

Black Elk apparently authored and nothing else. The filing was not supported with a statement of Ms. Black Elk, a summary of testimony she purported to give, or anything by way of foundation for the article's admission into evidence. It is apparent that Standing Rock intends to call Ms. Black Elk as a witness in these proceedings, as she is listed as a witness and her article is listed as an exhibit in the Tribe's July 7 witness and exhibit list.

The unsupported April 2 filing of the article "Culturally Important Plants of the Lakota" does not constitute pre-filed testimony in the sense directed by the Commission. It is not testimony and is not directed at any issue in this proceeding. There is no witness statement explaining what the article is, the foundation for its conclusions, how it is relevant to the matters in issue, and how it bears on Applicant's certification application. Accordingly, it does not constitute pre-filed testimony in the sense of the Commission's order or its regulations.

In the form filed, the article is hearsay and without foundation. Hearsay, per the South Dakota rules of evidence, is unsworn out-of-court statements offered for the truth of the matter asserted. *See* SDCL § 19-19-801. Hearsay is not admissible in this proceeding. An article may not be offered as a substitute for the testimony of the author, for the simple reason that the article cannot be cross-examined. Accordingly, it is not admissible as evidence in these proceedings. A learned treatise is admissible into evidence, but only after proper foundation for the article is presented, and then under limited circumstances. *See* SDCL § 19-19-803(18).

The article, while interesting, has no bearing on any issue before the Commission in this proceeding. It purports to identify plants used for food, medicine and other purposes by Lakota, identifies the genus and species and Lakota word(s) for the plants, but describes no locus for the plants, or how the certification of the Applicant's project relates to plants described. The article and its contents simply lack relevance to the matters here in issue.

It is entirely inappropriate to let Ms. Black Elk appear and offer facts, opinions, or give testimony in this proceeding. She has not filed any testimony, the parties have no idea what she may have to say, no discovery has been conducted with respect to anything she might say or opinion she might offer. To allow her to testify, even to lay foundation for the article she authored, corrupts the Commission's order requiring pre-filing of testimony and is unfair to the parties.

For those reasons, Applicant respectfully requests the Commission enter its order prohibiting Ms. Black Elk from testifying in the hearing on Applicant's Certification Petition and striking the article "Culturally Important Plants of the Lakota" from the record.

Dated this 10th day of July, 2015.

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