

BEFORE 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 PROJECT	: : : : :	HP 14-001  MOTION TO PRECLUDE TESTIMONY REGARDING MNI WICONI PIPELINE EASEMENTS
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Intervener Gary Dorr has raised the issue of whether Applicant TransCanada Keystone LLP may lawfully cross the Mni Wiconi pipeline, contending that Keystone did not secure tribal approval for the crossings. Keystone respectfully moves the Public Utilities Commission to preclude testimony and argument pertaining to tribal consent to the proposed Keystone XL pipeline’s crossing of the Mni Wiconi pipeline(s), for the reason and on the grounds that no consent is required.

**1. Mni Wiconi Background**

The Mni Wiconi Project Act of 1988, Pub. L. No. 100-516, 102 Stat. 2566, authorized construction of the Oglala Sioux Rural Water Supply System<sup>1</sup>. PL 100-516 (a) (1-4) authorized construction of a water intake and treatment facilities near Pierre, core pipelines from the Missouri River near Fort Pierre to the West River and Lyman-Jones rural water systems, Pine Ridge reservation and construction of distribution facilities on the Pine Ridge reservation.

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<sup>1</sup> The statute that authorized the project is called the *Mni Wiconi Project Act*. The core pipelines are called the Mni Wiconi core pipelines. The larger system is called the Oglala Sioux Rural Water Supply System, referred to as the OSRWSS.

Construction began in 1991. In 1994, the Mni Wiconi statute was amended by Pub. L. No. 103-434, Title 8, to include core pipeline extensions to the Lower Brule and Rosebud reservations.

Two core pipelines were constructed. One pipeline, constructed from PVC plastic pipe, runs due west from the Ft. Pierre treatment plant to Haakon County, then south to a terminus in Haakon County. The other core pipeline is a twenty-four inch steel pipeline running south from the Ft. Pierre water treatment plant, then west, roughly paralleling Interstate 90 to near Kadoka, then southwesterly to Pine Ridge. Lower Brule is served by a core line extension that intersects the steel pipeline south of Pierre. Rosebud is served by an extension that intersects the steel pipeline near Murdo. Taylor Declaration, Ex. 1.

The Mni Wiconi core pipelines supply water to four retail rural water systems, the West River/Lyman-Jones Rural Water System, Inc., the Lower Brule Rural Water System, the Rosebud Rural Water System, and the retail portion of the OSRWSS on the Pine Ridge Reservation. Taylor Declaration, Ex. 1.

Lyman-Jones and West River rural water systems merged into a single water system in 1993. <http://www.wrlj.com/about-us-2/history/>. The merged water systems receive water from the steel pipeline and from the PVC pipeline and serve retail customers from a network of distribution lines in a multi-county area, including all or parts of Stanley, Lyman, Jones, Haakon, Jackson, Mellette, and Pennington counties. <http://www.wrlj.com/about-us-2/service-area-map/>. The merged West River/Lyman-Jones Rural Water System, Inc., is a non-profit utility headquartered in Murdo and managed by a board of directors. <http://www.wrlj.com/>.

The proposed Keystone KXL Pipeline will cross the Mni Wiconi core pipelines twice. It crosses the PVC line in Haakon County and the steel pipeline in Jones County. The KXL

Pipeline crosses more than a dozen West River/Lyman-Jones retail distribution lines<sup>2</sup>. It does not cross any Lower Brule, Rosebud, or OSRWSS retail distribution lines. Taylor Declaration.

Public Law 100-516, section 3(e), provides

(e) Title to System.—Title to the Oglala Sioux Rural Water Supply System shall be held in trust for the Oglala Sioux Tribe by the United States and shall not be transferred without a subsequent Act of Congress.

The United States delegated its trust responsibility to Department of the Interior, Bureau of Reclamation (“BOR”). The Dakotas Area Office of the BOR in Bismarck manages the United States trust responsibility for the OSRWSS. The Dakota Area Office is supervised by the Great Plains Region Office of the BOR in Billings.

The BOR acquired easements for the construction and placement of the two core Mni Wiconi pipelines from private landowners. The easements and the rights associated with the easements are held in trust for the Oglala Sioux, per their terms and PL 100-516. The BOR easements permit construction of the Mni Wiconi core pipelines on the Hostutler property in Haakon County and the Dahlke-Mann property in Jones County. Both easements name the United States Bureau of Reclamation as the easement grantee. Taylor Declaration, Exhibits 2 and 3.

The Keystone KXL Pipeline will cross the PVC portion of the Mni Wiconi core pipeline on the Hostutler property in Haakon County and the steel core line on the Dahlke-Mann property in Jones County. Keystone has acquired easements for its pipeline from both property owners, Taylor Declaration Exhibits 4 and 5.

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<sup>2</sup> Keystone has entered into a contract with West River/Lyman Jones Rural Water System authorizing the pipeline to cross various distribution lines. The contract identifies the locations and addresses engineering of the crossings and payment of the costs involved.

**2. Keystone is not required to deal with the Oglala Sioux with respect to the crossings**

The Mni Wiconi genesis statute, PL 100-516, provides that the United States will own the core pipelines and the easements, but will hold the easements in trust for the benefit of the Oglala Sioux Tribe. The statute provides, in section 3(e)

(e) Title to System.—Title to the Oglala Sioux Rural Water Supply System shall be held in trust for the Oglala Sioux Tribe by the United States and shall not be transferred without a subsequent Act of Congress.

The Hostutler easement provides

. . . the United States of America, represented by the officer executing this contract [is] hereinafter referred to as the GRANTEE. The acquiring federal agency is the Department of Interior, Bureau of Reclamation.

The Dahlke-Mann easements provide that they are between the Grantor land owner and

. . . the United States of America, acting through the Department of the Interior, Bureau of Reclamation hereinafter referred to as the GRANTEE, represented by the officer executing [the] contract.

Nothing in the BOR easements on the Hostutler and Dahlke-Mann properties requires Keystone to deal with the Oglala Sioux or any other tribe. The easements describe the Bureau of Reclamation as the easement Grantee, not the Oglala Sioux. Nothing in the genesis statute or any of its subsequent amendments<sup>3</sup> modifies the ownership of the easement or the pipeline or requires that Keystone secure the consent of the Tribes to cross the easement premises or pipeline.

**3. South Dakota Law permits Keystone to cross the Mni Wiconi**

The easements are not exclusive to the United States. Both easements provide

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<sup>3</sup> The original Mni Wiconi statute has been amended several times since its enactment. The most significant amendment was the addition of the Lower Brule and Rosebud extensions in 1994, PL 103-434, Title 8. Subsequently the act has been amended to re-authorize the project and to fund the build out of retail distribution lines on the reservations.

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

. . .

The BOR easements don't grant the United States exclusive control over the easement premises. In *Canyon Lake Park, LLC v. Loftus Dental, PC*, 700 N.W.2d 729, 734 (S.D. 2005), the South Dakota Supreme Court held "The terms and extent of an easement by grant are ascertained either by the words clearly expressed, or by just and sound construction of the easement document." Under South Dakota law the scope of an easement is determined by the words used in the easement document.

In *Picardi v. Zimmond (Picardi II)*, 693 N.W.2d 656 (S.D. 2005), the South Dakota Supreme Court considered whether a road easement was exclusive to the easement holder, and what rights the easement grantor retained relative to the easement property. The court held "[w]e look first to the language and nature of the easement agreement and its terms. . . . If the terms of the agreement are specific in nature, the terms are decisive of the limits of the easement." The court held "[t]he grantor of an easement, who is also the owner in fee of the servient tenement . . . retain[s] all incidents of ownership over the property not specifically contracted away."<sup>4</sup> (citing *Picardi v. Zimmond (Picardi I)*, 689 N.W.2d 886 (S.D. 2004)).

The court, citing *Knight v. Madison*, 634 N.W.2d 540, 543 (S.D. 2001), held "[t]he owner of the servient tenement generally reserves the right to use the easement property in any manner or for any purpose, so long as the owner does not interfere with the use or enjoyment of the easement." The court concluded "[o]ur law is clear that the owner of the servient tenement

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<sup>4</sup> Per SDCL 43-13-3, the land on which the burden of an easement is laid is called the servient tenement.

retains all the incidents of ownership in the easement . . . the grant of an easement does not dispossess the landowner.”

In *Picardi I, supra.*, the Supreme Court considered whether an easement could be considered exclusive absent language to that end. The Court held “[i]t is illogical that a grantor of an easement would grant away all benefits to his or her property including actual access thereto and retain all detriments such as the legal obligation for real estate taxes.” The court required exclusivity to be spelled out in the easement document, holding “[f]or such an unusual situation to arise, the nature of the grant would have to be explicit and not implied.”

In *Knight v. Madison, supra.*, Knight held an access easement over Madison’s land. Knight challenged Madison’s right to use the land and claimed the exclusive right to control the easement property. The court ruled that land owner Madison’s rights include “. . . granting additional easements over the property, so long as the additional uses do not interfere with . . .” the easement holders use of his easement. The Court further noted that the landowner could make use of the easement property “. . . so long as the owner does not interfere with the use of enjoyment of the easement.”

In *Stanga v. Husman*, 694 N.W.2d 716 (S.D. 2005), the South Dakota Supreme Court discussed post-grant uses by the owner of the easement. The court cited the Restatement (Third) of Property (Servitudes) § 4.8 (2000) for the proposition that the owner may modify the easement premises if “those modifications are reasonable and do not significantly lessen the utility of the easement, increase the burdens on the owner of the dominant tenement, or frustrate the purpose for which the easement was created.” *Stanga*, 694 N.W.2d at 719.

The Restatement (Third) of Property (Servitudes) § 4.12 (2000) provides

“[u]nless the terms of the servitudes . . . provide otherwise, holders of separate servitudes creating rights to use the same property must exercise their rights so

that they do not unreasonably interfere with each other. In the event of irreconcilable conflicts in use, priority of use rights is determined by priority in time.”

The illustrations in the Restatement official comments include

O, the owner of Blackacre, granted Pipeline Company an easement for installation and maintenance of a high pressure natural gas pipeline. Subsequently, O granted A, the owner of Whiteacre, an easement to build a road across Blackacre to Whiteacre. A took the easement with notice of the pipeline easement. The road will necessarily cross the pipeline. In the absence of other facts or circumstances, Pipeline Company and A must each act reasonably to avoid unreasonable interference with the other, but if A’s road will unreasonably interfere with operation of the pipeline, A must bear the expenses required to lower or strengthen the pipeline, or otherwise avoid the interference because A’s interest is later in time.

Nothing in the BOR easements granted the United States exclusive use of the burdened property. Under South Dakota law, Hostutlers and Dahlke-Mann may therefor grant TransCanada a subsequent easement involving the same property, provided the additional easement does not interfere with BOR’s use of its easement.

#### **4. The Tribe’s remedy is in the Federal courts**

If the Oglala Sioux claim that the United States has breached its trust responsibility by not objecting to Keystone crossing the Mni Wiconi core pipelines, the Tribe’s remedy is not with the South Dakota Public Utilities Commission. Federal law affords the Tribes’ remedies against the Bureau of Reclamation for any claimed breach of trust responsibility with respect to the Mni Wiconi crossings. The Indian Tucker Act, 28 U.S.C § 1505, provides

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

The federal Administrative Procedures Act, 5 U.S.C. § 702 *et seq.* allows the Tribes to sue an agency of the United States for actions that are “. . . an abuse of discretion, or otherwise not in accordance with law.” See 5 U.S.C. § 706(2)(A).

If the Tribes and Mr. Dorr believe the Bureau of Reclamation acted improvidently and/or failed to communicate with the management of the Oglala Sioux Rural Water Supply System or with other tribes regarding the subject crossings, the affected parties remedy is in federal court, not before the PUC.

**5. The PUC does not have authority to decide whether KXL can cross the Mni Wiconi**

The South Dakota Public Utility Commission is a quasi-judicial agency, created with limited jurisdiction. Our Supreme Court has said that the PUC has no authority to define or interpret the law. In *In the Matter of the Petition of West River Electric*, 675 N.W.2d 222, 230 (S.D. 2004), the Court held “The PUC is not a court, and cannot exercise purely judicial functions. Defining and interpreting the law is a judicial function.”

The PUC simply does not have jurisdiction to hear and decide questions regarding the rights of the Tribes to consultation on the Mni Wiconi crossing, the rights of the BOR versus the landowners who granted BOR and KXL easements, or the nuances of the BOR and KXL relationships.

**6. Conclusion**

For all of the foregoing reasons, testimony regarding the relationship between the Tribes, BOR and Keystone regarding crossing the Mni Wiconi pipeline should be excluded. Keystone prays the Commission enter an order to that end.



Dated this 26th day of May 2015.

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### CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of May 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Motion to Preclude Testimony Regarding Mni Wiconi Easements to the following:

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