BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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HP 14-001

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 PROJECT

KEYSTONE'S OPPOSITION TO JOINT MOTION TO PRECLUDE IMPROPER RELIEF

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The Yankton Sioux Tribe and Indigenous Environmental Network ("Movants") have filed a Motion to Preclude Improper Relief or, In the Alternative, to Amend Findings of Fact. For the following reasons, Applicant TransCanada Keystone Pipeline, LP ("Keystone") respectfully requests that the motion be denied.

1. The motion argues that the Commission cannot amend its findings of fact to conform to the changes contained in Keystone's tracking table of changes attached to its Certification Petition as Appendix C. (Motion at 3.) Keystone has not asked the Commission to amend its findings and does not expect that any amendments are necessary. The motion argues a non-issue.

2. The logic of the motion is flawed. By statute, Keystone must certify that it can continue to meet the conditions on which the permit was granted, not that none of the underlying facts have changed. SDCL § 49-41B-27. For the logic of the motion to be correct, the certification statute would have to read like Minnesota's statute. In Minnesota, if construction

and improvement or a route or site has not commenced within four years after the permit was issued, then the commission "shall suspend the permit," and the permittee "shall certify to the commission that there have been no significant changes in any material aspects of the conditions *or circumstances when the permit was issued.*" Minn. R. Stat. 7850.4700 (emphasis added). South Dakota's certification statute is materially different and does not require that there have been no significant changes in the circumstances since the permit was issued. Rather, Keystone must prove that any changes in circumstances do not affect its ability to meet the conditions on which the permit was granted.

3. Although Keystone has not asked that the Commission amend any of the conditions, it would be reasonable for the Commission to conclude that it has the inherent authority to amend the conditions of the permit. For instance, Condition No. 2 requires that Keystone comply with any conditions of the Final Environmental Impact Statement that might conflict with the permit conditions. It would be reasonable for the Commission to amend that condition to refer to the Final Supplemental Environmental Impact Statement given its issuance after the Amended Final Decision and Order, dated June 29, 2010. It would not be reasonable for the Commission to conclude, for the reasons argued in the motion, that instead of amending a condition like Condition No. 2, it would be required to deny Keystone's certification even though Keystone is able to meet the conditions contained in the permit, which is what the Certification statute requires.

4. The Movants' request that the Commission alternatively amend Finding of Fact No. 113 because Keystone failed to fulfill its statutory obligation to give due consideration to the views of governing bodies of all affected local units of government is without merit. First, as explained in discovery, Keystone considers the Yankton Sioux Tribe and the other tribes that

have intervened to be sovereign nations, not "local units of government" within the meaning of SDCL § 49-41B-22. The Yankton Sioux Tribe did not intervene as a "local unit of government," but as an interested party under SDCL § 49-41B-17. The Tribe described itself in its application for party status as a "sovereign government." (Yankton Sioux Tribe Application for Party Status.) IEN does not claim to be a "local unit of government," so the requested relief cannot apply to it.

5. Second, the Tribe's unsupported contention that Keystone failed to consult with the Yankton Sioux Tribe is not true. Tribal "consultation" with respect to the Keystone XL project is the responsibility of the federal government, to be conducted on a government-to-government basis. Notwithstanding this, as explained in the affidavit of Lou Thompson, while not required, Keystone did engage with the Yankton Sioux Tribe. Even the Tribe's application for party status acknowledges this by stating that tribal input is necessary "[a]fter the initial flawed tribal consultation." (Yankton Sioux Tribe Application for Party Status.) If the Tribe has an issue with the adequacy of consultation, it should take that up with the State Department, not raise it here.

6. The contention that the Yankton Sioux Tribe's "treaty territory and aboriginal lands would be directly crossed by the proposed route" (Motion at 4) is inaccurate. The Yankton Sioux Tribe filed claims with the Indian Claims Commission in 1951, pursuant to Section 2 of the Indian Claims Commission Act, 25 U.S.C. 70 *et seq*. In the course of extensive litigation between the Yankton Sioux Tribe and the United States, the Indian Claims Commission established the boundary of the Yankton Sioux's claimed aboriginal lands. See *The Yankton Sioux Tribe v The United States,* 24 Ind. Cl. Comm. 208 (1970). The boundaries of the Tribe's aboriginal land claims are legally described in an interlocutory order of the Indian Claims

Commission in Docket No. 332-c. A copy is attached as Exhibit A. The starting point for the description is the point in the Missouri River where Hughes, Hyde, and Lyman Counties meet. The described territory is all east of that point; none of the aboriginal lands were located west of the Missouri River. A map showing the aboriginal lands is attached to an Opinion of the Commission, reported at 24 Ind. Cl. Comm. 208 (Dec. 14, 1970), and is attached here as Exhibit B. "In 1858, the Yankton Sioux entered into a treaty with the United States renouncing their claim to more than 11 million acres of their aboriginal lands in the north central plains." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998). The retained Tribal land is located in the southeastern part of Charles Mix County, and encompasses approximately 430,000 acres. *Id.* at 334.

7. Finally, the Yankton Sioux Tribe could have intervened in docket HP09-001 if it wanted to contend that Keystone could not meet its burden of proof under SDCL § 49-41B-22. It did not. It cannot now belatedly attempt to inject that issue into the instant Certification proceeding. The adequacy of Keystone's tribal consultation is not properly an issue before the Commission under SDCL § 49-41B-22.

8. The argument that Finding of Fact Number 114 should be amended because the Amended Final Decision & Order dated June 29, 2010, is not fully consistent with Keystone's tracking table of changes is illogical for the same reasons identified in paragraph 2. It makes no sense to say that the Commission's decision in 2010 was based on incomplete information due to facts known four years later. The Movants' argument that the tracking table is an admission that "key bases for the Commission's decision have been altered," (Motion at 5), is entirely unsupported. As demonstrated by the certification petition and tracking table, Keystone remains able to meet the conditions on which the permit was granted despite the changes in fact. To the

extent that the Movants disagree, their disagreement presents an issue for hearing, not a basis for the Commission to grant the motion.

Keystone respectfully requests that the motion be denied.

Dated this 2nd day of June, 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore
William Taylor
James E. Moore
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
William.Taylor@woodsfuller.com
James.Moore@woodsfuller.com
Attorneys for Applicant TransCanada

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Keystone's Opposition to Joint Motion to Preclude Improper Relief, to the following:

Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
patty.vangerpen@state.sd.us

Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
kristen.edwards@state.sd.us

Brian Rounds
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
brian.rounds@state.sd.us

Darren Kearney
Staff Analyst South Dakota Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501
darren.kearney@state.sd.us

Tony Rogers, Director
Rosebud Sioux Tribe - Tribal Utility Commission
153 South Main Street
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Cindy Myers, R.N.
PO Box 104
Stuart, NE 68780
csmyers77@hotmail.com

Jane Kleeb
1010 North Denver Avenue
Hastings, NE 68901
jane@boldnebraska.org

Byron T. Steskal
Diana L. Steskal
707 E. 2nd Street
Stuart, NE 68780
prairierose@nntc.net

Terry Frisch
Cheryl Frisch
47591 875th Road
Atkinson, NE 68713
tcfrisch@q.com

Arthur R. Tanderup
52343 857th Road
Neligh, NE 68756
atanderu@gmail.com

Lewis GrassRope
PO Box 61
Lower Brule, SD 57548
wisestar8@msn.com

Carolyn P. Smith
305 N. 3rd Street
Plainview, NE 68769
peachie_1234@yahoo.com

Robert G. Allpress
46165 Badger Road
Naper, NE 68755
bobandnan2008@hotmail.com

Amy Schaffer
PO Box 114
Louisville, NE 68037
amyannschaffer@gmail.com

Louis T. (Tom) Genung
902 E. 7th Street
Hastings, NE 68901
tg64152@windstream.net

Benjamin D. Gotschall
6505 W. Davey Road
Raymond, NE 68428
ben@boldnebraska.org

Nancy Hilding
6300 West Elm
Black Hawk, SD 57718
nhilshat@rapidnet.com

Elizabeth Lone Eagle
PO Box 160
Howes, SD 57748
bethcbest@gmail.com

Paul F. Seamans
27893 249th Street
Draper, SD 57531
jacknife@goldenwest.net

John H. Harter
28125 307th Avenue
Winner, SD 57580
johnharter11@yahoo.com

Viola Waln
PO Box 937
Rosebud, SD 57570
walnranch@goldenwest.net

Peter Capossela
Peter Capossela, P.C.
Representing Standing Rock Sioux Tribe
PO Box 10643
Eugene, OR 97440
pcapossela@nu-world.com

Travis Clark
Fredericks Peebles & Morgan LLP
Suite 104, 910 5th St.
Rapid City, SD 57701
tclark@ndnlaw.com

Jerry P. Jones
22584 US Hwy 14
Midland, SD 57552

Debbie J. Trapp
24952 US Hwy 14
Midland, SD 57552
mtdt@goldenwest.net

Jennifer S. Baker
Representing Yankton Sioux Tribe
Fredericks Peebles & Morgan LLP
1900 Plaza Dr.
Louisville, CO 80027
jbaker@ndnlaw.com

Duncan Meisel
350.org
20 Jay St., #1010
Brooklyn, NY 11201
duncan@350.org

Bruce Ellison
Attorney for Dakota Rural Action
518 6th Street #6
Rapid City, SD 57701
belli4law@aol.com

Wrexie Lainson Bardaglio
9748 Arden Road
Trumansburg, NY 14886
wrexie.bardaglio@gmail.com

Harold C. Frazier
Chairman, Cheyenne River Sioux Tribe
PO Box 590
Eagle Butte, SD 57625
haroldcfrazier@yahoo.com
mailto:kevinckeckler@yahoo.com

Cody Jones
21648 US Hwy 14/63
Midland, SD 57552

Gena M. Parkhurst
2825 Minnewsta Place
Rapid City, SD 57702
GMP66@hotmail.com

Joye Braun
PO Box 484
Eagle Butte, SD 57625
jmbraun57625@gmail.com

The Yankton Sioux Tribe
Robert Flying Hawk, Chairman
PO Box 1153
Wagner, SD 57380
robertflyinghawk@gmail.com
Thomasina Real Bird
Attorney for Yankton Sioux Tribe
trealbird@ndnlaw.com

Chastity Jewett
1321 Woodridge Drive
Rapid City, SD 57701
chasjewett@gmail.com

RoxAnn Boettcher
Boettcher Organics
86061 Edgewater Avenue
Bassett, NE 68714
boettcherann@abbnebraska.com

Bruce Boettcher
Boettcher Organics
86061 Edgewater Avenue
Bassett, NE 68714
boettcherann@abbnebraska.com

Bonny Kilmurry
47798 888 Road
Atkinson, NE 68713
bjkilmurry@gmail.com

Ronald Fees
17401 Fox Ridge Road
Opal, SD 57758

Robert P. Gough, Secretary
Intertribal Council on Utility Policy
PO Box 25
Rosebud, SD 57570
bobgough@intertribalCOUP.org

Tom BK Goldtooth
Indigenous Environmental Network (IEN)
PO Box 485
Bemidji, MN 56619
ien@igc.org

Dallas Goldtooth
38731 Res Hwy 1
Morton, MN 56270
goldtoothdallas@gmail.com

Gary F. Dorr
27853 292nd
Winner, SD 57580
gfdorr@gmail.com

Cyril Scott, President
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
cscott@gwtc.net
ejantoine@hotmail.com

Paula Antoine
Sicangu Oyate Land Office Coordinator
Rosebud Sioux Tribe
PO Box 658
Rosebud, SD 57570
wopila@gwtc.net
paula.antoine@rosebudsiouxtribe-nsn.gov

Thomasina Real Bird
Representing Yankton Sioux Tribe
Fredericks Peebles & Morgan LLP
1900 Plaza Dr.
Louisville, CO 80027
trealbird@ndnlaw.com

Sabrina King
Dakota Rural Action
518 Sixth Street, #6
Rapid City, SD 57701
sabinra@dakotarural.org

Frank James
Dakota Rural Action
PO Box 549
Brookings, SD 57006
fejames@dakotarural.org

Robin S. Martinez
Dakota Rural Action
Martinez Madrigal & Machicao, LLC
616 West 26th Street
Kansas City, MO 64108
robin.martinez@martinezlaw.net

Tracey A. Zephier
Attorney for Cheyenne River Sioux Tribe
Fredericks Peebles & Morgan LLP
910 5th Street, Suite 104
Rapid City, SD 57701
tzephier@ndnlaw.com

Paul C. Blackburn
4145 20th Avenue South
Minneapolis, MN 55407
paul@paulblackburn.net

Matthew Rappold
Rappold Law Office
on behalf of Rosebud Sioux Tribe
PO Box 873
Rapid City, SD 57709
matt.rappold01@gmail.com

April D. McCart
Representing Dakota Rural Action
Certified Paralegal
Martinez Madrigal & Machicao, LLC
616 W. 26th Street
Kansas City, MO 64108
april.mccart@martinezlaw.net

Kimberly E. Craven
3560 Catalpa Way
Boulder, CO 80304
kimecraven@gmail.com

Joy Lashley
Administrative Assistant
SD Public Utilities Commission
joy.lashley@state.sd.us

Mary Turgeon Wynne
Rosebud Sioux Tribe - Tribal Utility Commission
153 S. Main Street
Mission, SD 57555
tuc@rosebudsiouxtribe-nsn.gov

Eric Antoine
Rosebud Sioux Tribe
PO Box 430
Rosebud, SD 57570
ejantoine@hotmail.com

/s/ James E. Moore
One of the attorneys for Applicant