

1 TRANSCRIPT OF PROCEEDINGS, held in the
2 above-entitled matter, at the South Dakota State Capitol
3 Building, Room 413, 500 East Capitol Avenue, Pierre,
4 South Dakota, on the 12th day of May, 2015.

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1 CHAIRMAN NELSON: This is Docket HP14-002, In
2 the Matter of the Application of Dakota Access, LLC for
3 an Energy Facility Permit to Construct the Dakota Access
4 Pipeline.

5 The question we're going to deal with today is
6 shall the Commission grant Yankton Sioux Tribe's Motion
7 to Compel? And if so, shall the Commission award
8 reasonable attorneys fees and expenses associated with
9 the Motion to Compel?

10 The first thing I want to deal with is we do
11 have our court reporter with us so I need to slow down.

12 There was a request from Mr. Koenecke with
13 Dakota Access that we prohibit telephonic presentations
14 from attorneys representing the various Intervenors and
15 parties.

16 That is not something that we have done. I
17 don't intend to limit telephonic participation unless I
18 see otherwise from my fellow Commissioners.

19 Commissioner Hanson.

20 COMMISSIONER HANSON: I would represent the same
21 remarks that you just made. However, I would like to
22 hear why, and if there is a good reason for it, then I
23 could find myself supporting it. However, I come from
24 the same footings that you do, Mr. Chairman.

25 CHAIRMAN NELSON: Fair enough.

1 Before I turn it over to Mr. Koenecke, I'm just
2 going to say again to the folks on the phone line please
3 put your phones on mute if you're not talking. We're
4 still getting some clicking coming across.

5 Mr. Koenecke, would you tell us why you asked
6 for this limitation.

7 MR. KOENECKE: Certainly, Commissioner. Good
8 morning and happy birthday.

9 It is my feeling that the process so far has
10 been characterized by e-mails, a lack of telephone calls,
11 a lack of personal interaction. I don't see that
12 changing going forward. And I think that it's something
13 to -- it would aid the process considerably if people
14 would act in person and see the nonverbal reactions to
15 the things that they say, the things that they ask for,
16 the responses that are given. I think it would add a lot
17 of genuine character to the entire proceeding.

18 So I said that in order to bring that up, and
19 I'm thankful that Commissioner Hanson asked me this
20 morning. I think the discourse would be helped
21 immeasurably if people would act in person and not in
22 writing. Limit the impersonal conversations and start
23 interacting as individuals in a public open setting face
24 to face would act. So that's why I said that.

25 Thank you.

1 CHAIRMAN NELSON: Thank you. Anything else from
2 either of the fellow Commissioners?

3 Commissioner Hanson.

4 COMMISSIONER HANSON: I could entertain
5 discussion from the other parties as well. But,
6 Mr. Koenecke, it would seem that it would be more
7 beneficial to the individuals who are not here to be
8 here. I think it's an advantage for someone to be here
9 present if there is an advantage to be had. So it
10 surprises me that you'd ask for it.

11 Has there been some -- has there been some
12 activity that you would consider egregious to the process
13 by not being able to -- the phone calls work both ways.
14 The e-mails work both ways. I'm just curious what --
15 your argument this morning doesn't sway me, but I'm just
16 curious if there's something you're not telling us.

17 Are you trying to be diplomatic here, or what's
18 going on?

19 MR. KOENECKE: No, Commissioner. I'm not. I
20 didn't expect to be swayed -- to sway the Commission at
21 all, and I didn't expect the Commission would grant such
22 a request. But I did want to make the point that there's
23 been a tremendous amount of I would call it posturing,
24 from my standpoint, in writing, and I'd like to get to
25 the meat of the matter.

1 We sent out discovery to everybody simply asking
2 them what are your issues? We'd like to know what your
3 issues are. I got back a lot of discovery from a lot of
4 the Intervenors. Some I didn't hear back from at all.
5 Some I heard from late. Mostly it was very polite and
6 very courteous and told me what I wanted to know; what
7 are your issues so we can speak to them.

8 In some cases that hasn't been the case.
9 There's been nothing impolite. It's just been very --
10 not what I'm used to in front of the Commission so that's
11 why I brought it up.

12 I don't want to impugn or malign anybody here
13 this morning. I just think we'd be better off if we were
14 acting personally.

15 COMMISSIONER HANSON: Thank you, Mr. Chairman.
16 I don't see the need to hear from other persons on this
17 matter.

18 CHAIRMAN NELSON: Thank you. I think if there's
19 nothing further, we will proceed as is. And thank you
20 for your comments, Mr. Koenecke.

21 With that, Ms. Real Bird has brought this Motion
22 so, Thomasina, I'm going to turn it over to you.

23 MS. REAL BIRD: Thank you, Mr. Chairman and
24 members of the Commission. Thomasina Real Bird for the
25 Yankton Sioux Tribe.

1 The Yankton Sioux Tribe brought the Motion to
2 Compel. And I do want to reiterate a couple of the items
3 in the events section and also apprise the Commission of
4 a couple new events following the filing of the Motion.

5 So on April 1 the Tribe did serve Dakota Access
6 with our First Set of Interrogatories and Requests for
7 Production. Those were due April 1, and so they were
8 timely.

9 On May 1, the date that the Answers were due, I
10 along with a few other parties received an e-mail from
11 Dakota Access's counsel indicating that they would not be
12 serving responses by the May 1 deadline, that they're
13 working on them, and asked us for our thoughts.

14 So that was an e-mail format. That wasn't a
15 telephone call. So I responded in writing that, you
16 know, the Tribe would be happy to stipulate to Dakota
17 Access providing late responses as late as May 8, which
18 is a week, if Dakota Access would be amenable to amending
19 the schedule because obviously that would cut into our
20 time to review the discovery. And we asked Dakota Access
21 to let us know. In the absence of any Stipulation we
22 would have to file a Motion to Compel.

23 And so I did not hear back from that letter. On
24 May 2, however, I did receive what I would describe as
25 draft responses from Dakota Access's counsel and they

1 were attached to the Motion, for the Commission's
2 benefit. And then along with the draft responses was a
3 note that the complete discovery answers would be
4 provided early the next week.

5 And so we received those. We didn't respond
6 either way. We reviewed them.

7 So early next week -- I would consider Monday or
8 Tuesday. However, Monday and Tuesday came and passed.
9 Wednesday it was in the afternoon, and it looked like,
10 you know, Wednesday was going to come and go without the
11 complete discovery responses that Dakota Access had
12 indicated were forthcoming.

13 So I went ahead and sent a letter. Since all
14 communication to date has been in writing, I sent a
15 letter saying, you know, are you going to provide them?
16 You know, they're still late. We haven't received a
17 complete set. We did take the opportunity to go over
18 what we thought were insufficient and deficient responses
19 as far as substance as opposed to the timing in the same
20 letter and said let us know your intentions. If you're
21 going to provide them, please provide them by the
22 morning, or we're going to -- we're going to file a
23 Motion to Compel.

24 And so on Thursday morning there were still
25 no -- we had no phone call, no e-mail, no letter back.

1 So we prepared a Motion to Compel and filed it on
2 Thursday. And then Friday we did get the discovery
3 responses.

4 And so it seems like Dakota Access has resolved
5 some of the reasons for the Motion to Compel. You know,
6 the answers were a week late so in another pending Motion
7 that will be taken up later by the Commission we have
8 asked for the schedule to be amended.

9 But I can go ahead and go over the
10 Interrogatories and Requests for Production that we still
11 believe are deficient so we can cover those today in the
12 Motion to Compel.

13 CHAIRMAN NELSON: This is Chairman Nelson, and I
14 think it would be good for you to, yeah, go through each
15 one and tell us which ones have been resolved and then
16 which ones have not. That would be helpful to us.

17 MS. REAL BIRD: Okay. Sorry. I had it handy,
18 and then I didn't. Okay.

19 So Interrogatory No. 10 -- I'm sorry. If you'll
20 just give me a moment. Thank you to the Commission for
21 bearing with me.

22 We'll start with Interrogatory No. 10. We asked
23 for the address, phone number, and e-mails and names for
24 persons responsible for conducting surveys, addressing
25 property-specific issues, and civil survey information.

1 So that would have been pending in the first draft.

2 In the actual responses that was received on
3 May 8 the objection was the question is vague, overbroad,
4 and outside the scope. And without waiving that
5 objection, Dakota Access states that surveys were
6 conducted starting in 2014 and numerous individuals
7 participated and if the Tribe had questions about
8 specific tracts, we may be able to provide specific
9 information.

10 And the Tribe would submit that it's entitled to
11 an answer to our questions, including the date,
12 addresses, phone numbers, e-mails, and names responsible
13 for the surveys, not just specific tracts.

14 And so Dakota Access says that surveys were
15 conducted starting last year, and so we would like that
16 information. So that's Interrogatory No. 10. And we
17 feel we're entitled to that information.

18 Interrogatory No. 20 is similar. And we feel
19 it's still not completely answered. And the name,
20 address, phone number, and e-mails of all persons
21 involved in any cultural or historic surveys. In
22 addition, please provide a detailed description of all
23 pertinent professional training that qualifies the
24 surveyor as a professional who meets the standards of the
25 Secretary of Interior Historic Preservation Professional

1 Qualification Standards.

2 And the answer was an objection that the
3 question was vague, overbroad, and outside the scope.
4 However, without waiving objection, the Applicant states
5 that, again, surveys were started in 2014. And so the
6 Tribe would submit that's a partial answer, and we are
7 entitled to an answer to our Interrogatory.

8 Interrogatory No. 25 and 26 we're okay with the
9 Applicant in its answer on May 8 answered those, and so
10 we're no longer asking the Commission to compel those.
11 They've been resolved since the filing of the Motion.

12 Interrogatory No. 11 we asked if the Applicant
13 recognizes the Tribe as a local government unit, and we
14 still didn't get an answer to that. We got an answer
15 that they recognize the Tribe as a federally recognized
16 Tribe but not whether it's a local government unit as the
17 South Dakota Codified Laws define that. So that's still
18 pending in our mind.

19 Interrogatory 19 we asked whether Dakota Access
20 uncovered any cultural or historic sites by the surveys
21 and please provide a detailed description of those sites
22 including locations of the same. And the Applicant
23 stated that -- they referred us to the section of the
24 Application, and the descriptions and locations are
25 privileged and confidential citing South Dakota Codified

1 Law 1-20-21.2 and that the Applicant recommends the Tribe
2 contact the South Dakota State Historic Preservation
3 Office.

4 And this was also brought up in Staff's
5 response to the Motion to Compel. And I do want to take
6 a couple of minutes to discuss these provisions of the
7 South Dakota Codified Laws.

8 1-20-21, a plain reading of it applies to the
9 state archeologist surveys. It says "The state
10 archeologists on behalf of the State Historic Society
11 Board of Trustees shall conduct, as part of that Board's
12 statewide surveys of historical properties, a survey of
13 archaeological sites located within the state and
14 obtained records of such sites."

15 So 1-20-21 applies to the State employee. It
16 doesn't provide for the surveys that are conducted by an
17 Applicant or its contractors in this case. So the
18 surveys that the Applicant described as starting in 2014,
19 we believe we're entitled to those as well as the
20 information requested in our Interrogatories. And we
21 don't believe it's covered by 1-20-21 or 21.2 as that in
22 plain terms applies to the State party.

23 So the State thinks Interrogatory 19 is still
24 pending, and we are entitled to that information.

25 Interrogatory No. 40 and 18 -- so it looks like

1 the answers that were provided on May 8 resolved the --
2 we thought there was a conflict in the draft answers, the
3 way the draft was submitted to us on May 2. However,
4 when it was submitted on May 8 it appears that the final
5 answer resolved our concern with those draft answers.

6 And Request For Production No. 4, the Tribe
7 requested all documents relating to required permit, both
8 in South Dakota and outside of South Dakota, including
9 permit applications which were denied, revoked, or
10 suspended for the Dakota Access Pipeline Project or any
11 other project constructed by Dakota Access since 2007 --
12 or 2010. Excuse me.

13 And the answer stated -- it was an objection,
14 and they said the request seeks irrelevant information,
15 overly broad and burdensome, such matters occurred out of
16 state, are irrelevant, overly burdensome to produce, and
17 if any exists would be located on other state regulatory
18 body websites. Without waiving objections, no permits
19 have been denied or revoked relating to Dakota Access,
20 and there are websites provided to the other states.

21 And we still think that the document request is
22 incomplete. We asked for all documents relating to
23 required permits both in South Dakota. So we'd like that
24 answered, and the outside South Dakota we have those
25 links.

1 And then we also didn't receive an answer
2 regarding suspended -- documents relating to suspended
3 permits. So that portion of the document request is
4 still unanswered. And the Applicant states that the
5 request for all information presumably includes e-mails,
6 letters, applications, correspondence, notes, and other
7 internal communications. And so, yes, that's what the
8 request is for all documents related to.

9 And so if they exist and they're not, for
10 example, attorney-client privilege or work product, we
11 believe we're entitled to them through this discovery
12 process.

13 The Request For Production No. 7 is still
14 pending and unanswered in our mind. And it's very
15 similar. We asked for all documents, and the objection
16 was that the Request for Production is overbroad and
17 outside the scope of discovery.

18 And we believe it's not. We believe it's
19 important to the case to have the breeding time of the
20 South Dakota species and have a map showing migration of
21 those South Dakota species.

22 So those are sort of a summary of what we still
23 feel is pending in our mind. It looks like about four
24 Interrogatories were resolved when we received the May 8
25 discovery responses to us, and we would like the

1 Applicant to provide the other outstanding items so that
2 we can, you know, finish our review and get prepared for
3 the next round of discovery.

4 Thank you.

5 CHAIRMAN NELSON: Thank you. That was helpful
6 to us. I'm going to go to each of the Intervenors now.
7 And realize this is not your Motion. So if you have
8 anything to add that is pertinent, you're able to do
9 that, but if not, let's see if we can keep this moving
10 along.

11 Mr. Boomsma.

12 MR. BOOMSMA: I have nothing to add.

13 CHAIRMAN NELSON: Thank you.

14 Mr. Rappold.

15 MR. RAPPOLD: I have nothing substantively to
16 add. I would just support Yankton Sioux Tribe's Motion
17 to resolve this discovery issue.

18 CHAIRMAN NELSON: Thank you. One Intervenor
19 lawyer in the room.

20 Anything to add? No.

21 Staff.

22 MS. EDWARDS: Thank you.

23 Staff filed a Brief in this matter stating what
24 our motion is on the law. We stand by that Brief and
25 have nothing to add, but if there are any questions, we

1 will answer those.

2 Thank you.

3 CHAIRMAN NELSON: With that, we will turn to
4 Dakota Access for your response.

5 MR. KOENECKE: Thanks, Commissioners and
6 Intervenors. I'll take them in order going down through
7 the document.

8 Interrogatory No. 10 asks us to identify the
9 dates, addresses, phone numbers, and e-mails and names of
10 persons responsible for conducting surveys.

11 I point out initially that I don't think it's
12 proper or appropriate under the rules for these witnesses
13 to be personally contacted by the Intervenors anyways. I
14 would have -- I don't intend to contact their witnesses
15 personally at their own homes, at their own phone numbers
16 and e-mail addresses without going through counsel so I
17 don't think it's appropriate any other way.

18 We've had a number of surveys done on hundreds
19 of tracts of properties, and this answer would run into
20 numerous individuals. Property-specific issues in civil
21 survey information is vague to me and overbroad. We
22 offered to -- if there were specific tracts that they had
23 questions on, we'd do consultations with those. But we
24 think to provide the names, e-mails, and personal contact
25 information of people in the public setting --

1 CHAIRMAN NELSON: Mr. Koenecke, I'm going to
2 stop you for a moment.

3 Folks that are on the phone, please put your
4 phones on mute. We're getting a lot of background
5 noise.

6 Thank you.

7 Brett, I'm sorry. Go ahead.

8 MR. KOENECKE: No problem, Commissioner.

9 So we answered the question as we did. If the
10 Commission orders us to do otherwise, then so be it. But
11 I don't think people by virtue of acting as a surveyor on
12 this project should be subject to having their personal
13 contact information made public. Especially not in light
14 of any perceived deficiency in how they went about their
15 job.

16 I should have probably objected that this is
17 vexatious and harassing. I don't know that that's the
18 case, but I have suspicions. I could be wrong, and I
19 hope to be wrong.

20 But we've acted very assiduously in keeping the
21 contact information of the landowners involved in this
22 project confidential. I don't think that's on the
23 website available for anybody to see for good reasons,
24 and I don't think the contractors working on the project
25 should be subjected to the same thing.

1 We'd be glad to consult on individual tracts,
2 but we don't see the purpose of this question. So that's
3 our position, Commissioner.

4 Would you like me to go through all of them at
5 one time?

6 CHAIRMAN NELSON: Yeah. Go ahead.

7 MR. KOENECKE: Okay.

8 Interrogatory No. 11, I don't understand the
9 quotation remarks around local governmental unit. It
10 appears to be a legal question to me and not a fact
11 question.

12 We consider them to be a federally recognized
13 Tribe, which I believe them to be. I don't know the
14 significance of me doing the research to find out whether
15 they're a local governmental unit or not. And so we
16 answered the question as best we could.

17 I don't mean to be argumentative about it, but I
18 certainly don't understand the point of the question.
19 And so I would -- if we said yes, no, or whatever the
20 case may be, it's a legal question and not a fact
21 question, to my way of thinking. And so --

22 Interrogatory 19, this is not my first project
23 in front of the Commission. We're dealing with historic,
24 cultural, and archaeological sites. And it's been my
25 practice that has been forced on me by the Commission and

1 others in the past to keep such things as this
2 confidential.

3 It's been told to me by the SHPO office, among
4 others, that we don't want locations of sites out in the
5 public domain. And I would leave it to them to do that.
6 I don't mean to withhold this information from the
7 Intervenor for my own purposes. I understand that to be
8 the way the society or the group of people involved with
9 that seek to have that information be treated.

10 And I cited to the law on that, both federal and
11 state. We don't have any particular reason ourselves not
12 to give that information out, but I've simply understood
13 that to be the way that the practice is, that those sites
14 are not to be made public.

15 Again, with Interrogatory No. 20 we're seeking
16 the name, address, phone number, and e-mail of all
17 persons involved in any cultural historic survey. That's
18 a number of people. And, again, I don't want to
19 reiterate further. Their public -- or their contact
20 information, to my way of thinking, need not be made
21 either public or given out to anybody.

22 Document Request No. 4, on page 11 of my answer,
23 I should say, there are a number of documents related to
24 any filing. They are in some cases relevant to the
25 proceeding and a lot of cases not.

1 To bring in and make such a broad request would
2 require us, I think, to devote a substantial amount of
3 resources to answering a request which would be
4 voluminous and unlikely to be useful to anyone. That's
5 my own personal opinion.

6 I think that it's worth pointing out to the
7 Commission that we answered hundreds of questions both
8 from Staff and the Intervenors in the 30 days in April
9 leading into May. We didn't try to withhold anything
10 from anybody untowardly. We tried to be open and give
11 the information that was useful to people.

12 To ask us to produce volumes and boxes of
13 documents or perhaps CDs or what have you is to my way of
14 thinking incredibly burdensome to the project to
15 provide -- it's a herculean task and would require a lot
16 of devotion that I don't see the -- I don't see the
17 point. And perhaps it's not for me to make. A lot of it
18 would be irrelevant to the proceeding.

19 I can state that to my knowledge none of the
20 permits have been suspended relating to Dakota Access.

21 Finally, I would state that a number of the
22 documents which were requested are available publicly
23 with the click of a mouse.

24 CHAIRMAN NELSON: Thank you.

25 Ms. Real Bird, any brief rebuttal? Oh, just a

1 moment.

2 MR. KOENECKE: I failed to address No. 7. I'm
3 sorry. A table to show breeding times of sensitive
4 species and a map to show migration pathways. I don't
5 think discovery requires me to produce that at the
6 request of a party. If we have it, I think we can
7 certainly produce it, but to require me to have one
8 produced I think is going too far.

9 CHAIRMAN NELSON: Thank you.

10 Ms. Real Bird.

11 MS. REAL BIRD: Thank you, Mr. Chairman. I
12 would just say that, you know, the Yankton Sioux Tribe
13 has no vexatious intent. We're certainly seeking
14 information we believe we're entitled to under the
15 statutes within the scope of discovery. And to the
16 extend the Applicant hasn't answered those, we'd like the
17 Commission to compel those answers and those document
18 requests.

19 Thank you.

20 CHAIRMAN NELSON: Thank you.

21 Questions from the Commission. Seeing none --

22 Just a moment.

23 Let me just -- Commissioner Hanson first.

24 COMMISSIONER HANSON: Thank you, Mr. Chairman.

25 Mr. Koenecke, on Interrogatory 10 and 20 in the

1 request for information on different persons conducting
2 different activities, will any of those persons be
3 appearing as witnesses for you?

4 MR. KOENECKE: Thank you, Commissioner. I don't
5 know at this time. I suspect not. But I don't know at
6 this time.

7 COMMISSIONER HANSON: Okay. And on Document
8 Request No. 7 you intimated that it appears that you
9 don't know whether you have that information or not?

10 MR. KOENECKE: I don't know as I sit here
11 whether there is existing a table or a map to show those
12 specific requests. I don't know that we have those
13 things. I don't think we do.

14 COMMISSIONER HANSON: I guess that surprises me
15 a bit. I would think that since it was a document
16 request you would have checked that out to see.

17 Do you know if there's an agency that you've
18 worked with to try to find out that information, or is it
19 germane to the project in your mind?

20 MR. KOENECKE: I think that --

21 COMMISSIONER HANSON: Excuse me for asking two
22 questions.

23 MR. KOENECKE: Is it germane to the project? It
24 certainly is germane to the project to know what the
25 sensitive species are. Breeding times, I have less

1 confidence in the germaneness. And the map of
2 migrations, I have even less confidence in that. I'm not
3 certain sensitive species even migrate. The only
4 sensitive species I've heard discussed is the Topeka
5 Shiner. I don't think that it does. I think it's
6 resident.

7 Breeding times no one's said yes, I have a table
8 or a map. That's where I'm at with that one.

9 I hope I'm being responsive, Commissioner. I'm
10 not trying to be coy.

11 COMMISSIONER HANSON: Certainly. Document
12 Request No. 4, would you be able to -- you argued that it
13 would be a significant challenge. Would it be a
14 significant challenge to provide just the crude oil
15 pipeline permits?

16 And you've basically testified before us that no
17 permits have been declined or revoked so it would just be
18 permits that have been granted.

19 Forgive me. I assume there are a lot of permits
20 from my experience on a pipeline, but for just crude oil
21 pipelines, would that be such a challenge?

22 MR. KOENECKE: Thank you for the question,
23 Commissioner. It would be in some respects. All
24 documents related to those permits reaches down -- to my
25 way of thinking, into the employment records of the

1 people who worked on the project, the bills that were
2 involved, the payments back and forth.

3 All documents related is what I think is
4 overbroad. I think that the permit applications for
5 crude oil pipelines is probably not overbroad. And, as I
6 said, they're available with the click of a mouse.

7 But I think to go in the direction of the crude
8 oil permits is a good step, but the all documents
9 related, to my way of thinking, needs to be limited.
10 Where do we start and stop with all documents related?

11 Because to me that means every scrap of paper
12 that you kept. And I don't think they want that. I
13 certainly wouldn't. I would want only things that are
14 really critical to whatever case they intend to make.

15 I don't know what the thrust of the Intervenor
16 is going to be at the hearing with respect to this
17 matter, but I would guess that there's only really a few
18 pieces of information that they really want. But to ask
19 me to produce all documents related is essentially -- my
20 first blush reaction is duplicate everything you've got
21 and ship it here. We can't do that.

22 COMMISSIONER HANSON: Thank you. I fully
23 understand that, having participated -- the Commissioners
24 all and the Staff understand the challenge there.

25 Thank you, Mr. Chair.

1 CHAIRMAN NELSON: I'm going to need to follow up
2 on Commissioner Hanson's question regarding Request For
3 Production No. 7.

4 I thought I understood this, but perhaps not.
5 I'm reading from Mr. Koenecke from your response to this
6 Motion to Compel, and you say and I quote "The discovery
7 process is used to obtain information or documents which
8 exist. It is not intended to cause parties to create
9 documents. It seems the Yankton Sioux Tribe would like
10 Dakota Access to create documents which do not exist."

11 So you've made a statement to us that they don't
12 exist. But now today you're telling us you're not sure.
13 Help us out there.

14 MR. KOENECKE: I don't -- the project does not
15 have a table or a map as has been requested. To whether
16 somebody else, a third party, a graduate student perhaps
17 who might have made a map or a table, those probably do
18 exist. I don't have them. They're not in my possession.
19 I hope that's helpful.

20 CHAIRMAN NELSON: It is. Thank you.

21 Any other questions? Mr. Smith?

22 Any further questions?

23 Seeing none, is there a Motion?

24 Commissioner Hanson.

25 COMMISSIONER HANSON: Thank you, Mr. Chairman.

1 I move that the Commission deny Yankton Sioux
2 Tribe's Motion to Compel.

3 CHAIRMAN NELSON: Discussion on the Motion.
4 Commissioner Hanson.

5 COMMISSIONER HANSON: Mr. Chairman, in examining
6 and reading into the requests both for Interrogatories
7 and for the Document Requests I can see that -- I'm
8 vacillating a little bit on one of them, on Document
9 Request No. 4, and for that reason I guess I'm leaning
10 even against that. I don't see the value in obtaining
11 those -- that -- those permits.

12 Certainly I cannot see requesting all of the
13 documents that relate to those permits. As we know from
14 our own experience in these type of dockets, there are
15 just truckloads of information. And to have -- to place
16 that on the shoulders of the Applicant is just truly
17 burdensome. I can't imagine the amount of information
18 that they would have to provide to them.

19 I think that if the Yankton Sioux Tribe were
20 asking for specific information such as just the permits
21 that exist for crude oil, not all of the documents that
22 relate to those permits but just asking for what permits
23 have you received for what other crude oil pipelines, I
24 could certainly see going for that. But I think it goes
25 way too far.

1 It appears to me that Interrogatory No. 11 has
2 been answered. And 10 and 20 I fully agree with the
3 Applicant. And 19, we have always been extremely careful
4 to protect information of this nature. It is
5 confidential. I don't see why a specific location is
6 necessary.

7 What is necessary is to know that the Applicant
8 is going to follow the law, they're going to do
9 everything they can to protect these areas.

10 I really think that what we have to do is be
11 especially careful to make certain that that information
12 is limited to as few people as possible.

13 As a Commissioner I've had the opportunity to
14 know where a considerable amount of this information is
15 on previous dockets. I have chosen not to. And we have
16 historically been opposed to spreading out anymore
17 information on those locations. It's possible simply
18 from the standpoint of being able to protect them.

19 No. 7 I think has been answered from the
20 standpoint of the Applicant, and if there's an agency
21 that has that information, it may come to fruition later
22 on. The Applicant doesn't have it. So I can't see that
23 they would be even able to share it at this juncture.

24 Thank you, Mr. Chairman.

25 CHAIRMAN NELSON: Additional discussion on the

1 Motion.

2 I'm not going to support the Motion. I believe
3 there are certain of these items that should, in fact, be
4 compelled.

5 Do I share Commissioner Hanson's concern that
6 some of this goes too far? Yeah. I do.

7 So far as the confidential information, as we
8 have done in other dockets, I think that can be
9 adequately protected with the appropriate protective
10 orders. And so based on that, I'm not going to support
11 the broad Motion to Deny in its entirety.

12 Additional discussion.

13 Seeing none, all those in favor will vote aye.
14 Those opposed, nay.

15 Commissioner Sattgast.

16 ACTING COMMISSIONER SATTGAST: Nay.

17 CHAIRMAN NELSON: Commissioner Hanson.

18 COMMISSIONER HANSON: Aye.

19 CHAIRMAN NELSON: And Nelson votes nay. Motion
20 fails.

21 Additional motions.

22 I move that we grant the Motion to Compel for
23 Interrogatory No. 10, 19, 20, and Request For Production
24 No. 3 and 4, with an any information which is
25 confidential or should remain confidential be covered

1 with a protective order identical to what was recently
2 issued by this Commission in another Docket. As amended,
3 yes.

4 ACTING COMMISSIONER SATTGAST: Mr. Chairman,
5 could you restate those?

6 CHAIRMAN NELSON: Yes. I'd move to grant Motion
7 to Compel for Interrogatory No. 10, 19, and 20, and
8 Request For Production No. 3 and 4.

9 Discussion on the Motion.

10 Let me just say a number of these the Applicant
11 has expressed concerns about confidentiality, and those
12 concerns are absolutely accurate. But I believe that
13 that concern can be adequately covered with the
14 appropriate protective order that will accompany this.

15 Am I concerned that Request For Production No. 4
16 is too broad? I am concerned about that. And I'm simply
17 going to say to Ms. Real Bird, I think you need to get
18 together with the Applicant's attorneys and come to an
19 agreement as to what is really necessary there. I mean,
20 it does not need to be as broad as what, you know,
21 Mr. Koenecke fears that it is.

22 But beyond that, I think the items that I have
23 enunciated are appropriate for discovery and would move
24 to compel those.

25 Additional discussion.

1 ACTING COMMISSIONER SATTGAST: Mr. Chairman,
2 this is Acting Commissioner Sattgast. I do have a
3 question, I guess, for Staff on Interrogatory No. 10. I
4 have not been involved in what type of protection orders
5 that would entail.

6 If there could be some explanation of what type
7 of information would be blocked and who would it be
8 blocked from.

9 MS. EDWARDS: Thank you. This is Kristen
10 Edwards from Staff.

11 The Protection Order drafted and ordered by the
12 Commission in HP14-001 made all information which was
13 submitted as confidential viewable only by attorneys,
14 expert witnesses, and experts relied upon by the parties
15 for the purposes of examining that information. And all
16 parties -- or all persons viewing that information were
17 required to sign the nondisclosure agreement provided as
18 an attachment before being granted access to that
19 information.

20 ACTING COMMISSIONER SATTGAST: Thank you.

21 CHAIRMAN NELSON: Additional discussion.
22 Commissioner Hanson.

23 COMMISSIONER HANSON: Mr. Chairman, obviously I
24 cannot support the Motion for a number of reasons. In
25 Document Request No. 4 we all agree or at least you and I

1 agree that it's too broad. But the Motion will require
2 all documents relating -- and as much as we may request
3 the parties to come to some agreement, it nevertheless
4 places a hammer in the hands of one party because the
5 Motion requires all documents.

6 And as we are well-aware from our previous --
7 well, from our other existing pipeline dockets, there is
8 just a huge amount of information from every one of
9 those. And I can't imagine -- well, in another Docket
10 before us the party complained that they received too
11 much information. And that's just one.

12 And so I just -- I just don't think this is
13 workable to give that power to them.

14 We have really done everything we can to protect
15 the confidential -- confidentiality of sites. And
16 marking things confidential is one thing; protecting the
17 site is another.

18 The information exists long after the Docket is
19 even completed. Confidential information is leaked all
20 of the time, and as much as that confidentiality is
21 placed on papers, it has to be shared to other people.
22 And that information then is usually asked for by other
23 Applicants -- excuse me. By other parties to the Docket,
24 and it spreads rapidly and regardless of who it's being
25 shared with.

1 I see years ago within our own PUC that
2 confidential information was placed in the garbage, and
3 that then is available to whoever accesses the garbage.
4 And we have taken measures from that standpoint. I can't
5 be assured that this information is being destroyed from
6 every party that receives it. And this will spread
7 considerably.

8 Again, I do not understand why a party needs to
9 know where the site is. They need to know that it's
10 being protected. They need to know that the law is being
11 followed in every case.

12 And, frankly, if I were Yankton Sioux Tribe, I
13 would want to be assured that the information is not
14 shared anywhere further. And by asking for it, other
15 parties to this hearing are going to be able to ask for
16 that information as well. And historically we've shared
17 information when one party receives it.

18 So I'm very, very concerned about the
19 confidentiality. And I can certainly go along with 10
20 and 20. That was a challenge for me. But 19 and 4 I
21 just cannot support at all.

22 Thank you, Mr. Chairman.

23 CHAIRMAN NELSON: Thank you. I appreciate your
24 comments, particularly on Request No. 4.

25 So I'm going to ask Ms. Real Bird, as we are

1 speaking here now there's part of me that maybe wants to
2 remove that from my Motion.

3 Can you limit that? Can you tell me how we
4 might limit that to still allow you to accomplish what
5 you believe you have a right to access but not as
6 expansive as what you've asked for.

7 MS. REAL BIRD: Thank you, Mr. Chairman.

8 So as we sit here now we understand even in our
9 definition "all documents" can include a lot of
10 information. So what we are really after is for the
11 applications themselves, the correspondence to and from
12 whatever entity the applications were submitted to, the
13 correspondence -- the applications themselves, including
14 any parts, attachments, et cetera, any memorandums that
15 are not confidential, meaning like attorney-client work
16 product, for example, or attorney-client communication to
17 the Applicant and its attorneys.

18 But we really do want the correspondence to and
19 from the agencies related to the Application. And so,
20 yeah, we'd be happy to limit it to that, as long as the
21 correspondence includes both written and electronic form.
22 All forms of correspondence.

23 So as we sit here, I'd say we'd be happy with
24 that. We're really interested in the company's
25 interaction with whomever is receiving these permit

1 applications.

2 CHAIRMAN NELSON: Thank you. I am going to,
3 with the permission of my two fellow Commissioners, amend
4 my Motion to peel it back to -- for Request No. 4 to what
5 has just been enunciated to limit the scope.

6 Additional discussion.

7 Seeing none, all those in favor will vote aye.

8 Those opposed, nay.

9 Commissioner Sattgast.

10 ACTING COMMISSIONER SATTGAST: Aye.

11 CHAIRMAN NELSON: Commissioner Hanson.

12 COMMISSIONER HANSON: No.

13 CHAIRMAN NELSON: Commissioner Nelson votes aye.

14 Motion carries.

15 Is there anything else for the good of the
16 order?

17 I think as far as announcements are concerned --

18 COMMISSIONER HANSON: Mr. Chairman, I would move
19 that the Commission do not award reasonable attorney fees
20 and expenses associated with the Motion to Compel.

21 CHAIRMAN NELSON: Thank you.

22 Discussion on the Motion.

23 COMMISSIONER HANSON: Well, obviously the reason
24 for that is that there was -- it was not a simple up and
25 down, yes or no obvious situation to provide these items,

1 and it was a divided Commission on them. And we did not
2 grant some of the requests. So it doesn't comply with
3 what we would have for providing those funds.

4 CHAIRMAN NELSON: Additional discussion.

5 Seeing none, all those in favor of the Motion
6 will vote aye. Those opposed, nay.

7 Commissioner Sattgast.

8 ACTING COMMISSIONER SATTGAST: Aye.

9 CHAIRMAN NELSON: Commissioner Hanson.

10 COMMISSIONER HANSON: Aye.

11 CHAIRMAN NELSON: Nelson votes aye.

12 Motion carries. The fees are denied.

13 (The proceeding concludes at 10:43 a.m.)

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1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 12th day of May,
11 2015, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 16th day of
14 June, 2015.

15

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18

Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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