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South Dakota Public Utilities Commission

Pierre, South Dakota

Regarding: HP 14-001

Public Utilities Commission of the State of South Dakota:

Regarding the matter of application by TransCanada Keystone Pipeline, LP for a permit to construct the Keystone XL Project, I hereby submit the following opening statement electronically, copied electronically to all Intervenors, as stipulated by a decision of the Commissioners, as I am unable to be in South Dakota until the last week of the evidentiary hearing.

I was born in Hastings, Nebraska, where I grew up and lived before marrying and leaving the state. I still have family in Hastings. My ancestors were sitting atop the Ogallala Aquifer in Nebraska since before Nebraska was awarded statehood in 1867, and in fact my ancestors were also found throughout South Dakota, well before South Dakota became a state in 1889. In all respects, I am a child of the Great Plains. The water of the Ogallala Aquifer and the blood in my veins are one and the same. The waters of the aquifer, coursing under the Great Plains and cleansed in water-bearing sand and gravel, is fed by the spring runoff of the snows from the Rocky Mountains, and used some eleven times over in the State of Nebraska as it makes its way to the eastern boundaries of the state, where it flows into the Missouri River, the mighty Missouri, whose headwaters officially start at the confluence of the Jefferson and Madison Rivers, near Three Forks, Montana. As the Missouri travels through the State of South Dakota, it serves as the principle source of drinking water for 50% of the population of the state. To assert that "Water is Life" is not hyperbole; without it, there is no life at all.

When people grow up close to the land, they develop a worldview that relies on an understanding of stewardship and care for the organic resources that through the ages humans have known to be commons. Principle among these resources is water. It does not rely on state or national boundary lines, does not discriminate as to whom or what it serves—the most miniscule creatures and the mightiest nations have partaken as they pleased, and in the doing, some of humankind lost the balance intended by the Creator, becoming dominionist in attitude and behavior, and wittingly or unwittingly desecrating the resource and failing to understand its fundamental ethical implications. At the top of this abusive behavior sit multi-national corporations who have perfected the soulless stance that their single most important responsibility is the fiduciary one to their investors; nothing else matters, and much of the predominant political and financial apparatus at all levels support such massive enterprises. In my opinion, there is a word for what I have described: obscene.

In 1978 I went to work for the Honorable Doug Bereuter, (R-NE), retired. He was newly elected to the United States House of Representatives. When I told him during my employment interview I was a registered Democrat, he replied, "All right, but are you loyal and ethical?"

That question, simple and profound, set the tone for more than a decade working as a Legislative Assistant in his office. My principle areas of responsibility included Indian Affairs.

There are four Federally-recognized Tribes in the State of Nebraska: The Winnebago Tribe, the Omaha Tribe, the Santee Sioux Tribe, and at the end of my tenure with Mr. Bereuter, the Ponca Tribe of Nebraska received Federal recognition.

My perception of my legislative responsibilities with regard to the sovereign Nations within Nebraska included being accountable to the other Federally-recognized Tribes in the Aberdeen Service Delivery Area of the Bureau of Indian Affairs and Indian Health Service. While my primary duties were to Nebraska Tribes, because of the organizational structure of Federal service delivery areas, it was natural and presumed by Mr. Bereuter as well as by the Honorable Tom Daschle (D-SD), retired, at that time still serving in the House of Representatives, that considering the issues and priorities of all of the Tribes in the Aberdeen Area were essential to honoring the critical requirement for Federal Tribal Consultation in the process of developing legislation. Indeed, as Mr. Bereuter's legislative initiatives were sponsored, co-sponsored, passed, authorized, reauthorized and in a few instances permanently authorized, my own background and understanding of Tribal priorities, rights, and challenges among the then-some 550 Federally-recognized Tribes and Bands broadened and deepened.

In 1990, I went to work as a Legislative Specialist in Indian Affairs for the Washington, D.C. law firm of Sonosky, Chambers, Sachse, and Endresen, LLP, as it was then known; now Sonosky, Chambers, Sachse, Endresen and Perry, LLP. While I am not an attorney, I supported the work of the partners and associates in the firm. The Standing Rock Sioux Tribe of South Dakota was among the firm's general counsel clients at that time. The Fort Peck Assiniboine and Sioux Tribes, Fort Peck, Montana were also among the firm's general counsel clients at that time, germane to South Dakota issues because of some of the work that I did for Fort Peck involving many other Tribal Nations throughout the Dakotas and the Northern Plains.

The many years I spent working in Tribal affairs and policy were natural outgrowths of my own heritage and what I perceived to be a shared understanding and love of place, and the complex, unjust, deeply-flawed evolution of United States Trust Policy as the government not only undertook treaties with Indian Nations on a sovereign-to-sovereign basis, but abrogated them and twisted them in many instances—often around the struggles for natural resources.

As I undertook to discharge the duties of both of my positions during those years in Washington, D.C., what I learned about how Tribal Nations had been treated, from the time of first contact on through decades and centuries of struggle with a dominant and colonizing culture, only solidified my own moral and conscientious judgment that wrongs of the most egregious nature had been committed; that the Trust Policy of the United States was in part predicated on immoral actions, and that this policy was flawed. It was, and remains at the codified Federal level, seemingly the best that the Trustee was able to develop. However, I came to think of things this way: The United States "legally" stole Indian lands. In other words, after the fact, the United States made its actions legal.

I cannot go back and fix one single thing about the past. History will judge what well-intentioned individuals and entities do in the present, however. And this is what brought me to this decision to ask to be heard in what is very nearly as important to me as my family. What I am submitting here is organic to my sense of who I am in this life, and is one of the ways I express my view of what is just and right. In the Old Testament Biblical sense, I am called to witness and I am called to testify.

The Keystone XL pipeline, stretching from the Province of Alberta, in the British Commonwealth's largest nation, Canada, across an international border into the United States, and slicing through the American heartland to link to the pipeline in Steele City, Nebraska and then to Port Arthur, Texas on the Gulf of Mexico, would travel across the Ogallala Aquifer, on top of which the entire State of Nebraska floats. Beginning in southern South Dakota, the aquifer stretches southward to the State of Texas and nourishes eight states. Waters from the Ogallala provide 30% of all agricultural irrigation in the United States. Underlying the Ogallala Aquifer is the High Plains Aquifer. That a foreign corporation believes it has the right to exercise eminent domain, and that it has the right to traverse and bifurcate the United States with no benefit whatsoever to the United States, is antithetical to every sense of honor and fairness that I hold sacred.

It is not incumbent on me to restate the centrality of this aquifer or any aquifer to crops that feed the nation, to the cattle raised to feed the nation; anyone who breathes and thinks understands the waters of the Ogallala and the larger, underlying High Plains Aquifer mean life.

It is also not incumbent on me to restate the documented, technically-specific and voluminous record of accidents and spills and neglectful oversight by TransCanada, and the impact of those events on air, land, water, and on communities both human and non-human. I leave these arguments and submissions to experts more powerfully credentialed and thorough than I could ever be.

What is incumbent on me, however, is to state as clearly as possible and in common sense terms what I know and believe, from my years of work in Tribal affairs, to be a central, unequivocal, compelling and lawful fact: TransCanada cannot traverse the traditional Treaty lands of the signatories to the Fort Laramie Treaty of 1868 without the express permission of those Federally-recognized Sovereign Indian Nations. And furthermore, the United States, as Trustee, is obligated to uphold and defend these rights as agreed in the Fort Laramie Treaty.

Ordinary people like myself understand the power of treaties. As a United States citizen, I recognize and support the treaties between sovereign nations and the United States. As a citizen, I expect my rights will be protected by my government, also I expect that this government will honor and defend the Fort Laramie Treaty and respect the very terms that it extended to the signatories. To honor the treaties is not optional.

It is insufficient that TransCanada may attempt to thread among the specific Tribal Reservations through the Dakotas and in this instance, South Dakota. The United States granted, in language specific to the Tribes, that they were entitled to retain hunting and fishing rights in the Treaty Territory; here, lands that encompass nearly the entire western half of the State of South Dakota west of the Missouri River. The force of law, codified in this Treaty, has recognized these Tribal Nations as sovereign and granted them specific retained rights. Sovereign nations have the right to protect and defend themselves, and I assert that these include the rights to proactively protect and defend the resources in their traditional Treaty Territory.

> *"The Great Sioux Reservation comprised all of present-day South Dakota west of the Missouri River, including the sacred Black Hills and the life-giving Missouri River. Under article 11 of the 1868 Fort Laramie Treaty, the Great Sioux Nation retained off-reservation hunting rights to a much larger area,*

south to the Republican and Platte Rivers, and east to the Big Horn Mountains." ~ From the Standing Rock Sioux Tribe's government website.

One might well ask why my argument that Tribes have pre-emptive rights to protect these resources, and specifically water, has merit. Without water, there is no life: no life sustained to be hunted and fished. The many streams, rivers and tributaries flowing through Treaty lands—including the Little Missouri, Cheyenne and White Rivers—ultimately flow into and across the High Plains Aquifer, into the Ogallala, and into the Missouri. As I have stated, water is a common; it does not respect state boundaries, and in the ancient depths of the aquifers, it is cleansed and reused multiple times on its way into the mighty rivers that flow both north, on the west side of the Continental Divide, and south, ultimately into the Gulf of Mexico. The peril to water in an age of documented, measureable, widespread and frightening drought and fresh water shortages cannot be overstated. TransCanada is no steward of the public good, and no protector of water and life. It is a foreign corporation with a fiduciary obligation to its investors to make money. Period.

In fact, one can easily see that in the process of making money for its investors, TransCanada is a destroyer. I am not an expert on the impact of TransCanada's tar sands operations on wildlife and animals and water, but I don't need to be. Any individual can clearly ascertain for himself or herself the vast destruction of the land and the life in Alberta's bombed-out and alien landscape. Using Google Earth, the impact of TransCanada's operations and the operations of tar sands extraction generally cannot be hidden or disguised. The toxicity of the tailings ponds is not in question. Nor is the factual record of safety violations, cracks and fractures in casings, line reversals allowing increases in psi and resultant stresses on pipes, inconsistent monitoring and compliance and other threats to the integrity of the pipeline. These are easily documented. No matter TransCanada's claims, these incidents and the visual confirmation cannot be explained away or ignored.

My defense of the rights of the Great Sioux Nation to defend the resources in their traditional Treaty Territory is by far from unique or new. Consider, for example, the relevant decision in a case brought by the Nez Perce Tribe and Idaho Rivers United regarding the impact of megaloads:

> *"After reviewing Omega-Morgan's proposal, the Forest Service determined that the mega-load* ***had the potential to affect the values it must protect****. It decided to conduct a review of the mega-load's impacts and consult with the Nez Perce Tribe, who hold treaty rights in the National Forest land."*
>
> *"Although the National Forests are no longer part of the Nez Perce Reservation, the* ***Tribe retains treaty rights in the lands****, and the Forest Service manages these National Forests consistent with those treaty rights."* http://media.spokesman.com/documents/2013/09/winmill-ruling-9-13-13.pdf

This important decision affirms retained Treaty Territory rights, and next, it affirms the responsibility of the Trustee to pre-emptively look after resources.

Finally, I am married to a social and legal historian of the 19th century United States. As our conversations progressed about my involvement with this process, he pointed out to me something that I hope will have merit in the deliberations of the Commission, and that is that the state of South Dakota, in ignoring the Federal implications of United States Trust Policy and statute with regard to the rights of sovereign Tribal Nations, could arguably seem to imperil itself with regard to the United States Constitution. Specifically, I refer to Article VI of the Constitution, which states:

> *"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme*

law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

To be very clear, the implications that the State of South Dakota has possibly committed and may yet commit again an Act of Nullification—the states' rights doctrine that a state can refuse to recognize or to enforce a Federal law passed by the United States Congress—should give the Commission pause in their deliberations as to a determination with regard to TransCanada's petition. In 2010, when the SD permit was granted, the United States was absent in the process, neglecting its role as Trustee. It was clear that the Keystone pipeline crossed Treaty Territory. But South Dakota acted against the best interests of the Tribes by essentially not considering them and their Treaty Territory rights: Federal rights which supercede states' rights. The United States did not intervene, and it is my charge that this be considered an Act of Nullification under the United States Constitution.

In sum, I support the claim by Tribal Intervenors and other Intervenors that the Fort Laramie Treaty of 1868 is legally-binding and unabrogated. I know that Treaty Territory and retained rights are discussed and codified in the Treaty. The United States is Trustee for Federally-recognized Tribal Nations. The Trustee is to act on behalf of the Tribal Nations. This simply restates my initial position: Honor the Treaties. This is not optional, just because a foreign corporation finds itself facing difficulties transporting the climate-change inducing product of a dying industry across an international border to the Texas coast for further "refinement" and export to other foreign nations. This is Canada's problem, not ours, and if the Commission chooses to align with TransCanada, I believe that ultimately the decision will not rest easy on the consciences of the Commissioners and the Commission's legal staff.

As a active participant, an officer and member of several local and regional clean water organizations in New York—Gas Free Seneca, Finger Lakes Clean Water Initiative, Seneca Lake Pure Waters, Cayuga Lake Watershed Network, to name but four—my concern for water and protection of it underscores and amplifies the heart of my appeal to the South Dakota Public Utilities Commission to reject TransCanada's request for re-permitting. Therefore, I respectfully request that the Commission recognize the inherent legitimacy maintained by the signatories to the Fort Laramie Treaty of 1868—the Tribes of the Great Sioux Nation—to protect the resource rights they retained in their Treaty Territory lands, including the protection of waters that would be irreparably harmed when—**not if, but when**—the integrity of TransCanada's proposed Keystone XL pipeline is breached.

In closing, I wish to acknowledge the conversations I have had, as part of my own work product protections, with other Intervenors. In particular, Individual Intervenor Gary Dorr provided me with the Nez Perce Tribe and Idaho Rivers United case, which really helped me clarify how best to support Tribal Intervenors. In addition, my conversations with him long before I became an Intervenor helped me to remember much of the policy and legislative expertise that I had not called upon in the years since I left Washington D.C. behind.

Finally, I wish to acknowledge the courtesy and unfailingly prompt responses of the Public Utilities Commission staff and attorneys. While I clearly disagree with many of the legal positions the staff has prepared for the Commissioners, I recognize their professionalism, which has been in my experience beyond reproach.

I retain my right to offer a closing statement orally, when I will be in attendance for the last two days of the evidentiary hearing.

Respectfully submitted,

Wrexie Lainson Bardaglio

Individual Intervenor