

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE )  
APPLICATION OF DAKOTA )  
ACCESS, LLC FOR AN ENERGY )  
FACILITY PERMIT TO CONSTRUCT )  
THE DAKOTA ACCESS PIPELINE )  
PROJECT )

HP14-002

**BRIEF IN SUPPORT OF  
OPPOSITION TO MOTION TO COMPEL  
DISCOVERY**

**COMES NOW** Dakota Access, LLC, by and through one of its attorneys of record, Kara C. Semmler of May, Adam, Gerdes & Thompson LLP and submits this Memorandum in support of Dakota Access, LLC's opposition to the Yankton Sioux Tribe's Motion to Compel Discovery.

**FACTS**

On or about December 15, 2014 Dakota Access, LLC filed an Application for a Facility Permit to Construct and Operate the Dakota Access Pipeline with the SD PUC. Per SDCL 49-41B-24, the Commission must render a decision on the Application by December 15, 2015. On March 11, 2015 the Commission entered a Scheduling Order to assure the statutory decision timeframe can be met.

Pursuant to the Commission's Scheduling Order, the Yankton Sioux Tribe sent 49 discovery requests to Dakota Access, LLC on April 1, 2015. In addition to the Yankton Sioux Tribe's requests, Dakota Access, LLC received discovery requests from other interveners. Dakota Access, LLC worked diligently to respond to all requests by May 1, 2015. Highly substantial but incomplete responses were Answers were provided on May 2, 2015. Specifically of the 49 requests, 4 answers were pending on May 2, 2015. Final signed responses were provided on May 8, 2015.

## LAW

While the Supreme Court has indicated, “the scope of pretrial discovery is, for the most part, broadly construed,” discovery is not without boundaries. Bean v. Best, 80 N.W.2d 565 (SD 1957). “Application for discovery must contain facts showing or indicating a reasonable probability that documents...contain material evidence.” *Id.* The proper standard is to determine whether the information sought is “relevant to the subject matter involved....” Kaarup v. St. Paul Fire and Marine, Ins. Co., 436 N.W.2d 17 (SD 1989).

## ARGUMENT

### Interrogatories: 10, 20, 25, 26

Four individual requests for information made by the Yankton Sioux Tribe were not answered on May 2, 2015. Dakota Access, LLC indicated those Answers (Interrogatories 10, 20, 25, 26) were “Pending.” Those Answers required additional research that was not completed on May 2, 2015. The Yankton Sioux Tribe was aware that answers were forthcoming. Nonetheless, it included these items in its Motion to Compel which was filed on May 7, 2015. On May 8, 2015 answers to the above interrogatories were provided to the Yankton Sioux Tribe. See Attached Exhibit A. As a result, no Commission action is required.

Neither attorney fees nor other costs should be awarded to the Yankton Sioux Tribe. SDCL 15-6-37(a) instructs that attorney fees should not be awarded when the movant fails to first make “a good faith effort to obtain the disclosure or discovery without court action.” Court action on these four requests was completely unnecessary. Yankton Sioux Tribe did not make any good faith effort to resolve anything. Dakota Access, LLC assured the Yankton Sioux Tribe responses were on the way, and they have since been delivered. There was a 6 day delay in

answering these 4 requests. The slight delay in delivering answers did not prejudice Yankton Sioux Tribe in any way.

#### Interrogatory 11

This interrogatory asks, “Does Dakota Access recognize the Yankton Sioux Tribe, a federally recognized sovereign Indian Nation as a “local governmental unit?” Dakota Access answered, “Dakota Access considers the Yankton Sioux Tribe to be a federally recognized tribe.” Dakota Access fully answered the question, yet Yankton Sioux Tribe asks the Commission to Compel some further answer. Dakota Access is at a loss regarding what more the Yankton Sioux Tribe desired from this question. The Motion to Compel on this Interrogatory should be denied. The request for attorney fees should also be denied as the Interrogatory was answered.

#### Interrogatory 19

In this request, the Yankton Sioux Tribe asks for the description and location of all cultural or historic sites uncovered by surveys. By no means does Dakota Access intend to withhold any relevant information. However, it is concerned about the continued safety and preservation of historic sites it noted in its surveys. Additionally, State Statute protects much of this information as confidential per:

*1-20-21.2. Confidentiality of records pertaining to location of archaeological site-- Exceptions. Any records maintained pursuant to § 1-20-21 pertaining to the location of an archaeological site shall remain confidential to protect the integrity of the archaeological site. The state archaeologist may make the information from the records of an archeological site available to any agency of state government and any political subdivision of the state or to any tribe, which, in the opinion of the state archaeologist, may conduct an activity that affects any such site. The state archaeologist shall also make the information from the records of an archeological site available to the owner of the land that is an archeological site and may make the information available to any qualified researcher or research entity.*

If the cultural or historic resource is not protected under SDCL 1-20-21.2, the South Dakota Historic Preservation office regulates and otherwise manages the same. The historic preservation office is the agency with expertise and is the agency that the Yankton Sioux Tribe should work with to obtain detailed historic site information. If so compelled, Dakota Access will certainly provide the information. However, Dakota Access believes it is in the best interest of the State of South Dakota if the Yankton Sioux Tribe works directly with the Historic Preservation office, the experts in this area. The Motion to Compel on this Interrogatory should be denied as they are other more appropriate means for the Yankton Sioux Tribe to collect the requested information.

The request for attorney fees should be denied. Per SDCL 15-6-37(a) Dakota Access' objection is justified.

Interrogatory 40 and 18

There is no need for Commission action on these items. It seems the Yankton Sioux Tribe is merely seeking some clarification from Dakota Access regarding the answer to the above interrogatories. This is a conversation we can and should have without allocating Commission resources. See Attached Exhibit A. No Commission action is necessary or appropriate and as a result attorney's fees should not be awarded to Yankton Sioux Tribe as a result of this request.

Request for Production 4.

Document request 4 requests a variety of state based information generated in states other than South Dakota. This portion of the request is irrelevant, overbroad and burdensome. This Commission proceeding pertains to South Dakota only. With that said, Dakota Access did offer that no permits in any other state have been denied or revoked, in addition it provided a link to

other state applications. See Attached Exhibit A. The Yankton Sioux Tribe cannot justify this request or prove that this information is likely to lead to relevant information as it pertains to the South Dakota pipeline siting process. While discovery is broad, it is not without boundaries. The South Dakota siting process is not designed to “inspect” the permit process in all other states and any discovery along those lines is irrelevant. The Motion to Compel on this request for production should be denied.

Document request 4 also asks for “all documents” relating to required permits. The exchange of communication leading up to issuance of permit is irrelevant. Dakota Access followed the process required by each individual state or federal agency which has a permitting process. The applications, correspondence or other agency specific information is irrelevant to this process. Those state agencies are required to assure the permit requirements are met. The application process of outside agencies is irrelevant to the PUC siting process. In addition, it is overly burdensome for Dakota Access to produce all such information. The request for all information presumably includes e-mails, letters, applications, correspondence, notes and other internal communications. The Motion to Compel on this Request for Production should be denied.

The request for attorney fees should be denied. Per SDCL 15-6-37(a) Dakota Access’ objection is justified.

#### Request for Production 7.

Request for Production 7 asks for “all documents” related to any sensitive SD species located along or nearby the Dakota Access Pipeline Project. This request is overly broad. If the Yankton Sioux Tribe has any follow up question to Exhibit C which was filed with the Application and lists the Federal and State Threatened and Endangered species in South Dakota,

Dakota Access will make a good faith effort to reply. However, this particular request does not indicate in any way what type of information is sought. The Motion to Compel on this Request for Production should be denied.

Request for Production 7 also requests Dakota Access create a table to show breeding times of sensitive SD species and a map to show migration pathways of sensitive SD species. This request is outside the scope of discovery. The discovery process is used to obtain information or documents which exist. It is not intended to cause parties to create documents. It seems the Yankton Sioux Tribe would like Dakota Access to create documents which do not exist. The Motion to Compel on this Request for Production should be denied.

The request for attorney fees should be denied. Per SDCL 15-6-37(a) Dakota Access' objection is justified.

### **CONCLUSION**

Discovery is a necessary tool to learn about the opposing side's evidence and arguments. However, discovery is not without limits. It is improper to use the discovery process to simply burden a party with requests to dig into unrelated information for unrelated purposes. It is improper to use the discovery process to cause unnecessary delay to further an outside cause. It appears that is what is going on here.


Dakota Access communicated its desire to completely answer Discovery and invited conversation among the parties. However, the Yankton Sioux Tribe's reply did not reflect a desire to work through its apparent issues in an effort to obtain the information necessary to advocate its position in this South Dakota siting docket. Rather, the Yankton Sioux Tribe has been very adversarial, demanding and has itself generated the current discovery issues. It

appears the Yankton Sioux Tribe desires to use the Discovery process as a tool to complicate the overall siting docket process in furtherance of an outside agenda.

Dakota Access respectfully requests the PUC deny Yankton Sioux Tribe's to Compel and deny the request for attorney fees for all the above stated reasons.

Dated this 8 day of May, 2015.

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#### CERTIFICATE OF SERVICE

8 Kara C. Semmler of May, Adam, Gerdes & Thompson hereby certifies that on or before the 8 day of May, 2015, she electronically served through the PUC filing system or mailed by US First Class Mail, a copy of the Brief in Support of Opposition to Motion to Compel Discovery to the following:

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