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
REPLY BRIEF IN SUPPORT OF MOTION FOR DISCOVERY SANCTIONS

Based upon the filings and the record in this proceeding, the Standing Rock Sioux Tribe's *Motion for Discovery Sanctions* should be granted. TransCanada's relevancy objections lack merit and should be denied. SDCL §15-6-26(b); *see also Staff Response to Keystone Motion to Define Scope of Discovery*, 2-3 (discussing broad, liberal scope of relevancy under South Dakota law). The general objection of "overbroad" is a common refrain amongst litigants, and it is unfavored by the courts and routinely overruled. Roger S. Haydoc at al., DISCOVERY PRACTICE (5th ed. 2012 Suppl.) §25.06. Disclosure of the Keystone XL Pipeline facility response plan is not pre-empted by federal law, 33 U.S.C. §1321(j)(5), and in the absence of a protective order, it is discoverable in any event. SDCL §15-6-26(c). TransCanada's claim of good faith in responding to the Tribe's discovery requests is contradicted by the record. *Motion for Discovery Sanctions*, Exhibits A-D.

The proper remedy is to preclude the introduction of evidence on issues in which TransCanada failed to disclose information in discovery. *Haberer v. Radio Shack*, 555 N.W.2d 606, 610 (S.D. 1996). This common remedy preserves the integrity of the fact-finding process by deterring frivolous objections to discovery requests. *Id.* quoting *Schrader v. Tjarks*, 522 N.W.2d 205, 209 (S.D. 1994). An order precluding the introduction of evidence as requested by the Tribe in this case will ensure that TransCanada is more forthcoming and compliant with South Dakota discovery rules, the next time it files an application with the PUC.

I. South Dakota's Discovery Rules Recognize Broad Relevancy

In South Dakota, there is a "liberal interpretation of our discovery rules," including determinations of relevance. *State By and Through Dept. of Transp. v. Grudnik*, 243 N.W.2d 796, 798 (S.D. 1976). "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." SDCL §15-6-26(b). "All relevant matters are discoverable unless privileged." *Kaarup v. St. Paul Fire and Marine Insurance Co.*, 436 N.W.2d 17, 20 (S.D. 1988).

"Our pretrial discovery rules have been modeled on the Federal Rules." *Grudnik*, 243 N.W.2d at 797. The federal district court in Kansas explained that under the rules:

> Relevancy is broadly construed, and a request for discovery should be considered relevant if there is "any possibility" that the information sought may be relevant to the claim or defense of any party. A request for discovery should be allowed "unless it is clear that the information sought can have no possible bearing."

Cardenas v. Dorel Juvenile Group, 230 F.R.D. 611, 615 (D.Kan. 2005) quoting *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 652 (D.Kan. 2004).

The issue in this proceeding is whether the Keystone XL Pipeline "continues to meet the conditions upon which the permit was issued." SDCL §49-41B-27. Consequently, anything relevant to the Amended Conditions incorporated in the *Amended Final Decision and Order*, HP 09-001 (June 29, 2010) is relevant for purposes of discovery. Each of the Tribe's discovery requests to TransCanada identified the related condition, as required in the Commission's scheduling and discovery order dated December 17, 2014. *See Motion for Discovery Sanctions*, Exhibits A-D.

TransCanada argues that the Tribe's request to make a list of "every document… in your possession, custody or control relating to the Keystone XL Pipeline" is not "reasonably calculated to lead to the discovery of admissible evidence." *Keystone's Opposition to Standing Rock Sioux Tribe's Motion for Discovery Sanctions*, p. 7. Under the liberal standard of relevancy for pre-trial discovery in the South Dakota and federal rules, TransCanada's blanket contention is untenable. The interrogatory on its face requests only information that is relevant to Keystone XL.

II. The Tribe's Document Requests are Not Overbroad

Significantly, after TransCanada objected to virtually all of the Tribe's document requests, the Tribe attempted to scale-down its request with Interrogatory No. 51. *Motion for Discovery Sanctions*, Exhibit D. This interrogatory requested a listing of documents in TransCanada's possession on Keystone XL, to enable the Tribe to be more selective about its document requests. *Id.* TransCanada objected to both the request for documents, and the interrogatory for a listing of documents, and provided nothing. *Id*.

As described by Professor Roger S. Haydoc:

> There exists a temptation, because of the difficulties inherent in complying with a Rule 34 request, to yell "It's impossible." And it may well be. Negotiating with the requesting lawyer often yields a pragmatically responsive request…
>
> The party who receives an objection… may attempt to negotiate with the responding attorney to reach a compromise on disclosure. Courts look very, very kindly on these good faith efforts to resolve an objection and may mandate by local rule that such efforts be made. A party seeking materials that may place too heavy a burden on the responding party can reduce the burden… Should these efforts fail, the requesting party may seek a Rule 37 Order compelling production…
>
> Boilerplate objections that lack the requisite specificity required by the rules and case law are improper and subject to sanctions.

Haydoc at al., DISCOVERY PRACTICE §25.06, p. 25-17 – 25-18.

That is precisely the case here. The Tribe served reasonable document requests and interrogatories, designed to acquire information or documents that may have been obtained by TransCanada after June 29, 2010, and which relate to compliance with applicable law as required in condition #1 of the Amended Conditions. *Motion for Discovery Sanctions*, Exhibits A-D. No documents were supplied in response to 14 of 16 requests, so the Tribe attempted to compromise, but was rebuffed by TransCanada.

TransCanada possesses an "affirmative duty to make a reasonable inquiry (and) respond in manner which was both complete and correct." *Hershberger v. Ethicon Endo-Surgery, Inc.*, 277 F.R.D. 299, 305 (S.D. W.Va. 2011). On page six of the Opposition brief, TransCanada lists the various regulatory bodies and courts to which it prepares and

submits documents, ostensibly to illustrate the difficulty in responding to the Tribe's request. But that proves the Tribe's point, that the requisite documents do exist and may be readily compiled or listed. SDCL §15-6-34(a)(1). If a party does not make *some* effort to comply, it gets sanctioned. *Heberer v. Radio Shack,* 555 N.W.2d at 610-611.

Ultimately, TransCanada has not met the threshold showing required to sustain an objection of undue burden or expense. "To assert a proper objection on this basis, however, one must do more than intone [the] familiar litany that the interrogatories are burdensome, oppressive or overly broad." *Ferguson v. TD Bank, N.A.*, 268 F.R.D. 153, 155 (D.Conn. 2010) citations omitted. "The fact that production of documents would be burdensome and expensive… is not a reason for refusing to order production of relevant documents." *Wagner v. Dryvit Systems, Inc.*, 208 F.R.D. 606, 610 (D.Neb. 2001).

"It is well established that the burden is on the objecting party to show grounds for failing to provide the requested discovery… A party cannot make generalized objections." *Big Baboon Corp. v. Dell, Inc.*, 723 F.Supp.2d 1224, 1229 (C.D.Cal. 2010). An objection that discovery requests are unduly burdensome requires specific factual evidence regarding time and expense, and will not be sustained with mere generalities and conclusions. *See Horizon Holdings, L.L.C. v. Genmar Holdings, Inc*., 209 F.R.D. 208, 213 (D. Kan. 2002).

TransCanada relies on general allegations. There is no evidence the burden is undue. *See* Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE, §2214, p. 435. Accordingly, the objections that the Tribe's requests for the production of documents are overly burdensome must be rejected.

III. Disclosure of the Facility Response Plan is not Pre-empted by Federal Law and is Discoverable

TransCanada argues that the emergency response plan is not subject to discovery, because it is pre-empted by federal law and is privileged as a trade secret. However, as articulated in the *Motion for Discovery Sanctions*, the Kinder Morgan Puget Sound Pipeline Emergency Response Plan is found online on the web site of the Washington State Department of Ecology. Other companies make response plans public in other states. They are readily available.

TransCanada wrote "The Tribe is incorrect that the Emergency Response Plan is governed by the Clean Water Act… The only Emergency Response Plan that Keystone will prepare is one to be submitted to PHMSA. It is not governed by the Clean Water Act." *Keystone's Opposition to Standing Rock Motion for Discovery Sanctions,* p. 2. In arguing that the response plan is subject to PHMSA regulations rather than the Clean Water Act, TransCanada uses the words "will prepare," admitting that there is no facility or emergency response plan for the Keystone XL Pipeline. *Id.* TransCanada's brief indicates that the document does not exist, but it objected the discovery request anyway.

The PHMSA regulations governing response plans, cited by TransCanada as being the "sole" authority over the plans, identify as the authority for the regulation statutory provisions that have been codified Clean Water Act. *See* 49 CFR Part 194: "**Authority: 33 U.S.C. 1231, 1321(j)(1)(c), (j)(5) and (j)(6)**; sec. 2, E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., 49 CFR 1.54." http://www.ecfr.gov/cgi-bin/textidx?SID=a4d8d95381699a1cae61a5bb8152b133&mc=true&node=pt49.3.194&rgn=div5#se49.3.194_11.

Thus, the PHMSA regulation itself explicitly states that the provision of the 1990 Oil Pollution Act (OPA), which is codified and made part of the Clean Water Act, is the authorizing statute for the response plan regulation. 33 U.S.C. §1321(j)(5). The OPA further states, "Nothing in this Act… shall be interpreted as pre-empting the authority of any State." 33 U.S.C. §2718(a).

The very PHMSA regulations relied upon by TransCanada for pre-emption are promulgated under the authority of 33 U.S.C. §1321(j)(5), and 33 U.S.C. §2718(a) explicitly disclaims pre-emption. This Commission is not pre-empted by federal law from compelling disclosure of an emergency or facility response plan, if such plan even exists. TransCanada should be sanctioned for unmeritorious objections when it knew and should have admitted that the document does not exist.

TransCanada contends that "the Tribe does not dispute in its motion that documents related to compliance with the Oil Pollution Act are within the province of the Environmental Protection Agency. Nor does it dispute that PHMSA has exclusive jurisdiction over its regulations found at 49 CFR Part 194." *Keystone's Opposition to Standing Rock Motion for Discovery Sanctions,* p. 2. That statement is misleading,

because the issue is not whether the authorizing act is "within the province" of EPA or whether its regulations are under PHMSA's "exclusive jurisdiction." The issue is whether the statute requiring the response plan expresses a Congressional intent to supersede state authority, *see Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 248 (1984), which it does not. 33 U.S.C. §2718(a). That is why TransCanada's pre-emption argument fails.

Under South Dakota law, the remedy for a party seeking to shield from disclosure "a trade secret, or other confidential research, development or commercial information" is to make a motion for a protective order. SDCL §15-6-26(c)(7). TransCanada argues "Keystone was not legally obligated to seek a protective order because (1) the request seeks information that is not only confidential, but within the exclusive jurisdiction of PHMSA; (2) non-confidential information… is publicly available as part of Appendix I of the FSEIS; and (3) the commission has previously recognized… the confidential nature of the (plan)." *Keystone's Opposition to Standing Rock Motion for Discovery Sanctions,* p. 3-4.

These reasons may be justification for a protective order, but they definitely do not justify the failure to follow South Dakota law in order to shield a trade secret. SDCL §15-6-26(c)(7). TransCanada failed to properly obtain a protective order for the claimed trade secret, and its objection must be over-ruled.

With respect to the reference to the State Department's Supplemental Final Environmental Impact Statement (FSEIS), South Dakota law requires a party "To produce and permit the party making the request to copy, any designated documents." SDCL §15-6-34(a)(1). In its non-responses to numerous document requests, TransCanada repeatedly referred to the FSEIS, rather than producing the requested documents. That violates the statute. *Id.*

In the Tribe's *Brief in Support of the Motion for Discovery Sanctions*, the case of *Petruska v. Johns Manville*, 83 F.R.D. 32 (E.D. Pa. 1979) was cited in support of the Tribe's concern in this regard. TransCanada argues this case is inapplicable because of its unique facts, but the point of the case is that if a party merely refers the requesting party to public information, rather than producing the documents, a motion to compel

will be granted. *Id*. at 35. By law, a party cannot refer a requester to the library, or to the internet or anyplace else, but must produce the documents. SDCL §15-6-34(a)(1).

IV. Exclusion of Evidence is the Proper Remedy

Imposing a sanction such as the exclusion of evidence should result "when 'failure to comply has been due to… willfulness…' " *Haberer v. Radio Shack*, 555 N.W.2d at 610 citations omitted. That is the case here. No documents were produced. The answers to interrogatories were "evasive or incomplete," in violation of South Dakota law. SDCL §15-6-37(a)(3).

TransCanada argues that the exclusion of testimony is too severe a sanction because "Keystone has not acted in bad faith." *Keystone's Opposition to Standing Rock Motion for Discovery Sanctions,* p. 8. It cites the fact that the Tribe limited its motion to compel to a "handful" of interrogatories and document requests. *Id.* at 9. TransCanada complied with the South Dakota rules in its responses to less than one half of the Tribe's interrogatories and 2 of 16 document requests. The fact that the Tribe is focusing on the priority issues, such as emergency response, water, cultural resources, fish and wildlife, and Tribal consultation in no way exculpates TransCanada.

Typical of TransCanada's cavalier attitude to complying with the discovery rules and providing information in good faith are the following:

> INTERROGATORY NO. 10 Did you consult with the Standing Rock Sioux Tribe on the project? If the answer is yes, describe the details of such consultation, including the times, dates, topics of discussion and individuals involved.
>
> ANSWER: Keystone consulted with Standing Rock representatives in March and April 2009 regarding the project.
>
> INERROGATORY NO. 19 Identify the local contractors to be used to provide emergency response assistance.
>
> ANSWER: The resources will be secured from a Company approved contractor.
>
> INTERROGATORY NO. 28 Identify the source or sources of support to conduct the post-monitoring and post-use effectiveness evaluation required by the applicable Local or Area Contingency Plan, in the case of a spill.

> ANSWER: TransCanada will refer to the Local or Area Contingency Plan in the event of a spill. TransCanada is responsible for ensuring technical resources are utilized.
>
> INTERROGATORY NO. 29 For each county in which the project would be located, identify the availability of adequate temporary storage to sustain effective daily recovery of oil products that could be released during operation.
>
> ANSWER: TransCanada will calculate how much storage is sufficient and necessary. This storage may be company owned or third party.

Motion for Discovery Sanctions, Exhibit B.

"Complete and accurate responses to discovery are required for the proper functioning of our system of justice." *Litton Systems Inc. v. American Tel. & Tel. Co.*, 91 F.R.D. 574, 576 (S.D.N.Y. 1981). "Providing… incomplete discovery responses violates the Federal Rules of Civil Procedure and subjects the offending party… to sanctions." *Hogue v. Fruehauf Corp.*, 151 F.R.D. 635, 637 (N.D. Ill. 1993).

The Standing Rock Sioux Tribe produced dozens of documents to TransCanada in discovery, giving advance notice of the exhibits it intends to introduce and substantive information on the Tribe's evidence and arguments at the hearing. TransCanada produced no documents regarding the project to the Tribe. TransCanada's conduct puts it at a strong competitive advantage in this proceeding if it is allowed to stand. That is exactly what the South Dakota discovery rules are designed to prevent.

The *Staff Brief in Response to Standing Rock's Motion* states on page 5, "To grant the request to preclude would greatly stifle the truth finding process." Respectfully, that is not the law in South Dakota. The Supreme Court has ruled, "**Prohibition of evidence offered by a party who has not complied with the discovery rules** 'is designed to compel production of evidence and to **promote, rather than stifle, the fact-finding process**.'" *Haberer v. Radio Shack*, 555 N.W.2d at 610, quoting *Schrader v. Tjarks*, 522 N.W.2d at 210 and *Magbuhat v. Kovarik*, 382 N.W.2d 43, 45 (S.D. 1986) (emphasis added). For these reasons, the Tribe's Motion for Sanctions should be granted.

RESPECTFULLY SUBMITTED this 10th day of April, 2015

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