

IN THE SUPREME COURT OF SOUTH DAKOTA

**In the Matter of PUC Docket HP 14-0001,
Order Accepting Certificate of Permit issued
in Docket HP 09-001 to Construct the
Keystone XL Pipeline (Dakota Rural Action
Appeal)**

Case No. 28333

APPELLANT'S BRIEF

FOR DAKOTA RURAL ACTION

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED	iii
Jurisdictional Statement	1
Statement of Legal Issues	1
Statement of the Case and Facts	4
A. Introduction.	4
B. The Original PUC Permit.	7
C. Significant Erroneous Findings; Clear Error by the Commission and the Circuit Court.	8
1. Special Conditions imposed by PHMSA are deemed “voluntary” by TransCanada.	8
2. TransCanada’s risk analysis concerning the likelihood of spills and leaks was fatally flawed; facts ignored by the Commission and Circuit Court.	9
3. Evidence concerning flaws in TransCanada’s pipeline construction relating to the use of cathodic protection and fusion-bonded epoxy were ignored by the Commission and the Circuit Court.	12
4. TransCanada’s history of failure to comply with required land reclamation efforts.	16
5. The Commission and Circuit Court clearly erred when they ignored critical evidence presented concerning geological risks affecting the integrity of the proposed KXL Pipeline.	17
Argument	18
A. Standard of Review	18
B. The PUC Order and the Circuit Court’s Decision Affirming that Order are Clearly Erroneous.	21
1. TransCanada failed to meet its burden of proof in the proceedings before the Commission.	22
2. The PUC Order and its affirmation by the Circuit Court Order were clearly erroneous in that the underlying findings are not supported by evidence on the record.	25
3. The Commission abandoned its role in protecting South Dakota’s water resources and the health and safety of its residents, resulting in a clearly erroneous decision.	27
C. Commission Staff Role in Proceedings Gives Rise to Procedural Due Process Issues and Regulatory Capture.	29

D. The Commission’s Rulings Resulted in a Denial of Procedural Due Process to DRA and Other Intervenors.	31
Conclusion	32

APPENDIX:

1. Order dated June 19, 2017, of the Circuit Court of Hughes County, SD, in Case No. 16-33.
2. Memorandum Decision of the Circuit Court of Hughes County, SD, in Case No. 16-33.
3. Final Decision and Order Finding Certification Valid and Accepting Certification; Notice of Entry dated January 21, 2016, in Public Utilities Commission Docket No. HP14-0001.
4. Amended Final Decision and Order; Notice of Entry dated June 29, 2010, in Public Utilities Commission Docket No. HP09-001.
5. Cited Statutes.
6. Cited Regulations.
7. Stigler, “*The Theory of Economic Regulation*,” Bell Journal of Economics and Management Science (Spring 1971).

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

	Page No.
<i>Cases:</i>	
<i>Bean v. Best</i> , 76 S.D. 462, 80 N.W.2d 565 (S.D. 1957)	31
<i>Bishop Buffets, Inc. v. Westroads, Inc.</i> , 202 Neb. 171, 274 N.W.2d 530 (1979)	25
<i>Center for Biological Diversity, Inc. v. FPL Group, Inc.</i> , 166 Cal. App. 4 th 1349 (2008)	20
<i>Filsrand v. Madson</i> , 35 S.D. 457 (1915)	20
<i>Fortgang Bros., Inc. v. Cowles</i> , 249 Iowa 73, 85 N.W.2d 916 (1957)	25
<i>Frank Stinson Chevrolet, Inc. v. Connelly</i> , 356 N.W.2d 480 (S.D. 1984)	2, 25
<i>Goetz v. State</i> , 2001 S.D. 138, 636 N.W.2d 675 (S.D. 2001)	31
<i>Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.</i> 2014 S.D. 64, 853 N.W.2d 878 (S.D. 2014)	19
<i>Kaarup v. St. Paul Fire and Marine Ins. Co.</i> , 436 N.W.2d 17, 19 (S.D. 1989)	4, 31
<i>Kermmoade v. Quality Inn</i> , 2000 S.D. 81, ¶10, 612 N.W.2d 583, 586 (S.D. 2000)	19
<i>Onnen v. Sioux Falls Indep. Sch. Dist. No. 49–5</i> , 2011 S.D. 45, 801 N.W.2d 752 (S.D. 2011)	31
<i>Parks v. Cooper</i> , 2004 S.D. 27, 676 N.W.2d 823 (S.D. 2004)	20, 21
<i>Sopko v. C & R Transfer Co.</i> , 1998 S.D. 8, 575 N.W.2d 225 (S.D. 1998)	2, 3, 19, 26
<i>State v. Schwartz</i> , 2004 S.D. 123, 689 N.W.2d 430 (S.D. 2004)	21
<i>Tripp State Bank of Tripp v. Jerke</i> , 45 S.D. 580, 189 N.W. 514 (S.D. 1922)	2, 22
<i>Voorhees Cattle Company, LLP v. Dakota Feeding Company, LLC</i> , 2015 S.D. 68, 868 N.W.2d 399 (S.D. 2015)	3, 30
<i>W.R.B Corp. v. Geer</i> , 313 F.2d 750 (5 th Cir. 1963), <i>cert. denied</i> 379 U.S. 841 (1964)	19

<i>Statutes:</i>	
SDCL § 1-26-36	2, 19, 21
SDCL § 15-6-26(b)	1, 4
SDCL § 15-26A-3	1
SDCL § 19-19-502(b)	30
SDCL § 49-41B, <i>et seq.</i>	22
SDCL § 49-41B-22	27, 28, 31

SDCL § 49-41B-27	1, 2, 5, 6, 22, 23, 24, 25, 28, 30, 31
SDCL § 49-41B-33	31

<i>Regulations:</i>	
49 C.F.R. § 195.452	12
S.D. Admin. R. 20:10:01:15.01 (2006)	22

<i>Other Authorities:</i>	
1 S. Childress & M. Davis, <i>Federal Standards of Review</i> § 2.07 at 2-44 (2 nd ed. 1992)	19
Carstens, <i>The Public Trust Doctrine: Could a Public Trust Declaration for Wildlife Be Next?</i> (2006) vol. 2006, No. 9, Cal.Envtl. L.Rptr. 1)	20
Stigler, “ <i>The Theory of Economic Regulation</i> ,” Bell Journal of Economics and Management Science (Spring 1971)	30

Jurisdictional Statement

Dakota Rural Action (“**DRA**”) appeals the Order and Memorandum Decision (“**Order**”) entered by the Circuit Court for the Sixth Judicial District of the State of South Dakota on June 19, 2017 in Case No. 16-33. The Order resulted from an appeal to the Circuit Court of the Final Decision and Order Finding Certification Valid and Accepting Certification (the “**PUC Order**”) entered by the South Dakota Public Utilities Commission (the “**Commission**”) on January 21, 2016 in favor of TransCanada Keystone Pipeline, LP (“**TransCanada**”) in Commission Docket No. HP14-001. DRA filed its Notice of Appeal on July 19, 2017. The Order constitutes a judgment or final order by the Circuit Court from which appeal is allowed under SDCL § 15-26A-3.

Statement of Legal Issues

A. Whether the Circuit Court erred in affirming the Commission’s decision that TransCanada was not required to present substantial evidence in support of its petition for certification under SDCL § 49-41B-27.

SDCL § 49-41B-27 requires that TransCanada certify to the Commission that it continues to meet the conditions of the Original Permit.¹ How this statute is implemented is a core question in this case. The Original Permit contained 50 basic conditions, which combined with various sub-conditions, included 107 separate conditions. In the hearing before the Commission, TransCanada only presented evidence concerning compliance with six conditions, and the Commission staff presented evidence relating to only four

¹ “Original Permit” references the Commission’s Amended Final Decision and Order of June 29, 2010 in Docket HP09-001.

conditions. TransCanada and the Commission staff take the remarkable position that the statute only requires notice to the Commission in order to obtain certification. DRA and other intervenors argue to the contrary. If the statute is to have any meaning, companies seeking to certify continued compliance with a permit must present evidence of compliance. TransCanada's failure to present evidence demonstrating compliance with the conditions of the Original Permit, and the Commission blindly accepting the company's speculative assurances that it might comply at some point in the future resulted in a decision by both the Commission and the trial court that was clearly erroneous and against the weight of the evidence. In its decision, the trial court improperly inverted the burden of proof by holding that DRA and other intervenors must affirmatively prove TransCanada could not comply with the conditions of the Original Permit.

Relevant cases and statutory authority:

Sopko v. C & R Transfer Co., 1998 S.D. 8, 575 N.W.2d 225 (S.D. 1998).

Tripp State Bank of Tripp v. Jerke, 45 S.D. 580, 189 N.W. 514 (S.D. 1922).

Frank Stinson Chevrolet, Inc. v. Connelly, 356 N.W.2d 480 (S.D. 1984).

SDCL § 49-41B-27.

SDCL § 1-26-36.

B. Whether the Circuit Court erred in affirming the Commission's decision that evidence on the administrative record warranted granting certification under SDCL § 49-41B-27.

Testimony before the Commission established serious credibility problems with respect to TransCanada's witnesses. When the evidence is viewed as a whole, TransCanada failed to meet its burden of proof.

Relevant cases and statutory authority:

Sopko v. C & R Transfer Co., 1998 S.D. 8, 575 N.W.2d 225 (S.D. 1998).

C. Whether the Circuit Court erred in affirming the Commission's decision that communications between Commission staff and TransCanada constituted confidential attorney communications not subject to discovery by DRA.

While this question appears rather narrow, it has significant implications that go directly to the role of the Commission and its staff as a regulatory agency for the State of South Dakota. During the Commission's proceedings, DRA sought discovery of communications between the Commission staff and TransCanada. Following objections and a motion to compel, the Commission refused to permit discovery of those communications on the basis that they constituted privileged attorney work product. The trial court upheld the Commission's determination on the basis that the Commission staff was a separate party to the proceedings and that a Chinese wall existed between the Commission and its staff with respect to the proceedings. This misses the mark. The Commission's staff are government employees of a regulatory agency. The public is entitled to access communications between a regulatory agency and the companies it purports to regulate regardless of an alleged separation between staff and the Commissioners. This is a critical issue because if communications between a regulatory agency and regulated industries are not open and transparent, the public has no way of determining whether the agency has been subjected to regulatory capture.

Relevant cases and statutory authority:

Voorhees Cattle Company, LLP v. Dakota Feeding Company, LLC, 2015 S.D. 68, 868 N.W.2d 399 (S.D. 2015).

D. Whether the Circuit Court erred by affirming the Commission’s decision granting certification notwithstanding numerous procedural defects in the proceedings before the Commission.

The Commission’s proceedings were plagued with procedural defects that resulted in a process that erroneously limited discovery and excluded both witnesses and exhibits. The most significant errors were the Commission’s limitation on the scope of discovery, its exclusion of witness testimony, and its exclusion of a significant number of DRA’s exhibits. Early in the proceedings, the Commission granted TransCanada’s request to limit the scope of discovery to the conditions of the Original Permit. This restriction resulted in a denial of DRA’s and other intervenors’ due process rights.

Relevant cases and statutory authority:

Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N.W.2d 17, 19 (S.D. 1989).
SDCL § 15-6-26(b).

Statement of the Case and Facts

A. Introduction.

This is a case of first impression and one of national significance. To say that proposed construction of the Keystone XL Pipeline (“**KXL**” or the “**Project**”) is controversial would be an understatement. The proceedings in South Dakota are one piece of a larger national argument about KXL and other oil pipelines. That debate encompasses the role the fossil fuel industry plays in global climate change, to the desirability of continuing to sink costs into fossil fuel infrastructure as our economy increasingly shifts towards an emphasis on development of clean renewable energy, to the legitimate environmental risks posed by an industry whose prime directive appears to be

putting pipe in the ground as fast and cheap as possible – while worrying about the consequences later.

More specific to South Dakota, this case raises serious questions of first impression concerning the role of the Commission in permitting hydrocarbon pipelines, interpretation of the South Dakota statutes governing certification of compliance with permits for pipelines, the relationship between the Commission, its staff, and the industries it purports to regulate, and the threshold standards a company such as TransCanada must meet when seeking to route an environmentally-destructive project through private property in South Dakota. Beyond these questions, this case is characterized by the hubris of a large multinational corporation displaying a sense of entitlement with respect to taking land from farmers and ranchers for its own private purposes, the apparent unwillingness of a state regulatory agency to do much other than shield that corporation from the legitimate concerns raised by landowners and citizens about a project with significant implications for the state's land and water resources, and significantly, the effect of the Commission's actions in creating a virtually unlimited encumbrance on the property rights of individuals whose farms and ranches are within the proposed path of the KXL pipeline.

This struggle played itself out via an underlying challenge made by DRA and other intervenors to TransCanada's petition for certification under SDCL § 49-41B-27 of the Commission's Amended Final Decision and Order of June 29, 2010 (the "**Original Permit**"), for construction of the proposed Keystone XL Pipeline through South Dakota. The Original Permit was subject to fifty separate conditions, many with multiple sub-conditions. The statute provides in pertinent part that:

“Utilities which have acquired a permit in accordance with the provisions of this chapter may ... **if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.**” SDCL § 49-41B-27 (*emphasis added*).

Because construction of the Project had not commenced within four years of obtaining the Original Permit, TransCanada was required to certify to the Commission that “such facility continues to meet the conditions upon which the permit was issued.” The Commission proceedings culminated in a nine-day evidentiary hearing held on July 27 through August 1, and August 3 through August 5, 2015 (AR 031683)².

The proposed KXL Pipeline would primarily be used to transport tar sands crude oil extracted from the Western Canadian Sedimentary Basin from a hub near Hardisty, Alberta, Canada to delivery points in Oklahoma and Texas (AR 009173, referencing *U.S. State Dept. Final Supplemental Environmental Impact Statement* (“**FSEIS**”), pp. ES-6-7). In South Dakota, the proposed KXL Pipeline would cross portions of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman and Tripp counties (AR 031684-031685).

Should the Court desire a detailed procedural history of the proceedings before the Commission, a comprehensive history is set forth in the PUC Order. The transcripts of hearing held before the Commission, along with the parties’ exhibits, as well as the transcript of the hearing before the Circuit Court, are filed with the Court as part of the record on appeal. Because of the breadth of information presented in these proceedings, this statement of facts will focus on items relevant to the issues raised by DRA on appeal.

² “AR” references the Administrative Record as filed by the Commission in the proceedings before the Circuit Court.

B. The Original PUC Permit.

The Original Permit was issued on June 29, 2010 (AR 031684) and contained fifty separate conditions and multiple sub-conditions, each of which TransCanada had to certify that it could continue to meet. Some of the more significant conditions relevant to matters raised by DRA on appeal include (by condition number): **(1)** Compliance with all applicable laws and regulations with respect to construction and operation of the Project (Original Permit, p. 25); **(2)** Obtain and thereafter comply with all applicable federal, state and local permits – including the Presidential Permit (Original Permit, p. 25); **(3)** Comply with and implement the recommendations set forth in the US State Department’s final Environmental Impact Statement (Original Permit, p. 25); **(13)** Comply with all mitigation measures set forth in TransCanada’s Construction Mitigation and Reclamation Plan (“**CMR Plan**”) (Original Permit, p. 27); **(16)** Repair and restore property damaged by construction to their preconstruction condition (Original Permit, p. 28); **(25)** Suspend construction when weather conditions are such that construction activities will cause irreparable damage (Original Permit, p. 33); **(26)** Reclamation and clean-up along right-of-ways must be continuous and coordinated with ongoing construction (Original Permit, p. 33); and **(31)** Construct and operate the Project in the manner described in TC’s application and in accordance with the conditions of the Original Permit and a Special Permit, if issued, by the U.S. Pipeline and Hazardous Materials Safety Administration (“**PHMSA**”) (Original Permit, p. 34).

During the proceedings before the Commission, DRA explored a number of conditions of the Original Permit to determine whether TransCanada could continue to comply with them. The Commission made several findings in the PUC Order which were challenged in the Circuit Court by DRA and other intervenors. While some of the

findings are mere statements of fact (Findings No. 1-7 identify parties and witnesses, among other things) others are clearly erroneous based upon evidence on the record. Unfortunately, the Circuit Court compounded the Commission's error by failing to take into account the evidence on the record.

C. Significant Erroneous Findings; Clear Error by the Commission and the Circuit Court.

Because of the voluminous record in this case, a detailed discussion of each and every clearly erroneous finding made by the Commission and adopted by the Circuit Court is impossible given page limitations. However, there are several key findings that serve to illustrate that the Commission clearly erred in finding that TransCanada was in compliance with the conditions of the Original Permit. To illustrate the Commission's error (and the Circuit Court's acquiescence in upholding clearly erroneous findings) we will focus on five key areas of testimony: (1) TransCanada's admissions that it does not deem federal pipeline safety conditions imposed by the U.S. Pipeline and Hazardous Materials Safety Administration ("PHMSA") as binding on the company, (2) serious flaws in TransCanada's risk analysis, (3) TransCanada's history of construction and safety issues with respect to pipelines, as illustrated by the failure of cathodic protection and issues with the use of fusion-bonded epoxy necessary to prevent pipeline corrosion, (4) TransCanada's failure to appropriately reclaim farmland as required by permit conditions, and (5) TransCanada's failure to appropriately consider geological risks threatening the integrity of its proposed Project.

1. Special Conditions imposed by PHMSA are deemed "voluntary" by TransCanada.

Findings No. 18 and 20 of the PUC Order state that TransCanada both adopted and promised to meet special conditions developed by PHMSA as set forth in Appendix Z of the FSEIS (AR 031685). The Commission’s findings are interesting when viewed in the context of the record. TransCanada’s employee Meera Kothari³ testified before the Commission that Appendix Z of the FSEIS contains fifty-nine special conditions PHMSA (the “**PHMSA Conditions**”) required with respect to the proposed KXL Pipeline (AR 025544-025545). Condition No. 2 of the Original Permit mandates TransCanada’s compliance with any conditions imposed by any permitting agency, including PHMSA, and Condition No. 2 requires that TransCanada comply with and implement the recommendations set forth in the FSEIS. Contrary to this regulatory requirement, Kothari testified that TransCanada would only need to comply with the PHMSA Conditions if it chose to do so. Her explicit testimony was that TransCanada has “voluntarily adopted to apply those Permit Conditions ...” (AR 025583-025594), despite her admission that PHMSA had not notified TransCanada that the PHMSA Conditions were voluntary in nature (AR 025585), and despite the fact compliance was required by Condition No. 3 of the Original Permit. A promise to comply is not a showing of continued compliance.

2. TransCanada’s risk analysis concerning the likelihood of spills and leaks was fatally flawed; facts ignored by the Commission and Circuit Court.

A second significant factor that constituted clear and manifest error by the Circuit Court and the Commission relates to the risk analysis TransCanada performed on the KXL project. The question of risk analysis is a significant issue with respect to pipeline

³ Meera Kothari was TransCanada’s lead project engineer for the KXL Pipeline project. She is not licensed as an engineer in the United States (AR 025603, 025681).

construction and permitting, as it goes to the heart of the problem with crude oil pipelines – making an honest assessment of the likelihood of a pipeline leak or spill. Finding 25 of the PUC Order states that a spill from the proposed KXL Pipeline in a High Consequence Area (“**HCA**”) would occur no more than once every 420 years (AR 031685). This claim is clearly erroneous. TransCanada’s risk analysis was performed by Heidi Tillquist, an environmental toxicologist with no formal training in risk analysis whose testimony demonstrated a lack of knowledge of basic principles of risk analysis. (TR: 850)⁴. Tillquist’s testimony revealed that TransCanada’s risk analysis was seriously flawed, and that the company had not even completed its engineering analysis for the Project (TR: 825-826).

Testimony before the Commission revealed significant flaws in TransCanada’s purported ability to comply with the Original Permit. This was demonstrated by an admission that the company’s choice of statistical methodologies used to calculate the risks posed by the KXL Pipeline were, in part, designed for public relations purposes (TR: 844-847). Testimony before the Commission revealed that TransCanada’s risk analysis was based largely on analysis of the PHMSA database (TR: 825-828), that it excluded risk of spills at tanks and terminals (TR: 832), that geographical variances were not taken into account (TR: 861-863), that differences in construction and operation standards between pipeline companies reporting in the PHMSA database (TR: 834-835) were not factored into the risk analysis, and that TransCanada failed to account for an increased likelihood of adverse weather events (TR: 867). These factors were ignored by

⁴ The designation “TR” references the transcript of the evidentiary hearing held before the South Dakota Public Utilities Commission in Docket No. HP14-001, which is part of the Record on Appeal in these proceedings.

both the Commission and the Circuit Court and are significant to the point where both the PUC Order and the Circuit Court's Order were clearly erroneous.

Further undercutting the Commission's findings (and the Circuit Court's Order) concerning the likelihood of spills, testimony before the Commission revealed there were 14 spills during the first year TransCanada operated its base Keystone pipeline (TR: 1005-1006). In testimony that defied credibility, a TransCanada witness claimed a pipeline that spills 14 times in its first year of operation is "safe" (TR: 1007).

Illustrating the risks posed, testimony was presented to the Commission concerning a 400-barrel crude oil spill on the base Keystone pipeline at the Ludden Pump Station in May 2001. This spill was the largest in that pipeline's first year of operation (*see*, DRA Hearing Exhibit 172). TransCanada's lead project engineer testified about the Ludden spill, indicating that it involved failure of an "above-ground component, such as a fitting" (ROA 025533). TransCanada was unwilling to guarantee that a larger spill would not happen if the KXL Pipeline were constructed (ROA 025677-025678).

This prior point was of significant concern because TransCanada's witness was unaware of calculations performed by a third-party consultant that under the latest detection equipment plan provided to the US State Department by TransCanada, a spill of approximately 1,400 barrels of crude oil could occur for two hours before being detected electronically by TransCanada's systems (ROA 025679-025680) (*see, also*, FSEIS, Appendix B, 3.0(1)(g), p. 28). 1,400 barrels of crude oil consists of 58,800 gallons.

These facts are significant because they demonstrate that the Commission's Findings 18 and 20 in the PUC Order concerning the likelihood of a spill were not based on credible, substantial evidence and were clearly erroneous in light of the entirety of the

evidence. The fact that the Circuit Court chose to ignore these significant issues likewise compounds the Commission's error. TransCanada's witness testified that calculation of a risk of a KXL spill was conservative (2.2 spills over 10 years of pipeline operation), yet the actual number of spills on the base Keystone pipeline greatly exceeded these "conservative" estimates (TR: 855-856, 860).

A critical factor ignored by the Commission and the Circuit Court is that risk assessments are required by PHMSA for HCAs (Original Permit, Condition 14; 49 CFR 195.452; FSEIS 3.0(14), p. 33). In the FSEIS, State Department analysts noted the "large differences" between "system components and facilities that comprise the discrete elements [which] cast uncertainty on the use of aggregated metrics for risk" and equally on the use of aggregated "professional engineering judgment." (FSEIS 3.0(26), p. 38). For example, the FSEIS observed that seals and seats have a "higher potential for spills than (on equipment & pumps)" (FSEIS, Appendix B, 3.0(11)(a), p. 32). The FSEIS indicated that due to "dominance" of risks "associated with mainline pipe and other system components (other than mainline valves or tanks)" the risk assessment required by 49 CFR § 195.452 should address both "to effectively reduce risk" (FSEIS 3.0(20a), p. 35). Contrary to the Commission's findings, TransCanada provided no evidence to demonstrate compliance with these requirements. On this basis alone, the PUC Order confirmed by the Circuit Court's Order was clearly erroneous in that TransCanada failed to demonstrate compliance with the conditions of the Original Permit.

3. Evidence concerning flaws in TransCanada's pipeline construction relating to the use of cathodic protection and fusion-bonded epoxy were ignored by the Commission and the Circuit Court.

Both the Commission and the Circuit Court ignored evidence concerning flaws in TransCanada's pipeline construction. This resulted in both the PUC Order and the Circuit Court's Order being clearly erroneous. Significant testimony before the Commission concerned the use of fusion-bonded epoxy ("**FBE**") coatings used on pipelines. Finding 28 of the PUC Order states that TransCanada has thousands of miles of the same grade of pipeline steel coated FBE already produced for the KXL Pipeline, and references only one instance of corrosion found to have occurred at a location in Missouri (AR 031686). The proclivity of steel pipe to corrode when buried is critical to assessing pipeline safety and the risk posed to land and water resources from a potential leak or spill. Because this was a significant issue, the role of cathodic protection and FBE in construction of the proposed KXL Pipeline was explored in testimony before the Commission. Cathodic protection is a technique used to control the corrosion of a metal surface near another metal surface by making it the cathode of an electrochemical cell. FBE is a coating applied to the outer surface of the metal pipe in order to protect it from corrosion from contact with the earth after burying it.

Development of the facts of the case involved exploration of a serious incident involving TransCanada's base Keystone pipeline in Missouri (TR: 1027). The incident, described as a "near miss," involved discovery of corroded areas on the walls of buried and in-service pipe, including areas where the pipeline wall nearly corroded through within two years of the being installed (TR: 1026).

Key evidence presented to the Commission included the *Study of Root Cause and Contributing Factors to the Keystone Pipeline Corrosion Anomaly - Final Report of TransCanada 2-13-13* (AR 024360-024361, 024371) (the "**Root Cause Study**"). The

Root Cause Study indicated that at one area the peak depth of an anomaly (corroded area of pipe) was “96.8%,” there were 6 anomalies caused by external corrosion (AR 024369-024370). Testimony from TransCanada before the Commission was that the “root cause” of the “corrosion anomaly was related to cathodic protection interference” (TR: 1026, 1029). Critically, TransCanada admitted that “under the regulations, the cathodic protection system doesn’t have to be operational when a pipeline goes into service” (AR 024180). This testimony raised serious concerns about the safety of TransCanada’s pipeline construction methods – concerns that were ignored by the Commission and subsequently the Circuit Court.

In testimony before the Commission, TransCanada’s witness acknowledged that the impact of corroded areas of pipe of the depth and size shown in the Root Cause Study was such that if the corrosion went through the remaining outer wall of the pipeline, then “obviously it would create a leak” (AR 024360). This “near miss” in Missouri caused an emergency shutdown of the base Keystone pipeline for four days (AR 024372). A potential cause of this incident was the existence of a shared utility corridor with another pipeline, which risks acceleration of corrosion, hence underscoring the need for robust cathodic protection to prevent such an eventuality. TransCanada’s witness claimed “no similar situation could exist in South Dakota because there are no shared utility corridors” (TR: 1025). This testimony was patently false, as another TransCanada witness testified the proposed KXL Pipeline route crosses a metal pipeline of Mni Wiconi water transportation system (AR 024181-024182; also AR 024763-024764), as well as a 50-year old cast iron water pipe for the City of Colome’s water system (AR 024257-024257).

In addition to testimony concerning the failure of cathodic protection, TransCanada's quality control problems with the use of FBE were ignored by the Commission (and the Circuit Court, with its affirmation of the PUC Order), resulting in findings that were clearly erroneous.

A TransCanada witness testified that FBE is applied to pipe at pipe coating mills and is subject to degradation by ultraviolet light (AR 25895-25896); yet that witness, who was the company's lead project engineer on the KXL project was unaware of any inspections performed on the FBE prior to the KXL pipe being moved to open yard storage (AR 25896), and that equipment used to check the thickness of FBE did not detect instances where FBE disbonds from the pipe (AR 25897).

Other witnesses provided information concerning degradation of FBE. A Commission staff witness, David Schramm,⁵ testified that concerning the effect of UV light and weather on exposed pipe, underscoring the need for effective FBE coating (AR 025982-025983). Cross examination of witnesses revealed that for safety purposes, FBE should be applied within six months of a pipe being manufactured (AR 026011-026012), yet a TransCanada witness indicated that the company did not act for at least one year to one-and-a-half years before applying FBE to pipe (AR 25655).

Evidence before the Commission revealed that TransCanada's practices with respect to quality assurance and maintaining the integrity of the pipe it places in the ground are, at best, suspect. Testimony concerning both the failures of cathodic protection and inadequate protection of pipeline coatings shows that findings in the PUC

⁵ David Schramm of EN Engineering was hired at the taxpayers' expense to provide independent analysis and testimony in the KXL Pipeline proceedings on behalf of the Commission's staff. At the time of the hearing, EN Engineering listed TransCanada among its clients. (AR 026498-026499).

Order were clearly erroneous, and the Circuit Court erred in accepting the Commission's findings.

4. TransCanada's history of failure to comply with required land reclamation efforts.

A key issue for South Dakota's farmers and ranchers is the requirement that pipeline companies effectively reclaim and restore land damaged during construction. Finding 41 of the PUC Order concerned land reclamation. Condition 16(m) of the Original Permit requires TransCanada to re-seed all land affected by pipeline construction with comparable grasses and native species. The Commission went to great lengths in its finding to attempt to contradict testimony by a DRA witness concerning TransCanada's ongoing failure, over a six-year period, to reclaim portions of land damaged during construction of the base Keystone pipeline (AR 031687). In making its findings, the Commission clearly erred as TransCanada was unable to controvert this critical evidence.

DRA's witness testified that even though the Commission required TransCanada to take into account weather conditions, the company's contractors used heavy machinery in wetlands area during heavy rains, causing tremendous damage (AR 026761-026762), and that efforts to re-seed property were haphazard, resulting in nothing but noxious weeds growing on the pipeline easement area (AR 026762-026763). Furthermore, in areas of the easement where crops are grown, heat from the pipeline affects the root structure of crops resulting in significantly reduced yields (AR 026793).

The PUC Order merely recites TransCanada's testimony that very few landowners remain who have reclamation issues, ignoring DRA's testimony that neighboring properties in the pipeline easement area were in the same poor condition

post-construction, yet those landowners simply chose not to follow up with TransCanada's obligations to them (AR 026798). Land reclamation is critical for South Dakota's farming and ranching families, yet the Commission clearly erred in making this key factual finding.

5. The Commission and Circuit Court clearly erred when they ignored critical evidence presented concerning geological risks affecting the integrity of the proposed KXL Pipeline.

The Commission heard extensive testimony concerning geological risks affecting the safety of the KXL project. This testimony was significant because it highlighted the fact that the proposed pipeline route traversed landslide-prone areas of South Dakota. Simply put, landslides and oil pipelines don't mix.

Findings 44-48 of the PUC Order specifically related to testimony presented by DRA's expert witness, a professor emeritus of geology at the South Dakota School of Mines (AR 031687-031688). Testimony included references to mapping from the US Geological Survey ("USGS") contained in the FSEIS, showing that the KXL Pipeline was routed through over 150 miles of Pierre Shale (AR 026403), areas characterized by the USGS as a "high landslide Hazard Area" (*see*, FSEIS, Volume 2, Chapter 3, 3.1 Geology, Figure 3.1.2-3, p. 3.1-29) due to its bentonite content. This was clearly contrary to TransCanada's witnesses – who were not expert geologists – who stated insisted that their Project would go through only 1.6 miles of areas prone to landslide risk (AR 025573-025574). Frankly, TransCanada's testimony was not credible and the Commission's blind acceptance of the company's account in the face of reality constituted clear error.

The importance of this testimony cannot be discounted. One of TransCanada's own witnesses admitted that landslide risk is an important safety consideration in routing a pipeline (AR 024709), and that the bentonite soils of the Pierre Shale posed risks (AR 024713). The risk of slope instability related to bentonite layers in South Dakota was further amplified by DRA's expert geologist (AR 026396), and one of TransCanada's witnesses finally admitted on cross examination that the company's routing maps did "obviously not" remove the pipeline from high landslide hazard areas (AR 024715).

The Commission clearly erred when it dismissed credible geological evidence presented by DRA's witness on direct examination and even admitted to by one of TransCanada's own witnesses on cross-examination. Instead, the Commission chose to rely entirely on conclusory statements from the flawed risk analysis presented by another TransCanada expert (an environmental toxicologist, not a geologist or geophysicist) to arrive at its findings that the risks posed by the Project were "highly unlikely." Findings 44-48 in the PUC Order are clearly erroneous and defy credibility. The Commission's findings in this regard constitute a willingness to turn a blind eye to facts in order to achieve a pre-ordained result. That constitutes reversible error.

Argument

A. Standard of Review

The Court has the power to reverse or modify agency decisions if "... substantial rights of the appellant[s] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are ... (3) [m]ade upon unlawful procedure; (4) [a]ffected by other error of law; (5) [c]learly erroneous in light of the entire evidence in the record; or (6) [a]rbitrary or capricious or characterized by abuse of discretion or

clearly unwarranted exercise of discretion.” SDCL § 1-26-36. Additionally, the Court has the authority to fully review all decisions made by an administrative agency such as the Commission. *Hayes v. Rosenbaum Signs & Outdoor Advertising, Inc.* 2014 S.D. 64, ¶ 7, 853 N.W.2d 878, 881 (S.D. 2014).

In the underlying proceedings, the parties and Circuit Court devoted significant time discussing the concept of substantial evidence. DRA and other intervenors argued that TransCanada failed to present substantial evidence supporting its petition for certification. However, as correctly articulated by the Circuit Court, the core question is whether the PUC Order was clearly erroneous. *Sopko v. C & R Transfer Co.*, 1998 S.D. 8, ¶¶ 6-7, 575 N.W.2d 225, 228-229 (S.D. 1998). The critical point, however, is that the Court can still determine that the Commission’s findings are clearly erroneous even if the Commission and the Circuit Court believe they are supported by substantial evidence. *Id.*, citing 1 S. Childress & M. Davis, *Federal Standards of Review* § 2.07 at 2-44 (2nd ed. 1992). This Court articulated the principle clearly in *Sopko*, when it held that “[e]ven when substantial evidence supports a finding, reviewing courts must consider the evidence as a whole and set it aside if they are definitely and firmly convinced a mistake has been made.” *Id.*, citing *W.R.B Corp. v. Geer*, 313 F.2d 750, 753 (5th Cir. 1963), *cert. denied* 379 U.S. 841 (1964).

With respect to review of the underlying record, the Court reviews the administrative decision essentially in the same manner as did the circuit court, reviewing the agency’s findings “unaided by any presumption that the circuit court’s decision was correct.” *Kermmoade v. Quality Inn*, 2000 S.D. 81, ¶10, 612 N.W.2d 583, 586 (S.D. 2000).

The final issue DRA asks this Court to consider is novel and of first impression. The Circuit Court's Order summarily declined to consider it as a framework for decision making, but DRA suggests that this Court should give it due consideration. In effect, DRA argues the Commission is held to a higher standard with respect to its decision-making process under the principles of the public trust doctrine. The public trust doctrine holds that certain natural resources belong to all and cannot be privately owned or controlled because of their intrinsic value to each individual and society. Public governmental bodies such as the Commission are, in effect, held to be trustees, with a fiduciary duty owed to the public to safeguard those resources. "[T]he Public Trust Doctrine is a critically important reminder of the duty of government to preserve wildlife, to protect the public's right to enjoy and benefit from a diverse ecosystem, and the duty of courts to carefully scrutinize any attempts to abandon the public trust in those resources." *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 166 Cal. App. 4th 1349 (2008) (quoting Carstens, *The Public Trust Doctrine: Could a Public Trust Declaration for Wildlife Be Next?* (2006) vol. 2006, No. 9, Cal.Envtl. L.Rptr. 1).

South Dakota explicitly recognized the public trust doctrine. In *Parks v. Cooper*, 2004 S.D. 27 ¶ 46, 676 N.W.2d 823, 848 (S.D. 2004), the Court held that "as matter of first impression, all water in South Dakota belongs to the people in accord with the public trust doctrine ..." This principle in South Dakota extends back to the earlier part of last century, when in *Filsrand v. Madson*, 35 S.D. 457 (1915), the Court held that a riparian owner of water cannot interfere with "navigating, boating, fishing, fowling and like public uses" by the public. Interestingly, while not directly addressing the public trust

doctrine, the Court, in *State v. Schwartz*, 2004 S.D. 123 ¶ 52, 689 N.W.2d 430, 443 (S.D. 2004), stated:

“[O]ur decision in *Parks v. Cooper* exhibits the type of deeply rooted regional issue—preservation of precious water resources through the public trust doctrine—that a court might take into account in examining a disputed provision of our constitution.” *Id.*

DRA urges the Court to adopt the public trust doctrine to impose a heightened fiduciary standard on the Commission to protect South Dakota’s environment and resources from potential damage from a pipeline leak or spill. The public trust doctrine has explicitly been extended to protection of the State’s water resources – which would include its surface and groundwater. The same principle applies to protection of the State’s land, including its soil, native grasses, and crops. DRA suggests that the application of the public trust doctrine means that the Commission should have set a higher bar for companies such as TransCanada, whose activities risk damaging the State’s land and water resources. This Court should review the Commission’s Order through the lens of the public trust doctrine in addition to the base-line statutory standard set under SDCL § 1-26-36.

B. The PUC Order and the Circuit Court’s Decision Affirming that Order are Clearly Erroneous.

The PUC Order and the Circuit Court’s Order should be reversed for a number of reasons – purely as a matter of law in light of the statutory requirements of SDCL § 1-26-36 – not even taking into account the heightened standard of review urged by DRA. The PUC Order was clearly erroneous in light of the entire evidence in the record, was based on unlawful procedure, violates the statutory provisions of South Dakota’s Energy

Conversion and Transmission Facilities law, SDCL Chapter 49-41B, and contains numerous legal and factual errors warranting reversal.

1. TransCanada failed to meet its burden of proof in the proceedings before the Commission.

TransCanada's burden of proof is a key issue in this case. It is important because the parties have widely diverging views this Court needs to resolve as a matter of first impression.

The evidentiary record is clear. Under SDCL § 49-41B-27 TransCanada had to demonstrate that it could comply with all of the conditions imposed by Commission in the Original Permit. In a monumental act of hubris, TransCanada chose to only present evidence of compliance with six of the 50 conditions (107, including sub-conditions), and in its support of TransCanada, the Commission staff only presented evidence as to four conditions. Instead of meeting its burden of proof, TransCanada abandoned the playing field. In its effort to save TransCanada, the Commission then improperly shifted the burden of proof onto the intervenors. This inversion of a key legal principle underpins numerous findings set forth in the PUC Order and the Circuit Court's Order.

TransCanada unequivocally bears the burden of proof in advancing its petition for certification under SDCL § 49-41B-27. This principle is long-standing under South Dakota law, which has affirmed "the well-established rule that, "He who asserts an affirmative has the burden of proving the same."” *Tripp State Bank of Tripp v. Jerke*, 45 S.D. 580, 189 N.W. 514 (S.D. 1922). Further, the Commission's own rules state that “[i]n any contested case proceeding ... petitioner has the burden of proof as to factual allegations which form the basis of the ... application, or petition ...” S.D. Admin. R. 20:10:01:15.01 (2006).

TransCanada is the petitioner and submitted a petition to the Commission pursuant to SDCL § 49-41B-27 alleging that it continues to meet the conditions upon which the Original Permit was issued. The petition asks the Commission to make a factual determination that it can continue to meet the conditions upon which the Original Permit was issued. That petition was opposed by the intervenors, including DRA. Hence, TransCanada has the burden of proving that its proposed KXL project continues to meet the conditions upon which the Original Permit was granted.

Upon conclusion of evidence presented to the Commission, counsel for Intervenor Standing Rock Sioux Tribe, joined by DRA and other intervenors, moved for immediate dismissal of TransCanada's petition for certification (AR 027338). As a visual aid to assist the Commission, counsel provided a "tracking table of non-evidence" which tracked each and every permit condition which had been the subject of testimony by TransCanada or Commission staff witnesses during the course of the proceedings (AR 027339). The import being that of the fifty conditions of the Original Permit (which contained 107 separate and distinct requirements), during the entire course of the proceedings, TransCanada presented limited and insufficient evidence only as to its purported ability to continue to comply with six conditions (specifically, Conditions Nos. 1, 2, 6A, 13, 15, and 31). Commission staff witnesses presented evidence as to four conditions (Conditions Nos. 1, 13, 15 and 31). (AR 27340).

In what appears to be an attempt to save TransCanada from a fatal self-inflicted wound, the Commission came to the company's rescue by first improperly inverting the burden of proof, and second, by accepting (in Conclusion of Law No. 8 of the PUC Order

(AR 031694)) the premise that a conclusory statement by TransCanada that it “certified” that it could continue to meet the conditions of the Original Permit was sufficient.

The Commission went even further. In arguments before the Circuit Court, the Commission’s counsel took the position that the requirements of SDCL § 49-41B-27 were such that TransCanada had to merely tell the Commission that it was in compliance with the Original Permit – without having to present any evidence of compliance at all. Commission counsel went so far as to say that the “statute lets the fox guard the henhouse.” (Transcript of 3-8-17 Circuit Court Hearing, p. 122). If that is the low bar the Commission has set for itself, it might as well not exist.

The PUC Order, as affirmed by the Circuit Court, erroneously shifted the burden of proof to the intervenors. For example, Finding No. 31, which relates to approximately 41 separate requirements within the 50 conditions of the Original Permit, recites that “[n]o evidence was presented that Keystone cannot satisfy any of these conditions in the future”. (AR 031686). Likewise, Findings Nos. 32, 33, 34, 37, 42 and 68 also recite, in somewhat similar language, that “no evidence was presented that Keystone cannot continue to comply with this condition.” (AR 031686-031687, 031691).

The Commission and Circuit Court attempted to justify this improper burden shifting by drawing a distinction between the burden of proof and the burden of production. This misses the mark. TransCanada failed to present any evidence as the vast majority of the Original Permit conditions. Even if DRA accepts the Commission’s and Circuit Court’s position (which it does not), the fact that TransCanada presented no evidence provides ample grounds to conclude that the company failed to meet its burden of proof. The Commission and Circuit Court clearly erred in attempting to shift the

burden of proof to the intervenors given “... the general rule that the burden of proof falls on the party alleging the affirmative of an issue.” *Frank Stinson Chevrolet, Inc. v. Connelly*, 356 N.W.2d 480, 482 (S.D. 1984).

This Court has noted that the test for determining which party has the burden of proof, “is found in the result of an inquiry as to which party would be successful if no evidence were given, the burden being on the adverse party.” *Frank Stinson Chevrolet, supra*; (citing *Bishop Buffets, Inc. v. Westroads, Inc.*, 202 Neb. 171, 274 N.W.2d 530 (1979); *Fortgang Bros., Inc. v. Cowles*, 249 Iowa 73, 85 N.W.2d 916 (1957)).

TransCanada had the burden of demonstrating that it could continue to comply with the conditions of the Original Permit. In the absence of any evidence, certification could not have been granted. SDCL § 49-41B-27 is clear that it is up to the applicant to meet the burden. TransCanada failed to do so and the PUC Order and Circuit Court’s Order should be reversed.

2. The PUC Order and its affirmation by the Circuit Court Order were clearly erroneous in that the underlying findings are not supported by evidence on the record.

In the preceding section of this brief setting forth the facts of the case, DRA described five key areas where the Commission clearly erred in finding that TransCanada was in compliance with the conditions of the Original Permit. In each of these instances, the evidentiary record clearly demonstrates TransCanada’s unwillingness or inability to comply with the Original Permit conditions, or simply sets forth an instance where TransCanada chose to present no evidence of compliance.

The five key areas of evidence in the hearing before the Commission included (1) TransCanada’s admissions that it does not deem federal pipeline safety conditions

imposed by PHMSA as binding on the company, (2) serious flaws in TransCanada's risk analysis, (3) TransCanada's history of construction and safety issues with respect to pipelines, as illustrated by the failure of cathodic protection and issues with the use of fusion-bonded epoxy necessary to prevent pipeline corrosion, (4) TransCanada's failure to appropriately reclaim farmland as required by permit conditions, and (5) TransCanada's failure to appropriately consider geological risks threatening the integrity of its proposed Project.

The standard articulated by this Court in the *Sopko* case warrants an examination of the evidence, with the clear direction that the Court should consider the evidence as a whole, and set aside the Commission's and Circuit Court's findings if it is convinced a mistake has been made. *Sopko v. C & R Transfer Co.*, supra, at 228-229. The standard in *Sopko* has been met. The weight of the evidence is firmly against TransCanada in two respects – first, for those Original Permit conditions where no evidence was presented by the company (the vast majority) there is simply no evidence to satisfy TransCanada's burden of proof. Hence, any findings relating to those conditions are, by default, clearly erroneous as the Commission and Circuit Court had nothing in the record to enable any type of a determination other than to tell TransCanada that it had not met its burden and that certification should be denied.

Second, with respect to the subject matter areas explored in cross examination of TransCanada's witnesses and in direct examination of the various intervenors' witnesses, it is clear that the weight of the evidence was not in TransCanada's favor – either with respect to its approach to special conditions imposed by PHMSA, its flawed approach to risk analysis, its history of poor quality control and construction defects on pipelines, its

failure to reclaim land owned by farming and ranching families post-pipeline construction, and even with respect to its approach to pipeline routing and failure to take the unique geology and soil composition of South Dakota into account, thereby amplifying risks of a pipeline leak or spill.

Quite frankly, the combination of TransCanada's failure to support its petition for certification with evidence, along with credible testimony to the contrary from DRA's witnesses, followed by inadequate responses by the company, lead to no conclusion other than the proposed KXL pipeline poses significant risks to the State of South Dakota and that the Commission and Circuit Court's Orders were clearly erroneous in that they ignored both the lack of evidence as well as the evidence forwarded by DRA and other intervenors in order to grant certification. Reversal is clearly warranted.

3. The Commission abandoned its role in protecting South Dakota's water resources and the health and safety of its residents, resulting in a clearly erroneous decision.

Finding 43 in the PUC Order took the position that testimony from a number of intervenors regarding the potential impact of the proposed KXL project on South Dakota's water resources does not apply to TransCanada's ability to demonstrate continued compliance with conditions of the Original Permit, but instead, relates to its burden of proof under SDCL § 49-41B-22 (AR 031687), which the Commission does not believe is applicable. The Commission's position is incorrect. SDCL § 49-41B-22 states that:

The applicant has the burden of proof to establish that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;

- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

TransCanada was required to establish that it met the requirements of SDCL § 49-41B-22 to obtain the Original Permit. SDCL § 49-41B-27 requires the company to demonstrate that it continues to comply with the Original Permit conditions. Those conditions, by necessity, include the relevant portions of SDCL § 49-41B-22 and particularly Original Permit condition number 1, which requires TransCanada to “comply with all applicable laws and regulations in its construction and operation of the Project.” By dismissing the intervenors’ concerns about the Project’s potential effects on South Dakota’s water resources, the Commission seriously erred. TransCanada had the burden to demonstrate that its proposed Project could continue to meet all these conditions, including that it neither “pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area” and that it “will not substantially impair the health, safety or welfare of the inhabitants.” SDCL § 49-41B-22.

It is unfortunate that the Commission chose to abrogate its responsibilities and not hold TransCanada accountable under the statute. For example, evidence at the hearing before Commission revealed that TransCanada failed to prepare a health impact statement, and that its Emergency Response Plan set forth in the FSEIS failed to indicate a specific medical emergency response plan (AR 026266). Testimony at the hearing highlighted that emergency responders were not adequately prepared to deal with either testing or handling potential spills of tar sands crude oil, a component of which consisted

of a highly toxic chemical, benzene (AR 026266-026268). This is a serious concern because “benzene is the dominant toxin to be concerned about” and because “of benzene’s solubility and its allowable limit of only 5 parts per billion in drinking water, a pipeline leak could contaminate a large volume of surface water and groundwater” (AR 026268-026269). Furthermore, testimony revealed there was no evidence demonstrating that TransCanada had interfaced in any way with the Indian Health Service in regard to developing emergency medical responses (AR 026268).

The Commission’s failure to consider the effect of a potential KXL tar sands crude oil spill on South Dakota’s water resources was a manifest legal error and, in light of the facts elicited at the hearing, resulted in a decision by the Commission that was clearly erroneous with respect to Finding 43 of the PUC Order and TransCanada’s ability to continue to meet the conditions of the Original Permit.

C. Commission Staff Role in Proceedings Gives Rise to Procedural Due Process Issues and Regulatory Capture.

One of the more interesting questions arising in this case comes from an order entered by the Commission denying DRA’s motion to compel discovery from Commission staff (AR 004798-004799). DRA sought copies of communications between TransCanada, the Commission and its staff. This information was sought because of perceptions on the part of DRA and other intervenors that the interests of a regulatory agency and a company within the industry it purports to regulate were improperly aligned. The discovery sought was crucial to determining the level of regulatory capture in the relationship between the Commission and oil pipeline operators. Regulatory capture is a form of government failure that occurs when a regulatory agency, created to act in the public interest, instead advances the commercial or political concerns of special

interest groups that dominate the industry or sector it is charged with regulating. It is a recognition that “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.” George Stigler, “*The Theory of Economic Regulation*,” Bell Journal of Economics and Management Science (Spring 1971).

In denying DRA’s motion to compel discovery, the Commission erroneously determined that the records sought constituted attorney work product (AR 004798-004799). The attorney work product doctrine exists for the purpose of protecting the attorney/client privilege. There is no attorney/client privilege between a regulatory agency and the industries it regulates. A privilege exists only where there is (1) a client; (2) a confidential communication; (3) the communication was made for the purpose of facilitating the rendition of professional legal services to the client; and (4) the communication was made in one of the five relationships enumerated in SDCL § 19–19–502(b). *Voorhees Cattle Company, LLP v. Dakota Feeding Company, LLC*, 2015 S.D. 68, ¶10, 868 N.W.2d 399, 405 (S.D. 2015).

The Circuit Court side-stepped this issue by stating that the Commission staff was a separate party to the proceedings and did not advise the Commission concerning the proceedings. That misses the point. The Commission staff are employees of a regulatory agency charged with serving the public interest, and DRA and the general public are entitled to know if the Commission staff is serving the interests of the public or the companies they are supposed to oversee and regulate. This is a crucial point given the Commission’s counsel’s statement that the certification statute, SDCL §49-41B-27, is a case of the fox guarding the henhouse. (Transcript of 3-8-17 Circuit Court Hearing, p. 122).

D. The Commission's Rulings Resulted in a Denial of Procedural Due Process to DRA and Other Intervenors.

The Commission made numerous procedural errors that provide a basis for reversal. These errors started with the Commission's order on December 17, 2014, granting TransCanada's motion to limit the scope of discovery to the fifty conditions of the Original Permit and proposed changes to the findings of fact in the Original Permit that were identified in the company's "Tracking Table of Changes" attached as Appendix C to its petition for certification (AR 001528-001529), which adopted an erroneously narrow reading of SDCL § 49-41B-27 in that it failed to review the statute in context.

Statutes addressing the same subject matter are taken into consideration and read, or *in pari materia*. *Onnen v. Sioux Falls Indep. Sch. Dist. No. 49-5*, 2011 S.D. 45, ¶ 16, 801 N.W.2d 752, 756 (S.D. 2011). "Statutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." *Goetz v. State*, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683 (S.D. 2001). Certification of continued compliance under SDCL § 49-41B-27 must be read in the context of SDCL §§ 49-41B-22 and 49-41B-33 which permit revocation of a permit and which require consideration of factors including whether the proposed project will comply with all applicable laws and rules, pose a threat of serious injury to the environment or to the social and economic condition of inhabitants or expected inhabitants in the siting area, substantially impair the health, safety or welfare of inhabitants, or unduly interfere with the orderly development of the region.

The order limited discovery also ran afoul of established law concerning the scope of discovery in contested proceedings, which is broadly construed. *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989), citing *Bean v. Best*, 76 S.D.

462, 80 N.W.2d 565 (S.D. 1957). SDCL 15–6–26(b) provides, “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ...” A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial. *Kaarup v. St. Paul Fire and Marine Ins. Co.*, *supra*. The limitations placed on DRA and other intervenors by the Commission constituted reversible error.

Compounding its error, the Commission also excluded numerous DRA exhibits. While a small number of excluded exhibits were permitted on reconsideration (AR 021070- 021071), the Commission’s order was erroneous in that it was largely based on TransCanada’s complaint that the proposed exhibits were not timely disclosed in discovery. In making this ruling, the Commission abused its discretion and acted arbitrarily and capriciously because the bulk of the excluded exhibits constituted documents actually disclosed by TransCanada to DRA during discovery. TransCanada was on notice that its own documents could be used as exhibits. The Commission’s exclusion of those documents was in error and denied DRA procedural due process rights to which it was entitled.

Conclusion

The Commission made numerous fatal errors warranting reversal of its and the Circuit Court’s orders. The ultimate question, though, is whether TransCanada met its burden of proof demonstrating continued compliance with the conditions of the Original Permit as required under SDCL § 49-41B-27. TransCanada failed to meet its burden. It only presented evidence on six of the fifty conditions, and the evidence it presented was

inadequate when viewed in the entirety of the record. The PUC Order and the Circuit Court's Order should be reversed as they were clearly erroneous.

Respectfully submitted this 18th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the type volume limitation set forth in SDCL § 15-26A-66(b). The text of the brief, excluding the cover page, table of contents, and index to appendix, contains 9,191 words as determined by reliance on Microsoft Word.

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IN THE SUPREME COURT OF SOUTH DAKOTA

**In the Matter of PUC Docket HP 14-0001,
Order Accepting Certificate of Permit issued
in Docket HP 09-001 to Construct the
Keystone XL Pipeline (Dakota Rural Action
Appeal)**

Case No. 28333

APPENDIX TO APPELLANT'S BRIEF

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INDEX TO APPENDIX

1. Order dated June 19, 2017, of the Circuit Court of Hughes County, SD, in Case No. 16-33.
2. Memorandum Decision of the Circuit Court of Hughes County, SD, in Case No. 16-33.
3. Final Decision and Order Finding Certification Valid and Accepting Certification; Notice of Entry dated January 21, 2016, in Public Utilities Commission Docket No. HP14-0001.
4. Amended Final Decision and Order; Notice of Entry dated June 29, 2010, in Public Utilities Commission Docket No. HP09-001.
5. Cited Statutes.
6. Cited Regulations.
7. Stigler, "*The Theory of Economic Regulation*," Bell Journal of Economics and Management Science (Spring 1971).



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Re: Hughes County Civ. No. 16-33; *In the Matter of Public Utilities Commission Docket No. HP14-001, Order Accepting Certification of Permit Issued in Docket HP09-001 to Construct the Keystone XL Pipeline*

MEMORANDUM DECISION

This is an appeal from the Final Decision of the South Dakota Public Utilities Commission (“PUC”) regarding certification of TransCanada’s Keystone XL Pipeline Permit. Appellants are tribes, organizations, and individual landowners who intervened in the PUC’s proceeding and now appeal to this Circuit Court. In general, Appellants argue that TransCanada failed to prove that the Keystone XL Project “continues to meet the conditions upon which the permit was issued” in 2010. This Court AFFIRMS the decision of the PUC.

BACKGROUND

TransCanada Keystone Pipeline LP (“TransCanada”), appellee, is a Delaware limited partnership, a wholly owned subsidiary of TransCanada Corporation. TransCanada Reply Brief to Common Arguments of Several Appellants at 2. Based in Calgary, Alberta, Canada, TransCanada owns and operates power plants, natural gas storage facilities, and nearly 45,000 miles of crude oil and natural gas pipelines in Canada, the U.S., and Mexico. *Id.*

In 2005, TransCanada began developing the Keystone Project, anchored by two large capacity pipelines running from Hardisty, Alberta, to Patoka, Illinois and the Texas Gulf Coast. *Id.* The Keystone Pipeline, first operational in 2010, runs southeast from Hardisty to a point south of Winnipeg, then straight south across

North and South Dakota to Steele City, Nebraska, just north of the Nebraska-Kansas border. *Id.* In 2007, TransCanada applied for, and the South Dakota Public Utilities Commission issued, a construction permit for the Keystone Pipeline. *Id.* at 3.

In 2008, TransCanada announced its plan to construct the Keystone XL Pipeline. *Id.* The proposed Keystone XL Pipeline would primarily be used to transport tar sands crude oil extracted from the Western Canadian Sedimentary Basin from a hub near Hardisty, Alberta, Canada, to delivery points in Oklahoma and Texas. Dakota Rural Action Brief at 2; AR at 9173, referencing *U.S. State Dept. Final Supplemental Environmental Impact Statement* (“FSEIS”), pp. ES-6-7. In South Dakota, the proposed Keystone XL Pipeline would cross portions of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman, and Tripp counties. *Id.*; AR at 31684-31685.

On March 12, 2009, TransCanada filed an application with the South Dakota PUC for a permit as required by SDCL § 49-41B to construct the South Dakota portion of the Keystone XL Pipeline (“Pipeline”). ICOUP Brief at 1. The original application described the Pipeline to be an approximately 1,702 mile pipeline for transporting crude oil from Alberta, Canada, to the greater Houston area in Texas, with approximately 1,375 miles to be located in the United States, 313 of which would be located in the western part of South Dakota. *Id.* TransCanada was required to provide information including a description of the nature and location and the purpose of the proposed Pipeline to the PUC in its permit application in order for the PUC to make an informed, sound decision on the project under South Dakota Law. SDCL § 49-41B-11; Yankton Sioux Tribe Brief at 1. The PUC issued its *Amended Final Decision and Order* on June 29, 2010, based on that information. Yankton Sioux Tribe Brief at 1. As a part of its Final Decision, the PUC issued a detailed list of its findings of fact and conclusions of law that led to the decision. *Id.* Through this Final Decision, the PUC issued a permit authorizing construction of the Pipeline as the project was described and defined in the findings of fact contained in the 2009 Final Decision. *Id.*

On September 15, 2014, after failing to commence any construction in South Dakota over a four year period under its permit granted in 2010 in HP09-001, TransCanada filed a Certification with the PUC signed by Corey Goulet, President of the Keystone Pipeline business unit, on September 12, 2014, in Calgary, Alberta, Canada, and a Petition for Order Accepting Certification under SDCL § 49-41-27. ICOUP Brief at 1-2. The certification and petition, filed as PUC Docket HP14-001 asserted that the conditions upon which the PUC granted the facility permit in Docket HP09-001 continue to be satisfied. *Id.* The petition requested that the PUC issue an order accepting its certification pursuant to SDCL § 49-41B-27. *Id.* As an appendix to the petition, TransCanada submitted a document captioned “Tracking Table of Changes” that identified thirty (30) findings contained in the Final

Decision and, for each finding, sets out a new different finding. *Id.*; *see* Petition for Order Accepting Certification, Appendix C.

The Cheyenne River Sioux Tribe (“CRST”) filed for intervention in PUC docket HP14-001 on October 15, 2014. CRST Intervention at 305-07, Cheyenne Brief at 3. On October 30, 2015, TransCanada submitted a Motion to Define the Scope of Discovery. *Id.*; TransCanada’s Motion to Define Discovery at 1000-05. TransCanada asserted in its motion that the scope of the proceedings in Docket HP14-001 were narrowly confined by SDCL § 49-41B-27 to the fifty requirements listed in the original permit. *Id.* CRST opposed TransCanada’s Motion and filed its response on December 1, 2014. CRST Response to Motion to Define Discovery at 1249-61; Cheyenne Brief at 3. The PUC subsequently granted TransCanada’s Motion to Define the Scope of Discovery on December 17, 2014. PUC Order to Grant Motion to Define Issues at 1528-29; Cheyenne Brief at 3.

Following discovery, the PUC held an evidentiary hearing beginning on July 27, 2015. Cheyenne Brief at 3. The hearing lasted nine days and TransCanada submitted pre-filed direct testimony for its witnesses. *Id.*; TransCanada Pre-Filed Test. at 27465-917. At the conclusion of the evidentiary hearing CRST, along with other Appellants, made a Joint Motion to Deny the Petition for Certification on the grounds that TransCanada failed to submit substantial evidence. *Id.*; HP14-001 Evidentiary Hr’g Tr. at 27338, 27345; 7-11. The PUC denied the Joint Motion to Dismiss. HP14-001 Evidentiary Hr’g Tr. at 27361:16-18; 27367:13-14, Cheyenne Brief at 3-4.

Pursuant to the PUC’s instructions, CRST submitted its Post-Hearing Brief on October 1, 2015. CRST Post Hr’g Brief at 29538-559; Cheyenne Brief at 4. In its Post-Hearing Brief, CRST argued that the PUC must reject TransCanada’s Petition for Order Accepting Certification on the grounds that TransCanada failed to submit substantive evidence upon which it could grant the petition. Cheyenne Brief at 4. On November 6, 2015, after all post-hearing briefs had been submitted to the PUC, President Obama rejected TransCanada’s application for a Presidential Permit to cross the United States – Canada border. *Id.* Requirement number two (2) of the 2010 South Dakota permit explicitly requires TransCanada to obtain the Presidential Permit. *Id.* As such, on November 9, 2015, CRST and other Appellants filed a Joint Motion to Dismiss the Petition for Certification and Revoke the 2010 Permit. Joint Motion to Dismiss at 31347-355; Cheyenne Brief at 4.

CRST and others argued that, with the President’s rejection, it was now impossible for TransCanada to meet requirement number two (2) in the underlying permit. *Id.* On December 22, 2015, the PUC held a hearing dismissing Appellants’ Joint Motion, reasoning that it was still theoretically possible for TransCanada to eventually comply with the condition. PUC Motion Hr’g Tr. 31623:19-24 and 31625:1-14; Cheyenne Brief at 4.

On January 6, 2016, the PUC unanimously approved TransCanada's re-certification petition for continued construction through the western half of South Dakota. ICOUP Brief at 2. This region of the state, carved out of the heart of the Great Sioux Nation in 1889, remains home to five (5) of the nine (9) federally recognized, protected Indian reservations located within the geographic boundaries of South Dakota. *Id.* This region is presently untraversed by any major crude oil, refined products and highly volatile or hazardous liquid pipelines. *Id.* The only pipeline system of any real significance in this half of South Dakota is the Mni Wiconi Rural Water Supply Project which carries drinking water from the Missouri River near Pierre to "West River" communities and ensures safe and adequate municipal, rural, and industrial water supply for the residents of the Pine Ridge Indian, Rosebud Indian, and Lower Brule Indian Reservations and the citizens of Haakon, Jackson, Jones, Lyman, Mellette, Pennington, and Stanley counties. *Id.*

On January 21, 2016, the PUC granted TransCanada's Petition for Order Accepting Certification and published its Final Decision and Order Finding Certification Valid and Accepting Certification. PUC Final Decision and Order at 31668-695, Cheyenne Brief at 4. On February 19, 2016, CRST filed Notice of Appeal with the Sixth Circuit Court in Hughes County, TransCanada, and all interested parties in PUC Docket HP14-001. Cheyenne Brief at 4. CRST filed a Statement of Issues on February 29, 2016. *Id.* CRST and all other Appellants from PUC Docket HP14-001 subsequently filed a Motion and Stipulation for Consolidation and Extension of time on April 13, 2016. *Id.* at 4-5.

JUDICIAL NOTICE

To be built as proposed and originally permitted, the Pipeline needs permits from each of the states through which it passes. ICOUP Brief at 2-3. A Presidential Permit is required under federal law, because the proposed Pipeline crosses an international boundary. Executive Order 13337, 69 Fed. Reg. 25229 (August 30, 2004); Appellant Brief at 3. This Court takes judicial notice that on November 6, 2015, the U.S. Department of State denied TransCanada's second application for a Presidential Permit for the Keystone XL Pipeline. The federal Presidential Permit was rejected by the United States Department of State, after failed environmental reviews, as not in our national interest and denied on November 7, 2015. President Obama cited concerns about climate change, energy prices, and jobs as his major reason. ICOUP Brief at 2-3.

This Court also takes judicial notice that following the inauguration of President Trump, a number of actions have been taken to help facilitate the construction of both the Keystone XL Pipeline and the Dakota Access Pipeline (which would run thru a significant portion of Eastern South Dakota, though is not at issue in this case). On January 24, 2017, President Trump issued a Memorandum for the Secretary of State, Secretary of the Army, and Secretary of the Interior, which invited TransCanada to "promptly re-submit its application to

the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline, a major pipeline for the importation of petroleum from Canada to the United States.” Presidential Memorandum Regarding Construction of the Keystone Pipeline; <https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-keystone-xl-pipeline>. The Memorandum further directed that the Secretary of State shall take all actions necessary and appropriate to facilitate its expeditious review and reach a final determination within 60 days of TransCanada’s submission of the permit application. *Id.* The permit was submitted on January 26, 2017. <https://keystonepipeline-xl.state.gov/documents/organization/267737.pdf>. On March 24, 2017, the Under Secretary of State for Political Affairs issued a Presidential Permit to TransCanada authorizing TransCanada to construct, connect, operate, and maintain pipeline facilities at the U.S.-Canadian border in Phillips County, Montana. <https://www.state.gov/r/pa/prs/ps/2017/03/269074.htm>. This Court takes judicial notice of the current Presidential Permit.

QUESTIONS PRESENTED

Appellants join in these three substantive issues:

- I. Whether the PUC erred in denying Appellants’ Motion to Dismiss when the Presidential Permit was denied by the State Department and President Obama?
- II. Whether the PUC shifted the burden of proof to Appellants during the hearing, requiring Appellants to prove TransCanada cannot comply with the Conditions instead of requiring TransCanada to prove that they can comply?
- III. Whether the PUC committed clear error when it determined that TransCanada met its burden of proof by substantial evidence that it continues to meet the Conditions?

Appellants also appeal several discovery rulings and present these discovery-related issues:

- IV. Whether the PUC erroneously limited the scope of discovery by granting Motion to Define Issues?
- V. Whether the PUC committed clear error by ordering that pre-filed testimony be submitted

before discovery responses from a potential motion to compel were due?

- VI. Whether the PUC wrongfully excluded 20 intervenors' testimony as a discovery sanction for untimely disclosure?

DRA, ICOUP, and Yankton Sioux Tribe appeal several evidentiary rulings made by the PUC, and presents these issues:

- VII. Whether the PUC erroneously excluded DRA exhibits for untimely disclosure?
- VIII. Whether the PUC erred when it admitted and considered the "Tracking Table of Changes" prepared by TransCanada and included in its Petition for Certification?
- IX. ICOUP appeals whether the PUC erred when it failed to admit or consider climate change testimony during this Certification hearing?
- X. DRA appeals whether there was bias on behalf of the PUC regarding a denial to produce documents under the attorney work product doctrine and attorney-client privilege?

Next, Yankton Sioux Tribe appeals certain tribal rights issues:

- XI. Whether the PUC erred by relying on the Final Supplemental Environmental Impact Statement in FOF 57 that TransCanada consulted with the Standing Rock Sioux Tribe?
- XII. Whether the PUC erred by precluding testimony of aboriginal title or usufructuary rights?
- XIII. Whether the PUC erred when it concluded that Tribes are not "local governmental units" under Condition 6?

Finally, DRA individually appeals many of the PUC findings of facts. The Court will address those arguments that have merits. Otherwise, this Court summarily AFFIRMS all other PUC findings of fact. SDCL § 1-26-36.

STANDARD OF REVIEW

This court's review of a decision from an administrative agency is governed by SDCL 1-26-36.

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.”

SDCL 1-26-36. “Agency decisions concerning questions of law . . . are fully reviewable.” *Hayes v. Rosenbaum Signs & Outdoor Adver., Inc.*, 2014 S.D. 64, ¶ 7, 853 N.W.2d 878, 881.

All of the Appellants cite to pre-1998 case law for the outdated standard of review of an agency's findings of fact. Appellants cite to cases which applied a substantial evidence analysis to review an agency's findings.¹ However, the South

¹ *Abild v. Gateway 2000, Inc.*, 1996 S.D. 50, 6, ¶ 6, 547 N.W.2d 556, 558 (“Unless we are left with a definite and firm conviction a mistake has been made, the findings must stand. The question is not

Dakota Supreme Court revised and clarified the review standard in *Sopko I. Sopko v. C & R Transfer Co.*, 1998 S.D. 8, ¶ 6, 575 N.W.2d 225, 228. Our Supreme Court concluded,

To allay future confusion over the proper standard of review in administrative appeals, *we will no longer employ “substantial evidence” terminology.* In the past, we have regularly combined clearly erroneous and substantial evidence principles, but the latter is not the proper test. SDCL 1-26-36 was amended effective July 1, 1978, changing the standard of review for sufficiency of the evidence from “unsupported by substantial evidence on the whole record” to “clearly erroneous.” (For reasons unknown the definition remains unrepealed. SDCL 1-26-1(9)). The difference between the two standards should not be obscured: It is simply inaccurate to conclude, findings supported by substantial evidence are not clearly erroneous. 1 S. Childress & M. Davis, *Federal *229 Standards of Review* § 2.07 at 2-44 (2d ed. 1992) (citing cases from every federal circuit). Even when substantial evidence supports a finding, reviewing courts must consider the evidence as a whole and set it aside if they are definitely and firmly convinced a mistake has been made. *See W.R.B. Corp. v. Geer*, 313 F.2d 750, 753, (5th Cir.1963), *cert. denied* 379 U.S. 841, 85 S.Ct. 78, 13 L.Ed.2d 47 (1964). Furthermore, “[u]se of substantial evidence language, even in a technically correct comparison, is troublesome not only as a vestige of the rejected jury test, but also as a potential infringement on separate standards of review in other areas, such as administrative appeals.” Childress & Davis, *supra*, § 2.07, at 2-47.

Sopko v. C & R Transfer Co., 1998 S.D. 8, ¶ 7, n.2, 575 N.W.2d 225, 228-29 (“In our view, ‘substantial evidence’ and ‘clearly erroneous’ are not synonymous.”) (emphasis added).

whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them.”); *Therkildsen v. Fisher Beverage*, 1996 S.D. 39, ¶ 8, 545 N.W.2d 834, 836 (“Our standard of review of factual issues is the clearly erroneous standard. Under this standard, we must determine whether there was substantial evidence to support the Department’s finding.”); *Helms v. Lynn’s, Inc.*, 1996 SD 8, ¶ 10, 542 N.W.2d 764, 766.

Dakota Rural Action (“DRA”) asks this court to apply the Public Trust Doctrine and hold the PUC to a higher standard, a trustee with fiduciary duties to the public to protect natural resources. DRA Initial Brief, at 19-20. DRA suggests that the PUC should have set a higher bar for TransCanada, whose activities risk damaging the State’s land and water resources. As DRA cites, South Dakota adopted the Public Trust Doctrine in *Parks v. Cooper* and held, “we align ourselves with the Idaho, Iowa, Minnesota, New Mexico, Montana, North Dakota, Oregon, Utah, and Wyoming decisions that have recognized the public trust doctrine’s applicability to water, independent of bed ownership.” *Parks v. Cooper*, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 838. But *Parks* was an appeal to the Supreme Court from a declaratory judgment by a circuit court, not an administrative appeal, and the Supreme Court did not apply the Doctrine as an additional standard of review to SDCL § 1-26-36, but as a legal principle that “all waters . . . are held in trust by the State for the public.” There is no precedent for “review[ing] the PUC’s Order through the lens of the Public Trust Doctrine[.]” DRA Initial Brief at 20.

The standard of review the circuit court will apply when examining the PUC’s findings is “to decide whether they were clearly erroneous in light of the entire evidence in the record.” *Sopko v. C & R Transfer Co.*, 1998 S.D. 8, ¶ 6. “If after careful review of the entire record [the court is] definitely and firmly convinced a mistake has been committed, only then will [the court] reverse.” *Id.* Under the clearly erroneous standard, the question on appellate review is not whether the reviewing court would have made the same findings as the underlying court or agency, but whether on the entire evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Halbersma v. Halbersma*, 775 N.W.2d 210, 2009 S.D. 98.

ANALYSIS AND DECISION

I.

Whether the PUC erred in denying Appellants’ Motion to Dismiss when the Presidential Permit was denied by the State Department and President Obama?

In a statement by Secretary of State John Kerry on November 6, 2015, he stated,

“After a thorough review of the record, including extensive analysis conducted by the State Department, I have determined that the national interest of the United States would be best served by denying TransCanada a presidential permit for the Keystone XL pipeline. President Obama agrees with this determination and the

eight federal agencies consulted under Executive Order 13337 have accepted it.”

<http://www.state.gov/secretary/remarks/2015/11/249249.htm>.

“For proposed international petroleum pipelines (such as the Keystone XL Pipeline) the President of the United States, through Executive Order 13337, directs the Secretary of State to decide whether a project serves the national interest before granting a Presidential Permit.” Dakota Rural Action Brief at 21. DRA contends that PUC fatally erred in denying the Joint Motion to Dismiss which asked the PUC to revoke the Original Permit as a result of the denial of a Presidential Permit for the Project. *Id.*

Condition No. 2 of the Original Permit specifically provides that TransCanada “shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State”. *Id.* DRA argues that SDCL § 49-41B-27 clearly provides that TransCanada must show it could continue to meet the conditions of the Original Permit in order to obtain certification, not that they *will meet* conditions at some point in the future. *Id.* (emphasis added). DRA contends that when the Presidential Permit was applied for and denied, the PUC should have immediately dismissed TransCanada’s petition for certification and issued an order granting the Joint Motion to Dismiss. *Id.* at 22. DRA argues that the failure of the PUC to do so was in excess of its statutory authority, constituted an error of law, and was arbitrary or capricious in nature. *Id.*

The PUC looks to the definition of “shall” as meaning “something that *will* take place in the future,” and another definition of “shall” is a “requirement”. PUC Reply Brief to CRST at 17 (emphasis added). “Under KXL Condition 2, it is clear that [TransCanada] did not have the permits set forth in the condition at the time the KXL Decision was issued, but that it would be required to obtain such permits, to the extent such permits were still required, before it could proceed with the Project.” *Id.* PUC goes on to say that TransCanada has previously had its Presidential Permit denied and it has reapplied. *Id.* SDCL § 49-41B-33 allows the PUC to revoke TransCanada’s permit for “failure to comply with the terms or conditions of the permit”. *Id.* However, at this point the PUC states that they have not determined that such a time has arrived. *Id.*

DRA also touches on an argument raised by an individual Intervenor and rancher, Paul Seamans during the hearing on the Intervenor's Joint Motion to dismiss. *Id.* Mr. Seamans said, "if you let this thing go on forever and ever, you have that easement hanging over your head. And it's going to affect the salability of your land if you ever decide to sell it." Hr'g Tr. at 31600:13-16. DRA argues then that by denying the Joint Motion to Dismiss, the PUC has effectively told South Dakota landowners that title to their property is clouded in perpetuity. Dakota Rural Action Brief at 22. "A perpetual cloud on landowners' title, with a corresponding impairment of marketability of property, creates a tremendous issue with respect to due process of law and a deprivation of property rights." *Id.* Whatever significance that argument may have is rendered moot by the subsequent grant of the Presidential Permit, of which this Court has taken judicial notice, and is not now ripe for consideration in this proceeding.

This Court is in agreement with the PUC regarding the definition of *shall* in the Original Permit, that TransCanada could obtain the permit in the future and it would be required to do so prior to beginning construction on the Pipeline project. The PUC was not clearly erroneous in their decision to deny the Motion to Dismiss based on the denial of the Presidential Permit at the time of certification. Thus, the decision of the PUC is AFFIRMED.

II.

Whether the PUC shifted the burden of proof to Appellants during the hearing, requiring Appellants to prove TransCanada cannot comply with the Conditions instead of requiring TransCanada to prove that they can comply?

Pursuant to ARSD 20:10:01:15.01, in a contested case proceeding such as HP14-001, the "petitioner has the burden of proof going forward with presentation of evidence unless otherwise ordered by the commission". Yankton Sioux Tribe Brief at 10. Yankton argues that a plain reading of the rule required the PUC to place the burden of proof on TransCanada, and that the PUC issued no order to alter this standard. *Id.* However, Yankton asserts that the PUC "time and time again ruled in favor of [TransCanada] on the ground that the intervenors had failed to meet some nonexistent burden of proof". *Id.* Cheyenne River Sioux Tribe joins in this argument,

"The rules are explicitly clear and dispositive in the instant matter. TransCanada was the petitioner in HP14-001. TransCanada submitted a Petition for Order

Accepting Certification to the PUC pursuant to SDCL § 49-41B-27. TransCanada's Petition asked the PUC to make a factual determination that TransCanada can continue to meet the conditions upon which the original permit was granted. Intervening parties opposed TransCanada's Petition. As a result the PUC held a contested evidentiary hearing on the matter. During such a proceeding the rules state that TransCanada must carry the burden of proving that the proposed Keystone XL pipeline project continues to meet the conditions upon which the original permit was granted."

Cheyenne River Sioux Tribe Brief at 6.

Yankton cites to SDCL § 49-41B-22 in their brief to establish that the Applicant has the burden of proof when the PUC is acting as an adjudicator. Yankton Sioux Tribe Brief at 12. That statute reads,

"The applicant has the burden of proof to establish that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the sitting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government."

SDCL § 49-41B-22. However, this statute does not seem to be in concert with the actual issues at hand in this case.

Yankton also cites to ARSD 20:10:01:15.01, which states,

“In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant, applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.”

ARSD 20:10:01:15.01, Yankton Sioux Tribe Brief at 12. Yankton argues that this is the on-point rule, which the PUC is required to enforce. *Id.* at 13.

DRA also joins in this issue,

“The PUC in its Order, erroneously shifted the burden of proof to the intervenors. For example, Finding No. 31, which relates to approximately 41 separate requirements within the 50 conditions of the Original Permit, recites that “[n]o evidence was presented that [TransCanada] cannot satisfy any of these conditions in the future”. ([AR] 31686). Likewise, Findings Nos. 32, 33, 34, 27, 42, and 68 also recite, in somewhat similar language, that “no evidence was presented that [TransCanada] cannot continue to comply with this condition.” ([AR] 31686-31687, 31691). The PUC went even further in Conclusion of Law No. 10, which recites that the intervenors failed to establish any reason why TransCanada cannot continue to meet conditions of the Original Permit ([AR] 31694).”

Dakota Rural Action Brief at 26. DRA argues that TransCanada had the burden of demonstrating, through substantial evidence, that it could continue to comply with the conditions of the Original Permit, and in the absence of any evidence, certification could not have been granted. *Id.* TransCanada failed to meet their burden, and in an attempt to rescue the company, the PUC erroneously shifted the burden to the intervenors. *Id.*

TransCanada, on the other hand, contends that the Commission issued no explicit orders relating to the burden of proof other than the statements by various Commissioners throughout the proceeding that Keystone had the burden of proof. TransCanada Reply Brief to Common Arguments of Several Appellants at 10. Moreover, TransCanada argues,

“The Commission’s final decision does not indicate that it shifted any burden to the Appellants other than the

conclusion of law that [TransCanada] having met its burden, the Intervenor failed to establish any reason why [TransCanada] cannot continue to meet the conditions. That conclusion is not contrary to the administrative rule.”

Id. at 10-11.

During opening remarks at the beginning of the Evidentiary Hearing on July 27, 2015, Commissioner Nelson stated, “It is the Petitioner, TransCanada, that has the burden of proof. And under SDCL 49-41B-27 that burden of proof is to establish that the proposed facility continues to meet the 50 conditions set forth in the Commission’s Amended Final Decision.” HP14-001 Evidentiary Hr’g Tr. at AR 23968:6-10. Mr. Taylor, one of the lawyers appearing at that hearing on behalf of TransCanada Corporation gave an opening statement in which he acknowledge this burden by stating, “We are here today to meet Keystone’s burden of proof.” Id. at 24025:17-18.

TransCanada does not dispute that it had the burden of proof to show that its certification is valid. TransCanada Reply Brief to Common Arguments of Several Appellants at 8-9. However, TransCanada does not believe this means that the Appellants had no burden in the proceeding. Id. at 9.

“Rather, as the South Dakota Supreme Court has held, the term ‘burden of proof’ encompasses two distinct elements: ‘the burden of persuasion,’ i.e., which party loses if the evidence is closely balanced, and the ‘burden of production,’ i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding.”

Id. (citing *In re Estate of Duebendorfer*, 2006 S.D. 79, ¶ 42, 721 N.W.2d 438, 448). The burden of persuasion rests with the party having the affirmative side of an issue and does not change, but the burden of going forward with the evidence may shift. Id. TransCanada asserts that after they submitted their certification, accompanying documents, and testimony per SDCL § 49-41B-27, the Appellants, as challengers to TransCanada’s certification bore the burden of offering sufficient evidence to show that TransCanada’s certification was invalid because TransCanada could not in fact meet some of the permit conditions. Id.

This Court does not find clear error in the PUC’s application of the burden of proof in this case. While Appellants point to Findings by the PUC that no evidence was presented that TransCanada cannot satisfy conditions in the future, or continue to comply with the condition, this does not negate the burden of proof. TransCanada’s responsibility in meeting their burden of proof was to show that

they *can* continue to comply with the permit. If Appellant's want to show that it is impossible for TransCanada to do so or that TransCanada is not currently doing so, they must prove that affirmatively. The Court does not find that the PUC inappropriately shifted the burden of proof in this case, and that any shift that may have occurred was within their purview and not clearly erroneous.

III.

Whether the PUC committed clear error when it determined that TransCanada met its burden of proof by substantial evidence that it continues to meet the Conditions?

Yankton contends that TransCanada submitted a filing captioned "certification" with the PUC when it initiated this action. Yankton Sioux Tribe Brief at 18. "This document consists of a sworn statement by Corey Goulet, President of the Keystone Pipeline business unit, attesting that Keystone certifies that the conditions upon which the 2010 permit was granted continue to be satisfied." *Id.* Yankton believes this "certification" does not constitute evidence and is insufficient to prove continued compliance with the 50 conditions of the permit. *Id.* In fact, if filing a document labeled "certification" is sufficient to meet the burden of proof intended by SDCL 49-41B-27, then Yankton contends the burden should have shifted back to TransCanada upon Yankton's filing of a "certification" to the contrary. *Id.* at 20. Yankton did file a "certification" on October 30, 2015, which consisted of a sworn statement attested to by Yankton Sioux Tribal Chairman Robert Flying Hawk that TransCanada did *not* meet all 50 permit conditions. *Id.* (emphasis added).

Looking at the term "substantive evidence", SDCL § 1-26-1(9) provides some guidance, ". . . such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion". Cheyenne River Sioux Tribe Brief at 9, SDCL § 1-26-1(9). Cheyenne asserts that there was no physical evidence presented during the hearing but that TransCanada relied solely on the testimony of the witnesses that it submitted. *Id.* at 9. "With regard to testimonial evidence, such testimony must be specific and substantive in order to be regarded as substantive evidence sufficient to base an administrative decision." *Id.* at 11 (See *In re Establishing Elec. Boundaries*, 318 N.W.2d at 122). "Vague and/or conclusory testimony cannot be used to base a decision because such testimony is not substantive evidence." *Id.* (See *M.G. Oil Co.*, 793 N.W.2d at 823).

Cheyenne argues that the witness' testimony was not substantive because they merely referenced which changes he or she was responsible for in the Tracking

Table of Changes and then made a statement that he or she is unaware of any reason why TransCanada cannot continue to meet the permit conditions. *Id.* at 12 (See Direct Testimony of Corey Goulet at 27456-59; Direct Testimony of Meera Kothari at 27467-71; Direct Testimony of Heidi Tillquist at 27484-86; Direct Testimony of Jon Schnidt at 27508-12). “Such testimony merely recites the language of SDCL § 49-41B-27. Reciting the language of SDCL § 49-41B-27 followed by a vague statement of being unaware of any reason why [TransCanada] cannot comply in the future is materially no different from the testimony proffered in *M.G. Oil Co.*” *Id.* at 13. Cheyenne contends that TransCanada’s failure to submit specific and substantive testimonial evidence required the PUC to deny TransCanada’s Petition. *Id.*

PUC, however, contends that the reliance on *M.G. Oil Co.*, is misplaced. PUC Reply Brief to CRST at 15.

“The statements made by opponents of the conditional use permit in *M.G. Oil* were pure conclusory opinion statements made by persons opposed to the permit with no evidence of expertise or underlying factual justification whatsoever. The 31,000 plus pages of record, nine days of hearing, and 2,507 pages of evidentiary transcript and dozens of exhibits in this case bear no resemblance to the proceedings at issue in *M.G. Oil.*”

Id.

Yankton also asserts that the Commission committed reversible error by basing its decision on whether TransCanada is “able” to meet the requirement imposed by the 2010 permit, which is the incorrect standard to make the determination. Yankton Sioux Tribe Brief at 21. SDCL § 49-41B-27 reads,

“Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such

facility continues to meet the conditions upon which the permit was issued.”

SDCL § 49-41B-27. Yankton argues that this statute does not permit a utility to merely show that it is *able* to meet such conditions. Yankton Sioux Tribe Brief at 21 (emphasis in original).

Cheyenne River Sioux Tribe joins in this argument that the South Dakota Supreme Court has, on numerous occasions, declared that all agency actions must meet the “substantive evidence” standard of review. Cheyenne River Sioux Tribe Brief at 5. Cheyenne states that, “because TransCanada failed to submit any substantive evidence in the instant matter it has failed to meet the minimum burden of proof. As such, the PUC could not grant TransCanada’s Petition for Order Accepting Certification.” *Id.* at 5-6.

Upon the conclusion of evidence at the evidentiary hearing, a visual aid was provided to the PUC which tracked each and every permit condition which had been the subject of testimony by TransCanada or PUC staff witnesses during the course of the proceedings. Dakota Rural Action Brief at 25, referenced at AR 27339:23-24. DRA contends that of the Original Permit, which contained 107 separate and distinct requirements, during the entire course of proceedings, TransCanada presented limited and insufficient evidence only as to its purported ability to continue to comply with six (6) of the conditions. Dakota Rural Action Brief at 25. Furthermore, DRA argues that PUC’s staff’s witnesses only presented evidence as to four (4) conditions. *Id.*

TransCanada argues that its certification, testimony, and evidence were sufficient to meet its burden to prove the validity of its certification under SDCL § 49-41B-27. TransCanada Reply Brief to Common Arguments of Several Appellants at 14. The measure of TransCanada’s burden before the Commission was a preponderance of the evidence. *Id.* (citing *In re Setliff*, 2002 S.D. 58, ¶ 13, 645 N.W.2d 601, 605 (“The general burden of proof for administrative hearings is preponderance of the evidence.”)).

In its Reply Brief to Cheyenne River Sioux Tribe, PUC contends that a central issue to the proceeding boils down to what is meant by the term “certify” in SDCL § 49-41B-27, and what effect the use of that term has on issues such as the certifying party’s *prima facie* case and burden of proof. PUC Reply Brief to CRST at 6-7. PUC relies on the statutory language that the permit holder must simply

“certify” that “the facility continues to meet the conditions upon which the permit was issued.” PUC Reply Brief to CRST at 8.

“The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.”

City of Rapid City v. Estes, 2011 S.D. 75, ¶ 12, 805 N.W.2d 714, 718 (quoting *State ex rel. Dep’t of Transp. v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162). “Further, the Legislature has commanded that ‘[w]ords used [in the South Dakota Codified Laws] are to be understood in their ordinary sense[.]’” SDCL § 2-14-1. *Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621.

PUC argues that the word “certify” is a precise and narrow verb. PUC Reply Brief to CRST at 8. According to Black’s Law Dictionary (10th ed. 2014), “certify” means, “to authenticate or verify in writing,” or “to attest as being true or as meeting certain criteria.” *Id.* Thus, PUC goes on, under the plain meaning of the language of the statute, TransCanada’s obligation under SDCL § 49-41B-27 in this case was to verify in writing or to attest as true that it continues to meet the 50 Conditions to which the facility is subject. *Id.*

“Although the Certification standing alone would seem to have met the ‘must certify’ requirements set forth in SDCL 49-41B-27, [TransCanada] also filed in support of the Certification a Petition for Order Accepting Certification under SDCL § 49-41B-27, with a Quarterly Report of the status of Keystone’s activities in complying with the KXL Conditions set forth in the KXL Decision as required by Condition 8 and a tracking table of minor factual changes that had occurred since the Commission’s issuance of the KXL Decision attached as Appendices B and C respectively. Apx 27-28, #8. SDCL 49-41B-27 does not even explicitly require the Commission to open a docket proceeding to consider whether to ‘accept’ the certification as compliant with the statute.”

Id. at 9. PUC believes that sufficient evidence was produced at the hearing and judicially noticed by the Commission to support upholding TransCanada’s Certification and the Commission’s Decision. *Id.* at 10.

This Court agrees with the above definition of certify, and would also note, that had the legislature wanted to or meant to require a more significant burden or process to extend an already granted permit, they would have chosen more substantial language in the statute.

This Court must first look at where the “substantial evidence” test the Appellants rely on comes from, and then what “substantial evidence” means. Reviewing the record, Appellant’s seem to rely upon pre-1998 cases such as: *In re Establishing Elec. Boundaries*, *supra*; *Therkildsen v. Fisher Beverage*, 1996 S.D. 39, ¶ 8, 545 N.W.2d 834 (S.D. 1996) (“[T]he inquiry is whether the record contains substantial evidence to support the agency’s determination.”); *Helms v. Lynn’s, Inc.*, 1996 S.D. 8, ¶ 10, 542 N.W.2d 764 (S.D. 1996) (“The issue we must determine is whether the record contains substantial evidence to support the agency’s determination.”); *Abilb v. Gateway 2000, Inc.*, 1996 S.D. 50, 547 N.W.2d 556 (S.D. 1996) (“The question is not whether there is substantial evidence contrary to the findings, but whether there is substantial evidence to support them.”). As noted in the Standard of Review, *supra*, in 1998 the South Dakota Supreme Court did away with the substantial evidence test on administrative appeals. However, *arguendo*, the term “substantial evidence” means such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion. *In re Establishing Elec. Boundaries* at 121; SDCL § 1-26-1(8). This Court finds that 31,000 plus pages of record, nine days of hearing, and 2,507 page of evidentiary transcript and dozens of exhibits were “sufficiently adequate to support a conclusion” in this case. The PUC did not commit clear error when it determined that TransCanada met its burden of proof by substantial evidence and by a preponderance of the evidence, therefore, the PUC is AFFIRMED on this issue.

IV.

Whether the PUC erroneously limited the scope of discovery by granting Motion to Define Issues?

On December 7, 2014, the Commission issued an Order Granting Motion to Define Issues and Setting Procedural Schedule. Yankton Sioux Tribe Brief at 8. On October 30, 2014, before a prehearing scheduling conference had been ordered, TransCanada filed a Motion to Define the Scope of Discovery Under SDCL § 49-41B-27, *supra*. *Id.*

At the time the Order was granted, no party to the matter had sought discovery. Yankton Sioux Tribe Brief at 8. Pursuant to ARSD 20:10:01:01.02, the rules of civil procedure as used in the South Dakota circuit courts shall apply to proceedings before the Commission. *Id.* The scope of discovery is defined in SDCL § 15-6-26(b), which states in part,

“ . . . Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

SDCL § 15-6-26(b)(1).

However, in TransCanada’s Motion to Define the Scope of Discovery under SDCL § 49-41B-27, they asked the Commission to issue an order that the scope of discovery be limited to certain matters under SDCL § 15-6-26(c)(4), which deals with protective orders. Yankton Sioux Tribe Brief at 9, SDCL § 15-6-26(c)(4). SDCL § 15-6-26(c)(4) specifically reads,

“Upon motion by a party or by the person from whom discovery is sought or has been taken, or other person who would be adversely affected, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending, on matters relating to deposition, interrogatories, or other discovery, or alternatively, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.”

SDCL § 15-6-26(c)(4).

Yankton argues that TransCanada did not fulfill the requirements a party seeking a protective order must fulfill before a protective order can be issued. *Id.* at 9. Specifically, Yankton argues that TransCanada failed to certify that it conferred in good faith or attempted to confer with other affected parties in an effort to resolve

the dispute, and that TransCanada failed to show good cause for the issuance of a protective order. Yankton Sioux Tribe Brief at 9. Further, Yankton argues that it was improper for TransCanada to seek a protective order before any party had sought discovery because no dispute existed to necessitate such an order. *Id.*

“The Supreme Court has explained that ‘broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.’ . . . The Commission’s order effectively narrowed the issues by inappropriately limiting discovery, thereby defeating one of the very purposes of discovery as identified by the Supreme Court. As a matter of law, this decision must be reversed.”

Id. at 10 (internal citations omitted).

The PUC makes an argument that “[w]ith respect to statutory construction of the statute at issue in this proceeding, SDCL 49-41B-27, the Commission’s construction of such statute and corresponding limitation on discovery was in accord with South Dakota statutes and case law precedent.” PUC Reply Brief to Yankton Sioux Tribe at 13. Moreover, PUC believes that SDCL § 49-41B-24 must be read *in pari materia* with SDCL § 49-41B-27. *Id.* SDCL § 49-41B-24 reads,

“Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modification of the construction, operation, or maintenance as the commission deems appropriate.”

SDCL § 49-41B-24. “Statutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object.” *Goetz v. State*, 2001 S.D. 138, ¶ 26, 626 N.W.2d 675, 683.

“In this case, the statute at issue, SDCL 49-41B-27, states simply that the permit holder must ‘certify’ that ‘the facility continues to meet the conditions upon which the permit was issued.’ Therefore, limiting discovery to 1) whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the Amended Final Decision and Order; Notice of Entry issue

on June 29, 2010, in Docket HP09-001, or 2) the identified minor factual changes from the Findings of Fact in the Decision identified in [TransCanada's] Tracking Table of Changes attached to the Petition as Appendix C was appropriate."

PUC Reply Brief to Yankton Sioux Tribe at 14.

Giving broad deference to the administrative agency, this Court does not find that it was clearly erroneous, or an abuse of discretion to limit the scope of discovery in this case. The decision of the PUC is AFFIRMED.

V.

Whether the PUC committed clear error by ordering that pre-filed testimony be submitted before discovery responses from a potential motion to compel were due?

Yankton Sioux Tribe argues that the PUC committed a blatant and prejudicial error by requiring the submission of pre-filed testimony prior to the conclusion of discovery. Yankton Sioux Tribe Brief at 7. On April 3, 2015, the PUC issued an Order Granting in Part Motion to Amend Procedural Schedule, which established a schedule in which pre-filed direct testimony was to be filed and served no later than April 2, 2015. *Id.* Final discovery responses were to be served by April 17, 2015, *after* the service of final discovery responses. *Id.* The PUC then amended the procedural schedule on May 5, 2015, but it did not alter the dates on which pre-filed direct testimony and final discovery responses were due. *Id.* Yankton argues that this severely limited the parties' abilities to present their case through direct testimony and violated their due process rights. *Id.* As such, Yankton requests this action be reversed as prejudicial error. *Id.*

"When ordered by the commission in a particular proceeding, testimony and exhibits shall be prepared in written form, filed with the commission, and served on all parties prior to the commencement of hearing on such dates as the commission prescribes by order. The front page of all prefiled testimony shall show the docket number, docket name, and name of the witness."

ARSD 20:10:01:22.06. On April 23, 2015, the PUC issued an Order Granting Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefiled Testimony. PUC Reply Brief to Yankton Sioux Tribe at 11.

PUC argues that the record in this matter does not demonstrate error by the Commission in its conduct of a very protracted and inclusive set of proceedings. *Id.* at 12. PUC further contends that given the active evidentiary hearing participation, the multitude of motions and responses to motions filed by Intervenor, and the Intervenor's active participation in the numerous Commission motion hearings conducted during this proceeding that lasted more than fifteen months, neither Yankton nor any other Intervenor's due process rights or procedural rights under SDCL Chap. 1-26 were violated by the original order requiring prefiled testimony. *Id.* It is PUC's position that Yankton has failed to demonstrate prejudicial error resulting from the Commission's orders requiring the filing of prefiled testimony. *Id.* at 13.

Again, reviewing this appeal under a clearly erroneous standard of review, this Court is not left with a definite and firm conviction that a mistake was made by the PUC when it issued its Order Granting in Part Motion to Amend Procedural Schedule or its Order Amending Procedural Schedule. The Court also notes that Yankton Sioux Tribe presented no evidence in their briefs as to *how* this affected their case or caused prejudicial error to the evidence they did present at the hearing. As such, the PUC is AFFIRMED on this issue.

VI.

Whether the PUC wrongfully excluded 20 intervenors' testimony as a discovery sanction for untimely disclosure?

The PUC has broad discretion in imposing sanctions for failure to comply with discovery orders. PUC Reply Brief to Individual Intervenor at 18; SDCL § 15-6-37(c); *Schwartz v. Palachuk*, 597 N.W.2d 442, 447 (S.D. 1999) (citing *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316 (S.D. 1979)). The South Dakota Supreme Court has held,

“The severity of the sanction must be tempered with consideration of the equities. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and thus defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts.”

Haberer v. Radio Shack, a Div. of Tandy Corp., 555 N.W.2d 606, 611 (S.D. 1996) (citing *Magbahat v. Kovarik*, 382 N.W.2d 43 (S.D. 1986)).

The PUC contends that where the Commission excluded specific types of evidence, the grounds for such exclusion were based on sound evidentiary legal principles, such as relevancy or lack of jurisdiction. PUC Reply Brief to Individual Intervenor at 19.

“With respect to the other discovery sanctions, the Commission does not believe the rights of any Intervenor were substantially prejudiced. Of the seventeen Intervenor who did not respond at all to discovery, twelve did not participate further in the case. . . With respect to the three Intervenor, John Harter, BOLD Nebraska, and Carolyn Smith, who were precluded from offering witnesses or evidence at the evidentiary hearing for inadequately responding to discovery, all of them participated in further proceedings in the case and participated in the evidentiary hearing.”

Id. at 20. PUC further argues that despite the Appellant’s contention that lesser sanctions could have been imposed, “a very significant process of discovery and pre-hearing motions and a nine day hearing with a large number of both individual and organizational Intervenor participants make it highly unlikely that meaningful evidence was omitted from the record in this case.” *Id.* The authority of the PUC concerning sanctions is flexible and allows the PUC “broad discretion with regard to sanctions imposed thereunder for failure to comply with discovery orders.” *Id.* at 20-21; *Chittenden & Eastman Co. v. Smith, supra.*

This Court recognizes that the PUC does have broad discretion to impose sanctions under SDCL §§ 15-6-37(b)(2)(A), 15-6-37(b)(2)(B), and 15-6-37(c). The Court will not reverse the PUC’s decision to sanction under a clearly erroneous review of the record. The Court AFFIRMS the exclusion of this testimony.

VII.

Whether the PUC erroneously excluded DRA exhibits for untimely disclosure?

Dakota Rural Action contends that the PUC excluded numerous DRA exhibits following a Motion in Limine filed by TransCanada. Dakota Rural Action Brief at 30. A small number of excluded exhibits were permitted on reconsideration. AR at 21070-71. However, DRA argues that the PUC’s order was erroneous in that it was largely based on TransCanada’s complaint that the

proposed exhibits were not timely disclosed in discovery. Dakota Rural Action Brief at 30. “The PUC abused its discretion and acted arbitrarily and capriciously because the bulk of the excluded exhibits constituted documents disclosed by [TransCanada] to DRA during discovery. [TransCanada] was on notice that its own documents could be used as exhibits and PUC’s exclusion of those documents was in error.” Id.

TransCanada filed a Motion in Limine on July 10, 2015, prohibiting DRA from offering in evidence any exhibit disclosed on DRA’s exhibit list dated July 7, 2015, that had not been timely disclosed in discovery. TransCanada Reply Brief to Dakota Rural Action at 14; AR at 9474-9450. TransCanada’s basis for this motion was that DRA’s exhibit list included 1,073 documents, all but 36 of which had not been produced in discovery despite TransCanada’s outstanding request served on December 18, 2014, that DRA produce all documents that it intended to offer as exhibits. Id. Though DRA asserted that the rest of the documents on its exhibit list came from TransCanada’s document production, TransCanada argues that disclosing these documents for the first time on July 7, 2015 was sandbagging. Id.

Under SDCL § 15-6-26(e), a party must supplement its discovery responses at appropriate intervals. Id. at 15. Under SDCL § 15-6-37(c), a party who without substantial justification failed to timely supplement its discovery responses, “is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.” Id.; SDCL § 15-6-37(c).

TransCanada contends that under SDCL § 15-6-37(c), DRA was required to provide substantial justification for its failure to timely supplement its document production. Id. Because DRA made no effort to do so before the PUC, and does not cite to the applicable statutory framework in their appeal, DRA’s argument is entirely insufficient for this Court to conclude that the PUC abused its discretion in granting TransCanada’s motion. Id.

This Court finds that late disclosure of 1000+ exhibits would not be harmless under SDCL § 15-6-37(c), and as stated above, PUC does have broad discretion to impose sanctions. DRA provided no substantial justification as required, and therefore the PUC is AFFIRMED on this issue.

VIII.

Whether the PUC erred when it admitted and considered the Tracking Table of Changes prepared by TransCanada and included in its Petition for Certification?

Yankton Sioux Tribe filed a Motion to Dismiss early in the pendency of the case before the PUC arguing TransCanada's Petitions must be dismissed pursuant to SDCL 15-6-12(b)(5) for failure to state a claim upon which relief can be granted. Yankton Sioux Tribe Brief at 3. Yankton argued that TransCanada has never received a permit from the PUC for the project described in TransCanada's Petition and therefore the relief requested in the Petition cannot be granted. *Id.* at 3-4. In support of its motion, Yankton stated that TransCanada,

“asked the Commission to accept its certification that the project described in the Petition, the 2014 Project, continues to meet the conditions upon which a permit was issued in Docket No. 09-001. And although the Petition might mislead the reader to believe that the project referenced therein is the same project that was permitted in Docket 09-001, the appendix C to the Petitions clearly identifies thirty (30) differences between the two projects.”

Id. at 4. Appendix C is a “Tracking Table of Changes” which lists the thirty (30) findings of fact made by the PUC regarding the 2009 Project that do not apply to the 2014 Project. *Id.*

Yankton argued that because the PUC went through the trouble of making the above findings of fact in regards to the 2009 Project, any deviation from those findings then constitutes a new, separate project. *Id.* However the Motion to Dismiss was denied by the PUC, “concluding that the Petition does not on its face demonstrate that the Project no longer meets the permit conditions set forth in the Decision and that a decision on the merits should only be made after discovery and a thorough opportunity to investigate the facts and proceed to evidentiary hearing if necessary.” *Id.* (citing *Order Granting Motions to Join and Denying Motions to Dismiss* dated January 8, 2015, at 1).

Later, Yankton and other movants jointly filed a Motion in Limine challenging the pre-filed testimony of TransCanada's witnesses that solely reference the Tracking Table of Changes. *Id.* at 5. The PUC denied this motion and agreed with TransCanada, finding, that the testimony at issue, which only referenced the Tracking Table of Changes, was relevant to the proceeding. *Id.*

Yankton contends that when the PUC was then faced with a Motion to Strike filed by Dakota Rural Action during the evidentiary hearing, PUC Chairman Nelson questioned why no party had brought an appropriate motion timely to challenge the pre-filed testimony on the ground that it only concerned the Tracking Table of Changes, and not a single condition of the permit. *Id.* at 6. Yankton submits that this contrary and inconsistent ruling, along with the commentary provided by the PUC on the subject amounts to arbitrary and capricious decision making, constitutes an abuse of discretion, and are clearly unwarranted exercises of discretion. *Id.*

The Court finds that it is not clearly erroneous, in light of the entire record, for the PUC to find that this is in fact the same project as described in Docket No. 09-001. The Tracking Table of Changes was an acceptable and relevant illustration to rely upon during the hearing. And the Court finds no arbitrary or capricious decision making, no abuse of discretion, and no clearly unwarranted exercise of discretion. The admittance of the Tracking Table of Changes is **AFFIRMED**.

IX.

ICOUP appeals whether the PUC erred when it failed to admit or consider climate change testimony during this Certification hearing?

The Intertribal Council on Utility Policy argues that they were denied the opportunity to offer expert testimony on climate change, and that climate was deemed not relevant to the Keystone XL Pipeline proceedings. Intertribal Council on Utility Policy Brief at 11. Though not well stated, the argument seems to be based on the overall change, with regard to the governmental recognition worldwide of climate change and weather extremes, and that being one of the primary reasons that President Obama's State Department rejected and the President denied TransCanada's repeated application. *Id.*

“On May 28, 2015, the Commission issued an Order Granting TransCanada's Motion to Preclude Witnesses precluding [ICOUP] from offering the testimony of COUP's proposed witnesses Dr. James Hansen, Dr. George Seielstand, and Dr. Robert Oglesby. The basis for the Commission's decision to grant the motion was that the testimony of these witnesses dealt with climate and climate change and that this evidence was beyond the scope of this certification proceeding.”

PUC Reply Brief to ICoup at 26. PUC asserts that none of the 50 Conditions deal with climate change, nor do any of the Findings of Fact in the KXL Decision. *Id.* at 27.

The PUC notes that the Presidential Permit currently required by Condition 2 was denied by the U.S. Department of State due to concerns about climate change, and that the issue of CO₂ emissions and their effect on climate may affect other agency policies and permit proceedings required by Condition 2. *Id.* However, PUC believes these policy decisions are not within the province of this proceeding which deals with TransCanada's Certification that it continues to meet the 50 KXL Conditions. *Id.*

During oral arguments, Counsel for ICoup stated that climate change is relevant because climate affects the pipeline and the pipeline affects climate. However, the Court finds that climate change is not within the necessary qualifications that PUC must certify in this case. Further, the argument that the Presidential Permit denial addressed climate change, is not relevant to this proceeding, as this Court has already ruled, *supra*, that the denial had no effect on the certification of TransCanada's permit in South Dakota. There was no error in failing to admit evidence of climate change. Moreover, the Court agrees with TransCanada's view of the issue, presented during oral arguments, that the issue of climate change was not perfected or preserved for appeal in this case. The PUC is AFFIRMED on this issue.

X.

DRA appeals whether there was bias on behalf of the PUC regarding a denial to produce documents under the attorney work product doctrine and attorney-client privilege?

On April 22, 2015, the PUC entered an order denying DRA's motion to compel discovery from PUC staff. Dakota Rural Action brief at 29; AR 4798-99. DRA was seeking copies of all communications between TransCanada and its affiliates and the PUC and its staff because of assertions on the part of DRA and other intervenors that the interests of the PUC and TransCanada were improperly aligned. *Id.* "Throughout the course of the proceedings, DRA and other intervenors were left with the impression that PUC staff, instead of engaging on an independent basis, appeared largely supportive of [TransCanada's] attempt to seek certification." *Id.*

The DRA believes the documents sought from the PUC staff were important because: (1) the government should be open and transparent, and (2) as a public interest organization, DRA is concerned about the prospect of regulatory capture with respect to the PUC's relationship with hydrocarbon pipeline operators. *Id.* DRA lays out their argument as follows,

“In denying DRA’s motion to compel discovery and obtain the communications between [TransCanada] and PUC staff, the PUC erroneously determined that the communications sought constituted attorney work product. The attorney work product doctrine exists for the purpose of protecting the attorney/client privilege. By adopting the position that communications between [TransCanada] and PUC staff constitute attorney work product, the PUC has inadvertently admitted that the interests of PUC staff and [TransCanada] are aligned in an almost *de facto* attorney/client relationship, constituting the essence of regulatory capture and providing clear and convincing evidence of underlying bias.”

Id. at 30 (internal citations omitted).

In response, the PUC notes that the Staff does not advise the Commissioners in a contested case. PUC Brief at 24. “In order to avoid violating the *ex parte* communications prohibition of SDCL 1-26-26, the Commission maintains a fairly rigorous separation between the Commission, consisting of Commissioners and the Commission advisors, and the Staff.” *Id.* Moreover,

“The Commission determined that what DRA was seeking in the interrogatory objected to by Staff were documents and tangible things prepared in anticipation of litigation or for trial by or for another party’s representative (including such other party’s attorney). The Commission determined that Staff was a party to this docket, and the materials sought by DRA from Staff were documents prepared by Staff counsel in anticipation of the

evidentiary hearing in this matter and documents obtained by Staff for hearing preparation.”

Id. at 24-25. During oral arguments, counsel for PUC again addressed the “Chinese firewall” constructed to prevent any inappropriate communication between Commissioners and Staff within the PUC office.

This Court finds no evidence in the record that the denial of this discovery was clearly erroneous. As such, the PUC is AFFIRMED on this issue.

XI.

Whether the PUC erred by relying on the Final Supplemental Environmental Impact Statement in FOF 57 that TransCanada consulted with the Standing Rock Sioux Tribe?

Yankton believes, “[t]he Commission erred in its *Final Decision* by finding that page 11 of the State Department’s Record of Consultation, found at Appendix E to the Final Supplemental Environmental Impact Statement (“FSEIS”), constitutes proof that the Standing Rock Sioux Tribe was consulted by the Department of State.” Yankton Sioux Tribe Brief at 22. Executive Order 13175, as well as a number of federal laws, require federal agencies to conduct meaningful consultation with Indian tribes that may be affected by a proposed federal undertaking. Id. In order for the proposed project to be constructed in compliance with federal law, the State Department is required to meaningfully consult with affected tribes, including the Standing Rock Sioux Tribe. Id.

As part of the FSEIS, the State Department compiles a table which listed the dates of communication pertaining to each Tribe it interacted with during the process. Id. However, Yankton contends that this document is void of any evidence indicating that actual consultation, or meaningful consultation, occurred. Id. at 23.

In response, PUC asserts the following,

“Appendix E to the FSEIS, which is a matter of public record of which the Commission took judicial notice on July 21, 2015, without objection from any party, contains the Record of Consultation: Indian Tribe and Nations setting forth the consultations between the Department of State and various Tribes under Section 106 of the

National Historic Preservation Act. AR 020144. On page 11 of the Record of Consultation, all of the meetings, e-mails, telephone calls, and letters between the Department of State and the Standing Rock Sioux Tribe are listed. The record of consultation establishes that the Standing Rock Sioux Tribe was consulted by the Department of State.

Furthermore, multiple witnesses testified that the Tribes in South Dakota passed resolutions opposing the Project and that [TransCanada's] representatives were not welcome on Tribal land. TR 1745-1746, 1873, 2084, 2096-2097, 2104-2105 (AR 026353-02635[4], 026481, 026888, 026900-02690[1, 026908-026909])."

PUC Reply Brief to Yankton Sioux Tribe at 29.

The Court notes that communication was cut-off by the Tribes when they refused to communicate with TransCanada and voiced strong opposition to this project. Cheyenne River Sioux Tribe's Attorney, during oral argument, acknowledged this, but insisted that it didn't mean that TransCanada should stop trying to communicate with the Tribes. This logic is flawed. If one party is attempting to communicate and address issues, and the other party closes themselves off, it is not the responsibility of the first party to continue trying and pushing or forcing the second party to communicate with them. Further, this issue is raised by the Yankton Sioux Tribe but it is in regards to communication specifically with the Standing Rock Sioux Tribe. Standing Rock Sioux Tribe is not a party to this appeal. As independent, sovereign nations, this Court does not know of authority that would give Yankton Sioux Tribe standing in this matter, and Yankton Sioux Tribe has provided the Court with none.

XII.

Whether the PUC erred by precluding testimony of aboriginal title or usufructuary rights?

Yankton contends that the Commission erred when it precluded testimony regarding consideration of aboriginal treaty rights. Yankton Sioux Tribe Brief at 23.

“On May 26, 2015, [TransCanada] filed *Applicant’s Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights*, seeking to preclude the Commission from considering aboriginal title or usufructuary rights in its certification determination. [TransCanada] based its motion on three allegations: 1) that the Commission lacks authority to determine whether such rights exist; 2) that assertion of such rights is a challenge to the proposed route, over which the Commission lacks authority; and 3) that such rights do not exist with respect to the proposed project’s route. All three of these allegations were made in error and should have been rejected.”

Id.

Yankton argues that the legislature enacted SDCL § 49-41B in order to balance the welfare of the people and the environmental quality of the state with the necessity of expanding industry. Id. at 24. SDCL § 49-41B-1 reads,

“The Legislature finds that energy development in South Dakota and the Northern Great Plains significantly affects the welfare of the population, the environmental quality, the location and growth of industry, and the use of the natural resources of the state. The Legislature also finds that by assuming permit authority, that the state must also ensure that these facilities are constructed in an orderly and timely manner so that the energy requirements of the people of the state are fulfilled. Therefore, it is necessary to ensure that the location, construction, and operation of facilities will produce minimal adverse effects on the environment and upon the citizens of this state by providing that a facility may not be constructed or operate in this state without first obtaining a permit from the commission.”

SDCL § 49-41B-1.

Yankton continues, that their usufructuary rights in the land at issue have existed since the Treaty at Fort Laramie was signed in 1851. Yankton Sioux Tribe

Brief at 25. Yankton believes that the PUC is authorized to consider Yankton's concerns with respect to its usufructuary rights regardless of whether those rights have been identified as such in court. *Id.* Moreover, Yankton believes that "[b]ecause the Commission's decision to preclude relevant testimony and evidence violated the Tribe's due process rights and severely impaired its ability to fulfill its duties under SDCL Chapter 49-41B, the Commission's decision must be reversed." *Id.*

PUC argues that the Commission's exclusion of specific types of evidence such as usufructuary and aboriginal rights were based on sound evidentiary legal principle, such as relevancy or lack of jurisdiction. PUC Reply Brief to Yankton Sioux Tribe at 29-30. The example PUC cites to is that the Commission determined that it has no jurisdiction to adjudicate tribal rights. *Id.* at 30. Such determinations are properly litigated in the courts of this state or in federal court. *Id.*; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 118 S.Ct. 789, 139 L.Ed.2d 733 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977). PUC continues that no court has held that Native American Tribes have aboriginal title or usufructuary rights with respect to any of the real property crossed by the proposed KXL route in South Dakota. *Id.* at 30.

The Court would point out that the statute relied upon by Yankton Sioux Tribe, SDCL § 49-41B-1, makes no direct mention of aboriginal or usufructuary rights. The Court finds no clear error was committed when the PUC found no authority that Native American Tribes have aboriginal title or usufructuary rights with respect to the proposed route of the Keystone XL Pipeline. The decision of the PUC is AFFIRMED.

XIII.

Whether the PUC erred when it concluded that Tribes are not "local governmental units" under Condition 6?

SDCL § 49-41B-4.2 reads, in part,

"The South Dakota Legislature before approving a proposed trans-state transmission line shall find that each of the following criteria has been met:

...

- (4) That the proposed trans-state transmission line and route will not unduly

interfere with the orderly development of the region with due consideration having been given to views of the governing bodies of effective local units of government. . .”

SDCL § 49-41B-4.2. Yankton argues that the Commission failed to treat any Tribe as local units of government and failed to include any permit condition requiring that Keystone consult with tribes about the Project. Yankton Sioux Tribe Brief at 25. Yankton contends that “[a]s a governmental unit for a region and group of people likely to be affected by the proposed pipeline, the Yankton Sioux Tribe is clearly a local unit of government for purposes of the Project.” *Id.*

Further, Yankton argues that the PUC erred in its *Final Decision* by failing to treat Tribes as local units of government and by finding that no permit condition requires that TransCanada consult with tribes about the Project. *Id.* at 26.

PUC, in response, contends that TransCanada has tried to reach out to Tribes in the vicinity of the Project and employs a manager of Tribal relations, but that such consultations have not been achievable in cases such as Cheyenne River Sioux Tribe because the Tribe was not willing to speak with TransCanada’s representatives and has passed legislation that forbids TransCanada or any of its contractors from entering the reservation boundaries. PUC Reply Brief to Yankton Sioux Tribe at 30-31. Further, PUC argues that no permit condition requires that TransCanada consult with the Tribes about the Project. *Id.* at 31. “Condition 6, Apx 27, #6, refers to ‘local governmental units,’ but does not specify Tribes.” *Id.*

During oral arguments, Yankton Sioux Tribe made an argument that, although the Reservation is not near the path of the pipeline, they feel they will be affected by “man camps” that come with the building of the pipeline. Further Yankton made the statement that the “Tribe has unique knowledge” and should have therefore been consulted. The Court finds these arguments unpersuasive. It is clear that the Tribe is concerned with the possibility of negative impacts, likely crime and/or drug related issues, with which “man camps” have been stigmatized. However, this Court cannot consider any and all *remotely possible* impact this project *might* have somewhere down the line. If so, the Court would also have to look at, balance, and weigh against, the *possible positive* impacts including economic and job growth that will come once the project begins. The project itself is not within Tribal boundaries. Further, the fact that the Tribe feels it has unique knowledge of the land is not enough to warrant required discussions between

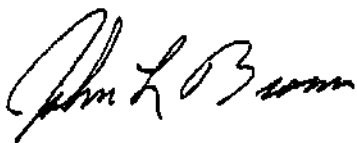
TransCanada and the Yankton Sioux Tribe when the land for which they claim knowledge is not Tribal land.

The Yankton Sioux Tribe is a sovereign nation within the bounds of the United States; it is not a local unit of government within the State of South Dakota's government structure. Further, the proposed route of the Keystone XL Pipeline does not cross any Tribal lands. The PUC is AFFIRMED.

CONCLUSION

Ultimately many of the issues raised by Appellant's would have been more properly raised following the issuance of the original permit in Docket No. 09-001. Four years lapsed between the issuance of the permit and the certification process, during which no suit was filed to challenge the petition itself. This appeal is from an already granted permit, to which the only requirement was to "certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued." While the Court recognizes there may be legitimate concerns regarding many of the issues raised, *inter alia*, potential distribution of arsenic into the river, sloughing on nearby roads, and issues of climate change, they have been adequately addressed by the Commission or are not appropriate to be addressed in this appeal.

For the foregoing reasons, the Public Utilities Commission's decision is AFFIRMED.

A handwritten signature in black ink, appearing to read "John L. Brown", is positioned above a horizontal line.

Honorable John L. Brown
Presiding Sixth Circuit Court Judge

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**

**) FINAL DECISION AND ORDER
) FINDING CERTIFICATION
) VALID AND ACCEPTING
) CERTIFICATION; NOTICE OF
) ENTRY**

HP14-001

PROCEDURAL HISTORY

On September 15, 2014, TransCanada Keystone Pipeline, LP (Keystone, TransCanada, or Applicant) filed with the Commission a Certification signed by Corey Goulet on September 12, 2014, in Calgary, Alberta, Canada, and a Petition for Order Accepting Certification under SDCL § 49-41B-27 (Petition). Attached to the Petition were Appendix A, Project Overview Map, Appendix B, Quarterly Report for the Quarter Ending 6/30/14, and Appendix C, Tracking Table of Changes, including Attachment A, Redlined Construction, Mitigation, and Reclamation Plan, and Attachment B, Preliminary Site-Specific Crossing Plans. The Commission opened Docket HP14-001 for consideration of the Certification and Petition.¹ The purpose of these filings was to provide the Commission with Keystone's certified statement that such facility continues to meet the conditions upon which the permit was issued and to otherwise verify that Keystone continues to meet the 50 conditions imposed in the Amended Final Decision and Order; Notice of Entry issued by the Commission on June 29, 2010, in Docket HP09-001 (Amended Final Decision) granting a permit to Keystone to construct the Keystone XL Pipeline (Project).² Since more than four years have elapsed since the Commission's issuance of the Amended Decision granting the permit to construct, Keystone now seeks an order from the Commission accepting Keystone's certification pursuant to SDCL 49-41B-27.

On September 18, 2014, the Commission electronically transmitted notice of the certification filing and the intervention deadline of October 15, 2014, to interested individuals and entities on the Commission's PUC Weekly Filings electronic listserv, and on October 1, 2014, the Commission issued an Order Assessing Filing Fee. Forty-three individuals and entities sought to intervene as parties by submitting applications between September 30 and October 17, 2014. On November 4, 2014, the Commission entered an Order Granting Intervention and Party Status to the following forty-two persons: John Harter, Rosebud Sioux Tribe-Tribal Utility Commission, Elizabeth Lone Eagle, Paul F. Seamans, Viola Waln, Cindy Myers, RN, Bold Nebraska, Diana L. Steskal, Cheryl Frisch, Terry Frisch, Standing Rock Sioux Indian Tribe, Byron T. Steskal, Arthur R. Tanderup, Lewis GrassRope, Carolyn P. Smith, Robert G. Allpress, Jeff Jensen, Amy Schaffer, Louis T. Genung, Nancy Hilding, Gary F. Dorr, Bruce Boettcher, Rosebud Sioux Tribe, Wrexie Lainson Bardaglio, South Dakota Wildlife Federation, Cheyenne River Sioux Tribe, Jerry D. Jones, Cody Jones, Debbie J. Trapp, Gena M. Parkhurst,

¹ The Commission's Orders in the case and all other filings and documents in the record are available on the Commission's web page for Docket HP14-001 at:
<http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-001.aspx>

² The Commission's Orders in the case and all other filings and documents in the record are available on the Commission's web page for Docket HP09-001 at:
<http://puc.sd.gov/Dockets/HydrocarbonPipeline/2009/hp09-001.aspx>

Sierra Club, Joyce Braun, 350.org, Yankton Sioux Tribe, Dakota Rural Action (DRA), Chastity Jewett, Indigenous Environmental Network, Dallas Goldtooth, RoxAnn Boettcher, Bonny Kilmurry, Ronald Fees, and Intertribal Council on Utility Policy (collectively, Intervenor). On March 4, 2015, the Commission issued an Order Granting Request to Withdraw Party Status allowing the South Dakota Wildlife Federation and the Sierra Club to withdraw as parties, and on April 21, 2015, the Commission issued an Order Granting Request to Withdraw Party Status allowing Jeff Jensen to withdraw as a party.

On October 30, 2014, Keystone filed Keystone's Motion to Define the Scope of Discovery under SDCL §49-41B-27 (Motion to Define Scope). On November 4, 2014, the Commission issued a Prehearing Scheduling Conference Order setting a telephonic scheduling conference to be conducted by General Counsel John Smith on November 13, 2014. On November 5, 2014, the Commission issued an Order for and Notice of Motion Hearing setting the Motion to Define Scope for hearing on November 25, 2014. The prehearing scheduling conference was held as scheduled on November 13, 2014. On November 14, 2014, a number of motions for extension of time to respond to the Motion to Define Scope were filed by Intervenor. Keystone did not object to the extension. On November 14, 2014, the Commission issued an Order Changing Motion Hearing Date and Order for and Notice of Scheduling Hearing setting the Motion to Define Scope and to establish a procedural schedule for hearing on December 9, 2014. Responses to the Motion to Define Scope and setting forth procedural schedule recommendations were filed by the Commission's staff (Staff) and many of the Intervenor. After hearing from the parties regarding the Motion to Define Scope and the procedural schedule, on December 17, 2014, the Commission issued an Order Granting Motion to Define Issues and Setting Procedural Schedule. In this order, the Commission decided that the scope of discovery would be limited to any matter relevant to: (1) whether the Project continues to meet the 50 conditions in Exhibit A to the Amended Final Decision; and (2) the changes in the Findings of Fact identified in the Tracking Table of Changes attached to Keystone's Certification Petition as Appendix C. The Commission also established the following deadlines: January 6, 2015, for serving initial discovery; February 6, 2015, for responding to initial discovery; February 20, 2015, for a second round of discovery; March 10, 2015, for responding to the second round of discovery; April 2, 2015, for submitting pre-filed direct testimony; April 23, 2015, for submitting pre-filed rebuttal testimony; and May 5-8, 2015, for an evidentiary hearing.

On December 2, 2014, Yankton Sioux Tribe (Yankton) filed Yankton Sioux Tribe's Motion to Dismiss, and on December 29, 2014, Rosebud Sioux Tribe (Rosebud) filed Rosebud Sioux Tribe's Motion to Dismiss and Request for Oral Argument. The motions contended that the Certification Petition on its face established that the Project was a different project than the one permitted in the Amended Final Decision in Docket HP09-001 and that Keystone could therefore not prove that it could continue to meet the conditions on which the permit was issued. A number of Intervenor filed motions to join in Yankton Sioux Tribe's Motion to Dismiss. On December 29, 2014, Keystone filed Applicant's Opposition to Yankton Sioux Tribe's Motion to Dismiss, and Staff filed Commission Staff's Response to Yankton Sioux Tribe's Motion to Dismiss. On January 2, 2015, Yankton Sioux Tribe filed Yankton Sioux Tribe's Reply in Support of Its Motion to Dismiss. After hearing from the parties at the hearing on the motions to join and dismiss on January 6, 2015, on January 8, 2015, the Commission issued an Order Granting Motions to Join and Denying Motions to Dismiss which granted the Intervenor's motions to join and to consider Rosebud's motion to dismiss together with Yankton's but denied the motions to dismiss.

On March 17, 2015, Staff filed a Motion to Amend Procedural Schedule to add to the procedural schedule a deadline by which parties must file a witness list and an exhibit list. On April 2, 2015, the Commission issued an Order Amending Procedural Schedule (Witness and Exhibit Lists) requiring that witness lists and exhibit lists must be filed and served by all parties no later than 5:00 p.m. CDT, on April 21, 2015. On March 25, 2015, Rosebud Sioux Tribe filed a Motion to Amend Order Setting Procedural Schedule requesting that the Commission amend the procedural schedule in the Order Setting Procedural Schedule to delay the date set for pre-filed testimony. The Commission heard Rosebud's motion to amend on March 31, 2015, and on April 3 issued an Order Granting in Part Motion to Amend Procedural Schedule extending the date for the filing of pre-filed rebuttal testimony to April 27, 2015, and allowing testimony regarding new information acquired as a result of any motion to compel granted by the Commission to be included in rebuttal testimony. On April 8, 2014, Rosebud Sioux Tribe filed Rosebud Sioux Tribe's Motion for Reconsideration. After hearing the Motion to Reconsider on April 9, 2015, on April 10 the Commission issued an Order Granting Motion to Reconsider and Amending In Part Procedural Schedule which granted reconsideration with respect to expert testimony, extended the deadline for Rosebud's pre-filed testimony for its expert witnesses to April 24, 2015, except to the extent it qualifies for later filing on April 27, 2015, pursuant to the Amended Scheduling Order, and extended the deadline for Keystone to file its rebuttal testimony with respect to the pre-filed testimony of Rosebud's expert witnesses to May 5, 2015. On March 27, 2015, Standing Rock Sioux Tribe (Standing Rock) filed a Motion to Amend Order Setting Procedural requesting that the Commission amend the procedural schedule to delay the dates set for close of discovery, pre-filed testimony, rebuttal testimony, filing of exhibits, and the evidentiary hearing. The Commission heard Standing Rock's motion to amend on March 31, 2015, and on April 2 issued an Order Denying Motion to Amend Order Setting Procedural Schedule as requested by Standing Rock.

The Commission decided a number of discovery-related motions. Dakota Rural Action, Standing Rock Sioux Tribe, Yankton Sioux Tribe, Gary Dorr, and Rosebud Sioux Tribe filed motions to compel discovery against Keystone and Staff. The Commission entered orders dated April 17, 2015, granting in part and denying in part the motions filed by Dakota Rural Action, Standing Rock Sioux Tribe, and Yankton Sioux Tribe, and compelling Keystone to answer certain discovery requests by April 17, 2015. The Commission denied the motions filed by Gary Dorr and Rosebud Sioux Tribe by orders dated April 22, 2015, and April 23, 2015.

On March 23, 2015, Keystone filed a Motion to Preclude Certain Intervenor (John Harter, BOLD Nebraska, Carolyn Smith, Gary Dorr, and Yankton Sioux Tribe) from Offering Evidence or Witnesses at Hearing (Motion to Preclude). On March 25, 2015, Keystone filed an Amended Motion to Preclude Certain Intervenor from Offering Evidence or Witnesses at Hearing and to Compel Discovery requesting: (1) that certain Intervenor be precluded from offering any evidence or witnesses at the hearing based on their complete failure to respond to Keystone's discovery requests (Rosebud Sioux Tribe-Tribal Utility Commission, Viola Waln, Cheryl & Terry Frisch, Louis Grass Rope, Robert Allpress, Jeff Jensen, Louis Genung, Jerry Jones, Debbie Tripp, Gina Parkhurst, Joye Braun, 350.org, Chastity Jewett, Dallas Goldtooth, and Ronald Fees); and (2) that certain Intervenor (John Harter, BOLD Nebraska, Carolyn Smith, Gary Dorr, and Yankton Sioux Tribe) be prohibited from offering evidence or witnesses at the hearing because of their failure to respond fully to Keystone's discovery requests. On April 17, 2015, the Commission issued an Order Granting In Part Keystone's Motion for Discovery Sanctions precluding the seventeen intervenors who did not respond at all to Keystone's requests for discovery from presenting evidence or witnesses at the evidentiary hearing, precluding John Harter, BOLD Nebraska, and Carolyn Smith from presenting evidence or witnesses at the evidentiary hearing for not sufficiently responding to Keystone's discovery

requests, but not precluding Yankton Sioux Tribe and Gary Dorr from presenting evidence or witnesses at the evidentiary hearing.

On April 2, 2015, Dakota Rural Action filed a Statement and Objections on behalf of Dakota Rural Action with respect to Submission of Written Testimony arguing that the Commission's pre-filed testimony rule, ARSD 20:10:01:06, violates SDCL 15-6-43(a) and 49-1-11. Several Intervenors filed statements in support of DRA's Statement and Objections. In Staff's Brief in Response to Motion to Preclude Witnesses from Offering Testimony Who Did Not File Pre-Filed Testimony filed on April 10, 2015, Staff pointed out that pre-filed testimony does not become evidence in the case unless and until it is received in evidence as an exhibit upon proper foundation by a live witness or stipulation and that ARSD 20:10:01:06 is not therefore violative of SDCL 15-6-43(a). In complex contested case proceedings, it is normal practice for the Commission to require pre-filed testimony as part of the discovery and hearing preparation process, and no court has ever ruled that such requirement is unlawful.

On April 6, 2015, Keystone filed Keystone's Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefile Testimony asking that the Commission preclude testimony from any witness who did not pre-file testimony as required by the Commission's procedural order. Responses to this motion were filed by Staff and numerous Intervenors. On April 23, 2015, the Commission issued an Order Granting Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefiled Testimony, precluding persons for whom pre-filed testimony was not filed from testifying at the hearing, subject to the condition that pre-filed rebuttal testimony would be allowed to be filed by all parties until the April 27, 2015, deadline, including testimony and exhibits addressing information obtained as a result of any order to compel discovery granted by the Commission.

On April 7, 2015, the Commission received Dakota Rural Action's, Rosebud Sioux Tribe's, Cheyenne River Sioux Tribe's and Indigenous Environmental Network's Joint Motion for Appointment of Special Master to oversee the discovery process in this docket (Special Master Motion). Responses in opposition to the Special Master Motion were filed by Staff and Keystone on April 8 and April 9, 2015, respectively. On April 22, 2015, the Commission issued an Order Denying Motion for Special Master, finding that the Commission has sufficient resources and is competent to hear and act on the discovery issues presented in this proceeding.

On April 7, 2015, the Commission received Dakota Rural Action's, Rosebud Sioux Tribe's, Standing Rock Sioux Tribe's, Cheyenne River Sioux Tribe's and Indigenous Environmental Network's Joint Motion for Stay of Proceedings (Motion for Stay) requesting a stay pending the Presidential Permit decision and the conclusion of the investigation initiated by the Canadian National Energy Board regarding allegations of pipeline safety violations. Keystone and Staff filed responses in opposition to the Motion for Stay on April 9 and 10, 2015, respectively. On April 22, 2015, the Commission issued an Order Denying Motion for Stay.

At a motion hearing on April 14, 2015, the Commission considered a number of discovery related motions filed by Keystone and a number of Intervenors. In response to objections raised by Keystone based on the confidential nature of many documents requested by intervenor parties, on April 17, 2015, the Commission issued a Protective Order imposing protective provisions on parties' discovery of materials deemed confidential, subject to the provisions of ARSD 20:10:01:40 through 20:10:01:44. On April 24, 2015, Dakota Rural Action, Rosebud Sioux Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe (Cheyenne River), Yankton Sioux Tribe, Indigenous Environmental Network, and BOLD Nebraska filed a Joint Motion to Vacate or, in the Alternative, to Clarify or Amend Protective Order. On April 27,

2015, Keystone filed Applicant's Opposition to Joint Motion to Vacate or Amend the Protective Order arguing that Keystone had in fact allowed intervenors to provide access to confidential materials to co-counsel and experts. On April 28, 2015, Staff filed Staff's Brief in Response to Joint Motion to Vacate or, in the Alternative, to Clarify or Amend Protective Order. In response to intervenors' motion, on May 13, 2015, the Commission issued an Amended Protective Order authorizing disclosure of confidential information to co-counsel, professional staff, and experts, in addition to attorneys of record, provided that notice of such disclosure is provided by the disclosing party and the persons receiving the information sign the non-disclosure agreement.

On April 24, 2015, Dakota Rural Action, Rosebud Sioux Tribe, Yankton Sioux Tribe, BOLD Nebraska, Cheyenne River Sioux Tribe, and Standing Rock Sioux Tribe filed a Joint Motion for Continuance and Relief from Scheduling Order requesting a later date for the evidentiary hearing to allow additional time for consideration of discovery documents and preparation for hearing. Indigenous Environmental Network joined the motion on April 27, 2015. On April 24, 2015, the Commission received Keystone's Opposition to Joint Motion for Continuance. On April 27, 2015, the Commission issued an Order Granting Joint Motion for Continuance and Relief from Scheduling Order in which the Commission granted the Joint Motion for Continuance and instructed Staff to propose a revised schedule at the next regularly scheduled Commission meeting. On May 5, 2015, the Commission issued an Order Amending Procedural Schedule establishing the following deadlines and dates: (1) substantive motions filed by May 26, 2015; (2) responses to substantive motions filed by June 2, 2015; (3) hearing on substantive motions on June 11, 2015; (4) rebuttal testimony filed by June 26, 2015; (5) witness and exhibit lists filed by July 7, 2015; (6) motions *in limine* filed by July 10, 2015; (7) responses to motions *in limine* filed by July 17, 2015; (8) motion hearing on motions *in limine* on July 21, 2015; and (5) an evidentiary hearing from July 27-31, and continuing August 3-4, 2015.

On April 27, 2015, the Commission received Standing Rock, Cheyenne River, Rosebud Sioux, and Yankton Sioux Tribes, Dakota Rural Action, Indigenous Environmental Network, Intertribal COUP and BOLD Nebraska Motion to Exclude Evidence and Testimony by TransCanada seeking to preclude Keystone from offering testimony or witnesses at the hearing based on its alleged failure to comply with discovery. On May 1, 2015, Intervenor Gary Dorr filed Gary Dorr's Motion to Join Joint Motion by Standing Rock, Cheyenne River, Rosebud, and Yankton Sioux Tribes, Dakota Rural Action, Indigenous Environmental Network, Intertribal COUP, and BOLD Nebraska to Exclude Evidence and Testimony by TransCanada. On April 27, 2015, Keystone filed Keystone's Opposition to Joint Motion to Exclude Evidence and Testimony. On May 18, 2015, Staff filed Staff's Brief in Response to Joint Motion to Exclude Evidence and Testimony. On May 19, 2015, Keystone filed Keystone's Supplemental Opposition to Joint Motion to Exclude Testimony and Evidence. Finding that TransCanada had produced a very large volume of documents in response to intervenor discovery requests and the Commission's Orders to Compel and that movants had not demonstrated that TransCanada had acted in bad faith or with willfulness or fault, on May 28, 2015, the Commission issued an Order Granting Motion to Join and Denying Joint Motion to Exclude Evidence and Testimony by TransCanada, granting Gary Dorr's motion to join and denying the joint motion to exclude.

On April 27, 2015, Intertribal Council on Utility Policy (COUP) filed a Notice of Request for a Time Certain for an Expert Rebuttal Witness for the Intertribal Council on Utility Policy asking for a time certain for testimony of three of its experts, namely Dr. James Hansen, Dr. George Seielstad, and Dr. Robert Oglesby. On April 27, 2015, Keystone filed Keystone's Objection to Coup's Request for a Time Certain and Motion to Preclude Witnesses. Keystone opposed Intertribal COUP's motion on the grounds that Intertribal COUP had not submitted pre-filed testimony for these experts and their proposed testimony was not rebuttal testimony. On

May 18, 2015, Intertribal COUP filed Intertribal COUP's Response to Keystone's Objection to COUP's Request for a Time Certain and Motion to Preclude Witnesses. On May 18, 2015, Staff filed Staff's Brief in Response to Keystone's Objection to COUP's Request for a Time Certain and Motion to Preclude Witness. In its brief, Staff argued that denial of a time certain and preclusion were appropriate, but for the reasons that the hearing dates have changed so the time certain is no longer at issue and that the testimony of Intertribal COUP's three witnesses is not relevant to the issues before the Commission in this proceeding. On May 19, 2015, Intertribal COUP filed Intertribal COUP's Amended Response to Keystone's Objection to COUP's Request for a Time Certain and Motion to Preclude Witnesses. On May 28, 2015, the Commission issued an Order Granting TransCanada's Motion to Preclude Witnesses on the grounds that the testimony of COUP's proposed witnesses was beyond the scope of the certification proceeding and took no action on COUP's Request for a Time Certain for an Expert Witness, finding that such issue was moot given the Commission's April 27, 2015 Order Granting Joint Motion for Continuance and Relief from Scheduling Order.

On May 26, 2015, the Commission received Yankton Sioux Tribe's and Indigenous Environmental Network's Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact seeking to have certain findings of fact contained in the Amended Final Decision amended. Alternatively, the motion asked that the Commission amend Findings of Fact numbers 113 and 114. On May 26, 2015, Staff filed Staff's Brief in Response to Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact. On June 2, 2015, DRA filed Dakota Rural Action's Joinder of Yankton Sioux Tribe's Motion to Preclude Improper Relief. On June 2, 2015, Keystone filed Keystone's Opposition to Joint Motion to Preclude Improper Relief. On June 6, 2015, the Commission received Yankton Sioux Tribe's And Indigenous Environmental Network's Reply in Support of Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact. Finding that TransCanada did not seek to amend the Findings of Fact in the Amended Final Decision and that there exists no legal authority for the Commission to amend the Amended Final Decision at this time, on June 15, 2015, the Commission issued an Order Denying Yankton Sioux Tribe's and Indigenous Environmental Network's Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings Of Fact.

On May 26, 2015, Keystone filed Keystone's Motion to Exclude Testimony of Richard Kuprewicz requesting that the Commission exclude all of Kuprewicz's testimony except for his opinion on pages 2-3 of Exhibit 9 that the Project will not pose a substantial risk to the Rosebud Sioux Tribe's water supply. On June 2, 2015, Staff filed a Corrected Staff's Brief in Response to Applicant's Motion to Exclude Testimony of Richard Kuprewicz. On June 2, 2015, the Commission received Rosebud Sioux Tribe's Response to Keystone's Motion to Exclude Testimony of Richard Kuprewicz. On June 2, 2015, DRA filed Dakota Rural Action's Joinder of Rosebud Sioux Tribe's Response to TransCanada's Motion to Exclude Testimony of Richard Kuprewicz, and Cheyenne River Sioux Tribe filed Cheyenne River Sioux Tribe's Response to Keystone's Motion to Exclude the Testimony of Richard Kuprewicz. On June 10, 2015, the Commission received Rosebud Sioux Tribe's Supplemental Response to Motion to Exclude Testimony of Richard Kuprewicz. On June 8, 2015, Keystone filed Applicant's Reply in Support of Motion to Limit Testimony of Richard Kuprewicz. On June 15, 2015 the Commission issued an Order Granting in Part and Denying in Part Keystone's Motion to Exclude Testimony of Richard Kuprewicz, in which the Commission ordered the exclusion of that portion of the testimony dealing with re-routing the Project as beyond the Commission's jurisdiction pursuant to SDCL 49-41B-36 and denying the motion with respect to the rest of Mr. Kuprewicz's testimony.

On May 26, 2015, Keystone filed a Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements, on the grounds that Keystone has already entered into easement agreements for such crossings from the U.S. Bureau of Reclamation and the affected landowners. On June 2, 2015, Intervenor Gary Dorr filed Gary Dorr's Response to Motion by TransCanada to Preclude Testimony Regarding Mni Wiconi Pipeline Easements. On June 9, 2015, Keystone filed a Reply Brief in Support of TransCanada's Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements and up-dated supporting documentation. On June 15, 2015, the Commission issued an Order Granting Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements, finding that tribal consent to the proposed Keystone XL Pipeline's crossing of the Mni Wiconi pipeline(s) is not relevant to this proceeding, because the Commission does not have jurisdiction over property rights.

On May 26, 2015, Keystone filed Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights as beyond the Commission's jurisdiction and the scope of this proceeding. On June 2, 2015, the Commission received Standing Rock Sioux Tribe Opposition to Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights, Yankton Sioux Tribe's Response to Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights, and Cheyenne River Sioux Tribe's Response to Keystone's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights. On June 8, 2015, Keystone filed Applicant's Reply Brief - Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights. Finding that the Commission does not have jurisdiction over aboriginal title or usufructuary rights, on June 15, 2015, the Commission issued an Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights.

On or before July 7, 2015, exhibit and/or witness lists were filed by Keystone, Staff, and Intervenor Cindy Myers, Cheyenne River Sioux Tribe, Dakota Rural Action, Standing Rock Sioux Tribe, Yankton Sioux Tribe, Chastity Jewett, and Rosebud Sioux Tribe.

On July 9, 2015, Staff filed a Motion for Judicial Notice requesting that the Commission take judicial notice of: the evidentiary record in Docket No. HP09-001; the Department of State's Final Environmental Impact Statement involving the Project; the Final Supplemental Environmental Impact Statement; and SDCL Chapter 49-41B in its entirety. On July 22, 2015, the Commission issued an Order Granting Judicial Notice of these documents.

On July 10, 2015, the Rosebud Sioux Tribe filed Rosebud Sioux Tribe's Motion *in Limine* asking that certain rebuttal testimony filed by Keystone in response to Rosebud's expert witnesses Richard Kuprewicz, Ian Goodman, and Brigid Rowan be excluded because it had elected not to call these persons as witnesses. At the hearing on the motion on July 21, 2015, Keystone and Rosebud agreed that the issue was moot because Kuprewicz, Goodman, and Rowan would not be called as witnesses at the hearing. On July 22, 2015, the Commission accordingly issued an Order Denying Rosebud Sioux Tribe's Motion to Exclude Testimony.

On July 10, 2015, Staff filed a Motion for Time Certain for Witness Testimony requesting that August 3, 2015, or such time as necessary on such date be set aside for the testimony of at least one of Staff's witnesses, Dan Flo, and witnesses for Standing Rock Sioux Tribe who will be traveling some distance from out of town. On July 22, 2015, the Commission issued an Order Granting Motion for Time Certain for Witness Testimony. On July 16, Diana Steskal filed a request for time certain for her testimony on either July 29 or 30, 2015. On July 22, 2015, the Commission issued an Order Granting Motion for Time Certain for Witness Testimony as requested by Ms. Steskal.

On July 10, 2015, Keystone filed the following motions *in limine*: (1) to strike the proposed testimony of Linda Black Elk, consisting of an article on Native American plants; (2) to strike Paula Antoine's rebuttal testimony; (3) to exclude the testimony of Kevin E. Cahill, Ph.D.; (4) to restrict the testimony of Leonard Crow Dog; (5) to preclude the testimony of Dr. Hansen and Dr. Oglesby; (6) to restrict the testimony of Faith Spotted Eagle and an unnamed member of the Yankton Sioux Tribe Business and Claims Committee; (7) to preclude the testimony of Chris Sauncosi; (8) to preclude the rebuttal testimony of Jennifer Galindo and Waste Win Young; and (9) to preclude the rebuttal testimony of Ian Goodman and Brigid Rowan. Staff and Intervenor filed responses. With respect to these motions, the Commission by separate orders dated July 22, 2015, granted the motions concerning Linda Black Elk, Kevin Cahill, Leonard Crow Dog, Dr. Hansen and Dr. Oglesby, Faith Spotted Eagle and an unnamed member of the Business and Claims Committee, Chris Sauncosi, and Jennifer Galindo and Waste Win Young. The Commission granted in part the motion to strike Paula Antoine's testimony as it related to the Spirit Camp located in Tripp County, but otherwise denied the motion in its July 22, 2015 Order Granting in Part and Denying in Part Motion *in Limine* to Strike Paula Antoine's Rebuttal Testimony. Also on July 22, 2015, the Commission issued an Order Denying Motion *in Limine* to Preclude Rebuttal Testimony of Ian Goodman and Brigid Rowan finding the issue to be moot.

On July 24, 2015, Standing Rock Sioux Tribe filed motions for reconsideration of the orders excluding the testimony of Kevin E. Cahill and Jennifer Galindo and Waste Win Young. On August 31, 2015, the Commission issued an Order Denying Motion for Reconsideration of Order Granting Motion *in Limine* to Preclude Rebuttal Testimony of Jennifer Galindo and Waste Win Young. On September 1, 2015, the Commission issued an Order Granting in Part Motion for Reconsideration of Order Granting Motion to Exclude Testimony of Kevin E. Cahill, Ph.D. allowing that part of Cahill's testimony responsive to the testimony of Staff witness Brian Walsh.

On July 10, 2015, Keystone filed Keystone's Protective Motion *in Limine* Regarding Dakota Rural Action's Exhibit List Dated July 7, 2015, seeking to preclude those documents or portions of documents on DRA's Exhibit List that were not timely disclosed to Keystone in DRA's responses to Keystone's discovery requests. After considering Keystone's motion at an ad hoc meeting, on July 17, 2015, the Commission issued an Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits) precluding exhibits 29-37, 39-65, 67-128, 397-409, 1058-1062, and 1063-1073. On July 21, 2015, DRA filed Dakota Rural Action's Motion and Memorandum for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits. On July 23, 2015, the Commission issued an Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits, allowing exhibits 29-37, 39-65, and 1058-1062 to be offered in evidence.

On July 10, 2015, Yankton Sioux Tribe, Cheyenne River Sioux Tribe, BOLD Nebraska, Rosebud Sioux Tribe, Indigenous Environmental Network, and Dakota Rural Action filed a Joint Motion *in Limine* to Exclude Evidence Pertaining to Keystone's Proposed Changes to Findings of Fact requesting that Keystone be prohibited from submitting any evidence related to changes in facts as reflected in the Tracking Table of Changes attached as Appendix C to its Certification Petition. On July 17, 2015, Keystone filed Applicant's Response to Joint Motion *in Limine* arguing that the Tracking Table of Changes is merely a reference to minor changes in facts that have occurred since the issuance of the Amended Final Decision in 2010. Finding that the testimony at issue is relevant to the proceeding and that amending the findings of fact in Docket HP09-001 is not requested, on July 23, 2015, the Commission issued an Order Denying Joint Motion *in Limine* to Exclude Evidence Pertaining to Keystone's Proposed Changes to Findings of Fact.

On July 10, 2015, Keystone filed Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing (Procedural Motion) requesting that the Commission issue several directives to expedite the evidentiary hearing and ensure that it operates efficiently given the number of parties and witnesses involved, namely: (1) limiting Intervenor with a common interest to one lawyer conducting cross-examination; (2) requiring written rather than oral opening statements; (3) precluding friendly cross examination; (4) limiting cross-examination to counsel if a party was represented by counsel; (5) limiting cross examination to the scope of direct examination; and (6) precluding argument on evidentiary objections unless requested by the Hearing Examiner. Responses to the Procedural Motion were filed by Staff and several Intervenor. On July 22, 2015, the Commission issued Order Denying in Part and Granting in Part Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing denying all of Keystone's requests except for limiting cross examination to the scope of direct examination and matters affecting the credibility of a witness and limiting cross-examination to counsel if a party was represented by counsel.

On July 6, 2015, a public input hearing was held before the Commission beginning at 5:30 p.m. in Room 414 of the State Capitol Building. The Commission heard public comment from 52 persons. The Commission also received written comments from a number of persons, which are included in the docket.

An evidentiary hearing was held beginning on Monday, July 27, 2015, in Room 414 of the State Capitol Building. On July 30, 2015, the Commission issued a Notice of Additional Hearing dates extending the hearing to include Saturday, August 1, 2015, and then continuing from August 3-5 and 6-7, 2015, if necessary. The hearing concluded near the end of the business day on August 5, 2015. The evidentiary hearing was conducted by Commission General Counsel John J. Smith, who acted as Hearing Examiner. Commissioners Chris Nelson and Gary Hanson attended the hearing in person. Due to medical treatment, Commissioner Kristie Fiegen elected to participate by reviewing the hearing transcript as allowed under SDCL § 1-26-24. TR 46-50.³ On October 5, 2015, Commissioner Fiegen filed a Certification attesting to the fact that she had read the entirety of the hearing transcripts.

At the conclusion of the hearing, the Commission established a briefing schedule. TR 2502-2503. On August 12, 2015, the Commission issued an Order Establishing Post-Hearing Briefing Schedule in conformity with the action taken at the hearing with simultaneous initial post-hearing briefs due October 1, 2015, and simultaneous reply briefs due October 31, 2015, with reply briefs limited to parties who submitted initial briefs.

At the evidentiary hearing, non-attorney Intervenor Cindy Myers testified on her own behalf. Keystone objected to much of Ms. Myers's testimony and exhibits; however, in the interest of time, it was agreed at the hearing that Keystone would submit its objections in writing to be ruled on at a later date. On September 21, 2015, Keystone filed Applicant's Motion to Strike Testimony and Exhibits of Cindy Myers requesting that the Commission issue an order striking certain portions of Intervenor Cindy Myers's hearing testimony and exhibits. The motion was heard on October 29, 2015. During the discussion on the motion, the following clarifications were made involving Keystone's references to specific items identified in the motion: 1) TransCanada's request to strike transcript testimony 1659:6-1660:13 should be 1659:6-

³ References to the June 10-11, 2014, Hearing Transcript are in the format "TR" followed by the Hearing Transcript page number(s) referenced, and references to Hearing Exhibits are in the format Ex followed by the exhibit number and, where applicable, the page number(s) referenced or other identifying reference and, where applicable, the appendix, attachment or sub-exhibit identifier and page number(s) referenced.

1660:15; 2) TransCanada's request to strike the first paragraph under "Aquifers" applies to the entire paragraph; the request to strike the second paragraph under "Aquifers" excludes the first sentence of the second paragraph; 3) the request to strike the third paragraph under "Aquifers" refers to the entire paragraph; and 4) the request to strike the third paragraph under "Waterways" should be the second paragraph. Chairman Chris Nelson moved to grant TransCanada's Motion to Strike, subject to the clarifications made during the hearing. Commissioner Gary Hanson moved to amend the motion to exclude Exhibit 6001 from the Motion to Strike, which motion failed. The Commission then voted unanimously to grant Keystone's motion subject to the clarifications made at the hearing. On November 4, 2015, Commissioner Hanson filed a request for reconsideration of the Commission action taken on October 29, 2015, in order to separately address Exhibit 6001. On November 6, 2015, the Commission issued an Order Granting Keystone's Motion to Strike Testimony and Exhibits of Cindy Myers. In response to Commissioner Hanson's request for reconsideration, on November 19, 2015, the Commission issued an Order Granting Reconsideration of Order Granting Keystone's Motion to Strike Testimony and Exhibits of Cindy Myers in which the Commission bifurcated the Motion to Strike in order to consider Exhibit 6001 separately. With Commissioner Hanson dissenting, a majority of the Commission voted to exclude Exhibit 6001. The Commission then voted unanimously to exclude the remaining testimony and exhibits addressed in the October 29 Commission action.

On November 4, 2015, Yankton Sioux Tribe, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, Standing Rock Sioux Tribe, Indigenous Environmental Network, Dakota Rural Action, Intertribal Council on Utility Policy, and BOLD Nebraska submitted a Joint Motion to Strike Proposed Findings of Fact and Conclusions of Law requesting that the Commission strike Keystone's Proposed Findings of Fact and Conclusions of law submitted as an attachment to Applicant's Post-Hearing Brief on the grounds that ARSD 20:10:01:25 states that "[i]f requested by the commission, the parties shall file proposed findings of fact." Finding that nothing in the statutes or rules precludes a party from filing proposed findings of fact and conclusions of law, on November 18, 2015, the Commission issued an Order Denying Joint Motion to Strike Proposed Findings of Fact and Conclusions of Law.

On November 9, 2015, John H. Harter, Elizabeth Lone Eagle, Paul F. Seamans, Cindy Myers, Diana L. Steskal, Byron T. Steskal, Arthur R. Tanderup, Lewis GrassRope, Carolyn P. Smith, Nancy Hilding, Gary F. Dorr, Wrexie L. Bardaglio, Joye Braun, Chastity Jewett, Dallas Goldtooth, Bonny J. Kilmurry, Viola Waln, Louis T. Genung, Terry Frisch, Cheryl Frisch, Dakota Rural Action, Indigenous Environmental Network, Intertribal Council on Utility Policy, BOLD Nebraska, Rosebud Sioux Tribe, Yankton Sioux Tribe, Cheyenne River Sioux Tribe, and Standing Rock Sioux Tribe filed Intervenor's Joint Motion to Dismiss requesting that the Commission enter an order (a) dismissing the petition for certification filed by TransCanada Keystone Pipeline, LP, and (b) revoking the permit for construction of the proposed Keystone XL Pipeline through South Dakota which was granted by the Commission on June 29, 2010, in the Amended Final Decision. On December 29, 2015, the Commission issued an Order Denying Motion to Dismiss denying both of these requests.

On December 9, 2015, Yankton Sioux Tribe filed Yankton Sioux Tribe's Proposed Findings of Fact and Conclusions of Law and Objections to Applicant's Proposed Findings of Fact and Conclusions of Law. On December 21, 2015, Keystone filed Applicant's Objections to Yankton Sioux Tribe's Proposed Findings of Fact and Conclusions of Law.

On December 18, 2015, the Commission received Dakota Rural Action's Motion to Supplement Administrative Record. In its motion, DRA asks the Commission to take

administrative notice of a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order filed by the United States Pipeline and Hazardous Materials Safety Administration (PHMSA) on November 20, 2015, and supplement the administrative record with the same. On December 21, 2015, Keystone filed Applicant's Response to DRA's Motion to Supplement the Record in which Keystone requests that the Commission also supplement the record with Keystone's response to the Notice of Probable Violation. On December 29, 2015, the Commission issued an Order Granting Motion for Administrative Notice and Supplementing the Administrative Record taking administrative notice of the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order as official documents of PHMSA, an agency of the government of the United States, and supplementing the record with these documents, but denying Keystone's request to supplement the record with its response on the grounds that such response is not an official record of a governmental agency and would therefore be hearsay without an opportunity for adjudicatory challenge by other parties.

At its regular meeting on January 5, 2016, the Commission took this matter up for decision. Commissioner Fiegen moved to accept Keystone's Certification in accordance with SDCL 49-41B-27 and find that the Certification is valid. After discussion by the Commissioners, the Commission voted unanimously in favor of the motion.

Having considered the evidence of record, applicable law, and the briefs and arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law, and Decision.

FINDINGS OF FACT

Parties

1. The permit holder and Applicant in this docket is TransCanada Keystone Pipeline, LP, a limited partnership organized under the laws of the State of Delaware and owned by affiliates of TransCanada Corporation, a Canadian public company organized under the laws of Canada. Amended Final Decision, Finding of Fact 1.

2. On November 4, 2014, the Commission issued an Order Granting Intervention and Party Status granting intervention and party status to all persons who had requested party status, namely: John H. Harter, Rosebud Sioux Tribe-Tribal Utility Commission, Elizabeth Lone Eagle, Paul F. Seamans, Viola Waln, Cindy Myers, RN, BOLD Nebraska, Diana L. Steskal, Cheryl Frisch, Terry Frisch, Standing Rock Sioux Indian Tribe, Byron T. Steskal, Arthur R. Tanderup, Lewis GrassRope, Carolyn P. Smith, Robert G. Allpress, Jeff Jensen, Amy Schaffer, Louis T. Genung, Nancy Hilding, Gary F. Dorr, Bruce Boettcher, Rosebud Sioux Tribe, Wrexie Lainsen Bardaglio, South Dakota Wildlife Federation, Cheyenne River Sioux Tribe, Jerry D. Jones, Cody Jones, Debbie J. Trapp, Gena M. Parkhurst, Sierra Club, Joye Braun, 350.org, Yankton Sioux Tribe, Dakota Rural Action, Chastity Jewett, Indigenous Environmental Network, Dallas Goldtooth, RoxAnn Boettcher, Bonny Kilmurry, Ronald Fees, and Intertribal Council on Utility Policy. On March 4, 2015, the Commission issued an Order Granting Request to Withdraw Party Status allowing the South Dakota Wildlife Federation and the Sierra Club to withdraw as parties, and on April 21, 2015, the Commission entered an Order Granting Request to Withdraw Party Status allowing Jeff Jensen to withdraw as a party.

3. Staff participated fully as a party, represented by Kristen Edwards and Karen Cremer.

Procedural Findings

4. The Procedural History set forth above is hereby incorporated by reference in its entirety in these Procedural Findings. The procedural findings set forth in the Procedural History are a substantially complete and accurate description of the material documents filed in this docket and the proceedings conducted and orders issued by the Commission in this matter. In addition to the procedural findings set forth in the Procedural History, the following Procedural Findings deal with the hearing process itself.

5. The following testimony was pre-filed on April 2, 2015, April 23, 2015, April 24, 2015, June 25, 2015, June 26, 2015, and August 4, 2015 in advance of the formal evidentiary hearing held July 27 through August 1, and August 3-5, 2015, in Room 414 of the State Capitol Building in Pierre, South Dakota:

Pre-filed Direct Testimony and Exhibits

Keystone

Heidi Tillquist's Testimony and Exhibit A - Resume
Corey Goulet's Testimony and Exhibit A - Resume
Jon Schmidt, Ph.D.'s Testimony and Exhibit A - Resume
Meera Kothari, P.E.'s Testimony and Exhibits A and B - Resume and Media Advisory
(August 5, 2010)
David Diakow's Testimony and Exhibit A - Resume

Staff

Brian Walsh's Testimony and Exhibit____BW-1
Derric Iles' Testimony and Exhibit____DI-1
Kimberly McIntosh's Testimony and Exhibit____KM-1
Tom Kirschenmann's Testimony and Exhibit____TK-1
Daniel Flo's Testimony and Exhibit____DF-1, Exhibit____DF-2, and Exhibit____DF-2
Revised
David Schramm's Testimony and Exhibit____DS-1
Jenny Hudson's Testimony and Exhibit____JH-1
Christopher Hughes' Testimony and Exhibit____CH-1
Supplemental Pre-filed Testimony of Christopher Hughes
Paige Olson's Testimony and Exhibit____PO-1
Darren Kearney's Testimony and Exhibit____DK-1
Darren Kearney's Testimony (Amended July 23, 2015)

Intervenors

Gary F. Dorr's Testimony and Exhibit
Wayne Frederick's Testimony and Exhibit A - Resume
Cindy Myers' Testimony
Diana Steskal's Testimony (will file exhibits later)
Paul F. Seamans' Testimony
Dakota Rural Action's Testimony
Evan Vokes' Testimony

Dr. Arden D. Davis, Ph.D, P.E.'s Testimony and Attachment (Figures 1, 2, 3, 4, 5, 6, 7, 8, and 9)

Sue Sibson's Testimony

Cheyenne River Sioux Tribe's Testimony

 Carlyle Ducheneaux's Testimony

 Steve Vance's Testimony

Yankton Sioux Tribe's Testimony

 Faith Spotted Eagle's Testimony

 Supplement to Faith Spotted Eagle Pre-filed Testimony and Attachment –
 International Treaty to Protect the Sacred From Tar Sands Projects

Standing Rock Sioux Tribe's Testimony

 Waste Win Young's Testimony

 Phyllis Young's Testimony

 Doug Crow Ghost's Testimony

 Linda Black Elk's Testimony

Rosebud Sioux Tribe's Testimony

 Richard Kuprewicz's Testimony Confidential (removed at the request of the party)

 RST Exhibit 8 - Richard B. Kuprewicz's Resume Confidential (removed at
the request of the party)

 RST Exhibit 9 - Accufacts Inc.'s Letter to Rosebud Sioux Tribe
Confidential (removed at the request of the party)

 RST Exhibit 10 - Figure 1 - South Dakota Elevation Profile with Valves
and Additional Information Confidential (removed at the request of the
party)

 Ian Goodman's Testimony Confidential (removed at the request of the party)

 RST Exhibit 1 – Ian Goodman's Resume Confidential (removed at the
request of the party)

 RST Exhibit 3 – Changes to the Economic Costs and Benefits of the
Keystone XL Pipeline for South Dakota Confidential (removed at the
request of the party)

 Brigid Rowan's Testimony Confidential (removed at the request of the party)

 RST Exhibit 2 – Brigid Rowan's Resume (removed at the request of the
party)

 RST Exhibit 3 – Changes to the Economic Costs and Benefits of the
Keystone XL Pipeline for South Dakota (removed at the request of the
party)

 RST Exhibit 4 – Landslide Hazard Areas Confidential (removed at the
request of the party)

 RST Exhibit 5 – Spill Costs Per Barrel from Comparable Crude Pipelines
Confidential (removed at the request of the party)

 RST Exhibit 6 – Range of Worst-Case Scenario Costs for Keystone XL
Using Spill Costs for Comparable Crude Oil Pipelines (with 15-minute
valve shutoff) Confidential (removed at the request of the party)

 RST Exhibit 7 - Range of Worst-Case Scenario Costs for Keystone XL
Using Spill Costs for Comparable Crude Oil Pipelines (with 30-minute
valve shutoff) Confidential (removed at the request of the party)

Pre-Filed Rebuttal Testimony and Exhibits

Staff

Darren Kearney's Rebuttal Testimony

Standing Rock Sioux Tribe

Kevin E. Cahill, Ph.D.'s Rebuttal Testimony and Rebuttal Expert Report of Economist
Kevin E. Cahill, PH.D. on Behalf of the Standing Rock Sioux Tribe

Rosebud Sioux Tribe

Jennifer Galindo's Rebuttal Testimony

Exhibit 11 - Curriculum Vitae Jennifer Galindo Archeologist

Exhibit 12 - Map from Programmatic Agreement

Exhibit 13 - RST Email and Letter to Paige Olson

Exhibit 14 - TransCanada's Policy regarding Native American Relations

Ian Goodman and Brigid Rowan's Rebuttal Testimony Confidential (removed at the request of the party)

Exhibit 15 - Changes to the Economic Costs and Benefits of the Keystone XL Pipeline for South Dakota Confidential (removed at the request of the party)

Paula Antoine's Rebuttal Testimony

Exhibit 16 - Rosebud Sioux Tribe's Resolution No. 2014-42 - Amended: Petition

Exhibit 17 - South Dakota Codified Laws 49-41B-1, 49-41B-11 and 49-41B-22

Amended Rebuttal Testimony of Paula Antoine

Chief Leonard Crow Dog's Rebuttal Testimony

Keystone

Corey Goulet's Rebuttal Testimony

Dan King's Rebuttal Testimony and Resume

F.J. (Rick) Perkins' Rebuttal Testimony and Resume

Meera Kothari's Rebuttal Testimony

Jon Schmidt's Rebuttal Testimony

Heidi Tillquist's Rebuttal Testimony

Exhibit List

Exhibit 1: Diluted Bitumen-Derived Crude Oil: Relative Pipeline Impacts (Battelle 2012)

Exhibit 2: Comparison of the Corrosivity to Dilbit and Conventional Crude (Been 2011) Confidential (not available to the public)

Exhibit 3: Effects of Diluted Bitumen on Crude Oil Pipelines (National Academy of Sciences 2013)

Exhibit 4: Crude Oil at the Bemidji Site: 25 Years of Monitoring, Modeling, and Understanding (Essaid et al. 2011)

Exhibit 5: Use of Long-Term Monitoring Data to Evaluate Benzene, MTBE and TBA Plume Behavior in Groundwater at Retail Gasoline Sites (Kamath et al. 2012)

- Exhibit 6: Review of Quantitative Surveys of the Length and Stability of MTBE, TBA, and Benzene Plumes in Groundwater at UST Sites (Connor et al. 2015)
- Exhibit 7: Characteristics of Dissolved Petroleum Hydrocarbon Plumes: Results from Four Studies (Newell and Connor 1998)
- Exhibit 8: A Comparison of Benzene and Toluene Plume Lengths for Sites Contaminated with Regular vs. Ethanol-Amended Gasoline (Ruiz-Aguilar et al. 2003)
- Exhibit 9: Evaluation of the Impact of Fuel Hydrocarbons and Oxygenates on Groundwater Resources (Shih et al. 2004)
- Exhibit 10: Leukemia Risk Associated With Low-Level Benzene Exposure (Glass et al. 2003)
- Exhibit 11: United States Department of State 12.1: Keystone XL Project, Risk Analysis (Kothari, Bajnok, Tillquist)

Jeff Mackenzie's Rebuttal Testimony

- Appendix A - Jeff Mackenzie's Resume
- Appendix B - Final EIS 3.13.5.3 and 3.13.5.4

Amended Rebuttal Testimony of Heidi Tillquist

Exhibit List

- Exhibit 1: Comparison of the Corrosivity of Dilbit and Conventional Crude
- Exhibit 2: Effects of Diluted Bitumen on Crude Oil Pipelines
- Exhibit 3: Leukemia Risk Associated With Low-Level Benzene Exposure
- Exhibit 4: Characteristics of Dissolved Petroleum Hydrocarbon Plumes
- Exhibit 5: Use of Long-Term Monitoring Data to Evaluate Benzene, MTBE, and TBA Plume Behavior in Groundwater at Retail Gasoline Sites
- Exhibit 6: Review of Quantitative Surveys of the Length and Stability of MTBE, TBA, and Benzene Plumes in Groundwater at UST Sites
- Exhibit 7: A Comparison of Benzene and Toluene Plume Lengths for Sites Contaminated with Regular vs. Ethanol-Amended Gasoline
- Exhibit 8: Evaluation of the Impact of Fuel Hydrocarbons and Oxygenates on Groundwater Resources
- Exhibit 9: United States Department of State 12.1 -Keystone XL Project Risk Analysis

Amended Rebuttal Testimony of Meera Kothari

Dakota Rural Action

Evan Vokes' Rebuttal Testimony

John Harter's Rebuttal Testimony

Yankton Sioux Tribe

Member of the Yankton Sioux Tribe Business & Claims Committee Consisting of Elected Members: Robert Flying Hawk, Quentin JB Brugier, Jr., Mona Wright, Justin Songhawk, Leo O'Conner, Jean Archambeau, Glenford Sam Sully, Jason Cooke, and Everdale Song Hawk's Rebuttal Testimony

- Exhibit A - Keystone's Responses to Yankton Sioux Tribe's First Interrogatories and Request for Production of Documents
- Exhibit B - Appendix S - Programmatic Agreement and Record of Tribal Contact

Exhibit C - Appendix E - Amended Programmatic Agreement and Record of Consultation
Faith Spotted Eagle's Rebuttal Testimony
Exhibit A - Appendix S - Programmatic Agreement and Record of Tribal Contact
Exhibit B - Appendix E - Amended Programmatic Agreement and Record of Consultation
Chris Sauncosi's Rebuttal Testimony

Intertribal Council On Utility Policy

Prefiled Testimony of Dr. Robert Oglesby
- Comments of Dr. James E. Hansen
Appendix: James E. Hansen Comments Charts
Exhibit 1 - James E. Hansen's Resume
Exhibit 2 - Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature

Surrebuttal Testimony

Cindy Myers' Surrebuttal Testimony

Keystone

Surrebuttal Testimony of Corey Goulet
Surrebuttal Testimony of Dan King and Certificate of Service

6. A nine-day evidentiary hearing was held on July 27 through August 1 and August 3 through August 5, 2015. In addition to Keystone and Staff, the following intervenors attended and participated in the hearing: Dakota Rural Action, BOLD Nebraska, Standing Rock Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, Intertribal COUP, Cheyenne River Sioux Tribe, Indigenous Environmental Network, Paul Seamans, Cindy Myers, Elizabeth Lone Eagle, John Harter, Gary Dorr, Joye Braun, Louis GrassRope, Diana Steskal, Carolyn Smith, Dallas Goldtooth, Chastity Jewett, Wrexie Lainson Bardaglio, and Bonny Kilmurry. Dakota Rural Action, BOLD Nebraska, Intertribal COUP, Indigenous Environmental Network, and the Tribes were all represented by counsel.

7. The following witnesses testified at the hearing and were subject to cross examination: Corey Goulet, Meera Kothari, Rick Perkins, Jon Schmidt, Heidi Tillquist, Dan King, Diana Steskal, Carlyle Ducheneaux, David Schramm, Steve Vance, Evan Vokes, Cindy Myers, Kevin Cahill, Phyllis Young, Arden Davis, Faith Spotted Eagle, Jon Schmidt, Christopher Hughes, Jenny Hudson, Sue Sibson, Doug Crow Ghost, Daniel Flo, Wayne Frederick, Paula Antoine, Brian Walsh, and John Harter.

Applicable Statute

8. The governing statute is SDCL § 49-41B-27, which requires that if construction has not started within four years of the permit being granted, then the permittee must "certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued."

9. There are no other statutes, regulations, or South Dakota cases directly addressing SDCL § 49-41B-27 and its application in this docket.

Updates to the Project since June 29, 2010

10. On March 12, 2009, Keystone filed an application for a permit pursuant to SDCL Chapter 49-41B to construct the South Dakota portion of the Project. The application was docketed as HP09-001. On June 29, 2010, after a three-day hearing, the Commission entered an Amended Final Decision and Order; Notice of Entry granting Keystone a permit to construct and operate the project subject to 50 conditions attached to the Decision as Exhibit A.

11. The Project, as proposed in Keystone's application for a permit in Docket HP09-001, was delayed. A Presidential Permit required by Executive Order 11423 of August 16, 1968, and Executive Order 13337 of April 30, 2004, allowing the pipeline to cross the border between Canada and the United States, was still under review by the United States Department of State at the time of the hearing. On November 6, 2015, the Presidential Permit was denied.

12. As originally proposed, the Project was to be developed in three segments: the Steele City Segment from Hardisty, Alberta, to Steele City, Nebraska; the Gulf Coast Segment from Cushing, Oklahoma, to Liberty County, Texas; and the Houston Lateral Segment from Liberty County, Texas, to refinery markets near Houston, Texas.

13. The Gulf Coast Segment has been constructed and was placed into operation as a stand-alone project on January 22, 2014. The Houston Lateral Segment has also been constructed as a stand-alone project. Ex 2001, ¶ 15. The Project therefore currently consists of only the Steele City segment. The Steele City Segment extends from Hardisty, Alberta, Canada, southeast to Steele City, Nebraska. It will interconnect with the previously-approved and constructed Keystone Cushing Extension segment of the Keystone Pipeline. The route in South Dakota has not changed in any material respect. Ex 2001, ¶ 7; Ex 2013.

14. The maximum capacity of the Project is 830,000 barrels per day. TR 186; Ex 2001, ¶ 6.

15. The Bakken Marketlink project was developed after Keystone's permit application in HP09-001. Ex 2001, ¶ 5. It includes a five-mile pipeline, pumps, meters, and storage tanks near Baker, Montana, to deliver light sweet crude oil from the Williston Basin in Montana and North Dakota for transportation through the Project. Bakken Marketlink will deliver up to 100,000 bpd of domestically-produced crude oil into the Keystone XL Pipeline. TR 184-187; 241-248.

16. Because the Project is only the Steele City segment, the mileage has decreased from approximately 1,707 miles to 1,202 miles with about 876 miles in the United States. Ex 2001, ¶ 7. The South Dakota portion of the Project will be approximately 315 miles in length and

crosses the South Dakota counties of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman, and Tripp. TR 291; Ex. 2005, ¶ 9; Petition, App. C, Finding 16.

17. There is no current construction schedule for the Project, pending issuance of a Presidential Permit. Ex 2001, ¶ 8.

18. The Pipeline will be constructed using API 5L X70M high-strength steel. This was one of the design options presented in the original permit application. Petition, App. C, ¶ 18; Ex. 2003, ¶ 5. Keystone withdrew its application to PHMSA for a special permit and adopted 59 special conditions developed by PHMSA as set forth in Appendix Z to the Department of State Final Supplemental Environmental Impact Statement (FSEIS). Petition ¶¶ 60, 90; TR 215, 302. As a result of this change, Keystone will construct the Pipeline using the as-proposed stronger steel, but will operate the Pipeline at a lower maximum pressure, 1,307 psig. Ex. 2003, ¶ 8; Petition, App. C, ¶¶ 18, 19, 63.

19. As part of the 59 special conditions, valves on the Pipeline must be located based on the worst-case discharge as calculated by 49 CFR 195.260 and by taking into consideration elevation, population, and environmentally-sensitive locations, or no more than 20 miles apart, whichever is less. As a result of this change, the number of mainline valves in South Dakota will be 20 instead of 16. Petition, App. C, ¶ 20; Ex. 2001, ¶ 9, 10, 11; FSEIS, App. Z, Condition 32; TR 215.

20. Keystone has committed to meet the 59 special conditions proposed by PHMSA as set forth in Appendix Z to the FSEIS. TR 215; Ex. 2001, ¶ 12.

21. The estimated cost of the Project in South Dakota has increased from \$921.4 million to \$1.974 billion due to new technical requirements, inflation, and additional costs due to the delay in receipt of federal approval and commencing construction. Ex. 2001, ¶ 13.

22. Keystone has continued to update its Construction, Mitigation, and Reclamation Plan (CMR Plan). A current, redlined version of the CMR Plan is attached to the Petition as Appendix C, Attachment A. Ex. 2005, ¶ 5; Petition, App. C, Attachment A.

23. In Docket HP09-001, Keystone submitted soil type maps as Exhibit TC-14. The maps are still generally consistent with the Project, but Keystone has committed to submit updated maps before construction begins as required by Condition No. 6. TR 575-640; Ex 2005, ¶ 6; Petition, App. C, ¶ 33.

24. Keystone will use horizontal directional drilling (HDD) to cross two additional rivers or streams—Bridger Creek and the Bad River. TR 335-336, 531, 537-538, 545, 547, 588-589, 633-634, 870, 1205, 1286-1287, 1886; Ex 2003 ¶ 10; Ex. 2005, ¶ 7; Ex. 2009 ¶ 6; Petition, App. C., ¶¶ 41, 83. The preliminary site-specific crossing plans for these additional HDD crossings are included with the Petition as Attachment B to Appendix C.

25. The projected total length of Project pipe with the potential to affect a High Consequence Area (HCA) is 15.8 miles, which is less than the 34.3 miles stated in the Amended Final Decision's findings of fact. TR 670, 1119; Ex. 2005 ¶ 4; Petition, App. C, ¶ 50. As a result of the change in mileage, it is estimated that a spill that could affect an HCA would occur no more than once in 460 years, rather than once in 250 years. TR 670.

26. Due to minor route refinements, all but 27.9 miles of the Project route in South Dakota are privately owned, an increase from 21.5 miles in the original application. Ex. 2005, ¶ 9; Petition, App. C, ¶ 54.

27. No Indian reservation or trust lands are crossed by the Project route. TR 394; Petition, App. C, ¶ 54.

28. TransCanada has thousands of miles of the same grade of pipeline steel, which has been coated with fusion bonded epoxy (FBE) installed and in operation. There has been no evidence of external corrosion except for one instance in Missouri in which an adjacent foreign utility interfered with the active cathodic protection system. Ex. 2003, ¶ 9; Petition, App. C, ¶ 68. The corrosion incident in Missouri was detected by Keystone during an in-line inspection of the pipe. TR 293-94, 2315-16. Keystone has since then started installing passive anodes to protect the pipeline during construction, which goes beyond what is required by federal regulation. TR 265, 309-310.

29. Since the Amended Final Decision was issued in 2010, Keystone has completed the process of consulting with the National Resource Conservation Service to create construction/reclamation units for the different soils along the pipeline route. TR 617; Petition, App. C, ¶ 80.

30. Other than these updates stated in Appendix C to the Petition, the parties did not present evidence of any other factual changes to the Project.

Keystone's Ability to Meet the Permit Conditions

31. None of the updates identified in Appendix C to Keystone's Certification Petition affects Keystone's ability to meet the conditions on which the permit was issued. As identified in Petition Appendix C, Conditions 1-3, 5, 6.a-6.f, 11-14, 16.a-16.p, 17, 18, 19.a, 20-34.a, 35-40, 41.b, and 42-48 are prospective. No evidence was presented that Keystone cannot satisfy any of these conditions in the future.

32. Condition 4 provides that the permit is not transferable without the consent of the Commission. No evidence was presented that Keystone cannot continue to comply with this condition.

33. Conditions 7-9 require that Keystone appoint a public liaison officer, which has been done, and submit quarterly reports to the Commission, which has also been done and is ongoing. No evidence was introduced that Keystone cannot continue to meet these conditions.

34. Condition 10 requires that not later than six months before construction, Keystone, must commence a program of contacts with local emergency responders. Keystone presented evidence that it has already started making such contacts and will continue. TR 317-318. No evidence was introduced that Keystone cannot continue to meet this condition.

35. Condition 10 does not specifically refer to Tribal governments or officials. To the extent that Tribes may be affected by construction and operation of the Project, Keystone presented evidence that it will contact Tribal emergency responders as well. TR 317-318.

36. Condition 15 requires consultation with the NRCS to develop the con/rec units, which Keystone established has been done. TR 617; Petition, App. C, ¶ 80; FSEIS, App. R.

37. Condition 19 requires that landowners be compensated for tree removal, which Keystone indicated is done as part of the process of acquiring easements. Petition, App. B, Condition 19. No evidence was presented that Keystone cannot continue to meet this condition.

38. Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding high consequence areas. Keystone presented evidence that this process is ongoing. TR 662-663. No witness testified to the contrary.

39. Condition 41 requires that Keystone follow all protection and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks (SDGFP). Keystone presented evidence that this process is ongoing. TR 630, 636-637; Petition, App. B, Condition 19. No witness testified to the contrary.

40. Condition 41 requires that Keystone consult with SDGFP to identify greater prairie chicken and greater sage and sharp-tailed grouse leks. In support of its Certification, Keystone submitted its Quarterly Report stating that this process is ongoing. Petition, App. B, Condition 41.a. No witness testified to the contrary.

41. Condition 16(m) requires that Keystone must re-seed all lands with comparable crops to be approved by the landowner, or with comparable grass or native species mix to be approved by the landowner for pasture, and that Keystone must actively monitor revegetation on all disturbed areas for at least two years. Condition 49 provides that Keystone must pay commercially reasonable costs and indemnify and hold harmless landowners for any loss or damage resulting from Keystone's use of the easement. The only evidence related to these conditions came from Sue Sibson, who testified that reclamation on her property after construction of the Keystone Pipeline has not been satisfactory. TR 1965. Sibson's testimony does not, however, establish that Keystone cannot meet these conditions with Keystone XL. She testified that it takes "quite a while" for native grasses to re-establish, and that her property has been reseeded at her request four or five times since 2009. TR 1977. She also testified that she has been paid damages for loss of use of the easement area, and she did not state that Keystone has failed to pay reasonable damages. The process of reclaiming her property is ongoing, and it is undisputed that Keystone has continued to work with Sibson. TR 1975, 1978, 306-307. Corey Goulet testified that Keystone was committed to continue reclamation efforts on the Sibson property until the Sibsons were satisfied. He also testified that out of 535 tracts on the Keystone Pipeline, all but 9 had been reclaimed to the satisfaction of the landowner. TR 306.

42. Condition 50 provides that the Commission's complaint process be available to landowners threatened with damage or the consequences of Keystone's failure to comply with any of the conditions. No evidence was presented that Keystone cannot comply with this condition.

43. Multiple Intervenor testified to their concerns about the possible adverse effects of the pipeline on groundwater resources, shallow aquifers, rivers, and streams. None of this testimony related to Keystone's ability to meet any permit condition. Rather, this testimony related to Keystone's burden of proof under SDCL § 49-41B-22.

44. Dr. Arden Davis testified to concerns that the Project right of way crosses the recharge areas of several shallow aquifers, including the Ogallala aquifer, Sand Hills-type material, gravel aquifers, eolian and alluvial aquifers, and the Fox Hills aquifer. Ex. 1003, p. 1.

Dr. Davis also testified that the Project right of way would cross the Little Missouri River, the Grand River and its tributaries, the Moreau River, the Cheyenne River, the Bad River, and the White River, and that dissolved hydrocarbon contaminants could be transported downgradient in surface water, in groundwater within the aquifers, or both. Dr. Davis also testified that the Cheyenne River, which drains much of the Black Hills, flows into the Missouri River and has exposed Pierre Shale along steep sides that are prone to slope failures. Ex. 1003, p. 2. These concerns do not specifically address any permit condition.

45. Heidi Tillquist testified on behalf of Keystone that adverse impacts to all of these areas are highly unlikely. Ex. 2017, ¶¶ 4-8. Dr. Davis did not respond to Tillquist, address the likelihood of adverse impacts, or conduct an independent risk assessment related to the Project. TR 1808-1809. The Commission addressed the likelihood of such adverse impacts in the Amended Final Decision in Findings of Fact 43-45 and 52. Dr. Davis's testimony is insufficient to warrant any change to those findings.

46. With respect to Dr. Davis's testimony about the Ogallala aquifer in Tripp County and the wind-blown Sand Hills type material crossed by the Project right of way, the Commission has required Keystone to treat that area as a hydrologically sensitive area. Amended Final Decision, Finding of Fact 53 and Condition 35; Ex. 2017, ¶ 9. Dr. Davis did not testify that such treatment was inappropriate or insufficient or that Keystone could not meet the condition.

47. Dr. Davis testified to his concern about possible benzene exposures from a leak or spill, especially since benzene is soluble in water and can be transported downstream, potentially affecting water intakes. Ex. 1003, pp. 3-4. Tillquist testified, however, that benzene exposures at a level that would cause health concerns would not be expected following a crude oil spill due to the low persistence of benzene and expected emergency response measures, and that a potential release would likely not threaten groundwater sources or public water intakes. Ex. 2017, ¶¶ 11-12. This testimony was undisputed.

48. Dr. Davis relied in his testimony on the Stansbury report from 2011 that was considered by the Department of State in connection with the FSEIS. Ex. 1003, p. 5. In her rebuttal testimony, Heidi Tillquist addressed flaws in Stansbury's analysis. Ex. 2017, ¶¶ 13-14. Dr. Davis did not address the Stansbury report in his hearing testimony, and Tillquist was not cross-examined about the Stansbury report.

49. John Harter testified to his concerns about the location of the Project right of way in relation to the City of Colome's water wells. TR 2209-2210. The proximity of the Project to the City of Colome's wells was addressed in Docket HP09-001. The Commission found that the risk of a spill affecting public or private water wells is low because the components of crude oil are unlikely to travel more than 300 feet from the spill site and there are no private or public wells within 200 or 400 feet, respectively, of the right of way and that the route was refined near Colome to avoid a groundwater protection area. Amended Final Decision, Findings 49 and 105. In this proceeding, Brian Walsh from the South Dakota Department of Environment and Natural Resources (DENR) testified that the route had been moved at DENR's request before the Amended Final Decision, and that the current route had been determined in consultation with DENR. TR 2155-2156. The route was moved 175 feet from the edge of the surface water protection area and 1,000 feet from the wellhead itself. TR 1323. Keystone also met at the time the route was changed with the mayor and an engineer for the City of Colome. TR 1384. This is not an issue that affects Keystone's ability to meet any permit condition.

50. Doug Crow Ghost, the Director of the Department of Water Resources for the Standing Rock Sioux Tribe, testified about the Winters Doctrine, tribal water rights, and his concern that the Keystone XL Pipeline presented a threat to tribal water supplies given long-term drought. TR 2015-2020. He testified that the Tribe is working with the State to quantify the Tribe's water rights. TR 2016-2017. His testimony was rebutted by Dr. Jon Schmidt, who explained in his rebuttal testimony that Keystone cannot use water if the use would adversely affect prior appropriations or vested rights, and that SDCL 46-5-40.1, which governs temporary water use permits for construction purposes, protects the Tribe, even in cases of long-term drought. Ex. 2009, ¶¶ 4-5, 7. Crow Ghost's testimony did not establish that Keystone is unable to meet any permit conditions.

51. Carlyle Ducheneaux is the Section 106 Coordinator for the Cheyenne River Sioux Tribe. TR 990. He testified that construction of the pipeline would disturb contaminated sediments in the Cheyenne River and its tributaries and that pipeline failure was likely to occur because of the sloughing of river banks and the movement of highly erodible soils. Ex. 7001, ¶¶ 8-14. Jon Schmidt testified that construction would not cause any disturbance of contaminated sediments in the Cheyenne River because Keystone will use HDD for the crossing. Schmidt also testified that sloughing of river banks is not an issue for the same reason and because Keystone can take other mitigation measures during construction. Ex. 2009, ¶¶ 8-9. Ducheneaux's testimony did not establish that Keystone is unable to meet any permit condition.

52. Cindy Myers testified to her concerns: (1) that emergency responders may not have adequate information about the chemical composition of the crude oil in case of a spill, TR 1658-1660; (2) the dangers of exposure to benzene, TR 1661-1663; (3) her opinion that benzene can permeate polyethylene and polyvinyl chloride water pipe and waterlines like the Mni Wiconi water pipeline, TR 1663-1664; (4) that, according to her, 62% of South Dakotans get their drinking water from the Missouri River, which is at risk from a spill, TR 1666-1667; and (5) because of the threat to drinking water resources, the Project "could substantially impair the health, safety, and welfare of South Dakotans." TR 1673. Tillquist's testimony established that the risks posed by possible benzene exposure due to a spill are low, and the Commission previously determined that the risk of any significant pipeline release was low. Amended Final Decision, Findings 43-45 and 52; Ex. 2017, ¶¶ 4, 6, 7, 8, 11, 12. Corey Goulet testified that studies have established that the amount of benzene present in crude oil is not a threat to PVC pipe. TR 950-951. Myers' testimony does not establish that Keystone is unable to meet any permit condition and essentially addresses SDCL 49-41B-22, the permitting statute, not SDCL 49-41B-27.

53. Faith Spotted Eagle testified to concerns about safe drinking water and the availability of water from the Missouri River for spiritual ceremonies. Ex. 9011, ¶¶ 21-23; TR 1855-1857. Spotted Eagle's testimony does not contain any factual basis for the Commission to find either that the Project poses a threat to the Tribe's drinking water or that water will not be available from the Missouri River for the Tribe's spiritual ceremonies.

54. Two Intervenors testified about their concerns that Keystone had not consulted with Tribal officials about the Project. Phyllis Young testified on behalf of the Standing Rock Sioux Tribe as an at-large Tribal Council Member that Keystone did not consult with the Tribe and, similarly, that the Department of State failed to consult with the Tribe in preparing the FSEIS. Ex. 8001, last page; TR 1722, 1732-1733. The Honorable Wayne Frederick testified on behalf of the Rosebud Sioux Tribe as a member of the Council that the Rosebud Sioux Tribe was not consulted by TransCanada. TR 2088. This testimony does not establish that Keystone

cannot meet any permit conditions because, as stated in the conclusions of law, it is not Keystone's legal obligation to consult with the Tribes in connection with the FSEIS.

55. No permit condition requires that Keystone consult with the Tribes about the Project. Condition 6 refers to "local governmental units," but does not specify Tribes. Condition 34 requires that Keystone must "consider local knowledge" in assessing and evaluating environmentally sensitive and high consequence areas. In support of its Certification, Keystone submitted its Quarterly Report in which Keystone's public liaison officer stated that Keystone has sought out local knowledge. Petition, App. B, Condition 34(b).

56. None of the Tribes who intervened in this proceeding were parties to Docket HP09-001, although all could have been.

57. Appendix E to the FSEIS, which is a matter of public record of which the Commission has taken judicial notice, contains the record of consultation between the Department of State and various Tribes under Section 106 of the National Historic Preservation Act. On page 11 of the record of consultation, all of the meetings, e-mails, telephone calls, and letters between the Department of State and the Standing Rock Sioux Tribe are listed. The record of consultation establishes that the Standing Rock Sioux Tribe was consulted by the Department of State.

58. Multiple witnesses testified that the Tribes in South Dakota passed resolutions opposing the Project and that Keystone representatives were not welcome on Tribal land. TR 1745-1746, 1873, 2084, 2096-2097, 2104-2105.

59. John Harter testified that Keystone acquired an easement on his property through the use of eminent domain. TR 2199. The court file in *TransCanada v. Harter*, Civ. 11-62 (6th Jud. Cir.), of which the Commission takes judicial notice, demonstrates that Keystone acquired an easement pursuant to a judgment entered by the court that enforces a settlement agreement between Keystone and Harter. TR 2214. Even if Keystone had acquired an easement on Harter's property by eminent domain, that would not establish that Keystone is unable to meet any permit condition.

60. Kevin E. Cahill, Ph.D., is an economist with ECONorthwest from Portland, Oregon. TR 1681-1682. Cahill testified that in his opinion the socio-economic analysis that was done as part of the FSEIS was "seriously flawed" because it was supposed to be a cost-benefit analysis, but it failed to consider any costs or potential indirect costs of the Project. TR 1685-1688. He testified that any benefits of the Project had not been measured against the costs as part of the analysis done in the FSEIS. TR 1690. The socioeconomic analysis in the FSEIS was conducted by the Department of State, not Keystone. No permit condition relates to the socioeconomic analysis in the FSEIS. Dr. Cahill's testimony does not establish that Keystone does not, or is unable to, meet any permit condition.

61. Paula Antoine testified about socioeconomic issues as a rebuttal witness on behalf of the Rosebud Sioux Tribe. Ex. 11000. Ms. Antoine is the Director of the Sicangu Oyate Land Office. TR 2131. She testified that in her opinion Keystone failed to present sufficient evidence related to Amended Final Decision Findings of Fact 107, 108, 109, and 110. Ex. 11000, pp. 2-4; TR 2133. Antoine's testimony is not based on her personal knowledge and does not relate to any permit condition.

62. Faith Spotted Eagle testified on behalf of the Yankton Sioux Tribe. Ex. 9011; TR 1848. She is a counselor and a PTSD therapist. TR 1848-1849. She testified as to her concerns about the proposed work camps in South Dakota and the effect they might have on the safety of Native American communities and tribal members. Ex. 9011, ¶¶ 14, 18, 19; TR 1850-1852. Spotted Eagle testified that the Commission should "anticipate a surge in crime, especially violent crime, in the communities near the man camps" and that because the camps are inhabited by young and single men who have financial means and are away from their families, "[t]he result is easy to predict and does not require any scientific analysis." Ex. 9011, ¶¶ 14, 18. Spotted Eagle cited no studies of crime associated with work camps, no crime statistics from work camps, and no personal experience with either work camps like those proposed for the Keystone XL Pipeline or with Target Logistics, Keystone's contractor.

63. Rick Perkins testified on behalf of Keystone about the work camps, and testified that Target Logistics, the contractor that will operate the camps, does not have a documented history of behavior problems associated with the camps. Ex. 2007, ¶¶ 5-6, 12-13; TR 2400. Perkins testified that Keystone expects no increase in crime associated with the camps. TR 2409. Workers who live in the camps must sign a code of conduct and may be expelled if they violate the code. TR 2413.

64. There are three proposed work camps in South Dakota - one in Harding County near Buffalo, one in Meade County near Howes, and one in Tripp County near Colome. Ex. 2007, ¶4. Keystone has talked to local law enforcement about the camps and is willing to supplement local law enforcement officers at Keystone's expense. Ex. 2007, ¶ 14; TR 2406. Keystone has obtained a conditional use permit from Harding County for the Buffalo camp. No such permit is required in Meade County or Tripp County, although Keystone will obtain an occupancy permit for the camp in Meade County. Ex. 2007, ¶ 15.

65. There is no permit condition related to the work camps. The testimony of Faith Spotted Eagle does not establish either that the work camps pose any particular threat to any South Dakota citizens, or that Keystone cannot meet any permit condition.

66. The Keystone XL pipeline route does not cross any reservation land or land held in trust for Indians. TR 254.

67. Steve Vance testified on behalf of the Cheyenne River Sioux Tribe. He is the Tribal Historic Preservation Officer. Ex. 7002, ¶ 2; TR 1524. Vance testified to his concern that the Project falls within the view shed of several cultural sites, like the Slim Buttes; that during construction, access to cultural and historic sites could be hindered; that operation and maintenance of the pipeline could disrupt spiritual practitioners requiring solitude; and that the Project will have long term negative effects emotionally and spiritually on many Tribal members. Ex. 7002, ¶¶ 7-10.

68. Vance's testimony is insufficient to establish that Keystone cannot meet any permit condition. Permit Condition 43 addresses the protection of cultural resources and provides that Keystone must follow the Unanticipated Discoveries Plan as approved by the Department of State. If Keystone finds any cultural resources during construction, Keystone must notify the Department of State and the State Historic Preservation Office, and, if appropriate, develop a plan to address the resource. Vance offered no testimony that Keystone cannot or will not comply with this condition.

69. Dakota Rural Action called Evan Vokes, a former TransCanada employee, to testify about welding and other safety issues that he perceived from his tenure. TR 1768; Ex. 1003-A. Vokes, who is no longer a licensed professional engineer, was employed by TransCanada from 2007 until May, 2012, although he did not actively work at TransCanada after October 26, 2011. TR 1544-1554. He started in the welding group as an engineer in training, and became a professional engineer in 2009. His rank from 2009 until October, 2011, was junior engineer. TR 1549-1552. When he started at TransCanada, he had no previous experience with pipeline welding. TR 1572.

70. Vokes testified that TransCanada inspects 100% of the welds in its mainline pipe, even though applicable federal regulations require that only 15% of the welds be inspected. TR 1578.

71. Vokes testified that he thought that TransCanada had problems with automated ultrasonic testing (AUT) of welds on the Cutbank Project in Canada. Vokes testified that he found defects in welding procedures used by TransCanada and that he notified his superiors. TR 1594-1597. He testified that the National Energy Board in Canada (NEB) sent a letter related to nine welding procedures not meeting minimum qualifications. TR 1594. Vokes testified that he thought that a pipeline rupture that occurred near Otterburne, Manitoba, was an example of a problem caused by a defective weld. TR 1598-9159. Dan King, TransCanada's Chief Engineer and Vice President for Asset Reliability, testified that the concerns that the NEB raised about AUT on the Cutbank Project were administrative in nature, not technical. He testified that they did not affect the safety of any welds. TR 2264-2265. He testified that the rupture on a natural gas pipeline near Otterburne was caused by a failure on a weld that was completed in 1960 under different procedures and standards. TR 2265-2266. In addition, he testified that TransCanada worked with the NEB to look at the other welds on the same pipeline and found no issues. TR at 2266-2267.

72. Vokes testified that he was aware of pipe intended for the Keystone Pipeline that had manufacturing defects. TR 1602-1603. Dan King testified that there was pipe manufactured for the Canadian portion of the project that had problems, and it was rejected by TransCanada and never shipped or installed. TR 2267-2268.

73. Vokes testified that he was involved in testing the integrity of the welds along a segment of the Keystone Pipeline. TR at 1600-1601. There were issues with peaked pipe, which is the result of a manufacturing problem. TR 1610-1611. Vokes thought that the pipe should not have been used because it could fatigue over time. TR 1611-1614. He thought, however, that "[w]e did a very good job, actually very good pipe, other than the fact of the peaking." TR 1613. Dan King testified that there was no pipe installed on the Keystone Pipeline that was inspected in a manner that did not come within the tolerances permitted by code, and that the pipe met TransCanada's tolerances, which are stricter than code. TR 2269-2270.

74. Vokes testified that he thought there were problems with gas metal arc welding causing lack-of-fusion defects. TR 1603-1605. Dan King testified that lack-of-fusion defects can occur with gas metal arc welding, which is typically used with larger diameter pipe, but that the defects are generally found during the inspection process, and then removed or repaired. TR 2271-2272.

75. Vokes testified that he worked on the Bison Project, that there were problems with the welding, and that while TransCanada wanted to use AUT for the welds, it was technically a problem. TR 1614-1619. As a result of the problems, Vokes testified that there

were 1,200 or 1,300 welds on the project that went into the ground that never had a code inspection. TR 1621. Vokes also testified that there were dents associated with welds on the Bison project. TR 1623-1624. Dan King testified that there was an in-service failure on the Bison Pipeline, which is a natural gas line. The failure was caused by some external force, but the source of the external force, which appeared to be some sort of heavy equipment strike, could not be determined. TR 2273-2274. PHMSA was involved in the investigation and, after investigation and a corrective action order, allowed the project back into service and cleared the corrective action order. TR 2274. As a result of the failure, TransCanada increased the number of inspectors on projects and improved inspector training. TR 2274-2275. King also testified that he disagreed with Vokes's testimony that there could be 1,200 to 1,300 welds in the ground that have not been subject to an inspection that meets code on the Bison project. He testified that PHMSA's involvement and inspection of 100% of the welds was thorough and complete. TR 2275-2276.

76. Vokes testified that in connection with the Keystone XL Pipeline, he worked on one section in Canada and maybe the Gulf Coast Project in the United States. TR 1754. He testified that he was concerned that TransCanada was using Weldsonix, a nondestructive examination company to inspect welds, because there had been issues with Weldsonix in the past. TR 1754-1756. He testified that he was told to qualify Weldsonix. TR 1756. Dan King testified that TransCanada was dissatisfied with the performance of Weldsonix on a project in 2004, but that Weldsonix U.S.A., which did work on the Keystone Pipeline, passed a qualification process and performed very well on that project. TR 2276-2277. After an anonymous person raised issues about inspection on the Keystone Pipeline, TransCanada did a 100% audit and found no issues with the work that Weldsonix had done. TR 2277.

77. Vokes's testimony is insufficient to establish that Keystone cannot meet any permit condition. His testimony did not directly relate to any permit condition. Moreover, it is undisputed that Vokes has no first-hand knowledge of any welding or inspection defects on the Keystone Pipeline, the Gulf Coast Project, or the Houston Lateral Project. It is also undisputed that he has no knowledge of any welding or inspection defects in South Dakota. TR 1773, 1775, 1777-1778.

Conclusion

78. At its regularly scheduled meeting on January 5, 2016, the Commission considered this matter. The Commission unanimously voted to approve the Company's request for an order accepting its certification. The Commission finds that the Company certified that it remains eligible to construct the project under the terms of 2010 permit, subject to the provisions of 49-41B. The Commission finds that the Company certified that the Project continues to meet the conditions upon which the 2010 permit was issued.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding under SDCL Chapter 49-41B and ARSD Chapter 20:10:22. The Commission has the legal authority to decide whether to accept Keystone's Certification under SDCL § 49-41B-27.

2. The Amended Final Decision and Order dated June 30, 2010, in Docket HP09-001 was not appealed and constitutes a final order of the Commission.

3. Even though more than four years have elapsed since the permit was issued in Docket HP09-001, the permit has not lapsed or expired. Keystone therefore has no legal obligation to again prove that it meets the requirements of SDCL § 49-41B-22, which the Commission concluded in the Amended Final Decision entered in Docket HP09-001 it had met. Keystone's burden of proof under SDCL § 49-41B-27 is distinct from its burden under SDCL § 49-41B-22.

4. Under SDCL § 49-41B-27, Keystone has the burden of proof to show that its certification is valid.

5. "Conditions" as used in SDCL § 49-41B-27 means the 50 Conditions attached as Exhibit A to the Decision.

6. The Commission has no authority over condemnation or eminent domain. SDCL 21-35-1 requires that these issues be brought before the circuit court.

7. The Keystone XL pipeline route does not cross any reservation land or land held in trust for Indian Tribes. The Commission has no jurisdiction to adjudicate aboriginal or usufructory rights with respect to lands that were formerly Indian country under the Treaties of 1851 or 1868 prior to diminishment.

8. Keystone met its burden of proof through the Certification signed by Corey Goulet, the documents filed with its Certification Petition, and the direct testimony of its witnesses establishing that despite some updates related to the Project since June 30, 2010, none of these updates affects Keystone's ability to meet the conditions on which the permit was granted.

9. With respect to prospective conditions that are unaffected by the updates since June 29, 2010, Keystone is as able today to meet the conditions as it was when the permit was issued as certified to in the Certification signed by Corey Goulet. No evidence was offered demonstrating that Keystone will be unable to meet the conditions in the future. Keystone offered sufficient evidence to establish that Keystone can continue to meet the conditions.

10. The Intervenor failed to establish any reason why Keystone cannot continue to meet the conditions on which the permit was issued.

11. Under Section 106 of the National Historic Preservation Act, it is the legal obligation of the Department of State to consult with the Tribes in South Dakota. 16 U.S.C. § 470f; 36 C.F.R. Part 800.

12. The Commission granted party status to every person or entity who sought it. The Intervenor was afforded a full and fair opportunity to be heard. The proceedings in this docket were substantially longer, more in-depth, and more involved than in HP09-001, even though Keystone's burden of proof was more limited in scope. The Commission needs no additional information to determine whether to accept Keystone's Certification under SDCL § 49-41B-27.

13. The Commission concludes that the Certification and all required filings have been filed with the Commission in conformity with South Dakota law and that all procedural

requirements under South Dakota law, including public hearing requirements, notice, and an opportunity to be heard, have been met.

It is therefore

ORDERED that Keystone's Certification under SDCL § 49-41B-27 is accepted by the Commission and found to be valid and Keystone is authorized to proceed with the construction and operation of the Keystone XL Pipeline subject to the conditions attached as Exhibit A to the Amended Final Decision and Order dated June 30, 2010.

NOTICE OF ENTRY AND OF RIGHT TO APPEAL

PLEASE TAKE NOTICE that this Final Decision and Order was duly issued and entered on the 21st day of January, 2016. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition with the Commission within 30 days from the date of issuance of this Final Decision and Order; Notice of Entry. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 21st day of January, 2016.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically or by mail.

By: Karen E. Bremer

Date: 1-21-16

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Chris Nelson

CHRIS NELSON, Chairman

Kristie Fiegen

KRISTIE FIEGEN, Commissioner

Gary Hanson

GARY HANSON, Commissioner

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY)	
TRANSCANADA KEYSTONE PIPELINE, LP)	AMENDED FINAL DECISION
FOR A PERMIT UNDER THE SOUTH DAKOTA)	AND ORDER; NOTICE OF
ENERGY CONVERSION AND TRANSMISSION)	ENTRY
FACILITIES ACT TO CONSTRUCT THE)	
KEYSTONE XL PROJECT)	HP09-001

PROCEDURAL HISTORY

On March 12, 2009, TransCanada Keystone Pipeline, LP ("Applicant" or "Keystone") filed an application with the South Dakota Public Utilities Commission ("Commission") for a permit as required by SDCL Chapter 49-41B to construct the South Dakota portion of the Keystone XL Pipeline ("Project")¹. The originally filed application described the Project as proposed to be an approximately 1,702 mile pipeline for transporting crude oil from Alberta, Canada, to the greater Houston area in Texas, with approximately 1,375 miles to be located in the United States and 313 miles located in South Dakota.

On April 6, 2009, the Commission issued its Notice of Application; Order for and Notice of Public Input Hearings; and Notice of Opportunity to Apply for Party Status. The notice provided that pursuant to SDCL 49-41 B-17 and ARSD 20:10:22:40, each municipality, county, and governmental agency in the area where the facility is proposed to be sited; any nonprofit organization, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups, or to promote the orderly development of the area in which the facility is to be sited; or any interested person, may be granted party status in this proceeding by making written application to the Commission on or before May 11, 2009.

Pursuant to SDCL 49-41B-15 and 49-41B-16, and its Notice of Application; Order for and Notice of Public Hearings and Notice of Opportunity to Apply for Party Status, the Commission held public hearings on Keystone's application as follows: Monday, April 27, 2009, 12:00 noon CDT at Winner Community Playhouse, 7th and Leahy Boulevard, Winner, SD, at which 26 persons presented comments or questions; Monday, April 27, 2009, 7:00 p.m. MDT at Fine Arts School, 330 Scottie Avenue, Philip, SD, at which 17 persons presented comments or questions; and Tuesday, April 28, 2009, 6:00 p.m. MDT at Harding County Recreation Center, 204 Hodge Street, Buffalo, SD, at which 16 persons presented comments or questions. The purpose of the public input hearings was to hear public comment regarding Keystone's application. At the public input hearings, Keystone presented a brief description of the project, following which interested persons appeared and presented their views, comments and questions regarding the application.

On April 29, 2009, Mary Jasper (Jasper) filed an Application for Party Status. On May 4, 2009, Paul F. Seamans (Seamans) filed an Application for Party Status. On May 5, 2009, Darrell Iversen (D. Iversen) filed an Application for Party Status. On May 8, 2009, the City of Colome (Colome) and Glen Iversen (G. Iversen) filed Applications for Party Status. On May 11, 2009, Jacqueline Limpert (Limpert), John H. Harter (Harter), Zona Vig (Vig), Tripp County Water User District (TCWUD), Dakota Rural Action (DRA) and David Niemi (David Niemi) filed Applications for

¹The Commission's Orders in the case and all other filings and documents in the record are available on the Commission's web page for Docket HP09-001 at:
<http://puc.sd.gov/dockets/hydrocarbonpipeline/2009/hp09-001.aspx>

Party Status. On May 11, 2009, the Commission received a Motion for Extension of Time to File Application for Party Status from DRA requesting that the intervention deadline be extended to June 10, 2009. On May 12, 2009, Debra Niemi (Debra Niemi) and Lon Lyman (Lyman) filed Applications for Party Status. On May 15, 2009, the Commission received a Response to Motion to Extend Time from DRA and a Motion to Establish a Procedural Schedule from the Commission's Staff ("Staff").

At its regularly scheduled meeting of May 19, 2009, the Commission voted unanimously to grant party status to Jasper, Seamans, D. Iversen, Colome, G. Iversen, Limpert, Harter, Vig, TCWUD, DRA, David Niemi, Debra Niemi and Lyman. The Commission also voted to deny the Motion for Extension of Time to File Application for Party Status, and in the alternative, the Commission extended the intervention deadline to May 31, 2009. On May 29, 2009, Ruth M. Iversen (R. Iversen) and Martin R. Lueck (Lueck) filed Applications for Party Status. At its regularly scheduled meeting of June 9, 2009, the Commission voted unanimously to grant the Motion to Establish a Procedural Schedule and granted intervention to R. Iversen and Lueck.

On August 26, 2009, the Commission received a revised application from Keystone. On September 3, 2009, the Commission received a Motion for Extension of Time to Submit Testimony from DRA. At its regularly scheduled meeting of September 8, 2009, the Commission voted unanimously to grant the Motion for Extension of Time to Submit Testimony to extend DRA's time for filing and serving testimony until September 22, 2009.

On September 18, 2009, Keystone filed Applicant's Response to Dakota Rural Action's Request for Further Discovery. On September 21, 2009, DRA filed a Motion to Compel Responses and Production of Documents Addressed to TransCanada Keystone Pipeline, LP Propounded by Dakota Rural Action. At an ad hoc meeting on September 23, 2009, the Commission considered DRA's Motion to Compel and on October 2, 2009, issued its Order Granting in Part and Denying in Part Motion to Compel Discovery. By letter filed on September 29, 2009, Chairman Johnson requested reconsideration of the Commission's action with respect to DRA's Request 6 regarding Keystone documents pertaining to development of its Emergency Response Plan for the Project. At its regularly scheduled meeting on October 6, 2009, the Commission voted two to one, with Commissioner Hanson dissenting, to require Keystone to produce to DRA via email the References for the Preparation of Emergency Response Manuals before the close of business on October 6, 2009, that DRA communicate which documents on the list it wished Keystone to produce on or before the close of business on October 8, 2009, and that Keystone produce such documents to DRA on or before October 15, 2009.

On October 2, 2009, Staff filed a letter requesting the Commission to render a decision as to whether the hearing would proceed as scheduled commencing on November 2, 2009. Staff's letter stated that rescheduling the hearing would result in significant scheduling complications for Staff's expert witnesses whose scheduling and travel arrangements had been made months earlier based on the Commission's Order Setting Procedural Schedule issued on June 30, 2009. At its regular meeting on October 6, 2009, the Commission considered Staff's request. At the meeting, all parties agreed that the hearing could proceed on the scheduled dates. DRA requested that its date for submission of pre-filed testimony be extended from October 14, 2009, until October 22, if possible, or at least until October 20, 2009. After discussion, the parties agreed on an extension for DRA's pre-filed testimony until October 20, 2009, with Applicant's rebuttal to be filed by October 27, 2009. The Commission voted unanimously to approve such dates and issued its Order Setting Amended Procedural Schedule on October 8, 2009.

On October 15, 2009, the Commission issued its Order for and Notice of Hearing setting the matter for hearing on November 2-6, 2009, and its Order for and Notice of Public Hearing for an

additional informal public input hearing to be held in Pierre on November 3, 2009, commencing at 7:00 p.m. CST. On October 19, 2009, DRA requested that the time for commencement of the public hearing be changed from 7:00 p.m. CST to 6:00 p.m. CST to better accommodate the schedules of interested persons. On October 21, 2009, the Commission issued an Amended Order for and Notice of Public Hearing amending the start time for the public hearing to 6:00 p.m. CST.

On October 19, 2009, Keystone filed a second revised application ("Application") containing minor additions and amendments reflecting refinements to the route and facility locations and the most recent environmental and other planning evaluations.

In accordance with the scheduling and procedural orders in this case, Applicant, Staff and Intervenor David and Debra Niemi filed pre-filed testimony. The hearing was held as scheduled on November 2-4, 2009, at which Applicant, DRA and Staff appeared and participated. The informal hearing was held as scheduled on the evening of November 3, 2009, at which 23 persons presented comments and/or questions. A combined total of 326 persons attended the public input hearings in Winner, Phillip, Buffalo and Pierre. As of February 26, 2009, the Commission had received 252 written comments regarding this matter from the public.

On December 31, 2009, the Commission issued its Amended Order Establishing Briefing Schedule setting the following briefing schedule: (i) initial briefs and proposed findings of fact and conclusions of law from all parties wishing to submit them due by January 20, 2010; and (ii) reply briefs and objections and revisions to proposed findings of fact and conclusions of law due from all parties wishing to submit them on or before February 2, 2010.

On January 13, 2009, Intervenor David Niemi filed a letter with the Commission requesting and recommending a series of conditions to be included in the order approving the permit, if granted. On January 20, 2010, initial briefs were filed by the Applicant and Staff. On January 20, 2010, Applicant also filed and served proposed findings of fact and conclusions of law. On January 21, 2010, DRA filed an initial brief and Motion to Accept Late-Filed Brief. On January 21 and 26, 2010, respectively, Keystone and Staff filed letters of no objection to acceptance of DRA's late-filed initial brief. On February 2, 2010, reply briefs were filed and served by Applicant, DRA and Staff, and Keystone filed Applicant's Response to David Niemi's Letter filed on January 13, 2010.

At an ad hoc meeting on February, 18, 2010, after separately considering each of a set of draft conditions prepared by Commission Counsel from inputs from the individual Commissioners and a number of Commissioner motions to amend the draft conditions, the Commission voted unanimously to approve conditions to which a permit to construct the Project would be subject, if granted, and to grant a permit to Keystone to construct the Project, subject to the approved conditions.

On April 14, 2010, Keystone filed Applicant's Motion for Limited Reconsideration of Certain Permit Conditions ("Motion"). On April 19, 2010, intervenors David Niemi and Seamans filed responses to the Motion. On April 19, 2010, Peter Larson ("Larson") filed two comments responsive to the Motion. On April 27, 2010, Keystone filed Applicant's Reply Brief In Support of Motion for Limited Reconsideration responding to the responses and comments filed by Niemi, Seamans and Larson. On April 28, 2010, Staff filed a response to the Motion. On April 29, 2010, DRA filed the Answer of Dakota Rural Action in Opposition to Applicant's Motion for Limited Reconsideration of Certain Permit Conditions.

At its regularly scheduled meeting on May 4, 2010, the Commission considered the Motion and the responses and comments filed by the parties and Larson. Applicant, Staff, intervenor John

H. Harter, DRA and Larson appeared and participated in the hearing on the Motion. After an extensive discussion among the Commission and participants, the Commission made rulings on the specific requests in the Motion and voted to grant the Motion in part and deny in part and amend certain of the Conditions as set forth in the Commission's Order Granting in Part Motion to Reconsider and Amending Certain Conditions In Final Decision And Order, which was issued by the Commission on June 29, 2010.

Having considered the evidence of record, applicable law and the arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

Parties

1. The permit applicant is TransCanada Keystone Pipeline, LP, a limited partnership, organized under the laws of the State of Delaware, and owned by affiliates of TransCanada Corporation ("TransCanada"), a Canadian public company organized under the laws of Canada. Ex TC-1, 1.5, p. 4.

2. On May 19, 2009, the Commission unanimously voted to grant party status to all persons that had requested party status prior to the commencement of the meeting. On June 9, 2009, the Commission unanimously voted to grant party status to all persons that had requested party status after the commencement of the meeting on May 19, 2009, through the intervention deadline of May 31, 2009. Fifteen persons intervened, including: Mary Jasper, Paul F. Seamans, Darrell Iversen, the City of Colome, Glen Iversen, Jacqueline Limpert, John H. Harter, Zona Vig, Tripp County Water User District ("TCWUD"), Dakota Rural Action, David Niemi, Debra Niemi, Ruth M. Iversen, Martin R. Lueck, and Lon Lyman. Minutes of May 19, 2009, and June 9, 2009, Commission Meetings; Applications for Party Status.

3. The Staff also participated in the case as a full party.

Procedural Findings

4. The application was signed on behalf of the Applicant on February 26, 2009, in Calgary, Alberta, Canada, and was filed with the Commission on March 12, 2009. Ex TC -1, 9.0, p. 116.

5. The Commission issued the following notices and orders in the case as described in greater detail in the Procedural History above, which is hereby incorporated by reference in these Findings of Fact and Conclusions of Law:

- Order of Assessment of Filing Fee
- Notice of Application; Order for and Notice of Public Input Hearings; and Notice of Opportunity to Apply for Party Status
- Order Granting Party Status; Order Denying Motion for Extension of Time to File Application for Party Status; Order Extending Intervention Deadline
- Order Granting Motion to Establish Procedural Schedule and Order Granting Party Status
- Order Setting Procedural Schedule
- Order Granting Motion for Extension of Time to Submit Testimony

- Order Granting in Part and Denying in Part Motion to Compel Discovery
- Order Amending Order Granting in Part and Denying in Part Motion to Compel Discovery
- Order Setting Amended Procedural Schedule
- Order for and Notice of Hearing
- Order for and Notice of Public Hearing
- Amended Order for and Notice of Public Hearing
- Order Establishing Briefing Schedule
- Amended Order Establishing Briefing Schedule
- Order Granting in Part Motion to Reconsider and Amending Certain Conditions In Final Decision And Order

6. Pursuant to SDCL 49-41B-15 and 49-41B-16 and its Notice of Application; Order for and Notice of Public Hearings; and Notice of Opportunity to Apply for Party Status, the Commission held public hearings on Keystone's application at the following times and places (see Public Hearing Transcripts):

- Monday, April 27, 2009, 12:00 noon CDT at Winner Community Playhouse, 7th and Leahy Boulevard, Winner, SD
- Monday, April 27, 2009, 7:00 p.m. MDT at Fine Arts School, 330 Scottie Avenue, Philip, SD
- Tuesday, April 28, 2009, 6:00 p.m. MDT at Harding County Recreation Center, 204 Hodge Street, Buffalo, SD.

7. The purpose of the public hearings was to afford an opportunity for interested persons to present their views and comments to the Commission concerning the Application. At the hearings, Keystone presented a brief description of the project after which interested persons presented their views, comments and questions regarding the application. Public Hearing Transcripts.

8. The following testimony was prefiled in advance of the formal evidentiary hearing held November 2, 3 and 4, 2009, in Room 414, State Capitol, Pierre, South Dakota:

- A. Applicant's March 12, 2009, Direct Testimony.
 - Robert Jones
 - John Phillips
 - Richard Gale
 - Jon Schmidt
 - Meera Kothari
 - John Hayes
 - Donald Scott
 - Heidi Tillquist
 - Tom Oster
- B. Supplemental Direct Testimony of August 31, 2009.
 - John Phillips
- C. Intervenor's Direct Testimony of September 11, 2009.
 - David Niemi
 - Debra Niemi

- D. Staff's September 25, 2009, Direct Testimony.
- Kim McIntosh
 - Brian Walsh
 - Derric Iles
 - Tom Kirschenmann
 - Paige Hoskinson Olson
 - Michael Kenyon
 - Ross Hargrove
 - Patrick Robblee
 - James Arndt
 - William Walsh
 - Jenny Hudson
 - David Schramm
 - William Mampre
 - Michael K. Madden
 - Tim Binder
- E. Applicant's Updated Direct and Rebuttal Testimony.
- Robert Jones Updated Direct (10/23/09)
 - Jon Schmidt Updated Direct and Rebuttal (10/19/09)
 - Meera Kothari Updated Direct and Rebuttal (10/19/09)
 - Donald M. Scott Updated Direct (10/19/09)
 - John W. Hayes Updated Direct (10/19/09)
 - Heidi Tillquist Updated Direct (10/20/09)
 - Steve Hicks Direct and Rebuttal (10/19/09)
- F. Staff's Supplemental Testimony of October 29, 2009.
- William Walsh
 - William Mampre
 - Ross Hargrove

9. As provided for in the Commission's October 21, 2009, Amended Order for and Notice of Public Hearing, the Commission held a public input hearing in Room 414 of the State Capitol beginning at 6:00 p.m. on November 3, 2009, at which 23 members of the public presented comments and/or questions. Transcript of November 3, 2009 Public Input Hearing.

Applicable Statutes and Regulations

10. The following South Dakota statutes are applicable: SDCL 49-41B-1 through 49-41B-2.1, 49-41B-4, 49-41B-11 through 49-41B-19, 49-41B-21, 49-41B-22, 49-41B-24, 49-41B-26 through 49-41B-38 and applicable provisions of SDCL Chs. 1-26 and 15-6.

11. The following South Dakota administrative rules are applicable: ARSD Chapter 20:10:01, ARSD 20:10:22:01 through ARSD 20:10:22:25 and ARSD 20:10:22:36 through ARSD 20:10:22:40.

12. Pursuant to SDCL 49-41B-22, the Applicant for a facility construction permit has the burden of proof to establish that:

- (1) The proposed facility will comply with all applicable laws and rules;

- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

The Project

13. The Project will be owned, managed and operated by the Applicant, TransCanada Keystone Pipeline, LP. Ex TC-1, 1.5 and 1.7, p. 4.

14. The purpose of the Project is to transport incremental crude oil production from the Western Canadian Sedimentary Basin ("WCSB") to meet growing demand by refineries and markets in the United States ("U.S."). This supply will serve to replace U.S. reliance on less stable and less reliable sources of offshore crude oil. Ex TC-1, 1.1, p. 1; Ex TC-1, 3.0 p. 23; Ex TC-1, 3.4 p. 24.

15. The Project will consist of three segments: the Steele City Segment, the Gulf Coast Segment, and the Houston Lateral. From north to south, the Steele City Segment extends from Hardisty, Alberta, Canada, southeast to Steele City, Nebraska. The Gulf Coast Segment extends from Cushing, Oklahoma south to Nederland, in Jefferson County, Texas. The Houston Lateral extends from the Gulf Coast Segment in Liberty County, Texas southwest to Moore Junction, Harris County, Texas. It will interconnect with the northern and southern termini of the previously approved 298-mile-long, 36-inch-diameter Keystone Cushing Extension segment of the Keystone Pipeline Project. Ex TC-1, 1.2, p. 1. Initially, the pipeline would have a nominal capacity to transport 700,000 barrels per day ("bpd"). Keystone could add additional pumping capacity to expand the nominal capacity to 900,000 bpd. Ex TC-1, 2.1.2, p. 8.

16. The Project is an approximately 1,707 mile pipeline with about 1,380, miles in the United States. The South Dakota portion of the pipeline will be approximately 314 miles in length and will extend from the Montana border in Harding County to the Nebraska border in Tripp County. The Project is proposed to cross the South Dakota counties of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman and Tripp. Ex TC-1, 1.2 and 2.1.1, pp. 1 and 8. Detailed route maps are presented in Ex TC-1, Exhibits A and C, as updated in Ex TC-14.

17. Construction of the Project is proposed to commence in May of 2011 and be completed in 2012. Construction in South Dakota will be conducted in five spreads, generally proceeding in a north to south direction. The Applicant expects to place the Project in service in 2012. This in-service date is consistent with the requirements of the Applicant's shippers who have made the contractual commitments that underpin the viability and need for the project. Ex TC-1, 1.4, pp. 1 and 4; TR 26.

18. The pipeline in South Dakota will extend from milepost 282.5 to milepost 597, approximately 314 miles. The pipeline will have a 36-inch nominal diameter and be constructed using API 5L X70 or X80 high-strength steel. An external fusion bonded epoxy ("FBE") coating will be applied to the pipeline and all buried facilities to protect against corrosion. Cathodic protection will be provided by impressed current. The pipeline will have batching capabilities and will be able to transport products ranging from light crude oil to heavy crude oil. Ex TC-1, 2.2, 2.2.1, 6.5.2, pp. 8-9, 97-98; Ex TC-8, ¶ 26.

19. The pipeline will operate at a maximum operating pressure of 1,440 psig. For location specific low elevation segments close to the discharge of pump stations, the maximum operating pressure will be 1,600 psig. Pipe associated with these segments of 1,600 psig MOP are excluded from the Special Permit application and will have a design factor of 0.72 and pipe wall thickness of 0.572 inch (X-70) or 0.500 inch (X-80). All other segments in South Dakota will have a MOP of 1,440 psig. Ex TC-1, 2.2.1, p. 9.

20. The Project will have seven pump stations in South Dakota, located in Harding (2), Meade, Haakon, Jones and Tripp (2) Counties. TC-1, 2.2.2, p. 10. The pump stations will be electrically driven. Power lines required for providing power to pump stations will be permitted and constructed by local power providers, not by Keystone. Initially, three pumps will be installed at each station to meet the nominal design flow rate of 700,000 bpd. If future demand warrants, pumps may be added to the proposed pump stations for a total of up to five pumps per station, increasing nominal throughput to 900,000 bpd. No additional pump stations will be required to be constructed for this additional throughput. No tank facilities will be constructed in South Dakota. Ex TC-1, 2.1.2, p.8. Sixteen mainline valves will be located in South Dakota. Seven of these valves will be remotely controlled, in order to have the capability to isolate sections of line rapidly in the event of an emergency to minimize impacts or for operational or maintenance reasons. Ex TC-1, 2.2.3, pp. 10-11.

21. The pipeline will be constructed within a 110-foot wide corridor, consisting of a temporary 60-foot wide construction right-of-way and a 50-foot permanent right-of-way. Additional workspace will be required for stream, road, and railroad crossings, as well as hilly terrain and other features. The Applicant committed to reducing the construction right-of-way to 85 feet in certain wetlands to minimize impacts. Ex TC-1, 2.2.4, pp. 11-12; Ex TC-7, ¶ 20. FERC guidelines provide that the wetland construction right-of-way should be limited to 75 feet except where conditions do not permit, and Staff witness Hargrove's Construction, Mitigation and Reclamation Plan Review states that industry practice is to reduce the typical construction right-of-way width to 75 feet in non-cultivated wetlands, although exceptions are sometimes made for larger-diameter pipelines or where warranted due to site-specific conditions. Ex S-5, p. 2 and Attachment 2, 6.2; TR 335, 353. The Commission finds that the construction right-of-way should be limited to 75 feet, except where site-specific conditions require use of Keystone's proposed 85-foot right-of-way or where special circumstances are present, and the Commission accordingly adopts Condition 22(a), subject to the special circumstance provisions of Condition 30.

22. The Project will be designed, constructed, tested, and operated in accordance with all applicable requirements, including the U.S. Department of Transportation, Pipeline Hazardous Materials and Safety Administration (PHMSA) regulations set forth at 49 CFR Part 195, as modified by the Special Permit requested for the Project from PHMSA (see Finding 71). These federal regulations are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures. Ex TC-1, 2.2, p. 8.

23. The current estimated cost of the Keystone Project in South Dakota is \$921.4 million. Ex TC-1, 1.3, p. 1.

Demand for the Facility

24. The transport of additional crude oil production from the WCSB is necessary to meet growing demand by refineries and markets in the U.S. The need for the project is dictated by a number of factors, including increasing WCSB crude oil supply combined with insufficient export pipeline capacity; increasing crude oil demand in the U.S. and decreasing domestic crude supply;

the opportunity to reduce U.S. dependence on foreign off-shore oil through increased access to stable, secure Canadian crude oil supplies; and binding shipper commitments to utilize the Keystone Pipeline Project. Ex TC-1, 3.0, p. 23.

25. According to the U.S. Energy Information Administration ("EIA"), U.S. demand for petroleum products has increased by over 11 percent or 2,000,000 bpd over the past 10 years and is expected to increase further. The EIA estimates that total U.S. petroleum consumption will increase by approximately 10 million bpd over the next 10 years, representing average demand growth of about 100,000 bpd per year (EIA Annual Energy Outlook 2008). Ex TC-1, 3.2, pp. 23-24.

26. At the same time, domestic U.S. crude oil supplies continue to decline. For example, over the past 10 years, domestic crude production in the United States has declined at an average rate of about 135,000 bpd per year, or 2% per year. Ex TC-1, 3.3, p. 24. Crude and refined petroleum product imports into the U.S. have increased by over 3.3 million bpd over the past 10 years. In 2007, the U.S. imported over 13.4 million bpd of crude oil and petroleum products or over 60 percent of total U.S. petroleum product consumption. Canada is currently the largest supplier of imported crude oil and refined products to the U.S., supplying over 2.4 million bpd in 2007, representing over 11 percent of total U.S. petroleum product consumption (EIA 2007). Ex TC-1, 3.4, p. 24.

27. The Project will provide an opportunity for U.S. refiners in Petroleum Administration for Defense District III, the Gulf Coast region, to further diversify supply away from traditional offshore foreign crude supply and to obtain direct access to secure and growing Canadian crude supplies. Access to additional Canadian crude supply will also provide an opportunity for the U.S. to offset annual declines in domestic crude production and, specifically, to decrease its dependence on other foreign crude oil suppliers, such as Mexico and Venezuela, the top two heavy crude oil exporters into the U.S. Gulf Coast. Ex TC-1, 3.4, p. 24.

28. Reliable and safe transportation of crude oil will help ensure that U.S. energy needs are not subject to unstable political events. Established crude oil reserves in the WCSB are estimated at 179 billion barrels (CAPP 2008). Over 97 percent of WCSB crude oil supply is sourced from Canada's vast oil sands reserves located in northern Alberta. The Alberta Energy and Utilities Board estimates there are 175 billion barrels of established reserves recoverable from Canada's oil sands. Alberta has the second largest crude oil reserves in the world, second only to Saudi Arabia. Ex TC-1, 3.1, p. 23.

29. Shippers have already committed to long-term binding contracts, enabling Keystone to proceed with regulatory applications and construction of the pipeline once all regulatory, environmental, and other approvals are received. These long-term binding shipper commitments demonstrate a material endorsement of support for the Project, its economics, proposed route, and target market, as well as the need for additional pipeline capacity and access to Canadian crude supplies. Ex TC-1, 3.5, p. 24.

Environmental

30. In order to construct the Project, Keystone is required to obtain a Presidential Permit from the U.S. Department of State ("DOS") authorizing the construction of facilities across the international border. Ex TC-1, 1.8, pp. 4-5; 5.1, p. 30.

31. Because Keystone is required to obtain a Presidential Permit from the DOS, the National Environmental Policy Act requires the DOS to prepare an Environmental Impact Statement

("EIS"). Ex TC-1, 1.8, pp. 4-5; Ex TC-4; Ex S-3. In support of its Presidential Permit application, Keystone has submitted studies and other environmental information to the DOS. Ex TC-1, 1.8, pp. 4-5; 5.1, p. 30.

32. Table 6 to the Application summarizes the environmental impacts that Keystone's analysis indicates could be expected to remain after its Construction Mitigation and Reclamation Plan is implemented. Ex TC-1, pp. 31-37.

33. The pipeline will cross the Unglaciaded Missouri Plateau. This physiographic province is characterized by a dissected plateau where river channels have incised into the landscape. Elevations range from just over 3,000 feet above mean sea level in the northwestern part of the state to around 1,800 feet above mean sea level in the White River valley. The major river valleys traversed include the Little Missouri River, Cheyenne River, and White River. Ex TC-1, 5.3.1, p. 30; Ex TC-4, ¶15. Exhibit A to the Application includes soil type maps and aerial photograph maps of the Keystone pipeline route in South Dakota that indicate topography, land uses, project mileposts and Section, Township, Range location descriptors. Ex TC-1, Exhibit A. Updated versions of these maps were received in evidence as Exhibit TC-14.

34. The surficial geologic deposits along the proposed route are primarily composed of Quaternary alluvium, colluvium, alluvial terraces, and eolian deposits (sand dunes). The alluvium primarily occurs in modern stream channels and floodplains, but also is present in older river terraces. The bedrock geology consists of Upper Cretaceous and Tertiary rocks. The Upper Cretaceous units include the Pierre Shale, Fox Hills Formation, and the Hell Creek Formation. The Ogallala Group, present in the far southern portion of the Project in South Dakota, was deposited as a result of uplift and erosion of the Rocky Mountains. Material that was eroded from the mountains was transported to the east by streams and wind. Ex TC-1, 5.3.2, p. 37.

35. Sand, gravel, crushed stone, oil, natural gas, coal and metallic ore resources are mineral resources existing along the proposed route. The route passes through the Buffalo Field in Harding County. Construction will have very minor and short-term impact on current mineral extraction activities due to the temporary and localized nature of pipeline construction activities. Several oil and gas wells were identified within or close to the Project construction ROW. Prior to construction, Keystone will identify the exact locations of active, shut-in, and abandoned wells and any associated underground pipelines in the construction ROW and take appropriate precautions to protect the integrity of such facilities. Ex TC-1, 5.3.3, pp. 38-39.

36. Soil maps for the route are provided in Exhibit A to Ex TC-1. In the northwestern portions of South Dakota, the soils are shallow to very deep, generally well drained, and loamy or clayey. Soils such as the Assiniboine series formed in fluvial deposits that occur on fans, terraces, and till plains. Soils such as the Cabbart, Delridge, and Blackhall series formed in residuum on hills and plains. Fertile soils and smooth topography dominate Meade County. The soils generally are shallow to very deep, somewhat excessively drained to moderately well drained, and loamy or clayey. Cretaceous Pierre Shale underlies almost all of Haakon, Jones, and portions of Tripp counties. This shale weathers to smectitic clays. These clays shrink as they dry and swell as they get wet, causing significant problems for road and structural foundations. From central Tripp County to the Nebraska state line, soils typically are derived from shale and clays on the flatter to moderately sloping, eroded tablelands. In southern Tripp County, the route also crosses deep, sandy deposits on which the Doger, Dunday, and Valentine soils formed. These are dry, rapidly permeable soils. Topsoil layers are thin and droughty, and wind erosion and blowouts are a common hazard. Ex TC-1, 5.3.4, p. 40.

37. Grading and excavating for the proposed pipeline and ancillary facilities will disturb a variety of agricultural, rangeland, wetland and forestland soils. Prime farmland soils may be altered temporarily following construction due to short-term impact such as soil compaction from equipment traffic, excavation and handling. However, potential impacts to soils will be minimized or mitigated by the soil protection measures identified in the Construction Mitigation and Reclamation Plan (CMR Plan) to the extent such measures are fully implemented. The measures include procedures for segregating and replacing top soil, trench backfilling, relieving areas compacted by heavy equipment, removing surface rock fragments and implementing water and wind erosion control practices. Ex TC-1, 5.3.4, p. 41; TC-1 Ex. B.

38. To accommodate potential discoveries of contaminated soils, Keystone made a commitment in the Application to develop, in consultation with relevant agencies, procedures for the handling and disposal of unanticipated contaminated soil discovered during construction. These procedures will be added to the CMR Plan. If hydrocarbon contaminated soils are encountered during trench excavation, the appropriate federal and state agencies will be contacted immediately. A remediation plan of action will be developed in consultation with that agency. Depending on the level of contamination found, affected soil may be replaced in the trench or removed to an approved landfill for disposal. Ex TC-1, 5.3.4, p. 42.

39. The USGS ground motion hazard mapping indicates that potential ground motion hazard in the Project area is low. South Dakota historically has had little earthquake activity. No ground subsidence or karst hazards are present in the vicinity of the route. Ex TC-1, 5.3.6, p. 43.

40. Cretaceous and Tertiary rocks in the Missouri River Plateau have high clay content and upon weathering can be susceptible to instability in the form of slumps and earth flows. Landslide potential is enhanced on steeper slopes. Formations that are especially susceptible are the Cretaceous Hell Creek and Pierre Shale as well as shales in the Tertiary Fort Union Formation mainly on river banks and steep slopes. These units can contain appreciable amounts of bentonite, a rock made up of montmorillonite clay that has deleterious properties when exposed to moisture. The bentonite layers in the Pierre Shale may present hazards associated with swelling clays. These formations are considered to have "high swelling potential." Bentonite has the property whereby when wet, it expands significantly in volume. When bentonite layers are exposed to successive cycles of wetting and drying, they swell and shrink, and the soil fluctuates in volume and strength. Ex TC-1, 5.3.4, pp. 43.

41. Fifteen perennial streams and rivers, 129 intermittent streams, 206 ephemeral streams and seven man-made ponds will be crossed during construction of the Project in South Dakota. Keystone will utilize horizontal directional drilling ("HDD") to cross the Little Missouri, Cheyenne and White River crossings. Keystone intends to use open-cut trenching at the other perennial streams and intermittent water bodies. The open cut wet method can cause the following impacts: loss of in-stream habitat through direct disturbance, loss of bank cover, disruption of fish movement, direct disturbance to spawning, water quality effects and sedimentation effects. Alternative techniques include open cut dry flume, open cut dam-and-pump and horizontal directional drilling. Exhibit C to the Application contains a listing of all water body crossings and preliminary site-specific crossing plans for the HDD sites. Ex TC-14. Permitting of water body crossings, which is currently underway, will ultimately determine the construction method to be utilized. Keystone committed to mitigate water crossing impacts through implementation of procedures outlined in the CMR Plan. Ex TC-1, 5.4.1, pp. 45-46.

42. The pipeline will be buried at an adequate depth under channels, adjacent flood plains and flood protection levees to avoid pipe exposure caused by channel degradation and lateral scour. Determination of the pipeline burial depth will be based on site-specific channel and hydrologic investigations where deemed necessary. Ex TC-1, 5.4.1, p. 46.

43. Although improvements in pipeline safety have been made, the risk of a leak cannot be eliminated. Keystone's environmental consulting firm for the Project, AECOM, estimated the chances of and the environmental consequences of a leak or spill through a risk assessment. Ex TC-1, 6.5.2, pp. 96-102; Table 6; TC-12, 10, 24.

44. Keystone's expert estimated the chance of a leak from the Project to be not more than one spill in 7,400 years for any given mile of pipe. TR 128-132, 136-137; Ex TC-12, ¶10; TC-1, 5.5.1, p. 54; 6.1.2.1, p. 87. The frequency calculation found the chance to be no more than one release in 24 years in South Dakota. TR 137.

45. Keystone's spill frequency and volume estimates are conservative by design, overestimating the risk since the intent is to use the assessment for planning purposes. The risk assessment overestimates the probable size of a spill to ensure conservatism in emergency response and other planning objectives. If a spill were to occur on the Keystone pipeline, PHMSA data indicate that the spill is likely to be three barrels or less. Ex TC-12, ¶10; TR 128-132, 137; TC-1, 6.1.2.1, p. 87.

46. Except for a few miles in the far southern reach of the Project in southern Tripp County which will be located over the permeable Sand Hills and shallow High Plains Aquifer, the Project route in South Dakota does not cross geologic units that are traditionally considered as aquifers. TR 440. Where aquifers are present, at most locations they are more than 50 feet deep, which significantly reduces the chance of contamination reaching the aquifer. Additionally, the majority of the pipeline is underlain by low permeability confining materials (e.g., clays, shales) that inhibit the infiltration of released crude oil into aquifers. TR 158; Ex TC-12, ¶13, EX TC-1, 5.4.2, pp. 47-48. Keystone consulted with the DENR during the routing process to identify and subsequently avoid sensitive aquifers and recharge areas, e.g., Source Water Protection Areas (SWPAs) in order to minimize risk to important public groundwater resources, and no groundwater SWPAs are crossed by the Project in South Dakota. EX TC-1, 5.4.2, pp. 47-48. Except for the Sand Hills area, no evidence was offered of the existence of a shallow aquifer (i.e. less than 50 feet in depth) crossed by the Project.

47. Because of their high solubility and their very low Maximum Contaminant Levels ("MCLs"), the constituents of primary concern in petroleum, including crude oil, are benzene, toluene, ethyl benzene and xylene. These constituents are commonly referred to as BTEX. TR 142, 146. The crude oil to be shipped through the Project will be similar in composition to other crude oils produced throughout the world and currently shipped in the United States. TR 155-56. The BTEX concentration in the crude oil to be shipped through the Project is close to 1 % to 1.5%. TR 151.

48. The Project will pass through areas in Tripp County where shallow and surficial aquifers exist. Since the pipeline will be buried at a shallow depth, it is unlikely that the construction or operation of the pipeline will alter the yield from any aquifers that are used for drinking water purposes. Keystone will investigate shallow groundwater when it is encountered during construction to determine if there are any nearby livestock or domestic wells that might be affected by construction activities. Appropriate measures will be implemented to prevent groundwater contamination and steps will be taken to manage the flow of any ground water encountered. Ex TC-

1, 5.4.2, pp. 47-48. The Tripp County Water User District is up-gradient of the pipeline and therefore would not be affected by a spill. TR 441, 449-50.

49. The risk of a spill affecting public or private water wells is low because the components of crude oil are unlikely to travel more than 300 feet from the spill site. TR 142-43. There are no private or public wells within 200 or 400 feet, respectively, of the right of way. TC-16, Data Response 3-46.

50. The total length of Project pipe with the potential to affect a High Consequence Area ("HCA") is 34.3 miles. A spill that could affect an HCA would occur no more than once in 250 years. TC-12, ¶ 24.

51. In the event that soils and groundwater are contaminated by a petroleum release, Keystone will work with state agency personnel to determine what type of remediation process would be appropriate. TR 148. Effective emergency response can reduce the likelihood and severity of contamination. TC-12, ¶ 10, 14, 24. Soils and groundwater contaminated by a petroleum release can be remediated. TR 499-500. The experience of DENR is that pipeline facilities have responded immediately to the incident in every case. TR 502.

52. The Commission finds that the risk of a significant release occurring is low and finds that the risk that a release would irretrievably impair a water supply is very low and that it is probable that Keystone, in conjunction with state and federal response agencies, will be able to and will be required to mitigate and successfully remediate the effects of a release.

53. The Commission nevertheless finds that the Sand Hills area and High Plains Aquifer in southeastern Tripp County is an area of vulnerability that warrants additional vigilance and attention in Keystone's integrity management and emergency response planning and implementation process. The evidence demonstrates that the shallow Sand Hills groundwater or High Plains Aquifer is used by landowners in the Project area, that many wells are developed into the aquifer, including TCWUD's, that the very high permeability of both the sandy surficial soils and deeper soils render the formation particularly vulnerable to contamination and that rapid discovery and response can significantly lessen the impact of a release on this vulnerable groundwater resource. The Commission further finds that if additional surficial aquifers are discovered in the course of pipeline construction, such aquifers should have similar treatment. The Commission accordingly finds that Condition 35 shall be adopted.

54. Of the approximately 314-mile route in South Dakota, all but 21.5 miles is privately owned. 21.5 miles is state-owned and managed. The list is found in Table 14. No tribal or federal lands are crossed by the proposed route. Ex TC-1, 5.7.1, p. 75.

55. Table 15 of the Application identifies the land uses affected by the pipeline corridor. Among other things, it shows that the project will not cross or be co-located with any major industrial sites, the pipeline will not cross active farmsteads, but may cross near them and the pipeline will not cross suburban and urban residential areas. The project will not cross municipal water supplies or water sources for organized rural water districts. Ex TC-1, 5.7.1, pp. 76-78.

56. The pipeline will be compatible with the predominant land use, which is rural agriculture, because the pipeline will be buried to a depth of four feet in fields and will interfere only minimally with normal agricultural operations. In most locations, the pipeline will be placed below agricultural drain tiles, and drain tiles that are damaged will be repaired. The only above-ground

facilities will be pump stations and block valves located at intervals along the pipeline. Ex TC-1, 5.7.3, pp.78-79.

57. The Project's high strength X70 steel will have a puncture resistance of 51 tons of digging force. Ex TC-8, ¶ 28. Keystone will have a public awareness program in place and an informational number to call where landowners and others can obtain information concerning activities of concern. TC-1, 6.3.4, pp. 93-94. The Commission finds that the risk of damage by ordinary farming operations is very low and that problems can be avoided through exercise of ordinary common sense.

58. If previously undocumented sites are discovered within the construction corridor during construction activities, all work that might adversely affect the discovery will cease until Keystone, in consultation with the appropriate agencies such as the SHPO, can evaluate the site's eligibility and the probable effects. If a previously unidentified site is recommended as eligible to the National Registry of Historic Places, impacts will be mitigated pursuant to the Unanticipated Discovery Plan submitted to the SHPO. Treatment of any discovered human remains, funerary objects, or items of cultural patrimony found on federal land will be handled in accordance with the Native American Grave Protection and Repatriation Act. Construction will not resume in the area of the discovery until the authorized agency has issued a notice to proceed. If human remains and associated funerary objects are discovered on state or private land during construction activities, construction will cease within the vicinity of the discovery and the county coroner or sheriff will be notified of the find. Treatment of any discovered human remains and associated funerary objects found on state or private land will be handled in accordance with the provisions of applicable state laws. TR 40; Ex TC-1, 6.4, pp. 96; Ex TC-16, 3-54. In accordance with these commitments, the Commission finds that Condition 43 should be adopted.

59. Certain formations to be crossed by the Project, such as the Fox Hills, Ludlow and particularly the Hell Creek Formation are known to contain paleontological resources of high scientific and monetary value. TR 438-439, 442-444. In northwest South Dakota, the Hell Creek Formation has yielded valuable dinosaur bones including from a triceratops, the South Dakota State fossil. Ex TC-1, 5.3.2, p. 38. Protection of paleontological resources was among the most frequently expressed concerns at the public input hearings held by the Commission. There is no way for anyone to know with any degree of certainty whether fossils of significance will be encountered during construction activities. TR 439. Because of the potential significance to landowners of the encounter by construction activities with paleontological resources and the inability to thoroughly lessen the probability of such encounter through pre-construction survey and avoidance, the Commission adopts Condition 44 to require certain special procedures in high probability areas, including the Hell Creek formation, such as the presence of a monitor with training in identification of a paleontological strike of significance.

Design and Construction

60. Keystone has applied for a special permit ("Special Permit") from PHMSA authorizing Keystone to design, construct, and operate the Project at up to 80% of the steel pipe specified minimum yield strength at most locations. TC-1, 2.2, p. 8; TR 62. In Condition 2, the Commission requires Keystone to comply with all of the conditions of the Special Permit, if issued.

61. TransCanada operates approximately 11,000 miles of pipelines in Canada with a 0.8 design factor and requested the Special Permit to ensure consistency across its system and to reduce costs. PHMSA has previously granted similar waivers adopting this modified design factor for natural gas pipelines and for the Keystone Pipeline. Ex TC-8, ¶¶ 13, 17.

62. The Special Permit is expected to exclude pipeline segments operating in (i) PHMSA-defined HCAs described as high population areas and commercially navigable waterways in 49 CFR Section 195.450; (ii) pipeline segments operating at highway, railroad, and road crossings; (iii) piping located within pump stations, mainline valve assemblies, pigging facilities, and measurement facilities; and (iv) areas where the MOP is greater than 1,440 psig. Ex TC-8, ¶ 16.

63. Application of the 0.8 design factor and API 5L PSL2 X70 high-strength steel pipe results in use of pipe with a 0.463 inch wall thickness, as compared with the 0.512 inch wall thickness under the otherwise applicable 0.72 design factor, a reduction in thickness of .050 inches. TR 61. PHMSA previously found that the issuance of a waiver is not inconsistent with pipeline safety and that the waiver will provide a level of safety equal to or greater than that which would be provided if the pipeline were operated under the otherwise applicable regulations. Ex TC-8, ¶ 15.

64. In preparation for the Project, Keystone conducted a pipeline threat analysis, using the pipeline industry published list of threats under ASME B31.8S and PHMSA to determine threats to the pipeline. Identified threats were manufacturing defects, construction damage, corrosion, mechanical damage and hydraulic event. Safeguards were then developed to address these threats. Ex TC-8, ¶ 22.

65. Steel suppliers, mills and coating plants were pre-qualified using a formal qualification process consistent with ISO standards. The pipe is engineered with stringent chemistry to ensure weldability during construction. Each batch of pipe is mechanically tested to prove strength, fracture control and fracture propagation properties. The pipe is hydrostatically tested. The pipe seams are visually and manually inspected and also inspected using ultrasonic instruments. Each piece of pipe and joint is traceable to the steel supplier and pipe mill shift during production. The coating is inspected at the plant with stringent tolerances on roundness and nominal wall thickness. A formal quality surveillance program is in place at the steel mill and at the coating plant. Ex TC-8, ¶ 24; TR 59-60.

66. All pipe welds will be examined around 100 percent of their circumferences using ultrasonic or radiographic inspection. The coating is inspected and repaired if required prior to lowering into the trench. After construction the pipeline is hydrostatically tested in the field to 125 percent of its maximum operating pressure, followed by caliper tool testing to check for dents and ovality. Ex TC-8, ¶ 25.

67. A fusion-bonded epoxy ("FBE") coating will be applied to the external surface of the pipe to prevent corrosion. Ex TC- 8, ¶ 26.

68. TransCanada has thousands of miles of this particular grade of pipeline steel installed and in operation. TransCanada pioneered the use of FBE, which has been in use on its system for over 29 years. There have been no leaks on this type of pipe installed by TransCanada with the FBE coating and cathodic protection system during that time. When TransCanada has excavated pipe to validate FBE coating performance, there has been no evidence of external corrosion. Ex TC-8, ¶ 27.

69. A cathodic protection system will be installed comprised of engineered metal anodes, which are connected to the pipeline. A low voltage direct current is applied to the pipeline, resulting in corrosion of the anodes rather than the pipeline. Ex TC-8, ¶ 27. FBE coating and cathodic protection mitigate external corrosion. Ex TC-8, ¶ 26.

70. A tariff specification of 0.5 percent solids and water by volume will be utilized to minimize the potential for internal corrosion. This specification is half the industry standard of one percent. In Condition 32, the Commission requires Keystone to implement and enforce its crude oil specifications in order to minimize the potential for internal corrosion. Further, the pipeline is designed to operate in turbulent flow to minimize water drop out, another potential cause of internal corrosion. During operations, the pipeline will be cleaned using in-line inspection tools, which measure internal and external corrosion. Keystone will repair areas of pipeline corrosion as required by federal regulation. Ex TC-8, ¶ 26. Staff expert Schramm concluded that the cathodic protection and corrosion control measures that Keystone committed to utilize would meet or exceed applicable federal standards. TR 407-427; Ex S-12.

71. To minimize the risk of mechanical damage to the pipeline, it will be buried with a minimum of four feet of cover, one foot deeper than the industry standard, reducing the likelihood of mechanical damage. The steel specified for the pipeline is high-strength steel with engineered puncture resistance of approximately 51 tons of force. Ex TC-8, ¶ 28.

72. Hydraulic damage is caused by over-pressurization of the pipeline. The risk of hydraulic damage will be minimized through the SCADA system's continuous, real-time pressure monitoring systems and through operator training. Ex TC-8, ¶ 29.

73. The Applicant has prepared a detailed CMR Plan that describes procedures for crossing cultivated lands, grasslands, including native grasslands, wetlands, streams and the procedures for restoring or reclaiming and monitoring those features crossed by the Project. The CMR Plan is a summary of the commitments that Keystone has made for environmental mitigation, restoration and post-construction monitoring and compliance related to the construction phase of the Project. Among these, Keystone will utilize construction techniques that will retain the original characteristics of the lands crossed as detailed in the CMR Plan. Keystone's thorough implementation of these procedures will minimize the impacts associated with the Project. A copy of the CMR Plan was filed as Exhibit B to Keystone's permit application and introduced into evidence as TC-1, Exhibit B.

74. The CMR Plan establishes procedures to address a multitude of construction-related issues, including but not limited to the following:

- Training
- Advance Notice of Access
- Depth of Cover
- Noise Control
- Weed Control
- Dust Control
- Fire Prevention and Control
- Spill Prevention and Containment
- Irrigation Systems
- Clearing
- Grading
- Topsoil Removal and Storage
- Temporary Erosion and Sediment Control
- Clean-Up
- Reclamation and Revegetation
- Compaction Relief

- Rock Removal
- Soil Additives
- Seeding
- Construction in Residential and Commercial/Industrial Areas
- Drain Tile Damage Mitigation and Repair

Ex TC-1, Exhibit B.

75. The fire prevention and containment measures outlined in the CMR Plan will provide significant protection against uncontrolled fire in the arid region to be crossed by the Project. The Commission finds, however, that these provisions are largely centered on active construction areas and that certain additional fire prevention and containment precautions are appropriate as well for vehicles performing functions not in proximity to locations where fire suppression equipment will be based, such as route survey vehicles and vehicles involved in surveillance and inspection activities whether before, during and after construction. The Commission accordingly adopts Conditions 16(p) and the last sentence of Condition 30 to address these situations.

76. Keystone's CMR Plan includes many mitigation steps designed to return the land to its original production. These include topsoil removal and replacement, compaction of the trench line, decompaction of the working area, and tilling the topsoil after replacement. Ex TC-1, Exhibit B; Ex TC-6, ¶ 27; Ex TC-1, 6.1.2.2, pp. 87-88.

77. In areas where geologic conditions such as ground swelling, or slope instability, could pose a potential threat, Keystone will conduct appropriate pre-construction site assessments and subsequently will design facilities to account for various ground motion hazards as required by federal regulations. The main hazard of concern during construction of the pipeline will be from unintentional undercutting of slopes or construction on steep slopes resulting in instability that could lead to landslides. Other hazards may result from construction on Cretaceous shales that contain bentonite beds. The high swelling hazard may cause slope instability during periods of precipitation. Ex TC-1, 5.3.6, p. 44.

78. When selecting the proposed pipeline route, Keystone has attempted to minimize the amount of steep slopes crossed by the pipeline. Special pipeline construction practices described in the CMR Plan will minimize slope stability concerns during construction. Landslide hazards can be mitigated by:

- Returning disturbed areas to pre-existing conditions or, where necessary, reducing steep grades during construction;
- Preserving or improving surface drainage;
- Preserving or improving subsurface drainage during construction;
- Removing overburden where necessary to reduce weight of overlying soil mass; and
- Adding fill at toe of slope to resist movement.

Ex TC-1, 5.3.6, pp. 43-44.

79. Slope instability poses a threat of ground movement responsible for approximately 1 percent of liquid pipeline incidents (PHMSA 2008). Keystone will monitor slope stability during routine surveillance. Areas where slope stability poses a potential threat to the pipeline will be incorporated into Keystone's Integrity Management Plan. If ground movement is suspected of having caused abnormal movement of the pipeline, federal regulations (49 CFR Part 195) require

Keystone to conduct an internal inspection. Consequently, damage to the pipeline would be detected quickly and spills would be averted or minimized. Ex TC-1, 5.3.6, p. 44

80. Keystone is in the process of preparing, in consultation with the area National Resource Conservation Service, construction/reclamation unit ("Con/Rec Unit") mapping to address differing construction and reclamation techniques for different soils conditions, slopes, vegetation, and land use along the pipeline route. This analysis and mapping results in the identification of segments called Con/Rec Units. Ex. TC-5; TC-16, DR 3-25.

81. The Applicant will use special construction methods and measures to minimize and mitigate impacts where warranted by site specific conditions. These special techniques will be used when constructing across paved roads, primary gravel roads, highways, railroads, water bodies, wetlands, sand hills areas, and steep terrain. These special techniques are described in the Application. Ex TC-1, 2.2.6, p. 17; TC-6, ¶ 11.

82. Of the perennial streams that are crossed by the proposed route, the Cheyenne River is the largest water body and is classified as a warm water permanent fishery. Of the other streams that have been classified, habitat is considered more limited as indicated by a warm water semi-permanent or warm water marginal classification. Ex TC-1, 5.6.2, pp. 71-72, Table 13.

83. Keystone will utilize HDD for the Little Missouri, Cheyenne and White River crossings, which will aid in minimizing impacts to important game and commercial fish species and special status species. Open-cut trenching, which can affect fisheries, will be used at other perennial streams. Keystone will use best practices to reduce or eliminate the impact of crossings at the perennial streams other than the Cheyenne and White Rivers. Ex TC-1, 5.4.1, p. 46; 5.6.2, p. 72; TC-16, DR 3-39.

84. Water used for hydrostatic testing during construction and subsequently released will not result in contamination of aquatic ecosystems since the pipe is cleaned prior to testing and the discharge water is monitored and tested. Ex TC-1, 5.4.3.1, pp. 48-50. In Conditions 1 and 2, the Commission has required that Keystone comply with DENR's regulations governing temporary use and discharge of water and obtain and comply with the DENR General Permits for these activities.

85. During construction, Keystone will have a number of inspectors on a construction spread, including environmental inspectors, who will monitor erosion control, small spills, full tanks, and any environmental issues that arise. TR. 37-38. In Condition 14, the Commission requires that Keystone incorporate such inspectors into the CMR Plan.

86. The Pipeline corridor will pass through areas where shallow and surficial aquifers exist. Appropriate measures will be implemented to prevent groundwater contamination and steps will be taken to manage the flow of any ground water encountered. Ex TC-1, 5.4.2, p. 47-48.

87. In addition to those recommendations of Staff and its expert witnesses referenced specifically in these Findings, Staff expert witnesses made a number of recommendations which the Commission has determined will provide additional protections for affected landowners, the environment and the public, and has included Conditions in this Order requiring certain of these measures. These recommendations encompassed matters such as sediment control at water body crossings, soil profile analysis, topsoil, subsoil and rock segregation and replacement, special procedures in areas of bentenitic, sodic, or saline soils, noise, etc. Staff's final recommendations are set forth in its Brief. See also Staff Exhibits and testimony in Transcript Vols. II and III.

88. Keystone will be required to acquire permits authorizing the crossing of county roads and township roads. These permits will typically require Keystone to restore roads to their pre-construction condition. If its construction equipment causes damage to county or township roads, Keystone will be responsible for the repair of those roads to pre-construction condition. Pursuant to SDCL 49-41B-38, Keystone will be required to post a bond to ensure that any damage beyond normal wear to public roads, highways, bridges or other related facilities will be adequately compensated. Staff witness Binder recommended that the bond amount under SDCL 49-41B-38 for damage to highways, roads, bridges and other related facilities be set at \$15,600,000 for 2011 and \$15,600,000 for 2012. TR 224. Keystone did not object to this requirement.

89. The Commission finds that the procedures in the CMR Plan and the other construction plans and procedures that Keystone has committed to implement, together with the Conditions regarding construction practices adopted by the Commission herein, will minimize impacts from construction of the Project to the environment and social and economic condition of inhabitants and expected inhabitants in the Project area.

Operation and Maintenance

90. The Keystone pipeline will be designed constructed, tested and operated in accordance with all applicable requirements, including the PHMSA regulations set forth at 49 CFR Parts 194 and 195, as modified by the Special Permit. These federal regulations are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures. Ex TC-8, ¶ 2.

91. The safety features of Keystone's operations are governed by 49 CFR Part 195 and include aerial inspection 26 times per year, with any interval not to exceed three weeks, right-of-way maintenance for accessibility, and continual monitoring of the pipeline to identify potential integrity concerns. A Supervisory Control and Data Acquisition ("SCADA") system will be used to monitor the pipeline at all times. Ex TC-8, ¶ 9.

92. The Project will have a SCADA system to remotely monitor and control the pipeline. The SCADA system will include: (i) a redundant, fully functional back-up Operational Control Center available for service at all times; (ii) automatic features within the system to ensure operation within prescribed limits; and (iii) additional automatic features at the pump stations to provide pipeline pressure protection in the event that communications with the SCADA host are interrupted. Ex TC-10, ¶ 8.

93. The pipeline will have a control center manned 24 hours per day. A backup control center will also be constructed and maintained. A backup communications system is included within the system design and installation. Keystone's SCADA system should have a very high degree of reliability. TR 82-83.

94. Keystone will use a series of complimentary and overlapping SCADA-based leak detection systems and methods at the Operational Control Center, including: (i) remote monitoring; (ii) software-based volume balance systems that monitor injection and delivery volumes; (iii) Computational Pipeline Monitoring or model-based leak detection systems that break the pipeline into smaller segments and monitor each segment on a mass balance basis; and (iv) computer-based, non-real-time, accumulated gain/(loss) volume trending to assist in identifying low rate or seepage releases below the 1.5 percent by volume detection threshold. The SCADA and other monitoring and control systems to be implemented by Keystone for the Project are state of the art

and consistent with the best commercially available technology. Ex TC-10, ¶ 8. Staff witness, William Mampre, testified that Keystone's SCADA system was one he probably would have selected himself. TR 431.

95. Additionally, Keystone will implement and utilize direct observation methodologies, which include aerial patrols, ground patrols and public and landowner awareness programs designed to encourage and facilitate the reporting of suspected leaks and events that may suggest a threat to the integrity of the pipeline. Ex TC10, ¶ 8. Remote sensing technologies that could be employed in pipeline surveillance such as aerial surveillance are in their infancy and practical systems are not currently available. Keystone would consider using such technology if it becomes commercially available. TR 89-90.

96. Keystone will implement abnormal operating procedures when necessary and as required by 49 CFR 195.402(d). Abnormal operating procedures will be part of the written manual for normal operations, maintenance activities, and handling abnormal operating and emergencies. Ex TC-1, 2.3.2, p. 20.

97. As required by US DOT regulations, Keystone will prepare an emergency response plan ("ERP") for the system. Ex TC-11, ¶ 13. The ERP will be submitted to PHMSA for review prior to commencement of pipeline operations. Ex TC-11, ¶ 13. The Commission finds that the ERP and manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR 195.402 should also be submitted to the Commission at the time it is submitted to PHMSA to apprise the Commission of its details. Keystone has agreed to do this. The Commission has so specified in Condition 36.

98. Keystone will utilize the ERP approved by PHMSA for the Keystone Pipeline as the basis for its ERP for the Project. Under the ERP, Keystone will strategically locate emergency response equipment along the pipeline route. The equipment will include trailers, oil spill containment and recovery equipment, boats, and a communication office. Keystone will also have a number of local contractors available to provide emergency response assistance. Ex TC-11, ¶ 15. Keystone's goal is to respond to any spill within six hours. TR 102-103. Additional details concerning the ERP and the ERP process are set forth in the Application at Section 6.5.2 and in the pre-filed and hearing testimony of John Hayes. Ex TC-11; EX TC-1, 6.5.2, pp. 96-101. Keystone has consulted with DENR in developing its ERP. TR 111-12.

99. If the Keystone pipeline should experience a release, Keystone would implement its ERP. TC-11, ¶ 10; S-18, p. 4. DENR would be involved in the assessment and abatement of the release, and require the leak to be cleaned up and remediated. S-18, p. 5. DENR has been successful in enforcing remediation laws to ensure the effects of any pipeline releases are mitigated. TR 488-89, 497, 502-03.

100. Local emergency responders may be required to initially secure the scene and ensure the safety of the public, and Keystone will provide training in that regard. Ex TC-11, ¶ 17; TR 105-107.

101. If ground movement is suspected of having caused abnormal movement of the pipeline, federal regulations (49 CFR Part 195) require Keystone to conduct an internal inspection. Consequently, damage to the pipeline would be detected quickly and spills would be averted or minimized. Ex TC-1, 5.3.6, p. 44.

102. In addition to the ERP, hazardous materials pipeline segments through High Consequence Areas (“HCAs”) are subject to the Integrity Management Rule. 49 CFR 195.452. Pipeline operators are required to develop a written Integrity Management Plan (“IMP”) that must include methods to measure the program’s effectiveness in assessing and evaluating integrity and protecting HCAs. Keystone will develop and implement an IMP for the entire pipeline including the HCAs. The overall objective of the IMP is to establish and maintain acceptable levels of integrity and having regard to the environment, public and employee safety, regulatory requirements, delivery reliability, and life cycle cost. The IMP uses advanced in-line inspection and mitigation technologies applied with a comprehensive risk-based methodology. 49 CFR Part 195 also requires pipeline operators to develop and implement public awareness programs consistent with the API’s Recommended Practice 1162, Public Awareness Programs for Pipeline Operators. Staff witness Jenny Hudson testified that Keystone’s planning and preparation of the IMP were fully compliant with the PHMSA regulations and had no recommendations for conditions. Ex S-9, p.5.

103. The Commission finds that the threat of serious injury to the environment or inhabitants of the State of South Dakota from a crude oil release is substantially mitigated by the integrity management, leak detection and emergency response processes and procedures that Keystone is continuing to plan and will implement.

Rural Water Crossings

104. The route crosses through two rural water system districts, the West River/Lyman-Jones Rural Water District and the Tripp County Water User District. Keystone met with these rural water districts to discuss the Project and will continue to coordinate with these districts. During construction and maintenance, Keystone will coordinate with the One Call system to avoid impacts to underground utilities, including water lines. Ex TC-4.

Alternative Routes

105. The proposed Project route was developed through an, iterative process. TC-1, 4.1, p. 25. During the course of the route evaluation process, Keystone held public meetings, open houses, and one-on-one meetings with stakeholders to discuss and review the proposed routing through South Dakota. TC-1, 4.1.5, p. 27. The route was refined in Mellette County to avoid environmentally sensitive areas and reduce wetland crossings, and near Colome to avoid groundwater protection areas. Ex TC-3; TC-1, 4.2.1-4.2.2, p. 28.

106. SDCL 49-41B-36 explicitly states that Chapter 49-41B “shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility.” The Commission accordingly finds and concludes that it lacks authority to compel the Applicant to select an alternative route or 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 itself might select.

Socio-Economic Factors

107. Socio-economic evidence offered by both Keystone and Staff demonstrates that the welfare of the citizens of South Dakota will not be impaired by the Project. Staff expert Dr. Michael Madden conducted a socio-economic analysis of the Keystone Pipeline, and concluded that the positive economic benefits of the project were unambiguous, while most if not all of the social impacts were positive or neutral. S-2, Madden Assessment at 21. The Project, subject to compliance with the Special Permit and the Conditions herein, would not, from a socioeconomic standpoint: (i) pose a threat of serious injury to the socioeconomic conditions in the project area; (ii)

substantially impair the health, safety, or welfare of the inhabitants in the project area; or (iii) unduly interfere with the orderly development of the region.

108. The Project will pay property taxes to local governments on an annual basis estimated to be in the millions of dollars. Ex TC-2, ¶ 24, TC-13, S-13; TR 584. An increase in assessed, taxable valuation for school districts is a positive development. TR 175.

109. The Project will bring jobs, both temporary and permanent, to the state of South Dakota and specifically to the areas of construction and operation. Ex TC-1 at 6.1.1, pp. 85-86.

110. The Project will have minimal effect in the areas of agriculture, commercial and industrial sectors, land values, housing, sewer and water, solid waste management, transportation, cultural and historical resources, health services, schools, recreation, public safety, noise, and visual impacts. Ex TC-1. It follows that the project will not substantially impair the health, safety, or welfare of the inhabitants.

General

111. Applicant has provided all information required by ARSD Chapter 20:10:22 and SDCL Chapter 49-41B. S-1.

112. The Commission finds that the Conditions attached hereto as Exhibit A and incorporated herein by reference are supported by the record, are reasonable and will help ensure that the Project will meet the standards established for approval of a construction permit for the Project set forth in SDCL 49-41B-22 and should be adopted.

113. The Commission finds that subject to the conditions of the Special Permit and the Conditions set forth as Exhibit A hereto, the Project will (i) comply with all applicable laws and rules; (ii) not pose an unacceptable threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area; (iii) not substantially impair the health, safety or welfare of the inhabitants; and (iv) not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

114. The Commission finds that a permit to construct the Project should be granted subject to the Conditions set forth in Exhibit A.

115. To the extent that any Conclusion of Law set forth below is more appropriately a finding of fact, that Conclusion of Law is incorporated by reference as a Finding of Fact.

Based on the foregoing Findings of Fact, the Commission hereby makes the following:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding pursuant to SDCL Chapter 49-41B and ARSD Chapter 20:10:22. Subject to the findings made on the four elements of proof under SDCL 49-41B-22, the Commission has authority to grant,

deny or grant upon reasonable terms, conditions or modifications, a permit for the construction, operation and maintenance of the TransCanada Keystone Pipeline.

2. The TransCanada Keystone Pipeline Project is a transmission facility as defined in SDCL 49-41B-2.1(3).

3. Applicant's permit application, as amended and supplemented through the proceedings in this matter, complies with the applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

4. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will comply with all applicable laws and rules, including all requirements of SDCL Chapter 49-41B and ARSD 20:10:22.

5. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will not pose an unacceptable threat of serious injury to the environment nor to the social and economic conditions of inhabitants or expected inhabitants in the siting area.

6. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will not substantially impair the health, safety or welfare of the inhabitants in the siting area.

7. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

8. The standard of proof is by the preponderance of evidence. The Applicant has met its burden of proof pursuant to SDCL 49-41B-22 and is entitled to a permit as provided in SDCL 49-41B-25.

9. The Commission has authority to revoke or suspend any permit granted under the South Dakota Energy Facility Permit Act for failure to comply with the terms and conditions of the permit pursuant to SDCL 49-41B-33 and must approve any transfer of the permit granted by this Order pursuant to SDCL 49-41B-29.

10. To the extent that any of the Findings of Fact in this decision are determined to be conclusions of law or mixed findings of fact and conclusions of law, the same are incorporated herein by this reference as a Conclusion of Law as if set forth in full herein.

11. Because a federal EIS will be required and completed for the Project and because the federal EIS complies with the requirements of SDCL Chapter 34A-9, the Commission appropriately exercised its discretion under SDCL 49-41B-21 in determining not to prepare or require the preparation of a second EIS.

12. PHMSA is delegated exclusive authority over the establishment and enforcement of safety-orientated design and operational standards for hazardous materials pipelines. 49 U.S.C. 60101, et seq.

13. SDCL 49-41B-36 explicitly states that SDCL Chapter 49-41B "shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility." The

Commission accordingly concludes that it lacks authority (i) to compel the Applicant to select an alternative route or (ii) 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.

14. The Commission concludes that it needs no other information to assess the impact of the proposed facility or to determine if Applicant or any Intervenor has met its burden of proof.

15. The Commission concludes that the Application and all required filings have been filed with the Commission in conformity with South Dakota law and that all procedural requirements under South Dakota law, including public hearing requirements, have been met or exceeded.

16. The Commission concludes that it possesses the authority under SDCL 49-41B-25 to impose conditions on the construction, operation and maintenance of the Project, that the Conditions set forth in Exhibit A are supported by the record, are reasonable and will help ensure that the Project will meet the standards established for approval of a construction permit for the Project set forth in SDCL 49-41B-22 and that the Conditions are hereby adopted.

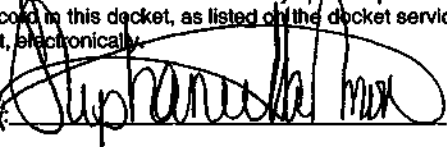
It is therefore

ORDERED, that a permit to construct the Keystone Pipeline Project is granted to TransCanada Keystone Pipeline, LP, subject to the Conditions set forth in Exhibit A.

NOTICE OF ENTRY AND OF RIGHT TO APPEAL

PLEASE TAKE NOTICE that this Amended Final Decision and Order was duly issued and entered on the ____ day of June, 2010. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition with the Commission within 30 days from the date of issuance of this Final Decision and Order; Notice of Entry. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 29th of June, 2010.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.	
By:	
Date:	06/29/10
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:


DUSTIN M. JOHNSON, Chairman


STEVE KOLBECK, Commissioner


GARY HANSON, Commissioner

Exhibit A

AMENDED PERMIT CONDITIONS

I. Compliance with Laws, Regulations, Permits, Standards and Commitments

1. Keystone shall comply with all applicable laws and regulations in its construction and operation of the Project. These laws and regulations include, but are not necessarily limited to: the federal Hazardous Liquid Pipeline Safety Act of 1979 and Pipeline Safety Improvement Act of 2002, as amended by the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, and the various other pipeline safety statutes currently codified at 49 U.S.C. § 60101 et seq. (collectively, the "PSA"); the regulations of the United States Department of Transportation implementing the PSA, particularly 49 C.F.R Parts 194 and 195; temporary permits for use of public water for construction, testing or drilling purposes, SDCL 46-5-40.1 and ARSD 74:02:01:32 through 74:02:01:34.02 and temporary discharges to waters of the state, SDCL 34A-2-36 and ARSD Chapters 74:52:01 through 74:52:11, specifically, ARSD § 74:52:02:46 and the General Permit issued thereunder covering temporary discharges of water from construction dewatering and hydrostatic testing.

2. Keystone shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State, Executive Order 11423 of August 16, 1968 (33 Fed. Reg. 11741) and Executive Order 13337 of April 30, 2004 (69 Fed. Reg. 25229), for the construction, connection, operation, or maintenance, at the border of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country; Clean Water Act § 404 and Rivers and Harbors Act Section 10 Permits; Special Permit if issued by the Pipeline and Hazardous Materials Safety Administration; Temporary Water Use Permit, General Permit for Temporary Discharges and federal, state and local highway and road encroachment permits. Any of such permits not previously filed with the Commission shall be filed with the Commission upon their issuance. To the extent that any condition, requirement or standard of the Presidential Permit, including the Final EIS Recommendations, or any other law, regulation or permit applicable to the portion of the pipeline in this state differs from the requirements of these Conditions, the more stringent shall apply.

3. Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement when issued by the United States Department of State pursuant to its Amended Department of State Notice of Intent To Prepare an Environmental Impact Statement and To Conduct Scoping Meetings and Notice of Floodplain and Wetland Involvement and To Initiate Consultation Under Section 106 of the National Historic Preservation Act for the Proposed Transcanada Keystone XL Pipeline; Notice of Intent--Rescheduled Public Scoping Meetings in South Dakota and extension of comment period (FR vol. 74, no. 54, Mar. 23, 2009). The Amended Notice and other Department of State and Project Documents are available on-line at: <http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open>.

4. The permit granted by this Order shall not be transferable without the approval of the Commission pursuant to SDCL 49-41B-29.

5. Keystone shall undertake and complete all of the actions that it and its affiliated entities committed to undertake and complete in its Application as amended, in its testimony and

exhibits received in evidence at the hearing, and in its responses to data requests received in evidence at the hearing.

II. Reporting and Relationships

6. The most recent and accurate depiction of the Project route and facility locations is found on the maps in Exhibit TC-14. The Application indicates in Section 4.2.3 that Keystone will continue to develop route adjustments throughout the pre-construction design phase. These route adjustments will accommodate environmental features identified during surveys, property-specific issues, and civil survey information. The Application states that Keystone will file new aerial route maps that incorporate any such route adjustments prior to construction. Ex TC-1.4.2.3, p. 27. Keystone shall notify the Commission and all affected landowners, utilities and local governmental units as soon as practicable if material deviations are proposed to the route. Keystone shall notify affected landowners of any change in the route on their land. At such time as Keystone has finalized the pre-construction route, Keystone shall file maps with the Commission depicting the final pre-construction route. If material deviations are proposed from the route depicted on Exhibit TC-14 and accordingly approved by this Order, Keystone shall advise the Commission and all affected landowners, utilities and local governmental units prior to implementing such changes and afford the Commission the opportunity to review and approve such modifications. At the conclusion of construction, Keystone shall file detail maps with the Commission depicting the final as-built location of the Project facilities.

7. Keystone shall provide a public liaison officer, approved by the Commission, to facilitate the exchange of information between Keystone, including its contractors, and landowners, local communities and residents and to promptly resolve complaints and problems that may develop for landowners, local communities and residents as a result of the Project. Keystone shall file with the Commission its proposed public liaison officer's credentials for approval by the Commission prior to the commencement of construction. After the public liaison officer has been approved by the Commission, the public liaison officer may not be removed by Keystone without the approval of the Commission. The public liaison officer shall be afforded immediate access to Keystone's on-site project manager, its executive project manager and to contractors' on-site managers and shall be available at all times to the Staff via mobile phone to respond to complaints and concerns communicated to the Staff by concerned landowners and others. Keystone shall also implement and keep an up-dated web site covering the planning and implementation of construction and commencement of operations in this state as an informational medium for the public. As soon as the Keystone's public liaison officer has been appointed and approved, Keystone shall provide contact information for him/her to all landowners crossed by the Project and to law enforcement agencies and local governments in the vicinity of the Project. The public liaison officer's contact information shall be provided to landowners in each subsequent written communication with them. If the Commission determines that the public liaison officer has not been adequately performing the duties set forth for the position in this Order, the Commission may, upon notice to Keystone and the public liaison officer, take action to remove the public liaison officer.

8. Until construction of the Project, including reclamation, is completed, Keystone shall submit quarterly progress reports to the Commission that summarize the status of land acquisition and route finalization, the status of construction, the status of environmental control activities, including permitting status and Emergency Response Plan and Integrity Management Plan development, the implementation of the other measures required by these conditions, and the overall percent of physical completion of the project and design changes of a substantive nature. Each report shall include a summary of consultations with the South Dakota Department of Environment and Natural Resources and other agencies concerning the issuance of permits. The

reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed construction, land restoration, environmental protection, emergency response and integrity management regulations, plans and standards. The first report shall be due for the period ending June 30, 2010. The reports shall be filed within 31 days after the end of each quarterly period and shall continue until the project is fully operational.

9. Until one year following completion of construction of the Project, including reclamation, Keystone's public liaison officer shall report quarterly to the Commission on the status of the Project from his/her independent vantage point. The report shall detail problems encountered and complaints received. For the period of three years following completion of construction, Keystone's public liaison officer shall report to the Commission annually regarding post-construction landowner and other complaints, the status of road repair and reconstruction and land and crop restoration and any problems or issues occurring during the course of the year.

10. Not later than six months prior to commencement of construction, Keystone shall commence a program of contacts with state, county and municipal emergency response, law enforcement and highway, road and other infrastructure management agencies serving the Project area in order to educate such agencies concerning the planned construction schedule and the measures that such agencies should begin taking to prepare for construction impacts and the commencement of project operations.

11. Keystone shall conduct a preconstruction conference prior to the commencement of construction to ensure that Keystone fully understands the conditions set forth in this order. At a minimum, the conference shall include a Keystone representative, Keystone's construction supervisor and Staff.

12. Once known, Keystone shall inform the Commission of the date construction will commence, report to the Commission on the date construction is started and keep the Commission updated on construction activities as provided in Condition 8.

III. Construction

13. Except as otherwise provided in the conditions of this Order and Permit, Keystone shall comply with all mitigation measures set forth in the Construction Mitigation and Reclamation Plan (CMR Plan) as set forth in Exhibit TC-1, Exhibit B. If modifications to the CMR Plan are made by Keystone as it refines its construction plans or are required by the Department of State in its Final EIS Record of Decision or the Presidential Permit, the CMR Plan as so modified shall be filed with the Commission and shall be complied with by Keystone.

14. Keystone shall incorporate environmental inspectors into its CMR Plan and obtain follow-up information reports from such inspections upon the completion of each construction spread to help ensure compliance with this Order and Permit and all other applicable permits, laws, and rules.

15. Prior to construction, Keystone shall, in consultation with area NRCS staff, develop specific construction/reclamation units (Con/Rec Units) that are applicable to particular soil and subsoil classifications, land uses and environmental settings. The Con/Rec Units shall contain information of the sort described in response to Staff Data Request 3-25 found in Exhibit TC-16.

- a) In the development of the Con/Rec Units in areas where NRCS recommends, Keystone shall conduct analytical soil probing and/or soil boring and analysis in areas of

particularly sensitive soils where reclamation potential is low. Records regarding this process shall be available to the Commission and to the specific land owner affected by such soils upon request.

b) Through development of the Con/Rec Units and consultation with NRCS, Keystone shall identify soils for which alternative handling methods are recommended. Alternative soil handling methods shall include but are not limited to the "triple-lift" method where conditions justify such treatment. Keystone shall thoroughly inform the landowner regarding the options applicable to their property, including their respective benefits and negatives, and implement whatever reasonable option for soil handling is selected by the landowner. Records regarding this process shall be available to the Commission upon request.

c) Keystone shall, in consultation with NRCS, ensure that its construction planning and execution process, including Con/Rec Units, CMR Plan and its other construction documents and planning shall adequately identify and plan for areas susceptible to erosion, areas where sand dunes are present, areas with high concentrations of sodium bentonite, areas with sodic, saline and sodic-saline soils and any other areas with low reclamation potential.

d) The Con/Rec Units shall be available upon request to the Commission and affected landowners. Con/Rec Units may be evaluated by the Commission upon complaint or otherwise, regarding whether proper soil handling, damage mitigation or reclamation procedures are being followed.

e) Areas of specific concern or of low reclamation potential shall be recorded in a separate database. Action taken at such locations and the results thereof shall also be recorded and made available to the Commission and the affected property owner upon request.

16. Keystone shall provide each landowner with an explanation regarding trenching and topsoil and subsoil/rock removal, segregation and restoration method options for his/her property consistent with the applicable Con/Rec Unit and shall follow the landowner's selected preference as documented on its written construction agreement with the landowner, as modified by any subsequent amendments, or by other written agreement(s).

a) Keystone shall separate and segregate topsoil from subsoil in agricultural areas, including grasslands and shelter belts, as provided in the CMR Plan and the applicable Con/Rec Unit.

b) Keystone shall repair any damage to property that results from construction activities.

c) Keystone shall restore all areas disturbed by construction to their preconstruction condition, including their original preconstruction topsoil, vegetation, elevation, and contour, or as close thereto as is feasible, except as is otherwise agreed to by the landowner.

d) Except where practicably infeasible, final grading and topsoil replacement and installation of permanent erosion control structures shall be completed in non-residential areas within 20 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls shall be maintained until conditions allow completion of cleanup and reclamation. In the event

Keystone can not comply with the 20-day time frame as provided in this Condition, it shall give notice of such fact to all affected landowners, and such notice shall include an estimate of when such restoration is expected to be completed.

e) Keystone shall draft specific crop monitoring protocols for agricultural lands. If requested by the landowner, Keystone shall provide an independent crop monitor to conduct yield testing and/or such other measurements of productivity as he shall deem appropriate. The independent monitor shall be a qualified agronomist, rangeland specialist or otherwise qualified with respect to the species to be restored. The protocols shall be available to the Commission upon request and may be evaluated for adequacy in response to a complaint or otherwise.

f) Keystone shall work closely with landowners or land management agencies to determine a plan to control noxious weeds. Landowner permission shall be obtained before the application of herbicides.

g) Keystone's adverse weather plan shall apply to improved hay land and pasture lands in addition to crop lands.

h) The size, density and distribution of rock within the construction right-of-way following reclamation shall be similar to adjacent undisturbed areas. Keystone shall treat rock that cannot be backfilled within or below the level of the natural rock profile as construction debris and remove it for disposal offsite except when the landowner agrees to the placement of the rock on his property. In such case, the rock shall be placed in accordance with the landowner's directions.

i) Keystone shall utilize the proposed trench line for its pipe stringing trucks where conditions allow and shall employ adequate measures to decompact subsoil as provided in its CMR Plan. Topsoil shall be decompact if requested by the landowner.

j) Keystone shall monitor and take appropriate mitigative actions as necessary to address salinity issues when dewatering the trench, and field conductivity and/or other appropriate constituent analyses shall be performed prior to disposal of trench water in areas where salinity may be expected. Keystone shall notify landowners prior to any discharge of saline water on their lands or of any spills of hazardous materials on their lands of one pint or more or of any lesser volume which is required by any federal, state, or local law or regulation or product license or label to be reported to a state or federal agency, manufacturer, or manufacturer's representative.

k) Keystone shall install trench and slope breakers where necessary in accordance with the CMR Plan as augmented by Staff's recommendations in Post Hearing Commission Staff Brief, pp. 26-27.

l) Keystone shall apply mulch when reasonably requested by landowners and also wherever necessary following seeding to stabilize the soil surface and to reduce wind and water erosion. Keystone shall follow the other recommendations regarding mulch application in Post Hearing Commission Staff Brief, p. 27.

m) Keystone shall reseed all lands with comparable crops to be approved by landowner in landowner's reasonable discretion, or in pasture, hay or native species areas with comparable grass or forage crop seed or native species mix to be approved by landowner in

landowner's reasonable discretion. Keystone shall actively monitor revegetation on all disturbed areas for at least two years.

n) Keystone shall coordinate with landowners regarding his/her desires to properly protect cattle, shall implement such protective measures as are reasonably requested by the landowner and shall adequately compensate the landowner for any loss.

o) Prior to commencing construction, Keystone shall file with the Commission a confidential list of property owners crossed by the pipeline and update this list if route changes during construction result in property owner changes.

p) Except in areas where fire suppression resources as provided in CMR Plan 2.16 are in close proximity, to minimize fire risk, Keystone shall, and shall cause its contractor to, equip each of its vehicles used in pre-construction or construction activities, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with Keystone's fire suppression resources and emergency services.

17. Keystone shall cover open-bodied dump trucks carrying sand or soil while on paved roads and cover open-bodied dump trucks carrying gravel or other materials having the potential to be expelled onto other vehicles or persons while on all public roads.

18. Keystone shall use its best efforts to not locate fuel storage facilities within 200 feet of private wells and 400 feet of municipal wells and shall minimize and exercise vigilance in refueling activities in areas within 200 feet of private wells and 400 feet of municipal wells.

19. If trees are to be removed that have commercial or other value to affected landowners, Keystone shall compensate the landowner for the fair market value of the trees to be cleared and/or allow the landowner the right to retain ownership of the felled trees. Except as the landowner shall otherwise agree in writing, the width of the clear cuts through any windbreaks and shelterbelts shall be limited to 50 feet or less, and the width of clear cuts through extended lengths of wooded areas shall be limited to 85 feet or less. The environmental inspection in Condition 14 shall include forested lands.

20. Keystone shall implement the following sediment control practices:

a) Keystone shall use floating sediment curtains to maintain sediments within the construction right of way in open water bodies with no or low flow when the depth of non-flowing water exceeds the height of straw bales or silt fence installation. In such situations the floating sediment curtains shall be installed as a substitute for straw bales or silt fence along the edge or edges of each side of the construction right-of-way that is under water at a depth greater than the top of a straw bale or silt fence as portrayed in Keystone's construction Detail #11 included in the CMR Plan.

b) Keystone shall install sediment barriers in the vicinity of delineated wetlands and water bodies as outlined in the CMR Plan regardless of the presence of flowing or standing water at the time of construction.

c) The Applicant should consult with South Dakota Game, Fish and Parks (SDGFP) to avoid construction near water bodies during fish spawning periods in which in-stream

construction activities should be avoided to limit impacts on specific fisheries, if any, with commercial or recreational importance.

21. Keystone shall develop frac-out plans specific to areas in South Dakota where horizontal directional drilling will occur. The plan shall be followed in the event of a frac-out. If a frac-out event occurs, Keystone shall promptly file a report of the incident with the Commission. Keystone shall also, after execution of the plan, provide a follow-up report to the Commission regarding the results of the occurrence and any lingering concerns.

22. Keystone shall comply with the following conditions regarding construction across or near wetlands, water bodies and riparian areas:

a) Unless a wetland is actively cultivated or rotated cropland or unless site specific conditions require utilization of Keystone's proposed 85 foot width and the landowner has agreed to such greater width, the width of the construction right-of-way shall be limited to 75 feet in non-cultivated wetlands unless a different width is approved or required by the United States Army Corps of Engineers.

b) Unless a wetland is actively cultivated or rotated cropland, extra work areas shall be located at least 50 feet away from wetland boundaries except where site-specific conditions render a 50-foot setback infeasible. Extra work areas near water bodies shall be located at least 50 feet from the water's edge, except where the adjacent upland consists of actively cultivated or rotated cropland or other disturbed land or where site-specific conditions render a 50-foot setback infeasible. Clearing of vegetation between extra work space areas and the water's edge shall be limited to the construction right-of-way.

c) Water body crossing spoil, including upland spoil from crossings of streams up to 30 feet in width, shall be stored in the construction right of way at least 10 feet from the water's edge or in additional extra work areas and only on a temporary basis.

d) Temporary in-stream spoil storage in streams greater than 30 feet in width shall only be conducted in conformity with any required federal permit(s) and any applicable federal or state statutes, rules and standards.

e) Wetland and water body boundaries and buffers shall be marked and maintained until ground disturbing activities are complete. Keystone shall maintain 15-foot buffers where practicable, which for stream crossings shall be maintained except during the period of trenching, pipe laying and backfilling the crossing point. Buffers shall not be required in the case of non-flowing streams.

f) Best management practices shall be implemented to prevent heavily silt-laden trench water from reaching any wetland or water body directly or indirectly.

g) Erosion control fabric shall be used on water body banks immediately following final stream bank restoration unless riprap or other bank stabilization methods are utilized in accordance with federal or state permits.

h) The use of timber and slash to support equipment crossings of wetlands shall be avoided.

i) Subject to Conditions 37 and 38, vegetation restoration and maintenance adjacent to water bodies shall be conducted in such manner to allow a riparian strip at least 25 feet wide as measured from the water body's mean high water mark to permanently re-vegetate with native plant species across the entire construction right-of way.

23. Keystone shall comply with the following conditions regarding road protection and bonding:

a) Keystone shall coordinate road closures with state and local governments and emergency responders and shall acquire all necessary permits authorizing crossing and construction use of county and township roads.

b) Keystone shall implement a regular program of road maintenance and repair through the active construction period to keep paved and gravel roads in an acceptable condition for residents and the general public.

c) Prior to their use for construction, Keystone shall videotape those portions of all roads which will be utilized by construction equipment or transport vehicles in order to document the pre-construction condition of such roads.

d) After construction, Keystone shall repair and restore, or compensate governmental entities for the repair and restoration of, any deterioration caused by construction traffic, such that the roads are returned to at least their preconstruction condition.

e) Keystone shall use appropriate preventative measures as needed to prevent damage to paved roads and to remove excess soil or mud from such roadways.

f) Pursuant to SDCL 49-41B-38, Keystone shall obtain and file for approval by the Commission prior to construction in such year a bond in the amount of \$15.6 million for the year in which construction is to commence and a second bond in the amount of \$15.6 million for the ensuing year, including any additional period until construction and repair has been completed, to ensure that any damage beyond normal wear to public roads, highways, bridges or other related facilities will be adequately restored or compensated. Such bonds shall be issued in favor of, and for the benefit of, all such townships, counties, and other governmental entities whose property is crossed by the Project. Each bond shall remain in effect until released by the Commission, which release shall not be unreasonably denied following completion of the construction and repair period. Either at the contact meetings required by Condition 10 or by mail, Keystone shall give notice of the existence and amount of these bonds to all counties, townships and other governmental entities whose property is crossed by the Project.

24. Although no residential property is expected to be encountered in connection with the Project, in the event that such properties are affected and due to the nature of residential property, Keystone shall implement the following protections in addition to those set forth in its CMR Plan in areas where the Project passes within 500 feet of a residence:

a) To the extent feasible, Keystone shall coordinate construction work schedules with affected residential landowners prior to the start of construction in the area of the residences.

- b) Keystone shall maintain access to all residences at all times, except for periods when it is infeasible to do so or except as otherwise agreed between Keystone and the occupant. Such periods shall be restricted to the minimum duration possible and shall be coordinated with affected residential landowners and occupants, to the extent possible.
- c) Keystone shall install temporary safety fencing, when reasonably requested by the landowner or occupant, to control access and minimize hazards associated with an open trench and heavy equipment in a residential area.
- d) Keystone shall notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption.
- e) Keystone shall repair any damage to property that results from construction activities.
- f) Keystone shall separate topsoil from subsoil and restore all areas disturbed by construction to at least their preconstruction condition.
- g) Except where practicably infeasible, final grading and topsoil replacement, installation of permanent erosion control structures and repair of fencing and other structures shall be completed in residential areas within 10 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls and appropriate mitigative measures shall be maintained until conditions allow completion of cleanup and reclamation.

25. Construction must be suspended when weather conditions are such that construction activities will cause irreparable damage, unless adequate protection measures approved by the Commission are taken. At least two months prior to the start of construction in South Dakota, Keystone shall file with the Commission an adverse weather land protection plan containing appropriate adverse weather land protection measures, the conditions in which such measures may be appropriately used, and conditions in which no construction is appropriate, for approval of or modification by the Commission prior to the start of construction. The Commission shall make such plan available to impacted landowners who may provide comment on such plan to the Commission.

26. Reclamation and clean-up along the right-of-way must be continuous and coordinated with ongoing construction.

27. All pre-existing roads and lanes used during construction must be restored to at least their pre-construction condition that will accommodate their previous use, and areas used as temporary roads during construction must be restored to their original condition, except as otherwise requested or agreed to by the landowner or any governmental authority having jurisdiction over such roadway.

28. Keystone shall, prior to any construction, file with the Commission a list identifying private and new access roads that will be used or required during construction and file a description of methods used by Keystone to reclaim those access roads.

29. Prior to construction, Keystone shall have in place a winterization plan and shall implement the plan if winter conditions prevent reclamation completion until spring. The plan shall be provided to affected landowners and, upon request, to the Commission.

30. Numerous Conditions of this Order, including but not limited to 16, 19, 24, 25, 26, 27 and 51 relate to construction and its effects upon affected landowners and their property. The Applicant may encounter physical conditions along the route during construction which make compliance with certain of these Conditions infeasible. If, after providing a copy of this order, including the Conditions, to the landowner, the Applicant and landowner agree in writing to modifications of one or more requirements specified in these conditions, such as maximum clearances or right-of-way widths, Keystone may follow the alternative procedures and specifications agreed to between it and the landowner.

IV. Pipeline Operations, Detection and Emergency Response

31. Keystone shall construct and operate the pipeline in the manner described in the application and at the hearing, including in Keystone's exhibits, and in accordance with the conditions of this permit, the PHMSA Special Permit, if issued, and the conditions of this Order and the construction permit granted herein.

32. Keystone shall require compliance by its shippers with its crude oil specifications in order to minimize the potential for internal corrosion.

33. Keystone's obligation for reclamation and maintenance of the right-of-way shall continue throughout the life of the pipeline. In its surveillance and maintenance activities, Keystone shall, and shall cause its contractor to, equip each of its vehicles, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with emergency services.

34. In accordance with 49 C.F.R. 195, Keystone shall continue to evaluate and perform assessment activities regarding high consequence areas. Prior to Keystone commencing operation, all unusually sensitive areas as defined by 49 CFR 195.6 that may exist, whether currently marked on DOT's HCA maps or not, should be identified and added to the Emergency Response Plan and Integrity Management Plan. In its continuing assessment and evaluation of environmentally sensitive and high consequence areas, Keystone shall seek out and consider local knowledge, including the knowledge of the South Dakota Geological Survey, the Department of Game Fish and Parks and local landowners and governmental officials.

35. The evidence in the record demonstrates that in some reaches of the Project in southern Tripp County, the High Plains Aquifer is present at or very near ground surface and is overlain by highly permeable sands permitting the uninhibited infiltration of contaminants. This aquifer serves as the water source for several domestic farm wells near the pipeline as well as public water supply system wells located at some distance and upgradient from the pipeline route. Keystone shall identify the High Plains Aquifer area in southern Tripp County as a hydrologically sensitive area in its Integrity Management and Emergency Response Plans. Keystone shall similarly treat any other similarly vulnerable and beneficially useful surficial aquifers of which it becomes aware during construction and continuing route evaluation.

36. Prior to putting the Keystone Pipeline into operation, Keystone shall prepare, file with PHMSA and implement an emergency response plan as required under 49 CFR 194 and a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR 195.402. Keystone shall also prepare and implement a written integrity management program in the manner and at such time as required under 49 CFR 195.452. At such time as Keystone files its Emergency Response Plan and

Integrity Management Plan with PHMSA or any other state or federal agency, it shall also file such documents with the Commission. The Commission's confidential filing rules found at ARSD 20:10:01:41 may be invoked by Keystone with respect to such filings to the same extent as with all other filings at the Commission. If information is filed as "confidential," any person desiring access to such materials or the Staff or the Commission may invoke the procedures of ARSD 20:10:01:41 through 20:10:01:43 to determine whether such information is entitled to confidential treatment and what protective provisions are appropriate for limited release of information found to be entitled to confidential treatment.

37. To facilitate periodic pipeline leak surveys during operation of the facilities in wetland areas, a corridor centered on the pipeline and up to 15 feet wide shall be maintained in an herbaceous state. Trees within 15 feet of the pipeline greater than 15 feet in height may be selectively cut and removed from the permanent right-of-way.

38. To facilitate periodic pipeline leak surveys in riparian areas, a corridor centered on the pipeline and up to 10 feet wide shall be maintained in an herbaceous state.

V. Environmental

39. Except to the extent waived by the owner or lessee in writing or to the extent the noise levels already exceed such standard, the noise levels associated with Keystone's pump stations and other noise-producing facilities will not exceed the L10=55dbA standard at the nearest occupied, existing residence, office, hotel/motel or non-industrial business not owned by Keystone. The point of measurement will be within 100 feet of the residence or business in the direction of the pump station or facility. Post-construction operational noise assessments will be completed by an independent third-party noise consultant, approved by the Commission, to show compliance with the noise level at each pump station or other noise-producing facility. The noise assessments will be performed in accordance with applicable American National Standards Institute standards. The results of the assessments will be filed with the Commission. In the event that the noise level exceeds the limit set forth in this condition at any pump station or other noise producing facility, Keystone shall promptly implement noise mitigation measures to bring the facility into compliance with the limits set forth in this condition and shall report to the Commission concerning the measures taken and the results of post-mitigation assessments demonstrating that the noise limits have been met.

40. At the request of any landowner or public water supply system that offers to provide the necessary access to Keystone over his/her property or easement(s) to perform the necessary work, Keystone shall replace at no cost to such landowner or public water supply system, any polyethylene water piping located within 500 feet of the Project with piping that is resistant to permeation by BTEX. Keystone shall not be required to replace that portion of any piping that passes through or under a basement wall or other wall of a home or other structure. At least forty-five (45) days prior to commencing construction, Keystone shall publish a notice in each newspaper of general circulation in each county through which the Project will be constructed advising landowners and public water supply systems of this condition.

41. Keystone shall follow all protection and mitigation efforts as identified by the US Fish and Wildlife Service ("USFWS") and SDGFP. Keystone shall identify all greater prairie chicken and greater sage and sharp-tailed grouse leks within the buffer distances from the construction right of way set forth for the species in the FEIS and Biological Assessment (BA) prepared by DOS and USFWS. In accordance with commitments in the FEIS and BA, Keystone shall avoid or restrict

construction activities as specified by USFWS within such buffer zones between March 1 and June 15 and for other species as specified by USFWS and SDGFP.

42. Keystone shall keep a record of drain tile system information throughout planning and construction, including pre-construction location of drain tiles. Location information shall be collected using a sub-meter accuracy global positioning system where available or, where not available by accurately documenting the pipeline station numbers of each exposed drain tile. Keystone shall maintain the drain tile location information and tile specifications and incorporate it into its Emergency Response and Integrity Management Plans where drains might be expected to serve as contaminant conduits in the event of a release. If drain tile relocation is necessary, the applicant shall work directly with landowner to determine proper location. The location of permanent drain tiles shall be noted on as-built maps. Qualified drain tile contractors shall be employed to repair drain tiles.

VI. Cultural and Paleontological Resources

43. In accordance with Application, Section 6.4, Keystone shall follow the "Unanticipated Discoveries Plan," as reviewed by the State Historical Preservation Office ("SHPO") and approved by the DOS and provide it to the Commission upon request. Ex TC-1.6.4, pp. 94-96; Ex S-3. If during construction, Keystone or its agents discover what may be an archaeological resource, cultural resource, historical resource or gravesite, Keystone or its contractors or agents shall immediately cease work at that portion of the site and notify the DOS, the affected landowner(s) and the SHPO. If the DOS and SHPO determine that a significant resource is present, Keystone shall develop a plan that is approved by the DOS and commenting/signatory parties to the Programmatic Agreement to salvage avoid or protect the archaeological resource. If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission and landowner approval for the new route before proceeding with any further construction. Keystone shall be responsible for any costs that the landowner is legally obligated to incur as a consequence of the disturbance of a protected cultural resource as a result of Keystone's construction or maintenance activities.

44. Keystone shall implement and comply with the following procedures regarding paleontological resources:

a) Prior to commencing construction, Keystone shall conduct a literature review and records search, and consult with the BLM and Museum of Geology at the S.D. School of Mines and Technology ("SDSMT") to identify known fossil sites along the pipeline route and identify locations of surface exposures of paleontologically sensitive rock formations using the BLM's Potential Fossil Yield Classification system. Any area where trenching will occur into the Hell Creek Formation shall be considered a high probability area.

b) Keystone shall at its expense conduct a pre-construction field survey of each area identified by such review and consultation as a known site or high probability area within the construction ROW. Following BLM guidelines as modified by the provisions of Condition 44, including the use of BLM permitted paleontologists, areas with exposures of high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5) rock formations shall be subject to a 100% pedestrian field survey, while areas with exposures of moderately sensitive rock formations (PFYC Class 3) shall be spot-checked for occurrences of scientifically or economically significant surface fossils and evidence of subsurface fossils. Scientifically or economically significant surface fossils shall be avoided by the Project or mitigated by collecting them if avoidance is not feasible. Following BLM guidelines for the assessment

and mitigation of paleontological resources, scientifically significant paleontological resources are defined as rare vertebrate fossils that are identifiable to taxon and element, and common vertebrate fossils that are identifiable to taxon and element and that have scientific research value; and scientifically noteworthy occurrences of invertebrate, plant and trace fossils. Fossil localities are defined as the geographic and stratigraphic locations at which fossils are found.

c) Following the completion of field surveys, Keystone shall prepare and file with the Commission a paleontological resource mitigation plan. The mitigation plan shall specify monitoring locations, and include BLM permitted monitors and proper employee and contractor training to identify any paleontological resources discovered during construction and the procedures to be followed following such discovery. Paleontological monitoring will take place in areas within the construction ROW that are underlain by rock formations with high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5), and in areas underlain by rock formations with moderate sensitivity (PFYC Class 3) where significant fossils were identified during field surveys.

d) If during construction, Keystone or its agents discover what may be a paleontological resource of economic significance, or of scientific significance, as defined in subparagraph (b) above, Keystone or its contractors or agents shall immediately cease work at that portion of the site and, if on private land, notify the affected landowner(s). Upon such a discovery, Keystone's paleontological monitor will evaluate whether the discovery is of economic significance, or of scientific significance as defined in subparagraph (b) above. If an economically or scientifically significant paleontological resource is discovered on state land, Keystone will notify SDSMT and if on federal land, Keystone will notify the BLM or other federal agency. In no case shall Keystone return any excavated fossils to the trench. If a qualified and BLM-permitted paleontologist, in consultation with the landowner, BLM, or SDSMT determines that an economically or scientifically significant paleontological resource is present, Keystone shall develop a plan that is reasonably acceptable to the landowner(s), BLM, or SDSMT, as applicable, to accommodate the salvage or avoidance of the paleontological resource to protect or mitigate damage to the resource. The responsibility for conducting such measures and paying the costs associated with such measures, whether on private, state or federal land, shall be borne by Keystone to the same extent that such responsibility and costs would be required to be borne by Keystone on BLM managed lands pursuant to BLM regulations and guidelines, including the BLM Guidelines for Assessment and Mitigation of Potential Impacts to Paleontological Resources, except to the extent factually inappropriate to the situation in the case of private land (e.g. museum curation costs would not be paid by Keystone in situations where possession of the recovered fossil(s) was turned over to the landowner as opposed to curation for the public). If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission approval for the new route before proceeding with any further construction. Keystone shall, upon discovery and salvage of paleontological resources either during pre-construction surveys or construction and monitoring on private land, return any fossils in its possession to the landowner of record of the land on which the fossil is found. If on state land, the fossils and all associated data and documentation will be transferred to the SDSMT; if on federal land, to the BLM.

e) To the extent that Keystone or its contractors or agents have control over access to such information, Keystone shall, and shall require its contractors and agents to, treat the locations of sensitive and valuable resources as confidential and limit public access to this information.

VII. Enforcement and Liability for Damage

45. Keystone shall repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility, including but not limited to, all fences, gates and utility, water supply, irrigation or drainage systems. Keystone shall compensate the owners for damages or losses that cannot be fully remedied by repair or replacement, such as lost productivity and crop and livestock losses or loss of value to a paleontological resource damaged by construction or other activities.

46. In the event that a person's well is contaminated as a result of construction or pipeline operation, Keystone shall pay all costs associated with finding and providing a permanent water supply that is at least of similar quality and quantity; and any other related damages, including but not limited to any consequences, medical or otherwise, related to water contamination.

47. Any damage that occurs as a result of soil disturbance on a persons' property shall be paid for by Keystone.

48. No person will be held responsible for a pipeline leak that occurs as a result of his/her normal farming practices over the top of or near the pipeline.

49. Keystone shall pay commercially reasonable costs and indemnify and hold the landowner harmless for any loss, damage, claim or action resulting from Keystone's use of the easement, including any resulting from any release of regulated substances or from abandonment of the facility, except to the extent such loss, damage claim or action results from the gross negligence or willful misconduct of the landowner or its agents.

50. The Commission's complaint process as set forth in ARSD 20:10:01 shall be available to landowners, other persons sustaining or threatened with damage or the consequences of Keystone's failure to abide by the conditions of this permit or otherwise having standing to obtain enforcement of the conditions of this Order and Permit.

Exhibit B

RULINGS ON PROPOSED FINDINGS OF FACT

Rulings on Applicants' Proposed Findings of Fact

As Applicant is the prevailing party, most of Applicant's Proposed Findings of Fact have been accepted in their general substance and incorporated in the Findings of Fact, with additions and modifications to reflect the Commission's understanding of the record.

Appendix: Cited Statutes

SDCL § 1-26-36

1-26-36. Weight given to agency findings--Disposition of case--Grounds for reversal or modification--Findings and conclusions--Costs

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

Credits

Source: SL 1966, ch 159, § 15 (7); SL 1972, ch 8, § 29; SL 1977, ch 13, § 16; SL 1978, ch 13, § 10; SL 1978, ch 17; SL 1983, ch 6, § 2.

SDCL § 15-6-26(b)

15-6-26(b). Scope of discovery

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

- (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in § 15-6-26(a) shall be limited by the court if it determines that:

- (A)(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

Appendix: Cited Statutes

(iii) discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy limitations on the party's resources, and the importance of the issues at stake in the litigation.

The court may act upon its own initiative after reasonable notice or pursuant to a motion under § 15-6-26(c).

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: materials. Subject to the provisions of subdivision (4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of subdivision 15-6-37(a)(4) apply to award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(C) of this section, concerning fees and expenses as the court may deem appropriate.

(B) Trial-preparation for draft reports or disclosures. Subdivision 15-6-26(b)(3) protects drafts of any report prepared by any witness who is retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involves giving expert testimony, regardless of the form in which the draft is recorded.

(C) Trial preparation protection for communication between a party's attorney and expert witnesses. Subdivision 15-6-26(b)(3) protects communications between the party's attorney and any witness who is

Appendix: Cited Statutes

retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, regardless of the form of the communications, except to the extent that the communications:

- (i) Relate to compensation for the expert's study or testimony;
- (ii) Identify facts or data that the party's attorney provided and that the expert considered in forming the opinion to be expressed; or
- (iii) Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in § 15-6-35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(E) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this section; and (ii) with respect to discovery obtained under subdivision (4)(A) (ii) of this section the court may require, and with respect to discovery obtained under subdivision (4)(B) of this section the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of privilege or protection of trial preparation materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Credits

Source: SDC 1939 & Supp 1960, § 36.0505; SD RCP, Rule 26 (b), as adopted by Sup. Ct. Order March 29, 1966, effective July 1, 1966; Supreme Court Rule 76-3, § 2; SL 1993, ch 385 (Supreme Court Rule 93-2); SL 2006, ch 288 (Supreme Court Rule 06-14), eff. July 1, 2006; SL 2011, ch 244 (Supreme Court Rule 11-01), eff. July 1, 2011.

SDCL § 15-26A-3

15-26A-3. Judgments and orders of circuit courts from which appeal may be taken

Appeals to the Supreme Court from the circuit court may be taken as provided in this title from:

- (1) A judgment;
- (2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
- (3) An order granting a new trial;
- (4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;

Appendix: Cited Statutes

(5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, claim and delivery, injunction, attachment, garnishment, receivership, or deposit in court;

(6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of such court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding; or

(7) An order entered on a motion pursuant to § 15-6-11.

Credits

Source: SDC 1939 & Supp 1960, § 33.0701; SDCL § 15-26-1; SL 1971, ch 151, § 2; SL 1986, ch 160, § 2.

SDCL § 49-41B-22

49-41B-22. Applicant's burden of proof

The applicant has the burden of proof to establish that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

Credits

Source: SL 1977, ch 390, § 17; SL 1981, ch 340, § 3; SL 1991, ch 386, § 6.

SDCL § 49-41B-27

49-41B-27. Construction, expansion, and improvement of facilities

Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.

Credits

Source: SL 1977, ch 390, § 29.

SDCL § 49-41B-33

49-41B-33. Revocation or suspension of permit--Grounds

Appendix: Cited Statutes

A permit may be revoked or suspended by the Public Utilities Commission for:

- (1) Any misstatement of a material fact in the application or in accompanying statements or studies required of the applicant, if a correct statement would have caused the commission to refuse to grant a permit; or
- (2) Failure to comply with the terms or conditions of the permit; or
- (3) Violation of any material provision of this chapter or the rules promulgated thereunder.

Credits

Source: SL 1977, ch 390, § 27.

Appendix – Cited Regulations

49 C.F.R. § 195.452

§ 195.452 Pipeline integrity management in high consequence areas.

(a) Which pipelines are covered by this section? This section applies to each hazardous liquid pipeline and carbon dioxide pipeline that could affect a high consequence area, including any pipeline located in a high consequence area unless the operator effectively demonstrates by risk assessment that the pipeline could not affect the area. (Appendix C of this part provides guidance on determining if a pipeline could affect a high consequence area.) Covered pipelines are categorized as follows:

- (1) Category 1 includes pipelines existing on May 29, 2001, that were owned or operated by an operator who owned or operated a total of 500 or more miles of pipeline subject to this part.
- (2) Category 2 includes pipelines existing on May 29, 2001, that were owned or operated by an operator who owned or operated less than 500 miles of pipeline subject to this part.
- (3) Category 3 includes pipelines constructed or converted after May 29, 2001.
- (4) Low stress pipelines as specified in § 195.12.

(b) What program and practices must operators use to manage pipeline integrity? Each operator of a pipeline covered by this section must:

- (1) Develop a written integrity management program that addresses the risks on each segment of pipeline in the first column of the following table not later than the date in the second column:

Pipeline	Date
Category 1	March 31, 2002.
Category 2	February 18, 2003.
Category 3	1 year after the date the pipeline begins operation.

- (2) Include in the program an identification of each pipeline or pipeline segment in the first column of the following table not later than the date in the second column:

Pipeline	Date
Category 1	December 31, 2001.
Category 2	November 18, 2002.
Category 3	Date the pipeline begins operation.

- (3) Include in the program a plan to carry out baseline assessments of line pipe as required by paragraph (c) of this section.

- (4) Include in the program a framework that—

- (i) Addresses each element of the integrity management program under paragraph (f) of this section, including continual integrity assessment and evaluation under paragraph (j) of this section; and
- (ii) Initially indicates how decisions will be made to implement each element.

- (5) Implement and follow the program.

- (6) Follow recognized industry practices in carrying out this section, unless—

- (i) This section specifies otherwise; or
- (ii) The operator demonstrates that an alternative practice is supported by a reliable engineering evaluation and provides an equivalent level of public safety and environmental protection.

- (c) What must be in the baseline assessment plan?

- (1) An operator must include each of the following elements in its written baseline assessment plan:

- (i) The methods selected to assess the integrity of the line pipe. An operator must assess the integrity of the line pipe by any of the following methods. The methods an operator selects to assess low frequency electric

Appendix – Cited Regulations

resistance welded pipe or lap welded pipe susceptible to longitudinal seam failure must be capable of assessing seam integrity and of detecting corrosion and deformation anomalies.

(A) In-Line Inspection tool or tools capable of detecting corrosion and deformation anomalies, including dents, gouges, and grooves. For pipeline segments that are susceptible to cracks (pipe body and weld seams), an operator must use an in-line inspection tool or tools capable of detecting crack anomalies. When performing an assessment using an In-Line Inspection Tool, an operator must comply with § 195.591;

(B) Pressure test conducted in accordance with subpart E of this part;

(C) External corrosion direct assessment in accordance with § 195.588; or

(D) Other technology that the operator demonstrates can provide an equivalent understanding of the condition of the line pipe. An operator choosing this option must notify the Office of Pipeline Safety (OPS) 90 days before conducting the assessment, by sending a notice to the address or facsimile number specified in paragraph (m) of this section.

(ii) A schedule for completing the integrity assessment;

(iii) An explanation of the assessment methods selected and evaluation of risk factors considered in establishing the assessment schedule.

(2) An operator must document, prior to implementing any changes to the plan, any modification to the plan, and reasons for the modification.

(d) When must operators complete baseline assessments? Operators must complete baseline assessments as follows:

(1) Time periods. Complete assessments before the following deadlines:

If the pipeline is:	Then complete baseline assessments not later than the following date according to a schedule that prioritizes assessments:	And assess at least 50 percent of the line on an expedited basis, beginning with the highest risk pipe, not later than:
Category 1	March 31, 2008	September 30, 2004.
Category 2	February 17, 2009	August 16, 2005.
Category 3	Date the pipeline begins operation	Not applicable.

(2) Prior assessment. To satisfy the requirements of paragraph (c)(1)(i) of this section for pipelines in the first column of the following table, operators may use integrity assessments conducted after the date in the second column, if the integrity assessment method complies with this section. However, if an operator uses this prior assessment as its baseline assessment, the operator must reassess the line pipe according to paragraph (j)(3) of this section. The table follows:

Pipeline	Date
Category 1	January 1, 1996.
Category 2	February 15, 1997.

(3) Newly-identified areas.

(i) When information is available from the information analysis (see paragraph (g) of this section), or from Census Bureau maps, that the population density around a pipeline segment has changed so as to fall within the definition in § 195.450 of a high population area or other populated area, the operator must incorporate the area into its baseline assessment plan as a high consequence area within one year from the date the area is identified. An operator must complete the baseline assessment of any line pipe that could affect the newly-identified high consequence area within five years from the date the area is identified.

(ii) An operator must incorporate a new unusually sensitive area into its baseline assessment plan within one year from the date the area is identified. An operator must complete the baseline assessment of any line pipe that could affect the newly-identified high consequence area within five years from the date the area is identified.

Appendix – Cited Regulations

(e) What are the risk factors for establishing an assessment schedule (for both the baseline and continual integrity assessments)?

(1) An operator must establish an integrity assessment schedule that prioritizes pipeline segments for assessment (see paragraphs (d)(1) and (j)(3) of this section). An operator must base the assessment schedule on all risk factors that reflect the risk conditions on the pipeline segment. The factors an operator must consider include, but are not limited to:

- (i) Results of the previous integrity assessment, defect type and size that the assessment method can detect, and defect growth rate;
 - (ii) Pipe size, material, manufacturing information, coating type and condition, and seam type;
 - (iii) Leak history, repair history and cathodic protection history;
 - (iv) Product transported;
 - (v) Operating stress level;
 - (vi) Existing or projected activities in the area;
 - (vii) Local environmental factors that could affect the pipeline (e.g., corrosivity of soil, subsidence, climatic);
 - (viii) Geo-technical hazards; and
 - (ix) Physical support of the segment such as by a cable suspension bridge.
- (2) Appendix C of this part provides further guidance on risk factors.

(f) What are the elements of an integrity management program? An integrity management program begins with the initial framework. An operator must continually change the program to reflect operating experience, conclusions drawn from results of the integrity assessments, and other maintenance and surveillance data, and evaluation of consequences of a failure on the high consequence area. An operator must include, at minimum, each of the following elements in its written integrity management program:

- (1) A process for identifying which pipeline segments could affect a high consequence area;
- (2) A baseline assessment plan meeting the requirements of paragraph (c) of this section;
- (3) An analysis that integrates all available information about the integrity of the entire pipeline and the consequences of a failure (see paragraph (g) of this section);
- (4) Criteria for remedial actions to address integrity issues raised by the assessment methods and information analysis (see paragraph (h) of this section);
- (5) A continual process of assessment and evaluation to maintain a pipeline's integrity (see paragraph (j) of this section);
- (6) Identification of preventive and mitigative measures to protect the high consequence area (see paragraph (i) of this section);
- (7) Methods to measure the program's effectiveness (see paragraph (k) of this section);
- (8) A process for review of integrity assessment results and information analysis by a person qualified to evaluate the results and information (see paragraph (h)(2) of this section).

(g) What is an information analysis? In periodically evaluating the integrity of each pipeline segment (paragraph (j) of this section), an operator must analyze all available information about the integrity of the entire pipeline and the consequences of a failure. This information includes:

- (1) Information critical to determining the potential for, and preventing, damage due to excavation, including current and planned damage prevention activities, and development or planned development along the pipeline segment;
- (2) Data gathered through the integrity assessment required under this section;
- (3) Data gathered in conjunction with other inspections, tests, surveillance and patrols required by this Part, including, corrosion control monitoring and cathodic protection surveys; and
- (4) Information about how a failure would affect the high consequence area, such as location of the water intake.

(h) What actions must an operator take to address integrity issues?—

- (1) General requirements. An operator must take prompt action to address all anomalous conditions the operator discovers through the integrity assessment or information analysis. In addressing all conditions, an operator must evaluate all anomalous conditions and remediate those that could reduce a pipeline's integrity.

Appendix – Cited Regulations

An operator must be able to demonstrate that the remediation of the condition will ensure the condition is unlikely to pose a threat to the long-term integrity of the pipeline. An operator must comply with § 195.422 when making a repair.

(i) Temporary pressure reduction. An operator must notify PHMSA, in accordance with paragraph (m) of this section, if the operator cannot meet the schedule for evaluation and remediation required under paragraph (h)(3) of this section and cannot provide safety through a temporary reduction in operating pressure.

(ii) Long-term pressure reduction. When a pressure reduction exceeds 365 days, the operator must notify PHMSA in accordance with paragraph (m) of this section and explain the reasons for the delay. An operator must also take further remedial action to ensure the safety of the pipeline.

(2) Discovery of condition. Discovery of a condition occurs when an operator has adequate information about the condition to determine that the condition presents a potential threat to the integrity of the pipeline. An operator must promptly, but no later than 180 days after an integrity assessment, obtain sufficient information about a condition to make that determination, unless the operator can demonstrate that the 180-day period is impracticable.

(3) Schedule for evaluation and remediation. An operator must complete remediation of a condition according to a schedule prioritizing the conditions for evaluation and remediation. If an operator cannot meet the schedule for any condition, the operator must explain the reasons why it cannot meet the schedule and how the changed schedule will not jeopardize public safety or environmental protection.

(4) Special requirements for scheduling remediation—

(i) Immediate repair conditions. An operator's evaluation and remediation schedule must provide for immediate repair conditions. To maintain safety, an operator must temporarily reduce the operating pressure or shut down the pipeline until the operator completes the repair of these conditions. An operator must calculate the temporary reduction in operating pressure using the formulas referenced in paragraph (h)(4)(i)(B) of this section. If no suitable remaining strength calculation method can be identified, an operator must implement a minimum 20 percent or greater operating pressure reduction, based on actual operating pressure for two months prior to the date of inspection, until the anomaly is repaired. An operator must treat the following conditions as immediate repair conditions:

(A) Metal loss greater than 80% of nominal wall regardless of dimensions.

(B) A calculation of the remaining strength of the pipe shows a predicted burst pressure less than the established maximum operating pressure at the location of the anomaly. Suitable remaining strength calculation methods include, but are not limited to, ASME/ANSI B31G (incorporated by reference, see § 195.3) and PRCI PR-3-805 (R-STRENG) (incorporated by reference, see § 195.3).

(C) A dent located on the top of the pipeline (above the 4 and 8 o'clock positions) that has any indication of metal loss, cracking or a stress riser.

(D) A dent located on the top of the pipeline (above the 4 and 8 o'clock positions) with a depth greater than 6% of the nominal pipe diameter.

(E) An anomaly that in the judgment of the person designated by the operator to evaluate the assessment results requires immediate action.

(ii) 60-day conditions. Except for conditions listed in paragraph (h)(4)(i) of this section, an operator must schedule evaluation and remediation of the following conditions within 60 days of discovery of condition.

(A) A dent located on the top of the pipeline (above the 4 and 8 o'clock positions) with a depth greater than 3% of the pipeline diameter (greater than 0.250 inches in depth for a pipeline diameter less than Nominal Pipe Size (NPS) 12).

(B) A dent located on the bottom of the pipeline that has any indication of metal loss, cracking or a stress riser.

(iii) 180-day conditions. Except for conditions listed in paragraph (h)(4)(i) or (ii) of this section, an operator must schedule evaluation and remediation of the following within 180 days of discovery of the condition:

(A) A dent with a depth greater than 2% of the pipeline's diameter (0.250 inches in depth for a pipeline diameter less than NPS 12) that affects pipe curvature at a girth weld or a longitudinal seam weld.

(B) A dent located on the top of the pipeline (above 4 and 8 o'clock position) with a depth greater than 2% of the pipeline's diameter (0.250 inches in depth for a pipeline diameter less than NPS 12).

(C) A dent located on the bottom of the pipeline with a depth greater than 6% of the pipeline's diameter.

Appendix – Cited Regulations

(D) A calculation of the remaining strength of the pipe shows an operating pressure that is less than the current established maximum operating pressure at the location of the anomaly. Suitable remaining strength calculation methods include, but are not limited to, ASME/ANSI B31G and PRCI PR-3-805 (R-STRENG).

(E) An area of general corrosion with a predicted metal loss greater than 50% of nominal wall.

(F) Predicted metal loss greater than 50% of nominal wall that is located at a crossing of another pipeline, or is in an area with widespread circumferential corrosion, or is in an area that could affect a girth weld.

(G) A potential crack indication that when excavated is determined to be a crack.

(H) Corrosion of or along a longitudinal seam weld.

(I) A gouge or groove greater than 12.5% of nominal wall.

(iv) Other conditions. In addition to the conditions listed in paragraphs (h)(4)(i) through (iii) of this section, an operator must evaluate any condition identified by an integrity assessment or information analysis that could impair the integrity of the pipeline, and as appropriate, schedule the condition for remediation. Appendix C of this part contains guidance concerning other conditions that an operator should evaluate.

(i) What preventive and mitigative measures must an operator take to protect the high consequence area?—

(1) General requirements. An operator must take measures to prevent and mitigate the consequences of a pipeline failure that could affect a high consequence area. These measures include conducting a risk analysis of the pipeline segment to identify additional actions to enhance public safety or environmental protection. Such actions may include, but are not limited to, implementing damage prevention best practices, better monitoring of cathodic protection where corrosion is a concern, establishing shorter inspection intervals, installing EFRDs on the pipeline segment, modifying the systems that monitor pressure and detect leaks, providing additional training to personnel on response procedures, conducting drills with local emergency responders and adopting other management controls.

(2) Risk analysis criteria. In identifying the need for additional preventive and mitigative measures, an operator must evaluate the likelihood of a pipeline release occurring and how a release could affect the high consequence area. This determination must consider all relevant risk factors, including, but not limited to:

(i) Terrain surrounding the pipeline segment, including drainage systems such as small streams and other smaller waterways that could act as a conduit to the high consequence area;

(ii) Elevation profile;

(iii) Characteristics of the product transported;

(iv) Amount of product that could be released;

(v) Possibility of a spillage in a farm field following the drain tile into a waterway;

(vi) Ditches along side a roadway the pipeline crosses;

(vii) Physical support of the pipeline segment such as by a cable suspension bridge;

(viii) Exposure of the pipeline to operating pressure exceeding established maximum operating pressure.

(3) Leak detection. An operator must have a means to detect leaks on its pipeline system. An operator must evaluate the capability of its leak detection means and modify, as necessary, to protect the high consequence area. An operator's evaluation must, at least, consider, the following factors—length and size of the pipeline, type of product carried, the pipeline's proximity to the high consequence area, the swiftness of leak detection, location of nearest response personnel, leak history, and risk assessment results.

(4) Emergency Flow Restricting Devices (EFRD). If an operator determines that an EFRD is needed on a pipeline segment to protect a high consequence area in the event of a hazardous liquid pipeline release, an operator must install the EFRD. In making this determination, an operator must, at least, consider the following factors—the swiftness of leak detection and pipeline shutdown capabilities, the type of commodity carried, the rate of potential leakage, the volume that can be released, topography or pipeline profile, the potential for ignition, proximity to power sources, location of nearest response personnel, specific terrain between the pipeline segment and the high consequence area, and benefits expected by reducing the spill size.

(j) What is a continual process of evaluation and assessment to maintain a pipeline's integrity?—

(1) General. After completing the baseline integrity assessment, an operator must continue to assess the line pipe at specified intervals and periodically evaluate the integrity of each pipeline segment that could affect a high consequence area.

(2) Evaluation. An operator must conduct a periodic evaluation as frequently as needed to assure pipeline integrity. An operator must base the frequency of evaluation on risk factors specific to its pipeline, including

Appendix – Cited Regulations

the factors specified in paragraph (e) of this section. The evaluation must consider the results of the baseline and periodic integrity assessments, information analysis (paragraph (g) of this section), and decisions about remediation, and preventive and mitigative actions (paragraphs (h) and (i) of this section).

(3) Assessment intervals. An operator must establish five-year intervals, not to exceed 68 months, for continually assessing the line pipe's integrity. An operator must base the assessment intervals on the risk the line pipe poses to the high consequence area to determine the priority for assessing the pipeline segments. An operator must establish the assessment intervals based on the factors specified in paragraph (e) of this section, the analysis of the results from the last integrity assessment, and the information analysis required by paragraph (g) of this section.

(4) Variance from the 5-year intervals in limited situations—

(i) Engineering basis. An operator may be able to justify an engineering basis for a longer assessment interval on a segment of line pipe. The justification must be supported by a reliable engineering evaluation combined with the use of other technology, such as external monitoring technology, that provides an understanding of the condition of the line pipe equivalent to that which can be obtained from the assessment methods allowed in paragraph (j)(5) of this section. An operator must notify OPS 270 days before the end of the five-year (or less) interval of the justification for a longer interval, and propose an alternative interval. An operator must send the notice to the address specified in paragraph (m) of this section.

(ii) Unavailable technology. An operator may require a longer assessment period for a segment of line pipe (for example, because sophisticated internal inspection technology is not available). An operator must justify the reasons why it cannot comply with the required assessment period and must also demonstrate the actions it is taking to evaluate the integrity of the pipeline segment in the interim. An operator must notify OPS 180 days before the end of the five-year (or less) interval that the operator may require a longer assessment interval, and provide an estimate of when the assessment can be completed. An operator must send a notice to the address specified in paragraph (m) of this section.

(5) Assessment methods. An operator must assess the integrity of the line pipe by any of the following methods. The methods an operator selects to assess low frequency electric resistance welded pipe or lap welded pipe susceptible to longitudinal seam failure must be capable of assessing seam integrity and of detecting corrosion and deformation anomalies.

(i) In-Line Inspection tool or tools capable of detecting corrosion and deformation anomalies, including dents, gouges, and grooves. For pipeline segments that are susceptible to cracks (pipe body and weld seams), an operator must use an in-line inspection tool or tools capable of detecting crack anomalies. When performing an assessment using an In-Line Inspection tool, an operator must comply with [§ 195.591](#);

(ii) Pressure test conducted in accordance with subpart E of this part;

(iii) External corrosion direct assessment in accordance with [§ 195.588](#); or

(iv) Other technology that the operator demonstrates can provide an equivalent understanding of the condition of the line pipe. An operator choosing this option must notify OPS 90 days before conducting the assessment, by sending a notice to the address or facsimile number specified in paragraph (m) of this section.

(k) What methods to measure program effectiveness must be used? An operator's program must include methods to measure whether the program is effective in assessing and evaluating the integrity of each pipeline segment and in protecting the high consequence areas. See Appendix C of this part for guidance on methods that can be used to evaluate a program's effectiveness.

(l) What records must an operator keep to demonstrate compliance?

(1) An operator must maintain, for the useful life of the pipeline, records that demonstrate compliance with the requirements of this subpart. At a minimum, an operator must maintain the following records for review during an inspection:

(i) A written integrity management program in accordance with paragraph (b) of this section.

(ii) Documents to support the decisions and analyses, including any modifications, justifications, deviations and determinations made, variances, and actions taken, to implement and evaluate each element of the integrity management program listed in paragraph (f) of this section.

(2) See Appendix C of this part for examples of records an operator would be required to keep.

(m) How does an operator notify PHMSA? An operator must provide any notification required by this section by:

Appendix – Cited Regulations

- (1) Sending the notification by electronic mail to InformationResourcesManager@dot.gov; or
- (2) Sending the notification by mail to ATTN: Information Resources Manager, DOT/PHMSA/OPS, East Building, 2nd Floor, E22–321, 1200 New Jersey Ave SE., Washington, DC 20590.

Credits

[Amdt. 195–70, [65 FR 75406](#), Dec. 1, 2000; [66 FR 9532](#), Feb. 8, 2001; Amdt. 195–74, [67 FR 1660](#), [1661](#), Jan. 14, 2002; Amdt. 195–76, [67 FR 2143](#), Jan. 16, 2002; [67 FR 46911](#), July 17, 2002; [70 FR 11140](#), March 8, 2005; Amdt. 195–85, [70 FR 61576](#), Oct. 25, 2005; Amdt. 195–87, [72 FR 39017](#), July 17, 2007; [73 FR 16571](#), March 28, 2008; [73 FR 31646](#), June 3, 2008; Amdt. 195–94, [75 FR 48607](#), Aug. 11, 2010; Amdt. 195–99, [80 FR 188](#), Jan. 5, 2015; Amdt. 195–100, [80 FR 12781](#), March 11, 2015; Amdt. 195–101, [82 FR 7999](#), Jan. 23, 2017]

SOURCE: Amdt. 195–22, [46 FR 38360](#), July 27, 1981; [53 FR 24950](#), July 1, 1988; [59 FR 17281](#), April 12, 1994; [59 FR 41260](#), Aug. 11, 1994; Amdt. 195–54, [60 FR 14650](#), March 20, 1995; Amdt. 195–55, [61 FR 18518](#), April 26, 1996; Amdt. 195–70, [65 FR 75405](#), Dec. 1, 2000; [66 FR 9532](#), Feb. 8, 2001; [70 FR 8302](#), Feb. 18, 2005; Amdt. 195–92, [74 FR 62506](#), Nov. 30, 2009; Amdt. 195–93, [74 FR 63328](#), Dec. 3, 2009; Amdt. 195–100, [80 FR 12779](#), March 11, 2015, unless otherwise noted.

AUTHORITY: [49 U.S.C. 5103](#), [60102](#), [60104](#), [60108](#), [60109](#), [60116](#), [60118](#), [60132](#), [60137](#), and [49 CFR 1.97](#). Current through Sept. 14, 2017; [82 FR 43194](#).

ARSD 20:10:01:15.01

20:10:01:15.01. Burden in contested case proceeding.

In any contested case proceeding, the complainant, counterclaimant, applicant, or petitioner has the burden of going forward with presentation of evidence unless otherwise ordered by the commission. The complainant, counterclaimant, applicant, or petitioner has the burden of proof as to factual allegations which form the basis of the complaint, counterclaim, application, or petition. In a complaint proceeding, the respondent has the burden of proof with respect to affirmative defenses.

Credits

Source: 2 SDR 56, effective February 2, 1976; transferred from § 20:10:14:16, 12 SDR 85, effective November 24, 1985; 12 SDR 151, 12 SDR 155, effective July 1, 1986; 33 SDR 107, effective December 26, 2006.

General Authority: SDCL 49-1-11(2),(4), 49-34A-4.

Law Implemented: SDCL 49-1-11(2),(4), 49-34A-61.

Current through rules published in the South Dakota register dated July 31, 2017.

ARSD 20:10:01:15.01, SD ADC 20:10:01:15.01

The theory of economic regulation

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The potential uses of public resources and powers to improve the economic status of economic groups (such as industries and occupations) are analyzed to provide a scheme of the demand for regulation. The characteristics of the political process which allow relatively small groups to obtain such regulation is then sketched to provide elements of a theory of supply of regulation. A variety of empirical evidence and illustration is also presented.

■ The state—the machinery and power of the state—is a potential resource or threat to every industry in the society. With its power to prohibit or compel, to take or give money, the state can and does selectively help or hurt a vast number of industries. That political juggernaut, the petroleum industry, is an immense consumer of political benefits, and simultaneously the underwriters of marine insurance have their more modest repast. The central tasks of the theory of economic regulation are to explain who will receive the benefits or burdens of regulation, what form regulation will take, and the effects of regulation upon the allocation of resources.

Regulation may be actively sought by an industry, or it may be thrust upon it. A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit. There are regulations whose net effects upon the regulated industry are undeniably onerous; a simple example is the differentially heavy taxation of the industry's product (whiskey, playing cards). These onerous regulations, however, are exceptional and can be explained by the same theory that explains beneficial (we may call it "acquired") regulation.

Two main alternative views of the regulation of industry are widely held. The first is that regulation is instituted primarily for the protection and benefit of the public at large or some large subclass of the public. In this view, the regulations which injure the public—as when the oil import quotas increase the cost of petroleum products to America by \$5 billion or more a year—are costs of some social goal (here, national defense) or, occasionally, perversions of the regulatory philosophy. The second view is essentially that the political process defies rational explanation: "politics" is an imponderable, a constantly and unpredictably shifting mixture of forces of the most diverse nature, comprehending acts of great moral virtue (the emancipation of slaves) and of the most vulgar venality (the congressman feathering his own nest).

The author obtained the B.B.A. degree from the University of Washington, the M.B.A. degree from Northwestern, and the Ph.D. degree from the University of Chicago. He is presently Charles R. Walgreen Distinguished Service Professor of American Institutions at the University of Chicago, and has published numerous articles and texts in the field of economics. Dr. Stigler is Vice Chairman of the Securities Investor Protective Commission.

why does not the powerful industry which obtained this expensive program instead choose direct cash subsidies from the public treasury? The "protection of the public" theory of regulation must say that the choice of import quotas is dictated by the concern of the federal government for an adequate domestic supply of petroleum in the event of war—a remark calculated to elicit uproarious laughter at the Petroleum Club. Such laughter aside, if national defense were the goal of the quotas, a tariff would be a more economical instrument of policy: it would retain the profits of exclusion for the treasury. The non-rationalist view would explain the policy by the inability of consumers to measure the cost to them of the import quotas, and hence their willingness to pay \$5 billion in higher prices rather than the \$2.5 billion in cash that would be equally attractive to the industry. Our profit-maximizing theory says that the explanation lies in a different direction: the present members of the refining industries would have to share a cash subsidy with all new entrants into the refining industry.¹ Only when the elasticity of supply of an industry is small will the industry prefer cash to controls over entry or output.

This question, why does an industry solicit the coercive powers of the state rather than its cash, is offered only to illustrate the approach of the present paper. We assume that political systems are rationally devised and rationally employed, which is to say that they are appropriate instruments for the fulfillment of desires of members of the society. This is not to say that the state will serve any person's concept of the public interest: indeed the problem of regulation is the problem of discovering when and why an industry (or other group of like-minded people) is able to use the state for its purposes, or is singled out by the state to be used for alien purposes.

1. What benefits can a state provide to an industry?

■ The state has one basic resource which in pure principle is not shared with even the mightiest of its citizens: the power to coerce. The state can seize money by the only method which is permitted by the laws of a civilized society, by taxation. The state can ordain the physical movements of resources and the economic decisions of households and firms without their consent. These powers provide the possibilities for the utilization of the state by an industry to increase its profitability. The main policies which an industry (or occupation) may seek of the state are four.

The most obvious contribution that a group may seek of the government is a direct subsidy of money. The domestic airlines received "air mail" subsidies (even if they did not carry mail) of \$1.5 billion through 1968. The merchant marine has received construction and operation subsidies reaching almost \$3 billion since World War II. The education industry has long shown a masterful skill in obtaining public funds: for example, universities and colleges have received federal funds exceeding \$3 billion annually in recent years, as well as subsidized loans for dormitories and other construction. The veterans of wars have often received direct cash bonuses.

¹ The domestic producers of petroleum, who also benefit from the import quota, would find a tariff or cash payment to domestic producers equally attractive. If their interests alone were consulted, import quotas would be auctioned off instead of being given away.

We have already sketched the main explanation for the fact that an industry with power to obtain governmental favors usually does not use this power to get money: unless the list of beneficiaries can be limited by an acceptable device, whatever amount of subsidies the industry can obtain will be dissipated among a growing number of rivals. The airlines quickly moved away from competitive bidding for air mail contracts to avoid this problem.² On the other hand, the premier universities have not devised a method of excluding other claimants for research funds, and in the long run they will receive much-reduced shares of federal research monies.

The second major public resource commonly sought by an industry is control over entry by new rivals. There is considerable, not to say excessive, discussion in economic literature of the rise of peculiar price policies (limit prices), vertical integration, and similar devices to retard the rate of entry of new firms into oligopolistic industries. Such devices are vastly less efficacious (economical) than the certificate of convenience and necessity (which includes, of course, the import and production quotas of the oil and tobacco industries).

The diligence with which the power of control over entry will be exercised by a regulatory body is already well known. The Civil Aeronautics Board has not allowed a single new trunk line to be launched since it was created in 1938. The power to insure new banks has been used by the Federal Deposit Insurance Corporation to reduce the rate of entry into commercial banking by 60 percent.³ The interstate motor carrier history is in some respects even more striking, because no even ostensibly respectable case for restriction on entry can be developed on grounds of scale economies (which are in turn adduced to limit entry for safety or economy of operation). The number of federally licensed common carriers is shown in Figure 1: the immense growth of the freight hauled by trucking common carriers has been associated with a steady secular decline of numbers of such carriers. The number of applications for new certificates has been in excess of 5000 annually in recent years: a rigorous proof that hope springs eternal in an aspiring trucker's breast.

We propose the general hypothesis: every industry or occupation that has enough political power to utilize the state will seek to control entry. In addition, the regulatory policy will often be so fashioned as to retard the rate of growth of new firms. For example, no new savings and loan company may pay a dividend rate higher than that prevailing in the community in its endeavors to attract deposits.⁴ The power to limit selling expenses of mutual funds, which is soon to be conferred upon the Securities and Exchange Commission, will serve to limit the growth of small mutual funds and hence reduce the sales costs of large funds.

One variant of the control of entry is the protective tariff (and the corresponding barriers which have been raised to interstate movements of goods and people). The benefits of protection to an industry, one might think, will usually be dissipated by the entry of new domestic producers, and the question naturally arises: Why does the industry not also seek domestic entry controls? In a few industries

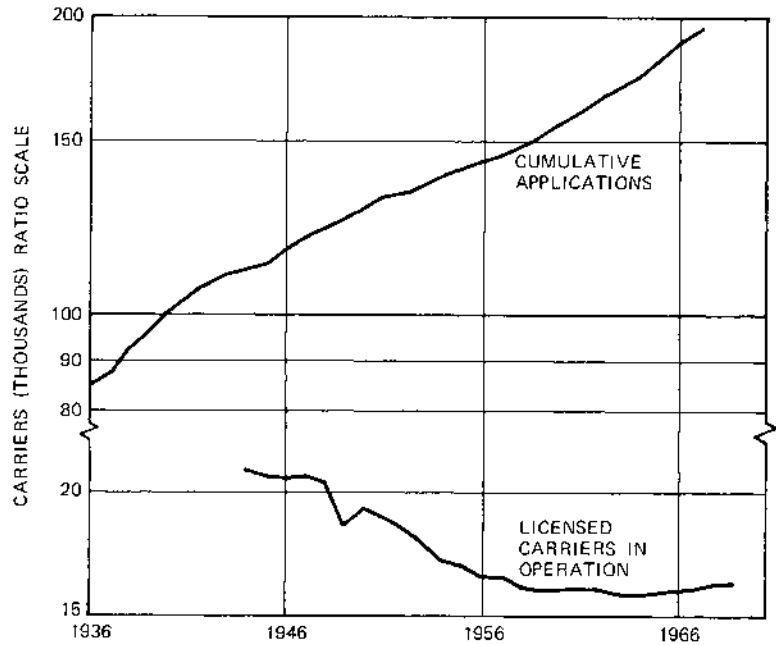
² See [7], pp. 60 ff.

³ See [10].

⁴ The Federal Home Loan Bank Board is the regulatory body. It also controls the amount of advertising and other areas of competition.

FIGURE 1

CERTIFICATES FOR INTERSTATE MOTOR CARRIERS



SOURCE: TABLE 5

(petroleum) the domestic controls have been obtained, but not in most. The tariff will be effective if there is a specialized domestic resource necessary to the industry; oil-producing lands is an example. Even if an industry has only durable specialized resources, it will gain if its contraction is slowed by a tariff.

A third general set of powers of the state which will be sought by the industry are those which affect substitutes and complements. Crudely put, the butter producers wish to suppress margarine and encourage the production of bread. The airline industry actively supports the federal subsidies to airports; the building trade unions have opposed labor-saving materials through building codes. We shall examine shortly a specific case of inter-industry competition in transportation.

The fourth class of public policies sought by an industry is directed to price-fixing. Even the industry that has achieved entry control will often want price controls administered by a body with coercive powers. If the number of firms in the regulated industry is even moderately large, price discrimination will be difficult to maintain in the absence of public support. The prohibition of interest on demand deposits, which is probably effective in preventing interest payments to most non-business depositors, is a case in point. Where there are no diseconomies of large scale for the individual firm (e.g., a motor trucking firm can add trucks under a given license as common carrier), price control is essential to achieve more than competitive rates of return.

□ **Limitations upon political benefits.** These various political boons are not obtained by the industry in a pure profit-maximizing form. The political process erects certain limitations upon the exercise of cartel policies by an industry. These limitations are of three sorts.

TABLE 1

IMPORT QUOTAS OF REFINERIES AS PERCENT
OF DAILY INPUT OF PETROLEUM
(DISTRICTS I - IV, JULY 1, 1959 - DEC. 31, 1959)

SIZE OF REFINERY (THOUSANDS OF BARRELS)	PERCENT QUOTA
0-10	11.4
10-20	10.4
20-30	9.5
30-60	8.5
60-100	7.6
100-150	6.6
150-200	5.7
200-300	4.7
300 AND OVER	3.8

SOURCE: HEARING, SELECT COMMITTEE ON SMALL BUSINESS, U. S. CONGRESS,
88th CONG., 2nd SESS., AUG. 10 AND 11, 1964, [12] P. 121.

First, the distribution of control of the industry among the firms in the industry is changed. In an unregulated industry each firm's influence upon price and output is proportional to its share of industry output (at least in a simple arithmetic sense of direct capacity to change output). The political decisions take account also of the political strength of the various firms, so small firms have a larger influence than they would possess in an unregulated industry. Thus, when quotas are given to firms, the small firms will almost always receive larger quotas than cost-minimizing practices would allow. The original quotas under the oil import quota system will illustrate this practice (Table 1). The smallest refiners were given a quota of 11.4 percent of their daily consumption of oil, and the percentage dropped as refinery size rose.⁵ The pattern of regressive benefits is characteristic of public controls in industries with numerous firms.

Second, the procedural safeguards required of public processes are costly. The delays which are dictated by both law and bureaucratic thoughts of self-survival can be large: Robert Gerwig found the price of gas sold in interstate commerce to be 5 to 6 percent higher than in intrastate commerce because of the administrative costs (including delay) of Federal Power Commission reviews [5].

Finally, the political process automatically admits powerful outsiders to the industry's councils. It is well known that the allocation of television channels among communities does not maximize industry revenue but reflects pressures to serve many smaller communities. The abandonment of an unprofitable rail line is an even more notorious area of outsider participation.

These limitations are predictable, and they must all enter into the calculus of the profitability of regulation of an industry.

□ **An illustrative analysis.** The recourse to the regulatory process is of course more specific and more complex than the foregoing sketch

⁵ The largest refineries were restricted to 75.7 percent of their historical quota under the earlier voluntary import quota plan.

suggests. The defensive power of various other industries which are affected by the proposed regulation must also be taken into account. An analysis of one aspect of the regulation of motor trucking will illustrate these complications. At this stage we are concerned only with the correspondence between regulations and economic interests; later we shall consider the political process by which regulation is achieved.

The motor trucking industry operated almost exclusively within cities before 1925, in good part because neither powerful trucks nor good roads were available for long-distance freight movements. As these deficiencies were gradually remedied, the share of trucks in intercity freight movements began to rise, and by 1930 it was estimated to be 4 percent of ton-miles of intercity freight. The railroad industry took early cognizance of this emerging competitor, and one of the methods by which trucking was combatted was state regulation.

By the early 1930's all states regulated the dimensions and weight of trucks. The weight limitations were a much more pervasive control over trucking than the licensing of common carriers because even the trucks exempt from entry regulation are subject to the limitations on dimensions and capacity. The weight regulations in the early 1930's are reproduced in the appendix (Table 6). Sometimes the participation of railroads in the regulatory process was incontrovertible: Texas and Louisiana placed a 7000-pound payload limit on trucks serving (and hence competing with) two or more railroad stations, and a 14,000-pound limit on trucks serving only one station (hence, not competing with it).

We seek to determine the pattern of weight limits on trucks that would emerge in response to the economic interests of the concerned parties. The main considerations appear to be the following:

- (1) Heavy trucks would be allowed in states with a substantial number of trucks on farms: the powerful agricultural interests would insist upon this. The 1930 Census reports nearly one million trucks on farms. One variable in our study will be, for each state, trucks per 1000 of agricultural population.⁶
- (2) Railroads found the truck an effective and rapidly triumphing competitor in the shorter hauls and hauls of less than carload traffic, but much less effective in the carload and longer-haul traffic. Our second variable for each state is, therefore, length of average railroad haul.⁷ The longer the average rail haul is, the less the railroads will be opposed to trucks.
- (3) The public at large would be concerned by the potential damage done to the highway system by heavy trucks. The better the state highway system, the heavier the trucks that would be permitted. The percentage of each state's highways that had a high type surface is the third variable. Of course good highways are more likely to exist where the potential contribution of trucks to a state's economy is greater, so the causation may be looked at from either direction.

⁶ The ratio of trucks to total population would measure the product of (1) the importance of trucks to farmers, and (2) the importance of farmers in the state. For reasons given later, we prefer to emphasize (1).

⁷ This is known for each railroad, and we assume that (1) the average holds within each state, and (2) two or more railroads in a state may be combined on the basis of mileage. Obviously both assumptions are at best fair approximations.

We have two measures of weight limits on trucks, one for 4-wheel trucks (X_1) and one for 6-wheel trucks (X_2). We may then calculate two equations,

$$X_1 \text{ (or } X_2) = a + bX_3 + cX_4 + dX_5,$$

where

X_3 = trucks per 1000 agricultural labor force, 1930,

X_4 = average length of railroad haul of freight traffic, 1930,

X_5 = percentage of state roads with high-quality surface, 1930.

(All variables are fully defined and their state values given in Table 7 on page 20.)

The three explanatory variables are statistically significant, and each works in the expected direction. The regulations on weight were less onerous; the larger the truck population in farming, the less competitive the trucks were to railroads (i.e., the longer the rail hauls), and the better the highway system (see Table 2).

□ The foregoing analysis is concerned with what may be termed the industrial demand for governmental powers. Not every industry will have a significant demand for public assistance (other than money!), meaning the prospect of a substantial increase in the present value of the enterprises even if the governmental services could be obtained gratis (and of course they have costs to which we soon turn). In some economic activities entry of new rivals is extremely difficult to control—consider the enforcement problem in restricting the supply of domestic servants. In some industries the substitute products cannot be efficiently controlled—consider the competition offered to bus lines by private car-pooling. Price fixing is not feasible where every

TABLE 2
REGRESSION ANALYSIS OF STATE WEIGHT LIMITS ON TRUCKS
(T VALUES UNDER REGRESSION COEFFICIENTS)

DEPENDENT VARIABLE	N	CONSTANT	X_3	X_4	X_5	R^2
X_1	48	12.28 (4.87)	0.0336 (3.99)	0.0287 (2.77)	0.2641 (3.04)	0.502
X_2	46	10.34 (1.57)	0.0437 (2.01)	0.0788 (2.97)	0.2528 (1.15)	0.243

X_1 = WEIGHT LIMIT ON 4-WHEEL TRUCKS (THOUSANDS OF POUNDS), 1932-33
 X_2 = WEIGHT LIMIT ON 6-WHEEL TRUCKS (THOUSANDS OF POUNDS), 1932-33
 X_3 = TRUCKS ON FARMS PER 1,000 AGRICULTURAL LABOR FORCE, 1930
 X_4 = AVERAGE LENGTH OF RAILROAD HAUL OF FREIGHT (MILES), 1930
 X_5 = PERCENT OF STATE HIGHWAYS WITH HIGH-TYPE SURFACE, DEC. 31, 1930

SOURCES: X_1 AND X_2 : THE MOTOR TRUCK RED BOOK AND DIRECTORY [11], 1934 EDITION, P. 85-102, AND U.S. DEPT. OF AGRIC., BUR. OF PUBLIC ROADS, DEC. 1932 [13].

X_3 : CENSUS OF AGRICULTURE, 1930, VOL. IV, [14].

X_4 : A.A.R.R., BUR. OF RAILWAY ECONOMICS, RAILWAY MILEAGE BY STATES, DEC. 31, 1930 [1] AND U.S.I.C.C., STATISTICS OF RAILWAYS IN THE U.S., 1930 [18].

X_5 : STATISTICAL ABSTRACT OF THE U.S., 1932 [16].

unit of the product has a different quality and price, as in the market for used automobiles. In general, however, most industries will have a positive demand price (schedule) for the services of government.

2. The costs of obtaining legislation

■ When an industry receives a grant of power from the state, the benefit to the industry will fall short of the damage to the rest of the community. Even if there were no deadweight losses from acquired regulation, however, one might expect a democratic society to reject such industry requests unless the industry controlled a majority of the votes.⁸ A direct and informed vote on oil import quotas would reject the scheme. (If it did not, our theory of rational political processes would be contradicted.) To explain why many industries are able to employ the political machinery to their own ends, we must examine the nature of the political process in a democracy.

A consumer chooses between rail and air travel, for example, by voting with his pocketbook: he patronizes on a given day that mode of transportation he prefers. A similar form of economic voting occurs with decisions on where to work or where to invest one's capital. The market accumulates these economic votes, predicts their future course, and invests accordingly.

Because the political decision is coercive, the decision process is fundamentally different from that of the market. If the public is asked to make a decision between two transportation media comparable to the individual's decision on how to travel—say, whether airlines or railroads should receive a federal subsidy—the decision must be abided by everyone, travellers and non-travellers, travellers this year and travellers next year. This compelled universality of political decisions makes for two differences between democratic political decision processes and market processes.

(1) The decisions must be made simultaneously by a large number of persons (or their representatives): the political process demands simultaneity of decision. If *A* were to vote on the referendum today, *B* tomorrow, *C* the day after, and so on, the accumulation of a majority decision would be both expensive and suspect. (*A* might wish to cast a different vote now than last month.)

The condition of simultaneity imposes a major burden upon the political decision process. It makes voting on specific issues prohibitively expensive: it is a significant cost even to engage in the transaction of buying a plane ticket when I wish to travel; it would be stupendously expensive to me to engage in the physically similar transaction of voting (i.e., patronizing a polling place) whenever a number of my fellow citizens desired to register their views on railroads versus airplanes. To cope with this condition of simultaneity, the voters must employ representatives with wide discretion and must eschew direct expressions of marginal changes in preferences. This characteristic also implies that the political decision does not predict voter desires and make preparations to fulfill them in advance of their realization.

⁸ If the deadweight loss (of consumer and producer surplus) is taken into account, even if the oil industry were in the majority it would not obtain the legislation if there were available some method of compensation (such as sale of votes) by which the larger damage of the minority could be expressed effectively against the lesser gains of the majority.

(2) The democratic decision process must involve "all" the community, not simply those who are directly concerned with a decision. In a private market, the non-traveller never votes on rail versus plane travel, while the huge shipper casts many votes each day. The political decision process cannot exclude the uninterested voter: the abuses of any exclusion except self-exclusion are obvious. Hence, the political process does not allow participation in proportion to interest and knowledge. In a measure, this difficulty is moderated by other political activities besides voting which do allow a more effective vote to interested parties: persuasion, employment of skilled legislative representatives, etc. Nevertheless, the political system does not offer good incentives like those in private markets to the acquisition of knowledge. If I consume ten times as much of public service A (streets) as of B (schools), I do not have incentives to acquire corresponding amounts of knowledge about the public provision of these services.⁹

These characteristics of the political process can be modified by having numerous levels of government (so I have somewhat more incentive to learn about local schools than about the whole state school system) and by selective use of direct decision (bond referenda). The chief method of coping with the characteristics, however, is to employ more or less full-time representatives organized in (disciplined by) firms which are called political parties or machines.

The representative and his party are rewarded for their discovery and fulfillment of the political desires of their constituency by success in election and the perquisites of office. If the representative could confidently await reelection whenever he voted against an economic policy that injured the society, he would assuredly do so. Unfortunately virtue does not always command so high a price. If the representative denies ten large industries their special subsidies of money or governmental power, they will dedicate themselves to the election of a more complaisant successor: the stakes are that important. This does not mean that every large industry can get what it wants or all that it wants: it does mean that the representative and his party must find a coalition of voter interests more durable than the anti-industry side of every industry policy proposal. A representative cannot win or keep office with the support of the sum of those who are opposed to: oil import quotas, farm subsidies, airport subsidies, hospital subsidies, unnecessary navy shipyards, an inequitable public housing program, and rural electrification subsidies.

The political decision process has as its dominant characteristic infrequent, universal (in principle) participation, as we have noted: political decisions must be infrequent and they must be global. The voter's expenditure to learn the merits of individual policy proposals and to express his preferences (by individual and group representation as well as by voting) are determined by expected costs and returns, just as they are in the private marketplace. The costs of comprehensive information are higher in the political arena because information must be sought on many issues of little or no direct concern to the individual, and accordingly he will know little about most matters before the legislature. The expressions of preferences in voting will be less precise than the expressions of preferences in the

⁹ See [2].

marketplace because many uninformed people will be voting and affecting the decision.¹⁰

The channels of political decision-making can thus be described as gross or filtered or noisy. If everyone has a negligible preference for policy A over B, the preference will not be discovered or acted upon. If voter group X wants a policy that injures non-X by a small amount, it will not pay non-X to discover this and act against the policy. The system is calculated to implement all strongly felt preferences of majorities and many strongly felt preferences of minorities but to disregard the lesser preferences of majorities and minorities. The filtering or grossness will be reduced by any reduction in the cost to the citizen of acquiring information and expressing desires and by any increase in the probability that his vote will influence policy.

The industry which seeks political power must go to the appropriate seller, the political party. The political party has costs of operation, costs of maintaining an organization and competing in elections. These costs of the political process are viewed excessively narrowly in the literature on the financing of elections: elections are to the political process what merchandizing is to the process of producing a commodity, only an essential final step. The party maintains its organization and electoral appeal by the performance of costly services to the voter at all times, not just before elections. Part of the costs of services and organization are borne by putting a part of the party's workers on the public payroll. An opposition party, however, is usually essential insurance for the voters to discipline the party in power, and the opposition party's costs are not fully met by public funds.

The industry which seeks regulation must be prepared to pay with the two things a party needs: votes and resources. The resources may be provided by campaign contributions, contributed services (the businessman heads a fund-raising committee), and more indirect methods such as the employment of party workers. The votes in support of the measure are rallied, and the votes in opposition are dispersed, by expensive programs to educate (or uneducate) members of the industry and of other concerned industries.

These costs of legislation probably increase with the size of the industry seeking the legislation. Larger industries seek programs which cost the society more and arouse more opposition from substantially affected groups. The tasks of persuasion, both within and without the industry, also increase with its size. The fixed size of the political "market," however, probably makes the cost of obtaining legislation increase less rapidly than industry size. The smallest industries are therefore effectively precluded from the political process unless they have some special advantage such as geographical concentration in a sparsely settled political subdivision.

If a political party has in effect a monopoly control over the governmental machine, one might expect that it could collect most of the benefits of regulation for itself. Political parties, however, are

¹⁰ There is an organizational problem in any decision in which more than one vote is cast. If because of economies of scale it requires a thousand customers to buy a product before it can be produced, this thousand votes has to be assembled by some entrepreneur. Unlike the political scene, however, there is no need to obtain the consent of the remainder of the community, because they will bear no part of the cost.

perhaps an ideal illustration of Demsetz' theory of natural monopoly [4]. If one party becomes extortionate (or badly mistaken in its reading of effective desires), it is possible to elect another party which will provide the governmental services at a price more closely proportioned to costs of the party. If entry into politics is effectively controlled, we should expect one-party dominance to lead that party to solicit requests for protective legislation but to exact a higher price for the legislation.

The internal structure of the political party, and the manner in which the perquisites of office are distributed among its members, offer fascinating areas for study in this context. The elective officials are at the pinnacle of the political system—there is no substitute for the ability to hold the public offices. I conjecture that much of the compensation to the legislative leaders takes the form of extra-political payments. Why are so many politicians lawyers?—because everyone employs lawyers, so the congressman's firm is a suitable avenue of compensation, whereas a physician would have to be given bribes rather than patronage. Most enterprises patronize insurance companies and banks, so we may expect that legislators commonly have financial affiliations with such enterprises.

The financing of industry-wide activities such as the pursuit of legislation raises the usual problem of the free rider.¹¹ We do not possess a satisfactory theory of group behavior—indeed this theory is the theory of oligopoly with one addition: in the very large number industry (e.g., agriculture) the political party itself will undertake the entrepreneurial role in providing favorable legislation. We can go no further than the infirmities of oligopoly theory allow, which is to say, we can make only plausible conjectures such as that the more concentrated the industry, the more resources it can invest in the campaign for legislation.

□ **Occupational licensing.** The licensing of occupations is a possible use of the political process to improve the economic circumstances of a group. The license is an effective barrier to entry because occupational practice without the license is a criminal offense. Since much occupational licensing is performed at the state level, the area provides an opportunity to search for the characteristics of an occupation which give it political power.

Although there are serious data limitations, we may investigate several characteristics of an occupation which should influence its ability to secure political power:

(1) *The size of the occupation.* Quite simply, the larger the occupation, the more votes it has. (Under some circumstances, therefore, one would wish to exclude non-citizens from the measure of size.)

(2) *The per capita income of the occupation.* The income of the occupation is the product of its number and average income, so this variable and the preceding will reflect the total income of the occupation. The income of the occupation is presumably an index of the probable rewards of successful political action: in the absence of specific knowledge of supply and demand functions, we expect

¹¹ The theory that the lobbying organization avoids the "free-rider" problem by selling useful services was proposed by Thomas G. Moore [8] and elaborated by Mancur Olson [9]. The theory has not been tested empirically.

licensing to increase each occupation's equilibrium income by roughly the same proportion. In a more sophisticated version, one would predict that the less the elasticity of demand for the occupation's services, the more profitable licensing would be. One could also view the income of the occupation as a source of funds for political action, but if we view political action as an investment this is relevant only with capital-market imperfections.¹²

The average income of occupational members is an appropriate variable in comparisons among occupations, but it is inappropriate to comparisons of one occupation in various states because real income will be approximately equal (in the absence of regulation) in each state.

(3) *The concentration of the occupation in large cities.* When the occupation organizes a campaign to obtain favorable legislation, it incurs expenses in the solicitation of support, and these are higher for a diffused occupation than a concentrated one. The solicitation of support is complicated by the free-rider problem in that individual members cannot be excluded from the benefits of legislation even if they have not shared the costs of receiving it. If most of the occupation is concentrated in a few large centers, these problems (we suspect) are much reduced in intensity: regulation may even begin at the local governmental level. We shall use an orthodox geographical concentration measure: the share of the occupation of the state in cities over 100,000 (or 50,000 in 1900 and earlier).

(4) *The presence of a cohesive opposition to licensing.* If an occupation deals with the public at large, the costs which licensing imposes upon any one customer or industry will be small and it will not be economic for that customer or industry to combat the drive for licensure. If the injured group finds it feasible and profitable to act jointly, however, it will oppose the effort to get licensure, and (by increasing its cost) weaken, delay, or prevent the legislation. The same attributes—numbers of voters, wealth, and ease of organization—which favor an occupation in the political arena, of course, favor also any adversary group. Thus, a small occupation employed by only one industry which has few employers will have difficulty in getting licensure; whereas a large occupation serving everyone will encounter no organized opposition.

An introductory statistical analysis of the licensing of select occupations by states is summarized in Table 3. In each occupation the dependent variable for each state is the year of first regulation of entry into the occupation. The two independent variables are

- (1) the ratio of the occupation to the total labor force of the state in the census year nearest to the median year of regulation,
- (2) the fraction of the occupation found in cities over 100,000 (over 50,000 in 1890 and 1900) in that same year.

¹² Let n = the number of members of the profession and y = average income. We expect political capacity to be in proportion to (ny) so far as benefits go, but to reflect also the direct value of votes, so the capacity becomes proportional to $(n^a y)$ with $a > 1$.

TABLE 3

INITIAL YEAR OF REGULATION AS A FUNCTION OF
RELATIVE SIZE OF OCCUPATION AND DEGREE OF URBANIZATION

OCCUPATION	NUMBER OF STATES LICENSING	MEDIAN CENSUS YEAR OF LICENSING	REGRESSION COEFFICIENTS (AND T-VALUES)		R ²
			SIZE OF OCCUPATION (RELATIVE TO LABOR FORCE)	URBANIZATION (SHARE OF OCCUPA- TION IN CITIES OVER 100,000*)	
BEAUTICIANS	48	1930	-4.03 (2.50)	5.90 (1.24)	0.125
ARCHITECTS	47	1930	-24.06 (2.15)	-6.29 (0.84)	0.184
BARBERS	46	1930	-1.31 (0.51)	-26.10 (2.37)	0.146
LAWYERS	29	1890	-0.26 (0.08)	-65.78 (1.70)	0.102
PHYSICIANS	43	1890	0.64 (0.65)	-23.80 (2.69)	0.165
EMBALMERS	37	1910	3.32 (0.36)	-4.24 (0.44)	0.007
REGISTERED NURSES	48	1910	-2.08 (2.28)	-3.36 (1.06)	0.176
DENTISTS	48	1900	2.51 (0.44)	-22.94 (2.19)	0.103
VETERINARIANS	40	1910	-10.69 (1.94)	-37.16 (4.20)	0.329
CHIROPRACTORS	48	1930	-17.70 (1.54)	11.69 (1.25)	0.079
PHARMACISTS	48	1900	-4.19 (1.50)	-6.84 (0.80)	0.082

SOURCES: THE COUNCIL OF STATE GOVERNMENTS, "OCCUPATIONAL LICENSING LEGISLATION IN THE STATES", 1952 [3], AND U.S. CENSUS OF POPULATION [15], VARIOUS YEARS.

* 50,000 IN 1890 AND 1900.

We expect these variables to be negatively associated with year of licensure, and each of the nine statistically significant regression coefficients is of the expected sign.

The results are not robust, however: the multiple correlation coefficients are small, and over half of the regression coefficients are not significant (and in these cases often of inappropriate sign). Urbanization is more strongly associated than size of occupation with licensure.¹³ The crudity of the data may be a large source of these disappointments: we measure, for example, the characteristics of the barbers in each state in 1930, but 14 states were licensing barbers by 1910. If the states which licensed barbering before 1910 had relatively more barbers, or more highly urbanized barbers, the predictions

¹³ We may pool the occupations and assign dummy variables for each occupation; the regression coefficients then are:

size of occupation relative to labor force: -0.450 ($t = 0.59$)
urbanization: -12.133 ($t = 4.00$).

Thus urbanization is highly significant, while size of occupation is not significant.

would be improved. The absence of data for years between censuses and before 1890 led us to make only the cruder analysis.¹⁴

In general, the larger occupations were licensed in earlier years.¹⁵ Veterinarians are the only occupation in this sample who have a well-defined set of customers, namely livestock farmers, and licensing was later in those states with large numbers of livestock relative to rural population. The within-occupation analyses offer some support for the economic theory of the supply of legislation.

A comparison of different occupations allows us to examine several other variables. The first is income, already discussed above. The second is the size of the market. Just as it is impossible to organize an effective labor union in only one part of an integrated market, so it is impossible to regulate only one part of the market. Consider an occupation—junior business executives will do—which has a national market with high mobility of labor and significant mobility of employers. If the executives of one state were to organize, their scope for effective influence would be very small. If salaries were raised above the competitive level, employers would often recruit elsewhere so the demand elasticity would be very high.¹⁶ The third variable is stability of occupational membership: the longer the members are in the occupation, the greater their financial gain from control of entry. Our regrettably crude measure of this variable is based upon the number of members aged 35–44 in 1950 and aged 45–54 in 1960: the closer these numbers are, the more stable the membership of the occupation. The data for the various occupations are given in Table 4.

The comparison of licensed and unlicensed occupations is consistently in keeping with our expectations:

- (1) the licensed occupations have higher incomes (also before licensing, one may assume),
- (2) the membership of the licensed occupations is more stable (but the difference is negligible in our crude measure),
- (3) the licensed occupations are less often employed by business enterprises (who have incentives to oppose licensing),
- (4) all occupations in national markets (college teachers, engineers, scientists, accountants) are unlicensed or only partially licensed.

¹⁴ A more precise analysis might take the form of a regression analysis such as:
Year of licensure = constant

+ b_1 (year of critical size of occupation)
+ b_2 (year of critical urbanization of occupation),

where the critical size and urbanization were defined as the mean size and mean urbanization in the year of licensure.

¹⁵ Lawyers, physicians, and pharmacists were all relatively large occupations by 1900, and nurses also by 1910. The only large occupation to be licensed later was barbers; the only small occupation to be licensed early was embalmers.

¹⁶ The regulation of business in a partial market will also generally produce very high supply elasticities within a market: if the price of the product (or service) is raised, the pressure of excluded supply is very difficult to resist. Some occupations are forced to reciprocity in licensing, and the geographical dispersion of earnings in licensed occupations, one would predict, is not appreciably different than in unlicensed occupations with equal employer mobility. Many puzzles are posed by the interesting analysis of Arlene S. Holen in [6], pp. 492–98.

TABLE 4

CHARACTERISTICS OF LICENSED AND UNLICENSED
PROFESSIONAL OCCUPATIONS, 1960

OCCUPATION	MEDIAN AGE (YEARS)	MEDIAN EDUCATION (YEARS)	MEDIAN EARNINGS (50-52 WKS.)	INSTABILITY OF MEMBERSHIP*	PERCENT NOT SELF-EMPLOYED	PERCENT IN CITIES OVER 50,000	PERCENT OF LABOR FORCE
LICENSED:							
ARCHITECTS	41.7	16.8	\$ 9,090	0.012	57.8%	44.1%	0.045%
CHIROPRACTORS	46.6	16.4	6,360	0.053	5.8	30.8	0.020
DENTISTS	45.9	17.3	12,200	0.016	9.4	34.5	0.128
EMBALMERS	43.5	13.4	5,990	0.130	52.8	30.2	0.055
LAWYERS	45.3	17.4	10,800	0.041	35.8	43.1	0.308
PROF. NURSES	39.1	13.2	3,850	0.291	91.0	40.6	0.868
OPTOMETRISTS	41.6	17.0	8,480	0.249	17.5	34.5	0.024
PHARMACISTS	44.9	16.2	7,230	0.119	62.3	40.0	0.136
PHYSICIANS	42.8	17.5	14,200	0.015	35.0	44.7	0.339
VETERINARIANS	39.2	17.4	9,210	0.169	29.5	14.4	0.023
AVERAGE	43.0	16.3	8,741	0.109	39.7	35.7	0.195
PARTIALLY LICENSED:							
ACCOUNTANTS	40.4	14.9	6,450	0.052	88.1	43.5	0.698
ENGINEERS	38.3	16.2	8,490	0.023	96.8	31.6	1.279
ELEM. SCHOOL TEACHERS	43.1	16.5	4,710	(a)	99.1	18.8	1.482
AVERAGE	40.6	15.9	6,550	0.117(b)	94.7	34.6	1.153
UNLICENSED:							
ARTISTS	38.0	14.2	5,920	0.103	77.3	45.7	0.154
CLERGYMEN	43.3	17.0	4,120	0.039	89.0	27.2	0.295
COLLEGE TEACHERS	40.3	17.4	7,500	0.085	99.2	36.0	0.261
DRAFTSMEN	31.2	12.9	5,990	0.098	98.6	40.8	0.322
REPORTERS & EDITORS	39.4	15.5	6,120	0.138	93.9	43.3	0.151
MUSICIANS	40.2	14.8	3,240	0.081	65.5	37.7	0.289
NATURAL SCIENTISTS	35.9	16.8	7,490	0.264	96.3	32.7	0.221
AVERAGE	38.3	15.5	5,768	0.115	88.5	37.6	0.242

(*) 1-R, WHERE R = RATIO: 1960 AGE 45-54 TO 1950 AGE 35-44.

(a) NOT AVAILABLE SEPARATELY; TEACHERS N.E.C. (INCL. SECONDARY SCHOOL AND OTHER). = 0.276

(b) INCLUDES FIGURE FOR TEACHERS N.E.C. IN NOTE (a)

SOURCE: U.S. CENSUS OF POPULATION, [15], 1960.

The size and urbanization of the three groups, however, are unrelated to licensing. The inter-occupational comparison therefore provides a modicum of additional support for our theory of regulation.

■ The idealistic view of public regulation is deeply imbedded in professional economic thought. So many economists, for example, have denounced the ICC for its pro-railroad policies that this has become a cliché of the literature. This criticism seems to me exactly as appropriate as a criticism of the Great Atlantic and Pacific Tea Company for selling groceries, or as a criticism of a politician for currying popular support. The fundamental vice of such criticism is that it misdirects attention: it suggests that the way to get an ICC which is not subservient to the carriers is to preach to the commissioners or to the people who appoint the commissioners. The only way to get a different commission would be to change the political

3. Conclusion

support for the Commission, and reward commissioners on a basis unrelated to their services to the carriers.

Until the basic logic of political life is developed, reformers will be ill-equipped to use the state for their reforms, and victims of the pervasive use of the state's support of special groups will be helpless to protect themselves. Economists should quickly establish the license to practice on the rational theory of political behavior.

Appendix

TABLE 5

COMMON, CONTRACT AND PASSENGER MOTOR CARRIERS, 1935-1969¹

YEAR ENDING	CUMULATIVE APPLICATIONS			OPERATING CARRIERS	
	GRAND- FATHER	NEW	TOTAL	APPROVED APPLICATIONS ³	NUMBER IN OPERATION ²
OCT. 1936	82,827	1,696	84,523	—	—
1937	83,107	3,921	87,028	1,114	—
1938	85,646	6,694	92,340	20,398	—
1939	86,298	9,636	95,934	23,494	—
1940	87,367	12,965	100,332	25,575	—
1941	88,064	16,325	104,389	26,296	—
1942	88,702	18,977	107,679	26,683	—
1943	89,157	20,007	109,164	27,531	—
1944	89,511	21,324	110,835	27,177	21,044
1945	89,518	22,829	112,347		20,788
1946	89,529	26,392	115,921		20,632
1947	89,552	29,604	119,156		20,665
1948	89,563	32,678	122,241		20,373
1949	89,567	35,635	125,202		18,459
1950	89,573	38,666	128,239		19,200
1951	89,574	41,889	131,463		18,843
1952	(89,574) ⁴	44,297	133,870		18,408
1953	"	46,619	136,192		17,869
1954	"	49,146	138,719		17,080
1955	"	51,720	141,293		16,836
JUNE 1956	"	53,640	143,213		16,486
1957	"	56,804	146,377		16,316
1958	"	60,278	149,851		16,065
1959	"	64,171	153,744		15,923
1960	"	69,205	158,778		15,936
1961	"	72,877	162,450		15,967
1962	"	76,986	166,559		15,884
1963	"	81,443	171,016		15,739
1964	"	86,711	176,284		15,732
1965	"	93,064	182,637		15,755
1966	"	101,745	191,318		15,933
1967	"	106,647	196,220		16,003
1968	"	(6)	(6)		16,230 ⁵
1969	"	(6)	(6)		16,318 ⁵

SOURCE: U.S. INTERSTATE COMMERCE COMMISSION ANNUAL REPORTS [17].

1 EXCLUDING BROKERS AND WITHIN-STATE CARRIERS.

2 PROPERTY CARRIERS WERE THE FOLLOWING PERCENTAGES OF ALL OPERATING CARRIERS: 1944-93.4%; 1950-92.4%; 1960-93.0%; 1966-93.4%.

3 ESTIMATED.

4 NOT AVAILABLE; ASSUMED TO BE APPROXIMATELY CONSTANT.

5 1968 AND 1969 FIGURES ARE FOR NUMBER OF CARRIERS REQUIRED TO FILE ANNUAL REPORTS.

6 NOT AVAILABLE COMPARABLE TO PREVIOUS YEARS; APPLICATIONS FOR PERMANENT AUTHORITY DISPOSED OF (I.E., FROM NEW AND PENDING FILES) 1967-69 ARE AS FOLLOWS: 1967-7,049; 1968-5,724; 1969-5,186.

TABLE 6

WEIGHT LIMITS ON TRUCKS, 1932-33*, BY STATES (BASIC DATA FOR TABLE 2).

STATE	MAXIMUM WEIGHT (IN LBS.)		STATE	MAXIMUM WEIGHT (IN LBS.)	
	4-WHEEL ¹	6-WHEEL ²		4-WHEEL ¹	6-WHEEL ²
ALABAMA	20,000	32,000	NEBRASKA	24,000	40,000
ARIZONA	22,000	34,000	NEVADA	25,000	38,000
ARKANSAS	22,200	37,000	NEW HAMPSHIRE	20,000	20,000
CALIFORNIA	22,000	34,000	NEW JERSEY	30,000	30,000
COLORADO	30,000	40,000	NEW MEXICO	27,000	45,000
CONNECTICUT	32,000	40,000	NEW YORK	33,600	44,000
DELAWARE	26,000	38,000	NO. CAROLINA	20,000	20,000
FLORIDA	20,000	20,000	NO. DAKOTA	24,000	48,000
GEORGIA	22,000	39,600	OHIO	24,000	24,000
IDAHO	24,000	40,000	OKLAHOMA	20,000	20,000
ILLINOIS	24,000	40,000	OREGON	25,500	42,500
INDIANA	24,000	40,000	PENNSYLVANIA	26,000	36,000
IOWA	24,000	40,000	RHODE ISLAND	28,000	40,000
KANSAS	24,000	34,000	SO. CAROLINA	20,000	25,000
KENTUCKY	18,000	18,000	SO. DAKOTA	20,000	20,000
LOUISIANA	13,400	N. A.	TENNESSEE	20,000	20,000
MAINE	18,000	27,000	TEXAS	13,500	N. A.
MARYLAND	25,000	40,000	UTAH	26,000	34,000
MASSACHUSETTS	30,000	30,000	VERMONT	20,000	20,000
MICHIGAN	27,000	45,000	VIRGINIA	24,000	35,000
MINNESOTA	27,000	42,000	WASHINGTON	24,000	34,000
MISSISSIPPI	18,000	22,000	WEST VA.	24,000	40,000
MISSOURI	24,000	24,000	WISCONSIN	24,000	36,000
MONTANA	24,000	34,000	WYOMING	27,000	30,000

* RED BOOK [11] FIGURES ARE REPORTED (P.89) AS "BASED ON THE STATE'S INTERPRETATIONS OF THEIR LAWS [1933] AND ON PHYSICAL LIMITATIONS OF VEHICLE DESIGN AND TIRE CAPACITY." PUBLIC ROADS [13] FIGURES ARE REPORTED (P.167) AS "AN ABSTRACT OF STATE LAWS, INCLUDING LEGISLATION PASSED IN 1932."

1. 4-WHEEL: THE SMALLEST OF THE FOLLOWING 3 FIGURES WAS USED:

(A) MAXIMUM GROSS WEIGHT (AS GIVEN IN RED BOOK, P.90-91).

(B) MAXIMUM AXLE WEIGHT (AS GIVEN IN RED BOOK, P.90-91), MULTIPLIED BY 1.5 (SEE RED BOOK, P.89).

(C) MAXIMUM GROSS WEIGHT (AS GIVEN IN RED BOOK, P.93).

EXCEPTIONS: TEXAS AND LOUISIANA—SEE RED BOOK, P.91.

2. 6-WHEEL: MAXIMUM GROSS WEIGHT AS GIVEN IN PUBLIC ROADS, P.167. THESE FIGURES AGREE IN MOST CASES WITH THOSE SHOWN IN RED BOOK, P.93, AND WITH PUBLIC ROADS MAXIMUM AXLE WEIGHTS MULTIPLIED BY 2.5 (SEE RED BOOK, P.93). TEXAS AND LOUISIANA ARE EXCLUDED AS DATA ARE NOT AVAILABLE TO CONVERT FROM PAYLOAD TO GROSS WEIGHT LIMITS.

TABLE 7

INDEPENDENT VARIABLES
(BASIC DATA FOR TABLE 2 - CONT'D)

STATE	TRUCKS ON FARMS PER 1,000 AGRICULTURAL LABOR FORCE	AVERAGE LENGTH OF RAILROAD HAUL OF FREIGHT (MILES)	PERCENT OF STATE HIGHWAYS WITH HIGH-TYPE SURFACE
ALABAMA	26.05	189.4	1.57
ARIZONA	79.74	282.2	2.60
ARKANSAS	28.62	233.1	1.72
CALIFORNIA	123.40	264.6	13.10
COLORADO	159.50	244.7	0.58
CONNECTICUT	173.80	132.6	7.98
DELAWARE	173.20	202.7	21.40
FLORIDA	91.41	184.1	8.22
GEORGIA	32.07	165.7	1.60
IDAHO	95.89	243.6	0.73
ILLINOIS	114.70	207.9	9.85
INDIANA	120.20	202.8	6.90
IOWA	98.73	233.3	3.39
KANSAS	146.70	281.5	0.94
KENTUCKY	20.05	227.5	1.81
LOUISIANA	31.27	201.0	1.94
MAINE	209.30	120.4	1.87
MARYLAND	134.20	184.1	12.90
MASSACHUSETTS	172.20	144.7	17.70
MICHIGAN	148.40	168.0	6.68
MINNESOTA	120.40	225.6	1.44
MISSISSIPPI	29.62	164.9	1.14
MISSOURI	54.28	229.7	2.91
MONTANA	183.80	266.5	0.09
NEBRASKA	132.10	266.9	0.41
NEVADA	139.40	273.2	0.39
NEW HAMPSHIRE	205.40	129.0	3.42
NEW JERSEY	230.20	137.6	23.30
NEW MEXICO	90.46	279.0	0.18
NEW YORK	220.50	163.3	21.50
N.C. CAROLINA	37.12	171.5	8.61
N.D. DAKOTA	126.40	255.1	0.01
OHIO	125.80	194.2	11.20
OKLAHOMA	78.18	223.3	1.42
OREGON	118.90	246.2	3.35
PENNSYLVANIA	187.60	166.5	9.78
RHODE ISLAND	193.30	131.0	20.40
S.C. CAROLINA	20.21	169.8	2.82
S.D. DAKOTA	113.40	216.6	0.04
TENNESSEE	23.98	191.9	3.97
UTAH	101.70	235.7	1.69
VERMONT	132.20	109.7	2.26
VIRGINIA	71.88	229.8	2.86
WASHINGTON	180.90	254.4	4.21
WEST VIRGINIA	62.88	218.7	8.13
WISCONSIN	178.60	195.7	4.57
WYOMING	133.40	286.7	0.08

- (1) AVERAGE LENGTH OF RR HAUL OF (REVENUE) FREIGHT = AVERAGE DISTANCE IN MILES EACH TON IS CARRIED = RATIO OF NUMBER OF TON-MILES TO NUMBER OF TONS CARRIED. FOR EACH STATE, AVERAGE LENGTH OF HAUL WAS OBTAINED BY WEIGHTING AVERAGE LENGTH OF HAUL OF EACH COMPANY BY THE NUMBER OF MILES OF LINE OPERATED BY THAT COMPANY IN THE STATE (ALL FOR CLASS I RR'S).
- (2) PERCENTAGE OF STATE ROADS WITH HIGH-QUALITY SURFACE: WHERE HIGH-QUALITY (HIGH-TYPE) SURFACE CONSISTS OF BITUMINOUS MACADAM, BITUMINOUS CONCRETE, SHEET ASPHALT, PORTLAND CEMENT CONCRETE, AND BLOCK PAVEMENTS. ALL STATE RURAL ROADS, BOTH LOCAL AND STATE HIGHWAYS SYSTEMS, ARE INCLUDED.

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF PUBLIC UTILITIES
COMMISSION DOCKET HP14-001, IN THE MATTER #28333
OF THE PETITION OF TRANSCANADA KEYSTONE
PIPELINE, LP FOR AN ORDER ACCEPTING
CERTIFICATION OF PERMIT ISSUED IN DOCKET HP
09-001 TO CONSTRUCT THE KEYSTONE XL
PIPELINE

Appeal from the Circuit Court, Sixth Judicial Circuit
Hughes County, South Dakota
The Honorable John L. Brown

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TABLE OF CONTENTS

TABLE OF CONTENTS

.....
i

TABLE OF

AUTHORITIESi

i

PRELIMINARY STATEMENT

.....
1

JURISDICTIONAL STATEMENT

.....
2

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

.....
2

STATEMENT OF THE CASE AND FACTS

.....
4

ARGUMENT

.....

5

CONCLUSION2

7

TABLE OF AUTHORITIES

CASES AND REFERENCES

<i>Alvine Family Ltd. Partnership v. Hagemann</i> 2010 SD 28, 780 N.W.2d 507.....	2
6	
<i>Argus Leader v. Hagen</i> 2007 S.D. 96, 739 N.W.2d 475	
9	
<i>Black's Law Dictionary</i> (10th ed. 2014)	
9	
<i>Boever v. Bd. of Accountancy</i> 526 N.W.2d 747 (S.D. 1995)	2
6	
<i>Chittenden & Eastman Co. v. Smith</i> 286 N.W.2d 314 (S.D. 1979)	2
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7	
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22	
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4	
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7	
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6	
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(1999).....	1
1	
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2002 SD 39, 642 N.W.2d	
533.....	2
0	
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1989)	2
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382 N.W. 2d 43 (S.D.	
1986)	2
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<i>Martz v. Hills Materials</i>	
2014 S.D. 83, 857 N.W.2d 413	
.....	
5	
<i>MacKaben v. MacKaben</i>	
2015 S.D. 86, 871 N.W.2d	
617.....	1
6	
<i>Mortweet v. Eliason</i>	
335 N.W.2d 812 (S.D.	
1983)	2
6	
<i>Olson v. City of Deadwood</i>	
480 N.W.2d 770 (S.D.	
1992)	1
2	
<i>Pearson v. Adams</i>	
279 N.W.2d 674 (S.D. 1979)	
.....	2
7	
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411 N.W.2d 113 (S.D. 1987)	
.....	
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487 U.S. 552, 108 S.Ct. 2541, 101 L.Ed.2d 490	
(1988).....	1
2	
<i>Pinkerton v. Jeld-Wen, Inc.</i>	
588 N.W.2d 679 (Iowa 1998)	
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8	
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597 N.W.2d 442 (S.D.	
1999)	2
4	
<i>S.D. Dep't of GF&P v. Troy Twp.</i>	
2017 S.D. 50, 900 N.W.2d	
840.....	passi
m	
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2010 S.D. 24, 780 N.W.2d 472	
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3	
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23 S.W.3d 673 (Mo. Ct. App.	
2000)	2
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2017 S.D.	
61.....	1
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1982)	2
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301 N.W.2d 673 (S.D.	
1981)	2
7	
STATUTES	
SDCL 1-26-	
1(9).....	1
1	
SDCL 1-26-	
26.....	1
9	
SDCL 1-26-36.....	2, 6, 16
SDCL 1-26-37	
.....	
5	
SDCL 2-14-1	
.....	
9	

SDCL 15-6-	
26(b).....	2
1	

SDCL 15-6-	
26(b)(3)	1
9	

SDCL 49-41B-	
22.....	passi
m	

SDCL 49-41B-24	2, 7,
21	

SDCL 49-41B-	
27.....	passi
m	

SDCL 49-41B-	
33(2).....	1
7	

ADMINISTRATIVE RULES

ARSD	
20:10:01	1
6	

PRELIMINARY STATEMENT

The Appellant, Dakota Rural Action, will be referred to as “DRA,” or “Appellant.” Appellee, the South Dakota Public Utilities Commission, will be referred to as the “Commission.” Appellee, TransCanada Keystone Pipeline, LP, will be referred to as “Keystone.” The 39 persons who were granted intervention in the case and did not withdraw as parties will be referred to collectively as “Intervenors.” The Petition for Order Accepting Certification under SDCL § 49-41B-27 filed by Keystone on September 15, 2014, will be referred to as the “Petition.” The Keystone XL Pipeline project will be referred to as the “Project” or “Keystone XL.” The Appendix to this brief will be referred to as “Apx” with reference to the appropriate page number(s). Cites to the chronological Administrative Record will be referred to as “AR” followed by the appropriate page number(s). The transcript of the evidentiary hearing held before the Commission on July 27-31, 2015, and continuing August 1 and 3-4, 2015, will be referred to as “TR” followed by the applicable page number(s). Exhibits offered into evidence at the evidentiary hearing will be referred to as “Ex” followed by the exhibit number and page number(s) where appropriate. The Final Decision and Order; Notice of Entry issued by the Commission in Docket HP14-001 on January 21, 2016, will be referred to as the “Decision.” The Amended Final Decision and Order; Notice of Entry issued by the Commission in Docket HP09-001 on June 29, 2010, will be referred to as the “KXL Decision.” The 50 conditions set forth by the Commission in Exhibit A to the KXL Decision will be referred to as the “KXL Conditions” followed by the Condition number(s) when specific condition(s) are referenced. References to the United States Department of State’s Final Supplemental Environmental Impact Statement will be referred to as “FSEIS” followed by the appropriate Volume and Chapter number or

Appendix letter followed by the section and/or page number where appropriate. The Circuit Court's Order and Memorandum Decision is designated as "Order." The Appendix to this brief includes the following documents: (1) HP09-001 Amended Final Decision and Order; Notice of Entry, Apx A2-A40, (2) HP14-001 Final Decision and Order Finding Certification Valid and Accepting Certification; Notice of Entry, Apx A41-A68, (3) SDCL 1-26-36, SDCL 49-41B-24 and SDCL 49-41B-27.

JURISDICTIONAL STATEMENT

The Commission accepts DRA's jurisdictional statement.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

Issue A. Whether the Commission improperly applied the burden of proof given the statute at issue in this case and whether sufficient evidence was presented to justify the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification?

The Circuit Court affirmed the Commission and found the Commission properly applied the burden of proof given the statute at issue in this case and that sufficient evidence was presented to justify the Commission's Decision.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue B. Whether sufficient evidence was presented to support the findings of fact set forth in the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification?

The Circuit Court affirmed the Commission and found sufficient evidence was presented to support the Commission's Final Decision and Order Finding Certification Valid and Accepting Certification.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue C. Whether the Commission properly determined that communications between Staff and counsel for Keystone were privileged as attorney work product, and whether, if the Commission's determination was incorrect, such ruling resulted in sufficient prejudice to DRA to justify reversal of the Decision?

The Circuit Court affirmed the Commission and found that it properly determined that communications between Staff and counsel for Keystone were privileged as attorney work product.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue D.1. Whether the Commission's rulings on discovery were based on a proper construction of SDCL 49-41B-27 and resulted in a sufficient process of discovery prior to hearing?

The Circuit Court affirmed the Commission and found that its rulings on discovery were based on a proper construction of SDCL 49-41B-27 and resulted in a very thorough process of discovery prior to hearing involving a very significant number of responses to interrogatories and the production of thousands of documents.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue D.2. Whether the Commission's issuance of the Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits) as modified by its Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits was clearly erroneous and whether such orders resulted in substantial prejudice to DRA?

The Circuit Court affirmed the Commission and found that its issuance of the Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits) as modified by its Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits was not erroneous and did not in any case result in substantial prejudice to DRA due to the evidence at hearing regarding the matters to which the excluded exhibits pertained.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

Issue D.3. Whether the proceedings conducted by the Commission were handled fairly and competently and comported with state law and whether the Commission acted with bias in rendering its decision?

The Circuit Court affirmed the Commission and found that the proceedings conducted by the Commission were handled fairly and competently and comported with state law and that the Commission did not act with bias in rendering its decision.

SDCL 49-41B-27

S.D. Dep't of GF&P v. Troy Twp., 2017 S.D. 50, 900 N.W.2d 840

STATEMENT OF THE CASE AND FACTS

This case is an appeal brought by Dakota Rural Action on February 29, 2016, from the Decision of the South Dakota Public Utilities Commission issued on January 21, 2016, in Docket HP14-001 titled “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.” The Commission granted intervention to all forty-two persons and organizations that applied for intervention. The Commission approved withdrawal from Docket HP14-001 to three intervenors who requested to withdraw. The Commission heard and issued decision orders on a very large number of motions filed by the parties. The evidentiary hearing was held by the Commission on July 27-31, 2015, and August 1 and 3-4, 2015. The record in this case on file with the Court contains over 31,000 pages. In its Decision, the Commission determined Keystone’s Certification to be valid and accepted the Certification as meeting the standard set forth in SDCL 49-41B-27. The Findings of Fact, including the Procedural History incorporated by reference therein, provide a detailed statement of the procedural and evidentiary facts in this case, which the Commission will not reiterate here.

ARGUMENT

STANDARD OF REVIEW

“The separation-of-powers doctrine proscribes de novo review of administrative action that is not quasi-judicial.” *S.D. Dep’t of GF&P v. Troy Twp.*, 2017 S.D. 50, ¶ 51, 900 N.W.2d 840, 858. The administrative act of accepting a company’s certification is not quasi-judicial. Therefore, the correctness of the Commission’s decision to accept the certification at issue may not be reviewed; this Court may consider only whether the Commission acted arbitrarily. “The [appellants] have the burden of proof.” *Id.*

If the Court determines that the administrative act of accepting a company’s certification is quasi-judicial, the standard of review in an appeal from the circuit court’s review of a contested case proceeding is governed by SDCL 1-26-37. *Dakota Trailer Manufacturing, Inc. v. United Fire & Casualty Company*, 2015 S.D. 55, ¶ 11, 866 N.W.2d 545, 548. “[I]n reviewing the circuit court’s decision under SDCL 1-26-37, we are actually making the ‘same review of the administrative tribunal’s action as did the circuit court.’” [citations omitted] “The agency’s findings are reviewed for clear error.” *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 14, 857 N.W.2d 413, 417. “A review of an administrative agency’s decision requires this Court to give great weight to the findings made and inferences drawn by an agency on questions of fact. We will reverse an agency’s decision only if it is ‘clearly erroneous in light of the entire evidence in the record.’” *In Re Pooled Advocate Trust*, 2012 S.D. 24, ¶ 49, 813 N.W.2d 130, 146; citing *Snelling v. S.D. Dep’t of Soc. Serv.*, 2010 S.D. 24, ¶ 13, 780 N.W.2d 472, 477. While statutory interpretation and other questions of law within an administrative appeal are reviewed under the de novo standard of review, “[a]n agency is usually given a

reasonable range of informed discretion in the interpretation and application of its own rules when the language subject to construction is technical in nature or ambiguous, or when the agency interpretation is one of long standing.” *Krsnak v. S. Dakota Dep’t of Env’t & Natural Res.*, 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436 (quoting *State v. Guerra*, 2009 S.D. 74, ¶ 32, 772 N.W.2D 907, 916).

“A reviewing court must consider the evidence in its totality and set the [PUC’s] findings aside if the court is definitely and firmly convinced a mistake has been made.” *In re Otter Tail Power Co. ex rel. Big Stone II*, 2008 SD 5, ¶ 26, 744 N.W.2d 594, 602. (citing *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8, ¶ 7, 575 N.W.2d 225, 228-29). Mixed questions of fact and law that require the Court to apply a legal standard are reviewed de novo. *Permann v. Department of Labor*, 411 N.W.2d 113, 119 (S.D. 1987).

A reviewing court may reverse or modify an agency only if substantial rights of the appellants have been prejudiced because the administrative findings, conclusions, or decision is inter alia, affected by error of law, clearly erroneous in light of the entire evidence in the record, or arbitrary or an abuse of discretion. SDCL 1-26-36; *In re PSD Air Quality Permit of Hyperion*, 2013 S.D. 10, ¶16, 826 N.W.2d 649, 654.

ISSUE A.

WHETHER THE COMMISSION IMPROPERLY APPLIED THE BURDEN OF PROOF GIVEN THE STATUTE AT ISSUE IN THIS CASE AND WHETHER SUFFICIENT EVIDENCE WAS PRESENTED TO JUSTIFY THE COMMISSION’S FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION?

A central issue in this proceeding boils down to what is meant by the term “certify” in SDCL 49-41B-27 and what effect does the use of that term have on issues such as the certifying party’s *prima facie* case and burden of proof. In terms of statutory

construction, it seems clear to the Commission that the language of SDCL 49-41B-27 does not say that Keystone has the burden of proof to “establish” that:

- (1) The proposed facility will comply with all applicable laws and rules;
- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

SDCL 49-41B-22. The statute at issue in this proceeding, SDCL 49-41B-27, does not contain the word “establish,” the word “prove,” or the word “demonstrate.” The language of SDCL 49-41B-22 clearly demonstrates that the Legislature knew how to craft language requiring the proposed facility to prove with evidence that it satisfies the four factors set forth in that statute.

With respect to statutory construction of the statute at issue in this proceeding, SDCL 49-41B-27, the Commission’s construction of such statute was in accord with South Dakota statutes and case law precedent. It is crystal clear which statute is the statute with which SDCL 49-41B-27 must be read *in pari materia*. That statute is SDCL 49-41B-24 which states as follows:

Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate. (emphasis supplied)

Three sections later SDCL 49-41B-27 states:

Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however,

that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis supplied)

As the South Dakota Supreme Court has stated: “Statutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object.” *Goetz v. State*, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683. In this case the same “purpose or object” would clearly seem to be “the conditions upon which the permit was issued” as expressly authorized in SDCL 49-41B-24. As previously addressed above, nothing in SDCL 49-41B-27 references a revocation of the permit, indicates that the permit holder must relitigate the original permit proceeding under SDCL 49-41B-22, or apply for a new permit. In this case, the statute at issue, SDCL 49-41B-27, states simply that the permit holder must “certify” that “the facility continues to meet the conditions upon which the permit was issued.”

The Commission’s Amended Final Decision and Order in Docket HP09-001 is a final and binding Commission order which was not appealed. Apx A2-A40.

An unappealed administrative decision becomes final and should be accorded res judicata effect. See *Joelson v. City of Casper, Wyo.*, 676 P.2d 570, 572 (Wy 1984) (if judicial review is granted by statute and no appeal is taken, the decision of an administrative board is final and conclusive); *Pinkerton v. Jeld-Wen, Inc.*, 588 N.W.2d 679, 680 (Iowa 1998) (final adjudicatory decision of administrative agency is regarded as res judicata).

Jundt v. Fuller, 2007 S.D. 52, ¶ 12, 736 N.W.2d 508. The instant proceeding is not, and cannot be, a re-adjudication of the permit issuance proceeding which resulted in the KXL Decision in Docket HP09-001. Apx A2-A39.

Instead, the statute at issue, SDCL 49-41B-27, states simply that the permit holder must “certify” that “the facility continues to meet the conditions upon which the permit

was issued.” The South Dakota Supreme Court has set forth the standard for statutory construction as follows:

The purpose of statutory construction is to discover the true intention of the law, which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect.

City of Rapid City v. Estes, 2011 S.D. 75, ¶ 12, 805 N.W.2d 714, 718 (quoting *State ex rel. Dep’t of Transp. v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162). “Further, the Legislature has commanded that ‘[w]ords used [in the South Dakota Codified Laws] are to be understood in their ordinary sense [.]’” SDCL 2-14-1. *Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621.

The word “certify” is a precise and narrow verb. “Certify” means “to authenticate or verify in writing,” or “to attest as being true or as meeting certain criteria.” Black’s Law Dictionary (10th ed. 2014). To “attest” means “to affirm to be true or genuine; to authenticate by signing as a witness.” *Id.*; *Deadwood Stage Run, LLC v. South Dakota Department of Revenue*, 857 N.W.2d 606 (2014). See also *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 13, 739 N.W.2d 475, 480 (“Words and phrases in a statute must be given their plain meaning and effect.”). Thus, under the plain meaning of the language of the statute, Keystone’s obligation under SDCL 49-41B-27 in this case was to verify in writing or to attest as true that it continues to meet the 50 KXL Conditions to which the facility is subject, which are set forth in Exhibit A to the KXL Decision. Apx A26-A39. Keystone’s obligation to “certify” could certainly be construed to mean that Keystone met its burden under the statute by filing with the Commission a certification signed under oath by Corey Goulet, President, Keystone Projects, the corporate entity in charge of

implementation and development of the Keystone Pipeline system, including the Keystone XL Project. Ex 2001, p. 1, (AR 020502).

Although the Certification standing alone would seem to have met the “must certify” requirement set forth in SDCL 49-41B-27, Keystone also filed in support of the Certification a Petition for Order Accepting Certification under SDCL § 49-41B-27, with a Quarterly Report of the status of Keystone’s activities in complying with the KXL Conditions set forth in the KXL Decision as required by Condition 8 and a tracking table of minor factual changes that had occurred since the Commission’s issuance of the KXL Decision attached as Appendices B and C respectively. Apx 27-28, #8. SDCL 49-41B-27 does not even explicitly require the Commission to open a docket proceeding to consider whether to “accept” the certification as compliant with the statute. Due to Keystone’s simultaneous filing of the Petition for Order Accepting Certification under SDCL §49-41B-27 and the Commission’s prior history of handling the receipt of certifications, however, the Commission opened a docket to consider Keystone’s Petition and Certification, despite the fact that the ministerial, non-quasi-judicial administrative act of accepting a certification pursuant to statute failed to deprive anyone of “life, liberty, or property”. *S.D. Dep’t of GF&P* at ¶21.

Since the statute governing this proceeding, SDCL 49-41B-27, clearly and unequivocally states that the person holding the permit must “certify,” it can certainly be reasonably argued that Keystone met its initial burden of production and proof by submitting its Certification that it continues to meet the conditions set forth in the KXL Decision. Apx A2-A39. As the Federal Communications Commission stated in a certification proceeding before it:

Thus, we find that, in this context, the ordinary meaning of the certification signifies an assertion or representation by the certifying party, not, as Defendants assert, a demonstration of proof of the facts being asserted. . . . The Commission did not institute a separate additional requirement that LECs prove in advance to the Commission, IXC, or any other entity that the prerequisites had been met.

In the Matter of Bell Atlantic-Delaware, et al v. Frontier Communications Services, Inc., et al and Bell Atlantic-Delaware, et al., v. MCI Telecommunications Corporation, 17 Communications Reg. (P&F) 955, ¶ 17, 1999 WL 754402 (1999). The language of SDCL 49-41B-27 would certainly seem to imply that, if the Commission or a third party wishes to challenge the authenticity or accuracy of the certification, the burden of proof and persuasion in a case involving the validity or accuracy of the certification lies with the parties challenging the certification.

Even if the Court determines that the Certification standing on its own is insufficient to shift the burden of production to Intervenors, however, the Commission believes that sufficient evidence was produced at the hearing to support upholding Keystone's Certification and the Commission's Decision. Keystone did not rest on its Certification standing alone. Along with its Certification, Keystone submitted the Petition and the accompanying three informational appendices at the time of initial filing, fourteen sets of pre-filed direct, rebuttal, and surrebuttal testimony for eight witnesses, nine of which were admitted in evidence as exhibits, and the evidentiary hearing testimony of seven witnesses lasting nearly six days.

As the references to the hearing transcript and exhibits and the Certification in the Decision demonstrate, substantial evidence exists in the record to support the Findings of Fact set forth in the Decision entered by the Commission. As set forth in SDCL 1-26-1(9), substantial evidence is "such relevant and competent evidence as a reasonable mind

might accept as being sufficiently adequate to support a conclusion.” Substantial evidence “‘does not mean a large or considerable amount of evidence ...,’ *Pierce v. Underwood*, 487 U.S., 564-65, 108 S.Ct., 2549, 101 L.Ed.2d, 504, but means ‘more than a mere scintilla’ of evidence, *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126, 140 (1938).” *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-65, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490, 504 (1988)).

Corey Goulet, the certifying officer for Keystone, spent approximately eight hours on the witness stand and testified that Keystone continues to meet, or with respect to prospective conditions will be able to meet, and has made a commitment to meet, the 50 KXL Conditions. Since the vast majority of the KXL Conditions are prospective and cannot be performed until the construction and operational phases of the Project, Mr. Goulet testified that Keystone intended to fully comply and “meet” such prospective conditions at the appropriate time. TR 151 (AR 024109); TR 512-514 (AR 024643 – 024645); Ex 2001, ¶ 15 (AR 020505). With respect to conditions that don’t come into action until the future, there is really no more that the permit holder can produce to demonstrate that its intention is to fully comply with all such permit conditions at the time they come into being as active conditions. As to Intervenor’s argument that the Decision should be overturned because Keystone did not produce substantial evidence specific to each prospective condition that it will be able to meet such prospective conditions in the future at the appropriate time for each such condition, such an argument is tantamount to an interpretation that a “certification” essentially goes even beyond a retrial of the original permit proceeding. If the Legislature had intended such a

construction, it would not have employed in SDCL 49-41B-27 the phrase “certify that it continues to meet the conditions upon which the permit was issued,” but would rather have stated that Keystone must reapply for a permit under SDCL 49-41B-22.

With respect to the KXL Conditions that are not fully prospective, Keystone presented evidence concerning the status of compliance with such conditions. Condition 4, Apx A26, #4, is not at issue because there is no evidence in the record, or knowledge of the Commission, of a proposed transfer of the permit. Conditions 7 through 9, Apx 27-28, #7, 8, and 9, require the appointment of a public liaison officer who must submit quarterly and annual reports to the Commission. Keystone appointed Sarah Metcalf who served as public liaison officer on the Keystone Pipeline project. TR 171 (AR 024129). On June 2, 2010, the Commission issued an Order Approving Public Liaison Officer approving Keystone’s appointment of Sarah J. Metcalf as the Keystone XL Public Liaison Officer. Since her appointment, Ms. Metcalf has filed six annual reports and twenty-nine quarterly reports with the Commission, one of which was attached to the Certification as Appendix B.

With respect to the remaining conditions that are not prospective, or at least not fully prospective, the record demonstrates that Keystone has taken steps to comply with such conditions to the extent feasible at this stage of the process. Condition 10, Apx A28, #10, requires that not later than six months before construction, Keystone must commence a program of contacts with local emergency responders. Keystone presented evidence that, despite the fact that it is likely significantly more than six months before construction will commence, it has already started making some of those contacts and will continue. TR 662 (AR 024793), 827 (AR 025248), 1292 (AR 025771), 2395 (AR

027282), 2405 (AR 027292), 2409 (AR 027296), 2447 (AR 027334), Petition, Appendix B, Condition 10. Apx A28, #10. Intervenors presented no evidence indicating this wasn't the case.

Condition 15 requires consultation with the Natural Resources Conservation Service to develop specific construction/reclamation units (con/rec units) that are applicable to particular soil and subsoil classifications, land uses, and environmental settings, which Keystone established has been done. TR 617 (AR 024748); FSEIS Appendix R. In its Order Granting Motion for Judicial Notice, the Commission took judicial notice of the Department of State's Final Supplemental Environmental Impact Statement (FSEIS). Intervenors produced no evidence that Keystone has not complied with Condition 15 as of this time or will not continue to comply with Condition 15 leading up to and during construction. Apx A28-29, # 15.

Condition 19 requires that landowners be compensated for tree removal. Keystone indicated compensation for trees will be done as part of the process of acquiring easements. TR 151 (AR 024109); Petition, Appendix B, Condition 19. Apx A31, #19. There is no evidence that Keystone has failed to comply with this condition or is unable or unwilling to comply with this condition.

Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding high consequence areas. Keystone presented evidence that this process is ongoing. TR 662 (AR 024793), 670 (AR 024801), 699 (AR 024830), 718 (AR 024849); Apx A35, #34. Intervenors produced no evidence that this process is not ongoing or will not continue to be so, but rather focused on whether Keystone had sought out local knowledge from tribes, particularly the Cheyenne River Sioux Tribe.

Condition 41 requires that Keystone follow all protection and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks (SDGFP). Keystone presented evidence that this process is ongoing. TR 630 (AR 024761), 637 (AR 024768); Petition, Appendix B, Condition 41. Apx A36-37, #41. There was no evidence to the contrary.

Condition 41 also requires that Keystone consult with SDGFP to identify the presence of greater prairie chicken and greater sage and sharp-tailed grouse leks. The record contains evidence that this process is ongoing. FSEIS, Vol.3, Ch. 4, Subchapter 4.6; Petition, Appendix B, Condition 41; Apx A36-37, #41. No evidence was presented to the contrary.

Condition 49 requires Keystone to pay commercially reasonable costs and indemnify and hold landowners harmless for any loss or damage resulting from Keystone's use of the easement. The evidence related to this condition was primarily the testimony of Susan Sibson and Corey Goulet. Ms. Sibson testified that reclamation on her property after construction of the Keystone Pipeline has not been satisfactory. TR 1965 (AR 026769); Ex 1003 (AR 002918-002920). Ms. Sibson also testified, however, that it takes "quite a while" for native grasses to re-establish, and that her property has been reseeded at her request five times since 2009. TR 1977-1978 (AR 026781-026782). She also testified that she has been paid compensation for loss of use of the easement area, and she did not state that Keystone has failed to pay reasonable compensation. The process of reclaiming her property is ongoing, and it is undisputed that Keystone has continued to work with Sibson. TR 1975, 1978, 306-307 (AR 026779, 026782, 024304-024305). Corey Goulet testified that Keystone was committed to continue reclamation

efforts on the Sibson property until the Sibsons are satisfied. He also testified that out of 535 tracts on the Keystone Pipeline in South Dakota, all but nine had been reclaimed to the satisfaction of the landowner. TR 306. There was no evidence that Keystone has not complied or cannot comply with Condition 49. Apx A39, #49.

Condition 50 requires that the Commission's complaint process be available to landowners threatened or affected by the consequences of Keystone's failure to comply with any of the Conditions. The Commission's complaint process is under the jurisdiction and responsibility of the Commission, not Keystone. ARSD 20:10:01. Obviously, no evidence was introduced that Keystone has not complied, or cannot comply, with this condition because the complaints would be filed by landowners. Although not specifically addressed in Condition 50, a complaint or petition could also be filed by Staff or a docket opened by the Commission itself, if either of them had knowledge of facts which indicate to them that Keystone has violated or is violating a permit condition. Apx A39, #50.

Sufficient evidence was presented in the very lengthy hearing conducted in this case to support the Decision and the Commission's Findings of Fact. Under these circumstances, the Commission's decision to accept the certification as valid and accurate was not "a choice outside the range of permissible choices." *State v. Stenstrom*, 2017 S.D. 61, ¶17 (quoting *MacKaben v. MacKaben*, 2015 S.D. 86, ¶ 9, 871 N.W.2d 617, 622).

Despite DRA's arguments, throughout its Statement of the Case and Facts, that the Commission and the Circuit Court "chose to ignore" certain testimony and evidence, it is the Commission, as the adjudicatory fact finder under SDCL 1-26-36 who is to

determine what credibility and weight to give the evidence in this case. (DRA Brief at 12). It is obvious from the voluminous record in this case, and particularly from the Commissioners' statements at the January 5, 2016, Commission meeting at which the Commission voted on its decision, that the Commission took this matter seriously. The Commission should not be faulted for deciding to handle this non-quasi-judicial administrative act in a quasi-judicial fashion. This case is not a retrial of the original permitting proceeding in Docket HP09-001. Intervenors simply did not provide any significant evidence indicating that Keystone does not currently comply with KXL Decision Conditions in process at this time or will be unable to comply with Conditions that must be complied with before the Project can be undertaken under the permit or do not come into effect until the immediate pre-construction and construction processes commence.

ISSUE B.

SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT THE FINDINGS OF FACT SET FORTH IN THE COMMISSION'S FINAL DECISION AND ORDER FINDING CERTIFICATION VALID AND ACCEPTING CERTIFICATION

Sufficient evidence was produced at the hearing to support upholding Keystone's Certification and the Commission's Decision. As the references to the hearing transcript and exhibits and the Certification in the Decision demonstrate, substantial evidence exists in the record to support the Findings of Fact set forth in the Decision and Order entered by the Commission. The Commission has set forth above in response to DRA's issue A. a detailed recitation of the evidence supporting the Decision and basis for the Commission's Decision.

Importantly, this administrative certification proceeding was not a revocation proceeding under SDCL 49-41B-33(2), but rather a certification proceeding under SDCL

49-41B-27. The issue of revocation was not raised during the proceedings. Does this mean that the Commission will never take action to revoke the Keystone XL permit, and the permit will remain in effect in perpetuity? It does not. At a point where Staff or the Commission determines that KXL Conditions cannot be complied with by Keystone, Staff or the Commission can commence an action to revoke the permit. At this point, the Commission has not determined that such time has yet arrived and that this proceeding was not the appropriate proceeding in which to take such action.

ISSUE C.

WHETHER THE COMMISSION PROPERLY DETERMINED THAT COMMUNICATIONS BETWEEN STAFF AND COUNSEL FOR KEYSTONE WERE PRIVILEGED AS ATTORNEY WORK PRODUCT, AND WHETHER, IF THE COMMISSION'S DETERMINATION WAS INCORRECT, SUCH RULING RESULTED IN SUFFICIENT PREJUDICE TO DRA TO JUSTIFY REVERSAL OF THE DECISION?

The only communications between the Commissioners, its advisor, or Commission Counsel and Keystone involving the Keystone XL Project since the hearing concluded in 2010 were the quarterly and annual reports that are publicly available on the website for Docket HP09-001 and the scheduling email exchange between Keystone's attorney Willian Taylor and Commission Counsel John Smith early in the process in November 2014, that is also on file in the record and publicly available on the web page for Docket HP14-001. Obviously, Staff, and in certain instances Commissioners and Commission advisors, had significant post-decision follow-up contact with Keystone regarding Keystone I construction issues, particularly reclamation issues, the most notable of which was on the Sibson's property, which was addressed at hearing and elsewhere in the record.

With respect to Staff communications and the “regulatory capture” theory, first of all it is important to note that the Staff does not advise the Commissioners in a contested case. In order to avoid violating the ex parte communications prohibition of SDCL 1-26-26, the Commission maintains a fairly rigorous separation between the Commission, consisting of Commissioners and the Commission advisors, and Staff. The Commission accordingly does not direct Staff as to what positions Staff should take regarding the issues presented in a case. The Commission’s decisions sometimes are in accord with Staff’s positions in a case and sometimes they are not. As far as DRA’s assertion that Staff counsel met with Keystone’s counsel “behind closed doors” during the short break during the December 9, 2014, Commission meeting, there is nothing in the transcript from the proceedings occurring after the break indicating that an impermissible meeting between Staff and counsel for Keystone occurred during the brief recess. (AR 001432-001527). The Commission also simply sees no basis in the record for DRA’s statement that Staff and Keystone are aligned in an almost *de facto* attorney/client relationship.

SDCL 15-6-26(b)(3) states the following with respect to attorney work product:

a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including such other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The Commission determined that what DRA was seeking in the interrogatory objected to by Staff were documents and tangible things prepared in anticipation of litigation or for

trial by or for another party's representative (including such other party's attorney). The Commission determined that Staff was a party to this docket, and the materials sought by DRA from Staff were documents prepared by Staff counsel in anticipation of the evidentiary hearing in this matter and documents obtained by Staff for hearing preparation. As stated in *Kaarup v. St. Paul Fire and Marine Insurance Company*, 436 N.W.2d 17 (S.D. 1989):

“The test we apply for determining whether a document or tangible thing is attorney work product is whether ‘in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.’ 8 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2024 (1970) at 198.

Furthermore, DRA made no showing that they had a substantial need, or any need at all, for the requested correspondence. See, April 14, 2015, motion hearing transcript 344-351 (AR 004526-004532); Dakota Rural Action's Motion and Supporting Memorandum to Compel Discovery. AR 003627-003635. The proponent of excluded evidence must also attempt to offer the excluded evidence at trial and make an offer of proof. *Joseph v. Kerkvliet*, 2002 SD 39, ¶ 7, 642 N.W.2d 533, 535 (quoting *State v. Norville*, 23 S.W.3d 673, 685 (Mo. Ct. App. 2000)). DRA did not.

Lastly, DRA has provided no evidence concerning prejudicial injury resulting from the Commission's denial of the Motion to Compel. Given the enormous amount of material produced through discovery in this proceeding, the lengthy hearing, and the fairly limited participation by Staff, it is difficult for the Commission to believe that any information produced under Dakota Rural Action's Motion and Supporting Memorandum to Compel Discovery would have had any significant influence on the outcome of this case.

ISSUE D.1.

WHETHER THE COMMISSION'S RULINGS ON DISCOVERY WERE BASED ON A PROPER CONSTRUCTION OF SDCL 49-41B-27 AND RESULTED IN A SUFFICIENT PROCESS OF DISCOVERY PRIOR TO HEARING?

The scope of discovery is set forth in SDCL 15-6-26(b):

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

- (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . (emphasis supplied)

In its Order Granting Motion to Define Issues and Setting Procedural Schedule issued on December 17, 2014, the Commission determined that the subject matter issue to which discovery requests must be relevant is whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions set forth in Exhibit A to the KXL Decision. This ruling was based on the Commission reading of the statute at issue in this docket, SDCL 49-41B-27.

With respect to statutory construction of the statute at issue in this proceeding, SDCL 49-41B-27, the Commission's construction of such statute was in accord with South Dakota statutes and case law precedent. It is crystal clear which statute is the statute with which SDCL 49-41B-27 must be read *in pari materia*. That statute is SDCL 49-41B-24 which states as follows:

Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate. (emphasis supplied)

Three sections later SDCL 49-41B-27 states:

Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued. (emphasis supplied)

As the South Dakota Supreme Court has stated: “Statutes are construed to be *in pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object.” *Goetz v. State*, 2001 S.D. 138, ¶ 26, 636 N.W.2d 675, 683. In this case the same “purpose or object” would clearly seem to be “the conditions upon which the permit was issued” as expressly authorized in SDCL 49-41B-24. As previously addressed above, nothing in SDCL 49-41B-27 references a revocation of the permit or indicates that the permit holder must relitigate the original permit proceeding under SDCL 49-41B-22. In this case, the statute at issue, SDCL 49-41B-27, states simply that the permit holder must “certify” that “the facility continues to meet the conditions upon which the permit was issued.”

Furthermore, the proceedings in this case following the Commission’s issuance on December 17, 2014, of its Order Granting Motion to Define Issues and Setting Procedural Schedule involved a very large number of motions filed by numerous parties, including motions to compel discovery filed by DRA and other Intervenors, several of which were granted, at least in part, by the Commission. In response to such motions to compel, Keystone produced 42.54 GB of electronic data, consisting of 6,214 total files, plus numerous additional documents that it had already produced. AR 002475, 005072, 005240, 005247-005250, 005256-006303, 021109.

Again, as stated previously, the issue in this case is a narrow one, i.e., whether Keystone's certification that it continues to meet the conditions upon which the permit was granted is valid. The massive amount of documents and discovery responses produced by Keystone went far beyond what should have been required for making such a determination. The Commission's proceedings in this docket resulted in a record consisting of over 31,000 pages, including a hearing lasting nine days. DRA's argument that the Commission committed prejudicial error in that portion of its December 17, 2014, Order Granting Motion to Define Issues and Setting Procedural Schedule concerning discovery limitations has no merit. "[T]he extent of discovery permitted by either side rests in the discretion of the court" *State v. Erickson*, 525 N.W.2d 703, 711 (S.D. 1994). The Commission did not abuse its discretion in its oversight of discovery conducted by the parties over a period of many months.

ISSUE D.2.

WHETHER THE COMMISSION'S ISSUANCE OF THE ORDER GRANTING IN PART AND DENYING IN PART MOTION *IN LIMINE* (DRA EXHIBITS) AS MODIFIED BY ITS ORDER GRANTING IN PART MOTION FOR RECONSIDERATION OF PARTIAL GRANTING OF MOTION *IN LIMINE* TO EXCLUDE EXHIBITS WAS CLEARLY ERRONEOUS AND WHETHER SUCH ORDERS RESULTED IN SUBSTANTIAL PREJUDICE TO DRA?

On July 7, 2015, DRA submitted its exhibit list identifying 1,073 exhibits that DRA stated it may introduce at hearing. On July 10, 2015, Keystone submitted Keystone's Protective Motion *in Limine* Regarding Dakota Rural Actions Exhibit List Dated July 7, 2015. Keystone's motion requested that any of the documents set forth on DRA's exhibit list that were not identified in DRA's responses to Keystone's discovery requests be precluded from admission in evidence at hearing. On July 17, 2015, the Commission issued an Order Granting in Part and Denying in Part Motion *in Limine*

(DRA Exhibits). On July 23, 2015, the Commission issued an Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine*. As a result of the two orders, 86 of the 1,073 exhibits on DRA's exhibit list were precluded from admission at hearing.

The Commission has broad discretion in imposing sanctions for failure to comply with discovery orders. SDCL 15-6-37(c). *Schwartz v. Palachuk*, 597 N.W.2d 442, 447 (S.D. 1999) (citing *Chittenden & Eastman Co. v. Smith*, 286 N.W.2d 314, 316 (S.D. 1979)). The South Dakota Supreme Court has held:

The severity of the sanction must be tempered with consideration of the equities. Less drastic alternatives should be employed before sanctions are imposed which hinder a party's day in court and thus defeat the very objective of the litigation, namely to seek the truth from those who have knowledge of the facts.

Haberer v. Radio Shack, a Div. of Tandy Corp., 555 N.W.2d 606, 611 (S.D. 1996)

(citing, *Magbahat v. Kovarik*, 382 N.W. 2d 43 (S.D. 1986)). The Court further stated:

Prohibition of evidence offered by a party who has not complied with the discovery rules “‘is designed to compel production of evidence and to promote, rather than stifle, the truth finding process.’” *Schrader*, 522 N.W.2d at 210 (quoting *Magbahat v. Kovarik*, 382 N.W.2d 43, 45 (S.D.1986)). Imposing a sanction such as the exclusion of the testimony should result when failure to comply has been due to willfulness, bad faith, or fault. Drastic sanctions under Rule 37 are not authorized when the failure to comply is the result of inability rather than willfulness or bad faith.

Id. at 610. The Court also has made it clear that it takes seriously deadlines for discovery and compliance with the discovery process. The Court has stated that “. . . order[s] are not invitations, requests or even demands; they are mandatory. Those who totally ignore them in this manner should not be heard to complain that a sanction was too severe.”

Schwartz v. Palachuk, *supra*.

The Commission does not believe that its issuance of the order on reconsideration violated the above principals of discovery sanctions. Out of the 1,073 documents listed on DRA's exhibit list, the Commission's order resulted in the preclusion of the admission of only 86 documents. The Commission doesn't believe this action was overly severe under the standards set forth above.

Furthermore, the Commission asserts that such preclusion of those 86 documents resulted in little if any prejudice to DRA. The Sibson photos, etc. were introduced by other Intervenors and admitted in evidence. Judicial notice was taken by the Commission of the entirety of the FSEIS record. With respect to the Evan Volkes' emails and communications concerning the Houston Lateral events, the PHMSA notices and other documents, and the pipe and inspection issues, Mr. Volkes testified concerning those matters at some length during the hearing. It is highly unlikely that any of the documents that were precluded would have materially influenced the outcome of the hearing and the Commission's Decision.

ISSUE D.3.

WHETHER THE PROCEEDINGS CONDUCTED BY THE COMMISSION WERE HANDLED FAIRLY AND COMPETENTLY AND COMPORTED WITH STATE LAW AND WHETHER THE COMMISSION ACTED WITH BIAS IN RENDERING ITS DECISION?

The record in this case does not support DRA's contention that the Commission's Decision in this case was arbitrary and capricious. The South Dakota Supreme Court has set forth the standard for concluding that an agency's action was arbitrary and capricious as follows:

““An arbitrary or capricious decision is one that is: based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken.”” *Huth v. Beresford*

Sch. Dist. # 61–2, 2013 S.D. 39, ¶ 14, 832 N.W.2d 62, 65 (quoting *Hicks v. Gayville–Volin Sch. Dist.*, 2003 S.D. 92, ¶ 11, 668 N.W.2d 69, 73).

In re Jarman, 2015 S.D. 8, 860 N.W. 2d 1. In its brief, DRA does not point to any record evidence of “personal, selfish, or fraudulent motives,” or “false information” on which to base its claim of arbitrary and capricious decision-making. The reason is simple. It doesn’t exist.

The record in this case clearly demonstrates the opposite, i.e., that the Commission entertained a very large number of Intervenor procedural and discovery motions over a many month period, which required the Commission to hold a very large number of motion hearings and required Keystone to produce an enormous quantity of documents. The Commission presided over an evidentiary hearing lasting nine days resulting in an evidentiary transcript of 2,507 pages. The parties to this case were certainly afforded procedural due process. The Commission’s Decision contains specific cites to the transcript and the administrative record for its Findings of Fact. With respect to evidence which was conflicting at hearing, of which there was virtually none, it is the Commission’s responsibility, as the trier of fact, to analyze such evidence and give it the credibility and weight it deserves. The fact that a party disagrees with an administrative decision does not render the decision arbitrary and capricious.

Furthermore, the South Dakota Supreme Court has consistently held that new theories may not be argued or reviewed for the first time on appeal. *Alvine Family Ltd. Partnership v. Hagemann*, 2010 SD 28, ¶ 21, 780 N.W.2d 507, 514, (citing *Boever v. Bd. of Accountancy*, 526 N.W.2d 747, 750 (S.D. 1995)). See also *Mortweet v. Eliason*, 335 N.W.2d 812 (S.D. 1983); *Ward v. Viborg School Dist. No. 60-5*, 319 N.W.2d 502 (S.D.

1982); *Weaver v. Boortz*, 301 N.W.2d 673 (S.D. 1981); *Estate of Assmus*, 254 N.W.2d 159 (S.D. 1977); *In re Estate of Grimes*, 87 S.D. 187, 204 N.W.2d 812 (1973).

In *Pearson v. Adams*, 279 N.W.2d 674, 676 (S.D. 1979) (citations omitted) the Court stated:

On appeal, the record and the transcript, if included in the record, imparts an absolute verity and is the sole evidence of the trial court's proceedings. While all parties are expected to protect themselves on the record, and all parties are obligated to see that the settled record contains all matters necessary for the disposition of the issues raised on appeal, the ultimate responsibility for presenting an adequate record on appeal falls upon the appellant.

If the record is incomplete or incorrect, the remedy is by appropriate action or proceedings in the trial court to secure a correction thereof.

The settled record, the exhibits contained therein, and the hearing transcripts do not contain any allegation by DRA that the Commission was acting subject to “regulatory capture.” Appellant did not raise the issue of “regulatory capture” in any of the documents and pleadings in the settled record, nor at the evidentiary and motion hearings held before the Commission. The Commission asserts that DRA failed to preserve its “regulatory capture” as an appealable issue for review.

VI. CONCLUSION

Based on the foregoing, the Commission respectfully requests that the Court affirm the Decision.

Dated this 4th day of December, 2017

SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION

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APPENDIX

To the Appellee's Reply Brief

In Response to Brief of Appellant Dakota Rural Action

Tribe Supreme Court #28333

Table of Contents.....	A1
HP09-001 Amended Final Decision and Order; Notice of Entry with Exhibit A and B..	A2
HP-14-001 Final Decision and Order Finding Certification Valid and Accepting Certification; Notice of Entry	A41
SDCL 1-26-36.....	A69
SDCL 49-41B-24	A70
SDCL49-41B-27	A71

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION BY)	
TRANSCANADA KEYSTONE PIPELINE, LP)	AMENDED FINAL DECISION
FOR A PERMIT UNDER THE SOUTH DAKOTA)	AND ORDER; NOTICE OF
ENERGY CONVERSION AND TRANSMISSION)	ENTRY
FACILITIES ACT TO CONSTRUCT THE)	
KEYSTONE XL PROJECT)	HP09-001

PROCEDURAL HISTORY

On March 12, 2009, TransCanada Keystone Pipeline, LP ("Applicant" or "Keystone") filed an application with the South Dakota Public Utilities Commission ("Commission") for a permit as required by SDCL Chapter 49-41B to construct the South Dakota portion of the Keystone XL Pipeline ("Project").¹ The originally filed application described the Project as proposed to be an approximately 1,702 mile pipeline for transporting crude oil from Alberta, Canada, to the greater Houston area in Texas, with approximately 1,375 miles to be located in the United States and 313 miles located in South Dakota.

On April 6, 2009, the Commission issued its Notice of Application; Order for and Notice of Public Input Hearings; and Notice of Opportunity to Apply for Party Status. The notice provided that pursuant to SDCL 49-41 B-17 and ARSD 20:10:22:40, each municipality, county, and governmental agency in the area where the facility is proposed to be sited; any nonprofit organization, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups, or to promote the orderly development of the area in which the facility is to be sited; or any interested person, may be granted party status in this proceeding by making written application to the Commission on or before May 11, 2009.

Pursuant to SDCL 49-41B-15 and 49-41B-16, and its Notice of Application; Order for and Notice of Public Hearings and Notice of Opportunity to Apply for Party Status, the Commission held public hearings on Keystone's application as follows: Monday, April 27, 2009, 12:00 noon CDT at Winner Community Playhouse, 7th and Leahy Boulevard, Winner, SD, at which 26 persons presented comments or questions; Monday, April 27, 2009, 7:00 p.m. MDT at Fine Arts School, 330 Scottie Avenue, Philip, SD, at which 17 persons presented comments or questions; and Tuesday, April 28, 2009, 6:00 p.m. MDT at Harding County Recreation Center, 204 Hodge Street, Buffalo, SD, at which 16 persons presented comments or questions. The purpose of the public input hearings was to hear public comment regarding Keystone's application. At the public input hearings, Keystone presented a brief description of the project, following which interested persons appeared and presented their views, comments and questions regarding the application.

On April 29, 2009, Mary Jasper (Jasper) filed an Application for Party Status. On May 4, 2009, Paul F. Seamans (Seamans) filed an Application for Party Status. On May 5, 2009, Darrell Iversen (D. Iversen) filed an Application for Party Status. On May 8, 2009, the City of Colome (Colome) and Glen Iversen (G. Iversen) filed Applications for Party Status. On May 11, 2009, Jacqueline Limpert (Limpert), John H. Harter (Harter), Zona Vig (Vig), Tripp County Water User District (TCWUD), Dakota Rural Action (DRA) and David Niemi (David Niemi) filed Applications for

¹The Commission's Orders in the case and all other filings and documents in the record are available on the Commission's web page for Docket HP09-001 at:
<http://puc.sd.gov/dockets/hydrocarbonpipeline/2009/hp09-001.aspx>

Party Status. On May 11, 2009, the Commission received a Motion for Extension of Time to File Application for Party Status from DRA requesting that the intervention deadline be extended to June 10, 2009. On May 12, 2009, Debra Niemi (Debra Niemi) and Lon Lyman (Lyman) filed Applications for Party Status. On May 15, 2009, the Commission received a Response to Motion to Extend Time from DRA and a Motion to Establish a Procedural Schedule from the Commission's Staff ("Staff").

At its regularly scheduled meeting of May 19, 2009, the Commission voted unanimously to grant party status to Jasper, Seamans, D. Iversen, Colome, G. Iversen, Limpert, Harter, Vig, TCWUD, DRA, David Niemi, Debra Niemi and Lyman. The Commission also voted to deny the Motion for Extension of Time to File Application for Party Status, and in the alternative, the Commission extended the intervention deadline to May 31, 2009. On May 29, 2009, Ruth M. Iversen (R. Iversen) and Martin R. Lueck (Lueck) filed Applications for Party Status. At its regularly scheduled meeting of June 9, 2009, the Commission voted unanimously to grant the Motion to Establish a Procedural Schedule and granted intervention to R. Iversen and Lueck.

On August 26, 2009, the Commission received a revised application from Keystone. On September 3, 2009, the Commission received a Motion for Extension of Time to Submit Testimony from DRA. At its regularly scheduled meeting of September 8, 2009, the Commission voted unanimously to grant the Motion for Extension of Time to Submit Testimony to extend DRA's time for filing and serving testimony until September 22, 2009.

On September 18, 2009, Keystone filed Applicant's Response to Dakota Rural Action's Request for Further Discovery. On September 21, 2009, DRA filed a Motion to Compel Responses and Production of Documents Addressed to TransCanada Keystone Pipeline, LP Propounded by Dakota Rural Action. At an ad hoc meeting on September 23, 2009, the Commission considered DRA's Motion to Compel and on October 2, 2009, issued its Order Granting in Part and Denying in Part Motion to Compel Discovery. By letter filed on September 29, 2009, Chairman Johnson requested reconsideration of the Commission's action with respect to DRA's Request 6 regarding Keystone documents pertaining to development of its Emergency Response Plan for the Project. At its regularly scheduled meeting on October 6, 2009, the Commission voted two to one, with Commissioner Hanson dissenting, to require Keystone to produce to DRA via email the References for the Preparation of Emergency Response Manuals before the close of business on October 6, 2009, that DRA communicate which documents on the list it wished Keystone to produce on or before the close of business on October 8, 2009, and that Keystone produce such documents to DRA on or before October 15, 2009.

On October 2, 2009, Staff filed a letter requesting the Commission to render a decision as to whether the hearing would proceed as scheduled commencing on November 2, 2009. Staff's letter stated that rescheduling the hearing would result in significant scheduling complications for Staff's expert witnesses whose scheduling and travel arrangements had been made months earlier based on the Commission's Order Setting Procedural Schedule issued on June 30, 2009. At its regular meeting on October 6, 2009, the Commission considered Staff's request. At the meeting, all parties agreed that the hearing could proceed on the scheduled dates. DRA requested that its date for submission of pre-filed testimony be extended from October 14, 2009, until October 22, if possible, or at least until October 20, 2009. After discussion, the parties agreed on an extension for DRA's pre-filed testimony until October 20, 2009, with Applicant's rebuttal to be filed by October 27, 2009. The Commission voted unanimously to approve such dates and issued its Order Setting Amended Procedural Schedule on October 8, 2009.

On October 15, 2009, the Commission issued its Order for and Notice of Hearing setting the matter for hearing on November 2-6, 2009, and its Order for and Notice of Public Hearing for an

additional informal public input hearing to be held in Pierre on November 3, 2009, commencing at 7:00 p.m. CST. On October 19, 2009, DRA requested that the time for commencement of the public hearing be changed from 7:00 p.m. CST to 6:00 p.m. CST to better accommodate the schedules of interested persons. On October 21, 2009, the Commission issued an Amended Order for and Notice of Public Hearing amending the start time for the public hearing to 6:00 p.m. CST.

On October 19, 2009, Keystone filed a second revised application ("Application") containing minor additions and amendments reflecting refinements to the route and facility locations and the most recent environmental and other planning evaluations.

In accordance with the scheduling and procedural orders in this case, Applicant, Staff and Intervenor David and Debra Niemi filed pre-filed testimony. The hearing was held as scheduled on November 2-4, 2009, at which Applicant, DRA and Staff appeared and participated. The informal hearing was held as scheduled on the evening of November 3, 2009, at which 23 persons presented comments and/or questions. A combined total of 326 persons attended the public input hearings in Winner, Phillip, Buffalo and Pierre. As of February 26, 2009, the Commission had received 252 written comments regarding this matter from the public.

On December 31, 2009, the Commission issued its Amended Order Establishing Briefing Schedule setting the following briefing schedule: (i) initial briefs and proposed findings of fact and conclusions of law from all parties wishing to submit them due by January 20, 2010; and (ii) reply briefs and objections and revisions to proposed findings of fact and conclusions of law due from all parties wishing to submit them on or before February 2, 2010.

On January 13, 2009, Intervenor David Niemi filed a letter with the Commission requesting and recommending a series of conditions to be included in the order approving the permit, if granted. On January 20, 2010, initial briefs were filed by the Applicant and Staff. On January 20, 2010, Applicant also filed and served proposed findings of fact and conclusions of law. On January 21, 2010, DRA filed an initial brief and Motion to Accept Late-Filed Brief. On January 21 and 26, 2010, respectively, Keystone and Staff filed letters of no objection to acceptance of DRA's late-filed initial brief. On February 2, 2010, reply briefs were filed and served by Applicant, DRA and Staff, and Keystone filed Applicant's Response to David Niemi's Letter filed on January 13, 2010.

At an ad hoc meeting on February, 18, 2010, after separately considering each of a set of draft conditions prepared by Commission Counsel from inputs from the individual Commissioners and a number of Commissioner motions to amend the draft conditions, the Commission voted unanimously to approve conditions to which a permit to construct the Project would be subject, if granted, and to grant a permit to Keystone to construct the Project, subject to the approved conditions.

On April 14, 2010, Keystone filed Applicant's Motion for Limited Reconsideration of Certain Permit Conditions ("Motion"). On April 19, 2010, intervenors David Niemi and Seamans filed responses to the Motion. On April 19, 2010, Peter Larson ("Larson") filed two comments responsive to the Motion. On April 27, 2010, Keystone filed Applicant's Reply Brief In Support of Motion for Limited Reconsideration responding to the responses and comments filed by Niemi, Seamans and Larson. On April 28, 2010, Staff filed a response to the Motion. On April 29, 2010, DRA filed the Answer of Dakota Rural Action in Opposition to Applicant's Motion for Limited Reconsideration of Certain Permit Conditions.

At its regularly scheduled meeting on May 4, 2010, the Commission considered the Motion and the responses and comments filed by the parties and Larson. Applicant, Staff, intervenor John

H. Harter, DRA and Larson appeared and participated in the hearing on the Motion. After an extensive discussion among the Commission and participants, the Commission made rulings on the specific requests in the Motion and voted to grant the Motion in part and deny in part and amend certain of the Conditions as set forth in the Commission's Order Granting in Part Motion to Reconsider and Amending Certain Conditions In Final Decision And Order, which was issued by the Commission on June 29, 2010.

Having considered the evidence of record, applicable law and the arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law and Decision:

FINDINGS OF FACT

Parties

1. The permit applicant is TransCanada Keystone Pipeline, LP, a limited partnership, organized under the laws of the State of Delaware, and owned by affiliates of TransCanada Corporation ("TransCanada"), a Canadian public company organized under the laws of Canada. Ex TC-1, 1.5, p. 4.

2. On May 19, 2009, the Commission unanimously voted to grant party status to all persons that had requested party status prior to the commencement of the meeting. On June 9, 2009, the Commission unanimously voted to grant party status to all persons that had requested party status after the commencement of the meeting on May 19, 2009, through the intervention deadline of May 31, 2009. Fifteen persons intervened, including: Mary Jasper, Paul F. Seamans, Darrell Iversen, the City of Colome, Glen Iversen, Jacqueline Limpert, John H. Harter, Zona Vig, Tripp County Water User District ("TCWUD"), Dakota Rural Action, David Niemi, Debra Niemi, Ruth M. Iversen, Martin R. Lueck, and Lon Lyman. Minutes of May 19, 2009, and June 9, 2009, Commission Meetings; Applications for Party Status.

3. The Staff also participated in the case as a full party.

Procedural Findings

4. The application was signed on behalf of the Applicant on February 26, 2009, in Calgary, Alberta, Canada, and was filed with the Commission on March 12, 2009. Ex TC -1, 9.0, p. 116.

5. The Commission issued the following notices and orders in the case as described in greater detail in the Procedural History above, which is hereby incorporated by reference in these Findings of Fact and Conclusions of Law:

- Order of Assessment of Filing Fee
- Notice of Application; Order for and Notice of Public Input Hearings; and Notice of Opportunity to Apply for Party Status
- Order Granting Party Status; Order Denying Motion for Extension of Time to File Application for Party Status; Order Extending Intervention Deadline
- Order Granting Motion to Establish Procedural Schedule and Order Granting Party Status
- Order Setting Procedural Schedule
- Order Granting Motion for Extension of Time to Submit Testimony

- Order Granting in Part and Denying in Part Motion to Compel Discovery
- Order Amending Order Granting in Part and Denying in Part Motion to Compel Discovery
- Order Setting Amended Procedural Schedule
- Order for and Notice of Hearing
- Order for and Notice of Public Hearing
- Amended Order for and Notice of Public Hearing
- Order Establishing Briefing Schedule
- Amended Order Establishing Briefing Schedule
- Order Granting in Part Motion to Reconsider and Amending Certain Conditions In Final Decision And Order

6. Pursuant to SDCL 49-41B-15 and 49-41B-16 and its Notice of Application; Order for and Notice of Public Hearings; and Notice of Opportunity to Apply for Party Status, the Commission held public hearings on Keystone's application at the following times and places (see Public Hearing Transcripts):

- Monday, April 27, 2009, 12:00 noon CDT at Winner Community Playhouse, 7th and Leahy Boulevard, Winner, SD
- Monday, April 27, 2009, 7:00 p.m. MDT at Fine Arts School, 330 Scottie Avenue, Philip, SD
- Tuesday, April 28, 2009, 6:00 p.m. MDT at Harding County Recreation Center, 204 Hodge Street, Buffalo, SD.

7. The purpose of the public hearings was to afford an opportunity for interested persons to present their views and comments to the Commission concerning the Application. At the hearings, Keystone presented a brief description of the project after which interested persons presented their views, comments and questions regarding the application. Public Hearing Transcripts.

8. The following testimony was prefiled in advance of the formal evidentiary hearing held November 2, 3 and 4, 2009, in Room 414, State Capitol, Pierre, South Dakota:

- A. Applicant's March 12, 2009, Direct Testimony.
 - Robert Jones
 - John Phillips
 - Richard Gale
 - Jon Schmidt
 - Meera Kothari
 - John Hayes
 - Donald Scott
 - Heidi Tillquist
 - Tom Oster
- B. Supplemental Direct Testimony of August 31, 2009.
 - John Phillips
- C. Intervenors' Direct Testimony of September 11, 2009.
 - David Niemi
 - Debra Niemi

D. Staff's September 25, 2009, Direct Testimony.

- Kim McIntosh
- Brian Walsh
- Derric Iles
- Tom Kirschenmann
- Paige Hoskinson Olson
- Michael Kenyon
- Ross Hargrove
- Patrick Robblee
- James Arndt
- William Walsh
- Jenny Hudson
- David Schramm
- William Mampre
- Michael K. Madden
- Tim Binder

E. Applicant's Updated Direct and Rebuttal Testimony.

- Robert Jones Updated Direct (10/23/09)
- Jon Schmidt Updated Direct and Rebuttal (10/19/09)
- Meera Kothari Updated Direct and Rebuttal (10/19/09)
- Donald M. Scott Updated Direct (10/19/09)
- John W. Hayes Updated Direct (10/19/09)
- Heidi Tillquist Updated Direct (10/20/09)
- Steve Hicks Direct and Rebuttal (10/19/09)

F. Staff's Supplemental Testimony of October 29, 2009.

- William Walsh
- William Mampre
- Ross Hargrove

9. As provided for in the Commission's October 21, 2009, Amended Order for and Notice of Public Hearing, the Commission held a public input hearing in Room 414 of the State Capitol beginning at 6:00 p.m. on November 3, 2009, at which 23 members of the public presented comments and/or questions. Transcript of November 3, 2009 Public Input Hearing.

Applicable Statutes and Regulations

10. The following South Dakota statutes are applicable: SDCL 49-41B-1 through 49-41B-2.1, 49-41B-4, 49-41B-11 through 49-41B-19, 49-41B-21, 49-41B-22, 49-41B-24, 49-41B-26 through 49-41B-38 and applicable provisions of SDCL Chs. 1-26 and 15-6.

11. The following South Dakota administrative rules are applicable: ARSD Chapter 20:10:01, ARSD 20:10:22:01 through ARSD 20:10:22:25 and ARSD 20:10:22:36 through ARSD 20:10:22:40.

12. Pursuant to SDCL 49-41B-22, the Applicant for a facility construction permit has the burden of proof to establish that:

- (1) The proposed facility will comply with all applicable laws and rules;

- (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
- (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
- (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

The Project

13. The Project will be owned, managed and operated by the Applicant, TransCanada Keystone Pipeline, LP. Ex TC-1, 1.5 and 1.7, p. 4.

14. The purpose of the Project is to transport incremental crude oil production from the Western Canadian Sedimentary Basin ("WCSB") to meet growing demand by refineries and markets in the United States ("U.S."). This supply will serve to replace U.S. reliance on less stable and less reliable sources of offshore crude oil. Ex TC-1, 1.1, p. 1; Ex TC-1, 3.0 p. 23; Ex TC-1, 3.4 p. 24.

15. The Project will consist of three segments: the Steele City Segment, the Gulf Coast Segment, and the Houston Lateral. From north to south, the Steele City Segment extends from Hardisty, Alberta, Canada, southeast to Steele City, Nebraska. The Gulf Coast Segment extends from Cushing, Oklahoma south to Nederland, in Jefferson County, Texas. The Houston Lateral extends from the Gulf Coast Segment in Liberty County, Texas southwest to Moore Junction, Harris County, Texas. It will interconnect with the northern and southern termini of the previously approved 298-mile-long, 36-inch-diameter Keystone Cushing Extension segment of the Keystone Pipeline Project. Ex TC-1, 1.2, p. 1. Initially, the pipeline would have a nominal capacity to transport 700,000 barrels per day ("bpd"). Keystone could add additional pumping capacity to expand the nominal capacity to 900,000 bpd. Ex TC-1, 2.1.2, p. 8.

16. The Project is an approximately 1,707 mile pipeline with about 1,380, miles in the United States. The South Dakota portion of the pipeline will be approximately 314 miles in length and will extend from the Montana border in Harding County to the Nebraska border in Tripp County. The Project is proposed to cross the South Dakota counties of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman and Tripp. Ex TC-1, 1.2 and 2.1.1, pp. 1 and 8. Detailed route maps are presented in Ex TC-1, Exhibits A and C, as updated in Ex TC-14.

17. Construction of the Project is proposed to commence in May of 2011 and be completed in 2012. Construction in South Dakota will be conducted in five spreads, generally proceeding in a north to south direction. The Applicant expects to place the Project in service in 2012. This in-service date is consistent with the requirements of the Applicant's shippers who have made the contractual commitments that underpin the viability and need for the project. Ex TC-1, 1.4, pp. 1 and 4; TR 26.

18. The pipeline in South Dakota will extend from milepost 282.5 to milepost 597, approximately 314 miles. The pipeline will have a 36-inch nominal diameter and be constructed using API 5L X70 or X80 high-strength steel. An external fusion bonded epoxy ("FBE") coating will be applied to the pipeline and all buried facilities to protect against corrosion. Cathodic protection will be provided by impressed current. The pipeline will have batching capabilities and will be able to transport products ranging from light crude oil to heavy crude oil. Ex TC-1, 2.2, 2.2.1, 6.5.2, pp. 8-9, 97-98; Ex TC-8, ¶ 26.

19. The pipeline will operate at a maximum operating pressure of 1,440 psig. For location specific low elevation segments close to the discharge of pump stations, the maximum operating pressure will be 1,600 psig. Pipe associated with these segments of 1,600 psig MOP are excluded from the Special Permit application and will have a design factor of 0.72 and pipe wall thickness of 0.572 inch (X-70) or 0.500 inch (X-80). All other segments in South Dakota will have a MOP of 1,440 psig. Ex TC-1, 2.2.1, p. 9.

20. The Project will have seven pump stations in South Dakota, located in Harding (2), Meade, Haakon, Jones and Tripp (2) Counties. TC-1, 2.2.2, p. 10. The pump stations will be electrically driven. Power lines required for providing power to pump stations will be permitted and constructed by local power providers, not by Keystone. Initially, three pumps will be installed at each station to meet the nominal design flow rate of 700,000 bpd. If future demand warrants, pumps may be added to the proposed pump stations for a total of up to five pumps per station, increasing nominal throughput to 900,000 bpd. No additional pump stations will be required to be constructed for this additional throughput. No tank facilities will be constructed in South Dakota. Ex TC-1, 2.1.2, p.8. Sixteen mainline valves will be located in South Dakota. Seven of these valves will be remotely controlled, in order to have the capability to isolate sections of line rapidly in the event of an emergency to minimize impacts or for operational or maintenance reasons. Ex TC-1, 2.2.3, pp. 10-11.

21. The pipeline will be constructed within a 110-foot wide corridor, consisting of a temporary 60-foot wide construction right-of-way and a 50-foot permanent right-of-way. Additional workspace will be required for stream, road, and railroad crossings, as well as hilly terrain and other features. The Applicant committed to reducing the construction right-of-way to 85 feet in certain wetlands to minimize impacts. Ex TC-1, 2.2.4, pp. 11-12; Ex TC-7, ¶ 20. FERC guidelines provide that the wetland construction right-of-way should be limited to 75 feet except where conditions do not permit, and Staff witness Hargrove's Construction, Mitigation and Reclamation Plan Review states that industry practice is to reduce the typical construction right-of-way width to 75 feet in non-cultivated wetlands, although exceptions are sometimes made for larger-diameter pipelines or where warranted due to site-specific conditions. Ex S-5, p. 2 and Attachment 2, 6.2; TR 335, 353. The Commission finds that the construction right-of-way should be limited to 75 feet, except where site-specific conditions require use of Keystone's proposed 85-foot right-of-way or where special circumstances are present, and the Commission accordingly adopts Condition 22(a), subject to the special circumstance provisions of Condition 30.

22. The Project will be designed, constructed, tested, and operated in accordance with all applicable requirements, including the U.S. Department of Transportation, Pipeline Hazardous Materials and Safety Administration (PHMSA) regulations set forth at 49 CFR Part 195, as modified by the Special Permit requested for the Project from PHMSA (see Finding 71). These federal regulations are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures. Ex TC-1, 2.2, p. 8.

23. The current estimated cost of the Keystone Project in South Dakota is \$921.4 million. Ex TC-1, 1.3, p. 1.

Demand for the Facility

24. The transport of additional crude oil production from the WCSB is necessary to meet growing demand by refineries and markets in the U.S. The need for the project is dictated by a number of factors, including increasing WCSB crude oil supply combined with insufficient export pipeline capacity; increasing crude oil demand in the U.S. and decreasing domestic crude supply;

the opportunity to reduce U.S. dependence on foreign off-shore oil through increased access to stable, secure Canadian crude oil supplies; and binding shipper commitments to utilize the Keystone Pipeline Project. Ex TC-1, 3.0, p. 23.

25. According to the U.S. Energy Information Administration ("EIA"), U.S. demand for petroleum products has increased by over 11 percent or 2,000,000 bpd over the past 10 years and is expected to increase further. The EIA estimates that total U.S. petroleum consumption will increase by approximately 10 million bpd over the next 10 years, representing average demand growth of about 100,000 bpd per year (EIA Annual Energy Outlook 2008). Ex TC-1, 3.2, pp. 23-24.

26. At the same time, domestic U.S. crude oil supplies continue to decline. For example, over the past 10 years, domestic crude production in the United States has declined at an average rate of about 135,000 bpd per year, or 2% per year. Ex TC-1, 3.3, p. 24. Crude and refined petroleum product imports into the U.S. have increased by over 3.3 million bpd over the past 10 years. In 2007, the U.S. imported over 13.4 million bpd of crude oil and petroleum products or over 60 percent of total U.S. petroleum product consumption. Canada is currently the largest supplier of imported crude oil and refined products to the U.S., supplying over 2.4 million bpd in 2007, representing over 11 percent of total U.S. petroleum product consumption (EIA 2007). Ex TC-1, 3.4, p. 24.

27. The Project will provide an opportunity for U.S. refiners in Petroleum Administration for Defense District III, the Gulf Coast region, to further diversify supply away from traditional offshore foreign crude supply and to obtain direct access to secure and growing Canadian crude supplies. Access to additional Canadian crude supply will also provide an opportunity for the U.S. to offset annual declines in domestic crude production and, specifically, to decrease its dependence on other foreign crude oil suppliers, such as Mexico and Venezuela, the top two heavy crude oil exporters into the U.S. Gulf Coast. Ex TC-1, 3.4, p. 24.

28. Reliable and safe transportation of crude oil will help ensure that U.S. energy needs are not subject to unstable political events. Established crude oil reserves in the WCSB are estimated at 179 billion barrels (CAPP 2008). Over 97 percent of WCSB crude oil supply is sourced from Canada's vast oil sands reserves located in northern Alberta. The Alberta Energy and Utilities Board estimates there are 175 billion barrels of established reserves recoverable from Canada's oil sands. Alberta has the second largest crude oil reserves in the world, second only to Saudi Arabia. Ex TC-1, 3.1, p. 23.

29. Shippers have already committed to long-term binding contracts, enabling Keystone to proceed with regulatory applications and construction of the pipeline once all regulatory, environmental, and other approvals are received. These long-term binding shipper commitments demonstrate a material endorsement of support for the Project, its economics, proposed route, and target market, as well as the need for additional pipeline capacity and access to Canadian crude supplies. Ex TC-1, 3.5, p. 24.

Environmental

30. In order to construct the Project, Keystone is required to obtain a Presidential Permit from the U.S. Department of State ("DOS") authorizing the construction of facilities across the international border. Ex TC-1, 1.8, pp. 4-5; 5.1, p. 30.

31. Because Keystone is required to obtain a Presidential Permit from the DOS, the National Environmental Policy Act requires the DOS to prepare an Environmental Impact Statement

("EIS"). Ex TC-1, 1.8, pp. 4-5; Ex TC-4; Ex S-3. In support of its Presidential Permit application, Keystone has submitted studies and other environmental information to the DOS. Ex TC-1, 1.8, pp. 4-5; 5.1, p. 30.

32. Table 6 to the Application summarizes the environmental impacts that Keystone's analysis indicates could be expected to remain after its Construction Mitigation and Reclamation Plan is implemented. Ex TC-1, pp. 31-37.

33. The pipeline will cross the Unglaciated Missouri Plateau. This physiographic province is characterized by a dissected plateau where river channels have incised into the landscape. Elevations range from just over 3,000 feet above mean sea level in the northwestern part of the state to around 1,800 feet above mean sea level in the White River valley. The major river valleys traversed include the Little Missouri River, Cheyenne River, and White River. Ex TC-1, 5.3.1, p. 30; Ex TC-4, ¶15. Exhibit A to the Application includes soil type maps and aerial photograph maps of the Keystone pipeline route in South Dakota that indicate topography, land uses, project mileposts and Section, Township, Range location descriptors. Ex TC-1, Exhibit A. Updated versions of these maps were received in evidence as Exhibit TC-14.

34. The surficial geologic deposits along the proposed route are primarily composed of Quaternary alluvium, colluvium, alluvial terraces, and eolian deposits (sand dunes). The alluvium primarily occurs in modern stream channels and floodplains, but also is present in older river terraces. The bedrock geology consists of Upper Cretaceous and Tertiary rocks. The Upper Cretaceous units include the Pierre Shale, Fox Hills Formation, and the Hell Creek Formation. The Ogallala Group, present in the far southern portion of the Project in South Dakota, was deposited as a result of uplift and erosion of the Rocky Mountains. Material that was eroded from the mountains was transported to the east by streams and wind. Ex TC-1, 5.3.2, p. 37.

35. Sand, gravel, crushed stone, oil, natural gas, coal and metallic ore resources are mineral resources existing along the proposed route. The route passes through the Buffalo Field in Harding County. Construction will have very minor and short-term impact on current mineral extraction activities due to the temporary and localized nature of pipeline construction activities. Several oil and gas wells were identified within or close to the Project construction ROW. Prior to construction, Keystone will identify the exact locations of active, shut-in, and abandoned wells and any associated underground pipelines in the construction ROW and take appropriate precautions to protect the integrity of such facilities. Ex TC-1, 5.3.3, pp. 38-39.

36. Soil maps for the route are provided in Exhibit A to Ex TC-1. In the northwestern portions of South Dakota, the soils are shallow to very deep, generally well drained, and loamy or clayey. Soils such as the Assiniboine series formed in fluvial deposits that occur on fans, terraces, and till plains. Soils such as the Cabbart, Delridge, and Blackhall series formed in residuum on hills and plains. Fertile soils and smooth topography dominate Meade County. The soils generally are shallow to very deep, somewhat excessively drained to moderately well drained, and loamy or clayey. Cretaceous Pierre Shale underlies almost all of Haakon, Jones, and portions of Tripp counties. This shale weathers to smectitic clays. These clays shrink as they dry and swell as they get wet, causing significant problems for road and structural foundations. From central Tripp County to the Nebraska state line, soils typically are derived from shale and clays on the flatter to moderately sloping, eroded tablelands. In southern Tripp County, the route also crosses deep, sandy deposits on which the Doger, Dunday, and Valentine soils formed. These are dry, rapidly permeable soils. Topsoil layers are thin and droughty, and wind erosion and blowouts are a common hazard. Ex TC-1, 5.3.4, p. 40.

37. Grading and excavating for the proposed pipeline and ancillary facilities will disturb a variety of agricultural, rangeland, wetland and forestland soils. Prime farmland soils may be altered temporarily following construction due to short-term impact such as soil compaction from equipment traffic, excavation and handling. However, potential impacts to soils will be minimized or mitigated by the soil protection measures identified in the Construction Mitigation and Reclamation Plan (CMR Plan) to the extent such measures are fully implemented. The measures include procedures for segregating and replacing top soil, trench backfilling, relieving areas compacted by heavy equipment, removing surface rock fragments and implementing water and wind erosion control practices. Ex TC-1, 5.3.4, p. 41; TC-1 Ex. B.

38. To accommodate potential discoveries of contaminated soils, Keystone made a commitment in the Application to develop, in consultation with relevant agencies, procedures for the handling and disposal of unanticipated contaminated soil discovered during construction. These procedures will be added to the CMR Plan. If hydrocarbon contaminated soils are encountered during trench excavation, the appropriate federal and state agencies will be contacted immediately. A remediation plan of action will be developed in consultation with that agency. Depending on the level of contamination found, affected soil may be replaced in the trench or removed to an approved landfill for disposal. Ex TC-1, 5.3.4, p. 42.

39. The USGS ground motion hazard mapping indicates that potential ground motion hazard in the Project area is low. South Dakota historically has had little earthquake activity. No ground subsidence or karst hazards are present in the vicinity of the route. Ex TC-1, 5.3.6, p. 43.

40. Cretaceous and Tertiary rocks in the Missouri River Plateau have high clay content and upon weathering can be susceptible to instability in the form of slumps and earth flows. Landslide potential is enhanced on steeper slopes. Formations that are especially susceptible are the Cretaceous Hell Creek and Pierre Shale as well as shales in the Tertiary Fort Union Formation mainly on river banks and steep slopes. These units can contain appreciable amounts of bentonite, a rock made up of montmorillonite clay that has deleterious properties when exposed to moisture. The bentonite layers in the Pierre Shale may present hazards associated with swelling clays. These formations are considered to have "high swelling potential." Bentonite has the property whereby when wet, it expands significantly in volume. When bentonite layers are exposed to successive cycles of wetting and drying, they swell and shrink, and the soil fluctuates in volume and strength. Ex TC-1, 5.3.4, pp. 43.

41. Fifteen perennial streams and rivers, 129 intermittent streams, 206 ephemeral streams and seven man-made ponds will be crossed during construction of the Project in South Dakota. Keystone will utilize horizontal directional drilling ("HDD") to cross the Little Missouri, Cheyenne and White River crossings. Keystone intends to use open-cut trenching at the other perennial streams and intermittent water bodies. The open cut wet method can cause the following impacts: loss of in-stream habitat through direct disturbance, loss of bank cover, disruption of fish movement, direct disturbance to spawning, water quality effects and sedimentation effects. Alternative techniques include open cut dry flume, open cut dam-and-pump and horizontal directional drilling. Exhibit C to the Application contains a listing of all water body crossings and preliminary site-specific crossing plans for the HDD sites. Ex TC-14. Permitting of water body crossings, which is currently underway, will ultimately determine the construction method to be utilized. Keystone committed to mitigate water crossing impacts through implementation of procedures outlined in the CMR Plan. Ex TC-1, 5.4.1, pp. 45-46.

42. The pipeline will be buried at an adequate depth under channels, adjacent flood plains and flood protection levees to avoid pipe exposure caused by channel degradation and lateral scour. Determination of the pipeline burial depth will be based on site-specific channel and hydrologic investigations where deemed necessary. Ex TC-1, 5.4.1, p. 46.

43. Although improvements in pipeline safety have been made, the risk of a leak cannot be eliminated. Keystone's environmental consulting firm for the Project, AECOM, estimated the chances of and the environmental consequences of a leak or spill through a risk assessment. Ex TC-1, 6.5.2, pp. 96-102; Table 6; TC-12, 10, 24.

44. Keystone's expert estimated the chance of a leak from the Project to be not more than one spill in 7,400 years for any given mile of pipe. TR 128-132, 136-137; Ex TC-12, ¶10; TC-1, 5.5.1, p. 54; 6.1.2.1, p. 87. The frequency calculation found the chance to be no more than one release in 24 years in South Dakota. TR 137.

45. Keystone's spill frequency and volume estimates are conservative by design, overestimating the risk since the intent is to use the assessment for planning purposes. The risk assessment overestimates the probable size of a spill to ensure conservatism in emergency response and other planning objectives. If a spill were to occur on the Keystone pipeline, PHMSA data indicate that the spill is likely to be three barrels or less. Ex TC-12, ¶10; TR 128-132, 137; TC-1, 6.1.2.1, p. 87.

46. Except for a few miles in the far southern reach of the Project in southern Tripp County which will be located over the permeable Sand Hills and shallow High Plains Aquifer, the Project route in South Dakota does not cross geologic units that are traditionally considered as aquifers. TR 440. Where aquifers are present, at most locations they are more than 50 feet deep, which significantly reduces the chance of contamination reaching the aquifer. Additionally, the majority of the pipeline is underlain by low permeability confining materials (e.g., clays, shales) that inhibit the infiltration of released crude oil into aquifers. TR 158; Ex TC-12, ¶13, EX TC-1, 5.4.2, pp. 47-48. Keystone consulted with the DENR during the routing process to identify and subsequently avoid sensitive aquifers and recharge areas, e.g., Source Water Protection Areas (SWPAs) in order to minimize risk to important public groundwater resources, and no groundwater SWPAs are crossed by the Project in South Dakota. EX TC-1, 5.4.2, pp. 47-48. Except for the Sand Hills area, no evidence was offered of the existence of a shallow aquifer (i.e. less than 50 feet in depth) crossed by the Project.

47. Because of their high solubility and their very low Maximum Contaminant Levels ("MCLs"), the constituents of primary concern in petroleum, including crude oil, are benzene, toluene, ethyl benzene and xylene. These constituents are commonly referred to as BTEX. TR 142, 148. The crude oil to be shipped through the Project will be similar in composition to other crude oils produced throughout the world and currently shipped in the United States. TR 155-56. The BTEX concentration in the crude oil to be shipped through the Project is close to 1 % to 1.5%. TR 151.

48. The Project will pass through areas in Tripp County where shallow and surficial aquifers exist. Since the pipeline will be buried at a shallow depth, it is unlikely that the construction or operation of the pipeline will alter the yield from any aquifers that are used for drinking water purposes. Keystone will investigate shallow groundwater when it is encountered during construction to determine if there are any nearby livestock or domestic wells that might be affected by construction activities. Appropriate measures will be implemented to prevent groundwater contamination and steps will be taken to manage the flow of any ground water encountered. Ex TC-

1, 5.4.2, pp. 47-48. The Tripp County Water User District is up-gradient of the pipeline and therefore would not be affected by a spill. TR 441, 449-50.

49. The risk of a spill affecting public or private water wells is low because the components of crude oil are unlikely to travel more than 300 feet from the spill site. TR 142-43. There are no private or public wells within 200 or 400 feet, respectively, of the right of way. TC-16, Data Response 3-46.

50. The total length of Project pipe with the potential to affect a High Consequence Area ("HCA") is 34.3 miles. A spill that could affect an HCA would occur no more than once in 250 years. TC-12, ¶ 24.

51. In the event that soils and groundwater are contaminated by a petroleum release, Keystone will work with state agency personnel to determine what type of remediation process would be appropriate. TR 148. Effective emergency response can reduce the likelihood and severity of contamination. TC-12, ¶ 10, 14, 24. Soils and groundwater contaminated by a petroleum release can be remediated. TR 499-500. The experience of DENR is that pipeline facilities have responded immediately to the incident in every case. TR 502.

52. The Commission finds that the risk of a significant release occurring is low and finds that the risk that a release would irretrievably impair a water supply is very low and that it is probable that Keystone, in conjunction with state and federal response agencies, will be able to and will be required to mitigate and successfully remediate the effects of a release.

53. The Commission nevertheless finds that the Sand Hills area and High Plains Aquifer in southeastern Tripp County is an area of vulnerability that warrants additional vigilance and attention in Keystone's integrity management and emergency response planning and implementation process. The evidence demonstrates that the shallow Sand Hills groundwater or High Plains Aquifer is used by landowners in the Project area, that many wells are developed into the aquifer, including TCWUD's, that the very high permeability of both the sandy surficial soils and deeper soils render the formation particularly vulnerable to contamination and that rapid discovery and response can significantly lessen the impact of a release on this vulnerable groundwater resource. The Commission further finds that if additional surficial aquifers are discovered in the course of pipeline construction, such aquifers should have similar treatment. The Commission accordingly finds that Condition 35 shall be adopted.

54. Of the approximately 314-mile route in South Dakota, all but 21.5 miles is privately owned. 21.5 miles is state-owned and managed. The list is found in Table 14. No tribal or federal lands are crossed by the proposed route. Ex TC-1, 5.7.1, p. 75.

55. Table 15 of the Application identifies the land uses affected by the pipeline corridor. Among other things, it shows that the project will not cross or be co-located with any major industrial sites, the pipeline will not cross active farmsteads, but may cross near them and the pipeline will not cross suburban and urban residential areas. The project will not cross municipal water supplies or water sources for organized rural water districts. Ex TC-1, 5.7.1, pp. 76-78.

56. The pipeline will be compatible with the predominant land use, which is rural agriculture, because the pipeline will be buried to a depth of four feet in fields and will interfere only minimally with normal agricultural operations. In most locations, the pipeline will be placed below agricultural drain tiles, and drain tiles that are damaged will be repaired. The only above-ground

facilities will be pump stations and block valves located at intervals along the pipeline. Ex TC-1, 5.7.3, pp.78-79.

57. The Project's high strength X70 steel will have a puncture resistance of 51 tons of digging force. Ex TC-8, ¶ 28. Keystone will have a public awareness program in place and an informational number to call where landowners and others can obtain information concerning activities of concern. TC-1, 6.3.4, pp. 93-94. The Commission finds that the risk of damage by ordinary farming operations is very low and that problems can be avoided through exercise of ordinary common sense.

58. If previously undocumented sites are discovered within the construction corridor during construction activities, all work that might adversely affect the discovery will cease until Keystone, in consultation with the appropriate agencies such as the SHPO, can evaluate the site's eligibility and the probable effects. If a previously unidentified site is recommended as eligible to the National Registry of Historic Places, impacts will be mitigated pursuant to the Unanticipated Discovery Plan submitted to the SHPO. Treatment of any discovered human remains, funerary objects, or items of cultural patrimony found on federal land will be handled in accordance with the Native American Grave Protection and Repatriation Act. Construction will not resume in the area of the discovery until the authorized agency has issued a notice to proceed. If human remains and associated funerary objects are discovered on state or private land during construction activities, construction will cease within the vicinity of the discovery and the county coroner or sheriff will be notified of the find. Treatment of any discovered human remains and associated funerary objects found on state or private land will be handled in accordance with the provisions of applicable state laws. TR 40; Ex TC-1, 6.4, pp. 96; Ex TC-16, 3-54. In accordance with these commitments, the Commission finds that Condition 43 should be adopted.

59. Certain formations to be crossed by the Project, such as the Fox Hills, Ludlow and particularly the Hell Creek Formation are known to contain paleontological resources of high scientific and monetary value. TR 438-439, 442-444. In northwest South Dakota, the Hell Creek Formation has yielded valuable dinosaur bones including from a triceratops, the South Dakota State fossil. Ex TC-1, 5.3.2, p. 38. Protection of paleontological resources was among the most frequently expressed concerns at the public input hearings held by the Commission. There is no way for anyone to know with any degree of certainty whether fossils of significance will be encountered during construction activities. TR 439. Because of the potential significance to landowners of the encounter by construction activities with paleontological resources and the inability to thoroughly lessen the probability of such encounter through pre-construction survey and avoidance, the Commission adopts Condition 44 to require certain special procedures in high probability areas, including the Hell Creek formation, such as the presence of a monitor with training in identification of a paleontological strike of significance.

Design and Construction

60. Keystone has applied for a special permit ("Special Permit") from PHMSA authorizing Keystone to design, construct, and operate the Project at up to 80% of the steel pipe specified minimum yield strength at most locations. TC-1, 2.2, p. 8; TR 62. In Condition 2, the Commission requires Keystone to comply with all of the conditions of the Special Permit, if issued.

61. TransCanada operates approximately 11,000 miles of pipelines in Canada with a 0.8 design factor and requested the Special Permit to ensure consistency across its system and to reduce costs. PHMSA has previously granted similar waivers adopting this modified design factor for natural gas pipelines and for the Keystone Pipeline. Ex TC-8, ¶¶ 13, 17.

62. The Special Permit is expected to exclude pipeline segments operating in (i) PHMSA-defined HCAs described as high population areas and commercially navigable waterways in 49 CFR Section 195.450; (ii) pipeline segments operating at highway, railroad, and road crossings; (iii) piping located within pump stations, mainline valve assemblies, pigging facilities, and measurement facilities; and (iv) areas where the MOP is greater than 1,440 psig. Ex TC-8, ¶ 16.

63. Application of the 0.8 design factor and API 5L PSL2 X70 high-strength steel pipe results in use of pipe with a 0.463 inch wall thickness, as compared with the 0.512 inch wall thickness under the otherwise applicable 0.72 design factor, a reduction in thickness of .050 inches. TR 61. PHMSA previously found that the issuance of a waiver is not inconsistent with pipeline safety and that the waiver will provide a level of safety equal to or greater than that which would be provided if the pipeline were operated under the otherwise applicable regulations. Ex TC-8, ¶ 15.

64. In preparation for the Project, Keystone conducted a pipeline threat analysis, using the pipeline industry published list of threats under ASME B31.8S and PHMSA to determine threats to the pipeline. Identified threats were manufacturing defects, construction damage, corrosion, mechanical damage and hydraulic event. Safeguards were then developed to address these threats. Ex TC-8, ¶ 22.

65. Steel suppliers, mills and coating plants were pre-qualified using a formal qualification process consistent with ISO standards. The pipe is engineered with stringent chemistry to ensure weldability during construction. Each batch of pipe is mechanically tested to prove strength, fracture control and fracture propagation properties. The pipe is hydrostatically tested. The pipe seams are visually and manually inspected and also inspected using ultrasonic instruments. Each piece of pipe and joint is traceable to the steel supplier and pipe mill shift during production. The coating is inspected at the plant with stringent tolerances on roundness and nominal wall thickness. A formal quality surveillance program is in place at the steel mill and at the coating plant. Ex TC-8, ¶ 24; TR 59-60.

66. All pipe welds will be examined around 100 percent of their circumferences using ultrasonic or radiographic inspection. The coating is inspected and repaired if required prior to lowering into the trench. After construction the pipeline is hydrostatically tested in the field to 125 percent of its maximum operating pressure, followed by caliper tool testing to check for dents and ovality. Ex TC-8, ¶ 25.

67. A fusion-bonded epoxy ("FBE") coating will be applied to the external surface of the pipe to prevent corrosion. Ex TC-8, ¶ 26.

68. TransCanada has thousands of miles of this particular grade of pipeline steel installed and in operation. TransCanada pioneered the use of FBE, which has been in use on its system for over 29 years. There have been no leaks on this type of pipe installed by TransCanada with the FBE coating and cathodic protection system during that time. When TransCanada has excavated pipe to validate FBE coating performance, there has been no evidence of external corrosion. Ex TC-8, ¶ 27.

69. A cathodic protection system will be installed comprised of engineered metal anodes, which are connected to the pipeline. A low voltage direct current is applied to the pipeline, resulting in corrosion of the anodes rather than the pipeline. Ex TC-8, ¶ 27. FBE coating and cathodic protection mitigate external corrosion. Ex TC-8, ¶ 26.

70. A tariff specification of 0.5 percent solids and water by volume will be utilized to minimize the potential for internal corrosion. This specification is half the industry standard of one percent. In Condition 32, the Commission requires Keystone to implement and enforce its crude oil specifications in order to minimize the potential for internal corrosion. Further, the pipeline is designed to operate in turbulent flow to minimize water drop out, another potential cause of internal corrosion. During operations, the pipeline will be cleaned using in-line inspection tools, which measure internal and external corrosion. Keystone will repair areas of pipeline corrosion as required by federal regulation. Ex TC-8, ¶ 26. Staff expert Schramm concluded that the cathodic protection and corrosion control measures that Keystone committed to utilize would meet or exceed applicable federal standards. TR 407-427; Ex S-12.

71. To minimize the risk of mechanical damage to the pipeline, it will be buried with a minimum of four feet of cover, one foot deeper than the industry standard, reducing the likelihood of mechanical damage. The steel specified for the pipeline is high-strength steel with engineered puncture resistance of approximately 51 tons of force. Ex TC-8, ¶ 28.

72. Hydraulic damage is caused by over-pressurization of the pipeline. The risk of hydraulic damage will be minimized through the SCADA system's continuous, real-time pressure monitoring systems and through operator training. Ex TC-8, ¶ 29.

73. The Applicant has prepared a detailed CMR Plan that describes procedures for crossing cultivated lands, grasslands, including native grasslands, wetlands, streams and the procedures for restoring or reclaiming and monitoring those features crossed by the Project. The CMR Plan is a summary of the commitments that Keystone has made for environmental mitigation, restoration and post-construction monitoring and compliance related to the construction phase of the Project. Among these, Keystone will utilize construction techniques that will retain the original characteristics of the lands crossed as detailed in the CMR Plan. Keystone's thorough implementation of these procedures will minimize the impacts associated with the Project. A copy of the CMR Plan was filed as Exhibit B to Keystone's permit application and introduced into evidence as TC-1, Exhibit B.

74. The CMR Plan establishes procedures to address a multitude of construction-related issues, including but not limited to the following:

- Training
- Advance Notice of Access
- Depth of Cover
- Noise Control
- Weed Control
- Dust Control
- Fire Prevention and Control
- Spill Prevention and Containment
- Irrigation Systems
- Clearing
- Grading
- Topsoil Removal and Storage
- Temporary Erosion and Sediment Control
- Clean-Up
- Reclamation and Revegetation
- Compaction Relief

- Rock Removal
- Soil Additives
- Seeding
- Construction in Residential and Commercial/Industrial Areas
- Drain Tile Damage Mitigation and Repair

Ex TC-1, Exhibit B.

75. The fire prevention and containment measures outlined in the CMR Plan will provide significant protection against uncontrolled fire in the arid region to be crossed by the Project. The Commission finds, however, that these provisions are largely centered on active construction areas and that certain additional fire prevention and containment precautions are appropriate as well for vehicles performing functions not in proximity to locations where fire suppression equipment will be based, such as route survey vehicles and vehicles involved in surveillance and inspection activities whether before, during and after construction. The Commission accordingly adopts Conditions 16(p) and the last sentence of Condition 30 to address these situations.

76. Keystone's CMR Plan includes many mitigation steps designed to return the land to its original production. These include topsoil removal and replacement, compaction of the trench line, decompaction of the working area, and tilling the topsoil after replacement. Ex TC-1, Exhibit B; Ex TC-6, ¶ 27; Ex TC-1, 6.1.2.2, pp. 87-88.

77. In areas where geologic conditions such as ground swelling, or slope instability, could pose a potential threat, Keystone will conduct appropriate pre-construction site assessments and subsequently will design facilities to account for various ground motion hazards as required by federal regulations. The main hazard of concern during construction of the pipeline will be from unintentional undercutting of slopes or construction on steep slopes resulting in instability that could lead to landslides. Other hazards may result from construction on Cretaceous shales that contain bentonite beds. The high swelling hazard may cause slope instability during periods of precipitation. Ex TC-1, 5.3.6, p. 44.

78. When selecting the proposed pipeline route, Keystone has attempted to minimize the amount of steep slopes crossed by the pipeline. Special pipeline construction practices described in the CMR Plan will minimize slope stability concerns during construction. Landslide hazards can be mitigated by:

- Returning disturbed areas to pre-existing conditions or, where necessary, reducing steep grades during construction;
- Preserving or improving surface drainage;
- Preserving or improving subsurface drainage during construction;
- Removing overburden where necessary to reduce weight of overlying soil mass; and
- Adding fill at toe of slope to resist movement.

Ex TC-1, 5.3.6, pp. 43-44.

79. Slope instability poses a threat of ground movement responsible for approximately 1 percent of liquid pipeline incidents (PHMSA 2008). Keystone will monitor slope stability during routine surveillance. Areas where slope stability poses a potential threat to the pipeline will be incorporated into Keystone's Integrity Management Plan. If ground movement is suspected of having caused abnormal movement of the pipeline, federal regulations (49 CFR Part 195) require

Keystone to conduct an internal inspection. Consequently, damage to the pipeline would be detected quickly and spills would be averted or minimized. Ex TC-1, 5.3.6, p. 44

80. Keystone is in the process of preparing, in consultation with the area National Resource Conservation Service, construction/reclamation unit ("Con/Rec Unit") mapping to address differing construction and reclamation techniques for different soils conditions, slopes, vegetation, and land use along the pipeline route. This analysis and mapping results in the identification of segments called Con/Rec Units. Ex. TC-5; TC-16, DR 3-25.

81. The Applicant will use special construction methods and measures to minimize and mitigate impacts where warranted by site specific conditions. These special techniques will be used when constructing across paved roads, primary gravel roads, highways, railroads, water bodies, wetlands, sand hills areas, and steep terrain. These special techniques are described in the Application. Ex TC-1, 2.2.6, p. 17; TC-6, ¶ 11.

82. Of the perennial streams that are crossed by the proposed route, the Cheyenne River is the largest water body and is classified as a warm water permanent fishery. Of the other streams that have been classified, habitat is considered more limited as indicated by a warm water semi-permanent or warm water marginal classification. Ex TC-1, 5.6.2, pp. 71-72, Table 13.

83. Keystone will utilize HDD for the Little Missouri, Cheyenne and White River crossings, which will aid in minimizing impacts to important game and commercial fish species and special status species. Open-cut trenching, which can affect fisheries, will be used at other perennial streams. Keystone will use best practices to reduce or eliminate the impact of crossings at the perennial streams other than the Cheyenne and White Rivers. Ex TC-1, 5.4.1, p. 46; 5.6.2, p. 72; TC-16, DR 3-39.

84. Water used for hydrostatic testing during construction and subsequently released will not result in contamination of aquatic ecosystems since the pipe is cleaned prior to testing and the discharge water is monitored and tested. Ex TC-1, 5.4.3.1, pp. 48-50. In Conditions 1 and 2, the Commission has required that Keystone comply with DENR's regulations governing temporary use and discharge of water and obtain and comply with the DENR General Permits for these activities.

85. During construction, Keystone will have a number of inspectors on a construction spread, including environmental inspectors, who will monitor erosion control, small spills, full tanks, and any environmental issues that arise. TR. 37-38. In Condition 14, the Commission requires that Keystone incorporate such inspectors into the CMR Plan.

86. The Pipeline corridor will pass through areas where shallow and surficial aquifers exist. Appropriate measures will be implemented to prevent groundwater contamination and steps will be taken to manage the flow of any ground water encountered. Ex TC-1, 5.4.2, p. 47-48.

87. In addition to those recommendations of Staff and its expert witnesses referenced specifically in these Findings, Staff expert witnesses made a number of recommendations which the Commission has determined will provide additional protections for affected landowners, the environment and the public, and has included Conditions in this Order requiring certain of these measures. These recommendations encompassed matters such as sediment control at water body crossings, soil profile analysis, topsoil, subsoil and rock segregation and replacement, special procedures in areas of bentonitic, sodic, or saline soils, noise, etc. Staff's final recommendations are set forth in its Brief. See also Staff Exhibits and testimony in Transcript Vols. II and III.

88. Keystone will be required to acquire permits authorizing the crossing of county roads and township roads. These permits will typically require Keystone to restore roads to their pre-construction condition. If its construction equipment causes damage to county or township roads, Keystone will be responsible for the repair of those roads to pre-construction condition. Pursuant to SDCL 49-41B-38, Keystone will be required to post a bond to ensure that any damage beyond normal wear to public roads, highways, bridges or other related facilities will be adequately compensated. Staff witness Binder recommended that the bond amount under SDCL 49-41B-38 for damage to highways, roads, bridges and other related facilities be set at \$15,600,000 for 2011 and \$15,600,000 for 2012. TR 224. Keystone did not object to this requirement.

89. The Commission finds that the procedures in the CMR Plan and the other construction plans and procedures that Keystone has committed to implement, together with the Conditions regarding construction practices adopted by the Commission herein, will minimize impacts from construction of the Project to the environment and social and economic condition of inhabitants and expected inhabitants in the Project area.

Operation and Maintenance

90. The Keystone pipeline will be designed constructed, tested and operated in accordance with all applicable requirements, including the PHMSA regulations set forth at 49 CFR Parts 194 and 195, as modified by the Special Permit. These federal regulations are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures. Ex TC-8, ¶ 2.

91. The safety features of Keystone's operations are governed by 49 CFR Part 195 and include aerial inspection 26 times per year, with any interval not to exceed three weeks, right-of-way maintenance for accessibility, and continual monitoring of the pipeline to identify potential integrity concerns. A Supervisory Control and Data Acquisition ("SCADA") system will be used to monitor the pipeline at all times. Ex TC-8, ¶ 9.

92. The Project will have a SCADA system to remotely monitor and control the pipeline. The SCADA system will include: (i) a redundant, fully functional back-up Operational Control Center available for service at all times; (ii) automatic features within the system to ensure operation within prescribed limits; and (iii) additional automatic features at the pump stations to provide pipeline pressure protection in the event that communications with the SCADA host are interrupted. Ex TC-10, ¶ 8.

93. The pipeline will have a control center manned 24 hours per day. A backup control center will also be constructed and maintained. A backup communications system is included within the system design and installation. Keystone's SCADA system should have a very high degree of reliability. TR 82-83.

94. Keystone will use a series of complimentary and overlapping SCADA-based leak detection systems and methods at the Operational Control Center, including: (i) remote monitoring; (ii) software-based volume balance systems that monitor injection and delivery volumes; (iii) Computational Pipeline Monitoring or model-based leak detection systems that break the pipeline into smaller segments and monitor each segment on a mass balance basis; and (iv) computer-based, non-real-time, accumulated gain/(loss) volume trending to assist in identifying low rate or seepage releases below the 1.5 percent by volume detection threshold. The SCADA and other monitoring and control systems to be implemented by Keystone for the Project are state of the art

and consistent with the best commercially available technology. Ex TC-10, ¶ 8. Staff witness, William Mampre, testified that Keystone's SCADA system was one he probably would have selected himself. TR 431.

95. Additionally, Keystone will implement and utilize direct observation methodologies, which include aerial patrols, ground patrols and public and landowner awareness programs designed to encourage and facilitate the reporting of suspected leaks and events that may suggest a threat to the integrity of the pipeline. Ex TC10, ¶ 8. Remote sensing technologies that could be employed in pipeline surveillance such as aerial surveillance are in their infancy and practical systems are not currently available. Keystone would consider using such technology if it becomes commercially available. TR 89-90.

96. Keystone will implement abnormal operating procedures when necessary and as required by 49 CFR 195.402(d). Abnormal operating procedures will be part of the written manual for normal operations, maintenance activities, and handling abnormal operating and emergencies. Ex TC-1, 2.3.2, p. 20.

97. As required by US DOT regulations, Keystone will prepare an emergency response plan ("ERP") for the system. Ex TC-11, ¶ 13. The ERP will be submitted to PHMSA for review prior to commencement of pipeline operations. Ex TC-11, ¶ 13. The Commission finds that the ERP and manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR 195.402 should also be submitted to the Commission at the time it is submitted to PHMSA to apprise the Commission of its details. Keystone has agreed to do this. The Commission has so specified in Condition 36.

98. Keystone will utilize the ERP approved by PHMSA for the Keystone Pipeline as the basis for its ERP for the Project. Under the ERP, Keystone will strategically locate emergency response equipment along the pipeline route. The equipment will include trailers, oil spill containment and recovery equipment, boats, and a communication office. Keystone will also have a number of local contractors available to provide emergency response assistance. Ex TC-11, ¶ 15. Keystone's goal is to respond to any spill within six hours. TR 102-103. Additional details concerning the ERP and the ERP process are set forth in the Application at Section 6.5.2 and in the pre-filed and hearing testimony of John Hayes. Ex TC-11; EX TC-1, 6.5.2, pp. 96-101. Keystone has consulted with DENR in developing its ERP. TR 111-12.

99. If the Keystone pipeline should experience a release, Keystone would implement its ERP. TC-11, ¶ 10; S-18, p. 4. DENR would be involved in the assessment and abatement of the release, and require the leak to be cleaned up and remediated. S-18, p. 5. DENR has been successful in enforcing remediation laws to ensure the effects of any pipeline releases are mitigated. TR 488-89, 497, 502-03.

100. Local emergency responders may be required to initially secure the scene and ensure the safety of the public, and Keystone will provide training in that regard. Ex TC-11, ¶ 17; TR 105-107.

101. If ground movement is suspected of having caused abnormal movement of the pipeline, federal regulations (49 CFR Part 195) require Keystone to conduct an internal inspection. Consequently, damage to the pipeline would be detected quickly and spills would be averted or minimized. Ex TC-1, 5.3.6, p. 44.

102. In addition to the ERP, hazardous materials pipeline segments through High Consequence Areas ("HCAs") are subject to the Integrity Management Rule, 49 CFR 195.452. Pipeline operators are required to develop a written Integrity Management Plan ("IMP") that must include methods to measure the program's effectiveness in assessing and evaluating integrity and protecting HCAs. Keystone will develop and implement an IMP for the entire pipeline including the HCAs. The overall objective of the IMP is to establish and maintain acceptable levels of integrity and having regard to the environment, public and employee safety, regulatory requirements, delivery reliability, and life cycle cost. The IMP uses advanced in-line inspection and mitigation technologies applied with a comprehensive risk-based methodology. 49 CFR Part 195 also requires pipeline operators to develop and implement public awareness programs consistent with the API's Recommended Practice 1162, Public Awareness Programs for Pipeline Operators. Staff witness Jenny Hudson testified that Keystone's planning and preparation of the IMP were fully compliant with the PHMSA regulations and had no recommendations for conditions. Ex S-9, p.5.

103. The Commission finds that the threat of serious injury to the environment or inhabitants of the State of South Dakota from a crude oil release is substantially mitigated by the integrity management, leak detection and emergency response processes and procedures that Keystone is continuing to plan and will implement.

Rural Water Crossings

104. The route crosses through two rural water system districts, the West River/Lyman-Jones Rural Water District and the Tripp County Water User District. Keystone met with these rural water districts to discuss the Project and will continue to coordinate with these districts. During construction and maintenance, Keystone will coordinate with the One Call system to avoid impacts to underground utilities, including water lines. Ex TC-4.

Alternative Routes

105. The proposed Project route was developed through an, iterative process. TC-1, 4.1, p. 25. During the course of the route evaluation process, Keystone held public meetings, open houses, and one-on-one meetings with stakeholders to discuss and review the proposed routing through South Dakota. TC-1, 4.1.5, p. 27. The route was refined in Mellette County to avoid environmentally sensitive areas and reduce wetland crossings, and near Colome to avoid groundwater protection areas. Ex TC-3; TC-1, 4.2.1-4.2.2, p. 28.

106. SDCL 49-41B-36 explicitly states that Chapter 49-41B "shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility." The Commission accordingly finds and concludes that it lacks authority to compel the Applicant to select an alternative route or 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 itself might select.

Socio-Economic Factors

107. Socio-economic evidence offered by both Keystone and Staff demonstrates that the welfare of the citizens of South Dakota will not be impaired by the Project. Staff expert Dr. Michael Madden conducted a socio-economic analysis of the Keystone Pipeline, and concluded that the positive economic benefits of the project were unambiguous, while most if not all of the social impacts were positive or neutral. S-2, Madden Assessment at 21. The Project, subject to compliance with the Special Permit and the Conditions herein, would not, from a socioeconomic standpoint: (i) pose a threat of serious injury to the socioeconomic conditions in the project area; (ii)

substantially impair the health, safety, or welfare of the inhabitants in the project area; or (iii) unduly interfere with the orderly development of the region.

108. The Project will pay property taxes to local governments on an annual basis estimated to be in the millions of dollars. Ex TC-2, ¶ 24, TC-13, S-13; TR 584. An increase in assessed, taxable valuation for school districts is a positive development. TR 175.

109. The Project will bring jobs, both temporary and permanent, to the state of South Dakota and specifically to the areas of construction and operation. Ex TC-1 at 6.1.1, pp. 85-86.

110. The Project will have minimal effect in the areas of agriculture, commercial and industrial sectors, land values, housing, sewer and water, solid waste management, transportation, cultural and historical resources, health services, schools, recreation, public safety, noise, and visual impacts. Ex TC-1. It follows that the project will not substantially impair the health, safety, or welfare of the inhabitants.

General

111. Applicant has provided all information required by ARSD Chapter 20:10:22 and SDCL Chapter 49-41B. S-1.

112. The Commission finds that the Conditions attached hereto as Exhibit A and incorporated herein by reference are supported by the record, are reasonable and will help ensure that the Project will meet the standards established for approval of a construction permit for the Project set forth in SDCL 49-41B-22 and should be adopted.

113. The Commission finds that subject to the conditions of the Special Permit and the Conditions set forth as Exhibit A hereto, the Project will (i) comply with all applicable laws and rules; (ii) not pose an unacceptable threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area; (iii) not substantially impair the health, safety or welfare of the inhabitants; and (iv) not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

114. The Commission finds that a permit to construct the Project should be granted subject to the Conditions set forth in Exhibit A.

115. To the extent that any Conclusion of Law set forth below is more appropriately a finding of fact, that Conclusion of Law is incorporated by reference as a Finding of Fact.

Based on the foregoing Findings of Fact, the Commission hereby makes the following:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding pursuant to SDCL Chapter 49-41B and ARSD Chapter 20:10:22. Subject to the findings made on the four elements of proof under SDCL 49-41B-22, the Commission has authority to grant,

deny or grant upon reasonable terms, conditions or modifications, a permit for the construction, operation and maintenance of the TransCanada Keystone Pipeline.

2. The TransCanada Keystone Pipeline Project is a transmission facility as defined in SDCL 49-41B-2.1(3).

3. Applicant's permit application, as amended and supplemented through the proceedings in this matter, complies with the applicable requirements of SDCL Chapter 49-41B and ARSD Chapter 20:10:22.

4. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will comply with all applicable laws and rules, including all requirements of SDCL Chapter 49-41B and ARSD 20:10:22.

5. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will not pose an unacceptable threat of serious injury to the environment nor to the social and economic conditions of inhabitants or expected inhabitants in the siting area.

6. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will not substantially impair the health, safety or welfare of the inhabitants in the siting area.

7. The Project, if constructed and operated in accordance with the terms and conditions of this decision, will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

8. The standard of proof is by the preponderance of evidence. The Applicant has met its burden of proof pursuant to SDCL 49-41B-22 and is entitled to a permit as provided in SDCL 49-41B-25.

9. The Commission has authority to revoke or suspend any permit granted under the South Dakota Energy Facility Permit Act for failure to comply with the terms and conditions of the permit pursuant to SDCL 49-41B-33 and must approve any transfer of the permit granted by this Order pursuant to SDCL 49-41B-29.

10. To the extent that any of the Findings of Fact in this decision are determined to be conclusions of law or mixed findings of fact and conclusions of law, the same are incorporated herein by this reference as a Conclusion of Law as if set forth in full herein.

11. Because a federal EIS will be required and completed for the Project and because the federal EIS complies with the requirements of SDCL Chapter 34A-9, the Commission appropriately exercised its discretion under SDCL 49-41B-21 in determining not to prepare or require the preparation of a second EIS.

12. PHMSA is delegated exclusive authority over the establishment and enforcement of safety-orientated design and operational standards for hazardous materials pipelines. 49 U.S.C. 60101, et seq.

13. SDCL 49-41B-36 explicitly states that SDCL Chapter 49-41B "shall not be construed as a delegation to the Public Utilities Commission of the authority to route a facility." The

Commission accordingly concludes that it lacks authority (i) to compel the Applicant to select an alternative route or (ii) 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.

14. The Commission concludes that it needs no other information to assess the impact of the proposed facility or to determine if Applicant or any Intervenor has met its burden of proof.

15. The Commission concludes that the Application and all required filings have been filed with the Commission in conformity with South Dakota law and that all procedural requirements under South Dakota law, including public hearing requirements, have been met or exceeded.

16. The Commission concludes that it possesses the authority under SDCL 49-41B-25 to impose conditions on the construction, operation and maintenance of the Project, that the Conditions set forth in Exhibit A are supported by the record, are reasonable and will help ensure that the Project will meet the standards established for approval of a construction permit for the Project set forth in SDCL 49-41B-22 and that the Conditions are hereby adopted.


It is therefore

ORDERED, that a permit to construct the Keystone Pipeline Project is granted to TransCanada Keystone Pipeline, LP, subject to the Conditions set forth in Exhibit A.

NOTICE OF ENTRY AND OF RIGHT TO APPEAL

PLEASE TAKE NOTICE that this Amended Final Decision and Order was duly issued and entered on the ____ day of June, 2010. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition with the Commission within 30 days from the date of issuance of this Final Decision and Order; Notice of Entry. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 29th of June, 2010.

<p align="center">CERTIFICATE OF SERVICE</p> <p>The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.</p> <p>By: </p> <p>Date: 06/29/10</p> <p align="center">(OFFICIAL SEAL)</p>
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BY ORDER OF THE COMMISSION:


DUSTIN M. JOHNSON, Chairman


STEVE KOLBECK, Commissioner


GARY HANSON, Commissioner

Exhibit A

AMENDED PERMIT CONDITIONS

I. Compliance with Laws, Regulations, Permits, Standards and Commitments

1. Keystone shall comply with all applicable laws and regulations in its construction and operation of the Project. These laws and regulations include, but are not necessarily limited to: the federal Hazardous Liquid Pipeline Safety Act of 1979 and Pipeline Safety Improvement Act of 2002, as amended by the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, and the various other pipeline safety statutes currently codified at 49 U.S.C. § 60101 et seq. (collectively, the "PSA"); the regulations of the United States Department of Transportation implementing the PSA, particularly 49 C.F.R. Parts 194 and 195; temporary permits for use of public water for construction, testing or drilling purposes, SDCL 46-5-40.1 and ARSD 74:02:01:32 through 74:02:01:34.02 and temporary discharges to waters of the state, SDCL 34A-2-36 and ARSD Chapters 74:52:01 through 74:52:11, specifically, ARSD § 74:52:02:46 and the General Permit issued thereunder covering temporary discharges of water from construction dewatering and hydrostatic testing.

2. Keystone shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State, Executive Order 11423 of August 16, 1968 (33 Fed. Reg. 11741) and Executive Order 13337 of April 30, 2004 (69 Fed. Reg. 25229), for the construction, connection, operation, or maintenance, at the border of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country; Clean Water Act § 404 and Rivers and Harbors Act Section 10 Permits; Special Permit if issued by the Pipeline and Hazardous Materials Safety Administration; Temporary Water Use Permit, General Permit for Temporary Discharges and federal, state and local highway and road encroachment permits. Any of such permits not previously filed with the Commission shall be filed with the Commission upon their issuance. To the extent that any condition, requirement or standard of the Presidential Permit, including the Final EIS Recommendations, or any other law, regulation or permit applicable to the portion of the pipeline in this state differs from the requirements of these Conditions, the more stringent shall apply.

3. Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement when issued by the United States Department of State pursuant to its Amended Department of State Notice of Intent To Prepare an Environmental Impact Statement and To Conduct Scoping Meetings and Notice of Floodplain and Wetland Involvement and To Initiate Consultation Under Section 106 of the National Historic Preservation Act for the Proposed Transcanada Keystone XL Pipeline; Notice of Intent--Rescheduled Public Scoping Meetings in South Dakota and extension of comment period (FR vol. 74, no. 54, Mar. 23, 2009). The Amended Notice and other Department of State and Project Documents are available on-line at: <http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open>.

4. The permit granted by this Order shall not be transferable without the approval of the Commission pursuant to SDCL 49-41B-29.

5. Keystone shall undertake and complete all of the actions that it and its affiliated entities committed to undertake and complete in its Application as amended, in its testimony and

exhibits received in evidence at the hearing, and in its responses to data requests received in evidence at the hearing.

II. Reporting and Relationships

6. The most recent and accurate depiction of the Project route and facility locations is found on the maps in Exhibit TC-14. The Application indicates in Section 4.2.3 that Keystone will continue to develop route adjustments throughout the pre-construction design phase. These route adjustments will accommodate environmental features identified during surveys, property-specific issues, and civil survey information. The Application states that Keystone will file new aerial route maps that incorporate any such route adjustments prior to construction. Ex TC-1.4.2.3, p. 27. Keystone shall notify the Commission and all affected landowners, utilities and local governmental units as soon as practicable if material deviations are proposed to the route. Keystone shall notify affected landowners of any change in the route on their land. At such time as Keystone has finalized the pre-construction route, Keystone shall file maps with the Commission depicting the final pre-construction route. If material deviations are proposed from the route depicted on Exhibit TC-14 and accordingly approved by this Order, Keystone shall advise the Commission and all affected landowners, utilities and local governmental units prior to implementing such changes and afford the Commission the opportunity to review and approve such modifications. At the conclusion of construction, Keystone shall file detail maps with the Commission depicting the final as-built location of the Project facilities.

7. Keystone shall provide a public liaison officer, approved by the Commission, to facilitate the exchange of information between Keystone, including its contractors, and landowners, local communities and residents and to promptly resolve complaints and problems that may develop for landowners, local communities and residents as a result of the Project. Keystone shall file with the Commission its proposed public liaison officer's credentials for approval by the Commission prior to the commencement of construction. After the public liaison officer has been approved by the Commission, the public liaison officer may not be removed by Keystone without the approval of the Commission. The public liaison officer shall be afforded immediate access to Keystone's on-site project manager, its executive project manager and to contractors' on-site managers and shall be available at all times to the Staff via mobile phone to respond to complaints and concerns communicated to the Staff by concerned landowners and others. Keystone shall also implement and keep an up-dated web site covering the planning and implementation of construction and commencement of operations in this state as an informational medium for the public. As soon as the Keystone's public liaison officer has been appointed and approved, Keystone shall provide contact information for him/her to all landowners crossed by the Project and to law enforcement agencies and local governments in the vicinity of the Project. The public liaison officer's contact information shall be provided to landowners in each subsequent written communication with them. If the Commission determines that the public liaison officer has not been adequately performing the duties set forth for the position in this Order, the Commission may, upon notice to Keystone and the public liaison officer, take action to remove the public liaison officer.

8. Until construction of the Project, including reclamation, is completed, Keystone shall submit quarterly progress reports to the Commission that summarize the status of land acquisition and route finalization, the status of construction, the status of environmental control activities, including permitting status and Emergency Response Plan and Integrity Management Plan development, the implementation of the other measures required by these conditions, and the overall percent of physical completion of the project and design changes of a substantive nature. Each report shall include a summary of consultations with the South Dakota Department of Environment and Natural Resources and other agencies concerning the issuance of permits. The

reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed construction, land restoration, environmental protection, emergency response and integrity management regulations, plans and standards. The first report shall be due for the period ending June 30, 2010. The reports shall be filed within 31 days after the end of each quarterly period and shall continue until the project is fully operational.

9. Until one year following completion of construction of the Project, including reclamation, Keystone's public liaison officer shall report quarterly to the Commission on the status of the Project from his/her independent vantage point. The report shall detail problems encountered and complaints received. For the period of three years following completion of construction, Keystone's public liaison officer shall report to the Commission annually regarding post-construction landowner and other complaints, the status of road repair and reconstruction and land and crop restoration and any problems or issues occurring during the course of the year.

10. Not later than six months prior to commencement of construction, Keystone shall commence a program of contacts with state, county and municipal emergency response, law enforcement and highway, road and other infrastructure management agencies serving the Project area in order to educate such agencies concerning the planned construction schedule and the measures that such agencies should begin taking to prepare for construction impacts and the commencement of project operations.

11. Keystone shall conduct a preconstruction conference prior to the commencement of construction to ensure that Keystone fully understands the conditions set forth in this order. At a minimum, the conference shall include a Keystone representative, Keystone's construction supervisor and Staff.

12. Once known, Keystone shall inform the Commission of the date construction will commence, report to the Commission on the date construction is started and keep the Commission updated on construction activities as provided in Condition 8.

III. Construction

13. Except as otherwise provided in the conditions of this Order and Permit, Keystone shall comply with all mitigation measures set forth in the Construction Mitigation and Reclamation Plan (CMR Plan) as set forth in Exhibit TC-1, Exhibit B. If modifications to the CMR Plan are made by Keystone as it refines its construction plans or are required by the Department of State in its Final EIS Record of Decision or the Presidential Permit, the CMR Plan as so modified shall be filed with the Commission and shall be complied with by Keystone.

14. Keystone shall incorporate environmental inspectors into its CMR Plan and obtain follow-up information reports from such inspections upon the completion of each construction spread to help ensure compliance with this Order and Permit and all other applicable permits, laws, and rules.

15. Prior to construction, Keystone shall, in consultation with area NRCS staff, develop specific construction/reclamation units (Con/Rec Units) that are applicable to particular soil and subsoil classifications, land uses and environmental settings. The Con/Rec Units shall contain information of the sort described in response to Staff Data Request 3-25 found in Exhibit TC-16.

a) In the development of the Con/Rec Units in areas where NRCS recommends, Keystone shall conduct analytical soil probing and/or soil boring and analysis in areas of

particularly sensitive soils where reclamation potential is low. Records regarding this process shall be available to the Commission and to the specific land owner affected by such soils upon request.

b) Through development of the Con/Rec Units and consultation with NRCS, Keystone shall identify soils for which alternative handling methods are recommended. Alternative soil handling methods shall include but are not limited to the "triple-lift" method where conditions justify such treatment. Keystone shall thoroughly inform the landowner regarding the options applicable to their property, including their respective benefits and negatives, and implement whatever reasonable option for soil handling is selected by the landowner. Records regarding this process shall be available to the Commission upon request.

c) Keystone shall, in consultation with NRCS, ensure that its construction planning and execution process, including Con/Rec Units, CMR Plan and its other construction documents and planning shall adequately identify and plan for areas susceptible to erosion, areas where sand dunes are present, areas with high concentrations of sodium bentonite, areas with sodic, saline and sodic-saline soils and any other areas with low reclamation potential.

d) The Con/Rec Units shall be available upon request to the Commission and affected landowners. Con/Rec Units may be evaluated by the Commission upon complaint or otherwise, regarding whether proper soil handling, damage mitigation or reclamation procedures are being followed.

e) Areas of specific concern or of low reclamation potential shall be recorded in a separate database. Action taken at such locations and the results thereof shall also be recorded and made available to the Commission and the affected property owner upon request.

16. Keystone shall provide each landowner with an explanation regarding trenching and topsoil and subsoil/rock removal, segregation and restoration method options for his/her property consistent with the applicable Con/Rec Unit and shall follow the landowner's selected preference as documented on its written construction agreement with the landowner, as modified by any subsequent amendments, or by other written agreement(s).

a) Keystone shall separate and segregate topsoil from subsoil in agricultural areas, including grasslands and shelter belts, as provided in the CMR Plan and the applicable Con/Rec Unit.

b) Keystone shall repair any damage to property that results from construction activities.

c) Keystone shall restore all areas disturbed by construction to their preconstruction condition, including their original preconstruction topsoil, vegetation, elevation, and contour, or as close thereto as is feasible, except as is otherwise agreed to by the landowner.

d) Except where practicably infeasible, final grading and topsoil replacement and installation of permanent erosion control structures shall be completed in non-residential areas within 20 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls shall be maintained until conditions allow completion of cleanup and reclamation. In the event

Keystone can not comply with the 20-day time frame as provided in this Condition, it shall give notice of such fact to all affected landowners, and such notice shall include an estimate of when such restoration is expected to be completed.

e) Keystone shall draft specific crop monitoring protocols for agricultural lands. If requested by the landowner, Keystone shall provide an independent crop monitor to conduct yield testing and/or such other measurements of productivity as he shall deem appropriate. The independent monitor shall be a qualified agronomist, rangeland specialist or otherwise qualified with respect to the species to be restored. The protocols shall be available to the Commission upon request and may be evaluated for adequacy in response to a complaint or otherwise.

f) Keystone shall work closely with landowners or land management agencies to determine a plan to control noxious weeds. Landowner permission shall be obtained before the application of herbicides.

g) Keystone's adverse weather plan shall apply to improved hay land and pasture lands in addition to crop lands.

h) The size, density and distribution of rock within the construction right-of-way following reclamation shall be similar to adjacent undisturbed areas. Keystone shall treat rock that cannot be backfilled within or below the level of the natural rock profile as construction debris and remove it for disposal offsite except when the landowner agrees to the placement of the rock on his property. In such case, the rock shall be placed in accordance with the landowner's directions.

i) Keystone shall utilize the proposed trench line for its pipe stringing trucks where conditions allow and shall employ adequate measures to decompact subsoil as provided in its CMR Plan. Topsoil shall be decompacted if requested by the landowner.

j) Keystone shall monitor and take appropriate mitigative actions as necessary to address salinity issues when dewatering the trench, and field conductivity and/or other appropriate constituent analyses shall be performed prior to disposal of trench water in areas where salinity may be expected. Keystone shall notify landowners prior to any discharge of saline water on their lands or of any spills of hazardous materials on their lands of one pint or more or of any lesser volume which is required by any federal, state, or local law or regulation or product license or label to be reported to a state or federal agency, manufacturer, or manufacturer's representative.

k) Keystone shall install trench and slope breakers where necessary in accordance with the CMR Plan as augmented by Staff's recommendations in Post Hearing Commission Staff Brief, pp. 26-27.

l) Keystone shall apply mulch when reasonably requested by landowners and also wherever necessary following seeding to stabilize the soil surface and to reduce wind and water erosion. Keystone shall follow the other recommendations regarding mulch application in Post Hearing Commission Staff Brief, p. 27.

m) Keystone shall reseed all lands with comparable crops to be approved by landowner in landowner's reasonable discretion, or in pasture, hay or native species areas with comparable grass or forage crop seed or native species mix to be approved by landowner in

landowner's reasonable discretion. Keystone shall actively monitor revegetation on all disturbed areas for at least two years.

n) Keystone shall coordinate with landowners regarding his/her desires to properly protect cattle, shall implement such protective measures as are reasonably requested by the landowner and shall adequately compensate the landowner for any loss.

o) Prior to commencing construction, Keystone shall file with the Commission a confidential list of property owners crossed by the pipeline and update this list if route changes during construction result in property owner changes.

p) Except in areas where fire suppression resources as provided in CMR Plan 2.16 are in close proximity, to minimize fire risk, Keystone shall, and shall cause its contractor to, equip each of its vehicles used in pre-construction or construction activities, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with Keystone's fire suppression resources and emergency services.

17. Keystone shall cover open-bodied dump trucks carrying sand or soil while on paved roads and cover open-bodied dump trucks carrying gravel or other materials having the potential to be expelled onto other vehicles or persons while on all public roads.

18. Keystone shall use its best efforts to not locate fuel storage facilities within 200 feet of private wells and 400 feet of municipal wells and shall minimize and exercise vigilance in refueling activities in areas within 200 feet of private wells and 400 feet of municipal wells.

19. If trees are to be removed that have commercial or other value to affected landowners, Keystone shall compensate the landowner for the fair market value of the trees to be cleared and/or allow the landowner the right to retain ownership of the felled trees. Except as the landowner shall otherwise agree in writing, the width of the clear cuts through any windbreaks and shelterbelts shall be limited to 50 feet or less, and the width of clear cuts through extended lengths of wooded areas shall be limited to 85 feet or less. The environmental inspection in Condition 14 shall include forested lands.

20. Keystone shall implement the following sediment control practices:

a) Keystone shall use floating sediment curtains to maintain sediments within the construction right of way in open water bodies with no or low flow when the depth of non-flowing water exceeds the height of straw bales or silt fence installation. In such situations the floating sediment curtains shall be installed as a substitute for straw bales or silt fence along the edge or edges of each side of the construction right-of-way that is under water at a depth greater than the top of a straw bale or silt fence as portrayed in Keystone's construction Detail #11 included in the CMR Plan.

b) Keystone shall install sediment barriers in the vicinity of delineated wetlands and water bodies as outlined in the CMR Plan regardless of the presence of flowing or standing water at the time of construction.

c) The Applicant should consult with South Dakota Game, Fish and Parks (SDGFP) to avoid construction near water bodies during fish spawning periods in which in-stream

construction activities should be avoided to limit impacts on specific fisheries, if any, with commercial or recreational importance.

21. Keystone shall develop frac-out plans specific to areas in South Dakota where horizontal directional drilling will occur. The plan shall be followed in the event of a frac-out. If a frac-out event occurs, Keystone shall promptly file a report of the incident with the Commission. Keystone shall also, after execution of the plan, provide a follow-up report to the Commission regarding the results of the occurrence and any lingering concerns.

22. Keystone shall comply with the following conditions regarding construction across or near wetlands, water bodies and riparian areas:

a) Unless a wetland is actively cultivated or rotated cropland or unless site specific conditions require utilization of Keystone's proposed 85 foot width and the landowner has agreed to such greater width, the width of the construction right-of-way shall be limited to 75 feet in non-cultivated wetlands unless a different width is approved or required by the United States Army Corps of Engineers.

b) Unless a wetland is actively cultivated or rotated cropland, extra work areas shall be located at least 50 feet away from wetland boundaries except where site-specific conditions render a 50-foot setback infeasible. Extra work areas near water bodies shall be located at least 50 feet from the water's edge, except where the adjacent upland consists of actively cultivated or rotated cropland or other disturbed land or where site-specific conditions render a 50-foot setback infeasible. Clearing of vegetation between extra work space areas and the water's edge shall be limited to the construction right-of-way.

c) Water body crossing spoil, including upland spoil from crossings of streams up to 30 feet in width, shall be stored in the construction right of way at least 10 feet from the water's edge or in additional extra work areas and only on a temporary basis.

d) Temporary in-stream spoil storage in streams greater than 30 feet in width shall only be conducted in conformity with any required federal permit(s) and any applicable federal or state statutes, rules and standards.

e) Wetland and water body boundaries and buffers shall be marked and maintained until ground disturbing activities are complete. Keystone shall maintain 15-foot buffers where practicable, which for stream crossings shall be maintained except during the period of trenching, pipe laying and backfilling the crossing point. Buffers shall not be required in the case of non-flowing streams.

f) Best management practices shall be implemented to prevent heavily silt-laden trench water from reaching any wetland or water body directly or indirectly.

g) Erosion control fabric shall be used on water body banks immediately following final stream bank restoration unless riprap or other bank stabilization methods are utilized in accordance with federal or state permits.

h) The use of timber and slash to support equipment crossings of wetlands shall be avoided.

i) Subject to Conditions 37 and 38, vegetation restoration and maintenance adjacent to water bodies shall be conducted in such manner to allow a riparian strip at least 25 feet wide as measured from the water body's mean high water mark to permanently re-vegetate with native plant species across the entire construction right-of way.

23. Keystone shall comply with the following conditions regarding road protection and bonding:

a) Keystone shall coordinate road closures with state and local governments and emergency responders and shall acquire all necessary permits authorizing crossing and construction use of county and township roads.

b) Keystone shall implement a regular program of road maintenance and repair through the active construction period to keep paved and gravel roads in an acceptable condition for residents and the general public.

c) Prior to their use for construction, Keystone shall videotape those portions of all roads which will be utilized by construction equipment or transport vehicles in order to document the pre-construction condition of such roads.

d) After construction, Keystone shall repair and restore, or compensate governmental entities for the repair and restoration of, any deterioration caused by construction traffic, such that the roads are returned to at least their preconstruction condition.

e) Keystone shall use appropriate preventative measures as needed to prevent damage to paved roads and to remove excess soil or mud from such roadways.

f) Pursuant to SDCL 49-41B-38, Keystone shall obtain and file for approval by the Commission prior to construction in such year a bond in the amount of \$15.6 million for the year in which construction is to commence and a second bond in the amount of \$15.6 million for the ensuing year, including any additional period until construction and repair has been completed, to ensure that any damage beyond normal wear to public roads, highways, bridges or other related facilities will be adequately restored or compensated. Such bonds shall be issued in favor of, and for the benefit of, all such townships, counties, and other governmental entities whose property is crossed by the Project. Each bond shall remain in effect until released by the Commission, which release shall not be unreasonably denied following completion of the construction and repair period. Either at the contact meetings required by Condition 10 or by mail, Keystone shall give notice of the existence and amount of these bonds to all counties, townships and other governmental entities whose property is crossed by the Project.

24. Although no residential property is expected to be encountered in connection with the Project, in the event that such properties are affected and due to the nature of residential property, Keystone shall implement the following protections in addition to those set forth in its CMR Plan in areas where the Project passes within 500 feet of a residence:

a) To the extent feasible, Keystone shall coordinate construction work schedules with affected residential landowners prior to the start of construction in the area of the residences.

- b) Keystone shall maintain access to all residences at all times, except for periods when it is infeasible to do so or except as otherwise agreed between Keystone and the occupant. Such periods shall be restricted to the minimum duration possible and shall be coordinated with affected residential landowners and occupants, to the extent possible.
- c) Keystone shall install temporary safety fencing, when reasonably requested by the landowner or occupant, to control access and minimize hazards associated with an open trench and heavy equipment in a residential area.
- d) Keystone shall notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption.
- e) Keystone shall repair any damage to property that results from construction activities.
- f) Keystone shall separate topsoil from subsoil and restore all areas disturbed by construction to at least their preconstruction condition.
- g) Except where practicably infeasible, final grading and topsoil replacement, installation of permanent erosion control structures and repair of fencing and other structures shall be completed in residential areas within 10 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls and appropriate mitigative measures shall be maintained until conditions allow completion of cleanup and reclamation.

25. Construction must be suspended when weather conditions are such that construction activities will cause irreparable damage, unless adequate protection measures approved by the Commission are taken. At least two months prior to the start of construction in South Dakota, Keystone shall file with the Commission an adverse weather land protection plan containing appropriate adverse weather land protection measures, the conditions in which such measures may be appropriately used, and conditions in which no construction is appropriate, for approval of or modification by the Commission prior to the start of construction. The Commission shall make such plan available to impacted landowners who may provide comment on such plan to the Commission.

26. Reclamation and clean-up along the right-of-way must be continuous and coordinated with ongoing construction.

27. All pre-existing roads and lanes used during construction must be restored to at least their pre-construction condition that will accommodate their previous use, and areas used as temporary roads during construction must be restored to their original condition, except as otherwise requested or agreed to by the landowner or any governmental authority having jurisdiction over such roadway.

28. Keystone shall, prior to any construction, file with the Commission a list identifying private and new access roads that will be used or required during construction and file a description of methods used by Keystone to reclaim those access roads.

29. Prior to construction, Keystone shall have in place a winterization plan and shall implement the plan if winter conditions prevent reclamation completion until spring. The plan shall be provided to affected landowners and, upon request, to the Commission.

30. Numerous Conditions of this Order, including but not limited to 16, 19, 24, 25, 26, 27 and 51 relate to construction and its effects upon affected landowners and their property. The Applicant may encounter physical conditions along the route during construction which make compliance with certain of these Conditions infeasible. If, after providing a copy of this order, including the Conditions, to the landowner, the Applicant and landowner agree in writing to modifications of one or more requirements specified in these conditions, such as maximum clearances or right-of-way widths, Keystone may follow the alternative procedures and specifications agreed to between it and the landowner.

IV. Pipeline Operations, Detection and Emergency Response

31. Keystone shall construct and operate the pipeline in the manner described in the application and at the hearing, including in Keystone's exhibits, and in accordance with the conditions of this permit, the PHMSA Special Permit, if issued, and the conditions of this Order and the construction permit granted herein.

32. Keystone shall require compliance by its shippers with its crude oil specifications in order to minimize the potential for internal corrosion.

33. Keystone's obligation for reclamation and maintenance of the right-of-way shall continue throughout the life of the pipeline. In its surveillance and maintenance activities, Keystone shall, and shall cause its contractor to, equip each of its vehicles, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with emergency services.

34. In accordance with 49 C.F.R. 195, Keystone shall continue to evaluate and perform assessment activities regarding high consequence areas. Prior to Keystone commencing operation, all unusually sensitive areas as defined by 49 CFR 195.6 that may exist, whether currently marked on DOT's HCA maps or not, should be identified and added to the Emergency Response Plan and Integrity Management Plan. In its continuing assessment and evaluation of environmentally sensitive and high consequence areas, Keystone shall seek out and consider local knowledge, including the knowledge of the South Dakota Geological Survey, the Department of Game Fish and Parks and local landowners and governmental officials.

35. The evidence in the record demonstrates that in some reaches of the Project in southern Tripp County, the High Plains Aquifer is present at or very near ground surface and is overlain by highly permeable sands permitting the uninhibited infiltration of contaminants. This aquifer serves as the water source for several domestic farm wells near the pipeline as well as public water supply system wells located at some distance and upgradient from the pipeline route. Keystone shall identify the High Plains Aquifer area in southern Tripp County as a hydrologically sensitive area in its Integrity Management and Emergency Response Plans. Keystone shall similarly treat any other similarly vulnerable and beneficially useful surficial aquifers of which it becomes aware during construction and continuing route evaluation.

36. Prior to putting the Keystone Pipeline into operation, Keystone shall prepare, file with PHMSA and implement an emergency response plan as required under 49 CFR 194 and a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR 195.402. Keystone shall also prepare and implement a written integrity management program in the manner and at such time as required under 49 CFR 195.452. At such time as Keystone files its Emergency Response Plan and

Integrity Management Plan with PHMSA or any other state or federal agency, it shall also file such documents with the Commission. The Commission's confidential filing rules found at ARSD 20:10:01:41 may be invoked by Keystone with respect to such filings to the same extent as with all other filings at the Commission. If information is filed as "confidential," any person desiring access to such materials or the Staff or the Commission may invoke the procedures of ARSD 20:10:01:41 through 20:10:01:43 to determine whether such information is entitled to confidential treatment and what protective provisions are appropriate for limited release of information found to be entitled to confidential treatment.

37. To facilitate periodic pipeline leak surveys during operation of the facilities in wetland areas, a corridor centered on the pipeline and up to 15 feet wide shall be maintained in an herbaceous state. Trees within 15 feet of the pipeline greater than 15 feet in height may be selectively cut and removed from the permanent right-of-way.

38. To facilitate periodic pipeline leak surveys in riparian areas, a corridor centered on the pipeline and up to 10 feet wide shall be maintained in an herbaceous state.

V. Environmental

39. Except to the extent waived by the owner or lessee in writing or to the extent the noise levels already exceed such standard, the noise levels associated with Keystone's pump stations and other noise-producing facilities will not exceed the L10=55dba standard at the nearest occupied, existing residence, office, hotel/motel or non-industrial business not owned by Keystone. The point of measurement will be within 100 feet of the residence or business in the direction of the pump station or facility. Post-construction operational noise assessments will be completed by an independent third-party noise consultant, approved by the Commission, to show compliance with the noise level at each pump station or other noise-producing facility. The noise assessments will be performed in accordance with applicable American National Standards Institute standards. The results of the assessments will be filed with the Commission. In the event that the noise level exceeds the limit set forth in this condition at any pump station or other noise producing facility, Keystone shall promptly implement noise mitigation measures to bring the facility into compliance with the limits set forth in this condition and shall report to the Commission concerning the measures taken and the results of post-mitigation assessments demonstrating that the noise limits have been met.

40. At the request of any landowner or public water supply system that offers to provide the necessary access to Keystone over his/her property or easement(s) to perform the necessary work, Keystone shall replace at no cost to such landowner or public water supply system, any polyethylene water piping located within 500 feet of the Project with piping that is resistant to permeation by BTEX. Keystone shall not be required to replace that portion of any piping that passes through or under a basement wall or other wall of a home or other structure. At least forty-five (45) days prior to commencing construction, Keystone shall publish a notice in each newspaper of general circulation in each county through which the Project will be constructed advising landowners and public water supply systems of this condition.

41. Keystone shall follow all protection and mitigation efforts as identified by the US Fish and Wildlife Service ("USFWS") and SDGFP. Keystone shall identify all greater prairie chicken and greater sage and sharp-tailed grouse leks within the buffer distances from the construction right of way set forth for the species in the FEIS and Biological Assessment (BA) prepared by DOS and USFWS. In accordance with commitments in the FEIS and BA, Keystone shall avoid or restrict

construction activities as specified by USFWS within such buffer zones between March 1 and June 15 and for other species as specified by USFWS and SDGFP.

42. Keystone shall keep a record of drain tile system information throughout planning and construction, including pre-construction location of drain tiles. Location information shall be collected using a sub-meter accuracy global positioning system where available or, where not available by accurately documenting the pipeline station numbers of each exposed drain tile. Keystone shall maintain the drain tile location information and tile specifications and incorporate it into its Emergency Response and Integrity Management Plans where drains might be expected to serve as contaminant conduits in the event of a release. If drain tile relocation is necessary, the applicant shall work directly with landowner to determine proper location. The location of permanent drain tiles shall be noted on as-built maps. Qualified drain tile contractors shall be employed to repair drain tiles.

VI. Cultural and Paleontological Resources

43. In accordance with Application, Section 6.4, Keystone shall follow the "Unanticipated Discoveries Plan," as reviewed by the State Historical Preservation Office ("SHPO") and approved by the DOS and provide it to the Commission upon request. Ex TC-1.6.4, pp. 94-96; Ex S-3. If during construction, Keystone or its agents discover what may be an archaeological resource, cultural resource, historical resource or gravesite, Keystone or its contractors or agents shall immediately cease work at that portion of the site and notify the DOS, the affected landowner(s) and the SHPO. If the DOS and SHPO determine that a significant resource is present, Keystone shall develop a plan that is approved by the DOS and commenting/signatory parties to the Programmatic Agreement to salvage avoid or protect the archaeological resource. If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission and landowner approval for the new route before proceeding with any further construction. Keystone shall be responsible for any costs that the landowner is legally obligated to incur as a consequence of the disturbance of a protected cultural resource as a result of Keystone's construction or maintenance activities.

44. Keystone shall implement and comply with the following procedures regarding paleontological resources:

a) Prior to commencing construction, Keystone shall conduct a literature review and records search, and consult with the BLM and Museum of Geology at the S.D. School of Mines and Technology ("SDSMT") to identify known fossil sites along the pipeline route and identify locations of surface exposures of paleontologically sensitive rock formations using the BLM's Potential Fossil Yield Classification system. Any area where trenching will occur into the Hell Creek Formation shall be considered a high probability area.

b) Keystone shall at its expense conduct a pre-construction field survey of each area identified by such review and consultation as a known site or high probability area within the construction ROW. Following BLM guidelines as modified by the provisions of Condition 44, including the use of BLM permitted paleontologists, areas with exposures of high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5) rock formations shall be subject to a 100% pedestrian field survey, while areas with exposures of moderately sensitive rock formations (PFYC Class 3) shall be spot-checked for occurrences of scientifically or economically significant surface fossils and evidence of subsurface fossils. Scientifically or economically significant surface fossils shall be avoided by the Project or mitigated by collecting them if avoidance is not feasible. Following BLM guidelines for the assessment

and mitigation of paleontological resources, scientifically significant paleontological resources are defined as rare vertebrate fossils that are identifiable to taxon and element, and common vertebrate fossils that are identifiable to taxon and element and that have scientific research value; and scientifically noteworthy occurrences of invertebrate, plant and trace fossils. Fossil localities are defined as the geographic and stratigraphic locations at which fossils are found.

c) Following the completion of field surveys, Keystone shall prepare and file with the Commission a paleontological resource mitigation plan. The mitigation plan shall specify monitoring locations, and include BLM permitted monitors and proper employee and contractor training to identify any paleontological resources discovered during construction and the procedures to be followed following such discovery. Paleontological monitoring will take place in areas within the construction ROW that are underlain by rock formations with high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5), and in areas underlain by rock formations with moderate sensitivity (PFYC Class 3) where significant fossils were identified during field surveys.

d) If during construction, Keystone or its agents discover what may be a paleontological resource of economic significance, or of scientific significance, as defined in subparagraph (b) above, Keystone or its contractors or agents shall immediately cease work at that portion of the site and, if on private land, notify the affected landowner(s). Upon such a discovery, Keystone's paleontological monitor will evaluate whether the discovery is of economic significance, or of scientific significance as defined in subparagraph (b) above. If an economically or scientifically significant paleontological resource is discovered on state land, Keystone will notify SDSMT and if on federal land, Keystone will notify the BLM or other federal agency. In no case shall Keystone return any excavated fossils to the trench. If a qualified and BLM-permitted paleontologist, in consultation with the landowner, BLM, or SDSMT determines that an economically or scientifically significant paleontological resource is present, Keystone shall develop a plan that is reasonably acceptable to the landowner(s), BLM, or SDSMT, as applicable, to accommodate the salvage or avoidance of the paleontological resource to protect or mitigate damage to the resource. The responsibility for conducting such measures and paying the costs associated with such measures, whether on private, state or federal land, shall be borne by Keystone to the same extent that such responsibility and costs would be required to be borne by Keystone on BLM managed lands pursuant to BLM regulations and guidelines, including the BLM Guidelines for Assessment and Mitigation of Potential Impacts to Paleontological Resources, except to the extent factually inappropriate to the situation in the case of private land (e.g. museum curation costs would not be paid by Keystone in situations where possession of the recovered fossil(s) was turned over to the landowner as opposed to curation for the public). If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission approval for the new route before proceeding with any further construction. Keystone shall, upon discovery and salvage of paleontological resources either during pre-construction surveys or construction and monitoring on private land, return any fossils in its possession to the landowner of record of the land on which the fossil is found. If on state land, the fossils and all associated data and documentation will be transferred to the SDSMT; if on federal land, to the BLM.

e) To the extent that Keystone or its contractors or agents have control over access to such information, Keystone shall, and shall require its contractors and agents to, treat the locations of sensitive and valuable resources as confidential and limit public access to this information.

VII. Enforcement and Liability for Damage

45. Keystone shall repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility, including but not limited to, all fences, gates and utility, water supply, irrigation or drainage systems. Keystone shall compensate the owners for damages or losses that cannot be fully remedied by repair or replacement, such as lost productivity and crop and livestock losses or loss of value to a paleontological resource damaged by construction or other activities.

46. In the event that a person's well is contaminated as a result of construction or pipeline operation, Keystone shall pay all costs associated with finding and providing a permanent water supply that is at least of similar quality and quantity; and any other related damages, including but not limited to any consequences, medical or otherwise, related to water contamination.

47. Any damage that occurs as a result of soil disturbance on a persons' property shall be paid for by Keystone.

48. No person will be held responsible for a pipeline leak that occurs as a result of his/her normal farming practices over the top of or near the pipeline.

49. Keystone shall pay commercially reasonable costs and indemnify and hold the landowner harmless for any loss, damage, claim or action resulting from Keystone's use of the easement, including any resulting from any release of regulated substances or from abandonment of the facility, except to the extent such loss, damage claim or action results from the gross negligence or willful misconduct of the landowner or its agents.

50. The Commission's complaint process as set forth in ARSD 20:10:01 shall be available to landowners, other persons sustaining or threatened with damage or the consequences of Keystone's failure to abide by the conditions of this permit or otherwise having standing to obtain enforcement of the conditions of this Order and Permit.

Exhibit B

RULINGS ON PROPOSED FINDINGS OF FACT

Rulings on Applicants' Proposed Findings of Fact

As Applicant is the prevailing party, most of Applicant's Proposed Findings of Fact have been accepted in their general substance and incorporated in the Findings of Fact, with additions and modifications to reflect the Commission's understanding of the record.

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

) FINAL DECISION AND ORDER
) FINDING CERTIFICATION
) VALID AND ACCEPTING
) CERTIFICATION; NOTICE OF
) ENTRY
)

HP14-001

PROCEDURAL HISTORY

On September 15, 2014, TransCanada Keystone Pipeline, LP (Keystone, TransCanada, or Applicant) filed with the Commission a Certification signed by Corey Goulet on September 12, 2014, in Calgary, Alberta, Canada, and a Petition for Order Accepting Certification under SDCL § 49-41B-27 (Petition). Attached to the Petition were Appendix A, Project Overview Map, Appendix B, Quarterly Report for the Quarter Ending 6/30/14, and Appendix C, Tracking Table of Changes, including Attachment A, Redlined Construction, Mitigation, and Reclamation Plan, and Attachment B, Preliminary Site-Specific Crossing Plans. The Commission opened Docket HP14-001 for consideration of the Certification and Petition.¹ The purpose of these filings was to provide the Commission with Keystone's certified statement that such facility continues to meet the conditions upon which the permit was issued and to otherwise verify that Keystone continues to meet the 50 conditions imposed in the Amended Final Decision and Order; Notice of Entry issued by the Commission on June 29, 2010, in Docket HP09-001 (Amended Final Decision) granting a permit to Keystone to construct the Keystone XL Pipeline (Project).² Since more than four years have elapsed since the Commission's issuance of the Amended Decision granting the permit to construct, Keystone now seeks an order from the Commission accepting Keystone's certification pursuant to SDCL 49-41B-27.

On September 18, 2014, the Commission electronically transmitted notice of the certification filing and the intervention deadline of October 15, 2014, to interested individuals and entities on the Commission's PUC Weekly Filings electronic listserv, and on October 1, 2014, the Commission issued an Order Assessing Filing Fee. Forty-three individuals and entities sought to intervene as parties by submitting applications between September 30 and October 17, 2014. On November 4, 2014, the Commission entered an Order Granting Intervention and Party Status to the following forty-two persons: John Harter, Rosebud Sioux Tribe-Tribal Utility Commission, Elizabeth Lone Eagle, Paul F. Seamans, Viola Waln, Cindy Myers, RN, Bold Nebraska, Diana L. Steskal, Cheryl Frisch, Terry Frisch, Standing Rock Sioux Indian Tribe, Byron T. Steskal, Arthur R. Tanderup, Lewis GrassRope, Carolyn P. Smith, Robert G. Allpress, Jeff Jensen, Amy Schaffer, Louis T. Genung, Nancy Hilding, Gary F. Dorr, Bruce Boettcher, Rosebud Sioux Tribe, Wrexie Lainson Bardaglio, South Dakota Wildlife Federation, Cheyenne River Sioux Tribe, Jerry D. Jones, Cody Jones, Debbie J. Trapp, Gena M. Parkhurst,

¹ The Commission's Orders in the case and all other filings and documents in the record are available on the Commission's web page for Docket HP14-001 at:
<http://puc.sd.gov/Dockets/HydrocarbonPipeline/2014/hp14-001.aspx>

² The Commission's Orders in the case and all other filings and documents in the record are available on the Commission's web page for Docket HP09-001 at:
<http://puc.sd.gov/Dockets/HydrocarbonPipeline/2009/hp09-001.aspx>

Sierra Club, Joyce Braun, 350.org, Yankton Sioux Tribe, Dakota Rural Action (DRA), Chastity Jewett, Indigenous Environmental Network, Dallas Goldtooth, RoxAnn Boeltcher, Bonny Kilmurry, Ronald Fees, and Intertribal Council on Utility Policy (collectively, Intervenor). On March 4, 2015, the Commission issued an Order Granting Request to Withdraw Party Status allowing the South Dakota Wildlife Federation and the Sierra Club to withdraw as parties, and on April 21, 2015, the Commission issued an Order Granting Request to Withdraw Party Status allowing Jeff Jensen to withdraw as a party.

On October 30, 2014, Keystone filed Keystone's Motion to Define the Scope of Discovery under SDCL §49-41B-27 (Motion to Define Scope). On November 4, 2014, the Commission issued a Prehearing Scheduling Conference Order setting a telephonic scheduling conference to be conducted by General Counsel John Smith on November 13, 2014. On November 5, 2014, the Commission issued an Order for and Notice of Motion Hearing setting the Motion to Define Scope for hearing on November 25, 2014. The prehearing scheduling conference was held as scheduled on November 13, 2014. On November 14, 2014, a number of motions for extension of time to respond to the Motion to Define Scope were filed by Intervenor. Keystone did not object to the extension. On November 14, 2014, the Commission issued an Order Changing Motion Hearing Date and Order for and Notice of Scheduling Hearing setting the Motion to Define Scope and to establish a procedural schedule for hearing on December 9, 2014. Responses to the Motion to Define Scope and setting forth procedural schedule recommendations were filed by the Commission's staff (Staff) and many of the Intervenor. After hearing from the parties regarding the Motion to Define Scope and the procedural schedule, on December 17, 2014, the Commission issued an Order Granting Motion to Define Issues and Setting Procedural Schedule. In this order, the Commission decided that the scope of discovery would be limited to any matter relevant to: (1) whether the Project continues to meet the 50 conditions in Exhibit A to the Amended Final Decision; and (2) the changes in the Findings of Fact identified in the Tracking Table of Changes attached to Keystone's Certification Petition as Appendix C. The Commission also established the following deadlines: January 6, 2015, for serving initial discovery; February 6, 2015, for responding to initial discovery; February 20, 2015, for a second round of discovery; March 10, 2015, for responding to the second round of discovery; April 2, 2015, for submitting pre-filed direct testimony; April 23, 2015, for submitting pre-filed rebuttal testimony; and May 5-8, 2015, for an evidentiary hearing.

On December 2, 2014, Yankton Sioux Tribe (Yankton) filed Yankton Sioux Tribe's Motion to Dismiss, and on December 29, 2014, Rosebud Sioux Tribe (Rosebud) filed Rosebud Sioux Tribe's Motion to Dismiss and Request for Oral Argument. The motions contended that the Certification Petition on its face established that the Project was a different project than the one permitted in the Amended Final Decision in Docket HP09-001 and that Keystone could therefore not prove that it could continue to meet the conditions on which the permit was issued. A number of Intervenor filed motions to join in Yankton Sioux Tribe's Motion to Dismiss. On December 29, 2014, Keystone filed Applicant's Opposition to Yankton Sioux Tribe's Motion to Dismiss, and Staff filed Commission Staff's Response to Yankton Sioux Tribe's Motion to Dismiss. On January 2, 2015, Yankton Sioux Tribe filed Yankton Sioux Tribe's Reply in Support of its Motion to Dismiss. After hearing from the parties at the hearing on the motions to join and dismiss on January 6, 2015, on January 8, 2015, the Commission issued an Order Granting Motions to Join and Denying Motions to Dismiss which granted the Intervenor's motions to join and to consider Rosebud's motion to dismiss together with Yankton's but denied the motions to dismiss.

On March 17, 2015, Staff filed a Motion to Amend Procedural Schedule to add to the procedural schedule a deadline by which parties must file a witness list and an exhibit list. On April 2, 2015, the Commission issued an Order Amending Procedural Schedule (Witness and Exhibit Lists) requiring that witness lists and exhibit lists must be filed and served by all parties no later than 5:00 p.m. CDT, on April 21, 2015. On March 25, 2015, Rosebud Sioux Tribe filed a Motion to Amend Order Setting Procedural Schedule requesting that the Commission amend the procedural schedule in the Order Setting Procedural Schedule to delay the date set for pre-filed testimony. The Commission heard Rosebud's motion to amend on March 31, 2015, and on April 3 issued an Order Granting in Part Motion to Amend Procedural Schedule extending the date for the filing of pre-filed rebuttal testimony to April 27, 2015, and allowing testimony regarding new information acquired as a result of any motion to compel granted by the Commission to be included in rebuttal testimony. On April 8, 2014, Rosebud Sioux Tribe filed Rosebud Sioux Tribe's Motion for Reconsideration. After hearing the Motion to Reconsider on April 9, 2015, on April 10 the Commission issued an Order Granting Motion to Reconsider and Amending In Part Procedural Schedule which granted reconsideration with respect to expert testimony, extended the deadline for Rosebud's pre-filed testimony for its expert witnesses to April 24, 2015, except to the extent it qualifies for later filing on April 27, 2015, pursuant to the Amended Scheduling Order, and extended the deadline for Keystone to file its rebuttal testimony with respect to the pre-filed testimony of Rosebud's expert witnesses to May 5, 2015. On March 27, 2015, Standing Rock Sioux Tribe (Standing Rock) filed a Motion to Amend Order Setting Procedural requesting that the Commission amend the procedural schedule to delay the dates set for close of discovery, pre-filed testimony, rebuttal testimony, filing of exhibits, and the evidentiary hearing. The Commission heard Standing Rock's motion to amend on March 31, 2015, and on April 2 issued an Order Denying Motion to Amend Order Setting Procedural Schedule as requested by Standing Rock.

The Commission decided a number of discovery-related motions. Dakota Rural Action, Standing Rock Sioux Tribe, Yankton Sioux Tribe, Gary Dorr, and Rosebud Sioux Tribe filed motions to compel discovery against Keystone and Staff. The Commission entered orders dated April 17, 2015, granting in part and denying in part the motions filed by Dakota Rural Action, Standing Rock Sioux Tribe, and Yankton Sioux Tribe, and compelling Keystone to answer certain discovery requests by April 17, 2015. The Commission denied the motions filed by Gary Dorr and Rosebud Sioux Tribe by orders dated April 22, 2015, and April 23, 2015.

On March 23, 2015, Keystone filed a Motion to Preclude Certain Intervenor (John Harter, BOLD Nebraska, Carolyn Smith, Gary Dorr, and Yankton Sioux Tribe) from Offering Evidence or Witnesses at Hearing (Motion to Preclude). On March 25, 2015, Keystone filed an Amended Motion to Preclude Certain Intervenor from Offering Evidence or Witnesses at Hearing and to Compel Discovery requesting: (1) that certain intervenors be precluded from offering any evidence or witnesses at the hearing based on their complete failure to respond to Keystone's discovery requests (Rosebud Sioux Tribe-Tribal Utility Commission, Viola Waln, Cheryl & Terry Frisch, Louis Grass Rope, Robert Allpress, Jeff Jensen, Louis Genung, Jerry Jones, Debbie Tripp, Gina Parkhurst, Joye Braun, 350.org, Chastity Jewett, Dallas Goldtooth, and Ronald Fees); and (2) that certain Intervenor (John Harter, BOLD Nebraska, Carolyn Smith, Gary Dorr, and Yankton Sioux Tribe) be prohibited from offering evidence or witnesses at the hearing because of their failure to respond fully to Keystone's discovery requests. On April 17, 2015, the Commission issued an Order Granting in Part Keystone's Motion for Discovery Sanctions precluding the seventeen intervenors who did not respond at all to Keystone's requests for discovery from presenting evidence or witnesses at the evidentiary hearing, precluding John Harter, BOLD Nebraska, and Carolyn Smith from presenting evidence or witnesses at the evidentiary hearing for not sufficiently responding to Keystone's discovery

requests, but not precluding Yankton Sioux Tribe and Gary Dorr from presenting evidence or witnesses at the evidentiary hearing.

On April 2, 2015, Dakota Rural Action filed a Statement and Objections on behalf of Dakota Rural Action with respect to Submission of Written Testimony arguing that the Commission's pre-filed testimony rule, ARSD 20:10:01:06, violates SDCL 15-6-43(a) and 49-1-11. Several Intervenor filed statements in support of DRA's Statement and Objections. In Staff's Brief in Response to Motion to Preclude Witnesses from Offering Testimony Who Did Not File Pre-Filed Testimony filed on April 10, 2015, Staff pointed out that pre-filed testimony does not become evidence in the case unless and until it is received in evidence as an exhibit upon proper foundation by a live witness or stipulation and that ARSD 20:10:01:06 is not therefore violative of SDCL 15-6-43(a). In complex contested case proceedings, it is normal practice for the Commission to require pre-filed testimony as part of the discovery and hearing preparation process, and no court has ever ruled that such requirement is unlawful.

On April 6, 2015, Keystone filed Keystone's Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefile Testimony asking that the Commission preclude testimony from any witness who did not pre-file testimony as required by the Commission's procedural order. Responses to this motion were filed by Staff and numerous Intervenor. On April 23, 2015, the Commission issued an Order Granting Motion to Preclude Witnesses from Testifying at Hearing Who Did Not File Prefiled Testimony, precluding persons for whom pre-filed testimony was not filed from testifying at the hearing, subject to the condition that pre-filed rebuttal testimony would be allowed to be filed by all parties until the April 27, 2015, deadline, including testimony and exhibits addressing information obtained as a result of any order to compel discovery granted by the Commission.

On April 7, 2015, the Commission received Dakota Rural Action's, Rosebud Sioux Tribe's, Cheyenne River Sioux Tribe's and Indigenous Environmental Network's Joint Motion for Appointment of Special Master to oversee the discovery process in this docket (Special Master Motion). Responses in opposition to the Special Master Motion were filed by Staff and Keystone on April 8 and April 9, 2015, respectively. On April 22, 2015, the Commission issued an Order Denying Motion for Special Master, finding that the Commission has sufficient resources and is competent to hear and act on the discovery issues presented in this proceeding.

On April 7, 2015, the Commission received Dakota Rural Action's, Rosebud Sioux Tribe's, Standing Rock Sioux Tribe's, Cheyenne River Sioux Tribe's and Indigenous Environmental Network's Joint Motion for Stay of Proceedings (Motion for Stay) requesting a stay pending the Presidential Permit decision and the conclusion of the investigation initiated by the Canadian National Energy Board regarding allegations of pipeline safety violations. Keystone and Staff filed responses in opposition to the Motion for Stay on April 9 and 10, 2015, respectively. On April 22, 2015, the Commission issued an Order Denying Motion for Stay.

At a motion hearing on April 14, 2015, the Commission considered a number of discovery related motions filed by Keystone and a number of Intervenor. In response to objections raised by Keystone based on the confidential nature of many documents requested by intervenor parties, on April 17, 2015, the Commission issued a Protective Order imposing protective provisions on parties' discovery of materials deemed confidential, subject to the provisions of ARSD 20:10:01:40 through 20:10:01:44. On April 24, 2015, Dakota Rural Action, Rosebud Sioux Tribe, Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe (Cheyenne River), Yankton Sioux Tribe, Indigenous Environmental Network, and BOLD Nebraska filed a Joint Motion to Vacate or, in the Alternative, to Clarify or Amend Protective Order. On April 27,

2015, Keystone filed Applicant's Opposition to Joint Motion to Vacate or Amend the Protective Order arguing that Keystone had in fact allowed intervenors to provide access to confidential materials to co-counsel and experts. On April 28, 2015, Staff filed Staff's Brief in Response to Joint Motion to Vacate or, in the Alternative, to Clarify or Amend Protective Order. In response to intervenors' motion, on May 13, 2015, the Commission issued an Amended Protective Order authorizing disclosure of confidential information to co-counsel, professional staff, and experts, in addition to attorneys of record, provided that notice of such disclosure is provided by the disclosing party and the persons receiving the information sign the non-disclosure agreement.

On April 24, 2015, Dakota Rural Action, Rosebud Sioux Tribe, Yankton Sioux Tribe, BOLD Nebraska, Cheyenne River Sioux Tribe, and Standing Rock Sioux Tribe filed a Joint Motion for Continuance and Relief from Scheduling Order requesting a later date for the evidentiary hearing to allow additional time for consideration of discovery documents and preparation for hearing. Indigenous Environmental Network joined the motion on April 27, 2015. On April 24, 2015, the Commission received Keystone's Opposition to Joint Motion for Continuance. On April 27, 2015, the Commission issued an Order Granting Joint Motion for Continuance and Relief from Scheduling Order in which the Commission granted the Joint Motion for Continuance and instructed Staff to propose a revised schedule at the next regularly scheduled Commission meeting. On May 5, 2015, the Commission issued an Order Amending Procedural Schedule establishing the following deadlines and dates: (1) substantive motions filed by May 26, 2015; (2) responses to substantive motions filed by June 2, 2015; (3) hearing on substantive motions on June 11, 2015; (4) rebuttal testimony filed by June 26, 2015; (5) witness and exhibit lists filed by July 7, 2015; (6) motions *in limine* filed by July 10, 2015; (7) responses to motions *in limine* filed by July 17, 2015; (8) motion hearing on motions *in limine* on July 21, 2015; and (9) an evidentiary hearing from July 27-31, and continuing August 3-4, 2015.

On April 27, 2015, the Commission received Standing Rock, Cheyenne River, Rosebud Sioux, and Yankton Sioux Tribes, Dakota Rural Action, Indigenous Environmental Network, Intertribal COUP and BOLD Nebraska Motion to Exclude Evidence and Testimony by TransCanada seeking to preclude Keystone from offering testimony or witnesses at the hearing based on its alleged failure to comply with discovery. On May 1, 2015, Intervenor Gary Dorr filed Gary Dorr's Motion to Join Joint Motion by Standing Rock, Cheyenne River, Rosebud, and Yankton Sioux Tribes, Dakota Rural Action, Indigenous Environmental Network, Intertribal COUP, and BOLD Nebraska to Exclude Evidence and Testimony by TransCanada. On April 27, 2015, Keystone filed Keystone's Opposition to Joint Motion to Exclude Evidence and Testimony. On May 18, 2015, Staff filed Staff's Brief in Response to Joint Motion to Exclude Evidence and Testimony. On May 19, 2015, Keystone filed Keystone's Supplemental Opposition to Joint Motion to Exclude Testimony and Evidence. Finding that TransCanada had produced a very large volume of documents in response to intervenor discovery requests and the Commission's Orders to Compel and that movants had not demonstrated that TransCanada had acted in bad faith or with willfulness or fault, on May 28, 2015, the Commission issued an Order Granting Motion to Join and Denying Joint Motion to Exclude Evidence and Testimony by TransCanada, granting Gary Dorr's motion to join and denying the joint motion to exclude.

On April 27, 2015, Intertribal Council on Utility Policy (COUP) filed a Notice of Request for a Time Certain for an Expert Rebuttal Witness for the Intertribal Council on Utility Policy asking for a time certain for testimony of three of its experts, namely Dr. James Hansen, Dr. George Seielstad, and Dr. Robert Oglesby. On April 27, 2015, Keystone filed Keystone's Objection to Coup's Request for a Time Certain and Motion to Preclude Witnesses. Keystone opposed Intertribal COUP's motion on the grounds that Intertribal COUP had not submitted pre-filed testimony for these experts and their proposed testimony was not rebuttal testimony. On

May 18, 2015, Intertribal COUP filed Intertribal COUP's Response to Keystone's Objection to COUP's Request for a Time Certain and Motion to Preclude Witnesses. On May 18, 2015, Staff filed Staff's Brief in Response to Keystone's Objection to COUP's Request for a Time Certain and Motion to Preclude Witness. In its brief, Staff argued that denial of a time certain and preclusion were appropriate, but for the reasons that the hearing dates have changed so the time certain is no longer at issue and that the testimony of Intertribal COUP's three witnesses is not relevant to the issues before the Commission in this proceeding. On May 19, 2015, Intertribal COUP filed Intertribal COUP's Amended Response to Keystone's Objection to COUP's Request for a Time Certain and Motion to Preclude Witnesses. On May 28, 2015, the Commission issued an Order Granting TransCanada's Motion to Preclude Witnesses on the grounds that the testimony of COUP's proposed witnesses was beyond the scope of the certification proceeding and took no action on COUP's Request for a Time Certain for an Expert Witness, finding that such issue was moot given the Commission's April 27, 2015 Order Granting Joint Motion for Continuance and Relief from Scheduling Order.

On May 26, 2015, the Commission received Yankton Sioux Tribe's and Indigenous Environmental Network's Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact seeking to have certain findings of fact contained in the Amended Final Decision amended. Alternatively, the motion asked that the Commission amend Findings of Fact numbers 113 and 114. On May 26, 2015, Staff filed Staff's Brief in Response to Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact. On June 2, 2015, DRA filed Dakota Rural Action's Joinder of Yankton Sioux Tribe's Motion to Preclude Improper Relief. On June 2, 2015, Keystone filed Keystone's Opposition to Joint Motion to Preclude Improper Relief. On June 6, 2015, the Commission received Yankton Sioux Tribe's And Indigenous Environmental Network's Reply in Support of Motion to Preclude Improper Relief or, in the Alternative, to Amend Findings of Fact. Finding that TransCanada did not seek to amend the Findings of Fact in the Amended Final Decision and that there exists no legal authority for the Commission to amend the Amended Final Decision at this time, on June 15, 2015, the Commission issued an Order Denying Yankton Sioux Tribe's and Indigenous Environmental Network's Motion to Preclude Improper Relief or, In the Alternative, to Amend Findings Of Fact.

On May 26, 2015, Keystone filed Keystone's Motion to Exclude Testimony of Richard Kuprewicz requesting that the Commission exclude all of Kuprewicz's testimony except for his opinion on pages 2-3 of Exhibit 9 that the Project will not pose a substantial risk to the Rosebud Sioux Tribe's water supply. On June 2, 2015, Staff filed a Corrected Staff's Brief in Response to Applicant's Motion to Exclude Testimony of Richard Kuprewicz. On June 2, 2015, the Commission received Rosebud Sioux Tribe's Response to Keystone's Motion to Exclude Testimony of Richard Kuprewicz. On June 2, 2015, DRA filed Dakota Rural Action's Joinder of Rosebud Sioux Tribe's Response to TransCanada's Motion to Exclude Testimony of Richard Kuprewicz, and Cheyenne River Sioux Tribe filed Cheyenne River Sioux Tribe's Response to Keystone's Motion to Exclude the Testimony of Richard Kuprewicz. On June 10, 2015, the Commission received Rosebud Sioux Tribe's Supplemental Response to Motion to Exclude Testimony of Richard Kuprewicz. On June 8, 2015, Keystone filed Applicant's Reply in Support of Motion to Limit Testimony of Richard Kuprewicz. On June 15, 2015 the Commission issued an Order Granting in Part and Denying in Part Keystone's Motion to Exclude Testimony of Richard Kuprewicz, in which the Commission ordered the exclusion of that portion of the testimony dealing with re-routing the Project as beyond the Commission's jurisdiction pursuant to SDCL 49-41B-36 and denying the motion with respect to the rest of Mr. Kuprewicz's testimony.

On May 26, 2015, Keystone filed a Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements, on the grounds that Keystone has already entered into easement agreements for such crossings from the U.S. Bureau of Reclamation and the affected landowners. On June 2, 2015, Intervenor Gary Dorr filed Gary Dorr's Response to Motion by TransCanada to Preclude Testimony Regarding Mni Wiconi Pipeline Easements. On June 9, 2015, Keystone filed a Reply Brief in Support of TransCanada's Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements and up-dated supporting documentation. On June 15, 2015, the Commission issued an Order Granting Motion to Preclude Testimony Regarding Mni Wiconi Pipeline Easements, finding that tribal consent to the proposed Keystone XL Pipeline's crossing of the Mni Wiconi pipeline(s) is not relevant to this proceeding, because the Commission does not have jurisdiction over property rights.

On May 26, 2015, Keystone filed Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights as beyond the Commission's jurisdiction and the scope of this proceeding. On June 2, 2015, the Commission received Standing Rock Sioux Tribe Opposition to Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights, Yankton Sioux Tribe's Response to Applicant's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights, and Cheyenne River Sioux Tribe's Response to Keystone's Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights. On June 8, 2015, Keystone filed Applicant's Reply Brief - Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights. Finding that the Commission does not have jurisdiction over aboriginal title or usufructuary rights, on June 15, 2015, the Commission issued an Order Granting Motion to Preclude Consideration of Aboriginal Title or Usufructuary Rights.

On or before July 7, 2015, exhibit and/or witness lists were filed by Keystone, Staff, and Intervenor Cindy Myers, Cheyenne River Sioux Tribe, Dakota Rural Action, Standing Rock Sioux Tribe, Yankton Sioux Tribe, Chastity Jewett, and Rosebud Sioux Tribe.

On July 9, 2015, Staff filed a Motion for Judicial Notice requesting that the Commission take judicial notice of: the evidentiary record in Docket No. HP09-001; the Department of State's Final Environmental Impact Statement involving the Project; the Final Supplemental Environmental Impact Statement; and SDCL Chapter 49-41B in its entirety. On July 22, 2015, the Commission issued an Order Granting Judicial Notice of these documents.

On July 10, 2015, the Rosebud Sioux Tribe filed Rosebud Sioux Tribe's Motion *in Limine* asking that certain rebuttal testimony filed by Keystone in response to Rosebud's expert witnesses Richard Kuprewicz, Ian Goodman, and Brigid Rowan be excluded because it had elected not to call these persons as witnesses. At the hearing on the motion on July 21, 2015, Keystone and Rosebud agreed that the issue was moot because Kuprewicz, Goodman, and Rowan would not be called as witnesses at the hearing. On July 22, 2015, the Commission accordingly issued an Order Denying Rosebud Sioux Tribe's Motion to Exclude Testimony.

On July 10, 2015, Staff filed a Motion for Time Certain for Witness Testimony requesting that August 3, 2015, or such time as necessary on such date be set aside for the testimony of at least one of Staff's witnesses, Dan Flo, and witnesses for Standing Rock Sioux Tribe who will be traveling some distance from out of town. On July 22, 2015, the Commission issued an Order Granting Motion for Time Certain for Witness Testimony. On July 16, Diana Steskal filed a request for time certain for her testimony on either July 29 or 30, 2015. On July 22, 2015, the Commission issued an Order Granting Motion for Time Certain for Witness Testimony as requested by Ms. Steskal.

On July 10, 2015, Keystone filed the following motions *in limine*: (1) to strike the proposed testimony of Linda Black Elk, consisting of an article on Native American plants; (2) to strike Paula Antoine's rebuttal testimony; (3) to exclude the testimony of Kevin E. Cahill, Ph.D.; (4) to restrict the testimony of Leonard Crow Dog; (5) to preclude the testimony of Dr. Hansen and Dr. Oglesby; (6) to restrict the testimony of Faith Spotted Eagle and an unnamed member of the Yankton Sioux Tribe Business and Claims Committee; (7) to preclude the testimony of Chris Sauncosi; (8) to preclude the rebuttal testimony of Jennifer Galindo and Waste Win Young; and (9) to preclude the rebuttal testimony of Ian Goodman and Brigid Rowan. Staff and intervenors filed responses. With respect to these motions, the Commission by separate orders dated July 22, 2015, granted the motions concerning Linda Black Elk, Kevin Cahill, Leonard Crow Dog, Dr. Hansen and Dr. Oglesby, Faith Spotted Eagle and an unnamed member of the Business and Claims Committee, Chris Sauncosi, and Jennifer Galindo and Waste Win Young. The Commission granted in part the motion to strike Paula Antoine's testimony as it related to the Spirit Camp located in Tripp County, but otherwise denied the motion in its July 22, 2015 Order Granting in Part and Denying in Part Motion *in Limine* to Strike Paula Antoine's Rebuttal Testimony. Also on July 22, 2015, the Commission issued an Order Denying Motion *in Limine* to Preclude Rebuttal Testimony of Ian Goodman and Brigid Rowan finding the issue to be moot.

On July 24, 2015, Standing Rock Sioux Tribe filed motions for reconsideration of the orders excluding the testimony of Kevin E. Cahill and Jennifer Galindo and Waste Win Young. On August 31, 2015, the Commission issued an Order Denying Motion for Reconsideration of Order Granting Motion *in Limine* to Preclude Rebuttal Testimony of Jennifer Galindo and Waste Win Young. On September 1, 2015, the Commission issued an Order Granting in Part Motion for Reconsideration of Order Granting Motion to Exclude Testimony of Kevin E. Cahill, Ph.D. allowing that part of Cahill's testimony responsive to the testimony of Staff witness Brian Walsh.

On July 10, 2015, Keystone filed Keystone's Protective Motion *in Limine* Regarding Dakota Rural Action's Exhibit List Dated July 7, 2015, seeking to preclude those documents or portions of documents on DRA's Exhibit List that were not timely disclosed to Keystone in DRA's responses to Keystone's discovery requests. After considering Keystone's motion at an ad hoc meeting, on July 17, 2015, the Commission issued an Order Granting in Part and Denying in Part Motion *in Limine* (DRA Exhibits) precluding exhibits 29-37, 39-65, 67-128, 397-409, 1058-1062, and 1063-1073. On July 21, 2015, DRA filed Dakota Rural Action's Motion and Memorandum for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits. On July 23, 2015, the Commission issued an Order Granting in Part Motion for Reconsideration of Partial Granting of Motion *in Limine* to Exclude Exhibits, allowing exhibits 29-37, 39-65, and 1058-1062 to be offered in evidence.

On July 10, 2015, Yankton Sioux Tribe, Cheyenne River Sioux Tribe, BOLD Nebraska, Rosebud Sioux Tribe, Indigenous Environmental Network, and Dakota Rural Action filed a Joint Motion *in Limine* to Exclude Evidence Pertaining to Keystone's Proposed Changes to Findings of Fact requesting that Keystone be prohibited from submitting any evidence related to changes in facts as reflected in the Tracking Table of Changes attached as Appendix C to its Certification Petition. On July 17, 2015, Keystone filed Applicant's Response to Joint Motion *in Limine* arguing that the Tracking Table of Changes is merely a reference to minor changes in facts that have occurred since the issuance of the Amended Final Decision in 2010. Finding that the testimony at issue is relevant to the proceeding and that amending the findings of fact in Docket HP09-001 is not requested, on July 23, 2015, the Commission issued an Order Denying Joint Motion *in Limine* to Exclude Evidence Pertaining to Keystone's Proposed Changes to Findings of Fact.

On July 10, 2015, Keystone filed Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing (Procedural Motion) requesting that the Commission issue several directives to expedite the evidentiary hearing and ensure that it operates efficiently given the number of parties and witnesses involved, namely: (1) limiting intervenors with a common interest to one lawyer conducting cross-examination; (2) requiring written rather than oral opening statements; (3) precluding friendly cross examination; (4) limiting cross-examination to counsel if a party was represented by counsel; (5) limiting cross examination to the scope of direct examination; and (6) precluding argument on evidentiary objections unless requested by the Hearing Examiner. Responses to the Procedural Motion were filed by Staff and several intervenors. On July 22, 2015, the Commission issued Order Denying in Part and Granting in Part Applicant's Motion Concerning Procedural Issues at the Evidentiary Hearing denying all of Keystone's requests except for limiting cross examination to the scope of direct examination and matters affecting the credibility of a witness and limiting cross-examination to counsel if a party was represented by counsel.

On July 6, 2015, a public input hearing was held before the Commission beginning at 5:30 p.m. in Room 414 of the State Capitol Building. The Commission heard public comment from 52 persons. The Commission also received written comments from a number of persons, which are included in the docket.

An evidentiary hearing was held beginning on Monday, July 27, 2015, in Room 414 of the State Capitol Building. On July 30, 2015, the Commission issued a Notice of Additional Hearing dates extending the hearing to include Saturday, August 1, 2015, and then continuing from August 3-5 and 6-7, 2015, if necessary. The hearing concluded near the end of the business day on August 5, 2015. The evidentiary hearing was conducted by Commission General Counsel John J. Smith, who acted as Hearing Examiner. Commissioners Chris Nelson and Gary Hanson attended the hearing in person. Due to medical treatment, Commissioner Kristie Fiegen elected to participate by reviewing the hearing transcript as allowed under SDCL § 1-26-24, TR 48-50.³ On October 5, 2015, Commissioner Fiegen filed a Certification attesting to the fact that she had read the entirety of the hearing transcripts.

At the conclusion of the hearing, the Commission established a briefing schedule. TR 2502-2503. On August 12, 2015, the Commission issued an Order Establishing Post-Hearing Briefing Schedule in conformity with the action taken at the hearing with simultaneous initial post-hearing briefs due October 1, 2015, and simultaneous reply briefs due October 31, 2015, with reply briefs limited to parties who submitted initial briefs.

At the evidentiary hearing, non-attorney Intervenor Cindy Myers testified on her own behalf. Keystone objected to much of Ms. Myers's testimony and exhibits; however, in the interest of time, it was agreed at the hearing that Keystone would submit its objections in writing to be ruled on at a later date. On September 21, 2015, Keystone filed Applicant's Motion to Strike Testimony and Exhibits of Cindy Myers requesting that the Commission issue an order striking certain portions of Intervenor Cindy Myers's hearing testimony and exhibits. The motion was heard on October 29, 2015. During the discussion on the motion, the following clarifications were made involving Keystone's references to specific items identified in the motion: 1) TransCanada's request to strike transcript testimony 1659:6-1660:13 should be 1659:6-

³ References to the June 10-11, 2014, Hearing Transcript are in the format "TR" followed by the Hearing Transcript page number(s) referenced, and references to Hearing Exhibits are in the format Ex followed by the exhibit number and, where applicable, the page number(s) referenced or other identifying reference and, where applicable, the appendix, attachment or sub-exhibit identifier and page number(s) referenced.

1660:15; 2) TransCanada's request to strike the first paragraph under "Aquifers" applies to the entire paragraph; the request to strike the second paragraph under "Aquifers" excludes the first sentence of the second paragraph; 3) the request to strike the third paragraph under "Aquifers" refers to the entire paragraph; and 4) the request to strike the third paragraph under "Waterways" should be the second paragraph. Chairman Chris Nelson moved to grant TransCanada's Motion to Strike, subject to the clarifications made during the hearing. Commissioner Gary Hanson moved to amend the motion to exclude Exhibit 6001 from the Motion to Strike, which motion failed. The Commission then voted unanimously to grant Keystone's motion subject to the clarifications made at the hearing. On November 4, 2015, Commissioner Hanson filed a request for reconsideration of the Commission action taken on October 29, 2015, in order to separately address Exhibit 6001. On November 6, 2015, the Commission issued an Order Granting Keystone's Motion to Strike Testimony and Exhibits of Cindy Myers. In response to Commissioner Hanson's request for reconsideration, on November 19, 2015, the Commission issued an Order Granting Reconsideration of Order Granting Keystone's Motion to Strike Testimony and Exhibits of Cindy Myers in which the Commission bifurcated the Motion to Strike in order to consider Exhibit 6001 separately. With Commissioner Hanson dissenting, a majority of the Commission voted to exclude Exhibit 6001. The Commission then voted unanimously to exclude the remaining testimony and exhibits addressed in the October 29 Commission action.

On November 4, 2015, Yankton Sioux Tribe, Rosebud Sioux Tribe, Cheyenne River Sioux Tribe, Standing Rock Sioux Tribe, Indigenous Environmental Network, Dakota Rural Action, Intertribal Council on Utility Policy, and BOLD Nebraska submitted a Joint Motion to Strike Proposed Findings of Fact and Conclusions of Law requesting that the Commission strike Keystone's Proposed Findings of Fact and Conclusions of law submitted as an attachment to Applicant's Post-Hearing Brief on the grounds that ARSD 20:10:01:25 states that "[i]f requested by the commission, the parties shall file proposed findings of fact." Finding that nothing in the statutes or rules precludes a party from filing proposed findings of fact and conclusions of law, on November 18, 2015, the Commission issued an Order Denying Joint Motion to Strike Proposed Findings of Fact and Conclusions of Law.

On November 9, 2015, John H. Harter, Elizabeth Lone Eagle, Paul F. Seamans, Cindy Myers, Diana L. Steskal, Byron T. Steskal, Arthur R. Tanderup, Lewis GrassRope, Carolyn P. Smith, Nancy Hilding, Gary F. Dorr, Wrexie L. Bardaglio, Joye Braun, Chastity Jewett, Dallas Goldtooth, Bonny J. Kilmurry, Viola Waln, Louis T. Genung, Terry Frisch, Cheryl Frisch, Dakota Rural Action, Indigenous Environmental Network, Intertribal Council on Utility Policy, BOLD Nebraska, Rosebud Sioux Tribe, Yankton Sioux Tribe, Cheyenne River Sioux Tribe, and Standing Rock Sioux Tribe filed Intervenor's Joint Motion to Dismiss requesting that the Commission enter an order (a) dismissing the petition for certification filed by TransCanada Keystone Pipeline, LP, and (b) revoking the permit for construction of the proposed Keystone XL Pipeline through South Dakota which was granted by the Commission on June 29, 2010, in the Amended Final Decision. On December 29, 2015, the Commission issued an Order Denying Motion to Dismiss denying both of these requests.

On December 9, 2015, Yankton Sioux Tribe filed Yankton Sioux Tribe's Proposed Findings of Fact and Conclusions of Law and Objections to Applicant's Proposed Findings of Fact and Conclusions of Law. On December 21, 2015, Keystone filed Applicant's Objections to Yankton Sioux Tribe's Proposed Findings of Fact and Conclusions of Law.

On December 18, 2015, the Commission received Dakota Rural Action's Motion to Supplement Administrative Record. In its motion, DRA asks the Commission to take

administrative notice of a Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order filed by the United States Pipeline and Hazardous Materials Safety Administration (PHMSA) on November 20, 2015, and supplement the administrative record with the same. On December 21, 2015, Keystone filed Applicant's Response to DRA's Motion to Supplement the Record in which Keystone requests that the Commission also supplement the record with Keystone's response to the Notice of Probable Violation. On December 29, 2015, the Commission issued an Order Granting Motion for Administrative Notice and Supplementing the Administrative Record taking administrative notice of the Notice of Probable Violation, Proposed Civil Penalty, and Proposed Compliance Order as official documents of PHMSA, an agency of the government of the United States, and supplementing the record with these documents, but denying Keystone's request to supplement the record with its response on the grounds that such response is not an official record of a governmental agency and would therefore be hearsay without an opportunity for adjudicatory challenge by other parties.

At its regular meeting on January 5, 2016, the Commission took this matter up for decision. Commissioner Fiegen moved to accept Keystone's Certification in accordance with SDCL 49-41B-27 and find that the Certification is valid. After discussion by the Commissioners, the Commission voted unanimously in favor of the motion.

Having considered the evidence of record, applicable law, and the briefs and arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law, and Decision.

FINDINGS OF FACT

Parties

1. The permit holder and Applicant in this docket is TransCanada Keystone Pipeline, LP, a limited partnership organized under the laws of the State of Delaware and owned by affiliates of TransCanada Corporation, a Canadian public company organized under the laws of Canada. Amended Final Decision, Finding of Fact 1.

2. On November 4, 2014, the Commission issued an Order Granting Intervention and Party Status granting intervention and party status to all persons who had requested party status, namely: John H. Harter, Rosebud Sioux Tribe-Tribal Utility Commission, Elizabeth Lone Eagle, Paul F. Seamans, Viola Waln, Cindy Myers, RN, BOLD Nebraska, Diana L. Steskal, Cheryl Frisch, Terry Frisch, Standing Rock Sioux Indian Tribe, Byron T. Steskal, Arthur R. Tanderup, Lewis GrassRope, Carolyn P. Smith, Robert G. Allpress, Jeff Jensen, Amy Schaffer, Louis T. Genung, Nancy Hilding, Gary F. Dorr, Bruce Boettcher, Rosebud Sioux Tribe, Wrexie Lainson Bardaglio, South Dakota Wildlife Federation, Cheyenne River Sioux Tribe, Jerry D. Jones, Cody Jones, Debbie J. Trapp, Gena M. Parkhurst, Sierra Club, Joye Braun, 350.org, Yankton Sioux Tribe, Dakota Rural Action, Chastity Jewett, Indigenous Environmental Network, Dallas Goldtooth, RoxAnn Boettcher, Bonny Kilmurry, Ronald Fees, and Intertribal Council on Utility Policy. On March 4, 2015, the Commission issued an Order Granting Request to Withdraw Party Status allowing the South Dakota Wildlife Federation and the Sierra Club to withdraw as parties, and on April 21, 2015, the Commission entered an Order Granting Request to Withdraw Party Status allowing Jeff Jensen to withdraw as a party.

3. Staff participated fully as a party, represented by Kristen Edwards and Karen Cremer.

Procedural Findings

4. The Procedural History set forth above is hereby incorporated by reference in its entirety in these Procedural Findings. The procedural findings set forth in the Procedural History are a substantially complete and accurate description of the material documents filed in this docket and the proceedings conducted and orders issued by the Commission in this matter. In addition to the procedural findings set forth in the Procedural History, the following Procedural Findings deal with the hearing process itself.

5. The following testimony was pre-filed on April 2, 2015, April 23, 2015, April 24, 2015, June 25, 2015, June 26, 2015, and August 4, 2015 in advance of the formal evidentiary hearing held July 27 through August 1, and August 3-5, 2015, in Room 414 of the State Capitol Building in Pierre, South Dakota:

Pre-filed Direct Testimony and Exhibits

Keystone

Heidi Tillquist's Testimony and Exhibit A - Resume
Corey Goulet's Testimony and Exhibit A - Resume
Jon Schmidt, Ph.D.'s Testimony and Exhibit A - Resume
Meera Kothari, P.E.'s Testimony and Exhibits A and B - Resume and Media Advisory
(August 5, 2010)
David Diakow's Testimony and Exhibit A - Resume

Staff

Brian Walsh's Testimony and Exhibit____BW-1
Derric Iles' Testimony and Exhibit____DI-1
Kimberly McIntosh's Testimony and Exhibit____KM-1
Tom Kirschenmann's Testimony and Exhibit____TK-1
Daniel Flo's Testimony and Exhibit____DF-1, Exhibit____DF-2, and Exhibit____DF-2
Revised
David Schramm's Testimony and Exhibit____DS-1
Jenny Hudson's Testimony and Exhibit____JH-1
Christopher Hughes' Testimony and Exhibit____CH-1
Supplemental Pre-filed Testimony of Christopher Hughes
Paige Olson's Testimony and Exhibit____PO-1
Darren Kearney's Testimony and Exhibit____DK-1
Darren Kearney's Testimony (Amended July 23, 2015)

Intervenors

Gary F. Dorr's Testimony and Exhibit
Wayne Frederick's Testimony and Exhibit A - Resume
Cindy Myers' Testimony
Diana Steskal's Testimony (will file exhibits later)
Paul F. Seamans' Testimony
Dakota Rural Action's Testimony
Evan Vokes' Testimony

Dr. Arden D. Davis, Ph.D, P.E.'s Testimony and Attachment (Figures 1, 2, 3, 4, 5, 6, 7, 8, and 9)

Sue Sibson's Testimony

Cheyenne River Sioux Tribe's Testimony

 Carlyle Ducheneaux's Testimony

 Steve Vance's Testimony

Yankton Sioux Tribe's Testimony

 Faith Spotted Eagle's Testimony

 Supplement to Faith Spotted Eagle Pre-filed Testimony and Attachment –
 International Treaty to Protect the Sacred From Tar Sands Projects

Standing Rock Sioux Tribe's Testimony

 Waste Win Young's Testimony

 Phyllis Young's Testimony

 Doug Crow Ghost's Testimony

 Linda Black Elk's Testimony

Rosebud Sioux Tribe's Testimony

 Richard Kuprewicz's Testimony Confidential (removed at the request of the party)

 RST Exhibit 8 - Richard B. Kuprewicz's Resume Confidential (removed at the request of the party)

 RST Exhibit 9 - Accufacts Inc.'s Letter to Rosebud Sioux Tribe Confidential (removed at the request of the party)

 RST Exhibit 10 - Figure 1 - South Dakota Elevation Profile with Valves and Additional Information Confidential (removed at the request of the party)

 Ian Goodman's Testimony Confidential (removed at the request of the party)

 RST Exhibit 1 - Ian Goodman's Resume Confidential (removed at the request of the party)

 RST Exhibit 3 - Changes to the Economic Costs and Benefits of the Keystone XL Pipeline for South Dakota Confidential (removed at the request of the party)

 Brigid Rowan's Testimony Confidential (removed at the request of the party)

 RST Exhibit 2 - Brigid Rowan's Resume (removed at the request of the party)

 RST Exhibit 3 - Changes to the Economic Costs and Benefits of the Keystone XL Pipeline for South Dakota (removed at the request of the party)

 RST Exhibit 4 - Landslide Hazard Areas Confidential (removed at the request of the party)

 RST Exhibit 5 - Spill Costs Per Barrel from Comparable Crude Pipelines Confidential (removed at the request of the party)

 RST Exhibit 6 - Range of Worst-Case Scenario Costs for Keystone XL Using Spill Costs for Comparable Crude Oil Pipelines (with 15-minute valve shutoff) Confidential (removed at the request of the party)

 RST Exhibit 7 - Range of Worst-Case Scenario Costs for Keystone XL Using Spill Costs for Comparable Crude Oil Pipelines (with 30-minute valve shutoff) Confidential (removed at the request of the party)

Pre-Filed Rebuttal Testimony and Exhibits

Staff

Darren Kearney's Rebuttal Testimony

Standing Rock Sioux Tribe

**Kevin E. Cahill, Ph.D.'s Rebuttal Testimony and Rebuttal Expert Report of Economist
Kevin E. Cahill, PH.D. on Behalf of the Standing Rock Sioux Tribe**

Rosebud Sioux Tribe

Jennifer Galindo's Rebuttal Testimony

Exhibit 11 - Curriculum Vitae Jennifer Galindo Archeologist

Exhibit 12 - Map from Programmatic Agreement

Exhibit 13 - RST Email and Letter to Paige Olson

Exhibit 14 - TransCanada's Policy regarding Native American Relations

**Ian Goodman and Brigid Rowan's Rebuttal Testimony Confidential (removed at the
request of the party)**

**Exhibit 15 - Changes to the Economic Costs and Benefits of the Keystone XL
Pipeline for South Dakota Confidential (removed at the request of the party)**

Paula Antoine's Rebuttal Testimony

Exhibit 16 - Rosebud Sioux Tribe's Resolution No. 2014-42 - Amended: Petition

Exhibit 17 - South Dakota Codified Laws 49-41B-1, 49-41B-11 and 49-41B-22

Amended Rebuttal Testimony of Paula Antoine

Chief Leonard Crow Dog's Rebuttal Testimony

Keystone

Corey Goulet's Rebuttal Testimony

Dan King's Rebuttal Testimony and Resume

F.J. (Rick) Perkins' Rebuttal Testimony and Resume

Meera Kothari's Rebuttal Testimony

Jon Schmidt's Rebuttal Testimony

Heidi Tillquist's Rebuttal Testimony

Exhibit List

**Exhibit 1: Diluted Bitumen-Derived Crude Oil: Relative Pipeline Impacts (Battelle
2012)**

**Exhibit 2: Comparison of the Corrosivity to Dilbit and Conventional Crude (Been
2011) Confidential (not available to the public)**

**Exhibit 3: Effects of Diluted Bitumen on Crude Oil Pipelines (National Academy of
Sciences 2013)**

**Exhibit 4: Crude Oil at the Bemidji Site: 25 Years of Monitoring, Modeling, and
Understanding (Essaid et al. 2011)**

**Exhibit 5: Use of Long-Term Monitoring Data to Evaluate Benzene, MTBE and
TBA Plume Behavior in Groundwater at Retail Gasoline Sites (Kamath et
al. 2012)**

- Exhibit 6: Review of Quantitative Surveys of the Length and Stability of MTBE, TBA, and Benzene Plumes in Groundwater at UST Sites (Connor et al. 2015)
- Exhibit 7: Characteristics of Dissolved Petroleum Hydrocarbon Plumes: Results from Four Studies (Newell and Connor 1998)
- Exhibit 8: A Comparison of Benzene and Toluene Plume Lengths for Sites Contaminated with Regular vs. Ethanol-Amended Gasoline (Ruiz-Aguilar et al. 2003)
- Exhibit 9: Evaluation of the Impact of Fuel Hydrocarbons and Oxygenates on Groundwater Resources (Shih et al. 2004)
- Exhibit 10: Leukemia Risk Associated With Low-Level Benzene Exposure (Glass et al. 2003)
- Exhibit 11: United States Department of State 12.1: Keystone XL Project, Risk Analysis (Kothari, Bajnok, Tillquist)

Jeff Mackenzie's Rebuttal Testimony

Appendix A - Jeff Mackenzie's Resume

Appendix B - Final EIS 3.13.5.3 and 3.13.5.4

Amended Rebuttal Testimony of Heidi Tillquist

Exhibit List

- Exhibit 1: Comparison of the Corrosivity of Dilbit and Conventional Crude
- Exhibit 2: Effects of Diluted Bitumen on Crude Oil Pipelines
- Exhibit 3: Leukemia Risk Associated With Low-Level Benzene Exposure
- Exhibit 4: Characteristics of Dissolved Petroleum Hydrocarbon Plumes
- Exhibit 5: Use of Long-Term Monitoring Data to Evaluate Benzene, MTBE, and TBA Plume Behavior in Groundwater at Retail Gasoline Sites
- Exhibit 6: Review of Quantitative Surveys of the Length and Stability of MTBE, TBA, and Benzene Plumes in Groundwater at UST Sites
- Exhibit 7: A Comparison of Benzene and Toluene Plume Lengths for Sites Contaminated with Regular vs. Ethanol-Amended Gasoline
- Exhibit 8: Evaluation of the Impact of Fuel Hydrocarbons and Oxygenates on Groundwater Resources
- Exhibit 9: United States Department of State 12.1 -Keystone XL Project Risk Analysis

Amended Rebuttal Testimony of Meera Kothari

Dakota Rural Action

Evan Vokes' Rebuttal Testimony

John Harter's Rebuttal Testimony

Yankton Sioux Tribe

Member of the Yankton Sioux Tribe Business & Claims Committee Consisting of Elected Members: Robert Flying Hawk, Quentin JB Brugler, Jr., Mona Wright, Justin Songhawk, Leo O'Connor, Jean Archambeau, Glenford Sam Sully, Jason Cooke, and Everdale Song Hawk's Rebuttal Testimony

Exhibit A - Keystone's Responses to Yankton Sioux Tribe's First Interrogatories and Request for Production of Documents

Exhibit B - Appendix S - Programmatic Agreement and Record of Tribal Contact

Exhibit C - Appendix E - Amended Programmatic Agreement and Record of Consultation
Faith Spotted Eagle's Rebuttal Testimony
Exhibit A - Appendix S - Programmatic Agreement and Record of Tribal Contact
Exhibit B - Appendix E - Amended Programmatic Agreement and Record of Consultation
Chris Saucosi's Rebuttal Testimony

Intertribal Council On Utility Policy

Prefiled Testimony of Dr. Robert Oglesby
- Comments of Dr. James E. Hansen
Appendix: James E. Hansen Comments Charts
Exhibit 1 - James E. Hansen's Resume
Exhibit 2 - Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature

Surrebuttal Testimony

Cindy Myers' Surrebuttal Testimony

Keystone

Surrebuttal Testimony of Corey Goulet
Surrebuttal Testimony of Dan King and Certificate of Service

6. A nine-day evidentiary hearing was held on July 27 through August 1 and August 3 through August 5, 2015. In addition to Keystone and Staff, the following intervenors attended and participated in the hearing: Dakota Rural Action, BOLD Nebraska, Standing Rock Sioux Tribe, Rosebud Sioux Tribe, Yankton Sioux Tribe, Intertribal COUP, Cheyenne River Sioux Tribe, Indigenous Environmental Network, Paul Seamans, Cindy Myers, Elizabeth Lone Eagle, John Harter, Gary Dorr, Joye Braun, Louis GrassRope, Diana Steskal, Carolyn Smith, Dallas Goldtooth, Chastity Jewett, Wrexie Lainson Bardaglio, and Bonny Kilmurry. Dakota Rural Action, BOLD Nebraska, Intertribal COUP, Indigenous Environmental Network, and the Tribes were all represented by counsel.

7. The following witnesses testified at the hearing and were subject to cross examination: Corey Goulet, Meera Kothari, Rick Perkins, Jon Schmidt, Heidi Tillquist, Dan King, Diana Steskal, Carlyle Ducheneaux, David Schramm, Steve Vance, Evan Vokes, Cindy Myers, Kevin Cahill, Phyllis Young, Arden Davis, Faith Spotted Eagle, Jon Schmidt, Christopher Hughes, Jenny Hudson, Sue Sibson, Doug Crow Ghost, Daniel Flo, Wayne Frederick, Paula Antoine, Brian Walsh, and John Harter.

Applicable Statute

8. The governing statute is SDCL § 49-41B-27, which requires that if construction has not started within four years of the permit being granted, then the permittee must "certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued."

9. There are no other statutes, regulations, or South Dakota cases directly addressing SDCL § 49-41B-27 and its application in this docket.

Updates to the Project since June 29, 2010

10. On March 12, 2009, Keystone filed an application for a permit pursuant to SDCL Chapter 49-41B to construct the South Dakota portion of the Project. The application was docketed as HP09-001. On June 29, 2010, after a three-day hearing, the Commission entered an Amended Final Decision and Order; Notice of Entry granting Keystone a permit to construct and operate the project subject to 50 conditions attached to the Decision as Exhibit A.

11. The Project, as proposed in Keystone's application for a permit in Docket HP09-001, was delayed. A Presidential Permit required by Executive Order 11423 of August 16, 1968, and Executive Order 13337 of April 30, 2004, allowing the pipeline to cross the border between Canada and the United States, was still under review by the United States Department of State at the time of the hearing. On November 6, 2015, the Presidential Permit was denied.

12. As originally proposed, the Project was to be developed in three segments: the Steele City Segment from Hardisty, Alberta, to Steele City, Nebraska; the Gulf Coast Segment from Cushing, Oklahoma, to Liberty County, Texas; and the Houston Lateral Segment from Liberty County, Texas, to refinery markets near Houston, Texas.

13. The Gulf Coast Segment has been constructed and was placed into operation as a stand-alone project on January 22, 2014. The Houston Lateral Segment has also been constructed as a stand-alone project. Ex 2001, ¶ 15. The Project therefore currently consists of only the Steele City segment. The Steele City Segment extends from Hardisty, Alberta, Canada, southeast to Steele City, Nebraska. It will interconnect with the previously-approved and constructed Keystone Cushing Extension segment of the Keystone Pipeline. The route in South Dakota has not changed in any material respect. Ex 2001, ¶ 7; Ex 2013.

14. The maximum capacity of the Project is 830,000 barrels per day. TR 186; Ex 2001, ¶ 6.

15. The Bakken Marketlink project was developed after Keystone's permit application in HP09-001. Ex 2001, ¶ 5. It includes a five-mile pipeline, pumps, meters, and storage tanks near Baker, Montana, to deliver light sweet crude oil from the Williston Basin in Montana and North Dakota for transportation through the Project. Bakken Marketlink will deliver up to 100,000 bpd of domestically-produced crude oil into the Keystone XL Pipeline. TR 184-187; 241-248.

16. Because the Project is only the Steele City segment, the mileage has decreased from approximately 1,707 miles to 1,202 miles with about 876 miles in the United States. Ex 2001, ¶ 7. The South Dakota portion of the Project will be approximately 315 miles in length and

crosses the South Dakota counties of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman, and Tripp. TR 291; Ex. 2005, ¶ 9; Petition, App. C, Finding 16.

17. There is no current construction schedule for the Project, pending issuance of a Presidential Permit. Ex 2001, ¶ 8.

18. The Pipeline will be constructed using API 5L X70M high-strength steel. This was one of the design options presented in the original permit application. Petition, App. C, ¶ 18; Ex. 2003, ¶ 5. Keystone withdrew its application to PHMSA for a special permit and adopted 59 special conditions developed by PHMSA as set forth in Appendix Z to the Department of State Final Supplemental Environmental Impact Statement (FSEIS). Petition ¶¶ 60, 90; TR 215, 302. As a result of this change, Keystone will construct the Pipeline using the as-proposed stronger steel, but will operate the Pipeline at a lower maximum pressure, 1,307 psig. Ex. 2003, ¶ 8; Petition, App. C, ¶¶ 18, 19, 63.

19. As part of the 59 special conditions, valves on the Pipeline must be located based on the worst-case discharge as calculated by 49 CFR 195.260 and by taking into consideration elevation, population, and environmentally-sensitive locations, or no more than 20 miles apart, whichever is less. As a result of this change, the number of mainline valves in South Dakota will be 20 instead of 16. Petition, App. C, ¶ 20; Ex. 2001, ¶ 9, 10, 11; FSEIS, App. Z, Condition 32; TR 215.

20. Keystone has committed to meet the 59 special conditions proposed by PHMSA as set forth in Appendix Z to the FSEIS. TR 215; Ex. 2001, ¶ 12.

21. The estimated cost of the Project in South Dakota has increased from \$921.4 million to \$1.974 billion due to new technical requirements, inflation, and additional costs due to the delay in receipt of federal approval and commencing construction. Ex. 2001, ¶ 13.

22. Keystone has continued to update its Construction, Mitigation, and Reclamation Plan (CMR Plan). A currently redlined version of the CMR Plan is attached to the Petition as Appendix C, Attachment A. Ex. 2005, ¶ 5; Petition, App. C, Attachment A.

23. In Docket HP09-001, Keystone submitted soil type maps as Exhibit TC-14. The maps are still generally consistent with the Project, but Keystone has committed to submit updated maps before construction begins as required by Condition No. 6. TR 575-640; Ex 2005, ¶ 6; Petition, App. C, ¶ 33.

24. Keystone will use horizontal directional drilling (HDD) to cross two additional rivers or streams—Bridger Creek and the Bad River. TR 335-336, 531, 537-538, 545, 547, 588-589, 633-634, 870, 1205, 1286-1287, 1886; Ex 2003 ¶ 10; Ex. 2005, ¶ 7; Ex. 2009 ¶ 6; Petition, App. C., ¶¶ 41, 83. The preliminary site-specific crossing plans for these additional HDD crossings are included with the Petition as Attachment B to Appendix C.

25. The projected total length of Project pipe with the potential to affect a High Consequence Area (HCA) is 15.8 miles, which is less than the 34.3 miles stated in the Amended Final Decision's findings of fact. TR 670, 1119; Ex. 2005 ¶ 4; Petition, App. C, ¶ 50. As a result of the change in mileage, it is estimated that a spill that could affect an HCA would occur no more than once in 460 years, rather than once in 250 years. TR 670.

26. Due to minor route refinements, all but 27.9 miles of the Project route in South Dakota are privately owned, an increase from 21.5 miles in the original application. Ex. 2005, ¶ 9; Petition, App. C, ¶ 54.

27. No Indian reservation or trust lands are crossed by the Project route. TR 394; Petition, App. C, ¶ 54.

28. TransCanada has thousands of miles of the same grade of pipeline steel, which has been coated with fusion bonded epoxy (FBE) installed and in operation. There has been no evidence of external corrosion except for one instance in Missouri in which an adjacent foreign utility interfered with the active cathodic protection system. Ex. 2003, ¶ 9; Petition, App. C, ¶ 68. The corrosion incident in Missouri was detected by Keystone during an in-line inspection of the pipe. TR 293-94, 2315-16. Keystone has since then started installing passive anodes to protect the pipeline during construction, which goes beyond what is required by federal regulation. TR 285, 309-310.

29. Since the Amended Final Decision was issued in 2010, Keystone has completed the process of consulting with the National Resource Conservation Service to create construction/reclamation units for the different soils along the pipeline route. TR 617; Petition, App. C, ¶ 80.

30. Other than these updates stated in Appendix C to the Petition, the parties did not present evidence of any other factual changes to the Project.

Keystone's Ability to Meet the Permit Conditions

31. None of the updates identified in Appendix C to Keystone's Certification Petition affects Keystone's ability to meet the conditions on which the permit was issued. As identified in Petition Appendix C, Conditions 1-3, 5, 6.a-6.f, 11-14, 16.a-16.p, 17, 18, 19.a, 20-34.a, 35-40, 41.b, and 42-48 are prospective. No evidence was presented that Keystone cannot satisfy any of these conditions in the future.

32. Condition 4 provides that the permit is not transferable without the consent of the Commission. No evidence was presented that Keystone cannot continue to comply with this condition.

33. Conditions 7-9 require that Keystone appoint a public liaison officer, which has been done, and submit quarterly reports to the Commission, which has also been done and is ongoing. No evidence was introduced that Keystone cannot continue to meet these conditions.

34. Condition 10 requires that not later than six months before construction, Keystone, must commence a program of contacts with local emergency responders. Keystone presented evidence that it has already started making such contacts and will continue. TR 317-318. No evidence was introduced that Keystone cannot continue to meet this condition.

35. Condition 10 does not specifically refer to Tribal governments or officials. To the extent that Tribes may be affected by construction and operation of the Project, Keystone presented evidence that it will contact Tribal emergency responders as well. TR 317-318.

36. Condition 15 requires consultation with the NRCS to develop the con/rec units, which Keystone established has been done. TR 617; Petition, App. C, ¶ 80; FSEIS, App. R.

37. Condition 19 requires that landowners be compensated for tree removal, which Keystone indicated is done as part of the process of acquiring easements. Petition, App. B, Condition 19. No evidence was presented that Keystone cannot continue to meet this condition.

38. Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding high consequence areas. Keystone presented evidence that this process is ongoing. TR 662-663. No witness testified to the contrary.

39. Condition 41 requires that Keystone follow all protection and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks (SDGFP). Keystone presented evidence that this process is ongoing. TR 630, 636-637; Petition, App. B, Condition 19. No witness testified to the contrary.

40. Condition 41 requires that Keystone consult with SDGFP to identify greater prairie chicken and greater sage and sharp-tailed grouse leks. In support of its Certification, Keystone submitted its Quarterly Report stating that this process is ongoing. Petition, App. B, Condition 41.a. No witness testified to the contrary.

41. Condition 16(m) requires that Keystone must re-seed all lands with comparable crops to be approved by the landowner, or with comparable grass or native species mix to be approved by the landowner for pasture, and that Keystone must actively monitor revegetation on all disturbed areas for at least two years. Condition 49 provides that Keystone must pay commercially reasonable costs and indemnify and hold harmless landowners for any loss or damage resulting from Keystone's use of the easement. The only evidence related to these conditions came from Sue Sibson, who testified that reclamation on her property after construction of the Keystone Pipeline has not been satisfactory. TR 1965. Sibson's testimony does not, however, establish that Keystone cannot meet these conditions with Keystone XL. She testified that it takes "quite a while" for native grasses to re-establish, and that her property has been reseeded at her request four or five times since 2009. TR 1977. She also testified that she has been paid damages for loss of use of the easement area, and she did not state that Keystone has failed to pay reasonable damages. The process of reclaiming her property is ongoing, and it is undisputed that Keystone has continued to work with Sibson. TR 1975, 1978, 306-307. Corey Goulet testified that Keystone was committed to continue reclamation efforts on the Sibson property until the Sibsons were satisfied. He also testified that out of 535 tracts on the Keystone Pipeline, all but 9 had been reclaimed to the satisfaction of the landowner. TR 306.

42. Condition 50 provides that the Commission's complaint process be available to landowners threatened with damage or the consequences of Keystone's failure to comply with any of the conditions. No evidence was presented that Keystone cannot comply with this condition.

43. Multiple Intervenor testified to their concerns about the possible adverse effects of the pipeline on groundwater resources, shallow aquifers, rivers, and streams. None of this testimony related to Keystone's ability to meet any permit condition. Rather, this testimony related to Keystone's burden of proof under SDCL § 49-41B-22.

44. Dr. Arden Davis testified to concerns that the Project right of way crosses the recharge areas of several shallow aquifers, including the Ogallala aquifer, Sand Hills-type material, gravel aquifers, eolian and alluvial aquifers, and the Fox Hills aquifer. Ex. 1003, p. 1.

Dr. Davis also testified that the Project right of way would cross the Little Missouri River, the Grand River and its tributaries, the Moreau River, the Cheyenne River, the Bad River, and the White River, and that dissolved hydrocarbon contaminants could be transported downgradient in surface water, in groundwater within the aquifers, or both. Dr. Davis also testified that the Cheyenne River, which drains much of the Black Hills, flows into the Missouri River and has exposed Pierre Shale along steep sides that are prone to slope failures. Ex. 1003, p. 2. These concerns do not specifically address any permit condition.

45. Heidi Tillquist testified on behalf of Keystone that adverse impacts to all of these areas are highly unlikely. Ex. 2017, ¶¶ 4-8. Dr. Davis did not respond to Tillquist, address the likelihood of adverse impacts, or conduct an independent risk assessment related to the Project. TR 1808-1809. The Commission addressed the likelihood of such adverse impacts in the Amended Final Decision in Findings of Fact 43-45 and 52. Dr. Davis's testimony is insufficient to warrant any change to those findings.

46. With respect to Dr. Davis's testimony about the Ogallala aquifer in Tripp County and the wind-blown Sand Hills type material crossed by the Project right of way, the Commission has required Keystone to treat that area as a hydrologically sensitive area. Amended Final Decision, Finding of Fact 53 and Condition 35; Ex. 2017, ¶ 9. Dr. Davis did not testify that such treatment was inappropriate or insufficient or that Keystone could not meet the condition.

47. Dr. Davis testified to his concern about possible benzene exposures from a leak or spill, especially since benzene is soluble in water and can be transported downstream, potentially affecting water intakes. Ex. 1003, pp. 3-4. Tillquist testified, however, that benzene exposures at a level that would cause health concerns would not be expected following a crude oil spill due to the low persistence of benzene and expected emergency response measures, and that a potential release would likely not threaten groundwater sources or public water intakes. Ex. 2017, ¶¶ 11-12. This testimony was undisputed.

48. Dr. Davis relied in his testimony on the Stansbury report from 2011 that was considered by the Department of State in connection with the FSEIS. Ex. 1003, p. 5. In her rebuttal testimony, Heidi Tillquist addressed flaws in Stansbury's analysis. Ex. 2017, ¶¶ 13-14. Dr. Davis did not address the Stansbury report in his hearing testimony, and Tillquist was not cross-examined about the Stansbury report.

49. John Harter testified to his concerns about the location of the Project right of way in relation to the City of Colome's water wells. TR 2209-2210. The proximity of the Project to the City of Colome's wells was addressed in Docket HP09-001. The Commission found that the risk of a spill affecting public or private water wells is low because the components of crude oil are unlikely to travel more than 300 feet from the spill site and there are no private or public wells within 200 or 400 feet, respectively, of the right of way and that the route was refined near Colome to avoid a groundwater protection area. Amended Final Decision, Findings 49 and 105. In this proceeding, Brian Walsh from the South Dakota Department of Environment and Natural Resources (DENR) testified that the route had been moved at DENR's request before the Amended Final Decision, and that the current route had been determined in consultation with DENR. TR 2155-2156. The route was moved 175 feet from the edge of the surface water protection area and 1,000 feet from the wellhead itself. TR 1323. Keystone also met at the time the route was changed with the mayor and an engineer for the City of Colome. TR 1384. This is not an issue that affects Keystone's ability to meet any permit condition.

50. Doug Crow Ghost, the Director of the Department of Water Resources for the Standing Rock Sioux Tribe, testified about the Winters Doctrine, tribal water rights, and his concern that the Keystone XL Pipeline presented a threat to tribal water supplies given long-term drought. TR 2015-2020. He testified that the Tribe is working with the State to quantify the Tribe's water rights. TR 2016-2017. His testimony was rebutted by Dr. Jon Schmidt, who explained in his rebuttal testimony that Keystone cannot use water if the use would adversely affect prior appropriations or vested rights, and that SDCL 46-5-40.1, which governs temporary water use permits for construction purposes, protects the Tribe, even in cases of long-term drought. Ex. 2009, ¶¶ 4-5, 7. Crow Ghost's testimony did not establish that Keystone is unable to meet any permit conditions.

51. Carlyle Ducheneaux is the Section 106 Coordinator for the Cheyenne River Sioux Tribe. TR 990. He testified that construction of the pipeline would disturb contaminated sediments in the Cheyenne River and its tributaries and that pipeline failure was likely to occur because of the sloughing of river banks and the movement of highly erodible soils. Ex. 7001, ¶¶ 8-14. Jon Schmidt testified that construction would not cause any disturbance of contaminated sediments in the Cheyenne River because Keystone will use HDD for the crossing. Schmidt also testified that sloughing of river banks is not an issue for the same reason and because Keystone can take other mitigation measures during construction. Ex. 2009, ¶¶ 8-9. Ducheneaux's testimony did not establish that Keystone is unable to meet any permit condition.

52. Cindy Myers testified to her concerns: (1) that emergency responders may not have adequate information about the chemical composition of the crude oil in case of a spill, TR 1658-1660; (2) the dangers of exposure to benzene, TR 1661-1663; (3) her opinion that benzene can permeate polyethylene and polyvinyl chloride water pipe and waterlines like the Mni Wiconi water pipeline, TR 1663-1664; (4) that, according to her, 62% of South Dakotans get their drinking water from the Missouri River, which is at risk from a spill, TR 1666-1667; and (5) because of the threat to drinking water resources, the Project "could substantially impair the health, safety, and welfare of South Dakotans." TR 1673. Tillquist's testimony established that the risks posed by possible benzene exposure due to a spill are low, and the Commission previously determined that the risk of any significant pipeline release was low. Amended Final Decision, Findings 43-45 and 52; Ex. 2017, ¶¶ 4, 6, 7, 8, 11, 12. Corey Goulet testified that studies have established that the amount of benzene present in crude oil is not a threat to PVC pipe. TR 950-951. Myers' testimony does not establish that Keystone is unable to meet any permit condition and essentially addresses SDCL 49-41B-22, the permitting statute, not SDCL 49-41B-27.

53. Faith Spotted Eagle testified to concerns about safe drinking water and the availability of water from the Missouri River for spiritual ceremonies. Ex. 9011, ¶¶ 21-23; TR 1855-1857. Spotted Eagle's testimony does not contain any factual basis for the Commission to find either that the Project poses a threat to the Tribe's drinking water or that water will not be available from the Missouri River for the Tribe's spiritual ceremonies.

54. Two intervenors testified about their concerns that Keystone had not consulted with Tribal officials about the Project. Phyllis Young testified on behalf of the Standing Rock Sioux Tribe as an at-large Tribal Council Member that Keystone did not consult with the Tribe and, similarly, that the Department of State failed to consult with the Tribe in preparing the FSEIS. Ex. 8001, last page; TR 1722, 1732-1733. The Honorable Wayne Frederick testified on behalf of the Rosebud Sioux Tribe as a member of the Council that the Rosebud Sioux Tribe was not consulted by TransCanada. TR 2088. This testimony does not establish that Keystone

cannot meet any permit conditions because, as stated in the conclusions of law, it is not Keystone's legal obligation to consult with the Tribes in connection with the FSEIS.

55. No permit condition requires that Keystone consult with the Tribes about the Project. Condition 6 refers to "local governmental units," but does not specify Tribes. Condition 34 requires that Keystone must "consider local knowledge" in assessing and evaluating environmentally sensitive and high consequence areas. In support of its Certification, Keystone submitted its Quarterly Report in which Keystone's public liaison officer stated that Keystone has sought out local knowledge. Petition, App. B, Condition 34(b).

56. None of the Tribes who intervened in this proceeding were parties to Docket HP09-001, although all could have been.

57. Appendix E to the FSEIS, which is a matter of public record of which the Commission has taken judicial notice, contains the record of consultation between the Department of State and various Tribes under Section 106 of the National Historic Preservation Act. On page 11 of the record of consultation, all of the meetings, e-mails, telephone calls, and letters between the Department of State and the Standing Rock Sioux Tribe are listed. The record of consultation establishes that the Standing Rock Sioux Tribe was consulted by the Department of State.

58. Multiple witnesses testified that the Tribes in South Dakota passed resolutions opposing the Project and that Keystone representatives were not welcome on Tribal land. TR 1745-1746, 1873, 2084, 2096-2097, 2104-2105.

59. John Harter testified that Keystone acquired an easement on his property through the use of eminent domain: TR 2189. The court file in *TransCanada v. Harter*, Civ. 11-62 (6th Jud. Cir.), of which the Commission takes judicial notice, demonstrates that Keystone acquired an easement pursuant to a judgment entered by the court that enforces a settlement agreement between Keystone and Harter. TR 2214. Even if Keystone had acquired an easement on Harter's property by eminent domain, that would not establish that Keystone is unable to meet any permit condition.

60. Kevin E. Cahill, Ph.D., is an economist with ECONorthwest from Portland, Oregon. TR 1681-1682. Cahill testified that in his opinion the socio-economic analysis that was done as part of the FSEIS was "seriously flawed" because it was supposed to be a cost-benefit analysis, but it failed to consider any costs or potential indirect costs of the Project. TR 1685-1688. He testified that any benefits of the Project had not been measured against the costs as part of the analysis done in the FSEIS. TR 1690. The socioeconomic analysis in the FSEIS was conducted by the Department of State, not Keystone. No permit condition relates to the socioeconomic analysis in the FSEIS. Dr. Cahill's testimony does not establish that Keystone does not, or is unable to, meet any permit condition.

61. Paula Antoine testified about socioeconomic issues as a rebuttal witness on behalf of the Rosebud Sioux Tribe. Ex. 11000. Ms. Antoine is the Director of the Sicangu Oyate Land Office. TR 2131. She testified that in her opinion Keystone failed to present sufficient evidence related to Amended Final Decision Findings of Fact 107, 108, 109, and 110. Ex. 11000, pp. 2-4; TR 2133. Antoine's testimony is not based on her personal knowledge and does not relate to any permit condition.

62. Faith Spotted Eagle testified on behalf of the Yankton Sioux Tribe. Ex. 9011; TR 1848. She is a counselor and a PTSD therapist. TR 1848-1849. She testified as to her concerns about the proposed work camps in South Dakota and the effect they might have on the safety of Native American communities and tribal members. Ex. 9011, ¶¶ 14, 18, 19; TR 1850-1852. Spotted Eagle testified that the Commission should "anticipate a surge in crime, especially violent crime, in the communities near the man camps" and that because the camps are inhabited by young and single men who have financial means and are away from their families, "[t]he result is easy to predict and does not require any scientific analysis." Ex. 9011, ¶¶ 14, 18. Spotted Eagle cited no studies of crime associated with work camps, no crime statistics from work camps, and no personal experience with either work camps like those proposed for the Keystone XL Pipeline or with Target Logistics, Keystone's contractor.

63. Rick Perkins testified on behalf of Keystone about the work camps, and testified that Target Logistics, the contractor that will operate the camps, does not have a documented history of behavior problems associated with the camps. Ex. 2007, ¶¶ 5-6, 12-13; TR 2400. Perkins testified that Keystone expects no increase in crime associated with the camps. TR 2409. Workers who live in the camps must sign a code of conduct and may be expelled if they violate the code. TR 2413.

64. There are three proposed work camps in South Dakota - one in Harding County near Buffalo, one in Meade County near Howes, and one in Tripp County near Colome. Ex. 2007, ¶4. Keystone has talked to local law enforcement about the camps and is willing to supplement local law enforcement officers at Keystone's expense. Ex. 2007, ¶ 14; TR 2406. Keystone has obtained a conditional use permit from Harding County for the Buffalo camp. No such permit is required in Meade County or Tripp County, although Keystone will obtain an occupancy permit for the camp in Meade County. Ex. 2007, ¶ 15.

65. There is no permit condition related to the work camps. The testimony of Faith Spotted Eagle does not establish either that the work camps pose any particular threat to any South Dakota citizens, or that Keystone cannot meet any permit condition.

66. The Keystone XL pipeline route does not cross any reservation land or land held in trust for Indians. TR 254.

67. Steve Vance testified on behalf of the Cheyenne River Sioux Tribe. He is the Tribal Historic Preservation Officer. Ex. 7002, ¶ 2; TR 1524. Vance testified to his concern that the Project falls within the view shed of several cultural sites, like the Slim Buttes; that during construction, access to cultural and historic sites could be hindered; that operation and maintenance of the pipeline could disrupt spiritual practitioners requiring solitude; and that the Project will have long term negative effects emotionally and spiritually on many Tribal members. Ex. 7002, ¶¶ 7-10.

68. Vance's testimony is insufficient to establish that Keystone cannot meet any permit condition. Permit Condition 43 addresses the protection of cultural resources and provides that Keystone must follow the Unanticipated Discoveries Plan as approved by the Department of State. If Keystone finds any cultural resources during construction, Keystone must notify the Department of State and the State Historic Preservation Office, and, if appropriate, develop a plan to address the resource. Vance offered no testimony that Keystone cannot or will not comply with this condition.

69. Dakota Rural Action called Evan Vokes, a former TransCanada employee, to testify about welding and other safety issues that he perceived from his tenure. TR 1768; Ex. 1003-A. Vokes, who is no longer a licensed professional engineer, was employed by TransCanada from 2007 until May, 2012, although he did not actively work at TransCanada after October 26, 2011. TR 1544-1554. He started in the welding group as an engineer in training, and became a professional engineer in 2009. His rank from 2009 until October, 2011, was junior engineer. TR 1549-1552. When he started at TransCanada, he had no previous experience with pipeline welding. TR 1572.

70. Vokes testified that TransCanada inspects 100% of the welds in its mainline pipe, even though applicable federal regulations require that only 15% of the welds be inspected. TR 1578.

71. Vokes testified that he thought that TransCanada had problems with automated ultrasonic testing (AUT) of welds on the Cutbank Project in Canada. Vokes testified that he found defects in welding procedures used by TransCanada and that he notified his superiors. TR 1594-1597. He testified that the National Energy Board in Canada (NEB) sent a letter related to nine welding procedures not meeting minimum qualifications. TR 1594. Vokes testified that he thought that a pipeline rupture that occurred near Otterburne, Manitoba, was an example of a problem caused by a defective weld. TR 1598-9159. Dan King, TransCanada's Chief Engineer and Vice President for Asset Reliability, testified that the concerns that the NEB raised about AUT on the Cutbank Project were administrative in nature, not technical. He testified that they did not affect the safety of any welds. TR 2264-2265. He testified that the rupture on a natural gas pipeline near Otterburne was caused by a failure on a weld that was completed in 1960 under different procedures and standards. TR 2265-2266. In addition, he testified that TransCanada worked with the NEB to look at the other welds on the same pipeline and found no issues. TR at 2266-2267.

72. Vokes testified that he was aware of pipe intended for the Keystone Pipeline that had manufacturing defects. TR 1602-1603. Dan King testified that there was pipe manufactured for the Canadian portion of the project that had problems, and it was rejected by TransCanada and never shipped or installed. TR 2267-2268.

73. Vokes testified that he was involved in testing the integrity of the welds along a segment of the Keystone Pipeline. TR at 1600-1601. There were issues with peaked pipe, which is the result of a manufacturing problem. TR 1610-1611. Vokes thought that the pipe should not have been used because it could fatigue over time. TR 1611-1614. He thought, however, that "[w]e did a very good job, actually very good pipe, other than the fact of the peaking." TR 1613. Dan King testified that there was no pipe installed on the Keystone Pipeline that was inspected in a manner that did not come within the tolerances permitted by code, and that the pipe met TransCanada's tolerances, which are stricter than code. TR 2269-2270.

74. Vokes testified that he thought there were problems with gas metal arc welding causing lack-of-fusion defects. TR 1603-1605. Dan King testified that lack-of-fusion defects can occur with gas metal arc welding, which is typically used with larger diameter pipe, but that the defects are generally found during the inspection process, and then removed or repaired. TR 2271-2272.

75. Vokes testified that he worked on the Bison Project, that there were problems with the welding, and that while TransCanada wanted to use AUT for the welds, it was technically a problem. TR 1614-1619. As a result of the problems, Vokes testified that there

were 1,200 or 1,300 welds on the project that went into the ground that never had a code inspection. TR 1621. Vokes also testified that there were dents associated with welds on the Bison project. TR 1623-1624. Dan King testified that there was an in-service failure on the Bison Pipeline, which is a natural gas line. The failure was caused by some external force, but the source of the external force, which appeared to be some sort of heavy equipment strike, could not be determined. TR 2273-2274. PHMSA was involved in the investigation and, after investigation and a corrective action order, allowed the project back into service and cleared the corrective action order. TR 2274. As a result of the failure, TransCanada increased the number of inspectors on projects and improved inspector training. TR 2274-2275. King also testified that he disagreed with Vokes's testimony that there could be 1,200 to 1,300 welds in the ground that have not been subject to an inspection that meets code on the Bison project. He testified that PHMSA's involvement and inspection of 100% of the welds was thorough and complete. TR 2275-2276.

76. Vokes testified that in connection with the Keystone XL Pipeline, he worked on one section in Canada and maybe the Gulf Coast Project in the United States. TR 1754. He testified that he was concerned that TransCanada was using Weldsonix, a nondestructive examination company to inspect welds, because there had been issues with Weldsonix in the past. TR 1754-1756. He testified that he was told to qualify Weldsonix. TR 1756. Dan King testified that TransCanada was dissatisfied with the performance of Weldsonix on a project in 2004, but that Weldsonix U.S.A., which did work on the Keystone Pipeline, passed a qualification process and performed very well on that project. TR 2276-2277. After an anonymous person raised issues about inspection on the Keystone Pipeline, TransCanada did a 100% audit and found no issues with the work that Weldsonix had done. TR 2277.

77. Vokes's testimony is insufficient to establish that Keystone cannot meet any permit condition. His testimony did not directly relate to any permit condition. Moreover, it is undisputed that Vokes has no first-hand knowledge of any welding or inspection defects on the Keystone Pipeline, the Gulf Coast Project, or the Houston Lateral Project. It is also undisputed that he has no knowledge of any welding or inspection defects in South Dakota. TR 1773, 1775, 1777-1778.

Conclusion

78. At its regularly scheduled meeting on January 5, 2016, the Commission considered this matter. The Commission unanimously voted to approve the Company's request for an order accepting its certification. The Commission finds that the Company certified that it remains eligible to construct the project under the terms of 2010 permit, subject to the provisions of 49-41B. The Commission finds that the Company certified that the Project continues to meet the conditions upon which the 2010 permit was issued.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding under SDCL Chapter 49-41B and ARSD Chapter 20:10:22. The Commission has the legal authority to decide whether to accept Keystone's Certification under SDCL § 49-41B-27.

2. The Amended Final Decision and Order dated June 30, 2010, in Docket HP09-001 was not appealed and constitutes a final order of the Commission.

3. Even though more than four years have elapsed since the permit was issued in Docket HP09-001, the permit has not lapsed or expired. Keystone therefore has no legal obligation to again prove that it meets the requirements of SDCL § 49-41B-22, which the Commission concluded in the Amended Final Decision entered in Docket HP09-001 it had met. Keystone's burden of proof under SDCL § 49-41B-27 is distinct from its burden under SDCL § 49-41B-22.

4. Under SDCL § 49-41B-27, Keystone has the burden of proof to show that its certification is valid.

5. "Conditions" as used in SDCL § 49-41B-27 means the 50 Conditions attached as Exhibit A to the Decision.

6. The Commission has no authority over condemnation or eminent domain. SDCL 21-35-1 requires that these issues be brought before the circuit court.

7. The Keystone XL pipeline route does not cross any reservation land or land held in trust for Indian Tribes. The Commission has no jurisdiction to adjudicate aboriginal or usufructory rights with respect to lands that were formerly Indian country under the Treaties of 1851 or 1868 prior to diminishment.

8. Keystone met its burden of proof through the Certification signed by Corey Goulet, the documents filed with its Certification Petition, and the direct testimony of its witnesses establishing that despite some updates related to the Project since June 30, 2010, none of these updates affects Keystone's ability to meet the conditions on which the permit was granted.

9. With respect to prospective conditions that are unaffected by the updates since June 29, 2010, Keystone is as able today to meet the conditions as it was when the permit was issued as certified to in the Certification signed by Corey Goulet. No evidence was offered demonstrating that Keystone will be unable to meet the conditions in the future. Keystone offered sufficient evidence to establish that Keystone can continue to meet the conditions.

10. The Intervenor failed to establish any reason why Keystone cannot continue to meet the conditions on which the permit was issued.

11. Under Section 106 of the National Historic Preservation Act, it is the legal obligation of the Department of State to consult with the Tribes in South Dakota. 16 U.S.C. § 470f; 36 C.F.R. Part 800.

12. The Commission granted party status to every person or entity who sought it. The Intervenor was afforded a full and fair opportunity to be heard. The proceedings in this docket were substantially longer, more in-depth, and more involved than in HP09-001, even though Keystone's burden of proof was more limited in scope. The Commission needs no additional information to determine whether to accept Keystone's Certification under SDCL § 49-41B-27.

13. The Commission concludes that the Certification and all required filings have been filed with the Commission in conformity with South Dakota law and that all procedural

requirements under South Dakota law, including public hearing requirements, notice, and an opportunity to be heard, have been met.

It is therefore

ORDERED that Keystone's Certification under SDCL § 49-41B-27 is accepted by the Commission and found to be valid and Keystone is authorized to proceed with the construction and operation of the Keystone XL Pipeline subject to the conditions attached as Exhibit A to the Amended Final Decision and Order dated June 30, 2010.

NOTICE OF ENTRY AND OF RIGHT TO APPEAL

PLEASE TAKE NOTICE that this Final Decision and Order was duly issued and entered on the 21st day of January, 2016. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition with the Commission within 30 days from the date of issuance of this Final Decision and Order; Notice of Entry. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate Circuit Court by serving notice of appeal of this decision to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 21st day of January, 2016.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically or by mail.

By Karen E. Bremer

Date: 1-21-16

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Chris Nelson

CHRIS NELSON, Chairman

Kristie Fiegen

KRISTIE FIEGEN, Commissioner

Gary Hanson

GARY HANSON, Commissioner

1-26-36. Weight given to agency findings--Disposition of case--Grounds for reversal or modification--Findings and conclusions--Costs. The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in light of the entire evidence in the record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment. The circuit court may award costs in the amount and manner specified in chapter 15-17.

Source: SL 1966, ch 159, § 15 (7); SL 1972, ch 8, § 29; SL 1977, ch 13, § 16; SL 1978, ch 13, § 10; SL 1978, ch 17; SL 1983, ch 6, § 2.

49-41B-24. Permit for energy conversion facilities, AC/DC conversion facilities, or transmission facilities--Complete findings by commission required within year of application. Within twelve months of receipt of the initial application for a permit for the construction of energy conversion facilities, AC/DC conversion facilities, or transmission facilities, the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation, or maintenance as the commission deems appropriate.

Source: SL 1977, ch 390, § 18; SL 1980, ch 328, § 2; SL 1981, ch 341; SL 2006, ch 242, § 5; SL 2009, ch 243, § 3; SL 2015, ch 235, § 2.

49-41B-27. Construction, expansion, and improvement of facilities. Utilities which have acquired a permit in accordance with the provisions of this chapter may proceed to improve, expand, or construct the facility for the intended purposes at any time, subject to the provisions of this chapter; provided, however, that if such construction, expansion and improvement commences more than four years after a permit has been issued, then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.

Source: SL 1977, ch 390, § 29.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28333

IN THE MATTER OF PUC DOCKET HP 14-001, ORDER ACCEPTING
CERTIFICATE OF PERMIT ISSUED IN DOCKET HP 09-001 TO CONSTRUCT THE
KEYSTONE XL PIPELINE

Appeal from the Circuit Court
Sixth Judicial Circuit
Hughes County, South Dakota

THE HONORABLE JOHN L. BROWN

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Notice of Appeal filed July 20, 2017

Table of Contents

Table of Authorities	iv
Jurisdictional Statement	1
Statement of the Issues.....	1
Statement of the Case.....	2
1. The permit proceedings in Docket HP09-001	2
2. Keystone’s certification	4
3. The proceedings in Docket HP14-001.....	6
4. The appeal to circuit court	7
Statement of Facts.....	8
1. The Keystone XL Pipeline project.....	8
2. Keystone’s certification and tracking table of changes	9
3. Appendix B	11
4. The Commission’s specific findings on the non-prospective permit conditions.....	12
5. The Commission’s findings on other hearing testimony	14
6. The circuit court’s decision on appeal	16
Argument	17
1. The standard of review.....	17
a. Findings of fact are reviewed for clear error, while interpretation of a statute is reviewed de novo	17
b. Discovery orders are reviewed for abuse of discretion.....	17
c. The public trust doctrine does not alter the standard of review	18
2. The findings challenged by DRA are not clearly erroneous	19
a. Findings 18 and 20 are not clearly erroneous	19

b.	Finding 25 is not clearly erroneous.....	21
c.	Finding 28 is not clearly erroneous.....	22
d.	Finding 41 is not clearly erroneous.....	24
e.	Findings 44-48 are not clearly erroneous.....	25
3.	The Commission did not erroneously shift Keystone’s burden of proof under SDCL § 49-41B-27 to the Appellants.....	27
a.	Keystone’s burden under SDCL § 49-41B-27 was to certify that it continued to meet the permit conditions.....	28
b.	The Commission’s findings and conclusions are consistent with established case law addressing the burden of going forward with the evidence.....	29
4.	Keystone met its burden of proof.....	32
5.	The standard under SDCL § 49-41B-27 is different than under § 49-41B-22.....	33
6.	The Commission did not abuse its discretion in addressing discovery	35
a.	The initial scheduling order was proper.....	35
b.	Communications between counsel for the parties were not.....	36
c.	DRA’s untimely exhibits were properly excluded.....	38
Conclusion		39
Certificate of Compliance		41
Certificate of Service		42
Appendix.....		I

Table of Authorities

	Page
Cases	
<i>Bertelsen v. Allstate Ins. Co.</i> , 2011 S.D. 13, 796 N.W.2d 685	36
<i>Dakota Indus. v. Cabela's.com, Inc.</i> , 2009 S.D. 39, 766 N.W.2d 510	32
<i>Dakota, Minn. & Eastern R.R. Corp. v. Acuity</i> , 2009 S.D. 69, 771 N.W.2d 623	2, 17, 37
<i>Emerson v. Steffen</i> , 959 F. 2d 119 (8th Cir. 1992)	28
<i>Goetz v. State</i> , 2001 S.D. 138, 636 N.W.2d 675	2, 34
<i>Illinois Central R. Co. v. State of Illinois</i> , 13 S.Ct. 110 (1892)	18
<i>In re Black Hills Power, Inc.</i> , 2016 S.D. 92, 889 N.W.2d 631	2, 17
<i>In re Estate of Duebendorfer</i> , 2006 S.D. 79, 721 N.W.2d 438	31
<i>In re Jarman</i> , 2015 S.D. 8, 860 N.W.2d 1	2, 18
<i>In re Yanni</i> , 2005 S.D. 59, 697 N.W. 2d 394	29
<i>Johnson v. Kreiser's, Inc.</i> , 433 N.W.2d 225 (S.D. 1988)	32
<i>Jundt v. Fuller</i> , 2007 S.D. 62, 736 N.W.2d 508	2, 34
<i>Knapp v. Hamm & Phillips Service Co., Inc.</i> , 2012 S.D. 82, 824 N.W.2d 785	17
<i>Kostel v. Schwartz</i> , 2008 S.D. 85, 756 N.W.2d 363	19

<i>McClaflin v. John Morrell & Co.,</i> 2001 S.D. 86, 631 N.W.2d 180.....	32
<i>Milstead v. Johnson,</i> 2016 S.D. 56, 883 N.W.2d 725.....	35
<i>Mulder v. South Dakota Department of Social Services,</i> 2004 S.D. 10, 675 N.W. 2d 212.....	28
<i>Niesche v. Wilkinson,</i> 2013 S.D. 90, 841 N.W.2d 250.....	19
<i>Olson v. City of Deadwood,</i> 480 N.W.2d 770 (S.D. 1992)	1
<i>Parks v. Cooper,</i> 2004 S.D. 27, 676 N.W.2d 823.....	18, 19
<i>Paul Nelson Farm v. South Dakota Department of Revenue,</i> 2014 S.D. 31, 847 N.W. 2d 550.....	29
<i>Peters v. Great Western Bank,</i> 2015 S.D. 4, 859 N.W.2d 618.....	29
<i>Peterson v. Evangelical Lutheran Good Samaritan Society,</i> 2012 S.D. 52, 816 N.W.2d 843.....	1, 17
<i>Rousseau v. Gesinger,</i> 330 N.W.2d 522 (S.D. 1983)	32
<i>Sopko v. C&R Transfer Co., Inc.,</i> 1998 S.D. 8, 575 N.W.2d 225.....	19
<i>Thurman v. CUNA Mut. Ins. Soc’y,</i> 2013 S.D. 63, 836 N.W.2d 611.....	18

Statutes

SDCL Ch. 49-41B.....	3
SDCL § 1-26-32.....	4
SDCL § 1-26-36.....	2, 17
SDCL § 1-26-36(5).....	1, 17
SDCL § 15-6-26(b)(1)	35
SDCL § 15-6-26(e)	38
SDCL § 15-6-37(c)	38, 39
SDCL § 15-6-37(c)(1).....	2, 39
SDCL § 15-26A-66(b)(4)	41
SDCL § 19-11-1.....	31
SDCL § 49-41B-2.1	3
SDCL § 49-41B-4	3
SDCL § 49-41B-22	2, 3, 25, 28, 30, 32, 33, 34, 35
SDCL § 49-41B-24	30
SDCL § 49-41B-27	iii, 1, 2, 4, 5, 17, 27, 28, 30, 31, 33, 34, 35, 36, 39, I
SDCL § 49-41B-30	7, 17
SDCL § 49-41B-33	4, 34

Jurisdictional Statement

On September 15, 2014, Appellee TransCanada Keystone Pipeline, LP (“Keystone”) filed an application under SDCL § 49-41B-27 with the South Dakota Public Utilities Commission to certify that the Keystone XL Pipeline, for which the Commission had previously granted a permit authorizing construction and operation, continued to meet the conditions on which the permit was granted. On January 21, 2016, the South Dakota Public Utilities entered a Final Decision and Order Finding Certification Valid and Accepting Certification. After an appeal by some of the intervenors in the Commission proceedings, on June 19, 2017, the Circuit Court, the Honorable John L. Brown presiding, entered a memorandum decision and a final order affirming the Commission’s decision. Dakota Rural Action timely filed a notice of appeal on July 20, 2017.

Statement of the Issues

1. DRA challenges a number of the Commission’s findings of fact as clearly erroneous. By statute, this Court must affirm findings of fact unless they are clearly erroneous, meaning that the Court is left with a definite and firm conviction that a mistake has been made and substantial rights of the appellant have been prejudiced; the question is not whether this Court would have made the same findings. Were the challenged findings of fact clearly erroneous?

The circuit court did not amend or reverse any of the Commission’s finding of fact.

SDCL § 1-26-36(5)

Peterson v. Evangelical Lutheran Good Samaritan Society, 2012 S.D. 52, 816 N.W.2d 843

Olson v. City of Deadwood, 480 N.W.2d 770 (S.D. 1992)

2. Under SDCL § 49-41B-27, Keystone had to “certify” that it continued to meet the conditions attached to the permit, which was granted by the Public Utilities Commission four years earlier in an underlying docket, for the construction and operation of the Keystone XL Pipeline. The Commission concluded in this proceeding that Keystone bore the burden

of proof; that Keystone met its burden of proof through a verified certification and direct testimony of multiple witnesses that certain changes to the project since it was permitted did not affect Keystone's ability to meet the permit conditions; and that the intervenors offered no evidence that Keystone could not meet any permit conditions in the future. Did the Commission misstate or misapply the burden of proof?

The circuit court found no legal error in the Commission's interpretation or application of SDCL § 49-41B-27.

SDCL § 49-41B-27

In re Black Hills Power, Inc., 2016 S.D. 92, 889 N.W.2d 631
Certify, Black's Law Dictionary (10th ed. 2014)

3. To obtain a permit to operate and construct the Keystone XL Pipeline, Keystone had to prove to the Commission in the underlying 2009 docket that the project met the standards established in SDCL § 49-41B-22. In this docket, the governing statute required Keystone to certify that the project continues to meet the conditions on which the permit was previously granted. In this certification proceeding, was Keystone obligated to again prove that the project met the standards of SDCL § 49-41B-22?

SDCL § 1-26-36

Jundt v. Fuller, 2007 S.D. 62, 736 N.W.2d 508
Goetz v. State, 2001 S.D. 138, 636 N.W.2d 675

4. This Court reviews discovery orders, like the admission of evidence, establishing a scheduling order, or narrowing the scope of discovery, for abuse of discretion. An abuse of discretion is defined as a fundamental error of judgment, a choice outside the range of permissible choices, or a decision that is arbitrary or unreasonable. In excluding exhibits that were not timely disclosed, refusing to compel disclosure of communications between counsel for the parties, and in defining the scope of discovery at the outset of the case, did the Commission abuse its discretion?

SDCL § 15-6-37(c)(1)

Dakota, Minn. & Eastern R.R. Corp. v. Acuity, 2009 S.D. 69, 771 N.W.2d 623
In re Jarman, 2015 S.D. 8, 860 N.W.2d 1

Statement of the Case

1. The permit proceedings in Docket HP09-001

TransCanada announced plans to construct and operate the Keystone XL Pipeline in 2008. On March 12, 2009, Keystone filed an application with the

South Dakota Public Utilities Commission under SDCL Ch. 49-41B, the South Dakota Energy Facility Permit Act. By statute, a common carrier seeking to construct and operate a pipeline to transport liquid hydrocarbons, a “transmission facility” under SDCL § 49-41B-2.1, must acquire a permit from the Commission. SDCL § 49-41B-4. Keystone bore the burden of proving: (1) that the pipeline will comply with all applicable laws and rules; (2) that it will not pose a threat of serious injury to the environment or the social and economic conditions in the siting area; (3) that it will not substantially impair the health, safety or welfare of the inhabitants of the siting area; and (4) that it will not unduly interfere with the orderly development of the region, with due consideration given to the views of governing bodies, including local units of government. SDCL § 49-41B-22.

The Commission opened Docket HP09-001 for the 2009 application. The Commission granted party status to 15 intervenors, including Dakota Rural Action (“DRA”). The Cheyenne River Sioux Tribe, the Yankton Sioux Tribe, and the Intertribal Council on Utility Policy (“COUP”) were not parties. After discovery, the Commission conducted a contested-case hearing that lasted three days beginning on November 2, 2009. The hearing participants were Keystone, DRA, and the Commission Staff. After post-hearing briefing, the Commission entered an Amended Final Order and Decision dated June 29, 2010, granting Keystone a permit to construct and operate the Keystone Pipeline subject to the conditions attached to the permit. (DRA App. at 66.)

Fifty permit conditions addressed compliance with laws, regulations, permits, and standards; reporting and relationships; construction; pipeline

operations, leak detection and emergency response; environmental conditions; cultural and paleontological resources; and enforcement and liability for damages. (*Id.* at 90-103.) The Commission has the authority to revoke or suspend any permit for failure to comply with the terms and conditions of the permit. SDCL § 49-41B-33. Although the Commission’s final decision and order granting the permit was appealable under SDCL § 1-26-32, no party appealed.

2. Keystone’s certification

Under SDCL § 49-41B-27, if construction of a permitted project begins more than four years after the permit was issued, “then the utility must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.” Construction of the Keystone XL Pipeline was proposed to begin in May 2011 and to be completed in 2012. (Keystone’s App. at 4.) Because of delays in receipt of a Presidential Permit, Keystone did not commence construction within four years following the Commission’s 2010 order granting the permit.

Because the Keystone XL Pipeline is an international project that crosses the border with Canada, Keystone was required by Executive Order 11423 of August 16, 1968, and Executive Order 13337 of April 30, 2004, to obtain a Presidential Permit allowing construction of the border crossing segment of the pipeline. Keystone filed its application for a Presidential Permit on September 19, 2008. (*Id.*) The application for a Presidential Permit was still being reviewed by the United States Department of State more than four years after June 29, 2010, the date that the Commission granted a permit for the project. (*Id.*) Keystone was

therefore obligated under SDCL § 49-41B-27 to certify that the project continues to meet the conditions on which the permit was issued.

Keystone chose to make the certification required under SDCL § 49-41B-27 before construction. Thus, on September 15, 2014, Keystone filed a Certification and a Petition for Order Accepting Certification with the Commission. (*Id.* at 1-3.) The certification was signed under oath by Corey Goulet, the President of the Keystone Pipeline business unit. Goulet attested that: (1) the conditions upon which the Commission issued the facility permit continued to be satisfied; (2) Keystone was in compliance with the conditions to the extent that they applied in the then-current preconstruction phase of the project; and (3) Keystone would meet and comply with all applicable permit conditions during construction, operation, and maintenance of the project. (*Id.* at 1-2.)

Three appendices were attached to the Certification and Keystone's Petition for Order Accepting Certification. Appendix A was an overview map of the project. Appendix B was a quarterly report to the Commission dated June 30, 2014, as required by condition 8 of the Commission's permit. (*Id.* at 9.) Included with the quarterly report is a table showing the status of implementation of each permit condition. (*Id.* at 19-38.) Appendix C was a Tracking Table of Changes, in which Keystone identified each finding of fact from the Commission's Amended Final Decision and Order with respect to which changes had occurred between the date of the permit and the date of the certification. (*Id.* at 39-43.)

3. The proceedings in Docket HP14-001

The Commission opened a new docket, HP14-001, for the certification proceeding. Forty-three persons, tribes, and environmental groups applied for intervention. Forty-two were granted party status. (DRA App. at 38-39.) The Commission entered a scheduling order on December 17, 2014, addressing discovery deadlines, dates for pre-filed testimony, and scheduling an evidentiary hearing from May 5-8, 2015. (Administrative Record at 1528-29.) In the same order, the Commission limited discovery to any matter relevant to (i) whether the proposed Keystone XL Pipeline continues to meet the permit conditions and (ii) the factual changes identified in Keystone's tracking table of changes attached to its certification petition. (*Id.*) After extensive written discovery, including motion practice on objections and motions to compel discovery, the Commission entered an amended scheduling order dated July 2, 2015, that the evidentiary hearing would begin on July 27, 2015, and continue through August 4, 2015. (*Id.* at 8419-21.)

The hearing began on July 27 and lasted nine days. Ten lawyers representing intervenors participated in the hearing. Another dozen intervenors appeared on their own behalf. Twenty-seven witnesses testified and thousands of pages of exhibits were received. The Commission considered post-hearing motions and briefs, and Keystone proposed findings of fact and conclusions of law that were briefed and argued.

On November 6, 2015, President Obama denied Keystone's application for a Presidential Permit after Secretary of State John Kerry recommended that it be denied because it would send the wrong signal about the leadership of the

United States on climate-change issues to the international community. Based on this action, all of the intervenors joined in a November 9, 2015 motion to dismiss and to revoke the permit. (*Id.* at 31,347-31,355.) They argued that Keystone could not comply with permit condition 2, requiring that Keystone obtain all applicable permits, including a Presidential Permit. Keystone opposed the motion, contending that the permit condition was prospective and it could obtain a Presidential Permit in the future. On December 29, 2015, the Commission entered an order denying the joint motion to dismiss. (*Id.* at 31,643-31,644.) On January 21, 2016, the Commission entered a Final Decision and Order Finding Certification Valid and Accepting Certification. (DRA App. at 38.)

4. The appeal to circuit court

The Yankton Sioux Tribe, the Cheyenne River Sioux Tribe, Dakota Rural Action, COUP, and thirteen individual intervenors (all of whom were represented on appeal by the same lawyer) filed notices of appeal under SDCL § 49-41B-30. The circuit court consolidated the appeals and set a briefing schedule. Briefing was completed in August, 2016.

Subsequently, on January 24, 2017, President Trump issued a Presidential Memorandum inviting Keystone to reapply for a Presidential Permit and directing the Secretary of State to facilitate its expeditious review. On January 26, 2017, Keystone submitted a new application for a Presidential Permit. On March 6, 2017, Keystone moved that the circuit court take judicial notice of these documents. (Settled Record at 1875.)¹ The appeal was argued on March 8, 2017.

¹ The Settled Record references are to the index prepared by the Clerk of Courts for Civ. 16-33.

By order dated March 29, 2017, the court granted Keystone's motion to take judicial notice. (*Id.* at 1927.) Before the appeal was decided, the Department of State issued a Record of Decision on March 23, 2017, finding that the Keystone XL Pipeline would serve the national interest. (Keystone's App. at 44-74.) On the same day, the State Department, acting under delegated Presidential authority, issued a Presidential Permit authorizing construction of the Keystone XL Pipeline at the international border. (*Id.* at 75-79.) Keystone filed a motion to supplement the record with, or take judicial notice of, these documents. (Settled Record at 1883.) The circuit court granted the motion by order dated June 16, 2017, taking judicial notice. (*Id.* at 1974.) On June 19, 2017, the circuit court issued a memorandum decision and entered an order affirming the decision of the Commission. (*Id.* at 1975.) The appeals to this Court followed.

Statement of Facts

1. The Keystone XL Pipeline project

The Keystone XL Pipeline was developed after the Keystone Pipeline, which was permitted by the Commission on April 25, 2008, constructed in 2009-10, and began operations in 2010. The original Keystone Pipeline transports crude oil from the Western Canadian Sedimentary Basin, starting in Hardisty, Alberta, Canada to Steele City, Nebraska, and from there to terminals at Wood River and Patoka, Illinois, and to a crude oil hub at Cushing, Oklahoma. The Keystone Pipeline enters South Dakota in Marshall County and travels generally south to Yankton, where it crosses the Missouri River into Nebraska.

The Keystone XL Pipeline was proposed in 2009 to transport oil in three segments: (1) the Steele City segment, from Hardisty to Steele City, Nebraska;

(2) the Gulf Coast Segment, from Cushing, Oklahoma to Liberty County, Texas; and (3) the Houston Lateral Segment, from Liberty County, Texas, to refinery markets near Houston, Texas. (DRA App. at 72, ¶ 15; 54, ¶ 12.) Due to the Department of State’s long delay in acting on Keystone’s application for a Presidential Permit, the second and third segments of the Keystone XL Pipeline have been constructed and are in operation. Those segments and the original Keystone Pipeline currently constitute the Keystone Pipeline system.

As of September 15, 2014, the date when Keystone filed its certification, the project consisted of only the Steele City Segment. (*Id.* at 54, ¶ 13.) That segment would follow a different path from Hardisty to Steele City than the Keystone Pipeline. It would enter South Dakota in Harding County northwest of Buffalo, travel generally southeast through Butte, Perkins, Meade, Pennington, Haakon, Jones, and Lyman counties, and leave the State in Tripp County southeast of Winner. (*Id.* at 72, ¶ 16.) It was proposed and permitted as a 36-inch diameter pipeline with a maximum nominal capacity of 900,000 barrels per day (bpd); the 2017 Presidential Permit is for a nominal capacity of 830,00 bpd. (*Id.* at 72-73, ¶¶ 18, 20.) The Keystone XL Pipeline route in South Dakota does not pass through Indian Country or cross any tribally-owned lands. (*Id.* at 56, ¶ 27.)

2. Keystone’s certification and tracking table of changes

To explain what had changed between June 29, 2010, when the permit was granted, and September 2014, Keystone attached a “tracking table of changes” to its certification petition. (Keystone’s App. at 39-43.) In the tracking table, Keystone updated certain findings from the Commission’s Amended Final Decision and Order dated June 29, 2010. The first section of the tracking table

identifies changes to the project in findings 14-20, 22, and 23. (*Id.* at 39-40.) For instance, the project currently consists of only the Steele City Segment. The mileage is therefore reduced in the United States, and the initial construction date of May 2011 obviously no longer applies. The number of pump stations in South Dakota is the same, but the number of mainline valves increased from 16 to 20, and the maximum design flow rate was reduced to 830,000 barrels per day. The estimated cost of the project increased from \$921.4 million to \$1.974 billion.

In the second section, findings 24-29, the tracking table addresses demand for the project, updates facts and statistics, and concludes that market demand remains strong. (*Id.* at 40-41.) The next section addresses environmental conditions, noting that the project's Construction Mitigation and Reclamation Plan ("CMR Plan") continues to be revised, that updated project maps will be submitted to the Commission before construction, that some site-specific crossing plans for two waterbody crossings were changed to horizontal directional drilling, and that the total length of the project affecting high consequence areas (HCA's, as defined by federal regulation), has been reduced. (*Id.* at 41-42.)

In the fourth section, addressing design and construction, the tracking table explains that Keystone withdrew its request to its federal regulator, the Pipeline Hazardous Materials Safety Administration (PHMSA), for a special permit to operate at 80% of the steel pipe's specified minimum yield strength. (*Id.* at 42-43.) Instead, Keystone committed to implement 59 additional safety measures set forth in the Department of State's Final Supplemental Environmental Impact Statement ("FSEIS"). In the last section, addressing

finding 107 related to socio-economic factors, the tracking table noted that the increased project cost could result in increased tax revenue to counties that host the pipeline. (*Id.* at 43.)

In its certification, Keystone attested that nothing about these factual changes altered either its compliance with conditions that applied in the pre-construction phase of the project or its ability to comply in the future with all applicable prospective permit conditions during construction, operation, and maintenance of the project. As stated in Keystone’s certification petition, “to the extent that there have been changes in the underlying facts, those changes are either neutral or positive to the Commission’s concerns. In sum, the need, impacts, efficacy, and safety of the Project have not changed since the Amended Final Decision and Order.” (Keystone’s App. at 8.)

3. Appendix B

The latest quarterly report submitted to the Commission, dated July 29, 2014, was attached to Keystone’s petition as Exhibit B. (*Id.* at 19-38.) As part of the report, Keystone included an approximately four-page narrative about the project’s status, a table showing recent consultations with the South Dakota Department of Environment and Natural Resources, and a table addressing the current status of each of the 50 permit conditions. The latter is Table 2, entitled “Status of Implementation of South Dakota PUC Conditions.” It recites each condition and then describes the “status of other measures required by” each condition. It comprises 20 pages of the quarterly report. (*Id.* at 19-38.)

As found by the Commission in Finding 31, nearly all of the permit conditions are prospective—they require that Keystone do something at a future

date, such as during construction or reclamation, or address maintenance or operation of the pipeline after construction is completed. (DRA App. at 56, ¶ 31.) Condition 1, for instance, states in its first sentence that “Keystone shall comply with all applicable laws and regulations in its construction and operation of the Project.” (*Id.* at 90, ¶ 1.) Keystone addressed this condition in Appendix B by stating: “Construction of the project has not been initiated. Keystone will comply with all applicable laws and regulations during construction and operation of the Project.” (Keystone’s App. at 19.) The other prospective conditions are similarly addressed in Appendix B.

In Finding 31, the Commission found that “[n]one of the updates identified in Appendix C [Keystone’s tracking table of changes] to Keystone’s Certification Petition affects Keystone’s ability to meet the conditions on which the permit was issued.” (DRA App. at 56, ¶ 31.) With respect to the prospective conditions, the Commission found that “[n]o evidence was presented that Keystone cannot satisfy any of these conditions in the future.” (*Id.*)

4. The Commission’s specific findings on the non-prospective permit conditions

In its findings, the Commission addressed the conditions that it found were not prospective. Condition 4 provided that the permit is not transferrable without the Commission’s approval. (*Id.* ¶ 32.) Conditions 7-9 required the appointment of a public liaison officer and the submission of quarterly reports, both of which the Commission found had been done. (*Id.* ¶ 33.) Condition 10 requires a program of contact with local emergency responders no later than six months before construction; the Commission found that Keystone had already started

making such contacts and that it would continue. (*Id.* ¶ 34.) The Commission further found that even though this condition does not refer to Tribal governments or officials, Keystone presented evidence that it would contact Tribal emergency responders. (*Id.*)

Condition 15 requires consultation with the NRCS to develop con/rec units, which the Commission found had been done. (*Id.* ¶ 36.) Condition 19 requires that landowners be compensated for tree removal, and that Keystone address that issue when acquiring easements. (*Id.* ¶ 37.) The Commission found no evidence that Keystone cannot continue to meet the condition. Condition 34 requires that Keystone continue to evaluate and perform assessment activities regarding HCAs. (*Id.* ¶ 38.) The Commission found that the process was ongoing. Condition 41 requires that Keystone follow all protective and mitigation efforts recommended by the U.S. Fish and Wildlife Service and the South Dakota Department of Game, Fish, and Parks, as well as consult with SDGFP to identify greater prairie chicken and greater sage and sharp-tailed grouse leks, and that the process was ongoing. (*Id.* ¶¶ 39-40.)

Condition 16(m) requires Keystone to reseed disturbed lands with comparable crops, grass, or a native-species mix to be approved by the landowner. Condition 49 provides that Keystone must pay commercially reasonable costs and indemnify landowners for any loss or damage resulting from Keystone's use of the easement. (*Id.* ¶ 41.) The Commission found that the only testimony bearing on these two conditions was from Sue Sibson, a landowner along the Keystone Pipeline who was not satisfied with the reclamation of her

property. (*Id.*) The Commission further found that Sibson's testimony was not evidence that Keystone could not comply with the reclamation conditions, as reclamation efforts are ongoing, and that Keystone was committed to continuing reclamation at the Sibson property until Mrs. Sibson and her husband were satisfied. (*Id.*)

Condition 50 provides that the Commission's complaint process be available to landowners threatened with damage or the consequences of Keystone's failure to comply with any of the conditions. The Commission found no evidence that Keystone could not comply with this condition. (*Id.* ¶ 42.)

5. The Commission's findings on other hearing testimony

The evidentiary hearing before the Commission lasted nine days. (*Id.* at 46.) Twenty-seven witnesses testified. The Commission entered an order at the outset of the case requiring pre-filed testimony. (Administrative Record at 1528-29.) Keystone submitted pre-filed direct testimony from five witnesses. (*Id.* at 2622-2702.) In addition to Corey Goulet's testimony noted above, Keystone submitted pre-filed testimony from Heidi Tillquist, an environmental toxicologist who is a contractor to the project and who conducted a risk analysis for the project. Her pre-filed testimony covered spill scenarios and potential impact to groundwater resources.

Jon Schmidt, Ph.D., who is also a contractor to the project, acting as its regulatory and permitting manager, offered pre-filed testimony about the CMR Plan, project mapping, river crossings, and the development of con/rec (construction/reclamation) units in consultation with the NRCS. Meera Kothari, P.E., who is a TransCanada employee and the project's lead engineer, filed

written testimony addressing Keystone's application with PHMSA for a special permit, the use of high-strength steel and operating pressures, fusion bond epoxy coating for the pipe, and the 59 special conditions that Keystone committed to follow. Keystone also submitted rebuttal testimony from Goulet, Kothari, Schmidt, and Tillquist, as well as from Dan King and Rick Perkins. (*Id.* at 7601-7965.) King, TransCanada's chief engineer, testified about pipeline integrity and welding procedures. Perkins testified about the proposed work camps to house workers during construction.

Commission Staff offered the pre-filed testimony of ten witnesses, many of whom testified in docket HP09-001, in which the permit was issued. The Intervenor offered the testimony of 16 witnesses, including experts and lay persons. The parties collectively filed rebuttal or sur-rebuttal testimony from 19 witnesses. Not all of the witnesses for whom pre-filed testimony was submitted actually testified at the hearing, but 27 witnesses took the witness stand and were subject to cross-examination, which was extensive. Meera Kothari, for example, was cross-examined by the intervenors for almost 13 hours.

Based on this testimony, the Commission made further factual findings addressing a number of issues and concerns raised by the intervenors. These include the possible adverse effects on groundwater resources; the testimony of Dr. Arden Davis about possible adverse effects on the Ogallala aquifer and others; the potential for landslides along the project right of way; possible benzene exposures from a leak or spill; proximity of the right of way to the City of Colome's water wells; the threat to tribal water rights; the possible disturbance of

contaminated sediments in the Cheyenne River; consultation with Tribal officials about the project and emergency response; whether the socio-economic analysis done by the Department of State as part of the FSEIS presented a flawed cost-benefit analysis; concerns about the proposed work camps in proximity to the Yankton Sioux Reservation; concerns about threats to cultural and historic sites; and the concerns of Evan Vokes, a former TransCanada employee, who testified about a variety of engineering concerns, including weld testing, pipe manufacture, and welding practices. (DRA App. at 57-63, ¶¶ 42-77.) The Commission found that the testimony on these issues did not establish that Keystone failed, or would be unable in the future, to meet any permit condition. (*Id.* at 57-63, ¶¶ 42, 43, 44, 46, 49, 50, 51, 52, 54, 55, 60, 61, 65, 68, 77.)

6. The circuit court's decision on appeal

The circuit court issued a 36-page memorandum decision dated June 16, 2017, affirming the decision of the Commission. (DRA App. at 2.) In its separate order affirming the Commission's decision, the court stated that its memorandum decision constituted its findings of fact and conclusions of law. (*Id.* at 1.) Except for taking judicial notice of the federal documents related to the Department of State's Record of Decision and the Presidential Memorandum pursuant to which a Presidential Permit was granted, the circuit court did not consider any new evidence, independently find any facts, or reject any of the Commission's findings of fact as clearly erroneous. The circuit court's decision addresses each of the arguments raised on appeal.

Argument

1. The standard of review

a. Findings of fact are reviewed for clear error, while interpretation of a statute is reviewed de novo

DRA's appeal is authorized by SDCL § 49-41B-30, which provides that the appeal is subject to SDCL § 1-26-36. This statute directs that the circuit court "give great weight" to the findings made and inferences drawn by the Commission on questions of fact and reverse or modify only if "substantial rights of the appellant have been prejudiced because the administrative findings are . . . clearly erroneous in light of the entire evidence in the record." SDCL § 1-26-36(5). *See generally Peterson v. Evangelical Lutheran Good Samaritan Society*, 2012 S.D. 52, ¶ 12, 816 N.W.2d 843, 846.

The Commission's interpretation of SDCL § 49-41B-27 is a question of law, subject to de novo review. *Knapp v. Hamm & Phillips Service Co., Inc.*, 2012 S.D. 82, ¶ 11, 824 N.W.2d 785, 788.

In considering whether the facts satisfy the legal standard of proof, this Court's review is de novo. *In re Black Hills Power, Inc.*, 2016 S.D. 92, ¶ 17, 889 N.W.2d 631, 636. The burden of proof in an administrative hearing is a preponderance of the evidence. *Id.*

b. Discovery orders are reviewed for abuse of discretion

Discovery orders are reviewed under an abuse-of-discretion standard. *Dakota, Minn. & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 47, 771 N.W.2d 623, 636. An abuse of discretion is defined as "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which on full

consideration, is arbitrary or unreasonable.” *In re Jarman*, 2015 S.D. 8, ¶ 19, 860 N.W.2d 1, 9 (quoting *Thurman v. CUNA Mut. Ins. Soc’y*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 616).

c. The public trust doctrine does not alter the standard of review

DRA argues that the Court should adopt and apply a “heightened fiduciary standard” for reviewing the Commission’s decision based on the public trust doctrine recognized in *Parks v. Cooper*, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 848. (DRA Br. at 20-21.) DRA suggests that “the Commission should have set a higher bar” for Keystone’s certification, but does not specifically define a standard. Nor does DRA cite any authority in which the public trust doctrine has created a stricter standard of review for permitting of a pipeline project.

The public trust doctrine doctrine originated in the late nineteenth century with the United States Supreme Court decision in *Illinois Central R. Co. v. State of Illinois*, 13 S.Ct. 110 (1892), in which the Court held that the ownership of submerged lands “is held by the state, by virtue of its sovereignty, in trust for the public.” *Id.* at 119. The doctrine was the basis for the South Dakota Supreme Court’s conclusion in *Parks* that “the State of South Dakota retains the right to use, control, and develop the water in these lakes as a separate asset in trust for the public.” *Id.* ¶ 46, 676 N.W.2d at 838.

This Court has considered the doctrine only in connection with issues related to the ownership of water and the rights of riparian landowners. *Id.* ¶ 46, 676 N.W.2d at 838-39. The Court concluded in *Parks* that “the public trust doctrine imposes an obligation on the State to preserve water for public use. It

provides that the people of the State own the waters themselves, and that the State, not as a proprietor, but as a trustee, controls the water for the benefit of the public.” *Id.* ¶ 53, 676 N.W.2d at 841.

The Court has never held that the doctrine converts state administrative agencies into trustees or imposes a fiduciary duty on them to apply some undefined but heightened standard of scrutiny to issues involving natural resources. The doctrine has no application whatsoever to this appeal.

Moreover, DRA’s failure to cite any authority that the public trust doctrine would apply in this context constitutes a waiver. *See Niesche v. Wilkinson*, 2013 S.D. 90, ¶ 15, 841 N.W.2d 250, 255 (“Because Niesche cites no authority for this novel proposition, it is waived.”); *Kostel v. Schwartz*, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363, 377 (appeal arguments must be supported by authority).

2. The findings challenged by DRA are not clearly erroneous

In its statement of facts, DRA challenges a number of the Commission’s findings as clearly erroneous. (DRA Br. at 8-18, 25-27.) Findings are clearly erroneous only if the Court is left with a definite and firm impression that a mistake has been made. *Sopko v. C&R Transfer Co., Inc.*, 1998 S.D. 8, ¶ 6, 575 N.W.2d 225, 228-29.

a. Findings 18 and 20 are not clearly erroneous

DRA challenges findings 18 and 20 because Meera Kothari testified that after Keystone withdrew its application to PHMSA for a special permit, it agreed to nevertheless adopt and adhere to the 59 special conditions that PHMSA had developed in connection with Keystone’s application for a special permit. (DRA Br. at 9.) DRA argues that while Kothari testified that Keystone’s adoption was

voluntary, its compliance with the Final Environmental Impact Statement (FEIS) is mandatory, and the 59 special conditions are part of the FEIS. (*Id.*) That does not, however, explain why these findings were erroneous.

Finding 18 states:

“The Pipeline will be constructed using API 5L X70M high-strength steel. This was one of the design options presented in the original permit application. Petition, App. C, ¶ 18; Ex. 2003, ¶ 5. Keystone withdrew its application to PHMSA for a special permit and adopted 59 special conditions developed by PHMSA as set forth in Appendix Z to the Department of State Final Supplemental Environmental Impact Statement (FSEIS). Petition ¶¶ 60, 90; TR 215, 302. As a result of this change, Keystone will construct the Pipeline using the as-proposed stronger steel, but will operate the Pipeline at a lower maximum pressure, 1,307 psig. Ex. 2003, ¶ 8; Petition, App. C, ¶¶ 18, 19, 63.”

Finding 20 states:

“Keystone has committed to meet the 59 special conditions proposed by PHMSA as set forth in Appendix Z to the FSEIS. TR 215; Ex. 2001, ¶ 13.”

In fact, the findings are amply supported by the record and Kothari’s testimony. It is undisputed that Keystone stated that it would comply with the special conditions. (Tr. at 215; 302; 1105-06.)² Kothari’s statement that Keystone agreed to adhere to the conditions despite withdrawing the special permit application does not negate Keystone’s commitment, which is what the Commission found. There is no basis to conclude that the findings are clearly erroneous.

² In the Administrative Record, the transcript is entered each day of the hearing, starting at page 23,931, and ending at page 27,437.

b. Finding 25 is not clearly erroneous

DRA challenges that part of Finding 25 addressing Heidi Tillquist's calculation of spill frequency in an area that could affect a High Consequence Area ("HCA"). Based on Tillquist's calculation, the Commission found that "a spill that could affect an HCA would occur no more than once in 460 years." (DRA App. at 55, ¶ 25.) DRA does not challenge the calculation, but rather Tillquist's qualifications. DRA first challenges her qualifications because she did not know what a black swan event was. (Tr. at 850.) DRA offered no evidence in the record to explain why that meant she is either unqualified to do a risk assessment or that, as DRA argues, she has "no formal training in risk analysis." Her resume amply supports her testimony. (Administrative Record at 23,677.)

DRA then argues that the risk assessment is flawed because the engineering analysis that is done as part of the process was not completed as of the hearing date. (DRA Br. at 10; Tr. at 825-26.) Tillquist testified that the engineering analysis was underway. (Tr. at 826.) The fact that the process would not be completed until a later stage of construction does not establish a flaw in the risk assessment that was done.

DRA cites to Tillquist's testimony that one of the purposes of the risk assessment is "to help communicate to the public and to regulatory agencies," which DRA interprets to mean that the risk assessment is just a public-relations tool. (DRA Br. at 10; Tr. at 846-47.) This quotation does not even address the calculation contained in the risk assessment, and therefore is not a basis for the Court to conclude that Tillquist's assessment was not based on sound

methodology. DRA's witness in this area did not challenge Tillquist's spill frequency calculation, and testified that he did not conduct an independent risk assessment. (Tr. at 1808.)

Finally, DRA cites to the 14 leaks involving fittings at several pump stations that occurred during start up of the Keystone Pipeline because the fittings were not sufficiently tightened. (DRA Br. at 11; Tr. at 2285-86.) DRA argues that these leaks are inconsistent with Tillquist's analysis. (DRA Br. at 11.) There is no connection, however, between the failed fittings and the spill frequency analysis involving HCA's stated in Finding 25. In other words, the testimony DRA cites and its entire argument on this issue is not specific to HCA's, which is what is addressed in Finding 25. There is no basis to conclude that Finding 25 is clearly erroneous.

c. Finding 28 is not clearly erroneous

In Finding 28, the Commission found that TransCanada has thousands of miles of pipe in operation coated with fusion bonded epoxy (FBE), and no evidence of external corrosion except for one instance in Missouri involving interference from another pipeline with the cathodic protection system. (DRA App. at 56, ¶ 28.) The Commission further found that Keystone discovered the problem in Missouri through its own in-line inspection program. (Tr. at 293-94, 2315-16.) In subsequent construction Keystone has been installing passive anodes to protect the pipeline during construction from a similar incident of interference with the cathodic protection system. (Tr. at 265, 309-10.)

DRA responds to this finding by arguing that the Missouri incident proves that the Keystone Pipeline is not safe (DRA Br. at 12-15), but its argument is not a basis to conclude that any part of Finding 28 is clearly erroneous. DRA cites no evidence in the record of any instance in which the FBE coating has failed or there has been external corrosion; no evidence that Keystone did not discover the problem in Missouri through its own in-line inspection; and no evidence that Keystone has not subsequently corrected the problem by installing passive anodes.

DRA argues that Meera Kothari's testimony that a similar situation could not occur on the Keystone XL Pipeline because there were no shared utility corridors was "patently false" because the Keystone XL Pipeline will cross the Mni Waconi water line in Jones County. (DRA Br. at 14.) A pipeline crossing, however, is not a shared utility corridor. Moreover, Kothari testified that Keystone worked with the Bureau of Reclamation, which had oversight responsibility for the Mni Waconi crossing, and that BOR's "requirements for that particular line, and those design requirements for cathodic protection as well as crossing designs were incorporated into our crossing design." (Tr. at 1187.) DRA offered no evidence or testimony that the Mni Waconi crossing presents any risk of the cathodic protection issue that existed in Missouri. DRA's argument on this point is not directly responsive to Finding 28 or any of the permit conditions.

DRA also argues that Keystone failed to properly protect the FBE coating on stored pipe from exposure to ultraviolet light. (DRA Br. at 15.) DRA quotes bits and pieces of testimony, but the issue was thoroughly discussed in some

detail by Kothari at pages 1163-80 of the transcript. Kothari testified that Keystone had applied a protective coating to stored pipe and that the coating was typically applied “[a] year to 18 months” after manufacture as “a way to mitigate any potential degradation.” (Tr. at 1176.) Kothari further testified that before pipe can be installed, Keystone has to prove that the FBE coating meets federal regulations. “So our regulations require us to ensure we have corrosion control on our pipe, and we have to prove that our pipe meets these corrosion controls before they are installed. And if they don’t meet those requirements, then we simply recoat the pipe.” (Tr. at 1179.) There was no contrary evidence before the Commission that Keystone would not follow this process or that the delay in constructing the Keystone XL Pipeline would affect the integrity of the FBE coating.

d. Finding 41 is not clearly erroneous

DRA argues that Finding 41 is clearly erroneous based on the testimony of Sue Sibson. (DRA Br. at 16-17.) Finding 41 relates to two permit conditions, 16(m) and 49, requiring that Keystone reclaim the right of way after construction by re-seeding with a landowner-approved seed mix and pay the costs of repairing any damage caused by Keystone’s use of the easement. (DRA App. at 57, ¶ 41.) Sibson is a landowner on the Keystone Pipeline some of whose property has not been reclaimed to her satisfaction. In Finding 41, the Commission found that Sibson’s testimony did not establish that Keystone cannot meet the reclamation conditions.

First, the Commission specifically addressed Sibson's concerns and testimony in Finding 41 and concluded that her concerns were not evidence that Keystone could not meet the permit condition. Second, DRA ignores Corey Goulet's testimony that reclamation on the Sibson property is not complete and that Keystone will continue its efforts until the Sibsons are satisfied. (Tr. at 306-07.) Out of 535 tracts of land on the Keystone Pipeline, reclamation continues on only 9 tracts. (Tr. at 306.) Given this undisputed fact, Finding 41 is not clearly erroneous.

e. Findings 44-48 are not clearly erroneous

In arguing that the Commission ignored geological risks, DRA mentions Findings 44-48, which address the testimony of Dr. Arden Davis, a geologist who is retired from the South Dakota School of Mines and Technology. (DRA Br. at 17-18.) In Finding 44, the PUC found that Dr. Davis testified to concerns about the possible effects of a pipeline spill on aquifers, rivers, and groundwater along the right of way. The PUC concluded that the concerns, which were relevant to Keystone's burden under SDCL § 49-41B-22, did not specifically address any permit condition.

In Finding 45, the Commission found that Dr. Davis's testimony did not challenge Heidi Tillquist's testimony about the likelihood of adverse impacts to the areas of concern. His testimony was therefore not sufficient to warrant any changes to findings of fact made in the Commission's Amended Final Decision and Order.

In Finding 46, the Commission addressed Keystone's obligation to treat the Ogallala aquifer in Tripp County and the wind-blown Sand Hills type material crossed by the proposed right of way as a hydrologically sensitive area. It found that Dr. Davis did not testify that such treatment was inappropriate or that Keystone could not meet that condition.

In Finding 47, the Commission noted Dr. Davis's testimony about possible benzene exposures from a leak or spill, but found that such exposures at a level that would cause health concerns were unlikely because of the low persistence of benzene and expected emergency response measures. In other words, the Commission found that despite Dr. Davis's concern, he failed to respond to Tillquist's testimony establishing that a harmful exposure of that sort was not likely.

In Finding 48, the Commission noted that Dr. Davis had relied in his testimony on a report referred to as the Stansbury report. The Commission also found that Tillquist had specifically addressed flaws in the Stansbury report, to which Dr. Davis did not respond.

In its brief, DRA does not challenge these particular findings.

Having failed to address any of the specifics of Findings 44-48, DRA instead argues that Dr. Davis testified that the pipeline route is in an area of high landslide potential, and that contrary testimony from Meera Kothari and Jon Schmidt was not credible. (DRA Br. at 17.) Dr. Davis testified that 150 miles of the route would travel through areas of Pierre Shale, which according to a USGS map are at high risk for landslides. (*Id.*) By contrast, Kothari testified that only

1.6 miles of the route were high-risk landslide areas. (*Id.*). DRA entirely ignores the basis for Kothari's testimony, which was that the USGS map on which Dr. Davis relied was "an extremely high level map" based on a scale of 1 to 7 million, which was not intended for pipeline routing. (Tr. at 1097, 1101.) The legend expressly states that the map is not intended for site-specific decisions, like routing. (See <http://landslides.usgs.gov/hazards/nationalmap/> ("because the map is highly generalized, owing to the small scale and the scarcity of precise landslide information for much of the country, it is unsuitable for local planning or actual site selection"). Thus, Keystone used this map only at the outset of the project, and then progressed through detailed engineering, field visits, and other site-specific work to refine the design and determine the best route. (Tr. at 1097-98.) Kothari's testimony is unrefuted that, using this process, only 1.6 miles of the pipeline route were in areas of high landslide potential. Dr. Davis specifically testified that he did not know the basis for Kothari's testimony. (*Id.* at 1810-11.) There is no evidence in the hearing record for the Court to find either that the Commission's findings were clearly erroneous, or that Keystone is unable to meet any permit condition because of the testimony on which DRA relies related to landslide potential.

3. The Commission did not erroneously shift Keystone's burden of proof under SDCL § 49-41B-27 to the Appellants

DRA argues that, despite recognizing from the outset that Keystone bore the burden of proof (DRA Br. at 22), the Commission improperly shifted the burden of proof to the intervenors. (*Id.* at 23-24.) It bases this argument on the Commission's various findings that with respect to a particular permit condition,

there was no evidence that Keystone did not or could not continue to meet the condition. (*Id.* at 24.)

a. Keystone’s burden under SDCL § 49-41B-27 was to certify that it continued to meet the permit conditions

The Commission expressly found in its final order that Keystone “has the burden of proof to show that its certification is valid.” (DRA App. at 64, ¶ 4.) Keystone does not and did not dispute this.

As the Commission correctly concluded, the Permit granted by the Amended Final Decision and Order dated June 30, 2010, in Docket HP09-001 was not appealed and constitutes a final order. (DRA App. at 63, ¶ 2.) The Commission also correctly concluded under SDCL § 49-41B-27 that the permit granted in Docket HP09-001 has not lapsed or expired, so that “Keystone therefore has no legal obligation to again prove that it meets the requirements of SDCL § 49-41B-22,” the statute that establishes what Keystone needed to prove to obtain the initial permit. (*Id.* at 64, ¶ 3.)

The certification statute requires that Keystone “must certify to the Public Utilities Commission that such facility continues to meet the conditions upon which the permit was issued.” SDCL § 49-41B-27. There are no reported cases addressing this statute. This Court’s review of the Commission’s interpretation of SDCL § 49-41B-27 is therefore deferential. “When faced with an agency’s interpretation of a statute that it administers, ‘so long as the agency’s interpretation is a reasonable one, it must be upheld.’” *Mulder v. South Dakota Department of Social Services*, 2004 S.D. 10, ¶ 5, 675 N.W. 2d 212, 214 (quoting *Emerson v. Steffen*, 959 F. 2d 119, 121 (8th Cir. 1992)).

The plain language of the statute provides that Keystone must “certify” that it can continue to meet the “conditions” on which the permit was granted. The Court must give the language of the statute its ordinary and plain meaning. *See, e.g., Peters v. Great Western Bank*, 2015 S.D. 4, ¶ 7, 859 N.W.2d 618, 621. “Certify” means “to authenticate or verify in writing,” or “to attest as being true or as meeting certain criteria.” BLACK’S LAW DICTIONARY at 275 (10th ed. 2014). To “attest” means “to affirm to be true or genuine; to authenticate by signing as a witness.” (*Id.* at 153.) These are narrow and precise terms. An agency may not “enlarge the scope of the statute by an unwarranted interpretation of its language.” *Paul Nelson Farm v. South Dakota Department of Revenue*, 2014 S.D. 31, ¶ 24, 847 N.W. 2d 550, 558 (quoting *In re Yanni*, 2005 S.D. 59, ¶ 16, 697 N.W. 2d 394, 400).

Thus, Keystone’s burden in this case was to verify in writing or to affirm as true that it continues to meet the conditions on which the permit was granted. As stated by the Commission, Keystone’s burden was to prove “that its certification is valid.” (DRA App. at 64, ¶ 4.)

b. The Commission’s findings and conclusions are consistent with established case law addressing the burden of going forward with the evidence

Much of the dispute about the burden of proof hinges on the fact that most of the 50 permit conditions are prospective—they require Keystone to do something in the future. DRA contends that Keystone was obligated to present affirmative evidence that it can meet each of those conditions in the future, even if nothing has changed since the permit was granted. (DRA Br. at 22-23.)

Keystone took a different approach. When the Commission granted Keystone a permit in 2010, it found that Keystone had met its burden of proof under SDCL § 49-41B-22. It granted the permit based on various conditions, some of which necessarily could be met only in the future. Thus, Keystone did not have to prove in docket HP09-001 that it did or could meet *all* 50 permit conditions. The Commission required that Keystone meet the conditions, concluding that it had authority to impose the conditions under SDCL § 49-41B-24, that they were reasonable, and that they would help ensure that the project met the standards under SDCL § 49-41B-22.

By contrast, in this certification proceeding Keystone had to certify that it “continues to meet the conditions upon which the permit was issued.” SDCL § 49-41B-27. The Commission construed “conditions” as used in the statute to mean the permit conditions. (DRA App. at 64, ¶ 5.) DRA does not challenge that conclusion.

Given that many of the conditions are prospective, Keystone complied with this statute by offering evidence of changes related to the project since 2010 and then addressing whether anything about those changes would prevent it from meeting the permit conditions. Keystone supported its sworn certification with Appendix C, a tracking table of changes related to the Commission’s findings of fact in Docket HP09-001, and Appendix B, a table addressing the status of each condition. Keystone’s pre-filed testimony similarly addressed the various subject matter areas covered by the permit conditions and stated that nothing had changed that would prevent Keystone’s compliance.

In this context, DRA misconstrues the Commission's statements that there was no evidence that Keystone could not in the future meet a particular condition as evidence that the burden of proof was shifted. (DRA Br. at 24.) This argument is not only illogical, it is contrary to this Court's understanding of a party's burden of going forward with the evidence.

As this Court has held, the term "burden of proof" encompasses two distinct elements: "'the burden of persuasion,' i.e., which party loses if the evidence is closely balanced, and the 'burden of production,' i.e., which party bears the obligation to come forward with the evidence at different points in the proceeding." *In re Estate of Duebendorfer*, 2006 S.D. 79, ¶ 42, 721 N.W.2d 438, 448 (Zinter, J., concurring). The burden of persuasion rests with the party having the affirmative side of an issue and does not change, but the burden of going forward with the evidence may shift. *Id.* That is what happened here. After Keystone submitted its certification, accompanying documents and testimony per SDCL § 49-41B-27, the Appellants, as challengers to Keystone's certification who chose to present evidence, bore the burden of production. That is, they had to convince the Commission that Keystone's certification was invalid because Keystone could not in fact meet some of the permit conditions.

The concept that the burden of going forward with the evidence can shift is hardly novel. It exists in all cases in which a presumption arises. *See* SDCL § 19-11-1. It exists in cases involving allegations of a confidential relationship and undue influence. *See, e.g., In re Estate of Duebendorfer*, ¶ 32, 721 N.W.2d at

446-47. It exists in employment cases involving allegations of retaliatory discharge. *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 227-28 (S.D. 1988). It exists in family-law cases involving a defense of inability to pay alimony, which shifts the burden of proof to establish inability to pay. *Rousseau v. Gesinger*, 330 N.W.2d 522, 524 (S.D. 1983). It exists in workers compensation cases involving the odd-lot doctrine. *McClaflin v. John Morrell & Co.*, 2001 S.D. 86, ¶ 7, 631 N.W.2d 180, 183. And it exists in every civil case when a party seeking summary judgment meets its initial burden, shifting the burden to the non-moving party to identify facts disputing the moving party's allegations. *Dakota Indus. v. Cabela's.com, Inc.*, 2009 S.D. 39, ¶ 14, 766 N.W.2d 510, 514.

Given this authority, there was nothing extraordinary or legally incorrect about the Commission's conclusions: (1) that Keystone met its burden of proof through the certification signed under oath by Corey Goulet and the direct testimony of its witnesses related to updates to the project; and (2) with respect to future conditions, that "[n]o evidence was offered demonstrating that Keystone will be unable to meet the conditions in the future." (DRA App. at 64, ¶¶ 8-9.)

4. Keystone met its burden of proof.

The record contains abundant evidence that Keystone met its burden under SDCL § 49-41B-22. The hearing transcript is 2,507 pages; the evidentiary hearing took nine days; and seven witnesses testified for Keystone. The certification proceeding took 16 months and created a 31,425-page record, not including a nine-day evidentiary hearing at which 27 witnesses testified. The Commission entered a 28-page decision with 78 findings of fact and 13 conclusions of law.

Most of the permit conditions are prospective in nature. They require that Keystone do something in the future. The Commission in its findings of fact identified the conditions that, like these examples, are prospective. (*Id.* at 56, ¶ 31 (identifying Conditions 1-3, 5 6.a-6.f, 11-14, 16.1-16.p, 17, 18, 19.a, 20-34.a, 35-40, 41.b, and 42-48 as prospective conditions).) The Commission then concluded that there was no evidence in the record that Keystone could not satisfy any of these conditions. (*Id.* at 64, ¶ 9.)

The logic of the Commission’s decision is clear. Keystone was unable to prove present compliance with future conditions, either in 2010 when the permit was first issued or on the date of the certification, because the conditions relate to future events. Keystone can do no more than verify its promise to comply with the future condition and establish that no factual change has occurred that would prevent its future compliance. This logic alone defeats DRA’s reliance on its “tracking table of non-evidence.” (DRA Br. at 23.) Moreover, DRA’s argument is fatally flawed based on Exhibit B, which presented the current status of Keystone’s compliance with each condition, and to which DRA did not respond before the Commission and does not respond here. The Commission’s findings and conclusions with respect to prospective conditions are logical and supported by the evidence.

5. The standard under SDCL § 49-41B-27 is different than under § 49-41B-22

DRA argues that the Commission failed to consider the effects of a possible pipeline leak on South Dakota’s water resources. DRA explicitly attributes this alleged failure to the Commission’s refusal to require Keystone to

again meet its burden of proof under SDCL § 49-41B-22, which is the statute that governed the 2009 permit proceeding.³ (DRA Br. at 27-29.) DRA contends that the first permit condition requires compliance with “all applicable laws,” and that includes SDCL § 49-41B-22. (DRA Br. at 28.)

This reading would nullify the plain language of SDCL § 49-41B-27 and the fact that the permit granted in 2009 does not expire. Rather, the only statutory limits on a permit once issued are the certification required by SDCL § 49-41B-22 and the Commission’s ability to revoke or suspend the permit for enumerated reasons under SDCL § 49-41B-33. The permit issued in docket HP09-001 was final and not appealed, so it is entitled to preclusive effect. *Jundt v. Fuller*, 2007 S.D. 62, ¶ 12, 736 N.W.2d 508, 513.

This certification proceeding was not a chance for the Commission to reconsider its decision. “Nothing in South Dakota’s Administrative Procedures Act authorizes an administrative agency to reconsider a decision in a contested case.” *Id.* ¶ 7, 736 N.W.2d at 512. The statutory requirement that Keystone “certify” that it continues to meet the conditions upon which the permit was issued cannot reasonably be read to require Keystone to prove everything that it had to prove to obtain a permit under SDCL § 49-41B-22. This Court may not alter the language of the statute, and must give words their plain and ordinary

³ Notwithstanding the legal flaws in DRA’s argument, it is factually inaccurate to say that the Commission did not consider the effects of a possible leak on South Dakota’s water resources. To the contrary, it considered that issue as it relates to the permit conditions, as Findings 43-53 demonstrate.

meaning. *Goetz v. State*, 2001 S.D. 138, ¶ 15, 636 N.W.2d 675, 681. DRA's argument violates these principles.

6. The Commission did not abuse its discretion in addressing discovery

a. The initial scheduling order was proper

DRA challenges the Commission's order dated December 17, 2014, limiting discovery to (1) whether the proposed Keystone XL Pipeline continues to meet the 50 permit conditions; and (2) the changes to the project identified in Appendix C to Keystone's permit application. (Administrative Record at 1528-1529.) The order was based on the language of SDCL § 49-41B-27 and the Commission's determination that the certification docket was not an opportunity to relitigate whether the permit should have been granted in HP09-001 based on the criteria established by SDCL § 49-41B-22. To the extent that DRA challenges this conclusion (DRA Br. at 31-32), its argument is no different than that addressed in the preceding section of this brief.

While DRA contends that the Commission arbitrarily limited the broad scope of discovery contemplated by SDCL § 15-6-26(b)(1) (*id.* at 32), DRA does not identify the relevant issues that it could not explore. As it was, DRA served 86 interrogatories and 56 broad-ranging requests for production of documents on Keystone. (Administrative Record at 3160-3353.) The evidentiary hearing lasted nine days. The administrative record is over 31,000 pages long. In the face of the extensive inquiry allowed by the Commission, DRA's unspecific argument is at best not persuasive. At worst it is fatally flawed for failure to show prejudice. *Cf., e.g., Milstead v. Johnson*, 2016 S.D. 56, ¶¶ 22-25, 883 N.W.2d 725, 734-35 (personnel records of law enforcement officers are discoverable only if the party

seeking production establishes “a factual predicate showing that it is reasonably likely that the requested file will bear information both relevant and material”). To prove an abuse of discretion on appeal, DRA should bear the burden of proving what difference the Commission’s order made to its case.

This Court reviews the Commission’s order for abuse of discretion. *See, e.g., Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 57, 796 N.W.2d 685, 703-04. The Commission’s order was appropriate considering that it had granted party status to 42 Intervenors, some of whom had raised issues in their applications for party status that were well beyond the scope of SDCL § 49-41B-27. These overbroad issues included the effects of the proposed pipeline on the Nebraska Sandhills; whether the project is in the national interest; whether Keystone is entitled to exercise the right of eminent domain; and whether development of the Canadian oil sands harms the environment and contributes to levels of CO₂ in the atmosphere.⁴ (Administrative Record at 278-342.) Having granted liberal intervention and seeing the broad construction that some of the Intervenors placed on the certification statute, the Commission acted reasonably to restrict the proceedings to issues that were relevant to the narrow scope of SDCL § 49-41B-27—Keystone’s continued compliance with the permit conditions. The Commission’s order was not an abuse of discretion.

b. Communications between counsel for the parties were not relevant

⁴ DRA’s own brief highlights these issues when it states that the proceedings here are “one piece of a larger national argument” that “encompasses the role the fossil fuel industry plays in global climate change,” among other national issues. (DRA Br. at 4.)

DRA argues that the Commission erred in entering an order on April 22, 2015, denying a motion to compel discovery of communications between Commission Staff lawyers and Keystone’s lawyers. (DRA Br. at 29-30.) In seeking a reversal of the discovery order, DRA must show that the Commission abused its discretion. *Dakota, Minn. & Eastern R.R. Corp.*, 2009 S.D. 69, ¶ 47, 771 N.W.2d at 636.

DRA contends that government should be open and transparent, and that regulatory capture is at issue. (DRA Br. at 29-30.) DRA’s argument misunderstands the role of Commission Staff in the proceeding. Staff’s role was to independently evaluate the technical merit of Keystone’s application and to answer Commission questions related to the application. Staff was a party to the proceeding—it hired experts, conducted discovery, and participated in the entire docket, including the evidentiary hearing, as a party separate from the Commission. Staff was separately represented by counsel, just as the Commission was represented by John J. Smith, who also conducted the hearing on behalf of the Commissioners. The role of counsel for Staff was to advocate Staff’s position before the Commission. Counsel for Staff did not speak for the Commission. Communications between counsel for Keystone and counsel for Staff were, therefore, communications between two parties to a case. They were not communications between Keystone and the Commission.

Given this role in the proceeding, DRA cannot show that the Commission abused its discretion in not compelling production of discovery related to communications between counsel for two parties to the proceeding. The

Commission's decision was not a "fundamental error of judgment" or a choice "outside the range of permissible choices."

c. DRA's untimely exhibits were properly excluded

DRA argues that the Commission erred in granting Keystone's motion in limine to exclude exhibits that had not been timely disclosed. (DRA Br. at 32.) Keystone filed a motion in limine on July 10, 2015, prohibiting DRA from offering any exhibit that had not been timely disclosed in discovery. (Administrative Record at 9474-9480.) The evidentiary hearing was set to start two weeks later, on July 25, 2016.

The basis for Keystone's motion was that DRA's exhibit list included 1,073 documents, all but 36 of which had not been produced in discovery despite Keystone's outstanding request that DRA produce all documents that it intended to offer as exhibits. (*Id.*) Included in DRA's untimely exhibit list were: documents numbered 67-128 from Evan Vokes that were not previously produced; photographs numbered 397-409 taken by Sue Sibson, who testified as a witness for DRA; geologic reports numbered 1058-1062; and photographs taken by Vokes of pipeline construction in Texas numbered 1067-1073. (*See generally* Administrative Record at 9662-19792.) DRA asserted that the rest of the documents on its exhibit list came from Keystone's document production, but by disclosing documents for the first time on July 7, 2015, DRA was sandbagging. Its exhibit list was disclosed after Keystone had filed its rebuttal testimony. (*Id.* at 9100-9106.)

Under SDCL § 15-6-26(e), a party must supplement its discovery responses at appropriate intervals. Under SDCL § 15-6-37(c), a party who fails to

timely supplement its discovery responses, “is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.” SDCL § 15-6-37(c)(1). s Keystone argued to the Commission, it prepared its defenses to DRA’s claims based on DRA’s document production and pre-filed testimony and would have been prejudiced at the hearing if DRA had been allowed to introduce hundreds of exhibits that had not been disclosed in discovery. Under SDCL § 15-6-37(c), DRA was required to provide substantial justification for its failure to timely supplement its document production. It made no effort to do so before the Commission, and its argument on appeal does not cite to the applicable statutory framework that guided the Commission’s decision. DRA’s one-paragraph argument on this issue (DRA Br. at 32) is entirely insufficient for this Court to conclude that the Commission abused its discretion in granting Keystone’s motion.

Conclusion

DRA openly contends that it should have been allowed to relitigate the permit granted to Keystone in docket HP09-001. It further argues that the Commission should have imposed no limits on its discovery or evidentiary presentation. These arguments plainly contradict the narrow and precise language of SDCL § 49-41B-27. The Commission’s more measured approach was not unreasonable and not unfair to DRA. Absent clear error in the Commission’s findings this Court is left with no reason to reverse. Keystone respectfully requests that the Commission’s order be affirmed.

Dated this ____ day of December, 2017.

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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 9,938 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this ____ day of December, 2017.

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Certificate of Service

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Appendix

1. CertificationAPP. 001-2
2. Petition for Order Accepting Certification Under
SDCL § 49-41B-27APP. 003-8
3. Appendix BAPP. 009-38
4. Appendix CAPP. 039-43
5. Department of State Record of Decision and National Interest
DeterminationAPP. 044-74
6. Presidential PermitAPP. 075-79

Appendix

1.	Certification	APP. 001-2
2.	Petition for Order Accepting Certification Under SDCL § 49-41B-27	APP. 003-8
3.	Appendix B	APP. 009-38
4.	Appendix C	APP. 039-43
5.	Department of State Record of Decision and National Interest Determination	APP. 044-74
6.	Presidential Permit	APP. 075-79

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

0-0

IN THE MATTER OF THE	:	
APPLICATION BY TRANSCANADA	:	DOCKET NUMBER HP _____
KEYSTONE PIPELINE, LP FOR A	:	
PERMIT UNDER THE SOUTH	:	
DAKOTA ENERGY CONVERSION	:	CERTIFICATION
AND TRANSMISSION FACILITIES	:	
ACT TO CONSTRUCT THE	:	
KEYSTONE XL PROJECT	:	
	:	

0-0

City of Calgary)
) ss
Alberta, Canada)

TransCanada Keystone Pipeline, LP ("Keystone") hereby certifies that the conditions upon which the South Dakota Public Utilities Commission granted the facility permit in Docket HP09-001 for the Keystone XL hydrocarbon pipeline (the "Project") under the Energy Conversion and Transmission Facilities Act continue to be satisfied. The basis for this certification is set forth in the accompanying Petition for Order Accepting Certification under SDCL 49-41B-27.

Keystone is in compliance with the conditions attached to the June 29, 2010 Amended Final Decision and Order in this docket, to the extent that those conditions have applicability in the current pre-construction phase of the Project. Keystone certifies that it will meet and comply with all of the applicable permit conditions during construction, operation, and maintenance of the Project.

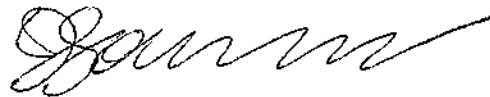
Case Number: HP _____

STATUTORY DECLARATION

_____, of _____, in the Province of Alberta,
Canada, do solemnly declare as follows:

And I make this solemn declaration conscientiously believing it to be true and knowing
that it is of the same force and effect as is made under oath.

DECLARED before me at the City)
of CALGARY in the)
Province of Alberta, this 12th day)
of September, A.D. 20 14 .)



COREY GOULET

A Commissioner for Oaths/Notary Public

(PRINT OF STAMP NAME HERE)

MY APPOINTMENT EXPIRES

(Must be legibly printed or stamped in legible
printing if appointed under section 1 of the act)

SHANNON R. ONOOK
A Notary Public in and for the
Province of Alberta. My Commission
expires at the pleasure of the
Lieutenant Governor-in-Council

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I. BACKGROUND

On March 12, 2009, Keystone filed an application in Docket HP 09-001 seeking a permit to construct and operate the Project in South Dakota. A hearing was held before the Commission from November 2-4, 2009. Keystone, Commission staff, and Dakota Rural Action were parties to the proceeding and participated in the hearing. The Commission issued a Final Decision and Order dated March 12, 2010. The Commission issued an Amended Final Decision and Order dated June 29, 2010, to which 50 conditions are attached.

As stated in the Amended Final Decision and Order, the Project originally was proposed to be developed in three segments: the Steele City Segment from Hardisty, Alberta, to Steele City, Nebraska; the Gulf Coast Segment from Cushing, Oklahoma, to Liberty County, Texas; and the Houston Lateral Segment from Liberty County, Texas to refinery markets near Houston, Texas. The Project was conceived to transport incremental crude oil production from the Western Canadian Sedimentary Basin to refineries and markets in the United States. Construction of the Project was proposed to begin in May 2011 and to be completed in 2012.

The Project, as proposed, has been delayed. A Presidential Permit required by Executive Order 11423 of August 16, 1968, and Executive Order 13337 of April 30, 2004, allowing the pipeline to cross the border between Canada and the United States, is still under review before the United States Department of State (DOS). Keystone submitted a Presidential Permit application to the DOS on September 19, 2008. After that application was denied without prejudice due to the Administration's inability to complete its review by a Congressionally imposed deadline, Keystone submitted a revised application on May 4, 2012. Drawing upon an

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extensive public record and multiple draft and final Environmental Impact Statements, DOS issued a Final Supplemental Environmental Impact Statement (Final SEIS) on January 31, 2014.¹ In the Final SEIS, the DOS concluded, among other things, that:

- Keystone has long-term commitments to ship both Canadian and Bakken oil to Gulf Coast refineries, production of Canadian and Bakken oil is projected to increase, and there is existing demand by Gulf Coast area refiners for stable sources of crude oil. (Final SEIS §§ 1.3.1, 1.4.)
- The analyses of potential impacts associated with construction and normal operation of the pipeline “suggest that significant impacts to most resources are not expected along the proposed Project route” assuming that the Project complies with applicable laws, regulations, and permit conditions. (Final SEIS § 4.16.)
- Due to market developments, the transportation of Canadian crude by rail is already occurring in substantial volumes (an estimated 180,000 bpd), with a greater risk of leaks and spills, as well as injuries and fatalities, than if the oil were transported by pipeline. (Final EIS, §§ E.S. 3.1, E.S.5.4.3.)

On April 18, 2014, the Administration announced an indefinite delay in the current Presidential Permit review process, referencing on-going litigation related to the approval of a revised pipeline route in Nebraska.²

During the pendency of the current Presidential Permit application, Keystone proceeded with the Gulf Coast Segment as a stand-alone project based on its independent utility. Construction is complete and that pipeline from Cushing, OK to Liberty County, Texas was placed in service on January 22, 2014. Construction of the Houston Lateral segment is currently

¹ <http://keystonepipeline-xl.state.gov/finalseis/index.htm>.

² In 2012, the Nebraska Legislature approved legislation giving the Governor authority to approve a revised route for the pipeline in that State. After an extensive public review process led by the Department of Environmental Quality, the Governor approved Keystone's proposed re-route in Nebraska. In February 2014, a Nebraska lower court declared the legislation unconstitutional. That case is currently on appeal to the Nebraska Supreme Court and the effect of the lower court's decision is stayed pending the outcome of that appeal.
(01717811.1)

under way. The currently pending Presidential Permit application involves consideration of the former Steele City segment only (see Appendix A; map of the current proposed Project).

Since the Amended Final Decision and Order, the Bakken Marketlink Project has been made part of the Project. Bakken Marketlink includes a five-mile pipeline, pumps, meters, and storage tanks near Baker, Montana, to deliver light sweet crude oil from the Bakken formation in Montana and North Dakota for transportation through the Project. Bakken Marketlink became commercial after the Amended Final Decision and Order in this case, as the result of a successful open season that closed on November 19, 2010. Bakken Marketlink will deliver up to 100,000 bpd of domestically-produced crude oil into the Keystone XL Pipeline. Approximately 700,000 bpd of Bakken formation production is currently being shipped by rail. Bakken Marketlink may relieve the need for some of that rail transportation while providing improved ratability and lower transportation costs for American producers.

The material aspects of the proposed construction and operation of the Project in South Dakota remain essentially unchanged since the Commission granted its approval in 2010. The Project will extend 315 miles, use 36-inch nominal diameter pipe made of high-strength steel, and be protected by an external fusion bonded epoxy coating and cathodic protection by impressed current. The route corridor through South Dakota is largely unchanged from the route analyzed by the Commission as part of the permitting process.³ The pipeline will have batching capabilities and will be able to transport products ranging from light crude oil to heavy crude oil.

³ Keystone has implemented minor route variations designed to accommodate landowner concerns and improve constructability. As required by Condition No. 6 of the Amended Final Decision and Order, any material route changes will be provided to the Commission for review prior to construction.
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Since the Amended Final Decision and Order, Keystone has filed seventeen quarterly reports with the Commission as required by Condition No. 8 of the Amended Final Decision and Order. Each report is submitted by Keystone's public liaison officer and addresses the status of land acquisition, construction, permitting, and other items. The most recent quarterly report was submitted on July 29, 2014, and a copy of this report is attached hereto as Appendix B.

**II.
THE PROJECT CONTINUES TO MEET THE CONDITIONS UPON WHICH THE
PERMIT WAS ISSUED**

Accompanying this petition is a Certification, signed by the President of the Keystone Pipeline business unit, attesting that: (i) the conditions upon which the Commission issued the facility permit in this docket continue to be satisfied; (ii) Keystone is in compliance with the conditions attached to the June 29, 2010 order, to the extent that those conditions have applicability in the current pre-construction phase of the Project; and (iii) Keystone will meet and comply with all of the applicable permit conditions during construction, operation, and maintenance of the Project. Compliance with those conditions is further reflected in Keystone's July 29, 2014 Quarterly Report (Appendix B). Thus, Keystone has satisfied the statutory requirement to certify that the Project continues to meet the conditions upon which the Commission's approval was issued.

In addition, Keystone submits that the circumstances and factual underpinnings of the Project that led the Commission to issue the facility permit remain valid. The factual findings underlying the Commission's decision are set forth in the June 29, 2010 Amended Final Decision and Order. In support of this petition, Appendix C hereto presents those findings of fact from the

Commission's Amended Final Decision and Order that have changed since 2010 and describes the nature of those changes. As Appendix C makes clear, to the extent that there have been changes in the underlying facts, those changes are either neutral or positive to the Commission's concerns. In sum, the need, impacts, efficacy, and safety of the Project have not changed since the Amended Final Decision and Order.

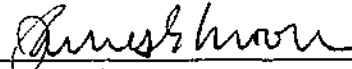
III. CONCLUSION

The attached Certification, together with this petition and the supporting appendices, provides the necessary basis for the Commission to find that the Project continues to meet the conditions upon which the June 2010 permit was issued. Accordingly, Keystone respectfully requests that the Commission accept its certification under SDCL § 49-41B-27.

Dated this 15th day of September, 2014.

WOODS, FULLER, SHULTZ & SMITH P.C.

By



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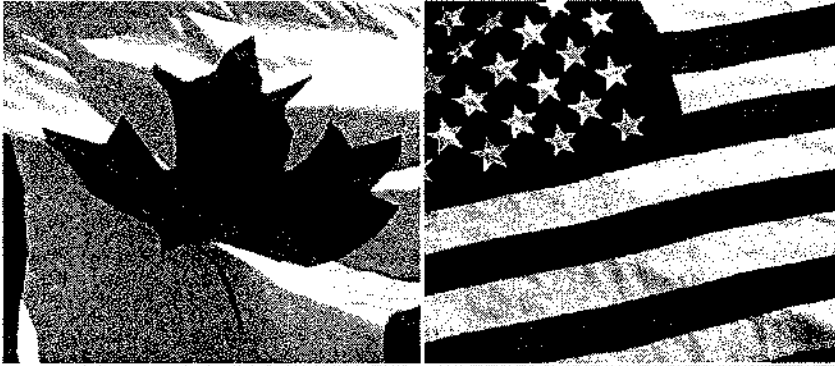
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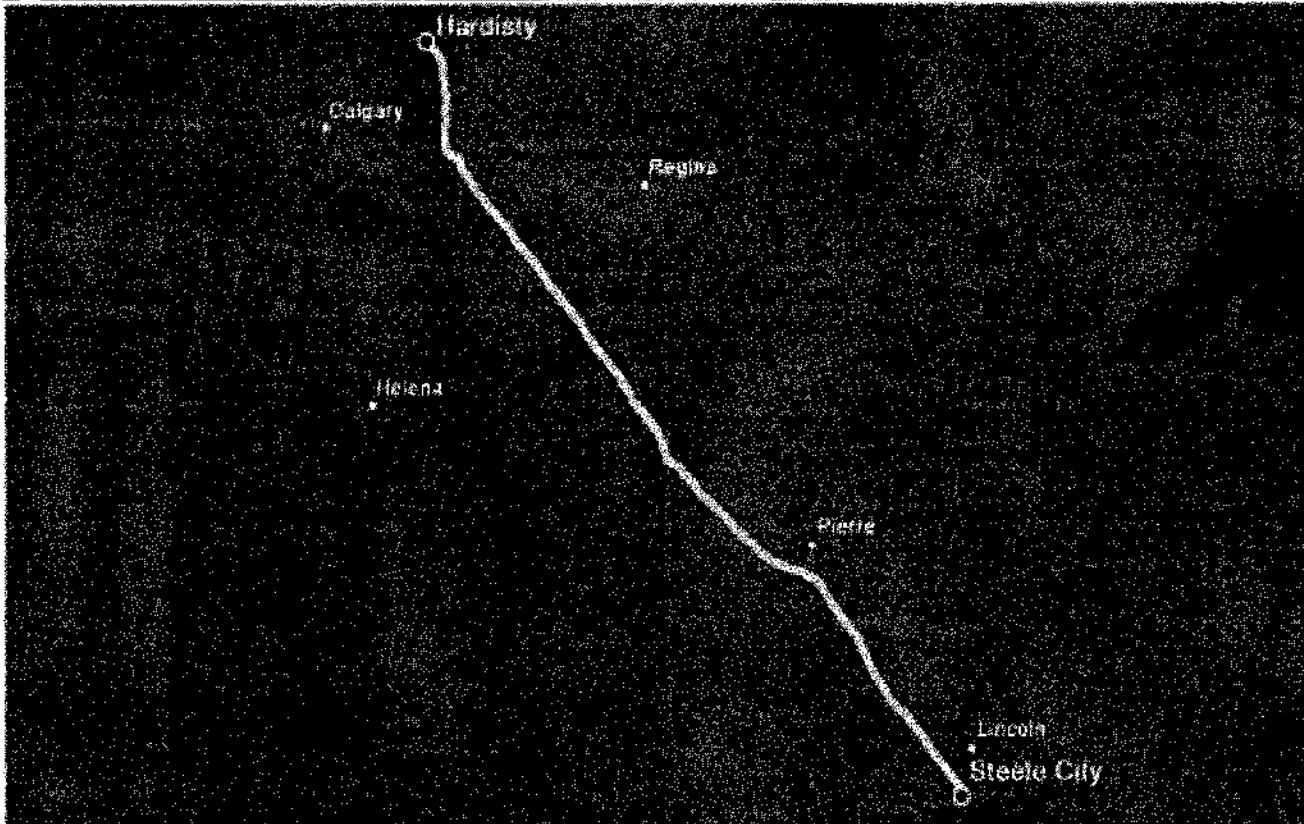
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Attorneys for Applicant

TransCanada Keystone Pipeline, LP.



TransCanada
In business to deliver



KEYSTONE XL PIPELINE PROJECT

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION QUARTERLY REPORT

For the Quarter Ending: **June 30, 2014**

TABLE OF CONTENTS

1.0	EXECUTIVE SUMMARY	3
2.0	PROJECT DESCRIPTION.....	3
3.0	LAND ACQUISITION STATUS (South Dakota)	3
3.1	Pipeline Right-of-Way Acquisition	3
3.2	Pump Stations	3
3.3	Pipe and Contractor Yards	2
3.4	Contractor Housing Camps	2
4.0	Non-Environmental Permitting Status (South Dakota).....	2
4.1	County Roads	2
4.2	State Roads	2
4.3	Railroads	2
4.4	Pump Stations	3
4.5	Contractor Camps	3
5.0	ENVIRONMENTAL PERMITTING STATUS (South Dakota).....	3
6.0	FEDERAL PERMITS	3
6.1	Permit Compliance	4
7.0	CONSTRUCTION STATUS	4
8.0	ENVIRONMENTAL CONTROL ACTIVITIES.....	4
9.0	STATUS OF EMERGENCY RESPONSE AND INTEGRITY MANAGEMENT PLANS	4
9.1	Emergency Response Plan	4
9.2	Integrity Management Plan for High Consequence Areas	4

1.0 EXECUTIVE SUMMARY

TransCanada filed a new a Presidential Permit application with the Department of State on May 4, 2012 and on January 31, 2014 the Department of State issued a Final Supplemental Environmental Impact Statement (FSEIS). The project is currently in the National Interest Determination period of the Presidential Permit process. Construction activities have not taken place, or will take place, in South Dakota until the required permits and regulatory approvals are obtained for any proposed construction site. Project personnel are continuing to review the proposed pipeline route to identify any potential construction issues before construction. The construction plan for the portion of the Keystone XL Pipeline Project through South Dakota is dependent on the timing of final regulatory approvals and may include three or four spreads.

Keystone will implement the conditions of federal and state permits at the times specified by those permits. (See Appendix A for a table of the Summary of Consultations with the South Dakota Department of Environmental and Natural Resources.)

2.0 PROJECT DESCRIPTION

The project will include approximately 1,204 miles of 36 inch diameter pipeline from Hardisty, Alberta to Steel City, Nebraska, including approximately 313 miles in South Dakota.

3.0 LAND ACQUISITION STATUS (South Dakota)

3.1 Pipeline Right-of-Way Acquisition

The pipeline centerline crosses property owned by 301 landowners. Keystone has acquired easements from over 99% of the landowners. Easements have been acquired from the vast majority of all private landowners. Acquisition of tracts owned by the State of South Dakota is in process.

3.2 Pump Stations

The pump stations will be located in Harding, Meade, Haakon, Jones, and Tripp County, South Dakota. Keystone has purchased all seven pump station sites. The size of each pump station site is approximately 10 acres.

3.3 Pipe and Contractor Yards

Keystone has leased 11 pipe yards and six contractor yards in South Dakota. The leases were originally for 36 months, commencing on October 10, 2010. The leases have been extended an additional 24 months, expiring on October 1, 2015. The yards are in Harding, Butte, Meade, Haakon, Jones, Lyman and Tripp Counties. Each yard is approximately 30 acres in size.

3.4 Contractor Housing Camps

As outlined in the Keystone XL FSEIS, in Section 2.1.5.4 - Construction Camps, some remote areas in South Dakota do not have sufficient temporary housing near the proposed route to house all construction personnel working on spreads in those areas. In those remote areas, temporary work camps would be constructed to meet the housing needs of the construction workforce. Details of the construction camp configuration will depend on the final construction spread configuration and construction schedule, which is dependent on receipt of the final federal approval.

4.0 Non-Environmental Permitting Status (South Dakota)

4.1 County Roads

102 crossing permit applications have been filed for the pipeline to cross under all county road rights-of-way. Of the 102 applications filed, 101 have been acquired as of September 30, 2013.

4.2 State Roads

Thirteen (13) crossing permits and twenty-four (24) temporary approach permit applications have been filed with the state of South Dakota Department of Transportation (SD DOT) for the pipeline to cross under the state road rights-of-way. All crossing and temporary approach permits have been received from the SD DOT.

4.3 Railroads

Two crossing easement permits are being negotiated for the pipeline to cross under existing railroad rights-of-way. The South Dakota State Railroad application was received November 23, 2012. Canadian Pacific Railway was sold to the Genesee & Wyoming Railway; All permitting was transferred and is pending a signed license agreement.

4.4 Pump Stations

The special use permits required for the two Harding County pump stations were approved on September 28, 2010. Of the remaining five pump stations, four do not require a special use permit, leaving only one special use permit needed for the pump station in Jones County.

4.5 Contractor Camps

All construction camps will be permitted, constructed and operated consistent with applicable county, state, and federal regulations. (See Table 2.1-11 of the FSEIS for relevant regulations and permits required for the construction.)

5.0 ENVIRONMENTAL PERMITTING STATUS (South Dakota)

Keystone is awaiting or will be preparing and submitting all remaining applications for required federal and state environmental permits for work in South Dakota and will obtain the required permits in advance of pipeline construction activities.

6.0 FEDERAL PERMITS

TransCanada filed a Presidential Permit application with the U.S. Department of State on May 4, 2012 to authorize the international border crossing for the Keystone XL Project. On January 31, 2014 the US Department of State issued a Final Supplemental Environmental Impact Statement addressing Keystone's May 2012 Presidential Permit application. The project is currently in the National Interest Determination phase. The route through South Dakota is largely unchanged from the route analyzed for the SDPUC permit.

The former "Gulf Coast Segment" of the Keystone XL Project (a pipeline from Cushing Oklahoma to the Gulf Coast in Texas) was determined to have independent utility and was constructed as the stand-alone Gulf Coast pipeline separate from the Keystone XL Project.

Keystone XL pipeline will also file permit applications with the US Army Corps of Engineers for the necessary authorizations under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.

6.1 Permit Compliance

Keystone will implement the conditions of federal and state permits at the times specified by those permits. (See Appendix A for a table of the Summary of Consultations with the South Dakota Department of Environmental and Natural Resources.)

7.0 CONSTRUCTION STATUS

No construction activities have taken place, or will take place, in South Dakota until the required permits and regulatory approvals are obtained for any proposed construction site. Project personnel are continuing to review the proposed pipeline route to identify any potential construction issues before construction.

8.0 ENVIRONMENTAL CONTROL ACTIVITIES

Environmental control activities, as required by applicable permit conditions, will be implemented when construction activities start in South Dakota.

9.0 STATUS OF EMERGENCY RESPONSE AND INTEGRITY MANAGEMENT PLANS

9.1 Emergency Response Plan

Development of the Keystone Pipeline Project operational Emergency Response Plan for the U.S. is ongoing and will be submitted to Pipeline and Hazardous Materials Safety Administration (PHMSA) six months before pipeline in-service. New TransCanada-owned emergency response equipment trailers are planned for storage in South Dakota.

Through its public awareness program, TransCanada continues to provide various types of information related to Keystone emergency response and pipeline safety awareness.

9.2 Integrity Management Plan for High Consequence Areas

Development of the Integrity Management Plan for the high consequence areas is ongoing. Progress in identifying high consequence areas and creating their subsequent tactical plans is about 70% complete. These tactical plans will be included in the Emergency Response Plan. After further discussions and coordination with PHMSA, the Integrity Management Plan will be formally submitted to PHMSA.

10.0 OTHER COMPLIANCE MEASURES

See Appendix B for the status of implementation of South Dakota Public Utilities Commission (PUC) conditions.

APPENDIX A

**Table 1: Recent Consultations with South Dakota
Department of Environment and Natural Resources**

Date of Contact	Agency / Individual	Purpose of Consultation	Results of Consultation	Follow-up Required
8-3-10	SD DENR Kelli Buscher, John Miller, Albert Spangler, Brian Walsh, Mike DeFea SDGFP Leslie Murphy, John Lott SD DAG Raymond Sowers, Bill Smith	Discuss both state and federal permitting for the Keystone XL Pipeline project in South Dakota as well as to review the current project status and schedule in South Dakota.	Laid out a blue print for State permitting.	Determine if a construction stormwater discharge permit is required for the camps as it is not required for pipeline related construction
10-23-12	SDGFP Silka Kempna, Travis Runia	Coordination with FWS, DOS, SD GFP regarding Keystone Sage Grouse Protection Plan and mitigation plans	Keystone will modify Sage Grouse Protection Plan to account for SD GFP additional input, conduct ambient noise studies and additional modeling, and revise mitigation plans for SD GFP review.	Updating Sage Grouse Protection Plan, mitigation plans and noise modeling
10-25-12	SD DENR Al Spangler	Verification of permit application process	Discussed water withdrawal and discharge permit application and format required	Keystone will prepare permit applications
12-3-12	SD DENR Ashley Brakke	Followed up with SD DENR with the submitted air permit applications for the contractor camps [for emergency generators].	DENR needs a notarized statement from the applicant saying these were the generators that would be used for emergency electric power. Ms. Brakke was about 1/2 way through with the applications and none yet required the permit.	Prepare statement for SD Camp Contractor(s) to sign, notarize and send to the DENR Air Quality representative when they are on board.
12-5-12	SD DENR Ashley Brakke	Followed up with SD DENR with the submitted air permit applications for the contractor camps [for emergency generators].	DENR stated that they were OK with the notarized letter not being submitted until the camp contractor had been identified and on board.	Prepare statement for SD Camp Contractor(s) to sign, notarize and send to the DENR Air Quality representative when they are on board.

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



Date of Contact	Agency / Individual	Purpose of Consultation	Results of Consultation	Follow-up Required
4-10-13	SD DENR Al Spangler	Confirm/discuss whether there would be any issues associated with hydrotest water obtained in SD being used to test pipe in Nebraska as long as the water was pushed back and released in SD near the location where the water was withdrawn.	Al Spangler confirmed that he did not see any issue with this approach. He would double-check with the water people and confirm.	Keystone will follow up with SD DENR on the feasibility of using SD test water in NE.
4-15-13	SD GFP Paul Coughlin	Discuss the potential for water withdrawal from Lake Gardner, which is a SD Game Protection Area.	SD GFP was receptive to the potential water withdrawal from Lake Gardner. SD GFP requested a formal written request.	Keystone will prepare a formal written request for the withdrawal of water from Lake Gardner
5-7-13	SD DENR Genny McMat, Marc Rush SDGFP Leslie Murphy, Gene Galinat, John Lott	Discuss the feasibility of the Keystone utilizing Lake Gardner as a source for hydrostatic test water and dust control water	SDGFP conditionally approved of the water withdrawal from Lake Gardner as long as there was adequate water present. SD GFP also stated that they would have to determine if there would be any other conditions that would need to be met to allow for the water withdrawal.	Follow-up with SDGFP on their progress developing a list of conditions that would permit the use of water from Lake Gardner for the proposed use [no further conditions were proposed] Work with SD GFP to fund restoration or conservation project in exchange for water use.
5-9-13	SDGFP Leslie Murphy	Emailed a pdf map of the proposed water withdrawal location for Lake Gardner	Provided the map following May 7, 2013 meeting	None
11-14-13	SD DENR William Marcouiller	Discuss the renewal process for the temporary discharge permit that had been issued to Keystone in April 2013.	SD DENR confirmed that the permit was good through December 31, 2015.	Keystone would need to renew the permit if discharge activities would occur after December 2015.
04-03-14	SD Natural Heritage Program Casey Heimerl	Request for most recent observation records for northern long-eared bat	Being processed	No
04-16-14	SD Natural Heritage Program Casey Heimerl	Request for most recent observation records for northern long-eared bat	Received via email: tabular and GIS (shapefiles) of the observation records of the northern long-eared bat for the counties that the Project crosses.	No

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



Date of Contact	Agency / Individual	Purpose of Consultation	Results of Consultation	Follow-up Required
05-28-14	SD Natural Heritage Program Casey Heimerl SD Game, Fish and Parks Tom Kirschenmann	Voluntary Informal Conference with US Fish and Wildlife Service to discuss the potential impacts to northern long-eared bat and red knot resulting from the Project. Both species are proposed for listing under the Endangered Species Act.	Keystone to revise habitat assessment report for the northern long-eared bat and red knot based on the comments and guidance provided during the meeting.	Keystone will submit a revised report to USFWS

APPENDIX B

Table 2: Status of Implementation of South Dakota PUC Conditions

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
1	<p>Keystone shall comply with all applicable laws and regulations in its construction and operation of the Project. These laws and regulations include, but are not necessarily limited to: the federal Hazardous Liquid Pipeline Safety Act of 1979 and Pipeline Safety Improvement Act of 2002, as amended by the Pipeline Inspection, Protection, Enforcement, and Safety Act of 2006, and the various other pipeline safety statutes currently codified at 49 U.S.C. § 601 01 et seq. (collectively, the "PSA"); the regulations of the United States Department of Transportation implementing the PSA, particularly 49 C.F.R Parts 194 and 195; temporary permits for use of public water for construction, testing or drilling purposes, SDCL 46-5-40.1 and ARSD 74:02:01 :32 through 74:02:01 :34.02 and temporary discharges to waters of the state, SDCL 34A-2-36 and ARSD Chapters 74:52:01 through 74:52:11, specifically, ARSD § 74:52:02:46 and the General Permit issued thereunder covering temporary discharges of water from construction dewatering and hydrostatic testing.</p>	<p>Construction of the project has not been initiated. Keystone will comply with all applicable laws and regulations during construction and operation of the Project.</p>
2	<p>Keystone shall obtain and shall thereafter comply with all applicable federal, state and local permits, including but not limited to: Presidential Permit from the United States Department of State, Executive Order 11423 of August 16, 1968 (33 Fed. Reg. 11741) and Executive Order 13337 of April 30, 2004 (69 Fed. Reg. 25229), for the construction, connection, operation, or maintenance, at the border of the United States, of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels to or from a foreign country; Clean Water Act § 404 and Rivers and Harbors Act Section 10 Permits; Special Permit if issued by the Pipeline and Hazardous Materials Safety Administration; Temporary Water Use Permit, General Permit for Temporary Discharges and federal, state and local highway and road encroachment permits. Any of such permits not previously filed with the Commission shall be filed with the Commission upon their issuance. To the extent that any condition, requirement or standard of the Presidential Permit, including the Final EIS Recommendations, or any other law, regulation or permit applicable to the portion of the pipeline in this state differs from the requirements of these Conditions, the more stringent shall apply.</p>	<p>Construction of the project has not been initiated. Keystone is in the process of obtaining all applicable permits from Federal, State and Local entities. Upon commencement of construction Keystone will follow all applicable laws and conditions related to these permits.</p>

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
3	Keystone shall comply with and implement the Recommendations set forth in the Final Environmental Impact Statement when issued by the United States Department of State pursuant to its Amended Department of State Notice of Intent To Prepare an Environmental Impact Statement and To Conduct Scoping Meetings and Notice of Floodplain and Wetland Involvement and To Initiate Consultation Under Section 106 of the National Historic Preservation Act for the Proposed TransCanada Keystone XL Pipeline; Notice of Intent--Rescheduled Public Scoping Meetings in South Dakota and extension of comment period (FR vol. 74, no. 54, Mar. 23, 2009). The Amended Notice and other Department of State and Project Documents are available on-line at: http://www.keystonepipeline-xl.state.gov/clientsite/keystonexl.nsf?Open .	The Department of State re-initiated its NEPA review upon receipt of Keystone's May 4, 2012 application for a Presidential Permit. The Department is in the process of preparing a Supplement to the August 2011 Final Environmental Impact Statement for the project. Construction of the project has not been initiated. Keystone will comply with and implement the Recommendations set forth in the Final Environmental Impact Statement, and the Supplemental Environmental Impact Statement, as reflected in the Record of Decision, when issued by the Department of State.
4	The permit granted by this Order shall not be transferable without the approval of the Commission pursuant to SDCL 49-418-29.	N/A at this time.
5	Keystone shall undertake and complete all of the actions that it and its affiliated entities committed to undertake and complete in its Application as amended, in its testimony and exhibits received in evidence at the hearing, and in its responses to data requests received in evidence at the hearing.	Construction of the project has not been initiated. When construction is initiated, Keystone will undertake the actions committed to during the SDPUC hearings.
6.a	The most recent and accurate depiction of the Project route and facility locations is found on the maps in Exhibit TC-14. The Application indicates in Section 4.2.3 that Keystone will continue to develop route adjustments throughout the pre-construction design phase. These route adjustments will accommodate environmental features identified during surveys, property-specific issues, and civil survey information. The Application states that Keystone will file new aerial route maps that incorporate any such route adjustments prior to construction. Ex TC-1.4.2.3, p. 27.	Keystone will file new aerial route maps reflecting route adjustments prior to construction.
6.b	Keystone shall notify the Commission and all affected landowners, utilities and local governmental units as soon as practicable if material deviations are proposed to the route.	Keystone will continue to work with all landowners, utilities, local government and other affected parties as the final route is being developed and will notify the Commission and all affected parties of any material deviations to the proposed route.
6.c	Keystone shall notify affected landowners of any change in the route on their land.	This is a continuing occurrence during engineering review. Keystone will continue to notify landowners of route changes on their land as well as inform them of associated activities, such as civil and environmental surveys.
6.d	At such time as Keystone has finalized the pre-construction route, Keystone shall file maps with the Commission depicting the final preconstruction route	Construction of the project has not been initiated. Keystone will finalize the route and submit to the Commission new maps depicting the final preconstruction route prior to construction.

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
6.e	If material deviations are proposed from the route depicted on Exhibit TC-14 and accordingly approved by this Order, Keystone shall advise the Commission and all affected landowners, utilities and local governmental units prior to implementing such changes and afford the Commission the opportunity to review and approve such modifications.	Keystone has advised the Commission of all material route changes to date and has afforded the commission the opportunity to review and approve such modifications.
6.f	At the conclusion of construction, Keystone shall file detail maps with the Commission depicting the final as-built location of the Project facilities.	Keystone will submit final route maps to the Commission at the conclusion of construction.
7	Keystone shall provide a public liaison officer, approved by the Commission, to facilitate the exchange of information between Keystone, including its contractors, and landowners, local communities and residents and to promptly resolve complaints and problems that may develop for landowners, local communities and residents as a result of the Project. Keystone shall file with the Commission its proposed public liaison officer's credentials for approval by the Commission prior to the commencement of construction. After the public liaison officer has been approved by the Commission, the public liaison officer may not be removed by Keystone without the approval of the Commission. The public liaison officer shall be afforded immediate access to Keystone's on-site project manager, its executive project manager and to contractors' on-site managers and shall be available at all times to the Staff via mobile phone to respond to complaints and concerns communicated to the Staff by concerned landowners and others. Keystone shall also implement and keep an up-dated web site covering the planning and implementation of construction and commencement of operations in this state as an informational medium for the public. As soon as the Keystone's public liaison officer has been appointed and approved, Keystone shall provide contact information for him/her to all landowners crossed by the Project and to law enforcement agencies and local governments in the vicinity of the Project. The public liaison officer's contact information shall be provided to landowners in each subsequent written communication with them. If the Commission determines that the public liaison officer has not been adequately performing the duties set forth for the position in this Order, the Commission may, upon notice to Keystone and the public liaison officer, take action to remove the public liaison officer.	<p>The Commission has approved Sarah Metcalf as the public liaison officer for the Keystone XL project. The liaison can be reached at:</p> <p>Mailing Address:</p> <p>South Dakota Pipeline Liaison Officer PO Box 491 Aberdeen, South Dakota 57402 Phone: (888) 375-1370 Email: smetcal12@gmail.com</p> <p>Contact information for the South Dakota liaison was sent out in December 2010 to landowners. Notification to law enforcement agencies and local governments in the vicinity of the Project was completed in 1st quarter 2011 in conjunction with notice required by other conditions for these groups. The liaison continues to contact affected counties, townships and other groups as the permit process takes place.</p> <p>The TransCanada Keystone Pipeline website at: http://www.transcanada.com/keystone.html provides general information about planning for construction of the project. When construction commences, more detailed construction information will be posted.</p>

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
8	Until construction of the Project, including reclamation, is completed, Keystone shall submit quarterly progress reports to the Commission that summarize the status of land acquisition and route finalization, the status of construction, the status of environmental control activities, including permitting status and Emergency Response Plan and Integrity Management Plan development, the implementation of the other measures required by these conditions, and the overall percent of physical completion of the project and design changes of a substantive nature. Each report shall include a summary of consultations with the South Dakota Department of Environment and Natural Resources and other agencies concerning the issuance of permits. The reports shall list dates, names, and the results of each contact and the company's progress in implementing prescribed construction, land restoration, environmental protection, emergency response and integrity management regulations, plans and standards. The first report shall be due for the period ending June 30, 2010. The reports shall be filed within 31 days after the end of each quarterly period and shall continue until the project is fully operational.	Keystone will continue to submit quarterly reports until the construction and reclamation of the Keystone XL pipeline is complete and the pipeline is operational.
9	Until one year following completion of construction of the Project, including reclamation, Keystone's public liaison officer shall report quarterly to the Commission on the status of the Project from his/her independent vantage point. The report shall detail problems encountered and complaints received. For the period of three years following completion of construction, Keystone's public liaison officer shall report to the Commission annually regarding post-construction landowner and other complaints, the status of road repair and reconstruction and land and crop restoration and any problems or issues occurring during the course of the year	The public liaison officer will comply with this condition and is currently available to affected landowners and parties in the State. Quarterly reporting will begin with active construction activities.
10	Not later than six months prior to commencement of construction, Keystone shall commence a program of contacts with state, county and municipal emergency response, law enforcement and highway, road and other infrastructure management agencies serving the Project area in order to educate such agencies concerning the planned construction schedule and the measures that such agencies should begin taking to prepare for construction impacts and the commencement of project operations.	Keystone has commenced and will continue a program of contacts to inform and coordinate with county and municipal emergency response, law enforcement and highway, road and other infrastructure management agencies regarding planned construction and eventual operation of the Keystone XL Pipeline.
11	Keystone shall conduct a preconstruction conference prior to the commencement of construction to ensure that Keystone fully understands the conditions set forth in this order. At a minimum, the conference shall include a Keystone representative, Keystone's construction supervisor and Staff.	Prior to the start of construction a Keystone representative, the Keystone construction supervisor, and staff will arrange a preconstruction conference with the Commission to ensure a full understanding of the conditions set forth in this order.
12	Once known, Keystone shall inform the Commission of the date construction will commence, report to the Commission on the date construction is started and keep the Commission updated on construction activities as provided in Condition 8.	Keystone will inform the Commission accordingly during the preconstruction conference.
13	Except as otherwise provided in the conditions of this Order and Permit, Keystone shall comply with all mitigation measures set forth in the Construction Mitigation and Reclamation Plan (CMR Plan)	Construction of the project has not been initiated. Keystone will comply with the requirements set forth in the CMR Plan during construction.

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
13.a	If modifications to the CMR Plan are made by Keystone as it refines its construction plans or are required by the Department of State in its Final EIS Record of Decision or the Presidential Permit, the CMR Plan as so modified shall be filed with the Commission and shall be complied with by Keystone.	Keystone will submit any modifications to the CMR Plan to the Commission and comply with any modifications to the CMR Plan.
14	Keystone shall incorporate environmental inspectors into its CMR Plan and obtain follow-up information reports from such inspections upon the completion of each construction spread to help ensure compliance with this Order and Permit and all other applicable permits, laws, and rules	Construction of the project has not been initiated. Keystone will utilize environmental inspectors and comply with this condition during the construction of the project.
15	Prior to construction, Keystone shall, in consultation with area NRCS staff, develop specific construction/reclamation units (Con/Rec Units) that are applicable to particular soil and subsoil classifications, land uses and environmental settings. The Con/Rec Units shall contain information of the sort described in response to Staff Data Request 3-25 found in Exhibit TC-16.	Keystone has completed the consultation with NRCS and has received the concurrence of the NRCS for Con/Rec Units to be utilized in South Dakota. Keystone will consult further with the NRCS should alterations to the Con/Rec Units be required.
15.a	In the development of the Con/Rec Units in areas where NRCS recommends, Keystone shall conduct analytical soil probing and/or soil boring and analysis in areas of particularly sensitive soils where reclamation potential is low. Records regarding this process shall be available to the Commission and to the specific land owner affected by such soils upon request	Keystone has completed analytical soil probing and/or soil boring and analysis in areas of particularly sensitive soils where reclamation potential is low. Records regarding the process are available to the Commission and to the specific land owner affected by such soil upon request.
15.b	Through development of the Con/Rec Units and consultation with NRCS, Keystone shall identify soils for which alternative handling methods are recommended.	Keystone has completed the analytical soil probing and/or boring in areas of sensitive soils following the NRCS recommendations.
15.b.1	Keystone shall thoroughly inform the landowner regarding the options applicable to their property, including their respective benefits and negatives, and implement whatever reasonable option for soil handling is selected by the landowner. Records regarding this process shall be available to the Commission upon request.	This is discussed with the landowners and itemized in the "Binding Agreement". These agreements are available to the Commission upon request.
15.c	Keystone shall, in consultation with NCRS, ensure that its construction planning and execution process, including Con/Rec Units, CMR Plan and its other construction documents and planning shall adequately identify and plan for areas susceptible to erosion, areas where sand dunes are present, areas with high concentrations of sodium bentonite, areas with sodic, saline and sodic-saline soils and any other areas with low reclamation potential	Keystone's construction planning and execution process consisted of consultation with the NRCS for identified areas susceptible to erosion, areas where sand dunes are present, areas with high concentration of sodium bentonite, areas with sodic, saline and sodic-saline soils and any other areas with low reclamation potential. The identified areas were addressed in the CON/REC Units, CMR Plan, and will be listed on construction alignment sheets.
15.d	The Con/Rec Units shall be available upon request to the Commission and affected landowners. Con/Rec Units may be evaluated by the Commission upon complaint or otherwise, regarding whether proper soil handling, damage mitigation or reclamation procedures are being followed.	Con/Rec Units will be available upon request to the Commission and affected landowners.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
15.e	Areas of specific concern or of low reclamation potential shall be recorded in a separate database. Action taken at such locations and the results thereof shall also be recorded and made available to the Commission and the affected property owner upon request.	Areas of specific concern or of low reclamation potential will be recorded in a separate database. Action taken at such locations and the results thereof will be recorded and made available to the Commission and the affected property owner upon request.
16	Keystone shall provide each landowner with an explanation regarding trenching and topsoil and subsoil/rock removal, segregation and restoration method options for his/her property consistent with the applicable Con/Rec Unit and shall follow the landowner's selected preference as documented on its written construction agreement with the landowner, as modified by any subsequent amendments, or by other written agreement(s).	This is discussed with the landowners and itemized in the "Binding Agreement".
16.a	Keystone shall separate and segregate topsoil from subsoil in agricultural areas, including grasslands and shelter belts, as provided in the CMR Plan and the applicable Con/Rec Unit.	Keystone will separate and segregate topsoil from subsoil in agricultural areas, including grasslands and shelter belts, as provided in the CMR Plan and the applicable Con/Rec Unit.
16.b	Keystone shall repair any damage to property that results from construction activities	Keystone will address this during or following construction activities.
16.c	Keystone shall restore all areas disturbed by construction to their preconstruction condition, including their original preconstruction topsoil, vegetation, elevation, and contour, or as close thereto as is feasible, except as is otherwise agreed to by the landowner.	Keystone will address this during or following construction activities and will restore disturbed areas as close as feasible to their preconstruction conditions or as otherwise agreed to by the landowner.
16.d	Except where practicably infeasible, final grading and topsoil replacement and installation of permanent erosion control structures shall be completed in non-residential areas within 20 days after backfilling the trench.	Keystone will address this during construction.
16.d.1	In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls shall be maintained until conditions allow completion of cleanup and reclamation.	Keystone will address this during construction.
16.d.2	In the event Keystone cannot comply with the 20-day time frame as provided in this Condition, it shall give notice of such fact to all affected landowners, and such notice shall include an estimate of when such restoration is expected to be completed.	Keystone will address this during construction.
16.e	Keystone shall draft specific crop monitoring protocols for agricultural lands.	Keystone is in the process of developing specific crop monitoring protocols for agricultural lands. These protocols will be finalized prior to the start of construction and implemented following construction.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
16.e.1	If requested by the landowner, Keystone shall provide an independent crop monitor to conduct yield testing and/or such other measurements of productivity as he shall deem appropriate. The independent monitor shall be a qualified agronomist, rangeland specialist or otherwise qualified with respect to the species to be restored. The protocols shall be available to the Commission upon request and may be evaluated for adequacy in response to a complaint or otherwise.	If requested by the landowner, Keystone will provide an independent crop monitor and develop appropriate protocols, which will be available to the Commission upon request
16.f	Keystone shall work closely with landowners or land management agencies to determine a plan to control noxious weeds. Landowner permission shall be obtained before the application of herbicides.	Keystone has prepared a noxious weed control plan and provided a draft to the County Weed Boards for review and approval.
16.g	Keystone's adverse weather plan shall apply to improved hay land and pasture lands in addition to crop lands.	Keystone is in the process of developing an adverse weather plan and will include both improved hay lands and pasture lands in addition to crop lands.
16.h	The size, density and distribution of rock within the construction right-of-way following reclamation shall be similar to adjacent undisturbed areas.	Keystone will require the Contractor to remove excess rocks so that the size density and distribution of rock within the construction right-of-way is similar to the adjacent undisturbed areas.
16.h.1	Keystone shall treat rock that cannot be backfilled within or below the level of the natural rock profile as construction debris and remove it for disposal offsite except when the landowner agrees to the placement of the rock on his property. In such case, the rock shall be placed in accordance with the landowner's directions.	Keystone will require the Contractor to treat rock that cannot be backfilled within or below the level of the natural rock profile as construction debris and remove it for disposal offsite except when the landowner agrees to the placement of the rock on his property. In such case, the rock shall be placed in accordance with the landowner's directions and all Federal and State permits.
16.i	Keystone shall utilize the proposed trench line for its pipe stringing trucks where conditions allow and shall employ adequate measures to de-compact subsoil as provided in its CMR Plan. Topsoil shall be de-compacted if requested by the landowner.	Keystone will utilize the trench line for its pipe stringing trucks when site conditions allow and will employ adequate measures to de-compact subsoil as provided in its CMR Plan and in the specified CON/REC unit.
16.i.1	Topsoil shall be de-compacted if requested by the landowner.	Keystone will employ adequate measures to de-compact subsoil as provided in its CMR Plan and in the specified CON/REC unit, and will de-compact topsoil if requested by the landowner.
16.j	Keystone shall monitor and take appropriate mitigative actions as necessary to address salinity issues when dewatering the trench, and field conductivity and/or other appropriate constituent analyses shall be performed prior to disposal of trench water in areas where salinity may be expected.	Keystone will monitor and take appropriate actions as necessary to address salinity issues when dewatering the trench. Field conductivity and/or other appropriate constituent analyses will be performed prior to disposal of trench water in areas where salinity is expected.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
16.j.1	Keystone shall notify landowners prior to any discharge of saline water on their lands or of any spills of hazardous materials on their lands of one pint or more or of any lesser volume which is required by any federal, state, or local law or regulation or product license or label to be reported to a state or federal agency, manufacturer, or manufacturer's representative.	Keystone will notify landowners prior to any discharge of saline water on private lands or of any spills of hazardous materials on private lands of one pint or more or of any lesser volume which is required by any federal, state, or local law or regulation or product license or label to be reported.
16.k	Keystone shall install trench and slope breakers where necessary in accordance with the CMR Plan as augmented by Staff's recommendations in Post Hearing Commission Staff Brief, pp. 26-27	Keystone will install trench and slope breakers where necessary in accordance with the CMR Plan and SDPUC recommendations.
16.l	Keystone shall apply mulch when reasonably requested by landowners and also wherever necessary following seeding to stabilize the soil surface and to reduce wind and water erosion. Keystone shall follow the other recommendations regarding mulch application in Post Hearing Commission Staff Brief, p. 27.	Keystone will apply mulch in accordance with the CMR Plan and the specific CON/REC units to stabilize the soil surface and to reduce wind and water erosion. Keystone will apply mulch at the landowners request when the request is reasonable and in accordance with site reclamation requirements. Keystone will follow the other recommendations regarding mulch application in Post Hearing Commission Staff Brief, p. 27.
16.m	Keystone shall reseed all lands with comparable crops to be approved by landowner in landowner's reasonable discretion, or in pasture, hay or native species areas with comparable grass or forage crop seed or native species mix to be approved by landowner in landowner's reasonable discretion.	Keystone has developed seed mixtures in consultation with the NRCS.
16.m.1	Keystone shall actively monitor revegetation of all disturbed areas for at least two years.	Keystone will monitor revegetation on all disturbed areas for at least two years.
16.n	Keystone shall coordinate with landowners regarding his/her desires to properly protect cattle, shall implement such protective measures as are reasonably requested by the landowner and shall adequately compensate the landowner for any loss.	Keystone will coordinate with landowners and implement reasonably requested protective measures during construction and adequately compensate landowners for any loss.
16.o	Prior to commencing construction, Keystone shall file with the Commission a confidential list of property owners crossed by the pipeline and update this list if route changes during construction result in property owner changes	Prior to commencing construction, Keystone will submit to the Commission a confidential list of property owners crossed by the pipeline and will update this list if route changes result in property owner changes during construction.
16.p	Except in areas where fire suppression resources as provided in CMR Plan 2.16 are in close proximity, to minimize fire risk, Keystone shall, and shall cause its contractor to, equip each of its vehicles used in pre-construction or construction activities, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with Keystone's fire suppression resources and emergency services.	Keystone will address compliance with this condition with Contractor prior to the commencement of construction on the right-of-way. Each vehicle that is subject to this condition will be equipped with fire extinguisher, portable compact shovel, and proper communications devices.

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
17	Keystone shall cover open-bodied dump trucks carrying sand or soil while on paved roads and cover open-bodied dump trucks carrying gravel or other materials having the potential to be expelled onto other vehicles or persons while on all public roads.	Keystone will address this with the Contractor. Contractor vehicles carrying sand, soil, or gravel while traveling on paved public roads shall be covered to avoid the potential of expelling the material onto other vehicles or persons.
18	Keystone shall use its best efforts to not locate fuel storage facilities within 200 feet of private wells and 400 feet of municipal wells and shall minimize and exercise vigilance in refueling activities in areas within 200 feet of private wells and 400 feet of municipal wells.	Keystone will address this in the pre-construction planning. Fuel storage tanks and refueling activities shall follow the requirements set forth in the CMRP and Spill Prevention and Containment Plan.
19	If trees are to be removed that have commercial or other value to affected landowners, Keystone shall compensate the landowner for the fair market value of the trees to be cleared and/or allow the landowner the right to retain ownership of the felled trees.	Keystone will comply with this condition during the easement acquisition process.
19.a	Except as the landowner shall otherwise agree in writing, the width of the clear cuts through any windbreaks and shelterbelts shall be limited to 50 feet or less, and the width of clear cuts through extended lengths of wooded areas shall be limited to 85 feet or less. The environmental inspection in Condition 14 shall include forested lands.	Keystone will comply with this condition prior to or during construction.
20.	Keystone shall implement the following sediment control practices: a) Keystone shall use floating sediment curtains to maintain sediments within the construction right of way in open water bodies with no or low flow when the depth of non-flowing water exceeds the height of straw bales or silt fence installation. In such situations the floating sediment curtains shall be installed as a substitute for straw bales or silt fence along the edge or edges of each side of the construction right-of-way that is underwater at a depth greater than the top of a straw bale or silt fence as portrayed in Keystone's construction Detail #11 included in the CMR Plan. b) Keystone shall install sediment barriers in the vicinity of delineated wetlands and water bodies as outlined in the CMR Plan regardless of the presence of flowing or standing water at the time of construction. c) The Applicant should consult with South Dakota Game, Fish and Parks (SDGFP) to avoid construction near water bodies during fish spawning periods in which in-stream construction activities should be avoided to limit impacts on specific fisheries, if any, with commercial or recreational importance.	Keystone will comply with parts (a) and (b) of this condition during construction. Keystone will consult with SDGFP regarding spawning periods. The current construction schedule will avoid impacts to streams during the spawning season.
21	Keystone shall develop frac-out plans specific to areas in South Dakota where horizontal directional drilling will occur. The plan shall be followed in the event of a frac-out.	Keystone has developed a draft frac-out plan and HDD plan in South Dakota. The plan will be finalized with the input from the Contractor. The plan will be followed in the event of a frac-out.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
21.a	If a frac-out event occurs, Keystone shall promptly file a report of the incident with the Commission. Keystone shall also, after execution of the plan, provide a follow-up report to the Commission regarding the results of the occurrence and any lingering concerns.	Keystone will comply with this section in the event of a frac-out.
22.	<p>Keystone shall comply with the following conditions regarding construction across or near wetlands, water bodies and riparian areas:</p> <p>a) Unless a wetland is actively cultivated or rotated cropland or unless site specific conditions require utilization of Keystone's proposed 85 foot width and the landowner has agreed to such greater width, the width of the construction right-of-way shall be limited to 75 feet in non-cultivated wetlands unless a different width is approved or required by the United States Army Corps of Engineers.</p> <p>b) Unless a wetland is actively cultivated or rotated cropland, extra work areas shall be located at least 50 feet away from wetland boundaries except where site-specific conditions render a 50-foot setback infeasible. Extra work areas near water bodies shall be located at least 50 feet from the water's edge, except where the adjacent upland consists of actively cultivated or rotated cropland or other disturbed land or where site-specific conditions render a 50-foot setback infeasible. Clearing of vegetation between extra work space areas and the water's edge shall be limited to the construction right-of-way.</p> <p>c) Water body crossing spoil, including upland spoil from crossings of streams up to 30 feet in width, shall be stored in the construction right of way at least 10 feet from the water's edge or in additional extra work areas and only on a temporary basis.</p> <p>d) Temporary in-stream spoil storage in streams greater than 30 feet in width shall only be conducted in conformity with any required federal permit(s) and any applicable federal or state statutes, rules and standards.</p> <p>e) Wetland and water body boundaries and buffers shall be marked and maintained until ground disturbing activities are complete. Keystone shall maintain 15-foot buffers where practicable, which for stream crossings shall be maintained except during the period of trenching, pipe laying and backfilling the crossing point. Buffers shall not be required in the case of non-flowing streams.</p> <p>f) Best management practices shall be implemented to prevent heavily silt-laden trench water from reaching any wetland or water body directly or indirectly.</p> <p>g) Erosion control fabric shall be used on water body banks immediately following final stream bank restoration unless riprap or other bank stabilization methods are utilized in accordance with federal or state permits.</p> <p>h) The use of timber and slash to support equipment crossings of wetlands shall be avoided.</p>	Keystone will comply with all ROW widths, setbacks, and BMPs as detailed by the Commission. Keystone is identifying the appropriate locations for these conditions at or near wetlands, water bodies and riparian areas during the pre-construction process and will identify the ROW widths and setbacks on the construction drawings. BMPs will be installed as detailed in the CMRP.

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
	<p>i) Subject to Conditions 37 and 38, vegetation restoration and maintenance adjacent to water bodies shall be conducted in such manner to allow a riparian strip at least 25 feet wide as measured from the water body's mean high water mark to permanently re-vegetate with native plant species across the entire construction right-of way.</p>	
23.	<p>Keystone shall comply with the following conditions regarding road protection and bonding:</p> <p>a. Keystone shall coordinate road closures with state and local governments and emergency responders and shall acquire all necessary permits authorizing crossing and construction use of county and township roads.</p> <p>b) Keystone shall implement a regular program of road maintenance and repair through the active construction period to keep paved and gravel roads in an acceptable condition for residents and the general public.</p> <p>c) Prior to their use for construction, Keystone shall videotape those portions of all roads which will be utilized by construction equipment or transport vehicles in order to document the pre-construction condition of such roads.</p> <p>d) After construction, Keystone shall repair and restore, or compensate governmental entities for the repair and restoration of, any deterioration caused by construction traffic, such that the roads are returned to at least their preconstruction condition.</p> <p>e) Keystone shall use appropriate preventative measures as needed to prevent damage to paved roads and to remove excess soil or mud from such roadways.</p> <p>f) Pursuant to SDCL 49-418-38, Keystone shall obtain and file for approval by the Commission prior to construction in such year a bond in the amount of \$15.6 million for the year in which construction is to commence and a second bond in the amount of \$15.6 million for the ensuing year, including any additional period until construction and repair has been completed, to ensure that any damage beyond normal wear to public roads, highways, bridges or other related facilities will be adequately restored or compensated. Such bonds shall be issued in favor of, and for the benefit of, all such townships, counties, and other governmental entities whose property is crossed by the Project. Each bond shall remain in effect until released by the Commission, which release shall not be unreasonably denied following completion of the construction and repair period. Either at the contact meetings required by Condition 10 or by mail, Keystone shall give notice of the existence and amount of these bonds to all counties, townships and other governmental entities whose property is crossed by the Project.</p>	<p>During the pre-construction planning period Keystone will develop and implement videotaping of road conditions prior to construction activities. Keystone, Contractor, and County Representatives will be present for evaluation and determination of road conditions.</p> <p>Keystone will notify state and local governments and emergency responders to coordinate and implement road closures. All necessary permits authorizing crossing and construction use of county and township roads will be obtained.</p> <p>Keystone will file the necessary bond prior to construction.</p>

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
24	<p>Although no residential property is expected to be encountered in connection with the Project, in the event that such properties are affected and due to the nature of residential property, Keystone shall implement the following protections in addition to those set forth in its CMR Plan in areas where the Project passes within 500 feet of a residence:</p> <p>a) To the extent feasible, Keystone shall coordinate construction work schedules with affected residential landowners prior to the start of construction in the area of the residences.</p> <p>b) Keystone shall maintain access to all residences at all times, except for periods when it is infeasible to do so or except as otherwise agreed between Keystone and the occupant. Such periods shall be restricted to the minimum duration possible and shall be coordinated with affected residential landowners and occupants, to the extent possible.</p> <p>c) Keystone shall install temporary safety fencing, when reasonably requested by the landowner or occupant, to control access and minimize hazards associated with an open trench and heavy equipment in a residential area.</p> <p>d) Keystone shall notify affected residents in advance of any scheduled disruption of utilities and limit the duration of such disruption.</p> <p>e) Keystone shall repair any damage to property that results from construction activities.</p> <p>f) Keystone shall separate topsoil from subsoil and restore all areas disturbed by construction to at least their preconstruction condition.</p> <p>g) Except where practicably infeasible, final grading and topsoil replacement, installation of permanent erosion control structures and repair of fencing and other structures shall be completed in residential areas within 10 days after backfilling the trench. In the event that seasonal or other weather conditions, extenuating circumstances, or unforeseen developments beyond Keystone's control prevent compliance with this time frame, temporary erosion controls and appropriate mitigative measures shall be maintained until conditions allow completion of cleanup and reclamation.</p>	<p>In the event that Keystone constructs within 500 feet of a residence, it will implement these protective measures and those set forth in the CMR Plan.</p>
25	<p>Construction must be suspended when weather conditions are such that construction activities will cause irreparable damage, unless adequate protection measures approved by the Commission are taken. At least two months prior to the start of construction in South Dakota, Keystone shall file with the Commission an adverse weather land protection plan containing appropriate adverse weather land protection measures, the conditions in which such measures may be appropriately used, and conditions in which no construction is appropriate, for approval of or modification by the Commission prior to the start of construction. The Commission shall make such plan available to impacted landowners who may provide comment on such plan to the Commission</p>	<p>Keystone is preparing this adverse weather land protection plan and will submit it to the Commission after the plan has been completed but at least 2 months prior to start of construction in South Dakota.</p>

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
26	Reclamation and clean-up along the right-of-way must be continuous and coordinated with ongoing construction.	Keystone will implement this requirement during construction of the project.
27	All pre-existing roads and lanes used during construction must be restored to at least their pre-construction condition that will accommodate their previous use, and areas used as temporary roads during construction must be restored to their original condition, except as otherwise requested or agreed to by the landowner or any governmental authority having jurisdiction over such roadway	Keystone is coordinating with county and state road authorities during the pre-construction planning phase. Pre-construction conditions will be documented and pre-existing roads will be restored to pre-construction condition following construction. Keystone will comply with the condition with respect to temporary roads after construction.
28	Keystone shall, prior to any construction, file with the Commission a list identifying private and new access roads that will be used or required during construction and file a description of methods used by Keystone to reclaim those access roads.	The list of private and new access roads that are being planned for use on the Project is being developed. This list of roads, including the reclamation methods that will be implemented will be provided to the Commission prior to construction.
29	Prior to construction, Keystone shall have in place a winterization plan and shall implement the plan if winter conditions prevent reclamation completion until spring. The plan shall be provided to affected landowners and, upon request, to the Commission.	Keystone will develop and submit to the Commission a winterization plan which addresses these factors.
30	Numerous Conditions of this Order, including but not limited to 16, 19, 24, 25, 26, 27 and 51 relate to construction and its effects upon affected landowners and their property. The Applicant may encounter physical conditions along the route during construction which makes compliance with certain of these Conditions infeasible. If, after providing a copy of this order, including the Conditions, to the landowner, the Applicant and landowner agree in writing to modifications of one or more requirements specified in these conditions, such as maximum clearances or right-of-way widths, Keystone may follow the alternative procedures and specifications agreed to between it and the landowner.	Keystone will comply with this condition and through negotiations with the landowner and any such modifications shall be agreed upon in writing. Note: Through the SDPUC liaison, Keystone has validated a typo in this condition with John Smith, the SDPUC General Counsel. The typo occurs in the first sentence and is a reference Condition 51, which does not exist. This should actually reference Condition 45.
31	Keystone shall construct and operate the pipeline in the manner described in the application and at the hearing, including in Keystone's exhibits, and in accordance with the conditions of this permit, the PHMSA Special Permit, if issued, and the conditions of this Order and the construction permit granted herein	Keystone will comply with this condition during construction and operation of the pipeline. Keystone XL has withdrawn its application to PHMSA for a Special Permit, subject to its right to apply for a Special Permit at a later time.
32	Keystone shall require compliance by its shippers with its crude oil specifications in order to minimize the potential for internal corrosion.	Keystone will require compliance by its shippers with its crude oil tariff specifications.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
33	Keystone's obligation for reclamation and maintenance of the right-of-way shall continue throughout the life of the pipeline.	Keystone will monitor the right-of-way conditions throughout the life of the pipeline.
33.a	In its surveillance and maintenance activities, Keystone shall, and shall cause its contractor to, equip each of its vehicles, including off-road vehicles, with a hand held fire extinguisher, portable compact shovel and communication device such as a cell phone, in areas with coverage, or a radio capable of achieving prompt communication with emergency services.	Keystone will require all Operators to maintain the required equipment in all vehicles on the right-of-way during surveillance and maintenance activities.
34	In accordance with 49 C.F.R. 195, Keystone shall continue to evaluate and perform assessment activities regarding high consequence areas.	Keystone will identify and assess high consequence areas in accordance with 49 C.F.R. 195.
34.a	Prior to Keystone commencing operation, all unusually sensitive areas as defined by 49 CFR 195.6 that may exist, whether currently marked on DOT's HCA maps or not, should be identified and added to the Emergency Response Plan and Integrity Management Plan	Keystone will identify HCA's as defined at 49 CFR 195.6 and add them to the Emergency Response Plan and Integrity Management Plan.
34.b	In its continuing assessment and evaluation of environmentally sensitive and high consequence areas, Keystone shall seek out and consider local knowledge, including the knowledge of the South Dakota Geological Survey, the Department of Game Fish and Parks and local landowners and governmental officials.	Keystone has conducted numerous consultations with South Dakota state agencies, local agencies and landowners and essentially concluded the assessment and evaluation of environmentally sensitive and high consequence areas and has concurrence from stakeholders related to construction and restoration plans within these areas. If new or different information on environmentally sensitive and high consequence areas becomes available, Keystone will assess that information.
35	The evidence in the record demonstrates that in some reaches of the Project in southern Tripp County, the High Plains Aquifer is present at or very near ground surface and is overlain by highly permeable sands permitting the uninhibited infiltration of contaminants. This aquifer serves as the water source for several domestic farm wells near the pipeline as well as public water supply system wells located at some distance and upgradient from the pipeline route. Keystone shall identify the High Plains Aquifer area in southern Tripp County as a hydrologically sensitive area in its Integrity Management and Emergency Response Plans. Keystone shall similarly treat any other similarly vulnerable and beneficially useful surficial aquifers of which it becomes aware during construction and continuing route evaluation	Keystone will identify the High Plains Aquifer area in southern Tripp County and any other similarly vulnerable and beneficially useful surficial aquifers as a hydrologically sensitive area in its Integrity Management and Emergency Response Plans.

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
36	Prior to putting the Keystone Pipeline into operation, Keystone shall prepare, file with PHMSA and implement an emergency response plan as required under 49 CFR 194 and a manual of written procedures for conducting normal operations and maintenance activities and handling abnormal operations and emergencies as required under 49 CFR 195.402. Keystone shall also prepare and implement a written integrity management program in the manner and at such time as required under 49 CFR 195.452. At such time as Keystone files its Emergency Response Plan and Integrity Management Plan with PHMSA or any other state or federal agency, it shall also file such documents with the Commission. The Commission's confidential filing rules found at ARSD 20:10:01:41 may be invoked by Keystone with respect to such filings to the same extent as with all other filings at the Commission. If information is filed as "confidential," any person desiring access to such materials or the Staff or the Commission may invoke the procedures of ARSD 20:10:01 :41 through 20: 10:01 :43 to determine whether such information is entitled to confidential treatment and what protective provisions are appropriate for limited release of information found to be entitled to confidential treatment.	Keystone will file its Emergency Response Plan and Integrity Management Plan with the Commission upon filing with PHMSA and will invoke the Commission's confidential filing rules.
37	To facilitate periodic pipeline leak surveys during operation of the facilities in wetland areas, a corridor centered on the pipeline and up to 15 feet wide shall be maintained in an herbaceous state. Trees within 15 feet of the pipeline greater than 15 feet in height may be selectively cut and removed from the permanent right-of-way.	Keystone will maintain a corridor centered on the pipeline and up to 15 feet wide in an herbaceous state to facilitate periodic pipeline leak surveys during operation of the facilities in wetland areas.
38	To facilitate periodic pipeline leak surveys in riparian areas, a corridor centered on the pipeline and up to 10 feet wide shall be maintained in an herbaceous state.	Keystone will maintain a corridor centered on the pipeline and up to 10 feet wide in an herbaceous state to facilitate periodic pipeline leak surveys during operation of the facilities in riparian areas.
39	Except to the extent waived by the owner or lessee in writing or to the extent the noise levels already exceed such standard, the noise levels associated with Keystone's pump stations and other noise-producing facilities will not exceed the L 1 0=55dbA standard at the nearest occupied, existing residence, office, hotel/motel or non-industrial business not owned by Keystone. The point of measurement will be within 100 feet of the residence or business in the direction of the pump station or facility. Post-construction operational noise assessments will be completed by an independent third-party noise consultant, approved by the Commission, to show compliance with the noise level at each pump station or other noise-producing facility. The noise assessments will be performed in accordance with applicable American National Standards Institute standards. The results of the assessments will be filed with the Commission. In the event that the noise level exceeds the limit set forth in this condition at any pump station or other noise producing facility, Keystone shall promptly implement noise mitigation measures to bring the facility into compliance with the limits set forth in this condition and shall report to the Commission concerning the measures taken and the results of post-mitigation assessments demonstrating that the noise limits have been met.	Keystone will design pump stations and other noise-producing facilities so that noise will not exceed the L 1 0 = 55dbA standard at the nearest occupied receptor (existing residence, office, hotel/motel or non-industrial business not owned by Keystone). Keystone will utilize a third-party noise consultant, approved by the Commission, to show post-construction compliance with the noise level at each pump station or other noise-producing facility and will file the assessments with the Commission.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
40	At the request of any landowner or public water supply system that offers to provide the necessary access to Keystone over his/her property or easement(s) to perform the necessary work, Keystone shall replace at no cost to such landowner or public water supply system, any polyethylene water piping located within 500 feet of the Project with piping that is resistant to permeation by BTEX.	Keystone will replace polyethylene water piping located within 500 feet of the Project with piping that is resistant to permeation by BTEX when requested and provided access by the landowner or a public water supply system.
40.a	Keystone shall publish a notice in each newspaper of general circulation in each county through which the Project will be constructed advising landowners and public water supply systems of this condition.	Keystone will publish a notice in each newspaper of general circulation in each county through which the Project will be constructed advising landowners and public water supply systems of condition 40.
41	Keystone shall follow all protection and mitigation efforts as identified by the U.S. Fish and Wildlife Service ("USFWS") and SDGFP	Keystone is currently involved in consultation with the USFWS and SDGFP and will follow protection and mitigation efforts agreed to during consultation with the agencies.
41.a	Keystone shall identify all greater prairie chicken and greater sage and sharp-tailed grouse leks within the buffer distances from the construction right of way set forth for the species in the FEIS and Biological Assessment (BA) prepared by DOS and USFWS	Keystone is involved in consultations with SDGFP to identify greater prairie chicken and greater sage and sharp-tailed grouse leks and to develop construction mitigation plans for each species.
41.b	In accordance with commitments in the FEIS and BA, Keystone shall avoid or restrict construction activities as specified by USFWS within such buffer zones between March 1 and June 15 and for other species as specified by USFW and SDGFP.	Keystone will address this requirement during pre-construction planning efforts.
42	Keystone shall keep a record of drain tile system information throughout planning and construction, including pre-construction location of drain tiles. Location information shall be collected using a sub-meter accuracy global positioning system where available or, where not available by accurately documenting the pipeline station numbers of each exposed drain tile.	Records will be kept of drain tile system information.
42.a	Keystone shall maintain the drain tile location information and tile specifications and incorporate it into its Emergency Response and Integrity Management Plans where drains might be expected to serve as contaminant conduits in the event of a release.	Keystone will maintain the drain tile location information and tile specifications and incorporate it into its Emergency Response and Integrity Management Plans where drains might be expected to serve as contaminant conduits in the event of a release.
42.b	If drain tile relocation is necessary, the applicant shall work directly with landowner to determine proper location.	Keystone will work directly with landowner to determine proper location should drain tile relocation be necessary.

Keystone XL Pipeline Project
Response to Condition 8 for the
South Dakota Public Utilities Commission



NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
42.c	The location of permanent drain tiles shall be noted on as-built maps. Qualified drain tile contractors shall be employed to repair drain tiles.	Keystone will identify the location of permanent drain tiles on as-built maps. Keystone will employ qualified drain tile contractors to repair drain tiles impacted by the project.
43	Keystone shall follow the "Unanticipated Discoveries Plan," as reviewed by the State Historical Preservation Office ("SHPO") and approved by the DOS and provide it to the Commission upon request. Ex TC-1.6.4, pp. 94-96; Ex S-3.	Keystone will comply with the "Unanticipated Discoveries Plan," as reviewed by the State Historical Preservation Office ("SHPO") and approved by the DOS and will provide the plan to the Commission upon request.
43.a	If during construction, Keystone or its agents discover what may be an archaeological resource, cultural resource, historical resource or gravesite, Keystone or its contractors or agents shall immediately cease work at that portion of the site and notify the DOS, the affected landowner(s) and the SHPO.	Keystone will comply with this condition during construction.
43.b	If the DOS and SHPO determine that a significant resource is present, Keystone shall develop a plan that is approved by the DOS and commenting/signatory parties to the Programmatic Agreement to salvage avoid or protect the archaeological resource.	Keystone will develop a treatment plan that is approved by the DOS and commenting/signatory parties to the Programmatic Agreement to salvage, avoid, or protect an archaeological resource that DOS and SHPO determine as significant.
43.c	If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission and landowner approval for the new route before proceeding with any further construction.	Keystone will obtain approval from the Commission and affected landowner(s) for any materially different route that may be required as a result of unanticipated discoveries prior to further construction.
43.d	Keystone shall be responsible for any costs that the landowner is legally obligated to incur as a consequence of the disturbance of a protected cultural resource as a result of Keystone's construction or maintenance activities.	Keystone will be responsible for costs that the landowner is legally obligated to incur as a consequence of the disturbance of a protected cultural resource as a result of Keystone's construction or maintenance activities.
44.a	Prior to commencing construction, Keystone shall conduct a literature review and records search, and consult with the BLM and Museum of Geology at the S.D. School of Mines and Technology ("SDSMT") to identify known fossil sites along the pipeline route and identify locations of surface exposures of paleontologically sensitive rock formations using the BLM's Potential Fossil Yield Classification system.	Keystone is currently completing consultations with the BLM and Museum of Geology at the S.D. School of Mines and Technology ("SDSMT") to identify known fossil sites along the pipeline route and identify locations of surface exposures of paleontologically sensitive rock formations using the BLM's Potential Fossil Yield Classification system.
44.a.1	Any area where trenching will occur into the Hell Creek Formation shall be considered a high probability area.	Keystone has identified locations along the pipeline route where trenching will occur into the Hell Creek Formation and has identified these locations as areas of high probability to yield fossils.

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
44.b	<p>Keystone shall at its expense conduct a pre-construction field survey of each area identified by such review and consultation as a known site or high probability area within the construction ROW. Following BLM guidelines as modified by the provisions of Condition 44, including the use of BLM permitted paleontologists, areas with exposures of high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5) rock formations shall be subject to a 100% pedestrian field survey, while areas with exposures of moderately sensitive rock formations (PFYC Class 3) shall be spot-checked for occurrences of scientifically or economically significant surface fossils and evidence of subsurface fossils. Scientifically or economically significant surface fossils shall be avoided by the Project or mitigated by collecting them if avoidance is not feasible. Following BLM guidelines for the assessment and mitigation of paleontological resources, scientifically significant paleontological resources are defined as rare vertebrate fossils that are identifiable to taxon and element, and common vertebrate fossils that are identifiable to taxon and element and that have scientific research value; and scientifically noteworthy occurrences of invertebrate, plant and trace fossils. Fossil localities are defined as the geographic and stratigraphic locations at which fossils are found</p>	<p>Keystone has conducting pre-construction field surveys of each area identified as high probability to yield fossils within the construction ROW. Keystone is conducting pedestrian field surveys of 100% of areas with exposures of high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5) rock formations utilizing the BLM guidelines as modified by the provisions of Condition 44, including the use of BLM permitted paleontologists. Additionally, Keystone is spot-checking areas of moderately sensitive rock formations (PFYC Class 3). Keystone will avoid scientifically or economically significant surface fossils or will mitigate by collecting them if avoidance is not feasible.</p>
44.c	<p>Following the completion of field surveys, Keystone shall prepare and file with the Commission a paleontological resource mitigation plan. The mitigation plan shall specify monitoring locations, and include BLM permitted monitors and proper employee and contractor training to identify any paleontological resources discovered during construction and the procedures to be followed following such discovery. Paleontological monitoring will take place in areas within the construction ROW that are underlain by rock formations with high sensitivity (PFYC Class 4) and very high sensitivity (PFYC Class 5), and in areas underlain by rock formations with moderate sensitivity (PFYC Class 3) where significant fossils were identified during field surveys.</p>	<p>Keystone will prepare and file with the Commission a paleontological resource mitigation plan upon completion of survey.</p>

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
44.d	<p>If during construction, Keystone or its agents discover what may be a paleontological resource of economic significance, or of scientific significance, as defined in subparagraph (b) above, Keystone or its contractors or agents shall immediately cease work at that portion of the site and, if on private land, notify the affected landowner(s). Upon such a discovery, Keystone's paleontological monitor will evaluate whether the discovery is of economic significance, or of scientific significance as defined in subparagraph (b) above. If an economically or scientifically significant paleontological resource is discovered on state land, Keystone will notify SDSMT and if on federal land, Keystone will notify the BLM or other federal agency. In no case shall Keystone return any excavated fossils to the trench. If a qualified and BLM-permitted paleontologist, in consultation with the landowner, BLM, or SDSMT determines that an economically or scientifically significant paleontological resource is present, Keystone shall develop a plan that is reasonably acceptable to the landowner(s), BLM, or SDSMT, as applicable, to accommodate the salvage or avoidance of the paleontological resource to protect or mitigate damage to the resource. The responsibility for conducting such measures and paying the costs associated with such measures, whether on private, state or federal land, shall be borne by Keystone to the same extent that such responsibility and costs would be required to borne by Keystone on BLM managed lands pursuant to BLM regulations and guidelines, including the BLM Guidelines for Assessment and Mitigation of Potential Impacts to Paleontological Resources, except to the extent factually inappropriate to the situation in the case of private land (e.g. museum curation costs would not be paid by Keystone in situations where possession of the recovered fossil(s) was turned over to the landowner as opposed to curation for the public). If such a plan will require a materially different route than that approved by the Commission, Keystone shall obtain Commission approval for the new route before proceeding with any further construction. Keystone shall, upon discovery and salvage of paleontological resources either during pre-construction surveys or construction and monitoring on private land, return any fossils in its possession to the landowner of record of the land on which the fossil is found. If on state land, the fossils and all associated data and documentation will be transferred to the SDSM; if on federal land, to the BLM.</p>	<p>Keystone will comply with this condition during construction.</p>
44.e	<p>To the extent that Keystone or its contractors or agents have control over access to such information, Keystone shall, and shall require its contractors and agents to, treat the locations of sensitive and valuable resources as confidential and limit public access to this information.</p>	<p>To the extent that Keystone or its contractors or agents have control over access to such information, Keystone will, and will require its contractors and agents to treat the locations of sensitive and valuable resources as confidential and limit public access to this information.</p>

NO.	CONDITION	STATUS OF OTHER MEASURES REQUIRED BY CONDITIONS
45	Keystone shall repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility, including but not limited to, all fences, gates and utility, water supply, irrigation or drainage systems.	Keystone will repair or replace all property removed or damaged during all phases of construction and operation of the proposed transmission facility.
45.a	Keystone shall compensate the owners for damages or losses that cannot be fully remedied by repair or replacement, such as lost productivity and crop and livestock losses or loss of value to a paleontological resource damaged by construction or other activities.	Keystone will compensate the owners for damages or losses that result from construction and operation of the proposed transmission facility and cannot be fully remedied by repair or replacement.
46	In the event that a person's well is contaminated as a result of construction or pipeline operation, Keystone shall pay all costs associated with finding and providing a permanent water supply that is at least of similar quality and quantity; and any other related damages, including but not limited to any consequences, medical or otherwise, related to water contamination.	Keystone will pay all costs associated with finding and providing a permanent water supply that is at least of similar quality and quantity and any other related damages related to water contamination in the event that a well is contaminated as a result of construction or pipeline operation.
47	Any damage that occurs as a result of soil disturbance on a persons' property shall be paid for by Keystone	Keystone will compensate for damage that occurs as a result of soil disturbance on a persons' property caused by construction and operation of the Project.
48	No person will be held responsible for a pipeline leak that occurs as a result of his/her normal farming practices over the top of or near the pipeline	Keystone will not hold any person responsible for a pipeline leak that occurs as a result of normal farming practices.
49	Keystone shall pay commercially reasonable costs and indemnify and hold the landowner harmless for any loss, damage, claim or action resulting from Keystone's use of the easement, including any resulting from any release of regulated substances or from abandonment of the facility, except to the extent such loss, damage claim or action results from the gross negligence or willful misconduct of the landowner or its agents.	Keystone will pay commercially reasonable costs and indemnify and hold the landowner harmless for any loss, damage, claim or action resulting from Keystone's use of the easement, including any resulting from any release of regulated substances or from abandonment of the facility, except to the extent such loss, damage claim or action results from the gross negligence or willful misconduct of the landowner or its agents.
50	The Commission's complaint process as set forth in ARSD 20:10:01 shall be available to landowners, other persons sustaining or threatened with damage or the consequences of Keystone's failure to abide by the conditions of this permit or otherwise having standing to obtain enforcement of the conditions of this Order and Permit.	The Commission's complaint process as set forth in ARSD 20:10:01 shall be available to landowners, other persons sustaining or threatened with damage or the consequences of Keystone's failure to abide by the conditions of this permit or otherwise having standing to obtain enforcement of the conditions of this Order and Permit.

Finding Number	Amended Final Decision and Order The Project	Update
14	The purpose of the Project is to transport incremental crude oil production from the Western Canadian Sedimentary Basin (WCSB) to meet growing demand by refineries and markets in the United States ("U.S."). This supply will serve to replace U.S. reliance on less stable and less reliable sources of offshore crude oil. Ex TC-1, 1.1, p. 1; Ex TC-1, 3.0 p. 23; Ex TC-1, 3.4 p. 24.	The purpose of the Project is to transport incremental crude oil production from the Western Canadian Sedimentary Basin (WCSB) and domestic production from the Williston Basin area to meet demand by refineries and markets in the United States ("U.S."). This supply will serve to replace U.S. reliance on less stable and less reliable sources of offshore crude oil and support the growth of crude oil production in the U.S. (See updated Findings 24-29)
15	The Project will consist of three segments: the Steele City Segment, the Gulf Coast Segment, and the Houston Lateral. From north to south, the Steele City Segment extends from Hardisty, Alberta, Canada, southeast to Steele City, Nebraska. The Gulf Coast Segment extends from Cushing, Oklahoma south to Nederland, in Jefferson County, Texas. The Houston Lateral extends from the Gulf Coast Segment in Liberty County, Texas southwest to Moore Junction, Harris County, Texas. It will interconnect with the northern and southern termini of the previously approved 298-mile-long, 36-inch-diameter Keystone Cushing Extension segment of the Keystone Pipeline Project. Ex TC-1, 1.2, p. 1; Initially, the pipeline would have a nominal capacity to transport 700,000 barrels per day ("bpd"). Keystone could add additional pumping capacity to expand the nominal capacity to 900,000 bpd. Ex TC-1, 2.1.2, p. 8.	The Project will consist of the Steele City Segment. From north to south, the Steele City Segment extends from Hardisty, Alberta, Canada, southeast to Steele City, Nebraska. It will interconnect with the previously approved and constructed 298-mile-long, 36-inch-diameter Keystone Cushing Extension segment of the Keystone Pipeline System allowing crude oil to be delivered to Gulf Coast Refineries. The pipeline would have a maximum capacity to transport 830,000 barrels per day.
16	The Project is an approximately 1,707 mile pipeline with about 1,380 miles in the United States. The South Dakota portion of the pipeline will be approximately 314 miles in length and will extend from the Montana border in Harding County to the Nebraska border in Tripp County. The Project is proposed to cross the South Dakota counties of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman and Tripp. Ex TC-1, 1.2 and 2.1.1, pp. 1 and 8. Detailed route maps are presented in Ex TC-1, Exhibits A and C, as updated in Ex TC-14.	The Project is an approximately 1202 mile pipeline with about 876 miles in the United States. The South Dakota portion of the pipeline will be approximately 315 miles in length and will extend from the Montana border in Harding County to the Nebraska border in Tripp County. The Project is proposed to cross the South Dakota counties of Harding, Butte, Perkins, Meade, Pennington, Haakon, Jones, Lyman and Tripp.
17	Construction of the Project is proposed to commence in May of 2011 and be completed in 2012. Construction in South Dakota will be conducted in five spreads, generally proceeding in a north to south direction. The Applicant expects to place the Project in service in 2012. This in-service date is consistent with the requirements of the Applicant's shippers who have made the contractual commitments that underpin the viability and need for the Project. Ex TC-1, 1.4, pp. 1 and 4; TR 26.	Construction of the Project is proposed to commence when all necessary permits are obtained. Construction in South Dakota will be conducted in three or four spreads, generally proceeding in a north to south direction. The Applicant expects to place the Project in service when construction is completed.
18	The pipeline in South Dakota will extend from milepost 282.5 to milepost 557, approximately 314 miles. The pipeline will have a 36-inch nominal diameter and be constructed using API 5L X70 or X80 high-strength steel. An external fusion bonded epoxy ("FBE") coating will be applied to the pipeline and all buried facilities to protect against corrosion. Cathodic protection will be provided by impressed current. The pipeline will have batching capabilities and will be able to transport products ranging from light crude oil to heavy crude oil. Ex TC-1, 2.2, 2.2.1, 6.5.2, pp. 8-9, 97-98; Ex TC-8, ¶ 26.	The pipeline in South Dakota will extend from milepost 285.6 to milepost 600.9, approximately 315 miles. The pipeline will have a 36-inch nominal diameter and be constructed using API 5L X70M high-strength steel. An external fusion bonded epoxy ("FBE") coating will be applied to the pipeline and all buried facilities to protect against corrosion. Cathodic protection will be provided by impressed current. The pipeline will have batching capabilities and will be able to transport products ranging from light crude oil to heavy crude oil.
19	The pipeline will operate at a maximum operating pressure of 1,440 psig. For location specific low elevation segments close to the discharge of pump stations, the maximum operating pressure will be 1,600 psig. Pipe associated with these segments of 1,600 psig MOP are excluded from the Special Permit application and will have a design factor of 0.72 and pipe wall thickness of 0.572 inch (X-76) or 0.500 inch (X-80). All other segments in South Dakota will have a MOP of 1,440 psig. Ex TC-1, 2.2.1, p. 9.	At most locations, the pipeline will operate at a maximum operating pressure of 1,307 psig. For location specific low elevation segments close to the discharge of pump stations, the maximum operating pressure will be 1,600 psig. Pipe associated with these segments of 1,600 psig MOP will have a design factor of 0.72 and a nominal pipe wall thickness of 0.572 inch (X-70M). All other segments in South Dakota will have a MOP of 1,307 psig.

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Finding Number	Amended Final Decision and Order	Update
20	The Project will have seven pump stations in South Dakota, located in Harding (2), Meade, Haakon, Jones and Tripp (2) Counties. TC-1, 2.2.2, p. 10. The pump stations will be electrically driven. Power lines required for providing power to pump stations will be permitted and constructed by local power providers, not by Keystone. Three to five pumps will be installed at each station to meet the maximum design flow rate of 830,000 bpd. No tank facilities will be constructed in South Dakota. Twenty mainline valves will be located in South Dakota. All of these valves will be remotely controlled, in order to have the capability to isolate sections of line rapidly in the event of an emergency to minimize impacts or for operational or maintenance reasons.	The Project will have seven pump stations in South Dakota, located in Harding (2), Meade, Haakon, Jones and Tripp (2) Counties. TC-1, 2.2.2, p. 10. The pump stations will be electrically driven. Power lines required for providing power to pump stations will be permitted and constructed by local power providers, not by Keystone. Three to five pumps will be installed at each station to meet the maximum design flow rate of 830,000 bpd. No tank facilities will be constructed in South Dakota. Twenty mainline valves will be located in South Dakota. All of these valves will be remotely controlled, in order to have the capability to isolate sections of line rapidly in the event of an emergency to minimize impacts or for operational or maintenance reasons.
22	The Project will be designed, constructed, tested, and operated in accordance with all applicable requirements, including the U.S. Department of Transportation, Pipeline Hazardous Materials and Safety Administration (PHMSA) regulations set forth at 49 CFR Part 195, as modified by the Special Permit requested for the Project from PHMSA (see Finding 71). These federal regulations are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures. Ex TC-1, 2.2, p. 8.	The Project will be designed, constructed, tested, and operated in accordance with all applicable requirements, including the U.S. Department of Transportation, Pipeline Hazardous Materials and Safety Administration (PHMSA) regulations set forth at 49 CFR Part 195, and the special conditions developed by PHMSA and set forth in Appendix Z to the Department of State ("DOS") January 2014 Final Supplemental Environmental Impact Statement ("Final SEIS"). These federal regulations and additional conditions are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures.
23	The current estimated cost of the Keystone Project in South Dakota is \$921.4 million. Ex TC-1, 1.3, p. 1.	The current estimated cost of the Keystone XL Project in South Dakota is \$1.974 billion. The estimated cost of the South Dakota portion of the project has primarily increased due to the new technical requirements (for example, the 59 additional conditions set forth in the DOS Final SEIS), and inflation and additional costs (for example, increased project management, regulatory, and material storage and preservation costs) due to the projected six-year delay in starting construction.
24	Demand for the Facility The transport of additional crude oil production from the WCSB is necessary to meet growing demand by refineries and markets in the U.S. The need for the project is dictated by a number of factors, including increasing WCSB crude oil supply combined with insufficient export pipeline capacity. Increasing crude oil demand in the U.S. and decreasing domestic crude supply, the opportunity to reduce U.S. dependence on foreign off-shore oil through increased access to stable, secure Canadian crude oil supplies, and binding shipper commitments to utilize the Keystone Pipeline Project. Ex TC-1, 3.0, p. 23.	The June 29, 2010 order recites Findings of Fact demonstrating the strong demand for the Project. Given the dynamic nature of the crude oil market, there have been changes in the nature of this demand since 2010. As demonstrated below, however market demand for the Project remains strong today. The transport of additional crude oil production from the WCSB continues to be necessary to meet demand by refineries and markets in the U.S. The need for the project is driven by a number of factors, including increasing domestic U.S. and Canadian crude oil production combined with insufficient pipeline capacity; an energy efficient and safe method to transport this growing production; the opportunity to reduce U.S. dependence on foreign offshore crude oil through increased access to North American supplies; and binding shipper commitments to utilize the Keystone Pipeline System.
25	According to the U.S. Energy Information Administration ("EIA"), U.S. demand for petroleum products has increased by over 11 percent or 2,000,000 bpd over the past 10 years and is expected to increase further. The EIA estimates that total U.S. petroleum consumption will increase by approximately 10 million bpd over the next 10 years, representing average demand growth of about 100,000 bpd per year (EIA Annual Energy Outlook 2008). Ex TC-1, 3.2, pp. 23-24.	United States production of crude oil has increased significantly, from approximately 6.5 million barrels per day (bpd) in 2012, and is expected to peak at 9.6 million bpd by 2019. However, even with the domestic production growth, the U.S. is expected to remain a net importer of crude oil. According to the U.S. Energy Information Administration ("EIA"), U.S. demand for crude oil has held steady at approximately 15 million bpd and is expected to remain relatively stable into the future. ¹
26	At the same time, domestic U.S. crude oil supplies continue to decline. For example, over the past 10 years, domestic crude production in the United States has declined at an average rate of about 135,000 bpd per year, or 2% per year. Ex TC-1, 3.3, p. 24. Crude and refined petroleum product imports into the U.S. have increased by over 3.3 million bpd over the past 10 years. In 2007, the U.S. imported over 13.4 million bpd of crude oil and petroleum products or over 60 percent of total U.S. petroleum product	The rise in U.S. crude oil production, predominantly light crude, has replaced most foreign imports of light crude. However the demand persists for imported heavy crude oil by U.S. refineries that are optimally configured to process heavy crude states. ² The U.S. Gulf Coast continues to import approximately 3.5 million bpd of heavy and medium sour crude oil. ³

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Finding Number	Amended Final Decision and Order	Update
27	<p>Consumption. Canada is currently the largest supplier of imported crude oil and refined products to the U.S., supplying over 2.4 million bpd in 2007, representing over 11 percent of total U.S. petroleum product consumption (EIA 2007). Ex TC-1, 3.4, p.24.</p> <p>The Project will provide an opportunity for U.S. refiners in Petroleum Administration for Defense District III, the Gulf Coast region, to further diversify supply away from traditional offshore foreign crude supply and to obtain direct access to secure and growing Canadian crude supplies. Access to additional Canadian crude supply will also provide an opportunity for the U.S. to offset annual declines in domestic crude production and, specifically, to decrease its dependence on other foreign crude oil suppliers, such as Mexico and Venezuela, the top two heavy crude oil exporters into the U.S. Gulf Coast. Ex TC-1, 3.4, p. 24.</p>	<p>Canadian production of heavy crude oil continues to grow, the vast majority of which is currently exported to the United States to be processed by U.S. refineries. North American crude oil production growth and logistics constraints have contributed to significant discounts on the price of landlocked crude and led to growing volumes of crude shipped by rail in the United States and, more recently Canada. As the DOS Final SEIS makes clear, in the absence of new pipelines, crude oil will continue to be transported via rail at an increasing rate.⁴</p> <p>The North Dakota Pipeline Authority estimates that rail export volumes from the U.S. Williston Basin have increased from approximately 40,000 bpd in 2010 to over 700,000 bpd in early 2014. Over 60% of crude oil transported from the Williston Basin is delivered by rail.⁵ The industry has also been making significant investments in increasing rail transport capacity for crude oil out of the Western Canadian Sedimentary Basin (WCSB).⁶ In recent years, rail transport of crude oil in Canada has grown from approximately 10,000 bpd in 2010 to approximately 270,000 bpd by the end of 2013.⁷ The DOS Final SEIS indicates that transportation of crude oil by pipeline is safer and less greenhouse gas intensive than crude oil transportation by rail.⁸</p> <p>The Project will provide an opportunity for U.S. refiners in Petroleum Administration for Defense District III, the Gulf Coast region, to further diversify supply away from traditional offshore foreign crude supply and to obtain direct access to secure and growing domestic crude supplies.</p>
28	<p>Reliable and safe transportation of crude oil will help ensure that U.S. energy needs are not subject to unstable political events. Established crude oil reserves in the WCSB are estimated at 179 billion barrels (CAPP 2008). Over 97 percent of WCSB crude oil supply is sourced from Canada's vast oil sands reserves located in northern Alberta. The Alberta Energy and Utilities Board estimates there are 175 billion barrels of established reserves recoverable from Canada's oil sands. Alberta has the second largest crude oil reserves in the world, second only to Saudi Arabia. Ex TC-1, 3.1, p. 23.</p>	<p>Reliable and safe transportation of crude oil will help ensure that U.S. energy needs are not subject to unstable political events. Of Canada's 173 billion barrels of oil reserves, 97% or 167 billion barrels are located in the oil sands. In terms of overall oil reserves, Canada's 173 billion barrels is third only to Venezuela and Saudi Arabia.⁹ Canada is the largest foreign supplier of crude oil to the U.S. and is likely to remain as such for the foreseeable future.¹⁰</p>
29	<p>Shippers have already committed to long-term binding contracts, enabling Keystone to proceed with regulatory applications and construction of the pipeline once all regulatory, environmental, and other approvals are received. These long-term binding shipper commitments demonstrate a material endorsement of support for the Project, its economics, proposed route, and target market, as well as the need for additional pipeline capacity and access to Canadian crude supplies. Ex TC-1, 3.5, p. 24.</p>	<p>Shippers have committed to long-term binding contracts, enabling Keystone to proceed with regulatory applications and construction of the pipeline once all regulatory, environmental, and other approvals are received. These long-term binding shipper commitments demonstrate a material endorsement of support for the Project, its economics, proposed route, and target market, as well as the need for additional pipeline capacity to access domestic and Canadian crude supplies. The DOS Final SEIS independently confirms the continuing strong market demand.¹¹</p>
32	<p>Table 6 to the Application summarizes the environmental impacts that Keystone's analysis indicates could be expected to remain after its Construction, Mitigation and Reclamation Plan (CMR Plan) are implemented. Ex TC-1, pp. 31-37.</p>	<p>Table 6 is still applicable. The latest version of the CMR Plan is Rev4, April 2012. Attachment A to this Tracking Table is a redline version showing changes to the CMR Plan from Rev1 to the current Rev4. Overall changes to the CMR Plan were made to clarify language, provide additional detail related to construction procedures and incorporate lessons learned from previous pipeline construction, current right-of-way conditions and project requirements</p>

⁴ Final Supplemental Environmental Impact Statement, Keystone XL Pipeline Project, January 2014 at 1.4.3.2 and 1.4.3.3.

⁵ North Dakota Pipeline Authority 2014 <https://ndpipelines.files.wordpress.com/2012/04/nd-rail-estimate-april-2014.jpg>

⁶ Final Supplemental Environmental Impact Statement Keystone XL Pipeline Project, January 2014 at 1.4.1.3

⁷ Transportation Safety Board of Canada <http://www.tsb.gc.ca/eng/recommendations-recommandations/rail/2014/rec-r1401-r1403.asp>

⁸ Final Supplemental Environmental Impact Statement, Keystone XL Pipeline Project, January 2014, Chapter 5 and Errata Sheet at <http://keystonepipeline-xl.state.gov/documents/organization/227464.pdf>.

⁹ Canadian Association of Petroleum Producers (CAPP) Crude Oil Forecast, Markets & Transportation June 2014

¹⁰ EIA Annual Energy Outlook 2014

¹¹ Final Supplemental Environmental Impact Statement, Keystone XL Pipeline Project, January 2014 at 1.3.1 and 1.4.2.6

Finding Number	Amended Final Decision and Order	Update
33	The pipeline will cross the Unglaciated Missouri Plateau. This physiographic province is characterized by a dissected plateau where river channels have incised into the landscape. Elevations range from just over 3,000 feet above mean sea level in the northwestern part of the state to around 1,800 feet above mean sea level in the White River valley. The major river valleys traversed include the Little Missouri River, Cheyenne River, and White River. Ex TC-1, § 3.1, p. 30; Ex TC-4, ¶ 15. Exhibit A to the Application includes soil type maps and aerial photograph maps of the Keystone pipeline route in South Dakota that indicate topography, land uses, project mileposts and Section, Township, Range location descriptors. Ex TC-1, Exhibit A. Updated versions of these maps were received in evidence as Exhibit TC-14.	The soil type maps and aerial photograph maps of the Keystone pipeline route in South Dakota that indicate topography, land uses, project mileposts and Section, Township, Range location descriptors that were submitted in evidence as Exhibit TC-14 are still generally consistent in the description of the current Project route through South Dakota. Keystone will submit updated maps prior to the initiation of construction as required by Condition No. 6 of the Amended Final Decision and Order.
41	Fifteen perennial streams and rivers, 129 intermittent streams, 206 ephemeral streams and seven man-made ponds will be crossed during construction of the Project in South Dakota. Keystone will utilize horizontal directional drilling ("HDD") to cross the Little Missouri, Cheyenne and White River crossings. Keystone intends to use open-cut trenching at the other perennial streams and intermittent water bodies. The open cut wet method can cause the following impacts: loss of in-stream habitat through direct disturbance, loss of bank cover, disruption of fish movement, direct disturbance to spawning, water quality effects and sedimentation effects. Alternative techniques include open cut dry flume, open cut dam-and-pump and horizontal directional drilling. Exhibit C to the Application contains a listing of all water body crossings and preliminary site-specific crossing plans for the HDD sites. Ex TC-14. Permitting of water body crossings, which is currently underway, will ultimately determine the construction method to be utilized. Keystone committed to mitigate water crossing impacts through implementation of procedures outlined in the CMP Plan. Ex TC-1, § 4.1, pp. 45-46.	Fifteen perennial streams and rivers, 129 intermittent streams, and 206 ephemeral streams will be crossed during construction of the Project in South Dakota. No man-made ponds are crossed. Keystone will utilize horizontal directional drilling ("HDD") to cross the Little Missouri, Cheyenne, Bad, and White rivers, as well as Bridger Creek. Keystone intends to use open-cut trenching at other perennial streams and intermittent water bodies. The open cut wet method can cause the following impacts: loss of in-stream habitat through direct disturbance, loss of bank cover, disruption of fish movement, direct disturbance to spawning, water quality effects and sedimentation effects. Alternative techniques include open cut dry flume, open cut dam-and-pump and horizontal directional drilling. To supplement Exhibit C to the Application, Attachment B to this Tracking Table contains the preliminary site-specific crossing plans for the two newly identified HDD crossings: Bad River and Bridger Creek.
50	The total length of Project pipe with the potential to affect a High Consequence Area ("HCA") is 34.3 miles. A spill that could affect an HCA would occur no more than once in 250 years. TC-12, ¶ 24.	The total length of Project pipe with the potential to affect a High Consequence Area ("HCA") is 19.9 miles. A spill that could affect an HCA would occur no more than once in 250 years.
54	Of the approximately 314-mile route in South Dakota, all but 21.5 miles is privately owned. 21.5 miles is state-owned and managed. The list is found in Table 14. No tribal or federal lands are crossed by the proposed route. Ex TC-1, § 7.1, p. 75.	Of the approximately 315-mile route in South Dakota, all but 27.9 miles are privately owned. 1.7 miles are local government owned, and 26.3 miles are state-owned and managed. No tribal or federal lands are crossed by the route.
	Design and Construction	
60	Keystone has applied for a special permit ("Special Permit") from PHMSA authorizing Keystone to design, construct, and operate the Project at up to 80% of the steel pipe specified minimum yield strength at most locations. TC-1, 2.2, p. 6; TR 62. In Condition 2, the Commission requires Keystone to comply with all of the conditions of the Special Permit, if issued.	Keystone withdrew its request to PHMSA for a special permit ("Special Permit") on August 5, 2010. Keystone will implement 59 additional safety measures as set forth in the DOS Final SEIS, Appendix Z. These measures provide an enhanced level of safety equivalent to or greater than those that would have applied under the previously requested Special Permit.
61	TransCanada operates approximately 11,000 miles of pipelines in Canada with a 0.8 design factor and requested the Special Permit to ensure consistency across its system and to reduce costs. PHMSA has previously granted similar waivers adopting this modified design factor for natural gas pipelines and for the Keystone Pipeline. Ex TC-8, ¶¶ 13, 17.	[Finding 61 is no longer relevant as Keystone has withdrawn its request for a Special Permit.]
62	The Special Permit is expected to exclude pipeline segments operating in (i) PHMSA defined HCAs described as high population areas and commercially navigable waterways in 49 CFR Section 195.450; (ii) pipeline segments operating at highway, railroad, and road crossings; (iii) piping located within pump stations, mainline valve assemblies, pigging facilities, and measurement facilities; and (iv) areas where the MOP is greater than 1,440 psig. Ex TC-8, ¶ 16.	[Finding 62 is no longer relevant as Keystone has withdrawn its request for a Special Permit.]
63	Application of the 0.8 design factor and API 5L X70 high-strength steel pipe results in use of pipe with a 0.463 inch wall thickness, as compared with the 0.512 inch wall thickness under the otherwise applicable 0.72 design factor, a reduction in thickness of .050 inches. TR 61. PHMSA previously found that the issuance of a waiver is not inconsistent with pipeline safety and that the waiver will provide a level of safety equal to or greater than that which would be provided if the pipeline were operated under the otherwise applicable regulations. Ex TC-8, ¶ 15.	The pipeline will operate at a maximum operating pressure of 1,307 psig. Use of API 5L X70 high-strength steel results in a 0.465 inch nominal pipe wall thickness. For location specific low elevation segments close to the discharge of pump stations, the maximum operating pressure will be 1,600 psig. Pipe associated with these segments of 1,600 psig MOP will have a design factor of 0.72 and a nominal pipe wall thickness of 0.572 inch (X-70M).

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Finding Number	Amended Final Decision and Order	Update
63	TransCanada has thousands of miles of this particular grade of pipeline steel installed and in operation. TransCanada pioneered the use of FBE, which has been in use on its system for over 29 years. There have been no leaks on this type of pipe installed by TransCanada with the FBE coating and cathodic protection system during that time. When TransCanada has excavated pipe to validate FBE coating performance, there has been no evidence of external corrosion. Ex TC-8, ¶ 27.	TransCanada has thousands of miles of this particular grade of pipeline steel installed and in operation. TransCanada pioneered the use of FBE, which has been in use on its system for over 33 years. There have been no leaks on this type of pipe installed by TransCanada with the FBE coating and cathodic protection system during that time. When TransCanada has excavated pipe to validate FBE coating performance, there has been no evidence of external corrosion except for one instance where an adjacent foreign utility interfered with the cathodic protection system. No similar situations exist on the Project in South Dakota.
73	The Applicant has prepared a detailed CMR Plan that describes procedures for crossing cultivated lands, grasslands, including native grasslands, wetlands, streams and the procedures for restoring or reclaiming and monitoring those features crossed by the Project. The CMR Plan is a summary of the commitments that Keystone has made for environmental mitigation, restoration and post-construction monitoring and compliance related to the construction phase of the Project. Among these, Keystone will utilize construction techniques that will retain the original characteristics of the lands crossed as detailed in the CMR Plan. Keystone's thorough implementation of these procedures will minimize the impacts associated with the Project. A copy of the CMR Plan was filed as Exhibit B to Keystone's permit application and introduced into evidence as TC-1, Exhibit B.	Keystone has updated its CMR Plan since the Amended Final Decision and Order. Overall changes to the CMR Plan were made to clarify language, provide additional detail related to construction procedures and incorporate lessons learned from previous pipeline construction, current right-of-way conditions and project requirements. A redlined version of the CMR Plan showing changes since the version considered in 2010 is attached as Attachment A to this Tracking Table.
80	Keystone is in the process of preparing, in consultation with the area National Resource Conservation Service, construction/reclamation unit ("Con/Rec Unit") mapping to address differing construction and reclamation techniques for different soils conditions, slopes, vegetation, and land use along the pipeline route. This analysis and mapping results in the identification of segments called Con/Rec Units. Ex. TC-5, TC-16, DR 3-25.	In consultation with the area National Resource Conservation Service, Keystone has completed construction/reclamation unit ("Con/Rec Unit") mapping to address differing construction and reclamation techniques for different soils conditions, slopes, vegetation, and land use along the pipeline route.
83	Keystone will utilize HDD for the Little Missouri, Cheyenne and White River crossings, which will aid in minimizing impacts to important game and commercial fish species and special status species. Open-cut trenching, which can affect fisheries, will be used at other perennial streams. Keystone will use best practices to reduce or eliminate the impact of crossings at the perennial streams other than the Cheyenne and White Rivers. Ex TC-1, 5.4.1, p. 46; 5.6.2, p. 72; TC-16, DR 3-39.	Keystone will utilize HDD for the Little Missouri, Cheyenne, Bad and White River crossings, as well as Bridger Creek, which will aid in minimizing impacts to important game and commercial fish species and special status species. Open-cut trenching, which can affect fisheries, will be used at other perennial streams. Keystone will use best practices to reduce or eliminate the impact of crossings at the perennial streams that are open cut.
	Operation and Maintenance	
90	The Keystone pipeline will be designed constructed, tested and operated in accordance with all applicable requirements, including the PHMSA regulations set forth at 49 CFR Parts 194 and 195, as modified by the Special Permit. These federal regulations are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures. Ex TC-8, ¶ 2.	The Keystone pipeline will be designed constructed, tested and operated in accordance with all applicable requirements, including the PHMSA regulations set forth at 49 CFR Parts 194 and 195, and the 59 PHMSA Special Conditions as set forth in DOS Final SEIS, Appendix Z. These federal regulations and additional conditions are intended to ensure adequate protection for the public and the environment and to prevent crude oil pipeline accidents and failures.
	Socio-Economic Factors	
107	Socio-economic evidence offered by both Keystone and Staff demonstrates that the welfare of the citizens of South Dakota will not be impaired by the Project. Staff expert Dr. Michael Madden conducted a socio-economic analysis of the Keystone Pipeline, and concluded that the positive economic benefits of the project were unambiguous, while most if not all of the social impacts were positive or neutral. S-2, Madden Assessment at 21. The Project, subject to compliance with the Special Permit and the Conditions herein, would not, from a socioeconomic standpoint: (i) pose a threat of serious injury to the socioeconomic conditions in the project area; (ii) substantially impair the health, safety, or welfare of the inhabitants in the project area; or (iii) unduly interfere with the orderly development of the region.	[Keystone has withdrawn its Special Permit application but will comply with the 59 additional conditions set forth in the DOS Final SEIS, Appendix Z, which provide an enhanced level of safety equivalent to or greater than those that would have applied under the requested Special Permit.] The increased cost of the Project reflected in updated Finding 23 is likely to result in increased tax revenue to the affected counties.

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**DEPARTMENT OF STATE
RECORD OF DECISION AND NATIONAL INTEREST
DETERMINATION**

**TransCanada Keystone Pipeline, L.P. Application for Presidential Permit, Keystone
XL Pipeline**

Contents:

1.0 Summary

2.0 Legal Authority

3.0 Agency and Tribal Involvement and Public Comment

4.0 Project Background

5.0 Issues Considered in the Final Supplemental Environmental Impact Statement

6.0 Basis for Decision

7.0 National Interest Determination

1.0 Summary

On May 4, 2012, TransCanada Keystone Pipeline, L.P. (Keystone) submitted an application to the U.S. Department of State (Department) for a Presidential permit that would authorize construction, connection, operation, and maintenance of pipeline facilities at the U.S.-Canada border in Phillips County, Montana, to import crude oil from Canada into the United States. The proposed project, called Keystone XL (the proposed Project), would consist of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska. The proposed Project would have the capacity to deliver up to 830,000 barrels per day (bpd) of crude oil. It would predominantly transport crude oil from the Western Canadian Sedimentary Basin (WCSB), but, subject to commercial demand, would also transport quantities of crude oil from Montana and North Dakota via a proposed pipeline and associated facilities known as the Bakken Marketlink Project. If issued, the permit would authorize operations at the border segment, which is from the international border near Morgan, Montana, to the first mainline shut-off valve within the United States located approximately 1.2 miles from the international border.

On November 6, 2015, Secretary of State Kerry determined under Executive Order 13337 that issuing a Presidential permit to Keystone for the proposed Keystone XL pipeline's border facilities would not serve the national interest, and denied the permit application (2015 Decision). On January 24, 2017, President Trump issued a Presidential Memorandum Regarding Construction of the Keystone XL Pipeline (Presidential Memorandum) which, *inter alia*, invited Keystone "to re-submit its application to the Department of State for a Presidential permit for the construction and operation of the Keystone XL Pipeline..." On January 24, 2017, President Trump also issued an Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects in which he set forth the general policy of the Executive Branch "to streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects, especially projects that are a high priority for the Nation," and cited pipelines as an example of such high priority projects.

On January 26, 2017, the Department received a re-submitted application from Keystone for the proposed Project. The re-submitted application includes minor route alterations due to agreements with local property owners for specific right-of-ways and easement access, but remains entirely within the areas previously surveyed by the Department in the 2014 Supplemental Environmental Impact Statement (EIS).

Keystone is a limited partnership organized under Delaware law with a primary business address in Houston, Texas. Its affiliate, TC Oil Pipeline Operations Inc. would operate the proposed Project. TC Oil Pipeline Operations Inc. is a limited company organized under the laws of Canada with its headquarters located in Calgary, Alberta, Canada. Both Keystone and TC Oil Pipeline Operations Inc. are owned by affiliates of TransCanada Corporation, a Canadian company with stock publicly traded on the Toronto and New York stock exchanges.

Executive Order 13337 (April 30, 2004) delegates to the Secretary of State the President's authority to receive applications for permits for the construction, connection, operation, or maintenance of facilities for the exportation or importation of petroleum, petroleum products, coal, or other fuels (except for natural gas) at the borders of the United States and to issue or deny such Presidential permits upon a national interest determination. The determination is Presidential action, made through the exercise of Presidentially delegated authorities, and therefore the requirements of the National Environmental Policy Act of 1969 (NEPA), the National Historic Preservation Act of 1966 (NHPA), the Endangered Species Act of 1973 (ESA), the Administrative Procedure Act (APA), and other similar laws and regulations that do not apply to Presidential actions are also inapplicable here. Nevertheless, the Department's review of the Presidential permit application for the proposed Project has, as a matter of policy, been conducted in a manner consistent with NEPA. A Final Supplemental EIS was released on January 31, 2014 as noted above. In the Supplemental EIS, the Department evaluated the potential construction and operational impacts of the proposed Project and alternatives that may occur without the proposed Project on a wide range of environmental and cultural resources. Similarly, as a matter of policy, the Department conducted reviews of the proposed Project consistent with Section 106 of the NHPA, as amended, and with Section 7 of the ESA. The Department solicited public comment and conducted a broad range of consultations with state, local, tribal, and foreign governments and other federal agencies as it considered Keystone's application.

Acting on behalf of the President under delegated authorities in accordance with Executive Order 13337 and the Presidential Memorandum, the Under Secretary of State for Political Affairs has determined that issuing a Presidential permit to Keystone to construct, connect, operate, and maintain at the border of the United States pipeline facilities for the import of crude oil from Canada to the United States as described in the Presidential permit application for the proposed Project would serve the national interest. Accordingly, the request for a Presidential permit is approved.

2.0 Legal Authority

The President of the United States has authority to require permits for transboundary infrastructure projects based upon his Constitutional powers. In Executive Order 13337, acting pursuant to the Constitution and laws of the United States, including Section 301 of Title 3 of the United States Code, the President delegated to the Secretary of State the authority to receive applications and make determinations regarding approval or denial of a Presidential permit for certain types of border facilities, including those for cross-border petroleum pipelines, based on the Secretary's finding as to whether issuance of a permit would serve the national interest. Because the proposed Project seeks to build new petroleum facilities that cross the international border, the authority to make a determination for the issuance of a Presidential permit for the border facilities is within the scope of authority delegated to the Secretary of State by the President. The functions assigned to the Secretary have been further delegated within the Department including to the Deputy Secretary of State, the Under Secretary of State for Political Affairs, and the Under Secretary of State for Economic Growth, Energy, and the Environment.

(Department of State Delegations of Authority No. 245-1, 118-2).

As noted above, when reviewing an application for a Presidential permit, the Secretary or his delegate is required by the Executive Order to determine if issuance of the permit would serve the national interest. The determination is made pursuant to the President's Constitutional authority. No statute establishes criteria for this determination. The President or his delegate may take into account factors he or she deems germane to the national interest. With regard to the proposed Project, the Under Secretary of State for Political Affairs has considered a range of factors, including but not limited to foreign policy; energy security; environmental, cultural, and economic impacts; and compliance with applicable law and policy. The determination is Presidential action, made through the exercise of Presidentially delegated authorities, and therefore the requirements of NEPA, the ESA, the NHPA, the APA, and other similar laws and regulations that do not apply to Presidential actions are also inapplicable here. Nevertheless, as a matter of policy and in order to inform the Under Secretary's determination regarding the national interest, the Department has reviewed the potential impacts of the action on the environment and cultural resources in a manner consistent, where appropriate, with these statutes. The purpose of preparing an environmental impact statement and undertaking the other statutory processes noted above was to produce a comprehensive review to inform decisionmakers and the relevant Executive Branch agencies about the potential environmental impacts of the proposed Project.

In accordance with the Presidential Memorandum, the agency notification and fifteen-day delay requirements of sections 1(g), 1(h) and 1(i) of Executive Order 13337 have been waived with respect to this re-submitted application.

3.0 Agency and Tribal Involvement and Public Comment

The Department conducted extensive public outreach and consultation during several stages of its consideration of Keystone's Presidential permit application in order to solicit input on issues to be considered. The Department also conducted government-to-government consultation with Indian tribes regarding historic properties in a manner consistent with the NHPA, and consulted with relevant agencies consistent with the ESA and other statutes as appropriate. Finally, the Department sought views of other federal agencies as required by Executive Order 13337. The public notice, outreach, and consultation efforts during consideration of Keystone's application are further detailed below. The Department has taken all comments and relevant information into account in making the national interest determination.

3.1 Public Notice: Upon receipt of Keystone's application in 2012, the Department published in the Federal Register a Notice of Receipt of the Keystone XL Pipeline Application (77 FR 27533, May 10, 2012). At that time, the Department also established a website that it updated with information and significant documents throughout its review of the Presidential permit application (*see* <https://keystonepipeline-xl.state.gov/>). In February 2017, the Department also published in the Federal Register a Notice of Receipt of TransCanada Keystone Pipeline, L.P.'s Re-Application for a Presidential

Permit to Construct, Connect, Operate, and Maintain Pipeline Facilities on the Border of the United States and Canada (82 FR 10429, Feb. 10, 2017).

3.2 Public Comment Periods: There has been significant opportunity for public comment on this project. On June 15, 2012, the Department published a notice in the Federal Register informing the public that it intended to prepare a Supplemental EIS (77 FR 36032). The notice also announced plans for developing the scope of the environmental review and content of the Supplemental EIS, and invited public participation in that process, including soliciting public comments. The Department received over 400,000 comments during the scoping period (including letters, cards, emails, and telephone calls), which were considered and reflected as appropriate in developing the scope of the Supplemental EIS. The Department also published all comments received during this and all other public comment periods in the review, consistent with its commitment to conduct an objective, rigorous, and transparent review process.

In March 2013, the Department released a Draft Supplemental EIS, which was posted on the Department's website for the project. The Department distributed copies to public libraries along the pipeline route and to interested Indian tribes, federal and state agencies, elected and appointed officials, media organizations, non-governmental organizations (NGOs), private landowners, and other interested parties. On March 27, 2013, the Department published a notice in the Federal Register inviting the public to comment on the document (78 FR 18665). The Department then held a public meeting on April 18, 2013, in Grand Island, Nebraska, to receive further views from the public and other interested parties. In total, the Department received more than 1.5 million submissions during the public comment period for the Draft Supplemental EIS. These submissions came from members of the public, federal, state, and local representatives, government agencies, Indian tribes, NGOs, and other interested groups and stakeholders. All comments were considered as part of the Supplemental EIS; Volumes V and VI of the Supplemental EIS address the comments that were received.

On February 5, 2014, five days after releasing the Supplemental EIS, the Department published a notice in the Federal Register inviting members of the public to comment within 30 days on any factors they deemed relevant to the national interest determination (79 FR 6984). Executive Order 13337 allows for such a public comment process, but does not require the Department to solicit public input. The response during the 30-day public comment period was unprecedented. The Department received more than three million submissions.

All comments were reviewed by subject matter experts from several Department bureaus who were knowledgeable about the proposed Project and involved in drafting sections of this Record of Decision and National Interest Determination, as well as by the third-party contractor engaged to assist the Department with tasks relating to the review of the permit application. The contractor, with guidance from Department experts, sorted the comments into six overarching issue areas discussed in the comments—environmental impacts (including climate change), cultural resources impacts, socioeconomic impacts, energy security, foreign policy considerations, and compliance with relevant federal and

state laws and regulations. For each of these issue areas, the contractor identified a number of themes that captured the ideas or points raised by public comments. The Department's subject matter experts directly reviewed all of the issues and information raised in the public comments. The Department determined that the comments largely addressed issues that were also raised during preparation of the Supplemental EIS.

3.3 Tribal Consultation: The Department directly contacted 84 Indian tribes within the United States that could have an interest in the resources potentially affected by the proposed Project. Of the 84 Indian tribes, 67 notified the Department that they would like to consult on the proposed Project or were undecided. The Department conducted extensive government-to-government consultations with those 67 Indian tribes on the environmental, cultural, and other potential impacts of the proposed Project. In addition to communications by phone, email, and letter, Department officials held tribal meetings in October 2012 (three meetings), May 2013 (one meeting), and July 2013 (teleconference). The face-to-face meetings were held in four locations: Billings, Montana; Pierre, South Dakota; Rapid City, South Dakota; and Lincoln, Nebraska.

In addition to the government-to-government consultations, the Department engaged in discussions consistent with Section 106 of the NHPA with Indian tribes, Tribal Historic Preservation Officers, State Historical Preservation Officers, and the Advisory Council on Historic Preservation. The topics of these discussions included cultural resources, in general, as well as cultural resources surveys, Traditional Cultural Properties surveys, effects on cultural resources, and potential mitigation. Additionally, Indian tribes were provided cultural resources survey reports for the proposed Project and were invited both to conduct Traditional Cultural Property surveys funded by Keystone and to help develop and participate in the Tribal Monitoring Plan. New cultural resources survey information provided by Keystone in its re-submitted application will be shared as appropriate according to the terms and conditions of the 2013 Amended Programmatic Agreement.

3.4 Consultation with Federal and State Agencies: Ten federal entities agreed to assist the Department as Cooperating Agencies during preparation of the Supplemental EIS: the U.S. Army Corps of Engineers, the Farm Service Agency, the Natural Resource Conservation Service, the Rural Utilities Service, the Department of Energy, the Bureau of Land Management, the National Park Service, the U.S. Fish and Wildlife Service (FWS), the Pipeline and Hazardous Materials Safety Administration's Office of Pipeline Safety (PHMSA), and the U.S. Environmental Protection Agency (EPA). These agencies had significant input into the drafting of the Draft and Final Supplemental EIS.

Consistent with Section 7 of the ESA, the Department consulted with the FWS and submitted a Biological Assessment on the proposed Project. The FWS issued a Biological Opinion in 2013 that is available as an attachment to the Supplemental EIS. Prior to issuance of the 2015 Decision, consultations with the FWS were reinitiated regarding the rufa red knot (*Calidris canutus rufa*), designated a threatened species effective January 12, 2015, and the northern long-eared bat (*Myotis septentrionalis*), designated a threatened species effective May 4, 2015. Following publication of the Supplemental EIS, the Department and FWS have concluded Section 7 consultations with

regard to both the rufa red knot and the northern long-eared bat to supplement the existing Biological Opinion for the proposed Project. The Department also reviewed the 2013 Biological Opinion and received confirmation from FWS that Section 7 consultations need not be reinitiated for any other species and that, following implementation of the conservation measures contained within that Opinion, no other species included in the project area would be adversely affected.

Executive Order 13337 requires that the Secretary request the views of eight specified U.S. federal agencies with regard to the permit application. Accordingly, the Department requested the views of the Department of Defense, the Department of Justice, the Department of the Interior, the Department of Commerce, the Department of Transportation, the Department of Energy, the Department of Homeland Security, and the EPA. The Department of Justice and the Department of Commerce informed the Department that they did not plan to provide any views with regard to the permit application. The other six agencies provided their views in writing; those views were released in conjunction with the 2015 Decision.

The Department has also monitored other federal and state permitting and licensing processes, including, for example, litigation and the recent application to the Nebraska Public Service Commission concerning the proposed Project's route through that state.

3.5 Information Provided by Keystone: The Department had robust communication with Keystone throughout the review of the application for the proposed Project. Keystone responded to multiple requests for information and provided supplemental views and information on its own initiative, including through letters on February 24, 2015, June 29, 2015, February 3, 2017, and March 17, 2017. The Department has taken all information provided by Keystone into account in making the national interest determination.

4.0 Project Background

4.1 Keystone XL Project: The proposed Project would consist of approximately 1,204 miles of new, 36-inch-diameter pipeline extending from Hardisty, Alberta, to Steele City, Nebraska. Approximately 875 miles of the pipeline would be located in the United States. The pipeline would cross the international border between Saskatchewan, Canada and the United States near the town of Morgan, Montana, in Phillips County. The border segment is from the international border near Morgan, Montana, to the first mainline shut-off valve within the United States located approximately 1.2 miles from the international border. The pipeline would have the capacity to deliver up to 830,000 bpd of crude oil. Annual quantities would likely vary based on market conditions and other factors.

Subject to commercial demand, Bakken crude will enter the pipeline within the United States through the proposed Bakken Marketlink Project—a five-mile pipeline with pumps, meters, and storage tanks that would connect to the Keystone XL pipeline near Baker, Montana. The facilities would supply up to 100,000 bpd of Bakken crude oil to the proposed Keystone XL pipeline.

At its southern terminus, the proposed Project would connect to the existing Keystone Cushing Extension pipeline, which extends from Steele City, Nebraska, to Cushing, Oklahoma. The Keystone Cushing Extension in turn connects to Keystone's Gulf Coast pipeline, which extends south to Nederland, Texas, in order to serve Gulf Coast refineries.

In addition to the pipeline and potential Bakken Marketlink Project facilities, the proposed Project would include ancillary facilities. Eighteen pumping stations would be located along the Keystone XL pipeline, and two pumping stations would be added to the Keystone Cushing Extension. Keystone further anticipates new pumping capacity on the Keystone Cushing Extension in Kansas. The pipeline would be located in a 50-foot-wide permanent right of way (ROW). The temporary construction ROW would be wider—110 feet—and access roads, construction camps, and related facilities would be needed during construction.

According to the application submitted by Keystone, the primary purpose of the proposed Project would be to transport crude oil from the border with Canada to delivery points in the United States (primarily to the Gulf Coast area). The proposed Project is meant to supply U.S. refineries with crude oil of the kind found in the WCSB (often called heavy crude oil). Subject to commercial demand, the proposed Project may also provide transportation for the kind of crude oil found within the Bakken formation of North Dakota and Montana (often called light crude oil).

Most recent U.S. production growth has been from tight oil formations—unlocked through technical innovations like hydraulic fracturing and horizontal drilling—that typically yield light, sweet crude. As a result, U.S. crude production growth has tended to displace imports from other countries also producing light, sweet crude—predominately in Africa. Oil sands bitumen consists of heavy, sour, viscous crude oil that is produced and marketed differently than most domestic unconventional crudes. Many U.S. refineries, particularly in the Midwest and Gulf Coast, are optimized to process heavy crudes like those from the oil sands.

As the Supplemental EIS explains, North American production growth coupled with constraints on transporting landlocked crude oil to market have contributed to discounts on the price of landlocked crude and led to growing volumes of crude shipped by rail. This has heightened the attractiveness of the proposed Project to many in industry. Keystone has stated that the proposed Project is commercially viable and sees the demand to be substantially similar to that which existed when Keystone first applied.

The Department notes that the ultimate disposition of crude oil that would be transported by the proposed Project, as well as any refined products produced from that crude oil, would be determined by market demand and applicable law. In the absence of heavy crude oil from Canada, U.S. refineries, particularly in the Gulf Coast, will continue to rely on comparable foreign heavy crudes.

4.2 Prior Permit Application: Keystone's first application for the Keystone XL pipeline was submitted to the Department on September 19, 2008. A Final EIS was published on August 26, 2011 (2011 Final EIS). The route proposed in 2008 included the same U.S.-Canadian crossing as the border currently proposed Project, but a different pipeline route in the United States. That route traversed a substantial portion of the Sand Hills Region of Nebraska, as identified by the Nebraska Department of Environmental Quality (NDEQ). Moreover, the 2011 Final EIS route went from Montana to Steele City, Nebraska, and then from Cushing, Oklahoma, to the Gulf Coast area.

In November 2011, the Department determined that additional information was needed to fully evaluate the application—in particular, information about alternative routes within Nebraska that would avoid the NDEQ-identified Sand Hills Region. In late December 2011, Congress enacted a provision of the Temporary Payroll Tax Cut Continuation Act that sought to require the President to make a decision on the Presidential permit for the 2008 application within 60 days. At the time, the prior administration determined that the deadline did not allow sufficient time for the Department to prepare a rigorous, transparent, and objective review of an alternative route through Nebraska. Accordingly, the Presidential permit was denied.

In February 2012, Keystone informed the Department that it considered the Gulf Coast portion of the originally proposed pipeline project (from Cushing, Oklahoma, to the Gulf Coast area) to have independent economic utility, and indicated that Keystone intended to proceed with construction of the Gulf Coast pipeline as a separate project, called the Gulf Coast Project. The Gulf Coast Project did not require a Presidential permit because it does not cross an international border. Construction on the Gulf Coast Project is now complete.

On May 4, 2012, Keystone filed a new Presidential permit application for the Keystone XL Project. The proposed Project has a new route and a new stated purpose and need. The new proposed route differs from the 2011 Final EIS Route in two significant ways: 1) it would avoid the environmentally sensitive NDEQ-identified Sand Hills Region and 2) it would terminate at Steele City, Nebraska. From Steele City, existing pipelines would transport the crude oil to the Gulf Coast area. The proposed Project no longer includes a southern segment.

In addition to the NDEQ-identified Sand Hills Region, the proposed Project route would avoid other areas in Nebraska (including portions of Keya Paha County) that have been identified by the NDEQ as having soil and topographic characteristics similar to the Sand Hills Region. The proposed Project route would also avoid or move further away from water wellhead protection areas for the towns of Clarks and Western, Nebraska.

On November 6, 2015, Secretary of State Kerry determined under Executive Order 13337 that issuing a Presidential permit to Keystone for the proposed Keystone XL pipeline's border facilities would not serve the national interest, and denied the permit application in the 2015 Decision. On January 24, 2017, President Trump issued the Presidential Memorandum which, inter alia, invited Keystone "to re-submit its application to the

Department of State for a Presidential Permit for the construction and operation of the Keystone XL Pipeline. . . .” On January 26, 2017, the Department received a re-submitted application from Keystone for the proposed Project. The proposed route in the re-submitted application includes minor route alterations due to changes in right-of-way and easement agreements with local property owners, but remains entirely within the area previously examined by the Department in the Supplemental EIS.

5.0 Issues Considered in the Final Supplemental Environmental Impact Statement

This Record of Decision and National Interest Determination is informed by the Supplemental EIS prepared by the Department and published in January 2014, which identified and analyzed a broad range of potential impacts of the proposed Project. The Presidential Memorandum directed the Department to consider to the maximum extent permitted by law the Supplemental EIS “and the environmental analysis, consultation, and review described in that document (including appendices)” to satisfy any provision of law that requires executive department consultation or review, including any applicable requirements of NEPA. As described above, the Department’s determination with respect to an application for a Presidential permit is Presidential action, made through the exercise of Presidentially delegated authorities, and therefore the requirements of NEPA, the ESA, the NHPA, the APA, and other similar laws and regulations that do not apply to Presidential actions are inapplicable. As a matter of policy, however, and in order to inform the Department’s determination regarding the national interest, the Department has reviewed the potential impacts of the proposed Project on the environment and cultural resources in a manner consistent, where appropriate, with these statutes.

The Supplemental EIS presents information and analysis on a range of potential impacts of the proposed Project. It also describes the tribal consultations undertaken as part of the Supplemental EIS process. The Supplemental EIS also considers reasonable alternative pipeline routes and No Action Alternative scenarios.

Key topics in the Supplemental EIS, particularly those that received significant public interest, are described below. The Supplemental EIS reflects the expected environmental impacts of the proposed Project. Certain topics examined therein such as greenhouse gas (GHG) emissions analysis and market analysis are dynamic, although, for the reasons discussed below, the Supplemental EIS continues to inform the Department’s national interest determination in respect of these topics. With respect to other topics such as threatened and endangered species, changes brought about either by the passage of time or differences in underlying law or regulations are noted. The Department has reviewed and considered these changes and concluded that they do not represent substantial changes, do not present significant new information, and do not affect the continued reliability of the Supplemental EIS.

5.1 Greenhouse Gas (GHG) Emissions: GHG emissions and the potential climate change impacts associated with the proposed Project were key areas of interest highlighted by the comments received by the Department. The Supplemental EIS evaluates the relationship between the proposed Project with respect to GHG emissions

and climate change from the following perspectives:

- The GHG emissions associated with the construction and operation of the proposed Project and its connected actions;
- The indirect lifecycle (wells-to-wheels) GHG emissions associated with the WCSB crude oil that would be transported by the proposed Project as compared to the GHG emissions of the crudes it may displace; and
- How the GHG emissions associated with the proposed Project cumulatively contribute to climate change.

GHG Emissions Associated with Construction and Operation

According to the Supplemental EIS, the proposed Project would emit approximately 0.24 million metric tons of carbon dioxide (CO₂) equivalents (MMTCO₂e) per year during the construction period. These emissions would be emitted directly through fuel use in construction vehicles and equipment as well as land clearing activities, including open burning, and indirectly from electricity usage. To operate and maintain the pipeline, approximately 1.44 MMTCO₂e would be emitted per year, largely attributable to electricity use for pump station power, fuel for vehicles and aircraft for maintenance and inspections, and fugitive methane emissions at connections. The 1.44 MMTCO₂e emissions would be equivalent to GHG emissions from approximately 300,000 passenger vehicles operating for one year, or 71,928 homes using electricity for one year.

GHG Emissions Associated with the Indirect Lifecycle of WCSB Crudes

To enable a more comprehensive understanding of the potential indirect GHG impact of the proposed Project, it is important to consider the wider GHG emissions associated with the crude oil that would be transported by the proposed Project. A lifecycle analysis is a technique used to evaluate the environmental aspects and impacts (in this case GHGs) that are associated with a product, process, or service from raw materials acquisition through production, use, and end-of-life (wells-to-wheels). This approach evaluates the GHG implications of the WCSB crudes that would be transported by the proposed Project compared to other crude oils that would likely be replaced or displaced by those WCSB crudes in U.S. refineries (hereinafter, reference crudes). The actual increase in GHG lifecycle emissions attributable to the proposed Project depends on whether or how much approval and use of the pipeline would cause an increase in oil sands production. Conclusions drawn from the Department's market review, detailed further below, indicate that the proposed Project would be unlikely to significantly impact the rate of extraction in the oil sands and is therefore not likely to lead to a significant net increase in GHG emissions.

The Supplemental EIS analysis considers wells-to-wheels GHG emissions, including extraction, processing, transportation, refining, and refined product use (such as combustion of gasoline in cars) of WCSB crudes compared to other reference crudes, including heavy slates. The lifecycle analysis also considers the implications associated with other generated products during the lifecycle stages (so-called co-products) such as

petroleum coke. The largest single source of GHG emissions in the lifecycle analysis is the finished-fuel combustion of refined petroleum fuel products, which is consistent for different crude oils.

WCSB crudes are generally more GHG intensive than other crudes they would replace or displace in U.S. refineries, and emit an estimated 17 percent more GHGs on a lifecycle basis than the average barrel of crude oil refined in the United States. As the EPA notes in its letter of February 2, 2015 to the Secretary, "oil sands crude is substantially more carbon intensive than reference crudes and its use will significantly contribute to carbon pollution."

According to the Supplemental EIS, the total lifecycle emissions associated with production, refining, and combustion of 830,000 bpd of oil sands crude oil transported through the proposed Project is approximately 147 to 168 MMTCO₂e per year. The annual lifecycle GHG emissions from 830,000 bpd of the four reference crudes examined in the Supplemental EIS are estimated to be 124 to 159 MMTCO₂e. The range of incremental GHG emissions for crude oil that would be transported by the proposed Project is estimated to be 1.3 to 27.4 MMTCO₂e annually. The estimated range of potential emissions is large because there are many variables, such as which reference crude is used for the comparison and which study is used for the comparison. Nevertheless, at the high end, the Supplemental EIS states that 27.4 MMTCO₂e per year is equivalent to the annual GHG emissions from 5.7 million passenger vehicles or 7.8 coal-fired power plants.

GHG lifecycle emissions analysis performed by the Department after publication of the Supplemental EIS in the context of the environmental review for a Presidential permit for another pipeline, Enbridge's Line 67 Expansion, estimates that GHG emissions from WCSB crude may be five to 20 percent higher than previously indicated. Using the Greenhouse Gases, Regulated Emissions, and Energy Use in Transportation (GREET) model, an alternative "well-to-wheels" fuel-cycle model developed by the Argonne National Laboratory (Argonne National Laboratory 2016, 2015), the Line 67 Expansion Draft Supplemental EIS places emissions per barrel of WCSB at 584 kg CO₂-eq per barrel, compared to approximately 485-555 kg CO₂-eq per barrel to in the Supplemental EIS for the proposed Project.¹

The estimates provided in the Supplemental EIS characterize the potential increase in emissions attributable to the proposed Project if one assumes that approval or denial of the proposed Project would directly result in a change in production of 830,000 bpd of oil sands crudes in Canada. That is because the estimates represent the total incremental emissions associated with production and consumption of 830,000 bpd of oil sands crude

¹ The primary driver for the Department's determination for Line 67 is the assumption that coke produced in the process of extraction of WCSB would not offset the use of coal as a source of energy to fuel WCSB extraction. If coke displaces coal, WCSB emissions would be 528 kg CO₂-eq per barrel according to the Line 67 Expansion Supplemental EIS. We note that comparing lifecycle greenhouse gas emissions to the U.S. average mix in GREET could potentially lead to over-estimating the change in emissions from using heavy WCSB crude oil, and under-estimating the change from using lighter WCSB crude oil.

above and beyond the current baseline compared to the reference crudes. However, as discussed further below, the Department's analysis continues to show that the approval of this proposed Project is unlikely to have a substantial effect on the rate of extraction of the oil sands and is also therefore unlikely to directly result in significant change in production in oil sands crudes in Canada.

5.2 Market Analysis

Proposed Project's Impact on Oil Sands Production

The Supplemental EIS utilizes analysis of evolving market conditions, transportation costs, oil-sands supply costs, and varying supply-demand scenarios to inform conclusions about the proposed Project's potential impact on oil sands production. The analysis concluded at the time it was published in January 2014 that approval or denial of any one crude oil transport project, including the proposed Project, would be unlikely to significantly impact the rate of extraction in the oil sands, or the continued demand for heavy crude oil at refineries in the United States. The Supplemental EIS balances this position by emphasizing that uncertainty underlies a number of key variables critical to projecting Canadian production growth.

Generally, the dominant drivers of oil sands development remain more global than any single infrastructure project. Oil sands production and investment could slow or accelerate depending on oil price trends, regulations, and technological developments, but the potential effects of those factors on the industry's rate of expansion need not be conflated with the more limited effects of individual pipelines. Under most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project. Most recently, this has been demonstrated by the growth in rail loading capacity in Western Canada, which as of February 25, 2017, the National Energy Board (NEB) of Canada now estimates at over 1,075,000 bpd. This significant rail capacity has been utilized to export over 160 million barrels of Canadian crude oil to the United States since 2011. The Supplemental EIS also determined that construction of the proposed Project would have some effect on discrete decisions about whether to develop specific oil sands projects if (1) no new pipeline capacity to Canadian ports or to the United States becomes operational and (2) the price of oil in the long run persists at a level where other transport options are no longer economical.

Coupled with supply growth in the WCSB, major crude oil export pipelines from the region have largely operated at, or near, capacity for several years; an observation highlighted by Prime Minister Trudeau on November 29, 2016 when he announced the conditional approval of Kinder Morgan's expansion of the Trans Mountain pipeline from Alberta to the port at Vancouver, British Columbia, which would increase the pipeline's capacity from 300,000 bpd to 890,000 bpd of crude oil. Kinder Morgan expects to begin construction of the Trans Mountain pipeline in September 2017. Current market projections from the Energy Information Administration (EIA) and the International Energy Agency (IEA) anticipate production growth in Canadian WCSB to continue, even when factoring in delays and cancellations of certain planned large-scale greenfield

projects resulting from the current crude oil price environment, further stressing the capability of existing pipeline infrastructure to keep pace with supply growth, and suggesting that there continues to be sustained demand for additional pipeline capacity. This near-term production growth in the WCSB is due largely to the start of other projects with long lead-times and continued incremental investment by certain market players to expand production from existing brownfield projects.

The impact on oil sands development is difficult to gauge with precision, in part because the cost differential between other modes of transport and pipelines may change over time; and production costs vary from one oil sands development to another. While the Department does not know all of the production costs or other investment factors for specific Canadian projects, the Supplemental EIS concluded that many projects are expected to break even when sustained oil prices are in the range of \$65-\$75 per barrel. On this basis, the Department's analysis found that oil sands production is expected to be most sensitive to transport costs with oil prices in or below that range.

Since the publication of the Supplemental EIS, the price of benchmark West Texas Intermediate (WTI) crude oil has declined by over 50 percent from \$98.23 per barrel in January 2014 to approximately \$48 per barrel at present. This represents a sizeable near-term price decline; however, the Department notes that the 30-year real price average (i.e., the nominal price adjusted for inflation using March 2017 \$) of WTI crude is \$55 per barrel. Although prices have rebounded from 2016 lows, global liquids production for the time being continues to outpace consumption. Organization for Economic Cooperation and Development commercial stocks of crude oil remain approximately 300 million barrels above the five-year average. This includes U.S. commercial oil stocks, which are at an all-time high of 528 million barrels or approximately 35 days of domestic supply needs. The EIA expects a relatively balanced oil market in the next two years, with inventory builds averaging 100,000 bpd in 2017 and 200,000 bpd in 2018. However, the Department underscores that short-term fluctuations in price driven by current market supply and demand dynamics are less indicative of the industry's general outlook than the broader macroeconomic forces that drive investment in the oil and gas sector.

In making long-term investment decisions, companies often distinguish between new development and production from existing projects with previously sunk capital costs. While oil prices consistently below supply costs over the long-term may lead some investors to delay or even cancel some future projects, decisions about proceeding with or expanding existing projects and those already under construction or with financing in place are largely based on marginal operating costs. In general, existing projects and those under development are unlikely to slow or stop unless revenues persistently fall below current operating costs, which are much lower than total supply costs (\$20 to \$40 per barrel according to most estimates reviewed). Most reports further indicate that oil sands supply costs have fallen in the lower-price environment. Collectively, these factors help to explain why Canadian crude oil production, including from the oil sands, has proven resilient despite lower oil prices, including a period during the first quarter of 2016 when price remained at or below \$40 per barrel. These market observations also

explain the growth trends expected by the Department and other market energy information organizations, such as the EIA, which predicts 340,000 bpd in crude production growth in Canada through 2018.

The Department recognizes that oil prices are volatile, particularly over the short term. However, the long-term trends that drive WCSB crude oil production and the amount of new transportation capacity needed to meet them, coupled with the documented ability of Canadian upstream producers to sustain production during a period of lower oil prices, lead the Department to have confidence in the forecasts presented by market experts at the EIA and IEA, and affirm the Department's conclusion that such infrastructure is supported by mid- and long-term market outlooks.

Crude-by-Rail

In recent years, industry has looked toward existing Canadian crude oil production forecasts and commercial realities tied to prevailing midstream bottlenecks as justification for further investment in alternative crude oil transportation. Although there are a number of possible alternative transportation avenues for crude from the oil sands to reach U.S. or other markets, significant investment has been made in the development of crude-by-rail loading and off-loading facilities throughout North America. Current WCSB rail loading capacity has been estimated to exceed 1,075,000 bpd, with potential to expand further. Under current market conditions, existing pipelines coupled with crude-by-rail facilities will likely have the capacity to accommodate new supply from upstream projects under construction and in various stages of completion in western Canada. Although existing rail capacity moderates the impact of pipeline constraints, according to NEB of Canada, it remains a more expensive form of transportation than pipelines, an observation that supports the economic utility and commercial viability of new pipeline infrastructure. Additionally, as stated in the Supplemental EIS, per unit rail transport of WCSB oil would be more GHG-intensive than transport by pipeline when accounting for the total aggregate lifecycle GHG emissions (including direct and indirect emissions).

The extent to which rail transport will actually occur, however, or would prove to be a major form of transport for WCSB crude to the United States in the long term, remains uncertain. Utilization of rail facilities will depend upon many factors, including the availability of cheaper pipeline transport options from the respective production areas, the rate of growth in emerging areas of crude production, demand from refineries that may be better served by rail from these sources, differences in the price of oil paid in the production areas and the price of oil paid at the refinery markets (particularly on the coasts), and arbitrage opportunities that may be available through faster rail-based transport.

Producers seeking to preserve margins in the face of narrowing price gaps between Western Canada Select crude, WTI, and other crudes such as the Mexican Maya, may seek to maximize the efficiency of existing pipeline infrastructure in lieu of rail. Moreover, implementation of new Department of Transportation rules intended to improve the safe transportation of large quantities of crude-by-rail may lead to a marginal

increase in crude-by-rail costs.

5.3 Potential Spill Risk and Safety Impacts: Many concerns were raised in comments received by the Department regarding the potential environmental effects of a pipeline release, leak, and/or spill. The Supplemental EIS analyzes impacts from potential releases from the proposed Project by analyzing historical spill data. The analysis identifies the types of pipeline system components that historically have been the source of spills, the sizes of those spills, and the distances those spills would likely travel. The resulting potential impacts to natural resources, such as surface waters and groundwater, are also evaluated and mitigation measures are included that are designed to prevent, detect, minimize, and respond to oil spills.

The Supplemental EIS analyzes historical crude oil pipeline incident data within the PHMSA and National Response Center incident databases. Over a period of ten years, from January 2002 through July 2012, a total of 1,692 incidents were reported in the United States, of which 321 were reported to be pipe incidents and 1,027 incidents were reported to involve different equipment components such as tanks, valves, or pumps.

Most spills over this period were small. Of the 1,692 incidents between 2002 and 2012, 79 percent of the incidents were in the small (zero to 50 barrel) range—roughly equivalent to a spill of up to 2,100 gallons. Four percent of the incidents were in the large (greater than 1,000 barrel) range. If a pipeline spill were to occur, the severity of its impact would depend on the volume and aerial extent of oil released; the distance of the impacted entity from the spill source; site-specific environmental circumstances, including climate and species present; and the timing and nature of response efforts.

An oil spill that reaches a surface waterbody or wetland could cause effects such as reduced dissolved oxygen levels or high benzene contaminant levels. The Supplemental EIS states that acute toxicity could occur if substantial amounts of crude oil were to enter rivers and streams. If diluted bitumen is accidentally released and it flowed into surface water, the diluent fraction would tend to volatilize or dissolve into the water, leaving bitumen behind to sink or become suspended. Upwards of 25 percent of residual hydrocarbons could be reasonably removed by natural attenuation, while active recovery methods would be required for remediation of the remaining spill volume. Aggressive cleanup methods could mix oil and water, which might result in longer-lasting impacts to sensitive waterbody habitat. Passive cleanup methods are less likely to impact resources, but require a timeframe on the order of tens of years.

There are 39 stream crossings within 40 miles upstream of protected or specially designated segments of the Niobrara and Missouri rivers, which are in proximity to the proposed Project route. The shortest distance an oil spill would have to travel to impact a protected waterbody is approximately 28.5 miles. Based on an analysis of PHMSA historical incident data of large-diameter pipeline releases, the probability of a spill occurring that would convey oil to a protected waterbody is once every 542 years.

Spilled crude oil could affect wildlife directly and indirectly. Direct effects include

physical processes such as oiling and toxicological effects, which could cause sickness or mortality. Indirect effects include habitat impacts, nutrient cycling disruptions, and alterations to the ecosystem.

A surface release could produce localized effects on plant populations by direct oiling or by oil permeating through the soil, affecting root systems and indirectly affecting plant respiration and nutrient uptake. Generally, most past spills on terrestrial habitats have caused minor ecological damage, and ecosystems have shown a good potential for recovery.

At the time of the release of the Supplemental EIS, there were 1,232 identified wells within the potential range of a large spill from the proposed Project. In Nebraska, the potential spill range from the proposed Project overlaps with the Steele City Wellhead Protection Area. Keystone agreed to provide an alternative water supply if an accidental release from the proposed Project contaminates groundwater or surface water used as potable water or for irrigation or industrial purposes.

Normal operations would be expected to result in less than one human injury per year. In the event of a spill, human health exposure pathways could include direct contact with crude oil, inhalation of airborne emissions from crude oil, or consumption of food or water contaminated by either the crude oil or components of the crude oil. Mitigation measures, including spill response and containment and emergency response plans, would reduce and minimize human and environmental exposures.

Keystone has agreed to incorporate additional mitigation measures in the design, construction, and operation of the proposed Project, in some instances exceeding what is normally required, including 59 Special Conditions, 57 of which were recommended by PHMSA. These commitments by Keystone remain in effect. Many of these mitigation measures are intended to reduce the likelihood of a release occurring. Other measures provide mitigation intended to reduce the consequences and impact of a spill should such an event occur.

Since the publication of the Supplemental EIS, several new studies related to cleanup of diluted bitumen have been published. The National Academy of Science (NAS) 2016 study, *Spills of Diluted Bitumen from Pipelines: A Comparative Study of Environmental Fate, Effects, and Response*, found that diluted bitumen presents more challenges for cleanup response than other types of oil commonly moved by pipeline. The NAS 2016 study also found that various government agencies (PHMSA, EPA, and the U.S. Coast Guard) and first responders are in need of more training and better communication in order to adequately and effectively address spills of diluted bitumen.

But as described in the Supplemental EIS, Appendix Z, *Compiled Mitigation Measures*, Keystone has agreed to develop and carry out multiple mitigation measures including developing monitoring plans and response plans, among other spill and spill-prevention mitigation measures. For example, if a spill were to occur, Keystone would provide material safety data sheets to first responders within one hour of the occurrence, and

would provide potable water for any affected communities, businesses, or affected entities within the spill area. Additionally, during the development and construction phase of the project, Keystone has agreed to consult with local emergency responders during development of an Emergency Response Plan (ERP) and update its mitigation and spill response plans with new knowledge or information on the chemistry of diluted bitumen as it becomes available. Accordingly, the measures that Keystone has already committed to—including commitments relating to development of an ERP and other mitigation plans that account for new information—adequately address the new challenges, training needs, and communication needs identified in the NAS 2016 study.

The Supplemental EIS also discusses transportation by rail, in particular as part of the No Action Alternative scenarios (in other words, scenarios that may occur if the proposed Project were denied), and concludes that transport by rail likely results in a greater number of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released. However, the average size of an accidental release associated with crude-by-rail transportation is smaller than the average size of an accidental release associated with a pipeline.

5.4 Socioeconomic Impacts: Socioeconomic impacts associated with the proposed Project were also of particular concern in the comments received by the Department throughout its process. The Supplemental EIS analyzes these impacts and provides information regarding economic activity that may result from an approval of the proposed Project.

Employment and Economic Activity

The Department utilized subject matter experts and established methodologies to characterize the macroeconomic impacts of the proposed Project in the Supplemental EIS. Benchmarking against 2010 economic data, construction spending on the proposed Project was found to support a combined total of approximately 42,100 jobs throughout the United States for the up to two-year construction period. Of these jobs, approximately 16,100 would be direct jobs supported at firms that are awarded contracts for goods and services, including construction, by Keystone. The other approximately 26,000 jobs would result from indirect and induced spending; this would consist of goods and services purchased by the construction contractors and spending by employees working for either the construction contractor or for any supplier of goods and services required in the construction process. About 12,000 jobs, or 29 percent of the total 42,100 jobs, would be supported in Montana, South Dakota, Nebraska, and Kansas.

Of the 42,100 supported jobs described above, approximately 3,900 (or 1,950 per year if construction took two years) would comprise a direct, temporary, construction workforce in the proposed Project area. Employment supported by construction of the proposed Project would translate to approximately \$2.05 billion in employee earnings. Of this, approximately 20 percent (\$405 million in earnings) would be allocated to workers in the proposed Project area. The remaining 80 percent, or \$1.6 billion, would occur in other locations around the country.

According to Keystone, once the proposed Project enters service, operations would require approximately 50 total employees in the United States: 35 permanent employees and 15 temporary contractors. This small number would result in negligible impacts on population, housing, and public services in the proposed Project area.

The total estimated property tax from the proposed Project in the first full year of operations would be approximately \$55.6 million spread across 27 counties in three states. This impact to local property tax revenue receipts would be substantial for many counties, constituting a property tax revenue benefit of 10 percent or more in 17 of these 27 counties. Operation of the proposed Project is not expected to have an impact on residential or agricultural property values.

Construction contracts, materials, and support purchased in the United States would total approximately \$3.1 billion. Another approximately \$233 million would be spent on construction camps for workers in remote locations of Montana, South Dakota, and northern Nebraska. Construction of the proposed Project would contribute approximately \$3.4 billion to the U.S. gross domestic product (GDP). This figure includes not only earnings by workers, but all other income earned by businesses and individuals engaged in the production of goods and services demanded by the proposed Project, such as profits, rent, interest, and dividends.

According to the U.S. Bureau of Economic Analysis, the U.S. oil and gas industry contributed 1.1% to total U.S. GDP in 2015. The proposed Project would make a meaningful contribution to this critically important sector of U.S. economy.

Since 2010, from which data the economic data was benchmarked, the U.S. economy has returned closer to full employment capacity but simultaneously has seen relative economic weakness in certain sectors and states due to the downturn in global energy prices in 2014. As a result, the economic benefits in terms of job creation from the proposed Project may be significantly different than the initial estimates.

Health Impacts

A number of commenters raised concerns about the potential for impacts on human health associated with the proposed Project. The Department took into account, with peer-reviewed research where appropriate, impacts to human health throughout the various resource areas in the Supplemental EIS.

For example, in the Potential Releases chapter, the Supplemental EIS examined potential health risks associated with exposure to crude oil and other relevant chemicals, were there to be a spill. In the Air Quality and Noise chapter, the Supplemental EIS addressed air pollution that would be associated with the construction and operation of the proposed Project. In the Cumulative Effects Assessment and Extraterritorial Concerns chapter, the Supplemental EIS described potential changes in pollution associated with refineries. Finally, the Supplemental EIS also examined potential human health impacts in Canada associated with oil sands development and pipeline construction and operation.

Environmental Justice

According to the Office of Environmental Justice in EPA, environmental justice refers to the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” A total of 17 separate census areas with minority and/or low income populations could potentially be affected by construction or operation of the proposed Project. Temporary environmental justice impacts during construction could include exposure to construction dust and noise, disruption to traffic patterns, and increased competition for medical or health services in underserved populations. Positive impacts could include increased employment and earnings.

Minority or low-income populations could be more vulnerable should an oil release occur along the segment of the pipeline that transits through their communities. Further, Indian tribes with significant dependence on natural resources could be disproportionately affected.

Mitigation of environmental justice concerns would include ensuring adequate communication with affected populations, such as through public awareness materials in appropriate languages so as to ensure an appropriate level of emergency preparedness. With respect to employment opportunities, Keystone has committed to employee and supplier diversity and has programs in place to mitigate impacts on vulnerable populations.

Some comments, particularly from Indian tribes, have expressed concern that temporary camps of construction workers along the proposed Project route may increase crime and otherwise disrupt local communities. In their letters to the Department of February 2, 2015, the Department of Homeland Security and the Department of the Interior also expressed concerns in this regard. Keystone committed to take several measures to ensure greater safety for those communities along the route, including security provisions and a code of conduct for the workers.

5.5 Physical Disturbance Impacts:

Water Resources

Construction and operation of the proposed Project could result in temporary and permanent surface water impacts, including stream sedimentation, changes in stream channels and stability, and temporary reduction in stream flow. The proposed Project's pipeline route would avoid surface water whenever possible, but would cross approximately 1,073 surface water bodies, including 56 perennial rivers and streams, as well as approximately 24 miles of mapped floodplains. Mitigation measures would include tunneling the pipeline underneath major rivers to mitigate construction impacts, erosion control during construction, and restoration of waterbodies as soon as practical after construction.

Wetlands

The proposed Project would affect approximately 383 acres of wetlands, two acres of which may be permanently lost. Remaining wetlands affected by the proposed Project would remain as functioning wetlands, provided that impact minimization and restoration efforts described in the mitigation plan are successful. The proposed route includes modifications to the route that Keystone originally proposed in 2012 to avoid wetland areas (such as the sensitive NDEQ-identified Sand Hills Region) and Keystone has committed to additional mitigation measures. Additionally, Keystone has identified mitigation measures for the protection of sensitive areas, including wetlands, such as industry-standard avoidance measures and best practices for working near sensitive areas as described in the Construction, Mitigation, and Reclamation Plan (CMRP), as well as a commitment to abide by all state, local, and tribal regulations and requirements. Finally, Keystone will work with state and local response agencies to develop and carry-out mitigation measures related to work near wetlands.

Threatened and Endangered Species

Thirteen federally listed threatened or endangered species occur in the proposed project area. The endangered American burying beetle (*Nicrophorus americanus*) is the only species that is likely to be adversely affected by the proposed Project, but other species could potentially be affected. These include the federally endangered black-footed ferret (*Mustela nigripes*), interior least tern (*Sternula antillarum*), whooping crane (*Grus americana*), and pallid sturgeon (*Scaphirhynchus albus*); and the threatened piping plover (*Charadrius melodus*), western prairie fringed orchid (*Platanthera praeclara*), northern long-eared bat (*Myotis septentrionalis*), and rufa red knot (*Calidris canutus rufa*).

The FWS issued a Biological Opinion in May 2013 to the Department regarding potential impacts of the proposed Project on seven federally protected species. The American burying beetle was the only species determined by the FWS to likely be adversely affected by the proposed Project. Since that time, two additional species have become federally listed as threatened—the northern long-eared bat and the rufa red knot. The consultations for both species were completed, with the FWS concurring in a “may affect, but is not likely to adversely affect” determination. The Department also reviewed the 2013 Biological Opinion and received confirmation from FWS that Section 7 consultations need not be reinitiated for any other species and that, following implementation of the conservation measures contained within that Opinion, no other species included in the project area would be adversely affected. The Department is committed to ensuring that all measures identified in the 2013 Biological Opinion, as supplemented, are implemented, including by Keystone.

Geology and Soils

The proposed Project’s pipeline route extends through relatively flat and stable areas, and the potential for seismic hazards (earthquakes), landslides, or subsidence (sink holes) is low. The route would avoid the NDEQ-identified Sand Hills Region, where soils are particularly susceptible to damage from pipeline construction. Potential impacts to soil resources in other areas associated with construction or operation of the proposed Project and connected actions include soil erosion, loss of topsoil, soil compaction, an increase in

the proportion of large rocks in the topsoil, soil mixing, soil contamination, and related reductions in the productivity of desirable vegetation or crops. Mitigation measures would include construction of temporary erosion control systems, implementation of topsoil segregation methods, and restoration of the ROW after construction.

Terrestrial Vegetation

Potential construction and operations-related impacts to terrestrial vegetation resources associated with the proposed Project include impacts to cultivated crops, developed land, grassland/pasture, upland forest, open water, forested wetlands, emergent herbaceous wetlands, and shrub-scrub communities. The proposed Project route would impact biologically unique landscapes and vegetation communities of conservation concern. Keystone committed to restore areas to preconstruction conditions as practicable, and reseed disturbed areas, and to use specific best management practices and procedures to minimize and mitigate the potential impacts to native prairie areas.

Wildlife

The proposed Project would cause minor impacts to wildlife and wildlife habitat. Potential impacts to wildlife include habitat loss, alteration, and fragmentation; direct mortality during construction and operation (e.g., wildlife collisions with vehicles and power lines/power poles); and reduced survival or reproduction due to stress or avoidance of feeding caused by factors such as construction and operations noise and increased human activity. Mitigation measures to reduce potential construction and operations-related effects to wildlife where habitat is entered would include construction timing restrictions and buffer zones developed in consultation with regulatory agencies as well as measures to minimize adverse effects to wildlife habitats. Keystone committed to develop and implement a conservation plan for migratory birds and bald and golden eagles and their habitats in consultation with the FWS.

Fisheries

Impacts to fisheries within the rivers and perennial streams crossed by the proposed Project route would occur during construction and would be temporary. The CMRP contains measures for waterbody crossings to reduce potential effects on fish and aquatic/stream bank habitat and otherwise minimize potential impacts to fisheries resources. Mitigation measures would include best practices in open-cut stream crossings to reduce stream bed disturbance, sediment impacts, and interference with spawning periods; crossing under large rivers using horizontal directional drilling methods; minimization of vehicle contact with surface waters; and development of site-specific contingency plans to address unintended releases of drilling fluids that include preventative measures and a spill response plan.

Land Use, Recreation, and Visual Resources

Approximately 15,296 acres of land would be affected by construction of the proposed Project, though only approximately 5,569 acres would be retained for operation within permanent easements along the pipeline ROW and at the locations of ancillary facilities (e.g., access roads, pump stations). Approximately 89 percent of the total affected acreage (13,597 acres) is privately owned and the remainder government-owned.

Rangeland (approximately 63 percent) and agricultural land (approximately 33 percent) comprise the vast majority of land use types that would be affected by construction. Impacts to land use resources include lease or acquisition and development of the pipeline ROW and land for ancillary facilities (e.g., access roads, pump stations, and construction camps), damage to agricultural features and productivity, visual impacts, and increased dust and noise.

Construction activities would temporarily affect recreational traffic and use patterns in special management and recreational areas, such as historic or scenic trails and rivers with recreational designations. Impacts of operation of the proposed Project on recreation would be minimal.

Visual impacts associated with the proposed Project would primarily occur during construction, when pipeline and ancillary facility construction, trenching, and facilities such as pipe yards would be visible. Permanent visual impacts following operation would include the presence of new ancillary facilities as well as visual disturbances in the landscape, such as tree removal, along the pipeline route.

Keystone committed to compensate landowners for construction- and operation-related impacts. It would implement measures to reduce impacts to land uses, recreation, and visual resources such as topsoil protection, restoring disturbed areas, and developing traffic access and management plans.

Air Quality and Noise

Construction dust and emissions from construction equipment would typically be localized, intermittent, and temporary since pipeline construction would move through an area relatively quickly. During normal operation of the proposed Project, there would be only minor emissions from valves and pumping equipment at the pump stations. Keystone would implement mitigation measures to reduce air quality impacts, including dust control measures and compliance with state and local air quality restrictions.

Construction noise impacts would also be localized, intermittent, and temporary. Noise impacts from operation of the pipeline would be limited to the electrically driven pump stations. During construction, Keystone would limit the hours during which activities with high-decibel noise levels are conducted in residential areas, require noise mitigation procedures, and develop site-specific mitigation plans to comply with regulations. During operations, Keystone would implement a noise control plan to mitigate noise impacts at affected sites and, as necessary, install sound barriers.

5.6 Cultural Resources: Pipeline construction may present a risk to historic and cultural resources unless appropriately addressed through avoidance or mitigation. This risk was a key concern for Indian tribes and other commenters. The Department of Interior in its February 2, 2015 letter to the Secretary reiterated these concerns. The Department concluded a Programmatic Agreement (an agreement with several interested parties that contemplates mitigation of certain cultural resources impacts in the event of construction). The Programmatic Agreement is appended to the Supplemental EIS, and

was concluded in consultation with Indian tribes, federal and state agencies, and the permit applicant. The Department incorporated input from Indian tribes to amend the Programmatic Agreement on cultural resources that had been developed for Keystone's 2008 permit application. The Programmatic Agreement describes the processes that would be followed by Keystone and applicable state and federal agencies to identify cultural resources and to avoid or mitigate adverse impacts.

The proposed Project was designed to avoid disturbing cultural resources listed in the National Register of Historic Places (NRHP), those considered to be eligible for listing in the NRHP, and others of potential concern that have not been evaluated for NRHP listing, to the extent possible. With regard to cultural resources that cannot be avoided, Keystone has committed to minimize and mitigate impacts whenever feasible. Additionally, Keystone would implement Unanticipated Discovery Plans in order to ensure minimization of impacts to as-yet-unknown cultural resources that might be inadvertently encountered during construction or operation of the proposed Project.

5.7 Cumulative Effects: The cumulative effects analysis in the Supplemental EIS evaluates the way that the proposed Project's impacts interact with the effects of other past, present, or reasonably foreseeable future actions or projects. The goal of the cumulative impacts analysis is to identify situations where sets of comparatively small individual impacts, taken together, constitute a larger collective impact. Cumulative effects associated with the proposed Project and connected actions vary among individual environmental resources and locations. Generally, where long-term or permanent impacts from the proposed Project are absent, the potential for additive cumulative effects with other past, present, and reasonably foreseeable future projects is negligible.

5.8 Alternatives: The Supplemental EIS provides a detailed description of the categories of alternatives to the proposed Project that were analyzed, as well as the alternative screening process and the detailed alternatives identified for further evaluation.

Consistent with NEPA and Council on Environmental Quality (CEQ) regulations, the Department compared the proposed Project with four reasonable alternatives: a pipeline that partly follows an alternative route (the "I-90 Corridor Pipeline Alternative"), and three different "No Action Alternative" scenarios that could result if the Presidential permit is not granted and the crude oil from the WCSB and the Bakken formations is carried on a different form of transport.

Consistent with CEQ regulations and the Department's authority, the Supplemental EIS specifically identifies the alternatives that are before the decisionmaker in considering the application and making the national interest determination pursuant to Executive Order 13337: the No Action Alternative (Permit denial) and the proposed Project (Permit approval).

No Action Alternative

The Supplemental EIS separately analyzed three No Action Alternative scenarios, which are described briefly below. The No Action Alternative analysis considers what would

likely happen if the Presidential permit would be denied or the proposed Project would not otherwise implemented. It includes the Status Quo Baseline, which serves as a benchmark against which other alternatives are evaluated. Under the Status Quo Baseline, the proposed Project would not be constructed, its capacity to transport WCSB crude would not be replaced, and the resulting direct, indirect, and cumulative impacts that are described in this Supplemental EIS would not occur. The Status Quo Baseline is a snapshot of the crude oil production and delivery systems at January 2014 levels.

The No Action Alternative includes analysis of three alternative transport scenarios that, based on the findings of the market analysis, are believed to meet the proposed Project's purpose (i.e., providing WCSB and Bakken crude oil to meet refinery demand in the Gulf Coast area) if the Presidential permit for the proposed Project were denied, or if the pipeline were otherwise not constructed. Under the alternative transport scenarios, other environmental impacts would occur in lieu of the proposed Project. The Supplemental EIS includes analysis of various combinations of transportation modes for oil, including truck, barge, tanker, and rail. These scenarios are considered representative of the crude oil transport alternatives with which the market could respond in the absence of the proposed Project. These three alternative transport scenarios (the Rail and Pipeline Scenario, Rail and Tanker Scenario, and Rail Direct to the Gulf Coast Scenario) are described below.

Rail and Pipeline Scenario: Under this scenario, WCSB and Bakken crude oil (in the form of dilbit or synbit) would be shipped via rail from Lloydminster, Saskatchewan, and Epping, North Dakota respectively (the nearest rail terminal served by two Class I rail companies for both locations), to Stroud, Oklahoma, where it would be temporarily stored and then transported via existing and expanded pipelines approximately 17 miles to Cushing, Oklahoma to interconnect with the interstate oil pipeline system. This scenario would require the construction of two new or expanded rail loading terminals in Lloydminster, Saskatchewan (the possible loading point for WCSB crude oil), one new terminal in Epping, North Dakota (the representative loading point for Bakken crude oil), seven new terminals in Stroud, and up to 14 unit trains (consisting of approximately 100 cars carrying the same material and destined for the same delivery location) per day (12 from Lloydminster and two from Epping) to transport the equivalent volume of crude oil as would be transported by the proposed Project.

Rail and Tanker Scenario: The second transportation scenario assumes WCSB and Bakken crude oil would be transported by rail from Lloydminster to a western Canada port (assumed to be Prince Rupert, British Columbia), where it would be loaded onto Suezmax tankers (capable of carrying approximately 986,000 barrels of WCSB crude oil) for transport to the U.S. Gulf Coast (Houston and/or Port Arthur) via the Panama Canal. Bakken crude would be shipped from Epping to Stroud via BNSF Railway or Union Pacific rail lines, similar to the method described under the rail and pipeline scenario. The rail and tanker scenario would require up to 12 unit trains per day between Lloydminster and Prince Rupert, and up to two unit trains per day between Epping and Stroud. This scenario would require the construction of two new or expanded rail loading facilities in Lloydminster with other existing terminals in the area handling the

majority of the WCSB for shipping to Prince Rupert. Facilities in Prince Rupert would include a new rail unloading and storage facility and a new marine terminal encompassing approximately 4,200 acres and capable of accommodating two Suezmax tankers. For the Bakken crude portion of this Scenario, one new rail terminal would be necessary in both Epping, North Dakota, and Stroud, Nebraska.

Rail Direct to the Gulf Coast Scenario: The third transportation scenario assumes that WCSB and Bakken crude oil would be shipped by rail from Lloydminster, Saskatchewan, and Epping, North Dakota, directly to existing rail facilities in the Gulf Coast region capable of off-loading up to 14 unit trains per day. These existing facilities would then either ship the crude oil by pipeline or barge the short distance to nearby refineries. As with the rail and tanker scenario, this scenario would likely require construction of up to two new or expanded terminals to accommodate the additional WCSB shipments out of Canada. One new rail loading terminal would be needed in Epping to ship Bakken crude oil. Sufficient off-loading rail facilities currently exist or are proposed in the Gulf Coast area such that no new terminals would need to be built under this scenario.

Comparison of Alternatives Before the Decisionmaker

The Supplemental EIS provides detailed analysis of the differences between these alternatives. With regard to GHG emissions, during operation of the No Action Alternative transportation scenarios, including rail and combination modes, the increased number of trains along the rail routes would produce GHG emissions from diesel fuel combustion and electricity generation to support rail terminal operations. Annual GHG emissions (direct and indirect) attributed to the No Action transportation scenarios would be greater than for the proposed Project, but those emissions relate solely to the movement of equivalent amounts of oil from Alberta to the Gulf Coast. Construction of the rail terminals would also involve large numbers of truck trips to transport construction materials and equipment. This increased traffic could cause congestion on roads. Increased shipment of crude by rail could reduce rail capacity available for other goods.

Transportation by rail would likely lead to a greater number of injuries and fatalities per ton-mile than transportation by pipeline, as well as a greater number of accidental releases of crude oil and a greater overall volume of crude oil released. However, the average size of an accidental release associated with crude-by-rail transportation is smaller than the average accidental release associated with a pipeline. Physical disturbance impacts of the No Action Alternative would vary depending upon the modes of transportation chosen by shippers. All three scenarios would require new or expanded facilities, likely concentrated near loading and off-loading terminals. Nevertheless, expansion of infrastructure would affect fewer acres of land (1,500-6,427) during construction than a new pipeline. During operations, the No Action Alternative would permanently affect between 1,500 acres and 6,303 acres of land, compared to 5,309 acres for the proposed Project.

6.0 Basis for Decision

Acting on behalf of the President of the United States under authority delegated by the Secretary of State to him, the Under Secretary of State for Political Affairs has determined that it serves the national interest to issue a Presidential permit to TransCanada Keystone Pipeline, L.P. to construct, connect, operate, and maintain pipeline facilities at the U.S.-Canada border in Phillips County, Montana, as part of the proposed Project. In accordance with the Presidential Memorandum dated January 24, 2017, and Executive Order 13337, the Department has considered Keystone's Presidential permit application originally filed with the Department on May 4, 2012 and re-submitted to the Department on January 26, 2017, and all input received over the course of the Department's review. The determination to issue a Presidential permit for the proposed Project is based on consideration of a broad range of factors, including the following assessments:

- The Department finds that the proposed Project will meaningfully support U.S. energy security by providing additional infrastructure for the dependable supply of crude oil. Global energy security is a vital part of U.S. national security. Moreover, crude oil is vital to the U.S. economy and is used to produce transportation fuels, fuel oils for heating and electricity generation, asphalt for our roads, and petrochemical feedstocks used for the manufacturing of chemicals, synthetic rubber, and a variety of plastics. Accordingly, the Department works closely with our international partners to ensure that adequate supplies of energy reach the global economy and to help manage geopolitical changes arising from shifting patterns of energy production and consumption. Whether promoting national and regional markets that facilitate financing for transformational and clean energy or inspiring civil society and governments to embrace transparent and responsible development of natural resources, the Department works to ensure energy is employed as a tool for stability, security, and prosperity. For U.S. policymakers, this has often translated into an acute focus on oil markets. Historically, oil has been a major source of U.S. energy security concerns due to our relatively high volume of net imports, and oil's economic importance and military uses. Such concerns are well founded. Over the past year, crude oil supply disruptions internationally have trended noticeably higher when controlling for Iran's return to the international oil market. Largely attributable to political instability and manipulative market tactics on the part of OPEC, when compared to disruptions at the time of the 2015 Decision, today unplanned disruptions are over 500,000 bpd higher, having reached a peak high of nearly one million bpd in September 2016. Moreover, OPEC's total spare capacity remains at or below two million bpd, which provides very little cushion for fluctuations in supply in a context of rapidly rising demand or further geopolitical disruptions. While U.S. oil imports have abated sharply in recent years, the United States remains a net oil importer. Moreover, even if the United States were self-sufficient in terms of meeting its domestic energy needs, because oil is traded globally, the United States would stay integrated with global oil markets and subject to global price volatility. Accordingly, the U.S. national interest in ensuring access to stable, reliable, and affordable energy supplies will persist in the foreseeable future.
- Canada's role as the largest and fastest-growing source of U.S. crude imports cannot

be dismissed. According to the latest statistics from the EIA, the United States imported 3.17 million bpd of crude oil from Canada in 2016, which accounted for more than 43 percent of total U.S. crude oil imports. Although domestic production growth from tight oil formations, which is predominately light crude, continues to supplant the majority of international alternatives, U.S. imports of Canadian crude oil are increasing. The vast majority of these imports reach U.S. markets via existing pipeline infrastructure between Canada and the United States. A growing share, however, reaches markets by rail. Over 160 million barrels of Canadian crude oil has been imported by rail from Canada since 2011. Current estimates for WCSB rail loading capacity show crude oil transport by rail has potential to grow further.

- Canadian oil is a relatively stable and secure source of energy supply for many reasons, and few countries share all of the political or physical characteristics that enable Canada to remain in this position. Its producing areas are physically close to the U.S. market, and there are limited chokepoints to disrupt trade between Canada and the United States. Canada has a low likelihood of political unrest, resource nationalism, or conflict—above-ground factors that sometimes disrupt oil production in other regions. Additionally, it is not a member of OPEC, which acts to restrict oil production and influence market conditions. The Canadian oil sector is efficiently run, without undue political interference. Canadian oil sands projects have low production decline rates compared to conventional oil fields, providing greater geologic certainty of future supply levels. Moreover, as the Canadian Government's conditional approval of the Trans Mountain pipeline illustrates, failure to approve new transboundary pipeline infrastructure may redirect this source of reliable supply to Asian markets.
- Any impact on prices for refined petroleum products would be minimal if the proposed Project is approved. The Supplemental EIS recognized that the proposed Project is unlikely to have a meaningful effect on crude flows and domestic fuel prices. While crude oil prices matter to those involved in producing oil or refining oil into products, most Americans are mainly concerned with the price of gasoline and other refined products. The price of those refined products in the United States continues to be set largely by global crude prices, which are tied to global production and consumption, rather than the availability of pipelines. The findings in the Supplemental EIS have been reinforced by EIA studies that assert that U.S. gasoline prices move with the international benchmark Brent crude oil price rather than WTI. Accordingly, energy security concerns stemming from the proposed Project's impact on domestic fuel prices are largely unwarranted—cross-border pipeline capacity does not measurably translate into lower retail gasoline prices. Oil trade is driven by commercial considerations and occurs in the context of a globally traded market in which crude oil and products are relatively fungible. The market continually adjusts both logistically and in terms of price to balance global supply and demand. As a result, the level or origin of U.S. oil imports has a minimal impact on the prices U.S. consumers pay for refined products.
- By itself the proposed Project is unlikely to significantly impact the level of GHG-

intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States. As stated in the Supplemental EIS, the dominant drivers of oil sands development remain more global than any single infrastructure project. Moreover, under most market conditions, alternative transportation infrastructure would allow growing oil sands production to reach markets irrespective of the proposed Project. Still, uncertainties about the future growth of oil sands production remain. Oil prices are volatile, particularly over the short term. However, the long-term price and technological trends that drive WCSB crude oil production and subsequently the amount of new transportation capacity needed to meet them, coupled with the documented ability of Canadian upstream producers to sustain production during a brief period of lower oil prices, leads the Department to have confidence in the forecasts presented by market experts at the EIA and IEA, and affirms the Department's conclusion that such infrastructure is supported by mid- and long-term market outlooks.

- In the 2015 Decision, the Department determined that approval of the proposed Project at that time would have undercut the credibility and influence of the United States in urging other countries to address climate change. Since then, there have been numerous developments related to global action to address climate change, including announcements by many countries of their plans to do so. In this changed global context, a decision to approve this proposed Project at this time would not undermine U.S. objectives in this area. Moreover, a decision to approve this proposed Project would support U.S. priorities relating to energy security, economic development, and infrastructure.
- The Department recognizes the importance of the proposed Project to Canada and places great significance on maintaining strong bilateral relations. The United States and Canada are the closest of allies, economic partners, and friends. This unique bilateral relationship is based on shared history, common values, and a vast and intricate network of ties between our federal governments, states, cities, and people. In many economic sectors the United States and Canada enjoy deeper, more integrated structures than found even among European Union member states. The United States has over \$2 billion in trade per day, U.S.-Canadian supply chains are interlinked, and U.S. and Canadian companies are heavily invested in each other's markets. The two countries coordinate closely on most foreign policy issues and have a robust partnership in critical areas around the world. Irrespective of the proposed Project, our relationship with Canada will endure. However, the United States recognizes Canada's interest in the completion of the proposed Project and finds that it is in the United States' interest to strengthen the role Canada plays as a secure conduit for crude oil to reach the U.S. market, and more broadly, to ensure our shared interests in energy, environmental, and economic issues continue to prosper.
- The Department considered the economic benefits of the proposed Project for the United States using an input-output model calibrated to 2010 data. During construction over a two-year period, the model estimates spending on the proposed Project would support approximately 42,100 jobs (direct, indirect, and induced jobs

combined), of which approximately 3,900 would be direct construction jobs. The majority of these jobs would be short-term in nature. According to the applicant, were the proposed Project to enter service, operations would require approximately 50 employees in the United States, consisting of 35 full-time employees and 15 temporary contractors. The proposed Project would also generate tax revenue for communities in the pipeline's path and it was estimated that pipeline activity would contribute \$3.4 billion to U.S. GDP. Since 2010, the U. S. economy has returned closer to full employment capacity but simultaneously has seen relative economic weakness in certain sectors and states due to the downturn in global energy prices in 2014. As a result, the economic benefits in terms of job creation from the proposed Project may be more significant than the initial estimates. The economic benefits are likely to be meaningful and reflect the importance policymakers place on positive near- and long-term economic growth.

- There are a variety of potential environmental and cultural impacts associated with the proposed Project, just as there would be for alternative methods of transporting crude oil. TransCanada Keystone Pipeline, L.P. has agreed to abide by all the terms and conditions of the mitigation measures outlined in the Supplemental EIS, including all Appendices and supplements, follow all state, local, and tribal laws and regulations with respect to the construction and operation of the proposed Project, follow monitoring and reporting requirements, and carry out response activities of any spills if they occur. Additionally, the Department has considered the concerns of some Indian tribes raised in the context of the proposed Project regarding sacred cultural sites and avoidance of adverse impacts to the environment, including to surface and groundwater resources.

Having weighed multiple policy considerations, the Under Secretary of State for Political Affairs finds that, at this time, the proposed Project's potential to bolster U.S. energy security by providing additional infrastructure for the dependable supply of crude oil, its role in supporting, directly and indirectly, a significant number of U.S. jobs and provide increased revenues to local communities that will bolster the U.S. economy, its ability to reinforce our bilateral relationship with Canada, and its limited impact on other factors considered by the Department, all contribute to a determination that issuance of a Presidential permit for this proposed Project serves the national interest.

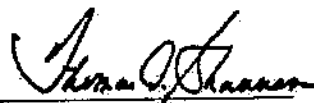
7.0 National Interest Determination

Pursuant to the authority vested in me under Executive Order 13337 of April 30, 2004, the Presidential Memorandum dated January 24, 2017, and Department of State Delegation of Authority No. 118-2 of January 26, 2006, I hereby determine that issuance of a permit to TransCanada Keystone Pipeline, L.P. (Keystone), a limited partnership organized under the laws of the State of Delaware, to construct, connect, operate, and maintain facilities at the border of the United States and Canada for the transport of crude oil from Canada to the United States across the international boundary in Phillips County, Montana, would serve the national interest.

The Presidential permit issued to TransCanada Keystone Pipeline, L.P. shall include authorizations to construct, connect, operate and maintain facilities at the border of the United States facilities for the transport of crude oil from Canada to the United States as described in the Presidential permit application dated January 26, 2017. No actions shall be taken by TransCanada Keystone Pipeline, L.P. pursuant to this authorization prior to Keystone's acquisition of all other necessary federal, state, and local permits and approvals from agencies of competent jurisdiction.

23 March 2017

Date



Thomas A. Shannon, Jr.
Under Secretary of State for Political
Affairs

PRESIDENTIAL PERMIT

AUTHORIZING TRANSCANADA KEYSTONE PIPELINE, L.P. ("KEYSTONE") TO CONSTRUCT, CONNECT, OPERATE AND MAINTAIN PIPELINE FACILITIES AT THE INTERNATIONAL BOUNDARY BETWEEN THE UNITED STATES AND CANADA

By virtue of the authority vested in me as Under Secretary of State for Political Affairs, including those authorities under Executive Order 13337, 69 Fed. Reg. 25299 (2004), the January 24, 2017 Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, and Department of State Delegation of Authority 118-2 of January 26, 2006; having considered the environmental effects of the proposed action consistent with the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4321 et seq.), Section 7 of the Endangered Species Act of 1973 (16 U.S.C. 1536), and other statutes relating to environmental concerns; having considered the proposed action consistent with the National Historic Preservation Act of 1966 (80 Stat. 917, 16 U.S.C. 470f et seq.); and having requested and received the views of members of the public, various federal and state agencies, and various Indian tribes; I hereby grant permission, subject to the conditions herein set forth, to TransCanada Keystone Pipeline, L.P. (hereinafter referred to as the "permittee"), a limited partnership organized under the laws of the state of Delaware, owned by affiliates of TransCanada Corporation, a Canadian public company organized under the laws of Canada, to construct, connect, operate, and maintain pipeline facilities at the international border of the United States and Canada at Morgan, Montana, for the import of crude oil from Canada to the United States.

The term "facilities" as used in this permit means the relevant portion of the pipeline and any land, structures, installations or equipment appurtenant thereto.

The term "United States facilities" as used in this permit means those parts of the facilities located in the United States. The United States facilities consist of a 36-inch diameter pipeline extending from the international border between the United States and Canada at a point near Morgan in Phillips County, Montana, to the first mainline shut-off valve in the United States located approximately 1.2 miles from the international border. The United States facilities also include certain appurtenant facilities.

This permit is subject to the following conditions:

Article 1. (1) The United States facilities herein described, and all aspects of their operation, shall be subject to all the conditions, provisions, and requirements of this permit and any amendment thereof. This permit may be terminated or amended at any time at the discretion of the Secretary of State or the Secretary's delegate or upon proper application therefor. The permittee shall make no substantial change in the United States facilities, the location of the United States facilities, or in the operation authorized by this permit until such changes have been approved by the Secretary of State or the Secretary's delegate.

(2) The construction, operation, and maintenance of the United States facilities shall be in all material respects as described in the permittee's application for a Presidential permit under Executive Order 13337, filed on May 4, 2012 and resubmitted on January 26, 2017, the Final Supplemental Environmental Impact Statement (SEIS) dated January 31, 2014 including all Appendices as supplemented, and any construction, mitigation, and reclamation measures included in the Construction, Mitigation, and Reclamation Plan (CMRP), Emergency Response Plan (ERP), Oil Spill Response Plan (SRP), and other mitigation and control plans that are already approved or that are approved in the future by the Department of State or other relevant federal agencies. In the event of any discrepancy among these documents, construction, connection, operation and maintenance of the United States facilities shall be in all material respects as described in the most recent approved document unless otherwise determined by the Department of State.

Article 2. The standards for, and the manner of, construction, connection, operation, and maintenance of the United States facilities shall be subject to inspection and approval by the representatives of appropriate federal, state and local agencies. The permittee shall allow duly authorized officers and employees of such agencies free and unrestricted access to said facilities in the performance of their official duties.

Article 3. The permittee shall comply with all applicable federal, state, local, and tribal laws and regulations regarding the construction, connection, operation, and maintenance of the United States facilities and with all applicable industrial codes. The permittee shall obtain requisite permits from relevant state and local governmental entities, and relevant federal agencies.

Article 4. All construction, connection, operation, and maintenance of the United

States facilities under this permit shall be subject to the limitations, terms, and conditions issued by any competent agency of the U. S. Government. The permittee shall continue the operations hereby authorized and conduct maintenance in accordance with such limitations, terms, and conditions. Such limitations, terms, and conditions could address, for example, environmental protection and mitigation measures, safety requirements, export or import and customs regulations, measurement capabilities and procedures, requirements pertaining to the pipeline's capacity, and other pipeline regulations. This permit shall continue in force and effect only so long as the permittee shall continue the operations hereby authorized in accordance with such limitations, terms, and conditions.

Article 5. Upon the termination, revocation, or surrender of this permit, and unless otherwise agreed by the Secretary of State or the Secretary's delegate, the United States facilities in the immediate vicinity of the international boundary shall be removed by and at the expense of the permittee within such time as the Secretary of State or the Secretary's delegate may specify, and upon failure of the permittee to remove, or to take such other appropriate action with respect to, this portion of the United States facilities as ordered, the Secretary of State or the Secretary's delegate may direct that possession of such facilities be taken and that they be removed or other action taken, at the expense of the permittee; and the permittee shall have no claim for damages by reason of such possession, removal, or other action.

Article 6. When, in the opinion of the President of the United States, the national security of the United States demands it, due notice being given by the Secretary of State or the Secretary's delegate, the United States shall have the right to enter upon and take possession of any of the United States facilities or parts thereof; to retain possession, management, or control thereof for such length of time as may appear to the President to be necessary; and thereafter to restore possession and control to the permittee. In the event that the United States shall exercise such right, it shall pay to the permittee just and fair compensation for the use of such United States facilities upon the basis of a reasonable profit in normal conditions, and the cost of restoring said facilities to as good condition as existed at the time of entering and taking over the same, less the reasonable value of any improvements that may have been made by the United States.

Article 7. Any transfer of ownership or control of the United States facilities or any part thereof shall be immediately notified in writing to the Department of State, including the submission of information identifying the transferee. This

permit shall remain in force subject to all the conditions, permissions and requirements of this permit and any amendments thereto unless subsequently terminated or amended by the Secretary of State or the Secretary's delegate.

Article 8. (1) The permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as may become necessary and appropriate.

(2) The permittee shall hold harmless and indemnify the United States from any claimed or adjudged liability arising out of construction, connection, operation, or maintenance of the facilities, including but not limited to environmental contamination from the release or threatened release or discharge of hazardous substances and hazardous waste.

(3) The permittee shall maintain the United States facilities and every part thereof in a condition of good repair for their safe operation, and in compliance with prevailing environmental standards and regulations.

Article 9. The permittee shall take all necessary measures to prevent or mitigate adverse impacts on or disruption of the human environment in connection with the construction, connection, operation, and maintenance of the United States facilities. Such measures will include the actions and obligations agreed to by permittee in the CMRP and other mitigation, control plans, and special conditions found in the Final SEIS, including all Appendices as supplemented, all of which are appended to and made part of this permit, or that are approved in the future by the Department or other relevant federal or state agencies, and any other measures deemed prudent by the permittee.

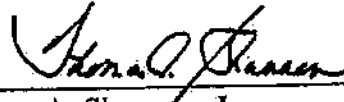
Article 10. The permittee shall file with the appropriate agencies of the United States Government such statements or reports under oath with respect to the United States facilities, and/or permittee's activities and operations in connection therewith, as are now, or may hereafter, be required under any laws or regulations of the United States Government or its agencies. The permittee shall file electronic Export Information where required.

Article 11. The permittee shall provide information upon request to the Department of State with regard to the United States facilities. Such requests could include, for example, information concerning current conditions or anticipated changes in ownership or control, construction, connection, operation, or maintenance of the U.S. facilities.

Article 12. The permittee shall provide written notice to the Department of State at such time as the construction authorized by this permit is begun, at such time as construction is completed, interrupted, or discontinued, and at other times as may be designated by the Department of State.

Article 13. This permit shall expire five years from the date of issuance in the event that the permittee has not commenced construction of the United States facilities by that deadline.

IN WITNESS WHEREOF, I, Under Secretary of State for Political Affairs, have hereunto set my hand this 23rd day of March, 2017 in the City of Washington, District of Columbia.



Thomas A. Shannon, Jr.
Under Secretary of State for Political Affairs

IN THE SUPREME COURT OF SOUTH DAKOTA

**In the Matter of PUC Docket HP 14-0001,
Order Accepting Certificate of Permit issued
in Docket HP 09-001 to Construct the
Keystone XL Pipeline (Dakota Rural Action
Appeal)**

Case No. 28333

APPELLANT'S REPLY BRIEF

FOR DAKOTA RURAL ACTION

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Table of Contents

Table of Authorities	ii
Preliminary Statement.....	1
Introduction.....	1
Argument	7
1. Standard of Review.....	7
2. Scope and Conduct of PUC Proceedings; Agency Role; Due Process Rights under South Dakota Administrative Procedures Act Violated by PUC.....	8
a. Case of First Impression; Applicability of South Dakota Administrative Procedures Act.....	8
b. Applicability of the Public Trust Doctrine	10
c. Transparency of State Regulatory Agencies; Denial of Key Discovery into Communications between the PUC and TransCanada Thwarts Effective Citizen Oversight.....	11
3. Burden of Proof is on TransCanada.....	12
4. TransCanada Failed to Present Evidence Sufficient to Demonstrate Compliance with Permit Conditions	13
5. PUC Procedural Rulings	16
Conclusion	16

Table of Authorities

Statutes:

SDCL § 1-26-18	9
SDCL § 1-26-36	6
SDCL § 1-26-37	7
SDCL § 15-26A-62	1
SDCL § 15-26A-66	1
SDCL §49-41B-22	14, 15
SDCL § 49-41B-27	6, 7, 8, 9, 14, 15, 16

Cases:

<i>Application of Union Carbide Corp.</i> , 308 N.W.2d 753 (S.D. 1981).	9
<i>In re Black Hills Power, Inc.</i> , 2016 S.D. 92.	13, 14
<i>Irvine v. City of Sioux Falls</i> , 2006 S.D. 20.	13
<i>Kelo v. City of New London</i> , 545 U.S. 469 (2005).	4, 5
<i>Knapp v. Hamm & Phillips Service Co., Inc.</i> , 2012 S.D. 82.	7
<i>Parks v. Cooper</i> , 2004 S.D. 27.	10, 11
<i>Peterson v. Evangelical Lutheran Good Samaritan Society</i> , 2012 S.D. 52.	8
<i>State, Div. of Human Rights ex rel. Miller v. Miller</i> , 349 N.W.2d 42 (S.D. 1984).	8
<i>State v. Schwartz</i> , 2004 S.D. 123.	11

Preliminary Statement

This reply brief from Dakota Rural Action (DRA) is in response to the appellee's briefs filed by both TransCanada Keystone Pipeline, LP (TransCanada) and the South Dakota Public Utilities Commission (PUC). The arguments of both the PUC and TransCanada overlap in any number of material respects, so DRA was of the view that the Court would appreciate one less brief to read given the voluminous record on appeal and the number of parties.

SDCL § 15-26A-62 simply provides that “[t]he appellant may file a brief in reply to the brief of the appellee. The reply brief must be confined to new matter raised in the brief of the appellee and shall not exceed the page limitation set in § 15-26A-66.”

Introduction

Because this reply is the final brief to be submitted to the Court in what has been a long and contentious process, DRA believes it is crucial to take a step back and remind ourselves and the Court of the context of these proceedings and how events in South Dakota fit into the larger policy questions concerning this case that are being debated in both the United States and Canada. In short, why are we before this Court?

Whether or not to build the Keystone XL Pipeline (KXL) is a question of international significance. Any decision about KXL made in South Dakota will have effects extending well beyond the Upper Great Plains. Those consequences will be felt not just by South Dakota's farming and ranching families and the indigenous tribes in KXL's path, but by people around the world. The record before the PUC and publicly-available information (of which this Court can take judicial notice) shows that KXL has

created significant flashpoints extending from its origins in the tar sands region of Alberta, Canada, to refineries on the Gulf of Mexico, where TransCanada proposes to ship tar sands crude.

This case is important because it lies at the intersection of a host of public policy and legal questions. At its core, though, this case reverts to the question of whether TransCanada should be allowed to build a high-capacity tar sands crude pipeline – through South Dakota, or for that matter, anywhere else.

The PUC proceedings produced a lot of information about KXL and TransCanada's ability (or lack thereof) to build a safe pipeline. A significant concern lies in the information intervenors were prevented from exploring with the PUC. From the outset, in its December 17, 2014 Order Granting Motion to Define Issues and Setting Procedural Schedule (Administrative Record, pp. 1528-1529), the PUC determined that it did not want to hear any evidence outside of a narrow range of subjects. That decision was fateful, because it deprived South Dakota citizens and the PUC itself of the ability to examine the larger context of KXL, and its risks and harms.

It is undisputed that KXL was being developed for the express purpose of allowing oil companies operating in Western Canada to exploit and expand production of tar sands crude. That is a significant issue, not just for the members of First Nations and other communities living in Alberta's tar sands region who are being poisoned by tar sands extraction, but because the tar sands have been described as one of the single

biggest sources of carbon pollution on the planet.¹ Yet, despite the efforts of intervenors such as the Intertribal Council on Utilities Policy (ICOU), the PUC declined to consider the impact of tar sands extraction and consumption when making its decision, going so far as to decree that issues impacting South Dakota, such as the role of tar sands exploitation as a factor in accelerating unstable and negative climate effects, were off the table for discussion.

Throughout the PUC proceedings, DRA and other intervenors pointed to TransCanada's base Keystone 1 pipeline as an example of the company's handiwork – premised on the common-sense approach that a company's past performance is the best indicator of its future efforts. Following the PUC's evidentiary hearing in this case, Keystone 1 sprung a major leak near Freeman, South Dakota, that was publicly reported on April 2, 2016 (*see, Joint Memorandum of Law in Support of Joint Motion for Leave to Present Additional Evidence*, p. 1, filed by DRA and other intervenors with the Circuit Court on July 18, 2016). The Freeman spill was followed by another, larger spill near Amherst, South Dakota, on November 16, 2017, consisting of approximately 200,000 gallons of oil that gushed from the Keystone 1 pipeline over a 15-minute period.²

Pipelines such as KXL are in a different category, largely due to their high-capacity and the volume of hazardous liquids being shipped through them at high pressure. TransCanada wants to move 830,000 barrels of liquid hydrocarbons per day

¹ L. Poulton, S. Goldenberg, et al., *The Guardian*, "Carbon Bomb: Canada, The tar sands sell-out", May 28, 2015; <https://www.theguardian.com/environment/ng-interactive/2015/may/28/carbon-bomb-canada-tar-sands-fort-mckay-town-sold-itself> (last accessed, January 20, 2018).

² S. Gibbens and C. Welch, *National Geographic*, "Keystone Pipeline Spills 200,000 Gallons of Oil", November 16, 2017; <https://news.nationalgeographic.com/2017/11/keystone-oil-spill-south-dakota-spdl/> (last visited, January 20, 2018).

through KXL. *U.S. State Dept. Final Supplemental Environmental Impact Statement* (FSEIS), p. ES-6. Landowners, farmers, and ranchers in the pathway of such a pipeline are increasingly at risk considering KXL's capacity. South Dakota's history with Keystone 1 presents a cautionary tale – particularly because Keystone 1's capacity is only 590,000 barrels per day.³ It is not too much of a stretch to recognize that a bigger pipeline means a bigger mess when it inevitably leaks. The Freeman and Amherst spills illustrate that reality, and the risk posed to land and water resources in the pipeline's path.

TransCanada maintains that it builds safe pipelines and that the risk of spills is minimal. Those claims are disputed by DRA and other intervenors, as highlighted in the PUC's record and in the briefs submitted on appeal. TransCanada also argues that tar sands oil is needed to fulfill our energy requirements. That is also in dispute.

What is not in dispute is that this Court is faced with a disconnect and divergent interests between a large transnational corporation (and the industry of which it is a part) and South Dakota property owners who do not want to put their land and water at risk. These local, geographic-centered disputes are not going away. With every pipeline leak, spill, or failure, landowners are increasingly aware of risks.

The dispute over KXL has in many respects reignited a debate over eminent domain and the extremely liberal approach to takings permitted by the U.S. Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005). In *Kelo*, the Court held that notwithstanding the Fifth Amendment's prohibition on the use of eminent domain power

³ Web Archive of TransCanada website:
<https://web.archive.org/web/20130116010600/http://transcanada.com/100.html> (last visited, January 21, 2018).

to take property of one private party for sole purpose of transferring it to another private party, “economic development” as a public purpose could justify its use. *Id.*, at 484-485. Whether a private oil pipeline serves a public purpose – as opposed to serving the private profit interests of a particular industry – is a question that courts and state legislatures will continue to grapple with. As briefly mentioned by DRA in prior filings, this is a key question being litigated in the State of Nebraska, one which may ultimately preclude construction of KXL.

These local concerns – whether the interests of a large multinational energy companies outweigh the property rights of local landowners – do connect back to the larger policy questions that KXL raises and the direction of our national energy policy, which asks the fundamental question of how our society is going to meet its energy needs. Do we continue to construct large fossil fuel infrastructure projects such as KXL that will enable production of Canadian tar sands crude and associated petrochemicals? Should we instead be focusing our efforts on building infrastructure for cleaner, renewable energy such as wind and solar, and enabling the transition of our economy to one that embraces renewable and sustainable practices? The development of a significant number of wind energy generation facilities in South Dakota provides evidence of this energy transition.⁴ While the PUC and TransCanada seek to duck these crucial questions in this case, they nonetheless lie at the core of the dispute. It’s the elephant in the room neither wants to acknowledge exists.

⁴ South Dakota Public Utilities Commission: South Dakota Wind Energy Projects; <https://puc.sd.gov/energy/Wind/project.aspx> (last visited, January 20, 2018).

That said, this Court is not hinging its decision on these larger policy issues. Nonetheless, they form the context informing any decision concerning KXL and oil pipelines in general and should be considered. This Court's focus, as argued in the prior briefs, is on a narrower question – whether reversing the PUC's decision is warranted under SDCL § 1-26-36, which provides the framework for review of administrative agency decisions in South Dakota. SDCL § 1-26-36 empowers this Court with authority to reverse the PUC's decision if, among other things, substantial rights of the appellants have been prejudiced because the administrative findings, inferences, conclusions, or decisions are “made upon unlawful procedure,” “affected by other error of law,” “clearly erroneous in light of the entire evidence in the record,” or “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” SDCL § 1-26-36.

As simple as these questions may appear, they open a virtual Pandora's box of issues and further questions, all of which are in play before this Court. Those questions revolve around a number of key themes, including the authority and role of the PUC, the meaning of SDCL § 49-41B-27, which required TransCanada to certify to the PUC that it continued to meet the conditions of the Original Permit,⁵ the necessary burden of proof required for certification, along with the need for substantial evidence to meet that burden, not to mention the fact-driven question of whether TransCanada even presented substantial evidence warranting the PUC decision. We also have questions as to whether the process before the PUC itself was fair and afforded intervenors such as DRA

⁵ “Original Permit” references the PUC's Amended Final Decision and Order of June 29, 2010 in Docket HP09-001.

procedural due process considering the severe limitations on proceedings and testimony imposed by the PUC. Finally, the tribal intervenors in this case have posed substantial questions concerning the rights of tribes and the indigenous peoples of the Upper Great Plains in challenging the decisions of state and local governments that infringe upon their interests.⁶

All these questions are significant – not just in the context of whether the PUC’s decision in this case should be reversed, but for the citizens of South Dakota in how they interact with state administrative agencies that are charged with regulating the conduct of industry and protecting South Dakota’s land and water resources.

Argument

1. Standard of Review

If there is one point DRA and TransCanada can agree upon, it is that this Court’s examination of the PUC’s interpretation of SDCL § 49-41B-27 is subject to *de novo* review. *Knapp v. Hamm & Phillips Service Co., Inc.*, 2012 S.D. 82, ¶ 11, 824 N.W.2d 785, 788.

That level of review also extends to examination of the facts upon which the PUC based its decision. This Court previously explained that in reviewing a circuit court’s decision under SDCL § 1–26–37, the Court was reviewing the underlying agency’s findings.

“Even if we apply SDCL 1–26–37 as amended [requiring review of the circuit court’s decision for clear error], ... we [would then] decide whether the circuit court was clearly erroneous in determining that the agency was clearly erroneous.

⁶ DRA joins and supports the tribal intervenors – the Cheyenne River Sioux Tribe and the Yankton Sioux Tribe – in their arguments in this case.

This reverts us to the agency record.... It follows that, in the final analysis, we still review [the agency record] essentially as did the circuit court.”

State, Div. of Human Rights ex rel. Miller v. Miller, 349 N.W.2d 42, 46 (S.D. 1984).

This Court further noted that “[t]herefore, in reviewing the circuit court’s decision under SDCL 1-26-37, we are actually making “the same review of the administrative tribunal’s action as did the circuit court.” *Peterson v. Evangelical Lutheran Good Samaritan Society*, 2012 S.D. 52, ¶13, citing, *Miller*, supra, at 46. Further, this Court performs that review of the agency’s findings “unaided by any presumption that the circuit court’s decision was correct.” *Id.*

The upshot of this point is that the Court is undertaking a fresh look at the evidence submitted to the PUC, as well as how the PUC interpreted SDCL § 49-41B-27 in light of what TransCanada was required to demonstrate in order to “certify” compliance with the Original Permit conditions. As DRA argued in its brief and throughout the proceedings below, the PUC got it wrong on multiple counts, and its decision should be reversed.

2. Scope and Conduct of PUC Proceedings; Agency Role; Due Process Rights under South Dakota Administrative Procedures Act Violated by PUC

a. Case of First Impression; Applicability of South Dakota Administrative Procedures Act.

What makes this case unique and fascinating is that it presents any number of issues of first impression that will have significance beyond the decision of whether TransCanada should be permitted to build KXL. Although we will briefly touch on issues raised concerning the appropriate burden of proof and whether TransCanada presented

sufficient evidence to meet it below, those questions are by necessity tied to a review of the PUC's role and the rights of parties appearing in contested cases before that agency.

What makes this case one of first impression is that, among other things, this Court has never examined whether contested proceedings before the PUC under §49-41B-27 require the PUC to afford parties due process rights afforded under SDCL §1-26-18. The statute provides that:

“Opportunity shall be afforded all parties to respond and present evidence on issues of fact and argument on issues of law or policy. ... A party to a contested case proceeding may appear in person or by counsel, or both, may be present during the giving of all evidence, may have reasonable opportunity to inspect all documentary evidence, may examine and cross-examine witnesses, may present evidence in support of the party's interest, and may have subpoenas issued to compel attendance of witnesses and production of evidence in the party's behalf.”

SDCL §1-26-18. This point is critical because the Court has previously noted that due process rights apply to contested cases before administrative agencies. *Application of Union Carbide Corp.*, 308 N.W.2d 753, 758 (S.D. 1981). This is clearly a “contested case”. The import of *Union Carbide* is that once an agency matter becomes a “contested case”, SDCL §1-26-18 applies. *Id.*

A key question before this Court is to what extent DRA and other intervenors were afforded due process rights by the PUC in a contested hearing that involved interpretation of §49-41B-27 as to certification of continued compliance with permit conditions for a hydrocarbon pipeline. The application of SDCL §1-26-18 of the South Dakota Administrative Procedures Act (SDAPA) to SDCL §49-41B-27 gives rise to a host of issues.

For example, when on December 17, 2014, the PUC issued its Order Granting Motion to Define Issues and Setting Procedural Schedule (Administrative Record, pp.

1528-1529), which limited the extent of discovery and issues that the PUC was willing to hear, it created a *de facto* limitation on DRA's and other intervenors' due process rights under the SDAPA. Likewise, from a procedural standpoint, the PUC's limitation on participation and presentation of evidence at its hearing on the part of lay intervenors also constituted an unlawful and unwarranted limitation on their due process rights as afforded under the SDAPA.

b. Applicability of the Public Trust Doctrine

DRA, as well as the PUC and TransCanada, have briefed issues raised concerning the applicability of the public trust doctrine in South Dakota. DRA has urged the Court to apply the public trust doctrine in a way that holds the PUC accountable as a fiduciary for South Dakota's land and water resources. DRA has previously cited this Court's ruling that "as matter of first impression, all water in South Dakota belongs to the people in accord with the public trust doctrine ..." *Parks v. Cooper*, 2004 S.D. 27 ¶ 46. In effect, the PUC's and TransCanada's response to this argument is that existing case law provides no precedent for application of the public trust doctrine.

These responses miss the point. This Court has the power and authority to interpret law, including matters of first impression. DRA suggests that, to fulfill the Court's holding in *Parks*, and for that ruling to have meaning, state regulatory agencies such as the PUC that are in a position to make decisions affecting South Dakota's water resources are, in effect, trustees for the public and should be held to a higher standard of review with respect to such decisions.

What TransCanada and the PUC fail to recognize is that while, yes, there are no decisions on point, this is a matter of first impression and DRA is asking the Court to

make a logical extension of its ruling in *Parks* by holding the PUC to a higher standard of decision making. This ties directly to the points made by DRA throughout these proceedings concerning both the burden of proof placed on TransCanada and the need for substantial evidence. While this Court has not considered the applicability of the public trust doctrine to state administrative agencies, the door is clearly open to do so as when this Court commented on the *Parks* decision by noting that it “exhibits the type of deeply rooted regional issue—preservation of precious water resources through the public trust doctrine—that a court might take into account in examining a disputed provision of our constitution.” *State v. Schwartz*, 2004 S.D. 123 ¶ 52.

DRA understands that it is asking the Court to break new ground and apply the existing public trust doctrine so that it has meaning with respect to the administrative agencies whose decisions impact the state’s water and land resources. TransCanada and the PUC have not provided any rationale for why the Court is not able to do so – other than state that it has not done so before. That is insufficient. The Court can make a significant impact by providing a check on state regulatory agencies by holding them to a higher, fiduciary standard. It should do so.

c. Transparency of State Regulatory Agencies; Denial of Key Discovery into Communications between the PUC and TransCanada Thwarts Effective Citizen Oversight

Another issue argued by the parties with respect to the conduct of the PUC resulted from the agency’s ruling on a discovery issue where DRA sought to obtain communications between PUC staff and TransCanada. As described in DRA’s brief, the PUC denied DRA’s discovery request on the basis that communications between TransCanada and PUC staff constituted privileged attorney communications. The PUC

and TransCanada have taken the position that DRA (or for that matter, the general public) is not entitled to examine communications between them because the PUC staff is a separate party to these proceedings from the PUC itself. Apparently, the PUC believes that communications between the staff of a state regulatory agency and the companies it is charged with regulating should not see the light of day because of the existence of a “Chinese wall” between PUC staff and commissioners.

This response completely misses the mark and misconstrues the status of a key state regulatory agency. The fact that the PUC staff participates as a party to the proceedings does not matter. They are still the staff of a state regulatory agency. Their activities and salaries are paid for with public funds. They are charged with regulatory oversight of various industrial sectors, including hydrocarbon pipelines. No attorney-client privilege exists between a regulatory agency and the companies it regulates. The ability of the public to obtain communications between regulators and the regulated is critical to the functioning of an open and democratic system. The PUC’s ruling was off the mark. In its brief, DRA explained its concerns about regulatory capture of the PUC as a state agency by the industry it is charged with regulating.

The PUC’s misguided ruling frankly heightens those concerns as we are now left wondering what type of interactions between the PUC and TransCanada require a shroud of secrecy. The Court should not let this stand, should reverse the PUC’s decision, and remand the case with instructions to the PUC to reveal the contents of its staff’s communications with TransCanada. Otherwise, South Dakota’s citizens will be left with the question – what do they have to hide?

3. Burden of Proof is on TransCanada

The parties have extensively briefed how the PUC impermissibly attempted to shift the burden of proof to the intervenors in this case. Despite the law being clear that the applicant before an administrative agency bears the burden of proving its assertions, the PUC nonetheless took the position that when TransCanada made a blank statement asserting compliance with the conditions of the Original Permit, it was then up to the intervenors, including DRA, to disprove the company's assertion.

In contested administrative cases, the burden of proof consists of a preponderance of the evidence. *In re Black Hills Power, Inc.*, 2016 S.D. 92, ¶ 17, citing, *Irvine v. City of Sioux Falls*, 2006 S.D. 20, ¶ 10. In its brief, DRA noted that the Original Permit contained 50 basic conditions which, combined with various sub-conditions, included 107 separate conditions. In the hearing before the PUC, TransCanada only presented evidence concerning compliance with six of those conditions, and PUC staff presented evidence relating to only four conditions. That is not a preponderance of evidence, and neither the PUC nor TransCanada have shown a statutory or regulatory basis that would permit TransCanada to sidestep its obligations.

Again, this situation presents another issue of first impression for this Court. Given the basic rule concerning the burden of proof being on an applicant, can the PUC simply shift that burden onto intervenors to disprove an applicant's bald assertion that it "certifies" compliance with permit conditions? DRA suggests not, and that the position taken by the PUC and TransCanada, in effect, constitutes an abdication of the PUC's role as an effective oversight agency.

4. TransCanada Failed to Present Evidence Sufficient to Demonstrate Compliance with Permit Conditions

Again, the question of whether TransCanada presented sufficient evidence to warrant the PUC's determination that it effectively certified continued compliance with the Original Permit conditions has been argued extensively. The parties' briefs included a significant discussion of the fact that between both TransCanada and the PUC staff, they only presented evidence concerning 10 of the total of 107 separate conditions/sub-conditions in the Original Permit. This reality sets up a core question this Court will need to determine – mainly, what constitutes substantial, substantive evidence that TransCanada is in compliance with the conditions of the Original Permit in order to justify certification under §49-41B-27?

TransCanada and the PUC continue to argue in their briefs that, in effect, TransCanada's simple signature on piece of paper stating it continues to comply with the Original Permit conditions suffices. This position flies in the face of the requirement that an applicant must meet its burden of proof with a preponderance of evidence. *In re Black Hills Power, Inc., supra*, at ¶ 17. In that regard, TransCanada and the PUC are further asking this Court to hold that somehow, a promise to comply with conditions at some point in the future constitutes a preponderance of or substantial evidence of compliance.

DRA suggests, contrary to the position taken by TransCanada and the PUC, that logic and a reasonable interpretation of SDCL § 49-41B-22 and § 49-41B-27, which creates an opportunity (presuming intervention) for a hearing and, hence, a “contested case” under the SDAPA, would reasonably require actual evidence that in the more than four years since the Original Permit was issued to TransCanada, as applicant, it must present substantive evidence showing actual compliance with all conditions of the Original Permit.

Furthermore, because the Original Permit required compliance with all federal and state laws and regulations, TransCanada had the burden of presenting such evidence of compliance. TransCanada could have presented working drafts of changes in design, construction plans, and improvements in leak detection to sufficiently protect the safety of the environment from leaks and spills of toxic tar sands crude, as well as compliance with the PHMSA special conditions noted in DRA's brief. TransCanada chose not to do this, and should not be rewarded by this Court for that failure.

The Original Permit, as TransCanada and the PUC argue, contained a number of prospective conditions. Yet the language of SDCL § 49-41B-27 requires certification of compliance when "construction" "commences" more than four years after permit issuance. TransCanada was not and is not ready to commence construction. It admittedly has not even completed its design and construction drawings, leak detection, and spill response plans. While a limited number of prospective conditions may have been warranted on issuance of the Original Permit, certification four years later under SDCL § 49-41B-27 should require a showing that those conditions were met. Instead, the PUC granted certification on a hope and promise.

DRA notes that SDCL §49-41B-22 requires that, to receive a permit, a hazardous transportation facility applicant must convince the PUC that the proposed facility will: "(1) ... comply with all applicable laws and rules; (2) ... not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area; (3) ... not substantially impair the health, safety or welfare of the inhabitants; and (4) ... not unduly interfere with the orderly development of the region ...". Yet, SDCL § 49-41B-27 authorizes the PUC to certify a permit when the

applicant certifies its proposed facility “continues” to meet the conditions upon which the permit was issued. In short, how is it reasonable to interpret § 49-41B-27 as simply requiring another promise it “will” comply, without demonstrating actual compliance? DRA urges the Court to reject TransCanada’s and the PUC’s interpretation of § 49-41B-27 as merely permitting certification of compliance based upon a future promise.

5. PUC Procedural Rulings

There is no need to revisit the PUC’s defective procedural rulings concerning excluded witnesses, evidence, and exhibits in this reply – they have been fully briefed. However, DRA does wish to highlight what is perhaps the key procedural ruling requiring reversal of the PUC decision – the December 17, 2014 Order Granting Motion to Define Issues and Setting Procedural Schedule (Administrative Record, pp. 1528-1529). The limitations placed on the scope of the proceedings constitute a fatal denial of the intervenors’ due process rights afforded by the SDAPA as discussed above.

Conclusion

DRA trusts this Court will carefully weigh all the issues raised on appeal of the PUC’s decision and, upon evaluating factors such as the role to be played by the PUC in protecting South Dakota’s land and water, and the paucity of evidence presented by TransCanada to support certification under SDCL § 49-41B-27, conclude that TransCanada has not met its burden of certifying continued compliance with the conditions of the Original Permit. The PUC’s decision in this case, as well as the Circuit Court’s affirmation of that decision, should be reversed. There are ample grounds for doing so, and DRA urges the Court to reverse the PUC’s decision.

Respectfully submitted this 22nd day of January, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing reply brief complies with the type volume limitation set forth in SDCL § 15-26A-66(b). The text of the brief, excluding the cover page, table of contents, table of authorities, and this signature page, contains 4,568 words as determined by reliance on Microsoft Word.

/s/ Robin S. Martinez

Robin S. Martinez
Attorney for Dakota Rural Action