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
BRIEF IN OPPOSITION TO TRANSCANADA'S MOTION IN LIMINE
TO PRECLUDE THE EXPERT REPORT OF LINDA BLACK ELK

I. Introduction

The *Motion in Limine to Exclude Linda Black Elk* mis-portrays the import of the South Dakota Rules of Evidence, and the statutes and regulations governing the Public Utilities Commission. Intervener Standing Rock Sioux Tribe has fully complied with the procedural and substantive requirements of South Dakota law for the admittance of the expert report of Professor Black Elk. The motion in limine should be denied.

II. Professor Black Elk's Report is Helpful, Relevant and Admissible

TransCanada argues that the expert report should be excluded because it is not relevant. Rule 401 of the South Dakota Rules of Evidence, codified at SDCL §19-12-1, "uses a lenient standard for relevance." *St. John v. Peterson*, 804 N.W.2d 71, 75 (S.D. 2011) *citing Supreme Pork v. Master Blaster*, 2009 SD 20, ¶46. "'Relevant evidence' means evidence having *any* tendency to make the existence of *any* fact that is of consequence… more or less probable..." *Id. emphasis added.* The South Dakota Supreme 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). "The standard is extremely liberal." *V & M Star Steel v. Centimark Corp.*, 678 F.3d 459, 468 (6th Cir. 2012).

With respect to expert testimony, the test is "whether it will assist the trier of fact to understand a fact in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc*. 509 U.S.

579, 592 (1993). It is deemed relevant if it "would be of assistance" to the finder of fact. *Ready v. White Consol. Industries*, 890 F. Supp. 1417, 1448 (N.D. Iowa 1995). The "fact in issue," *Daubert, id*., addressed by Professor Black Elk, is information relating to the *Final SEIS*, which is to introduced and testified upon by Staff witnesses.

The Black Elk expert report describes the abundance, and lack thereof, of terrestrial plant species harvested by the Lakota for medicinal, cultural and nutritional purposes. This information is extremely rare, highly specialized, and unique to South Dakota. The Black Elk Report contains information that is available literally nowhere else. This is an important part of what makes South Dakota a special place.

This information relates to the adequacy of the *Final Environmental Statement on the Keystone XL Project*, released in January 2014, well after the issuance of TransCanada's 2010. HP 09-001 *Amended Final Order* (June 2010). The Staff has requested that the Commission take judicial notice of the *Final SEIS*. It was not litigated in HP 09-001, and it contains information relevant to the certification of the permit for Keystone XL. SDCL §49-41B-27. The information contained in the *Final SEIS* is relevant and admissible, as evidenced by the staff motion for judicial notice. Thus, the report pro-offered as an expert assessment of the information improperly omitted from the *Final SEIS* is obviously relevant as well.

Chapter 3.5 of Volume 2 to the *Final SEIS* is the description of impacts on Terrestrial Vegetation. Under the regulations applicable to the environmental impact statement, the State Department was required to evaluate Keystone XL's impacts on the species described in Professor Black Elk's report. *See* 40 CFR §§1502.16(c) & (g) (EIS must describe impacts on Tribal land uses and cultural resources); Executive Order 12898 (addressing disproportionate impacts of projects on minority communities), 59 Fed. Reg. 7629. The environmental impact statement "is required to document and consider a range of possible impacts – ecologic, aesthetic, historic, cultural, economic, social, or health, weather direct, indirect or cumulative." Gerrard and Foster, Ed. *The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks* (2nd ed) 297.

Expert testimony about terrestrial plants affected by Keystone XL which are important to the Lakota, in light of Chapter 3.5 in the *Final SEIS*, is relevant, admissible

testimony on the issue of compliance with "applicable law" – the National Environment Environmental Policy Act. 42 U.S.C. §4321 *et seq*. This relates to Amended Conditions 1 and 3 in the permit for Keystone XL.

TransCanada's motion confuses "relevancy" with "weight" of evidence. As explained in the text *Evidence: Practice Under the Rules*, "Relevancy must be distinguished from the related issues of weight and sufficiency. While relevancy is primarily a question of admissibility, "weight" describes the persuasive force assigned to the evidence." Christopher B. Mueller et al, *Evidence: Practice Under the Rules* (3RD ED. 2009) 152.

Professor Black Elk's report may not be determinative in this case – it does not have to be, in order to be relevant and admissible. That is the lesson of the South Dakota Supreme Court decision in *Supreme Pork v. Master Blaster*, 764 N.W.2d at 488-490. In *Master Blaster*, the Court affirmed the admissibility of expert testimony, explaining:

> The dissent suggests that the only evidence that is "relevant" in this case is that which relates to the one 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*, §401.04[2][c].

Id. at 488 *emphasis original*.

Testimony that has any probative value with respect to the *Final SEIS* 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. As further explained by South Dakota Court,

> We interpret our rules of evidence liberally with the general approach of relaxing the traditional barriers of opinion testimony. *Guthrie*, *Daubert*. …. Any other deficiencies can be tested through the adversarial process at trial.

Burley v. Kytec Innovative Sports Equip., 737 N.W.2d at 402-403, 405-406.

The South Dakota Court merely follows the rule as outlined by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc*. In requiring the admittance of expert testimony, the Court explained in *Daubert*:

> (The objecting party) seems to us overly pessimistic about the capabilities of the jury and of the adversarial system generally.

> Vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence… These conditional devices, rather than wholesale exclusion… are the appropriate safeguards.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. at 596.

III. The Standing Rock Sioux Tribe has Fully Complied with the Procedural and Evidentiary Requirements for Admission of the Black Elk Report

TransCanada also argues in its motion that the pre-filing of the report was somehow defective. However, the record in this docket indicates full compliance with South Dakota law by the Standing Rock Sioux Tribe, in every respect. On March 10, 2015, the Tribe disclosed to TransCanada in *Supplemental Answers to Interrogatories* that Professor Black Elk was asked by the Tribal Council to present expert testimony, and produced the expert report. *Exhibit A, attached hereto*. This was in compliance with the timelines for such disclosures established by the Commission in this docket. *Order Granting Motion to Define Procedural Issues and Setting Schedule,* December 17, 2014. Professor Black Elk's expert report was pre-filed on April 2, 2015 and she was included in the Tribe's witness list in order to introduce the report, both of which were filed in compliance with the Commission's *Order Amending Procedural Schedule*, May 5, 2015.

Thus, TransCanada has had the report since March 10. "From the transcript, it does not appear that (the moving party) was taken by surprise or 'bushwacked' by this testimony." *Supreme Pork v. Master Blaster*, 764 N.W.2d at 482. There is no surprise or unfairness to TransCanada, whatsoever.

On the other hand, if the report is excluded, issues of importance to South Dakotans of Lakota origin would be totally lacking in consideration, both at the federal level, and the state level in South Dakota. That is inconsistent with South Dakota evidence law, as well as the Commission's statutory mandate to "ensure the location, construction and operation of facilities will produce minimal adverse effects upon the environment and upon the citizens of this state," SDCL §49-41B-1, even in this certification proceeding. SDCL §49-41B-27. It would be a serious injustice to the

Standing Rock Sioux Tribe, which has complied with all of the rules governing interveners in this proceeding.

RESPECTFULLY SUBMITTED this 17th day of July, 2015

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