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

IN THE MATTER OF THE PETITION OF
DAKOTA ACCESS, LLC PIPELINE, LP FOR
A PERMIT TO CONSTRUCT THE DAKOTA
ACCESS PIPELINE

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

HP14-002

FINDINGS OF FACT

Application

1. Dakota Access' Revised Application did not "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" as required by ARSD 20:10:22:10.

2. Participants in the proposed facility include Dakota Access, LLC, Energy Transfer Partners, and Phillips 66. Tr. 65 ln. 22 – 66 ln. 1, 66 ln. 17-18. Energy Transfer Partners and Phillips 66 were not listed as participants in the Revised Application. While Sunoco Logistics may participate in the proposed facility in the future, it does not at this time. Tr. 66 ln. 3-4, 16-19.

3. Dakota Access' Revised Application failed to "contain the name, address, and telephone number of all persons participating in the proposed facility at the time of filing" as required by ARSD 20:10:22:06 (emphasis added).

4. Dakota Access failed to "file all data, exhibits, and related testimony which [it intended] to submit in support of its application" upon the filing of its application as required by ARSD 20:10:22:39.

5. Dakota Access' Revised Application was not filed in the form and content required by SDCL 49-41B-11.

Misstatements of Material Facts

6. According to the Revised Application, the proposed project would create approximate 12 permanent jobs. Revised Application at 39. However, the Economic Impact Study provided by Dakota Access asserts that 31 permanent jobs would be created in South Dakota. Staff Ex. 1, Ex A at 112 of 310. Due to the discrepancy between the number of permanent jobs created according to the Revised Application and the number of permanent jobs created according to the Economic Impact Study accompanying the Revised Application, one or both of those documents contains a misstatement of material fact. There is no conclusive evidence in the record that identifies the number of permanent jobs the proposed project would create.

Compliance with Applicable Law

7. Dakota Access failed to prove that the proposed project would fulfill the energy needs of the people of the State of South Dakota. Nothing in Dakota Access' Revised Application, testimony, or exhibits addressed the energy needs of the people of the State. Dakota Access therefore failed to prove that the proposed project complies with SDCL 49-41B-1.

8. Approximately two-thirds of the length of the proposed project would cross through aboriginal territory of the Yankton Sioux Tribe. Ex. YST 7 at 5-6; Ex. YST 9; Tr. 1032 ln. 13-15; *Yankton Sioux Tribe v. United States*, 24 Ind. Cl. Comm. 208, 215 and App. A (1970); *Yankton Sioux Tribe v. United States*, 24. Ind. Cl. Comm. 208, 236 (1970).

9. Construction and operation of the proposed project would infringe upon the Yankton Sioux Tribe's aboriginal rights including gathering on its aboriginal territory. Ex. YST 7 at 6. The proposed project would therefore result in a violation of law.

10. The Yankton Sioux Tribe and the Rosebud Sioux Tribe are local units of government for purposes of SDCL 49-41B-27.

11. In its permit application process, Dakota Access did not coordinate with the governing bodies of any tribes or any tribal agencies in South Dakota (tr. 67 ln. 23 – 68 ln. 2) as required by SDCL 49-41B-27.

12. Dakota Access failed to prove that the proposed project would comply with all applicable laws and rules.

Environment and Socioeconomics

13. Construction of the proposed project would require an influx of approximately 1,500 to 3,000 out-of-state workers into the State of South Dakota for temporary jobs. Tr. 302 ln. 1-15, 19-24.

14. The temporary influx of workers and the conditions of their employment are likely to lead to increased crime, including in particular sexual violence, in local communities. Tr. 1040 ln. 15-17; Ex. YST 7 at 3, 4.

15. The Yankton Sioux Tribe's Fort Randall Casino is in such proximity to the proposed project that workers are likely to frequent the Casino during their non-working time, placing young women in that community at risk. Ex. YST 7 at 3. Young women in the nearby, highly populated areas of and near Sioux Falls would be placed at risk as well.

16. If the project were constructed, there would be insufficient law enforcement in affected communities to safely address the threats and safety concerns posed by the presence of the 1,500 to 3,000 temporary, out-of-state workers. Ex. YST 7 at 4; Ex. YST 6 at 3.

17. Should an act of violence occur between a worker and a tribal member on an Indian reservation, jurisdictional issues and lack of law enforcement coordination would make it difficult to hold the worker responsible. Ex. YST 7 at 4.

18. As a new company (Tr. 67 ln. 5), Dakota Access has no experience operating pipelines.

19. No environmental impact statement (EIS) has been conducted with respect to the proposed project. *See, generally*, Joint Motion to Stay Proceedings for Preparation of an Environmental Impact Statement.

20. Without an EIS, insufficient evidence exists to know the comprehensive impact of a spill on the environment.

21. Dakota Access failed to show that the proposed pipeline will not spill or leak.

22. Dakota Access has no experience cleaning up spills. Tr. 67 ln. 2-5. Sunoco Logistics, which has experience cleaning up spills, is not currently a participant in the proposed project. Tr. 66 ln. 3-4; Revised Application at 4 (listing only DAPL-ETCO Operations Management, LLC as the operator).

23. The proposed project would cross the Missouri River twice (Tr. 217 ln. 15-18), placing all downstream users of the water in South Dakota at risk in the event of a spill at one of those locations.

24. A spill in the Missouri River would have severe negative social impacts on the Yankton Sioux Tribe due to the spiritual and medicinal uses of the water in that river.

25. A spill within the Yankton Sioux Tribe's aboriginal territory, and particularly in or near the James River, which would also be crossed by the proposed pipeline, would have severe negative social impacts on the impacts of the Yankton Sioux Tribe due to the spiritual and medicinal uses of the plants gathered there.

26. Infringement on the ability of members of the Yankton Sioux Tribe to exercise their aboriginal right to gather plants for medicinal and other purposes is an unacceptable risk to Tribal members.

Views of Governing Bodies of Affected Local Units of Government

27. Dakota Access must give due consideration to the views of the governing bodies of the Yankton Sioux Tribe and the Rosebud Sioux Tribe as local units of government pursuant to SDCL 49-41B-22.

28. In its permit application process, Dakota Access did not coordinate with the governing bodies of any tribes or any tribal agencies in South Dakota (tr. 67 ln. 23 – 68 ln. 2) as required by SDCL 49-41B-27. Tr. 67 ln. 23 – 68 ln. 2; Ex. YST 6 at 2-4; YST 7 at 6.

29. Dakota Access failed give due consideration to the views of the governing bodies of the Yankton Sioux Tribe and the Rosebud Sioux Tribe as local units of government.

General

30. The proposed pipeline route is in unnecessarily close proximity to Harrisburg, Tea, Hartford, and Sioux Falls, including designated growth areas, placing those highly populated communities at risk and jeopardizing their abilities for future development and economic growth. It is also unnecessarily close to the Sioux Falls Regional Landfill and Wall Lake.

31. Dakota Access presented contradictory evidence regarding the number of permanent employees that would be hired in South Dakota, thus the Commission is unable to make a finding regarding the number of permanent employees. Revised Application at 39.

32. As few as zero construction workers could be hired in the State of South Dakota, creating as few as zero temporary jobs for South Dakota residents. Tr. 73 ln. 25 – 74 ln. 8.

33. Dakota Access did not consult with the Yankton Sioux Tribe with respect to cultural resources. Tr. 72 ln. 2-4.

34. Dakota Access' cultural resource studies do not appear to have included oral history (tr. 70 ln. 21 – 71 ln. 1), and are therefore insufficient.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding pursuant to SDCL Chapter 49-41B and ARSD Chapter 20:10:22. Subject to the findings made on the four elements of proof under SDCL 49-41B-22, the Commission has authority to grant, deny or grant upon reasonable terms, conditions or modifications, a permit for the construction, operation and maintenance of the Dakota Access Pipeline Project.

2. The Dakota Access Pipeline Project is a transmission facility as defined in SDCL 49-41B-2.1(3).

3. Applicant bears the burden of proof and the burden of production with respect to all elements of its permit application and with respect to each requirement of SDCL 49-41B-22.

4. Applicant's permit application fails to comply with the applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

5. Applicant failed to meet its burden of proof that the Project, if constructed, would comply with all applicable laws and rules, including all requirements of SDCL Chapter 49-41B and ARSD 20:10:22.

6. Applicant failed to meet its burden of proof that the Project, if constructed, would not pose an unacceptable threat of serious injury to the environment nor to the social and economic conditions of inhabitants or expected inhabitants in the siting area.

7. Applicant failed to meet its burden of proof that the Project, if constructed, would not substantially impair the health, safety or welfare of the inhabitants in the siting area.

8. The Yankton Sioux Tribe is a local unit of government for purposes of SDCL 49-41B-22(4).

9. Applicant failed to meet its burden of proof that the Project, if constructed, would 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 because not all such views were given consideration.

10. Applicant has failed to meet its burden of proof pursuant to SDCL 49-41B-22 and is not entitled to a permit as provided in SDCL 49-41B-24.

11. To the extent that any of the Findings of Fact in this decision are determined to be conclusions of law or mixed findings of fact and conclusions of law, the same are incorporated herein by this reference as a Conclusion of Law as if set forth in full herein.

12. Because a comprehensive federal EIS was not required and completed for the Project, no permit should be issued absent a state EIS under SDCL 49-41B-21.

13. PHMSA is delegated exclusive authority over the establishment and enforcement of safety-orientated design and operational standards for hazardous materials pipelines. 49 U.S.C. 60101, et seq.

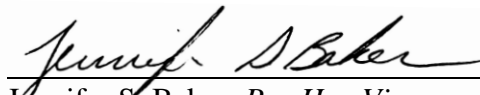
14. SDCL 49-41 8-36 explicitly states that SDCL Chapter 49-41B "shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility." The Commission accordingly concludes that it lacks authority (i) to compel the Applicant to select an alternative route or (ii) to base its decision on whether to grant or deny a permit for a proposed facility on whether the selected route is the route the Commission might itself select.

15. The Commission concludes that Applicant has not met its burden of proof.

16. The Commission concludes that the Revised Application and all required filings have not been filed with the Commission in conformity with South Dakota law.

17. The Commission concludes that it possesses the authority under SDCL 49-41B to deny the permit requested for the proposed project.

Dated this 6th day of November, 2015.



Jennifer S. Baker, *Pro Hac Vice*
Thomasina Real Bird, SD Bar No. 4415
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: jbak@ndnlaw.com
Email: trealbird@ndnlaw.com

Attorneys for Yankton Sioux Tribe