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	**ROSEBUD SIOUX TRIBE'S POST TRIAL BRIEF** **HP14-002**

COMES NOW, the Rosebud Sioux Tribe and for its post-trial brief in the above referenced matter state and assert the following:

> *Clear blue skies frame spectacular views of grasslands and wetlands teeming with migratory waterfowl and other wildlife in the Huron, Madison, and Sand Lake Wetland Management Districts. Here, future generations will experience the whistle of the northern pintail, the song of the western meadowlark, and the distant boom of the prairie chicken. Located in the Prairie Pothole Region of South Dakota, these districts preserve timeless landscapes in the face of change. Conservation of these lands is achieved through hard work and the support of friends and neighbors who value natural places as an essential component of their quality of life.*
>
> USFWS Vision Statement of the Comprehensive Conservation Plan, South Dakota Wetland Management Districts and
> Rosebud Sioux Tribe Exhibit 22

The land described above in the US Fish and Wildlife Service Vision Statement was once the aboriginal home to the Great Sioux Nation, who had occupied approximately 60 million acres west of the Missouri River in the present day states of North Dakota, South Dakota, Nebraska, Montana and Wyoming and approximately 14 million acres of land in what are now the States of North Dakota and South Dakota east of the Missouri River. Since time immemorial

the seven Teton bands of the Sioux Nation[1] (including what is now the Rosebud Sioux Tribe) enjoyed exclusive use of that territory located in the Missouri River basin.

The Rosebud Sioux Tribe is the modern day successor-in-interest to the Brule Band of the Teton Division of the Sioux Nation from the Missouri River basin. The Sioux Nation entered into the Fort Laramie Treaty of 1851 with the United States which was a multilateral treaty whereby the United States recognized this aboriginal territory of the seven Teton bands as well as other signatory tribes. The Indian Claims Commission recognized this in *Sioux Tribe v. United States*, when the Commission ruled that Article 5 of the 1851 Ft. Laramie Treaty recognized the Teton bands' joint and several aboriginal Indian title to (1) the entire sixty million acre area west of the Missouri River and (2) the entire fourteen million acre east of the Missouri River, Sioux Nation v. United States, 23 Ind. C1. Comm. 419, 424 (1970).

Aboriginal rights and other Tribal interests exist today and are recognized and protected through various United States Supreme Court opinions, executive orders and federal statutes. Several of those protections are relevant to the matter pending before the Public Utilities Commission, including Tribal reserved water rights, recognized in the Winters Doctrine, as explained by Indigenous Environmental Network and Dakota Rural Action expert witness Peter Capossela. Tribes also have protected interests to cultural sites located on and off of the modern day reservations pursuant to the Section 106 consultation requirements of the National Historic Preservation Act as explained by the Standing Rock Sioux Tribe Tribal Historic Preservation Officer Waste Win Young and Paige Olson from the South Dakota State Historic Preservation

[1] The Sioux Nation is comprised of seven divisions: (1) Medawakanton; (2) Sisseton; (3) Wahpakoota; (4) Wahpeton; (5) Yankton; (6) Yanatonai; and (7) Teton. Sioux Nation v. United States, 24 Ind. C1. Comm. 147, 162 (1970). The Teton Division is comprised of seven distinct, sovereign bands: (1) Blackfeet; (2) Brule; (3) Hunkpapa; (4) Minnecounjou; (5) No Bows; (6) Oglala; and (7) Two Kettle (App. 63).

Office. Faith Spotted Eagle, from the Yankton Sioux Tribe addressed in her testimony the concepts associated with aboriginal title and some of the numerous tribal interests associated with tribal aboriginal land located along the proposed pipeline route, including the gathering and use of traditional plants and medicines as well as information related to the significance of stone circles and mounds located along the pipeline route. Other Tribal interests are protected by the Native American Graves Protection and Repatriation Act and the Clean Water Act.

Over the course of time and interactions between the Sioux Nation and immigrating easterners, treaties were abrogated by Congress and eventually, the West, including South Dakota was opened up for homesteading, with numerous territories being admitted to the Union as States, South Dakota being one. The Sioux aboriginal and treaty land was offered for settlement by the United States government through various federal statutes designed to encourage westward expansion. As a result, territorial control over much of the aboriginal territory was taken away from tribes with the resulting reservation locations as they presently exist.

Presently, the Rosebud Sioux Tribe is organized pursuant to the Indian Reorganization Act of 1934. The Rosebud Sioux Indian Reservation is located in South Central South Dakota and comprises the entirety of Todd County as well as trust land and communities in the surrounding five counties. Some of the individual interveners in opposition to the Dakota Access Pipeline are the decedents of original Homesteaders who trace their present interest in the land to that historical period in time when the Sioux Nation was losing its land to expansion. It is within this historical backdrop that today, we see South Dakotans from historically opposed backgrounds and all walks of life, uniting to oppose the Dakota Access pipeline because of the potential damage that it could cause to this land that we all share as a home. These people share

a way of life that is inextricably tied to and rooted in a close, protective, nurturing relationship with the land where Dakota Access seeks to construct its 30 inch crude oil pipeline.

Today, this area represents some of the last remaining vestiges of the natural landscape in South Dakota that existed prior to pre-colonial contact. It is home to numerous species, many of which are either threatened or endangered, including the bald eagle, the northern long eared bat, the Sprague's pipit, the whooping crane, the Pallid sturgeon, the Topeka shiner, the Dakota Skipper, the western prairie fringed orchid, the northern river otter, the Eskimo curlew, the Osprey as well as each species required habitat.

Introduction

Dakota Access, LLC (herein after Applicant) filed its permit application with the Public Utilities Commission (herein after PUC or Commission) for the construction of the Dakota Access Pipeline (herein after DAPL) pursuant to SDCL 49-41B-1, 49-41B-4, 49-41B-11 and 49-41B-22 along with ARSD 20:10:22 on December 15, 2014 and its Amended Permit application and supporting documents on December 23, 2014. All documents were filed with and maintained at the South Dakota Public Utilities Commission website maintained at http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-002.aspx

The Application

Dakota Access filed its first application for construction of the DAPL on December 15, 2015. The application package consisted of the application itself along with Attachment A "Project Mapping," Attachment B "Project Typicals and Flow Diagrams," Attachment C "Supplementary Table" and Attachment D "Dakota Access Project Plans." Each Attachment consisted of several attachments or appendixes as follows: "Attachment A" included Exhibit A1

"Project Vicinity Maps," Exhibit A2 "Topographic Maps," Exhibit A3 "Soil Maps", Exhibit A4 "Hydrology Maps" and Exhibit A5 "USGS Land Cover/Land Use Field Data Maps". Attachment B included Exhibit B "Table of Contents" Project Typicals which included Right of Way, Main Line Valve and Pump Station Typicals and Project Flow Diagrams (Confidential). "Attachment C" "Supplementary Table" included Exhibit C "Table of Contents" and included documents entitled "Soil Characteristics for Each Soil Map Unit within the Project Area" "Water Bodies Crossed by the Project" and Federal and State Threatened and Endangered Species in South Dakota." "Attachment D" "Dakota Access Project Plans" included Exhibit D "Table of Contents" and included the following documents "Draft Storm Water Pollution Prevention Plan", Appendix A- "Best Management Practice Figures", Appendix B "Draft Spill Prevention Control and Counter Measures Plan", Appendix C "Inspection forms and Instructions", "Agricultural Impact Mitigation Plan", Horizontal Directional Drilling Contingency Plan" and "Blast Plan"

Dakota Access, LLC filed its amended Application on December 23, 2014 which consisted of updated documents and exhibits that were originally filed with the PUC on December 15, 2015 and which changes are identified and currently maintained at the following http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-002.aspx, which is the PUC's public website for the Dakota Access docket.

Applicable Law

In reaching a decision regarding the Application the PUC is guided by the requirements of SDCL 49-41B the "Energy Conversion Transmission Facilities Act" and Administrative Rules of South Dakota Chapter 20:10. Particular attention should be paid to the application of SDCL 49-41B-1, 49-41B-4, 49-41B-11 and 49-41B-22 as well as ARSD 20:10:22 "Energy Facility Siting Rules" throughout the deliberative process. Additionally, the hearing is considered a

contested case within the meaning of SDCL 1-26-1(2). A brief overview of the relevant statutes and administrative rules is provided, followed by a substantive examination of relevant portions of the revised application along with the evidence Dakota Access put on at the trial to satisfy its burden of proof. The conclusion is reached that Dakota Access has not put on substantial evidence as required by SDCL 49-41B-22 to meet its burden of proof and that the application for a permit should be denied.

The Energy Conversion Transmission Facilities Act and the Energy Facility Siting Rules

The Energy Conversion Transmission Facilities Act (hereafter the Act) along with the Energy Facility Siting Rules (here after the Rules) combine to create a comprehensive regulatory system to govern the construction, maintenance and operation of energy transmission facilities for the purpose of satisfying the energy needs and future energy demands of the residents of the State of South Dakota. With the passage of 49-41B-1, the South Dakota Legislature declared that energy development in the Northern Great Plains region, including South Dakota, is an activity that "significantly affects the welfare of the population, the environmental quality, the location and growth of industry and the use of natural resources of the state." The Legislature further found that in assuming energy permitting authority the state must ensure that facilities "are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled" while requiring "minimal adverse effects on the environment and upon the citizens of this state." SDCL 49-41B-1. SDCL 49-41B-4 requires all utilities to obtain a permit before engaging in construction of any facility regulated by the Act.

SDCL 49-41B-11 addresses the statutory requirements for the contents of each application and provides that at a minimum each application for such a facility must contain the following information:

1. The name and address of the applicant;
2. Description of the nature and location of the facility;
3. Estimated date of commencement of construction and duration of construction;
4. Estimated number of employees employed at the site of the facility during the construction phase and during the operating life of the facility. Estimates shall include the number of employees who are to be utilized but who do not currently reside within the area to be affected by the facility;
5. Future additions and modifications to the facility which the applicant may wish to be approved in the permit;
6. A statement of the reasons for the selection of the proposed location;
7. Person owning the proposed facility and person managing the proposed facility;
8. The purpose of the facility;
9. Estimated consumer demand and estimated future energy needs of those consumers to be directly served by the facility;
10. The potential short and long range demands on any estimated tax revenues generated by the facility for the extension or expansion of public services within the affected areas;
11. Environmental studies prepared relative to the facility; and
12. Estimated construction cost of the facility.

SDCL 49-41B-22 establishes the Applicant's burden of proof. It provides that the Applicant has the burden to establish that:

1. The proposed facility will comply with all applicable laws and rules;
2. The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
3. The facility will not substantially impair the health, safety or welfare of the inhabitants; and
4. The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

The Order for and Notice of Evidentiary Hearing

By Order dated August 20, 2015 the PUC provided notice of the evidentiary hearing consistent with the requirements of SDCL 1-26-17. The Order for and Notice of Evidentiary Hearing set out 10 issues to be decided by the Commission:

1. Whether the application was filed generally in the form and content required by SDCL 49-41B-11 and ARDS 20:10:22?
2. Whether the application or any accompanying statements or studies required of the Applicant contain any deliberate misstatements of material fact?
3. Whether the Project will comply with all applicable laws and rules?
4. Whether the project will pose an unacceptable threat of serious injury to the environment or to the social and economic conditions of inhabitants or expected inhabitants in the siting area?
5. Whether the project will substantially impair the health, safety or welfare of the inhabitants?
6. Whether the project will interfere with the orderly development of the region with due consideration having been given to the views of governing bodies of affected local units of government?
7. Whether a permit for the project should be granted, denied or granted upon such terms, conditions or modification of the construction, operation or maintenance of the Project as the Commission deems appropriate?
8. If granted subject to terms, conditions or modifications of the construction, operation, or maintenance of the Project, what terms, conditions or modifications of the construction, operation or maintenance of the project are appropriate?
9. What amount of coverage under the indemnity bond required by SDCL 49-41B-38 is a reasonable amount? and
10. What the form, terms and conditions of the indemnity bond should be?

Statement of the Case and Burden of Proof

In order for the Commission to enter an order approving the application for a permit to construct the Dakota Access Pipeline, the applicant must put on substantial evidence that supports the burden of proof from SDCL 49-41B-22 as defined by the South Dakota Supreme Court from *In the Matter of Establishing Certain Territorial Electric Boundaries within the State of South Dakota*. Substantial evidence is "such relevant and competence evidence as a

reasonable mind might accept as being sufficiently adequate to support a conclusion." A review of the record will show that the applicant has not satisfied the issues as framed by the Commission in the Notice and Order for Evidentiary Hearing, nor has the applicant presented substantial evidence to satisfy its burden of proof under SDCL 49-41B-22.

The burden of proof rests with the applicant throughout the duration of a contested case. PUC Administrative Rule 20:10:01:15.01 establishes the burden in contested case proceedings. It provides:

> "In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant, ***applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition.*** In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses."

Accordingly, the Applicant has the affirmative burden to put on substantial evidence to meet its burden under SDCL 49-41B-22. This brief will address the shortcomings of the application as well as demonstrated ability to comply with the issues as framed by the Commission in the Order for and Notice of Evidentiary Hearing along with an examination of evidence presented at the evidentiary hearing. The brief reaches the conclusion that the Applicant has failed to put on substantial evidence sufficient to satisfy the burden of proof from SDCL 49-41B-22 and *In the Matter of Establishing Certain Territorial Electric Boundaries within the State of South Dakota*. Absent a finding that the applicant can show that the facility will comply with all applicable laws and rules, the Commission cannot issue an order that the facility will not pose an unacceptable threat of serious injury to the environment or to the social and economic conditions of inhabitants or expected inhabitants in the siting area. Nor can the

Commission issue an order that the project will not substantially impair the health, safety or welfare of the inhabitants of the siting area.

ARSD 20:10:22:04 – Requirements for the General Format of the Application

ARSD 20:10:22:04 provides the requirements for the general format of the application for the permit and requires that the "truth and accuracy of the application" be "verified by the applicant" and to "immediately notify the commission of any changes of fact or applicable law materially affecting the application." The applicant has not complied with the above stated requirements from ARSD 20:10:22:04(5) in at least three instances. First and foremost, the application does not contain the required statement that verifies the truth and accuracy of the application. In the second instance, the Applicant also failed to immediately notify the PUC of the new Clean Water Act rule regarding the definition of "waters of the United States." The applicant also failed to notify the Commission of its intent to collocate the pipeline with an existing energy transfer power line in the Harrisburg area.

Additionally, the applicant did not specifically identify the power line and also failed to provide this updated information on a map as required by ARSD 20:10:22:11. Furthermore, the DAPL application and Monica Howard testimony specify that species observation was conducted for three months between September 2014 and November, 2014. When questioned about the adequacy of this short period of time utilized for species observation, Howard responded that "Additional surveys were done in the spring of '15, not accounted for in the application that was filed in December." EH TR page 446 line 16. This failure to update the

application does not support a finding that the applicant has complied with the requirements of ARSD 20:10:22:04(5). Because the applicant did not comply with the requirements of ARSD 20:10:22:04(5) the Commission cannot issue an order that affirms the applicant has satisfied all of the issues defined in the Notice of Hearing.

The New Clean Water Rule

The Environmental Protection Agency along with the Army Corps of Engineers published the final rule that redefined the scope and definition of waters entitled to protection under the Clean Water Act on June 29, 2015 in Federal Register Vol. 80 No. 124. The rule had an effective date of August 28, 2015. According to the Federal Register, the new rule "clarifies the scope of waters of the United States consistent with the Clean Water Act, Supreme Court precedent and science. Programs established by the CWA, such as the section 402 National Pollution Discharge Elimination System (NPDES) permit program, the section 404 program for discharge of dredged or fill material, and the section 311 oil spill prevention and response programs, all rely on the definition of waters of the United States."

In order to construct the DAPL, the applicant must also secure all of the above mentioned permits. Each of which is referenced and changed by the new rule. With over 200 waterbodies crossed in South Dakota alone, there is the potential that the applicant may have to reevaluate the manner in which it defined "waters of the United States" in order to comply with the new federal regulations under the Clean Water Act.

It is important to note here that the application of the new rule has been challenged in various federal jurisdictions. Initially, in the summer of 2015, the North Dakota federal district

court enjoined implementation of the new CWA rule in 13 states that challenged the validity of the new CWA rule. South Dakota was one of the original 13 states that make up the North Dakota litigation to which the injunction applied. More recently, the 6th Circuit Court of Appeals stayed enforcement of the rule nationwide. It is unclear and unknown to the author what an accurate time frame is for the resolution of these challenges to the implementation of the new CWA rule. Furthermore, the Environmental Protection Agency and the Army Corps of Engineers has resumed the use of nationwide permits using the "waters of the United States" definition that existed under the agencies regulations in place prior to the issuance of the new CWA rule. http://www2.epa.gov/cleanwaterrule/clean-water-rule-litigation-statement

Notwithstanding the foregoing, the Applicant's omission of the fact that the Environmental Protection Agency, together with the Army Corps of Engineers issued a new rule that affects the definition of "waters of the United States" under the requirements of the Clean Water Act is a violation of the applicant's continuing duty to "immediately notify the commission of any changes to applicable laws that materially affect the application" as required by ARSD 20:10:22:04(5). The PUC should find that the Applicant has not conformed to the requirements of ARSD 20:10:22:04(5) and SDCL 49-41B-11 and cannot show that is has satisfied the requirements of the statement of issues 1 through 10 as contained in the August 20, 2015 Notice of Evidentiary Hearing. The application should be denied accordingly.

SDCL 49-41B-11(6) and ARSD 20:10:22:11 – The Reasons for the Selected Location Requirement

SDCL 49-41B-11(6) requires the application to contain a statement "of the reasons for the selection of the proposed location." ARSD 20:10:22:11 is the administrative rule that implements the requirements of SDCL 49-41B-11. It provides that "the application shall

contain a general site description of the proposed facility including a description of the specific site and its location with respect to state, county, and other political subdivisions; a map showing prominent features such as cities, lakes and rivers; and maps showing cemeteries, places of historical significance, transportation facilities, or other public facilities adjacent to or abutting the plant or transmission site."

The Applicant attempts to address the requirements of SDCL 49-41B-11(6) and ARSD 20:10:22:11 starting on page 4 of the application at Section 11.0 "General Site Description" and continuing through page 7. This section includes information relating to the general location of the DAPL and describes where the project enters and exits the state. It contains information that describes the location with respect to state, county and other political subdivisions. It provides the pump station location. It directs the reader to Exhibits A1 and A2 for detailed maps of the Project area in South Dakota. Exhibit A1 consists of 2 maps, one of the overall proposed route starting in North Dakota and ending in Illinois. The second being a topographic map for the route in South Dakota. However, neither of these maps includes "prominent features such as cities, lakes and rivers; and maps showing cemeteries, places of historical significance, transportation facilities, or other public facilities adjacent to or abutting the plant or transmission site" as required by ARSD 20:10:22:11. Section 11.0 "General Site Description" does not satisfy the requirements of SDCL 49-41B-11(6) and ARSD 20:10:22:11.

This section goes on to describe the number of main line valves to be used on the project in South Dakota, provides information regarding the need to construct aboveground appurtenances, which includes the previously mentioned main line valves, pig launching and receiving stations and contractor yards. It also describes the typical construction Rights of Way

that would be needed in different areas along the route. It describes the 50 foot permanent easement that will be needed along the entirety of the DAPL. They describe the need for additional workspace located outside of the construction zone as well. Section 11.0 further describes the need for staging/contractor yards to store materials needed for the construction of the pipeline. They talk about various plans for crossing roads and pastures to reach the construction ROW as well as the possible need to modify or improve existing roads along with the possibility of needing to construct new roads. The application also states that the Applicant has not thoroughly defined access roads and have not started talking to local governments regarding road use agreements. This section concludes with a description of above ground facilities including a description of the pump station, the placement of the mainline valves and general locations of pig launching and receiving stations.

Wetland Management Districts, Species Protection and Other Permits

In examining the contents of the application the Commission should also look at what the Applicant has not discussed. Monica Howard is the Director of Environmental Sciences for Energy Transfer Partners in their Engineering and Construction Division. Howard's direct testimony indicates that she is responsible for the following sections of Dakota Access's application: 12) Alternatives, 13) Environmental Information 14) Effects on Physical Environment 15) Hydrology 16) Effects on Terrestrial Ecosystems 17) Effects on Aquatic Ecosystems 18) Land Use 20) Water Quality 21) Air Quality and parts of 23) Community Impact.

She testified at length at the evidentiary hearing on these subjects but provided little of substantive value to assist the Commission in its decision making process. Howard identified all

of the other permits the Dakota Access must attain at her direct testimony starting on page 1. She identifies 16 additional permits or other approvals that Dakota Access must obtain in connection with this application, including a Clean Water Act Section 404/401 Nationwide Permit 12 authorization; Section 10 of the Rivers and Harbors Act; Section 106 Archeological Resources Protection Act; Endangered Species At Section 7 consultation requirements; Us Fish and Wildlife Service Special Use Permit for Wetland and Grassland Easements; US Fish and Wildlife Service Wetland and Grassland Easements Rights of way easement; Farm Service Agency/Natural Resources Conservation Services Crop Service Program easements; Plans necessary to satisfy the PHMSA requirements of 49 CFR Part 194 and 195; National Pollutant Discharge Elimination System General Permit for discharges of Hydrostatic Test Water; Surface Water Withdraw permit; South Dakota Oil Spill response plan; Consultation with South Dakota Game Fish and Parks regarding state listed threatened and endangered species; Section 106 of the National Historic Preservation Act; South Dakota Department of Transportation Crossing permits; county road departments road crossing permits and County and Local Authorities regarding floodplain, conditional use and building permits where required.

Dakota Access did not put on evidence to show that they have obtained any of the other permits and approvals necessary as part of this permitting process to demonstrate their present ability to comply with all laws. Dakota Access provided no substantive updates regarding the current status of these permits. Despite stating that they have been in communications with various agencies for over a year, they offered no evidence to address the substance of those communications. Dakota Access was not able to inform the commission when they anticipated receiving communications from these agencies that either confirmed or denied their applications for permits and other necessary approvals for the construction of the Dakota Access Pipeline.

SDCL 49-41B-22 provides the burden of proof for this case and requires the applicant to present substantial evidence that the proposed facility will: 1) comply with all applicable laws and rules, 2) that it will not pose a threat of serious injury to the environment nor to the social and economic condition of the inhabitants or expected inhabitants of the siting area, 3) that the facility will not substantially impair the health, safety or welfare of the inhabitants and 4) that it will not unduly interfere with the orderly development of the region with due consideration having been given to the views of affected local units of government.

Presumably the remainder of the Act's requirements exist to provide a framework for which to judge the Applicants evidence in order to make a determination as to whether or not the burden of proof was satisfied. For example, in order to show that the facility will comply with all applicable laws and rules, the Applicant should identify the applicable rules, define the applicability and requirements of those rules and then show how they have complied with each of the laws and rules. The applicant has not identified the substantive requirements of each rule that applies for purposes of meeting the burden from SDCL 49-41B-22(1). Without a clear statement of the legal requirements, there is nothing to base the ability to comply on. The applicant was also not able to demonstrate weather or not they would be able to obtain each of the other required permits. For this reason the Applicant has failed to put on substantial evidence to support a finding that the facility will comply with all laws.

An example of why communications are necessarily helpful to the Commission in determining the reliability of the testimony is the topic of threatened and endangered species and habitat protection as presented by Howard and Dakota Access. Dakota Access submitted information regarding 33 species that are listed as threatened, endangered or candidate species

that is eligible for protection under the Endangered Species Act or other state species protections laws. The US Fish and Wildlife Service and the Army Corps of Engineers are the federal agencies that share primary enforcement responsibility for the application of purely federal law. For all but one of these species, Howard reaches what is in effect a no impact determination for all of the species except for the Topeka Shiner, which is reported at a "not likely to adversely affect" designation. Other Staff witnesses disagreed with some of these determinations but all witnesses generally agreed that the US Fish and Wildlife Service would make the final determination of issues that are a matter of federal law. Despite there being over a year of reported communications between Dakota Access and these agencies Dakota Access provided none of the US Fish and Wildlife Services responses to Howard's determination of the effects of eligible federal species. There was also no evidence presented on what level of protection is offered to state level species or the specific protections and requirements of the Migratory Bird Act or the Bald and Golden Eagle Protection Act.

The eastern half of South Dakota, including the proposed route in its entirety, consists of areas that are largely defined as Wetland Management Districts. The section did not identify the fact that the entire pipeline route goes through the Sand Lake, Huron, Madison and Lake Andes Wetland Management Districts (hereafter WMD's) in South Dakota. There is not one portion of the route in South Dakota that is not located within a WMD. There is no discussion in the application regarding the significance of the WMD's. WMD's are part of the National Wildlife Refuge System. Each district has a purpose for which it was established. WMD's provide oversite for all of the US Fish and Wildlife Services small land tracks in multicounty areas. In South Dakota these three districts manage more that 1 million acres of conservation easements in 25 counties. These lands are part of "a network of lands set aside to conserve fish

and wildlife and their habitat, known as the National Wildlife Refuge System." RST Exhibit 22. Each of the districts are established with objectives, purposes and goals. The objectives of these three districts are "wetland preservation, waterfowl and wildlife production and maintenance of breeding grounds for migratory birds" in addition to "providing a northern staging area and habitat" for migratory birds. RST Exhibit 22 page 15. The purposes of each of these districts "is to assure the long term viability of the breeding waterfowl population and production through the acquisition and management of waterfowl production areas, while considering the needs of other migratory birds, threatened and endangered species and other wildlife." RST Exhibit 22 page 23.

Additionally, the districts have developed the following goals to accomplish the objectives and purposes through effective management decisions: "to conserve, restore and improve the biological integrity and ecological function of the native prairies to support healthy populations of native plants and wildlife, to manage planted grasslands to contribute to the production and growth of continental waterfowl populations, other migratory birds, threatened and endangered species; to protect, restore and enhance prairie pothole wetlands to provide a learning environment for improved research and monitoring of prairie potholes; to provide visitors with opportunities to enjoy hunting, fishing in waterfowl production areas and increase understanding of the National Wildlife Refuge System; to provide visitors with the opportunity to enjoy nature, to promote partnerships, operations and administration and provide environmental education and interpretation." Where the route is located on US Fish and Wildlife Grassland and Wetland Easements Dakota Access must first obtain a Special Use Permit from the Fish and Wildlife Services. Dakota Access has not obtained such a permit and was not able

to update the Commission with substantive information concerning the status of this permit application.

At trial, Howard was unfamiliar with the goals of WMD's. Eventually she acknowledged that the goals of the WMD's in South Dakota are "to assure the long-term viability of breeding waterfowl population and production through the acquisition and management of waterfowl production areas while considering the need of other migratory birds, threatened and endangered species and other wildlife." EH TR at page 440 line 15. Howard agreed that the stated goals do not include the insertion of a 200 mile long by 50 foot wide permanent right of way easement for a 30 inch crude oil pipeline. In an apparent attempt that seeks to avoid a robust discussion of these issues, Dakota Access does not include any of this information in this Section of the application that purports to comply with the requirements of ARSD 20:10:22:11. This omission is an effort to down play the significance of these areas to the State of South Dakota. This information represents the type of information that reasonably prudent professionals in the same fields as Dakota Access's witnesses would know about, consult and rely upon in its analysis of the potential environmental effects of the DAPL.

Wetlands of International Importance

Also avoided is the discussion of the overall importance of wetlands in the proposed project area. The Sand Lake National Wild Life Refuge (located within the Sand Lake District approximately 44 miles from the proposed route) has received the designation of a "Wetland of International Importance" pursuant to the Convention on "Wetlands of International Importance Especially as Waterfowl Habitat" commonly known as the Ramsar Convention. See generally http://www.fws.gov/mountain-prairie/refuges/sd/ and "*The Ramsar Conventions on Wetlands:*

Assessment of International Designations within the United States" by Royal C. Gardner and Kim Diana Connolly, 37 ELR 10089. (hereafter The Convention). Over 150 countries including the United States are parties to The Convention which serves as a "useful framework for cooperative efforts to protect wetlands and the benefits that people derive from the areas." 37 ELR 10089. The Convention is a non-regulatory cooperative agreement to protect and conserve wetlands at a domestic and an international level.

The Convention imposes three duties on its parties, which include: 1) designation of sites as sites of international importance, 2) to apply a "wise use" concept to all wetlands within a party's territory and 3) to engage in international cooperation. 37 ELR 10090 As of January 2007, the United States has designated 22 sites. 37 ELR 10089. One of these site is the Sand Lake National Wildlife Refuge. The wise use requirement can be satisfied by developing national wetland policies and legislation, through implementation of programs on inventories, research, monitoring, and education on wetlands. It is important to note that the wise use concept from The Convention applies to all wetlands within each Nation's territory and not just to its Ramsar sites. 37 ELR 10091 An example of the United States implementation of the "wise use" concepts from the Convention is RST Exhibit 22 Chapter 2 of the US Fish and Wildlife Services Comprehensive Conservation Plan as well as the Clean Water Act and its implementing regulations and rules.

While all of this information is relevant when considering the environmental description of the proposed corridor of it was included in the application or considered by the Applicant in its decision to route the DAPL through nearly 200 miles consisting entirely of Wetland Management Districts. Nonetheless, this international agreement to cooperate to protect and

conserve is instrumental in understanding the role and importance of United States laws relating to wetland areas. The application does not recognize the international cooperative efforts surrounding the protection and conservation of these importance areas and how that applies to the matter before the Commission. Most of the information contained in Section 11.0 does not constitute a general site description as that term is defined and required by ARSD 20:10:22:11. It does not contain a statement of the "reasons for the selection of the proposed location" as required by SDCL 49-41B-11(6). Accordingly, the application does not satisfy the requirements of SDCL 49-41B-11(6).

Location of the Route

The location of the route has been a concern of the general public as well as the Commission as evidenced from the public hearing meeting transcripts, particularly the January 22, 2015 session in Sioux Falls where there were several questions relating to route selection and the reason for its close proximity to the high growth areas near Sioux Falls. In response to questioning about the route selection process Project Director Joey Mahmoud described the routing process as follows: "When we start we look at it from the very big picture, how to get from point A to point B. We factor in – we go through what's called the siting analysis that's actually part of the PUC process where we look at all the various constraints, environmental constraints, residential, populated areas, city centers. It could be cultural resources. It could be a lot of things." SF meeting TR at page 22 line 7.

On its face this answer appears to be a comprehensive explanation of the PUC routing process to South Dakotans in attendance at the meeting. It is actually misleading and leaves out important PUC requirements regarding the siting process. ARSD 20:10:22:12 requires that the

applicant develop alternative sites and evaluate alternative sites to the proposed route. The statements made about how the route is selected are not reflective of an application that has complied with the requirements of the law regarding the same. By avoidance of a discussion of the alternative route required by the Energy Facility Siting rules Mahmoud does little to assure the listener that Dakota Access will comply with the requirements of the Act. ARSD 20:10:22:12 also requires that the alternative site analysis include "a discussion of the extent to which reliance upon eminent domain powers could be reduced by use of an alternative site." Although eminent domain was raised as a concern at the Sioux Falls meeting, Mahmoud did not recognize this aspect of the PUC citing process at the January 22, 2015 meeting in Sioux Falls. SF meeting TR at page 43 line 4. The application also does not provide a discussion related to how the use of an alternative route could reduce reliance on the need for eminent domain. In fact it was revealed at the evidentiary hearing that many of the individual interveners had previously sued by Dakota Access and amazingly enough Dakota Access initiated new eminent domain lawsuits *during* this hearing.

At the evidentiary hearing Mahmoud was first questioned by Staff regarding the location of the project originally being so close to Sioux Falls. EH TR at p. 181 line 14. Mahmoud responded that the reason it was in the original location because that "was just the shortest distance between the beginning and the end." EH TR at p. 181 line 22. The testimony offers no information to indicate that the original route selection was performed in the manner contemplated and required by SDCL 49-41B-11(6) and ARSD 20:10:22:11 or 20:10:22:12. Mahmoud goes on to state that the location of the proposed route near Sioux Falls was rerouted due to concerns that the route was in the high growth areas of Sioux Falls, Tea, Harrisburg and Hartford. EH TR at page 182.

Mahmoud was not questioned by Commissioner Hanson regarding the location of the routes and its close proximity to the high growth areas in the Sioux Falls area. Rather, Commissioner Hanson inquired into Mahmoud's understanding of the requirements of an environmental impact statement which culminated in Commissioner Hanson paraphrasing Mahmouds' testimony as follows: "the project already includes everything that would be required by the State of South Dakota." EH TR at page 257 line 23. Mahmoud agreed with this characterization of his testimony. EH TR at page 258 line 2. SDCL 34A-9-7 provides that the EIS must at a minimum include "(4) Alternatives to the proposed action." ARSD 20:10:22:12 "Alternative Sites" provides that the applicant shall present information related to its selection of the proposed site for the facility, which includes general criteria used to select alternate sites, an evaluation of the alternative sites considered by the facility and an evaluation of the proposed project and its advantages over the other alternative sites considered. Had Dakota Access complied with this requirement of the Commission's Energy Siting Rules Mahmoud's statement may have been accurate. The applicant identifies several small reroutes of the pipeline which are limited to very specific geographic points along isolated areas of the pipeline and calls them alternatives. ARSD 20:10:22:12 contemplates and requires that at least one site for the entire project should be mapped out, considered and compared to other possible routes. For example, the route as initially selected and proposed traverses through four Wetland Management Districts located in eastern South Dakota. DAPL should have, in compliance with the requirements of ARSD 20:10:22:12 presented an alternative route of the entire project that avoids these four important areas. Had this been done and properly analyzed under the rules, there would have been at least one alternative site to compare the final proposed route with. This would have provided tangible information related to different routes whose benefits and drawbacks could

have been compared with for environmental impact purposes. In order for the PUC process to be comparable to the requirements of an EIS, the PUC permitting process must be followed in its entirety. In this case, DAPL did not fully comply with the application requirements.

DAPL witness Chuck Frey was also questioned at the hearing regarding the location of the pipeline in such close proximity to the high growth areas near Sioux Falls by Commissioner Hanson, when he asked "Do you have any knowledge of a need for routing the pipeline so close to the highest populated and highest economic growth area of South Dakota, a need for routing it?" EH TR at page 289 line 15. Frey testifies that the route was "chosen and based on a number of factors as discussed in Mahmoud's testimony." EH TR at page 289 line 19. One of those factors being the shortest point from one point to another point. Frye identifies additional factors in the route selection process which include "work to move around high consequence areas, tribal lands, environmentally sensitive areas, you know, a large number of items are involved in the routing selection." EH TR at page 289 line 22. Fry agreed that the route was initially routed based on the shortest route. Frye provided no testimony to indicate that the route selection process utilized by Dakota Access was one that complied with the requirements of SDCL 49-41B-11(6) and ARSD 20:10:22:11 or 20:10:22:12. Minor route adjustments along the route do not constitute alternative sites for the project in a manner that is consistent with the requirements of ARSD 20:10:22:11 or 20:10:22:12.

Jack Edwards also testified on behalf of DAPL regarding the need for the route location in the Sioux Falls area. Commissioner Hanson asked the initial question at EH TR page 369 at line 17, when he stated "Are you aware if there is a need for routing the pipeline so close to the highest populated and the highest economic growth area of South Dakota?" Edwards response

was not responsive to the question when he stated that "We did have meetings with those cities, and they expressed, as Joey testified, --they concurred that where we put the line was least impact to their – any growth plans they knew at the time." EH TR at page 369 line 21. In apparent dissatisfaction with Edwards' response Commissioner Hanson asked the question again. EH TR at page 370 line 19. Edwards responded that "It was a method to get from point A to point B within the shortest distance. We did move the line further south from Sioux Falls. We realized our error within trying to get the shortest length of pipe." EH TR at page 370 line 22. Commissioner Hanson completed this line of questioning seeking confirmation that the routing is still motivated by having the shortest route possible. Edwards agreed that "In the pipeline business it's always motivated by the shortest route." EH TR at page 371 line 8. Curiously, at no point does Frye testify that route selection methods and criteria were generated because of the legal requirements from SDCL 49-41B-11(6) and ARSD 20:10:22:11 or 20:10:22:12. Under this method of pipeline design and routing, they simply select the shortest route from the starting point to the ending point and then make minor adjustments along the way to try and avoid certain areas and other legal requirements. At no point does Dakota Access actually identify an alternative site and then provide a comparative analysis of the proposed route and the alternative routes consistent with the requirements of the Energy Facility Siting rules. Edwards does not mention that the final route selection was based on city officials desire to place the line along an existing electrical power transmission line.

Monica Howard also testified on behalf of Dakota Access and was questioned about her knowledge for the need to route the pipeline so close to Sioux Falls and the surrounding communities. The question was posed to her in the context of an "environmental reason why the route of the pipeline cannot be moved farther away from the high growth areas of Tea and

Harrisburg?" EH TR at page 4836 line 16. Howard testified that there was an environmental reason to not move the route further away from the high growth areas. EH TR at page 4836 line 24. She stated that "the general nature of environmental impacts is to minimize impacts and the strongest way to minimize impacts is to minimize length. The more dirt you turn over, the more erosion potential you have. The more length you add, the more likely you are to cross additional features or increase lengths of habitats, things of that nature. So from an environmental standpoint, minimization is by far priority." EH TR at page 483 line 24. Howard's response seems plausible at first glance. However, deeper examination reveals its flaws. The response is conclusory in nature and provides no quantifiable data upon which the answer is based. The response is not consistent with a route that was identified through the application of SDCL 49-41B-11(6) and ARSD 20:10:22:11 or 20:10:22:12.

Had the project been designed within these parameters it is quite possible that there would be quantifiable data to support this conclusion. However, in the absence of an alternative route being provided consistent with ARSD 20:10:22:12 and the appropriate comparative analysis being performed, no conclusions can be reached, certainly not Howards. Accordingly, Dakota Access cannot satisfy its burden of proof under SDCL 49-41B-22.

The Preferred Route Location

The last day of the hearing during Mahmoud's rebuttal testimony is the first time we hear live testimony regarding the reasoning behind the selection of the proposed final route in the Sioux Falls area. In response to the description of the final route selection as depicted on Exhibit A1 by Commissioner Hanson, Mahmoud agrees with Hanson when Hanson states that he is

familiar with the location and that there was a power line in that location near the city of Harrisburg.

Commissioner Hanson describes the route as going "within a quarter mile of the city limits of Harrisburg. It goes through the proposed development area." Commissioner Hanson then shows his surprise with this location when he states "I'm curious, is that the location where the powerline is? I'm familiar with the area. It seems like there's a powerline right there." EH TR at page 2106 line 9-14. Following a short recess, Mahmoud returns with the map and he and Commissioner Hanson engaged in dialogue regarding the specific location on the map of the existing powerline route. This discussion is detailed in nearly 4 pages of the transcript, which is equally surprising because it is a clear indication that the coexisting location was not previously identified on the map as required by SDCL 49-41B-11(6) and ARSD 20:10:22:11. Looking at the map as contained on A1 there is no powerline depicted or otherwise shown on the map. This map was originally filed with the Commission on March 19, 2015 as an exhibit to Dakota Access' letter regarding the Route Revisions in Minnehaha and Turner Counties and Route Alternatives in Lincoln County. Exhibit B contains a table of several route options that also includes several qualifying characteristics related to each route. It identifies length of reroute, powerline crossings, pipeline crossings, existing utilities colocation distance, NHD lake/pond crossings, NHD lake/pond total distance crossed, NHD Stream crossings, NWI PEM Wetlands crossed, PEM wetland total crossing distance and cultural resources. This chart does not specifically identify where each of these features are located in proximity to each of the routes, nor is that information provided in the maps. Because this new development suddenly supporting the routing selection also qualifies as a change in fact as contemplated by ARSD

20:10:22:04(5) Dakota Access information is insufficient as a matter of law to satisfy the minimum requirements regarding the form of the application.

In response to the concerns regarding the location and the reasoning behind its selection at the hearing, DAPL proffered and the Commission admitted Exhibit 54 which purported to account for the final location. DAPL 54 consisted of the same March 19, 2015 letter from DAPL's attorneys to the PUC advising the commission of developments and updates regarding the route location in the Sioux Falls, Tea, Harrisburg and Hartford areas, a table of meetings, Minnehaha County/City of Sioux Falls January 13, 2015 meeting agenda, Motions Excerpts from January 13 meeting, a February 17, 2015 email from Josh Larson to Jack Edwards regarding Planning and Zoning in Minnehaha and Lincoln Counties, a list of people in attendance at the Sioux Falls Landfill Meeting dated February 19, 2015, a list of people in attendance at the City of Tea/Harrisburg Route Review Meeting dated February 19, 2015, and a series of several emails from various DAP officials and other local officials. DAPL Exhibit 54 offers no evidence of the reason suggested by Mahmoud as the reason for the selection of the final location. There is no reference to an existing electrical transmission powerline in any of the documents that comprise DAPL Exhibit 54. In fact, Exhibit F of DAPL 54 only mentions street and utility crossing depths near the city of Hartford. There is no mention of running parallel to or coexisting with an existing electrical power transmission line. DAPL 54 does not include Exhibit A1 mentioned in the previous route discussion between Commissioner Hanson and Mahmoud.

There is nothing in revised application that states that the final route as selected was based on the request of local governments, nothing in the exhibits submitted and no other witnesses to corroborate DAPLS's testimony that the final route location was along an existing electric transmission power line as Mahmoud testified to. The application does not even identify

any electrical transmission power lines near the route. Only in the March 19, 2015 filing with the Commission does Dakota Access briefly mention a coexisting powerline. The reasoning for the final route selection in the Sioux Falls area is disingenuous at best. Regardless of the reasoning, the method used to determine the route does not comply with the requirements of the law and must be rejected by the Commission. The PUC should find that the Applicant has not conformed to the requirements of SDCL 49-41B-11(6) and ARSD 20:10:22:11. Additionally, the applicant cannot show that is has satisfied the requirements of the statement of issues 1 through 10 as contained in the August 20, 2015 Notice of Evidentiary Hearing. The application should be denied accordingly.

Cultural Assessment

Furthermore, this section of the application contained minimal information relating to places of historical significance. As revealed at the evidentiary hearing, there are numerous documented places of cultural and historical significance located along the proposed route and in very close proximity to the proposed route. Many of these locations are eligible for protection or are protected under the National Historic Preservation Act, many sites are unevaluated and some are newly discovered. They include sites that are unique to the Tribes located in South Dakota as well as to the history of the State of South Dakota. Other than general statements, little of this information was contained in this section of the application. A brief section of the application titled 23.6 "Forecast of Impact on Cultural Resources" provided a two page overview of some of the relevant information pertaining to places of historical significance. A great deal of information regarding places of historical significance along with DAPLS's knowledge of the same was not included in the application. Additionally, DAPL did not update the application as required by ARSD 20:10:22 04 (5) when it learned of new facts contained in confidential DAPL

Exhibit 45 through 49 which consisted of the five volume Level III Intensive Cultural Resources Survey for the Dakota Access Pipeline dated August 2015.

This failure to update the application with new facts was examined and addressed at the Evidentiary Hearing. Without revealing the confidential location and types of numerous newly discovered, protected cultural sites, the testimony of Paige Olson revealed that there is at least one newly discovered cultural site on land subject to federal jurisdiction that triggers the Section 106 Tribal Consultation requirements of the National Historic Preservation Act. This information was known to Dakota Access and not filed with the Commission. Dakota Access deliberately withheld this information from the Commission. Had this information pertaining to the location of these sights not been brought out on cross examination, the Commission would never had known the sites existed and would never had known of the federal tribal consultation requirement triggered by the sites location and the requirements of NHPA Section 106.

Curiously, rather that file the entire five volume cultural assessment as an exhibit during its case in chief, Dakota Access filed DAPL 10 which is an Addendum to the main cultural survey report.

SDCL 49-41B-11(7) – The Owner Operator Requirement

The application also does not satisfy SDCL 49-41B-11(7) which requires the application to contain information regarding the persons owning the proposed facility and the person managing the proposed facility. SDCL 49-41B-11(7) implicates ARSD 20:10:22:07 "Name of Owner and Manager" and requires the application to "contain a complete description of the current and proposed rights of ownership of the proposed facility" as well as "the name of the project manager of the proposed facility." The application at page 4 provides that the "proposed pipeline project will be owned by Dakota Access, LLC and operated by DAPL-ETCO

Operations Management, LLC and identifies Joey Mahmoud as the Project Director." There is no mention of Sunoco Philips in the application. At the trial, Mahmoud testified that Energy Transfer Partners, Dakota Access, LLC parent company, recently entered into an oral agreement whereby Sunoco Philips would manage the DAPL. He testified that "The third, once the deal is signed and we go through the corporate paperwork is Sunoco Logistics." EHTR page 66 at line 3. He went on to testify that "Sunoco Logistics, one of the parents who is also going to be a primary operator of the pipeline…" EH TR page 66 at line 16. This information was not a part of the application and should have been if it was known at that time. If not known, the failure to disclose this information at the earliest possible time is also a violation of the applicant's continuing duty to "immediately notify the commission of any changes of fact or applicable law materially affecting the application" as required by ARSD 20:10:22:04(5).

The PUC should find that the Applicant has not conformed to the requirements of ARSD 20:10:22:04(5), ARSD 20:10:22:07 and SDCL 49-41B-11, and cannot show that is has satisfied the requirements of the statement of issues 1 through 10 as contained in the August 20, 2015 Notice of Evidentiary Hearing. The application for the permit should be denied accordingly.

SDCL 49-41B-11(6) and ARSD 20:10:22:12 – The Alternative Site Requirement

SDCL 49-41B-11(6) as described above requires "a statement of the reasons for the selection of the proposed location." ARSD 20:10:22:12 "Alternative sites" is another rule that implicates SDCL 49-41B-11(6) and requires the applicant to "present information related to its selection of the proposed site for the facility, including the following:

1. The general criteria used to select alternative sites, how these criteria were measured and weighed, and reasons for selecting these criteria;

2. An evaluation of alternative sites considered by the applicant for the facility;
3. An evaluation of the proposed plant, wind energy, or transmission site and its advantages over the other alternative sites considered by the applicant, including a discussion of the extent to which reliance upon eminent domain powers could be reduced by use of an alternative site, alternative generation method, or alternative waste handling method.

The applicant attempts to satisfy the alternative sites requirements at page 7 of the application in Section 12.0 through 12.3. Section 12.1 entitled "Route Selection" consists of one paragraph and informs the Commission that DAPL used a "sophisticated and proprietary Geographic Information System (GIS) based routing program to determine the preferred pipeline route" which was based on multiple publicly available and purchased data sets. The paragraph dedicated to route selection also describes some of the various data sets used to calculate the route and it also briefly described how the datasets were weighted based on the "desire to co-locate with certain features and the risk of crossing, or desire to avoid others, while minimizing the overall length of the route." Application at page 7. One example was provided. This paragraph consists of the entirety of the information included regarding route selection.

This paragraph does not identify any alternative sites. The paragraph does not identify criteria used to select alternative sites, it does not state how these non-existent criteria were measured and weighed, nor does it provide any reasons for selecting the criteria for the alternative sites. The paragraph does not provide an evaluation of alternative sites that were considered by the applicant. The application does not provide an evaluation of the proposed DAPL route over the other alternative sites that were considered by the applicant. The application does not discuss the extent to which reliance on eminent domain may be reduced by the use of an alternative site. The reason the application does not include this information is because there were no alternative route utilized. These information contained in these sections

are inadequate for the commission to determine that the requirements of ARSD 20:10:22:12 are satisfied and that the applicant chose what they call the preferred route in a manner that is within the bounds and requirements of the law which is necessary to grant the permit.

Environmental Impact Statement

Dakota Access resisted a motion to request the PUC to order an environmental impact study to be performed as part of the permitting process. A primary reason to support their opposition was their assertion that the PUC permitting process accomplishes the same goals of an EIS and that the permitting process is a more open process and therefore a preferred manner to identify the projects potential effects on the environment. Ultimately the Commission declined to order an EIS. A short comparison of certain aspects of the permitting regulations along with the statutory EIS requirements are helpful to the Commission in determining if in fact the permitting process is preferable to the EIS requirements.

The Energy Facility Siting Rules are very comprehensive in nature and they do provide for and take into account many of the same subjects as an Environmental Impact Statement. For example, the Energy Facility Siting Rules require applications to provide a general site description, provide alternative sites, to include environmental information, to describe the effect on physical environment, to include information on hydrology and to describe effects on terrestrial and aquatic ecosystems. The minimum requirements for the contents of an Environmental Impact Statement are embodied at SDCL 34A-9-7 "Contents of environmental impact statement." It provides that the EIS "shall be prepared in accordance with the procedural requirements relating to citizen participation of the National Environmental Policy Act of 1969

as amended to January 1, 2011, and implementing regulations adopted pursuant to that act, and shall include, at a minimum, a detailed statement setting forth the following:

1. A description of the proposed action and its environmental setting;
2. The environmental impact of the proposed action including short-term and long-term effects
3. Any adverse environmental effects that cannot be avoided if the proposal is implemented;
4. Alternatives to the proposed action;
5. Any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented;
6. Mitigation measures proposed to minimize the environmental impact; and
7. The growth-inducing aspects of the proposed action.

The permitting scheme only works and can only be considered comparable or preferable to an environmental impact statements if applicants provide all of the information that the Energy Facility Siting Rules are followed by applicants. As previously identified Dakota Access has not provided all of the information required to be included in applications such as this so the two processes cannot be considered comparable under these facts.

As previously stated, ARSD 20:10:22:12 "Alternative sites" requires the applicant to identify alternative sites for the proposed facility and then to provide a comparative analysis of the proposed route with the alternative sites. Also, as previously identified above, the Applicant did not provide any alternative sites and has not complied with the requirements of ARSD 20:10:22:12.

Commissioner Hanson also questioned Howard about the EIS protections by stating "the environmental work that the -- that Dakota Access has performed or has testified that it will

perform provide protections of endangered species commensurate with an EIS that meets federal standards?" EH TR at page 484 line 15. Howard testified that "there's no different surveys or measures we would have taken on our analysis and evaluation of this project, whether it be for an EIS or not." 484 at line 18. Her incorrect assessment that the two are comparable shows her lack of in depth knowledge and understanding of the NEPA requirements and ultimately calls into question the overall reliability of her testimony.

The environmental work that is required to be performed by Dakota Access is significantly different than the requirements of an Environmental Impact Statement that meets federal standards and to suggest otherwise is disingenuous at best. In order to properly evaluate Howard's answer a brief overview of the National Environmental Policy Act is necessary. The "NEPA advanced an interdisciplinary approach to Federal project planning and decision making through environmental impact assessment. This approach requires Federal officials to consider environmental values alongside the technical and economic considerations that are inherent factors in Federal decision making. Environmental impact assessment also calls for the evaluation of reasonable alternatives to a proposed Federal action; solicitation of input from organizations and individuals that could potentially be affected; and the unbiased presentation of direct, indirect, and cumulative environmental impacts." https://ceq.doe.gov/welcome.html#eis

The Environmental Impact Statement represents the most rigorous level of environmental compliance under the NEPA and represents the culmination of a process of considering numerous possible effects of a project on its surrounding environment. An EIS is only required to be performed following an Environmental Assessment (hereafter EA). The purpose of an EA is to determine if a proposed action, or its alternatives, potentially may have significant environmental effects. The EA also provides evidence and analysis to determine if an EIS is

necessary, it aids agency compliance with NEPA when no EIS is necessary and it facilitates preparation of an EIS when one is necessary. Generally speaking the EA will also identify ways that agencies can change proposed actions to reduce environmental effects. https://ceq.doe.gov/welcome.html#eis An EA is concluded with either the requirement to conduct an EIS or a determination of a Finding of no Significant Impact.

Although the PUC permitting process is a comprehensive scheme, neither it, nor the environmental work that Dakota Access has done or will promise to do in the future is commensurate with the level of protection that is afforded by the environmental assessment that would be performed under the Endangered Species Act as claimed by Howard. The data that would be collected during the EA process has not been collected, without it Howard's statement cannot be supported. Her opinion is off the mark. Without this information it is impossible to determine if the current environmental work performed would offer comparable protections of an Environmental Impact Statement.

Consider the following in determining the veracity of Howard's response – if an EIS were to be performed, first the Fish and Wildlife Service would publish a Notice of Intent in the Federal Register which would inform the public and notify the public how they can become involved in the preparation of the EIS. This starts the process known as the scoping process, which is the process of the agency and the public working together to define the range of issues that will be addressed in the EIS. The federal agency will also encourage participation from interested parties, will define the role of involved agencies and determines the relevant environmental issues. The lead agency also prepares a purpose and need statement to describe the rationale for the action while drafting the EIS. This statement serves as the basis for creating alternative solutions. NEPA also requires agencies to present reasonable alternative solutions.

Additionally, NEPA also requires agencies to present alternatives in sufficient detail to allow for readers to compare environmental effects. Another significant requirement of the EIS that was not performed or considered by Dakota Access is that the NEPA requires agencies to consider a no action alternative. Clearly the federal process is a much different process than the PUC permitting process. Based on the review of NEPA and EIS requirements compared to the actions performed by Dakota Access along with the actions they promise to perform at some point in the future, it is hard to comprehend the position that the current level of commitment by the company is commensurate with actual federal protection of endangered species as required by the NEPA, an Environmental Impact Statement and the Endangered Species Act.

SDCL 49-41B-11(9) and ARSD 20:10:22:10 – The Estimated Consumer Demand Requirement

SDCL 49-41B-11(9) requires the applicant to state the estimated consumer demand and estimated future needs of those consumers to be directly served by the facility. This requirement is implemented by ARSD 20:10:22:10 "Demand for facility" and requires the 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. The applicant shall also provide data, data sources, assumptions, forecast methods or models, or other reasoning upon which the description is based. This statement shall also include information on the relative contribution to any power or energy distribution network or pool that the proposed facility is projected to supply and a statement on the consequences of delay or termination of the construction of the facility."

The application attempts to comply with this rule in Section 10.0 "Demand for the Facility" at page 4 of the application. Section 4 consists of one paragraph in its entirety. It

states that the Dakota access has secured long term transportation contracts from multiple shippers that would transport 450,000 bpd of crude oil through the pipeline. It states that the transportation service would be conducted pursuant to the Interstate Commerce Act and in accordance with applicable Federal Energy Regulatory Commission regulations. It concludes by telling the Commission when the commitments from shippers were obtained.

All of this information is irrelevant to the requirements of SDCL 49-41B-11(9) and ARSD 20:10:22:10. The application does not identify who the consumer is. The application does not describe present or estimated demand or provide an estimate of customers to be directly served by the facility. It provides no data, no data sources, no forecast methods or models, assumptions or any other reasoning to address current or future demands. It does not state whether or not there is a contribution to any energy distribution system or provide a statement on consequences of any delay in the construction of the pipeline. The information provided in the application is wholly inadequate to satisfy the requirements of the law.

Also, there is also some confusion as to who the actual consumer of the product is. When questioned about the identity of consumers, Chuck Frey identifies the consumers as "the consumers of the services we'll provide are the shippers on our pipeline system." EH TR at page 263 line 20. Additionally, Frey admits that there was no direct consideration given to South Dakota citizens as consumers of the product shipped on the pipeline. EH TR at page 264 line 5. Frey provides general information about DAPL providing transportation of crude oil to refineries and that citizens of South Dakota use products that are later produced from the crude oil. Aside from generalizations that South Dakotans use petroleum based products, which is beyond the obvious, he is unable to articulate any specific energy needs of the citizens of South Dakota, nor

is he able to articulate how this pipeline meets these needs. The applicant failed to provide any type of data and supporting analysis that addresses the future energy needs of the citizens of the State of South Dakota and make a showing that the project somehow satisfies the undefined future energy needs of the residents of the State of South Dakota.

SDCL 49-41B-11(10) and ARSD 20:10:22:23 - The Community Impact Requirement

SDCL 49-41B-11(10) requires the application to contain a statement of "the potential short and long range demands on any estimated tax revenues generated by the facility for the extension or expansion of public services within the affected areas." This requirement is embodied in ARSD 20:10:22:23. This rule requires the application to, in part "include an identification and analysis of the effects the construction, operation, and maintenance of the proposed facility will have on the anticipated affected area including the following:

(2) A forecast of the immediate and long-range impact of property and other taxes of the affected taxing jurisdictions;"

The application attempts to comply with these requirements starting at page 42 of the application in Section 23.2 "Forecast of Impact on Taxes." This Section consists of two paragraphs in its entirety. This section tells us that SDCL 10-13 requires the Department of Revenue to annually determine the assessed value of the pipeline for ad valorem property tax purposes. It also states the manner in which to determine assessed value. The next paragraph states that increased economic activity generated as a result of the construction activity will generate $36 million for state government in addition to $3 million for local governments. They state that during the first year of operations the pipeline will generate an estimated $14 million in new property taxes to local governments. While this information may sound good,

none of it is provided in a manner in which satisfies the requirements of the law. None of it is relevant to the requirements of the law.

PUC Staff called Michael Houdyshell, Director of the Property and Special Tax Division, South Dakota Department of Revenue to "explain how the Dakota Access Pipeline will be assessed for purposed of property taxation." PUC Staff Exhibit 6 page 2 line 33. In Mr. Houdyshell's testimony he describes the documents he reviewed in preparing his testimony, describes South Dakota's ad valorem system of property taxes along with the manner in which South Dakota law requires pipelines to be taxed. His testimony provided an overview of the central assessment process, described how the "unit value" is determined and described the cost, market and income approached to determining value.

Mr. Houdyshell was asked if it was possible to estimate the property taxes that Dakota Access will pay. PUC Staff Exhibit 6 page 4 line 41. In his testimony starting at line 44 he states that "It is extremely difficult to derive reliable estimates of the property tax liability of a nonexistent property such as the Dakota Access pipeline." He went on to further state that to do so would "require the Department to make several assumptions regarding valuation and levy rates" and that the "relevant data is unknown to the Department at this time, so making an estimate is unwise and I decline to do so." PUC Staff Exhibit 6 page 5 line 1-3. Mr. Houdeyshell was also asked to comment on Dakota Access's property tax projections. PUC Staff Exhibit 6 page 4 line 11. In response to this question Mr. Houdeyshell stated that "the estimate provided by the Dakota Access Pipeline highlights the difficulties in making a reliable estimate of the property tax liability of the pipeline. There is simply not enough data available at this time. The actual cost of the pipeline does not equal the fair market value of the property and

likely overstates the year 1 value of the pipeline in South Dakota." PUC Staff Exhibit 6 page 5 at lines 25-29. He goes on to state that "again, without the full array of data that Dakota Access readily admits is not available, any estimate made by Dakota Access is speculative at best." PUC Staff Exhibit 6 page5 lines 30-31.

The significance of Mr. Houdeyshell's testimony shows that, as Dakota Access admits, the information required to satisfy the requirements of SDCL 49-41B-11(10) and ARSD 20:10:22:23 is not available. Because the information that is necessary to make prudent calculations that are needed to satisfy the statutory and administrative requirements does not exist under the requirements of the law, Dakota Access has not and cannot put on substantial evidence to satisfy its burden of proof. Accordingly, the permit must be denied.

During the trial, Mr. Houdeyshell's testimony and conclusions were the subject of considerable scrutiny. His live testimony did not contradict his written testimony when he testified that "we did not come up with a number or any sort of estimate of the value of the applicant's property in the state or the amount of taxes what would be paid simply because we don't have sufficient information to make that type of and opinion of value at this point." Evidentiary Hearing Transcript at page 1601 lines 5-9. When questioned about why he did not have the necessary information Mr. Houdyshell testified that they "don't have that information because the company is not required to report that information to the Department of Revenue until they have actually started construction in the state. At that time state law requires that they file reports with the Department of Revenue listing their various assets in property in the state. And at that time we would be making an opinion of value for the property in the state. But until they file those reports, we don't have information available to make a determination of value."

EHT at page 1601 lines 12-22. Until Dakota Access starts construction there is no property located in South Dakota to value for tax purposes and it is impossible for Dakota Access to meet this aspect of its burden of proof under SDCL 49-41B-22.

There was also no exonomc information presented that compared the costs of a worst case discharge scenario with the alleged benefits gained from the project. The applicant did not look at the possible levels of harm that spills or ruptures could have on the tourism and hunting industries in South Dakota to determine, financially, if the risk is worth the reward.

SDCL 49-41B-11(11) and ARSD 20:10:22:13 – The Environmental Studies Requirement

Finally, SDCL 49-41B-11(11) requires the application to identify "environmental studies prepared relative to the facility." This requirement is embodied in ARSD 20:10:22:13 "Environmental Information" which requires the applicant to provide certain environmental information including a description of the existing environment at the time the application is submitted, estimates of changes in existing environment that the applicant anticipates will result from construction and operation of the facility and to identify irreversible changes they anticipate will remain after the operational lifetime of the pipeline.

The rule also requires that the effects be calculated in such a manner so as to reveal and assess demonstrated or potential hazards "to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with any operating energy conversion facilities, existing or under construction." The rule also requires the applicant to list all other regulated major industrial

facilities that may have adverse effects on the environment due to their construction or operation within the currently proposed pipeline route.

Section 13.0 of the application states that other sections of the application address the required environmental information. It states that the requirements from ARSD 20:10:22:13 through 20:10:22:17 address the projects potential effects to "Effects on Physical Environment, Hydrology", "Effect on Terrestrial Ecosystems" and "Effect on Aquatic Ecosystems." The application is insufficient to satisfy the requirements of the Energy Facility Siting rules and the permit should be denied accordingly.

Tribal Water Rights

The application does not take into account Tribal reserved water rights as part of its environmental analysis. Indian Water Law expert witness Peter Capossella provided expert rebuttal testimony and testified at the trial on behalf of the Indigenous Environmental Network and Dakota Rural Action regarding the nature of tribal water rights claims and to "urge the PUC to give thoughtful consideration to the risks posed by the Dakota Access Pipeline to the waters of the Missouri River that are subject to the water rights claims of the South Dakota tribes." IEN and DRA Exhibit 7. His testimony explains the nature and application of Tribal water rights under the Winters Doctrine and shows how no consideration was given to the existence and protection of these rights. All tribes in South Dakota share in the same water rights that Capossela described and each tribe is entitled to the same consideration and level of protection of these rights by the Commission. Just because Dakota Access does not identify these rights, does not mean that they do not exist or that they do not apply.

The information provided in Section 13 does not satisfy the requirements of SDCL 49-41B-11(11) and ARSD 20:10:22:13. It merely purports to tell the reader that the required information may be found in several other sections of the application, each of which is an individually numbered rule that has its own requirements. It does not provide a description of the existing environment at the time the application was filed, it does not estimate changes to be expected from the operation and construction of the pipeline and it does not identify irreversible changes that will extend beyond the life of the pipeline. There in nothing in this section that shows that the potential environmental effects were calculated to "reveal and assess demonstrated or suspected hazards to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with any operating energy conversion facilities, existing or under construction." It does not provide a list of other facilities "under regulation that could have an adverse effect on the environment as a result of their construction or operation in the transmission site." ARSD 20:10:22:13.

Section 13.1 identifies other major industrial facilities. It states that "the potential cumulative impacts associated with the Project may result from the impacts of construction and operation of the Project facilities combined with the impacts of other proposed major developments within the Project vicinity." Application at p. 9. This section concludes with a statement that publicly available online resources, PUC and Federal Energy Regulatory Commission dockets were all searched for other major projects within the vicinity resulting in no other projects being located. This is curious as Mahmoud testified at the evidentiary hearing that the final route was selected by local governmental officials in the Sioux Falls area to run along and parallel an existing electrical transmission power line. Had it been a fact that was

learned after the revised application was filed, then Dakota Access has violated the requirements of ARSD 20:10:22:04(5) (requiring immediate notification of update to new facts or law) because Dakota Access did not properly notify the Commission of the new fact. Neither of these actions were taken. Either way, the applicant has not lived up to their responsibilities to properly file an application and update the same when required to do so by law.

The Burden of Proof

At issue in this case is the application of SDCL 49-41B-22 and whether or not Dakota Access has presented substantial evidence to satisfy its burden of proof under 49-41B-22. In making this determination the PUC should also fully examine the requirements of SDCL 1-26-36, SDCL 49-41B-1 and SDCL 49-41B-11 as well as South Dakota Administrative Rules Chapter 20:10:22 Energy Facility Siting Rules.

The South Dakota Supreme Court examined the meaning of SDCL 1-26-36 in *Therkildsen v. Fisher Beverage*, 545 N.W.2d 834 (1996), when it said: "Our standard of review of factual issues is the clearly erroneous standard." The Court went on to elaborate stating "under this standard, we must determine whether there was substantial evidence to support the Department's finding." Quoting *Helms vs Lynn's, Inc.,* 542 NW 2d 764, 766 (SD 1996). Furthermore, in regards to the meaning of SDCL 1-26-36 the Court stated that "the question is not whether there is substantial evidence contrary to the agency finding, but whether there is substantial evidence to support the agency finding." *Therkildsen v. Fisher Beverage.* The holdings from *Therkildsen v. Fisher Beverage*, 545 N.W.2d 834 (1996) and *Helms v. Lynns*, 542 N.W.2d 764 (1991) and *In the Matter of Establishing Certain Territorial Electric Boundaries within the State of South Dakota* (Aberdeen City Vicinity) (F-

3111) 318 N.W.2d 118 clearly establish that the applicant has the burden to present substantial evidence.

The PUC must also examine SDCL 1-26-36 which provides "[w]eight given to agency findings--Disposition of case--Grounds for reversal or modification--Findings and conclusions--Costs. The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in light of the entire evidence in the record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

A reviewing court will not look at whether the record contains sufficient evidence to support a different finding, rather the record must reflect substantial evidence to support the agencies actual decision. When viewed in this light the applicant has not presented enough substantial evidence to satisfy the burden of proof and the petition for a permit to construct the Dakota Access Pipeline must be denied.

Dated this 6th day of November, 2015.

RESPECTFULLY SUBMITTED:
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing Rosebud Sioux Tribe's Post Trial Brief on the following persons as designated and maintained on the website "Service List" at the following:

http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-002.aspx

Dated this 6th day of November, 2015.

/s/ Matthew L. Rappold
Matthew L. Rappold