
**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION OF
TRANSCANADA KEYSTONE PIPELINE, LP
FOR ORDER ACCEPTING CERTIFICATION
OF PERMIT ISSUED IN DOCKET
HP09-001 TO CONSTRUCT THE
KEYSTONE XL PIPELINE

**YANKTON SIOUX TRIBE'S
PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND
OBJECTIONS TO APPLICANT'S
PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

HP14-001

COMES NOW Yankton Sioux Tribe (“Yankton”), by and through Jennifer S. Baker and Thomasina Real Bird with Fredericks Peebles & Morgan LLP, and hereby submits its proposed findings of fact and conclusions of law and its objections to Applicant’s Proposed findings of Fact and Conclusions of Law filed by TransCanada Keystone Pipeline, LP (“Keystone”).

I. YANKTON’S PROPOSED FINDINGS OF FACT

1. The proposed project would cross through treaty lands of the Yankton Sioux Tribe and other federally recognized Indian tribes that were established as such by the 1851 Fort Laramie Treaty.

2. The Yankton Sioux Tribe has not granted its consent for the pipeline to cross through its treaty lands.

3. The Yankton Sioux Tribe is a “local unit of government” or “local government” for purposes of SDCL 49-41B-22 and Conditions 1, 6, 7, and 34 of the Permit issued in Docket HP09-001 (“Permit”).

4. Keystone has not taken into account the views of the Yankton Sioux Tribe as required by SDCL 49-41B-22.

5. Keystone has not notified the Yankton Sioux Tribe of material deviations proposed to the route as required by Condition 6 of the Permit.

6. Keystone has not provided contact information for the public liaison officer to the Yankton Sioux Tribe and its law enforcement agency as required by Condition 7 of the Permit.

7. Keystone has not sought out and considered the knowledge of Yankton Sioux Tribe government officials as required by Condition 34 of the Permit.

8. The Final Environmental Impact Statement (“FEIS”), with which Keystone is bound to comply pursuant to Condition 2 of the Permit, has been superseded by a Final Supplemental Environmental Impact Statement (“FSEIS”) which differs from the FEIS. Tr. 556 In 7-15.

9. The Amended Programmatic Agreement contained in the FSEIS is a different agreement from the Programmatic Agreement contained in the FEIS. Tr. 557 In 6-8.

10. The Programmatic Agreement is a binding document that places legal responsibilities on Keystone with which Keystone is bound to comply pursuant to Condition 2 of the Permit. Tr. 557 In 16 – 25.

11. TransCanada intends to comply with the Amended Programmatic Agreement contained in the FSEIS, rather than the Programmatic Agreement contained in the FEIS. Tr. 558 In 1-4.

12. Condition 2 of the Permit requires TransCanada to comply with the Programmatic Agreement contained in the FEIS, rather than the Amended Programmatic Agreement contained in the FSEIS with which TransCanada intends to comply.

13. During the construction of the pipeline, Keystone would have three camps to accommodate the influx of approximately 3,600 pipeline workers. Ex. 2007 at 1-3.

14. Keystone conducted no risk assessment with respect to the worker camps. Tr. 700 ln 8 – 701 ln 1.

15. It is inevitable that the impacts of worker camps would include an increase in crime which would affect law enforcement. Tr. 2407 ln 3-7.

16. Keystone intends to provide additional funding to local sheriff's departments to address the increase in criminal activity surrounding the planned camps. It is up to the discretion of Keystone and local sheriffs to decide when Keystone will provide funds to these local sheriff's departments to address the increase in criminal activity. Tr. 2407 ln 18-22.

17. The worker camps will be operated by Target Logistics. Each camp will have a security team provided by Target Logistics. Ex. 2007 at 2, 4.

18. Keystone is unaware of the degree of training Target Logistics security officers receive. Tr. 2409 ln 22-25.

19. Target Logistics is not aware of whether or when they have sex offenders living in their camps. Tr. 2429 ln 3-5.

20. Keystone is aware that human trafficking is a problem at camps. 2413 ln 19-21.

21. Worker camps would increase crime and pose an unacceptable threat to the safety and welfare of surrounding communities.

22. The proposed camp located near Colome would be in relatively close proximity to the Yankton Sioux Tribe's Fort Randall Casino. Tr. at 2404 ln 12-19. This would place Yankton Sioux tribal members at particular risk to the criminal threat posed by the influx of workers.

II. YANKTON'S PROPOSED CONCLUSIONS OF LAW

1. Keystone bears the burden of production and the burden of proof to show that the Permit should be certified pursuant to SDCL 49-41B-27.

2. Pursuant to SDCL 49-41B-27, Keystone must prove that it continues to meet the Conditions on which the Permit issued in Docket HP09-001 was granted.

3. Keystone cannot meet Condition 1 of the Permit because federal law requires Keystone to obtain a Presidential Permit in order to construct the proposed project and Keystone's application for a Presidential Permit has been denied. **Exhibit A.**

4. Keystone is further unable to meet Condition 1 of the Permit because it has failed to obtain consent for the pipeline from the signatory tribes to the 1851 Fort Laramie Treaty, thus construction would constitute a trespass, a violation of the Treaty, and a violation of law.

5. Keystone cannot meet Condition 2 of the Permit because Condition 2 requires Keystone to comply with the FEIS, which differs from the FSEIS that has now superceded the FEIS.

6. Keystone has not proven that it will meet Condition 5 of the Permit, which requires Keystone to undertake and complete all of the actions that it and its affiliated entities committed to undertake and complete in Docket HP09-001. Keystone committed to comply with the Programmatic Agreement contained in the FEIS in Docket HP09-001, but Keystone has now testified that it instead intends to comply with the Amended Programmatic Agreement contained in the FSEIS.

7. Keystone has failed to meet its burden of proof with respect to Conditions 6, 7, and 34 because it has not shown that it has or will comply with these Conditions with respect to the Yankton Sioux Tribe.

8. Keystone failed to provide evidence or provided insufficient evidence to prove that it will meet Conditions including, but not limited to, 13-16, 18, 20, 22, 24, 26, 28, 31-33, 35, and 39-49.

9. Keystone has failed to meet its burden of production and its burden of proof with respect to each of the Permit Conditions.

10. The Commission concludes that Keystone is not entitled to certification pursuant to SDCL 49-41B-27.

III. OBJECTIONS TO KEYSTONE'S PROPOSED FINDINGS OF FACT

Yankton stands firmly behind its Post-Hearing Evidentiary Brief, its Post-Hearing Reply Brief, and its position that Keystone has failed to meet its burden of proof for certification in this matter. However, in the event the Commission finds that Keystone is entitled to its requested relief under SDCL 49-41B-22, Yankton offers the following objections to the proposed findings of fact and conclusions of law submitted by Keystone.

Yankton objects to Proposed Finding of Fact No. 12: The final sentence of the proposed finding, which states that only Dakota Rural Action was a party to Docket HP09-001, should be rejected as it bears no relevance to the pending proceeding.

Yankton objects to Proposed Finding of Fact No. 17: This proposed finding should be amended to read: "A Presidential Permit required by Executive Order 11423 of August 16, 1968, and Executive Order 13337 of April 30, 2004, that would allow the pipeline to cross the border between Canada and the United States has been denied by the Secretary of State under the authority delegated to him by the President of the United States."

Yankton objects to Proposed Finding of Fact Nos. 19 and 20: These proposed findings, which address the Gulf Coast Segment and the Houston Lateral Segment, should be rejected as they bear no relevance to the pending proceeding.

Yankton objects to Proposed Findings of Fact Nos. 24, 26, 27, and 33: These findings should be rejected to the extent they reference things that will happen or actions Keystone will take (e.g., “will construct” and “will operate”) because such things cannot happen and Keystone can take no such actions in the absence of a Presidential Permit, which has been denied.

Yankton objects to Proposed Finding of Fact No. 25: This finding should be amended to read: “There is no current construction schedule for the Project.” The latter portion of the finding is moot as the Presidential Permit has been denied.

Yankton objects to Proposed Finding of Fact No. 30: The absence of a condition is irrelevant. If every potential subject of a condition was to receive a finding, there would be no end to the findings. Moreover, this proposed finding gives the false impression that demand is not a factor in the issuance of the Permit. SDCL 49-41B-11(9) requires all applications for a permit to include the “[e]stimated *consumer demand* and estimates for future energy needs of those consumers to be directly served by the facility.” (Emphasis added.) In addition, ARSD 20:10:22:10 requires an applicant to “provide a description of present and estimated *consumer demand* and estimated future energy needs of those customers to be directly served by the proposed facility.” (Emphasis added.) Permit Condition 1 requires Keystone to comply with South Dakota law, which does include consumer demand as a factor in the issuance of a permit. SDCL 49-41B-11(9); ARSD 20:10:22:10.

Yankton objects to Proposed Finding of Fact No. 34: This finding falsely states that the “total length of Project pipe with the potential to affect a High Consequence Area is 15.8 miles.”

Heidi Tillquist testified that this figure could change depending on “the landowners and what they request.” Tr. 608 ln 9. Ms. Tillquist further stated that this figure could change as additional high consequence areas are identified. Tr. 670 ln 18-24. Because there are two factors that could potentially change the total length of Project pipe that has the potential to affect a High Consequence Area, the total length of pipe that could affect a high consequence is actually unknown. This proposed finding is inaccurate and should be rejected.

Yankton objects to Proposed Finding of Fact No. 36: The statement that “[n]o tribal ... lands are crossed by the Pipeline route” misrepresents the character of the land that would be crossed by the proposed pipeline, as the route does traverse tribal treaty territory pursuant to the 1851 and 1868 Fort Laramie Treaties. However, the route does not cross through any present-day Indian reservations in South Dakota. This proposed finding should be revised to read: “No present-day Indian reservations ... would be crossed by the Pipeline route.”

Yankton objects to Proposed Finding of Fact No. 39: This statement is inaccurate. In addition to the changes stated in Exhibit C to Keystone’s Certification Petition, the intervening parties elicited testimony that the FEIS is no longer the governing State Department environmental review document because there is now a FSEIS which superceded the FEIS and which contains different provisions (Tr. 556 ln 7-15), including a different Programmatic Agreement from the FEIS (Tr. 557 ln 6-8).

Yankton objects to Proposed Finding of Fact No. 42: This proposed finding should be rejected because the intervening parties presented an abundance of evidence that Keystone cannot satisfy a number of conditions, including the evidence cited in Yankton’s Post-Hearing Brief and Post-Hearing Reply Brief, which are incorporated herein by reference. Furthermore, as a matter of public record, Keystone is now unable to comply with Condition No. 2 which

requires Keystone to obtain and comply with all applicable federal, state, and local permits, including the Presidential Permit. With the support of President Obama, the Secretary of State rejected Keystone's application for a Presidential Permit on November 3, 2015, denying Keystone of the ability to comply with Condition No. 2. *See Exhibit A.* Finally, this proposed finding mistakenly places the burden of proof on the intervening parties to show that Keystone cannot satisfy conditions when, to the contrary, the onus is on Keystone to prove that it can meet each and every condition. ARSD 20:10:01:15.01.

Yankton objects to Proposed Finding of Fact No. 45: Keystone alleges in this finding that it has already started making contacts with local emergency responders and will continue to do so. However, no such contacts have been made with any emergency responders for the tribes. *See, e.g.,* Tr. at 2038 ln 6 – 1039 ln 3; 2092 ln 4-16. Furthermore, nothing in page 317 of the transcript supports Keystone's assertion that it has already started making contacts and will continue to do so. *See* Tr. 317. This constitutes evidence that Keystone will not meet Condition No. 10. Proposed Finding No. 45 should be rejected.

Yankton objects to Proposed Finding of Fact No. 46: Keystone alleges that, “[t]o the extent that Tribes may be affected by construction and operation of the Pipeline, Keystone presented evidence that it will contact Tribal emergency responders as well.” However, Keystone has admitted (Tr. 317 ln 21-22) and witnesses for tribal intervenors have testified (Tr. at 2038 ln 6 – 1039 ln 3; 2092 ln 4-16) that no such contacts have been made, despite the fact that Keystone says it has already started making contacts with local emergency responders (Applicant's Proposed Findings of Fact and Conclusions of Law at 45). Furthermore, Keystone has given no indication that it has taken or will take into account the affect of construction of operation of the proposed pipeline on tribes – which means Keystone will not contact tribal

emergency responders. In the testimony cited in Keystone's Proposed Finding of Fact No. 46, Corey Goulet states that, for tribes which are "downstream of the pipeline" or if "there's a river that goes through there," Keystone would contact those tribes. Tr. 318 ln 5-9. This statement is extremely vague and does not support a conclusion that tribes including the Yankton Sioux Tribe would be contacted, despite their potentially affected interests. Given the lack of contact to date and Keystone's lack of consideration for tribal interests as a whole, Keystone has failed to prove that it will comply with Condition No. 10. Proposed Finding of Fact No. 46 should therefore be rejected.

Yankton objects to Proposed Finding of Fact No. 56: This proposed finding states that "Dr. Davis's testimony is insufficient to warrant any change to [Findings of Fact 43-45 in Docket HP09-001]. Because the Commission does not have authority to amend the findings from Docket HP-001, this statement is irrelevant and should be rejected.

Yankton objects to Proposed Finding of Fact No. 61: Contrary to Keystone's proposed finding, Pages 1880-1882 of the transcript contain no testimony rebutting Doug Crow Ghost's testimony about tribal water rights. The testimony on said pages in fact reveals Dr. Schmidt's lack of knowledge about tribal water rights in South Dakota. Furthermore, because tribal water rights have not yet been adjudicated, there is no measure that can be applied at this stage to ensure that tribal water rights are protected despite ARSD 46:5:40:01. In addition, if somehow it was possible for South Dakota to determine the extent of those water rights for purposes of ARSD 46:5:40:01 and if tribal water rights would be affected, then the Yankton Sioux Tribe's water rights would be senior to any later permit holder under the *Winters* Doctrine.

Yankton objects to Proposed Finding of Fact No. 63: Corey Goulet is not an expert in PVC pipe and has no direct knowledge of the studies about which he testified. The reference to

Mr. Goulet's testimony (the second-to-last sentence in this proposed finding) should be rejected. Furthermore, the burden is not on Cindy Myers or any other intervenor to show that Keystone is unable to meet a Permit condition. The final sentence of this proposed finding should therefore also be rejected.

Yankton objects to Proposed Finding of Fact No. 64: The purpose of Faith Spotted Eagle's testimony was not to prove the technical bases for failures of the pipeline that could threaten drinking water or water from the Missouri River, but rather, to show the harms that could result from contamination of the Missouri River by the proposed pipeline. Ms. Spotted Eagle's testimony, in combination with other testimony showing that spills are possible, does in fact show that the Project poses a threat to the Tribe's drinking water and to water available for ceremonial purposes. The second sentence of Proposed Finding of Fact No. 64 should be rejected.

Yankton objects to Proposed Finding of Fact No. 66: Contrary to this proposed finding, several Permit conditions effectively require that Keystone consult with certain tribes about the proposed project. Condition 1 requires compliance "with all applicable laws and regulations in its construction and operation of the Project." This includes compliance with SDCL 49-41B-22(4), which requires an applicant to give due consideration to the views of governing bodies of local units of government. Condition 6 requires Keystone to "notify the Commission and all landowners, utilities and local governmental units as soon as practicable if material deviations are proposed to the route." (Emphasis added.) Condition 7 requires that Keystone's public liaison officer "provide contact information for him/her to all landowners crossed by the Project and to law enforcement agencies and local governments in the vicinity of the Project." (Emphasis added.) Condition 34 requires Keystone to "seek out and consider local knowledge,

including...local landowners and governmental officials.” (Emphasis added.) As a governmental unit for a region and group of people likely to be affected by the proposed pipeline, the Yankton Sioux Tribe is clearly a local unit of government for purposes of the Project. Those conditions do not specify municipalities, yet Keystone clearly considered them to be local units of government. In fact, the conditions do not specify any particular type of unit of government. The fact that tribes are not specified is irrelevant. Keystone even acknowledged this by alleging compliance with Condition 34 through its testimony that Keystone sought out local knowledge from tribes, though it failed to prove this. Proposed Finding of Fact No. 66 should therefore be rejected.

Yankton objects to Proposed Finding of Fact No. 68: This proposed finding erroneously asserts that page 11 of Appendix E to the FSEIS establishes that the Standing Rock Sioux Tribe was consulted by the Department of State. For purposes of tribal consultation, such consultation must be “meaningful.” Exec. Order 13175, Fed. Reg. 65-67249 (Nov. 9, 2000). The cited portion of the FSEIS merely contains a series of dates corresponding with alleged letters, telephone calls, emails, and meetings. It does not address who the correspondence was issued to or whether it was even received, whether any response was received, who participated in the meetings and telephone calls, or the scope and content of the correspondence and meetings. Nothing on page 11 indicates that the alleged contacts constituted “meaningful” consultation, therefore nothing on page 11 establishes that consultation was properly conducted between the Department of State and the Standing Rock Sioux Tribe. Proposed Finding of Fact No. 68 should be rejected.

Yankton objects to Proposed Finding of Fact No. 78: This proposed finding incorrectly alleges that “[w]orkers who live in the camps must sign a code of conduct and *are expelled if*

they violate the code.” (Emphasis added.) Rick Perkins testified during the evidentiary hearing that, while some violations might warrant expulsion from the camp, others would not. Tr. 2416 ln 23 – 2417 ln 5; *see also* Ex. 2007 at 4. In addition, while Mr. Perkins testified at one point that Keystone expects no increase in crime associated with the camps (Tr. 2409 ln 13-14), he also testified as to the need for increased police presence in areas around the camps (Tr. 2407 ln 3-7) which can only logically lead to the conclusion that an increase in crime is expected. Moreover, Mr. Perkins’ expectations are hardly a basis for a finding of fact in the Commission’s order. All except the first sentence of Proposed Finding of Fact No. 78 should be rejected.

IV. OBJECTIONS TO KEYSTONE’S PROPOSED CONCLUSIONS OF LAW

Yankton objects to Proposed Conclusion No. 3. Keystone alleges that it has no legal obligation to meet the burden required under SDCL 49-41B-22. While the burden of proof under 49-41B-22 is not the burden of proof that applies to the pending case, Keystone is still required to comply with all applicable laws pursuant to Condition 1, including SDCL 49-41b-22. This proposed conclusion of law should be rejected.

Yankton objects to Proposed Conclusion No. 6. In this proposed conclusion, Keystone claims that it has met its burden of proof through merely submitting a signed certification, submitting documents with its petition, and testimony that despite some changes in facts and circumstances, nothing that has changed affects Keystone’s *ability to meet* the conditions on which the Permit was granted. This allegation misinterprets the burden of proof in this case. Keystone has an affirmative obligation to prove that it continues to actually meet each of the conditions on which the Permit was granted. *See* Yankton’s Post-Hearing Brief at 2-5, incorporated herein by reference. Keystone’s *ability* to meet Permit conditions is not at issue. *See* SDCL 49-41B-27. Furthermore, the original Permit contained no finding or conclusion

asserting that, at that time, Keystone was able to meet or did meet the conditions on which the Permit was based. *See* Amended Final Decision and Order, HP09-001. Keystone's Proposed Conclusion of Law No. 6 must be rejected.

Yankton objects to Proposed Conclusion No. 7: Keystone again misinterprets the burden of proof in this case. Keystone claims that it is as able today to meet the conditions as it was when the Permit was issued. SDCL 49-41B-27 requires an applicant to prove "that such facility *continues to meet* the conditions on which the permit was issued." Keystone's ability to meet the conditions either now or at the time the Permit was issued is irrelevant. Furthermore, the Commission has made no finding or conclusion that Keystone was able to meet the conditions at the time the Permit was issued. *See* Amended Final Decision and Order, HP09-001. In addition, Keystone claims that it "had no burden to offer affirmative evidence that it would be able to meet the conditions in the future beyond the Certification signed by Corey Goulet." Keystone implies that the Certification signed by Mr. Goulet alone was sufficient to meet its burden of proof in this case. A mere sworn statement by an individual is hardly satisfactory evidence to meet a burden of proof. *See* Yankton's Post-Hearing Brief at 2, incorporated herein by reference. Keystone's Proposed Conclusion of Law No. 7 must be rejected.

Yankton objects to Proposed Conclusion No. 8: Keystone again mistakenly concludes that its burden of proof relates to its ability to meet the Permit conditions. SDCL 49-41B-27 contains the standard Keystone must meet, which is continued compliance with the Permit conditions. Because Keystone's ability to meet Permit conditions is irrelevant, this proposed conclusion should be rejected.

Yankton objects to Proposed Conclusion No. 9: This proposed conclusion is flawed on two grounds. First, Keystone's ability to meet the Permit conditions is irrelevant. Second, the

burden of proof rests on Keystone, not on the intervenors. See Yankton's Post-Hearing Brief at 2-5. This proposed conclusion should be rejected.

Respectfully submitted this 9th day of December, 2015.



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