BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

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	:	HP 14-001 APPLICANT'S REPLY BRIEF - MOTION TO PRECLUDE CONSIDERATION OF ABORIGINAL TITLE OR USUFRUCTUARY RIGHTS

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

Interveners have raised the issue of whether the Applicant's proposed pipeline route is subject to the Indian aboriginal title and/or usufructuary rights. Applicant moved to preclude testimony concerning or consideration of tribal aboriginal title and/or usufructuary rights, contending there are no applicable aboriginal title or usufructuary rights favoring the tribal Interveners and that issues regarding the existence of tribal aboriginal title and/or usufructuary rights have no place before the Public Utilities Commission.

Interveners Yankton Sioux Tribe, Cheyenne River Sioux Tribe and Standing Rock Sioux Tribe responded to Applicant's motion. Yankton Sioux concedes "the Commission certainly lacks jurisdiction to adjudicate land use rights in this matter." *Yankton Sioux Brief* p. 1. Cheyenne River claims no intervener "makes such a request to the PUC." *Cheyenne River Brief* p. 1, but even so argues that it "merely desire[s] to present testimony and evidence related to aboriginal and usufructuary issues for the PUC's consideration." *Id* at 5. Standing Rock asserts that its usufructuary rights are a product of modern federal statutes, not historical or treaty claims

and that "Standing Rock and other Interveners have significant usufructuary rights outside of the current-day Reservation boundaries that are recognized under federal law." *Standing Rock brief*, p. 2.

A. Yankton Sioux's role in this motion.

Yankton Sioux's role in defending this motion is curious. As noted in Applicant's June 2 brief in opposition to the Intervener's Joint Motion to Preclude Testimony, the Indian Claims Commission decided in *Yankton Sioux Tribe v. United States,* 24 Ind. Cl. Com. 208 (1970) that the Yankton Sioux aboriginal territory was entirely east of the Missouri River in South Dakota. See Exhibits A and B to Applicants Brief in Opposition to Joint Motion. If the Yankton Sioux have aboriginal land claims, they are entirely in eastern South Dakota. Even if such claims exist, they do not include the route of the Keystone XL pipeline.

Second, Yankton Sioux concedes, on page 2 of its brief, that no court decision has ever held that it has usufructuary interests in the lands west of the Missouri transited by the proposed pipeline. That is exactly the point Applicant made in its opening brief, namely that Congressional abrogation of the treaties ended aboriginal and usufructuary rights in the subject lands before the turn of the last century and that no court has overturned that abrogation. For those reasons alone, Yankton Sioux's assertions should be ignored by the Commission.

B. The Commission does not have routing authority.

The Yankton Sioux contend that *In re Nebraska Public Power Distr.*, 354 N.W.2d 713 (S.D. 1984) stands for the proposition that ". . .the PUC [has] the authority to disapprove permit applications, including the proposed route."

By statute, SDCL Ch. 49-41B is not construed as "a delegation to the commission of the authority to route a transmission facility, AC/DC conversion facility, or wind energy facility, or

to designate or mandate location of an energy conversion facility." SDCL § 49-41B-36. *In re Nebraska Public Power* involved the proposed Mandan power line, a "trans-state transmission facility," not a "transmission facility" -- a distinction that is reflected in the definition sections of the statute, SDCL § 49-41B-2 (11) and 2.1(2).1. SDCL § 49-41B-36, noted above, applies to transmission facilities. The proposed Keystone XL pipeline is a transmission facility per definition, not a trans-state transmission facility like the Mandan power line. The Supreme Court did not consider the terms of SDCL § 49-41B-36 and did not cite the statute. The statutes cited in the opinion, SDCL §§ 49-41B-22.1 through 49-41B-22.2, are not particular to routing and address instead the applicant's burden of proof in a second proceeding after a permit has been denied. *Nebraska Public Power* cannot be read, contrary to the terms of SDCL § 49-41B-36, to support an argument that the Commission has routing authority.

In Conclusion of Law 13 in the June 2010 Amended Final Decision and Order, the Commission found it does not have the authority 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." The Commission was correct in its finding in 2010. Nothing has changed. The *Nebraska Public Power* case does not stand for what the Yankton Sioux asserts.

C. Statutory protections are not in issue.

Standing Rock argues that the federal National Historic Preservation Act and the Native American Graves Protection and Repatriation Act of 1990 confirm the existence of usufructuary rights in tribal Interveners in land areas crossed by the proposed Keystone XL pipeline.[1]

[11] Whether or not statutorily created interests are *usufructuary* in nature is an interesting academic debate, but of no consequence to this motion, given Applicant has already complied with the requirements of the subject statutes.

Applicant concedes both statutes apply to the proposed project, but notes the Commission already addressed those issues in its 2010 Order. Applicant makes no contention that the conditions that underpinned those provisions in the order have changed. Permit Condition 43 in the 2010 Order directs that Applicant follow the Unanticipated Discoveries Plan approved by the State Historical Preservation Office and the Department of State. The Unanticipated Discoveries Plan applies to matters considered in the NHPA and the NAGPRA. Condition 43 requires work be shut down upon discovery of an unanticipated or newly found cultural resource, grave site or other historical resource and directs how the SHPO will be engaged before construction resumes. Appendix Z to the State Department's January 2014 Final Supplemental Environmental Impact Statement, at section 12.0, page 66, describes how management of newly discovered cultural resources will be implemented, including consultation with Indian tribes. Condition 43 correctly manages the requirements of the NHPA and the NAGPRA.

Most importantly, Condition 43 is not in issue in this proceeding. SDCL § 49-41B-27, the certification statute and genesis of this proceeding, requires Applicant certify to the Commission that the proposed project "continues to meet the conditions upon which the permit was issued." In the Tracking Table filed with the certification application, Keystone addressed condition 43 and its subparts, noting in each instance that "it will comply" with each element of the condition. *Tracking Table, N0. 43-43.d.* The Certification Declaration of Corey Goulet also commits the Applicant to comply with the Conditions of the order.

There simply is no issue before the Commission regarding Applicant's ability to comply with Condition 43. There are no changed circumstances or new facts to consider. Applicant has said it will comply, not that it cannot comply or that circumstances now dictate some new unanticipated discoveries protocol.

This is not an appeal or retrial of the original proceeding. No one has challenged Condition 43. To the extent the rights asserted by the Tribes have their genesis in the NHPA and the NAGPRA, Applicant has committed to a method to manage those rights, the Commission has implemented a condition to ensure it, and no one has or can contend that Applicant cannot now "meet the conditions." Accordingly no evidence is required and no issue is open for consideration.

D. Tribal contentions that aboriginal rights are judicially recognized are wrong.

Standing Rock and Cheyenne River both contend the Indian Claims Commission and the U.S. Supreme Court have ruled the entire pipeline route is in the "*Sioux aboriginal area.*" *See Standing Rock Brief,* p. 2, *Cheyenne River Brief,* p. 4. The contention is misleading. Both tribes would have the reader think the courts have said the tribes have *aboriginal title* to the subject lands. While the cases may have discussed aboriginal areas, neither the Indian Claims Commission nor the Supreme Court made a finding that the proposed route is within lands subject to tribal *aboriginal title*.

Sioux Tribe v. United States, 21 Ind. Cl. Comm. 371 (1969) is an interim finding handed down in the middle of a decades-long dispute over reparations for federal taking of the Black Hills. The decision examines the 1851 Treaty of Ft. Laramie and associated history to determine what geographic area the treaty makers were considering in the treaty. It clarified a 1965 decision of the Commission on what mountains constituted the Black Hills and in so doing described the treaty borders, which included all of western South Dakota. The case is not a decision that establishes aboriginal title; rather, it simply describes what borders the treaty makers had in mind 101 years earlier.

The second case cited is the U.S. Supreme Court's final decision in the Black Hills case, *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). Standing Rock and Cheyenne River cite page 424 as affirming the Indian Court of Claims decision.[2] That simply is not the case. First, the 1969 Indian Court of Claims decision is not mentioned by the Supreme Court in its opinion. Second, the point citation to page 424 encompasses only a single paragraph, the last paragraph in the decision, which says nothing about aboriginal title. It simply notes that the government's actions regarding the Black Hills constituted a taking of land set aside by the 1868 Treaty and that compensation must be paid.

The cited cases are not authority for the conclusion that Standing Rock and Cheyenne River have aboriginal title to lands beneath the proposed pipeline route. As Yankton Sioux correctly pointed out, no case has found aboriginal title to the lands transited by the pipeline.

Conclusion

The Tribe's contention that aboriginal title and usufructuary rights are judicially supported is incorrect. No court has found that either survived Congressional abrogation of the 1868 Treaty of Fort Laramie. The Public Utilities Commission does not have jurisdiction or legal authority to decide issues pertaining to treaty rights and should not. If in fact, as Standing Rock intimates, the usufructuary rights in issue are those created by Congress in National Historic Preservation Act and the Graves Repatriation Act, both are addressed in Condition 43 of the 2010 Order. Given Applicant continues to affirm that it will comply with Condition 43, there is no issue to try in this limited scope certification proceeding.

[2] Note that Cheyenne River and Standing Rock briefs cite the Indian Claims Commission case at page 382 for the point made. There is no page 382 in the decision, rather, it ends at page 380. Both also cite the Supreme Court decision at "428 U.S." The correct citation is 448 U.S.

Applicant prays the Commission rule accordingly and grant its motion to exclude consideration of aboriginal title and/or usufructuary rights from the hearing.

Dated this 9th day of June, 2015.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ William Taylor
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 9th day of June, 2015, I sent by United States first-class mail, postage prepaid, or e-mail transmission, a true and correct copy of Applicant's Reply Brief – Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights, 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

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

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

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

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

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

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

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

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

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

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

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

Bruce Ellison
Attorney for Dakota Rural Action
518 6th Street #6
Rapid City, SD 57701
belli4law@aol.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/ William Taylor
One of the attorneys for Applicant