

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

IN THE MATTER OF THE)	
APPLICATION OF DAKOTA)	HP14-002
ACCESS, LLC FOR AN ENERGY)	
FACILITY PERMIT TO)	ROSEBUD SIOUX TRIBE
CONSTRUCT THE DAKOTA)	RESPONSE TO MOTION
ACCESS PIPELINE PROJECT)	TO STRIKE
)	

TO: Dakota Access and its attorneys:
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For its response to the Applicant’s Motion to Strike Rosebud Sioux Tribe’s Exhibit List and Preclude Introduction of Undisclosed Exhibits, the Rosebud Sioux Tribe, by and through Counsel states the following:

1. That the Rosebud Sioux Tribe filed and served its Witness and Exhibit List on all parties on September 23, 2015 consistent with the Commissions Scheduling Order.
2. That to the best of attorney’s knowledge, for the Rosebud Sioux Tribe, Dakota Access served the Rosebud Sioux Tribe with 4 discovery requests as stated in their Motion to Strike.
3. That Discovery in this matter is governed by appropriate PUC Administrative Rules and the South Dakota Rules of Civil Procedure, particularly SDCL 16-6-33, 16-6-37(a) and 15-6-37(c).
4. That the Rosebud Sioux Tribe responded to each of Dakota Accesses discovery requests with answers and objections consistent with the Rules of Civil Procedure.
5. That the Rosebud Sioux Tribe provided supplemental answers to Dakota Access First Set of Interrogatories and Request for Production of Documents on June 15, 2015 through additional answers and objections. See RST Exhibit A which is attached hereto and incorporated by reference. The Rosebud Sioux Tribe informed Dakota Access that the Rosebud Sioux Tribe objected to the application on the grounds that Dakota Access would be unable to satisfy the statutory requirements of SDCL 49-41B and other relevant laws, including but not limited to the Pipeline Safety Act.

6. That in the same response the Rosebud Sioux Tribe objected to the remaining questions that requested a complete outline of a factual basis, any relevant law or regulation and the request for the decision maker responsible for deciding said objection on the grounds that the questions sought answers beyond the scope of the requirements of the discovery statutes. The Rosebud Sioux Tribe is entitled to rely on its objections until such time as they are ruled on by the Commission. Dakota Access has taken no action to resolve Rosebud Sioux Tribe's Objections nor to seek to resolve the issues informally and they have not filed a motion to compel production.

7. That the Motion to Strike filed by Dakota Access is not procedurally proper under the Rules of Civil Procedure and should be denied as such. Seeking to strike otherwise relevant and properly disclosed documents the day before trial without following the rules of civil procedure is akin to taking an end run around the rules and is prejudicial to the Rosebud Sioux Tribe.

8. That SDCL 15-6-37(a) requires the party seeking to enforce the discovery provisions, including the exclusion of exhibits, to seek an order to compel disclosure or production of documents prior to seeking such exclusion. However, the same rule requires the moving party to include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

9. That at no point in time throughout the duration of this proceeding did counsel for Dakota Access ever attempt to confer with counsel for the Rosebud Sioux Tribe regarding any concerns that Dakota Access may have with Rosebud Sioux Tribe's discovery responses nor did counsel ever attempt to meet and confer in an attempt to secure the material or resolve the objections prior to seeking to exclude the identified exhibits.

10. That the motion to exclude contains no certificate that the moving party has attempted to meet and confer as required by statute.

11. That the Rosebud Sioux Tribe responded to each request with either an answer or an objection or with answers and objections to each interrogatory. The answers and objections were made in good faith and Rosebud Sioux Tribe is entitled as a matter of law to rest on its objections until such time that each and every objection is ruled on and determined by the Public Utilities Commission. Resting on our objections and reliance on the law until such time as Dakota Access sought to take action to seek an order to compel and resolve the objections, qualifies as substantial justification under SDCL 15-6-37(a).

12. That there is no statutory remedy to exclude or strike materials in the manner Dakota Access seeks. The remedy for failure to disclose information provided for in SDCL 16-6-37(c) is only appropriate following the PUC issuing an Order compelling production of discovery and resolving raised objections. In this situation there is no order compelling the production of discovery, nor is there an order ruling on the objections propounded by Rosebud in response to Dakota Access discovery requests.

13. That granting Dakota Accesses motion to strike without first requiring Dakota Access to follow the Rules of Civil Procedure would be an order that is in violation of the Rosebud Sioux Tribe's rights as an intervening party as protected by the laws and Constitution of the State of South Dakota.

14. If Dakota Access had concerns with the responses provided throughout discovery, the appropriate steps for Dakota Access to take would have been to ask for a meet and confer, asked for ruling on the objections and asked for an order compelling discovery. Dakota Access did not take any of those actions or steps and now seeks to exclude otherwise relevant evidence and exhibits without following the Rules of Civil Procedure.

15. That all of the exhibits listed in Rosebud Sioux Tribes exhibit list are either documents or websites that are either available in the public domain or are Dakota Access's own documents produced during discovery. They are all documents that one could reasonably expect that some of Dakota Accesses witnesses would have consulted and relied upon in preparing the application and testimony for the hearing.

16. Dakota Access even makes mention of RST Exhibit 23, the South Dakota Department of Game Fish and Parks, Wildlife Division; *East River Fisheries Management Area Strategic Plan (pdf)*, in its U.S. Fish and Wildlife Service Environmental Assessment Grassland and Wetland Easement Crossings application dated June 2015.

17. In this situation, where Dakota Access has sat on any rights it may have had regarding the subject matter of its motion and where all exhibits have been produced in conformance with the procedural order regarding the same; where Dakota Access has indeed referenced and relied on at least one of the documents; where some of the documents sought to be excluded are in fact documents produced by Dakota Access and many of the documents and websites are documents that other similarly situated professionals would have consulted and relied on in preparing testimony for a proceeding of this nature, it is hard to imagine a situation whereby Dakota Access is actually prejudiced by introduction of these otherwise relevant materials.

Wherefore, based on the foregoing, the Rosebud Sioux Tribe respectfully requests the PUC to deny the Motion to Strike.

Dated this 28th day of September, 2015.

RESPECTFULLY SUBMITTED:

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