BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY TRANSCANADA KEYSTONE PIPELINE, LP FOR A PERMIT UNDER THE SOUTH DAKOTA ENERGY CONVERSION AND TRANSMISSION FACILITIES ACT TO CONSTRUCT THE KEYSTONE XL PROJECT	))))))	HP 14-001

STANDING ROCK SIOUX TRIBE
OPPOSITION TO MOTION TO PRECLUDE CONSIDERATION
OF ABORIGINAL TITLE OR USUFRUCTUARY RIGHTS

The Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights violates the requirement in SDCL §15-6-7(b) that all motions "shall *state with particularity* the grounds therefor, and shall set forth the relief sought." *Emphasis added*. The motion uses terms such as "aboriginal" and "usufructuary" without defining these terms. The motion is vague with respect to the relief requested, and what evidence or testimony, were the motion to be granted, would be deemed impermissible. The lack of particularity and clarity prevent intervener Standing Rock Sioux Tribe from fully responding.

SDCL §49-41B-27 requires that TransCanada certify that it meets the conditions in the permit for the Keystone XL Pipeline, and condition number 1 requires compliance with all applicable laws. *Amended Final Decision and Order*, HP 09-001 at 25 (June 30, 2010). Obviously, this includes federal laws. As TransCanada concedes, Tribal rights exist under federal law. *E.g. McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 172, n. 7 (1973) ("The source of federal authority over Indian matters… derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."). Consequently, under SDCL §49-41B-27, the Standing Rock and other interveners have the right to introduce testimony and evidence regarding TransCanada's compliance with the federal laws governing the rights of the Tribes.

Standing Rock and other interveners have significant usufructuary rights outside of the current-day Reservation boundaries that are recognized under federal law, particularly under the National Historic Preservation Act, 16 U.S.C. §470 *et seq*., and the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), 25 U.S.C. §§3001-3013. Testimony on issues relating to these acts has already been pre-filed by the staff. *See Pre-filed Testimony of Paige Olson*. The Motion to Preclude vastly overstates the limits to permissible evidence in this proceeding.

Under section 3 of NAGPRA,

> *The ownership and control of Native American cultural items*… shall be… if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were *discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the Court of Claims as the aboriginal land* of some tribe – (1) in the Indian tribe that is recognized as aboriginally-occupying the area…

25 U.S.C. §3002(a)(2)(C).

The entire pipeline route in South Dakota has been adjudicated by the U.S. Court of Claims to be Sioux aboriginal area. *Sioux Tribe v. United States*, 21 Ind. Cl. Comm. 371, 382 (1969) *aff'd United States v. Sioux Nation of Indians*, 428 U.S. 371, 424 (1980). Thus, under section 3 of NAGPRA the ownership of certain cultural items in this area rests with Standing Rock and other Tribal interveners – Tribal usufructuary rights firmly recognized under federal law. 25 U.S.C. §3002(a)(2)(C). NAGPRA is merely one example of a federal law incorporating aboriginal Tribal rights into its proprietary and regulatory scheme. *Id.*

NAGPRA is covered by condition number 1 in the Amended Permit Conditions. *Amended Final Decision and Order*, HP 09-001. It is a law with which TransCanada must comply in order for re-certification of its permit. *See also* Finding number 58 on page 14 of the Amended Final Decision and Order, HP 09-001: "Treatment of any undiscovered human remains, funerary objects or or items of cultural patrimony found on federal land… will be handled in accordance with the Native American Graves Protection and Repatriation Act." Yet TransCanada's overwrought and meritless motion seeks to preclude the introduction of any testimony in these areas of federal law.

The regulations governing the Commission contemplate a much more open process than that suggested by TransCanada in its motion. The Commission affords liberal intervention, ARSD 20:10:01:15.02, and "the commission shall give the parties an opportunity for a hearing." ARSD 20:10:01:15. The parties have the right to present competent evidence regarding TransCanada's compliance with federal law. *Id.* The weight to be given by the Commission for evidence and testimony is within its discretion, but the right to introduce evidence regarding the federal laws that may apply to the Tribes is established in the Commission's hearings procedures and South Dakota Rules of Evidence. *See Application of Nebraska Public Power District to Construct and Operate Proposed MANDAN Nominal KV Transmission Facility*, 354 N.W.2d 713, 720 (S.D. 1984) ("[T]he statute clearly designates the PUC as the fact finder").

In its motion, TransCanada relies on cases which have been overturned by the Supreme Court, or which are totally unrelated. TransCanada argues that under *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), Congress enjoys absolute power to dispose of Tribal property, ostensibly to argue the Tribes lack rights outside of current Reservation boundaries. In the case of *United States v. Sioux Nation of Indians*, 448 U.S. at 412, 414, the Supreme Court ruled that, "(We) doubt whether the *Lone Wolf* Court meant to state a general rule applicable to cases such as the one before us… *Lone Wolf's* presumption of congressional good faith has little to commend it as an enduring principle."

TransCanada also cites *Oregon Fish and Wildlife Department v. Klamath Tribe*, 473 U.S. 753 (1983), in support of its contention that land outside of the current Reservation boundaries are "public domain" to which Tribes lack rights. The Klamath Tribes were subject to termination by an act of Congress in 1954 – its very Tribal existence was attacked by legislation, 68 Stat. 718, and the Court determined that prior exclusive hunting and fishing rights no longer existed on ceded lands. *Id.*

Conversely, by referendum vote in South Dakota, the State rejected the assumption of termination-era state jurisdiction over the Indian Reservations. *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990) (State did not obtain civil jurisdiction over Indian Reservations under P.L. 280, a termination-era statute authorizing certain states to assume certain jurisdiction on Reservations). The *Klamath*

case does not support the proposition that the Sioux Nation may be prohibited from introducing testimony on Treaty or aboriginal rights in Keystone XL re-certification.

In its motion, TransCanada stated, "Congress terminated aboriginal and usufructuary interests with respect to the lands outside the boundaries of the current south Dakota in the Act of March 2, 1889, in subsequent statutes." *TransCanada Motion to Preclude*, p. 5. Yet it cites no such statutes. Indeed, the Sioux Nation was not "terminated." *See Termination of the Federal Supervision Over Certain Tribes of Indians*: Joint Hearings on S 2670 and HR 7674 Before the Subcomms. on Indian Affairs of the Comms. on Interior and Insular Affairs, 83rd Cong. 2d Sess. (1954). TransCanada uses erroneous and misleading terminology to mis-portray the rights of Sioux people outside of the current Reservation boundaries, in an attempt to justify the preclusion of evidence and testimony about the concerns of South Dakota Indians. *cf.* SDCL §1-54-5 (State policy of Tribal consultation).

The ancestors of the Standing Rock Sioux Tribe roamed throughout the region, and there are valuable historic properties, sacred sites, medicinal plants, hunting grounds and other areas to which Lakota people pilgrammage today. *See Sioux Nation Black Hills Act*: Hearing Before the Select Comm. on Indian Affairs, 99th Cong. 2d Sess. 44-47 (1986) (Statement of Aljoe Agard, Statement of Phyllis Young). Although its request for relief is unclear in violation of SDCL §15-6-7(b), TransCanada appears to be seeking to limit testimony in these areas, even if Tribal practices are protected under state or federal law. *E.g.* 25 U.S.C. §§3001-3013.

The Tribal interveners possess the right under South Dakota law to present testimony and evidence relating to compliance by TransCanada with the Amended Conditions in the permit for Keystone XL. The Motion to Preclude is unclear, unjustified, misleading and unsupported by law. It should be denied.

DATED this 2nd day of June, 2015

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Certificate of Service

The undersigned hereby certifies that, on this day, I served the afore Opposition to Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights via electronic mail to –

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