IN THE SUPREME COURT OF SOUTH DAKOTA

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 (Cheyenne River Sioux Tribe Appeal)

Case No. 28331

APPELLANT'S BRIEF FOR

CHEYENNE RIVER SIOUX

TRIBE

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JURISDICTIONAL STATEMENT

CRST appeals an Order entered by the Circuit Court for the South Dakota Sixth Judicial Circuit, Hughes County, on June 19, 2017 in case number CIV-16-33. The circuit court's order affirmed the SD Public Utilities Commission's January 21, 2016, Order in Matter No. 14-001, Finding Certification Valid and Accepting Certification [of Permit Issued in Docket 09-001 to Construct Keystone XL Pipeline]. CRST filed its Notice of Appeal of the circuit court's order on July 19, 2017.

The circuit court's June 19, 2017 Order is a final order and is therefore reviewable by this Court pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUE ON APPEAL

On appeal, CRST submits the following legal issue:

Whether the PUC correctly interpreted and applied (2006) ARSD 20:10:01:15.01 and SDCL §49-41B-27 in finding and concluding that TransCanada had met its burden of proof in the PUC docket #14-001 Keystone XL certification proceedings, and whether the circuit court erred in affirming the PUC's findings and conclusions in this regard?

The Sixth Judicial Circuit Court did not find clear error in the PUC's application of the burden of proof in this case, and therefore the PUC's decision was affirmed.

Relevant Statutes and Regulations:

SDCL §49-41B-27

(2006) ARSD 20:10:01:15.01

Relevant Cases:

M.G. Oil Co. v City of Rapid City, 2011 S.D. 3, 793 N.W.2d 816

In re Establishing Certain Territorial Elec. Boundaries, 318 N.W.2d 118 (S.D. 1982)

STATEMENT OF THE CASE AND FACTS

On June 29, 2010 the South Dakota Public Utilities Commission ("PUC") issued a permit to TransCanada Keystone Pipeline, LP ("TransCanada") to build the Keystone XL Pipeline through Western South Dakota ("2010 Permit"). The permit was accompanied by fifty separate requirements that TransCanada was obligated to abide by during construction and operation of the pipeline. TransCanada failed to begin construction within four years of the permit being issued. SDCL §49-41B-27 requires permittees, such as TransCanada, to obtain a determination by the PUC that the project for which an original permit was issued continues to "…meet the conditions on which the permit was issued." SDCL §49-41B-27. On September 15, 2014, TransCanada submitted to the PUC a Petition for Order Accepting Certification ("Certification Petition") under SDCL §49-41B-27, which stated that "…the conditions upon which the [PUC] granted the facility permit in Docket HP09-001…continue to be satisfied" and that TransCanada "…certifies that it will meet and comply with all of the applicable permit conditions…" TransCanada's Pet. For Order Accepting Certification at 46-47.

The Cheyenne River Sioux Tribe ("CRST") filed for intervention in PUC docket HP14-001 on October 15, 2014. CRST Intervention at 305-07. On October 30, 2015 TransCanada submitted a Motion to Define the Scope of Discovery. TransCanada's Mot. to Define Disc. 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 to Define the Scope of Discovery and filed its response on December 1, 2014. CRST

Resp. to Mot. to Define Disc. at 1249-61. The PUC subsequently granted TransCanada's Motion to Define the Scope of Discovery on December 17, 2014. PUC Order to Grant Mot. to Define Issues. at 1528-29.

Following discovery the PUC held an evidentiary hearing beginning on July 27, 2015. The hearing lasted nine days and TransCanada submitted prefiled direct testimony for its witnesses. 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. HP14-001 Evidentiary Hr'g Tr. at 027338, 027345:7-11. The PUC denied the joint motion to dismiss TransCanada's Petition for Order Accepting Certification. HP14-001 Evidentiary Hr'g Tr. at 027361:16-18; 027367:13-14.

Pursuant to the PUC's instructions CRST submitted its Post-Hearing Brief on October 1, 2015. CRST Post Hr'g Br. at 29538-559. In its Post-Hearing Brief CRST argued that the PUC must reject TransCanada's Certification Petition on the grounds that TransCanada failed to submit substantive evidence upon which it could grant the petition. On January 21, 2016 the PUC granted TransCanada's Certification Petition and published its Final Decision and Order Finding Certification Valid and Accepting Certification ("Order Finding Certification"). PUC Final Decision and Order at 31668-695.

On February 19, 2016 CRST filed a Notice of Appeal to the Sixth Circuit Court of the PUC's Order Finding Certification in PUC Matter Number #14-004. The case was assigned to the Honorable John L. Brown, Presiding Judge of the Sixth Circuit Court. A number of issues were raised by all Appellants, including Appellant CRST, on appeal.

After issues were briefed by the parties, a hearing was held before the Court on March 8, 2017.

Among other issues, CRST argued to the Sixth Circuit that the PUC committed reversible error when it published its Order Finding Certification because TransCanada had failed to meet the requisite burden of proof in its Certification Petition by not putting forth evidence showing that it continued to meet all 50 conditions of the 2010 Permit. Because TransCanada failed to submit any evidence pertaining to 44 of the 50 conditions in the 2010 Permit during the HP14-001 certification proceedings, CRST argued that TransCanada failed to meet the minimum burden of proof required by SDCL §49-41B-27 and (2006) ARSD 20:10:01:15.01. Moreover, the PUC's findings and conclusions in its Order Finding Certification shift the burden of proof from the Petitioner TransCanada to anyone who contested TransCanada's Petition, including Intervenor CRST. In Finding #31, the PUC stated, that "No evidence was presented that Keystone cannot satisfy any of these conditions in the future." Nearly identical findings were made in Paragraphs #32, 33, 34, 37, 42 of the PUC's Final Decision and Order. TransCanada's failure to come forward with proof that it could still meet all 50 conditions of the 2010 Permit, combined with the PUC's shifting of the burden of proof from TransCanada to anyone who contested the Keystone Petition for Certification, was a clearly erroneous interpretation and application of SDCL §49-41B-27 and (2006) ARSD 20:10:01:15.01.

On June 19, 2017, the Sixth Circuit issued an Order and Memorandum Decision affirming the PUC's decision in full.

CRST believes that the PUC and the Sixth Circuit's decisions should be reversed.

ARGUMENT

The PUC's Decision to Grant TransCanada's Petition for Certification, and the Sixth Circuit's Affirmation of such Decision, was Clearly Erroneous and Arbitrary and Capricious because TransCanada Failed to Submit Substantial Evidence During the Evidentiary Hearing and because the PUC Improperly Shifted the Burden of Proof from the Petitioner to the Intervenors During the Proceeding.

A. Under both the "clearly erroneous" and the "arbitrary and capricious" standards of review, the Sixth Circuit erred in finding that TransCanada had met its burden of proof to show that it continued to meet all 50 conditions of the 2010 Permit.

In general, South Dakota courts are obligated to give broad deference to the decisions of administrative agencies. More specifically, courts must "…give great weight to the findings made and inferences drawn by an agency on questions of fact." SDCL § 1-26-36. Nonetheless, judicial deference to agency findings is not absolute. Courts may reverse or modify agency decisions if "…substantial rights of the appellant[s] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are...*(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."* *Id.* (emphasis added).

The standard of review this Court applies when reviewing 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, 575 N.W.2d 225, 227. After careful review of the entire record, if the court is "definitely and firmly convinced a mistake has been committed," only then will the court reverse. *Id.* Under this standard the question is, based on the entire evidence in the record, is the reviewing court left with

a definite and firm conviction that a mistake has been made? *Halbersma v. Halbersma*, 2009 S.D. 98, 775 N.W.2d 210.[1]

The "arbitrary and capricious" provision of SDCL § 1-26-36(6) employs the substantial evidence standard. *M.G. Oil Co. v. City of Rapid City*, 2011 S.D. 3, ¶ 15, 793 N.W.2d 816 (citing *Therkildsen v. Fisher Beverage*, 1996 S.D. 39, 545 N.W.2d 834 and *Abild v. Gateway 2000, Inc*., 1996 S.D. 50, 547 N.W.2d 556 as authority, the South Dakota Supreme Court upheld and endorsed a circuit court's substantial evidence analysis stating '[t]he use of the "substantial evidence" review was correct to determine whether there was substantial evidence to support the City Council's findings.'). Moreover, the Supreme Court has explicitly applied the substantial evidence standard to all state agency actions, including the Public Utilities Commission. *In re Establishing Certain Territorial Elec. Boundaries*., 318 N.W.2d 118, 121 (S.D. 1982). The practical implication in the instant matter is that, in order to have granted TransCanada's Petition, the PUC must have based such a decision on substantial evidence which proved that each of the fifty requirements contained in the original 2010 Permit continued to be met. If there was not substantial evidence put forth, then it was arbitrary and capricious for the PUC to have granted such permit.

B. TransCanada Failed to Meet its Burden of Proof During the Evidentiary Hearing.

1. Petitioners in Contested Hearings Carry the Initial Burden of Proof.

[1] CRST agrees with the Sixth Circuit's note in its decision clarifying that the "clearly erroneous" standard of review no longer employs the "substantial evidence" terminology that CRST used during its arguments before the Sixth Circuit.

TransCanada carried the initial burden of proof during the HP14-001 proceedings. The PUC's Administrative Rules state that "[e]xcept to the extent a provision is not appropriately applied to an agency proceeding *or is in conflict with…the commission's rules*, the rules of civil procedure as used in the circuit courts of this state shall apply." (2006) ARSD 20:10:01:01.02 (emphasis added). Accordingly, matters of proof during PUC evidentiary hearings, such as the one held in the HP14-001 docket, are governed by PUC's administrative rules unless no such rules exist, in which case the rules of civil procedure for South Dakota circuit courts are to be applied.

With regard to the burden of proof, the PUC's rules expressly and specifically address the issue of which party carries the initial burden of proof during a contested case proceeding. The PUC 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…" (2006) ARSD 20:10:01:15.01 (emphasis added). The rules are explicitly clear and dispositive in the instant matter. TransCanada was the petitioner in HP14-001. TransCanada submitted a Certification Petition to the PUC pursuant to SDCL §49-41B-27. TransCanada's Certification Petition asked the PUC to make a factual determination that TransCanada can continue to meet the conditions upon which the original 2010 Permit was granted. Intervening parties opposed TransCanada's Certification 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 2010 Permit was granted.

A careful review of the record reveals that, at least at the start of the evidentiary hearing, the PUC, TransCanada, and the Appellants all agreed that the initial burden of proof was on TransCanada and that TransCanada was required to prove at the evidentiary hearing that it can continue to meet each of the fifty requirements set forth in the original 2010 Permit. For example, Commissioner Nelson stated at the beginning of the hearing that "*[i]t 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 023968:6-10 (emphasis added). In addition, Mr. Bill Taylor, counsel for Keystone, stated that

> "[w]e are here today to meet Keystone's burden of proof. That is, certifying that the project continues to meet the 50 Conditions on which the Permit was issued and that it can be constructed and operated accordingly. We'll offer the testimony of seven witnesses, five of whom are direct witnesses, two of whom are rebuttal. We will present exhibits that meet that burden of proof. The testimony of our witnesses, many of whom you've heard before, will conclusively demonstrate that the project will continue to meet the 50 Conditions on which the Permit was issued." HP14-001 Evidentiary Hr'g Tr. at 024025:17-25 and 024026:1-3.

Simply put, South Dakota law, the PUC's rules, PUC Chairman Nelson, and TransCanada itself all assert that TransCanada carried the burden of proof during the HP14-001 proceedings.

2. South Dakota Law Requires the PUC to Base its Decisions on the Submission of Substantial Evidence.

South Dakota law provides some guidance regarding what the term substantial evidence means. SDCL §1-26-1(9) defines the term as "…such relevant and competent evidence as a reasonable mind might accept as being sufficiently adequate to support a conclusion." SDCL §1-26-1(9). However, this statutory definition is somewhat vague and

must be read in light of the South Dakota Supreme Court's substantial evidence case law. Generally, there are two types of evidence which the South Dakota Supreme Court has accepted as substantial evidence: physical and testimonial. During the HP14-001 evidentiary hearing no physical evidence was submitted. Instead, TransCanada solely relied on the testimony of the witnesses that it submitted.

With regard to testimonial evidence, such testimony must be specific and substantive in order to be regarded as substantial evidence sufficient to base an administrative decision. See *In re Establishing Elec. Boundaries*, 318 N.W.2d at 122. In the case *In re Establishing Electric Boundaries*, an expert witness testified that he used the criteria described in SDCL § 49-34A-44 when determining his boundaries recommendation to the PUC. *In re Establishing Elec. Boundaries*, 318 N.W.2d at 121. Essentially, the witness' testimony consisted of a summary of each of the criteria listed in SDCL § 49-34A-44 and specific testimony as to how he applied the criteria in his analysis. See *Id.* In making its decision the PUC essentially adopted the witness' recommendation. The appellant challenged the sufficiency of the testimonial evidence, arguing that it did not meet substantial evidence minimum. The Supreme Court disagreed, stating that substantial evidence existed due to the record being "replete" with testimony in which the witness explained how he applied the underlying statute to his analysis and recommendation. *Id*. at 122. That testimony was both specific and substantive. It was not a rote recitation of the standards laid out in the statute.

As illustrated above, testimonial evidence may be sufficient to base an administrative decision in certain circumstances. *In re Establishing Elec. Boundaries*, 318 N.W.2d at 122. However, as stated before the testimony must be *specific* and

substantive. See *Id*. Vague and/or conclusory testimony cannot be used to base a decision because such testimony is not substantial evidence. *M.G. Oil Co*., 2011 S.D. 3, ¶18, 793 N.W.2d at 823. The Court's requirement for testimonial evidence to be substantive and specific is most apparent in the *M.G. Oil Co*. case. In *M.G. Oil. Co*. an applicant applied for a conditional use permit to operate a video lottery casino. *Id*. at ¶ 1, 817. Under the governing statute, the Rapid City Common Council ("City Council") could deny issuing such a permit if it concluded that issuing the permit would cause an undue concentration of similar uses, so as to cause blight, deterioration or substantially diminish or impair property value. *Id.* at ¶ 16, 822. During a series of public meetings several individuals made vague conclusory statements regarding the potential impact of granting the conditional permit. It was alleged by several individuals that an increase in crime would occur and a City Alderman stated that it was his belief that real estate values might depreciate as a consequence of issuing the permit. *Id*. at ¶ 20, 823-24. The City Council voted to deny the permit. The applicant appealed arguing that the City's decision was arbitrary and capricious and an abuse of discretion. *Id*. at ¶ 1, 817.

In *M.G. Oil Co*. the South Dakota Supreme Court applied the substantial evidence analysis to the underlying arbitrary and capricious claim. *Id*. at ¶ 12-15, 821-22. In its analysis the Court looked to see whether the testimony and comments submitted during the City Council meetings were substantial evidence upon which the Council could base its decision to deny the applicant's permit. *Id*. at ¶ 17-20, 822-23. The Court concluded that such testimonial statements were not substantial evidence. *Id*. In reaching its decision the Court reasoned that "[v]ague reservations expressed by [Council] members and nearby landowners are not sufficient to provide factual support for a Board decision."

Id. at ¶ 18, 823 (citing *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992)). The Court went on to assert that the City's failure to link specific and substantive testimonial evidence to the governing statute resulted in nothing more than simply repeating the language of the ordinance as a basis to deny the permit. *Id.* ¶ 20, 823-24. As such, the Court found that no substantial evidence existed to support the City's actions and stated that "[the City Council] renders a decision so implausible that it cannot be ascribed to a difference in view or the product of agency expertise." *Id*. at 824 (citing *Johnson v. Lennox Sch. Dist. #41-4*, 2002 S.D. 89, 649 N.W.2d 617, 621 n. 2). In other words, testimony which merely recites the language of a governing statute cannot be considered substantial evidence.

The facts present in *M.G. Oil Co*. are startling similar to the facts present in the instant matter. In *M.G. Oil Co*. a series of witnesses made vague conclusory statements which largely parroted the language of the governing statute. In the instant matter TransCanada's witnesses did precisely the same. TransCanada's witnesses merely reference which changes that he or she was responsible for in the Tracking Table of Changes and then makes a statement that he or she is unaware of any reason why TransCanada cannot continue to meet the permit Conditions. See Direct Testimony of Corey Goulet at 027456-027459; Direct Testimony of Meera Kothari at 027467-027471; Direct Testimony of Heidi Tillquist at 027484-027486; Direct Testimony of Jon Schnidt at 027508-027512.

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 Keystone cannot comply in the future is materially no different from the

testimony proffered in *M.G. Oil Co.* TransCanada could have directed its witnesses submit specific and substantive prefiled testimony. It chose not to do so. TransCanada's witnesses could have submitted testimony which did not simply repeat the language of SDCL §49-41B-27 followed by a vague statement of being unaware of any reason TransCanada cannot comply with permit conditions in the future. They did not. In light of *M.G. Oil Co.*, such testimony cannot reasonably be construed as substantial evidence upon which the PUC could base its decision to grant TransCanada's Petition for Order Accepting Certification. It is not the responsibility of the PUC or a court to rescue petitioners who fail to meet their evidentiary burdens. TransCanada's failure to submit specific and substantive testimonial evidence required the PUC to deny TransCanada's Petition. Instead the PUC arbitrarily and capriciously granted the Petition for Order Accepting Certification despite the fact that all of TransCanada's witnesses failed to submit specific and substantive testimony during the HP14-001 evidentiary hearing.

In yet another case the Court issued a similar reproach with regard to vague conclusory statements being passed off as substantial evidence. In that case, an employer asserted that two of its former employees were not entitled to unemployment benefits due to "misconduct." *Abild v Gateway 2000, Inc.*, 1996 S.D. 50, ¶¶2-5, 547 N.W.2d at 557-8. Specifically, the employer accused the employees of intentionally inflating their sales statistics. *Id.* at 558. In *Abild* South Dakota law placed the burden of proving "misconduct" on the employer. *Id.* at 559-60. At the agency level the Department of Labor concluded that the employer had not met its burden of proof and awarded benefits to the two terminated employees. *Id.* at 557. On appeal, the South Dakota Supreme Court upheld the agency's decision. In reaching its decision the Supreme Court pointed out that

the employer had merely alleged that the employees had been "dishonest" and therefore had committed misconduct. *Id*. at 559. The Court characterized this evidence as nothing more than a legal conclusion insufficient to base a conclusion that the Department's decision was clearly erroneous. *Id*.

Obviously the circumstances in *Abild* are slightly different than the circumstances in the instant matter. Namely, in *Abild* the burden was on the employer to show that the employees had not submitted substantial evidence. As such, the Court's statements regarding the employer's conclusory testimony was not analyzed in the same manner as an appellant challenging the sufficiency of evidence on which an agency has based a decision. Nonetheless, the Court's language regarding vague conclusory statements is helpful in the instant matter. More to the point, just as the employer in *Abild* relied solely on a vague conclusory statement, so too did TransCanada during the HP14-001 proceedings. TransCanada failed to meet its evidentiary burden when it chose to rely solely on the vague testimony proffered by its witnesses. This evidentiary failure on the part of TransCanada required the PUC to deny the Petition for Order Accepting Certification, thereby making the PUC's subsequent decision to grant TransCanada's Petition arbitrary and capricious.

3. During the HP14-001 Proceedings TransCanada Failed to Submit Any Substantial Evidence, as Defined by SDCL § 1-26-1(9) and the South Dakota Supreme Court Case Law.

TransCanada failed to submit any substantial evidence whatsoever during the HP14-001 evidentiary hearing. TransCanada's failure to submit substantial evidence required the PUC to dismiss the Certification Petition. *See Therkildsen*, 1996 S.D. 39,

545 N.W.2d 834; *In re Establishing Certain Territorial Elec. Boundaries*, 318 N.W.2d 118.

The original permit hearing in Docket HP09-001 required the PUC to make a factual determination as to whether TransCanada could safely construct and operate the proposed project pursuant to the fifty conditions as they existed in 2010. By comparison, the HP14-001 proceedings required the PUC to make a separate and distinct factual determination; namely, whether TransCanada is able construct and operate the proposed project in 2016 given present-day conditions. TransCanada and the PUC repeatedly stated throughout the HP14-001 proceedings that those proceedings were not the HP09-001 proceedings and that Intervenors could not keep revisiting the HP09-001 proceedings. Using their own reasoning, then, Keystone cannot merely rely on the evidence which it submitted in the HP09-001 proceeding to meet the burden in a separate PUC proceeding. In HP14-001 TransCanada asked the PUC to make a second factual determination: that it can construct and operate the proposed project safely in 2016. It should have been required to put forward and present as much specific and substantive evidence as was necessary to carry its burden of proof.

Admittedly, the burden of proof is low. Any substantial evidence whatsoever submitted by TransCanada during the HP14-001 evidentiary hearing would have sufficed; however, TransCanada chose not to submit any such evidence. None of TransCanada's witnesses provided specific and substantive testimony. Rather, all of the testimony offered by TransCanada's witnesses merely recited the language of SDCL §49-41B-27 followed by brief conclusory remarks stating that the respective witness is unaware of any reasons why the fifty requirements cannot be met. *See* Direct Testimony

of Corey Goulet at 027456-027459; Direct Testimony of Meera Kothari at 027467-027471; Direct Testimony of Heidi Tillquist at 027484-027486; Direct Testimony of Jon Schnidt at 027508-027512. Indeed, upon examination of the 2,507 pages of transcripts the Court will find that nearly all of it is the Intervenors' cross examinations of TransCanada's witnesses and not substantial evidence testimony.

Such vague and conclusory testimony is precisely the same sort of testimony which was at issue in *M.G. Oil Co.* Because TransCanada offered no other evidence its burden of proof was not met, thereby making the PUC's Final Order granting certification arbitrary and capricious.

C. The PUC Improperly Shifted the Burden of Proof to the Intervenors

Instead of requiring TransCanada to submit substantial evidence, the PUC asserted that no substantial evidence is required and that TransCanada carried its burden of proof when Mr. Corey Goulet signed a certification on September 15, 2014, assuring the PUC that TransCanada can and will continue to meet the conditions upon which the underlying permit was granted. January 5, 2016 PUC Hr'g Tr. at 031660:15-18. The PUC's erroneous belief that the burden of proof should be shifted to the Appellants was repeated in Finding #31 of the Certification Order where the PUC stated, that "No evidence was presented that Keystone cannot satisfy any of these conditions in the future." Nearly identical findings were made in Paragraphs #32, 33, 34, 37, 42 of the Certification Order. These findings turned the burden of proof in (2006) ARSD 20:10:01:15.01 on its head, from requiring the Petitioner to prove that it can satisfy the

conditions, to requiring the Intervenors to prove that the Petitioner *cannot* satisfy the conditions.

The PUC's assertion that Mr. Goulet's certification constituted sufficient proof, coupled with the PUC's upside-down findings regarding the burden of proof, erroneously and capriciously shifted the burden of proof to anyone who chose to contest the proceeding. Such unlawful burden shifting amounts to reversible error on the part of the PUC.

CONCLUSION

Though deference is generally afforded to administrative agencies, such deference is not absolute. In the instant matter no deference was due by the Sixth Circuit with regard to the PUC's decision in HP14-001. Indeed this Court must reverse the PUC's Final Decision and Order Finding Certification Valid and Accepting Certification and remand with instructions to dismiss TransCanada's Petition for Order Accepting Certification.

Respectfully submitted this 20th 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 4,429 words as determined by reliance on Microsoft Word.

/s/ Tracey Zephier
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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 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

#28331

Appeal from the Circuit Court, Sixth Judicial Circuit
Hughes County, South Dakota
The Honorable John L. Brown

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PRELIMINARY STATEMENT

Appellant Cheyenne River Sioux Tribe will be referred to as "CRST," 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 §49-4lB-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 administrative 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 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 HP09-001on 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 a specific condition or conditions 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 CRST'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

STATEMENT OF THE CASE AND FACTS

This case is an appeal brought by Cheyenne River Sioux Tribe 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 S.D. 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 Labo*r, 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?

The record in this case simply does not support CRST'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, CRST did 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 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.

1. Burden of Proof

The Chairman of the Commission, Chris Nelson, who presided over the hearing, stated at the outset of the hearing that the initial burden of proof falls on Keystone. TR 10 (AR 023968). So what is that burden of proof in a case under SDCL 49-41B-27? A central issue in this proceeding boils down to what is meant by the term "certify" in the statute 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. This proceeding is not, however, a retrial of the permit proceeding conducted in 2009 and 2010 in Docket HP09-001. 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" means 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 § 49-4lB-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"; 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.

2. Even if Keystone's Burden of Proof Required More than its Certification, Sufficient Evidence was Entered into the Record at Hearing and through Judicial Notice to Support the Commission's Decision.

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 and judicially noticed by the Commission 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 into 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*, 487 U.S. at 564-65, 108 S.Ct.at 2549, 101 L.Ed.2d at 504, but means 'more than a mere scintilla' of evidence, *Consolidated Edison*, 305 U.S. at 229, 59 S.Ct. at 217, 83 L.Ed. at

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. Apx A26-A39. 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 Intervenors’ 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 is essentially 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 is not at issue because there is no evidence in the record, or knowledge of the Commission, of a proposed transfer of the permit. Apx A26, #4. Conditions 7 through 9 require the appointment of a public liaison officer who must submit quarterly and annual reports to the Commission. Apx 27-28, #7, 8, and 9. Keystone XL appointed Sarah Metcalf who served as public liaison officer on the Keystone Pipeline. 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; Ex 1003. 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. 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. 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 306-307, 1975-1976 (AR 024304-024305, 026779-

026780). 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).

As set forth above, 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. 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. The Intervenors simply did not provide any evidence indicating that Keystone does not currently comply with 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.

As far as CRST's argument relying on *M.G. Oil Company v. City of Rapid City*, 2011 S.D. 3, 793 N.W. 2d 816, the nature of the matter before the Rapid City Council, the proceedings conducted by the City Council, and the "evidence" or lack thereof heard by the Council and referred to by Council members as the basis for their votes bears no resemblance whatsoever to the proceedings conducted and the evidence heard and considered by the Commission in making its decision in this matter. 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 bears no resemblance to the proceedings at issue in *M.G. Oil*. As far as CRST's statement about the Court finding that "no substantive evidence existed to support the decision," the standard set forth in *M.G. Oil* is the usual substantial evidence standard for review, not substantive evidence. As stated above, the enormous quantity of evidence heard by the Commission in this case, much of which was from highly professional expert witnesses and a directly involved high level executive of Keystone, bears no resemblance to what was presented before the Rapid City Commission.

As far as CRST's argument that SDCL 49-41B-27 required the Commission to make a factual determination as to whether Keystone "is able to construct the proposed project in 2016 given present conditions" and that Keystone asked the Commission to make a determination "that it can construct and operate the proposed project safely in 2016" (CRST Circuit Court Brief at 16), this would appear to be an argument that SDCL 49-41B-27 is essentially a statute requiring a permit holder to reapply for and re-prove its original permit proceedings under the elements set forth under SDCL 49-41B-22. SDCL 49-41B-27 contains no language whatsoever that this is what the statute intended. Rather, the statute requires Keystone to "certify . . . that such facility continues to meet the conditions upon which the permit was issued." The only rational construction of this statute under the *in pari materia* principle of statutory construction is that the term "conditions" means the "conditions" to which the Commission made the permit subject under 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 Court has stated, "[s]tatutes 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. If the Legislature had intended to place a four year limit on a facility construction permit, they would certainly have known how to place such a simple provision in the law.

This administrative certification proceeding is not an enforcement proceeding. If the Commission believed that Keystone was violating one or more of the KXL Conditions, it could and should open an enforcement proceeding under SDCL 49-41B-33(2). This was a certification filed by Keystone under SDCL 49-41B-27. No enforcement action under SDCL 49-41B-33(2) has been undertaken by the Commission. As far as CRST's argument about changed general conditions surrounding the Project, Keystone's Tracking Table of Changes notes a number of minor changes in factual circumstances and certain minor route refinements to accommodate landowner preferences, to make minor adjustments based on additional information gained during continuing evaluation of the route terrain, river crossings, etc., to add an additional input location in Montana to receive slugs of oil from the Bakken formation in Montana and North Dakota, and to add an additional two horizontal directional drilling river crossings to minimize the effects of such crossings and the need for extensive restoration work. None of these indicate that Keystone is out of compliance with any KXL Conditions or will be unable to comply at such time as the particular condition is ripe for action.

SDCL 49-41B-27 should be read *in pari materia* with SDCL 49-41B-24. *Goetz v. State*, *supra*. As far as the CRST's argument that the Commission is handcuffing itself by its interpretation of SDCL 49-41B-27 as a ministerial, non-quasi-judicial act, the Commission would point out that it has the power to revoke the permit for the Project under SDCL 49-41B-33(2) should circumstances change to the point where the Keystone cannot comply with the KXL Conditions.

CONCLUSION

Based on the foregoing, the Commission respectfully requests that the Court affirm the Decision.

Dated this 28th day of November, 2017

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28331

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 19, 2017

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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. The Cheyenne River Sioux Tribe timely filed a notice of appeal on July 19, 2017.

Statement of the Issues

1. 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)

2. This Court reviews an administrative agency's findings of fact for clear error and must give great weight to the findings and inferences drawn by

the agency. The Commission made 77 findings of fact, most of which specifically addressed Keystone's compliance with particular permit conditions, and none of which are challenged on appeal. Are any of the Commission's findings of fact clearly erroneous because Keystone did not offer sufficient evidence to support them?

The circuit court affirmed the Commission's findings of fact as not clearly erroneous.

SDCL § 1-26-36
Sopko v. C & R Transfer Co., Inc., 1998 S.D. 8, 575 N.W.2d 225
Olson v. City of Deadwood, 480 N.W.2d 770 (S.D. 1992)

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. (Tribe's 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 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. (Tribe's 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. (Tribe's 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. 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.

[1] The Settled Record references are to the index prepared by the Clerk of Courts for Civ. 16-33.

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. (Tribe's 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 affected counties. (*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

Also attached to Keystone's certification petition, as Appendix B, was the latest quarterly report submitted to the Commission, dated July 29, 2014. (*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. (Tribe's 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." (Tribe's 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 addresss 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 Intervenors 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. (Tribe's 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 19, 2017, affirming the decision of the Commission. (Tribe's 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

The Cheyenne River Sioux Tribe'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. On further appeal, this Court must "give the same deference to the findings of fact, conclusions of law, and final judgment of the circuit court as it does to other appeals from the circuit court. Such appeal may not be considered de novo." SDCL § 1-26-37. With respect to agency findings, this Court has held that its

review is the same as the circuit court's review and is "'unaided by any presumption that the circuit court's decision was correct.'" *Peterson*, ¶ 13, 816 N.W.2d at 847 (quoting *Kermmoade v. Quality Inn*, 2000 S.D. 81, ¶ 10, 612 N.W.2d 583, 586). The circuit court affirmed the Commission's final decision without making any new findings of fact. Thus, this Court must give great deference to the Commission's findings and reverse only if they are clearly erroneous.

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.*

1. The Commission did not erroneously shift Keystone's burden of proof under SDCL § 49-41B-27 to the Appellants.

The Cheyenne River Sioux Tribe argues that despite recognizing from the outset that Keystone bore the burden of proof (Tribe's Br. at 8-9), the Commission improperly shifted the burden of proof to the intervenors. (*Id.* at 15-16.) 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.

a. It is undisputed that Keystone had the burden of proof.

The Commission expressly found in its final order that Keystone "has the burden of proof to show that its certification is valid." (Tribe's App. at 64, ¶ 4.) Keystone does not and did not dispute this. Resolution of this issue does not turn on who had the burden of proof, but what was the burden required of Keystone and whether it was met.

b. The burden required Keystone to certify under SDCL § 49-41B-27 that it continued to meet the permit conditions.

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. (Tribe's 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 Cheyenne River Sioux Tribe does not expressly challenge these legal conclusions.

Accordingly, Keystone's burden of proof under SDCL § 49-41B-27 was necessarily different than what it had to prove in the original proceeding to obtain a permit to operate and construct the Keystone Pipeline. The certification statute 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.

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 statue 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.[2] As stated by the Commission, Keystone's burden was to prove "that its certification is valid." (Tribe's App. at 64 ¶ 4.) Even the Tribe describes the burden as "low." (Tribe's Br. at 14.)

c. 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, during construction, maintenance, or operation of the pipeline. The Cheyenne River Sioux Tribe 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 that would affect Keystone's ability to meet the conditions.

Keystone took a different approach, the logic of which is clear from its application and supporting materials as well as the two different statutes stating Keystone's burden. 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-

[2] The Tribe incorrectly states that Keystone's burden in Docket HP14-001 was to show "that it can construct and operate the proposed project safely in 2016." (Tribe's Br. at 14.) Rather, Keystone's burden corresponds to the language of SDCL § 49-41B-27.

001 that it did or could meet *all* 50 permit conditions.[3] The Commission required that Keystone meet the conditions, concluding that it had authority to impose the conditions under SDCL § 49-41B-25, that they were reasonable, and that they would help ensure that the project met the standards under SDCL § 49-41B-22. Keystone's failure to meet a permit condition would be grounds, in that docket, for revocation of the permit. SDCL § 49-41B-33(2).

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. (Tribe's App. at 64, ¶ 5.) The Tribe 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. In support, Keystone attached to its certification Appendix C, a tracking table of changes related to the Commission's findings of fact in Docket HP09-001. It also attached a sworn certification from the president

[3] The statement in the Cheyenne River Sioux Tribe's brief that "the original permit hearing in Docket HP09-001 required the PUC to make a factual determination as to whether TransCanada could safely construct and operate the proposed project pursuant to the fifty conditions as they existed in 2010" (Tribe's Br. at 14) is incorrect. The conditions did not exist at the time of that hearing; they were imposed as part of the Commission's subsequent amended final decision and order. The parties presented evidence at the hearing related to Keystone's burden under SDCL § 49-41B-22. Thus, the Commission's amended final decision and order required that Keystone meet the permit conditions, but compliance was not a subject of evidence in the 2009 docket.

of its business unit stating that nothing about those changes prevented it from meeting the permit conditions, now or in the future. Finally, Keystone included 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.

At that point, the Intervenors had a choice to make: they could dispute the sufficiency of Keystone's evidence and seek a summary order that Keystone had failed to prove its continued compliance, or they could challenge Keystone's evidence through cross-examination and by presenting their own evidence. They chose the latter course.

Having done so and lost, they now misconstrue 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. 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 ("a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast"). 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) (when employee makes prima facie case of retaliatory discharge, burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the employment action). 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 (burden of persuasion remains with

claimant, but when claimant makes prima facie case, burden shifts to employer to show availability of regular work). 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 (under SDCL § 15-6-56(e), "once the moving party meets its initial burden of proof, the burden shifts to the non-moving party to identify facts disputing the moving party's allegations").

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." (Tribe's App. at 64, ¶¶ 8-9.)

2. Keystone met its burden of proof.

a. "Clearly erroneous," not "substantial evidence," is the standard

The Cheyenne River Sioux Tribe focuses its argument on whether Keystone presented substantial evidence in support of its certification. (Tribe's Br. at 9-15.) As the circuit court held, in 1998 this Court rejected the language of "substantial evidence" as the standard of proof in administrative appeals. (Tribe's App. at 10.) Instead, the standard is whether, considering the evidence as a whole, the reviewing court is definitely and firmly convinced 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. The Cheyenne River Sioux Tribe's argument does not respond to this point.

This Court's standard of review on burden of proof and sufficiency of the evidence is clear: (1) Keystone bore the burden of proof; (2) Keystone's burden was a preponderance of the evidence; *id.*; (3) on appeal, the Commission's findings can be reversed only if they are clearly erroneous, which must be decided without reference to whether there is "substantial evidence"; *In re Black Hills Power*, 2016 S.D. 92, ¶ 17, 889 N.W.2d at 636; (4) a reviewing court must give great weight to the Commission's findings and inferences; and (5) "sufficient evidence" is not "'a large or considerable amount of evidence,'" but enough evidence "'to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Olson v. City of Deadwood*, 480 N.W.2d 770, 775 (S.D. 1992) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988)). Despite the clarity of these standards, the Cheyenne River Sioux Tribe does not challenge any specific finding as clearly erroneous.

b. The Commission's findings are not clearly erroneous

The disconnect in the argument stems from the Tribe's refusal to acknowledge the evidence that Keystone presented and the logic of its presentation. Corey Goulet's certification, which recited the statutory standard, was not Keystone's only proof. Rather, in support of the certification Keystone submitted a tracking table of project-related changes and the Commission's findings implicated by each change. It also submitted Appendix B, a table

showing the status of each permit condition. The Cheyenne River Sioux Tribe does not mention Appendix B or refute the logic of Keystone's strategy, which was necessary and appropriate to address compliance with future conditions. Nor does its argument address the Commission's specific findings addressing Keystone's ability to meet the permit conditions. (Tribe's App. at 56-63, ¶¶ 31-77.)

1. Current conditions

The Commission addressed current conditions in Findings of Fact ¶¶ 32-77. (*Id.*) The Tribe argues in response that Keystone failed to meet its burden with respect to the current permit conditions because its witness testimony was conclusory or non-existent. (Tribe's Br. at 10.) This is demonstrably untrue, as evidenced by the certification, Appendix B, Keystone's direct testimony, and the testimony of Keystone's witnesses on cross-examination.

The hearing transcript is 2,507 pages; the evidentiary hearing took nine days; and seven witnesses testified for Keystone. Keystone relied on the pre-filed testimony that its witnesses presented, and so almost all of its witness testimony at the hearing was cross-examination by the Intervenors. The Tribe is critical of this (Tribe's Br. at 15), but it is the inevitable result of pre-filed testimony. Meera Kothari, Keystone's lead engineer for the Keystone XL Pipeline, was cross-examined for 13 hours. Presumably, the Intervenors were not asking questions about issues that they thought were irrelevant to the single issue before the Commission. Given the Tribe's failure to challenge the Commission's specific

factual findings, its broad-brush argument that Keystone failed to present "any substantial evidence" is without merit.

The Tribe likens this case to the decision in *M.G. Oil Co. v. City of Rapid City*, 2011 S.D. 3, 793 N.W.2d 816 (S.D. 2011), in which this Court affirmed a decision reversing the Rapid City Council's decision not to issue a conditional-use permit for an on-sale liquor establishment. (Tribe's Br. at 10-12.) The Council denied the permit because it would cause a concentration of similar uses, so as to cause blight or otherwise substantially diminish property values. *Id.* ¶ 8, 793 N.W.2d at 820. This Court affirmed the circuit court's finding that there was insufficient evidence in the record to support the denial, noting that "[t]he City Council left virtually no factual record for the circuit court or this Court to examine its decision." *Id.* ¶ 21, 793 N.W.2d at 824. This Court agreed that the decision was "'so implausible that it cannot be ascribed to a difference in view or the product of agency expertise.'" *Id.* ¶ 22, 793 N.W.2d at 823 (quoting *Johnson v. Lennox Sch. Distr.*, 2002 S.D. 89, ¶ 10 n. 2, 649 N.W.2d 617 621 n.2).

Here, by contrast, the Commission conducted a secondary certification proceeding following a permit hearing that occurred in 2009. 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. It is nonsense to suggest that *M.G. Oil*, a case involving "virtually no factual record" for review, is precedent for this Court to conclude that Keystone somehow failed

to present sufficient evidence that it could continue to meet the conditions on which the permit was granted.[4]

2. Evidence related to prospective conditions

Most of the conditions are prospective in nature. They require that Keystone do something in the future, such as condition 11 ("Keystone shall conduct a preconstruction conference prior to the commencement of construction") or condition 12 ("[o]nce known, Keystone shall inform the Commission of the date construction will commence"). (Tribe's App. at 92.) 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

[4] The Tribe also relies on *Ablid v. Gateway 2000, Inc.*, 1996 S.D. 50, 547 N.W.2d 556, in which this Court found that a conclusory assertion on appeal was insufficient to prove that a finding of fact was clearly erroneous given that the finding was made based on the circuit court's resolution of conflicting evidence. *Id.*, ¶ 8, 547 N.W.2d at 559. Not only does this decision not support the Tribe's argument, it highlights the challenge the Tribe faces in overcoming the Commission's findings of fact.

prevent its future compliance. The Cheyenne River Sioux Tribe does not refute the logic of this argument.

The Commission considered whether any of the factual changes since June 29, 2010, affected Keystone's ability to meet these conditions in the future and concluded, in Finding of Fact ¶ 31, that they did not. (*Id.* at 56, ¶ 31.) The Cheyenne River Sioux Tribe does not specifically challenge this finding, but instead repeats the mantra that the testimony was "vague and conclusory." (Tribe's Br. at 12-13.) The Tribe's argument fails to explain how Keystone could prove its ability to satisfy a future condition other than by showing that nothing has changed that would affect its ability to meet that condition. Keystone said that nothing has changed in its certification, Appendix C to its petition, and its direct testimony. The Commission, therefore, correctly concluded that "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." (Tribe's App. at 64, ¶ 9.)

In this appeal, the Court must consider the prospective conditions at issue and what evidence satisfies Keystone's burden under SDCL § 49-41B-27. For example, condition 11 requires a preconstruction conference prior to the commencement of construction. The Tribe does not suggest what specific evidence Keystone should have presented to demonstrate that it would conduct a preconstruction conference at some unknown date in the future, other than its

attestation that it would conduct such a conference. For another example, condition 16.a requires that Keystone separate and segregate topsoil from subsoil in agricultural areas, and 16.b. requires that Keystone repair any damage to property that results from construction activities. Not only does the Tribe fail to suggest what evidence Keystone should have presented on this issue, but Keystone addressed all of the prospective conditions in Appendix B to its certification. (Keystone's App. at 16-38.)

Some of the conditions are inapplicable to certification. Condition 4 provides that the Permit is not transferable. Conditions 7-9 require the appointment of a public liaison and the submission of quarterly reports to the Commission by the liaison, which has been done. (Tribe's App. at 90-92.) The reports are public record, filed in Docket HP09-001. Again, the Tribe does not mention these conditions.

The Commission's findings and conclusions with respect to prospective conditions are logical and supported by the evidence. The Tribe offers no argument with respect to any particular prospective condition that the Commission's findings are clearly erroneous.

Conclusion

This Court has not construed SDCL § 49-41B-27, but the Commission did not go astray in interpreting the statute. The Commission reasonably concluded that "conditions" means the permit conditions; found that the changes identified in Keystone's tracking table did not affect Keystone's compliance with any present condition or its ability to comply with any prospective condition; and, therefore, concluded that Keystone had satisfied its burden under the statute. In

opening a new docket, granting liberal intervention, allowing extensive discovery, and conducting a thorough and lengthy evidentiary hearing in which the intervenors were granted every opportunity to challenge Keystone's certification and to present their own evidence, the Commission afforded the intervenors a full and fair opportunity to be heard and created a record that is more than sufficient to withstand the Tribe's arguments on appeal. Keystone respectfully requests that the Commission's final decision and order accepting Keystone's certification be affirmed.

Dated this ___ day of November, 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 6,286 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 November, 2017.

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Certificate of Service

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Appendix