BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT	))))))	HP 14-001

STANDING ROCK SIOUX TRIBE, BOLD NEBRASKA AND INDIGENOUS ENVIRONMENTAL NETWORK JOINT POST HEARING BRIEF

I. Introduction

The burden of proof in this certification proceeding under SDCL §41-49B-27 is on TransCanada. ARSD §20:10:01:15.01. TransCanada's burden is to certify that it continues to meet all conditions incorporated into the permit issued in HP 09-001, with substantial evidence. *M.G. Oil Co. v. City of Rapid City*, 793 N.W.2d 816, 822 (SD. 2011); *Therkildsen v. Fisher Bev.*, 545 N.W.2d 834 (1996). TransCanada failed to do so and accordingly the Commission should deny certification. Moreover, denial is required by the evidence of violations of numerous important laws that apply to Keystone XL Pipeline. *E.g.* 42 U.S.C. §4231 *et seq.* Alternatively, the Commission should schedule supplemental evidentiary proceedings for the purpose of hearing additional testimony and evidence that was improperly excluded from the evidentiary hearing.

II. TransCanada Failed to Meet its Burden of Proof and Certification Should be Denied

A. The Burden of Proof is on TransCanada

The PUC regulations impose the burden of proof on TransCanada in this docket. ARSD §20:10:01:15.01. The applicable rule provides that "In **any** contested case proceeding…petitioner has the burden of proof as to factual allegations which form the basis of the... application or permit." *Id*. (emphasis added). For this reason, the Commission Counsel, John Smith, opened the hearing by stating:

> It is the Petitioner, TransCanada, that has the burden of proof. And under SDCL 49-41B-27, that burden of proof is to establish that the proposed facility continues to meet the 50 conditions set forth in the Commission's Amended Final Decision.

TRANSCRIPT, *In re the Application of TransCanada Keystone Pipeline LLP for a Permit Under the South Dakota Energy Conversion and Transmission Facilities Act to Construct the Keystone XL Pipeline*, Vol. I, p. 10 (hereinafter cited as "Tr.").

The underlying statute itself imposes the burden of proof on TransCanada. SDCL §41-49B-27 provides in relevant part:

> … if such construction, expansion or improvement commences more than four years after a permit has been issued, then **the utility must certify** to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis added).

The plain words of the statute impose the evidentiary burden on the permittee. A statute must be interpreted according to its plain words. *See Matter of SDDS, Inc.*, 472 N.W.2d 502, 509 (S.D. 1991). And the plain words of §41-49B-27 require the utility to certify that it continues to meet the conditions.

The statute does not state that intervenors who object to the permit must demonstrate non-compliance – in that case the burden of proof would fall upon the objecting parties. Nevertheless, TransCanada advanced this unmeritorious argument at the evidentiary hearing:

> Under the statute, we could have said we certify and at that moment the burden of proof shifts to **anyone who wants to contest that certification** to come forward with affirmative proof that there are conditions in our permit issued in 2010 that we cannot meet. And **they have to provide permanent proof** of that.

Tr. at 2467 (emphasis added).

The South Dakota Supreme Court has rejected the concept advanced by TransCanada. The Court explained, "The question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them." *Abild v. Gateway 2000, Inc.*, 547 N.W.2d 556, 558 (1996). TransCanada's argument is also contrary to the plain words of section 27 of the Energy Conversion and Transmission Facilities Act, SDCL §41-49B-27, the PUC regulations, ARSD

§20:10:01:15.01, and the sound advice of Commission Counsel John Smith at the evidentiary hearing. Tr. at 10.

Indeed, the entire procedure invoked by Mr. Smith and the Commissioners in conducting the evidentiary hearing reflected that TransCanada has the burden of proof. South Dakota law prescribes the "Order of proceedings at trial," and the party with the burden of proof puts forward its case first, SDCL §15-14-1(2), followed by the party which does not have the burden of proof, *id.* at (3), and then rebuttal by the party with the burden, *id.* at (4). That is how the evidentiary hearing was conducted from the start. Notwithstanding the misleading and erroneous arguments by TransCanada to the contrary, this entire docket has been conducted in a manner reflecting that the burden of proof falls upon the party that filed the petition, TransCanada.

B. TransCanada's Burden of Proof Requires Substantial Evidence that it Continues to Comply with the Permit Conditions

In any administrative agency contested case in South Dakota, "the issue we must determine is whether the record contains substantial evidence to support the agency's determination." *Helms v. Lynn*, 542 N.W.2d 764, 766 (S.D. 1996). In order to certify the permit per TransCanada's petition in this docket, the Commission must find that TransCanada continues to comply with the conditions in its 2010 permit. SDCL §41-49B-27. "The inquiry is whether the record contains substantial evidence to support the agency's determination." *Matter of Establishing Certain Territorial Electric Boundaries Within South Dakota*, 318 N.W.2d 118, 121 (1982). As the burden of proof is substantial evidence, and the issue in this docket is whether TransCanada still complies with the permit conditions, in order to certify the permit the PUC must find compliance with each permit condition by substantial evidence. *Id.*

The substantial evidence standard is not overly burdensome on TransCanada. *Id.* Under South Dakota law, substantial evidence is "such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL §1-26-1(9).

Nevertheless, inexplicably, TransCanada failed to pro-offer **any evidence whatsoever** to demonstrate continuing compliance with an overwhelming majority of the permit conditions. Exhibit A filed herewith lists the conditions and subconditions in the Keystone XL permit, and identifies the evidence introduced by TransCanada for each condition. The evidence column is generally empty – TransCanada introduced no evidence to certify that it continues to meet 101 of 107 conditions and subconditions. *See* Exhibit A. Its evidence covered merely 6 of 107 condition and subconditions. Consequently, it failed to meet its burden of proof and certification must be denied. *Id.*

Notwithstanding the requirement in SDCL §41-49B-27 that it certify its continuing compliance with the conditions, TransCanada argued that it need not introduce evidence for "prospective" conditions: "… some of the conditions that are considered – that are imposed by the permit you issued in 2010 are inherently prospective in nature and can't be complied with or conformed to until the project is underway or completed." Tr. at 2467-2468.

However, TransCanada failed to provide any evidence on many conditions and subconditions which must be complied with prior to construction. *See* Exhibit A. For example, condition 15c requires special plans for reclamation of areas with bentonite and sandy soils, but offered no evidence that such plans have been prepared. *Id*. More than four years after issuance of the permit, there is no Emergency Response Plan (condition 36), integrity management plan, or paleontology mitigation plan (condition 44c).

An example of a non-prospective condition violated by TransCanada is condition 6b, requiring landowner consultation in route changes. As stated by John Harter, the pipeline route was altered immediately near his property, with no communication having been made. Tr. at 718-719.

An area in which TransCanada failed to provide sufficient evidence with respect to a non-prospective condition is reflected in the TransCanada testimony of Heidi Tillquist. Tr. Vol. II-III. The PHMSA regulations require the preparation of worst case discharge spills and related information. 49 CFR Part 194 Appendix B. Under cross examination, Tilliquist described that her efforts in these studies as "It's a start." Tr. at 686. Five years after obtaining the permit for Keystone XL, TransCanada has just "started" to address important non-prospective conditions.

Conditions such as compliance with Appendix B are not prospective – compliance or good faith efforts at compliance must be demonstrated. Yet TransCanada offered no evidence that it complied with these conditions, or intends to. The failure to comply, five years later, casts doubt on their ability and willingness to do so. To be sure, they presented no evidence of this, much less substantial evidence as required under South Dakota law. *Therkildsen v. Fisher Bev.*, 545 N.W.2d 834; *Helms v. Lynn's, Inc.*, 643 N.W.2d 764. Accordingly, certification should be denied for failure to meet the petitioner's burden of proof in this contested case proceeding. *See In re SDDS, Inc.*, 472 N.W.2d 502, 507 (S.D. 191). TransCanada simply failed to make its case.

III. The Evidence Reveals Significant Developments Since Issuance of the 2010 Permit Relating to TransCanada's Ability to Comply with Many Permit Conditions

Moreover, the Commission received competent, substantial evidence that the Keystone XL Pipeline project fails to comply with numerous federal laws, and is unable to comply with condition 1 (compliance with applicable laws) and other conditions. In considering whether to certify the permit, the PUC must consider all relevant evidence, including the significant developments since issuance of the 2010 permit. This includes the sufficiency of the *Final Supplemental Environmental Impact Statement* by the Department of State, TransCanada's Programmatic Agreement for future discoveries, and the impacts on Indian water.

A. The Final Supplemental Environmental Impact Statement and the Keystone XL Pipeline Do Not Comply with the Requirements of the National Environmental Policy Act

The Commission took judicial notice of the U.S. Department of State, *Final Supplemental Environmental Impact Statement, Keystone XL Pipeline Project* (2014) ("FSEIS"). This document did not exist and could not be used as evidence in the HP 09-001. In order to serve as a sufficient environmental review of Keystone XL under the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.*, the FSEIS must include take a "hard look (and) consider every significant aspect of the environmental impact of a

proposed action," through a rigorous alternatives analysis and reasonable findings based on the record. *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1982); *Muckleshoot Indian Tribe v. U.S. Forest Service*, 652 F.3d 1092 (9th Cir. 2010).

"NEPA ensures that important effects will not be overlooked." *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 349 (1989). The Keystone XL Pipeline would be in compliance with applicable law, NEPA, and condition 1 of the permit, only if the Final SEIS "adequately disclosed the adverse impacts" *Id*. at 346.

The record before the Commission establishes that the environmental impacts of Keystone XL have not been evaluated in compliance with NEPA. SRST Exhibit 8014, the Congressional Research Service report on Keystone XL Pipeline, describes the EPA's evaluation of the NEPA documents:

> On July 26, 2010, EPA rated the draft EIS "Inadequate." EPA found that potentially significant impacts were not evaluated and that the additional information and analysis needed was of such importance that the draft EIS would need to be formally revised… On June 6, 2011, EPA sent a letter to the State Department that rated the supplemental draft EIS as having "Insufficient Information" and having "Environmental Objections" to the proposed action… additional analysis was needed on several points, including potential oil spill risks and lifecycle greenhouse gas emissions of the proposed project.

Congressional Research Service, *CRS Report for Congress: Oil Sands and the Keystone XL Pipeline, Background and Selected Environmental Issues* (2012), p. 17, SRST Exhibit 8014.

With respect to the FSEIS, the EPA expressed alarm that environmental concerns have not been adequately addressed:

> … risks of oil spills and adverse impacts remain, and spills of diluted bitumen can have different impacts than spills of conventional oil… Nonetheless, the Final EIS acknowledged that the proposed pipeline does present a risk of spills, which remains a concern for citizens and businesses relying on ground water resources crossed by the route.

Letter of Cynthia Giles, EPA, to Department of State, dated February 15, 2015.

The EPA also pointed out the specific misapplication of NEPA and invalid findings by the state Department on the FSEIS:

> [T]he Final SEIS concluded that although development of oil would lead to significant additional releases of greenhouse gases, a decision not to grant the permit would likely not change the outcome, i.e., those significant greenhouse gas emissions would likely happen regardless of the decision on the proposed Project. The conclusion was based in large part on projections of the global price of oil… Given the recent variability in oil prices, **it is important to revisit these conclusions**… Given recent declines in oil prices and the uncertainty of oil price projections, the additional low price scenario in the Final SEIS should be given additional weight during decision making… we note that eliminating alternatives from a detailed analysis based on an abbreviated estimate of environmental impacts is not the preferred approach under NEPA's requirement to take a 'hard look" at alternatives.

Id.

The EPA is the agency with statutory authority to review all environmental impact statements, and in its review it found that the Final SEIS violates the act. This information was not available in Docket HP 09-001. The point is not whether Keystone XL will increase greenhouse gases – the point is that the Keystone XL Pipeline as currently evaluated does not comply with NEPA, as required in condition 1.

Standing Rock Sioux Tribal rebuttal witness Kevin Cahill corroborated the EPA's finding that Keystone XL Pipeline violates federal law. SRST Exhibit 8029. Cahill's report states in relevant part:

> If the State Department and TransCanada are serious about conducting an analysis of the socioeconomic impact of the Keystone oil pipeline, such an analysis, at a minimum, would include: (1) an IMPLAN model that takes into account the impact of potential oil spills; (2) an IMPLAN model that estimates net effects (3) a survey of individuals currently living in areas at risk of an oil spill; and (4) a survey of individuals currently living in areas at risk of an oil spill; and (5) a comparative analysis of socioeconomic impact based on areas where an oil pipeline is introduced.

Id. at 26.

The Keystone XL Pipeline does not comply with the National Environmental Policy Act as required in condition 1, as demonstrated by evidence that was not available to the Commission in HP 09-001. Certification of the permit under must be denied under SDCL §41-49B-27.

B. The Programmatic Agreement and Unanticipated Discoveries Plan were not Prepared in Accordance with the NHPA

Any cultural surveys conducted by TransCanada are invalid unless there was proper consultation with the Standing Rock THPO by the State Department, under section 106 of the National Historic Preservation Act. 36 CFR §800.2(c)(2)(A). Moreover, the legality of the Programmatic Agreement and Unanticipated Discoveries Plan are determined in part by the sufficiency of Tribal consultation in their preparation. 36 CFR §800.13(b).

The gravamen of NHPA section 106 is proper identification of historic properties that may be affected by a project, a determination of whether there may be adverse effects, and the resolution of effects. *See e.g. Nat'l Trust for Historic Preservation v. Blanck*, 938 F.Supp. 908, 920 (D.D.C. 1996). The propriety of the surveys to determine the location of such properties and efforts to resolve adverse effects is determined by 36 CFR §800.2(c)(2)(A). This section provides that:

> [C]onsultation in the section 106 process provides the Indian Tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, **advise on the identification** and evaluation of historic properties, including those of traditional religious and cultural importance, **articulate its views on the undertaking's effects** on such properties, and **participate in the resolution of adverse effects**."

Id. (emphasis added).

Thus, the affected Tribal Historic Preservation Officers must be consulted in at last two regards: (1) identification and evaluation – i.e. the Class III survey; and (3) resolution of effects – the Programmatic Agreement. In the uncontroverted testimony of Steve Vance, Tribal Historic Preservation Officer, Cheyenne River Sioux Tribe, he explained, "Consultation (must) be conducted in a good faith efforts. And we responded that **that wasn't sufficient**." Tr. at 1533-1534 (emphasis added).

Neither TransCanada's Class III survey nor the Programmatic Agreement on the resolution of effects were properly prepared. The Keystone XL Pipeline project would violate section 106 of the National Historic Preservation Act, 16 U.S.C. §§470f and the

implementing regulations. 36 CFR §800.2. Consequently, TransCanada is not in compliance with conditions 1 and 43. The permit should not be certified.

C. Impacts on Indian Water Rights Should be Considered

The South Dakota and North Dakota Tribes possess significant unquantified reserved water rights. *See* Peter Capossela, *Indian Reserved Water Rights in the Missouri River Basin,* 6 GREAT PLAINS NATURAL RESOURCES J. 131 (2002). In *Winters v. United States*, the Supreme Court established that when Montana's Fort Belknap Tribe reserved rights to land, they also reserved water rights as needed to survive on the Reservation. *Winters v. United States*, 207 U.S. 564, 600 (1908). Indian water rights have been characterized as "prior and superior" to state-granted water rights: "prior" because the reservations were established before most western states and are thus senior during periods of shortage, *Arizona v. California,* 373 U.S. at 575-576. (Indian water rights are "entitled to priority…"), and "superior" because Indian reserved water rights exist pursuant to federal law, rather state law. As explained in COHEN'S HANDBOOK OF FEDERAL INDIAN LAW:

> The *Winters* decision established that the creation of an Indian reservation impliedly reserves water rights to the tribe or tribes occupying the territory; that those rights are reserved in order to carry out the purposes for which the lands were set aside, and that the rights are paramount to water rights later perfected under state law.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, (2009 ed.) §19.03(1).

In *Arizona v. California*, the Court held that "when the United States created these reservations, or added to them, it reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands." 373 U.S. at 596. The Court recognized a reservation of a quantity of water "to satisfy the future as well as the present needs of the Indian Reservations and… that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations." *Id*. at 600. Ultimately, the over-arching purpose of most Indian Reservations is to provide a permanent homeland for that Tribe, which encompasses water for all beneficial uses, including livestock, fish and wildlife and ceremonial uses. *United States v. Adair*, 723

F.2d 1394, 1413-1415 (9th Cir. 1983) (reserved water right for fishery with priority date of time immemorial),

The precise quantity of a Tribe's reserved water right may be determined in an adjudication or by compact. *See* Robert T. Anderson, *Indian Water Rights: Litigation and Settlements*, 42 TULSA L. REV. 23 (2006). Under *Winters*, the priority date of the water right is the date which the Reservation was established, or earlier. *Winters*, 207 U.S. at 575-576; *Adair*, 723 F.2d at 1413-1415. Consequently, according to foremost Indian law expert Felix Cohen, "the exercise of tribal water rights has the potential to disrupt non-Indian water uses." Cohen's Handbook of Federal Indian Law §19.03(1).

Certification of the Keystone XL Pipeline turns these concepts on their head. It would permit a foreign oil and gas company to withdrawal water from stream systems subject to Tribal claims. It would enable the construction of a dangerous pipeline crossing waters subject to Tribal claims, jeopardizing the water quality with enhanced total dissolved solvents, and posing long-term jeopardy with the threat of a release. *See* SRST Exhibit 8013, S.D. DENR, Integrated Report, Surface Water Quality (identifying impaired waters crossed by Keystone XL). For these reasons also, certification should be denied.

IV. The Testimony of Waste'Win Young, Standing Rock Sioux Tribe Historical Preservation Officer, was Improperly Excluded

Waste'Win Young, the Standing Rock Sioux Tribal Historic Preservation Officer, timely pre-filed testimony, regarding her scant interactions with the Department of State on cultural resources surveys along the pipeline route, and requests of information she made regarding impacts on specific identified sites. The Commission issued an order excluding her testimony as not relevant. The exclusion of Ms. Young's testimony is contrary to the South Dakota Rules of Evidence and results in significant prejudice to the Tribe.

Rule 401 of the Rules of Evidence governs the admission of relevant evidence. As explained by the South Dakota Supreme Court, the threshold is low:

> Relevance is defined by SDCL 19-12-1 (Rule 401). " 'Relevant evidence' means evidence having *any* tendency to make the existence of *any* fact that is of consequence… more or less

> probable..." SDCL 19-12-1 (Rule 401). As we have previously noted, "Rule 401 uses a lenient standard for relevance." *citing Supreme Pork v. Master Blaster,* 2009 SD 20, ¶46.

St. John v. Peterson, 804 N.W.2d 71, 75 (S.D. 2011) *emphasis added*.

The South Dakota Court deems evidence relevant "even if it only slightly affects the trier's assessment." *Supreme Pork v. Master Blaster*, 764 N.W.2d 474, 488 (S.D. 2009) (affirming the admission of expert testimony at trial). All there must be is "a probative connection, however slight." *VC v. Cassady*, 634 N.W.2d 798, 810 (Neb. 2001) (ordering new trial due to improper exclusion of relevant evidence). "The standard is extremely liberal." *V & M Star Steel v. Centimark Corp.*, 678 F.3d 459, 468 (6th Cir. 2012). "The relevancy threshold established by the Federal Rules of Evidence is fairly low." *Harrington v. City of Council Bluffs, Iowa*, 902 F.Supp.2d 1195, 1202 (S.D. Iowa 2012) (challenged evidence deemed relevant and admitted). In order to be relevant under Rule 401, evidence must merely "shed light upon or touch the issues" in dispute. *Dean v, Nunez*, 534 So.2d 1282, 1289 (La. App. 1988).

The South Dakota Court has rejected the contention that the Rule 401 prescribes a "narrow interpretation of 'relevance.'" *Supreme Pork v. Master Blaster*, 764 N.W.2d at 481. Chief Justice Gilbertson explained:

> The dissent suggests that the only evidence that is "relevant" in this case is that which relates to the ultimate fact issue. Quite simply, this narrow view of relevancy misinterprets Rule 401… Evidence, to be relevant to an inquiry, *need not conclusively prove the fact in issue*. *citing Weinstein's Federal Evidence*, §401.

Id. at 488.

The testimony may not be determinative in this case – it does not have to be. That is the lesson of the South Dakota Supreme Court decision in *Supreme Pork v. Master Blaster*, *Id*. at 481, 488.

Nevertheless, Ms. Young's pre-filed testimony is relevant because it addressed the permit conditions covering historic properties. (condition 1 – comply with all applicable laws; condition 45 – compliance with proper unanticipated discoveries plan, programmatic agreement on cultural resources). She stated in her pre-filed testimony:

> Yet the proper procedures to make the requisite determinations have not been followed. The Keystone XL Pipeline is unable to comply with Amended Condition number 43 in the Amended Conditions in the Final Order in HP 09-001.

The Standing Rock Sioux Tribe has the right in this docket to present testimony and evidence that developments since the issuance of the Keystone XL 2010 illustrate that cultural resources compliance efforts are insufficient, and consequently TransCanada cannot comply with conditions 1 and 43. SDCL §1-26-18 (right to present evidence in administrative hearing). As the Nebraska Supreme Court explained, "[T]he parties are to be given a chance to rebut or comment on any evidence considered by the agency in making its decision." *Langvardt v. Horton*, 581 N.W.2d 60, 69 (Neb. 1998).

Testimony that has any probative value with respect to the Keystone XL's potential impact on cultural resources is relevant, admissible testimony in this proceeding, with the finder of fact (the Commission) possessing reasonable discretion to give it whatever weight it sees fit in making the decision whether to certify the permit. The exclusion of Young's testimony confuses "relevancy" with "weight" of evidence. That is precisely the mistake that the South Dakota Supreme Court inveighed against in *Supreme Pork v. Master Blaster*, 764 N.W.2d at 481.

General and amorphous findings about relevance are not countenanced by reviewing courts – there must be specific reasons to exclude evidence on grounds of relevance. *Doe v. Young*, 664 F.3d 727, 733 (8th Cir. 2011) (trial court improperly excluded testimony, new trial ordered). In order to exclude testimony, the moving party "should state exactly the objection." *Davidson Oil Country Supply, Inc. v. Klockner, Inc.*, 908 F.2d 1238, 1247 (5th Cir. 1990) (reversing trial court grant of motion in limine). There are no specific findings in the record to justify the exclusion of Waste'Win Young. The exclusion of Waste'Win Young's testimony was improper, and additional proceedings are necessary in this docket to take such testimony in order to avoid substantial prejudice to the Standing Rock Sioux Tribe.

RESPECTFULLY SUBMITTED this 1st day of October, 2015

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