

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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HP14-001

IN THE MATTER OF THE APPLICATION BY		
TRANSCANADA KEYSTONE PIPELINE, LP		GARY DORR'S MOTION TO COMPEL
FOR A PERMIT UNDER THE SOUTH		DISCOVERY AND PRECLUDE KEYSTONE
DAKOTA ENERGY CONVERSION AND		FROM OFFERING EVIDENCE OR
TRANSMISSION FACILITIES ACT TO		WITNESSES AT HEARING
CONSTRUCT THE KEYSTONE XL		
PROJECT		

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Intervener, Gary F. Dorr moves that the Commission enter an order to Compel Discovery and require TransCanada Keystone XL Pipeline, LP, (KS) to answer the questions listed below and on the attachments A,B,C and D and preclude KS from offering evidence or witnesses at Hearing.

I take offense to the notion expressed by the PUC Chairman that the interveners had until March 10 to file motions to compel. It was never stated in any order by the PUC that interveners had to file motions to compel by March 10. It is also offensive that the PUC commissioners would imply that the interveners had not been prejudiced. As can be noted by my record of interrogatory and response from Keystone, I have been severely prejudiced. Keystone has failed to provide me with correct documents. I personally had to drive over 80 miles from my residence to Haakon and Jones County Deeds of Records offices where one of the staff members indicated that the easement agreement provided to me by TransCanada did not contain any water line easements. I also appeared at Haakon County in person and found out that the Clerk in the Deeds of Record office was not bonded to conduct searches. I personally paid for the Haakon County Abstract Company to search documents for me as the time was drawing near to closing for the work offices. I also found that in agreement with my line of questioning, Attachment OS-3 clearly shows that the West River/Lyman-Jones RWS Inc. easement agreements have specific language above and beyond the United States Easement Agreements with landowners that states that the grantors will not build anything "other than an ordinary fence" on the waterline right of way. I was also given a blank standard easement agreement from West River/Lyman-Jones RWS Inc. (attached as **Attachment E**) The

information I requested from TransCanada will lead to discovery of either subsequent easement agreements that provide proof of permission to build anything other than ordinary fences in the waterline right of way, or they will lead to discovery that TransCanada does not have permission to build anything other than an ordinary fence. TransCanada did not provide proof of any such documents. Further I requested a map of the entire system to include the core lines and the branch lines of the waterline system. This map will show the hundreds of crossings that the proposed Keystone pipeline will cross, and the fact that Keystone does not have proof of permission would mean discovery in each of these questions would lead to admissible evidence and TransCanada has not provided that. Further if TransCanada does not have a map showing the location of the Waterlines, how can they provide evidence that they are necessarily planning appropriately for any waterline crossings? My questions of TransCanada or Keystone would lead to admissible evidence. I am providing evidence of my request for TransCanada to answer my questions below. I attempted to reconcile the questions by further explaining the questions in a manner that better defines and narrows the questions.

Also, as can be evidenced by Keystone's responses to my questions, it becomes evident that when I asked for proof of permission from the Bureau of Reclamation and the Oglala Sioux Rural Water Supply System, TransCanada said "discussions" were held. This does not answer my request for proof of permission from TransCanada. Again, this discovery would lead to admissible evidence based on the amended permit condition or finding of fact, contained with that question. I have attached my questions and TransCanada's Response to my discovery requests as **Attachments A, B, C, and D**.

Based on the below exchange with TransCanada or Keystone, sent in an email dated April 6, 2015, regarding their failure to provide me with correct easements and additional questions I am requesting a motion to Compel Discovery on Keystone:

This is to serve as notice that TransCanada has provided insufficient or deficient responses to my First Interrogatories and Request for Production in the above mentioned matter, and that I requested that they cure said deficiencies.

In TransCanada or Keystone's (KS) responses dated 05 February 2015 KS stated "Keystone does not believe that any part of its route as currently permitted passes through Indian Country or across tribally owned lands." KS also stated "Keystone does not agree that the Treaties of Fort Laramie of 1851 and 1868 create usufructuary rights in lands that are within the KXL pipeline's currently permitted route." I did not ask whether the usufructuary rights were created by the treaty. The rights of the Tribes, like any other nation are "inherent." A right is never created, only taken or ceded. The Rosebud Sioux

tribe did not give up their usufructuary rights in the Treaty of 1868. The usufructuary rights are reserved unto the tribe unless it was recognized that Congress took that right from them. The usufructuary rights are still valid, still reserved by the tribe and still a concern to the Tribe today because Keystone has not provided explanation for how TransCanada is consulting separate of other applicable Federal laws, with the Rosebud Sioux Tribe about protecting usufructuary and reserved resource rights as contained in the un-abrogated treaty stipulation in Article 11 of the TREATY WITH THE SIOUX-BULE, OGLALA, MINICONJOU, YANKTONAI, HUKPAPA, BLACKFEET, CUTHEAD, TWO KETTLE, SAND ARCS, AND SANTEE-AND ARAPAHO, 1868, contained in 15 Stats. 635. If TransCanada has not consulted with the Rosebud Sioux Tribe about protecting usufructuary and reserved resource rights in accordance with this treaty reserved right which is the supreme law of the land under Article 6 Section 2 of the United States Constitution whereby it states "states "[A]ll Treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding," then please indicate that TransCanada has not done so.

KS also said, "The currently permitted route for the KXL pipeline in South Dakota does not pass across any lands owned by the federal government or any South Dakota resident tribe nor does it pass across Indian Country as that term is defined by the laws of the United States. Keystone does not believe that it is required to obtain consent from the Rosebud Sioux Tribe to construct the pipeline project on lands that are within the currently permitted route." Perhaps you did not understand my question of "Provide proof that TransCanada has obtained consent from the Rosebud Sioux or Great Sioux Nation to pass through the 1868 boundaries of the Great Sioux Nation in accordance with the un-abrogated treaty stipulation in Article 16 of the TREATY WITH THE SIOUX-BULE, OGLALA, MINICONJOU, YANKTONAI, HUKPAPA, BLACKFEET, CUTHEAD, TWO KETTLE, SAND ARCS, AND SANTEE-AND ARAPAHO, 1868, contained in 15 Stats. 635. I made no mention of currently owned lands. I made no mention of "Indian Country" in my question. I asked for proof that TransCanada complied with standing Treaty Reserved Right and obtained permission to cross the 1868 treaty territory boundaries. I would add that my question is asking if TransCanada complied with a Supreme law of the land that has never been abrogated from the 1868 Treaty provisions. Article 6 Section 2 of the Constitution states "[A]ll Treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." If TransCanada did not obtain consent, then please indicate you did not get consent from the Rosebud Sioux Tribe

or the Great Sioux Nation to cross the 1868 treaty boundaries.

In that same letter KS stated that my request for KS to identify “all emergency medical response planning being provided to the Rosebud Sioux Tribal Government as contained within the emergency response plan” was seeking “information that is beyond the scope of the PUC’s jurisdiction and Keystone’s burden under SDCL 49-41B-27. This is an amended permit condition #36(a) so I feel it is under the purview of the PUC and therefore should be a vital piece of information as the Rosebud Sioux Tribe is a “LOCAL GOVERNMENT” and should be consulted as they have housing areas that are not under the jurisdiction of the county and state governments that are in areas that could be impacted in emergencies. The citizens of the Rosebud Sioux Tribe housing areas are also State and Federal citizens and thus are entitled to have a voice in the emergency planning response under their local Federally-recognized government, the Rosebud Sioux Tribe. If KS has not provided any emergency response planning to the Rosebud Sioux Tribe, then please indicate so.

KS also in the same letter indicated that my question 36(b) about providing explanation for why the Rosebud Sioux Tribal Government was being excluded from having emergency management plan(s) filed with them, was beyond the PUC’s jurisdiction; however, it is not beyond TransCanada or Keystone’s duty and that is why I asked that question. I am not asking for compliance, I am asking for an explanation for why one of the local governments in the pipeline corridor area is being excluded from emergency management planning. This is directly in relation to the amended permit condition which TransCanada agreed to in 36(b).

When I asked about amended permit condition 36(d) about how Tribal rural housing areas, allotments and political precincts of the Rosebud Sioux Tribe in and near to the project area be notified of spills or other emergencies KS responded “If it is appropriate under the circumstances to notify political subdivision of the Rosebud Sioux Tribe, it will be done in the manner provided in the emergency response plan, through contacts with law enforcement agencies and other official representatives of the body politic of the Rosebud Sioux Tribe.” I didn’t ask if it what responses would be “appropriate,” rather this question seeks to identify how, since the Rosebud Sioux Tribe is not part of the emergency response plan, and the plan is not being filed with them, how any coordination is supposed to take place to provide emergency response planning when some allotments are near to towns with no local law enforcement or very little, as in having one officer. If TransCanada or Keystone has no idea how they will notify Tribal housing areas and tribally-controlled landowners about spills or other emergencies, please indicate so.

When I asked about amended permit condition 43(c), and providing proof that the Rosebud Sioux Tribe was consulted about the results of the cultural survey, I sought discovery of proof from TransCanada that TransCanada consulted with the Rosebud Sioux Tribe about the results of the Cultural survey. If TransCanada does not have proof of consultation with the Rosebud Sioux Tribe about the results of the Cultural survey, please indicate so.

In that same letter I asked in relation to amended permit condition 43(d) that TransCanada provide proof that any maps used for the survey and compiled from the survey contain recognition that the Rosebud Sioux Tribe is the appropriate tribe of consultation, I was referring to Section 106 of the National Historic Preservation Act's definition of the appropriate tribe of consultation for an area. While many tribes may have interest in an area there is "an appropriate" tribe for purposes of consultation. Since the Rosebud Sioux Tribe contains political precincts and housing areas, and allotments under their jurisdiction all the way across Gregory, Tripp, Melette, Todd, and Lyman County, to name a few, my question was to provide proof that the maps TransCanada used as part of this process contain recognition that the Rosebud Sioux Tribe is the appropriate tribe of consultation. I am not asking if the SD SHPO and DOS reviewed and approved the survey methodologies used in the course of the surveys noted in Sections 3.11 and 4.11 of the Department of State SFEIS (2014). I am asking for proof that the appropriate tribe of consultation according to the rules of Section 106 of the National Historic Preservation Act is being referenced in the process. If TransCanada has a Tribe other than the Rosebud Sioux tribe recognized on their maps as having jurisdiction over the counties of Gregory and Tripp, please indicate so.

In the KS response dated 10 March 2015 when I asked,

"1. TransCanada has publicly stated through its Tribal Liaison with the United States, Calvin Harlan, that it has a process of reaching out to a tribe "as a priority." Calvin Harlan further said "First, TransCanada researches the tribal historical jurisdictions of each tribe along a proposed project. Next, meetings are set up with the tribe, providing TransCanada the opportunity to introduce themselves and explain their reason for meeting. Tribes are then advised of all project details, ensuring they understand that the project's goal is to have little effect on their traditional lands." This was reported in the online edition of The Vindicator at

[http://www.thevindicator.com/news/article\\_5c63b1ee-e643-11e2-ad3a-001a4bcf887a.htm](http://www.thevindicator.com/news/article_5c63b1ee-e643-11e2-ad3a-001a4bcf887a.htm).

Provide any and all documentation that TransCanada or Keystone complied with its publicly stated policy of consultation with Tribes and met with the Rosebud Sioux Tribal Council. The Tribe has a distinct National Government represented by an elected Tribal Council,”

KS answered “See Keystone Documents numbered 1122, 1129-30, 1135-1140, 1145-1146, 1148-1150, 1170-1181.” I did not receive these Keystone Documents with any of these numbers. If TransCanada does not have proof of complying with their own publicly stated policy as stated by Calvin Harlan, a TransCanada tribal liaison employee, then please indicate so. I also asked for documentation in questions number 2 and 3 of the same document, and KS provided the same page numbers of documents I have not received.

In the March 10 letter, when I asked

“4. Provide proof of TransCanada’s or Keystone’s compliance with the United States Easement Agreements held in South Dakota County Recorders’ Offices between the United States and South Dakota Landowners whose land the Oglala Sioux Rural Water Supply System crosses, whereby permission must be granted by the United States to cross the Oglala Sioux Rural Water Supply System, otherwise known as the “Mni Wiconi” water line.

KS answered that Keystone objects to interrogatory number 4 on the grounds that it is argumentative, is an incorrect expression of law and assumes facts not in evidence. Notwithstanding the objection and without waiving, the United States Department of the Interior, acting through the Bureau of Reclamation, secured easements for the construction of the Oglala Sioux Rural Water Supply System core pipeline. Keystone’s proposed route crosses the Oglala Sioux Rural Water Supply System core line in Haakon Count and in Jones County. Discussions have been held between Keystone and the Bureau of Reclamation with respect to construction of the crossings and criteria governing the same.” I am actually seeking factual evidence that TransCanada is complying with specific language contained in every Oglala Sioux Rural Water Supply System easement agreed to by South Dakota landowners between them and the United States, signed by the Bureau of Reclamation (under colors of National Government) which states on Exhibit OS-1 and OS-2:

*“3. The GRANTOR, his successors or assigns shall have the right to cultivate, use, and occupy said premises for any purposes which will not, by the determination of the GRANTEE, interfere with the easement rights herein granted or endanger any of its property, but said right of cultivation, use and occupancy shall not extend to or include the erection of any structure(s), planting of trees on, or the drilling of any wells in or the removal of material from or placement of material on said Premises without advance*

*written permission from the GRANTEE.” The Easement agreements go on to indicate in paragraph 7 that “This easement and provisions hereof shall constitute covenants running with the land for the benefits of the parties, their successors, and assigns forever. Title to the Oglala Sioux Rural Water Supply System shall be held by the United States in trust for the Oglala Sioux Tribe and shall not be transferred or encumbered without a subsequent act of Congress. By acceptance of this grant of easement, the GRANTEE does not intend to diminish any claim that the easement area is “Indian Country.” Buy this grant of easement the GRANTOR does not intend to make or recognize that the easement as “Indian Country.”*

As the common man would understand the legal language, this easement agreement is for a pipeline HELD IN TRUST by the United States for the Oglala Sioux Tribe and later by amendment of Public Law 100-516 for the Rosebud, Lower Brule, and Cheyenne River Sioux Tribes. The opening paragraph states that the easement agreement is with the landowners and the GRANTEE, the United States of America, not merely the Bureau of Reclamation. The signature block also contains a signature under “UNITED STATES OF AMERICA” with a Bureau of Reclamation Area Manager in the Dakota Area Office “for” THE UNITED STATES OF AMERICA.” These two documents are held in the Records of Deeds Office for Jones County. So again to make the question more clear, please provide proof that Keystone or TransCanada has **written permission** to cross the Oglala Sioux Rural Water Supply System, a subsequent act of Congress, or permission from the Oglala Sioux Rural Water Supply system tribes for whom the waterline is held in trust by the United States. If TransCanada does not have proof to cross a current South Dakota Easement held in South Dakota County Records of Deeds offices then please indicate so. If TransCanada does not have permission from the Tribes for whom the Oglala Sioux Rural Water System is held in trusty by Public Law 100-516, then please indicate so. Further, the “conclusion” by the Bureau of Reclamation dated Nov 4, 2011, DOES indeed indicate in part that permission must be gained for TransCanada to “enter the subsurface or surface space,” of the OSRWSS. An English sentence containing the word “but” as in “but said right of cultivation, use and occupancy...” as contained in the easement agreements will indicate that the clause is separate of the previous clause and therefore must be construed as a supplementary and additional comment not tied to the first clause. That BOR concluded that the U.S. does not have any right has not been argued as a point of law, it is merely an opinion and is up for challenge. If TransCanada does not have substantive evidence beyond a mere conclusion that the signer for the United States does not believe that permission is needed, please indicate so. Additionally, **in attachment OS-3, a right of Way Agreement between Hostutlers and West River Lyman Jones Rural Water System, the Hostutlers agree that they “will not construct any structure (other than ordinary fencing) within the right of way except upon the prior agreement thereto by the Grantee in writing.** “ This is in addition to the attachment OS-4 a right of Way Agreement between

Hostutlers and United States of America. So again I respectfully ask that if TransCanada does not have every single easement agreement signed by the landowners for every place where the Keystone crosses the OSRWSS's "SYSTEM" please indicate so.

5. Provide all easement agreements made by TransCanada or Keystone between TransCanada or Keystone and landowners on land where the Keystone XL pipeline will cross the Oglala Sioux Rural Water Supply System, otherwise known as the Mni Wiconi Waterline.

KS answered: "Responsive documents are attached as Keystone 1539-1564." These documents are incorrect to the answer. Further I asked for easement agreements by TransCanada or Keystone to the "system" not just the core lines. The System as identified in Public Law 100-516 would include the core lines and the branch lines. If TransCanada does not have easements to cross the entire "Oglala Sioux Rural Water Supply System" which would include Core lines and Branch lines, please indicate so. Also please review your documentation as you provided the wrong easement agreements where there is no waterline.

6. In TransCanada or Keystone's required criteria for crossing Reclamation facilities, **TransCanada said "TransCanada shall receive OSRWSS and Reclamation's review and approval of crossing specifications and drawings prior to starting work, including on the cathodic protection design to assure it does not impact the OSRWSS Core System or its cathodic protection system."** Provide proof that TransCanada or Keystone gained approval of crossing specifications from the Oglala Sioux Rural Water Supply System and the Bureau of Reclamation in accordance with TransCanada's or Keystone's own reclamation plan.

KS answered "Keystone and The Bureau of Reclamation have agreed on crossing criteria. The Bureau of Reclamation has discussed the crossing criteria with both the executive and engineering staff of the Oglala Sioux Rural Water Supply System. " I appreciate the response; however, it should be noted that TransCanada agreed (and provide proof of ) with another Area Office of the Bureau of Reclamation who does not have jurisdiction over South Dakota. TransCanada got agreement from a Montana Bureau of Reclamation Office. The North Dakota Office of Bureau of Reclamation has jurisdiction over South Dakota. Further, when TransCanada answered they have "discussed the crossing criteria" with the Oglala Sioux Rural Water Supply System, that is outside the question I posed. If TransCanada does not have Oglala Sioux Rural Water Supply System's approval of crossing specifications, please indicate so.

7. In the same Criteria for Crossing Reclamation facilities TransCanada said "OSRWSS has a buried fiber optic cable installed with its pipeline that was placed by plow; its precise



location is unknown. The burial depth information provided on the drawings is for information purposes only. TransCanada shall undertake exploratory excavations (potholing) to determine the exact burial depth for both the OSRWSS core pipeline and fiber optic line prior to starting crossing designs and construction of their pipeline.” Provide proof that TransCanada or Keystone has received permission from the United States to “undertake exploratory excavations (potholing)” inside the Oglala Sioux Rural Water Supply System Right of Way, whereby permission must be gained from both the United States and the Oglala Sioux Rural Water Supply System to disturb the ground, as stipulated in the Oglala Sioux Rural Water Supply System Easement Agreement which was signed by the United States, and is held in a South Dakota County Recorder’s Office.

KS answered in part: “The construction of the pipeline has not yet begun. Accordingly, Keystone has not yet asked to undertake exploratory investigations within the easements held by the Bureau of Reclamation.” A note from me on this response, I object to the wording of this answer. The Easement for the OSRWSS is not merely “held by the Bureau of Reclamation.” It is held by the UNITED STATES OF AMERICA as indicated by the attachments contained herein.

8. Provide maps showing for every single place where the Keystone XL pipeline will cross a Core Line of the Oglala Sioux Rural Water Supply System, providing Latitude and longitude or Public Land Survey System information to identify those locations.

TransCanada provided a map. The map is too difficult to read.

9. Provide a map showing every single place where the Keystone XL Pipeline will cross a Branch of the Core Lines of the Oglala Sioux Rural Water Supply System, providing Latitude and longitude or Public Land Survey System information to identify those locations.

The map KS provided is too difficult to read and does not include every single branch of the core line. If KS does not have a map showing every single place where the Keystone will cross a branch line of the OSRWSS, please indicate so.

10. Provide a map showing every single place where the Keystone XL Pipeline will cross the Core Lines of the Lyman-Jones Rural Water Supply System, providing Latitude and longitude or Public Land Survey System information to identify those locations

KS replied “The request for latitude and longitude seeks information that is confidential for security reason. Without waiving the objection, see the maps marked as Keystone 1633.” See my reply to TransCanada’s response in Number 9.

11. Provide all easement agreements between TransCanada or Keystone and those landowners who have both the Oglala Sioux Rural Water System and will have the proposed Keystone XL Pipeline situated on their land and also have a previous easement agreement with the Oglala Sioux Rural Water Supply System.

KS refused to provide an answer fully and provided incorrect documents. See my answer to Number 4.

I am hopeful that with more explanation TransCanada can more fully understand my questions and answer accordingly.

With respect to my witnesses, I have not fully compiled a list yet, however I plan to call the Honorable Wayne Frederick, and the Honorable Don Fire Thunder at minimum. I reserve the right to call more witnesses and will submit the list by the PUC's published deadline for witnesses.

Additionally, TransCanada did not provide appropriate questions as stipulated to and agreed to by the PUC. In an email to interveners, Kristin Edwards indicated that ALL parties must state question and amended permit number in their questions. Please re-word your questions so that I may be able to answer your questions. I hope we can come to some agreement on these issues.

### **Conclusion**

Gary Dorr respectfully requests that the Commission enter an order:

- 1) to compel discovery, requiring KS to disclose answers to the above mentioned questions regarding the map, correct easement agreements, and tribal consultation;
- 2) precluding KS from offering evidence or witnesses at Hearing in relation to waterline and pipeline easements, waterline maps, and tribal consultation.

7 April 2015

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