
**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
PROPOSED FINDINGS
OF FACT**

HP14-002

In accordance with the Commissions post trial scheduling order the Rosebud Sioux Tribe submits the following Proposed Findings of Fact:

1. The procedural history is maintained at the Public Utilities Commission public website located at <http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-002.aspx>.
2. Dakota Access filed its application on December 15, 2014 and its Amended Permit application and supporting documents on December 23, 2014.
3. The Commission granted party status to numerous parties, including the Rosebud Sioux Tribe.
4. The Staff participated in the case as a party.
5. The case is a contested case pursuant to SDCL 1-26.
6. The following website contains the testimony and exhibits that were pre-filed in advance of the formal evidentiary hearing held November 2, 3 and 4, in Room 414, State Capitol, Pierre, South Dakota and are maintained at the same:
<http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-002.aspx>.
7. SDCL 49-41B the "Energy Conversion Transmission Facilities Act" applies to the proceedings.
8. Administrative Rules of South Dakota Chapter 20:10:22 "Energy Facility Siting Rules" applies to the proceedings.
9. The applicant has the burden of proof to present substantial evidence to support its application for a permit to construct the Dakota Access pipeline.
10. The application was not filed generally in the form and content required by SDCL 49-41B-11 and ARDS 20:10:22.
11. No witness testified on behalf of the Cities of Harrisburg, Tea, Hartford, or Sioux Falls.

12. Dakota Access has not presented substantial evidence to demonstrate that the facility will comply with all applicable laws and rules.

13. Dakota Access has not presented substantial evidence to demonstrate that 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.

14. Dakota Access has not presented substantial evidence to demonstrate that the facility will not substantially impair the health, safety or welfare of the inhabitants.

15. Dakota Access has not presented substantial evidence to demonstrate that 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.

16. That the Applicant did not verify the truth and accuracy of the application.

17. The applicant did not immediately notify the commission of changes to fact and applicable law materially affecting the application.

18. Applicant failed to immediately notify the PUC of the new Clean Water Act rule regarding the definition of “waters of the United States.”

19. 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.

20. Dakota Access did not provide updated information regarding the collocation of the pipeline with an existing energy transmission line on a map as required by ARSD 20:10:22:11.

21. Additional species surveys were done in the spring of 2015 that were not accounted for in the application. Dakota Access did not provide this information to the Commission.

22. Dakota Access is required to obtain permits or other authorization from various jurisdictions regarding compliance with the following: 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 Act 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 Service 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.

23. Dakota Access did not present evidence or testimony regarding the status of the permits identified in FOF # 22 permits from any other agency Dakota Access is required to obtain prior to construction the Dakota Access pipeline.

24. Dakota Access has not obtained all of the other permits from all other jurisdictions required to construct the Dakota Access pipeline.

25. 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 with an effective date of August 28, 2015.

26. Programs established by the Clean Water Act, 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.

27. Dakota Access is required to obtain permits referenced in FOF 22.

28. The North Dakota federal district court enjoined implementation of the new CWA rule in 13 states in the summer of 2015 including South Dakota. The 6th Circuit Court of Appeals stayed enforcement of the rule nationwide.

29. The Environmental Protection Agency and the Army Corps of Engineers have resumed the use of nationwide permits under the “waters of the United States” definition that existed under the agencies regulations in place prior to the issuance of the new CWA rule.

30. Dakota Access is required to comply with the Endangered Species Act, the National Historic Preservation Act and the Clean Water Act.

31. Dakota Access must obtain a Special Use Permit from the United States Fish and Wildlife in order to construct the pipeline through over a combined 100 grassland and wetland easements.

32. The entire pipeline route travels through portions of the Sand Lake, Huron, Madison and Lake Andes Wetland Management Districts.

33. Wetland Management Districts are part of the National Wildlife Refuge System which is a network of lands set aside to conserve fish and wildlife and their habitat.

34. The United States is a party to the Convention on “Wetlands of International Importance Especially as Waterfowl Habitat” which is commonly known as the Ramsar Convention.

35. The Convention imposes three duties on its parties including: 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.

36. Dakota Access through its applications and witnesses did not put on substantial evidence to meet its burden of proof under SDCL 49-41B-11(6) and ARSD 20:10:22:11.

37. Dakota Access learned of new factual information contained in the five volume Level III Intensive Cultural Resources Survey for the Dakota Access Pipeline dated August 2015 which was not known at the time of the application.

38. The Level III Intensive Cultural Resources Survey revealed new information pertaining to previously undiscovered tribal cultural sites located on land subject to the jurisdiction of the Army Corps of Engineers triggering the National Historic Preservation Act Section 106 Tribal consultation requirements.

39. Regarding the new facts discovered reverenced in FOF # (), Dakota Access did not update its application as required by ARSD 20:10:22 04 (5).

40. Dakota Access through its applications and witnesses did not put on substantial evidence to meet its burden of proof under SDCL 49-41B-11(7) and ARSD 20:10:22:07.

41. Dakota Access through its applications and witnesses did not put on substantial evidence to meet its burden of proof under SDCL 49-41B-11(6) and ARSD 20:10:22:12.

42. Dakota Access through its applications and witnesses did not put on substantial evidence to meet its burden of proof under SDCL 49-41B-11(9) and ARSD 20:10:22:10.

43. Dakota Access through its applications and witnesses did not put on substantial evidence to meet its burden of proof under SDCL 49-41B-11(10) and ARSD 20:10:22:23.

44. Dakota Access did not put on evidence to adequately forecast the immediate and long-range impact of property and other taxes of the taxing jurisdictions affected by the pipeline.

45. Dakota Access through its applications and witnesses did not put on substantial evidence to meet its burden of proof under SDCL 49-41B-11(11) and ARSD 20:10:22:13.

46. The environmental work that Dakota Access did in completing its application and the environmental work that Dakota Access promised to perform in the future is not comparable to a federal Environmental Impact Statement.

47. South Dakota Indian Tribes possess water rights under the Winter's rights doctrine as recognized by the United States Supreme Court. Tribal water rights were not considered in the Applicant's analysis related to the projects effect on hydrology and its worst case discharge scenario analysis.

48. The Rosebud Sioux Tribe possesses aboriginal land rights along the proposed pipeline route.

49. Dakota Access did not attempt to engage in consultation with the Rosebud Sioux Tribe regarding the pipeline's potential effects on the members of the Rosebud Sioux Tribe.

50. The proposed pipeline route is in unnecessarily close proximity to Harrisburg, Tea, Hartford, and Sioux Falls, placing those highly populated communities at risk and jeopardizing their abilities for future development and economic growth.

51. The Dakota Access pipeline as proposed does not satisfy the requirements of SDCL 49-41B-22.

Dated this 6th day of November, 2015.

RESPECTFULLY SUBMITTED:

/s/ Matthew L. Rappold

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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 Proposed Findings of Fact 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

