

9 Q. Okay. It is in the scope of the permitting process
10 and in the scope of the EIS.

11 A. It's an engineering permit. I'm responsible for
12 environmental ones.

13 Q. Are you aware of the number of surface water bodies
14 that the proposed pipeline would cross?

15 A. I believe there's hundreds of ephemeral,
16 intermittent, and perennial streams.

17 Q. Would it cross important aquifers such as the
18 Northern Plains Aquifer, which includes the Ogallala
19 Aquifer and the Great Plains Aquifer?

20 A. Yes, it does.

21 Q. How many wells are located within one mile of the
22 proposed project route?

23 A. I don't have that information in front of me.

24 Q. Okay.

25 A. It's in the FSEIS.

1 Q. Are you aware that a number of public water supply
2 wells will be affected by a release from the proposed
3 project?

4 A. Potentially, they could be.

5 MS. BAKER: Nothing further.

6 Thank you.

7 MR. SMITH: We're just about at 10 o'clock.

8 Mr. Blackburn, do you have a lot to ask or --

9 MR. BLACKBURN: I don't believe it would be more
10 than about 10 minutes.

11 Let's take a break until about a quarter after,
12 a quarter after 10:00. We're in recess.

13 (A short recess is taken)

14 MR. SMITH: We'll call the hearing back to order
15 in Docket HP14-001. And Mr. Moore of TransCanada,
16 attorney for TransCanada, had a request.

17 And I will let you proceed to address that
18 before we turn to Mr. Blackburn for initiation of his
19 cross-examination.

20 MR. MOORE: Thank you, Mr. Smith.

21 After tendering Dr. Schmidt for
22 cross-examination, I realized that I had neglected to
23 offer Exhibit 2013 in connection with his direct
24 testimony. Those are the route variation maps that were
25 produced in discovery.

1 Paragraph 6 of his direct says that we would
2 offer those at the hearing. And so I would like to offer
3 those while Dr. Schmidt is still on the stand and would
4 offer Exhibit 2013.

5 MR. SMITH: Okay. Is there objection from
6 anyone?

7 MR. ELLISON: We have no objection.

8 MR. SMITH: Anybody else?

9 Seeing none, Exhibit 2013 is admitted.

10 MR. MOORE: Thank you. That's all I have.

11 CROSS-EXAMINATION

12 BY MR. BLACKBURN:

13 Q. Dr. Schmidt, could you describe your employer?

14 A. exp Energy Services, environmental and engineering
15 consulting firm.

16 Q. And your position there is?

17 A. Vice president.

18 Q. How many people do you supervise?

19 A. I think it's about 60 or 70. I have managers that
20 actually -- I mean, I have four managers so under them
21 are about 60 or 70 people.

22 Q. And what's the general scope of the work provided in
23 total by exp?

24 A. There's five different divisions. They do building
25 science, which means they do the heating and ventilation

1 design. They do architectural work. They do permitting.
2 They do roadwork, pretty much a standard A&E type
3 contract work.

4 Q. Uh-huh. Thank you. And could you describe the
5 general scope of your work for TransCanada with regard to
6 the Keystone XL Project?

7 A. There are two components. There's an engineering
8 component where we supported the engineering team. And
9 then my team and contractors that we hired support on the
10 environmental side to the environmental staff at
11 TransCanada.

12 Q. And is part of that responsibility to track permits?

13 A. Permits for surveys, and then eventually when we
14 apply for them, permits for construction.

15 Q. And you track them for all states and the Federal
16 Government?

17 A. Correct.

18 Q. Do you prepare time estimates about when you think
19 the permits will be finished?

20 A. I'm not sure I understand your question.

21 Q. Do you estimate the time that it would take to
22 complete each permit?

23 A. The Application? Yeah. We kind of -- once we know
24 when construction starts, we back out, you know, make
25 sure we file for the permits to get them at the right

1 time.

2 Q. Are you tracking the Permit processes that are
3 currently ongoing?

4 A. We started some of them. There were some filed
5 actually in South Dakota in 2011. And then we stopped.
6 And we've started some work on the Corps of Engineers
7 application, but we just reviewed a draft with them and
8 that was it. We haven't proceeded again.

9 Q. Have you provided an estimate to TransCanada for how
10 long, for example, this hearing process before the
11 South Dakota Public Utilities Commission would take?

12 A. No.

13 Q. So you don't keep -- you don't give an estimate to
14 them about how long it would take to complete a permit?

15 A. We do, but this hearing is not part of my scope. I
16 mean, that's -- legal deals with that.

17 Q. What's the relationship between the completion of
18 permits and the start of construction?

19 A. You usually get your permits before you start
20 construction.

21 Q. Is there a dependency there?

22 A. Well, obviously, yes. You can't start construction
23 until you get permits.

24 Q. Thank you. Is it possible for a permit in another
25 state to -- if it's -- to affect the start date of

1 construction in South Dakota?

2 A. Well, if you look at the FSEIS, it describes the
3 spreads that the whole project's broken out into, and you
4 can get permits in one state and start work on that
5 spread and not have them in another state and just start
6 that spread later.

7 It just depends on, you know, the overall time frame
8 for construction.

9 Q. Are you familiar with the permitting process in
10 Nebraska?

11 A. Yes.

12 Q. Could you describe the status of the permitting
13 process there?

14 A. I don't believe we've done anything more than the
15 preliminary work that we've done here, which is, you
16 know, consult the agencies of what's required in the
17 applications. Sometimes we prepare drafts for them to
18 look at, but that's all.

19 Q. And can you describe generally what's in the
20 applications there?

21 A. It depends on the permit. Water use, it's, you
22 know, how much water you need, what water sources, what
23 kind of impacts.

24 Q. Has the permitting process there started?

25 A. Not other than what I just described.

1 Q. Do you know why it hasn't started?

2 A. I just, you know, meet the schedule that they want.

3 Q. So you don't have any estimate about when the
4 permitting process in Nebraska might begin or end?

5 A. No. Most of those permits do not take very long
6 so -- a nationwide permit takes 60 days, 90 days. Water
7 use permits and construction permits for storm water,
8 usually a 30-day notice. They're not very long lead
9 permits to get.

10 Q. And does TransCanada provide you with estimates of
11 how long a permitting process will take?

12 A. They set the schedule, and then we will apply for
13 the permits in due time.

14 Q. Do you know if there's any relationship between the
15 permitting in South Dakota and ongoing litigation in
16 South Dakota?

17 A. I have no idea.

18 MR. BLACKBURN: Thank you. No further
19 questions.

20 MR. SMITH: Okay. Next, Dakota Rural Action.
21 Mr. Ellison or Mr. Martinez.

22 MR. ELLISON: It will be me. I need a moment to
23 get all of my books over there.

24

25

CROSS-EXAMINATION

BY MR. ELLISON:

Q. Good afternoon, Dr. Schmidt.

A. Morning.

Q. Morning. Thank you. I am confused already, and it's just the start of the day.

Sir, I note from your testimony -- your direct testimony which you submitted in writing I think you said you work for exp Energy Services.

In 2009 you worked for a different company?

A. Yeah. I worked for what was called ENSR, which became AECOM. AECOM acquired ENSR.

Q. Okay. Is the company you're now working for, did they acquire --

A. No. It's a different firm.

Q. When you were working for AECOM, you were the lead environmental contractor for the KXL project?

A. Correct.

Q. And did that change at all when you went to a different company?

A. No.

Q. Do you know how the companies worked that out?

A. Just phases of work. The first phase was finished with the original Application, and then when the next phase started up, exp picked up the environmental

1 component.

2 Q. Now in your -- do I understand correctly that
3 your -- while you are the regulatory and permitting
4 manager for the KXL project -- and that includes, does it
5 not, coordination with the State Department?

6 A. We are the consultant to Keystone to manage
7 permitting and regulatory work, but they have their own
8 environmental staff. So they lead those kind of permits,
9 particularly Department of State.

10 Q. Your direct testimony --

11 CHAIRMAN NELSON: I'm going to have to ask you
12 to pull that mic. up.

13 MR. ELLISON: I'm sorry. I just had a court
14 proceeding where we had actual mics. on. But thank you
15 for reminding me.

16 Q. I just want to make sure that I'm not still
17 confused. In answer to question No. 2 -- and you have
18 your direct testimony in front of you, sir; is that
19 correct?

20 A. Uh-huh. Yes.

21 Q. Okay. Does it not state that you are the regulatory
22 and permitting manager for Keystone XL Pipeline project,
23 including coordination of the State Department and the
24 various environmental --

25 A. Right. As a contractor to TransCanada's Keystone.

1 Q. So your -- you're actually involved in the actual
2 coordination between --

3 A. Correct.

4 Q. Was that a little different than what you just said?

5 A. Well, there's -- I'm not TransCanada. I'm not
6 Keystone. But I'm a contractor working for them to
7 manage this work.

8 Q. And one of your jobs as a contractor is to testify
9 on behalf of Keystone, is it not?

10 A. Correct.

11 Q. Your primary experience, sir, is it not, is in the
12 preparation of permit applications and regulatory
13 filings?

14 A. That's correct.

15 Q. Does that mean that you're the guy who actually is
16 in charge of doing the document preparation?

17 A. We prepare the drafts, and the Applicants review and
18 finalize, and they actually would be the ones that would
19 sign and submit.

20 Q. And so, therefore, I would imagine that you have put
21 a lot of effort into learning how agencies -- the
22 phraseologies that agencies like to hear in a permit
23 application.

24 Would that be fair to say?

25 A. I mean, we make sure that the data provided is what

1 they need to base their decision on. I'm not sure about
2 phraseology.

3 Q. Okay. You're the one that dots the Is and crosses
4 the Ts of what you think the PUC would want to know for
5 them to grant the relief that TransCanada is asking for?

6 A. Based on what they tell us they require in their
7 Application.

8 Q. Because of your familiarity with that, let me ask
9 you a couple of questions, if I may.

10 You talked a little bit earlier about the Amended
11 Programatic Agreement I think you said between various
12 federal agencies and TransCanada. That was something
13 that was submitted and, would you agree, would be
14 relevant to the recertification process --
15 recertification Petition before the PUC?

16 A. I believe that's stated in the -- you know, the fact
17 that we're complying with what's in the FSEIS and the
18 original EIS.

19 Q. And would that also, sir, apply to the cultural
20 resource surveys?

21 A. That's correct.

22 Q. Could you tell us, sir, you know, for example who
23 from the Cheyenne River Tribe was involved in the
24 cultural resource surveys that were conducted?

25 A. I think a previous witness testified that Keystone

1 had approached the Tribes about hiring tribal monitors.
2 And I believe there's an exhibit that's been submitted.
3 They manage that work I did. But there were numerous
4 tribal members that participated in the cultural resource
5 surveys. And I don't know if anybody from Cheyenne River
6 did or did not.

7 Q. Do you know about, say, from the Standing Rock
8 Reservation?

9 A. That list is in the FEIS as well as an exhibit that
10 I saw that was in all of this paper.

11 Q. Do you know if any Tribal Historic Preservation
12 Officers within the borders of the State of South Dakota,
13 Tribes that are currently within those borders, do you
14 know if any or which ones were, in fact, involved in the
15 process?

16 A. I know Department of State reached out to all of
17 them. Whether they chose to participate and review the
18 documents, you'd have to ask someone from the Department
19 of State.

20 I believe all of that consultation is summarized in
21 that FSEIS.

22 Q. Would you agree, sir, that someone from the Cheyenne
23 River Sioux Tribe might have a different interpretation
24 of the same cultural resource than, say, someone from the
25 Standing Rock Sioux Tribe?

1 MR. MOORE: Object to foundation. Speculation.

2 MR. ELLISON: I'm asking if he knows.

3 MR. SMITH: With that clarification of asking if
4 he knows, I will overrule the objection.

5 A. I can't -- I mean, I have no idea what one Tribe
6 would think about something that somebody else looks at.
7 I can't project that.

8 Q. Would you agree, sir, that -- I mean, would you
9 agree that there's a good chance that there could be even
10 material differences in interpretation?

11 MR. MOORE: Same objection.

12 Q. If you know.

13 A. I have no idea. I know Department of State spent a
14 lot of time consulting with -- there's a very thorough
15 record of e-mails, telephones, letters, meetings. I was
16 not party to those, but looking at the face of it,
17 there's a lot of communication.

18 So I would imagine DOS's 106 responsibilities would
19 be to do exactly what you're talking about.

20 Q. But you have to speculate.

21 A. That's not TransCanada's role. It's Department of
22 State's role as lead under 106.

23 Q. If a Tribe decides not to participate say even in
24 discussions of water resources' potential impacts, how
25 does TransCanada deal with that so that it ensures that

1 if there is a worst-case scenario spill, for example,
2 that, in fact, the land, the water, the people, are, in
3 fact, protected?

4 MR. MOORE: I'll object. Insufficient
5 foundation and speculation.

6 MR. SMITH: Sustained.

7 Can you do it in a little bit of a stepped
8 process?

9 MR. ELLISON: I sure can. Thank you, Mr. Smith.

10 MR. SMITH: Thank you.

11 Q. Let's take the Cheyenne River Sioux Tribe for the
12 moment. Do you know what TransCanada's approach was --
13 because we've heard that the Cheyenne River Sioux Tribe
14 did not want anything to do with this project
15 essentially; is that correct, sir?

16 A. That's what I heard.

17 Q. Okay. But you still have a responsibility as being
18 involved in environmental and regulatory services to
19 still be concerned, do you not, about potential impacts
20 on the Tribe, on the land; is that correct?

21 A. Yeah. We make sure we complete the surveys, give
22 the information that the SHPO, Department of State needs,
23 to make a determination of eligibility of those sites.

24 But I think as you'll note in the FSEIS, we avoided
25 what we found. So we tried to incorporate those values

1 in the design by avoiding sites that were found.

2 Q. Do you know if the department -- I'm sorry. The
3 State Historic Preservation Officer is a Lakota or a
4 Dakota or Nakota?

5 A. I have no idea what Paige's history is.

6 Q. I didn't hear Tribal Historic Preservation Officer
7 on that list. That's why I was just asking.

8 A. Sure. But Department of State reached out to them.
9 It's documented in the FSEIS. Whether they choose to
10 participate or not, I have no control over that. But the
11 information was offered.

12 Q. Were you involved, sir, in the creation of any of
13 the maps that have been submitted on behalf of
14 TransCanada, either in the initial Application or the
15 2012 recertification -- 2014 recertification?

16 A. The environmental data I was involved with because
17 we managed the contractors that collected that data. So
18 they were collected using GIS and then entered into a
19 database used to create the maps.

20 Q. Well, I noticed from your direct testimony, isn't it
21 a fact that you discussed the fact that soil type maps
22 and aerial photographic maps were involved in this
23 process?

24 A. Sure. Uh-huh.

25 Q. And you reviewed those?

1 A. Yeah. We collected the data. Most of the data like
2 soils data comes from agencies.

3 Q. Uh-huh.

4 A. And then it's just transferred into a database, and
5 you create map layers with it.

6 Q. And I think in your direct testimony you say, do you
7 not, that they're generally consistent with the previous
8 route?

9 A. Yeah. A lot of the route changes were, you know,
10 100 feet movement or 200 feet. And if you look at soil
11 maps, the scale of those maps, it's within that scale.

12 Q. Okay. And I think that from Mr. Moore's offer of
13 exhibit -- TransCanada Exhibit 2013, that reflects some
14 of the changes?

15 A. There's maps that show each of the reroutes, yes.

16 Q. Okay. Were those in areas where there was concerns
17 about sliding slopes?

18 A. There was a lot of engineering work which Meera
19 could probably talk to that drove those. Plus landowner
20 requests.

21 A lot of them were driven by landowners and there
22 were a few driven by cultural sites and we had
23 recommended they avoid those cultural sites.

24 MR. SMITH: Bruce, I hate to keep bugging you,
25 but if you can, speak into the mic. I wish we had the

1 collar --

2 MR. ELLISON: It's hard to carry it around. But
3 thank you. Please remind me. I know I forget.

4 I was referring to Rosebud Sioux Tribal
5 Exhibit 4.

6 MR. SMITH: Okay. Thank you.

7 Q. I need to skip back or jump back or whatever; right?
8 Go back to a previous area.

9 Did I hear you correctly that you were not involved
10 in the filings, the environmental filings with the
11 South Dakota Public Utilities Commission?

12 A. We prepared environmental sections of that
13 Application.

14 Q. Okay. I thought you had answered something a little
15 different.

16 All right. Sir, I'm going to show you what has been
17 marked for identification as Rosebud Sioux Tribe
18 Exhibit 4.

19 MR. MOORE: Mr. Ellison, just for clarification,
20 the exhibits that I have marked by the Rosebud Sioux
21 Tribe all start with 11000, and 11004 is a letter. So
22 I'm just not clear which exhibit you're actually showing
23 him.

24 MR. ELLISON: I don't know the answer to that
25 question. This comes from the FSEIS. I'm not moving for

1 the admission of this exhibit.

2 MR. MOORE: Okay.

3 MR. ELLISON: I just want to use it for --

4 MR. MOORE: So it's not previously been filed as
5 an exhibit in this docket?

6 MR. ELLISON: I understood that it was in the
7 earlier submissions, but it apparently did not get a
8 number.

9 MR. MOORE: Okay. Thank you.

10 Q. Have you ever -- I mean, one of the things that is
11 an important consideration, is it not, for whether it's a
12 good idea to build a pipeline in a particular area has to
13 do with the soils, basically the contents of the soils
14 that the pipeline would be going through?

15 A. The stabilities? Is that what you mean?

16 Q. Yeah. Stability. Thank you.

17 A. That's one of the considerations.

18 Q. Okay. Now you said that you had reviewed the FSEIS;
19 correct?

20 A. Yes.

21 Q. And would you agree with me looking at this map down
22 here where it says -- would you agree with me that this
23 is a FSEIS map?

24 A. I don't see a figure number that came from it, but I
25 see somebody typed on the bottom where it came from.

1 MR. MOORE: May I interpose an objection at this
2 point? This appears to be a map related to landslide
3 hazards. That was the subject of testimony offered by
4 Mr. Kuprewicz by the Rosebud Sioux Tribe. It was
5 withdrawn.

6 We had prepared rebuttal testimony specifically
7 addressing this issue that by motion of the Tribe was
8 withdrawn in response to the Rosebud Sioux Tribe's
9 withdrawal of its witness.

10 So I think it's inappropriate for this subject
11 to be coming into the hearing through cross-examination
12 of a different witness.

13 MR. ELLISON: May I respond?

14 MR. SMITH: You may.

15 MR. ELLISON: This witness has stated in his
16 direct testimony of March 30, 2015, page 3 -- he talks
17 about TransCanada submitting in its Permit Application
18 soil type maps and aerial photographs.

19 Therefore, it would seem to me that this is the
20 subject of relevant inquiry. Whether Rosebud Sioux Tribe
21 intends or has withdrawn Mr. Kuprewicz as a witness, this
22 is the testimony that is offered, and these are questions
23 about which I intend to inquire.

24 MR. SMITH: I am going to overrule, Mr. Moore.
25 It's, again, cross-examination, and it appears there's at

1 least some connection here.

2 So to the extent he's able to answer.

3 MR. ELLISON: Sure.

4 MS. EDWARDS: Mr. Smith, could I weigh in
5 briefly?

6 MR. SMITH: Yes.

7 MS. EDWARDS: There is a June 15 Commission
8 Order that is somewhat on point. It deals with
9 Mr. Kuprewicz, but it I believe dealt with this subject.

10 MR. SMITH: Okay. It's hard for me to juggle
11 all of that. Can you pull that up? Let me know what it
12 says.

13 MS. EDWARDS: It was titled Order granting in
14 part and denying in part Keystone's Motion to Exclude
15 Testimony of Richard Kuprewicz.

16 And the Order states Finding, the Commission
17 does not have authority to order a reroute of the
18 pipeline and finding that portions of Kuprewicz's
19 testimony may be relevant to this proceeding, the
20 Commission voted unanimously to grant the motion in part
21 only to the extent that the testimony relates to
22 rerouting of the pipeline.

23 MR. SMITH: Okay.

24 MR. ELLISON: But we're not dealing with
25 Mr. Kuprewicz.

1 And, again, I appreciate your assistance to
2 TransCanada.

3 MR. SMITH: Well, I don't think we've gotten to
4 the point where I would characterize your questions at
5 this point at least of requesting a reroute. So but --

6 MR. ELLISON: No. Because I understand this
7 Commission has no authority to determine the route. It
8 can determine whether it is yes or no, but it can't say,
9 no, you need to move it over two miles.

10 MS. EDWARDS: I would move to strike
11 Mr. Ellison's comment that I was assisting TransCanada.
12 I believe I was assisting the Commission.

13 Thank you.

14 MR. SMITH: I'll grant the motion.

15 Q. Sir, from your looking at the entire environment
16 that, at least in South Dakota, TransCanada proposes to
17 build the KXL Pipeline and your reference in your direct
18 testimony specifically to soil type maps, could you tell
19 us, sir, what -- is there a problem with the stability of
20 an area with certain soil compositions?

21 A. If there's slope coupled with erodible or soils of
22 that nature, then, yeah, you look to try and minimize.
23 Because it becomes a reclamation issue. It becomes
24 difficult to maintain that right of way.

25 So a lot of the minor reroutes we did, did take some

1 of that into incorporation.

2 Q. Okay. But over all would you agree with me that
3 soils that contain bentonite create a particular
4 potential problem for the stability of a pipeline?

5 A. Potentially. If it's coupled with water source and
6 slope and other factors.

7 Q. Okay. You are aware that we recently had what was
8 called a 500-year flood?

9 A. I wasn't aware of that.

10 Q. You realize that -- or are you aware, sir, that over
11 the last few years the storms that have come through
12 South Dakota have been extreme?

13 A. I wasn't aware of that.

14 Q. Do you think that that would be something to be
15 important for consideration? If you have a bentonite
16 slippery slope area that then gets 2, 3, 4, 5 inches of
17 rain on it, that can create a problem for a pipeline, can
18 it not?

19 A. It could.

20 MR. MOORE: I'll object to foundation,
21 speculation, relevance, and argument.

22 MR. SMITH: I'm going to overrule. I think he
23 can understand it.

24 CHAIRMAN NELSON: I'm going to sustain.

25 COMMISSIONER HANSON: Sustain.

1 MR. SMITH: Okay. I'm overruled.

2 Q. Could you tell us, sir, since you did the
3 environmental analysis how many miles of the proposed
4 pipeline route, including the proposed changes, are in
5 what it regarded as high hazard -- high landslide hazard
6 areas?

7 A. I don't have that number in front of me. Most of
8 our description of soils are based on NRCS definitions of
9 reclamation issues. They're not defined this way.

10 Q. In other words, you are dealing with reclamation of
11 the installation of a pipe?

12 A. Reclamation of the environment after disturbance.
13 So NRCS defines them as low reclamation potential, high
14 reclamation potential, high clay content, low clay
15 content, a lot of different factors. That was what was
16 in the FSEIS.

17 Q. Okay. But also it's important for you to take into
18 consideration -- I think you just mentioned the soil
19 consideration.

20 A. Yeah.

21 Q. Okay. And you say you don't know how many miles --

22 A. I don't have all the numbers.

23 Q. Would you agree with me since you are the
24 environmental person here that of the 315 miles of the
25 currently proposed route through South Dakota that a

1 majority of the pipeline is routed through what in the
2 FSEIS is shown as a high landslide hazard area?

3 A. I don't recall seeing that. I saw the numbers
4 related to soil characteristics.

5 Q. Referring you then to this FSEIS document, Volume 2,
6 Chapter 3.1 in Geology, Figure 3.1.2-3, page 3.1 through
7 29 original.

8 This is the landslide hazard map; isn't that right,
9 sir?

10 A. Sure.

11 Q. And if it shows that, in fact, the majority of the
12 proposed pipeline route is in the high hazard area, would
13 you disagree with that?

14 A. No. Based on looking at this map.

15 Q. Okay. Now when you -- would it be fair to say that
16 the proposed route changes, that some of them are in the
17 high landslide hazard area?

18 A. Yes.

19 Q. Would you agree that the proposed changes do not
20 remove the pipeline from the high landslide hazard areas?

21 A. Obviously not, based on this map. But keep in mind
22 this -- this is probably from the geology section, not
23 the soils section. And landslide is also tightly related
24 to slope.

25 So a lot of the flat areas that you see on this map

1 are deemed high landslide area, but if there's no slope
2 associated with it --

3 Q. Does this map show topography?

4 A. No.

5 Q. Oh, okay. So you're guessing as to what's in flat
6 areas and what's not?

7 A. I've seen a lot of the state so --

8 Q. According to your earlier testimony, you were
9 involved, were you not, in the preparation and production
10 of map books?

11 A. Correct.

12 Q. Could you tell us what books?

13 A. Lots of books.

14 Q. Okay. But which ones?

15 A. Map books that were related to this Application, the
16 original map books that went in to the Department of
17 State, map books that had been provided for the
18 biological opinion. Lots of different map books.

19 Q. You can't identify them other than that?

20 A. There's maps for vegetation. There's maps for
21 stream crossings. There's maps for wetlands. I mean,
22 there's lots of maps.

23 Q. In your work, looking at your curriculum vitae, you
24 have a master's in marine biology; correct?

25 A. Correct.

1 Q. We don't have much marine area here that's not
2 prehistoric. Would that be fair to say?

3 A. Is that a question or --

4 Q. Yes, sir.

5 A. Yeah. It's not, obviously.

6 Q. All right. I'm not trying to be facetious. I'm
7 just trying to make sure that we're clear about this.

8 Do you have a master's degree in biological
9 sciences?

10 A. Doctorate.

11 Q. Doctorate as well. But you also have a master's
12 agree in biological sciences too?

13 A. Yes. Marine emphasis.

14 Q. You are not a geologist?

15 A. No.

16 Q. You are not a geological stratigrapher?

17 A. No.

18 Q. You are not a hydrologist?

19 A. No.

20 Q. Or a geochemist?

21 A. Nope. But our contractors that we hire cover those
22 disciplines.

23 Q. Would you agree, sir, that the land forms and
24 topography of the area that this pipeline's going through
25 is characterized by dissected plateau with river channels

1 that have incised into the landscape?

2 A. Yes.

3 Q. And that was part of the testimony, I think, back in
4 2009?

5 A. Yes.

6 Q. Each one of these rivers has numerous tributaries
7 that feed water into the major rivers in South Dakota; is
8 that correct?

9 A. That's correct.

10 Q. Okay. And I think you previously identified them as
11 the Little Missouri River, the Cheyenne River, the
12 White River, and now -- well, basically anything that's a
13 river, the South Grand Fork River, North Fork Moreau,
14 South Fork Moreau, and the Bad River as well.

15 Is that a fair statement, sir?

16 A. We talked about different things, HDD, not HDD.
17 But, yeah. Those were discussed.

18 Q. No. I'm just at this point talking about the water
19 resources themselves.

20 A. Sure.

21 Q. Okay. And I think that you mentioned that -- well,
22 let me back up a little bit.

23 I think you gave a figure of something like hundreds
24 of streams of various types from perennial to --

25 A. Ephemeral and intermittent.

1 Q. Right. And to some extent what we're really talking
2 about, some streams have waters or tributaries have water
3 all the time, some have water only during certain seasons
4 or storms. Wouldn't that be a fair statement?

5 A. That's correct.

6 Q. Okay. A tributary that feeds into a river, that's
7 an important component of the river's quantity and
8 quality, is it not?

9 A. That's part of the watershed.

10 Q. And this is an area that the pipeline proposes to
11 cross from the northwestern part of South Dakota to the
12 southeastern part of South Dakota.

13 Do you know how many watersheds are crossed?

14 A. I don't have that map in front of me, no.

15 Q. Okay. At this point do I understand your testimony
16 that there are -- we've got four rivers with the addition
17 of the Bad River, and now one creek, Bridger Creek, of
18 which TransCanada has decided to put HDDs?

19 A. Correct.

20 Q. Okay. And all the rest, tributary, ephemeral,
21 perennial stream, whatever it might be, is the open cut.

22 A. (Witness nods head).

23 Q. Okay. If there was to be a spill, particularly a
24 large spill, on even tributaries, say, for the Little
25 Missouri River, would it be fair to say as an

1 environmental scientist that you would get flow that
2 would go down that tributary?

3 MR. MOORE: Object to foundation. Speculation.

4 MR. SMITH: I'm going to overrule that.

5 Q. Sir.

6 A. There's another witness will testify to how far
7 things could go. But if the grading is there, it could
8 move a certain distance.

9 Q. What is the protection for these streams,
10 tributaries, should there be a spill? What's the
11 environmental protection? Is there any?

12 A. Another witness would have to answer that. I didn't
13 prepare any of that material.

14 Q. Why was Bridger Creek added? Why was there a
15 decision to do an HDD for Bridger Creek?

16 A. You can ask Meera that question but there was just
17 an alignment and you basically have an incised creek so
18 they're going to drill from plateau to plateau to
19 minimize the impacts.

20 Q. And none of similar type topography exists for, say,
21 Pine Creek or Sulfur Creek or Clark Creek?

22 A. Not to that extreme.

23 Q. Do you know where the cutoff point is in terms of
24 extreme?

25 A. You'd have to ask an engineer.

1 Q. One of the things I think you've talked a little bit
2 about from one of the other Intervenor's had to do I think
3 with Map A that was submitted with the Application that I
4 think was displayed up on the board.

5 Do you remember that?

6 A. What's it called? Sorry.

7 Q. Map A.

8 A. Map A.

9 Q. Maps A. It was an A or -- Exhibit A.

10 A. I'm not sure if I understand what you're talking
11 about.

12 MR. ELLISON: If I could have just a moment.

13 (Pause)

14 Q. Would you agree, sir, that South Dakota soils are --
15 range from very shallow to very deep?

16 A. Yes.

17 Q. And that while they're generally well drained,
18 they're also loamy and clayey?

19 A. In some areas, yes.

20 Q. What does loamy mean?

21 A. Loamy means it's got organic material that makes it
22 absorb water -- like not as bad as clay but similar to
23 that.

24 Q. And clayey is --

25 A. Clayey is obviously just like bentonite clay or some

1 other types of clays.

2 Q. And that goes into the bentonite areas, would be one
3 of those areas; right?

4 A. Sure.

5 Q. Now you said that they absorb water more than the
6 loamy areas?

7 A. Well, yeah. Clay is well-known for absorbing lots
8 of water.

9 Q. One of the components of tar sands crude is benzene,
10 is it not?

11 A. I believe so.

12 Q. Okay. And that is highly soluble in water, is it
13 not?

14 A. I'm not a chemist.

15 Q. Are the areas that are described as shallow to very
16 deep and generally well drained and loamy and clayey in
17 the northwestern part of the state?

18 A. I can't remember all of the soils maps.

19 Q. If that was part of your direct testimony,
20 paragraph 18, page 6 through 7 of your February 26, 2009
21 direct testimony, you wouldn't disagree with that, would
22 you?

23 A. I wouldn't disagree, but don't ask me to remember.

24 Q. No. I understand.

25 A. Long time ago.

1 Q. Didn't you look at your prior testimony prior to
2 coming here today?

3 A. No, I did not.

4 Q. Okay. Was there a reason for that?

5 A. I felt confident with what the Commission did.
6 We've covered this area. We had to map construction
7 reclamation units. That was a Condition that the
8 Commission wanted us to complete. Working with the
9 NRCS.

10 So all of this was addressed in the original Permit
11 as far as making sure we do the consultation to address
12 issues like this.

13 Q. So because of your confidence that the Commission
14 had done the right thing, you didn't think it was
15 necessary; is this correct --

16 MR. MOORE: I'll object. Irrelevant. I'm
17 sorry.

18 Q. -- to review your prior testimony?

19 MR. SMITH: Sustained.

20 MR. ELLISON: What was the objection?

21 MR. MOORE: The objection was irrelevant and
22 argumentative.

23 Q. Did you put a lot of irrelevant materials in your
24 2009 testimony, sir?

25 A. No.

1 Q. In fact, if it was in your testimony, it was because
2 you and TransCanada considered it to be relevant; isn't
3 that right?

4 A. Or based on what the Commission asked during the
5 hearings.

6 Q. What about your written testimony? They didn't ask
7 anything, hadn't asked anything yet.

8 A. I'm not sure I understand your question.

9 Q. Okay. In other words, you just said that you were
10 responding to Commission questions. Your direct
11 testimony was submitted in writing.

12 A. I understand.

13 Q. And that was before the Commission had asked
14 questions; right?

15 A. Sure.

16 Q. And am I correct also, sir, that from your prior
17 testimony that almost all of Haakon, Jones, and portions
18 of Tripp County have what are called gumbo soils?

19 A. That's part of it, yeah.

20 Q. TransCanada had a problem with sliding slopes down
21 in Guadalajara not too many years ago?

22 A. No idea. Didn't work for them in Guadalajara.

23 Q. So you hadn't been informed for your work here for
24 potential slip slopes elsewhere that had taken out a
25 pipeline?

1 A. No.

2 Q. But you would agree with me that ground movement may
3 occur due to the presence of the Pierre Shale?

4 A. Yes.

5 Q. Especially in bentonite layers?

6 A. Correct.

7 Q. And upon weathering they are, in fact, susceptible
8 to instability?

9 A. Correct.

10 Q. Would you agree, sir, that the area that TransCanada
11 proposes to build this pipeline is an area that is
12 subjected to considerable weathering?

13 A. Parts of it are. And that's why we were given some
14 Conditions originally to work with the NRCS and the
15 landowners to identify those places. That's why some of
16 the reroutes were suggested.

17 MR. ELLISON: If I may have just a moment.

18 I may need some technical help.

19 Q. Sir, directing your attention to Exhibit 427, see if
20 I can make it a little bit bigger.

21 Is this --

22 MR. MOORE: Mr. Smith, I'm sorry. I don't know
23 what Exhibit 427 is. I don't know whether I've seen it
24 before.

25 MR. ELLISON: It's DRA 427 if you haven't seen

1 it before, Mr. Moore.

2 MR. MOORE: Thank you. May I have a moment to
3 locate it before we commence with questioning?

4 MR. SMITH: You may.

5 (Pause)

6 MR. MOORE: Thank you. I have it.

7 MR. ELLISON: Thank you.

8 This is an 11-page exhibit. Apparently only one
9 page was loaded.

10 If I could have a moment.

11 I'm going to try the paperwork version since my
12 children are always talking about my technological
13 skills.

14 THE WITNESS: The older we get the slower we
15 get.

16 Q. All right, sir. So that counsel can see, we're
17 talking about the same exhibit. Any questions?

18 MR. MOORE: I only have one page.

19 MR. ELLISON: I understand. You only have one
20 page that you were given, or one page that was being
21 looked at?

22 MR. MOORE: I'm looking at what was prefilled,
23 sir, and that's just one page.

24 MR. ELLISON: Okay.

25 MR. MOORE: So that's all I have in front of me

1 is all I'm saying.

2 MR. ELLISON: Oh, okay. You don't have page 2?

3 MR. MOORE: When I pull up DRA's exhibits in the
4 docket I have one page.

5 MR. ELLISON: That was my problem so I went back
6 and got it.

7 MR. MOORE: I have it, Mr. Ellison.

8 MR. ELLISON: Okay. Thank you.

9 Q. I'm looking at --

10 MR. ELLISON: I haven't counted the number of
11 pages, Mr. Moore, but it is proposed route variation
12 0216-01.

13 Is that the same as your Exhibit 2013?

14 MR. MOORE: You're asking me whether it's
15 included in our Exhibit 2013?

16 MR. ELLISON: I thought the 2013 was root
17 variation maps, and I just wanted to know if this was one
18 of the documents that was included.

19 MR. MOORE: Without specifically looking, I
20 can't answer that. It may be.

21 Q. Sir, you will see the TransCanada logo on the upper
22 right-hand corner?

23 A. Yes.

24 Q. And you see in the left-hand corner proposed
25 variation route 0216-01?

1 A. Correct.

2 Q. Is this one of the change areas that you were
3 talking about?

4 A. I believe so.

5 Q. Okay. And, according to this map, the dotted line
6 that runs straight as opposed to the -- I don't know what
7 that's called in geometry anymore.

8 It's the dotted line that runs straight is the
9 proposed reroute?

10 A. I can't tell looking at this, but it could be.

11 Q. Okay. Just so you can see the scale. Because I'm
12 not trying to trick you on this. I'm just trying to get
13 the basis for our discussion here.

14 A. Okay. I see it now.

15 Q. Okay. Is that right?

16 A. Uh-huh.

17 Q. The straight line that goes across?

18 A. Yeah.

19 Q. You would agree at least from the view of the
20 topography that it's still within an area of slopes?

21 A. Correct. But it looks like it's moved to the top of
22 the ridge as opposed to side slopes.

23 Q. These --

24 A. Right. But it looks like they're trying to get to
25 the top of the ridge. This looks like an engineering

1 change, but the route above your pen is all side slopes.

2 In other words, your right of way is on the slope so
3 you would have to cut to make it flat.

4 Q. Isn't that a slope?

5 A. I can't tell from the scale, but it looks like the
6 line's trying to get to that ridge. An engineer can
7 explain it more than me.

8 Q. I understand. But this is what you worked on so I
9 just wanted to explore your knowledge for the
10 Commission's benefit.

11 A. Sure.

12 Q. You'd agree there's still some slopes there?

13 A. Uh-huh. Yes. Sorry.

14 Q. As long as it's an audible response, I think it
15 works.

16 The next map I'm going to show you is proposed route
17 variation -- big law firms get to have technical people
18 to help.

19 All right. You see this is proposed route variation
20 0216-02?

21 A. Correct.

22 Q. And again does this appear one of the areas that you
23 were talking about in terms of proposed route changes?

24 A. It could be. Yeah.

25 Q. A couple of things on this.

1 First of all, we're still in some of the areas that
2 at least from the topography appear to be somewhat
3 sloped.

4 A. Yeah. It's a little flatter along the dash line.

5 Q. A little flatter. Okay.

6 We also cross an area that looks like some kind of a
7 water body.

8 A. Uh-huh. Correct.

9 Q. No HDD.

10 A. I don't know what the name of this one is.

11 Q. Okay.

12 A. This creek's not labeled.

13 Q. Okay. I mean, you don't -- doesn't look like
14 Bridger Creek to you?

15 A. No.

16 Q. And then we have -- these are both labeled the same,
17 but I think one is a continuation of the other. Is that
18 what it is?

19 A. Probably two parts.

20 Q. Okay. And, again, we -- it doesn't go through some
21 of the top peaks, but it still goes through an area that
22 there's not a flat topography?

23 A. Well, it's a lot flatter where the dashed line is as
24 opposed to the solid line.

25 Q. So it's a lot flatter but still it's sloped and you

1 could have problems if there's sufficient rain?

2 MR. MOORE: Object. Foundation.

3 A. You can ask an engineer.

4 MR. ELLISON: If I might, the witness had
5 already answered that water would --

6 MR. MOORE: Well, then I'll ask that the answer
7 be stricken based on the fact that the objection was
8 sustained.

9 MR. ELLISON: No. Let me finish, Mr. Moore.
10 The witness has previously stated in an area where there
11 was a lot of bentonite slip slope areas if there was a
12 lot of moisture, that would affect the stability. It was
13 a question related to that.

14 MR. SMITH: I think he answered. What did you
15 answer again?

16 (Reporter reads back the last answer.)

17 Q. Do you know, sir, that one of the areas that there
18 is a proposed change, route change, goes through
19 John Harter's land?

20 A. Yeah. There are a lot of landowner and engineering.
21 I was involved in the ones that avoided cultural sites.

22 Q. Do you know if Mr. Harter's ranch has cultural
23 sites?

24 A. I don't know whose property. We do it by milepost,
25 not by tract name.

1 Q. Okay. None of the proposed modifications have to do
2 with pump stations?

3 A. I'm not sure.

4 Q. Do any of them have to do with valve sites?

5 A. If they included the new requirements that came out
6 of the FSEIS, they could have, yes.

7 Q. Would you agree that there are areas that the --
8 there are biological, cultural, and environmental surveys
9 that have not been conducted even on the old original
10 route?

11 A. Yeah. Most of the route's been done, but there are
12 still some places that have to be completed.

13 Q. Of the areas that we have been talking about --
14 well, the entire route when we're talking about soils and
15 whatnot.

16 You have testified, have you not, that 74 percent of
17 the soils along the route are compaction prone?

18 A. That's what the NRCS defines it as.

19 Q. And what you testified about?

20 A. Sure.

21 Q. What does that mean? What is compaction prone?

22 A. If you put a lot of pressure on it and it's wet, you
23 can get it to compact. So NRC is more -- there's
24 mitigation measures to relieve that compaction that we
25 have to comply with.

1 Q. Why is that important?

2 A. Because it helps reclamation. Otherwise, you just
3 have hard packed soil, and it's hard to grow things in
4 it.

5 Q. So it sounds like three-quarters of this route?

6 A. That's not uncommon for pipeline projects.

7 Q. But at least in this project three-quarters of the
8 route fit into that category?

9 A. Yeah.

10 Q. And would you agree that 43 percent of the route has
11 a low reclamation potential?

12 A. If that's what was defined by NRCS and the tables we
13 produced, yes.

14 Q. What about your prior testimony?

15 A. I would believe so.

16 Q. Okay. When you previously testified that 43 percent
17 of the route area has a low reclamation potential, was
18 that you talking about just from construction, or were
19 you talking about if there was a spill or both?

20 A. Just construction.

21 Q. Okay. What would make an area have a low
22 reclamation potential?

23 A. Low nutrients, doesn't hold enough moisture. NRCS
24 defines all these criteria. And one of the requirements
25 is this construction mitigation reclamation plan that we

1 developed with NRCS with measures to ensure that we can
2 get vegetation to come back.

3 Q. Well, it has a low reclamation potential. Doesn't
4 that mean it's going to be really difficult to try and
5 get it back the way it was?

6 A. It doesn't mean really difficult. There's grass
7 growing on it now.

8 Q. Okay. Well, it hasn't been disturbed yet?

9 A. We don't know if it's disturbed in the past, but
10 it's just defined as a soil type that's low reclamation.

11 Q. Okay. And that's important because for TransCanada
12 to prepare for the disturbance it will do, if the
13 pipeline goes through?

14 MR. MOORE: Mr. Smith, I will just object at
15 this point at the line of questioning. I think we're
16 relitigating the underlying Permit.

17 MR. SMITH: Which Permit Conditions are we
18 dealing with here? Which particular Permit Condition?

19 MR. ELLISON: Whichever ones have to do with
20 reclamation.

21 MR. SMITH: And are we talking here this line of
22 questioning is related to whether TransCanada continues
23 to comply?

24 MR. ELLISON: It goes to whether they are
25 capable of complying.

1 MR. SMITH: It's not at issue. It's whether
2 they continue to comply.

3 MR. ELLISON: Well, they can only continue to
4 comply if they're capable of complying; isn't that right,
5 sir?

6 MR. SMITH: I don't think so. I think those are
7 different subjects.

8 MR. ELLISON: Okay.

9 Q. We talked a little bit about the weather --
10 weatherly effects on these lands, and I think you
11 testified that that can increase instability.

12 Would you agree that 20 percent of the soils that
13 are crossed by the route are susceptible to wind
14 erosion?

15 A. Yeah.

16 Q. And that 32 percent of the surface disturbance by
17 the construction of this pipeline will impact soils that
18 are highly erodible, 32 percent?

19 A. As defined by the NRCS.

20 Q. Okay. You mentioned, sir, that when you submitted
21 or when you -- the direct testimony that you provided,
22 you said, I believe, in response to earlier inquiry by
23 Mr. Moore that the HCAs, there was a typo?

24 A. Uh-huh.

25 Q. The reduction from 34.3 miles to 19.9 miles, and it

1 was really 14.9 miles?

2 A. The 19.9 to 14.9 was a typo.

3 Q. Did you review the testimony that TransCanada
4 submitted on your behalf before it was submitted?

5 A. My testimony, yes.

6 Q. Okay. And this was involved in your testimony, was
7 it not?

8 A. It was an attachment to the Application.

9 Q. But so when you submitted it you had checked it, but
10 that wasn't --

11 A. I didn't type the table.

12 Q. I understand. But you did review it, didn't you?

13 A. I may have glanced at it, but I focused on my
14 written testimony.

15 Q. If you'd look, please, sir, on page 4 in response to
16 question 8, that is your direct testimony, is it not,
17 sir?

18 A. Correct.

19 Q. Okay. And that is where the discussion take place?

20 A. That is correct.

21 Q. About it being 14.9?

22 A. Yes.

23 Q. And that the -- at least we know and perhaps -- are
24 you familiar with the fact that what we're really talking
25 about are not populated areas or high drinking water

1 areas, you know, massive drinking water areas; correct?

2 A. The HCA categories you're talking about?

3 Q. Well, yes. The 14.9 miles of HCA.

4 A. Right.

5 Q. But that really excludes, you know, as we sort of
6 touched upon before, all of the tributaries and streams
7 that would contribute to some of these ecologically
8 sensitive areas, does it not?

9 A. Yeah. DOT defines how they classify those areas.

10 Q. Now let me ask you a question about that.
11 TransCanada expresses, does it not, that what it wants to
12 do is build a safe pipeline; correct?

13 A. Correct.

14 Q. Why wouldn't you -- regardless of what DOT says --
15 do HDD on every, say, perennial stream or creek?

16 A. Yeah. It's not -- it's not related just to how you
17 cross the creek. So there's a lot of factors that Heidi
18 can talk about that drive consequence areas and things of
19 that nature.

20 So HDD is not just the only answer.

21 Q. But when you do an HDD it's so that you want to
22 maximize the protection of the water body or
23 environmentally sensitive area that you're going under;
24 is that right?

25 A. That's one of the factors, yeah.

1 Q. And TransCanada is going to follow PHMSA, I
2 imagine -- they're saying 20 valves now, though
3 TransCanada originally proposed 16.

4 You are aware of that; right?

5 A. Yeah.

6 Q. Okay. And that's a -- do you know how many -- are
7 we really just talking about the rivers, the five rivers,
8 four rivers, five rivers?

9 A. For HDD?

10 Q. Yeah.

11 A. That's correct.

12 Q. And Bridger Creek?

13 A. (Witness nods head).

14 Q. And the rest of the area's just basically on its
15 own?

16 A. If the agencies Permit it that way, that's how
17 they'll be crossed.

18 Q. Okay. But you haven't proposed -- to your
19 knowledge, TransCanada hasn't proposed, look we are so
20 concerned about these water bodies or wetlands that we're
21 going to cross that we want to do 50, not 20. You
22 haven't done that?

23 MR. MOORE: I'll object. The question's
24 argumentative, and this is asked and answered at this
25 point.

1 MR. SMITH: Sustained.

2 Q. And I think actually the HCA mileage figure is now
3 15.8 miles?

4 A. For the very route at --

5 Q. Do you expect this to keep changing?

6 A. It depends on the landowners and what they request.

7 Q. This 26.3 miles of this pipeline as proposed crosses
8 state lands; is that right?

9 A. That's correct.

10 Q. And again that's a figure that's also been changing
11 and evolving?

12 A. Sure.

13 Q. I think it's 26.3 now, but it used to be 21.5?

14 A. That's correct.

15 Q. And 1.7 miles of local government land. Do you know
16 what local government that is?

17 A. County. County lands. I don't know which counties
18 it is.

19 Q. Do you know whether those counties have been
20 consulted as to whether they would like more extensive
21 protection of water resources in the area?

22 A. I have not heard.

23 Q. Okay. You also -- you mentioned that one of the
24 things that TransCanada does or -- you have to tell me if
25 it's just your company, if there's a distinction. That

1 when an employer receives training as to how to do their
2 work and they are certified then to do that once -- if
3 they go through the training and they pass the training,
4 that they get a sticker for their helmet?

5 A. I never discussed that.

6 Q. I'll try and show it to you.

7 A. Is it from the original hearing?

8 Q. Yes, sir.

9 A. Environmental training?

10 Q. Yes. That's one form of training that TransCanada
11 does with its workers?

12 A. Sure. But that's all I know about is the
13 environmental.

14 Q. Understand. Understand. Was that something that
15 your company put on, or did TransCanada say, no, when you
16 go through a certain type of training we want to
17 supervise this to be able to immediately know from the
18 stickers on the helmet -- the supervisors would be able
19 to tell by looking at, say, one of the people that you
20 had trained in environmental matters?

21 MR. MOORE: Excuse me. I'll just object that I
22 think this is beyond the scope of direct. I think it's
23 beyond the scope of this proceeding.

24 MR. ELLISON: It does have to go to the evidence
25 that will come in through other witnesses, and I want

1 this witness's perspective. And I think I'm entitled to
2 get it --

3 MR. SMITH: Which Condition is at issue here for
4 relevancy purposes? He made a relevancy objection.

5 MR. ELLISON: It has to do with ensuring that
6 the Conditions that have to do with all work being done
7 by properly trained and certified people.

8 I can't tell you what the number is, Mr. Smith.
9 But that is one of the Conditions.

10 MR. SMITH: I'm going to sustain the objection.

11 Q. Why don't you tell me what Condition this goes to.

12 A. I don't see anything about training of construction
13 personnel.

14 Q. So are you saying that when you previously gave this
15 testimony it was irrelevant?

16 A. No.

17 MR. MOORE: Excuse me. I'll object to the
18 question as argumentative. Mr. -- Dr. Schmidt's
19 testimony in the underlying proceeding was relevant to
20 the issues in that docket. We are litigating a different
21 issue in this docket.

22 MR. SMITH: Sustained.

23 Q. Would you agree that one of your responsibilities is
24 to ensure that you oversee contractors' compliance with
25 environmental requirements?

1 A. If I'm still involved in the project during
2 construction.

3 Q. Is that something you're hoping to do?

4 A. Sure.

5 Q. Okay. In fact, it gives an economic interest, does
6 it not, to your company to get that future contract?

7 A. To provide inspection services?

8 Q. Yeah.

9 A. Sure.

10 Q. And it's financial.

11 A. Sure.

12 Q. According to your resume, sir, one of the things
13 that is on your resume, is it not, that one of your
14 previous areas where you worked was the Gulf Coast
15 Pipeline?

16 A. Oh, for the KXL?

17 Q. Yes.

18 A. Yes.

19 Q. And your job in that was overall responsibility for
20 environmental compliance?

21 A. For environmental? We didn't do environmental
22 inspection on that. We did the permitting that led up to
23 construction.

24 Q. On your resume, sir, page 2, did you not state that
25 Jon's role was -- oh, I'm sorry. That's the wrong one.

1 Yes. You mention that -- you're talking about the
2 Keystone Pipeline, Montana, South Dakota, Nebraska,
3 Kansas, Oklahoma, and Texas, 2010 you served as the
4 overall environmental manager reporting directly to
5 TransCanada for pipeline to the Gulf Coast and that your
6 role was similar to the Keystone Project with overall
7 responsibility for environmental compliance?

8 A. For permitting, but we didn't do inspection. There
9 was another firm hired to do the environmental
10 inspection. We did the permitting and compliance of the
11 permitting Conditions during construction, which meant
12 reporting mostly.

13 Q. So when you said overall responsibility for
14 environmental compliance you were just talking about
15 permits, not compliance?

16 A. That's correct.

17 Q. It had nothing to do with compliance then?

18 A. Well, that's part of it. During construction you
19 comply with the Permit Conditions. May be reports you
20 have to submit. We had a lot of those.

21 Q. Okay. So you are involved in ensuring that during
22 the construction phase there is environmental
23 compliance?

24 A. On that project we did that, and it's complete. We
25 don't know if we'll be doing that for this project.

1 Q. I understand. Well -- okay.

2 That was a 36-inch pipe down the Gulf Coast?

3 A. Correct.

4 Q. Similar to what Keystone wants to build?

5 A. That's correct.

6 Q. Would your ensuring that there was environmental
7 compliance during the construction phase have anything to
8 do with ensuring that welders were properly trained and
9 certified to do the work on the project to ensure
10 protection of the environment?

11 A. Yeah. They'd be given a -- we didn't do that
12 training for Gulf Coast because we didn't do the
13 inspection. But normally you do a training for different
14 tiers of employees in construction.

15 We call that environmental awareness training so
16 that they're aware of the environment they're working in
17 and what the requirements are.

18 Q. And how their work could affect the environment, I
19 would imagine; right?

20 A. Sure.

21 Q. And the importance of everything being done
22 according to specs and code.

23 A. For the workers? They don't get into that. I mean,
24 you're talking welders and backhoe operators. They're
25 given environmental awareness training of what they have

1 to do to meet the Conditions.

2 Q. But not whether they do it there --

3 A. The inspectors follow up to make sure they comply.

4 Q. As to reclamation, is one of the things that's --
5 that you try and do -- or at least state that TransCanada
6 tries to do is to reseed with native species?

7 A. That's correct.

8 Q. Do you know of any reason why -- when you're talking
9 about native species you're talking about native species
10 to the immediate geographic area?

11 A. Right.

12 Q. Of the earth?

13 A. Correct.

14 Q. Do you know any reason why native seeds from another
15 part of the country would be used on any reclamation that
16 was done on, say, the XL Pipeline?

17 A. Yeah. If a landowner requested a certain seed mix,
18 they would try and honor that to the extent they could.

19 Q. That would be the only reason?

20 A. Correct.

21 MR. ELLISON: Thank you, sir. No further
22 questions.

23 MR. SMITH: Thank you. Next up would be, I
24 think -- just from my looking would be Ms. Craven?

25 MS. CRAVEN: Yes. That's correct.

1 MR. SMITH: Do you have a lot of questions?

2 MS. CRAVEN: Why? Do you want to break for
3 lunch?

4 MR. SMITH: Well, I thought if you're going to
5 be 15, 20 minutes, we could do that now and then break
6 for lunch.

7 Any preference, Commissioners?

8 CHAIRMAN NELSON: No. I'd say if it's 15 or 20,
9 let's do it. If not, let's break.

10 MS. CRAVEN: All right.

11 CROSS-EXAMINATION

12 BY MS. CRAVEN:

13 Q. Good morning. My name is Kimberly Craven. I'm
14 appearing here on behalf of the Indigenous Environmental
15 Network.

16 How are you, Dr. Schmidt?

17 A. Fine. How are you?

18 Q. Good.

19 So have you been able to spend a lot of time in
20 South Dakota getting familiar with the state and all your
21 work for --

22 A. Over seven years, yeah.

23 Q. So are you able on this map to indicate where the
24 Cheyenne River Sioux Reservation is?

25 A. I can't see the milepost of the pump stations, but

1 it would be between Pump Station 16 and 17 to the east of
2 the line.

3 Q. And are you able to show where the Standing Rock
4 Sioux Reservation is on this map?

5 A. I can't see the county lines real well. I've seen
6 the maps of the tribal locations. They're basically on
7 either side of the route.

8 Q. On either side of the route?

9 A. (Indicating.)

10 Q. Could you kind of point up there? Would you mind
11 pointing to show?

12 A. (Indicating.)

13 Q. Okay. So where is the Rosebud Sioux Reservation?

14 A. To the southwest of Pump Station 19.

15 Q. Okay. Great. Okay. So you are familiar with where
16 the reservations are then?

17 A. Yes.

18 Q. Okay. Great. All right.

19 So I have a follow-up question about the seeds, and
20 it relates to Condition 16M. Could you kind of just
21 expand upon the Condition and then what's currently
22 happening with that?

23 A. So we're not reseeding, but we have started
24 discussions with landowners on seed mixes. And obviously
25 we're not monitoring re-vegetation.

1 So what we've completed is the Commission asked us
2 to do con. rec. mapping. I don't know if you looked at
3 those in the FSEIS. They describe seed mixes, how to
4 handle the soils. All of that was developed with the
5 NRCS. We did those meetings, and now we're starting to
6 talk with the landowners on what mixes they'd like.

7 Q. I did look at those, and I saw that -- the
8 discussions with the NCRS?

9 A. NRCS.

10 Q. Was done primarily in Nebraska?

11 A. No. We met with the folks in Pierre too. There was
12 exhibits filed, I believe.

13 Q. Okay. And so because the original Condition, if I
14 could read it into the record, it says "Keystone shall
15 reseed all lands with comparable crops to be approved by
16 landowner in landowner's reasonable discretion."

17 But in the status update, which was filed on the PUC
18 website at the end of March, it says "Keystone has
19 developed seed mixtures in consultation with the NRCS."

20 And I was wondering, that seems to be a deviation
21 from your original Condition.

22 A. No. Actually it was a requirement to consult with
23 them first, then work with the landowners. And if they
24 wanted to add something or change the mix, they could do
25 that.

1 Q. And where is that written in the Condition that
2 you're supposed to consult with the Federal Government
3 before the landowner?

4 A. Let's see. Condition 15. It says "Prior to
5 construction Keystone shall, in consultation with area
6 NRCS staff, develop specific construction reclamation
7 units that are applicable to the particular soil/subsoil
8 classification, land uses, and environmental settings."
9 So those con. recs. have the seed mixes in them.

10 Q. I don't see where it says seed mixture in that
11 Condition, though.

12 A. That's where the con. rec. -- if you look at those
13 packages, it's all geared towards soil handling, soil
14 reclamation, and seeding.

15 Q. But I don't see where it says -- I think we're
16 having different interpretations of how those two
17 Conditions interact with each other.

18 My other question is you are -- you have a -- you
19 have written testimony and you've orally stated today
20 that you are certifying that all these Conditions are met
21 and you do have one exhibit.

22 Were you engaged in putting together any other
23 written exhibits verifying all of these Conditions that
24 you're vouching for?

25 A. Just what's been filed.

1 Q. Just what's currently in the record today?

2 A. Correct.

3 Q. Okay. So do you have any draft documents that you
4 thought might be important to bring as exhibits?

5 A. Well, most of these Conditions are prospective.
6 They're preconstruction so they're ongoing. They're not
7 completed yet.

8 Q. So you haven't started an adverse weather plan?

9 A. I wouldn't be responsible for that.

10 Q. Okay. A draft crop protocol?

11 A. Wouldn't do that until we get into discussions with
12 the landowners on the seed mixes and stuff.

13 Q. This document says that you've been working on it
14 and so you have nothing that you want to enter into the
15 record regarding that today?

16 A. We haven't gotten ahold of every landowner yet so --

17 Q. All right.

18 MS. CRAVEN: I think that's all my questions.
19 Thank you.

20 MR. SMITH: Thank you.

21 Next is Mr. Gough.

22 MR. GOUGH: I think I'll have questions that
23 will go a little bit beyond.

24 MR. SMITH: Okay. Commissioner Hanson thinks we
25 should take a break now. So we'll go into recess, and we

1 will reconvene at about 5 after 1:00.

2 (A short recess is taken)

3 MR. SMITH: We'll come back to order in the
4 hearing in Docket HP14-001. We're in the middle of
5 cross-examination of witness Jon Schmidt. And we're at
6 Mr. Gough or InterTribal COUP.

7 Did you notice that I got it right this time?

8 MR. GOUGH: Thank you, sir.

9 Mr. Smith, I've got actually two very short
10 matters. Number one, a correction from the opening
11 statement. I had attributed to Cheyenne River a
12 discussion of the FEIS and FSEIS that was actually coming
13 from Yankton.

14 So I just want the record to reflect that
15 correction.

16 MR. SMITH: Okay.

17 MR. GOUGH: And the second thing is I had to
18 leave yesterday due to a prior engagement in Rapid City,
19 and I come back to find that one of the witnesses that I
20 was intending to -- or actually referred to by Mr. Goulet
21 apparently is no longer part of the proceedings?

22 MR. SMITH: Which witness would that be?

23 MR. GOUGH: Mr. Dakins?

24 MR. SMITH: Diakow, you mean?

25 MR. GOUGH: Diakow?

1 MR. SMITH: Yeah. He was withdrawn.

2 MR. GOUGH: Will we have other people taking
3 care of the area that Mr. Goulet had referenced us to?

4 MR. SMITH: Do you want to address that,
5 Mr. Moore?

6 MR. MOORE: No, we will not. The testimony was
7 withdrawn. We do not have another witness to cover the
8 same subject matter.

9 MR. GOUGH: I'm sorry. There was noise.

10 MR. SMITH: It was withdrawn.

11 MR. GOUGH: There's no other witness that will
12 handle the engineering and those things? Is that my
13 understanding?

14 MR. MOORE: The subject of Mr. Diakow's
15 testimony was all related to commercial matters, demand,
16 contracts. That was what was withdrawn.

17 We have other witnesses who are addressing
18 engineering matters, Dan King and Meera Kothari. Dan
19 King is a rebuttal witness, and by order of the
20 Commission yesterday, his testimony will not be offered
21 until after all of the direct examinations.

22 MR. GOUGH: So there will be no one else to
23 discuss commercial issues then.

24 MR. MOORE: That's correct.

25 MR. GOUGH: Thank you.

CROSS-EXAMINATION

BY MR. GOUGH:

Q. Mr. Schmidt, Bob Gough, InterTribal Council on Utility Policy. Good afternoon.

A. Good afternoon.

Q. I've appreciated your testimony with regard to the soil types and conditions and concerns around that.

Is it fair to say that your testimony -- that a good portion of the route through South Dakota will be through lands and soils that have been very weathered?

A. I think we covered that with Mr. Ellison so --

Q. Right. And that -- is there a percentage you could give us --

A. Not without seeing the FSEIS. A lot of volumes over there (indicating).

Q. Right. Yeah. We had issues going through all of the documents as well at the end.

This weathering, is this a recent phenomenon to this lands and soils?

A. I'm not a geologist so I can't really address that.

Q. Okay. So you don't know how long these conditions have prevailed?

A. All I know is, you know, we've worked with the agencies to develop mitigation measures to address, you know, going through and then reclaiming the land.

1 Q. Do you have an awareness of what processes caused
2 this erodibility of these soils?

3 MR. MOORE: I'll just object to this line of
4 questioning as beyond the scope of the hearing.

5 MR. GOUGH: He's testified that --

6 MR. SMITH: Well, his -- I'm going to -- I'm
7 going to overrule, at least as long as we keep it within
8 bounds here.

9 MR. GOUGH: Thank you, sir.

10 A. Just basic wind, sun, water. You know, those are
11 mainly the erosive forces.

12 Q. So these are ongoing conditions as well, phenomenon
13 that we can expect?

14 A. (Witness nods head).

15 Q. Do you have any awareness of whether these have
16 occurred at a constant rate over the years?

17 A. No.

18 Q. You expect these conditions to continue?

19 A. All I know is, you know, once you have a certain
20 soil type, you reclaim for that soil type. So if it
21 changes, I would assume the vegetation changes with it.

22 Q. Uh-huh. You indicated that you get to oversee a
23 good deal of the permitting that's going on here. And
24 you also indicated in your previous testimony, I believe
25 to Mr. Ellison, that -- or maybe it was Mr. Blackburn,

1 that there was concerns about -- particularly about
2 weather during the construction phase and during the
3 drilling under water bodies.

4 A. We didn't -- we didn't talk about that weather in
5 construction methods. We talked about an adverse weather
6 plan being prepared by somebody else. I'm not
7 responsible for that.

8 Q. Do you know whether that plan has been --

9 A. No, I do not.

10 Q. -- initiated?

11 A. I do not.

12 Q. Are you likely to have any input into that plan?

13 A. Probably not. It's mostly a logistical plan.

14 Q. Okay. So you have not seen anything on it other
15 than the promise one will be made at some point?

16 A. No. I have not seen it.

17 Q. Okay. I'm looking at the Keystone Pipeline
18 Conditions, and Condition No. 25 says Keystone is
19 preparing this adverse weather land protection plan.
20 Will submit it sometime in the future.

21 Did you have any input in that characterization?

22 A. No.

23 Q. Do you know who might have?

24 A. No, I don't. That's not one of the Permit
25 Conditions I said I was responsible for so --

1 Q. Because --

2 MR. GOUGH: Well, for the record, I note that we
3 had testimony yesterday, I believe, that nothing has been
4 done on the plan, and I wonder what "is preparing" means
5 if nothing has been done.

6 They certainly know how to use the future tense
7 in will submit. Will prepare, I understand, but it says
8 is preparing.

9 MR. MOORE: I'll object to this, Mr. Smith, as
10 this is not a question for the witness.

11 MR. SMITH: Yes. He's not involved in it. So
12 sustained.

13 Q. And you don't know who will be involved in that?

14 A. You'll have to ask another witness.

15 Q. Thank you. Any suggestions as to which witness?

16 A. Construction.

17 Q. Thank you.

18 MR. GOUGH: No further questions.

19 MR. SMITH: Thank you. We're down to
20 Mr. Harter.

21 MR. ELLISON: Mr. Smith, excuse me, sir.

22 (Discussion off the record)

23 MR. HARTER: Mr. Smith, for the record, I just
24 e-mailed a picture of a map to Ms. Edwards that I would
25 like to be able to reference to, if possible.

1 MR. SMITH: Ms. Edwards.

2 MS. EDWARDS: Can I forward it to Tina really
3 quick and we'll see?

4 MR. SMITH: Yes.

5 CROSS-EXAMINATION

6 BY MR. HARTER:

7 Q. Dr. Schmidt, John Harter. Earlier you testified to
8 doing open cuts in waterways; right?

9 A. Correct.

10 Q. In the open cuts in the waterways how do you get the
11 compaction back on top of the line to a nonerodible
12 point?

13 A. I'm not sure I understand your question. You mean
14 in the stream bed?

15 Q. In the stream bed, yes.

16 A. Again, I'm not a construction guy, but you excavate,
17 side cast, put the pipe in, put the material back, and
18 that's -- and then they use the natural course of the
19 stream to even the bed out.

20 Q. So are you -- at all these water crossings that you
21 were talking about earlier are you diverting the water
22 somehow so that you've got bare ground, or how does that
23 work?

24 A. Well, a lot of them will be dry if it's towards the
25 end of the summer or if they're ephemeral streams. But

1 there's two open cut methods, one called isolated and one
2 called wet, and both of those are explained in the CMR
3 plan.

4 Q. Okay. Do you believe or would it be fair to say
5 that when loosening these soils that you've got a higher
6 chance of erosion in those areas?

7 A. It's possible, yeah. But I've seen a lot of open
8 cuts installed, and you don't get a divot. You don't get
9 a big hole that erodes away.

10 Q. So when these -- I'm going to just specify, but they
11 generally kind of fall into it. But the Keya Paha River
12 which is south of Colome, South Dakota where you're
13 crossing that someplace south and east of Colome,
14 South Dakota on like this tributary, are you digging down
15 25 foot then to lay that pipe into that?

16 A. No. I think Meera will be discussing the
17 construction methodologies. I'm not a construction
18 engineer. I'm just an environmental guy. So sorry.

19 Q. Okay. Thank you.

20 Earlier you testified, made some statements about
21 landowners requesting reroutes?

22 A. Uh-huh. Yes. Correct.

23 Q. I guess I was kind of -- how was those reroutes
24 presented to you? Let's go with that first so it's not
25 compound.

1 A. Well, they weren't presented to me. They would have
2 been presented to TransCanada through the land department
3 or the engineer. Then they would identify where they
4 wanted to move the route to, and then we would do either
5 additional surveys or what was required to analyze that
6 reroute.

7 Q. Do you know who from TransCanada would that possibly
8 come from?

9 A. You can talk a lot of those with Meera Kothari
10 because she's the design engineer.

11 Q. Were you the person that was in charge of --
12 probably weren't in charge, I guess.

13 How do you get identify of -- of the wetlands? You
14 testified to the wetlands. How does that come to you?

15 A. We hired a firm to do the surveys, and they followed
16 the Corps of Engineers' requirements for survey
17 methodologies.

18 So there's a step process. You have to look at the
19 soils, the vegetation and the hydrology, and you have to
20 document it in forms. They use GPS to record the
21 boundaries. It's a very standard delineation method.

22 Q. Thank you. I'm going to come back to a little bit
23 of that in just a minute so I'm jumping around in my
24 notes a little bit.

25 Earlier you testified to the -- is it HDD, the

1 boring under the pipeline?

2 A. Yes.

3 Q. HDD. And you said that you hook the pipe to your
4 drilling rig and pull it through?

5 A. Correct.

6 Q. I know during a lot of your river bed crossings you
7 have a lot of rock, gravel, in those areas.

8 Is this true?

9 A. Could be, yeah. They do geotechnical borings first
10 to make sure the HDD will work in that area.

11 Q. Okay. And when they're pulling the pipe through
12 isn't there a chance it's peeling off the coating while
13 they're doing that?

14 A. You'd have to ask an engineer.

15 Q. Okay. Thank you.

16 How much bigger is your bore than your pipe?

17 A. It's usually about 6 inches or more greater than the
18 diameter of the pipe.

19 Q. Okay. Thank you.

20 What process is used to determine an HCA? Do you
21 know?

22 A. I'm not aware of that. You could probably ask
23 Heidi Tillquist.

24 Q. Okay. You are aware of the soils in southern Tripp
25 County?

1 A. Not off the top of my head, but I know it's all been
2 documented in the FSEIS.

3 Q. Are you aware of Special Condition 35 in the Special
4 Conditions?

5 A. For the PHMSA Special Conditions?

6 Q. No. For the PUC Special Conditions.

7 A. You mean, the Amended Permit Conditions?

8 Q. Yes.

9 A. Yeah. That's not one of my -- as I stated early on,
10 that's not one of my -- yeah.

11 Q. So you said something about you know about my land.
12 But you're not in charge of what's going on on that piece
13 of property with your work?

14 A. We did environmental surveys, cultural, biological,
15 endangered species, those kind of surveys. This talks
16 about general High Plains Aquifer information, which was
17 analyzed in the base SEIS as well as this Application
18 here.

19 Q. Okay. Let's go to what you just said on the
20 endangered species. I had earlier asked another witness,
21 I believe, about reports on that.

22 So did you guys make reports, your crew, whoever
23 done your surveys when you went across my property?

24 A. Yeah. We submit reports to the agencies that review
25 them; Fish & Wildlife Service, South Dakota Game, Fish &

1 Parks.

2 Q. And even if there's nothing on there, there's
3 something in that report, isn't there?

4 A. It talks about where things were surveyed. But if
5 there's nothing found there, there wouldn't be a
6 statement to that effect. It would just say where things
7 were found.

8 Q. Okay. Thank you.

9 Are you aware of the aspects of the pressure testing
10 on the pipeline?

11 A. No. I just get the permits for the water use and
12 discharge.

13 Q. So the permits for the water use, are you -- can you
14 tell me where the water's coming from to test through
15 South Dakota?

16 A. There's a table in the FSEIS that identified the
17 preliminary locations, but they won't be finalized until
18 the construction plan is finalized. So test segments are
19 based on length, geography, topography and that kind of
20 thing.

21 Q. So you can't tell me where you're getting your water
22 to do the testing pressure from?

23 A. There's a preliminary list in the FSEIS.

24 Q. Thank you.

25 MR. HARTER: I believe I'll save the rest of my

1 stuff for another witness.

2 Thank you.

3 MR. SMITH: Thank you.

4 Ms. Braun, Joye Braun, do you have a question?

5 MS. BRAUN: Not at this time. Thank you.

6 MR. SMITH: Thank you.

7 Cindy Myers.

8 MS. MYERS: Yes. I have some questions.

9 CROSS-EXAMINATION

10 BY MS. MYERS:

11 Q. Good afternoon, Dr. Schmidt. My questions are
12 concerning the Mni Wiconi water line in Tripp County
13 related to Conditions No. 35 and No. 40.

14 You are aware of the Mni Wiconi Water System and how
15 its location relates to the KXL route?

16 A. I answered that question, yes.

17 Q. And is it true the route crosses the Mni Wiconi
18 water line?

19 A. Yes.

20 Q. And how many locations?

21 A. In two locations that I'm aware of.

22 Q. What type of material is the Mni Wiconi water pipe
23 made out of?

24 A. I think there's two different types. Steel and PVC.

25 Q. And where it crosses the Mni Wiconi water line in

1 those two locations, what type of pipe is that?

2 A. You'd have to ask the engineer, Meera Kothari. She
3 can talk about those crossings.

4 Q. So can you tell me the distance of the Mni Wiconi
5 water line to the proposed KXL route in the locations
6 where it's crossed?

7 A. You mean, where it crosses those lines or --

8 Q. Yes.

9 A. I don't have a map in front of me. No, I can't.

10 Q. But it crosses right on top of the line; right?

11 A. Well, that's not the method that will be used to
12 cross it. She can discuss the method that was discussed
13 with the Bureau of Reclamation.

14 Q. Okay. What do you know about polyethylene water
15 pipe being permeable to benzene?

16 A. I don't know.

17 Q. And who can tell me that?

18 A. Probably Heidi Tillquist.

19 Q. Who's responsible for the decisions with the
20 Mni Wiconi water line as far as the situation with the
21 KXL crossing it?

22 MR. MOORE: I'll just object to that as beyond
23 the scope of this witness's direct testimony.

24 MR. SMITH: Sustained.

25 Q. How far from the Cheyenne River crossing is the HDD

1 entry point and the exit point?

2 A. From the river itself?

3 Q. Yes.

4 A. I don't have that distance. There was drawings
5 submitted in the FSEIS that showed the preliminary
6 designs of that crossing.

7 Q. Okay. Okay. Now to Tripp County.

8 Southern Tripp County's been designated as a
9 hydrologically sensitive area. Is that your
10 understanding?

11 A. It is, yes.

12 Q. And I've read in two different sources -- one source
13 said that area is considered a source water protection
14 area. And another place I read it was moved out of that
15 area because it was a source water protection area.

16 And what's your take on that?

17 A. I don't. You'd have to ask Heidi Tillquist, who was
18 involved in the risk assessment and the HCA analysis.

19 Q. Do you agree that southern Tripp County's permeable
20 sands permit uninhibited infiltration of contaminants?

21 A. It's sandy soil. So if that's what you're asking,
22 yes.

23 Q. That's what it states in Condition No. 35.

24 What would you do in this area that's considered a
25 hydrologically sensitive area? What more would you do in

1 this area compared to other areas not designated as
2 hydrologically sensitive?

3 MR. MOORE: Again, I'll object that this is
4 beyond the scope of this witness's direct.

5 MR. SMITH: Sustained.

6 Q. Even with extra measures to protect the ground water
7 in Tripp County, is it still possible for spills to
8 contaminate the aquifer in this vulnerable area?

9 MR. MOORE: Same objection. Beyond the scope.

10 MR. SMITH: I think, Ms. Myers, yeah. Hydrology
11 isn't his area here.

12 MS. MYERS: I had that in my testimony.

13 MR. SMITH: Pardon me?

14 MS. MYERS: I included that in my prefiled
15 testimony.

16 MR. SMITH: No. It's this witness on the stand.
17 So sustained.

18 MS. MYERS: Okay. I understand.

19 Q. If a spill occurs in this aquifer, what's the
20 possibility of cleaning that to the prespill status?

21 MR. MOORE: Same objection. Beyond the scope of
22 this witness's direct.

23 MR. SMITH: Sustained. His is biological.

24 I can't see you, Ms. Myers. I'm sorry. You're
25 behind that pillar. We're talking through a blank here.

1 His testimony was about biological and those
2 kind of surveys.

3 MS. MYERS: Yeah.

4 MR. SMITH: And so he doesn't deal with things
5 like this. Okay?

6 MS. MYERS: Okay.

7 MR. SMITH: There will be another witness taking
8 the stand that does deal with stuff like this.

9 MS. MYERS: Okay. That concludes my questions.

10 MR. SMITH: Thank you.

11 Mr. Seamans.

12 CROSS-EXAMINATION

13 BY MR. SEAMANS:

14 Q. Dr. Schmidt, Paul Seamans here. I've got a couple
15 of questions about endangered and threatened species.

16 Is the American burying beetle on the endangered
17 threatened list?

18 A. It's on the endangered species list.

19 Q. Is it found in South Dakota?

20 A. In Tripp County it could be.

21 Q. How do you find out if it is in an area?

22 A. We hired Dr. Wyatt Hoback from the University of
23 Nebraska who's probably the leading expert on the
24 American burying beetle.

25 He conducted surveys for many years up and down

1 Nebraska and southern Tripp County, and he worked with
2 the Fish & Wildlife Service here in Pierre on where the
3 habitat is and where to conduct those surveys.

4 Q. Do you perform this survey on the entire route, or
5 how do you do that?

6 A. He had to -- he works with the Fish and Wildlife to
7 identify potential habitat, and then he surveys the
8 potential habitat.

9 Q. And what measures do you take if you do find it in
10 an area during construction, say?

11 A. Well, there's -- if you look in the FSEIS, there's
12 an appendix called the Biological Opinion, and in it is a
13 very extensive section describing the measures to take
14 before construction, during, and after.

15 Q. Okay.

16 A. So there has to be some tracking work done ahead of
17 construction, then reclamation work, and then
18 monitoring.

19 Q. Okay. Thank you.

20 I'm going to switch now to cultural resource
21 surveys.

22 Has the cultural resource survey been completed
23 along the entire route?

24 A. Almost.

25 Q. What was the company that performed this survey?

1 A. SWCA.

2 Q. And where are they headquartered out of?

3 A. I'm not sure where their headquarters are, but they
4 used resources from Nebraska, Denver, and I think Iowa to
5 do the surveys.

6 Q. Now their people that work on the survey, are they
7 qualified to work in, say, South Dakota?

8 A. They have to be -- they have to be approved by the
9 South Dakota SHPO, yes.

10 Q. They do. Okay.

11 MR. SEAMANS: I guess that's all I have. Thank
12 you.

13 MR. SMITH: Thank you. I think that concludes
14 Intervenor cross-examination.

15 Do the Commissioners have any questions of
16 Mr. Schmidt?

17 CHAIRMAN NELSON: Dr. Schmidt, you were asked
18 some questions about the construction mitigation and
19 reclamation plan, and I've got a follow-up question, but
20 it's my understanding there's somebody later better to
21 answer those questions?

22 THE WITNESS: Yeah. I helped prepare it, but
23 the engineers are the ones who describe the construction
24 methods.

25 CHAIRMAN NELSON: Actually it's more the

1 reclamation area that I'm concerned with.

2 THE WITNESS: I can answer some of those.

3 CHAIRMAN NELSON: Thank you.

4 I believe when Mr. Goulet was testifying he was
5 asked a question about the percentage of cover that
6 would be restored in reclamation. He said it would be
7 100 percent. I don't find that percentage as a
8 requirement in the Conditions.

9 And so what I'm wondering is, is that percentage
10 something that would be found in the CMR plan?

11 THE WITNESS: No. We don't -- we discuss
12 reclamation in relation to areas adjacent to the
13 construction. He might have been talking about we will
14 do 100 percent of the route. I don't think he was
15 talking about percent cover or things like that.

16 CHAIRMAN NELSON: Okay. So the percentage of
17 cover restored, where would that --

18 MR. HARTER: I would object to that last
19 statement. Speculation. John Harter.

20 MR. SMITH: Overruled.

21 CHAIRMAN NELSON: Okay. So I'm going to ask the
22 question again.

23 The percentage of forage cover that would be
24 expected in the reclamation, where is that designated?

25 THE WITNESS: I'm not sure it's designated in a

1 specific percent, but the con. rec. unit descriptions
2 describe the vegetation, the species, the cover, and then
3 the measures he used during construction, how to reclaim
4 the soils, and then the seeding mixes.

5 So I'm not sure if it's in there or not, but
6 that would be the only place it would be.

7 CHAIRMAN NELSON: So I think the last question
8 then in Condition 16M, and you were asked about this
9 earlier -- the last sentence says "Keystone shall
10 actively monitor re-vegetation on all disturbed areas for
11 at least two years."

12 At the end of two years how do you know if you
13 were successful in meeting the requirements of a plan or
14 not?

15 THE WITNESS: You would do surveys to compare it
16 to the adjacent undisturbed areas. But I think in the
17 FSEIS we have a longer commitment period of five years or
18 more.

19 CHAIRMAN NELSON: Thank you.

20 MR. SMITH: Commissioner Hanson.

21 COMMISSIONER HANSON: Staff.

22 MS. EDWARDS: Thank you. Staff has no
23 questions.

24 However, I would note that we have two more
25 Intervenor parties who may wish to note their appearances

1 for the record and ask questions.

2 MS. STESKAL: Diana Steskal. I have no
3 questions.

4 MR. SMITH: Sorry. I forgot.

5 MS. KILMURRY: Bonnie Kilmurry. I have no
6 questions. Thank you.

7 MR. SMITH: Thank you, Ms. Edwards.

8 COMMISSIONER HANSON: Thank you, Mr. Smith.

9 Doctor, in your -- in the discussions that were
10 had here today there's been quite a bit about potential
11 land slides and corrosion and such.

12 Do you have any concerns that you have not yet
13 had an opportunity to express pertaining to any erosion
14 or areas that -- of potential land slides along this
15 area?

16 THE WITNESS: No. No, sir.

17 COMMISSIONER HANSON: And the 12th paragraph in
18 your testimony states that -- and you acquitted to this
19 from when your attorney was preparing you and introducing
20 you, that you've reviewed the -- you have no -- at that
21 time you didn't have any changes to your written
22 testimony.

23 THE WITNESS: Other than what he discussed in
24 the beginning.

25 COMMISSIONER HANSON: Is that still the case

1 after having gone through this process here today?

2 THE WITNESS: Yes.

3 COMMISSIONER HANSON: All right. Thank you. No
4 further questions.

5 MR. SMITH: Chairman Nelson?

6 CHAIRMAN NELSON: I'm going to pass.

7 MR. SMITH: Okay. I think that concludes -- I'm
8 going to limit it, but just in response to Commissioner
9 questions are there any follow-up questions of
10 Intervenors? Cross-examination? But I want to limit it
11 to that.

12 Do you have one?

13 MR. CAPOSSELA: Yes, Mr. Smith. Thank you.
14 I'll attempt to be as brief as I can.

15 Thank you. Peter Capossela for the Standing
16 Rock Sioux Tribe.

17 RECROSS-EXAMINATION

18 BY MR. CAPOSSELA:

19 Q. There's been a fair amount of discussion this
20 morning, Dr. Schmidt, regarding cultural resources and
21 cultural resource surveys and a Programatic Agreement
22 prepared by the State Department.

23 And just by way of review, are you directly familiar
24 with the cultural resource survey process?

25 A. Yes.

1 Q. Are you familiar with the Programatic Agreement
2 published with the FSEIS?

3 A. Somewhat, but it's not my document. It's Department
4 of State's.

5 Q. I understand that. But my question is are you
6 familiar with that document?

7 A. Yeah. Generally, yes.

8 Q. Okay. Are these subjects appropriate subjects for
9 discussion with respect to the certification of the
10 Permit?

11 A. I believe they show that the Applicant is still
12 progressing the Conditions that were required to complete
13 the work necessary to get them to approve the project,
14 you know, so it can move forward.

15 Q. From TransCanada's standpoint is this helpful to
16 discuss these subjects, cultural resource surveys and the
17 Programmatic Agreement to determine if certification is
18 appropriate? Is this helpful stuff?

19 MR. MOORE: I'll just object. I think it's
20 either asking for a legal conclusion, or it's
21 argumentative.

22 MR. SMITH: I guess I'm trying to -- what are
23 you getting at, Mr. Capossela?

24 MR. CAPOSSELA: I want to know if this helps the
25 Commission determine that certification should, in fact,

1 be granted.

2 MR. SMITH: Well, again, the ultimate -- the
3 issue, you know what it is. It's whether the Petitioner
4 continues to comply with the Conditions of the -- set by
5 the Commission in the Amended Final Decision.

6 I mean, that really is the actual issue --

7 MR. CAPOSSELA: Right.

8 MR. SMITH: -- at issue here.

9 MR. CAPOSSELA: Right. I would like to
10 proceed.

11 MR. SMITH: I'm going to sustain it mainly
12 because I'm having difficulty understanding what the
13 question is, frankly. He has it as a legal conclusion.
14 I don't know that I could understand it as being that,
15 but I couldn't understand quite what it was.

16 Q. I'll try to ask the question a different way that
17 would kind of make -- get the information that we're
18 trying to get and see if there's a point worth making.

19 Within the universe, however big or however small it
20 may be, the universe of issues warranting consideration
21 by the Public Utilities Commission in determining
22 compliance, continuing compliance with the Amended
23 Conditions, is the cultural resources surveys within that
24 universe?

25 MR. MOORE: I'll just object that the relevance

1 of that issue to the Commission is an issue for the
2 Commission to decide, not for Dr. Schmidt's opinion.

3 MR. SMITH: Sustained.

4 Q. Have you discussed in your testimony the cultural
5 resources surveys, Dr. Schmidt?

6 A. Those questions that were asked of them.

7 Q. And did you answer those questions?

8 A. Yes.

9 Q. Did you discuss -- was the Programmatic Agreement
10 discussed in the course of your testimony?

11 A. Generally, yes.

12 Q. And did you answer those questions with respect to
13 the Programmatic Agreement?

14 A. Yes.

15 MR. CAPOSSELA: Thank you.

16 I have no further questions on redirect,
17 Mr. Smith.

18 MR. SMITH: Any other questions in response to
19 Commissioner questions?

20 MR. CLARK: Yes, Mr. Smith. Just for a point of
21 clarification for if we want to submit recross questions,
22 we have to limit it to the scope of the Commissioners'
23 questions only?

24 MR. SMITH: Well, yeah. Because that's --
25 otherwise, you've already heard the direct testimony.

1 MR. CLARK: Okay. I only ask because --

2 MR. SMITH: I mean --

3 COMMISSIONER HANSON: The answer is yes.

4 MR. SMITH: The answer is yes.

5 MR. CLARK: If I could, I had two questions that
6 I wanted to ask based on cross-examination questions that
7 Standing Rock submitted, and if that's how you would like
8 to proceed, I would just like to note our objection
9 because we would have wanted to submit those two
10 questions.

11 MR. SMITH: Do the Commissioners have --

12 (Pause)

13 MR. SMITH: Mr. Clark, we want to keep it
14 narrow. We don't want to go around and around and
15 around. But if you have some things that are pointed
16 at -- that are narrow in scope and that related to things
17 that came about newly as a result of cross-examination,
18 please proceed with those limited --

19 MR. CLARK: Thank you, sir. I do appreciate
20 it.

21 RECROSS-EXAMINATION

22 BY MR. CLARK:

23 Q. I only have two questions, Mr. Schmidt -- sorry.
24 Dr. Schmidt.

25 You stated to Standing Rock Sioux Tribe that the

1 environmental review was completed in 2013?

2 A. Surveys continued up through 2013.

3 Q. Okay. And that would necessarily include the survey
4 regarding the Bridger Creek crossing; is that correct?

5 A. Correct.

6 MR. CLARK: No further questions.

7 MR. SMITH: I think we are concluded with
8 cross-examination of Mr. Schmidt.

9 MS. REAL BIRD: Mr. Smith, Thomasina Real Bird
10 for Yankton Sioux Tribe. We had a couple of questions,
11 about four questions in response to answers to questions
12 from DRA.

13 MR. SMITH: Okay. Proceed.

14 MS. REAL BIRD: Thank you.

15 RECROSS-EXAMINATION

16 BY MS. REAL BIRD:

17 Q. Dr. Schmidt, you stated that Department of State
18 spent a lot of time consulting with Tribes because you
19 saw e-mails that led you to that conclusion; is that
20 correct?

21 A. Yeah. There's a table at the back of -- I think
22 it's the Programatic Agreement that lists the dates of
23 those three categories of outreach.

24 Q. Just to clarify, you didn't mean that the
25 consultation was over e-mails?

1 A. No, no. That's just the communications. They just
2 showed how much they tried to communicate with people.

3 Q. Thank you for that clarification. Do you know how
4 the consultation with Tribes was performed?

5 A. No. You'd have to ask Department of State.

6 Q. So based upon your role as a regulatory and
7 permitting manager for the KXL Pipeline project, you do
8 not know?

9 A. I just know that the federal agencies lead under
10 106, and they're responsible for government-to-government
11 consultation. The Applicant can't do that so I have to
12 rely on their record to proceed.

13 Q. Based on their record that you would have observed
14 or reviewed, do you know how the consultations with
15 Tribes were performed?

16 A. I know they made an extended effort, far greater
17 than I've seen on a lot of projects that go through 106
18 review. But I don't have or have seen the administrative
19 record that has the meeting minutes or the phone
20 conversations. We don't get that information.

21 Q. And what's your conclusion that they made that sort
22 of effort based upon?

23 A. Based on the lists of meetings they had, the tables
24 of the outreach they had that showed who's consulting,
25 who's not, and the table that showed all the outreach

1 that they tried.

2 Q. So just because it was numerous in volume?

3 A. Well, a lot of federal agencies try once. They
4 tried multiple times.

5 Q. And do you know the detail of the tries or the
6 attempts?

7 A. That wasn't my responsibility.

8 Q. And as the regulatory and permitting manager what is
9 your definition of consultation when you said the
10 Department spent a lot of time consulting?

11 A. Getting input to the process either through
12 traditional cultural property surveys or reviews of the
13 106 documents.

14 Q. So could input be a phone call? Would that
15 include -- would it be included in your definition of
16 consultation?

17 A. It could be.

18 Q. What are the other ways that would count as
19 consultation in your mind?

20 A. Well, they had lists of meetings they held as well
21 as the e-mails, letters, things in writing, e-mailing
22 documents and phone conversations. So they kind of
23 documented in different categories.

24 Q. And would that include just one-way attempts, or
25 would it actually have to engage in a meaningful

1 discussion?

2 A. Well, they summarized any kind of discussions that
3 they had. And there were Tribes that agreed to do
4 traditional cultural property surveys so they had that
5 summary in there as well. So, yeah. You would have to
6 have some back and forth.

7 Most of that's probably in the administrative record
8 because I'm sure a lot of it's confidential. But just
9 looking at what they've done and compared to what I've
10 seen over 27 years, it was very extensive.

11 Q. If, for example, the Department reached out and sent
12 a letter addressed to someone at the Tribe and there was
13 no response, would that count as consultation under your
14 definition?

15 A. It would be a start, but they usually follow that up
16 as well. But, again, I don't have their records to know
17 what they did or, you know, what happened in a phone call
18 or what was sent in a letter.

19 Q. It's my understanding, though, that there was a
20 finite number that was counted as consultation. So if it
21 were a start, would that count?

22 Would that add to the tally mark of consultations?

23 MR. MOORE: I'll just object to the insufficient
24 foundation and relevance at this point, and asked and
25 answered to the extent of the witness's knowledge.

1 MR. SMITH: Yeah. Department of State
2 proceeding, that is not us.

3 Sustained. The objection is sustained.

4 MS. REAL BIRD: Sir, I'll just add for the
5 record that he testified earlier the Department of State
6 spent a lot of time consulting. And if you're going to
7 exclude this evidence, I'd like to make an offer of proof
8 for the record as to this line of questioning.

9 MR. SMITH: All right. Make your offer of
10 proof.

11 MS. REAL BIRD: Would you like me to ask the
12 questions, or how would you like me to make that?

13 MR. SMITH: I suppose you could. Or else just
14 make a brief statement about what it is you're attempting
15 to elicit here from the Department of State proceeding.

16 MS. REAL BIRD: What we attempted to elicit is
17 follow-up questions from this witness concerning his
18 statement that the Department of State spent a lot of
19 time consulting with Tribes because he saw e-mails that
20 led to that conclusion.

21 And my line of questioning was to flush out what
22 this witness considered consultation insofar as the
23 documents the Commission took public judicial notice of
24 contained that information. And I wanted to see from
25 this witness's perspective and his capacity as regulatory

1 and permitting manager what were counted as consultations
2 within his definition.

3 So I hope to elicit that, and I'd like that
4 offer of proof.

5 MR. SMITH: Okay. Thank you.

6 MS. REAL BIRD: No further questions.

7 MR. SMITH: Mr. Gough.

8 MR. GOUGH: Thank you.

9 RECROSS-EXAMINATION

10 BY MR. GOUGH:

11 Q. Dr. Schmidt, following up on Commissioner Nelson's
12 question on reclamation, the 100 percent reclamation,
13 it's your testimony this is confined to construction
14 reclamation --

15 A. That's correct.

16 Q. -- after construction?

17 Not for operation of the pipeline?

18 A. Well, it's the period after construction until
19 reclamation is successful. So if it's two years --

20 Q. Two to five years?

21 A. -- five years, whatever it is.

22 Q. But not for operation?

23 A. Not for 50.

24 MR. GOUGH: Thank you. No further questions.

25 MR. SMITH: Any additional follow-ons to the

1 Commissioner questions?

2 I don't see any, but I can't see.

3 Okay.

4 MR. HARTER: Mr. Smith, I just got one
5 lighthearted question.

6 RECROSS-EXAMINATION

7 BY MR. HARTER:

8 Q. The prairie orchid?

9 A. Western fringed prairie orchid.

10 Q. Yes. Do you know where I can get some seed for
11 that?

12 A. Nebraska.

13 MR. SMITH: Thank you, Mr. Harter.

14 With that, redirect?

15 MR. MOORE: I have no additional redirect for
16 Dr. Schmidt.

17 Thank you.

18 MR. SMITH: Okay. With that, you may step down.
19 TransCanada, please call your next witness.

20 MR. MOORE: Heidi Tillquist.

21 (The oath is administered by the court reporter.)

22 MR. MOORE: Mr. Smith, just a point of
23 clarification for the record. When we submitted the
24 amended -- sorry. I'll reserve that for later.

25 Thank you.

DIRECT EXAMINATION

BY MR. MOORE:

Q. Can you state your name and business address, please.

A. Heidi Tillquist. StanTec Consulting Services, Inc., Fort Collins, Colorado.

Q. Ms. Tillquist, have you testified before the Commission before?

A. Yes, I have.

Q. And have you submitted Prefiled Direct Testimony in this proceeding that was previously marked as Exhibit 2004?

A. Yes, I did.

Q. And do you have any corrections or changes to make to your Prefiled Direct Testimony?

A. I do not.

Q. Ms. Tillquist, have you had an opportunity to review the Conditions that are part of the Amended Final Decision and Order in this case?

A. Yes, I have.

Q. And have you, through that process, identified Conditions to which your testimony is responsive?

A. Yes, I have.

Q. And which are those?

A. 1, 2, 3, 34, 35, and 36.

1 Q. Based on your review of the Conditions and the
2 testimony that you have submitted as prefiled direct, are
3 you aware of any changes in facts or circumstances since
4 2010 that would mean that TransCanada cannot continue to
5 meet the Conditions as they are within the scope of your
6 testimony?

7 A. I am not.

8 Q. And if I asked you all of the questions that are in
9 your direct -- Prefiled Direct Testimony today, would the
10 answers be the same?

11 A. They would.

12 Q. And are you adopting that testimony under oath?

13 A. Yes, I am.

14 MR. MOORE: I would submit the witness for
15 cross-examination.

16 MR. MARTINEZ: Mr. Smith, I would like to ask a
17 few questions for the purposes of making an objection.

18 MR. SMITH: Please.

19 MR. MARTINEZ: Ms. Tillquist, do you have your
20 Direct Testimony in front of you that's been marked as an
21 exhibit?

22 THE WITNESS: Yes, I do.

23 MR. MARTINEZ: Can you take a look at the first
24 page.

25 Anywhere on the first page do you identify any

1 of the Amended Conditions?

2 THE WITNESS: No.

3 MR. MARTINEZ: Okay. Can you take a look at the
4 second page which encompasses questions 3 and 4, the same
5 question.

6 THE WITNESS: No.

7 MR. MARTINEZ: Do you identify any?

8 Okay. Page 3, which encompasses questions No. 5
9 through 7. Do you reference anywhere in here
10 specifically any of the Amended Conditions?

11 THE WITNESS: No, I do not.

12 MR. MARTINEZ: I would go ahead and move to
13 strike this witness's -- or this particular exhibit and
14 the witness's testimony.

15 MR. SMITH: Response.

16 MR. MOORE: I think we went through this same
17 issue this morning, Mr. Smith, with respect to
18 Dr. Schmidt.

19 There's nothing in the Commission's practice or
20 Orders that would require that we specifically identify
21 those Conditions. Since it became an issue during this
22 hearing, we have offered that out of courtesy to the
23 Intervenors.

24 MR. HARTER: Mr. Smith, John Harter. I didn't
25 feel that I had a courtesy when I didn't follow the

1 rules. I was suspended from giving testimony and direct
2 testimony in evidence. So I would join the motion to --
3 that -- to strike.

4 MR. SMITH: Well, this isn't a matter of
5 following the rules. We didn't issue any order
6 concerning this.

7 But I'm going to overrule the objection.

8 Now it hasn't been offered into evidence.

9 MR. MOORE: And I apologize, Mr. Smith. I would
10 offer it.

11 Thank you.

12 MR. SMITH: Objection. And you've already made
13 one.

14 Other objections.

15 MR. CAPOSSELA: Standing Rock Sioux Tribe joins
16 the objection. In quoting counsel for TransCanada
17 yesterday, "what's good for the goose is good for the
18 gander."

19 MR. RAPPOLD: Rosebud joins the objection.

20 MR. CLARK: Cheyenne River Sioux Tribe joins the
21 objection as well.

22 MS. REAL BIRD: Yankton Sioux Tribe joins the
23 objection.

24 MS. CRAVEN: Indigenous Environmental Network
25 also joins the objection.

1 MR. GOUGH: InterTribal Council On Utility
2 Policy, having lost our witnesses, even though we cited
3 Conditions they were to speak to, joins in the
4 objection.

5 MR. BLACKBURN: Bold Nebraska joins in the
6 objection and also requests that TransCanada, if it
7 responds, provide -- identify specifically which
8 Conditions it believes these are responsive to.

9 MR. SMITH: Okay. The objection is overruled.

10 MR. ELLISON: Point of clarification, Mr. Smith.

11 Therefore, I should not expect that any time I
12 want to ask a question on cross-examination of any
13 witness that I'm going to have to identify the Amended
14 Condition. Because it seems like now that's been
15 dropped.

16 Am I understanding that, or does the rule only
17 apply one way?

18 MR. SMITH: Well, I don't recall ever specifying
19 that --

20 MR. ELLISON: You did. Several times I was
21 asked what Amended Condition does my question apply to.

22 MR. SMITH: Right. When we got going and went
23 on and on and on, yes, I did start to do that. But in
24 terms of -- we've allowed a ton of questioning here where
25 no reason has been specified.

1 MR. ELLISON: I do understand that. But it
2 seems like the rules are like evolving up and down.

3 MR. SMITH: Yep. We're going to move on, and
4 we're going to start with cross-examination here.

5 First again is, pardon me, Ms. Zephier or
6 Mr. Clark.

7 MR. CLARK: Thank you, Mr. Smith.

8 CROSS-EXAMINATION

9 BY MR. CLARK:

10 Q. Good afternoon, Ms. Tillquist.

11 A. Good afternoon.

12 Q. You were tasked with Keystone -- you stated in your
13 direct testimony that you were tasked by Keystone to
14 evaluate human environmental risks posed by the proposed
15 pipeline; is that correct?

16 A. Correct.

17 Q. Okay. You also stated as part of your testimony
18 that you were aware of changes in the route to the
19 pipeline?

20 A. Correct.

21 Q. Okay. One such change being the Bridger Creek
22 crossing?

23 A. Correct.

24 Q. Okay. Are you aware that the Bridger Creek crossing
25 is immediately adjacent to the Cheyenne River Sioux

1 Reservation?

2 A. It's in proximity, yes.

3 Q. Okay. Are you aware that the Bridger Creek crossing
4 is upstream of the water intake for the Mni Waste Water
5 Company?

6 A. We've heard testimony to that.

7 Q. But you weren't -- before you heard testimony on
8 that you weren't aware that the water intake was near the
9 Bridger Creek crossing?

10 A. No, I was not.

11 Q. Okay. So that would mean necessarily that during
12 your risk assessment you did not take note of the
13 Mni Waste Water Company's position of the water intake;
14 is that correct?

15 A. Not -- no.

16 Q. During your risk assessment did you take note that
17 the Mni Waste Water Company is the sole provider of the
18 potable water on the Cheyenne River Sioux Reservation?

19 A. Yes. I believe so.

20 Q. Are you aware that the Mni Waste Water Company is a
21 tribally chartered entity of the Cheyenne River Sioux
22 Tribe?

23 A. I'm sorry. I'm going to back up again.

24 Q. No worries.

25 A. I'm sorry. Yes.

1 THE WITNESS: Can I back up? I made a mistake.
2 I apologize.

3 MR. SMITH: Go ahead.

4 A. I was incorrect in my statement. I was aware of the
5 intake location for the CRST intake on the Cheyenne
6 River.

7 Q. So you knew it was on the Cheyenne River, but did
8 you know that it was upstream of the proposed Bridger
9 Creek crossing?

10 A. Yes, I did.

11 Q. Okay.

12 A. No, no, no. The intake --

13 Q. I'm getting confused now. It's downstream.

14 A. Thank you.

15 Q. You were aware of that?

16 A. Yes.

17 Q. Okay.

18 A. I apologize.

19 Q. Not a problem.

20 You said that you can speak to Condition 34.

21 Condition 34 required Keystone to seek out and consider
22 local knowledge during the HCA review process; is that
23 correct?

24 A. That's correct.

25 Q. As part of your risk evaluation did you seek out and

1 consider the local knowledge of the Cheyenne River Sioux
2 Tribe?

3 A. The process of evaluating HCAs is ongoing. The 2009
4 risk assessment stands as it is. We are continuing to
5 evaluate HCAs, identifying them, coordinating with local
6 and state governments, and this is an ongoing process
7 that will be completed at least at the initial -- sorry.

8 The analysis will be completed -- one year it needs
9 to be completed -- in order to complete with federal
10 regulations has to be completed one year after
11 construction and operation begins.

12 So we are in the process of doing that. And then it
13 continues through the life of the project.

14 Q. So the HCA evaluation process has not been completed
15 at all so there are potentially more portions of the
16 pipeline other than the I think 19.9 miles that have been
17 identified? There are potentially more HCAs?

18 A. We have identified those that have been identified
19 through standard procedures. We are now expanding that
20 to include other avenues, such as identified through
21 South Dakota's Order as well as the FSEIS.

22 Q. So to simplify that, no, the HCA evaluation process
23 is not complete, and there are potentially more HCAs
24 other than the 19 however many miles that you listed in
25 the Tracking Table of Changes?

1 A. The process will be continuing and ongoing
2 throughout the life of the project. Is there a
3 possibility of additional HCAs? There are -- there is
4 that possibility.

5 And it's more of the pipeline segments that could
6 affect those HCAs. There's a smaller chance that those
7 new areas would be identified because they're often tied
8 to major rivers.

9 Q. Okay. Thank you.

10 Getting back to my original question -- and I
11 appreciate the description that you gave, but I did ask
12 whether you had sought out and considered the local
13 knowledge of the Cheyenne River Sioux Tribe during the
14 HCA review process.

15 Have you sought out that information?

16 A. The information regarding the downstream location of
17 the Cheyenne River Sioux Tribe's water intake is on the
18 website, and it's talked about. And using maps that I
19 have, I can correlate the two areas. And I have
20 discussed that with local officials.

21 Q. Okay. But local officials.

22 A. Not the Sioux Tribe itself.

23 Q. Not the -- so you have not sought out specifically
24 the local knowledge of the Cheyenne River Sioux Tribe
25 itself?

1 A. Correct.

2 Q. Okay. As part of your risk evaluation did you seek
3 out and consider the local knowledge of the Mni Waste
4 Water Company?

5 A. I did not.

6 Q. And I'm sorry. I meant to ask this before the water
7 company question. But did you seek out and consider the
8 local knowledge of the Cheyenne River Environmental
9 Resources Department?

10 A. No, I have not.

11 Q. To the best of your knowledge, has anyone else at
12 Stantec Consulting Service sought out and considered
13 knowledge from the Cheyenne River Sioux Tribe?

14 A. To the best of my knowledge, no.

15 Q. To the best of your knowledge, has anyone at
16 Keystone or any of its agents sought out and considered
17 such local knowledge of the Cheyenne River Sioux Tribe?

18 A. To the best of my knowledge, no.

19 Q. To the best of your knowledge, have you or anyone
20 else at Stantec Consulting notified the Cheyenne River
21 Sioux Tribe of the Bridger Creek crossing?

22 A. I would not be responsible for notifying anyone
23 about the Bridger Creek crossing.

24 Q. Okay. And to the best of your knowledge, has anyone
25 at Keystone notified the Cheyenne River Sioux Tribe of

1 the newly proposed Bridger Creek crossing?

2 A. That is out of my realm of knowledge.

3 Q. In your professional opinion as a spill and risk
4 assessor, in the event of a significant spill or accident
5 at Bridger Creek would that affect the Cheyenne River
6 Sioux Tribe?

7 A. If you're -- are you asking if it would affect their
8 intake?

9 Q. Yes.

10 A. In my professional opinion, no.

11 Q. So in your professional opinion, there's no
12 possibility whatsoever that a spill at the Bridger Creek
13 crossing could travel downstream to the water intake?
14 There's no possibility at all?

15 A. Based on my experience, based on all my education,
16 based on case studies, based on the fact that the
17 crossing is HDD'd, and a number of factors, I believe
18 that that is not within the realm of possibilities.

19 Q. Do you know how far downstream the water intake is
20 from the Bridger Creek crossing off the top of your
21 head?

22 A. From the Bridger Creek crossing it is 76 miles.

23 Q. 76 miles? And so let me make sure I'm understanding
24 you correctly.

25 It's your professional opinion that any oil spill

1 could not travel 76 miles from that point of origin to
2 the water intake?

3 A. It is my opinion that a spill at the Bridger Creek
4 crossing could not reach the intake and exceed the water
5 quality criteria.

6 Q. As part of your risk assessment did you submit any
7 kind of contact information with the Cheyenne River Sioux
8 Emergency Services?

9 A. No.

10 Q. As part of -- I'm sorry. I didn't mean to cut you
11 off.

12 A. That's all right. Go ahead.

13 Q. As part of your risk assessment did you factor in,
14 in any way, the emergency services of the Cheyenne River
15 Sioux Tribe?

16 A. No. My job is to relay the information from my risk
17 assessment to TransCanada's emergency response group.

18 Q. In your professional opinion, if a spill were to
19 occur at the Bridger Creek crossing, do you think that
20 that would necessitate the response of the Cheyenne River
21 Sioux Tribe or that the Cheyenne River Sioux Tribe's
22 emergency services would take part in such a response?

23 A. I believe that the -- the fact that the spill may
24 enter the tribal land would -- may elicit a need for --
25 an interest for the Tribe to have some responders there.

1 Q. Okay. And to highlight -- I'm sorry.

2 To clarify, did you just say that there was a
3 possibility that spilled oil may enter the Cheyenne River
4 Sioux Tribe's land?

5 A. Yes, I did.

6 Q. But necessarily implied an if, it's possible that it
7 could?

8 A. I would say it would be highly improbable.

9 Q. Improbable -- improbable is not impossible; correct?

10 A. That is correct.

11 MR. CLARK: No further questions for this
12 witness.

13 MR. SMITH: Thank you.

14 Mr. Rappold.

15 CROSS-EXAMINATION

16 BY MR. RAPPOLD:

17 Q. Good afternoon, Ms. Tillquist. Could you state
18 again what Conditions your testimony applies to?

19 A. 1, 2, 3, 34, 35, 36.

20 Q. Thank you.

21 In your direct testimony you indicate that you are
22 partially responsible for the information contained in
23 Appendix C; is that correct?

24 A. The Tracking Table?

25 Q. Yes. That would be the Tracking Table of Changes.

1 A. Yes, sir.

2 Q. And you specifically reference that you are directly
3 responsible for Finding No. 15 and the information it
4 contains? Finding 50. I'm sorry.

5 A. I believe I said that the information that's in 50,
6 I altered that to reflect the information that's changed.

7 Q. So in your testimony page 2, No. 4, it says with
8 respect to Finding No. 50, "The minor route changes have
9 caused slight changes resulting in the reduced
10 probability of a spill occurring in high consequence
11 areas. As a result, the statement that a spill that
12 could affect an HCA would occur no more than once in
13 every 250 years would now be altered to no more than once
14 in 460 years based on the 15.8 miles of HCAs crossed in
15 South Dakota"?

16 A. That is correct.

17 Q. Do you have Exhibit Appendix C in front of you?

18 A. I do not.

19 MR. RAPPOLD: Is it possible to bring Appendix C
20 up on the overhead projector?

21 MR. SMITH: Tina, is that doable? Katlyn? It's
22 an exhibit to the Application. Or the Petition.

23 MR. RAPPOLD: Is the exhibit on the overhead up
24 to the section that identifies No. 50? I can't tell from
25 where I'm sitting. It's kind of hard to read because

1 it's so small.

2 MR. SMITH: Can you blow it up with the crank
3 over on the projector?

4 MR. RAPPOLD: I've got a paper copy, if that
5 would be helpful to hand the witness.

6 MS. GUSTAFSON: Paper copy we can put on here.

7 MR. SMITH: Maybe why don't you do that, Matt.

8 Q. On the exhibit that's Appendix C up on the overhead
9 projector on what will be the left-hand side immediately
10 to the right of Finding No. 50.

11 Under Amended Final Decision and Order can you read
12 what that says?

13 A. "The total length of the project pipe within the
14 potential to effect a high consequence area 'HCA' is
15 34.3 miles. A spill that could affect an HCA would occur
16 no more than once every 250 years." And then it provides
17 a reference.

18 Q. Okay. Thank you. Can you see the updated
19 information?

20 A. I can see most of it. It cuts off at high
21 consequence.

22 Q. There. And now can you read the update to No. 50?

23 A. "The total length of the project pipe with the
24 potential to affect a high consequence area 'HCA' is
25 19.9 miles. A spill that could affect an HCA would occur

1 no more than once in 250 years."

2 Q. And someone testified earlier that there was a
3 typographical error in this portion of it?

4 A. That is correct.

5 Q. And what would that be attributed to? I mean, which
6 number would that apply to?

7 A. So the 19.9 miles should have been 15.8. And -- I'm
8 sorry. And the -- let me double-check my numbers.

9 Q. Your testimony conflicts with that. Your direct
10 testimony that you submitted would have no changes
11 conflicts with that; is that correct?

12 A. It conflicts with what's in this table, yes.

13 Q. Yes. So your direct testimony says that a spill
14 would occur once in no more than 460 years?

15 A. That is correct.

16 Q. So which is the accurate information?

17 A. The accurate information is 15.8 miles, no more than
18 once in 460 years.

19 Q. And that again could change subject to additional
20 high consequence areas being identified?

21 A. Yes. This is based on the standard high consequence
22 areas that are typically identified. As we identify more
23 based on the Order and the FSEIS, we may alter that
24 number.

25 Q. Yes. So the information contained in the Appendix C

1 for Finding 50 is not accurate then; correct?

2 A. It is correct in my testimony.

3 Q. That wasn't my question.

4 My question was related to the accuracy of the
5 information contained in Finding 50 update Appendix C
6 Tracking Table of Changes. And I questioned that's not
7 accurate; correct?

8 A. That is not accurate. We have provided the correct
9 information.

10 Q. Okay. Are you aware that the Rosebud Sioux Tribe
11 operates a portion of the Mni Wiconi Water System?

12 A. No, I'm not.

13 Q. I'm sorry. You said you're not aware of that?

14 A. I am not.

15 Q. Are you aware that the Rosebud Sioux Tribe is
16 involved in providing water to the Tripp County Water
17 Users Association?

18 A. I believe I am.

19 Q. And you believe you are, or you are certain?
20 Because you just testified --

21 A. No. I'm not certain.

22 Q. You just testified you didn't know that Rosebud
23 operated a portion of the Mni Wiconi Water System.

24 A. Yes. You're right.

25 Q. Okay. So are you aware that Rosebud Sioux Tribe

1 provides water through the Mni Wiconi Water System for
2 the Tripp County Water Users Association?

3 You're not aware of that, are you?

4 A. That I actually -- I did read that, yes.

5 Q. But you just testified that you weren't aware of it.
6 When did you read it?

7 A. I'm sorry. Your first question led me down a
8 different road. Could you repeat your first question.

9 Q. First question from when I started?

10 A. That Rosebud operated --

11 Q. Yes. I asked if you had knowledge of whether or
12 not the Rosebud Sioux Tribe operates a portion of the
13 Mni Wiconi Water System, and your answer was that you
14 were not aware.

15 A. Yes. That's correct. And then the whether they are
16 using part --

17 Q. Then I asked you if you knew whether or not the
18 Rosebud Sioux Tribe through the operation of their water
19 system provided water to the Tripp County Water Users
20 Association, and you said you were aware of that.

21 A. I am aware that that's what the water is used for,
22 as opposed to who operates it.

23 Q. Some of the water is used for that? Which portion
24 of the water?

25 A. I believe the water is used for that.

1 Q. Are you making a distinction between water from the
2 Missouri River or from the Ogallala Aquifer?

3 A. I believe we're talking about the water that was in
4 the rural water system.

5 Q. Are you aware of the primary source of that water?

6 A. It comes -- I believe it comes from the Missouri
7 River.

8 Q. For the Tripp County Water Users Association?

9 A. I believe so.

10 Q. Can you state what type of contact occurred between
11 yourself and anyone from the Rosebud Sioux Tribe's water
12 system?

13 A. There has been no contact, to my knowledge.

14 Q. Would your knowledge include any contact from anyone
15 on the part of Keystone and their agents?

16 A. I'm not aware of any.

17 Q. Then it would be impossible for you to conduct your
18 risk assessment and impact with local knowledge from the
19 Rosebud Sioux Tribe and their water system if there's
20 been no contact?

21 A. No. Not necessarily.

22 Q. Well, I'm not speaking into the future. I'm
23 speaking as of right now. If there's been no contact,
24 how could the local knowledge of the water system be
25 taken into account in your risk impact assessments?

1 A. We have some information on -- I can't remember what
2 is provided, but state and federal regulators. Without
3 divulging issues of confidentiality, they may -- I'm
4 treading on thin ice as far as confidentiality.

5 I conducted the analysis based upon the high
6 consequence areas that have been provided and requested.

7 Q. And who provides and requests those?

8 A. So the PHMSA high consequence areas are provided by
9 PHMSA through Keystone, and then exp provided that
10 information to us.

11 The other data have been acquired through other
12 sources, including contacts with South Dakota State
13 agencies.

14 Q. So you're aware then that southern Tripp County
15 consists of the Tripp County Water Users Association?

16 Are you aware of that?

17 A. I'm aware that the Tripp County Water Users
18 Association is located down there.

19 Q. And in your analysis you didn't come across anything
20 that -- anything that pointed you in the direction that
21 someone else was providing their water?

22 A. The information that's provided by the federal and
23 state agencies does not identify specific users when they
24 identify the location of the intakes.

25 Q. I wasn't asking about a specific user. I was asking

1 about a specific source or provider.

2 The water users district would be the user. The
3 Rosebud Sioux Tribe would be the provider. You didn't
4 encounter any of that sort of information?

5 A. No.

6 Q. If there were other HCAs identified as part of the
7 nonstandard procedures throughout the course of the
8 project, how would those locations be described or
9 communicated to the Rosebud Sioux Tribe?

10 A. High consequence areas are held confidential so
11 there would not be any communication regarding their
12 location.

13 Q. So the owner and operator of a water system would
14 have no right to know if a high consequence area was
15 determined to be in close proximity to their water
16 system.

17 Is that what you're saying?

18 A. No. I'm saying I don't have the ability to do that,
19 nor does Keystone. PHMSA controls the data, and due to
20 Homeland Security they are the ones that would likely be
21 the ones that you would have to discuss that with.

22 Q. So we'd have to go to Homeland Security to find out
23 where the high consequence areas are? Is that what
24 you're saying?

25 A. No, sir. PHMSA.

1 Q. Oh, okay. Has there been any contact with the
2 Rosebud Sioux Tribe Environmental Protection Department?

3 A. Not that I'm aware of.

4 Q. Do you know how close in proximity -- strike that.

5 In your review of the materials that form the basis
6 for your opinions, did you look at a town called Ideal?

7 A. The name does not strike my memory. I'd have to
8 look on a map.

9 Q. Is there a particular map that would help you
10 refresh your memory?

11 A. If you're asking -- what I'm looking at the data --
12 if you show me a state map and showed me where it was,
13 that would be helpful to understand where you're talking
14 about.

15 Q. It's a community located in Tripp County.

16 A. Okay.

17 Q. It's within the jurisdiction of the Rosebud Sioux
18 Tribe.

19 A. Okay.

20 Q. And you have no recollection of that town?

21 A. I do not.

22 Q. Okay. Is it fair to say then that because there's
23 no recollection of that town existing that there's no
24 communication with that town concerning environmental
25 protection as it relates to the pipeline going in that

1 area and a possibility of a spill and responding?

2 MR. MOORE: I just want to ask for clarification
3 of the question. I'm not clear who we're talking about
4 the communication between.

5 Is it between Ms. Tillquist and the Rosebud
6 Sioux Tribe or TransCanada and the Sioux Tribe?

7 I would object to it to the extent that it's
8 beyond her personal knowledge or communication.

9 MR. RAPPOLD: I would ask first -- I guess it's
10 a compound question. Does the witness have any personal
11 knowledge?

12 MR. SMITH: Ms. Tillquist, can you answer that?

13 A. I do not have personal knowledge.

14 Q. And based on the information that you've reviewed,
15 do you have knowledge of any -- any of Keystone's agents
16 making such contact?

17 A. I do not.

18 Q. The second to the last question, No. 6, "Are you
19 aware of any reason that Keystone cannot continue to meet
20 the Conditions on which the Permit was granted by the
21 Commission?" And your answer is "No. I have reviewed
22 the Conditions contained in the Amended Final Decision
23 and Order. With respect to risk assessment and
24 environmental toxicology, the changes discussed in the
25 Tracking Table do not affect Keystone's ability to meet

1 the Conditions on which the Permit was granted."

2 Is it your testimony then that your answer is based
3 on strictly those Conditions and nothing else?

4 A. I believe the answer is yes.

5 Q. And you provided testimony in the 2009 docket;
6 correct?

7 A. Yes, sir.

8 Q. And what's your understanding of Keystone's ability
9 to comply with the original Presidential Permit request
10 for the initial Keystone project?

11 A. Can you repeat the question, please.

12 MR. RAPPOLD: Could you repeat the question.

13 MR. MOORE: Well, I'll object to foundation. It
14 seems overbroad with respect to this witness.

15 MR. SMITH: Can you narrow it down? Sustained.

16 MR. RAPPOLD: Well, the witness testified in the
17 original proceeding so she's indicated -- do you want me
18 to proceed with questioning the witness on it or argue
19 why it should be overruled?

20 MR. SMITH: Well, I'm going to sustain it, and
21 just maybe you could break it down into some steps.

22 Would that be doable?

23 Q. You were involved in the original testimony here at
24 the Public Utilities Commission for the Permit that
25 Keystone currently has, HP09-001; correct?

1 A. Yes.

2 Q. Okay. And during that proceeding -- not during that
3 proceeding, but in connection with that Permit
4 Application you're aware that Keystone applied for a
5 Presidential Permit; correct?

6 A. Yes.

7 Q. And is it your understanding that that Permit was
8 denied?

9 A. On the original Keystone line?

10 Q. Yeah.

11 A. The base Keystone?

12 Q. The project that is referred to and described in the
13 Application.

14 MR. SMITH: I think he's referencing
15 Keystone XL.

16 A. Yes. I am aware that it was denied for KXL,
17 Keystone XL.

18 Q. Yes. And it's your understanding that a new Permit
19 Application was applied for?

20 A. Yes, sir.

21 Q. And that was based on a different project; correct?

22 MR. MOORE: I'll object to the form. It's
23 argumentative.

24 MR. RAPPOLD: I'll rephrase.

25 MR. SMITH: Thank you.

1 Q. Was the new Application based on a same or different
2 project?

3 A. The project that is applied for is substantially the
4 same as the original.

5 Q. So that means it's a different project; correct?

6 MR. MOORE: Well, I'll object to that as
7 argument.

8 MR. SMITH: Sustained.

9 Q. Is it your understanding that if the current
10 Presidential Permit is approved, it would apply to
11 construction in South Dakota?

12 MR. MOORE: I'll just object. This is beyond
13 the scope of the witness's direct.

14 MR. SMITH: Sustained.

15 MR. RAPPOLD: I don't believe it's beyond.

16 MR. SMITH: Which part of her testimony are you
17 looking at?

18 MR. RAPPOLD: Well, it goes to all of her
19 testimony. I mean, she's stated that she's testifying
20 concerning Keystone's ability to demonstrate compliance
21 with the Conditions of the Permit.

22 MR. SMITH: It says with respect to risk
23 assessment and environmental toxicology.

24 MR. RAPPOLD: Certainly. And that's part of the
25 overall compliance with the project. You can't just

1 limit it to one specific area. And we do have the right
2 to participate and conduct cross-examinations for full
3 and true disclosure of the facts.

4 MR. SMITH: Okay. Well, her opinion was
5 based -- was limited to those issues, though.

6 MR. RAPPOLD: And those issues are still
7 connected to the overall ability to comply with the
8 Presidential Permit and not beyond the scope of her
9 direct.

10 MR. SMITH: Correct. But she doesn't have --
11 she didn't express an opinion about a multitude of other
12 things that are involved in that.

13 MR. RAPPOLD: Right. But my question was simply
14 whether or not the current Presidential Permit would
15 apply to this docket.

16 MR. MOORE: Well, again, I'll object that that's
17 an issue beyond this witness's scope, and it's really
18 ultimately an issue for the Commission.

19 MR. SMITH: Yeah. I'm going to sustain because
20 to me that's a -- that's a legal issue.

21 MR. RAPPOLD: If it's a question for the
22 Commission to decide, then we have the right to present
23 evidence on that. I don't think it's a legal conclusion
24 but --

25 She's been able to testify as to whether or not

1 other Conditions apply and whether or not they have
2 demonstrated the ability to comply with those Conditions
3 without reaching a legal conclusion. I don't see how
4 this is any different.

5 MR. SMITH: Well, yeah. I've sustained it so
6 maybe you can get at it from a different angle where it's
7 not asking for her to decide the ultimate legal issue in
8 the case.

9 MR. RAPPOLD: Witnesses are permitted to form an
10 opinion on the ultimate issue even if it is something
11 that will ultimately be decided by the Commission.

12 Q. So would you agree that -- what Permit Conditions --
13 strike that.

14 Which Conditions would apply from the Presidential
15 Permit?

16 MR. MOORE: I object to the form of the
17 question. I don't understand it.

18 MR. SMITH: Sustained. Let me ask you this,
19 Mr. Rappold. When you say Presidential Permit are you
20 referencing the original?

21 MR. RAPPOLD: The original in 2012. I'll go on.

22 Q. Can you explore the differences in the Permit
23 applications that you're aware of?

24 MR. MOORE: Object. It's beyond the scope of
25 this witness's testimony.

1 MR. RAPPOLD: Again, we have the right to
2 conduct cross-examination for a full and true disclosure
3 of the facts, and the witness has indicated that she has
4 knowledge of both Presidential Permit Applications and
5 that she's testifying concerning Keystone's ability to
6 meet the Conditions that exist here. And her testimony
7 is relevant and not beyond the scope.

8 MR. SMITH: With respect to risk assessment and
9 environmental toxicology.

10 MR. RAPPOLD: Yeah. The differences in the
11 Permit Application.

12 MR. SMITH: Overruled.

13 Q. So can you tell us some of the differences between
14 the 2012 Permit Application for the Presidential Permit
15 and the original one which is denied?

16 A. The differences that I've identified are in question
17 No. 4, and it talks about the differences in the tracking
18 changes for those that are responsible with respect to
19 risk assessment and environmental toxicology.

20 Q. So is the only differences in the Permit
21 applications you're aware of are the ones that are in
22 answer No. 4?

23 A. Those are the ones that I have the ability to speak
24 to as an expert.

25 Q. Okay.

1 MR. RAPPOLD: I have no further questions.

2 MR. SMITH: Thank you.

3 (Discussion off the record)

4 We're at right about 10 to. We'll take a break
5 until about 5 after 3:00.

6 (A short recess is taken)

7 MR. SMITH: We'll call the hearing back to order
8 in HP14-001 after a brief recess.

9 Mr. Capossela, cross-examination of
10 Ms. Tillquist.

11 CROSS-EXAMINATION

12 BY MR. CAPOSSELA:

13 Q. Ms. Tillquist, there's a measure to measure the
14 volume of water; cubic feet per second, CFS.

15 Are you familiar with that?

16 A. Yes, sir.

17 Q. So if I use that, you'll know what I'm talking about
18 in the course of the questions?

19 A. Yes, sir.

20 Q. I'm going to make a -- play true/false real quick.
21 I'm going to make a statement and ask you if you would
22 agree or disagree with this statement.

23 Native Americans may have risk factors different
24 than non-Natives with respect to the health effects of
25 some organic or inorganic substances.

1 Would you agree or disagree with that?

2 A. I do not have any information that would confirm or
3 deny that.

4 Q. We've been in many meetings in which there's jokes
5 about smallpox, but there's no reason to go there this
6 afternoon.

7 In the risk assessment, have you -- there has been
8 some question of you with respect to the consultation
9 with tribal programs, Cheyenne River or other
10 reservations.

11 Have there been any -- have you consulted or to your
12 knowledge has anyone from TransCanada involved with the
13 risk assessment process consulted with toxicologists of
14 the Indian Health Service on risk assessments for native
15 people in South Dakota?

16 A. Not to the best of my knowledge.

17 Q. Are you familiar with the requirements of the Safe
18 Drinking Water Act?

19 A. Broadly.

20 Q. Do you know, is there a maximum contaminant level
21 for mercury? Do you know whether there is?

22 A. I believe there is.

23 Q. Do you know what it is?

24 A. I couldn't tell you offhand.

25 Q. Do you know, is there a maximum contaminant level in

1 the EPA regulations for selenium?

2 A. I would go and reference the internet and pull up
3 websites to make that determination.

4 Q. Do you know, is there an MCL for benzene?

5 A. Yes, sir.

6 Q. Do you know what that MCL is?

7 A. 5 parts per billion.

8 Q. Have you estimated the -- you've done some analysis
9 of the probability of spills from Keystone XL in
10 South Dakota; correct?

11 A. That is correct.

12 Q. Is estimating the probability of a spill for each
13 mile of pipeline an -- in South Dakota an accurate way to
14 assess the risk throughout South Dakota?

15 A. You're talking the entirety of South Dakota?

16 Q. Correct.

17 A. If I'm looking at the -- evaluating the effects of
18 the -- sorry. The effects of a pipeline release on
19 South Dakota --

20 I'm sorry. Repeat the question.

21 Q. Is estimating the probability of a release of oil
22 from any one mile of a pipeline in South Dakota an
23 accurate methodology to assess the risk throughout
24 South Dakota?

25 A. It is a start.

1 Q. Would you explain how historic spill data was
2 considered in your estimates of spill frequency for
3 Keystone XL in South Dakota?

4 A. So historical incident frequencies were used to
5 estimate the probability of a spill from the Keystone XL
6 Pipeline.

7 Q. Within the historical spill data, what
8 percentages -- what percentage of spills was categorized
9 as resulting from "other causes" in the risk assessment?

10 A. I would have to pull up the risk assessment and see
11 if that information's in the risk assessment. I don't
12 recall the exact percentage offhand.

13 Q. Were spills from "other causes" considered at all in
14 the -- within the data set of historical spills that were
15 utilized?

16 A. The incident frequency was generated from all the
17 database, which included the other category.

18 Q. Is there an Emergency Response Plan for Keystone XL?

19 A. Is there an Emergency Response Plan?

20 MR. MOORE: Excuse me. I'll object to -- that's
21 beyond the scope of this witness.

22 MR. SMITH: Would you repeat the question,
23 please.

24 Q. Is there an Emergency Response Plan for Keystone XL?

25 MR. SMITH: I'm going to overrule the objection.

1 THE WITNESS: So do I have to answer?

2 MR. SMITH: If you know.

3 A. I believe the Emergency Response Plan is in
4 development. It would not be completed at this time.

5 Q. And what phase of development?

6 A. I do not have personal knowledge of that. I have
7 talked to the emergency response planning team and
8 continually provide updates on the information that I
9 have.

10 Q. So as the toxicologist responsible for evaluating
11 the risk to public health in South Dakota, am I
12 understanding it correctly, you are not a participant on
13 the emergency response team?

14 A. They have their own group of people that are on
15 their emergency response planning and development team.

16 Q. And as a consultant you're not on the team; is that
17 correct?

18 A. That is correct.

19 Q. Are you familiar with the Emergency Response Plan
20 for Keystone Pipeline?

21 A. I have -- no. I know that it exists. I do not have
22 personal -- I've seen it one time. I was not allowed to
23 review it.

24 Q. I'm sorry. Would you please repeat your answer to
25 that question?

1 A. I have seen the document, but it was not in my
2 purview to review it.

3 Q. What does that mean?

4 A. It is their document, and it was not something I
5 reviewed.

6 Q. Are you able to identify the members of
7 TransCanada's spill response team?

8 A. I worked with several individuals, including
9 Nickie Afflack [phonetic], Jeff Mackenzie. Historically
10 John Hayes and Brian Thomas has provided input, I
11 believe, historically.

12 Q. And are these folks -- are they in Calgary? Are
13 they in Houston? Do you know where they're based?

14 A. I believe -- well, Nickie is in Calgary. John and
15 Brian have left or retired. Jeff Mackenzie, I believe
16 he's in the U.S., but I'm not sure. There's also a group
17 in South Dakota that I've interacted with.

18 Q. And who --

19 A. I'm sorry. Not South Dakota. In Omaha, Nebraska.
20 I'm sorry.

21 Q. How are spills detected?

22 A. I can talk at a very high level about that. As far
23 as the details, I believe that would be best left to
24 TransCanada's engineers.

25 Q. Who would be the best person, per your

1 understanding, to -- with TransCanada or a consultant of
2 TransCanada with whom to discuss the details of emergency
3 response planning for South Dakota?

4 A. I don't know.

5 Q. Your employer is Stantec? Is that how it's
6 pronounced?

7 A. That is correct.

8 Q. In assessing the risk to the resources and public
9 health in South Dakota, what consideration was conferred
10 upon the release of Enbridge 6B Pipeline in the
11 Kalamazoo River?

12 A. Can you repeat the question, please.

13 Q. In assessing the risk to the environment and public
14 health in South Dakota, what consideration was given to
15 the release of oil from the 6B Pipeline in the Kalamazoo
16 River in Michigan?

17 A. So the information from the Kalamazoo River provided
18 some information on fate and effects of oil released,
19 heavy oil released into a river, and those lessons
20 learned were communicated with TransCanada and
21 incorporated as far as some discussions within -- I'm
22 trying to think if the -- I'm not sure if it was in the
23 2009 risk assessment, but it is certainly something that
24 we are continuing to evaluate in our risk assessments as
25 we continue on.

1 Q. But it's not included in the risk assessment that's
2 being utilized currently?

3 A. If you would like, I would look through the 2009
4 risk assessment.

5 Q. I would.

6 THE WITNESS: Please, may I have a copy. The
7 2009 Risk Assessment.

8 MR. CREMER: Mr. Capossela, were you going to
9 provide that to her?

10 MR. CAPOSSELA: I would ask TransCanada --

11 Q. You don't have it? It's your document.

12 A. Not in front of me.

13 Q. Do you have it here with you today?

14 A. It would be in electronic form.

15 Q. May we put it up on -- may we --

16 A. I'd rather see a written document, sir. Or a
17 printed copy. Thank you.

18 Q. Without reading it, you're not able to -- I mean,
19 did you write it?

20 A. Yes, sir. Well, and I oversaw it. I'm just trying
21 to recollect the time lines of all of these events, sir.

22 MR. MOORE: Mr. Smith, I believe that the Risk
23 Assessment is an appendix to the FSEIS, and there is a
24 paper copy of the FSEIS near Mr. Capossela.

25 MR. CAPOSSELA: We're on it right now. We're

1 trying to pull it.

2 Q. Would you rather us -- and I don't want to confuse
3 you and go someplace else, but I can do that.

4 Would you rather sit tight and check it out?

5 A. I'd rather wait.

6 Q. Okay. Let's do that. You bet. I would too. But
7 as one of the attorneys, I'm always interested in moving
8 things along as best we can.

9 A. I understand.

10 Q. But let's hold off for a minute and see if we can
11 pull that document, and I'd like for you to thumb through
12 it and refresh your memory.

13 MR. CAPOSSELA: Thank you, Mr. Smith and
14 Mr. Chairman, for indulging us on this.

15 MR. SMITH: Uh-huh.

16 A. Sir, I think I can assist -- I believe the Kalamazoo
17 River spill was in 2010. Is that correct?

18 Q. I am not in a position to --

19 A. I believe it is. And the Risk Assessment was
20 published in 2009.

21 Q. So there's been nothing with respect to risk
22 assessment since 2009?

23 A. No. I wouldn't say that. We are continually
24 ongoing evaluating events. And, as we've discussed, the
25 FSEIS contains Conditions that require us to continually

1 evaluate the risk of the pipeline.

2 Q. Do you know the answer to this question, and if so,
3 I'd appreciate your response.

4 Do you know what the Facility Response Plan for
5 6B -- how long that plan estimated the detection time for
6 a spill from 6B? Do you know that?

7 A. For Enbridge?

8 Q. For Enbridge.

9 A. I do not know Enbridge's procedures and what their
10 detection time was. I can only speak to the KXL.

11 Q. It was -- the detection time was five minutes, and
12 the shutdown time was eight minutes.

13 Do you know how long it took them to shut down once
14 the leak started for 6B?

15 MR. MOORE: I'd just object to relevance and
16 foundation.

17 MR. SMITH: Sustained.

18 MR. CAPOSSELA: I have no further questions for
19 Ms. Tillquist.

20 Thank you.

21 MR. SMITH: Did you want to -- did you find the
22 document they were looking for, Mr. Ellison?

23 MR. ELLISON: The problem here, Mr. Smith, is it
24 says it should be here. It's Appendix P to the FSEIS.
25 And you go to Appendix P and it's like one page and

1 there's nothing on it. That's why I know I'm having a
2 hard time finding it.

3 But I do have another paper copy. It's just
4 that two pages have been pulled from it so I was trying
5 to find a complete copy.

6 MR. CAPOSSELA: I had assumed that because she
7 wrote it that she would be able to respond to the
8 question.

9 MR. SMITH: Okay.

10 MR. CAPOSSELA: And that's my fault. That's an
11 assumption that I made that has proven incorrect. So I
12 have no further questions.

13 MR. SMITH: Do you want to proceed then?

14 MR. ELLISON: Apparently it's on the State
15 Department website, which is available. We have one
16 computer link up to it, if that would help the witness.

17 MR. MOORE: Mr. Smith, I believe that
18 Mr. Capossela concluded his examination.

19 MR. SMITH: Well, he did based on an assumption
20 that we couldn't find the document.

21 MR. CAPOSSELA: Yeah. I would think that were
22 we to be able to find it and it were to be helpful, that
23 I could continue.

24 And I would appreciate the opportunity if you
25 don't mind. And give Ms. Tillquist a moment to review it

1 and see if she can answer the question.

2 MR. MOORE: I'm sorry. What is the question?

3 MR. SMITH: Cheri, do you want to try to locate
4 the question.

5 MR. CAPOSSELA: I'll rephrase the question.

6 Q. What consideration was conferred upon oil releases
7 from prior -- prior oil releases from pipelines of tar
8 sands crude?

9 A. That's a very different question, sir. So you asked
10 about the Kalamazoo.

11 Q. That's correct. And I've rephrased it.

12 A. So regarding the Kalamazoo, the Kalamazoo River
13 spill occurred in 2010. Which I had answered before.

14 Q. Right. And I've rephrased it and have asked for you
15 to look at the document and explain to the Commission
16 what other releases of oil, of tar sands crude, from
17 other pipelines were used -- were utilized and considered
18 in the preparation of the Risk Assessment for Keystone
19 XL. Okay?

20 A. Okay. So with regard to that, I can't answer that.

21 Q. So you don't know?

22 A. Sorry. Because you were specifically talking about
23 Kalamazoo.

24 Q. Correct. I apologize.

25 A. So with regards to spills from other pipelines, we

1 evaluated a number of spills, looked at case studies, and
2 how oil reacts within the environment. And that
3 information is provided in the Risk Assessment.

4 Q. What spills?

5 A. What spills? We've looked at a number of case
6 studies that have to do with heavy crude oils. There was
7 a tanker. There have been -- in the PHMSA database there
8 are studies that -- sorry. Not studies.

9 There are incidents that have occurred on a number
10 of different pipelines, but there is not a specific
11 case --

12 Well, there is the -- I can't think of the tanker
13 that it occurred. It was a heavy crude that had similar
14 properties as far as the Kalamazoo spill.

15 Q. Perhaps it would be helpful to have you review your
16 document and see if you can give a more complete answer.

17 MR. CAPOSSELA: The document's up on the screen,
18 the Risk Assessment.

19 (Witness examines document)

20 A. So with regard to the Risk Assessment we -- again,
21 we conducted an analysis that looked at the effect of
22 diluted bitumen, compared it with other -- we've looked
23 at the analysis that -- the constituents and evaluated
24 the effects.

25 This was consistent with our analyses on our

1 projects such as the Keystone Pipeline. And it doesn't
2 pull out any case studies, per se. It just talks about
3 the overall effects of a crude oil such as diluted
4 bitumen.

5 Q. But it does not include any case studies, per se.
6 So you did not utilize information from prior releases of
7 dilbit from other pipelines in other cases prior?

8 A. I didn't call those out in text. The information
9 from those spills is within the Risk Assessment.

10 Q. Can you just tell me what page?

11 A. No. What I'm saying is the analysis includes
12 information from that based on databases and things like
13 that.

14 Q. Okay. But there's no reference to lessons learned
15 or anything in the Risk Assessment from those prior
16 cases; is that correct?

17 A. With specific reference to diluted bitumen, correct.

18 Q. Are you familiar with Stantec's mission statement on
19 its website?

20 A. So that's a very broad question. You're talking
21 a -- can you -- a mission statement?

22 Q. Sure. I would be happy to read it. "To achieve our
23 goal we take a proactive approach. When incidents occur
24 we share the lessons learned to avoid recurrence and to
25 improve our practices."

1 That's your company's mission statement that's on
2 its website.

3 A. I believe you're talking about workplace safety and
4 our objectives within the workplace safety environment.

5 Q. That very well may be. It's on the website, and
6 that's what it says. If it's only for you folks and not
7 for the beneficiaries of your work and for public health
8 and safety, then I'll accept that answer.

9 MR. CAPOSSELA: And I have no further questions,
10 Mr. Chairman and Mr. Smith.

11 MR. SMITH: Thank you.

12 MR. CAPOSSELA: Thank you for indulging me while
13 we figured out those --

14 THE WITNESS: Sir, do you want your computer?

15 MR. CAPOSSELA: That would probably be a good
16 idea.

17 Thanks, Ms. Tillquist.

18 MR. SMITH: Ms. Baker.

19 MS. BAKER: Thank you. If you'd give me just
20 one second here.

21 CROSS-EXAMINATION

22 BY MS. BAKER:

23 Q. All right. Ms. Tillquist, I can see you now.

24 Your testimony says that you're responsible for
25 evaluating risks posed by the project to human and

1 environmental resources.

2 Can you explain to us what human resources are in
3 this context?

4 A. Yes. So what we looked at is the effects to human
5 resources basically that are defined by PHMSA, which
6 includes very broadly, effects to public health and to
7 region economics. And those basically consist of high
8 consequence areas.

9 So that would consist of populated areas, municipal
10 drinking water intakes, and commercially navigable
11 waterways. That is how the Federal Government defines
12 it, and that's how we analyze it.

13 Q. So is it fair to say that human resources in this
14 context includes human health and human safety?

15 A. We did not look at human -- we did not look at
16 safety in terms of worker safety. Is that what you're
17 referring to?

18 Q. No. I'm referring to the local population.

19 A. When we look at populated areas we are looking at
20 safety of the individuals or the municipality.

21 Q. Okay. How did you determine the risk posed by the
22 project to human resources? How did you make that
23 determination?

24 A. We look at the four -- for populated areas we look
25 at the proximity of the pipeline in relationship to the

1 populated area. We evaluate the spill frequency, the
2 range of possible spill volumes.

3 We look at the potential effects as that are
4 described in the Risk Assessment.

5 And then for drinking water we do the same. We look
6 at the drinking water impacts, and we compare those with
7 the maximum contaminant levels for the intakes.

8 Q. Thank you. What did you determine the risk posed by
9 man camps to be?

10 A. I don't believe man camps -- they are not part of
11 the -- man camps are not a populated area.

12 Q. Man camps are located near and surrounding populated
13 areas, and they do include a large, significant
14 population. I believe it was 1,200 maximum individuals.

15 A. Ma'am, so my Risk Assessment was -- referred to the
16 risk posed by a release from the pipeline.

17 Q. Okay. I'm sorry. Your testimony didn't actually
18 specify that. It simply said evaluating risk posed by
19 the project to human and environmental resources. And
20 we've discussed that human life is a human resource.

21 So no evaluation was done with respect to the man
22 camps?

23 A. I did not personally conduct an analysis on that.

24 Q. To your knowledge, did anyone make an analysis on
25 that?

1 A. I have no knowledge of that.

2 Q. Okay. Can you explain how risk assessments related
3 to spill frequency and volume are conducted?

4 A. Can I explain -- I'm sorry. Repeat.

5 Q. How risk assessments that relate to spill frequency
6 and volume are conducted?

7 A. So risk assessments basically look at the
8 probability of a spill. So risk can be considered the
9 probability of an event occurring, the magnitude of the
10 event, the concentration once it reaches a receptor, and
11 the distance to the receptor and the viability of that
12 pathway.

13 And so our analysis looks at those factors as far as
14 frequency of spill, the range of volumes that could be
15 potentially released. We look at are there viable
16 pathways to sensitive receptors. And then we evaluate --

17 In the case of say like drinking water we compare --
18 we compare the concentration of benzene to drinking water
19 standards.

20 Q. So where do you come up with these factors, these
21 risks or these frequencies if the pipeline hasn't yet
22 been built?

23 A. These are based on historical incident frequencies
24 from the PHMSA National Incident Database.

25 Q. Okay. How up to date are those numbers? The

1 numbers that you use to generate your Risk Assessment,
2 how current are those?

3 A. So the numbers that are in the 2009 Risk Assessment
4 were dated based on the time line when it was submitted.
5 We did for the purposes of evaluating whether our
6 Conditions were met with the new -- this new submission,
7 we looked at the incident frequencies to -- from 2010
8 to -- I'm sorry. 2002 to date. And we compared those
9 incident frequencies to see if they had substantively
10 changed, and they had not.

11 Q. And I'm sorry. You may have just said and I didn't
12 hear, but where did the 2009-to-date data come from?

13 A. So the -- the data that was used in the 2009 Risk
14 Assessment was from the PHMSA National Incident Database.

15 Q. Right. But from 2009 forward. You said to date.

16 A. That was also from the PHMSA database.

17 Q. Okay. So you haven't used any data post-2009?

18 A. No. You misunderstood me, ma'am. Sorry.

19 Q. Okay.

20 A. So the 2009 Risk Assessment was based on data that
21 was available at that time. To respond to the Conditions
22 and whether the -- Keystone was still able to meet the
23 Conditions, one of the things we did look at was had the
24 incident rates significantly changed, would it change the
25 basis of the risk assessment?

1 And so we evaluated the data from 2002 to present
2 and compared those risk statistics compared to the older
3 data and those have not substantively changed.

4 Q. Okay. So my question was actually that 2002 to
5 present data.

6 A. Yes.

7 Q. Where did that 2009 to present data come from?

8 A. The PHMSA Incident Database.

9 Q. Can you tell me who determines whether a particular
10 location is in an affected area for emergency response
11 purposes?

12 A. I am not an emergency response expert, nor do I
13 represent TransCanada on that subject.

14 Q. Okay. One of our previous witnesses mentioned that
15 you should be able to answer that question.

16 If you're not able to answer that question, do you
17 know who might?

18 A. I would defer to Ms. Kothari, but I don't believe
19 she has -- well, I will leave it to Ms. Kothari to answer
20 that question.

21 Q. Okay. Thank you.

22 Has Keystone commenced a program of contacts with
23 Yankton Sioux Tribe Law Enforcement in order to educate
24 Yankton Sioux Tribe's law enforcement concerning the
25 planned construction schedule and the measures the

1 agencies should be taking to prepare for construction
2 impacts?

3 MR. MOORE: I'll object to that as beyond the
4 scope of her direct.

5 MR. SMITH: Sustained.

6 MS. BAKER: I believe her direct states that she
7 can speak to -- one second, please.

8 Ms. Tillquist's Direct Testimony states that she
9 can speak to Condition No. 2, which does speak to
10 obtaining permits from local law enforcement entities and
11 commencement of -- I'm sorry.

12 Following local or applicable laws relating to
13 these permits.

14 MR. MOORE: Mr. Smith, I think she can speak to
15 that Condition as it relates to her area of expertise,
16 which is not communicating with law enforcement.

17 THE WITNESS: That is correct.

18 MR. SMITH: Did you hear that, Ms. Baker?

19 MS. BAKER: I apologize. If you could repeat
20 it, please.

21 MR. SMITH: Would you, Mr. Moore?

22 MR. MOORE: Yes. I said I think she can respond
23 to Condition 2 as it relates to her area of expertise,
24 which does not include communications with law
25 enforcement.

1 MS. BAKER: Thank you. We'll just move on.

2 MR. SMITH: Okay.

3 Q. Ms. Tillquist, are you familiar with the FEIS and
4 the FSEIS?

5 A. In a very general level.

6 Q. Okay. Can you tell me which Presidential Permit
7 Application the FEIS was based upon?

8 A. I'm going to say no at this point.

9 Q. Okay. Are you familiar with which Environmental
10 Impact Statement now governs the project?

11 A. The FSEIS.

12 Q. Are you familiar with the differences between the
13 two documents?

14 A. I guess at a high level.

15 Q. Can you elaborate, please.

16 MR. MOORE: I'll object that this is beyond the
17 scope of her direct.

18 MR. SMITH: Sustained.

19 Yes.

20 MR. CAPOSSELA: I'd just like to make a point
21 that because we went through this with me, Ms. Tillquist
22 created part of the appendices to the FSEIS.

23 It's difficult to see how it's beyond her role
24 here. She wrote part of it.

25 MR. SMITH: Can you repeat the question, Cheri.

1 I may have just not understood it.

2 (Reporter reads back the two previous questions.)

3 MS. REAL BIRD: And, Mr. Smith, this is
4 Thomasina Real Bird for the Yankton Sioux Tribe.

5 Her testimony earlier was that she can answer
6 questions relevant to Condition No. 3. And so that's the
7 identified Condition this witness stated in her direct.

8 So we'd ask you to reconsider that ruling on the
9 objection.

10 MR. SMITH: Okay. Sure. To the extent she's
11 able to, okay, that she has actual knowledge of it.

12 Because there's a very broad range of stuff in
13 there, you know, but to the extent it's within her area
14 of knowledge.

15 Is that what you're getting at?

16 MS. REAL BIRD: Well, we expect any witness to
17 only speak to their knowledge. So with that
18 explanation.

19 MR. SMITH: Okay. So to that extent, I change
20 my ruling, and to that extent you may proceed to answer.

21 Thank you.

22 A. I did not write the FEIS. I wrote the Risk
23 Assessment that is an appendices to the FEIS.

24 And as far as -- there were recommendations set
25 forth in the initial FEIS, and then the FSEIS provided

1 additional recommendations, which is what I'm referring
2 to in Condition No. 3.

3 And both the Conditions and recommendations on the
4 FEIS and the FSEIS are the ones that -- they apply to the
5 Risk Assessment, those are the ones that I'm familiar
6 with.

7 Q. So is your testimony that you wrote a portion of the
8 FSEIS but not of the FEIS?

9 A. I wrote a -- the Risk Assessment that is attached as
10 the FEIS. Both in the original FEIS and in the FSEIS was
11 included and was written by me.

12 Q. Okay.

13 A. Myself.

14 Q. Can you tell me what the governing body of the
15 Yankton Sioux Tribe is?

16 A. I cannot.

17 Q. Can you tell me if due consideration has been given
18 to the views of the Yankton Sioux Tribe's Business and
19 Claims Committee when it comes to this project?

20 MR. MOORE: I'll object to that as beyond the
21 scope of her direct.

22 MR. SMITH: Sustained.

23 MS. BAKER: If I may, this speaks directly to
24 Condition 1, which requires compliance with all
25 applicable laws, and 49-41B-22, Subsection 3 implies a

1 requirement that an Applicant give due consideration to
2 the views of governing bodies of local units of
3 government.

4 MR. SMITH: It does. But I think as we just
5 ruled with respect to the previous question, to the
6 extent it's related to her testimony -- her subject
7 matter area --

8 I think when she meant she's going to speak to
9 those particular sections, I don't think she meant across
10 the entire spectrum of issues in the case but with
11 respect to those matters that she has expertise and has
12 provided expert opinions on.

13 And so, I mean, to the extent that it deals with
14 her areas of expertise, which is Risk Assessment and --
15 what's the other?

16 THE WITNESS: Environmental toxicology.

17 MR. SMITH: And environmental. I will allow the
18 question with respect to that. Okay? With respect to --
19 is it paragraph 1 you're talking about now?

20 MS. BAKER: Yes. I can move on. And actually I
21 can rephrase.

22 Q. In your preparation of the Risk Assessment, did you
23 ever contact the Yankton Sioux Tribe Business and Claims
24 Committee or the Yankton Sioux Tribe General Counsel?

25 A. I did not.

1 Q. Thank you.

2 MS. BAKER: Yankton Sioux Tribe has no further
3 questions.

4 MR. SMITH: Okay. Thank you.

5 And I apologize for my not seeing the bottom
6 down there. I think then if I'm right, if I'm getting
7 this order correctly, we are at Indigenous -- or where
8 are we at now?

9 Oh, we're just at Bold. Okay. Pardon me. Now
10 we're there. Okay.

11 Mr. Blackburn.

12 MR. BLACKBURN: Thank you, Mr. Smith.

13 CROSS-EXAMINATION

14 BY MR. BLACKBURN:

15 Q. Hi, again.

16 A. Hi.

17 Q. So I wanted to start with your testimony in
18 paragraph 5.

19 The question is, just so it's here and everybody
20 hears, "Are you able to address issues on the worst-case
21 spill scenarios, environmental cleanup in the event of a
22 spill, and the potential impacts to ground water
23 resources?"

24 And the answer is "Yes. I participated in answering
25 discovery in these proceedings with respect to all of

1 these issues."

2 And that's the substance of your testimony on that;
3 is that correct?

4 A. That is what it says, yes.

5 Q. Do you have any other testimony on these particular
6 matters that were identified in paragraph 5?

7 A. Do I have any other testimony related to -- can you
8 expand on that, sir?

9 Q. Any other written testimony or prefiled written
10 testimony related to worst-case spill scenarios,
11 environmental cleanup, or potential impacts to ground
12 water.

13 A. I believe what I have on paper is what I'm
14 testifying to.

15 Q. And that's the only -- the only written testimony
16 you've submitted in this proceeding; is that correct?

17 A. That has been accepted as my testimony at this time,
18 yes.

19 Q. Thank you.

20 I'd like to go into a bit of background with you.
21 Could you describe what your company does -- or just
22 describe your company and generally what is their
23 responsibility?

24 A. So Stantec is an architectural and engineering firm.
25 We conduct both engineering and environmental work as

1 consultants.

2 Q. Uh-huh. And how would you generally describe your
3 primary area of responsibility within the company and the
4 services you provide to TransCanada?

5 A. So you have two questions there.

6 Q. We'll take the first one. Generally your
7 responsibilities.

8 A. Sure. Okay. So within Stantec my job is the
9 director of risk management for the oil and gas industry.
10 And describe my services; is that correct?

11 Q. Uh-huh.

12 A. Basically I manage staff, and we evaluate oil and
13 gas projects, as well as oil and gas companies, both for
14 federal agencies as well as for industry itself.

15 Q. Uh-huh. And when you say you evaluate them, what do
16 you evaluate them with regard to? You personally.

17 A. Me personally? We evaluate -- when we're evaluating
18 a company we're looking at the risk assessments that we
19 provide for the -- whether it's a federal agency or for
20 the individual company, we provide a risk assessment that
21 would be very similar to what you're seeing.

22 So, again, we look at incident rates, spill volumes.
23 We help identify. We work with these companies to try to
24 proactively mitigate risk whenever possible.

25 Q. Thank you. I wanted to turn to the first category

1 that you are able to testify to, and that is the
2 worst-case spill scenario category.

3 And to start with, I wanted to see -- first I wanted
4 to ask, do you consider yourself an expert in worst-case
5 spill scenarios?

6 A. I would say that we evaluate the effects of worst
7 case -- of spills that include -- we include worst-case
8 discharge. So yes.

9 Q. What does "include worst-case discharge" mean?

10 A. I'm sorry. That wasn't very clear. I'm sorry.

11 So we evaluate risk for companies and for federal
12 governments. And we include in our analyses an
13 evaluation of, in this case, a range of possible spill
14 volumes, as well as in subsequent and later analyses
15 what's required by federal law is to evaluate worst-case
16 discharge.

17 Q. And evaluate worst-case discharge, what does that
18 mean? I'm not sure what "evaluate" means in that regard.

19 A. What we will do as part of -- we follow 195,
20 evaluations for high consequence areas, as a detailed
21 engineering assessment that's required.

22 And we will conduct and assist TransCanada or other
23 clients with that evaluation, and it includes the use of
24 a worst-case discharge.

25 Q. Are you familiar with 33 U.S.C. Section 1321?

1 A. The code doesn't -- by number does not -- I do not
2 recognize that.

3 Q. Okay. Well, I'd call your attention to -- bear with
4 me for just a second here. I'm not used to working with
5 laptops.

6 I'd call your attention to specifically
7 Section 1321, Subpart A. And then Part 24 under that,
8 which, I mean, I know --

9 A. What document are you referring to, sir?

10 Q. I'm talking about a federal statutory provision.

11 A. Could you give me a copy of that, please.

12 Q. What this is, so everybody knows, is it's simply a
13 definition of worst-case discharge within Section 1321.
14 And I just wanted to see if you're familiar with that
15 discharge.

16 A. I am -- I have a knowledge of this. Again, a very
17 high level.

18 Typically the worst-case discharge that we are
19 referring to is the one referred to in 194 and is
20 calculated by those means.

21 Q. And what's the statutory authority for -- you're
22 talking about 49 CFR Part 194?

23 A. Yes.

24 Q. What's the statutory authority for that?

25 A. That's a legal question, sir. Not my expertise.

1 Q. So you're not familiar with the statutory authority
2 for section -- for 49 CFR Part 194?

3 A. Again, that would be a legal question.

4 Q. And an expert and somebody who wants to be an
5 expert, who claims to be an expert in worst-case
6 discharges, would not be familiar with the statutory
7 authorization for the regulation in which they're
8 implementing?

9 A. Sir, I take the worst-case discharge, and we use
10 that in our analyses. So it is the application of the
11 worst-case discharge into -- again, into my expertise
12 which is risk assessment and environmental toxicology.

13 Q. And you are familiar -- the point of this proceeding
14 is to ensure that TransCanada is continuing or able to
15 implement federal law, which is required by Conditions 1
16 and 2.

17 And the federal laws applicable here I think are
18 relevant in the sense of what they are because this
19 Commission says that TransCanada must comply with them.
20 So in that regard the knowledge -- TransCanada's
21 knowledge of the federal law is relevant.

22 A. You would be correct, but I -- this would refer to
23 TransCanada's knowledge, and this is based on emergency
24 response. This falls into emergency response. So it's
25 not --

1 Q. So you're saying that 33 U.S.C. Section 1321 is
2 irrelevant or not related to emergency response?

3 A. No, sir. I'm saying that it is related to emergency
4 response, and what I'm -- what I'm saying is that my use
5 of worst-case discharge is based on the engineering
6 calculations of that and then use of that in the risk
7 assessments, not in the emergency --

8 Like I said, the information I generate is then
9 provided to TransCanada to apply for emergency response
10 purposes.

11 Q. Just a little bit more about background on this.
12 Are you familiar with 33 U.S.C. -- CFR Part 154?

13 A. I'm sorry. CFR --

14 Q. 154.

15 A. No, sir.

16 Q. Those are the U.S. Coast Guard regulations relating
17 to emergency response.

18 How about 40 CFR Part 112(d), Subpart D?

19 A. I believe those are all related to spill risk.

20 Q. Those are the EPA spill response --

21 (Discussion off the record)

22 A. So TransCanada would have staff that are well versed
23 in emergency response.

24 Q. All right. Are you familiar with the ACP for this
25 area?

1 A. Would you define ACP.

2 Q. Area contingency plan.

3 A. I have -- no. The one I -- so no. I am not
4 directly familiar with that.

5 Q. Do you know who prepares the area contingency plan
6 with regard to oil spills for this state?

7 A. No, I do not.

8 Q. Are you aware of any sub area contingency plans that
9 apply to this area?

10 A. I know when we've dealt with PHMSA in the past
11 they've mentioned these types of plans. And certainly
12 TransCanada's mentioned these. I do not know who the
13 responsible agencies are.

14 Q. Did you calculate the worst-case discharges for the
15 base Keystone Pipeline as used in its Emergency Response
16 Plan?

17 A. I did not.

18 Q. Did your company calculate those amounts?

19 A. No, they did not.

20 Q. Did you calculate the worst-case discharges for the
21 Keystone extension pipeline from Steele City, Nebraska to
22 Cushing, Oklahoma?

23 A. No. We used the numbers that were provided to us by
24 TransCanada.

25 Q. Okay. And your company did not either?

1 A. That is correct.

2 Q. And do you anticipate that your company would be the
3 company that provides the worst-case discharge amounts
4 for the Keystone XL Pipeline's Emergency Response Plan?

5 A. I believe we have the technical expertise to do that
6 if required but that's not within my group's expertise
7 and we would likely look to TransCanada to do that.

8 Q. Does worst-case discharge -- you've heard the term
9 worst-case discharge scenario?

10 A. Yes, sir.

11 Q. What is the difference between a worst-case
12 discharge and a worst-case discharge scenario?

13 A. So worst-case discharge is a spill volume, and a
14 scenario would be the set of events that occur as a
15 result of a worst-case discharge.

16 Q. Thank you. And have you ever prepared a worst-case
17 discharge scenario as part of your employment?

18 A. That's a -- the worst-case discharge is not used in
19 the risk assessments we have done. The worst-case
20 discharge is routinely used in the detailed engineering
21 analysis.

22 Q. And do you do the detailed engineering analysis?

23 A. The engineering analysis is something we provide.
24 We do some of the work and then we provide that input
25 back to TransCanada and they actually are the engineers

1 in charge for that.

2 Q. And the engineering analysis includes what aspects
3 of the engineering for this? Could you describe the
4 scope of the engineering analysis you do?

5 A. What we do is we provide the environmental analysis.
6 So, again, the identification of the high consequence
7 areas, the identification of those pipeline segments that
8 have the potential to affect high consequence areas, and
9 then we help the company to prioritize those areas, those
10 pipeline segment.

11 Q. Could you describe how worst-case discharge is
12 calculated?

13 A. Let me just -- so it's basically in a very -- at a
14 higher level it's basically the time to detection. And
15 then -- so the offload during that time period. And then
16 it's the time to shut down the pipeline and -- including
17 its pump stations and its valves, and then it's the drain
18 down volume.

19 Q. So the first category -- you had two parts there.
20 One is the drain down volume, and the first part was
21 the -- could we refer to it as the pumping volume, the
22 amount that's pumped out before the valves are shut down?
23 Is that correct?

24 A. That's fair, yeah.

25 Q. Do you know the pumping -- not the pumping volume,

1 but do you know the rate of pumping for the Keystone XL
2 Pipeline?

3 A. The worst-case discharge was calculated based on a
4 1 million barrel throughput.

5 Q. All right. And what's -- since this is on a
6 minute -- the calculation is for a number of minutes, is
7 it not? Not a number of --

8 The 1 million barrel figure is a barrels per day
9 figure; is that correct?

10 A. That is correct.

11 Q. And do you off the top of your head know the barrels
12 per minute or the gallons per minute figures?

13 A. I would be able to calculate that if you would ask.

14 Q. So I guess the next step here is to look at the
15 environmental cleanup in the event of a spill, which is
16 part of the area which you're able to address.

17 Since you haven't performed a -- or prepared a
18 worst-case discharge scenario in terms of all the events
19 that would happen afterwards, could you describe
20 generally how the environmental cleanup of a spill would
21 work?

22 A. So basically there's the notification procedures.
23 Well, once a leak is detected the -- and as we have
24 talked about, the pipeline is shut down, emergency
25 notifications are sent out. Teams are dispatched to

1 contain and clean up the spill.

2 And as far as, you know, basically the first groups
3 would be containing the oil, and then subsequent crews
4 will be coming in to clean up that material. They work
5 together with federal and state agencies to determine how
6 to clean it up and what resources --

7 They go through and strategically are looking at
8 this at the incident command structure to basically
9 identify their sensitive resources and protect those
10 during the event.

11 Q. Have you prepared an Emergency Response Plan for a
12 pipeline?

13 A. I have been involved in the review of at least two.

14 Q. Have you written them or prepared them yourself?

15 A. I have written portions of them.

16 Q. Uh-huh. What portions have you written?

17 A. I provided direction for, you know, the preparation,
18 the -- some of the texts that I was preparing would deal
19 with response times to a spill based on location of
20 response trailers and their proximity to the pipeline.

21 Q. For any of the Keystone pipelines?

22 A. No, sir.

23 Q. Do you know what an OSRO is?

24 A. OSRO. It's Oil Spill Response Organization.

25 Q. Do you know who maintains the OSRO database?

1 A. No, sir, I cannot.

2 Q. Are you aware of where the OSROs in South Dakota are
3 located?

4 A. I do not.

5 Q. Do you know where any OSROs are located in the
6 Midwest?

7 A. Yes. Actually we're dealing with some in
8 North Dakota, that I'm dealing with.

9 Q. Uh-huh.

10 A. And so but what I'm dealing with Keystone, that is
11 Keystone's emergency response team that is responsible
12 for dealing with them and identifying with them.

13 Q. So you can't testify today about the spill response
14 capacity of TransCanada with regard to any particular
15 resources for spill response?

16 A. What I can do is I can respond to -- I can respond
17 to the regulations as I'm aware of it and the
18 observations that I've made of TransCanada in response --
19 or in their fulfillment of emergency response planning.
20 I can't speak to their actual plans or their engagement
21 of communities or -- yeah.

22 Q. Can you speak to the actual spill response resources
23 that are available to respond to a spill --

24 A. They would have to meet the requirements of federal
25 regulations, and many of them are identified in 194.

1 Q. But you can't speak to the actual location or
2 capacity of particular OSROs in South Dakota?

3 A. No, sir. I cannot.

4 Q. And you can do that -- you can speak to the capacity
5 of OSROs in North Dakota?

6 A. What I would be able to say is that the -- the
7 company has to meet and comply with the minimum
8 requirements that are being prepared for a spill under
9 194.

10 Q. Which is the simple statement of what the law
11 requires.

12 A. Yes, sir.

13 Q. Have you participated in spill cleanups?

14 A. Yes, I have.

15 Q. What spill cleanups have you participated in?

16 A. I was involved with a couple of spills in North
17 Dakota. One was referred to as the Drovedahl [phonetic]
18 spill. One, I believe, is still confidential. And very
19 early in my career I was basically a number cruncher for
20 the Exxon Valdez.

21 Q. Do you consider yourself an expert in actual
22 emergency spill response?

23 A. I have experience, but I would not consider myself
24 an expert.

25 Q. Uh-huh. Have you ever managed a spill response?

1 A. I have been responsible for portions of a spill
2 response, as far as planning on some of these spills. So
3 dealing with agencies and directing response.

4 Q. Do you consider yourself a spill response manager
5 then?

6 A. I have fulfilled that function.

7 Q. For an entire spill?

8 A. For a portion of a spill.

9 Q. What portions?

10 A. The initial response. I think we -- the spill that
11 I'm thinking of in particular we were there for I think
12 the first 20 days or so, and then a lot of us caught the
13 flu.

14 Q. Do you believe that participation in answering
15 discovery qualifies you to provide expert testimony on
16 spill response?

17 A. Say that again, sir.

18 Q. Do you believe that participation in answering
19 discovery in this proceeding qualifies you to be an
20 expert in spill response?

21 A. I believe I can testify to those areas in which I
22 have experience or expertise.

23 Q. Do you consider Mr. Mackenzie, whose testimony was
24 withdrawn, to be a more experienced or capable spill
25 response expert?

1 A. Yes, sir.

2 Q. Does he have greater capability than you in that
3 regard?

4 A. Yes, sir.

5 Q. Do you know why he isn't testifying in this
6 proceeding?

7 MR. MOORE: I'll object to that. The testimony
8 is based on what's been submitted in direct. It's a
9 legal issue, and it's not within the scope of this
10 witness's knowledge.

11 MR. SMITH: Sustained.

12 Q. Have you ever operated any spill response equipment?

13 A. No, sir.

14 Q. Are you familiar with the Coast Guard's rating for
15 spill response equipment in terms of oil spill removal
16 capability?

17 A. I cannot say that for certain. No, I don't. I
18 cannot come up with that answer.

19 Q. Are you aware that TransCanada bases its spill
20 response capability on the Coast Guard's rating for
21 OSROs?

22 A. Is that a statement?

23 Q. Are you aware of that, that's the case?

24 A. I am not. I am not aware of it.

25 MR. BLACKBURN: I'd like to move that

1 Ms. Tillquist's testimony with regard to worst-case spill
2 scenarios and environmental cleanup in the event of a
3 spill or sections of paragraph 5 be stricken because she
4 is not an expert in these areas.

5 The testimony says only that she participated in
6 answering discovery in this proceeding with respect to
7 these issues. She's offered as an expert, and she's
8 already testified that she does not consider herself an
9 expert in spill response. And she's not planning --
10 she's not expecting to participate in calculation of
11 worst-case discharges, nor has she participated in the
12 calculation of prior worst-case discharges.

13 Moreover, TransCanada had a far more experienced
14 witness who is, in fact, an expert in that area, which
15 they chose voluntarily not to provide. Therefore,
16 Ms. Tillquist is not fully capable of responding to
17 questions relating to 2010 Permit Conditions I believe it
18 was 34 and 35 related to emergency spill response.

19 To fully inquire about questions relating to
20 emergency spill response we need somebody on the stand
21 who's able and fully qualified as an expert in those
22 areas to testify in that regard. So since Ms. Tillquist
23 says she's not an expert in emergency spill response or
24 worst-case discharge scenario development, we'd like her
25 testimony stricken in that regard.

1 MR. SMITH: Do you have a response, Mr. Moore?

2 MR. MOORE: Mr. Smith, with respect to the
3 particular issue of emergency response and the testimony
4 of Jeff Mackenzie, it was offered in response to
5 particular testimony of an Intervenor witness on direct.
6 It was offered as rebuttal testimony.

7 That witness's direct testimony was withdrawn,
8 and so we withdrew the testimony of Mr. Mackenzie, except
9 to the extent that there is one issue that still pertains
10 to Ms. Tillquist's rebuttal, which is not yet before the
11 Commission because of the procedural order that we're
12 following.

13 With respect to striking any portion of
14 Ms. Tillquist's direct, it is clear from the record and
15 from her testimony and from her experience what her
16 qualifications and expertise are. To the extent that
17 paragraph 5 says that she was available to answer
18 questions with respect to those issues, she has yet to be
19 asked questions related to those issues on
20 cross-examination as it pertains to this proceeding.

21 I disagree with Mr. Blackburn's characterization
22 that she is not qualified with respect to the issues that
23 are outlined in her direct.

24 Her testimony that she is not an emergency
25 responder, per se, does not mean that she is not

1 qualified to address those issues.

2 MR. SMITH: Yeah. I -- in just looking at it
3 myself, I just don't see those things in there. And so
4 I'm going to deny your motion to strike.

5 Q. Could you describe -- you've testified that you've
6 seen the Emergency Response Plan for the base Keystone
7 Pipeline, seen it physically, but that you haven't looked
8 through it; is that correct?

9 A. I would say I've seen the document. I leafed
10 through it. I've seen the Table of Contents. I was not
11 a reviewer of the document.

12 Q. And were you a reviewer of the document when it was
13 revised to include the Keystone extension pipeline?

14 A. No, sir.

15 Q. Are you familiar with a mapping that TransCanada has
16 done with regard to emergency spill response impacts?

17 A. Are you referring to tactical spill response
18 planning?

19 Q. Yes.

20 A. I am aware of them. I do not have knowledge of them
21 specifically. I'm aware that they exist, yes.

22 Q. Yes. Are you aware of how many personnel
23 TransCanada has that are available that it employs that
24 are available to respond to oil spills on Keystone XL or
25 from base Keystone?

1 A. Indirectly, I do in the fact that Stantec does
2 provide emergency spill response staff to assist
3 TransCanada in the event of a spill, and there are
4 several hundred that are available in North America to
5 assist TransCanada.

6 Again, that is -- but as far as TransCanada's staff
7 themselves, that would -- I do not know the number.

8 Q. Have you participated in any emergency response
9 drills with TransCanada staff?

10 A. I've provided them some information to assist them
11 in their spills, their training.

12 Q. Their training. But have you participated in the
13 actual drills?

14 A. No, I have not.

15 Q. Thank you. Are you in a position to offer an
16 opinion on their capability from firsthand experience to
17 comply with 49 CFR Part 194? Not their intention, but
18 their ability.

19 A. In one person in particular, I'm aware of her
20 qualifications. She is a -- this would be Nickie
21 Afflack. And I'm aware of her years of experience with
22 other pipeline companies and as well as working on
23 TransCanada's projects.

24 She seems a highly capable person. I've seen her
25 engage a number of groups, emergency responders, and work

1 with them about developing their Emergency Response Plan
2 so I can speak to that.

3 Q. And what's her name again, please?

4 A. Nickie Afflack.

5 Q. And do you know where her office is, where she
6 works?

7 A. Calgary.

8 Q. In Calgary. Okay.

9 MR. BLACKBURN: I think I'll leave it at that
10 for now. Thank you very much.

11 MR. SMITH: Dakota Rural Action. Mr. Martinez.

12 MR. MARTINEZ: Yes. I'm going to go ahead and
13 handle this.

14 A couple of just quick preliminary things. A
15 couple of the exhibits, in fact three of the exhibits I
16 intend to use, have been designated as confidential.

17 MR. SMITH: Okay.

18 MR. MARTINEZ: So I think we're going to have to
19 deal with that. Now of those three exhibits, one of
20 which is their SCADA specifications, the systems control
21 document, we do agree that that is confidential. I'll
22 give that to TransCanada.

23 The other two, though, are the Interrogatory
24 responses that Ms. Tillquist has indicated that she was
25 apparently involved in preparing. And those are a couple

1 of tables that list the actual worst-case spill
2 scenarios.

3 I would move that those particular responses and
4 those two exhibits be unsealed at this time because I
5 think the people of South Dakota have a right to know
6 where and to what extent the worst-case spills may affect
7 them here in the state.

8 MR. SMITH: Is this you, Mr. Moore, on this one?

9 MR. MOORE: I guess I'd like to see the
10 Interrogatory Answers and the tables and then have an
11 opportunity to respond, Mr. Smith.

12 MR. SMITH: Should we take a break then for a
13 while, while you can try to dig them out?

14 MR. MOORE: That would be fine.

15 MR. SMITH: Where is it?

16 MR. MARTINEZ: I actually have all the exhibits
17 I intend to use just for ease of purpose saved on one
18 flash drive I was going to plug in. I can give you the
19 actual exhibit numbers.

20 The two that we're talking about. I have them
21 labeled as DRA Exhibits C, for Confidential, -179, and
22 the second is C-396.

23 Now the other confidential document that I would
24 like to get into is designated at No. C-395. But we'll
25 agree that that document is not part of this motion to

1 unseal them.

2 MR. SMITH: Okay. They were 179.

3 MR. MARTINEZ: And 396.

4 MR. SMITH: Okay. What do you think, Mr. Moore?
5 What kind of a --

6 MR. MOORE: 15 minutes would be fine.

7 MR. SMITH: 15 minutes you can do it. Okay.
8 We'll take a break for everybody here for that long, and
9 we'll dig into this.

10 (A short recess is taken)

11 MR. SMITH: Okay. We're calling the hearing
12 back to order following our recess to allow the review of
13 some documents.

14 Mr. Moore, are you going to take care of this?

15 MR. MOORE: Yes, Mr. Smith. Thank you.

16 First of all, with respect to the exhibits
17 related to worst-case discharge information, those being
18 DRA 179 and DRA 396, I think the response to the same is
19 both, and it's in three parts.

20 First of all, when we produced that information
21 in discovery we produced it as confidential information
22 on our confidentiality FTP site. My understanding was
23 that was consistent with the Commission's understanding
24 that the information was, in fact, consistent, and
25 there's been no previous challenge by DRA to that before

1 today.

2 Secondly, the information is clearly treated by
3 PHMSA as confidential. I'm looking at a page from
4 PHMSA's website related to oil spill response plans, and
5 it says this about oil spill response plans: "PHMSA
6 posts these plans to help federal, state, and local
7 officials strengthen and coordinate planning and
8 prevention activities. PHMSA has redacted all oil spill
9 response plans to protect personal information and
10 Keystone security-sensitive material such as worst-case
11 discharge information and for other limited exclusions."

12 Clearly, it is protected by PHMSA as
13 confidential for security reasons.

14 Thirdly, that makes sense. What we're talking
15 about is the specific location of a worst-case discharge,
16 meaning that if you publicly disclose this, everyone in
17 South Dakota knows exactly the point in the pipeline
18 where if they want to cause the maximum possible problem,
19 that's it.

20 That endangers the pipeline. It endangers the
21 public. It endangers the inhabitants at that particular
22 location. And I think it would be extremely unwise of
23 the Commission to reveal that information publicly for
24 what I see is no legitimate reason or purpose.

25 With respect to Exhibit DRA-395 related to the

1 SCADA specifications, while there's no argument that that
2 should be treated as nonconfidential, it is not within
3 the scope of Ms. Tillquist's direct testimony. It is not
4 within her area of expertise. She is not a SCADA expert
5 and is not in any position today to address questions
6 related to the SCADA specifications.

7 MR. SMITH: Response, Mr. Martinez.

8 MR. MARTINEZ: With respect to Mr. Moore, I have
9 yet to see a specific citation to any federal statute or
10 regulation that specifically states that that information
11 is to be kept confidential, other than simply some
12 unsubstantiated material of how PHMSA may choose to treat
13 something.

14 Agencies will routinely decide to treat
15 something that may be confidential from their standpoint
16 that is then subject to challenge and subsequently is
17 found not to be confidential.

18 In terms of the wisdom of releasing this
19 information, I think it would be extremely foolish not to
20 release that information because that's the type of
21 information that the residents of South Dakota need to
22 know.

23 They need to know where there may be some
24 particular incidents. They need to know how they might
25 be at risk in the event of a worst-case spill. That is

1 information that every single landowner and every single
2 resident of this state ought to know so they know whether
3 or not there is a risk to their water, to their land. I
4 think it would be incredibly negligent not to release
5 that information.

6 And going back, I have yet to see -- and I have
7 asked TransCanada for this previously. Get me a single
8 statute or regulation that says it's confidential.

9 I have heard nothing.

10 MR. SMITH: Mr. Capossela, did you want to weigh
11 in?

12 MR. CAPOSSELA: Thank you, Mr. Smith.

13 I'd like to briefly comment in support of DRA's
14 motion. And with Staff's assistance, which I appreciate
15 very much, up on the screen right now is proposed
16 Exhibit 8021, page 214.

17 And Chapter 18.0 in this document is captioned
18 Worst-Case Discharge. This is the Emergency Response
19 Plan for the Puget Sound Pipeline System in Washington
20 state, pipeline system coming from British Columbia to
21 Washington state.

22 A fully unredacted Emergency Response Plan at
23 the beginning of Chapter 18 begins on page 214. This is
24 our proposed Exhibit 8021, and identifies the worst-case
25 discharge from really pages 214 to almost to the end of

1 this exhibit, which will be proposed to be introduced
2 into the record for the purpose of challenging the
3 confidentiality designation of the emergency response
4 planning documents under discussion today.

5 And also for the purpose of demonstrating that
6 TransCanada's being too secretive to the Indian Tribes
7 and to the people of South Dakota as for the policy
8 reasons in contravention of the policy reasons that were
9 just identified by Dakota Rural Action.

10 And so in front of us this afternoon we have a
11 different oil company's worst-case discharge estimates in
12 a different state, and I submit that the Indian Tribes
13 and the people of South Dakota are entitled to the same
14 protections as the citizens in the state of Washington
15 and the Indian Tribes in the state of Washington.

16 There is no policy reason that would justify
17 folks in a different state and Tribes in a different
18 state enjoying greater protections and greater
19 transparency than the Tribes and the people of the
20 State of South Dakota.

21 And so we thought it may be helpful in the
22 determination of DRA's motion to put this -- to put this
23 information forward at this time, not for the purpose of
24 introducing it but for the purpose of highlighting the
25 merits of DRA's motion as it relates to the emergency

1 response planning and the worst-case discharge estimates.

2 And thank you for hearing me out on this.

3 MS. REAL BIRD: Mr. Smith.

4 MR. SMITH: Yes, ma'am.

5 MS. REAL BIRD: Thomasina Real Bird for the
6 Yankton Sioux Tribe.

7 We join in the motion for the reasons stated by
8 DRA and Standing Rock Sioux Tribe.

9 MR. BLACKBURN: Mr. Smith, we'd join the motion
10 too. I'd also note that the worst-case discharge amounts
11 and locations for the base Keystone pipelines are public
12 knowledge and have already been distributed so the
13 subsequent addition of additional knowledge about that,
14 there's just simply no evidence that these are
15 confidential and must be treated so by federal law.

16 MR. HARTER: Mr. Smith, I would join the motion.
17 My property where the proposed line is crossed has the
18 City of Colome's water wells on it and the aquifer system
19 under it, and I would believe it to be in one of these
20 worst-case discharge areas.

21 Thank you.

22 MS. LONE EAGLE: Mr. Smith, I would join their
23 motion also. And I take exception to TransCanada's
24 characterization of South Dakota's citizens as being
25 vandilists.

1 MR. GOUGH: InterTribal COUP joins in the motion
2 for the reasons stated already.

3 MR. CLARK: Cheyenne River Sioux Tribe also
4 joins in the motion.

5 MR. RAPPOLD: As does the Rosebud Sioux Tribe.

6 MS. CRAVEN: As does the Indigenous
7 Environmental Network.

8 MR. MOORE: Mr. Smith, may I respond?

9 MR. SMITH: You may.

10 MR. MOORE: First of all, it's undisputed that
11 PHMSA treats this information as confidential.

12 Secondly, the authority for that is under
13 49 U.S.C. Section 60138(a)(2). And PHMSA has
14 specifically said that under that statute the information
15 is exempt from the Freedom of Information Act request.

16 So it is undisputed that PHMSA treats it as
17 confidential. And I think it would be very unwise to
18 make it publicly available in South Dakota.

19 MR. BLACKBURN: Excuse me, Mr. Smith.

20 Could he repeat the citations that he used for
21 that.

22 MR. MOORE: 49 U.S.C. Section 60138(a)(2).

23 MR. SMITH: Did you get that?

24 MR. MARTINEZ: Yeah. We just wrote it down.
25 You know, it's interesting that they're just now

1 providing the citation when I asked for it months ago and
2 was not given anything.

3 I think that one thing to look at is there's a
4 huge difference between something being exempt or
5 nonexempt under FOIA versus being available publicly in
6 legal proceedings that are here for the benefit of the
7 public.

8 And I think what it boils down to is, as
9 Mr. Capossela has pointed out, other states clearly make
10 this available. It's already available publicly for the
11 base Keystone Pipeline.

12 So you've got a tremendous amount of
13 inconsistency if you're going to maintain that this
14 particular information is confidential here.

15 And, you know, at the risk of sounding
16 inflammatory, I think, you know, if you maintain this as
17 confidential, you're basically telling the Tribes and the
18 citizens of South Dakota that they're second-class
19 citizens compared to the citizens of Washington state.

20 MR. SMITH: Commissioners, thoughts or --

21 COMMISSIONER HANSON: I'd like to hear from the
22 Applicant.

23 Is that true what he just said, that information
24 of this nature is already available?

25 MR. MOORE: With respect to Keystone? Not to my

1 knowledge, Commissioner. I don't know the basis for that
2 statement.

3 MR. BLACKBURN: I'll e-mail it to him right now.

4 COMMISSIONER HANSON: Excuse me?

5 MR. BLACKBURN: I'm willing to e-mail it to
6 counsel right now. I don't have a printed copy. Or he
7 can come look at it on my computer.

8 MS. EDWARDS: This is Kristen Edwards for Staff.
9 The ERP in the base docket, HP09-001, has been put on our
10 website as confidential.

11 COMMISSIONER HANSON: Okay. Thank you. That's
12 all I needed to know.

13 MR. MARTINEZ: Commissioner Hanson, if I could
14 add something to that, frankly, we got a copy by simply
15 making an open records request to the Department of
16 Environment & Natural Resources sent to us completely on
17 a nonconfidential basis. Any citizen can get it.

18 COMMISSIONER HANSON: Well, under that situation
19 then you would be able to introduce it, wouldn't you?

20 MR. MARTINEZ: For Keystone I. We're talking
21 about the data here. The two exhibits that I'm talking
22 about are for KXL.

23 CHAIRMAN NELSON: Well, I guess I'm willing to
24 put my thoughts on the table, and Commissioner Hanson can
25 respond.

1 When you made your motion, I mean, that was very
2 appealing to me. I'm all about transparency. But when I
3 consider the thought that this would create a roadmap for
4 a terrorist, I don't want to be any part of that.

5 And based on that, I don't think I can support
6 it.

7 MS. LONE EAGLE: With all due respect,
8 Commissioner Nelson, the entire pipeline is a map for a
9 terrorist.

10 MR. HARTER: I would agree with that.

11 CHAIRMAN NELSON: Excuse me. I asked for
12 Commissioner Hanson's response.

13 COMMISSIONER HANSON: Well, my feeling is when a
14 party files something confidentially and it is deemed to
15 be confidential, especially by a federal agency, then we
16 do not have a choice. We need to maintain that
17 confidentiality.

18 In the absence of being able to prove or show
19 that it should not be confidential, it's obvious that it
20 needs to be confidential. So we need to go through the
21 process.

22 MR. CAPOSSELA: I'd like to comment on the
23 regulation that was cited.

24 (Pause)

25 MR. SMITH: Okay. Commissioners, I mean, do you

1 feel you've formally enough registered your opinions on
2 this?

3 CHAIRMAN NELSON: Yes.

4 MR. SMITH: Well, both the Commissioners believe
5 it's been presented as confidential, and they maintain
6 that that status should be respected at least until we go
7 through the process for undoing confidentiality in
8 accordance with our rules. And we're not going to be
9 able to do that here now.

10 I mean, the bottom line is at this point what it
11 means is we're just going to have to clear the room of
12 people who are not subject to some kind of a
13 confidentiality covenant. And I have no idea who that
14 is.

15 Mr. Moore, can you assist us in that?

16 MR. MARTINEZ: Mr. Smith, if I could ask a
17 favor.

18 Just so we have an absolutely complete record,
19 could I have a -- you or one of the Commissioners provide
20 on the record a basis for this ruling?

21 MR. SMITH: Go ahead.

22 I mean, the basis is confidentiality has been
23 requested. It's been marked that way. And we have rules
24 in ARSD 20:10:01 that deal with our procedures for
25 determining that -- whether something is entitled to that

1 kind of protection.

2 And until we go through that process, generally
3 speaking, we have to respect that. And so that would be
4 our basis.

5 Yes, sir.

6 MR. CAPOSSELA: Thank you, Mr. Smith.

7 I just want to point out that the statute does
8 address confidentiality. And it does authorize
9 confidentiality. It does not require confidentiality.

10 The statute uses the word with respect to the
11 confidentiality of emergency response plans "may," not
12 "shall." It does not require it. Other jurisdictions do
13 not. And the maintenance of confidentiality per
14 TransCanada's opposition to the motion would put the
15 Public Utilities Commission in a position of being less
16 transparent than comparable commissions in other states,
17 as well as other South Dakota State Executive Branch
18 agencies.

19 CHAIRMAN NELSON: Mr. Smith, we need to move
20 along. We understand that. Your point is well taken.
21 We've made our decision.

22 Here's what we're going to do. We understand
23 that you want to ask some questions about these three
24 documents; correct?

25 MR. MARTINEZ: That is correct.

1 CHAIRMAN NELSON: Okay. So what we're going to
2 do is at this point we're going to go into confidential
3 session. Those that are not covered by a confidential
4 agreement are going to have to leave the room. We're
5 going to shift up our audio systems. We're going to
6 allow you to ask your questions based on those documents,
7 and then we're going to be done for the day.

8 That's how we're going to proceed.

9 MR. CLARK: Mr. Smith -- and I really do
10 apologize for interjecting -- Cheyenne River Sioux Tribe
11 was not part of that part of discovery. And, therefore,
12 we are not subject to that confidentiality agreement.

13 However, we would like to be present, and we
14 would readily submit ourselves to any requirements of
15 confidentiality.

16 MR. SMITH: I was going to state, at least with
17 legal counsel, to me under just the ethical rules I
18 think -- unless there's an objection from somebody out
19 there, a lawyer out here who doesn't think that, that --

20 To me, under the ethical standards the
21 Commission has deemed it confidential, and I think as
22 attorneys unless we want to say otherwise, that we're
23 under an ethical obligation to respect that until there's
24 a decision to the contrary.

25 And, again, like I said, we have a procedural

1 set of rules. They're the very last I think it's five
2 sections of ARSD 20:10:01. And they deal with the
3 procedure of deconfidentializing something. And,
4 again -- I don't know, is that -- just to get through
5 this. Okay. Okay.

6 MR. MOORE: Mr. Smith, James Moore. I just
7 wondered whether given the late hour it might make sense
8 to start the confidential session first thing in the
9 morning with a designated time for folks who are not part
10 of the confidential session to appear.

11 MR. SMITH: Commissioners, that's more your
12 decision than mine.

13 MR. BLACKBURN: If I may too, just to add a
14 friendly amendment is that would allow TransCanada to
15 confirm who its comfortable with being subject to the
16 confidentiality. There was a prior agreement for some of
17 us.

18 MR. SMITH: Right.

19 MR. BLACKBURN: If they really wanted it, they
20 could bring documents to sign tomorrow morning to make
21 sure it's all in accordance with what they would like.
22 After all, it's their information in the documents.

23 MR. ELLISON: And if I may just add something,
24 what I'd also like to request is to add to Bold's
25 position, we have a number of Individual Intervenors. If

1 they are willing to sign a confidentiality agreement --

2 Obviously, there's a difference between the Bar.
3 We're separately bound regardless of whether we sign an
4 agreement or not as officers of the court. If a person
5 signs the confidentiality, that's like a contract, and
6 they are bound themselves. And it would allow them to
7 hear the evidence, to participate in the process.

8 And I would just ask TransCanada to consider
9 that as like a friendly amendment to what's been
10 proposed.

11 COMMISSIONER HANSON: However, only for persons
12 who are actual parties to it.

13 MR. ELLISON: No. That's what I was suggesting,
14 people who were actual Intervenors recognized by the
15 Commission. That's all I was asking for.

16 MR. SMITH: Well, yeah. That's the case
17 generally. I mean, people who are not attorneys are
18 privy to all kinds of confidential information anymore on
19 these.

20 MR. ELLISON: Just suggesting a mechanism.

21 MR. MOORE: Mr. Smith, we'll be happy to discuss
22 this with counsel tonight. The previous Protective Order
23 that we agreed to was related to counsel and attorneys'
24 eyes only, and the reason for that was because there's an
25 enforcement mechanism. There is not with private

1 parties.

2 We'll be glad to talk to counsel tonight about
3 those who may not have actually been signatories, so to
4 speak, to the Protective Order that's in place and work
5 with them.

6 MR. ELLISON: If a Protective Order was issued
7 based upon signing a confidentiality agreement, then
8 there would be a legal mechanism.

9 MR. SMITH: I think there would be, called
10 contempt.

11 MR. HARTER: Mr. Smith, John Harter. I would
12 just like to for the record know that I think this
13 prejudices me as a property owner being affected by this,
14 and I object to it.

15 MR. SMITH: Well, what we're talking about is
16 creating a mechanism for you to be right here.

17 MR. HARTER: I'm a little bit sick of their gag
18 orders.

19 COMMISSIONER HANSON: Mr. Moore, I would also
20 like to have a copy of that cite that you gave for the
21 confidentiality, if you would. I didn't write it down,
22 and I'm asking one of my staff to provide that to me.

23 Thank you.

24 MR. MOORE: Yes.

25 CHAIRMAN NELSON: I think the last --

1 Mr. Martinez, how long do you think your questioning's
2 going to take on these three documents?

3 MR. MARTINEZ: The questioning on the
4 confidential documents is honestly not going to take that
5 terribly long because the two of them are just simply
6 one-page documents.

7 The other document, Mr. Moore has indicated he
8 may have some relevance objections to. I guess we'll
9 deal with that in the morning. We'll see that. But I do
10 have a number of questions for Ms. Tillquist about that.

11 Honestly, I would -- it would be a stretch to
12 think that those confidential documents is going to take
13 more than 20 to 30 minutes, I mean, at most.

14 CHAIRMAN NELSON: Obviously it's going to take
15 some time to work through getting folks signed if you all
16 come to an agreement on that.

17 MR. ELLISON: And without trying to create more
18 complications but just trying to think down the road,
19 these are statistics or figures which are then going to
20 be compared with nonconfidential worst-case scenario
21 documents. And we've got to figure out some mechanism to
22 be able to both argue it on the record while we're here
23 and then later on appellate purposes.

24 So I was just thinking, boy, how are we going to
25 do this, but I just wanted to raise it for everybody to

1 think about.

2 MR. SMITH: Okay. Chairman.

3 CHAIRMAN NELSON: Yeah. I think housekeeping, I
4 think we've got an idea of how we're going to start
5 tomorrow. Can somebody give me an idea -- we've
6 obviously got some more cross-examination here.

7 Who is up next tomorrow? How are we looking
8 that way?

9 MR. MOORE: Our last witness on direct is
10 Meera Kothari.

11 CHAIRMAN NELSON: Okay. That will, I suspect,
12 take at least the rest of tomorrow.

13 Do we have anybody that we have specifically
14 granted -- Mr. Smith, anybody that we have
15 specifically designated?

16 MR. SMITH: Yeah. I'm sorry. I can't see your
17 sign.

18 MS. STESKAL: Diana Steskal.

19 MR. SMITH: Diana. I'm sorry. We previously
20 determined that she would be able to have a time today or
21 tomorrow.

22 CHAIRMAN NELSON: Okay. Is there anybody else
23 that we've designated tomorrow?

24 MR. CLARK: As I discussed at the very
25 beginning, we had -- one of our witnesses had

1 unexpectedly traveled out of state, and we were able to
2 arrange his schedule so that he could arrive tomorrow.
3 So we were going to provide both of our witnesses to be
4 available for --

5 CHAIRMAN NELSON: Okay. Well, it probably makes
6 sense to me since those two are locked in that after
7 we're done with rebut here, then we will probably go to
8 those two so we can make sure we keep that promise and
9 then on.

10 MR. TAYLOR: Did I understand Cheyenne River to
11 say it's going to have both Mr. Ducheneaux and Mr. Vance
12 here tomorrow?

13 MR. CLARK: I just want -- for convenience
14 purposes, we were going to have both available for
15 testimony, yes.

16 MR. TAYLOR: So do you want to do them both
17 tomorrow and be done with them?

18 MR. CLARK: Sure. That's absolutely good with
19 us.

20 CHAIRMAN NELSON: If that's acceptable. I mean,
21 we only guaranteed you the one that was having the
22 out-of-state issue. So I think that's up to you all if
23 you want to grant them that or not.

24 MR. TAYLOR: Who is the one who -- is it
25 Ducheneaux or Vance? We've never heard a name.

1 MR. CLARK: It was Mr. Ducheneaux who traveled
2 out of state.

3 MR. TAYLOR: So do you want to just do
4 Ducheneaux tomorrow?

5 CHAIRMAN NELSON: Yeah. That's fine with me.
6 Okay. Let's do it that way.

7 Leah Mohr, do you have any information for me or
8 not at this time?

9 Okay. Not at this time.

10 MR. CREMER: This is Karen Cremer, and I would
11 just throw this out as long as we're all sitting here
12 anyway.

13 The Steskals, is it just Diana that's going to
14 go and give an opening statement?

15 MS. STESKAL: No. I'm going to do testimony. I
16 filed exhibits.

17 MR. CREMER: So it will take a bit.

18 MS. STESKAL: Yes.

19 MS. REAL BIRD: Mr. Smith, the Commission
20 granted us an order for time certain for our witness
21 Faith Spotted Eagle Thursday or Monday. Her schedule has
22 again changed, and she would be available for Friday if
23 that frees up the schedule.

24 MR. SMITH: And is she in relative proximity to
25 Pierre?

1 MS. REAL BIRD: She's here at present and will
2 be present over the week.

3 MR. SMITH: Yeah. And, I don't know,
4 Commissioners, thoughts on accommodating her so --

5 MS. REAL BIRD: It's not a request for another
6 time certain. It's just saying she would be available if
7 that helps in the scheduling. So Thursday, Friday, or
8 Monday so that it's just a slight addition of an
9 additional available day.

10 MR. SMITH: Okay. Thoughts.

11 CHAIRMAN NELSON: That's fine. Yeah.

12 MR. SMITH: Okay. So what time do the
13 Commissioners want -- what do you want to set aside then
14 for tomorrow for the confidential?

15 MR. MARTINEZ: I think I indicated that because
16 it's really a short line of questioning, I would be
17 frankly surprised if it took more than a half an hour.
18 At most. I'm trying to -- but, you know, I don't know.

19 You know how cross-examination goes. Sometimes
20 a question may elicit an answer that leads to something
21 else that leads to something else.

22 MR. SMITH: Well, and we have a lot of other
23 lawyers in the room here so one never knows, as we've
24 seen so far.

25 Should we set for other business -- should we

1 set aside a half an hour or an hour?

2 CHAIRMAN NELSON: Let's set aside a half an
3 hour.

4 MS. REAL BIRD: Mr. Smith, I don't want to add
5 to the complexity, but you sort of raised this as an
6 issue that popped into my mind. If folks on cross wanted
7 to ask about the confidential documents if they're
8 accepted into evidence, how would the Commission do that?
9 All at once or -- I hate to see us keep going in and out
10 of confidential.

11 MR. SMITH: I think so. Yeah.

12 MS. REAL BIRD: I know. But typically you could
13 go with -- you know, your questions on the confidential
14 and then come back in with everybody else for the rest of
15 your questions. And then if folks had cross or the
16 Commission had questions or Staff regarding the
17 confidential documents, I guess I'm trying to figure out
18 what makes sense here.

19 MR. ELLISON: Could I propose that Mr. Martinez
20 finish his examination, and then we just continue as
21 though the -- the Commissioners might have questions.
22 Finish just the normal way that we do do this while we're
23 all here under the confidential agreement.

24 We could finish it all, and then whatever time
25 that is, then we bring in everybody else.

1 MR. SMITH: Then we move on to the
2 nonconfidential portion.

3 And, again, set aside a half an hour. And you
4 said it would be relatively brief, Mr. Martinez.

5 MR. MARTINEZ: Yes.

6 MR. ELLISON: Then everybody else.

7 MR. SMITH: Based on the description you gave, I
8 haven't seen this, but it doesn't look like it would be
9 that terribly complicated of a thing that would involve
10 too many questions but --

11 MR. ELLISON: Since we don't know, I mean, it
12 could take an hour with everybody.

13 MR. SMITH: I will say this: Other hearings
14 here, many, many other hearings we've had ins and outs
15 with confidential material. We have. Now normally it
16 doesn't involve as many parties and as many people
17 present, but yeah.

18 Okay. All confidential.

19 CHAIRMAN NELSON: Yeah. Mr. Ellison's
20 suggestion is exactly how we're going to do it. We're
21 going to shoot for a half hour but keep your fingers
22 crossed.

23 So for those of you that come at 8:30 the doors
24 may still be barred, but just bear with us until
25 everybody gets around.

1 MR. SMITH: People out there who have signed the
2 confidential agreement, that's a different kettle of
3 fish.

4 Okay. We are adjourned for the night, and we
5 will reconvene at 8:00 in the morning for the
6 confidential portion.

7 (The hearing is adjourned at 5:23 p.m.)
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1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 29th day of
11 July, 2015, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 30th day of
14 August, 2015.

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16

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18 Cheri McComsey Wittler,
19 Notary Public and
20 Registered Professional Reporter
21 Certified Realtime Reporter

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