BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF TRANSCANADA KEYSTONE PIPELINE, LP FOR ORDER ACCEPTING CERTIFICATION OF PERMIT ISSUED IN DOCKET HP09-001 TO CONSTRUCT THE KEYSTONE XL PIPELINE	**GARY DORR'S POST HEARING BRIEF** **HP14-001**

Gary Dorr ("Dorr"), *pro se*, makes the following post hearing brief.

The certification of the proposed Keystone XL pipeline construction permit must be denied. Keystone cannot certify that the permit will continue to meet the 50 amended permit conditions. The Public Utilities Commission also conducted itself with flawed procedures during the process which was prejudicial to the interveners and jurisprudence.

1. The amended permit conditions state that Keystone will comply with "***all applicable laws and regulations in its construction and operation***." The amended permit conditions go on to name the 19 Federal laws and Federal regulations stated below:
    a. Hazardous Liquid Pipeline Safety Act of 1979 and
    b. Pipeline Safety Improvement Act of 2002, as amended by the
    c. Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006
    d. other pipeline safety statutes currently codified at 49 U.S.C. § 601 01 et seq. (collectively, the "PSA")
    e. regulations of the United States Department of Transportation implementing the PSA, particularly
    f. 49 C.F.R Parts 194 and
    g. 49 C.F.R. Part 195

h. Presidential Permit from the United States Department of State, Executive Order 11423 of August 16, 1968 (33 Fed. Reg. 11741) and

i. Executive 'Order 13337 of April 30, 2004 (69 Fed. Reg. 25229)

j. Clean Water Act §404 and Rivers and Harbors Act

k. Clean Water Act §404 Section 10 Permits; Special Permit if issued by the Pipeline and Hazardous Materials Safety Administration;

l. federal, state and local highway and road encroachment permits.

m. Section 106 of the National Historic Preservation Act

n. applicable American National Standards Institute standards

o. BLM's Potential Fossil Yield Classification system

p. BLM guidelines as modified by the provisions of Condition 44

q. BLM guidelines for the assessment and mitigation of paleontological resources

r. BLM regulations and guidelines, including

s. BLM Guidelines for Assessment and Mitigation of Potential Impacts to Paleontological Resources

2. The permit also states in condition #1: "***These laws and regulations include, but are not necessarily limited to:***" and then goes on to begin naming some of the laws. It makes the statement that some of the laws might not be named here. In the opening statement of Amended Permit Condition #1 it states, "***Keystone shall comply with all applicable laws and regulations in its construction and operation of the Project.***" There is another Federal Statute which is applicable and is valid; the other valid statute which is applicable is 15 Stat 635.

3. The Fort Laramie Treaty of 1868 was codified by Congress within 15 Stat 635. That makes the Fort Laramie Treaty a Federal Document. It makes it a Federal Law. One of the stipulations of the treaty contained in 15 Stat 635, in states in Article II,

"*The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river where the 46th parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the 104th degree of longitude west from Greenwich, thence north on said meridian to a point where the 46th parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations of the east back of said river, shall be and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that* ***no persons, except those herein designated and authorized so to do****, and except such* ***officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law****, shall ever be permitted to* ***pass over****, settle upon, or reside in* ***the territory described in this article****, or in such territory as may be added to this reservation for the use of said Indians…*"

The emphasis was added by me to highlight this point. To abrogate this Treaty Stipulation, Congress must have specifically addressed this with legislative action or specific language. To date, this has never been done. 15 Stat 635 with regard to this specific Treaty Stipulation is still a valid Federal "applicable" law.

4. Further in Article XVI of the Treaty of Fort Laramie of 1868, contained within 15 Stat 635 it states:

> "*The United States hereby agrees and stipulates that the country north of the North Platte river and east of the summits of the Big Horn mountains shall be held and considered to be unceded. Indian territory, and also stipulates and agrees that* ***no white person or persons*** *shall be permitted to settle upon* ***or occupy any portion of the same****; or* ***without the consent of the Indians, first had and obtained, to pass through*** *the same…"*

Emphasis was added by me to emphasize the point that this Federally Codified Statute contains language that has never been removed from the Statute. The Treaty Stipulation has never been abrogated. Therefore TransCanada cannot without consent of the tribes in South Dakota comply with 15 Stat 635.

5. This commission has attempted to pass off consideration of the Treaty of Fort Laramie of 1868, codified under 15 Stat 635, making flippant remarks that this SD Public Utility Commission does not have jurisdiction over Federal Treaty stipulations. Keystone has led the Commissioners and staff of the PUC to believe that Federal Consultation is a duty of the Department of State and that this is what Interveners are referring to when any mention of Treaty Rights are discussed. Keystone is correct; there are Federal duties to Consult; Department of State should be consulting with Tribes as should Federal Departments; however, this duty to consult is not necessarily what Interveners are referring to when it comes to discussion of Treaty Stipulations. The Treaty stipulations named herein have never been abrogated; they are still valid. And a proper reading in line with the Cannons of Treaty Construction will yield an understanding as the Indians at the time of the treaty would have understood the stipulations to be read. Treaties are construed to "give effect to the terms as the Indians themselves would have understood them," Minnesota, 526 U.S. at 196. Therefore in Article 16 when it states no white persons shall be allowed to occupy the Treaty Territory named in the Treaty without the **consent** of the Indians, or shall be allowed to pass through without consent of the Indians in the Treaty, that is exactly what it means. The **individual who wishes to pass through or occupy** the territory must gain consent. This stipulation is a matter of Federal Law, and is **separate** from the Federal Duty to consult with Tribes, which Mr. Bill Taylor would have the SD PUC Commissioners and Staff believe is the only issue the interveners are talking about with relation to Treaty Stipulations.

6. The simplest terms: Keystone has not gained consent from the Tribes in South Dakota who are parties of the Treaty of Fort Laramie Treaty of 1868 to cross the territory named in the Treaty which was codified in 15 Stat 635. It is for this simplest principle that **separate from the Federal obligation to consult with tribes,** Keystone **must also gain consent**, and since they have not Keystone will be in violation of 15 Stat 635 if they cross the territory because the Treaty Stipulation has never been abrogated.

7. To say that this commission will not hear this discussion would be prejudicial to the interveners and the Tribes who enjoy all facets of every other Treaty Stipulation. For instance in the 2009 case of Lavetta Elk V. United States (70 Fed.Cl. 405), it was once again reaffirmed that the Fort Laramie Treaty of 1868 was valid. This case of Elk v. U.S. reaffirmed that the Fort Laramie of 1868 Treaty stipulations were still valid when the

Court ruled that Elk was entitled to a claim under the Bad Man Clause of the Fort Laramie Treaty of 1868. (The Bad Man Clause is the Court's reference to Article I of the Fort Laramie Treaty of 1868.)

8. It would be prejudicial to consider all 19 of the other Federal Laws and Regulations named herein which are named in the 50 Amended Permit Conditions HP09-001, and exclude consideration of 15 Stat 635. It would only be prejudicial to specific Governments and specific people of those governments if this commission did not consider 15 Stat 635 and the Fort Laramie Treaty of 1868 contained in that statute when making a decision to either grant or not grant certification of this permit for Keystone. This commission would only be prejudicing the Tribal Governments and the people of the Tribal Governments by excluding consideration of the Fort Laramie Treaty of 1868 under the Federal Statute, 15 Stat 635. This SD Public Utilities Commission must not grant full consideration and inclusion of these other above-named 19 Federal laws and regulations <u>while only excluding any protection of Tribal interests contained under 15 Stat 635 in the Treaty of Fort Laramie of 1868.</u>

9. This commission must deny certification of the Keystone Permit as if it would violate any other "applicable" Federal Law or Regulation. That this commission will require compliance with all the above-named 19 Federal Laws and then tell the interveners that the federally recognized and codified Treaty is not of consideration is a departure from jurisprudence. The list at the start of this brief must also have 15 Stat 635 added as one of the laws from those not named but not limited from inclusion. 15 Stat 635 states that Tribes have still valid, unabrogated Treaty Rights which is not argumentative, but rather a result of years of court decisions that all point to the recognition of Federally Codified Treaties as being "the Supreme Law of the Land." Article VI of the United States Constitution stipulates in part,

   "*…all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.*

   The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution…"

10. It therefore becomes obvious that even under South Dakota State Law, procedures must come under the Federal Jurisdiction when it comes to Treaties. If you support the United States Constitution, you must support the Fort Laramie Treaty of 1868 and all its unabrogated treaty stipulations as spelled out in 15 Stat 635.

11. The case has been made through evidence and testimony at the Hearing that several tribes have resolutions opposing the Keystone XL Pipeline. Keystone has not gained consent. As an individual duty separate from the Federal Government's obligations, Keystone will be in violation of 15 Stat 635. Therefore this Commission must deny the certification for the Keystone XL permit for construction because they will be in violation of HP09-001 Amended Permit Condition #1 for non-compliance with all applicable laws and regulations.

12. During the proceedings this commission omitted key testimony from one of its own staff members. This commission stated that they would hear testimony from its own staff when considering Yankton's motion to dismiss on January 6 2015. The testimony from staff attorney Kristen Edwards would have been key as she herself sent emails to interveners stating that Keystone was a party to the case and therefore was supposed to comply with the commission's order to ask discovery questions by Paragraph and number in its discovery requests. Keystone did not comply with this order from the Commission and therefore this entire case has been one of prejudice from the start. This case should have been dismissed on January 6, 2015 and might have been if the commissioners had sought testimony from Kristen Edwards who was in the room at the time of the hearing and could have corroborated her opinion which she publicly expressed with the interveners.

13. Further, the Commission denied my request to Compel Keystone to answer my discovery requests. The Commission made a statement that it appears as though the information I sought was publicly available; however it is not. Individual-owned water lines have agreements that either don't exist or are not publicly available. I made several statements that I wanted "every" water line crossing agreement. Mr. Taylor stated he had supplied agreements for the Mni Wiconi Waterlines. This does not cover the individually-constructed water lines which many ranchers have crossing their property to feed animals at strategically located water tanks. There may be backflow regulators at the tanks themselves or there may not be. If there is not a backflow regulator at the meter end of these individually owned water lines and a leak from a Keystone XL Pipeline occurs, eating through those pipe joints, the backflow could propel dilbit into the well or even the Mni Wiconi Water System. This was a serious event that the Commission did not grant my request. In this end time now, it should be apparent that not enough information was disclosed to determine the safety of the Keystone XL pipeline crossing individually-owned and constructed waterlines which may or may not contaminate the local aquifer or even the Mni Wiconi Water System.

14. I reserve the right to amend this Post Hearing Brief.

15. For each one of these reasons stated herein, I implore the Commission to consider <u>all applicable laws</u>, to finally see that the Keystone XL pipeline cannot cross South Dakota without the consent of the Treaty of 1868 Tribes of South Dakota, and therefore would be

in violation of Amended Permit Condition #1. There are too many avenues where public safety would be at risk, to knowingly approve the certification of this permit without taking every applicable law into consideration.

Dated this 30 Day of September, 2015

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